IN THE SUPREME COURT OF THE VIRGIN ISLANDS

Appeal No. 2021-0001

SENATOR ADLAH DONASTORG, JR. BENEDICTA DONASTORG, ADLAH DONASTORG, SR., JOSEPHINA DONASTORG, ELLA MORON AND NORMA DURAN

Appellants

v.

DAILY NEWS PUBLISHING COMPANY, INC., LOWE DAVIS AND HOLLAND "DYKE" REDFIELD,

Appellees

On Appeal from the Superior Court of the Virgin Islands

Superior Court Civil Number ST-2002-CV-00117

Honorable Denise M. Francois

APPELLEES' OPPOSITION BRIEF

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APPELLEES' OPPOSITION BRIEF

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I. Subject Matter and Appellate Jurisdiction

The Superior Court of the Virgin Islands has subject matter jurisdiction over this civil action under and pursuant to the provisions of Title 4 V.I.C. §76(a).

This Court has appellate jurisdiction "…over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law…" under and pursuant to the provisions of Title 4 V.I.C. §32(a).

On August 19, 2015, the Superior Court of the Virgin Islands (*Francois, D. presiding*), the Court below, issued a Memorandum Opinion and Order granting summary judgment against all Plaintiffs and in favor of Defendants Daily News Publishing, Inc., J. Lowe Davis (herein "The Daily News") and the late Holland "Dyke" Redfield in the matter *Donastorg v. Daily News Publ'g Co.*, 63 V.I. 196 (V.I. Super. Ct. Aug. 19, 2015), *judgment entered,* 2021 VI SUPER 3U. The claims against Defendants Virgin Islands Telephone Corporation and Oakland Benta remain pending. On February 7, 2018, Daily News Publishing, Inc. and J. Lowe Davis filed a Motion to Enter Final Judgment. On January 7, 2021, the Superior Court issued a Memorandum Opinion and Order

under Rule 54(b) of the Virgin Islands Rules of Civil Procedure, entering final Judgment with respect to the Order on summary judgment which dismissed, with prejudice, each of the Counts in Plaintiff's Fourth Amended Complaint as to The Daily News.

Appellants Adlah Donastorg, Jr., Benedicta Donastorg, Adlah Donastorg, Sr., Josefina Donastorg, Ella Moron and Norma Duran (collectively Appellants) filed a timely Notice of Appeal on February 8, 2021, which was amended on February 22, 2021.

II. Statement of the Issues Presented for Review

A. Whether the Superior Court Committed Reversible Error When It Entered Summary Judgment in Favor of The Daily News and J. Lowe Davis.

Appellees contend that The Superior Court correctly interpreted applicable Virgin Islands law and properly applied the operative facts to the law.

In their Fourth Amended Complaint, Plaintiffs alleged two theories of liability against The Daily News. First, Plaintiffs allege that Defendants published defamatory material about them, resulting in a series of harms. Second, Plaintiffs claim that Defendants acted in concert with the other Defendants to cause Plaintiff certain losses and damages.

After its exhaustive review of the parties' fully briefed Motion for Summary Judgment and Supplemental Motion for Summary Judgment, the Superior Court found that The Daily News did not defame the Plaintiffs, that The Daily News committed no tortious conduct and that The Daily News neither directed the other Defendants nor were they directed by the other Defendants in the commission of any wrongful acts. As a result, the Superior Court found that summary judgment was appropriate, and it was granted. This Appeal followed.

III. Statement of the Standard of Review

In *Joseph v. Daily News Publishing Company, Inc.* 57 V.I. 566, 575 (2012), this Court established the standard of review in a matter where summary judgment was granted in favor of Defendants in an action brought by a general-purpose public figure who had alleged defamation by a newspaper publication or publications. The standard of review is twofold, including the initial *de novo* review of the facts and the law to determine whether the grant of summary judgment was appropriate, and the secondary *de novo* review of the facts and the law to determine whether the Plaintiff has demonstrated clear and convincing proof of actual malice.

This Court's review of a grant of summary judgment is plenary. In doing so, the Court may not weigh the evidence or determine the credibility of witnesses.

In this matter, the initial test to be applied by this Court requires it to make a finding, based upon its review of the record as a whole, with all inferences to be drawn in the light most favorable to the non-moving party, as to whether there exists any genuine issue of material fact that would preclude the grant of summary judgment.

The second part of the test to be applied by this Court requires it to undertake an independent examination of the entire record, made without deference to the trial court. In doing so, this Court must bar the entry of a judgment against Defendants unless it determines that a reasonable jury could make a finding of clear and convincing proof of actual malice based on a newspaper publication or publications that reported on a matter or matters of public concern.

IV. Statement of Related Cases or Proceedings

When the Superior Court granted Summary Judgment for The Daily News and Redfield, that portion of the case involving Virgin Islands Telephone Corporation and Oakland Benta were yet to be adjudicated.

Those claims remain pending. Appellees are unaware of any other related cases or proceedings pending in any Court.

V. Statement of the Case and Summary of Argument

On March 1, 2002, Senator Adlah F. Donastorg and his wife Benedicta (herein "Donastorg"), filed a civil suit against The Daily News Publishing Company, Inc., J. Lowe Davis, its Executive Editor (herein collectively "The Daily News"), Innovative Communication Corporation ("ICC") the owner of the Daily News Publishing Company, Inc., and Jeffrey J. Prosser ("Prosser"), the owner of ICC. Donastorg does not allege that J. Lowe Davis undertook any actions separate and apart from The Daily News Publishing Company, Inc. On that basis, The Daily News Publishing Company, Inc. and J. Lowe Davis will be referred to collectively as The Daily News. In their Fourth Amended Complaint, Donastorg alleged that The Daily News defamed them at the behest of Jeffrey Prosser. Further, Donastorg alleged that Prosser hired a private investigator to compile information about them from both public and confidential sources, in an effort to threaten or to harm them. During the course of the litigation, Donastorg's parents Adlah, Sr. and Josefina Donastorg, and Donastorg's sisters, Ella Moron and Norma Duran were

added as Plaintiffs. Two employees of ICC, the late Holland "Dyke" Redfield and Oakland Benta, were added as Defendants.

Plaintiffs alleged multiple causes of action against The Daily News, including defamation, tortious interference with business relationships, intentional or, in the alternative, negligent infliction of emotional distress and invasion of privacy. Plaintiffs purport to include a count for punitive damages. However, it is well established in the Virgin Islands that punitive damages are not a stand-alone cause of action, *R.J. Reynolds Tobacco Co. v. Gerald*, 76 V.I. 656, 706, 2022 VI 14, ¶ 71 (2022) (citing *Bonelli v. Gov't of the V.I.*, 67 V.I. 714, 726 (2017), *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 176 n.5 (V.I. 2012)).

Plaintiff's Fourth Amended Complaint, supported by a series of broad-based and wide-ranging allegations made throughout his responses to discovery and during the course of his deposition, caused The Daily News to unearth its entire history of news articles and editorials written about Senator Donastorg, in order to assess them against Donastorg's claim of defamation. Among those were twenty-three news articles and editorials that referred to Senator Donastorg, one news article that referred to both Senator Donastorg and his wife, and no

news articles or editorials that referred to any of Adlah Donastorg, Sr., Josefina Donastorg, Ella Moron or Norma Duran. In the various pleadings on summary judgment and in the Superior Court's Memorandum Opinion and Order on summary judgment, each of the news articles and editorials referring to Senator Donastorg were analyzed by the Court. None of the articles or editorials were found to be defamatory. The news article that referred to both Senator and Mrs. Donastorg were conceded by Senator Donastorg to be objectively true.

In this proceeding, Appellants have limited their claim of defamation to one News Article, one Editorial and certain oral statements made on a radio broadcast by Redfield, who was, at the time the statement was made, an employee of ICC. In brief, the challenged News Article, entitled "*Legislation Reduction on Agenda for Rules Committee*" was written by the late Hal Hatfield, was published on June 12, 2001 and contained a statement that Senator Donastorg voted against his own Bill in the Government Operations, Planning and Environmental Protection Committee of the 24th Legislature of the Virgin Islands. What actually occurred is that Senator Donastorg voted against a Motion brought by one of his colleagues to refer the Bill to the Rules

Committee, rather than to the floor of the Legislature, as was Senator Donastorg's preference. The Motion to refer the Bill to the Rules Committee passed on a three-to-one vote, with Senators Donald "Ducks" Cole, Adelbert Bryan and David Jones voting "yes", and with Senator Donastorg voting "no". Of course, what Senator Donastorg voted against was how his colleagues intended to route the Bill through the legislative process. The late Hal Hatfield apparently spoke to an unnamed legislative staffer, who informed him that Senator Donastorg had voted against the Bill. The Daily News published a story including that misunderstanding under Mr. Hatfield's byline. The statement that Senator Donastorg voted against his own Bill was the subject of a correction by The Daily News that was published two days later.

The second publication identified by Appellants is the May 29, 1998 editorial, "*The Public's Right to Know*". The editorial suffers from the facially obvious legal deficiency of being outside of the statute of limitations, given that Donastorg's Complaint was filed on March 1, 2002. The Superior Court did not need to reach the issue of the Statute of Limitations, because it made the initial, overriding determination that the editorial was not published with actual malice, [JA000129]. Even if

the editorial had been published within the limitations period, there has been no evidence adduced in this case that The Daily News knew that the contents of the Editorial were false, or that it entertained serious doubts about the Editorial's truth or falsity. The Editorial contains nothing more than ICC's opinions on matters of public concern, published by The Daily News at the direction of ICC. Given the operative facts and applicable law, the Editorial cannot be used as a basis for finding liability against Appellees [JA000136 – JA000138].

Appellants have failed to unearth a legally cognizable basis for extending liability to The Daily News as a result of the dozens of publications that Senator Donastorg challenged before the Superior Court, and the two publications that Donastorg has challenged in this Appeal. In the lee of such failure, Appellants shift gears and attempt to attribute liability to The Daily News arising from a broadcast in which Sam Topp, a radio personality, interviewed Redfield in his capacity as an employee of ICC. During the course of that interview, Redfield made utterances that Senator Donastorg deemed defamatory. In order to establish a connection to these Appellees, Appellants, wholly without proof, assert that Redfield was acting as an "agent" of The Daily News.

This level of conflation is akin to holding The Washington Post accountable for a statement made about a politician by a public relations professional at Amazon. Simply put, notwithstanding that The Washington Post and Amazon are both beneficially owned by Jeff Bezos, no one cognizant of the law of defamation would, with a straight face, advance the theory that The Washington Post can be held liable for a defamatory statement made by an employee of Amazon. Appellants' effort to attribute liability to The Daily News as a result of statements made by Redfield must fail.

Appellants propose to upend the summary judgment standard for a claim of defamation that is made by a public figure by eliminating the requirement that the facts in the record must be sufficient to support a jury finding of actual malice by clear and convincing evidence, a question of law that must be resolved by the court.

In making this proposal, Appellants take the position that allegations of tortious behavior in the publication of news articles and editorials involving matters of public concern should be treated in the same manner as allegations of tortious behavior arising from any other endeavor. In other words, Appellants would have this Court declare that

at the summary judgment stage, an allegation made by a public figure that he or she was defamed by a news article or editorial should be subject to the same level of a scrutiny as an allegation made by a person who slips on a banana peel in the produce aisle of a supermarket. This approach diminishes or disregards the Constitutional issues implicated by the process of news gathering and dissemination by a free press. The approach proposed by Senator Donastorg would not only upend decades of First Amendment jurisprudence, it would have a chilling effect on all newspaper coverage of public figures including, in this case, politicians. This, I must presume, is the point.

Appellants make a similar proposal with respect to its false light invasion of privacy claim. In its decision on summary judgment, the Superior Court undertook a comprehensive and cogent *Banks* analysis of the tort of false light invasion of privacy to conclude that the Virgin Islands does not and should not recognize it as a cause of action [JA000194 to JA000200]. The Superior Court is correct in both its assessment and its conclusion.

Appellants have also made the claim that The Daily News committed the tort of intrusion upon seclusion. In Appellants' Brief, they

allege that when ICC commissioned the Investigative Report, The Daily News committed that tort (Brief of Appellants at 7). Appellants take the position that when the representative of The Daily News testified that, under applicable law, there could be no conspiracy between ICC and the Daily News and when J. Lowe Davis testified that there was (in fact) no conspiracy between ICC and The Daily News, that these two fully consistent arguments gave rise to a genuine issue of material fact precluding summary judgment. Clearly, it does not.

Appellants' Opposition to Motion for Summary Judgment makes an entirely different argument, As succinctly pointed out in the Superior Court's Memorandum Opinion on Summary Judgment, the only evidence offered by Plaintiffs to support their claim of intrusion upon seclusion by The Daily News is at Section 4.B.1 of Plaintiff's Amended Response to Defendants' Statement of Facts. Plaintiffs allege that a reporter from The Daily News made an unsuccessful attempt to acquire information concerning unpaid child support payments by an unnamed Senator [JA0000200]. The Superior Court correctly concluded that this unsuccessful effort to acquire information about an unnamed Senator did not constitute intrusion upon Donastorg's seclusion.

Appellants advance the claim that The Daily News committed the tort of one or both of negligent and intentional infliction of emotional distress. As to the former, the Superior Court properly found that Donastorg alleged no act committed by The Daily News that constituted the commission of that tort. [JA000184]. As to the latter, the Superior Court properly found that Plaintiffs did not make out the elements of a claim of negligent infliction of emotional distress [JA000193].

Appellants finally advance the claim that The Daily News tortiously interfered with Senator Donastorg's business relationships or prospective business relationships. The Superior Court properly found that Senator Donastorg never identified a business relationship or a prospective business relationship that was allegedly interfered with or otherwise compromised by The Daily News. As a result, that claim was dismissed [JA000178 – JA000179].

The decision of the Superior Court should be affirmed in its entirety.

VI. ARGUMENT

A. Scope of this Argument

As an initial matter, and with respect to each of the allegations of torts committed by The Daily News, the entire scope of this Appeal has been reduced to two matters: the first is a single news article, challenged by Donastorg within the limitations period, entitled "*Legislation Reduction on Agenda for Rules Committee*". The news article misconstrued the meaning of Senator Donastorg's vote in a Committee of the 24th Legislature, a misconstruction that was soon corrected. The second is a radio interview between Redfield, in his capacity as a representative of ICC, and radio personality Sam Topp, in which the gentlemen discussed certain public confrontations between Senator Donastorg and ICC.

As to the first matter, there can be no showing of actual malice. As to the second matter, it has nothing to do with The Daily News, or its employees, or its news gathering, or its publication process.

B. The Summary Judgment Standard in *Joseph v. Daily News Publishing Company, Inc.* 57 V.IU. 566 (V.I. 2012) is and Should Remain the Correct Approach for Adjudicating Allegations of Defamation of a Public Figure.

Appellees adopt in its entirety the Statement of Applicable Law as described in the Analysis Section of the Memorandum Opinion issued by the court below, under the heading Defamation [JA000126 – JA000127].

Appellants have proposed to this Court that it abandon the two-step process for determining if an allegation of defamation brought by a public figure can survive summary judgment. In its current iteration, a plaintiff may only prevail on a defamation claim by proving 1) the existence of "a false and defamatory statement concerning another," (2) the existence of "an unprivileged publication [of the false and defamatory statement] to a third party;" (3) "fault mounting to at least negligence on the part of the publisher," and (4) "either the actionability of the statement irrespective of special harm or the existence of special harm caused by the publication". *Donastorg at 223.* In cases involving public figures, such as Senator Donastorg, surviving summary judgment also requires clear and convincing proof that the challenged statement was made with "actual malice", that is, clear and convincing evidence that the defendant knew that the statement was false or that the defendant made the statement with reckless disregard for whether or not it was false. A finding of recklessness requires a showing that the defendant

entertained serious doubts as to the truth of the statement or that the defendant had a subjective awareness of its probable falsity. *Donastorg* at 223, *citing cases*. This two-stage process, unique to public figure defamation cases, is required at the summary judgment stage to protect newspapers like The Daily News from frivolous defamation actions. Without this protection, there would be a chilling effect on the newsgathering and publication process which would unduly compromise freedom of the press.

Appellants cite one case in support of its radical proposition that the two-step process should be abandoned. Appellants cite *Huckabee v. Time Warner Ent. Co. L.P.,* 19 S.W.3d 413 (Tex. 2000) for the proposition that public figure defamation cases should be treated like any other case. In *Huckabee*, a Family Court Judge brought a defamation claim against a broadcaster based on statements made about the Judge in an HBO documentary concerning, *inter alia*, child custody cases over which the Judge presided. The allegations against the broadcaster survived summary judgment, but the plaintiff lost at trial because she could not establish, with clear and convincing evidence, that the publication was made with actual malice. The Texas Supreme Court explained and

supported the rationale of the trial court in denying summary judgment by differentiating between the Texas and the federal systems as follows: "…our state's summary judgment practice served only the limited purpose of " 'eliminat[ing] patently unmeritorious claims and untenable defenses,' " *id.* (quoting *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n. 5 (Tex. 1979) while in the federal system it played an "integral part" in " securing the just, speedy and inexpensive determination of every action.' " *Id.* (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L.Ed.2d 2654 (1986). (quoting Fed.R.Civ.P. 1) *see Huckabee* at 421. This approach may be the law of the State of Texas, but it is an outlier, as was clearly enunciated in Justice Hecht's dissent, as follows

> '…[S]ince a public figure cannot recover damages for defamation without clear and convincing evidence that the defendant acted with actual malice, I would hold, like the United States Supreme Court and the courts of thirty-seven states, that he likewise cannot defeat a motion for summary judgment without evidence of the same quality and quantity. This does not mean that the plaintiff in such a case must prove actual malice in response to the defendant's motion for summary judgment. It means only that once the defendant has adduced summary judgment evidence that it did not act with actual malice, the plaintiff, in order to raise a genuine issue of material fact precluding summary judgment, must produce some evidence that if believed, and without regard to the defendant's evidence, would clearly and convincingly

> show that the defendant did act with actual malice. It is not enough for the plaintiff to produce merely *some* evidence—more than a scintilla—as it would be in other contexts. *Huckabee* at 430–31…" [1]

If this Court were to disregard or reverse its own precedent from *Joseph*, and reject the position taken by the United States Supreme Court and the vast majority of states that have weighed in on this question, it would still be unavailing for Donastorg. In order to meet his burden of proof, Donastorg must demonstrate that the reporter, Hal Hatfield, had knowledge of the falsity of a defamatory statement or statements made in the news article, or that he acted with reckless disregard concerning its truth or falsity. Donastorg cannot meet this burden, because Hal Hatfield, who was never deposed and never gave a statement about the challenged news article, died in 2006, some four years after Senator and Mrs. Donastorg filed their Complaint. In addition, nothing in the article is defamatory and the News Article was not published with actual malice.

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[1] In Footnote 2 of the majority Opinion and Footnote 3 of the Dissent in *Huckabee,* the Court cites to dozens of cases from states that utilize the two-step analysis for rendering summary judgment in public figure defamation cases. Both the majority Opinion and the Dissent recognize Texas as an outlier in limiting the scope of its review in public figure defamation cases solely to the traditional summary judgment standard.

Appellants have cited three cases that are allegedly in accord with *Huckabee*. These include *Chester v. Indianapolis Newspapers, Inc.*, 553 N.E.2d 137, 140–141 (Ind. Ct. App.1990); *Moffatt v. Brown*, 751 P.2d 939, 942–944 (Alaska 1988) and *Dairy Stores, Inc. v. Sentinel Pub. Co., Inc.*, 516 A.2d 220, 235–236 (N.J. 1986). In each of these cases, the respective courts determined that the plaintiffs failed to adduce any evidence whatsoever demonstrating actual malice. On that basis, the two-part test was not required, because plaintiffs in each of the cases presented no facts tending to demonstrate actual malice with clear and convincing evidence. In fact, in *Daily Stores*, the Supreme Court of the State of New Jersey stated that:

> "…we recognize also that summary judgment practice is particularly well-suited for the determination of libel actions, the fear of which can inhibit comment on matters of public concern. By discouraging frivolous defamation actions, motions for summary judgment keep open lines of communication to the public on such issues…" *Id.* at 157.

C. The June 12, 2001 News Article "*Legislation Reduction on Agenda for Rules Committee*" is not defamatory, it touches on issues of public concern and its minor inaccuracy was corrected by a prominent insert on June 14, 2001.

The June 12, 2001 News Article "*Legislation Reduction on Agenda for Rules Committee*" [JA003008] is brief enough to restate it here in its entirety:

Legislation reduction on agenda for Rules Committee

_____

By HAL HATFIELD
Daily News Staff

> ST. THOMAS - Senate Rules Committee Chairman Carlton Dowe has added the controversial legislation to reduce the size of the Senate to his committee's agenda for Thursday.
>
> Senator Adlah Donastorg Jr.'s bill would cut the Senate's membership from 15 to four Senators from each legislative district and one at-large member.
>
> It also would appropriate $9,975,000 to the Legislature for Fiscal **Year** 2002, a 25 percent cut from its current $13.3 million appropriation.
>
> The Government Operations, Planning and Environmental Protection Committee **passed the bill** on a 3 to 1 vote Thursday after holding lengthy hearings on all three islands.
>
> Ironically. Donastorg voted no on his own bill, while three senators who oppose the bill Chairman Donald Cole, Senator Adelbert Bryan and Senator David Jones – voted to send it on to the Rules Committee. Donastorg wanted to send the bill directly to the full Senate for a vote when it meets in session on June 25.
>
> The strategy of members of the Senate majority is to pass a bill through the Government Operations and Rules committee to force all senators to take a stand on the legislation in the full Senate.

This News Article appeared on Page 11 of the June 12, 2001 edition of The Daily News. It was not boxed, it did not have a bolded headline, and it appeared on a page with two other Articles that carried bolded headlines. Although the News Article does state that (ironically) Senator Donastorg voted against his own Bill, it expressly states how he voted and why he voted that way. It also states that Senator Donastorg voted in a manner contrary to the votes of the three other Committee members, members of the Senate majority, who opposed the Bill. It finally states that Senator Donastorg wanted to send the Bill directly to the floor of the Legislature, but explained that doing so would be contrary to the procedures employed by the Senate majority.

Two days later, The Daily News printed a Correction [JA003009] as follows:

> **Setting the record straight**
>
> Senator Adlah Donastorg, Jr. did not vote against the bill to reduce the size of the Senate from 15 to nine members when it was approved by the Committee on Government Operations, Planning and Environmental Protection last week. An article Tuesday on page 11 of The Daily News about the vote was based on information provided by committee staff.

The Correction was printed on Page 2 of the June 14, 2001 edition of The Daily News. The Correction was boxed and appeared under a bolded headline.

Clearly, the News Article is not defamatory. The News Article accurately reported what happened and why. The nuanced difference between "*Senator Donastorg voted against his own bill*" and "*Senator Donastorg voted against advancing his own bill to the Committee on Government Operations and Rules*" is only relevant to people who have a familiarity with the legislative process. Anyone reading the News Article would have been informed that Senator Donastorg wanted to advance the Bill to the floor of the Legislature, and voted against the decision of the majority not to do so. That cannot be characterized as defamatory. In this regard, Appellants adopt the reasoning of the court below that the News Article addresses a matter of public concern [JA000131] and that there is no showing in the record that The Daily News published a false statement of fact knowing that it was false or that it entertained serious doubts about the truth or falsity of the News Article [JA000143].

The Correction that Appellants decry as inadequate was published on Page 2 of the June 14, 2001 edition of The Daily News, was boxed and carried a bolded headline. The challenged News Article was on Page 11 of the June 12, 2001 edition of The Daily News, was unboxed and carried an unbolded headline. The Correction was clearly given a higher profile than the challenged News Article.

Appellants spill much ink alleging that there were bad feelings or bad intentions directed by The Daily News to Senator Donastorg. Therefore, it requires mention that "…[P]roof of "ill will, evil motive, [or] intent to injure" does not constitute actual malice…" *Donastorg* at 224.

D. **The May 29, 1998 Editorial June 12, 2001 News Article *"The Public's Right to Know"* is outside of the Statute of Limitations and cannot be a basis for a finding of liability against The Daily News. In the alternative, the Editorial was not published with actual malice.**

The challenged Editorial was published in the May 29, 1998 edition of The Daily News, some three years, nine months before the filing of Senator and Mrs. Donastorg's March 1, 2002 Complaint. The publication of the Editorial is, therefore, outside of the two-year statute of limitations for defamation under Title 5 V.I.C. Section 31(A)(5) *see: Espersen v. Sugar Bay Club & Resort Corp.*, No. ST-14-CV-355, 2018 WL 3494658,

at *8 (V.I. Super. Ct. July 18, 2018), adhered to on reconsideration, No. ST-14-CV-355, 2018 WL 6177341 (V.I. Super. Ct. Nov. 21, 2018). These Defendants asserted a statute of limitations defense in the third Affirmative Defense to their Answer to the Fourth Amended Complaint [JA0000242] and in their Motion for Summary Judgment [JA000314].

Even if the Editorial was published within the limitations period, it would not be actionable because there was no proof whatsoever adduced by Appellants that The Daily News published the Editorial with knowledge of or with reckless disregard for any alleged false statements therein. In addition, the statements in the article are protected opinion. In this regard, Appellees adopt in its entirety the Superior Court's concise and cogent analysis of and decision on this issue at [JA000137 - JA000138].

E. Senator Donastorg was not defamed by The Daily News.

At the risk of redundancy, it is essential to note that Appellants have limited their claims in this appeal to three allegations, two of which are within the limitations period: The first allegation concerns a 2001 News Article that made reference to a vote in a legislative Committee on a Bill proposed by Senator Donastorg. Rather than sending the Bill

directly to the Floor of the Legislature, as was his preference, a majority of Committee members voted to send the Bill to a different Committee. Senator Donastorg disagreed with this legislative maneuver. The challenged News Article did not characterize Senator Donastorg in any way, nor did it characterize the vote in Committee as a loss for Senator Donastorg. The News Article simply reported the facts, but incorrectly characterized his negative vote as a vote against the Bill rather than as a vote against the legislative maneuver employed by his colleagues with respect to the Bill. That incorrect characterization was quickly and prominently corrected.

The June 12, 2001 News Article was not defamatory. The News Article clearly explained the purpose of Senator Donastorg's "no" vote in Committee, but it contained a potentially misleading turn of phrase concerning Donastorg's vote that was quickly corrected. Plaintiffs did not depose the reporter, Hal Hatfield, before his death, and cannot make out a case that the News Article was published with knowledge of its falsity or with a reckless disregard for whether it was true or false. Under *Joseph*, the News Article was not published with actual malice and is therefore not actionable.

Appellants' second claim concerns an Editorial that was published in The Daily News on May 29, 1998. Because this Editorial is clearly time-barred, it cannot constitute the basis for a finding of liability against The Daily News. On an equally fundamental level, however, the Editorial is protected opinion, which cannot, therefore, be proven false. The court below properly concluded that the Editorial implicated matters of public concern [JA000129-JA000130] and, in reaching its conclusion that the Editorial is not actionable, undertook an exhaustive analysis [JA000136-JA000137] of the four claims made by Plaintiffs concerning the contents of the Editorial. Apparently, Senator Donastorg is aggrieved that there is so significant a difference between The Daily News' opinion of him, and Senator Donastorg's opinion of himself. However, that difference of opinion cannot constitute the foundation for a claim of defamation. Plaintiffs failed to establish, with clear and convincing evidence, that The Daily News knew that they were publishing false information or that they entertained serious doubts about the truth or falsity of the facts in the Editorial. On that basis, separate and apart from the fact that the Editorial is outside of the limitations period, it

constitutes protected opinion on a matter of public concern, it was not published with actual malice and is therefore not actionable.

Appellants' third claim is that Senator Donastorg was defamed during the course of a radio interview between Redfield, in his capacity as an employee of ICC, and the radio personality Sam Topp.

Regardless of what Redfield said to Sam Topp, Appellants fail entirely to tie Redfield's statements to The Daily News. Redfield was an employee of ICC at all times during his tenure and never represented that he was an employee of, an agent of or a spokesman for The Daily News. Appellants tortured twisting and bending of Redfield's deposition testimony in this regard is wholly unavailing.

In Appellant's Brief at pages 23-26, Appellants tie themselves in veritable knots trying to attribute Redfield's statements on the Sam Topp Radio Show to The Daily News. For example, Appellants state at page 24 of their Brief that "[A]s V.P. of Corporate Affairs, Redfield dealt with "media issues" and was "working for, you know, the different entities under that umbrella…", referencing JA1224. This excerpt is apparently intended to mislead this Court into concluding that Redfield was referring to The Daily News. However, in the Transcript at JA1224, the

complete sentence reads: "…I mean, just basically media issues, whether it was the wireless, or whether it was cable T.V., or that type of thing…". In this, Redfield limits the scope of his responsibility to ICC's cellular telephone and cable television subsidiaries. Appellants continue with their apparently intentional misdirection at page 25 of Appellants' Brief by referencing JA1328-34; JA3047-54, and concluding with the wholly unsupported conclusion that "[T]herefore, at all material times, Redfield was acting as an agent of Daily News when his defamatory statements were made on the Sam Topp Radio Show".

In JA1328-34, which is a portion of Redfield's deposition, there is not a single question asked about The Daily News, nor is there a single unsolicited reference made to The Daily News either by Redfield or by any of the attorneys who were present at the deposition. In JA3047-54, which is a Transcript of the Sam Topp Radio Program, there is likewise not a single question asked about The Daily News, nor is there a single unsolicited reference made to The Daily News by either Redfield or Sam Topp. These portions of the record cited by Appellants provide no support whatsoever for Appellants' claim that Redfield made his statements on the Sam Topp Radio Show as an agent of The Daily News.

F. The Daily News' Alleged Hostility to Senator Donastorg is Irrelevant to a Finding of Actual Malice.

Appellants expend substantial effort attempting to document how The Daily News was hostile to him or that it treated him unfairly. Quoting the late Judge Francis D'Eramo in the case-in chief in *Joseph*

> "…[A] newspaper's alleged motive in publishing a story cannot provide a sufficient basis for finding actual malice. *Harte-Hanks,* 491 U.S. at 665. As one court stated: "[N]either negligence nor failure to investigate, on the one hand, nor ill will, bias, spite, nor prejudice, on the other, standing alone, [are] sufficient to establish either a knowledge of the falsity of, or a reckless disregard of, the truth or falsity of the materials used." *Goldwater v. Ginzburg,* 414 F.2d 324, 342 (2d Cir.1969). Similarly, "[t]he deliberate choice of [one of several possible] interpretation[s of events], though arguably reflecting a misconception, [is] not enough to create a jury issue of 'malice' under New York Times. *Time, Inc. v. Pape,* 401 U.S. 279, 290, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971). *see: Joseph v. Daily News Pub. Co.,* 51 V.I. 3, 12 (V.I. Super. Ct. Jan. 21, 2009), *aff'd sub nom. Joseph v. Daily News Publ'g Co., Inc.*, 57 V.I. 566 (2012) …".

Despite Appellants' belief that The Daily News' coverage of Senator Donastorg was disdainful, and that The Daily News demonstrated bias or ill will, the legal standard for defamation when reporting on a public

figure involving matters of public concern requires a showing of clear and convincing evidence of actual malice as defined in law.

Appellants have failed entirely to make any such showing.

G. **The Virgin Islands Should Not Recognize the Tort of False Light Invasion of Privacy. If the Tort of False Light Invasion of Privacy is Recognized, The Daily News Can Not Be Held Liable to Appellants Thereunder.**

The Daily News adopts the arguments and the conclusions of the Superior Court in holding that recognition of the tort of false light invasion of privacy is not the soundest rule for the Virgin Islands. The Superior Court undertook a cogent and comprehensive analysis of the tort of false light invasion of privacy based upon the standard enunciated in *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011) and *Gov't of the V.I. v. Connor* , 60 V.I. 597 (V.I. 2014). The Superior Court found that no Court in the Virgin Islands had set forth the elements of such a claim. In putative contrast, Appellants cite to three cases, an unreported case out of the District Court of the Virgin Islands, Division of St. Thomas and St. John entitled *Del Valle v. Officemax N. Am., Inc.,* No. CV 13-24, 2015 WL 222582, at *6 (D.V.I. Jan. 14, 2015), *aff'd sub nom. Del Valle v. Officemax N. Am.,* 680 F. App'x 51 (3d Cir. 2017). In discussing that unreported case, Appellants make reference to the elements of the claim

of false light invasion of privacy, quoting language from the Restatement of Torts that does not appear in the text. The second case referenced by Appellants, *Anderson v. Gov't of the Virgin Islands*, 199 F. Supp. 2d 269, 276 (D.V.I. 2002) makes only a passing reference to false light invasion of privacy, a matter not central to its holding. In the third case referenced by Appellants, *Francis v. Pueblo Xtra Int'l, Inc.,* 412 F. App'x 470 (3d Cir. 2010) the Third Circuit Court of Appeals does not disturb the holding of the District Court dismissing Plaintiff's claim for false light invasion of privacy, and, in so doing, touches on the elements of the claim as follows:

> "…[W]e agree with Francis that this tort "does not depend upon making public any facts concerning the private life of the individual." Restatement (Second) of Torts § 652E, cmt a. Rather, it is "enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false and so is placed before the public in a false position." *Id.,* cmt. b. Comment c to the Restatement explains that this cause of action exists "only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity.... It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position[.]…" *Id.,* cmt. c *see: Francis* at 476.

It is Appellants overstatement to hold out that "various Virgin Islands courts have previously recognized a claim for false light invasion

of privacy." The more limited statement made by the Superior Court in this regard is accurate.

The Superior Court undertook a nuanced analysis of the thirty-five (35) jurisdictions that recognize the tort of false light invasion of privacy. Of those jurisdictions, the vast majority (28) mechanistically "…draw their statement of the law directly from Section 625E of the Restatement of Torts…", and the majority of those (19) do not opine on whether the tort should be recognized in their jurisdiction. On the basis presented, there is no consensus that a false light invasion of privacy claim is necessary in the Virgin Islands, given the fully developed and well-understood law concerning the tort of defamation.

The danger of recognizing the tort of false light invasion of privacy is that under its rubric, non-defamatory speech can be actionable. Non-defamatory speech should not be proscribed by making it subject such a claim. Appellants allegations in this matter constitute a prime example of why recognizing such a tort in the Virgin Islands would be highly counterproductive. Clearly, Senator Donastorg is "…feeling seriously offended and aggrieved…" as a result of the non-defamatory language in The Daily News' June 12, 2001 News Article. The Daily News should not

be required to defend itself from litigation involving a non-defamatory publication based upon the "feelings" of the individual who is a subject of that publication.

Appellees need not analyze the tort of false light invasion of privacy in the context of a 1998 Editorial, because it is outside of the limitations period, nor are Appellees required to consider the application of the tort to a statement made by Redfield, in his capacity as an employee of ICC, who advances no claim and evidences no fact that could render The Daily News legally liable for any public statements that he may have made.

H. The Virgin Islands Recognizes the Tort of Intrusion into Seclusion. The Daily News Cannot Be Held Liable to Appellants Thereunder.

The parties agree that the Virgin Islands recognizes the tort of intrusion into seclusion. Therefore, the *Banks* analysis undertaken by Appellants to establish this point is mere surplusage.

Appellants limit the factual basis for their claim of intrusion into seclusion to the so-called Prosser Investigation, which was constituted of hiring a licensed private investigator, David R. Sheraw & Associates, Inc., (herein "Sheraw") to investigate Senator Donastorg. There is a statutory provision cited by Appellants, Title 23 V.I.C. Section 1301(f)(2),

which allows properly licensed companies to investigate "…(t)he identity, habits, conduct, movement, whereabouts, affiliations, associations, transactions, reputation or character of any person or group [sic] persons, organization, society, other group of persons or partnership or corporation…", which is apparently precisely what Sheraw did with respect to Senator Donastorg. Apparently, Appellants are not claiming that Sheraw was unlicensed, but are apparently aggrieved about the scope of its investigation, arguing that the statute does not set parameters around the type of information that can be accessed, investigated and complied on behalf of a client. Because the statute is silent of the issue, Appellants apparently perceive it as their role to unilaterally fill in the perceived gaps. In this, Appellants take issue with Sheraw's compilation of birth dates, Social Security numbers, banking and medical information, but they do not explain, other than by giving vent to umbrage, why investigating those classes of information are outside the scope of the governing statute. Plaintiffs apparently conclude that since the statute does not expressly authorize investigation of those classes of information, they are in some manner both proscribed and

actionable. This is the level of hubris that is characteristic of each of Appellants' claims.

It appears that Appellants are requesting that this Court legislate a limitation of the scope of a statute, arguing that it allows overreach by licensed investigators. Appellants' request for such relief should more properly be sought from the Virgin Islands Legislature.

Appellees have no interest or involvement whatsoever in Appellants' dispute with ICC, Jeffrey Prosser, Oakland Benta, Dennis Sheraw or others. The Daily News never had access to any Report issued by Sheraw, and was never provide Sheraw's source material. The Daily News never published the Report, which was released by Senator Donastorg to the St. Croix Avis. The representatives of The Daily News who were deposed consistently denied any knowledge of or involvement with the Report.

J. Lowe Davis (herein "Davis"), the Executive Editor of The Daily News at all times relevant hereto, addressed the issue of the Investigative Report in Paragraphs 19 through 22 of her March 5, 2002 Affidavit [JA00635 – JA00638] as follows:

> "19. Neither the Daily News nor myself ever engaged Dennis Sheraw & Associates to perform any investigations and specifically no investigation of either Plaintiff.
> 20. Neither I nor The Daily News ever published the contents of the Donastorg investigative report, or disclosed its contents to third parties.
> 21. I have never seen the Donastorg investigative report
> 22. I did not learn about the Donastorg investigative report until its existence was disclosed by Donastorg himself."

Davis' Affidavit has never been challenged, much less refuted with respect to The Daily News' complete lack of knowledge of or involvement with the Donastorg investigative report. Some years later, in Davis' September 15, 2010 deposition, the investigation was referred to in pages 45-46 and 138-139. The investigative report was barely deemed a topic for inquiry, and no concessions to Appellants theory of the case was made by Davis. In the deposition of the Publisher of The Daily News, Jason Robbins, counsel for Plaintiffs tried repeatedly, with no success whatsoever, to tie The Daily News to the Donastorg investigative report [JA000494 – JA000501], or to in some manner conflate the Donastorg investigative report with The Daily News' normal and customary news gathering and dissemination process. Counsel for Plaintiff failed in that effort.

Appellants likewise fail entirely to tie The Daily News to ICC's engagement of Sheraw or to Sheraw's work in furtherance of that engagement.

I. The Daily News is Not Liable to Appellants for the Actions or the Decisions of ICC, Virgin Islands Telephone Corporation or their Respective Employees.

Appellants have taken the untenable position that The Daily News is legally responsible for the actions of ICC and Virgin Islands Telephone Corporation and their employees, Oakland Benta and Redfield. Appellants seek to impose liability on The Daily News regardless of whether or not it participated in any such action or had prior knowledge that any such action would be taking place. Appellants various concerted action theories are unavailing, because The Daily News committed no tort in any of its dealings with Appellants.

Equal importantly, it must be emphasized that Appellants' purpose in advancing concerted action theories in this Appeal is to attribute tort liability to ICC primarily and to Vitelco and The Daily News derivatively for commissioning the Donastorg investigative report from Sheraw. However, as stated *infra*, Appellants have not and cannot make out a claim that the Donastorg investigative report diverges, in any

material way, from the statutorily authorized scope of an investigation that may be undertaken by a licensed private investigator. In other words, Appellants petition this Court to impose derivative tort liability on The Daily News for what appears to be statutorily authorized actions taken by Sheraw on behalf of ICC without the knowledge or participation of The Daily News. Seen in its proper light, the utter frivolousness of Appellants' continued prosecution of this case becomes self-evident.

Appellants argue that The Daily News has taken inconsistent positions concerning alleged concerted action by ICC and The Daily News, precluding summary judgment. It has not. Appellees have argued that under applicable law, there can be no conspiracy between ICC and the Daily News, given that they are parent and subsidiary. In addition, Appellees have argued there was no conspiracy between ICC and The Daily News. These arguments are fully consistent, are made in the alternative and do not give rise to a genuine issue of material fact precluding summary judgment.

J. The Daily News is Not Liable to Appellants for the Tort of Intentional or Negligent Infliction of Emotional Distress.

The parties agree that the Virgin Islands recognizes the torts of intentional and negligent infliction of emotional distress. Therefore, the

Banks analysis undertaken by Appellants to establish this point is mere surplusage.

Appellants limit their claim of intentional and negligent infliction of emotional distress to the effect of the Prosser investigation and the Donastorg investigative report on Appellants. Appellants have not made a showing that any of Sheraw's activities or findings are outside of the statutory parameters of an investigation by a licensed private investigator. Appellants have not demonstrated that The Daily News had any involvement in the Prosser investigation or the Donastorg investigative report. On that basis, and on the basis of an objective review of its challenged publications, The Daily News committed no tort affecting Appellants, and Appellants' claim of intentional or negligent infliction of emotional distress cannot be sustained.

K. The Daily News is Not Liable to Appellants for Tortious Interference with Existing or Prospective Business Relationships.

The parties agree that the Virgin Islands recognizes the related torts of tortious interference with existing or prospective business relationships. Therefore, the *Banks* analysis undertaken by Appellants to establish this point is mere surplusage.

Appellants allege that Virgin Islands Telephone Corporation temporarily cut the telephone service for his business and that the Prosser investigation included telephone calls to his business clients, to his detriment. These are not allegations against The Daily News. Appellants have been wholly unable to enunciate how the Prosser investigation was outside of the proper scope of an investigation by a licensed private investigator. Likewise, Appellants have been unable to establish that the acts of ICC and the Virgin Islands Telephone Corporation can be attributable to The Daily News. Finally, Appellants have not identified any tortious behavior committed by The Daily News and directed at Appellants.

VII. Conclusion and Prayer for Relief.

This litigation has been no more than a two-decade ego project for Senator Adlah F. Donastorg, Jr. Both the case in chief and this Appeal have been a massive waste of time and legal resources. The defamation claim against The Daily News was made in clear derogation of applicable law, in which Appellants decline to accept binding precedent but would have this Court revisit its thoughtful analysis of the standards for public figure defamation solely to save Senator Donastorg's ego project from

summary judgment. Even if this Court were to upend *Joseph* in order to follow the Supreme Court of Texas in *Huckabee*, it would be unavailing for Appellants due to the simple reason that The Daily News did not commit any tortious behavior whatsoever in its dealings with Appellants.

This case should be figuratively tossed into the dustbin where it belongs, and it should be declared frivolous here and in post-appeal motions for attorneys' fees and costs, which currently well exceed a quarter million dollars. A declaration of frivolousness and a subsequent award of attorneys' fees and costs would stand as an example both to Appellants and to anyone else who undertakes to manipulate and to abuse the legal process for the assuage of one's ego, to the damage and loss of the persons and corporations victimized by it.

The decision of the court below on summary judgment should be affirmed in all of its particulars.

Respectfully Submitted,
Law Office of K.A. Rames, P.C.

November 22, 2022

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CERTIFICATE OF SUPREME COURT BAR MEMBERSHIP

The undersigned hereby certifies that pursuant to Virgin Islands Rules of Appellate Procedure 22(I) he is a Member of the Bar of the Supreme Court of the Virgin Islands.

November 22, 2022 *<u>/s/ Kevin A. Rames, Esq.</u>*
Kevin A. Rames, Esq.

CERTIFICATE OF WORD COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of Appellees contains a total of 8,752 words, which is in compliance with the August 29, 2022 Order of this Court.

November 22, 2022 *<u>/s/ Kevin A. Rames, Esq.</u>*
Kevin A. Rames, Esq.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Appellees was served on the following counsel of record for Appellants through the CM/ECF System of this Court and via email as follows:

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