

---

---

COMMONWEALTH OF MASSACHUSETTS  
**APPEALS COURT.**

No. 2000-P-1005

MIDDLESEX SUPERIOR COURT No. 98-04820.

---

WILLIAM SILVERSTEIN,  
DEFENDANT - IN - COUNTERCLAIM / APPELLANT,

V.

MICROSYSTEMS SOFTWARE INC., ET AL.,  
PLAINTIFFS - IN - COUNTERCLAIM / APPELLEES.

---

ON APPEAL FROM A JUDGMENT  
OF THE MIDDLESEX SUPERIOR COURT.

---

BRIEF OF THE APPELLANT, WILLIAM SILVERSTEIN.

---

PHILIP R. OLENICK  
BBO No. 378605  
101 TREMONT STREET-SUITE 801  
BOSTON, MASSACHUSETTS 02108  
(617) 357-5660

---

---

**Table of Contents.**

Table of Authorities Cited . . . . . iii

Appendix Table of Contents . . . . . iv

The Issues Presented for Review . . . . . 1

Statement of The Case . . . . . 2

    Procedural History . . . . . 2

    Facts . . . . . 7

Summary of Argument . . . . . 30

**Argument . . . . . 32**

1. **William Silverstein is entitled to the entry of summary judgment dismissing the libel counterclaim with prejudice . . . . . 32**

    a. **The defendants contractually agreed to the entry of judgment against them on all claims in the case-without excluding the counterclaim from that agreement . . . . . 38**

    b. **The allegations of the complaint cannot be found libellous after judgment has been entered in favor of those allegations . . . . . 40**

    c. **The libel counterclaim is frivolous. . . . . 41**

Conclusion . . . . . 48

Addendum:

The Decision Appealed From . . . . . Add.1

The Judgment Appealed From . . . . . Add.2

The Prior Judgment . . . . . Add.3

Civil Rule 68 . . . . . Add.4

## Table of Authorities Cited.

## CASES.

<i>Appleby v. Daily Hampshire Gazette</i> , 395 Mass. 32 (1985) . . . . .	32
<i>Brauer v. Globe Newspaper Co.</i> , 351 Mass. 53 (1966) . . . . .	42
<i>Curtis Publishing Company v. Butts</i> , 388 U.S. 130 (1967) . . . . .	42
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974) .	41
<i>Godbout v. Cousens</i> , 396 Mass. 254 (1985) . . . . .	32
<i>John J. Stone v. Essex County Newspapers, Inc.</i> , 367 Mass. 849, 860 (1975) . . . . .	42
<i>King v. Globe Newspaper Co.</i> , 400 Mass. 705 (1987), <i>cert. denied</i> , 485 U.S. 940 (1988) . . . . .	32, 34, 37
<i>Lovell v. Griffin</i> , 303 U.S. 444 (1938) . . . . .	45
<i>Macheras v. Syrmopoulos</i> , 319 Mass. 485 (1946) . . .	40
<i>Nathan Friedman, et al. v. Boston Broadcasters, Inc.</i> , 402 Mass. 376 (1988) . . . . .	41, 46
<i>National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp.</i> , 379 Mass. 220 (1979), <i>cert. denied</i> , 446 U.S. 935 (1980) . . . . .	32
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) . . . . .	32, 42
<i>Philadelphia Newspapers, Inc., et al. v. Hepps et al.</i> , 475 U.S. 767 (1986) . . . . .	41
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997) . . . . .	44
<i>Shaari v. Harvard Student Agencies, Inc.</i> , 427 Mass. 129 (1998) . . . . .	44, 45

## MASSACHUSETTS GENERAL LAWS.

c. 231, § 59H . . . . .	33, 34
c. 231, § 93 . . . . .	42

## MASSACHUSETTS RULES OF CIVIL PROCEDURE.

Rule 41 . . . . .	35-36
Rule 68 . . . . .	38-41

## TREATISES.

<i>Tort Law</i> , Ch. 7, Defamation, at § 118, Vol. 37, <i>Massachusetts Practice</i> . . . . .	41
<i>Tort Law</i> , Ch. 13, Damages, at § 249, Vol. 37, <i>Massachusetts Practice</i> . . . . .	42

## Appendix Table of Contents.

Middlesex Superior Court Docket Sheet . . . . .	1
Amended Complaint . . . . .	7
Corrected Responsive Pleading [Answer] and Counter- claim of Defendants . . . . .	32
Plaintiff's Answer to Counterclaim . . . . .	51
Defendants' Offer of Judgment Pursuant to Rule 68 .	55
Plaintiff's Acceptance of Defendants' Rule 68 Offer of Judgment . . . . .	57
September 13, 1999 Clerk's Notice . . . . .	59
September 13, 1999 Judgment . . . . .	60
Emergency Request for a Declaration that Further Discovery is Moot, Due to the Entry of Judgment in the Case (w/exhibits) . . . . .	61
· September 13, 1999 Clerk's Notice . . . . .	64
· September 13, 1999 Judgment . . . . .	65
· Defendants' Offer of Judgment Pursuant to Rule 68	66
· September 21, 1999 fax from TLC/MSI counsel . .	68-70
· September 22, 1999 fax from Philip R. Olenick to Foley Hoag notifying them of hearing on emer- gency motion . . . . .	72
Defendants' Opposition to Plaintiff's Emergency Motion and Defendants' Emergency Cross-Motion for Clarification of Judgment (w/exhibits) . .	73
· Defendants' Offer of Judgment . . . . .	76
· September 13, 1999 Judgment . . . . .	78
The Rule 9A package filed in connection with William Silverstein's Motion for Summary Judgment on the counter- claim asserted against him by Microsystems Software, Inc. and The Learning Company, Inc.:	
Notice of Filing . . . . .	79
Request for Hearing . . . . .	81
Motion for Summary Judgment . . . . .	83

<b>Memorandum of Law in Support of Summary Judgment (w/exhibits)</b>	85
· Defendants' Offer of Judgment Pursuant to Rule 68	98
· September 13, 1999 Clerk's Notice	100
· September 13, 1999 Judgment	101
· TLC/MSI Proposed Settlement Agreement	102-110
· September 21, 1999 fax from TLC/MSI counsel	111-113
<b>Statement of Material Facts as to Which There is No Genuine Issue to Be Tried</b>	115
<b>Supporting Exhibits to Summary Judgment Motion's Statement of Material Facts:</b>	133
A Complaint	136
B Corrected Answer & Counterclaim	162
C Answer to Counterclaim	181
D Affidavit of William Silverstein in Support of Summary Judgment	185
E Silverstein deposition excerpt, day 1	189
F Silverstein deposition excerpt, day 2	213
G Silverstein deposition excerpt, day 3	224
H Richard Gorgens deposition excerpt	226
I Debra Gorgens deposition excerpt	229
J Larry Mason deposition excerpt	232
K Reed Lewis deposition excerpt	235
L Dr. McKay deposition excerpt, with exhibits 5 and 8	248
M Dr. Gordin prescription	268
N Dr. Stirrat's IME report	269
O SIL-0038 Larry Mason's log	273
P Department of Industrial Accidents settlement excerpt	274
Q Defendants' Answer to Plaintiff's Interrogatory 16	276
R Postcard acknowledgment of application from TLC	278
S Email acknowledgment of inquiry about what is defamatory	279-282
T Announcement of discontinuance of CaLANdar	283
U Defendants' Rule 68 Offer of Judgment	285
V Plaintiff's Acceptance of Defendants' Rule 68 Offer of Judgment	287
W September 13, 1999 Clerk's Notice and Judgment	289
X TLC/MSI Proposed Settlement Agreement	291-299
Y September 21, 1999 fax from TLC/MSI counsel	300-302

<b>Counterclaim-Plaintiffs' Opposition to Counterclaim Defendant's Motion for Summary Judgment . . .</b>	<b>303</b>
<b>Counterclaim-Plaintiffs' Response to Counterclaim Defendant's Statement of Facts (w/exhibits) . . .</b>	<b>310</b>
A August 10, 1995 memo from Debra Gorgens . . . . .	320
B January 18, 1994 memo from Dick Gorgens . . . . .	321
C Affidavit of Larry Mason . . . . .	322
D 8/19/96 Memo from William Silverstein . . . . .	324
E August 9, 1996 letter from Dr. Gordin . . . . .	325
F August 9, 1996 letter from Dr. Gordin . . . . .	326
G August 21, 1996 memo from Larry Mason . . . . .	327
H Partial copy of Silverstein email . . . . .	328
I Report of Independent Medical Examiner Craig Stirrat, M.D. . . . .	329
J Affidavit of Michael Rosen, Esquire . . . . .	333
K Excerpts from William Silverstein's document production . . . . .	340
<b>Defendants/Counterclaim-Plaintiff's Response to Plaintiff/Counterclaim-Defendant's Reply to Summary Judgment Opposition . . . . .</b>	<b>396</b>
<b>Counterclaim-Plaintiffs' Motion for Voluntary Dismissal of Counterclaim . . . . .</b>	<b>399</b>
<b>Notice of Returned Pleading . . . . .</b>	<b>402</b>
<b>William Silverstein's Opposition to Dismissal of Libel Action "Without Prejudice" (with exhibits) . . . . .</b>	<b>403-452</b>
<b>Letter Refiling Motion for Voluntary Dismissal . . .</b>	<b>453</b>
<b>The Superior Court's March 15, 2000 allowance of the motion to dismiss, expressly "without prejudice" (in the left-hand margin of a copy of the first page of that motion) and the Notice of Docket Entry of that Order . . . . .</b>	<b>454-456</b>

The Judgment entered on April 3, 2000 dismissing the counterclaim without prejudice . . . . .	457
April 21, 2000 Restated Notice of Appeal from Dismissal of Libel Claim "Without Prejudice" .	458
April 28, 2000 Revised Restated Notice of Appeal from Dismissal of Libel Claim "Without Prejudice" . . . . .	460
Appellate Rule 8(b)(1) Notice That No Transcripts Will Be Ordered as No Evidentiary Hearing Was Held, and Designation of Issues on Appeal . .	462

---

---

COMMONWEALTH OF MASSACHUSETTS  
**APPEALS COURT.**

No. 2000-P-1005

MIDDLESEX SUPERIOR COURT No. 98-04820.

---

WILLIAM SILVERSTEIN,  
DEFENDANT - IN - COUNTERCLAIM / APPELLANT,

V.

MICROSYSTEMS SOFTWARE INC., ET AL.,  
PLAINTIFFS - IN - COUNTERCLAIM / APPELLEES.

---

ON APPEAL FROM A JUDGMENT  
OF THE MIDDLESEX SUPERIOR COURT.

---

BRIEF OF THE APPELLANT, WILLIAM SILVERSTEIN.

---

---

## The Issues Presented for Review.

- Where a libel claim is brought as a counterclaim,
  - The opinions that were the basis for the libel counterclaim were substantially the same as the allegations of the complaint, and
  - The libel counterplaintiffs offered “to allow judgment to be entered against them in the above-captioned case”—which did not contain any reservation of the right to continue with the counterclaim, and was accepted by the libel defendant,

Can the counterclaim survive the entry of an agreed-to judgment in the case that, like the offer of judgment, contained no language limiting its scope?

- May a libel defendant be denied a ruling on his motion for summary judgment where:
  - After a year of litigation, including federal Court removal, remand, extensive discovery, and the entry of a judgment that should have disposed of the entire case but was not treated as doing so, he prepared and fully-briefed a meritorious motion for summary judgment;
  - At the hearing on the motion for summary judgment, when the judge asked the libel plaintiffs what was defamatory, they replied that they’d decided to dismiss their claim “to let the parties get on with their lives,” but then filed a motion to dismiss the claim *without prejudice*, over a written opposition by the libel defendant asking for finality?
- May a libel claim be brought against an individual merely for publishing unfavorable *opinions* about a company on his web site, where those opinions were accompanied by the underlying facts?
- Where well-known computer software companies plead their libel claim as public figures, alleging that the opinions were published “recklessly or with actual malice,” may they maintain that action in the absence of any showing of malice or negligence on the part of the individual, or even any showing that the individual’s statements were defamatory falsehoods?
- Where libel plaintiffs refused to answer an individual’s inquiries about what they considered untrue on his web site, and cannot show that they have suffered any harm from it, may they maintain an action in libel?

**Statement of The Case.**

This is an appeal from the Superior Court's failure to rule on a motion for summary judgment on a libel counterclaim, instead allowing the defendants' motion to dismiss their libel counterclaim without prejudice, over the protest of the plaintiff that the case should be ended with finality, *and in fact had already been disposed of with finality.*

*Procedural History.*

The plaintiff in this action, William Silverstein, filed his complaint on September 24, 1998<sup>1</sup> and amended it on October 2, 1998,<sup>2</sup> before making service on October 8, 1998.<sup>3</sup>

After securing the plaintiff's agreement to an enlargement of time to answer,<sup>4</sup> the defendants removed the case to federal court on October 30, 1998,<sup>5</sup> despite explicit notice in the text of the complaint that it was not removable.<sup>6</sup>

- 
1. Docket entry 1.0 at Appendix p. 3 ("A.3").
  2. Docket entry 2.0 at A.3. The document is at A.7-31.
  3. Docket entry 3.0 at A.3.
  4. Docket entry 4.0 at A.3.
  5. Docket entry 5.0 at A.3.
  6. See ¶¶ 152-154 at A.27.

On November 18, 1998, the plaintiff successfully moved to remand the action to Middlesex Superior Court,<sup>7</sup> which received the case back on February 23, 1999.<sup>8</sup> While the motion for remand was pending in federal court, the defendants answered the complaint on December 8, 1998,<sup>9</sup> including a counterclaim for libel by the corporate defendants (the individual defendants did not join in the counterclaim).<sup>10</sup> The plaintiff answered the libel counterclaim on December 22, 1998.<sup>11</sup>

Due to the delay occasioned by the removal and remand, the parties jointly requested an enlargement of time for discovery on July 7, 1999, which was allowed.<sup>12</sup>

The parties engaged in extensive discovery, with multiple depositions conducted by each side, as well as document requests and interrogatories by each side.

---

7. Docket entries 6.0, 7.0, 8.0 and 11.0 at A.3.

8. Un-numbered 02/23/1999 docket entry at A.3 and docket entry 12.0 at A.4.

9. Docket entry 9.0 at A.3. The initially-filed version of this document was captioned for Middlesex Superior Court, but was replaced the following day by a "corrected" version captioned for the federal court, which is at A.32-50.

10. The libel counterclaim is at A.48-50.

11. Docket entry 10.0 at A.3. The plaintiff's answer to the libel counterclaim is at A.51-54.

12. Docket entry 14.0 at A.4.

On August 27, 1999, a Rule 9A package was filed containing cross motions by each side to compel fuller responses to discovery by the other.<sup>13</sup>

On August 31, 1999, contemporaneous with one of the depositions being conducted by the plaintiff, the defendants jointly served an offer of judgment on the plaintiff under Rule 68, offering “to allow judgment to be entered against them in the above-captioned case” which the plaintiff accepted, filing the offer and his acceptance together on September 1, 1999.<sup>14</sup>

On September 7, 1999, the pending cross-motions were ruled on without hearing, and the plaintiff was ordered to provide additional discovery responses to the defendants within 21 days.<sup>15</sup> On September 13, 1999, judgment was entered pursuant to the Rule 68 offer and acceptance, “against the defendants in the above-captioned case in favor of the plaintiff.”<sup>16</sup>

---

13. Docket entries 15.0 through 19.0 at A.4.

14. Docket entry 20.0 at A.4. The offer of judgment is at A.55-56, and the plaintiff’s acceptance is at A.57-58.

15. Un-numbered 09/07/1999 docket entry at A.4.

16. Docket entry 21.0 at A.4. The judgment is at A.60, and the Clerk’s Notice to the parties is at A.59.

On September 22, 1999, the plaintiff filed an emergency request for a declaration that further discovery was moot due to the entry of judgment in the case, which the defendants opposed.<sup>17</sup> The parties appeared that afternoon before Judge Fahey, who denied the plaintiff's motion by a notation on its face (at A.57).

On or about October 4, 1999, the plaintiff served a motion seeking for summary judgment on the libel counterclaim, which the defendants opposed. The Rule 9A package on that motion was filed on November 16, 1999.<sup>18</sup>

The summary judgment motion came on for hearing on Tuesday, January 18, 2000. In the course of that hearing, when the motion judge asked counsel for the defendants what defamatory statements they were complaining about, he started to quote a statement listed in the counterclaim, but then cut the hearing short by telling the motion judge that the defendants had decided to dismiss the libel counterclaim "to let the parties go on

---

17. Docket entry 22.0 at A.5. The plaintiff's motion is at A.61-72 and the defendants' opposition is at A.73-78.

18. Docket entries 23.0 and 24.0 at A.5. The complete summary judgment package is in the Appendix at A.79-398, with all exhibits and submissions by both sides.

with their lives.” The motion judge stated that this had to be done in writing, and directed the defendants to file a written dismissal “forthwith.”

On Friday, January 21, 2000, the defendants filed a motion for voluntary dismissal without prejudice.<sup>19</sup> This was returned to the defendants on Monday, January 24, 2000, with a notice directing the defendants to instead file a joint stipulation signed by the plaintiff as well.<sup>20</sup> On Monday, January 24, 2000, the plaintiff had filed a written opposition objecting to the dismissal being without prejudice,<sup>21</sup> asking instead for a ruling on his motion for summary judgment or, in the alternative, that it be treated as a motion under the SLAPP statute, § 59H of chapter 231.<sup>22</sup> The opposition closed by stating that dismissal without prejudice would force the plaintiff to appeal (see A.412-413).

---

19. Docket entry 25.0 at A.5. The motion is at A.399-401.

20. Un-numbered 01/24/2000 docket entry at A. 5. The notice is at A.402.

21. Reproduced at A.403-451. The plaintiff’ opposition was not docketed until the defendants’ motion for voluntary dismissal without prejudice was resubmitted—unchanged—on February 24, 2000 (A.453-455), and both were docketed as of that date as docket entries 26.0 and 27.0.

22. At A.409-413.

On March 15, 2000, after being resubmitted (see fn.21 above), the defendants' motion for voluntary dismissal without prejudice was allowed without hearing by a notation in the left hand margin of the face of that motion.<sup>23</sup>

On April 3, 2000, a formal judgment was entered dismissing the libel counterclaim without prejudice,<sup>24</sup> and this appeal followed.<sup>25</sup>

*Facts.*

The following statement of facts is, in large part, based upon the *Statement of Material Facts* (at A.115) submitted in support of William Silverstein's motion for summary judgment, updated to reflect later proceedings.

**The truth of the plaintiff's statements**

William Silverstein was employed by Microsystems Software, Inc. ("MSI") from March 5, 1993 until late September 1996 as a software engineer.<sup>26</sup>

---

23. See A.454 and the Clerk's Notice to the parties at A.456, the un-numbered 03/15/2000 docket entry at A.5.

24. Docket entry 29.0 at A.5. That judgment is at A.457.

25. Docket entries 30.0 at A.5 (the *Restated Notice of Appeal*—a notice of appeal had been filed on March 24, 2000, prior to the entry of judgment) and 31.0 and A.6 (the *Revised Restated Notice of Appeal*, which corrected the date stated for the summary judgment hearing).

26. *Amended Complaint*, ¶ 5 at A.8. admitted at A.33.

MSI was a computer software company that sold several programs, including a local-area-networked calendar program called CaLANdar, software for handicapped computer users called HandiWare, and CyberPatrol, a program for blocking access to obscene or otherwise objectionable internet web sites.<sup>27</sup>

MSI sold and advertised its programs in the national software market, including governmental entities, and publicized its consultations with politicians, including the President of the United States.<sup>28</sup>

Until the time of his discharge by MSI, the plaintiff was engaged in development work on version 4.0 of CaLANdar.<sup>29</sup>

On May 17, 1995 the plaintiff was diagnosed with tendinitis.<sup>30</sup>

From May 1995 until May 1996 the plaintiff treated with multiple medical practitioners and multiple forms of treatment while his medical condition worsened.<sup>31</sup>

---

27. *Statement of Material Facts* (“*Statement*”), ¶ 2 at A.115, admitted at A.310.

28. *Statement* ¶ 3, at A.116, admitted at A.310.

29. *Amended Complaint*, ¶ 21 at A.10, admitted at A.34.

30. *Statement* ¶ 5, at A.116, admitted at A.310.

31. *Statement* ¶ 7, at A.116, admitted at A.310.

The plaintiff's condition worsened to the point that he suffered constant pain in his hands, wrists, and forearms, at times waking him up in pain during the night, and at times keeping him from getting to sleep at all.<sup>32</sup> All his doctors attributed his tendinitis to his work.<sup>33</sup>

On May 10, 1996 the plaintiff was advised by his doctor that he had the following choices:

1. See a career counselor and go into a career that did not involve a keyboard, or
2. See a psychologist for pain management, or
3. Take 3 to 4 weeks off of work and try acupuncture.<sup>34</sup>

This information was relayed to MSI by the plaintiff, who told this to defendant Mason, and that he wanted the acupuncture.<sup>35</sup>

In June and July of 1996 the plaintiff received acupuncture treatment (during afternoons off from work).<sup>36</sup>

---

32. *Statement* ¶ 8, at A.116, admitted at A.310.

33. *Silverstein Affidavit* ¶ 6 at A.185.

34. *Statement* ¶ 9, at A.116, admitted at A.311.

35. *Statement* ¶ 9, at A.116, admitted at A.311.

36. *Statement* ¶ 10, at A.116, admitted at A.311.

The doctor performing this treatment instructed the plaintiff to remain off of the keyboard and in a low stress environment for at least 18 hours following each treatment.<sup>37</sup>

The plaintiff was placed under increased scrutiny at work and harassed by one or more of MSI's managers after he reported his injury.<sup>38</sup>

The plaintiff requested the use of unused memory upgrade parts in MSI's possession to enable him to use voice-recognition software at his workstation to reduce his need to use the keyboard.<sup>39</sup> His request for the use of these parts was ignored.<sup>40</sup>

At no time did MSI dispute the validity of the plaintiff's medical documentation or seek clarification.<sup>41</sup>

At no time did MSI have a medical evaluation done of the plaintiff that disputed the existence, seriousness,

---

37. Prescription by Dr. Gordin at A.268.

38. Silverstein deposition, day two, A.216 ln.2 to A.217 ln. 13. Larry Mason deposition, A.384, ln.3 to A.387, ln.23.

39. *Amended Complaint*, ¶ 33 at A.11, admitted at A.35.

40. Silverstein deposition, day 2, A.219, ln. 15 to A.221, ln. 16.

41. Deposition of Debra Gorgens, A.231, ln. 6 to 16.

or work-related nature of the plaintiff's injury, or his need to take time off for treatment.<sup>42</sup>

MSI interfered with the plaintiff having an ergonomist hired by MSI's workers compensation insurer evaluate his workstation by cancelling the plaintiff's appointment.<sup>43</sup> The appointment was rescheduled only after the plaintiff inquired directly of the insurer why no visit by the ergonomist had occurred.<sup>44</sup>

MSI advertised that CaLANdar 4.0 would be released in the Summer of 1996.<sup>45</sup>

On August 10, 1996 the plaintiff gave MSI a letter from his treating physician recommending that he take three weeks off from work to get treatment.<sup>46</sup>

On August 19, 1996 the plaintiff informed MSI that he would be absent from September 11, 1996 until October

---

42. *Statement* ¶ 16, at A.118, admitted at A.31.

43. *Statement* ¶ 18, at A.118, admitted at A.313.

44. *Statement* ¶ 19, at A.118, admitted at A.313.

45. Richard Gorgens deposition, A.227, lines 3-11.

46. Mason deposition, A.233, ln. 3-11, and A.325-326, the two versions of the letter given to the plaintiff by Dr. Gordin. When MSI objected that the first version's statement that he needed to be "away from keyboard" didn't entitle him to time off, Dr. Gordin revised that letter to say "away from work." (MSI has been shown both signed originals.)

1, 1996 for medical treatment. The plaintiff later provided a copy of his scheduled airline flights to and from China, where he was going for acupuncture.<sup>47</sup>

The plaintiff did not request that MSI pay either for his travel to China or for his treatment.<sup>48</sup> The plaintiff also did not request that he be paid his salary during the time he was asking he be allowed to take off.<sup>49</sup>

On August 20, 1996, the announced CaLANdar 4.0 release date was September 3, 1996.<sup>50</sup>

On August 20, 1996 the plaintiff's supervisor, defendant Larry Mason, complained about the time that the plaintiff was taking for medical treatment and told the plaintiff that he would not be permitted by MSI to take time off for medical treatment until three weeks had elapsed after the release of CaLANdar 4.0.<sup>51</sup>

The plaintiff responded that he would comply and delay taking time off for treatment until September 25,

---

47. *Statement* ¶ 23, at A.119, admitted at A.313.

48. *Amended Complaint*, ¶ 43 at A.12, admitted at A.36.

49. *Amended Complaint*, ¶ 44 at A.12, admitted at A.36.

50. *Statement* ¶ 26, at A.120, admitted at A.314.

51. *Amended Complaint*, ¶ 46 at A.12-13, admitted at A.36, and Mason deposition at A.234, lines 1-20.

1996. The plaintiff obtained provided a revised itinerary of his airline flights, showing a travel time each way of more than one day.<sup>52</sup>

Subsequent to the plaintiff's informing defendant Mason of his revised plans, delaying his time off for treatment from September 11, 1996 to September 25, 1996, defendant Mason stated that MSI was not committed to any particular release date for CaLANdar 4.0, but would release it "when the pain of not releasing it exceeds the pain of releasing it."<sup>53</sup>

By August of 1996, CaLANdar 4.0 had been substantially finished for several weeks, and was undergoing only minor revisions.<sup>54</sup> Nevertheless, CaLANdar 4.0 was not released on September 3, 1996.<sup>55</sup>

On September 9, 1996 the plaintiff requested an accommodation of schedule modification to allow him to spend less time at the keyboard each weekday, and make up the time by coming in on weekends.<sup>56</sup> The schedule

---

52. *Amended Complaint*, ¶ 48 at A.13, admitted at A.36.

53. *Statement* ¶ 29, at A.120, admitted at A.314.

54. *Silverstein Affidavit* ¶ 13 at A.186.

55. *Amended Complaint*, ¶ 53 at A.14, admitted at A.37.

56. *Statement* ¶ 32, at A.121, admitted at A.314.

modification to spread the plaintiff's work across the weekends had been recommended in writing by the plaintiff's treating physician.<sup>57</sup>

On September 16, 1996 MSI's workers compensation carrier had an independent medical examination (IME) performed on the plaintiff.<sup>58</sup> The IME doctor, Dr. Craig Stirrat, found that the plaintiff's condition was work-related, and recommended that the plaintiff change his lifestyle and spend less time at a computer keyboard.<sup>59</sup> On September 17, 1996 the plaintiff informed Mason of the recommendations made by Dr. Stirrat.<sup>60</sup>

MSI, through defendant Mason, then took the office keys that were in the possession of the plaintiff, advising the plaintiff that to allow him to retain office keys would constitute impliedly agreeing that he could work on weekends—which Mason said MSI felt would be detrimental to the plaintiff's condition—directly countermanding Dr. Gordin's advice.<sup>61</sup>

---

57. *Statement* ¶ 33, at A.121, admitted at A.314.

58. *Amended Complaint*, ¶ 56 at A.14, admitted at A.37.

59. See the report by Dr. Stirrat at A.269-272.

60. *Statement* ¶ 36, at A.122, admitted at A.314.

61. See SIL-0038 at A.273, 9/19 entry in Mason's surveillance log of Silverstein produced in discovery.

Reed Lewis, who was principal software engineer for The Learning Company (“TLC”) (which bought MSI) at the time of his deposition, testified that the plaintiff had taken over the role of primary engineer on CaLANdar from him in 1995, as Lewis had shifted his attention to a newer project, CyberPatrol.<sup>62</sup>

Lewis testified that the plaintiff consulted with him about CaLANdar at times and he did not criticize the plaintiff’s work on CaLANdar.<sup>63</sup>

Richard Gorgens, President of MSI, agreed at his deposition that Silverstein was a very good software engineer.<sup>64</sup>

On September 24, 1996, on the eve of the plaintiff’s departure for China, MSI, through defendant Mason, requested that the plaintiff provide the passwords to software personally owned by the plaintiff, “in case we need to make changes while you are away.”<sup>65</sup>

On September 24, 1996 the MSI defendants, through defendant Mason, asked the plaintiff how to contact him

---

62. Lewis deposition, A.239, ln. 23 to A.240, ln. 24.

63. *Id.*, A.241, ln.1-23 and A.242, ln. 11-24.

64. Richard Gorgens deposition, A.228, ln. 5-6.

65. *Statement* ¶ 42, at A.123, admitted at A.314.

by electronic mail.<sup>66</sup> MSI did not tell the plaintiff before he left that he would be fired if he took his announced three-week leave for treatment.<sup>67</sup>

MSI's managers knew that the trip to and from China took approximately two days each way, having made the trip themselves previously.<sup>68</sup>

On Thursday, September 26, 1996 at 5:32 pm Boston time, MSI, through defendant Mason, sent electronic mail to the plaintiff instructing him to return for work the next day—Friday, September 27, 1996—and that if the plaintiff did not return to work by then, he would be considered to have abandoned his job.<sup>69</sup>

The plaintiff e-mailed defendant Mason in response, requesting that any action on the termination be deferred until he returned from receiving medical treatment.<sup>70</sup>

On September 30, 1996 MSI, by defendant Mason, sent electronic mail to the plaintiff informing him that he had been fired.<sup>71</sup>

---

66. *Statement* ¶ 43, at A.123, admitted at A.314.

67. *Silverstein Affidavit* ¶ 15 at A.186.

68. *Statement* ¶ 45, at A.123, admitted at A.315.

69. *Statement* ¶ 46, at A.123, admitted at A.315.

70. *Statement* ¶ 47, at A.123, admitted at A.315.

71. *Statement* ¶ 48, at A.123, admitted at A.315.

On September 30, 1996, the program files for the previous version of CaLANdar, version 3.11, were archived and CaLANdar 4.0 was made available for downloading from MSI's internet site.<sup>72</sup>

After the plaintiff left, no new features were added to the program, and little if any further debugging was done or revisions made, before it shipped.<sup>73</sup>

On October 25, 1996 the MSI defendants refused to allow the plaintiff to retrieve his property.<sup>74</sup>

The MSI defendants, through defendant Debra Gorgens, refused to allow the plaintiff to return to work on December 18, 1996.<sup>75</sup>

The plaintiff complained of MSI's treatment of him to the United States Department of Labor.<sup>76</sup>

On information and belief, the investigator from the United States Department of Labor requested that MSI reinstate the plaintiff, which request was refused.<sup>77</sup>

---

72. Lewis deposition, A.243, ln. 23 to A.244, ln. 5.

73. *Statement* ¶ 50, at A.124, admitted at A.315.

74. *Statement* ¶ 51, at A.124, admitted at A.315.

75. *Statement* ¶ 52, at A.124, admitted at A.315.

76. *Statement* ¶ 53, at A.125, admitted at A.315.

77. *Statement* ¶ 54, at A.125, admitted at A.315.

The plaintiff sought and received benefits under the Massachusetts Workers' Compensation law from MSI in a written settlement before the Massachusetts Department of Industrial Accidents ("DIA").<sup>78</sup>

The written settlement agreement before the DIA, while stating that it did not constitute a stipulation that the plaintiff's injury was work-related, did not dispute that the plaintiff was totally-disabled during the time he had taken off for treatment in September of 1996.<sup>79</sup>

The MSI defendants took possession of software written by the plaintiff.<sup>80</sup>

The MSI defendants took possession of software licensed to the plaintiff.<sup>81</sup>

MSI posted openings for technical support engineers, a position for which the plaintiff was qualified due to his familiarity with the company's programs.<sup>82</sup>

---

78. *Statement* ¶ 55, at A.125, admitted at A.315.

79. See Department of Industrial Agreements settlement agreement at A.274-275.

80. *Amended Complaint*, ¶ 85 at A.18, admitted at A.40.

81. *Statement* ¶ 58, at A.125, admitted at A.315.

82. *Statement* ¶ 60, at A.126, admitted at A.315.

The plaintiff applied to MSI for re-employment in December of 1996, and in 1997.<sup>83</sup>

Defendant Debra Gorgens acknowledged receipt of the plaintiff's resume on behalf of MSI when he sought re-employment in 1997.<sup>84</sup>

After the plaintiff was discharged by MSI, TLC acquired the stock of MSI in late 1997 and took control of MSI's business operations, moving MSI's employees and operations out of MSI and into TLC Multimedia over the course of 1998.<sup>85</sup>

TLC is a software publisher larger than MSI, which, directly or through subsidiaries, markets many more lines of software than had MSI alone, also on a national basis, both directly to consumers and, in the case of Cyber-Patrol, also indirectly, by providing the use of Cyber-Patrol's filtering functions to America Online.<sup>86</sup>

---

83. *Statement* ¶ 61, at A.126, admitted at A.315.

84. *Amended Complaint*, ¶ 90 at A.19, admitted at A.40.

85. See *Defendants' Answer to Plaintiff's Interrogatory 16* at A.276-277.

86. *Statement* ¶ 63, at A.126, admitted at A.315.

The plaintiff applied to TLC for employment in 1998, after TLC had acquired MSI.<sup>87</sup> TLC acknowledged receipt of the plaintiff's application for employment in 1998.<sup>88</sup>

The plaintiff was not interviewed or hired for any job for which he applied at MSI or TLC after his return from China.<sup>89</sup>

The plaintiff's job was still advertised as being open by MSI in 1998 after he had been turned down for re-employment by MSI and for employment with TLC.<sup>90</sup>

On August 20, 1997 the plaintiff had surgery to correct a medical condition known as a supracondylar process, a congenital condition that made the plaintiff more susceptible to tendinitis from extended work at a computer keyboard.<sup>91</sup>

### The Libel Counterclaim

Starting shortly after his return from China in the fall of 1996, the plaintiff began to post information on

---

87. *Statement* ¶ 65, at A.127, admitted at A.316.

88. See postcard acknowledgment, A.278.

89. *Amended Complaint*, ¶ 91 at A.18, admitted at A.40.

90. *Statement* ¶ 69, at A.127, admitted at A.316.

91. Deposition of Dr. McKay at A.249, ln.11 to A.262, ln.6, and exhibits 5 & 8 thereto at A.263-267.

his site on the World Wide Web documenting his complaints against MSI.<sup>92</sup>

On December 19, 1996, shortly after the plaintiff had put up his web site, he was sent a letter by defendant Richard Gorgens calling his web site defamatory, and threatening him with legal action if he did not remove from it what he was saying about MSI.<sup>93</sup> In response, the plaintiff contacted Gorgens by e-mail on January 4, 1997 and asked him what about the site was inaccurate. When there was no response, he repeated that inquiry on January 10, 1997, and elicited from Mr. Gorgens the cryptic non-answer (which included a copy of his inquiry) "Received. Regards, Dick Gorgens."<sup>94</sup>

No explanation of what was considered untrue or defamatory was forthcoming, and no further communication was received from MSI on the subject until after the plaintiff filed this lawsuit alleging discrimination and

---

92. *Statement* ¶ 71, at A.128, admitted at A.316.

93. That letter carried a "cc" to Michael Rosen, the lead attorney from Foley, Hoag and Eliot who represented the defendants until recently, including at the hearing on the plaintiff's summary judgment motion. (He was the attorney who submitted the request that the case be dismissed without prejudice.)

94. See this correspondence at A.278-281.

retaliation in September of 1998, although the parties had, in the intervening time, been in communication through counsel in litigating the plaintiff's Workers Compensation claim, his agency claim of handicap discrimination and retaliation as a condition precedent to this suit, and an unemployment compensation claim.<sup>95</sup>

In September of 1998, after prior filing with the Massachusetts Commission Against Discrimination,<sup>96</sup> the plaintiff filed his claims in the present lawsuit,<sup>97</sup> which alleged that the defendants had discriminated and retaliated against him due to his handicap, his requests for accommodation, and for his exercise of rights, under the Workers Compensation law, the Massachusetts anti-discrimination law, chapter 151B, and the federal Family and Medical Leave Act, as well as claims for breach of contract, conversion of his property, intentional interference with advantageous relationship, and negligent or intentional infliction of emotional distress.

Defendants MSI and TLC, in addition to answering, filed a counterclaim for libel, alleging that on the

---

95. *Statement* ¶ 73, at A.129, admitted at A.316.

96. See ¶¶ 127-132 of the *Amended Complaint*, at A.24-25.

97. See the plaintiff's *Amended Complaint* at A.7-31.

plaintiff's web site, which discussed his claims in his lawsuit, including a timeline that showed when events had occurred, including when TLC acquired MSI, he had recklessly or with actual malice published false statements:<sup>98</sup>

“that he was harassed at work by MSI's management because of his alleged handicap; that MSI, “owned by the The [sic] Learning Company,” fired him because of his alleged medical condition; that MSI is using software which belongs to Silverstein; that MSI violated and refuses to comply with the Family and Medical Leave Act, the Americans With Disabilities Act, M.G.L. c.151B and other laws, that Microsystems “fires an employee who goes to the hospital for medical treatment,” and that Microsystems refuses to accommodate injured employees.”

The plaintiff's statements were not made recklessly, with disregard to whether they were true, or with knowledge of their falsity, but were made in the reasonable belief, based on his own experiences, that they were true.<sup>99</sup>

MSI and TLC thus set forth as the basis for their counterclaim the plaintiff's protected statements of opinion. While these conclusions were attacked as defamatory, MSI and TLC have not shown that they—or the

---

98. See ¶¶ 7-9 of the defendants' *Corrected Answer and Counterclaim* at A.48-49.

99. *Silverstein Affidavit* ¶ 21 at A.186.

underlying facts set forth along with them—were false or otherwise met the standards applicable to a libel action like this.

There was no suggestion of undisclosed facts. Instead, there was an exhaustive timeline and documents posted—including not only the plaintiff's court filings but also those of the defendants, letting them tell their side of the story, along with an explicit disclaimer on every page that this was opinion.

The counterclaimants ignored the facts and focused on the opinions.

Nor have MSI and TLC shown any harm from the plaintiff's statements.<sup>100</sup> MSI, the chief target of the plaintiff's complaints on his web site, existed, after January of 1998, only as a paper entity, as its operations had been transferred to TLC Multimedia pursuant to its purchase by TLC.<sup>101</sup> CaLANdar was withdrawn from the market by TLC during the summer of 1999.<sup>102</sup> HandiWare was

---

100. *Silverstein Affidavit* ¶ 22 at A.186.

101. See *Defendants' Answer to Plaintiff's Interrogatory 16* at A.276-277.

102. See announcement web page at A.283-284.

discontinued in 1997 or 1998. According to Reed Lewis, its author for MSI, it had been “fading away.”<sup>103</sup>

After several months of discovery, both paper and testimonial, a Rule 9A package was filed on August 27, 1999 containing cross motions by each side to compel fuller responses to discovery by the other.<sup>104</sup>

### **The Agreed-Upon September 1999 Judgment**

On August 31, 1999, contemporaneous with one of the depositions being conducted by the plaintiff, the defendants jointly served an offer of judgment for \$125,000 plus interest<sup>105</sup> on the plaintiff under Rule 68, offering “to allow judgment to be entered against them in the above-captioned case” which the plaintiff accepted, filing the offer and his acceptance together on September 1, 1999.<sup>106</sup>

On September 7, 1999, the previously-filed discovery motions were ruled on without hearing, and the plaintiff

---

103. Lewis deposition, A.236, ln. 13 to A.237, ln. 6.

104. Docket entries 15.0 through 19.0 at A.4.

105. This was by no means a “nuisance” settlement, being several times his lost wages. To have exceeded that recovery and avoided a potential offset under Rule 68 would have required recovering punitive damages in addition.

106. Docket entry 20.0 at A.4. The offer of judgment is at A.55-56, and the plaintiff’s acceptance is at A.57-58.

was ordered to provide additional discovery responses to the defendants within 21 days.<sup>107</sup> On September 13, 1999, judgment was entered pursuant to the Rule 68 offer and acceptance, “against the defendants in the above-captioned case in favor of the plaintiff.”<sup>108</sup>

Commencing on September 14, 1999, after receipt of that judgment, plaintiff’s counsel made several requests to the defendants that they agree that the entry of judgment on September 13, 1999 mooted the September 7, 1999 order to compel discovery by September 28, 1999.<sup>109</sup>

#### **The Libel Counterclaim Resurfaces**

On September 20, 1999, the defendants e-mailed plaintiff’s counsel a proposed settlement agreement<sup>110</sup> that would have had the libel counterclaim dismissed if the plaintiff removed his coverage of the case from his web site and agreed not to voluntarily speak about his case, his employment by MSI, or the employment practices

---

107. Un-numbered 09/07/1999 docket entry at A.4.

108. Docket entry 21.0 at A.4. The judgment is at A.60, and the Clerk’s Notice to the parties is at A.59.

109. See fn.1 to the *Emergency Request for Declaration that Further Discovery is Moot, Due to the Entry of Judgment in the Case*, at A.61.

110. See A.102-110.

of MSI, TLC or Mattel, an agreement that would have been punishable by a penalty of \$50,000 per violation.<sup>111</sup>

On September 21, 1999 the counsel that represented the defendants at the time sent a letter to plaintiff's counsel responding to his immediate rejection of that offer as unconscionable, saying that the defendants wanted the "penalty" provision to restrain the plaintiff, noting that the plaintiff "honestly" believed what he was saying (that letter also listed which of their outstanding discovery requests they still wanted answered).<sup>112</sup>

On September 22, 1999, the plaintiff filed an emergency request for a declaration that further discovery was moot due to the entry of judgment in the case, which the defendants opposed.<sup>113</sup> The parties appeared that afternoon before Judge Fahey, who denied the plaintiff's motion by a notation on its face (at A.57).

On or about October 4, 1999, the plaintiff served a motion seeking for summary judgment on the libel counterclaim, which the defendants opposed. When that motion was

---

111. See ¶¶ 1, 2, 3, and 10 at A.104-108.

112. That letter is at A.111-113.

113. Docket entry 22.0 at A.5. The plaintiff's motion is at A.61-72 and the defendants' opposition is at A.73-78.

received by defendants' counsel, it was responded to by a letter faxed by the defendants' counsel within hours (see A.415), which pledged that "Mattel will aggressively pursue the counterclaim, as is its right."<sup>114</sup>

The Rule 9A package on that motion was filed on November 16, 1999.<sup>115</sup>

The summary judgment motion came on for hearing on Tuesday, January 18, 2000. In the course of that hearing, when the motion judge asked the defendants what defamatory statements they were complaining about, their counsel started to quote a statement listed in the counterclaim, but then told the motion judge that the defendants had decided to dismiss the libel counterclaim "to let the parties go on with their lives." The motion judge stated that this required a writing, and directed the defendants to file a written dismissal "forthwith."

---

114. TLC (which by that point owned MSI) was merged into Mattel in May of 1999, and was merely a division of Mattel, rather than being a separate company. See the defendants' response to the plaintiff's Interrogatory 16, at A.276-277.

115. Docket entries 23.0 and 24.0 at A.5. The complete summary judgment package is in the Appendix at A.79-398, with all exhibits and submissions by both sides.

On Friday, January 21, 2000, the defendants filed a motion for voluntary dismissal without prejudice.<sup>116</sup> This was returned to the defendants on Monday, January 24, 2000, with a notice directing the defendants to instead file a joint stipulation signed by the plaintiff as well.<sup>117</sup>

On Monday, January 24, 2000, the plaintiff had filed a written opposition objecting to the dismissal being without prejudice,<sup>118</sup> asking instead for a ruling on his motion for summary judgment or, in the alternative, that it be treated as a motion under the SLAPP statute, § 59H of chapter 231.<sup>119</sup> The opposition closed by stating that a “without prejudice” dismissal would force the plaintiff to appeal (see A.412-413).

On March 15, 2000, after being resubmitted (see fn.21), the defendants’ motion for voluntary dismissal

---

116. Docket entry 25.0 at A.5. The motion is at A.399-401.

117. Un-numbered 01/24/2000 docket entry at A. 5. The notice is at A.402.

118. Reproduced at A.403-451. The plaintiff’ opposition was not docketed until the defendants’ motion for voluntary dismissal without prejudice was resubmitted—unchanged—on February 24, 2000 (A.453-455), and both were docketed as of that date as docket entries 26.0 and 27.0.

119. At A.409-413.

without prejudice was allowed without hearing by a notation in the left hand margin of the face of that motion.<sup>120</sup>

On April 3, 2000, a formal judgment was entered dismissing the libel counterclaim without prejudice,<sup>121</sup> and this appeal followed.<sup>122</sup>

### Summary of Argument.

The plaintiff is entitled to have his motion for summary judgment on libel counterclaim decided to prevent chilling his First Amendment rights. (pp. 32-34)

It was improper for the Superior Court to have granted the defendants' motion to dismiss without prejudice in the face of a meritorious summary judgment motion, given the prejudice that caused to the plaintiff, including the loss of a defense of *res judicata* against the counterclaim. (pp. 34-37)

---

120. See A.454 and the Clerk's Notice to the parties at A.456, the un-numbered 03/15/2000 docket entry at A.5.

121. Docket entry 29.0 at A.5. That judgment is at A.457.

122. Docket entries 30.0 at A.5 (the *Restated Notice of Appeal*—a notice of appeal had been filed on March 24, 2000, prior to the entry of judgment) and 31.0 and A.6 (the *Revised Restated Notice of Appeal*, which corrected the date stated for the summary judgment hearing).

The defendants offered, and the plaintiff accepted, a judgment on the whole lawsuit, which did not exclude the libel counterclaim, and must be construed in favor of the offeree. Rule 68 does not prevent an offering party to include dismissal of its own claim as part of the offer. (pp. 38-39)

The judgment that was entered in September of 1999 precluded recovery on the counterclaim by resolving the facts on which the counterclaim was based adversely to the counterclaim. (pp. 40-41)

The libel counterclaim is frivolous without regard to the agreement or judgment, under the legal standards applicable to actions for libel. (pp. 41-43)

The libel counterplaintiffs are public figures, and pled their counterclaim on that basis. (p. 44)

The defense of truth extends even to suit by "private figure" plaintiffs. (pp. 44-46)

Opinion is not independently actionable if the underlying facts are presented—liability will depend solely on the facts presented. (pp. 46-46)

The libel counterplaintiffs admitted that the plaintiff's interpretation had support, destroying their whole case. (pp. 46-48)

**Argument.**

1. **William Silverstein is entitled to the entry of summary judgment dismissing the libel counterclaim with prejudice**

The libel claim brought against William Silverstein was threatened to obtain leverage over him before he sued, brought when he did sue, and kept alive even after giving him judgment, in an attempt to extract an agreement from him to be silent, as no such requirement was attached to the Rule 68 offer or judgment. Dismissal “without prejudice” permits that tactic to be continued.

The Supreme Judicial Court has made clear that while in most cases the preference is for trial, the chill on free speech entailed by defamation actions leads to favoring summary judgment:

“[S]ummary judgment procedures are especially favored in defamation cases. *Godbout v. Cousens*, 396 Mass. 254, 258 (1985). “Allowing a trial to take place in a meritless case ‘would put an unjustified and serious damper on freedom of expression.’” *Appleby v. Daily Hampshire Gazette*, 395 Mass. 32, 37 (1985), quoting *National Ass’n of Gov’t Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 233 (1979), *cert. denied*, 446 U.S. 935 (1980). Even if a defendant in a libel case is ultimately successful at trial, the costs of litigation may induce an unnecessary and undesirable self-censorship. See *New York Times Co. v. Sullivan*, *supra* at 279.”

*King v. Globe Newspaper Co.*, 400 Mass. 705, 708 (1987),  
*cert. denied*, 485 U.S. 940 (1988).

This is especially true where the defamation plaintiff cannot make the required showing: no evidence has been presented to show the falsity of any statement that could be taken as defamatory of these companies, nor of any harm suffered by them.

This libel claim fits under the definition of a SLAPP suit contained in § 59H of chapter 231, as it was based upon William Silverstein's exercise of his right to petition, as defined in the concluding passage of that section:

“As used in this section, the words “a party’s exercise of its right of petition” shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; *any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.*”

*[emphasis added]*

As pointed out in William Silverstein's opposition to the motion to dismiss without prejudice:

"The SLAPP statute was not used at the outset of this lawsuit because, in the context of a lawsuit by Silverstein that turned on the same facts as the libel counterclaim, it was felt to be unnecessary and subject to criticism as unfair: if he was entitled to discovery on his claims, they should be also.

Now, however, it *is* appropriate, but, absent leave from this court to use it more than 60 days after the filing of the counterclaim (which leave is hereby requested), it is inapplicable.

Even if that statute is not being used, however, the considerations it makes explicit are still instructive here, as they essentially make operational the SJC decisions in cases like *King v. Globe* by putting the burden on the party opposing dismissal to show both that "the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law" and that "the moving party's acts caused actual injury to the respondent."

The libel counter-plaintiffs here cannot make either showing, much less both. They cannot by any stretch of the imagination show that Silverstein's exercise of his right to petition was devoid of any reasonable factual support or arguable basis in law, and they have not shown any actual injury."

(at A.411-412)

It is not likely that a discrimination plaintiff—or most plaintiffs, for that matter—who walked into a summary judgment hearing aimed at his claim would be able to dodge a final judgement by obtaining a dismissal without prejudice.

There is not a lot of express authority for this commonsense observation, but there are a few guideposts. For example, a party may dismiss a claim without prejudice as of right only prior to service of an answer or a motion for summary judgment, under Massachusetts Rules of Civil Procedure 41(a)(1)(i) and (c).<sup>123</sup>

---

**123. RULE 41. DISMISSAL OF ACTIONS**

**(a) Voluntary Dismissal: Effect thereof.**

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of these rules and of any statute of this Commonwealth, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any other state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision (a), an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed upon the plaintiff's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

**(b) Involuntary Dismissal: Effect Thereof.**

...

**(c) Dismissal of Counterclaim, Cross-Claim, or**

In any other situation, consent of all other parties—or a motion—is required. While Rule 41(a)(2) states that a dismissal on motion shall be without prejudice unless otherwise stated, it nowhere authorizes the court to grant a dismissal without prejudice if doing so would prejudice the opposing party.

Beyond the prejudice of allowing continued first amendment chill, a more concrete prejudice results from a “without prejudice” dismissal: it expressly undercuts the argument that the September 13, 1999 entry of judgment “against the defendants in the above-captioned case in favor of the plaintiff” was *already* a judgment dismissing the libel counterclaim with prejudice, by superseding that judgment with a contrary one.

Unless that action is reversed, the defense of *res judicata*—that the libel counterclaim had already been

---

**Third-Party Claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone shall be made before a responsive pleading or a motion for summary judgment is served, whichever first occurs, or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously-Dismissed Action.

. . . .

dismissed with prejudice—will not be available in a later case.

Given the posture of this case, with the libel counterclaim having been used as a club against the plaintiff even before he filed his suit, and the defendants' efforts to preserve that ability even after giving him a judgment that should have been preclusive of that counterclaim on the merits, the Superior Court should not to have refused to rule on the plaintiff's motion for summary judgment against the counterclaim.

Granting the motion for summary judgment serves both the free speech goals of *King v. Globe* and the goal judicial economy by putting the libel claim to rest with finality. Refusing to rule on a properly presented motion for summary judgment and instead allowing the prosecuting parties to dismiss without prejudice gives them the option to start the entire process of litigating the libel counterclaim all over again and thus the chance to try to intimidate—or exhaust—their opponent.<sup>124</sup>

---

124. This court has before it the entire summary judgment record that was presented to the court below. The brief's statement of facts is updated to reflect admissions made in that proceeding, and William Silverstein therefore asks that, in the interests of judicial economy and freedom of speech, this Court end this litigation with

- a. **The defendants contractually agreed to the entry of judgment against them on all claims in the case—without excluding the counterclaim from that agreement**

Rule 68 provides a contractual method for disposing of a lawsuit which the parties availed themselves of.

The Superior Court entered judgment “against the defendants in the above-captioned case in favor of the plaintiff” language that was almost exactly the same as that of the Offer of Judgment. A “case” consists of all claims of all parties—not just the claims of one party. Had the defendants wished to exclude their counterclaim from the scope of their offer, they could have easily done so by offering to let the plaintiff take judgment against them “on his claims” instead of “in the case.”

As there was no language included in the judgment (or in the Offer of Judgment it flowed from) to exclude any claim or counterclaim from its scope, that judgment disposed of the whole case, not just part of it. The language of the parties’ agreement and the resulting judgment is clear and unambiguous, and does not permit

---

finality by holding that he was and is entitled to the entry of summary judgment on the libel counterclaim. Failing that, he asks that the case be remanded to the court below for decision on his summary judgment motion.

the defendants' interpretation. In any case, the canons of contract interpretation provide that where the parties do not agree about what was intended, contracts are to be construed against the one who proffered the language.<sup>125</sup>

In construing a contract, it is to be interpreted as a whole, with every word to be given force so far as practicable.<sup>126</sup>

The defendants have argued, in opposing this, that since Rule 68 only authorizes offers by defending parties, their offer could not include their counterclaim, regardless of how it was worded, since—with respect to the counterclaim—they were not defending parties but prosecuting parties.

However, while Rule 68 does not let a prosecuting party use the threat of recovering costs to get a defending party to agree to pay money, nothing in Rule 68

---

125. *Merrimack Valley National Bank v. Baird*, 372 Mass. 721, 724 (1977). (See also *Schaffer v. Hobel & Railroad News Co.*, 266 Mass. 276, 277 (1929), citing *N.Y. Central R. Co. v. Stoneman*, 233 Mass. 258, 262 (1919) and *Morse v. Boston*, 260 Mass. 255, 262 (1927).)

126. *Tupper v. Hancock*, 319 Mass. 105, 108 (1946), citing *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 466 (1944). See also *Crimmins & Pierce v. The Kidder Peabody Acceptance Corporation, et al.*, 282 Mass. 367, 375 (1933).

prevents a defending party from sweetening its offer to pay by including the dismissal of its own claims.

**b. The allegations of the complaint cannot be found libellous after judgment has been entered in favor of those allegations**

Even aside from the contractual genesis of the judgment, the mirror-image nature of the counterclaim here compels this result. It asserts that the allegations that formed the basis for the plaintiff's complaint are false and were published recklessly or maliciously. A finding to that effect can not be reconciled with a judgment already entered in favor of the plaintiff on those allegations.<sup>127</sup> Judgments cannot be entered that treat William Silverstein's claims both as true and as so false as to be libellous. Such judgments would be mutually-exclusive and could not co-exist.

Rule 68 was intended to end cases, by acting as a shield for defendants being pursued by unreasonable plaintiffs. It was not intended to be used as a sword to slash at plaintiffs who accept the offers, by allowing

---

127. See *Macheras v. Syrmopoulos*, 319 Mass. 485, 486 (1946)—in which an agreed-upon judgment between the plaintiff and defendant in one case barred relitigation of the same issues between the same parties in another case—and the cases cited therein.

defendants to make offers that they can undercut by forcing the plaintiffs to endure the very expense and delay the defendants were purportedly trying to avoid by making the offers—and on the same factual issues!

**c. The libel counterclaim is frivolous.**

The libel counterclaim was subject to summary judgment on its pure substantive merits, even without regard to the procedural arguments just made.

A claim for libel requires proof of the following elements:

- (1) A defamatory communication about the complainant,<sup>128</sup>
- (2) Which was untrue,<sup>129</sup>
- (3) With respect to which the party complained of was either:
  - (a) in the case of a complainant that is not a public figure: negligent in ascertaining its truth<sup>130</sup> or

---

128. “A person is actionably defamed when he is exposed to public hatred, ridicule or contempt to a considerable and respectable class in the community.” *Tort Law*, Ch. 7, Defamation, at § 118, Vol. 37, *Massachusetts Practice*—the precise formulation used in paragraph 9 of the instant counterclaim.

129. *Nathan Friedman, et al. v. Boston Broadcasters, Inc.*, 402 Mass. 376 (1988). See also *Philadelphia Newspapers, Inc., et al. v. Hepps et al.*, 475 U.S. 767 (1986). These cases make it clear that it is the plaintiff’s burden to prove falsity, not the defendant’s burden to prove truth, contrary to older cases. Nonetheless, Silverstein has here documented the truth of his statements.

130. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

(b) in the case of a public figure: acting with actual malice, in the sense of knowledge that the communication was false or having reckless disregard of its truth or falsity,<sup>131</sup>

- (4) Which was published;<sup>132</sup>  
 (5) Causing actual damage to the complainant.<sup>133</sup>

The complainants here can prove that unflattering communications about them were published, but they cannot show that the communications were falsehoods, and since what he was saying was true they cannot show that there was negligence, much less malice, on his part in saying

131. *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), and *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967). Proof of malice must be clear and convincing evidence, under *New York Times v. Sullivan*, 376 U.S. at 286-286 and *Gertz v. Robert Welch, Inc.*, *supra* 418 U.S. at 342 (1974).

132. *Brauer v. Globe Newspaper Co.*, 351 Mass. 53 (1966).

133. G.L. c. 231, § 93, prohibits the awarding of punitive or exemplary damages for defamation:

“ . . . In no action of slander or libel shall exemplary or punitive damages be allowed, whether because of actual malice or want of good faith or for any other reason. Proof of actual malice shall not enhance the damages recoverable for injury to the plaintiff’s reputation.”

This is, of course, in line with the general rule in this Commonwealth that punitive damages are available only where specifically provided for by statute. See *Tort Law*, Ch. 13, Damages, at § 249, Vol. 37, *Massachusetts Practice*.

The limitation of defamation damages—in any and all circumstances—to actual damages was reaffirmed in *John J. Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 860 (1975).

it. They also made no showing that they were harmed by his statements.<sup>134</sup>

---

134. The defendants did not show any concrete losses due to the plaintiff's web site. Their only showing of harm was to quote from a small number of comments made to the plaintiff about them by e-mail or through a questionnaire on his web site (which he was compelled to produce to them, even though he objected that these were work product, being in the nature of mock jury research). However, as there was no evidence about what these individuals thought *before* reading the plaintiff's web site (many of them were embroiled in similar situations), this did not constitute meaningful evidence of harm.

Significantly, the questionnaire responses (which appear at A.350-351) were not entirely one-sided, showing that the plaintiff's site was, in fact, a fair and honest presentation:

"You have no case. If you were a good employee; they probably would've been smart to give you re-hiring preference" "Today's society is too litigious as it is. Make your living the old fashioned way; rather than trying to cash in through a lawsuit" at A.350

"Very interesting and informative site. Good luck with the case. I'm going to go back to work (at a small college) and make sure I do everything to accommodate a lady who is having RSI." at A.351

"If it really was causing damage you should've gotten a new job." "No one forced you to work for the firm. Employment is a choice. I know repetitive stress injuries are real. Chinese treatments are not, your reliance on them shows the psychological nature of the problem. You had responsibility to mitigate the damages you incurred by getting a new job that didn't require using a keyboard as much. The defendants actions may have been irresponsible; but; frankly; you started the whole deal." at A.352

"Fake Diagnosis" "You will lose if you have an intelligent jury!" at A.352

The complainants are (or, in the case of MSI, were) major software companies, with wide distribution of their products at both the consumer and business level. MSI's prize product—now sold by TLC—was Cyber Patrol, sold to keep children and employees alike out of objectionable web sites, which was referred to by name in Justice O'Connor's partially-concurring, partially-dissenting opinion in *Reno v. ACLU*, 521 U.S. 844, 890 (1997).<sup>135</sup>

In clear recognition of their prominence, they pled their counterclaim as public figures, explicitly alleging that William Silverstein's statements were "made and published recklessly or with actual malice" in paragraph 9 of their counterclaim.

Proof of malice, in the defamation context, may be necessary to keep a public figure claimant in court once the claimant has succeeded in proving falsity, but it cannot substitute for proving falsity. Even with regard to a private figure plaintiff, proof of malice cannot turn a true statement into libel. *Shaari v. Harvard*

---

135. In addition to being run by users on their own machines, Cyber Patrol is run by America Online (AOL) on its servers, with parents being able to assign their childrens' sessions to pre-defined age-groupings with progressively fewer types of sites blocked.

*Student Agencies, Inc.*, 427 Mass. 129 (1998), held that even a private figure plaintiff cannot rely on malicious intent by a defendant to make a true statement actionable if it was made with respect to a subject of public concern.

It is questionable, in light of the authorities cited above, that any limitation of the absolute defense of truth to subjects of public concern even applies any more. However, Silverstein's allegations of the violation by prominent employers of federal and state statutes designed to protect employees from mistreatment by their employers—rights considered important enough to warrant the creation of administrative agencies and the ability to sue not only for compensatory but also punitive damages—certainly met the test of public concern, when compared the other examples of matters of public concern cited in *Shaari* at page 133 of that opinion.

*Shaari* also reaffirmed (at page 134), that the organized news media do not have a monopoly on constitutional protection, but that the protections of Freedom of Speech and the Press extend equally to “the lonely pamphleteer,” quoting from *Lovell v. Griffin*, 303 U.S. 444 (1938). (If protection extended only to the newspaper and

not to the source, the newspaper could not get the story in the first place.)

The result of the application of this black-letter law to this case is that the libel counterclaim cannot succeed. MSI and TLC cannot show that William Silverstein's statements were intentional, reckless, or even negligent falsehoods. They cannot, in fact, even show any falsehoods at all. As set forth in the *Facts* section above, there were good grounds for William Silverstein's statements. They were not only not recklessly false but provably true.

*Friedman, et al v. Boston Broadcasters, Inc.*, cited above, made it clear that where an expression of opinion is accompanied by the facts it is based on, the opinion itself is not actionable, and the analysis of whether there was a defamatory statement will focus solely on the facts alleged (402 Mass at 379-380). Whether the defendants' acts amounted to a violation of the ADA, the FMLA, chapter 151B, or the Workers Compensation law is a legal conclusion that falls within the category of opinion. As long as the underlying facts were set forth and are not defamatory, the addition of his legal opinion was protected under *Friedman v. BBI*.

The defendants made feeble attempts to show contested issues of fact meriting a trial in their response to his statement of material facts (at A.310-353). Silverstein found it so full of falsehoods that he served a motion for leave to respond, exposing its misrepresentations of the record (at A.355-395), and gave them time to respond once again (at A.396-398) before filing the motion package.

A measure of how insubstantial the libel claim is may be found in the final submission in opposition to summary judgment:

“In any event, the fact that Silverstein can point to parts of the record suggesting that he spent more than three days receiving treatment, while MSI and TLC can point to parts of the record suggesting that he spent only three days receiving treatment or that he spent no more than two weeks receiving treatment, underscores the existence of a material fact about the necessity of his three-week trip to China, which precludes summary judgment.”

at A.396-397

Since the plaintiff was fired less than one week after he left for China, it is hard to see how the number of treatments he received after he was fired (the medical records show that he received two weeks of daily treatment) could bear on whether it was defamatory for him to

say that it was illegal to have fired him for leaving for China.<sup>136</sup>

Only genuine questions of *material* facts can bar summary judgment.

Given that the burden on a libel plaintiff is, at a minimum, to show that what the libel defendant said was not only false but that no reasonable person could believe it was true, the argument quoted above backfires: if there was evidentiary support for either reading of the facts (maybe he needed a three-week leave, maybe he didn't), the plaintiff's interpretation of the facts is *by definition* reasonable and thus sufficient to preclude an action for libel.

#### Conclusion.

Therefore, since the libel counterclaim (1) (a) was disposed of contractually by an agreed-upon judgment in favor of the plaintiff in September 13, 1999 (b) which is preclusive of an inconsistent judgment on the same

---

136. In her deposition, Debra Gorgens, Vice President and Human Resources Director of MSI, admitted that MSI knew that the trip to China was two days each way, that MSI had decided, before Silverstein left, that if he did go to China he would be fired for being absent for more than three days, and that they took his keys away *in preparation to fire him* (Debra Gorgens deposition, A.390-391 and A.392-395).

allegations; and (2) was subject to summary judgment for those reasons as well as on its substantive merits, the defendants being unable to show any defamatory falsehoods, much less publication in reckless or wilful disregard of the truth, and being unable to show any harm; the plaintiff asks that the defendants' libel counterclaim be dismissed with prejudice by the grant of summary judgment in his favor by this Court or on remand.

Respectfully submitted,

WILLIAM SILVERSTEIN,

By his attorney,

PHILIP R. OLENICK  
BBO No. 378605  
101 Tremont Street-Suite 801  
Boston, Massachusetts 02108  
(617) 356-5660



## Addendum 1

## Addendum 2

## Addendum 3

**RULE 68. OFFER OF JUDGMENT**

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment exclusive of interest from the date of offer finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served

## Addendum 5

within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.