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# Ventura v. Kyle and American Sniper; The Anatomy of a Public Figure's Lawsuit

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# Ventura v. Kyle and American Sniper; The Anatomy of a Public Figure's Lawsuit

## **Abstract**

Chris Kyle's book, *American Sniper*, detailed his exploits as a prolific Navy SEAL sniper. In a book subchapter Kyle detailed an encounter with a "Mr. Scruff Face" in a San Diego Bar. The book states that Ventura made certain statements that were demeaning of the United States and the Navy SEALs. Scruff Face was subsequently identified by Chris Kyle as Jesse Ventura, former governor of Minnesota. Ventura sued Chris Kyle for defamation, appropriation, and unjust enrichment. Relying on trial court documents, briefs, and the opinions in the case, this article probes those theories of recovery with an emphasis on the jury instructions, with a view to establishing clearer instructions in public figure lawsuits involving overlapping defamation and appropriation claims.

## **Keywords**

Defamation, Unjust enrichment, Appropriation, Jury instructions, Jesse Ventura, Chris Kyle

## **Disciplines**

First Amendment | Torts

## VENTURA V. KYLE AND AMERICAN SNIPER: THE ANATOMY OF A PUBLIC FIGURE'S LAWSUIT

*By: Mike Steenson\**

### ABSTRACT

*Chris Kyle's book, American Sniper, detailed his exploits as a prolific Navy SEAL sniper. In a book subchapter Kyle detailed an encounter with a "Mr. Scruff Face" in a San Diego Bar. The book states that Ventura made certain statements that were demeaning of the United States and the Navy SEALS." Scruff Face was subsequently identified by Chris Kyle as Jesse Ventura, former governor of Minnesota. Ventura sued Chris Kyle for defamation, appropriation, and unjust enrichment. Relying on trial court documents, briefs, and the opinions in the case, this article probes those theories of recovery with an emphasis on the jury instructions, with a view to establishing clearer instructions in public figure lawsuits involving overlapping defamation and appropriation claims.*

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## I. INTRODUCTION – THE STORY

Chris Kyle, a prolific Navy SEAL sniper, wrote a book about his life entitled *American Sniper, the Autobiography of the Most Lethal Sniper in U.S. Military History*.<sup>1</sup> The book was released at the beginning of January 2012.<sup>2</sup> By the end of January, it had topped the New York Times' Bestseller list.<sup>3</sup> In June of 2012, Warner Brothers purchased the film rights.<sup>4</sup> The book was subsequently made into a movie, *American Sniper*.<sup>5</sup>

The book details Chris Kyle's life before he joined the Navy, his experiences training to be a SEAL, his marriage, war experiences, and struggles to adjust to life in the United States between deployments and after his discharge.<sup>6</sup> It intersperses Tara Kyle's observations about the turmoil in her marriage to Chris Kyle.<sup>7</sup>

There are numerous instances in the book that detail Kyle's drinking episodes, brawls and altercations.<sup>8</sup> In chapter 12 of the book, covering Kyle's experiences while home after his third deployment to Iraq, he wrote in a subchapter, *Mr. Scruff Face*, of an alleged encounter in a bar at a wake for a fellow SEAL who was killed in the line of duty in Iraq:

AFTER THE FUNERAL WE WENT TO A LOCAL BAR FOR THE WAKE proper.

As always, there were a bunch of different things going on at our favorite nightspot, including a small party for some older SEAL's and UDT members who were celebrating the anniversary of their graduation. Among them was a celebrity I'll call Scruff Face.

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<sup>1</sup> CHRIS KYLE, WITH SCOTT MCEWEN & JIM DEFELICE, *AMERICAN SNIPER, THE AUTOBIOGRAPHY OF THE MOST LETHAL SNIPER IN U.S. MILITARY HISTORY* 354-56 (2012) [hereinafter *AMERICAN SNIPER*].

<sup>2</sup> *Ventura v. Kyle*, 63 F. Supp. 3d 1001, 1005 (D. Minn. 2014).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; *AMERICAN SNIPER* (Warner Brothers 2014).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Scruff served in the military; most people seem to believe he was a SEAL. As far as I know, he was in the service during the Vietnam conflict but not actually in the war.

I was sitting there with Ryan and told him that Scruff was holding court with some of his buddies.

“I’d really like to meet him,” Ryan said.

“Sure.” I got up and went over to Scruff and introduced myself.

“Mr. Scruff Face, I have a young SEAL over here who’s just come back from Iraq. He’s been injured but he’d really like to meet you.”

Well, Scruff kind of blew us off. Still, Ryan really wanted to meet him, so I brought him over. Scruff acted like he couldn’t be bothered.

*All right.*

We went back over to our side of the bar and had a few more drinks. In the meantime, Scruff started running his mouth about the war and everything and anything he could connect to it. President Bush was an asshole. We were only over there because Bush wanted to show up his father. We were doing the wrong thing, killing men and women and children and murdering.

And on and on. Scruff said he hates America and that’s why he moved to Baja California. 9/11 was a conspiracy.

And on and on some more.

The guys were getting upset. Finally, I went over and tried to get him to cool it.

“We’re all here in mourning,” I told him. “Can you just cool it? Keep it down.”

“You deserve to lose a few,” he told me. Then he bowed up as if to belt me.

I was uncharacteristically level-headed at that moment.

“Look,” I told him, “why don’t we just step away from each other and go on our way?” Scruff bowed up again. This time he swung.

Being level-headed and calm can last only so long. I laid him out.

Tables flew. Stuff happened. Scruff Face ended up on the floor.

I left.

Quickly.

I have no way of knowing for sure, but rumor has it he showed up at the BUD/S graduation with a black eye.<sup>9</sup>

“Scruff Face” was not named in the book, but Kyle confirmed in radio, television, and print interviews that it was Jesse Ventura, former Navy Special Forces Underwater Demolition/SEAL Teams member during the Vietnam War, professional wrestler, actor, and former Governor of Minnesota.<sup>10</sup> On two talk shows Kyle repeated the alleged statement that Ventura said “You deserve to lose a few guys.” The same statement appeared on Fox News.<sup>11</sup>

Based on the book subchapter and interviews, Ventura sued Kyle in state district court, asserting claims of defamation, misappropriation, and unjust enrichment.<sup>12</sup> The case was removed to the United States District Court for the District of Minnesota.<sup>13</sup> After Kyle was killed by a fellow veteran in February 2013, his wife was appointed executrix of his estate and substituted as the defendant in the lawsuit in July of 2013.<sup>14</sup>

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<sup>9</sup> Ventura v. Kyle, *supra* note 2 at 1005–06.

<sup>10</sup> *Id.* at 1006.

<sup>11</sup> *Id.*

<sup>12</sup> Complaint, Ventura v. Kyle (D. Minn. Jan. 26, 2012) (No. 27-CV-12-4221).

<sup>13</sup> See Notice of Removal, Ventura v. Kyle, 2012 WL 4844623 (D. Minn. Feb. 23, 2012).

<sup>14</sup> Ventura v. Kyle, *supra* note 2 at 1006.

The case was tried to a jury in July of 2014 on the three claims the plaintiff asserted in the complaint. Because the unjust enrichment claim was equitable, the jury acted in an advisory capacity only on that claim.<sup>15</sup>

The jury struggled to reach a verdict. After four full days of deliberation, the jury concluded that it could not reach a decision. After the district court instructed the jury to continue its deliberations, they reported back the next day, still unable to reach a verdict. The following morning the parties consented to a 9–1 verdict, but the jury still could not reach a verdict. The next day the parties agreed to an 8-2 verdict on the fifth full day of deliberations.<sup>16</sup>

The jury found for Ventura on the defamation claim and awarded him \$500,000 in damages.<sup>17</sup> The jury found for Kyle on the appropriation claim but found for Ventura on the unjust-enrichment claim and awarded damages of \$1,345,477.25.<sup>18</sup> The district court adopted the jury's findings on the unjust-enrichment claim.<sup>19</sup> On appeal, the Eighth Circuit reversed.<sup>20</sup> Ventura petitioned the Supreme Court for a writ of certiorari. It was denied on January 9, 2017.<sup>21</sup>

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<sup>15</sup> *Id.*; FED. R. CIV. P. 39(c)(1) covers the use of juries in an advisory capacity. The jury instructions on liability and damages are set out in an appendix to this article.

<sup>16</sup> *Ventura v. Kyle*, *supra* note 2 at 1006

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Ventura v. Kyle*, 825 F.3d 876, 878 (8th Cir. 2016) (No. 14–3876). The Eighth Circuit reversed the district court on the defamation claim because “Ventura’s counsel’s closing remarks, in combination with the improper cross-examination of two witnesses about Kyle’s insurance coverage, prevented Kyle from receiving a fair trial.” *Id.* at 886. While a key issue, the insurance question is not analyzed in this article because it is unrelated to the article’s main themes.

<sup>21</sup> *Ventura v. Kyle*, 137 S. Ct. 667 (2017). The petition for certiorari was based on Ventura’s claim that the Eighth Circuit denied him his Seventh Amendment right to a jury trial:

Is a defamation plaintiff denied his Seventh Amendment right to trial by jury where, in the absence of “extraordinary circumstances” or a “plain miscarriage of justice,” an appellate court vacates a damages verdict that was found to be neither excessive nor irrational based upon its subjective opinion that comments made during closing argument to which the defense chose not to object until after the jury retired to deliberate were “prejudicial”?

*Ventura v. Kyle*, 2016 U.S. S. Ct. Briefs LEXIS 3978, at \*4-\*5 (Oct. 31, 2016).



This article traces the case from its initiation through the Eighth Circuit's decision. With the aid of briefs and other trial court documents in the case, it examines the development of the theories in the case, the defenses, the jury instructions and special verdict form, and the appeal and Eighth Circuit's decision.

The case raises an array of questions concerning invasion of privacy, defamation, and unjust enrichment theories, their relationship to each other, the recoverable damages under the theories, and the First Amendment implications involved in the theories as they were asserted in the case. The primary focus is on how cases involving public figures should be submitted to juries, including how juries should be instructed and what special verdict questions should accompany those instructions. As the article demonstrates, the concepts involved in the theories may be understandable to judges and lawyers, but making them comprehensible to juries is yet another question. That is the primary focus of this article.

Part I of this article examines Ventura's complaint. Part II analyzes Ventura's claims of defamation, appropriation, and unjust enrichment. The analysis of the claims focuses on the disputed issues involved in each of the claims and the jury instructions and verdict form that emerged from those disputes. The article concludes with some suggestions that simplify the instructions and clarify the verdict form that might be used these sorts of cases in order to facilitate a jury's understanding of the law and its ability to apply it.

## II. THE COMPLAINT

The complaint in the case was initially filed in Ramsey County District Court. It identifies Ventura as a former governor of Minnesota and "a veteran of the United States Navy, having served his country as a member of the Naval Special Forces Underwater Demolition/SEAL Teams."<sup>22</sup> It describes his current occupation as "that of television performer and host for a program titled *Conspiracy Theory*, which airs on the truTV network, and . . . a bestselling author who continues to write books." It also identifies him as "an active political commentator" who "has not definitely ruled out another run for political office."<sup>23</sup>

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<sup>22</sup> Complaint, ¶ 5, *Ventura v. Kyle* (D. Minn. Jan. 23, 2012) (No. 27-CV-12-4221) [hereinafter Complaint].

<sup>23</sup> *Id.* at ¶ 8.

The complaint alleged that:

Governor Ventura has become well known to the public throughout the United States as a professional wrestler, entertainer, actor, speaker, author, and politician; has created for himself a unique public personality and image; and his professional names, “Jesse Ventura” and “Jesse ‘the Body’ Ventura,” as well as his image, voice, photograph likeness and public persona, have become commercially valuable commodities.<sup>24</sup>

The core of the complaint concerns the statements made by Chris Kyle in his book, specifically the sub-chapter that is captioned “Punching Out Scruff Face,”<sup>25</sup> which details the alleged encounter between Kyle and Ventura at a bar in San Diego. Ventura was not identified by name, but the complaint alleges that Kyle later identified “Scruff Face” as Ventura in talk show appearances, including two appearances on the Opie & Anthony radio show,<sup>26</sup> and the O’Reilly Factor.<sup>27</sup> His appearance on the *O’Reilly Factor* was then discussed on *The Five*, a FOX News commentary show in which the hosts discussed the incidents, agreeing that Kyle was telling the truth concerning the comments attributed to Ventura.<sup>28</sup>

The complaint establishes the factual allegations for the counts that follow:

Knowing that the alleged statements he attributes to Governor Ventura were never made, and that the alleged assault and battery incident involving Governor Ventura had never occurred, for the purpose of gaining notoriety and generating publicity for his *American Sniper* book, and thereby furthering his own economic gain, and/or for other reasons presently unknown, Kyle knowingly, intentionally and maliciously published the false and

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<sup>24</sup> *Id.* at ¶ 6.

<sup>25</sup> AMERICAN SNIPER at 354.

<sup>26</sup> Complaint, *supra* note 16, ¶ 21.

<sup>27</sup> *Id.* at ¶ 24.

<sup>28</sup> *Id.* at ¶ 23.

defamatory statements of and concerning Governor Ventura . . .

By falsely claiming that Governor Ventura said United States Navy SEALs deserve to die, Kyle intended to inflict a vicious, deliberate and calculated assault on Governor Ventura's character, honor and reputation, and to turn the SEAL and military community, and Americans in general, against Governor Ventura and to cause them to have contempt, scorn, disgust and hatred for him, and to hold him in the lowest possible regard.

By his own admission, Kyle has gained more notoriety and publicity for the false, defamatory and malicious statements he has made about Governor Ventura, than he has for all of the military exploits he writes about in *American Sniper*.<sup>29</sup>

The first count in the complaint alleged defamation, including libel and slander. The complaint alleges that because of the defamatory statements, "Governor Ventura's reputation and standing in the community, including Minnesota and the United States, has been harmed, he has been embarrassed and humiliated, and he has suffered emotional distress."<sup>30</sup> The complaint also alleged that the publication of the statements "has negatively affected, and will continue to negatively affect Governor Ventura in connection with his businesses and professions, including but not limited to his current and future opportunities as a political candidate, political commentator, author, speaker, television host and personality, and all other commercial endeavors that involve exploitation of his name, likeness and public persona."<sup>31</sup>

Count two alleged misappropriation of Ventura's name and likeness. It alleged that "Governor Ventura has acquired a property right in the exclusive commercial use of his own identity, as represented by his name, image, voice, photograph and public persona,"<sup>32</sup> and that "Kyle has wrongfully appropriated and used Governor Ventura's identity for his

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<sup>29</sup> *Id.* at ¶¶ 32-34.

<sup>30</sup> *Id.* at ¶ 42.

<sup>31</sup> *Id.* at ¶ 43.

<sup>32</sup> *Id.* at ¶ 47.

own economic advantage and gain, including Governor Ventura's name, image and public persona."<sup>33</sup>

Count three alleged unjust enrichment. It alleged that "[a]s a direct result of his tortious, inequitable and unlawful conduct, Kyle has been unjustly enriched at Governor Ventura's expense,"<sup>34</sup> and that "[e]quity requires that Kyle make restitution to Governor Ventura for all property and benefits unjustly received, including but not limited to income from the sale of *American Sniper* books and/or any subsidiary or ancillary rights sales."<sup>35</sup>

The complaint prayed for damages in excess of \$50,000<sup>36</sup> for the defamation and invasion of privacy counts and "restitution for all property and benefits unjustly received."<sup>37</sup>

### III. THE THEORIES OF RECOVERY

Each of the theories presented complex problems that had to be resolved by the trial court in deciding whether and how the case should be submitted to the jury.

#### A. Defamation

Ventura alleged that Kyle's story about the altercation in the bar was false and Kyle knew it or had serious doubts about the veracity of the story. As the case proceeded, several issues arose concerning the claim. The parties generally agreed on the definition of defamation and the standard for determining falsity, but there were also several contested issues concerning the defamation claim. One was whether the defamation claim was confined to the specific statements attributed to Ventura or encompassed the whole story (the Scruff Face subchapter), and the correlative question of whether the district court erred in instructing the jury. A second was whether the clear and convincing evidence or convincing clarity standard, which is the standard that applies as a

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<sup>33</sup> *Id.* at ¶ 48.

<sup>34</sup> *Id.* at ¶ 50.

<sup>35</sup> *Id.* at ¶ 51.

<sup>36</sup> Minnesota law provides that "If a recovery of money in an amount greater than \$50,000 is demanded, the pleading shall state merely that recovery of reasonable damages in an amount greater than \$50,000 is sought." MINN. STAT. ANN. § 544.36 (2016).

<sup>37</sup> Complaint, *supra* note 16, at 17.

constitutional mandate to the actual malice issue in defamation cases involving public figures, also applied to the falsity element, and whether the trial court erred in failing to instruct that Ventura had to meet the higher evidentiary standard on the falsity issue. A third involved the issue of whether the trial court committed error in instructing the jury to consider whether the story was defamatory, rather than just the isolated statements in the story. A fourth concerned the damages that may be awarded in a defamation action, including the issues of whether Ventura should be entitled to recover for damages for emotional harm and how the rule permitting presumed damages should apply.

*1. Jury Instructions – Defamation and Falsity*

The requested instructions on the definition of defamation submitted by Ventura<sup>38</sup> and Kyle<sup>39</sup> followed Minnesota's pattern jury instruction on the definition of defamation. The district court used that instruction:

The first element is that Mr. Kyle's story about Mr. Ventura was *defamatory*. The story was defamatory if it tends to:

1. So harm the reputation of Mr. Ventura that it lowers his esteem in the community; *or*
2. Deter persons from associating or dealing with him; *or*
3. Injure his character; *or*
4. Subject him to ridicule, contempt, or distrust; *or*
5. Degrade or disgrace him in the eyes of others.

Mr. Ventura must prove this element by the greater weight

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<sup>38</sup> Plaintiff's Proposed Jury Instructions, *Ventura v. Kyle*, at 24 (D. Minn. Apr. 21, 2014) (No. 12-0472).

<sup>39</sup> Defendant's Revisions to Selected Proposed Jury Instructions at 1-8; *Ventura*, 63 F. Supp. 3d at 1001; *Ventura v. Kyle*, No. 12-cv-0472, 2014 WL 8721598 (D. Minn. July 18, 2014).

of the evidence (see Instruction No. 7).<sup>40</sup>

## 2. *The Individual Statements or the Entire Story?*

There was conflict at the outset of the case over the basis for the defamation claim and the method of submitting the claim to the jury. The complaint in the case focused on the specific statements Kyle attributed to Ventura, although Ventura claimed that the entire story was defamatory. In response to interrogatories, Ventura listed 15 separate statements in the story that were alleged to be defamatory.<sup>41</sup>

Pruning the list to six statements, Kyle wanted the jury to be able to independently determine whether each statement met the definition of defamation, whether the statements were published with actual malice, and then decide what damages were caused by each statement.<sup>42</sup> Ventura's position in the case was that the individualized consideration

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<sup>40</sup> Jury Instructions, Jury Instruction No. 8A, *Ventura v. Kyle*, 2014 WL 3729686 (D. Minn. July 22, 2014) (No. 12-cv-0472). The court's definition is standard in pattern instructions. *See, e.g.*, ARIZONA PATTERN JURY INSTRUCTIONS-CIVIL, Defamation 2 (2017); CAL. JURY INSTR.--CIV. 7.00 (Mar. 2018); PATTERN INSTRUCTIONS KANSAS - CIVIL 127.51 (Nov. 2016); 8 TENN. PRAC. PATTERN JURY INSTR. T.-CIVIL 7.01 (2017 ed.).

<sup>41</sup> Defendant's Trial Brief, Part I., B, *Ventura v. Kyle*, No. 12-cv-0472, 2014 WL 3729664 (D. Minn. Apr. 21, 2014). The fifteen statements were:

1. Ventura said that he "hates America."
2. Ventura said Navy SEALs "deserve to lose a few."
3. Ventura said Navy SEALs "deserve to lose a few guys."
4. Ventura said "y'all [Navy SEALs] deserve to lose a few guys."
5. Ventura said Navy SEALs "were killing innocent people."
6. Ventura said Navy SEALs "were murderers."
7. Ventura said "We were doing the wrong thing, killing men and women and children and murdering."
8. Ventura "bowed up as if to belt" Kyle.
9. Ventura "bowed up again."
10. Ventura "swung" at Kyle.
11. "Stuff happened. Scruff Face ended up on the floor."
12. Ventura "showed up at the BUD/S graduation with a black eye."8
13. Kyle "was in a bar fight with Jesse Ventura," Kyle "punched him ... in the face," "he went down," Kyle "knocked him down," Kyle "popped him," and/or "he [Ventura] went down."
14. Ventura threatened or assaulted Kyle.
15. Kyle physically assaulted, battered, or punched Ventura.

<sup>42</sup> Plaintiff Jesse Ventura's Reply to Defendant's Trial Brief, Part A, *Ventura v. Kyle*, 2014 WL 3729676 (D. Minn. May 5, 2014) (No. 12-0472).

of the statements would actually detract from the jury's consideration of whether the entire *story* was fabricated.<sup>43</sup> Ventura argued that:

It is, of course, obvious why the Estate wants the jury to consider particular words and phrases isolated from Kyle's story as a whole: when taken out of context, words lose not only their original meaning, but also lose their power to evoke emotion, and to cause harm. The Estate's proposed verdict form illustrates the point.<sup>44</sup>

Kyle's position was reiterated in her response to Ventura's brief in opposition to Kyle's motion for judgment as a matter of law:

Why is it important for the Court to engage in this paring-down exercise? Because if the jury is simply asked to decide whether the *entire* "Punching Out Scruff Face" subchapter is materially false, it could find that the statement that Ventura said "You deserve to lose a few" is *not* materially false, but that the statement that Kyle punched Ventura (or that "tables flew" or that Ventura was rumored to have a black eye) *is* materially false. It could then go on to find that, because the subchapter as a whole (including the portions it believed to be true) damaged Ventura's reputation, Ventura is entitled to monetary compensation. This would be a miscarriage of justice because the jury would be awarding Ventura damages even though the only portions of the subchapter that it found to be materially false (*i.e.*, the statements related to the physical altercation, as opposed to the verbal exchange) are-as Ventura concedes – not defamatory and thus not actionable. Such a broad and ambiguous verdict would complicate independent review both by this Court upon a motion for JNOV and for appellate courts at a later stage.<sup>45</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Defendant's Reply in Support of Motion for Judgment as a Matter of Law, *Ventura v. Kyle*, No. 12-cv-0472, 2014 WL 3729672 (D. Minn. July 21, 2014) (footnote omitted).

Kyle lost the argument. As submitted, the verdict form asked only “Did Plaintiff Jesse Ventura prove his claim of defamation against Chris Kyle? (See Jury Instruction Nos. 8, 8A, 8B, 8C.)”<sup>46</sup> The district court’s introductory jury instruction on defamation notes Ventura’s claims that he was defamed by Kyle when he asserted in his book, on television, and radio, “that Mr. Ventura said “he hates America,” the SEALs “were killing men and women and children and murdering,” and the SEALs ‘deserve to lose a few.’”<sup>47</sup> The remaining part of the introductory defamation instruction set out the elements of the defamation claim, including the requirement that Mr. Kyle’s story about Mr. Ventura had to be defamatory.<sup>48</sup>

This resulted in some jury confusion at trial. After it began deliberations the jury asked the district court:

In jury instruction #8, when referring to Mr. Ventura's story (Punching Out Scruff Face) is the “story” the subchapter or the 3 lines? (“he hates America,” “we’re killing men & women and children and murdering,” “deserve to lose a few”).<sup>49</sup>

Ventura’s attorney argued in a conference in chambers that it was necessary to “focus on what the jury's question was. Their question is: ‘is the story the subchapter or the 3 lines?’ The answer to that is, obviously, it's the whole story. It's not three lines of a story.”<sup>50</sup> The trial court agreed.<sup>51</sup>

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<sup>46</sup> Verdict Form, Question 1, *Ventura v. Kyle*, 2014 WL 3729676 2014 WL 3729681 (D. Minn. July 29, 2014) (No. 12-0472). Jury instructions 8A, 8B, and 8C are the jury instructions on the elements of a defamation claim. Minnesota’s pattern special verdict form covering libel claims by public figures breaks down the elements of a defamation claim into separate special verdict questions. *See* 4 MINN. PRAC. SERIES, CIVSVF 50.93 (6th ed. 2014).

<sup>47</sup> Jury Instructions, Jury Instruction No. 8, *Ventura*, 2014 WL 3729686.

<sup>48</sup> *Id.*

<sup>49</sup> Plaintiff Jesse Ventura's Memorandum in Opposition to Defendant's Motion for Judgment as a Matter of Law or a New Trial, Part II., B., 2, *Ventura v. Kyle*, 2014 WL 5018930 (D. Minn. Sept. 26, 2014) (No. 12-0472).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*



The district court's response to the jury's question was that:

"The story," as used in Instruction No. 8 (and other Instructions), refers to the statements Mr. Kyle made about Mr. Ventura in the *Punching Out Scruff Face* subchapter and on television and radio, which include the three statements identified in your question. You are instructed to consider each element of Instruction No. 8 as to the story as a whole.<sup>52</sup>

This was consistent with Magistrate Judge Boylan's earlier ruling that the story as a whole had to be considered, rather than just the individual statements.<sup>53</sup>

Ventura argued in his reply to the defendant's trial brief that:

Ventura's complaint is that his reputation has been damaged by publication of the fabricated story told in the *Scruff Face* sub-chapter, and by media interviews in which Kyle repeated the story. Ventura is not claiming, and has never claimed, that his reputation has been damaged by individual words and phrases *taken out of their context and viewed in isolation*. Because it is the story, as a whole, that is defamatory, the jury cannot be asked to consider isolated words and phrases apart from their context.<sup>54</sup>

The clarifying instruction told the jury that the "story" as used in the jury instructions included both the subchapter and Kyle's comments on it on television and radio, and that the "story" included the three statements noted in the instruction on defamation. Jury instruction 8 initially stated that "Plaintiff Jesse Ventura claims that Chris Kyle defamed him by asserting in *American Sniper*, as well as on television and radio, that Mr.

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<sup>52</sup> *Id.* (footnote omitted).

<sup>53</sup> See Plaintiff Jesse Ventura's Reply to Defendant's Trial Brief, Part A, *Ventura v. Kyle*, No. 12-0472, 2014 WL 3729676 (D. Minn. May 5, 2014).

<sup>54</sup> *Id.* (emphasis supplied). Ventura's brief cited *Harman v. Heartland Food Co.*, 614 N.W.2d 236, 240 (Minn. Ct. App. 2000) for the proposition that "Whether a defamatory meaning is conveyed is dependent upon how an ordinary person understands 'the language used in the light of surrounding circumstances.'" (quoting *Gadach v. Benton County Co-op Ass'n*, 53 N.W.2d 230, 232 (Minn. 1952)).

Ventura said ‘he hates America,’ the SEALs ‘were killing men and women and children and murdering,’ and the SEALs “deserve to lose a few.”<sup>55</sup>

The variance between the district court’s initial defamation instruction, which focused on the three specific statements, and the remaining defamation instructions, which focused on the story, was confusing. Focusing on the story as a whole means that a jury could find that the story as a whole was false, even if some or all of the statements Kyle attributed to Ventura were true. It might have concluded, for example, that Ventura made the three statements, but that other parts of the story, including the encounter between Kyle and Ventura, and the punch that Kyle said knocked Ventura down were falsified.

On the other hand, the order of the instructions required a finding that the story was defamatory, that it was false, and that Kyle knew or believed the story was false, or had substantial doubts about its truth. While the special verdict form only asked whether Ventura had established his claim for defamation, *the jury’s path to answer that question*, the jury would have (should have) worked through the elements of the defamation claim to arrive at its conclusion that the story was defamatory. Considering the jury instructions as a whole, it is hard to argue that the instructions were erroneous. Kyle raised the issue on appeal, but the Eighth Circuit did not reach that issue.<sup>56</sup>

Nonetheless, there is a question as to whether the method of presenting the issue to the jury could have been clarified. The jury might have been asked to consider whether Ventura made those statements and whether they were defamatory against the background of the events set out in the subchapter in American Sniper.

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<sup>55</sup> Jury Instructions, Jury Instruction No. 8, Ventura, 2014 WL 3729686.

<sup>56</sup> Brief of Appellant at 24, 26-27, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876). Had the Eighth Circuit reached the issue it seems unlikely that the court would have reversed on that basis. Trial judges have wide latitude in framing instructions. *See Reed v. Malone's Mech., Inc.*, 765 F.3d 900, 907 (8th Cir. 2014); *McCoy v. Augusta Fiberglass Coatings, Inc.*, 593 F.3d 737, 744 (8th Cir. 2010). This case is a good example of why. *See Reed v. Malone's Mech., Inc.*, 765 F.3d 900, 907 (8th Cir. 2014); *McCoy v. Augusta Fiberglass Coatings, Inc.*, 593 F.3d 737, 744 (8th Cir.2010).

Generally, courts, the Restatement (Second) of Torts, and treatise writers take the position in defamation cases that statements alleged to be defamatory must be considered in light of the context of the work in which the statements appear.<sup>57</sup> As the Restatement (Second) of Torts notes, “[t]he context of a defamatory imputation includes all parts of the communication that are ordinarily heard or read with it.”<sup>58</sup>

Conveying that law to the jury is another issue. The jury instruction could have explained more simply the importance of context in determining whether a statement is defamatory. Arizona’s pattern instruction provides an example of how it might have been explained to the jury:

A statement is defamatory if it tends to bring [Name of Plaintiff] into disrepute, contempt or ridicule, or to impeach [Name of Plaintiff]'s honesty, integrity, virtue, or reputation. The defamatory nature of the statement is determined by the natural and probable effect a reading of the entire [statement, publication, or broadcast] in context would have on the mind of the average [reader or hearer].<sup>59</sup>

The key point is that context has to be considered in determining whether a communication is defamatory (and false). A clearer jury instruction on the issue would have told the jury to simply consider the allegedly

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<sup>57</sup> See, e.g., *Yohe v. Nugent*, 321 F.3d 35, 41 (1st Cir. 2003) (applying Massachusetts law); *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 181 (2d Cir. 2000) (applying New York law); *Biro v. Conde Nast*, 883 F.Supp.2d 441, 457 (S.D.N.Y. 2012) (applying New York law); *Miracle v. New Yorker Magazine*, 190 F.Supp.2d 1192, 1199 (D. Haw. 2001) (applying Hawaiian law); *Clawson v. St. Louis Post-Dispatch, L.L.C.*, 906 A.2d 308 (D.C. Ct. App. 2006); *Solaia Technology, LLC v. Specialty Publishing Co.*, 852 N.E.2d 825, 39 (Ill. 2006); *McKee v. Laurion*, 825, 725, 731 (Minn. 2013); *Schlieman v. Gannett Minnesota Broadcasting, Inc.*, 637 N.W.2d 297, 304 (Minn. Ct. App. 2001); *Ward v. Zelikovsky*, 643 A.2d 972, 978 (N.J. 1994); *Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 655 (Tex. 1987); RESTATEMENT (SECOND) OF TORTS § 563 cmt. d (Am. Law Inst. 1977) (“In determining the meaning of a communication, words, whether written or spoken, are to be construed together with their context.”); ROBERT D. SACK, 1 SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2.4.2[A], at 2-20 – 2-21 (4th ed. 2012) (“Particular words must be read in the context of the communication as a whole”).

<sup>58</sup> RESTATEMENT (SECOND) OF TORTS § 563 cmt. d (Am. Law Inst. 1977).

<sup>59</sup> ARIZONA PATTERN JURY INSTRUCTIONS-CIVIL, Defamation 2 (2014).

defamatory statements in context.

### 3. *Burden of Proof*

Public figures and officials are required to prove a false and defamatory communication, but also that the communication was made with “actual malice,” which has to be established by clear and convincing evidence.<sup>60</sup> There was a dispute in the case as to whether both falsity and actual malice had to be proven by clear and convincing evidence, or only the actual malice element. There was also a dispute over the definition of actual malice.

Kyle argued throughout the case that the clear and convincing evidence standard should also apply to the falsity issue, and that the evidence was insufficient to meet the higher standard.<sup>61</sup> The trial court rejected the argument that the clear and convincing evidence standard applied to the falsity issue because of the lack of any binding Supreme Court, Eighth Circuit, or Minnesota authority on the issue,<sup>62</sup> instead instructing the jury on both the preponderance of the evidence and clear and convincing evidence standards.<sup>63</sup> The court applied the preponderance of the evidence standard to the falsity issue<sup>64</sup> and the clear and convincing evidence standard to the actual malice issue.<sup>65</sup> The district court also concluded that the evidence was sufficient to meet the higher standard.<sup>66</sup>

The Supreme Court bypassed the burden of proof issue in *Harte-Hanks Communications, Inc. v. Connaughton*.<sup>67</sup> The state and federal cases vary

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<sup>60</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

<sup>61</sup> Memorandum in Support of Defendant's Motion for Judgment as a Matter of Law or a New Trial, *Ventura v. Kyle*, No. 12-cv-0472, 2014 WL 4425622 (D. Minn. Sept. 4 2014); Brief of Appellant at 37-39, *Ventura*, 825 F.3d 876 (8th Cir. 2016) (No. 14-3876).

<sup>62</sup> *Ventura*, 63 F. Supp. 3d at 1012.

<sup>63</sup> Jury Instructions, Jury Instruction No. 7, *Ventura*, 2014 WL 3729686. The district court also concluded that the evidence on the falsity issue was sufficient to meet the clear and convincing burden of proof. *Ventura*, 63 F. Supp. 3d at 1007 n.1.

<sup>64</sup> *Ventura*, 2014 WL 3729686 at No. 8B.

<sup>65</sup> *Id.* at No. 8C.

<sup>66</sup> *Ventura*, 63 F. Supp. 3d at 1007 n.1.

<sup>67</sup> *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 (1989). The Court noted that “[t]here is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence, but expressed no view on the issue.

in their treatment of the issue.<sup>68</sup> Courts may conclude that the plaintiff must prove falsity of the defamatory communication by a preponderance of the evidence<sup>69</sup> or by clear and convincing evidence.<sup>70</sup> Or, they may conclude that a plaintiff bears the burden of proving all elements of a defamation claim by clear and convincing evidence.<sup>71</sup> Still others recognize the split in authority without reaching the issue.<sup>72</sup> The analysis in many of the opinions is conclusory.

The argument in favor of applying the preponderance standard turns primarily on the lack of a Supreme Court holding on the issue.<sup>73</sup> The argument in favor of the clear and convincing evidence standard is set out in *DiBella v. Hopkins*,<sup>74</sup> a Second Circuit decision applying New York

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<sup>68</sup> See Daniel William Weininger, Note, “We Express No View On This Issue”: The Standard of Proof for the Element of Falsity In A New York Public Official/Figure Defamation Action, 81 ST. JOHN’S L. REV. 455 (2007).

<sup>69</sup> In *Ratray v. City of Nat’l City*, 51 F.3d 793, 801 (9th Cir. 1994), the Ninth Circuit concluded that the clear and convincing evidence standard did not apply to the falsity element of a defamation claim. Judge Hug, dissenting, argued that the clear and convincing evidence standard should apply to the falsity element to avoid the same chilling effect the Supreme Court sought to avoid in applying the higher standard of proof to the actual malice issue. *Id.* at 804 (Hug, J., dissenting).

<sup>70</sup> See *Phillips v. Ingham County*, 371 F.Supp.2d 918 (W.D. Mich. 2005) (applying Michigan law, holding that clear and convincing evidence standard applies to falsity element).

<sup>71</sup> *Pritt v. Republican Nat’l Comm.*, 557 S.E.2d 853, 862-63 (W. Va. 2001) (following Miller, J.’s dissenting opinion in *Hinerman v. Daily Gazette Co.*, 423 S.E.2d 560, 590 (W. Va. 1992)).

<sup>72</sup> See *Gleason v. Smolinski*, 125 A.3d 920, 957 n. 44 (Conn. 2015) (noting the division in authority without deciding the issue). In *Nevada Indep. Broad. Corp. v. Allen*, 664 P.2d 337 (1983), the Nevada Supreme Court noted that the burden of proof on the falsity issue is unclear. *Id.* at 343. In a footnote, the court noted the division of authority on the issue, but observed, without further explanation, that “[p]ractically speaking, it may be impossible to apply a higher standard to ‘actual malice’ than to the issue of falsity.” *Id.* at 343 n. 5. That observation is similar to the court’s in *Robertson v. McCloskey*, 666 F. Supp. 241, 248 (D.D.C. 1987).

<sup>73</sup> See, e.g., *Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir. 1969) (concluding that the Supreme Court only changed the burden of proof with respect to the actual malice requirement, not the other elements of a defamation claim).

<sup>74</sup> 403 F.3d 102 (2d Cir. 2005) (predicting New York law), *cert. denied*, 546 U.S. 939 (2005). The Minnesota Supreme Court has not addressed whether the common law requires a public figure to prove falsity by clear-and-convincing evidence or a mere preponderance. The U.S. Supreme Court, after noting a split in authority, avoided deciding the issue of whether the First Amendment requires it. *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 (1989). The Eighth Circuit has not

law. The court concluded that the majority of courts to consider the issue have applied the higher standard of review to the falsity issue. The rationale for the higher standard is threefold. One is that a rule favoring the higher standard of care is more speech protective. A second is that plaintiffs who are public figures effectively already bear the higher burden of proof because the issue of falsity is subsumed in the actual malice requirement that the defamatory communication was made with knowledge of its falsity or in reckless disregard of the truth. A third is that instructing a jury that the plaintiff has to prove falsity by a preponderance of the evidence, but must prove actual malice by clear and convincing evidence, is likely to result in confusion and error.<sup>75</sup>

The Eighth Circuit did not reach the issue on appeal.<sup>76</sup> The court commented on the issue in a footnote, however, noting “the complications that can arise when a general verdict form is used in public-figure defamation cases.”<sup>77</sup> The alternative, a special verdict form, would break the defamation claim into its elements, requiring separate findings on the defamation, falsity, and actual malice issues.

#### 4. Actual Malice

There are at least two issues relating to the actual malice standard, which is part of a public figure plaintiff’s burden of proof in establishing a right to recover for defamation. There are lingering questions concerning the proper standard for actual malice and in drafting appropriate jury instructions that will make the standard comprehensible for juries.

##### a. The Actual Malice Standard

The Supreme Court applied the First Amendment to a defamation case for the first time in *New York Times Co. v. Sullivan*.<sup>78</sup> The Court

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decided the issue. But most jurisdictions addressing the issue hold that public figures must prove falsity by clear-and-convincing evidence. *See, e.g.*, *DiBella v. Hopkins*, 403 F.3d 102, 110-15 (2d Cir. 2005) (collecting cases); *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1128 (10th Cir. 2014); see also R. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 3:4 at 3-14 to -15 & n. 52 (4th ed. 2010 & Supp. 2013).

<sup>75</sup> *Id.* at 114 (quoting *Robertson v. McCloskey*, 666 F. Supp. 241, 248 (D.D.C.1987)).

<sup>76</sup> *Ventura v. Kyle*, 825 F.3d 876, 802 n. 4. (8th Cir. 2016).

<sup>77</sup> *Id.* at 886 n. 8. The court cites as examples *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 11 (1970) and *West v. Media Gen. Operations, Inc.*, 120 Fed. Appx. 601, 602, 619 (6th Cir. 2005) (unpublished) (collecting cases).

<sup>78</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

established a First Amendment baseline that precludes recovery by public officials for false and defamatory statements relevant to their conduct in office unless the officials establish actual malice by clear and convincing evidence.<sup>79</sup>

The actual malice standard requires proof that a defamatory communication was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>80</sup> The Supreme Court has variously defined reckless disregard to mean publication with “serious doubts” about the truth of the communication<sup>81</sup> or publication with a “high degree of awareness . . . of probable falsity,”<sup>82</sup> but the Court has also noted that there is no single, “infallible definition” of the term.<sup>83</sup> The Court has suggested that one of the definitions should be used in lieu of the use of the term “actual malice,” to avoid jury confusion.<sup>84</sup>

#### *b. Actual Malice – Jury Instructions*

Federal and state pattern jury instructions are generally consistent in defining the term “actual malice” to mean publication with knowledge of its falsity or reckless disregard of whether it is false or not.<sup>85</sup> The term “reckless disregard” may or not be further defined in pattern instructions. If it is, it is typically defined as publication with serious doubts as to the truth of the publication.<sup>86</sup>

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<sup>79</sup> *Id.* at 279-280. The Court drew the standard from the Kansas Supreme Court’s decision in *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908), which enunciated a rule that several state courts had adopted. The standard in *Coleman* was based on the free press provision in the Kansas Constitution. *Id.* at 283.

<sup>80</sup> *Sullivan*, 376 U.S. at 280.

<sup>81</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

<sup>82</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

<sup>83</sup> *Connaughton*, 491 U.S. at 667 (quoting *Thompson*, 390 U.S. at 730).

<sup>84</sup> *Masson v. New Yorker Mag., Inc.* 501 U.S. 496, 511 (1991).

<sup>85</sup> *E.g.*, 3 FED. JURY PRAC. AND INSTR. § 124.11 (6th ed. 2015) (“A publication is made with “actual malice,” as that term is used in this charge, if it is made with knowledge that it is false, or with reckless disregard of whether it is false or not”); DEL. P.J.I. CIV. § 11.16 (2000) (“A publication is made with “actual malice” if it is made with knowledge that it is false or with reckless disregard for whether it is false”); VA. PRAC. JURY INSTR. § 48.15 (2015) (“‘Actual malice’ is that malice that shows that a statement was made with knowledge that it is false or with reckless disregard of whether it is false or not”).

<sup>86</sup> *E.g.*, JOSEPH D. LIPCHITZ & JOHN F. NUCCI, MASS. SUPER. CT. CIV. PRAC. JURY INSTRUCTIONS, § 6.3.1 (2014) (“‘Reckless disregard’ means that the defendant or the

Ventura's requested instruction was drawn from the Eighth Circuit<sup>87</sup> and Minnesota<sup>88</sup> pattern jury instructions on actual malice. The requested instruction read as follows:

In a defamation suit, it must be proved by clear and convincing evidence that the allegedly defamatory statement or communication was published with actual malice. A statement or communication is published with "actual malice" if the person who publishes it knew it was false or had serious doubts about its truth. "Clear and convincing evidence" means it is highly probable that the statement was published with actual malice. Put another way, you must firmly believe that the defendant published the statement with actual malice.<sup>89</sup>

In contrast, Kyle's requested jury instruction on actual malice was quite detailed:

The third thing that Jesse Ventura must prove is that Chris Kyle made his January 2012 statements (that Jesse Ventura made offensive statements at the Michael Monsoor wake on October 12, 2006, including the "deserve to lose a few" statement) with actual knowledge that they were false or with a high degree of subjective awareness that they probably were false.

Ventura must prove by clear and convincing evidence that the allegedly defamatory statements were made with actual knowledge that they were false or with a high

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defendant's agent entertained serious doubts as to the truth of the publication"); MINN. DIST. JUDGES ASS'N, JURY INSTRUCTION GUIDE – CIVIL, CIVSVF 50.93 (6th ed. 2014) ("actual malice" is defined in part as publication with "serious doubts about its truth"); COMMITTEE ON PATTERN JURY INSTRUCTIONS, N.C. PATTERN JURY INSTRUCTIONS FOR CIVIL CASES, No. 806.85 (2018) ("Reckless disregard means that, at the time of the publication, the defendant had serious doubts about whether the statement was true") (footnote omitted).

<sup>87</sup> COMMITTEE ON MODEL JURY INSTRUCTIONS, MANUAL OF MODEL CIV. JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE EIGHTH CIR. § 3.04 (2013).

<sup>88</sup> MINN. DIST. JUDGES ASS'N, JURY INSTRUCTIONS GUIDE – CIVIL, CIVJIG 50.40 (6th ed. 2014) (modified).

<sup>89</sup> Plaintiff's Proposed Jury Instructions, Instruction 18, *Ventura v. Kyle*, (D. Minn. Apr. 21, 2014) (No. 12-0472 27) (footnotes omitted).



degree of subjective awareness that they probably were false.<sup>10</sup>

Knowledge that the statement was false means that Chris Kyle actually knew that he was saying something that was untrue.

A high degree of subjective awareness that statements probably were false is shown if Kyle actually recognized that the statement was probably false, but went ahead and made it anyway, ignoring that it was probably false.

That Chris Kyle was or might have been careless in making the statements does not constitute subjective awareness of probable falsity. Chris Kyle's conduct is not to be measured by whether a reasonably prudent person would have made the challenged statements, or would have been more careful in how the statement was worded, or would have investigated more before making the challenged statements.

Disapproval, ill will, prejudice, hostility or contempt do not by themselves amount to knowledge of falsity or awareness of probable falsity. Evidence that a party or a witness had a lapse in memory regarding one event while he clearly recalls other events is not implausible, nor does it demonstrate that he knew his statement was false or probably false. Anyone with a less-than-perfect memory will recall some things precisely and other things in a fog.<sup>90</sup>

The proposed instruction was cobbled together from various sources. The actual malice standard in the proposed instruction appears to be based primarily on *Masson v. New Yorker Magazine, Inc.*, which notes that a "high degree of awareness of . . . probably falsity" is necessary to establish reckless disregard.<sup>91</sup> The Supreme Court has equated the serious

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<sup>90</sup> Defendant's Revisions to Selected Proposed Jury Instructions at 4, Ventura, 2014 WL 8721598 (footnotes omitted).

<sup>91</sup> *Masson*, 501 U.S. at 510.

doubt half of the standard with “subjective awareness of probable falsity.”<sup>92</sup> In *St. Amant v. Thompson*, the Court stated that “reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing,” and that “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”<sup>93</sup> *Niska v. Clayton*, an unpublished Minnesota Court of Appeals decision, was the basis for part of the penultimate sentence and the last sentence of the instruction.<sup>94</sup>

The instruction the trial court gave was considerably shorter than Kyle’s requested instruction. It also differed from Ventura’s requested instruction. Without using the term “actual malice,” the court instructed the jury that:

The third element is that Mr. Kyle published the story about Mr. Ventura despite:

1. Knowing the story was false; *or*
2. Believing the story was false; *or*
3. Having serious doubts about the story’s truth.<sup>95</sup>

There was some jury confusion about the instructions. Two questions were raised, one by the full jury during deliberations and one by an individual juror after the jury deadlocked. During its initial deliberations, the jury asked for guidance on the meaning of “serious doubt.”<sup>96</sup> Kyle argued in his post-trial motion<sup>97</sup> for judgment as a matter of law or a new trial and on appeal<sup>98</sup> that the trial court should have instructed the jury

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<sup>92</sup> Gertz, 418 U.S. at 334 n.6.

<sup>93</sup> *Thompson*, 390 U.S. at 731.

<sup>94</sup> *Niska v. Clayton*, No. A13-0622, 2014 WL 902680 at \*5 (Minn. Ct. App. Mar. 10, 2014), *cert. denied*, 135 S. Ct. 1399 (2015). The case involved the application of MINN. STAT. § 211B.06, subd. 1(a) (2014) (held unconstitutional in 281 Care Committee v. Arneson, 766 F.3d 774, 785 (8th Cir. 2014)).

<sup>95</sup> *Ventura*, 2014 WL 3729686, at \*5.

<sup>96</sup> Brief of Appellant at 9–10, *Ventura*, 2014 WL 3729686.

<sup>97</sup> Memorandum in Support of Defendant’s Motion for Judgment as a Matter of Law or a New Trial at 13, *Ventura v. Kyle*, 2014 WL 4425622 (D. Minn. Sept. 14, 2014) (No. 12-cv-0472).

<sup>98</sup> Brief of Appellant at 5, *Ventura*, 2014 WL 3729686.

that “serious doubt” means a “high degree” of “awareness of probable falsity.”

The trial court instead told the jury that there was no legal definition of the term “serious doubt” and that they would have to “rely on [their] common sense in interpreting and applying the standard.”<sup>99</sup> The trial court was undoubtedly correct in telling the jury that there was no legal definition of “serious doubt.” The circularity of the definitions of “reckless disregard” and “serious doubt” establish that.<sup>100</sup>

The court responded to the second question by referring the jury to instructions 8 through 8C, the defamation instructions.<sup>101</sup> The juror’s question about whether the jury had “to believe that Kyle thought he was telling the truth” may well have been prompted by the second part of the third element of jury instruction 8C. The focus of the Supreme Court decisions on actual malice and the pattern jury instructions does not include the “belief” element. While the issue of belief in the truth of the defamatory matter was relevant at common law to a determination of whether there was actual malice sufficient to overcome conditional privileges, the focus, post-*Sullivan*, is on whether the defamatory communication was made with knowledge of its falsity or with serious doubts about its truth.<sup>102</sup>

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<sup>99</sup> Brief and Addendum of Appellant at 45–47, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14-3876).

<sup>100</sup> See *supra* notes 72–79 and accompanying text.

<sup>101</sup> See *supra* notes 72–79 and accompanying text.

<sup>102</sup> Before *Sullivan*, 376 U.S. 254 (1964), proof of malice necessary to overcome a conditional privilege meant that the defendant must have made the defamatory statement with an improper motive, which turned on “the intent or purpose with which the publication was made, the belief of the defendant in the truth of his statement, or upon the ill will which the defendant might have borne toward the plaintiff.” *Herbert v. Lando*, 441 U.S. 153, 164–65 (1979). That approach was adopted in section 600 of the Restatement of Torts, which provided that a conditional privilege was abused if the person publishing a false and defamatory communication did “not believe in the truth of the defamatory matter.” A conditional privilege was abused under section 601 of the person making the person publishing the false and defamatory communication “although believing the defamatory communication to be true” did not have reasonable grounds for that belief. RESTATEMENT OF TORTS §§ 600, 601 (Am. Law Inst.1938).

Section 600 of the Restatement (Second) of Torts combined those two sections of the Restatement of Torts. It provides that a conditional privilege is overcome if the person publishing the defamatory communication does so knowing

Belief is irrelevant to the issue of whether Kyle knew the story was false. Either he knew it was false or he didn't. Belief might be seen as the flip side of whether he had serious doubts about the truth of the story. If he believed it was true, he might not have serious doubts about the truth of the story. If so, there is no need to use both in a jury instruction because it would prompt a jury to look for different answers to the same question. Also, in some cases, there could be doubts about the truth of a story, but the evidence is nonetheless sufficient to justify publication because of corroborating evidence, even in the face of those doubts.<sup>103</sup>

### 5. Damages

Ventura alleged in his original complaint that “[a]s a direct result of Kyle’s publication of knowingly, intentionally, and maliciously false and defamatory statements,” his “reputation and standing in the community, including Minnesota and the United States, has been harmed, he has been embarrassed and humiliated, and he has suffered emotional distress.”<sup>104</sup> He also alleged that:

Kyle’s publication of knowingly, intentionally and maliciously false and defamatory statements has negatively affected, and will continue to negatively affect Governor Ventura in connection with his businesses and professions, including but not limited to his current and future opportunities as a political candidate, political commentator, author, speaker, television host and

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that it is false or “acts in reckless disregard as to its truth or falsity.” RESTATEMENT (SECOND) OF TORTS § 600 (AM. LAW INST. 1977).

A comment to section 600 of the Second Restatement notes that at common law the traditional balance was achieved by imposing strict liability for a defamatory communication only if the defendant “did not believe the statement to be true or lacked reasonable grounds for so believing.” *Id.* cmt. a.

The Reporter’s Note to the section explains that the combined section has shifted the focus from the issue of whether the defendant believed in the truth of the defamatory matter or had reasonable grounds for believing it was true, to a standard that asks whether the defendant knew the defamatory communication was false, or acted in reckless disregard of its truth or falsity. *Id.* reporter’s note. “Belief” is excised from the black letter statement.

<sup>103</sup> *E.g.*, *Jackson v. Paramount Pictures Corp.*, 84 Cal. Rptr. 2d 1, 15 (Cal. Ct. App. 1998) (“A healthy skepticism is a normal part of a reputable journalist’s makeup and leads him or her to obtain corroborating evidence to back up a source’s story.”).

<sup>104</sup> Complaint, paragraph 42, *Ventura v. Kyle*, No. E 0:12-cv-00472-RHK-JJG.

personality, and all other commercial endeavors that involve exploitation of his name, likeness and public persona.<sup>105</sup>

He sought to recover for presumed damages, including injury to reputation and emotional harm, as well as for economic loss caused by the defamatory communication.

The case raised several issues concerning his right to recover damages for emotional harm. Kyle contested Ventura's right to recover damages for emotional distress, as well as his evidence of diminished reputation.<sup>106</sup> and Ventura contested Kyle's proof of Ventura's diminished reputation.<sup>107</sup>

Injury to reputation is generally presumed in libel cases<sup>108</sup> and in defamation claims by public officials,<sup>109</sup> figures,<sup>110</sup> or in cases involving public issues,<sup>111</sup> once *New York Times* actual malice is established.

A key question in any defamation case concerns the plaintiff's burden of establishing damages, not only for injury to reputation, but also for emotional harm caused by the defamatory communication. Injury to reputation is generally presumed in libel cases.<sup>112</sup> In defamation claims by public officials,<sup>113</sup> figures,<sup>114</sup> or in cases involving public issues,<sup>115</sup> there no First Amendment impediment to the award of presumed

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<sup>105</sup> *Id.* at paragraph 43.

<sup>106</sup> Memorandum in Support of Defendant's Motion In Limine to Exclude Certain Evidence not Properly Admissible With Regard to Plaintiff's Reputation at 2-3, *Ventura v. Kyle*, 2014 WL 3729659 (D. Minn. Apr. 21, 2014) (No. 12-cv-0472).

<sup>107</sup> Plaintiff Jesse Ventura's Memorandum in Support of Motion In limine to Exclude David A. Schultz From Testifying as an Expert Witness for the Defense and to Confirm the Exclusion of Robert G. Meekins as A Defense Expert, *Ventura v. Kyle*, 2014 WL 3729652 (D. Minn. Apr. 21, 2014) (No. 12-0472).

<sup>108</sup> *W.J.A. v. D.A.*, 43 A.2d 1148, 1154 (N.J. 2012).

<sup>109</sup> *Sullivan*, 376 U.S. at 279-80, 283-84.

<sup>110</sup> *See Gertz*, 418 U.S. at 343.

<sup>111</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756-61 (1985) (plurality).

<sup>112</sup> *W.J.A.*, 43 A.2d at 1154.

<sup>113</sup> *Sullivan*, 376 U.S. at 279-80, 283-84.

<sup>114</sup> *See Gertz*, 418 U.S. at 343.

<sup>115</sup> *Dun & Bradstreet*, 472 U.S. at 756-61.

damages, once *New York Times* actual malice is established. While damages may be presumed, nothing precludes the plaintiff from attempting to prove actual injury to reputation. On the other hand, evidence that a plaintiff already had a bad reputation may tend to establish that an additional defamatory communication would not result in any increased harm.<sup>116</sup>

In contrast, the plaintiff has the burden of pleading<sup>117</sup> and proving special damages.<sup>118</sup> A plaintiff seeking to recover for special damages has to show the loss of something of pecuniary value.<sup>119</sup> It may include various sorts of losses, such as loss of a contract, a loss of earnings, credit, or employment.<sup>120</sup>

#### *a. Damages for Emotional Harm*

Under applicable state and federal law Ventura was entitled to presumed damages for emotional harm upon proof that the statements were false and defamatory and made with actual malice.<sup>121</sup> The claim for emotional

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<sup>116</sup> See ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 10.5.5[B] (4th ed. 2012).

<sup>117</sup> Fed. R. Civ. P. 9(g).

<sup>118</sup> See RESTATEMENT (SECOND) OF TORTS §§ 575, 622 (1977). The defamatory communication must be the “legal cause” of the special harm to the plaintiff. *Id.* § 622A. It is a legal cause if it was a “substantial factor” in causing the harm. *Id.* § 622A (a).

<sup>119</sup> RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (AM. LAW INST. 1977).

<sup>120</sup> DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE § 9:3 (West Supp. 2016); 2 RODNEY A. SMOLLA, LAW OF DEFAMATION § 9.35 (2d ed. 2013).

<sup>121</sup> See *Gertz*, 418 U.S. at 343. Minnesota law permits presumed damages in libel cases. Mike Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1492, 1511-12 (2014). In *Richie v. Paramount Pictures, Inc.*, 544 N.W.2d 21, 26 (Minn. 1996). However, the Minnesota Supreme Court restricted the right of a private plaintiff involved in a public issue to recover damages by limiting the right to recover damages for emotional distress to cases in which the plaintiff is able to establish actual injury to reputation, at least when the plaintiff is unable to establish actual malice. While it is clear that *Gertz* permits recovery of actual damages, including damages for emotional distress, see *Time, Inc. v. Firestone*, 424 U.S. 448, 46 (1976) (recovery permitted for emotional distress absent proof of actual injury to reputation in libel case involving a public issue), the Minnesota Supreme Court held that as a matter of Minnesota law a plaintiff involved in a public issue who brings suit against a media defendant has to prove actual injury to reputation in order to recover damages for emotional distress. *Richie* was inapplicable in Ventura's case, however, because he established actual malice, entitling him to presumed damages.

harm was a hotly contested issue.

Kyle argued in his trial brief that Ventura should not be allowed to recover damages for emotional harm. Rather than producing his medical records, Ventura stipulated to the removal of any reference to “mental distress” and “emotional distress” or, as argued in the trial brief, “variations of those terms” as noted in Ventura’s complaint. The brief acknowledged, however, that the stipulation did not affect Ventura’s “continuing allegations regarding humiliation, embarrassment, harm to his reputation and standing in the community, or regarding negative effects in connection with Plaintiff’s business and professions.”<sup>122</sup>

Kyle nonetheless argued that the lack of medical support for Ventura’s claim for “mental/emotional distress” was significant, because “Minnesota law does not permit recovery of such damages in the absence of reliable evidence,”<sup>123</sup> and that plaintiffs seeking recovery for those damages must “offer medical proof of physical manifestations of alleged mental distress or anguish.”<sup>124</sup> Building on that proposition, Kyle argued that Ventura would “have a difficult time distinguishing damages for ‘mental distress’ and ‘emotional distress,’ which he has withdrawn, from damages for ‘humiliation, embarrassment’ which he continues to assert.”<sup>125</sup>

The supporting authority for that argument<sup>126</sup> was drawn from Minnesota Court of Appeals cases involving claims for emotional distress, but those claims were not parallel to Ventura’s claim for emotional harm. The cases involved claims for promissory estoppel,<sup>127</sup> negligent infliction of

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<sup>122</sup> Defendant's Trial Brief at 11, *Ventura v. Kyle*, 2014 WL 3729664 (D. Minn. Apr. 21, 2014) (No. 12-cv-0472).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 12.

<sup>126</sup> *Id.* (citing *Deli v. Univ. of Minn.*, 578 N.W.2d 779 (Minn. Ct. App. 1998); *Soucek v. Banham*, 503 N.W.2d 153 (Minn. Ct. App. 1993); *Copeland v. Hubbard Broad., Inc.*, No. C7-97-733, 1997 WL 729195 (Minn. Ct. App. Nov. 25, 1997)).

<sup>127</sup> *Deli*, 578 N.W.2d at 779. The plaintiff, the women’s gymnastics coach at the University, brought suit against the University for breach of the athletic director’s oral promise not to view a videotape containing not only the performance of the gymnastics team but also of her sexual encounter with her husband in a hotel room. The court of appeals held that absent an independent tort claim the plaintiff could not recover damages for emotional harm under a promissory estoppel theory, but that even

emotional distress,<sup>128</sup> and trespass.<sup>129</sup> Those cases are inapposite for two reasons.

First, Minnesota law seems clear in holding that a plaintiff is entitled to recover for presumed damages in libel cases, and that presumed damages include damages for mental suffering.<sup>130</sup> Kyle did not dispute that point, although Kyle argued that Ventura's right to recover damages for any emotional harm was foreclosed by his stipulation to withdraw his claims for mental distress.<sup>131</sup> Second, claims for emotional harm in libel cases need not be supported by physical symptoms or medical evidence. The Minnesota Supreme Court cases on that issue are clear.<sup>132</sup>

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if those damages were allowable the plaintiff's evidence, the lack of medical evidence supporting the claim would preclude recover for those damages. *Id.* at 783-84.

<sup>128</sup> Banham, 503 N.W.2d at 153. The plaintiff sued police officers and the City of Minneapolis for negligent infliction of emotional distress arising out the death of his dog, which was shot to death by the officers. The court held that the plaintiff was not entitled to recover for emotional distress because Minnesota requires the person seeking to recover under that theory to prove that he is in the zone of danger and reasonably feared for his own safety, or is able to show "a direct invasion of his rights, such as defamation, malicious prosecution, or other willful, wanton or malicious conduct." *Id.* at 163.

<sup>129</sup> Copeland, No. C7-97-733, 1997 WL 729195. Defendant news room employee of the defendant, accompanied a veterinarian who was being investigated by the defendant's news station, to the plaintiffs' home. She asked to accompany the vet because she was interested in becoming a veterinary technician. The Copelands sued the defendants for trespass. The trial court granted partial summary judgment on the trespass claim, holding that the plaintiffs could not recover damages for their emotional harm caused by the trespass. The court of appeals affirmed, holding that the plaintiffs were required to show physical symptoms arising out of the trespass, but that the evidence was insufficient to justify the claim. *Id.* at \*4 -\*5.

<sup>130</sup> Thorson v. Albert Lea Pub. Co., 251 N.W. 177, 179 (Minn. 1933) ("Mental suffering is an element of general damage. Such suffering is presumed to have naturally resulted from the publication of a libelous article.").

<sup>131</sup> Memorandum in Support of Defendant's Motion in Limine to Exclude Evidence of "Mental Distress" and "Emotional Distress," Ventura v. Kyle, 2014 WL 3729678 (D. Minn. Apr. 21, 2014) (No. 12-cv-0472).

<sup>132</sup> In Lickteig v. Alderson, Ondov, Leonard & Sween, P.A., 556 N.W.2d 557, 560 (Minn. 1996) (citations omitted), the Minnesota Supreme Court noted that:

In tort cases, emotional distress may be an element of damages in only three circumstances. First, a plaintiff who suffers a physical injury as a result of another's negligence may recover for the accompanying mental anguish. . . . Second, a plaintiff may recover for negligent infliction of emotional distress when physical symptoms arise after and because of emotional distress, if the plaintiff was actually exposed to physical harm as a result of the negligence



*b. Presumed Damages - Jury Instructions*

The jury instructions on presumed damages in the case raised two issues. First, if Ventura withdrew his claims for mental distress, there was still an issue as to whether he should nonetheless be entitled to recover for other emotional harm, including humiliation and embarrassment. Second, there was an issue as to whether the instructions should in some way constrain the jury's discretion to award presumed damages.

Ventura's requested instruction on presumed damages was a slightly modified version of Minnesota's pattern instruction on the issue:

The only question for you to decide [in answering Question \_\_] is the amount of money plaintiff is entitled to receive for:

1. Harm to his reputation and standing in the community
2. Humiliation
3. Embarrassment
4. Economic loss caused by the defamatory statements or communication

No evidence of actual harm is required.<sup>133</sup>

Ventura requested the following instruction on presumed damages:

Jesse Ventura is seeking to recover against Chris Kyle's Estate what the law calls "presumed damages."

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of reasonable compensation. In

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of another (the "zone-of-danger" rule). . . Finally, a plaintiff may recover emotional distress damages when there has been a "direct invasion of the plaintiff's rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious conduct."

<sup>133</sup> Plaintiff's Proposed Jury Instructions, No. 28, *Ventura v. Kyle*, No. 12-0472 27 (D. Minn. Apr. 21, 2014) (12-cv-0472). Minnesota's pattern instruction is 4 MINN. PRAC. SERIES, CIVJIG 50.55 (6th ed. 2014).

making an award of presumed damages you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence.

In determining an award of presumed damages in this case, you must not include any amount for emotional distress or mental distress. Ventura is not seeking these types of damages.

Presumed damages are permitted because in some cases injury to reputation may be difficult of monetary proof, but presumed damages nonetheless are intended to be an approximate compensation for real injury. Presumed damages are intended as some estimate, however rough, of the probable degree of actual loss that a person will suffer given the particular charge against him, even though the loss cannot be identified in money terms. You are not required to award presumed damages, and you may consider any evidence that may exist that Ventura did not suffer any damages. If you find that Ventura has not suffered any actual injury to reputation as a result of the challenged book passage, then you should not award presumed damages.

Presumed damages are not intended to punish Chris Kyle or his Estate for making the challenged statements and are not intended to deter or prevent others from making similar statements in the future.<sup>134</sup>

The proposed instruction is lengthy but generally accurate.

The third paragraph states that the jury is not to award damages for “emotional or mental distress.” That was a debatable point, in light of Ventura’s stipulation that he would not seek to recover damages for mental or emotional distress.

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<sup>134</sup> Defendant's Revisions to Selected Proposed Jury Instructions, Ventura, 2014 WL 8721598.

The next to the last sentence of the instruction states that the jury may not award presumed damages unless Ventura suffered “actual injury to reputation as a result of the challenged book passage.” That part of the requested instruction would have been accurate had Ventura not been a public figure, but if he established that the statement was defamatory, and that it was made with knowledge of the falsity or in reckless disregard of the truth, presumed damages would be recoverable, absent additional state law restrictions. There are none.<sup>135</sup>

The district court’s jury instruction on damages for Ventura’s defamation claim tracked Minnesota’s pattern instruction, as requested by Ventura. It did not restrict Ventura from recovering for humiliation and embarrassment, although it does not specifically include damages for mental distress:

If you find that Mr. Ventura has proved his claim of defamation, you may presume he has suffered damages and award him the amount of money you determine he is entitled to receive for harm to his reputation and standing in the community, humiliation, and embarrassment. No evidence of actual harm is required for you to award him these damages.<sup>136</sup>

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<sup>135</sup> In *Richie*, 544 N.W.2d at 26, however, the Minnesota Supreme Court restricted the right of a private plaintiff involved in a public issue to recover damages by limiting the right to recover damages for emotional distress to cases in which the plaintiff is able to establish actual injury to reputation, at least when the plaintiff is unable to establish actual malice. While it is clear that *Gertz* permits recovery of actual damages, including damages for emotional distress, *see* *Firestone*, 424 U.S. at 482–83 (recovery permitted for emotional distress absent proof of actual injury to reputation in libel case involving a public issue), the Minnesota Supreme Court held that as a matter of Minnesota law a plaintiff involved in a public issue who brings suit against a media defendant has to prove actual injury to reputation in order to recover damages for emotional distress. The court clearly recognized that its holding was inapplicable in cases where a public figure establishes actual malice. *Richie* at 26 (“In a case such as this, where the defamatory statements were made by the media, involved a matter of public concern, and there have been no allegations of actual malice, recovery cannot be based on presumed damages”). *Richie* was inapplicable in Ventura’s case because Ventura established actual malice, entitling him to presumed damages.

<sup>136</sup> Jury Instructions, Instruction No. 12, *Ventura v. Kyle*, WL 3729686.

Kyle prevailed on the mental distress issue, but not the argument that any emotional harm that might be categorized as mental distress should not be recoverable. The instructions clearly permitted Ventura to recover for humiliation and embarrassment, however. Both types of injuries are emotional responses to the defamatory communication.

The jury instruction, coupled with the special verdict question on defamation damages, raises additional issues. Question No. 2 on the verdict form asked:

What amount of money, if any, will fairly and adequately compensate Plaintiff Jesse Ventura for damages directly caused by the defamation? (See Jury Instruction Nos. 12 and 13 for the means of determining damages.)<sup>137</sup>

The instruction on presumed damages states that the jury may award damages without evidence of actual harm. There were no limitations on the instruction along the lines suggested by Kyle (“[p]resumed damages are intended as some estimate, however rough, of the probable degree of actual loss that a person will suffer”), which raises questions concerning whether and how presumed damages can be subject to reasonable limitations and how to convey that concept to a jury.

There is generally a disconnect between the acknowledgment that presumed damages should be an approximation of the damages that would ordinarily flow from the defamatory communication and jury instructions that actually impose boundaries on presumed damages.

The district court’s instruction did not limit presumed damages, but the special verdict question on defamation damages did in asking the jury to determine what amount of money would fairly and adequately compensate Ventura “for damages directly caused by the defamation.” Incorporation of the causation requirement imposed a limitation that is inconsistent with the concept of presumed damages. Some of these problems are illustrated in a Minnesota saga, *Longbehn v. Schoenrock*,<sup>138</sup>

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<sup>137</sup> Question No. 2, Verdict Form, *Ventura v. Kyle*, No. 12-472 (D. Minn. July 29, 2014).

<sup>138</sup> *Schoenrock* was an appellant in the first appeal in the case, *Longbehn v. City of Moose Lake*, No. A04-1214, 2005 WL 1153625 (Minn. Ct. App. May 17, 2005). The

which involved a series of trials and appeals over a twelve-year period, cases in which the presumed damages problem was pivotal.

The defamation suit arose out of a single phone call made by the defendant to a third person, during the course of which he referred to the plaintiff, a police officer, as “Pat the Pedophile,” a sobriquet that referred to the fact that Longbehn had dated a younger woman. That case rocked back and forth between the trial court and court of appeals for several years as the courts grappled with the issue of how to constrain the jury’s discretion in awarding presumed damages to the plaintiff in a case involving “defamation per se.” In the first trial of the case the jury awarded the plaintiff \$230,000 in presumed damages for past and future harm to reputation, mental distress, humiliation, and embarrassment.

Concerned about the size of the damages award, but keenly aware that the presumed damages rule gives courts little control in determining damages, the court of appeals applied a review standard drawn from a comment to section 621 of the Restatement (Second) of Torts, which states that “in the absence of proof, general damages are limited to harm that ‘would normally be assumed to flow from a defamatory publication of the nature involved,’”<sup>139</sup> and concluded that the award for “general damages far exceeds the amount of past and future harm to appellant’s reputation, mental distress, humiliation, and embarrassment that would normally flow from a publication of this kind.”<sup>140</sup>

On remand, the trial court, trying to accommodate the court of appeals, was careful in attempting to establish parameters for the jury by instructing them, in part, that:

A person is liable for the general harm *which results from*  
the defamatory statement.  
Your duty as a jury is to determine the amount of damages,  
if any, *that the plaintiff sustained by* the defendant’s use

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court of appeals opinions in the second and third appeals are Longbehn v. Schoenrock, 727 N.W.2d 153 (Minn. Ct. App. 2007); No. A09-2141 2010 WL 3000283 (Minn. Ct. App. Aug. 3, 2010). For a detailed analysis of the cases see Mike Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1492, 1523-39 (2014).

<sup>139</sup> Schoenrock, 727 N.W.2d at 162 (quoting RESTATEMENT (SECOND) OF TORTS § 621 cmt. a (1977)).

<sup>140</sup> *Id.*

of that nickname. In making your decisions, the court has determined as a matter of law that, number one, the defendant used the offensive nickname on one isolated occasion. . . .

*A party asking for damages must prove the nature, extent, duration and consequences of his harm. You must not decide damages based on speculation or guess.*<sup>141</sup>

In addition, the first four special verdict form questions asked if “Longbehn ‘suffer[ed]’ some form of harm ‘from the Defendant’s use of the defamatory nickname.’”<sup>142</sup>

The court of appeals held that the trial court erred in giving the highlighted parts of the instruction and in formulating its special verdict form because they required a finding of causation, a requirement that is inconsistent with the presumed damages rule as set out in its previous opinion in the case.<sup>143</sup>

The case was reversed and remanded. The trial court, which by now may have thought it was playing whack-a-mole, instructed the jury in the retrial as follows:

Deciding harm for defamation

The only question for you to decide is the amount of money the Plaintiff is entitled to receive for

1. Harm to his reputation and standing in the community;
2. Mental distress;
3. Humiliation; and
4. Embarrassment

No evidence of actual harm is required.

You may base the amount of money Plaintiff if entitled to receive on your assessment of the harm that would normally be assumed to flow from a defamatory publication of the nature involved here.

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<sup>141</sup> Longbehn v. Schoenrock, No. A09-2141, 2010 WL 3000283, at \*3 (Minn. Ct. App. Aug. 3, 2010) (emphasis the court’s).

<sup>142</sup> *Id.*

<sup>143</sup> Schoenrock, 727 N.W.2d at 160 (stating that where damages are presumed the plaintiff is entitled to recover without proof that the publication caused actual harm).

In your assessment of presumed general damages you may consider: (1) the character of the Plaintiff; (2) the Plaintiff's general standing and his reputation in the community; (3) the character of the defamatory publication; (4) the extent of dissemination of the statement by the Defendant; and (5) the extent and duration of the circulation of the Defendant's publication.<sup>144</sup>

The special verdict question on damages, with the jury's response, was as follows:

1. What amount of money will fairly and adequately compensate the Plaintiff for Defendant's use of the defamatory nickname?
  - a. Harm to Plaintiff's reputation and standing in the community \$ 00.00
  - b. Mental distress \$ 00.00
  - c. Humiliation \$ 750.00
  - d. Embarrassment \$ 00.00<sup>145</sup>

The court was careful in framing the question to avoid any requirement of a causal connection between the defendant's use of the defamatory nickname and any harm to the plaintiff's reputation or mental distress, humiliation, and embarrassment.

The district court's jury instructions and special verdict questions in the *Ventura* case would have more accurately reflected Minnesota law had there been limitations on presumed damages and had the causal connection required in the special verdict form been removed. Only Ventura would have complained about that, of course, and a verdict in his favor rendered it moot. As to the lack of limitations on presumed damages in the instruction, the broad discretion trial courts have in instructing juries would have made it an effectively nonappealable point. Nonetheless, the instructions and special verdict form in the *Ventura* case illustrate the inadequacies of jury instructions and special verdict questions on the presumed damages issue. The dilemma created by the

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<sup>144</sup> Mike Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1492, 1535–36 (2014).

<sup>145</sup> *Id.* at 1536.

presumed damages rule, which permits damages in the absence of proof of those damages, and the need for some boundaries in a jury's discretion to award those damages, can be avoided. Instructions such as those in the last trial in *Longbehn v. Schoenrock* illustrate that reasonable limitations can be imposed on presumed damages without running afoul of the contrary rule that there does not have to be proof of actual harm to justify a damages award.<sup>146</sup>

*B. Invasion of Privacy – Appropriation*

Section 652C of the Restatement (Second) of Torts provides that “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”<sup>147</sup> Relying on section 652C, Ventura alleged that he “has acquired a property right in the exclusive commercial use of his own identity, as represented by his

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<sup>146</sup> North Carolina's pattern instruction on presumed damages in cases involving claims for presumed damages by public figures or officials suggests a guide for juries to follow:

The determination of the amount of presumed damages is not a task which can be completed with mathematical precision and is one which unavoidably includes an element of speculation. The amount of presumed damages is an estimate, however rough, of the probable extent of actual harm, in the form of loss of reputation or standing in the community, mental or physical pain and suffering, and inconvenience or loss of enjoyment which the plaintiff has suffered or will suffer in the future as a result of the defendant's publication of the [libelous] [slanderous] statement.

NC PATTERN JURY INST. - CIV. 806.83 (June 2017).

California's Bar Association Jury Instruction is another example of a limiting instruction:

Presumed damages are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include, but are not limited to, reasonable compensation for loss of personal [or professional] reputation, shame, mortification, and hurt feelings. No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable.

CAL. JURY INSTR.--CIV. 7.10.1 (March 2018).

<sup>147</sup> RESTATEMENT (SECOND) OF TORTS §652C (Am. Law Inst. 1977). The Minnesota Supreme Court adopted section 652C in 1998. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233 n.3, 236 (Minn. 1998).



name, image, voice, photograph and public persona,”<sup>148</sup> and that “Kyle has wrongfully appropriated and used [his] identity for his own economic advantage and gain, including Governor Ventura’s name, image and public persona.”<sup>149</sup>

There is a substantial body of case law and overlapping Restatement provisions covering the tort of appropriation, and a lack of clarity in the law.<sup>150</sup> Threading that law through the eye of the jury instruction needle is made harder because of that lack of clarity. The treatment of appropriation in the *Ventura* case is a good illustration of the problems.

There are several intersecting problems that have to be addressed in understanding the tort of appropriation, including what kind of appropriation is necessary to trigger the tort, what the defendant’s purpose has to be in appropriating the plaintiff’s name or likeness, what damages the plaintiff is entitled to recover if the appropriation is established, when the exception for the incidental use of a plaintiff’s name or likeness applies, and what limitations the First Amendment imposes on the right to recover for appropriation. Those recurring issues in appropriation cases were all involved in the case.

### *1. Jury Instructions*

The jury instructions on appropriation in the *Ventura* case, proposed and given, highlight the problems involved in understanding the tort of appropriation and in explaining the law to the jury in a comprehensible form.

Ventura’s requested jury instruction on appropriation, which was drawn from Minnesota’s pattern jury instruction, was brief and straightforward:

Invasion of privacy by appropriation occurs when a person appropriates another person’s name or likeness for his or her own use or benefit.<sup>151</sup>

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<sup>148</sup> Complaint *supra* note 16, ¶ 16.

<sup>149</sup> *Id.* at ¶ 48.

<sup>150</sup> See Eric E. Johnson, *Disentangling the Right of Privacy*, 111 NW. U.L. REV. 891, 93–909 (2017); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. REV. 477, 546–59 (2006).

<sup>151</sup> Plaintiff’s Proposed Jury Instructions, *Ventura v. Kyle*, (RHK/SER) 27 (D. Minn. Apr. 21, 2014) (No. 12-0472). The proposed instruction is taken verbatim from MINN. PRAC. SERIES, CIVJIG 72.15 (6th ed. 2014).

Kyle's proposed jury instruction on appropriation was more detailed:

A defendant is liable for invasion of privacy/appropriation if he improperly appropriates another person's name for his or her own use or benefit. The value of a plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities.

A plaintiff does not have the right to object merely because his name or his appearance is brought before the public. The publication of biographical data of a well-known figure does not constitute an invasion of privacy or a wrongful appropriation of his name.

A plaintiff cannot recover where the plaintiff's name is used in connection with communications about matters of legitimate public interest, so long as there is a real relationship between the plaintiff and the subject matter of the publication.

The plaintiff has the burden to show that his name has been appropriated. If he does not meet this burden, you must find for the defendant.<sup>152</sup>

The district court gave the following five-sentence instruction on appropriation:

Plaintiff Jesse Ventura also claims that Chris Kyle invaded his privacy by appropriating his name. To prevail on this appropriation claim, Mr. Ventura must have proved his defamation claim. Mr. Ventura must also prove by the greater weight of the evidence that Mr. Kyle appropriated to his own use or benefit the value of Mr. Ventura's name.

The value of a person's name is not appropriated by mere mention of it or in connection with publication about matters of legitimate public interest, so long as there is a

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<sup>152</sup> Defendant's Revisions to Selected Proposed Jury Instructions, Defendant's Revised Final Instruction No. 24--Elements of the Claim of Appropriation, *Ventura v. Kyle*, 2014 WL 8721598 (footnotes omitted).

real relationship between the plaintiff and the subject matter of the publication. It is only considered appropriation when a plaintiff's name is used for the purpose of appropriating to the defendant's benefit the commercial or other value associated with the plaintiff's name.<sup>153</sup>

The first sentence introduces the claim. The second sentence states that Ventura has to prevail on his defamation claim in order to be entitled to recover for invasion of privacy. The third incorporates Ventura's proposed instruction, except rather than stating that the appropriation had to be of the person's name or likeness, it states that Kyle had to have appropriated the "value" of Ventura's name. The fourth sentence was taken from the penultimate paragraph of Kyle's proposed appropriation instruction, which stated that there is no appropriation if a name is merely mentioned or used in connection with "matters of legitimate public interest," if "there is a real relationship between" the person and "the subject matter of the publication." The last sentence of the instruction was based substantially on the third-to-the-last paragraph of comment d to section 652C of the Restatement (Second) of Torts.<sup>154</sup>

The only question on appropriation on the special verdict form was, "Did Plaintiff Jesse Ventura prove his claim of appropriation against Chris Kyle?"<sup>155</sup> The jury answered that question in the negative, but because the elements of the claim were not broken down in the verdict form, there is no way of knowing why the jury found in Kyle's favor. The jury might have found that there was no appropriation because Kyle's purpose was not to appropriate the commercial or other value associated with Ventura's name, that the publication was about a matter of "legitimate public interest," that there was only a "mere mention" of Ventura's name in connection with a publication about a matter of "legitimate public interest," or that there was no "real relationship" between Ventura and the subject matter of the publication. Take your pick.

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<sup>153</sup> Jury Instructions, Jury Instruction No. 9, *Ventura v. Kyle*, No. 12-472, 2014 WL 3729686. The instruction uses the term publication. The defamation instruction focused on the story. The instructions should have been consistent in use of the "story" as the focus of both claims.

<sup>154</sup> See RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (AM. LAW INST. 1977).

<sup>155</sup> Special Verdict Form No. 2, *Ventura v. Kyle*, No. 12-0472 (D. Minn. July 29, 2014).

The last four sentences of the instruction raise several issues. The second sentence, conditions the right to recover for invasion of privacy on Ventura's right to recover for defamation. The issue is why. The third sentence raises an issue as to what constitutes an appropriation for one's "use or benefit." Commercial use is obvious. Other "benefit" is not. The fourth raises the issue of how a matter of "legitimate public interest" is defined, whether it means the same thing as newsworthiness for First Amendment purposes, why it would be relevant if a jury is first required to find "actual malice" (a requisite finding if the jury first has to find in Ventura's favor in order to even consider the appropriation issue), and why in any event it would be a jury issue rather than a question of law for the court. The final part of the sentence raises a question as to what a "real relationship" is between Ventura and the subject matter of the publication. That sentence also uses the term "publication," which apparently refers to the book, although Ventura's theory of appropriation was also based on the subsequent publicity the book received through Kyle's radio and television appearances to promote the book.

The next sections unpack the instruction and suggest a more simplified alternative instruction for appropriation cases.

## *2. Defamation as a Prerequisite to Appropriation*

The first issue is why a finding of defamation should be a prerequisite to recovery for appropriation. Kyle argued in the first motion for summary judgment that he was entitled to summary judgment because the First Amendment protected his statements about Ventura. In a heading entitled "Invasion of Privacy/Appropriation," the district court noted that summary judgment was inappropriate because the parties could not agree whether the statements were true or false.<sup>156</sup> That linked the appropriation claim to the defamation claim, but without explaining why.

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<sup>156</sup> Ventura v. Kyle, Civ. No. 12-472, 2012 WL 6634779, at \*3 (D. Minn. Dec. 20, 2012). This is the court's analysis of the issue:

Kyle argues that he is entitled to summary judgment because his statements about Ventura are protected by the First Amendment. See Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, (1977) (applying First Amendment analysis to invasion-of-privacy claim); C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 823-24 (8th Cir.2007) (First Amendment privilege defeated right-of-publicity claim). But this argument depends entirely on his own version of the facts and ignores Ventura's. His statements are not protected by the First Amendment

If the jury did not find for Ventura on the defamation claim, it could have been for various reasons. The jury might have found that Ventura was unable to prove that the story was false, or if it was, that Kyle did not know it was false or that he did not have substantial doubts about its truth. But even if the defamation claim failed for either or both of those reasons, the issue is why the appropriation claim would necessarily be barred. While there is often an element of falsity in appropriation claims, appropriation of a person's name or likeness for the defendant's benefit, commercial or otherwise, may be actionable, Ventura might have claimed that even if the story were true, Kyle used the story (and Ventura's name) for the primary purpose of gaining a commercial advantage. If so, there would still be impediments to the claim, however. The story about Kyle's encounter with Scuff Face would most certainly be newsworthy, and that story played only a small part in Kyle's overall life story, small enough to be simply an incidental use in connection with that larger story.

If that is accepted, the issue then is why a finding of defamation, which necessarily included a finding that the story was defamatory, false and that Kyle published it with knowledge of the falsity or with substantial doubts about its truth, would place Ventura in a better position with respect to the appropriation claim. If the Scuff Face story was false, and Kyle knew it was false or had substantial doubts about its truth, the newsworthiness defense would necessarily collapse, opening the door to an appropriation claim that would likely be precluded if the story were true. There is no First Amendment interest in protecting a false appropriation claim when the use of a person's name or likeness is defamatory, false, and made with actual malice.

The conclusion that follows from the court's ruling is that if the statements are not protected by the First Amendment because they were false, and that Kyle knew they were false or had substantial doubts about their truth, there is no *constitutional* bar to the claim for appropriation. Kyle's publication of a false story with knowledge of the falsity or

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if they were knowingly false and defamatory, as Ventura claims. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964). Because the parties do not agree whether Kyle's statements were true or false, the Court cannot determine whether the First Amendment protects them.

*Id.*

substantial doubts about its truth tips the case to actionable appropriation. But, whether true or false, Ventura would still have to establish that his name or likeness was more than just an incidental use of his name or likeness.

The finding that the actual malice standard was met leads to the next question of whether that finding should have prevented jury consideration of whether the publication was about a matter of legitimate public concern. There is an auxiliary question of whether that issue should have been for the jury in any event.

### *3. Legitimate Public Interest*

The instruction states that the value of a person's name is not appropriated if there is a "mere mention of it in connection about matters of legitimate public interest." The term "legitimate public interest" is not defined for the jury, but incorporation of the term in the instruction requires a finding on that issue in order for the jury to consider the other parts of the instruction.

There are at least two issues that are involved. One is how the term "legitimate public interest" should be defined. A second is whether the issue is one for the jury, or a question of law for the court. A third is whether consideration of that issue was foreclosed by the jury's finding in Ventura's favor on the defamation claim.

Defining what is newsworthy, or what is a matter of legitimate concern to the public is problematic,<sup>157</sup> as is the issue of whether newsworthiness should be a question of fact for the jury or a question of law for the court. In cases involving the issue of whether a public employee may be discharged for commentary on a matter of public concern, courts take the position that the issue is a question of law for the court.<sup>158</sup> The Supreme Court considers it to be a question of law in defamation claims involving

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<sup>157</sup> See Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 778 (1999); Allen Rostron, *The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked By An Unusual New Type of Business*, 90 WASH. U. L. REV. 1321, 1330 (2013).

<sup>158</sup> E.g., *Callaghan v. City of S. Portland*, 76 A.3d 348, 354 (Mass. 2013); *Santer v. Bd. of Educ. of East Meadow Union Free Sch. Dist.*, 13 N.E.3d 1028, 1038 (N.Y. 2014); *Sprague v. Spokane Valley Fire Dep't*, No. 93800-8, 2018 WL 547363, \*9 (Wash. Jan. 25, 2018).

a matter of public concern,<sup>159</sup> limitations on the claims for intentional infliction of emotional distress,<sup>160</sup> and cases involving speech by public employees.<sup>161</sup> Leaving the issue to a jury in cases involving appropriation claims is inconsistent with those decisions.

#### *4. Use or Benefit and Damages*

Early wrangling over Ventura's appropriation claim involved the issue of whether Ventura should be limited to damages for commercial appropriation. Kyle argued in his motion for summary judgment that appropriation was limited to commercial appropriation, but the district court rejected the argument.<sup>162</sup> The trial court instructed the jury that Ventura had to prove that Kyle "appropriated to his own use or benefit the value of Mr. Ventura's name," and that "[i]t is only considered appropriation when a plaintiff's name is used for the *purpose* of appropriating to the defendant's benefit the commercial *or other value* associated with the plaintiff's name."<sup>163</sup> According to the instruction, actionable appropriation is not limited to the appropriation of just the commercial value of the plaintiff's name, and the benefit may be other than commercial.

That left the damages instruction.

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<sup>159</sup> See *Milkovich v. Lorain Journal, Inc.*, 497 U.S. 1, 20 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

<sup>160</sup> See *Snyder v. Phelps*, 562 U.S. 443, 553 (2011).

<sup>161</sup> See *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014).

<sup>162</sup> *Ventura*, 2012 WL 6634779, at \*3.

<sup>163</sup> *Jury Instructions*, *Jury Instruction No. 9, Ventura v. Kyle*, 2014 WL 3729686 (first emphasis the court's; second emphasis added).

Ventura's proposed instruction on damages was based on section 49 of the Restatement (Third) of Unfair Competition<sup>164</sup>:

Damages for invasion of privacy by appropriation are the greater of either the pecuniary loss to the person whose likeness is appropriated or the pecuniary gain to the person who appropriated the other's likeness.

Kyle proposed the following instruction on damages for appropriation (and unjust enrichment):

Jesse Ventura has also claimed damages for invasion of privacy/appropriation and unjust enrichment. No fixed standard exists for deciding the amount of damages for using a plaintiff's name or likeness for the benefit of a defendant. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. If you do not find by a preponderance of the evidence that Ventura has proved the elements of appropriation or unjust enrichment, then he cannot prevail

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<sup>164</sup> Section 49 in its entirety reads as follows:

(1) One who is liable for an appropriation of the commercial value of another's identity under the rule stated in § 46 is liable for the pecuniary loss to the other caused by the appropriation or for the actor's own pecuniary gain resulting from the appropriation, whichever is greater, unless such relief is precluded by an applicable statute or is otherwise inappropriate under the rule stated in Subsection (2).

(2) Whether an award of monetary relief is appropriate and the appropriate method of measuring such relief depend upon a comparative appraisal of all the factors of the case, including the following primary factors:

- (a) the degree of certainty with which the plaintiff has established the fact and extent of the pecuniary loss or the actor's pecuniary gain resulting from the appropriation;
- (b) the nature and extent of the appropriation;
- (c) the relative adequacy to the plaintiff of other remedies;
- (d) the intent of the actor and whether the actor knew or should have known that the conduct was unlawful;
- (e) any unreasonable delay by the plaintiff in bringing suit or otherwise asserting his or her rights; and
- (f) any related misconduct on the part of the plaintiff.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 (Am. Law. Inst. 1995).



on that claim and you must find in favor of the Kyle Estate as to this element of damages.<sup>165</sup>

Ventura's proposed instruction was narrowed to pecuniary loss, notwithstanding his earlier arguments that damages should not be so limited in appropriation cases; the defendant's proposed instruction was not so limited, although it was vague in terms of the exact kinds of damages that the jury could award.

The trial court accepted Ventura's proposed jury instruction, with modifications:

If you find that Mr. Ventura has proved his claim of appropriation, you must award him the greater of either the amount the Defendant Estate has gained as a direct result of the appropriation *or* the amount Mr. Ventura has lost as a direct result of the appropriation.<sup>166</sup>

The damages instruction effectively compresses the broader theory of appropriation into the narrower theory of publicity.

The value of Ventura's name would have to be the commercial value. The benefit could be other than commercial benefit, although what that benefit might be is not defined in the instruction; but the damages instruction necessarily limits that gain to commercial gain and the loss to Ventura commercial loss. That gain and loss was the focus of the proof in the case.<sup>167</sup> Ventura's argued that damages should not be limited to commercial loss,<sup>168</sup> but his proposed jury instructions for appropriation damages compressed the issue into one of commercial loss.<sup>169</sup>

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<sup>165</sup> Plaintiff's Proposed Jury Instructions, Instruction No. 25 (Custom Instruction 2) Ventura v. Kyle, No. 12-0472 27.

<sup>166</sup> Jury Instructions, Jury Instruction No. 13, Ventura v. Kyle, 2014 WL 3729686 (D. Minn. July 22, 2014) (12-cv-0472) (emphasis the court's).

<sup>167</sup> Plaintiff Jesse Ventura's Memorandum in Opposition to Defendant's Motion for Judgment as a Matter of Law or a New Trial, Ventura v. Kyle, 2014 WL 5018930 part D, (detailing evidence of gain and loss on the unjust enrichment issue).

<sup>168</sup> Plaintiff Jesse Ventura's Reply to Defendant's Trial Brief, Part D.1, Ventura v. Kyle, 2014 WL 3729676 (No. 12-0472), (D. Minn. May 5, 2014).

<sup>169</sup> The Restatement is clear that section 49 "states the rules governing the recovery of monetary relief in actions for infringement of the right of publicity." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. a (Am. Law. Inst. 1995).

The potential damages for appropriation, other than commercial loss, could include damages for emotional harm associated with the appropriation. The damages instruction effectively seems to foreclose those damages.

### 5. *Real Relationship*

The instruction states that there is no appropriation of a person's name by "*mere mention* of it or in connection with publication about matters of legitimate public interest, so long as there is a *real relationship* between the plaintiff and the subject matter of the publication." The terms "mere mention" and "real relationship" are not defined in the instruction.

Comment d of the Restatement (Second) of Torts explains the issue:

The value of the plaintiff's name is not appropriated by *mere mention* of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given *for the purpose* of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded.<sup>170</sup>

The dividing line is important, because in cases where a book is published, and it discusses a public figure, there is always the possibility that there was at least *some* motivation to use that name to enhance the story and the salability of the book. Not all uses are actionable, however. The "real relationship" standard is a means of separating actionable from nonactionable uses, but when it is used as a standard for a jury to apply without further definition, it does not provide much assistance. The focus, as noted in comment d, is on the purpose of the use of the name or likeness. That was the key factor in Ventura's case: was Kyle's *purpose*

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<sup>170</sup> RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (AM. LAW. INST. 1965) (emphasis added). An incidental use of the plaintiff's name or likeness is insufficient to trigger liability for appropriation. The reason is that the incident

to gain an advantage by his portrayal of Ventura in the Scuff Face subchapter and in the talk shows following.

*6. An Alternative?*

Embodying the key concepts in appropriation cases in a way that juries can understand is difficult. We may have a pretty good idea of the paradigms that spawn appropriation claims, but the general way in which the law is formulated, including in the Restatements, is not particularly helpful in drafting coherent jury instructions on appropriation. In effect, the issue is effectively punted in pattern jury instructions, which leaves juries without sufficient guidance in deciding the cases. An additional complicating factor is the lack of clarity concerning the role of judges and juries in appropriation cases. That may lead to over-instructing a jury in appropriation cases. That seemed to be what happened in Ventura's case.

What follows is a suggested instruction that avoids some of the common problems with jury instructions in appropriation cases:

(Defendant) appropriates the value of another person's name or likeness when (he) (she)

- (1) takes advantage of the reputation, prestige, or other value that is associated with the other person's name or likeness, and
- (2) a primary purpose of (defendant) is to use that reputation, prestige, or other value associated with the other person's name or likeness for (his) (her) own benefit.

The use may be for commercial benefit, although it does not have to be.

The proposed instruction is perhaps conspicuous because of what it does *not* include. The instruction is based on the assumption that the issue of whether the public concerned a matter of legitimate public interest is a question of law for the court to decide. It omits the "mere mention" and "real relationship" language that was used in the district court's instruction. Those concepts are difficult for a jury to understand and apply and may be more suitable for a court considering a summary judgment motion in an appropriation case. The key element is whether the defendant's primary purpose was to use the plaintiff's name or likeness for his own advantage.

The damages issue also has to be sorted. The pecuniary loss to the plaintiff/pecuniary gain jury instructions in the case ran damages through what was effectively a “publicity” pinch point. Damages may be broader and jury instructions on the damages issue should provide for the broader elements of damages, if the controlling law allows.

### *C. Unjust Enrichment*

Ventura’s third theory of recovery was unjust enrichment. The complaint alleged that “[a]s a direct result of his tortious, inequitable and unlawful conduct, Kyle has been unjustly enriched at Governor Ventura’s expense,”<sup>171</sup> and that “[e]quity requires that Kyle make restitution to Governor Ventura for all property and benefits unjustly received, including but not limited to income from the sale of *American Sniper* books and/or any subsidiary or ancillary rights sales.”<sup>172</sup>

Kyle argued from the outset that Ventura was not entitled to recover for unjust enrichment, in part because Ventura had an adequate remedy at law and in part because an unjust enrichment theory basing damages on the benefit to the defendant would be inconsistent with the First Amendment.<sup>173</sup>

#### *1. Jury Instructions*

Ventura proposed the following instruction on unjust enrichment:

Definition of unjust enrichment

A defendant has been unjustly enriched where:

1. Defendant knowingly received something valuable from the plaintiff;
2. Defendant is not entitled to the benefit received; and
3. Circumstances exist that would make it unjust for the defendant to retain the benefit received without compensation to the plaintiff.

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<sup>171</sup> Complaint, ¶ 50.

<sup>172</sup> *Id.* ¶ 51.

<sup>173</sup> Defendant’s Memorandum in Support of Motion for Partial Summary Judgment, Part III, *Ventura v. Kyle*, 2012 WL 11622854 (D. Minn. Aug. 28, 2012) (No. 12-472).

An action for unjust enrichment must be based on situations where it would be morally wrong for one party to enrich himself at the expense of another.

Damages that can be recovered for an unjust enrichment claim are based on what the person enriched has inappropriately received, rather than on what the opposing party has lost.<sup>174</sup>

Kyle's proposed instruction on unjust enrichment reads as follows:

A defendant has been unjustly enriched if he "has knowingly received or obtained something of value for which [he] in equity and good conscience should pay." "Unjust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in the sense that the term 'unjustly' could mean illegally or unlawfully." An author or publisher is not held to have received a benefit merely because the publication that referred to plaintiff was published for profit. In such cases, unjust enrichment requires Plaintiff to prove a deliberate association with the defendant's products in an advertising or promotional scheme unrelated to the book, broadcast, or other mass communication.

The Plaintiff has the burden to prove that the defendant was enriched and the amount by which the defendant was enriched. If Jesse Ventura fails to do so, you must find for Taya Kyle.<sup>175</sup>

The district court gave the following instruction on unjust enrichment:

Plaintiff Jesse Ventura also claims that Chris Kyle and the Defendant Estate were unjustly enriched by the story about Mr. Ventura. To prevail on this unjust-enrichment

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<sup>174</sup> Plaintiff's Proposed Jury Instructions, Custom Instruction 3, *Ventura v. Kyle* (D. Minn. Apr. 21, 2014) (No. 12-0472).

<sup>175</sup> Defendant's Revisions to Selected Proposed Jury Instructions, Defendant's Revised Final Instruction No. 25--Elements of the Claim of Unjust Enrichment, *Ventura v. Kyle*, 2014 WL 8721598 (D. Minn. June 18, 2014) (No. 12-cv-0472) (footnotes omitted).

claim, Mr. Ventura must have proved his defamation claim. He must also prove by the greater weight of the evidence:

One, the Defendant Estate knowingly received a benefit from the story; and

Two, the Defendant Estate is not entitled to the benefit received because circumstances exist that would make it unjust for the Defendant Estate to retain that benefit without compensating Mr. Ventura.<sup>176</sup>

The instruction closely followed Ventura's proposed instruction. The two elements required a showing of benefit to Kyle's estate, but without defining that benefit, and second, that the estate was not entitled to the benefit it received because it would be unjust for the estate to retain the benefits without compensating Ventura. Because unjust enrichment is an equitable claim, the jury was acting in an advisory capacity in determining whether Ventura established the claim.<sup>177</sup>

The district court's instruction on damages for unjust enrichment gave the jury substantial latitude in awarding damages:

If you find that Mr. Ventura has proved his claim of unjust enrichment, you must award him the amount of money by which you find the Defendant Estate has been unjustly enriched. However, if you find that Mr. Ventura's

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<sup>176</sup> Jury Instructions, Jury Instruction No. 10, Ventura, 2014 WL 3729686 (No. 12-0472). The instruction's generality is a function of the general nature of the unjust enrichment theory. See DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES § 4.1(2) (3d ed. 2018). Other pattern instructions are similar to Minnesota's. For example, Maryland's pattern instruction states that:

A plaintiff may recover from a defendant on a claim for unjust enrichment upon proving the following three elements:

- (1) A benefit conferred on the defendant by the plaintiff;
- (2) An appreciation or knowledge by the defendant of the benefit; and
- (3) The acceptance or retention by the defendant of the benefit under circumstances that would make it inequitable for the defendant to retain the benefit without the payment of its value.

MARYLAND CIV. PATTERN JURY INSTRUCTIONS, MPJI-Cv 9:32 (5th ed. 2018). The damages instruction states simply that "[t]he measure of damages for unjust enrichment is the value of the benefit conferred upon the defendant." *Id.*

<sup>177</sup> Ventura, 63 F. Supp. 3d at 1006.

damages award for defamation and/or appropriation provide him with an adequate remedy, you may not award him any further damages for unjust enrichment.<sup>178</sup>

Question five on the special verdict form asked only:

Did Plaintiff Jesse Ventura prove his claim of unjust enrichment against Chris Kyle and the Defendant Estate? (See Jury Instruction No. 10.)<sup>179</sup>

The jury answered “yes” to that question.

The damages question asked:

By what amount of money, if any, has the Defendant Estate been unjustly enriched? (See Jury Instruction No. 13 for the means of determining damages.)<sup>180</sup>

The jury set the damages at \$1,345,477.25.

Kyle argued in his motion for JMOL that the damages award for unjust enrichment could not be sustained because Ventura had an adequate remedy at law. The district court initially rejected the argument because it was not raised in a timely manner, but held that even if it had, the damages award for defamation was not *adequate*.<sup>181</sup>

The Eighth Circuit, reversed, holding that Ventura was not unjustly enriched as a matter of Minnesota law and that it was therefore unnecessary to reach the First Amendment claim or the issue of whether the district court’s factual findings supported the damages claim.<sup>182</sup>

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<sup>178</sup> Jury Instructions, Jury Instruction No. 13, Ventura, 2014 WL 3729686 (No. 12-0472).

<sup>179</sup> Verdict Form, Question 5, Ventura v. Kyle, 2014 WL 3729681 (D. Minn. July 29, 2014) (No. 12-CV 12-472).

<sup>180</sup> Special Verdict Form, at 2, Ventura v. Kyle, No. 12-0472 (D. Minn. July 29, 2014).

<sup>181</sup> Ventura, 63 F. Supp. at 1009–1011.

<sup>182</sup> 825 F.3d 876, 886 (8th Cir. 2016) The evidentiary support for the jury’s award of substantial damages for unjust enrichment was questionable. The district court defended its decision to accept the jury’s award of \$1,345,477 in damages for unjust enrichment, holding that the evidence supported the court’s conclusion that Kyle “unfairly profited from the story regarding” Ventura, and “that the jury’s calculation of damages fell within a reasonable range (approximately 25% of *American Sniper*’s

## 2. *The Common Law*

The Minnesota Supreme Court has characterized unjust enrichment as “an equitable doctrine that allows a plaintiff to recover a benefit conferred upon a defendant when retention of the benefit is not legally justifiable.”<sup>183</sup> The theory requires the claimant to “establish an implied-in-law or quasi-contract in which the defendant received a benefit of value that unjustly enriched the defendant in a manner that is illegal or unlawful.”<sup>184</sup> Equitable relief is not permitted where the party has an adequate remedy at law.<sup>185</sup>

The Eighth Circuit rejected the unjust enrichment claim for two reasons. First, while noting that Ventura was correct in noting that a quasi-contract will be imposed if the plaintiff “unknowingly or unwillingly” imposes a

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profits.” Ventura, 63 F. Supp. 3d at 1009 n.3. Kyle’s brief attacked the award based on the lack of evidentiary support for the award. Brief of Appellant at 65-68, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876). The brief argued, among other things, that “Ventura relied solely on speculation that the mention of his name on a radio and a television interview must have increased profits simply because sales of the book continued to rise following those appearances,” *Id.* at 65, and “[t]he district court asserted that its award constituted “approximately 25%” of the \$6 million in royalties Ventura claimed the book had generated,” but with “no basis for its assertion that ‘approximately 25%’ of the book’s sales were driven by use of Ventura’s name; it plucked the number from thin air.” *Id.* at 67.

In *Ventura v. Titan Sports, Inc.*, 65 F.3d 725 (8th Cir. 1995), in contrast, the damages for Ventura’s quantum meruit claim arising out of the use of his likeness on wrestling videotapes produced by Titan Sports, Ventura established damages with specificity. The evidence was much more specific on the value of the use of his likeness and on the royalty rates applicable to the use of his likeness.

<sup>183</sup> *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 838 (Minn. 2012). There are numerous Minnesota cases stating that unjust enrichment is applicable in cases in which it would be morally wrong for a party to enrich himself at the expense of the plaintiff. *See, e.g.*, *Klass v. Twin City Fed. Sav. & Loan Ass'n*, 190 N.W.2d 493, 495 (Minn. 1971) (suit by lessee to recover part of a condemnation award that was intended to reimburse the lessor for real taxes that had been paid by the lessee under the provisions of a lease agreement); *Cady v. Bush*, 166 N.W.2d 358, 362-63 (Minn. 1969) (suit by motel purchases against vendors for the return of properties that were exchanged and cash payments that were made pursuant to a contract); *Holman v. CPT Corp.*, 457 N.W.2d 740, 745 (Minn. Ct. App. 1990) (unjust enrichment claim based on failure to pay sales commissions).

<sup>184</sup> *Id.*

<sup>185</sup> *Ventura*, 825 F.3d at 887, quoting *ServiceMaster of St. Cloud v. GAB Bus. Serv., Inc.*, 544 N.W.2d 302, 305 (Minn. 1996) (“A party may not have equitable relief where there is an adequate remedy at law available.”).



“benefit” on the defendant, the court rejected Ventura’s argument “that Ventura conferred a ‘benefit’ on Kyle by Ventura’s mere existence as a colorful figure who might inspire people to make up stories about him.”<sup>186</sup>

Second, the equitable remedy of unjust enrichment would be unavailable because Ventura, a public figure, had an adequate remedy at law in his defamation claim against Kyle for money damages. The district court held that Ventura’s claim for defamation claim was inadequate:

The jury was expressly advised—*at Defendant’s behest* . . . that it could *not* award additional damages for unjust enrichment if it found that Plaintiff’s “damages award for defamation . . . provide[d] him with an adequate remedy.” . . . This scuttles Defendant’s argument. Plaintiff’s defamation claim provided him with no means to obtain the disgorgement of Defendant’s ill-gotten gains—money the jury found, and the Court agreed, that Defendant made by defaming Plaintiff in *American Sniper*. Only through unjust enrichment could Plaintiff attempt to force Defendant to yield those improper profits. Under these circumstances, Plaintiff’s legal remedy was inadequate to fully ameliorate Defendant’s wrongful conduct, and the defamation claim did not preclude the unjust-enrichment claim as a matter of law.<sup>187</sup>

The Eighth Circuit rejected that argument for two reasons. The first is that the issue of whether there is an adequate remedy at law is a question of law for the court, rather than a question of fact for the jury.<sup>188</sup> The second reason is that Ventura was adequately compensated for injury to his reputation by the jury’s award of \$500,000 on his defamation claim. The court found no contrary authority that would support the award of damages for unjust enrichment in these circumstances.<sup>189</sup>

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<sup>186</sup> *Id.* (citing *Galante v. Oz, Inc.*, 379 N.W.2d 723, 725–26 (Minn. Ct. App. 1986)).

This evokes the incidental use issue in appropriation cases.

<sup>187</sup> *Ventura*, 63 F. Supp. 3d at 1011 (emphasis is the court’s).

<sup>188</sup> *Ventura v. Kyle*, 825 F.3d at 887.

<sup>189</sup> *Ventura*, 825 F.3d at 887. The court cited “one of the few cases addressing the issue,” *Hart v. E.P. Dutton & Co.*, 93 N.Y.S.2d 871, 879 (N.Y. Sup. Ct. 1949), which noted the novelty of such a claim and the absence of support for such a claim. 825

### 3. *The First Amendment*

The district court rejected Kyle's argument that that the damages award for unjust enrichment violated the First Amendment. While recognizing that the Supreme Court has taken the position that some knowingly false speech is protected by the First Amendment, the court concluded that defendants have "no *carte blanche* immunity to lie with impunity," and that Kyle was simply wrong in his claim that the First Amendment necessitates limiting damages for actionable false speech.<sup>190</sup> The court relied in part on the Supreme Court's opinion in *United States v. Alvarez*,<sup>191</sup> for the proposition that government restrictions on speech are permissible in cases "[w]here false claims are made to effect a fraud or secure moneys or other value considerations,"<sup>192</sup> and in part on *Gertz v. Robert Welch, Inc.*,<sup>193</sup> for the proposition that because punitive damages are available in a defamation action where there is knowledge of the falsity or reckless disregard of the truth, by analogy damages for disgorgement should be allowed for unjust enrichment because both damages claims transcend compensatory damages.<sup>194</sup>

The district court's ruling on the First Amendment issue drew fire in Kyle's appellate brief<sup>195</sup> and in two amicus briefs in the case.<sup>196</sup> One amicus brief attacked the district court's holding based primarily on the lack of support in Minnesota law for an unjust enrichment claim.<sup>197</sup> The other opened its argument by stating that "[t]he notion that a court may award profits as damages for allegedly defamatory conduct is all but

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F.3d at 888. The Eighth Circuit also relied on the Supreme Court's opinion in *Milkovich*, 497 U.S. at 23, noting that the claim for damages, even if an imperfect remedy, is the only means of vindicating a claim for injury to reputation.

<sup>190</sup> Ventura, 63 F. Supp. 3d at 1011.

<sup>191</sup> *United States v. Alvarez*, 567 U.S. 709 (2012).

<sup>192</sup> Ventura, 63 F. Supp. 3d at 1011, (citing *Alvarez*, 567 U.S. at 723 (emphasis the district court's)).

<sup>193</sup> *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 349 (1974).

<sup>194</sup> Ventura, 63 F. Supp. 3d at 1011, (citing, 418 U.S. at 349 (1974)).

<sup>195</sup> Brief of Appellant at 59-65, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14-3876).

<sup>196</sup> Brief of Amici Curiae 33 Media Companies and Organizations at 16-24, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14-3876); Brief of Amicus Curiae Thomas More Law Center at 2, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14-3876).

<sup>197</sup> Brief of Amicus Curiae Thomas More Law Center, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14-3876).

unknown in American jurisprudence.”<sup>198</sup> The brief focused on the reasons for the lack of authority for the award of those damages as a first point. As a second, the brief attacked the district court’s analogy of disgorgement damages to the award of punitive damages in defamation cases, based in part on the criticism of permitting punitive damages in public figure defamation cases, the lack of any Supreme Court decision expressly permitting public figures to recover for those damages, and the more stringent standards states, including Minnesota, have adopted in punitive damages cases.<sup>199</sup>

The Eighth Circuit avoided the necessity of deciding the First Amendment issue because of its conclusion that Minnesota law did not support the unjust enrichment theory.<sup>200</sup> If followed, the court’s position that compensatory damages in unjust enrichment cases will not be allowed where the plaintiff has an adequate remedy in law via a defamation action would foreclose any necessity of the consideration of the issue from a First Amendment standpoint in any future cases.

#### IV. CONCLUSION

Jesse Ventura’s lawsuit against Chris Kyle’s estate brought into sharp focus important issues relating to defamation, appropriation, and unjust enrichment. Many of the legal issues concerning the standards that governed the theories of recovery were heavily briefed and thoughtfully considered by the district court, which had difficult decisions to make in determining how to instruct the jury. The key defamation issues that are the subject of this article were not considered by the Eighth Circuit when it reversed based on the improper mention of insurance in the case. It did not reach the appropriation issues because the jury found in Kyle’s favor on that claim. The judgment on the unjust enrichment claim was reversed because Minnesota law did not support it.

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<sup>198</sup> Brief of Amici Curiae 33 Media Companies and Organizations at 16, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876).

<sup>199</sup> Brief of Amici Curiae 33 Media Companies and Organizations at 22–24, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876). Minnesota’s punitive damages statute, Minn. Stat. § 549.20 (2016), requires proof of deliberate indifference to the rights of the plaintiff and applies a clear and convincing evidence standard to that determination.

<sup>200</sup> Ventura, 825 F.3d at 886.

While key issues swirling around Ventura's defamation and appropriation claims were irrelevant in the Eighth Circuit's decision, those issues will be recurrent in many cases. The goal of this article in working through those issues is to suggest a way of avoiding some of the sticking points, resolving them early, and generating jury instructions that can simplify the issues for juries asked to decide these sorts of cases.

In defamation cases, there should be early clarification of the standard for determining actual malice and the burden of proof on the falsity issue. Pattern instructions generally provide working definitions of "actual malice" that need not be amplified.

A public figure who establishes actual malice is entitled to presumed damages, but it is important to understand that there are boundaries that can be imposed on those damages through appropriate jury instructions. The issue concerning the limitation on damages for mental distress will not be replicated in other cases, leaving plaintiffs who establish *New York Times* actual malice open to recovery for emotional harm as an element of presumed damages. It is also important to understand that even though damages are presumed, the plaintiff may attempt to prove actual damages. Defendants may also attempt to prove diminished reputation with appropriate evidence.

The appropriation claim in a public figure context seems complex. There were several issues in the case that had to be resolved in determining how the case would be submitted to the jury. Had the Scruff Face story been true, it would not have been actionable, which is why the district court instructed the jury that it had to first find that Ventura was entitled to recover for defamation before it could consider the appropriation claim. When Ventura necessarily established *New York Times* actual malice in order for the jury to get to the appropriation claim, it should have precluded jury consideration of the issue of whether the publication was a matter of legitimate public concern.

That still would have left issues concerning Kyle's purpose in using the Scruff Face story. Looking at the district court's instructions in the case, questions remained concerning whether there was simply a "mere mention" of Ventura's name, or a "real relationship between the plaintiff and the subject matter of the publication," according to the district court's jury instruction on appropriation. The language is loose, not only in the jury instruction, but in the cases. Providing a jury with a tighter standard

for resolving those key issues, and eliminating the issues the jury need not decide, will facilitate the jury's decision-making in these cases.

While damages in appropriation cases may include damages for mental distress, Ventura abandoned his claim for emotional harm based on the appropriation. The damages issue in Ventura's case narrowed to a consideration of the amount of loss to Ventura or the amount gained by the estate; the district court's instruction excluded damages for emotional harm. Those damages would be permissible in an appropriate case, assuming a proper foundation, and assuming that the relevant jurisdiction does not limit damages for the tort of appropriation solely to commercial loss to the plaintiff or gain to the defendant. Any time there is an appropriation claim, questions may arise concerning the appropriate measure of damages. Ventura's circumstances seemed to be unique, given the stipulation concerning recovery of damages for mental distress, but in other cases those damages may be awarded, given appropriation proof. Plaintiffs in cases involving damages for emotional harm will not have to prove the value of their name or likeness in order to justify recovery. In cases involving commercial appropriation there will have to be proof of the benefit to the defendant or the loss to the plaintiff.<sup>201</sup>

The unjust enrichment issue was Minnesota-specific in the case, but the specter of using that theory as a means of enhancing damages in a defamation case is questionable. The Eighth Circuit's opinion in the case, if followed, puts the issue to rest.

Many appropriation cases will involve the issue of whether there are First Amendment limitations on the right to recover. The starting point for jury instructions will be pattern instructions, but many of the pattern instructions are very brief, primarily because of the lack of authority that would justify more expansive instructions on the privacy issues. The First Amendment issue should be a question of law for the court, and, in the suggested alternative instruction, issues concerning "mere mention" and "real relationship" should be collapsed into the more simplified issue of the defendant's purpose in using the plaintiff's name or likeness.

As a final point, there is significant benefit in working through a complex lawsuit like this. The excellent work of the lawyers exhibited in the

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<sup>201</sup> Plaintiff Jesse Ventura's Memorandum in Opposition to Defendant's Motion for Judgment as a Matter of Law or a New Trial, Part II, *Ventura v. Kyle*, 2014 WL 3729679 (D. Minn. July 18, 2014).

numerous skirmishes over jury instructions in the case has hopefully resulted in a clearer understanding of the law that applies in public figure cases involving defamation and appropriation claims, and in the jury instructions that emerge from that law.

#### APPENDIX

Jury Instructions, *Ventura v. Kyle*, 2014 WL 3729686 (D. Minn. July 22, 2014)(12-cv-0472)

#### **JURY INSTRUCTION NO. 6**

Plaintiff Jesse Ventura asserts three claims against Chris Kyle and the Defendant Estate: (1) defamation; (2) invasion of privacy by appropriation; and (3) unjust enrichment. The following instructions will explain each of these claims in more detail, as well as Mr. Ventura's burden of proof.

#### **JURY INSTRUCTION NO. 7**

There are two standards of proof that you will apply to the evidence in this case, depending on the issue you are considering.

For the most part, you must decide whether certain facts have been proved by "the greater weight of the evidence." A fact has been proved by the greater weight of the evidence if you find that it is more likely true than not true. You decide that by considering all of the evidence and deciding which evidence is more believable.

But on one issue (discussed in Instruction No. 8C), you must decide whether a certain fact has been proved by "clear and convincing evidence." A fact has been proved by clear and convincing evidence if you find it is highly probable that it is true or, put another way, you firmly believe it is true.

You may have heard the term "proof beyond a reasonable doubt." That is a stricter standard that applies in criminal cases. It does not apply in civil cases such as this one.

**JURY INSTRUCTION NO. 8**

In this case, Plaintiff Jesse Ventura claims that Chris Kyle defamed him by asserting in *American Sniper*, as well as on television and radio, that Mr. Ventura said “he hates America,” the SEALs “were killing men and women and children and murdering,” and the SEALs “deserve to lose a few.” To prevail on this defamation claim, Mr. Ventura must prove:

*One*, Mr. Kyle’s story about Mr. Ventura was defamatory;

*Two*, the story was materially false; *and*

*Three*, Chris Kyle published the story knowing it was false, believing it was false, or having serious doubts about its truth.

If any of these three elements has not been proved, then you must answer “No” to Question No. 1 on the Verdict Form.

The following instructions explain each of these elements in more detail.

**JURY INSTRUCTION NO. 8A**

The first element is that Mr. Kyle’s story about Mr. Ventura was *defamatory*. The story was defamatory if it tends to:

1. So harm the reputation of Mr. Ventura that it lowers his esteem in the community; *or*
2. Deter persons from associating or dealing with him; *or*
3. Injure his character; *or*
4. Subject him to ridicule, contempt, or distrust; *or*
5. Degrade or disgrace him in the eyes of others.

Mr. Ventura must prove this element by the greater weight of the

evidence (see Instruction No. 7).

#### **JURY INSTRUCTION NO. 8B**

The second element is that Mr. Kyle's story about Mr. Ventura was *materially* false or, put another way, was *not substantially accurate*. The story may be substantially accurate even if it contains minor inaccuracies, as long as the substance or gist of it is accurate.

Mr. Ventura must prove this element by the greater weight of the evidence (see Instruction No. 7).

#### **JURY INSTRUCTION NO. 8C**

The third element is that Mr. Kyle published the story about Mr. Ventura despite:

1. Knowing the story was false; *or*
2. Believing the story was false; *or*
3. Having serious doubts about the story's truth.

Mr. Ventura must prove this element by clear and convincing evidence (see Instruction No. 7).

#### **JURY INSTRUCTION NO. 9**

Plaintiff Jesse Ventura also claims that Chris Kyle invaded his privacy by appropriating his name. To prevail on this appropriation claim, *Mr. Ventura must have proved his defamation claim*. Mr. Ventura must also prove by the greater weight of the evidence that Mr. Kyle appropriated to his own use or benefit the value of Mr. Ventura's name.

The value of a person's name is not appropriated by mere mention of it or in connection with publication about matters of legitimate public interest, so long as there is a real relationship between the plaintiff and the subject matter of the publication. It is only considered appropriation when a plaintiff's name is used for the *purpose* of appropriating to the



defendant's benefit the commercial or other value associated with the plaintiff's name.

**JURY INSTRUCTION NO. 10**

Plaintiff Jesse Ventura also claims that Chris Kyle and the Defendant Estate were unjustly enriched by the story about Mr. Ventura. To prevail on this unjust-enrichment claim, Mr. Ventura must have proved his defamation claim. He must also prove by the greater weight of the evidence:

*One*, the Defendant Estate knowingly received a benefit from the story;  
*and*

*Two*, the Defendant Estate is not entitled to the benefit received because circumstances exist that would make it unjust for the Defendant Estate to retain that benefit without compensating Mr. Ventura.

**JURY INSTRUCTION NO. 11**

I am about to instruct you as to damages, and you should understand that this should not be considered as suggesting any view of mine as to whether Mr. Ventura has proved any of his claims or is entitled to damages.

**JURY INSTRUCTION NO. 12**

If you find that Mr. Ventura has proved his claim of defamation, you may presume he has suffered damages and award him the amount of money you determine he is entitled to receive for harm to his reputation and standing in the community, humiliation, and embarrassment. No evidence of actual harm is required for you to award him these damages.

**JURY INSTRUCTION NO. 13**

Before you award any of the following damages that I am about to describe, you must first determine that Mr. Ventura has proved them by

the greater weight of the evidence. He has the burden of proving the nature, extent, duration, and consequences of these damages (if any) and your award may not be based on speculation or guess.

If you find that Mr. Ventura has proved his claim of defamation, you must also consider whether he has suffered economic loss as a direct result of the defamation in determining his damages. Economic loss includes the loss of employment, as well as the denial of employment which he would have secured but for the defamation.

If you find that Mr. Ventura has proved his claim of appropriation, you must award him the greater of either the amount the Defendant Estate has gained as a direct result of the appropriation *or* the amount Mr. Ventura has lost as a direct result of the appropriation.

If you find that Mr. Ventura has proved his claim of unjust enrichment, you must award him the amount of money by which you find the Defendant Estate has been unjustly enriched. However, if you find that Mr. Ventura's damages award for defamation and/or appropriation provide him with an adequate remedy, you may not award him any further damages for unjust enrichment.

If you find that damages you would award Mr. Ventura for one claim are duplicative of the damages you would award him for another claim, you may not award him those damages under both claims because the law does not allow double recovery.

Finally, you must not award any damages as a form of punishment or deterrent.

#### **JURY INSTRUCTION NO. 14**

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

*First*, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

*Second*, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because your verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

*Third*, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone -- including me -- how your votes stand numerically.

*Fourth*, your verdict must be based solely on the evidence presented to you and on the legal principles which I have given to you in my instructions. Nothing I have said or done is intended to suggest what your verdict should be -- that is entirely for you to decide.

*Finally*, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room. The form has specific questions for you to answer. The form reads: (read form).

Consider the questions in order and follow the directions on the verdict form. The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer in the space provided opposite each question. As you will note from the wording of the questions, some questions should be answered only if certain answers are given to prior questions.

When each of you has agreed on the verdicts and your foreperson has entered those verdicts on the form, the foreperson should sign and date

the form and advise the court security officer that you have reached a verdict. However, you should not tell anyone what your verdict is, nor should you give the verdict form to the court security officer.

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