

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

WILLIAM B. TUTTLE, JR., RAYMOND J. : VOLUME V
JOHNSON, GEORGE H. KUCHEN, JOHN E. :
STRAIT, RICHARD SIROIS, WILLIAM :
MENKINS and JAMES A. TAYLOR :
vs. :
DANIEL MARVIN, TRINE DAY, LLC : 2:04 CV 948

Trial in the above-captioned matter held on Monday,
January 30, 2007, commencing at 9:07 a.m., before the
Hon. David C. Norton, in the United States Courthouse,
Courtroom II, 81 Meeting St., Charleston, South Carolina.

APPEARANCES:

BOBBY G. DEAVER, ESQUIRE, 3760 Bald Mountain Rd.,
West Jefferson, NC, appeared for plaintiffs.

BENJAMIN W. DEAVER, ESQUIRE, 705 Princess St.,
Wilmington, NC, appeared for plaintiffs.

CHRIS OGIBA, ESQUIRE, 205 King St., Charleston,
SC, appeared for defendants.

BARRY A. BACHRACH, ESQUIRE, 311 Main St.,
Worcester, MA, appeared for defendants.

REPORTED BY DEBRA L. POTOCKI, RMR, RDR, CRR
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843/723-2208

1 THE COURT: I think over the weekend we let y'all
2 know that I granted the plaintiffs' motion on the counterclaim
3 with regard to the libel claim against Trine Day. And the
4 reason for that is Trine Day must prove that it is the persons
5 or entity with reference to whom the defamation was made.
6 It's not necessary that Trine Day have been named, but it is,
7 quote, "sufficient that there is a description of or reference
8 to him --" it, in this case, "-- by which he may be known."
9 Which is Nash versus Sharper, 229 South Carolina 451, 456.
10 And statements are actionable only if they refer to some
11 ascertainable person. And to be entitled to recover, the
12 plaintiffs must show that he is the person with reference to
13 whom the statement was made. The language used must be such
14 that persons reading or hearing it will, in the light of
15 surrounding circumstances, be able to understand that it
16 refers to the person complaining, and it must have been so
17 understood by at least one other person, which is Neely versus
18 Win Dixie Greenville, 178 South East 2d. 662 at 665.

19 The questionnaires in question, which is kind of
20 redundant, do not refer to Trine Day in any way by name,
21 description, position, there's just nothing in there that --
22 and the questionnaires I'm talking about is the plaintiffs'
23 questionnaires returned to the Special Forces Association,
24 which is the writing which the defendants identified that
25 they're complaining of. In contrast, the book specifically

1 identifies and refers to the plaintiffs. The questionnaires
2 also specifically identify Colonel Marvin. Trine's identity
3 may be inferred, but the above language that I just read
4 suggest that more is required. Persons reading the
5 questionnaires could not think the plaintiffs are complaining
6 at all about Trine Day.

7 The connection requires an extra inference, which is
8 inconsistent with your inference, requires more than the
9 Supreme Court has demanded.

10 Okay. So based on that, we've redone the verdict forms,
11 and now is there any complaints about the charge anymore?
12 Everybody has their old complaints. So anything new with
13 regard to the charge?

14 MR. COLLINS: Your Honor, from the plaintiff, the
15 jury verdict forms are fine, we don't have any problem with
16 the verdict forms. The only thing that I would ask, Your
17 Honor, is to consider -- and I may have just missed this
18 because I was tired -- but something in the jury charge about
19 expert witnesses. I don't know if there's a standard canned
20 charge for --

21 THE COURT: There hasn't been an expert witness. Oh,
22 yeah, I guess that's what's his name, the lawyer.

23 MR. COLLINS: And Major Dix.

24 THE COURT: Major Dix was not qualified as an expert.
25 That was -- he was qualified giving a lay opinion. Y'all used

1 the word expert, but I admitted his testimony under 701, so
2 he's not a expert.

3 MR. COLLINS: Fair enough. Then we have General
4 Overholt.

5 THE COURT: I've got a canned charge to that effect.

6 MR. OGIBA: I had sent an e-mail to Eli over the
7 weekend concerning -- and we have no problems with the jury
8 instructions.

9 THE COURT: No more problems with the jury
10 instructions.

11 MR. OGIBA: Right, no more problems with the jury
12 instructions. But as to the verdict forms for the
13 counterclaims, I think I detailed that in the e-mail, about
14 the second sentence in paragraphs four and five on the verdict
15 forms of the counterclaims. Specifically, in -- I guess our
16 argument is that the second sentence in those -- in paragraphs
17 four and five are redundant of the italicized instructions
18 after paragraph two. And at least as to paragraph four, we
19 believe that it could be prejudicial to the jury, because
20 there's separate standards for the actual malice for clear and
21 convincing, and then a preponderance of the evidence for the
22 special damages under paragraph four. And it's just two
23 separate standards of proof that are set forth in the same
24 paragraph. Although they're delineated, we just think that it
25 could be unduly confusing to a juror.

1 THE COURT: Okay. I talked about that in -- really
2 just mirrored the varied burdens of proof that the Supreme
3 Court has tagged us all with. And so I think at least in
4 paragraph four, it says, remember, you may only award special
5 damages if you find that clear and convincing evidence exists
6 that plaintiff had knowledge of the actual malice, had
7 knowledge of the statements regarding Marvin were false,
8 with reckless disregard to whether they're false or not. And
9 then the last part of it, prove special damages by a
10 preponderance of the evidence. So I think it delineates the
11 two -- the two burdens that you have, in really the same
12 issue.

13 MR. OGIBA: I agree, Your Honor, that it delineates
14 it. However, under paragraph two, and paragraph two deals
15 with the clear and convincing standard for actual malice. And
16 then the italicized instructions under paragraph two says, if
17 you answered yes to question two, then proceed to the
18 remaining questions. If you answered no to question two, then
19 skip the remaining questions and sign and date this verdict
20 form. And we believe that that sets forth clear instructions
21 to the jury that if the actual malice standard is not met, you
22 don't even get to paragraph four.

23 THE COURT: Well, what harm is it to your client to
24 remind them that they have clear and convincing evidence
25 standard twice?

1 MR. OGIBA: Well, Your Honor, I just -- I would just
2 submit to Your Honor, especially with paragraph four where
3 there are two -- and I understand it's delineated in paragraph
4 four, the two different standards apply to two different
5 elements. However, our position is that it could be unduly
6 confusing to a jury to see a clear convincing standard, and
7 then a preponderance of the evidence standard in the same
8 instruction.

9 THE COURT: In the 25 pages of instruction, that kind
10 of reminds me of, what was it, abandon hope all ye who enter
11 here? What's that, Dante's Inferno? Going through these
12 instructions, I ought to put that in front. So if they're not
13 so confused by the instructions, I just don't think that
14 this -- and we're trying to make it clear what they have to do
15 and tell them separate burdens, and so I think I'll deny your
16 motion to amend that, okay?

17 MR. OGIBA: Okay. I'm sorry. The only other thing
18 we brought up in our e-mail to Eli was if the plaintiffs would
19 agree to a six-to-two verdict, then the defendants agree to a
20 six to -- to be bound to a six-to-two verdict.

21 THE COURT: And I think as question two you brought
22 out, I think we're going to do a little amending of that. I
23 think when you go -- did defendant Daniel Marvin prove by
24 clear and convincing evidence that plaintiff Raymond L.
25 Johnson had actual knowledge, in other words -- or actual

1 malice, use the words actual malice in question two, in order
2 to clarify both of those two. Okay?

3 MR. OGIBA: Okay.

4 THE COURT: Just say actual malice, that he had
5 knowledge of statements, just using the word actual malice in
6 question two, okay?

7 MR. OGIBA: Instead of knowledge that the
8 statement --

9 THE COURT: No, I'm going to use all of it, I'm going
10 to use the term actual malice, because y'all are probably
11 going to be throwing that around somewhat, so I'm going to tie
12 that into the verdict form and the instructions, okay?

13 MR. OGIBA: Okay.

14 THE COURT: We're just going to throw the actual
15 malice in everything that requires actual malice. That same
16 formula, using those words in order --

17 MR. OGIBA: So that would include paragraphs four and
18 five?

19 THE COURT: Yeah, because that may help out.

20 (Brief interruption in proceedings.)

21 MR. COLLINS: Judge, I think we want to stay with the
22 unanimous verdict.

23 THE COURT: Okay. You can always change your mind
24 later on.

25 MR. COLLINS: And that's what we were pondering,

1 whether or not that would be possible.

2 THE COURT: Because the third time is not the charm
3 in this case.

4 MR. COLLINS: I concur. Judge, the only other thing
5 I've got, you asked -- asked you on Thursday, just to make
6 sure in my own head that we've got the right to open and to
7 close?

8 THE COURT: Yeah.

9 MR. COLLINS: I'm going to do most of the closing
10 argument. Mr. Deaver wants to participate in that, by doing
11 the second half, the rebuttal part of it. Is it -- do you
12 have a problem with that?

13 THE COURT: No.

14 MR. COLLINS: Mr. Ogiba doesn't.

15 MR. OGIBA: That's fine.

16 MR. COLLINS: I didn't want to surprise anybody when
17 he stood up.

18 THE COURT: That's no problem, that happens all the
19 time. Anything else?

20 MR. COLLINS: No, sir.

21 THE COURT: We'll start when the jury gets here. And
22 we'll add the expert witness paragraph. We'll keep the
23 unanimous thing on the back page. You don't need another copy
24 of these instructions?

25 MR. COLLINS: No, sir.

1 (Discussion held off the record.)

2 (A recess was held at this time.)

3 (Jury not present.)

4 THE COURT: Anything before we bring the jury in?

5 MR. COLLINS: Not from the plaintiff.

6 MR. OGIBA: No, Your Honor.

7 THE COURT: Mr. Collins, you're going to open,
8 Mr. Deaver is going to close?

9 MR. COLLINS: That's correct, sir.

10 THE COURT: Bring them in for me.

11 (Jury present.)

12 THE COURT: Ladies and gentlemen of the jury, welcome
13 back. We're all going to have to work today, like I said.
14 First the lawyers are going to work, because they're going to
15 do their closing arguments for you. Then I'm going to work,
16 because I'm going to read you that charge, and you each have a
17 copy of the charge, and the lawyers may refer to it during the
18 closing arguments or they may not, but I'll read the whole
19 thing to you and you'll be able to take it back with you when
20 you deliberate. Because the charge and the verdict form
21 sometimes have reference to each other. Okay? And then y'all
22 will work, because y'all have to decide this case, all right?
23 And so y'all have to do the hardest work.

24 What I'll do is during the course of the day is maybe --
25 depends on how everything breaks, but I'll get the deputies to

1 give you menus. I'll bring lunch -- they'll bring lunch in to
2 you so you can eat lunch while you deliberate. I'm not
3 cooking, I'm just buying. All right? So that will get you
4 more efficient so you can go through and eat at the same time
5 rather than leave and come back. And then whenever y'all
6 decide everything, we'll be done. All right?

7 So the plaintiff will open, and then the defendant will
8 make its closing argument, Mr. Ogiba will, and then the
9 plaintiffs will have the ability to reply to Mr. Ogiba's
10 argument. So give your attention to the lawyers as they make
11 their closing statements.

12 Mr. Collins, be glad to hear from you, sir.

13 MR. COLLINS: Thank you, Your Honor. Good morning.
14 First thing I want to do this morning is something that you'll
15 hear a lot of lawyers do, and it's something that every lawyer
16 should do, and that is to thank you for your attention and
17 your time. I know that this jury service this past week has
18 been an incredible imposition on all of you. It's been an
19 incredible imposition on all of us. But fortunately, we are a
20 nation of laws, and part of those laws is the creation of what
21 you see here today.

22 This is a forum where individual citizens such as our
23 clients and such as Colonel Marvin and Mr. Millegan, can bring
24 their disputes before the group of citizens just like
25 yourselves. We're all Americans in this courtroom. We don't

1 take our justice out and try to even things out, like other
2 people in the world. We bring it to a civilized conclusion.
3 And that means that I want you to know how much I appreciate
4 you being here, and I'm sure that Mr. Ogiba and his clients
5 appreciate you being here also.

6 When I was a little boy I was raised on a small dirt road
7 in North Charleston up by the paper mill. And my grandmother,
8 who raised me, worked for the Air Force as a civil servant.
9 And because of that, and because of the location of our house,
10 I routinely saw the sailors in and out of the naval base here
11 at Charleston. I always saw the airmen that worked on the Air
12 Force base. I saw the Army guys that worked at the Army depot
13 up in Goose Creek. And I was always fascinated by the guys in
14 military uniform.

15 My godfather was in the Navy, my stepfather was in the
16 Navy, both my uncles were in the Navy, they served in Vietnam,
17 served in World War II. And because of that, I was raised
18 with a great respect for the men who wear the uniform in our
19 military. And that respect has carried me on through my life.

20 I have great respect for my clients, win or lose this
21 case, because they have the guts to put the uniform on. I
22 also have great respect for Colonel Marvin, because he had the
23 guts to wear the uniform. And he and I may disagree about
24 what is in evidence in this case and why we're here, but I
25 can, in front of you, I can look at him and say thank you for

1 what you did for this country.

2 All that being said, it's very ironic that I'm here
3 arguing this case in front of you today. And the reason is
4 because this may be the last time I ever address a jury as a
5 lawyer. Eighteen months ago I retired from the active
6 practice of trial law to take a job with a business over in
7 Mt. Pleasant. So this is kind of my swan song. And nothing
8 could mean more to me than having the opportunity to represent
9 these fine gentlemen before you on this case.

10 All that being said, let's see if we can kind of get to
11 the heart of the matter. Mr. Ogiba and I had somewhat of an
12 understanding before these proceedings today, in that we would
13 try to keep them relatively short, let the judge do his thing
14 and tell you what the law is and put it in your hands. I
15 think you've heard enough. All I really want to do is just
16 kind of recap some of it for you.

17 We all know why we're here. It's this book called
18 Expendable Elite, which is authored by Colonel Marvin,
19 published by Mr. Millegan at Trine Day.

20 I literally believe that -- literally is a tough word --
21 but I literally believe that we could go through every page of
22 this book and find something that is not consistent with the
23 factual history. I don't care about all that. What I care
24 about are the major allegations included in this work, that
25 directly relate to our clients. And those are these:

1 First of all, Colonel Marvin is a quartermaster. There's
2 nothing wrong with that, it's an admirable part of military
3 service. But one theme that I want you to go through or
4 analyze from that perspective is, the things that he says he
5 did, with the benefit of the help of these guys, is that the
6 kind of job that you give a quartermaster?

7 Colonel Marvin was sent to An Phu for one reason and for
8 one reason only, and that was to shut down this base and turn
9 it over to the indigenous forces in Vietnam. There was
10 probably no better man anywhere in that district, to do this.
11 He was a highly trained quartermaster, he was proficient in
12 logistics at running camps, making sure they were supplied,
13 that kind of stuff.

14 And as I guess he reflected back on his service in the mid
15 80s and late 80s, all of a sudden something started to change.
16 And instead of becoming the great quartermaster and supply
17 officer that he was, he suddenly became the Walter Nitty of
18 Vietnam. I know some of you probably too young, as am I, but
19 I've heard a lot about it, to really know what I mean by that.
20 Walter Nitty was a character in a book and movie years and
21 years ago, that everything he saw in day-to-day life was blown
22 totally out of proportion. And I think that's what we've got
23 here.

24 Number one, Colonel Marvin says Colonel Tuttle, one of the
25 plaintiffs in this case, assigned him an independent

1 operation. There's no such thing. You heard Major Drew Dix
2 get on this witness stand, a recipient of the Congressional
3 Medal of Honor, our nation's highest award for bravery in
4 battle, who testified he had never heard of, in all of his
5 experience, in covert and clandestine warfare. It did not
6 exist. There is no such thing as an independent operation
7 where a man operates with his team, absent authority from some
8 commanding officer. It just doesn't exist.

9 The second thing I want to draw your attention to is the
10 alleged firing into Cambodia. All of the plaintiffs
11 testified, whether they had tapes or not, with the exception
12 of John Strait, that no such firing into Cambodia occurred.
13 In fact, the plaintiffs testified there wasn't any firing
14 going on at all. John Strait further testified when he got
15 off the helicopter or the boat, they were playing horseshoes.
16 Raymond Johnson testified that Colonel Marvin was a great Army
17 officer, but he was the worst Pinocle player he'd ever seen.
18 It didn't happen.

19 The third issue I want to address is the battle of Khanh
20 Bin. There's been some allegation on the part of the
21 defendants in this case that we have stated the battle of
22 Khanh Bin never happened. That's not true. We've always
23 maintained there was an action at Khanh Bin. We've seen the
24 pictures of the dead Viet Cong, we've seen the battle maps,
25 we've heard the testimony of Colonel Marvin. We freely admit

1 to you that yes, there was a battle; battle being a relative
2 term.

3 These men weren't involved in that, with the exception of
4 John Strait, who was several hundred meters away in an ambush
5 position. You've heard testimony from the witnesses that the
6 battle of Khanh Bin lasted for 24 hours. After Colonel Marvin
7 got ahold of the battle, it was a five-day battle where the
8 outcome was very much in question.

9 The next item that I want to bring to your attention is
10 this stuff about mutiny. In the military language there's no
11 worse crime than mutiny. What Colonel Marvin has stated in
12 his book, and it's been read ad nauseam in front of all of
13 y'all, is that he had been ordered by his superior officer,
14 even though he's on an independent operation, to gather up his
15 team and to leave An Phu. Colonel Marvin decides he didn't
16 want to do that. He wants to stay and protect the Hoa Hoas,
17 despite the direct order. Then, in typical Walter Nitty
18 fashion, he takes that one step further and says, Big John
19 stood up and said I'm staying you with, Dai-uy. And all the
20 rest of these guys, and the other 17 or 18 of them that were
21 there, say, we're behind you, we're not going anywhere.

22 Now, what does that say about these men? It says they're
23 on the verge of committing mutiny. Even though ordered to
24 abandon that base and turn it over to the Vietnamese regulars,
25 they said no, we're staying with you.

1 And then again in Walter Nitty fashion, what does Colonel
2 Marvin do? He sets up an ambush on the river to prevent
3 anybody from coming into his camp. Not just Viet Cong, not
4 just Vietnamese, but American soldiers also. And you heard
5 him testify under oath, if it meant killing an American
6 soldier to prevent them access to his camp, he was going to do
7 it. That in itself is bad enough, but the fact of the matter
8 is, I don't think it ever happened. And I don't think you do
9 either.

10 The last allegation of criminality in this book that I
11 want to talk about is this plot to assassinate Prince Sihanouk
12 of Cambodia. And again, this goes back to the issue of if
13 you're an American commander or you're a CIA agent or FBI
14 agent or whatever it is, and you've got to pick one guy in
15 Vietnam to do this mission, what are you looking for? I mean,
16 use your common sense. What are you looking for? Are you
17 looking for a trained sniper? Are you looking for a man like
18 Major Dix, with all this experience? No. In true Walter
19 Nitty fashion, you choose a quartermaster, a supply officer, a
20 logistics guy. That, by itself, makes no sense. I don't
21 understand it; maybe you do.

22 The judge is going to instruct you, when he's talking
23 about the law, about something called credibility of
24 witnesses. And what that basically means is that when a
25 witness sits in the witness stand, you get the opportunity to

1 watch that person testify. You get to decide whether or not
2 that person is telling the truth. You get to decide what
3 bias, what prejudice that person has, why is that person
4 saying that? What has he got to gain by all of this?

5 And when you go through that analysis and you look at the
6 people that testified in this trial, you'll find that they run
7 the full gamut from totally credible and believable, all the
8 way to the other side, where you probably don't believe a word
9 they say.

10 When you look at the plaintiffs, Taylor, Kuchen, these
11 people had no tapes. Okay? There was -- you couldn't put a
12 cassette in a box and listen to their testimony on tape. They
13 came to you and they testified that none of this happened.
14 All right? And then you've got the guys with the tapes.
15 You've got Dick Sirois, who is the medic, he gave a tape. He
16 didn't say the first thing about firing into Cambodia, about
17 killing Prince Sihanouk, about mutiny, about independent
18 operations, not one word. And yet that was the basis for
19 writing this book.

20 You had Mr. Johnson. What did he say? He was the guy
21 that said they were playing horseshoes and Pinocle. Johnson
22 did not say the first thing about firing into Cambodia, he did
23 not say the first thing about the assassination of Sihanouk,
24 he did not say the first thing about mutiny. Not one mention.

25 And then you've got Colonel Tuttle. Colonel Tuttle wasn't

1 here. Colonel Tuttle is an old retired Army officer who
2 wasn't capable of coming to trial, as he told us. We read his
3 deposition. And he did testify about the independent
4 operation. He testified it never happened, that it would be
5 ludicrous to even think about something like that. There was
6 no firing into Cambodia, there was no assassination of Prince
7 Sihanouk, there was no mutiny.

8 And then you've got Big John Strait. Everybody remembers
9 Big John Strait, all right? Couldn't hear. Everybody
10 remembers him. He got on the witness stand and he testified
11 none of this happened also. But he had a tape. And we heard
12 that tape. And I played that tape for y'all. Me, Ben Deaver
13 and Bobby Deaver. I didn't hide behind it and let Mr. Ogiba
14 play it and cross-examine Mr. Strait. I brought it to your
15 attention. We played it in our case, because I knew that that
16 was going to become an issue in this trial. And I did the
17 best I could to get Mr. Strait to explain to you why he made
18 that tape.

19 And in that tape he says, Colonel Marvin, I guess if you
20 say it happened, and you're writing a novel, I don't have any
21 reason to say anything. And the man got on the witness stand
22 and said, I had been drinking when I made this tape and it's
23 not right. He didn't try to lie about anything when he was on
24 that witness stand. He told you the truth. Now, you can hold
25 that against John Strait, if you want to. But everybody, all

1 of us in this room have been in that situation before, and
2 we've said things that we didn't think that should be said.
3 So I would ask you to consider the circumstances surrounding
4 how that tape was made and the representations that were made
5 to Mr. Strait by Colonel Marvin regarding publication of this
6 book. And I think you're going to find in your heart of
7 hearts that the testimony that he gave on this witness stand
8 is the truth.

9 Now, there were a couple other people that testified in
10 this trial. And all three of those people are beyond
11 reproach. The first is Major General Hugh Overholt. You
12 remember him, he was the Major General in the JAG Corps and he
13 was talking about military law. A man of impeccable
14 reputation. JAG of the entire Army. What that means, for
15 those of you who don't know, he's the head lawyer in the Army,
16 the number one cheese.

17 He testified that if you look at the allegations made
18 against these men in this book, there's several crimes that
19 they allegedly committed that were punishable by death. And
20 there's no statute of limitations on some of those. I suppose
21 if some smart JAG officer or U.S. Attorney wanted to prosecute
22 Colonel Marvin, or if he believed that these guys participated
23 in, add any of them, he can charge them now. I don't know
24 that that's going to ever happen, but the possibility exists.

25 The next guy you heard from that I think is a very

1 independent witness in this is Chuck Borg. Chuck Borg flew in
2 to testify in this case from Alaska. And his position in
3 Vietnam at this time, he was in charge of the Vietnamese army
4 in Chau Doc, in the Chau Doc district around An Phu.

5 If you'll remember, Colonel Marvin said in the book, and
6 when he testified, that a Vietnamese regiment was massing --
7 that was the exact term he used -- in Chau Doc, which is a
8 little ways from where his camp was, for the sole purpose of
9 coming to his camp at An Phu and taking him out.

10 Chuck Borg was the guy that was in charge of those units
11 in Chau Doc, and he testified it didn't happen. That if it
12 had happened, he'd have been the first one to know about it.
13 What axe does he have to grind, ladies and gentlemen? He's
14 not a plaintiff in this case. He didn't have to fly all the
15 way here from Alaska to give a half hour worth of testimony at
16 all. He has nothing to grind.

17 The last guy is Drew Dix. We've already talked about
18 Major Dix. But he testified, to the best of my memory, that
19 none of this could have happened the way Colonel Marvin said
20 it did.

21 And eventually, under rather intense drilling by my
22 colleague, Mr. Ogiba, he did spit out that maybe he knew a
23 little bit more about covert warfare than he wanted to let on.
24 I'm not -- I don't want to put words in his mouth, you heard
25 his testimony. Maybe he does know a little bit more about

1 stuff he doesn't want to talk about. I can understand that.
2 But again, what you have is an independent witness. You have
3 somebody that's not a plaintiff, you have somebody that's not
4 a defendant in this case. That goes back to the issue of
5 credibility. Why was Major Dix here? He didn't have to come
6 here. Same with General Overholt.

7 Now, on the other side of the coin you have the evidence
8 that the defendants presented. Understand that they're
9 defendants in this case, they're being sued. Factor that into
10 your credibility; we do. They have a reason for testifying
11 the way they did. Of course they do.

12 The publisher in this case, Trine Day, represented today
13 and throughout the trial by Mr. Millegan, testified that
14 Colonel Marvin provided him with copious notes, I believe is
15 the term he used, reams of paper, reports, newspapers, tapes,
16 all this stuff to support his story. But what struck me as
17 interesting about that whole thing, and you heard this
18 exchange on probably more than one occasion, he was provided
19 these three audio tapes where you heard them on the tapes,
20 this is John Strait or this is Dick Sirois, this is Raymond
21 Johnson. Not one time did it ever occur to him to pick up the
22 phone and make a phone call. It's not that hard to do. We do
23 it all every day. And I asked him, I said, Mr. Millegan, why
24 didn't you call John Strait? The response was, I didn't think
25 that I needed to do that. And you remember I asked him,

1 because Mr. Ogiba objected to this question, do you think that
2 it was reasonable for you not to do that? Would a reasonable
3 person have picked up the phone and called and said is this
4 your tape, do you stand by this? To me the answer is a
5 resounding yes. It would not have taken 15 minutes out of his
6 day to call these three individuals, he would have had all of
7 the verification he needed, and he would have been able to sit
8 here on this witness stand in Charleston, South Carolina, last
9 week, and say, you know what, Mr. Collins, I did call them, I
10 did call Raymond Johnson, and he stood by everything he said
11 in his tape. It would just make sense to me.

12 Now, when the judge instructs you on the law, he's going
13 to tell you something about something that we lawyers refer to
14 as the burden of proof. And everybody has seen law shows on
15 television, and you can go back all the way to Perry Mason,
16 and everybody has third phrase beyond a shadow of a doubt.
17 Well, that's a criminal trial. We're in a civil trial today,
18 and that's not our burden of proof. We don't have to prove
19 Colonel Marvin guilty, we don't have to prove that what he
20 said was defamatory beyond a shadow of a doubt. Our burden is
21 much less than that.

22 And I think in all the years I practiced law, the best way
23 to explain that to a jury is something that Mr. Ogiba brought
24 up in his opening -- and I'm kind of upset with him a little
25 bit by that, because he stole part of my closing argument --

1 but if you visualize the old scales of justice, everybody has
2 seen those in pharmacies. I'm sure they don't use -- put
3 justice on their scales, but everybody has seen them, you know
4 what I'm talking about. We use the term called preponderance
5 of the evidence. And all that really means in lay terms is
6 that we have to tip the scale just a little bit to our favor,
7 and we win. Just a little bit, just a hair. Doesn't have to
8 be this, it's just got to be this.

9 What do you put on your side of the scale? You put your
10 testimony on, put your documents, everything that is
11 considered to be evidence in this case is put on those scales.
12 And when you look at what has been put on our side of the
13 scale, it far outweighs what's on the defendants' side of
14 their scale.

15 There's not been one independent witness come in this
16 courtroom and sit there and testify that everything or
17 anything that this man says is right. Not one. You ask
18 yourself, there's 17 other members of this A Team in An Phu
19 that served with all these guys. Where are they? I can tell
20 you where they're not. They're not here. And they haven't
21 been here all week.

22 All right. The last thing I want to talk to you about is
23 something I call the cream of this case and the damages that
24 it produces. When bobby Deaver and Ben Deaver and I were
25 talking about closing in this case, I asked them what they

1 thought the theme of this case was. I think every case has a
2 theme, every case is about something. And to me, this case is
3 really about two things. First of all, it's about truth.
4 That's an easy one. We all know that. We all know y'all were
5 here to determine whether or not this is true. That's your
6 job.

7 The other theme in this case is the abuse of a friendship.
8 Now, that sounds kind of silly, I guess, sometimes, but back
9 when all this stuff started, when Colonel Marvin went into his
10 Walter Nitty role and decided that he was going to write a
11 book, he went to his men, or a portion of them, and he asked
12 them, look at this, I'm writing a novel, please help me with
13 this. And he took the materials that they gave him and he
14 produced this. He didn't tell them that there were going to
15 be accusations of mutiny in this book. He didn't tell them
16 that there were going to be accusations of some plot to kill a
17 foreign leader. He didn't tell them that there were going to
18 be accusations about firing into Cambodia. He didn't tell
19 them there were going to be accusations about him running an
20 independent operation. He didn't do any of that. Instead,
21 what he did was he took their trust and he abused it. And
22 more so than telling a lie about somebody, that's a bad thing.

23 Now, all of this stuff about people writing books that
24 aren't true and telling the world they're true, everybody's
25 heard about the Oprah story, all right, except for me, I

1 hadn't heard about it until Thursday when my wife told me
2 about it, because I'd been involved in this. This is an issue
3 that is bigger than Charleston County, South Carolina.
4 Apparently it appears to be something that is widespread.
5 Now, I'm going to tell you, I'm not hear to try Oprah's case,
6 okay? I don't know enough of the facts of all that to really
7 even comment on it intelligently. All I can tell you is that
8 it seems funny to me that the problem has arisen at this time.

9 In closing, I want to speak just for a minute about the
10 damages in this case, and then I'll sit down. And this is
11 going to sound funny, coming from a lawyer, I know, this case
12 is not about money. We're seeking damages, naturally, for the
13 damage to these guys' reputation, for their humiliation, for
14 their embarrassment, and all the judge is going to read to
15 you. But you've not heard a man sit on this witness stand and
16 say I want a million dollars because of what he did. That's
17 not what this case is about. This case may not produce a
18 dollar for any of these people. That's not why they're here.
19 They're here because they want their reputation back. They
20 want somebody to say, you know what, you're right, Colonel
21 Marvin shouldn't have done this.

22 George Kuchen said it best when he sat on the witness
23 stand and he said, this is not about money to me, this is
24 about clearing my name and being able to look my friends in
25 the eye and say, see, I told you it didn't happen.

1 I thank you again for your attention. Mr. Ogiba is going
2 to address you now, and then Mr. Deaver will finalize our
3 arguments. It's been a pleasure being in front of you, you'll
4 be my last jury, I guess, and when you're back there
5 deliberating, please take your time and go through all the
6 evidence and use your recollection as to what people said and
7 who's credible and who's not. And when you do that, I'm
8 pretty confident you're going to come back and say yes, Mr.
9 Collins, your client is right.

10 THE COURT: Thank you, Mr. Collins. Mr. Ogiba?

11 MR. OGIBA: Thank you, Your Honor.

12 I guess I'd just like to start out by saying, you know,
13 echoing what Mr. Collins said. The work that you've done in
14 this trial is yeoman's work. You've had to sit through a lot
15 of testimony, had to review a lot of documentation, it's been
16 hard work. But hopefully, I hope that each one of you has
17 found it worthwhile, I hope each one of you has found
18 something beneficial out of this experience. And I would join
19 in Mr. Collins in thanking you for your service on this jury.

20 And I guess at this point I'd also like to indicate that
21 Mr. Collins, he's -- you know, I've dealt with him in other
22 cases, he's a fine lawyer, and the Charleston bar is going to
23 be the worse for not having him in it anymore.

24 MR. COLLINS: Thank you.

25 MR. OGIBA: So it's too bad that this case is going

1 to be his send off.

2 Mr. Collins also indicated this has been a long trial, I
3 mean, this is a week today that we've been sitting here and
4 you've been sitting here. I've got a five-month-old baby boy,
5 and he's gotten three teeth since this trial started. So I
6 mean, it's definitely gone for quite a long time. So I'm
7 going to try to keep my comments as brief as possible.

8 Mr. Collins kind of glazed over this a little bit, but the
9 plaintiffs have asserted defamation claims against both Trine
10 Day and Colonel Marvin. Colonel Marvin has a defamation
11 counterclaim against the plaintiffs.

12 Now, Judge Norton is going to instruct you on what the
13 elements of defamation are. And I'm not going to go through
14 all of those elements for you. But there are three that I'd
15 like to -- there are three issues with defamation that I'd
16 like to address with you today.

17 Number one, the requirement that the plaintiffs must
18 establish that the stories in the book are false. They have
19 to prove that. They have to prove that the allegedly
20 defamatory statements are false. That's number one.

21 Number two, I want to talk to you about the defamatory
22 requirement. The plaintiffs must prove that the statements in
23 the book that they claim are false, were also defamatory. So
24 that's a second thing I want to talk to you about.

25 And the third thing is, despite what Mr. Collins says that

1 this isn't about money, this is about money. This is a civil
2 trial. Plaintiffs have asked in their complaint, they've
3 asked for nothing except for money. This is about money.
4 They're asking you to award them damages. And so I want to
5 talk -- the last -- the third thing I want to talk to you
6 about is damages, and the plaintiffs' requirement for proving
7 damages.

8 So first, let's talk about the falsity requirement. And
9 again, we'll go back to the whole scales analogy. As
10 Mr. Collins indicated, the scale must tip slightly in the
11 plaintiffs' favor on the issue of falsity for them to recover
12 in this case.

13 Now, what evidence do we have on both sides? Mr. Collins
14 kind of glazed over this a little bit, but what do we have on
15 the -- let's start with the defendants' side. Let's start
16 with Colonel Marvin and Trine Day. What have we presented to
17 you? We've presented the testimony of Colonel Marvin, who was
18 there in An Phu during the time at issue here. And you heard
19 his testimony. He never backed off anything, any relevant
20 statement in this book. I mean, you heard the cross-
21 examination, I mean, they were asking him questions about,
22 well, was Colonel Maggie actually a colonel? Was, you know,
23 when did the Korean War end? And, you know, why didn't you
24 include this story, the story about you getting drunk in the
25 book. I mean, these are completely irrelevant issues to this

1 case.

2 As Mr. Collins indicated, there are specific allegations
3 in this case about defamatory statements that these plaintiffs
4 claim have been made against them, but as you heard from the
5 cross-examination, Colonel Marvin didn't back off any of
6 those. They couldn't -- as hard as Mr. Deaver tried, he could
7 not get Colonel Marvin to budge on his story. Colonel Marvin
8 has not budged on the story since 1966. You cannot find one
9 piece of evidence that suggests that his story has changed at
10 all.

11 So you've heard from Colonel Marvin on the stand, you've
12 heard from Chris Millegan on the stand. Granted, he wasn't
13 there, but he, like you, had to sit down and go through all of
14 this evidence, go through all of the tapes and whatnot, and he
15 had to make a decision as to whether he thought that the book
16 was believable. And you heard his testimony.

17 Now, Mr. Collins seems to have forgotten that we also
18 produced another witness. Granted, he wasn't here in the
19 courtroom, but we read his deposition into the record. And
20 that was Tony Trung. Tony Trung was an interpreter in An Phu
21 at the time that is set in this book. He didn't have an axe
22 to grind, he had no dog in the fight. He gave his deposition
23 of his own free will, nobody was holding his arm behind his
24 back making him testify as he did in his deposition. And you
25 heard his deposition testimony. Tony Trung, who is also a 20-

1 year -- who served on the San Diego police department for 20
2 years, you heard him testify that he recalls firing into
3 Cambodia, and he recalls other people in the camp firing into
4 Cambodia.

5 You heard Tony Trung testify that he recalls the battle of
6 Khanh Bin and he recalls some of the plaintiffs being involved
7 in the battle at Khanh Bin.

8 Now, Mr. Collins tried to present it that the plaintiffs
9 never disputed that the battle of Khanh Bin happened. You
10 heard these plaintiff testify. To a man, they were testifying
11 that the An Phu district was a resort and that it was R and R
12 and -- I'm sorry, but if that's a resort, I don't want to go
13 to that resort. I mean, there's -- if they admit that there
14 was firing at Khanh Bin, it wasn't a resort.

15 So anyway, you've heard Tony Trung. Again, we've got
16 Colonel Marvin, you've got Chris Millegan, you have Tony Trung
17 on behalf of Colonel Marvin and Trine Day.

18 Now, what else do we have besides testimony on our side of
19 the scale. We've got documents. As well as Mr. Collins gave
20 his argument before, did he mention any documents that they
21 have supporting their side of the story? The documents that
22 we presented to you include monthly operational summaries that
23 were prepared at the time that -- in 1966. Those monthly
24 operational summaries set forth the extensive battles, the
25 extensive casualties that were suffered in the An Phu

1 district. Certainly undermines the plaintiffs' contention
2 that it was a resort.

3 We also presented newspaper articles from America and
4 Vietnam that were written at the time of the -- that was set
5 forth in the book. Again, supporting Colonel Marvin's side of
6 the story. We presented questionnaires that the plaintiffs
7 provided in -- when Colonel Marvin was writing this book.
8 Colonel Marvin put those questionnaires into his book almost
9 verbatim, according to the way the plaintiffs wrote them.
10 Again, supporting the colonel's side of the story.

11 We introduced photographs, they were in the back of the
12 book, photographs that depicted some pretty gruesome scenes of
13 carnage in the An Phu district, again supporting Colonel
14 Marvin's side of the story.

15 We presented General Dang's letter. Now, General Dang,
16 contrary to what Mr. Collins indicated about Mr. Borg,
17 Mr. Borg was not the head of all the ARVN regiments in the
18 district. As Mr. Borg testified on the stand, General Dang
19 was his boss' boss' boss. I mean, General Dang was way up
20 here, he was the commander of all the ARVN regiments in that
21 district.

22 And what did General Dang indicate in his letter? General
23 Dang indicated that he supported Colonel Marvin's story that
24 the ARVN regiment had come down, that General Dang had to
25 intervene to prevent any bloodshed. General Dang's letter

1 represents that.

2 We also presented to you Tony Trung's letter. Now, Tony
3 Trung's deposition testimony and his letter basically say the
4 same thing, that there was firing into Cambodia and that there
5 was a battle at Khanh Bin and that there was -- that there
6 were fire fights in the An Phu district.

7 We also presented as evidence General Westmoreland's book.
8 As you heard General Overholt testify on the stand, General
9 Westmoreland was the big cheese in Vietnam. I mean, he was
10 the commander of all forces in Vietnam at the time. And
11 according to General Westmoreland in his book, he said that he
12 had authority to go into Cambodia under certain circumstances,
13 as early as 1966, which is the time that we're talking about
14 in this book.

15 Now, the plaintiffs have made a lot of hay about, well,
16 there were these general orders which prevented anybody from
17 firing into or invading Cambodia. Where are they? We've had
18 years to produce these general orders. We haven't seen any
19 documents indicating these general orders. All you've got
20 before you is General Westmoreland, the big cheese in Vietnam,
21 indicating that he had authority to go into Cambodia in 1966
22 under certain circumstances.

23 Now, the plaintiffs made some hay about the fact that
24 well, well, if he had authority, that doesn't mean that people
25 under him had authority. What does that mean? General

1 Westmoreland was going to, you know, go up to the Cambodian
2 line and fire in there himself? Of course not. It meant that
3 he had authority to give people under him authority to fire
4 into and to go into Vietnam under certain circumstances.

5 So this is a group of documents that the defendants,
6 Colonel Marvin and Trine Day, have on their side of the scale.
7 No documents on the plaintiff's side of the scale.

8 Now, and the last thing that we add to our side of the
9 scale are the tapes, the plaintiffs' tapes. I mean, let's
10 start with Mr. Strait. And I called him mister, I'm going to
11 call the plaintiffs mister, I don't mean any disrespect by it,
12 I just can't remember exactly what their ranks were when they
13 retired. So I don't mean any disrespect. But Mr. Strait
14 indicates several things on his tapes. He confirmed the CIA's
15 story. He confirmed that there was a man and a woman who came
16 into camp, that he thought that it was a flimsy cover that she
17 was a newspaper reporter. And that if Colonel Marvin wanted
18 him, he would back up his story. Now, why would you need to
19 back up a story for a novel? I don't know. I mean, clearly
20 it indicated on the tapes that he knew that this was a work of
21 nonfiction.

22 So what else did Mr. Strait indicate? He said all hell
23 was breaking loose in Khanh Bin. Again, undermining the
24 plaintiffs' theory or statements that it was a resort area, or
25 he went there for R and R.

1 Mr. Strait also indicated that he confirmed shooting into
2 Cambodia at Phu Hiep. He indicated that on his tapes. He
3 indicated, quote, "I'm aware of the ARVN regiment coming
4 down." Again, something that undermines the plaintiffs' claim
5 that the ARVN regiment was a fantasy concocted by Colonel
6 Marvin.

7 And lastly, Mr. Strait indicated on his tape that Colonel
8 Marvin saved his life in Vietnam. He tried to back away from
9 it on the stand, he tried to indicate that it wasn't as big as
10 he made it out to be on the tapes. But on the tape he
11 indicated that a mortar landed right near him, Colonel Marvin
12 pulled him down and saved his life. Why he would back off
13 that, I don't know.

14 Now, Mr. Collins mentioned one of the excuses that the
15 plaintiffs have set forth for Mr. Strait's tape. He said that
16 Mr. Strait was drunk at the time he made these tapes. You
17 heard Mr. Strait testify. He said that he was not drinking at
18 the time he was making the tapes. He said that he had been at
19 the American Legion before he made these tapes and, you know,
20 and had had some to drink, but he never indicated -- he
21 specifically stated he wasn't drinking when he made these
22 tapes. Did he sound drunk on these tapes? Or did it sound
23 like somebody who was recounting actual events that took place
24 in Vietnam? That's for you to decide.

25 So that's the first excuse they came up with. The second

1 excuse is that Mr. Strait was -- was that Mr. Strait was
2 coming up with fantasies for a fiction story, that he was
3 concocting these fantasies out of mid air for a book that he
4 thought was fiction. Now, you've heard evidence that the
5 book, the manuscript that he was presented with by Colonel
6 Marvin indicated clearly that it was a nonfiction story, that
7 it was a true story.

8 But in addition, on the tape he indicates that quote, "My
9 first impression of An Phu." In addition, he says, quote, "I
10 remember," several times during his tape. Am I not the only
11 one that finds it a coincidence that these fantasies that he
12 concocted out of thin air also happen to exactly jive with the
13 stories that Colonel Marvin had in his manuscript at the time?
14 I mean, coming up with these fantasies just doesn't -- anyway,
15 that's their -- that's the second excuse that they came up
16 with.

17 The third one, by my count, was that he was just telling
18 war stories. You know how, you know, old soldiers, they get
19 together and they kind of tell war stories and they kind of
20 make bigger of it than it actually was. My question to you
21 is, why would anyone make up a story that they now come into
22 court saying was defamatory? I don't know about you, but when
23 I'm telling stories, you know, I played college basketball in
24 a division three school, but when I tell stories about my
25 experience playing basketball, I don't talk about, oh, yeah,

1 the time I, you know, intentionally fouled a starting point
2 guard on the other team and put him out of the game. I don't
3 talk about that. I talk about the important, or the things
4 that make me look bigger. You know, the three-pointers I hit,
5 or the time I almost dunked. You know, those are the stories
6 that you tell. You don't tell stories that make you look
7 worse.

8 So those are the three excuses that I counted. There may
9 have been more, I'm not sure, those are the three that I
10 counted.

11 So anyway, you've got the tape of Mr. Strait. You've got
12 the tape of Mr. Johnson who, on his tape says, number one,
13 that he went into Cambodia. He doesn't say he fired into
14 Cambodia, but he says he went into Cambodia and then came back
15 and he didn't know why. He said it several times on the tape.
16 He also says that he remembers fire fights in the An Phu
17 district. Again, contradicting what the plaintiffs have
18 indicated on the stand, that this was a resort or an R and R
19 area. And Mr. Johnson compliments, almost ad nauseam, Colonel
20 Marvin and his service in Vietnam. Calls him a ten out of a
21 ten as a CO in Vietnam. And finally Mr. Johnson, at the end
22 of his testimony, via cross-examination, stated, quote, "I
23 said it, it's got to be true." So I didn't see any excuses
24 that they came up for Mr. Johnson's testimony. Or on the
25 tape.

1 Mr. Sirois also provided a tape. In it he says that he
2 saw a lot of action at the outposts, and that he confirmed
3 operations around the Cambodian border at Phu Hiep. In
4 addition, he says that he heard other soldiers report lots of
5 action at the outposts. Again, this confirms the story told
6 by Colonel Marvin, and contradicts what the plaintiffs have
7 indicated in their testimony.

8 He explains these stories away by saying that these were
9 from the -- the incidents on the tape are from another area
10 where he served, in Bac Chu. However, on the tape he says,
11 quote, "those are the things I remember from An Phu." So it
12 just doesn't make sense that he would say that, and at the
13 same time say that he was recalling it from another area
14 that he served.

15 So where do we stand on the issue of the plaintiffs'
16 proving falsity? We have Colonel Marvin's testimony, Tony
17 Trung's testimony, document after document after document, and
18 photograph after photograph supporting the story. We have the
19 tapes provided by the three plaintiffs, none of whom are here
20 today.

21 We have all of this evidence in support of Colonel
22 Marvin's story. What evidence do they have on their side?
23 What testimony did they put forward? They put forward their
24 own testimony, their own bias testimony, which was
25 contradicted at times. They put forth the testimony of Drew

1 Dix, who wasn't even there. He wasn't an eyewitness; he got
2 to Vietnam in 1967. He was never in camp An Phu. They put up
3 the testimony of Mr. Borg. Again, he was never in An Phu.
4 He -- and despite Mr. Collins putting him up as the big boss
5 man, he wasn't the big boss man; that was General Dang. So in
6 addition, Mr. Borg indicated that, you know, testified about
7 his specific regiment. In the book there's no allegation
8 about a specific ARVN regiment coming down, just says an ARVN
9 regiment. So it may or may not have been Mr. Borg's regiment,
10 we just don't know.

11 So that's what they've got on their side of the scale.
12 We've got all of the testimony, all of the documentation on
13 our side, all of the tapes on our side. So which way does
14 that scale balance in your minds?

15 So that's the first issue, that they have to prove
16 falsity. Second, they have to prove that the statements were
17 defamatory, that these allegedly false statements in the book
18 were defamatory toward these plaintiffs. What evidence have
19 they presented that they were defamatory?

20 They put up General Overholt, who testified that -- and
21 you heard him when I was asking him questions during his
22 cross-examination, he testified that it depends on the
23 context. In his own oral history he talks about a -- about an
24 incident where a captain, I believe, directly violated an
25 order that was issued by a general. And he put it that -- he

1 wrote it out like he was a hero. There are instances -- so it
2 was clear from General Overholt's testimony that there are
3 certain instances of violating orders that are heroic, and
4 then there are some that are criminal.

5 We don't know how the JAG would handle the particular
6 allegations in this case, but you can decide for yourself. Is
7 violating -- violating an order in order to save the lives of
8 thousands of troops that you have trained with for months, is
9 that a moral decision to violate that order? Is it even
10 reasonable -- is it reasonable to believe that that order is
11 illegal, if it was going to lead to the deaths of all these
12 Hoa Hoas? And as General Overholt testified, you know, it's
13 up to the person at the time to decide whether or not to --
14 whether or not that order was legal or illegal, and then you
15 sort it out later.

16 And despite Mr. Collins' testimony -- or Mr. Collins'
17 argument about General Overholt, and about the fact that these
18 plaintiffs could be prosecuted for the crimes that are set
19 forth in this book, you heard General Overholt. He said that
20 there's no practical way that these plaintiffs were going to
21 be prosecuted for those crimes.

22 So that's the evidence that they put up that it was
23 defamatory. Now, how did they testify that it was defamatory?
24 And by the way, the definition of defamatory, and Judge Norton
25 will read these instructions to you, but a defamatory

1 statement is a communication -- I'm sorry -- a communication
2 is defamatory if it tends to harm the reputation of another as
3 to lower him in the estimation of the community or to deter
4 third persons from associating or dealing with him. To
5 determine whether the words were defamatory, you should ask
6 yourselves whether, taken as a whole, the words tend to
7 diminish the respectability of the plaintiff and to expose him
8 to disgrace and ill repute.

9 What did the plaintiffs testify? The plaintiffs, to a
10 man, testified that the statements in the book set them out as
11 heroes. Mr. Taylor said that the book portrayed him as a,
12 quote, "hero." Mr. Kuchen stated that the statements put him
13 on a pedestal, and that his family told him how great the book
14 was. Mr. Johnson also testified that he was made out to be a
15 hero. Mr. Tuttle and Mr. Sirois, they didn't say one way or
16 the other.

17 So does that make sense, that if these statements are so
18 bad and they put them in such a bad light, why are people
19 coming up and telling them that they're heroes? If they're
20 directly accused of mutiny, and it was a completely
21 unjustified violation of an order, then why would they be made
22 out to be heroes? Why would people come up to them and call
23 them heroes?

24 Clearly, judging by the plaintiffs' testimony themselves,
25 the statements in the book could not be considered to diminish

1 their respectability in their communities. If anything, even
2 assuming, which -- even if these statements were false, all
3 they did were artificially raise their respectability in their
4 communities. It just doesn't meet the standard of defamatory
5 content under the elements that the judge will explain to you
6 later.

7 Finally, I want to talk to you about damages. What
8 damages have the plaintiffs established? Mr. Collins, again,
9 testified it isn't about money, but it is about money. What
10 damages have they established as a result of the content of
11 this book? I mean, how do you put a price on people coming up
12 to you and calling you a hero? I mean, the plaintiffs simply
13 have not established any damages as a result of this book and
14 the allegations in this book.

15 Now, Mr. Collins also talked about how you assess the
16 credibility of witnesses. Again, let me read to you from the
17 instructions that Judge Norton will give you later today. And
18 two in particular I want to read for you. Under how he asks
19 you to guide your decision on how to assess the credibility of
20 witnesses. First, was the witness able to see or hear or know
21 the things about which that witness testified? Was Mr. Borg
22 there? Was Mr. Dix there? They weren't there. They couldn't
23 see or hear or know what happened in camp An Phu.

24 Another issue concerning credibility of witnesses is was
25 the witness' testimony contradicted by what that witness has

1 said or done at another time? Three of these plaintiffs put
2 forth tapes that directly contradict what they said in their
3 testimony, and directly contradict what these other plaintiffs
4 testified to in court here over the last week.

5 So according to the judge's guidance on credibility, how
6 you are to assess credibility of witnesses, they undermine the
7 plaintiffs' credibility and undermine the credibility of the
8 plaintiffs' case in general.

9 So now dealing with the plaintiffs' defamation case you've
10 got the falsity, you've got the defamatory content and you've
11 got damages, all of which the plaintiffs can't prove.

12 Now, as I mentioned earlier, there is a counterclaim, and
13 I'm going to touch on this really quickly. But actually
14 before I touch on the counterclaim, I want to talk about the
15 claims against Mr. Millegan, because he didn't write this
16 book, he wasn't there. In a lot of ways he sits in the
17 position that you sit in. All he had to look at was the
18 documentation that you reviewed, the tapes that these
19 plaintiffs provided. And Mr. Collins made a lot of noise
20 about the fact that Mr. Millegan never called these plaintiffs
21 to confirm that these tapes were theirs. It's a distinction
22 without meaning. They were the plaintiffs' tapes. The
23 plaintiffs confirmed that they were their tapes. What were
24 the plaintiffs going to tell Mr. Millegan, that they weren't
25 their tapes? I mean, it's a rhetorical technique that's

1 trying to pull the wool over your eyes. They were the
2 plaintiffs' tapes, Mr. Millegan reviewed those tapes, he
3 reviewed the documents, he reviewed Colonel Marvin's notes.

4 You heard Mr. Millegan testify that he did extensive
5 research on his own to investigate the incidents in the book.
6 And he -- and through his research and through his review of
7 the documents, all he found was documentation and evidence
8 supporting the allegations in the book, and nothing on the
9 other side of the ledger.

10 Now, the Special Forces Association, on behalf of the
11 plaintiffs, sent a letter to Mr. Millegan. In it, they said
12 that they had documentation that supported the fact that the
13 book was untrue. Well, they never produced it to
14 Mr. Millegan, and they never produced it at trial here over
15 the last week. There's no documentation supporting the
16 plaintiffs' story.

17 So what was Mr. Millegan to do? All he had was evidence
18 supporting the book. He had no evidence going against it. A
19 reasonable person in Mr. Millegan's position would have
20 published that book.

21 Now, finally, going into our defamation or Colonel
22 Marvin's defamation claims against the plaintiffs. Again,
23 it's the same -- they are the same elements going back. The
24 plaintiffs each, and this is beyond dispute, and you'll see in
25 Defendants' Exhibits 22, 23, 24, 25, 26 and 27, they all

1 provided written questionnaires to the Special Forces
2 Association, which were then distilled down and put in The
3 Drop, in which basically it coincided with what the plaintiffs
4 testified, that they claim that the book is full of lies and
5 100 percent lies. And I'm not going to say the words, but it
6 was BS. I mean, these plaintiffs made all these allegations
7 on the stand, they made these allegations in these
8 questionnaires. These writings constituted libel. Because,
9 No. 1, they were false. I mean, even if you believe the
10 plaintiffs' story, there are elements in this book that are
11 true, that they can't dispute are true. So it's not a
12 100 percent lies. They're defamatory because they serve to
13 harm the reputation of Colonel Marvin.

14 Colonel Marvin is retired from the service. All -- he's
15 an author. He wrote this book. That's his job. And what
16 does it do when you say that the book is full of lies? It
17 harms your reputation as an author, because it makes you --
18 because it sets you forth as a liar. And without -- so that
19 people can't trust you.

20 Now, another element of the defamation claim is whether
21 the plaintiffs were at fault. The fault standard that -- as
22 Judge Norton will explain to you -- the fault standard that
23 Colonel Marvin must prove is whether the plaintiffs acted with
24 actual malice. Now, what actual malice means is whether they
25 had knowledge that their statements were untrue. Clearly they

1 knew their statements were untrue. They were there, they know
2 that the book isn't a 100 percent lies, they know that the
3 events that are depicted in the book actually did happen. You
4 can hear from the tapes, they knew that these events happened,
5 and still they sent these written questionnaires claiming that
6 the book was full of lies.

7 And finally, damages. What damages has Colonel Marvin
8 proved on this counterclaim? As you heard in his testimony,
9 he has suffered extensive financial impact as a result of the
10 plaintiffs' libel, in attorneys' fees, in failure -- in lack
11 of sales from the book, lack of royalties, he's suffered
12 extensively as a result, financially. He's suffered
13 emotionally. His family relations have suffered as a result
14 of the plaintiffs' libeling him in their questionnaires. So
15 Colonel Marvin has established extensive damages as a result
16 of the libel.

17 Now, before I end, I just want to go over a couple of
18 other things that Mr. Collins indicated in his closing
19 statement.

20 Now, he mentioned, and I just want to point out a couple
21 of instances where he kind of contradicted himself a little
22 bit. He indicated in his closing that with the exception of
23 Mr. Strait, all of the plaintiffs testified that they had not
24 fired their weapon, that there was -- that there was no firing
25 at all. However, he also indicated that there was action at

1 Khanh Bin. And you've heard other evidence in this case from
2 Tony Trung and from -- and from the documentation, that at
3 least one of these plaintiffs was involved in that battle.
4 Mr. Taylor. Mr. Strait indicated that he was kind of on the
5 periphery of that battle. So these -- so the fact that they
6 claim that they never fired their weapons, is contradicted by
7 the fact that a couple of them were there at the battle of
8 Khanh Bin.

9 Now, Mr. Collins also indicated in his closing that he
10 thinks that the alleged mutiny never happened, that the ARVN
11 regiment never came down. Well, that may be the best evidence
12 that they've presented on this point. But Mr. Collins, what
13 he thinks, is not evidence in this case. Did he point to any
14 evidence to you that contradicts that that ARVN regiment came
15 down, except for Mr. Borg's testimony? He didn't. What he
16 thinks is irrelevant in this case.

17 Now, he also indicated, Mr. Collins also indicated that
18 Mr. Dix was an independent witness, an unbiased witness.
19 Well, you heard him on the stand, he's a member of the Special
20 Forces Association. The Special Forces Association has funded
21 this lawsuit on behalf of the plaintiffs. He does -- he's a
22 member of the association that is paying the way for these
23 plaintiffs. Of course he's biased. He's a member of the
24 association.

25 Aside from the other problems with Mr. Dix's testimony,

1 that he wasn't there in 1965 and 1966, he only got to Vietnam
2 in 1967. And the fact that he testified, alternatively, that
3 he didn't know about covert warfare, and then he said that he
4 did, and he couldn't give us examples because he would then
5 have to kill us.

6 And so Mr. Dix being an unbiased witness is contradicted
7 by the fact that he is a member of the Special Forces
8 Association. Mr. Collins also represented that we had no
9 unbiased witnesses on our side of things. However, he forgot
10 into Tony Trung. Tony Trung, again, no axe to grind, he's not
11 a party in this case, he's just out there in California,
12 retired from the San Diego police department, and all he did
13 was tell the truth in his deposition, and in his letter that
14 you will have as evidence in this case.

15 Now, Mr. Collins is a gifted lawyer, all of these men are,
16 Mr. Deaver the younger and Mr. Deaver the elder, they're
17 gifted lawyers, but they can't create evidence that doesn't
18 exist. And they didn't present any evidence in this case,
19 aside from the plaintiffs' testimony.

20 Although they'd love to do this, they can't throw away
21 those tapes, they can't explain away those tapes. Those tapes
22 are what they are. They are statements by the plaintiffs that
23 recall instances that they remember in Vietnam. They're not
24 drunken fantasies, they're not stories, they're not war
25 stories for a novel. They are statements of their

1 recollections from Vietnam. And unfortunately, they cannot
2 now come before you and come up with new excuses for why those
3 tapes were made.

4 Now, just to conclude, Judge Norton is going to ask you to
5 render a verdict, or maybe -- or several verdicts, you're
6 going to have a lot of verdict forms in this case.

7 Now, the term verdict comes from the Latin, and it means
8 to speak the truth. That is no more appropriate than in this
9 case. Because what we are asking you to do is to allow
10 Colonel Marvin and Trine Day to speak the truth, and to not
11 allow the plaintiffs to silence the truth for one reason or
12 another. So all we ask you, respectfully, is to go render a
13 verdict that will allow Colonel Marvin and Trine Day to speak
14 the truth.

15 Again, thank you so much for your time.

16 THE COURT: Thank you, Mr. Ogiba. Mr. Deaver?

17 MR. BEN DEAVER: Thank you, Your Honor. Good
18 morning. I guess I can go through and thank everybody also
19 for everything, but I think Mr. Collins did a great job, as
20 did Mr. Ogiba. But I do really, I thank you.

21 I might just start off real quickly about Major General
22 Overholt and his testimony saying that it was mutiny, it was
23 mutiny that these men committed crimes, according to this
24 book, punishable by death during wartime. And that's all we
25 have to get into on that, that they committed the crimes, if

1 that book is true. We're saying that it's not true.

2 There was also a gentleman who testified, Major Drew Dix,
3 the Medal of Honor winner, who has been involved in covert
4 operations, although he didn't really want to testify about it
5 on the stand, because the operations that he was involved in
6 are ones that have not been declassified yet and he couldn't
7 get into it. Mr. Ogiba kept drilling him on it, you don't
8 know anything about covert operations, you don't know anything
9 about covert operations, till it got to the point where he
10 said I'm an expert on covert operations, but I'm not going to
11 tell you about them. And for me to even say that, I would be
12 arrogant to do so to talk about things that never exist. But
13 what he did, actually exist. He had that little blue lapel
14 that showed Medal of Honor winner, the highest award that
15 anybody in the United States can get. I think it was General
16 Patton who said that I would sell my mortal soul to get one of
17 those. To question Drew Dix is wrong.

18 I, like Mr. Collins, grew up in a military town. It
19 wasn't here in Charleston, but I grew up in Cumberland County
20 on the outskirts where Fort Bragg is where all these men
21 serve. And growing up, I too was impressed by the men in the
22 uniform, the military. We had the Army, we didn't have the
23 Navy guys, we really didn't have any Air Force guys around
24 there, but we had a lot of Army guys. And it impressed me
25 growing up, seeing these guys, seeing the guys walk around

1 that had the Green Berets on, it impressed me. Impressed me
2 so much that when I graduated high school, I decided I was
3 going to join the Army. And I did. I went and joined the
4 Army and I became a quartermaster, just like Mr. Marvin over
5 there. I was a quartermaster. I was assigned to the Fifth
6 Special Forces group, just like his assignment at one time was
7 the Fifth Special Forces group as a quartermaster. My job
8 there was to make sure people had towels, they had blankets,
9 they had ammunition, anything that they needed, was my job.
10 And I did it and I did it well. Mr. Marvin, he did it and he
11 did it well. I don't think there's any question about his
12 being a quartermaster. He did his job. He was logistics
13 before he got to An Phu, he got assigned to an A Team because
14 of, as Colonel Tuttle testified in his deposition, because
15 they needed somebody with logistics skills to shut down this
16 area that was pacified, there was nothing going on in there.

17 Mr. Ogiba said that we didn't present any that said --
18 would contradict that. I think that it's in the record,
19 there's a newspaper article that you'll get to read when you
20 go back there in the back, that took place back in 1966, that
21 was published in 1966, it was an English one and written in
22 English that quotes Mr. Marvin, and it talks about the area
23 being the most pacified. It was a pacified area. So when
24 these men took the stand and they said it was a resort area,
25 they were telling the truth. They were out there shooting

1 horseshoes, shooting cans on the wire just to kill time.

2 Tony Trung. Let's talk about Tony Trung real quick, since
3 Mr. Ogiba says that Mr. Trung testified and supported what
4 Mr. Marvin said. If y'all remember what Mr. Trung said, he
5 said he never saw any Viet Cong in the Cambodian side, he said
6 he never saw an American fire their weapon in hostility. He
7 said basically when he was on the outpost, he would shoot cans
8 to kill time. And he also said that yes, he was a retired
9 detective with the San Diego police department, and he's an
10 expert with weaponry, and in his deposition he said that he
11 owes a lot of that because he had a lot of time to fire his
12 pistol, shooting at the cans.

13 It is uncontroverted and undisputed that there was a probe
14 that took place up at Khanh Bin. Everybody testified to that.
15 Mr. Strait said he was up in the area of Khanh Bin when the
16 probe took place, but he was about a thousand meters, I
17 believe, and never shot his weapon. There wasn't any
18 statement from anybody that would show that any American shot
19 their weapon up there. Everybody, including the testimony of
20 their witness, Mr. Tony Trung, said it was a one-night probe.
21 It was not a five-day battle. The only person who says it's a
22 five-day battle is Mr. Marvin, and it's supported in some
23 documents.

24 The monthly reports. Let's look at those monthly reports.
25 Who put those together? Mr. Marvin. He put it together. He

1 said it was a five-day battle. But you know what? Let's
2 think about it, let's use our reasoning here. A five-day
3 battle, and it's not that far from An Phu to the Khanh Bin
4 outpost, just common sense would tell us, why would it take
5 him five days to get up there? Because he didn't get up there
6 until after the battle was over. So does it make sense that
7 it would take him five days to get -- I think it was maybe 30,
8 40 kilometers -- up to Khanh Bin. The reason why? Because it
9 was a one-night probe.

10 Mr. Borg, the gentleman that didn't have a dog in this
11 fight, who came all the way from Alaska, he said that he was
12 in Chau Doc and there was a probe happening in Khanh Bin, said
13 he could get his guys together in about three hours, and they
14 were in the boats heading up there. By the time they got up
15 there it was about noon, they were told turn around, go back,
16 it's over, nothing happened. So they went back.

17 Mr. Borg was in Chau Doc, the same place where Mr. Marvin
18 states in this book where the ARVN regiment came together.
19 Mr. Borg was there, he was in Chau Doc at that very time, and
20 he said it never happened. And he would know. They're saying
21 he wasn't there. He was there. He was in Chau Doc and he
22 said that the ARVN regiment never got together to come take
23 over this camp. Because I believe they had some renegade
24 captain up there.

25 The other witnesses. You know, what these guys did in

1 Khanh Bin, they did a lot of fine things. Mr. Sirois, who was
2 the medic, he got up there and he testified about all the
3 great things he did. He was extremely proud of what he did.
4 He went out, he took care of little children, I don't know if
5 you remember him talking about the sores in their heads and
6 stuff like that, that he went out there and he took care of
7 that stuff, and that was their job. They all completed the
8 job. Colonel Tuttle said he sent Mr. Marvin over there to
9 shut down that camp, turn it over to the regular forces or to
10 the Vietnamese, and that's exactly what they did. They left.
11 After they left, Mr. Marvin was never assigned to another
12 Special Forces A Team. The remainder of his career he was in
13 logistics doing quartermaster stuff, the exact same stuff I
14 did.

15 Thank you.

16 THE COURT: Okay. Ladies and gentlemen of the jury,
17 why don't we take a morning break at this time, and when we
18 come back I'll give you the final charge on the law, and then
19 you can retire to deliberate on the verdict.

20 (Jury excused.)

21 THE COURT: We'll start again at ten till 12:00.

22 (A recess was held at this time.)

23 (Jury not present.)

24 THE COURT: Anything before we bring the jury in?

25 MR. COLLINS: Nothing from us, Your Honor.

1 MR. OGIBA: No, Your Honor.

2 (Jury present.)

3 (At this time the Court charged the jury.)

4 (Jury excused.)

5 THE COURT: Any additions, corrections, objections?

6 MR. COLLINS: None from the plaintiff.

7 MR. OGIBA: No, Your Honor.

8 THE COURT: All right. So you can go to lunch or do
9 whatever you want, but make sure Gail has your cell phone
10 numbers so she can get ahold of you. And we'll see you
11 whenever they get done. Thank y'all.

12 (A recess was held at this time.)

13 (Jury present.)

14 THE COURT: Ladies and gentlemen of the jury, it's my
15 understanding you've reached a unanimous verdict. I guess
16 you're the foreperson, because you're carrying all the
17 paperwork, right? Do you want to hand it to the marshal,
18 please?

19 Do you want to do these, since they're all alike, the
20 categories? We, the jury, unanimously find none of the
21 plaintiffs proved defamation against Mr. Marvin, okay?
22 Additionally, none of the plaintiffs proved defamation against
23 Trine Day. Additionally, Mr. Marvin didn't prove defamation
24 against any of the plaintiffs. Okay? Is that correct?

25 FOREPERSON: That's correct.

1 THE COURT: Anyone want to pole the jury?

2 MR. COLLINS: That's not necessary from the
3 plaintiffs' perspective.

4 MR. OGIBA: Nor from the defense.

5 THE COURT: Okay. Okay. Ladies and gentlemen of the
6 jury, as the lawyers said, I want to thank you, too. I mean,
7 this is a tough case, it's extraordinarily difficult law.
8 Okay? I've been here 16 years, this is probably the most
9 complicated charge I've ever had to do. You worked
10 extraordinarily hard and so did you and so did everybody else.
11 I want to thank you for your service on this case. I don't
12 know if you've been selected to have any other cases, but call
13 the magic number; sometimes these cases go away.

14 (Jury excused.)

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16 (Court adjourned at 3:35 p.m.)

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REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court
Reporter for the United States District Court for the District
of South Carolina, hereby certify that the foregoing is a true
and correct transcript of the stenographically recorded above
proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR