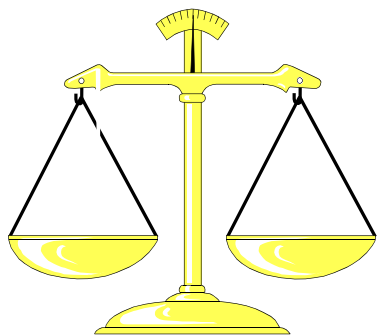


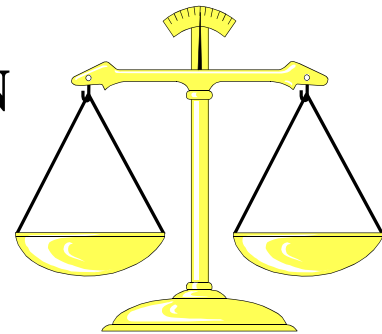
CASE MATERIALS

Official 2007 Mock Trial Materials
for the
TWENTY-SEVENTH ANNUAL
UTAH LAW-RELATED EDUCATION PROJECT
MOCK TRIAL PROGRAM



EVAN NELSON

v.



**CHRIS MILLER AND
RED ROCK COUNTY SCHOOL DISTRICT**

Case No. 07utcV01382

New York Moot Court Program
Rewritten and Adapted to Utah Law by
Michelle M. Roybal and Kathi Sjoberg

STATEMENT OF THE FACTS

Social networking websites such as MySpace.comTM (“MySpace”), Friendster.comTM, Facebook.comTM, Xanga.comTM, and LiveJournal.comTM are only a few of the social websites that have made the internet both accessible and attractive to young people seeking a forum to express their views.¹ The success of these sites has been tremendous: MySpace, the most popular and biggest of these sites, recently boasted over seventy-five million registered users in the United States, with hundreds of thousands of new users registering every day.²

MySpace has attracted negative publicity due to concerns that the predominantly young users³ are ignorant of the ramifications of having so much biographical information publicly available. Incidents in the national news regarding MySpace and its connections with online predators and “cyber-bullying” have many parents and educators worried about use of the site.⁴ MySpace users can customize almost everything about their profile. To become a registered user, an individual need only provide an e-mail address and a name; after that, users may do as they like with their personal corners of the world-wide web.

The default MySpace privacy settings make a user’s profile accessible to the general public. Unless the user modifies this setting, other users can post comments that will be visible to any persons authorized to view the user’s profile, without the user’s prior consent or approval. MySpace users can, however, remove these comments from their profile at the time of their next log-in. A MySpace profile asks users to provide their “Interests and Personality,” “Basic Info,” “Background & Lifestyle,” “Schools,” “Companies,” and “Networking.” Users can supply whatever (and however much) information they choose in these categories, and many users leave certain categories blank. Although most MySpace users have pictures of themselves in the top left-hand corner of their profile, many users put iconic photographs, cartoons, or other symbols in that location.

MySpace users post on-line photo albums, links to music, or favorite internet sites. The site prohibits libelous or lewd material, but with so many users and visitors, MySpace depends on user and visitor cooperation to report and eradicate abuses. Red Rock County, located in the State of Utah, has approximately 40,000 residents. Canyon View High School (“Canyon View High”), the public high school for Red Rock County, has approximately 2,000 students enrolled in grades 9 through 12. In September 2004, the Red Rock County School District passed an Educational Protocol requiring all Red Rock County public schools to install filters on school computers to block access to social networking sites. Nevertheless, the sites still generated controversy during the 2004-2005 school year when student disputes that originated on the websites outside of school found their way into the classroom. Because of the observed increase in student disputes, due in part to student use of MySpace, the Canyon View High Guidance Department urged the school administration to investigate measures that might curb student use of MySpace for the upcoming school year.

¹ Janet Kornblum, *Teens Hang Out At MySpace: Web Is Now A Real Place to Socialize*, *USA Today*, January 9, 2006.

² Hoover’s. (2006, Aug. 9). MySpace.com. Hoover’s In-Depth Company Records, retrieved September 1, 2006 from Westlaw.

³ The company’s Hoover report indicates that MySpace has gained popularity primarily with teens and twenty- and thirty-somethings. *Id.*

⁴ Janet Kornblum, *Adults Question Its Safety*, *USA Today*, January 9, 2006.

On August 25, 2005, just before the September 5 start of the 2005-2006 academic term, the Canyon View High administration sent letters to its students' parents and guardians. In the letter, the Canyon View High administration encouraged parents and guardians to consult with their teens about appropriate uses of social networking sites like MySpace and emphasized the emotional consequences of anonymous personal attacks, so often affected by these sites. The administration also informed parents and guardians that a Canyon View High faculty member would be appointed to occasionally monitor the sites and keep school administrators up-to-date on cyber-fights brewing amongst Canyon View High students. On August 26, Alex Hawes, Canyon View High's principal, appointed Chris Miller, a veteran Canyon View High teacher, to monitor the MySpace site once the school year commenced.

Since 2004, *The Daily Red Rock*, Red Rock County's local newspaper, has published several articles on the nationwide controversies arising from MySpace. In light of the August 25 letter sent home to parents, Ronny Bernstein, a staff reporter for *The Daily Red Rock*, wrote an article profiling Red Rock County MySpace users of different ages for the September 5 edition. The article began with a short squib detailing the August 25 letter sent home by the Canyon View High administration and a general overview of MySpace. The article then introduced four Red Rock County MySpace users. Jennifer Spillane, a thirty-year-old singer, touted MySpace's creative potential, explaining that through the site, she had been able to connect with a base of musicians outside the Red Rock County area. The connection had produced a "virtual" collaboration that Spillane maintained would not have been possible without MySpace. Omri Schmidt, a fifty-year-old plumber, discussed the ease with which he had been able to track down long-lost family members, as well as discover his inner-poet. Erika Newhouse, a nineteen-year-old college student, gleefully noted that it was a "really easy and great way to meet guys—oh, and other like-minded people." Evan Nelson, a seventeen-year-old junior at Canyon View High, explained that s/he had been using MySpace for over a year, and that it was a great place to "let loose." Nelson also remarked that the site gave him/her an opportunity to practice and develop his/her website design skills and to showcase his/her artistic endeavors. *The Daily Red Rock* published the article on September 5, making Nelson a Canyon View High celebrity for having been interviewed and profiled in a front-page story.

During a free period on the first day of school, Chris Miller logged onto her/his office computer for her/his first MySpace monitoring session. After finding the MySpace homepage, Miller limited the search to "MySpace.com" and typed "Canyon View" in the search field. This search produced over 3,000 results. Miller then added "Red Rock County, Utah" to the search field and began to recognize some Canyon View High students. The third profile s/he viewed was "Evan Nelson." According to his/her profile, Nelson has been a registered MySpace user since 2004 and last updated his/her profile that morning (September 5). The "Background & Lifestyle" portion of Nelson's profile tells users that s/he is single, from Red Rock County, Utah, attends Canyon View High, and is 5'9". Under his/her "Interests & Personality," Miller learned that Nelson likes books by Michael Crichton, dislikes asparagus and "when people make assumptions about [him/her]," had an "awesome time at Tommy's on fri," and photography is his/her favorite class at Canyon View High. His /her profile has links to three on-line photo albums, but only the album entitled "Wears the Floods" is instantly viewable on his/her profile;

the other two are archived. The first picture in the “Wears the Floods” album shows Nelson between three other teenagers in cropped pants, none of whom Miller recognized as Canyon View High students. All four teens are making the same unusual finger gesture. The next photograph is a black and white grainy portrait of someone who appears to be Nelson with his/her hands behind his/her back, head down, and a man in a dark but unidentifiable uniform standing behind him/her outside a QuikMart convenience store. (Hereinafter, “QuikMart photograph.”)

Knowing the Floods to be a notorious juvenile gang in Utah, Miller jotted down on her/his notepad: “Evan Nelson—Floods gang, robbery arrest.” S/he then decided to post a comment on Nelson’s profile. After registering her/his Canyon View High faculty e-mail address with MySpace, Miller wrote the following message: “Being a member of a gang is nothing to be proud of. Neither is being arrested for robbing a convenience store or suggesting violence against other students. Don’t think that your parents, your principal, and future employers won’t see this.”

Nelson did not check his MySpace profile until the following day, September 6, after a friend informed him that someone had commented on his/her profile. When Nelson logged into his/her MySpace account, s/he saw Miller’s message on his/her publicly viewable profile, the only comment under “Evan Nelson’s Friend’s Comments.” S/He wrote on his/her MySpace blog:

I am not a Gang Member and am an artist. let’s band together against teachers and parents spying on us. protest protest protest this procedure. this is our space against assumptions misconceptions and TEACHERS.

Nelson’s blog posting was instantly viewable on his/her profile.

On September 8, Nelson’s employment at QuikMart was terminated. His/Her supervisor, Dave Sprague, told him/her he had seen Nelson’s MySpace profile the prior day. Although Sprague stated that he believed Nelson was not a member of the Floods nor had an arrest record, he concluded that QuikMart could not afford to be associated with an individual who had a reputation in Red Rock County as a criminal with a violent temperament. Nelson deleted Miller’s posting that evening, September 8.

Nelson filed this defamation action against Miller and Red Rock County School District, alleging that Miller’s posting defames him/her by stating that s/he is a member of a juvenile gang, has a criminal record, and has a violent and antagonistic temperament. Plaintiff argues that Miller’s statements are defamatory per se. Defendants Miller and Red Rock County School District argue that the post was not defamatory per se because it was an expression of Miller’s opinion. Defendants Miller and Red Rock County School District have raised a public figure defense. The defendants argue that Nelson is a limited purpose public figure by virtue of his/her prominent role in the public debate concerning the use of MySpace by Red Rock County public

school students. If their defense is accepted, plaintiff Nelson must prove that Miller posted the statement with knowledge of the statement's falsity or in reckless disregard for the truth of the statement.

During discovery, Nelson produced evidence that his/her profile had been viewed over 15,000 times. It is undisputed that Nelson is not a member of the Floods gang and has never been arrested. Red Rock County School District is a party to this action because Chris Miller, in monitoring the site and making her/his posting, was acting within the scope of her/his employment, thereby making the school district vicariously liable for any potential liability arising from the post.

FIRST AMENDMENT AND DEFAMATION LAW

In the state of Utah, an individual is liable for defamation if s/he negligently publishes false and defamatory statements concerning another. See Utah Civ. Code § 570. A statement is defamatory if it tends to injure the plaintiff in the “estimation of a considerable and respectable class in the [relevant] community.” *Peck v. Tribune*, 214 U.S. 185, 190 (1909). However, because the law of defamation overlaps with the First Amendment’s guarantee of freedom of speech, courts must balance the state’s interest in protecting its citizens’ reputations with the interests of the First Amendment. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); U.S. Const. amend. I.

The First Amendment forbids a public official plaintiff from recovering damages for a defamation relating to his/her official conduct unless the statement was made with constitutional malice (also known as actual malice), defined as knowledge of a statement’s falsity or reckless disregard for its truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The Supreme Court broadened the application of the constitutional malice standard to apply not only to public officials, but public figures as well. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The Court reasoned that the constitutional malice standard serves “to free criticism of public officials from the restraints imposed by the common law of defamation.” *Gertz*, 418 U.S. at 164. Although public figures are not constrained by the same political processes demanded of public officials, they “often play an influential role in ordering society” and should be subjected to the same standard. *Butts*, 388 U.S. at 164 (Warren, J. concurring in the result). The Court conceded that “[s]ome tension necessarily exists between the need for . . . [a] vigorous and uninhibited press and the legitimate interest in redressing wrongful injury,” but concluded that in cases involving public official or public figure plaintiffs, some level of falsity was preferable to a chilling effect on speech. *Gertz*, 418 U.S. at 342.

There are three types of “public figures”: the all-purpose public figure, the limited purpose public figure, and the involuntary public figure. *Id.*, 418 U.S. at 345, 351. An all-purpose public figure is an individual who has “achieve[d] such pervasive fame or notoriety that [he] become[s] a public figure[] for all purposes and in all contexts.” *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551-52 (4th Cir. 1994). A limited purpose public figure, conversely, is a public figure with regard only to certain public controversies into which s/he has voluntarily injected himself/herself and is only a public figure “for a limited range of issues.” *Id.* at 1552. An involuntary public figure is one who “become[s] a public figure through no purposeful action of [his] own.” *Id.* at 1551. Whether, and for what purposes, an individual is a public figure is a matter of law for the court to decide. *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1294 n.12 (D.C. Cir. 1980), cert. denied, 101 S. Ct. 266 (1980). The determination of a plaintiff’s public or private status is crucial to the plaintiff’s likelihood of prevailing on his/her defamation claim. If the plaintiff is a private person, as opposed to a “public figure,” the plaintiff must show only that the publisher made a defamatory statement to a third party where a reasonable person in the publisher’s shoes would not have. Utah Civ. Code § 570. However, if a plaintiff is a public figure, the plaintiff must prove that the publisher made the defamatory

statements with constitutional or actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The constitutional malice standard is a very difficult one for a plaintiff to satisfy. The Supreme Court has admonished that involuntary public figure status should be found only in “exceedingly rare” cases. *Gertz*, 418 U.S. at 345.

The Supreme Court has not delineated any specific tests to determine what makes a plaintiff a limited purpose public figure. Lower courts have taken guidance from the Supreme Court’s decisions in *Gertz* and *Butts* and have concluded that the proper inquiry is whether an individual has become engaged in a public controversy to such an extent that the state’s interest in protecting the individual’s reputation must be subordinated to the publisher’s First Amendment right to free expression, without fear of liability for reasonable inaccuracies or misstatements. *Waldbaum*, 627 F.2d 1287. Although courts uniformly require a public controversy for limited public figure status to apply, they have developed different tests to measure the extent of a plaintiff’s participation in the controversy. The Fourth Circuit in *Froetich*, 37F. 3rd 1541, set forth a balancing test for the competing interests of the First Amendment with the interests in vindicating an individual’s reputation.

ISSUES

I. IS EVAN NELSON A LIMITED PURPOSE PUBLIC FIGURE?

A. Argument that Nelson is not a limited purpose public figure.

The Court should find that Nelson is not a limited purpose public figure because s/he did not voluntarily assume any role of special significance in the public controversy surrounding Red Rock County MySpace users. *Gertz* and its progeny developed a two-part analysis to determine whether a plaintiff was a private person or “limited purpose” public figure. The test examines whether (1) there was a “public controversy” that gave rise to the defamation, and (2) the nature and extent of the plaintiff’s participation in that controversy was sufficiently prominent that s/he should be deemed a public figure. *Foretich*, 37 F.3d at 1553. The debate in Red Rock County over the appropriate use of MySpace and its social benefits and detriments was indeed a public controversy. However, Nelson did not voluntarily pursue any role of special prominence in this wide-reaching controversy. Therefore, s/he cannot be considered a public figure.

1. The use of MySpace was a public controversy in Red Rock County.

Within the Red Rock County community, the use of MySpace was a public controversy. A public controversy is “a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.” *Waldbaum*, 627 F.2d at 1297. A controversy can be national, regional, or local in scope for the purpose of determining whether the plaintiff was a public figure. *Id.* at 1295 n.22. In Red Rock County, the several *Daily Red Rock* articles from 2004 through 2005 profiling both the local and national use of MySpace, the August 25 letter from the Canyon View High administration expressing concerns over the use of MySpace, and considerable discussion among Red Rock County citizens all support the finding that the citizens of Red Rock County were engaged in a real dispute over the appropriate use of MySpace. Therefore, the controversy at bar was public.

2. The nature and extent of Nelson’s participation in the controversy are not substantial enough to warrant limited purpose public figure status.

Nelson is not a limited purpose public figure because his/her access to effective means of communication was no greater than that of an ordinary private citizen, his/her role in the public controversy was minimal, and his/her blog postings responding to Miller’s defamatory

posting were privileged statements of self-defense. For a plaintiff to be labeled a public figure, s/he must have voluntarily injected himself/herself into the “vortex” of a public controversy such that a reasonable person viewing the plaintiff’s actions would conclude that the plaintiff would play, or would seek to play, a role in the resolution of the controversy. *Gertz*, 418 U.S. at 352; *Waldbaum*, 627 F.2d at 1298.

To determine the nature and extent of a plaintiff’s involvement in a public controversy, courts look to such factors as (a) whether the plaintiff had access to means of effective communication, so that his/her views on the public controversy were equally “public,” (b) whether plaintiff voluntarily assumed a role of special prominence in the public controversy, (c) whether plaintiff sought to influence the outcome of the controversy, (d) whether the controversy existed prior to the allegedly defamatory statement, and (e) whether plaintiff retained public figure status at the time of the publication of the defamatory statement. *Foretich* 37 F.3d at 1556. Courts do not need to consider all five elements of the test if one or more is sufficient to resolve the issue. *Id.* (holding that where the court found that the plaintiffs had not voluntarily assumed roles of special prominence in a public controversy, consideration of the other elements was unnecessary).

Nelson’s participation in the controversy was limited to maintaining his/her own MySpace profile, the few comments he made to *The Daily Red Rock* about his use of MySpace, and his blog postings denying gang membership and an arrest record. Therefore, the first three elements sufficiently indicate that Nelson is not a limited purpose public figure, and it is unnecessary to consider the remaining two.

(a) Access to Means of Effective Communication

Nelson’s access to effective means of communication was no greater than an ordinary private citizen’s, militating against a finding that s/he is a limited purpose public figure. “Effective means of communication” is typically understood as media access. *Hutchinson v. Proxmire*, 443 U.S. 111, 135-36 (1979) (holding that the recipient of federal research funding was not a limited purpose public figure where plaintiff’s access to the media was not “regular and continuing access”, because regular and continuing media access is “one of the accouterments of having become a public figure”). The *Gertz* decision indicated that access to channels of effective communication was primarily relevant because it afforded

public figures “a more realistic opportunity to counteract false statements than private individuals.” *Gertz*, 418 U.S. at 344.

Nelson’s single interview with *The Daily Red Rock* did not afford him/her heightened access to the media. Further, Nelson’s maintenance of a profile on a popular social networking website gives him/her no greater access to effective communication than the seventy-five million other MySpace users.

(b) Voluntary Assumption of a Role of Special Prominence

Nelson’s conduct does not endow him/her with a role of special prominence or establish that s/he “voluntarily” injected himself/herself into this public controversy. Nelson was only brought into the vortex of the public controversy by the actions of defendants. See *Foretich*, 37 F.3d 1541, 1557-58 (stating that plaintiffs were only injected into the “public eye” as a result of extraordinary attacks on plaintiff’s reputation). Although s/he was a MySpace user prior to the publication of *The Daily Red Rock* article, Nelson was only one of millions of other MySpace users and only one of four to be interviewed for the Bernstein article on Red Rock County MySpace users.

In *Time, Inc. v. Firestone*, a prominent socialite was held not to be a public figure even though she held numerous press conferences during her divorce proceedings. 424 U.S. 448 (1976). Even in *Gertz*, a plaintiff who voluntarily took on a case that was guaranteed to have heightened media attention was still found to be a private figure plaintiff. 418 U.S. at 323. Here, Nelson was interviewed in a single article in a local newspaper and maintained a profile that s/he had created a year before. Therefore, his/her conduct does not suggest that s/he assumed a role of special prominence or voluntarily injected himself/herself into the public controversy.

(c) Attempts to Influence the Outcome of the Controversy

Nelson’s September 6 blog post was a defensive reply to Miller’s post and not an attempt to influence the outcome of the controversy. Where a party reasonably and proportionately responds to a reputational attack, such responses are not statements intended to influence the outcome of the controversy. *Foretich*, 37 F.3d at 1558-59. Nelson’s blog posting is appropriately characterized as a reasonable public reply to Miller’s accusations

of serious criminal misconduct. Her/His statement, “I am not a Gang Member and am an artist,” was an attempt by plaintiff to salvage his/her reputation within the Red Rock County community and not a statement intended to resolve the controversy. Her/His other statement, “this is our space against assumptions misconceptions and TEACHERS,” supports this interpretation, in that Nelson is suggesting that Miller misinterpreted his/her profile and made incorrect assumptions about his/her “artwork.” Nelson’s blog posting was proportional because it did not reach a wider audience than Miller’s post on her/his MySpace profile and was directly responsive to the charges leveled against her/him.

Nelson’s additional comments, asking other students to protest the Canyon View High practice of monitoring MySpace, do not constitute an attempt to influence the outcome of the controversy. Nelson never took any substantial action to galvanize the student body. The context of the statements is most reasonably read as an angry victim of defamation firing back at his/her accuser and critiquing the administration that had mandated the monitoring practice. Further, Nelson’s blog did not contain any language regarding the use of MySpace by Red Rock County citizens. Her/His statements merely attacked Canyon View High’s monitoring program, thereby addressing a dispute narrower than the public controversy at bar. Therefore, Nelson was not attempting to influence the outcome of this public controversy .

B. Argument that Evan Nelson is a limited purpose public figure.

This discussion is limited to whether Nelson has so injected himself/herself into a public controversy as to be considered a limited purpose public figure. Nelson’s claim is much less likely to succeed if s/he is found to be a public figure. Defendants do not claim that Nelson is an all-purpose public figure.

1. The Waldbaum test is the appropriate test to determine limited purpose public figure status because it furthers the First Amendment’s interest in free speech by lowering the threshold required to find a limited purpose public figure.

Under the *Waldbaum* test, a plaintiff is a limited purpose public figure if (1) the controversy at issue is public (people are discussing it, and people other than the immediate participants are likely to feel the impact of its resolution), (2) the plaintiff has more than a trivial or tangential role in the controversy (plaintiff must purposely try to influence the outcome

of the controversy), and (3) the alleged defamation is germane to plaintiff's participation in the controversy. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980).

The *Foretich* test too narrowly defines limited purpose public figure, thereby inadequately protecting the First Amendment interest in free expression. Although the tests are similar, the *Waldbaum* test does not require that a plaintiff voluntarily pursue a role of special prominence in the public controversy. Therefore, the *Waldbaum* test better serves the interest of free and robust public debate.

2. The controversy was public and encompassed the use of MySpace by Red Rock County public high school students.

There is no question that there was a public controversy and that this controversy existed before Miller's post on Nelson's MySpace profile. A public controversy is "a real dispute, the outcome of which affects the general public or some identifiable segment of the public in an appreciable way." *Hibdon v. Grabowski*, 195 S.W.3d 48, 59 (Ct. App. Tenn. 2006). Additionally, a public controversy must exist prior to the alleged defamatory comments, since "no branch of the government . . . should be able to set society's agenda for public debate." *Id.* at 60. The controversy is best defined here as limited to the use of MySpace by Red Rock County public high school students. The controversy developed in the 2004-2005 school year and intensified on August 25, 2005, when Alex Hawes, the Canyon View High principal, sent home a letter about MySpace and other similar sites informing parents of school monitoring of these sites. This letter prompted Bernstein to write an article profiling MySpace use, which was published by *The Daily Red Rock* on the first day of school at Canyon View High. Therefore, the public controversy in dispute was the use of MySpace by Red Rock County public school students, not the use of MySpace by all Red Rock County citizens.

3. Nelson's participation in the public controversy was more than trivial or tangential.

The front-page *Daily Red Rock* article featuring Nelson, coupled with his/her maintenance of a MySpace profile, demonstrates that his/her participation in the public controversy was greater than an ordinary MySpace user. Courts have held that participating in media interviews can satisfy this requirement. See *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2002); see also *Finkelstein v. Albany Herald Publishing Co., Inc.*, 392 S.E.2d 559, 561-62 (Ga. Ct. App. 2003) (holding plaintiff, a lawyer, to be a public figure where he had been the subject of

a single newspaper article reporting his accusations of a local district attorney's lack of professionalism). In *Jewell*, the court held that because the plaintiff had voluntarily participated in the public controversy of the 1996 Atlanta Olympic Park bombing by granting several media interviews regarding the bombing and the Park's safety, he could be considered a public figure regarding the media frenzy surrounding the subsequent investigation into his culpability in the bombing. 555 S.E.2d at 184-85.

Here, Nelson's participation in the front-page article made him/her a celebrity within the halls of Canyon View High, having been the only high school student profiled in the story. This interview with *The Daily Red Rock* is significant because the article began by detailing the letter sent home to Canyon View High parents and guardians about student use of MySpace. Therefore, Nelson's comments as a student at Canyon View High, in contrast to the other citizens profiled in the article, assumed superior significance in the controversy over student MySpace use. Further, Nelson welcomed the public to view his/her site and peruse his/her musings: his/her privacy settings allowed visitors to view his/her entire profile without requiring MySpace membership, and s/he maintained a blog where s/he urged other students to protest the Canyon View High practice of monitoring student profiles. S/He cannot now claim that s/he is a private person because someone disliked or misinterpreted materials put forth on his/her profile.

Moreover, Nelson was able to adequately counteract the reputational damage done by Miller's posting. The availability and effectiveness of self-help remedies for any victim of defamation are important factors underlying the public figure analysis. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). Here, anyone viewing Nelson's profile would have seen not only Miller's defamatory statements, but also Nelson's blog which responded to Miller's comments. Thus, Nelson was capable of defending his/her reputation in a meaningful way by posting his/her reply on the very forum where the alleged defamatory statement was made. See *Hibdon v. Grabowski*, 195 S.W.3d 48, 62 (Ct. App. Tenn. 2006) (finding that the plaintiff had adequate access to counter speech by posting comments in the same sports news group where the original defamatory statements appeared). Therefore, Nelson's participation in this public controversy was significant.

4. Miller’s posting on Nelson’s profile was germane to his involvement in the public controversy.

Miller’s posting on Nelson’s MySpace profile was relevant to his/her participation in the public controversy of the use of MySpace by Red Rock County public school students. A defamatory statement must be relevant or “germane” to the plaintiff’s involvement in the public controversy. *Waldbaum*, 627 F.2d at 1298 (“Misstatements wholly unrelated to the controversy . . . do not receive [constitutional malice] protection.”). A defamatory publication is “germane” to a public controversy if it assists the public in measuring the plaintiff’s credibility. *Jewell*, 555 S.E.2d at 185. In *Jewell*, the court held that the allegedly defamatory publications regarding plaintiff Jewell’s “aberrant” character were germane to his participation in the controversy surrounding the safety of Olympic Park. *Id.* at 185-86. Similarly, Miller’s post on Nelson’s MySpace profile was relevant to Nelson’s involvement in the MySpace controversy. Her/His comment addressed precisely the behavior that prompted the controversy surrounding Red Rock County public students’ MySpace use, namely that Miller perceived Nelson’s profile to encourage student-on-student violence. Therefore, Miller’s post was directly related to Nelson’s participation in the public controversy.

II. SHOULD LIABILITY BE FOUND PER SE OR MUST PLAINTIFF PROVE DAMAGES?

A. Miller’s Posting on Nelson’s Myspace Profile was Defamatory Per Se.

In the State of Utah, a plaintiff must prove that a defendant has negligently or unreasonably published a false and defamatory statement concerning plaintiff to a third party, and plaintiff was injured by the publication. See Utah Civ. Code § 570. There is no dispute that Plaintiff has been injured by the posting or that Miller’s post was published to third parties. Therefore, we need only examine whether Miller’s post was false and defamatory concerning Plaintiff. Miller’s post, “[b]eing a member of a gang is nothing to be proud of. Neither is being arrested for robbing a convenience store or suggesting violence against other students,” implies that he/she is a member of the Floods, has a criminal record, is an instigator of violence, and is, therefore, defamatory per se under Utah Civ. Code § 571.

1. The posting was “of and concerning” plaintiff Evan Nelson.

The defamatory statements in the posting did not refer explicitly to Nelson, and the defense may argue were merely statements expressing Miller’s disapproval of Canyon View High students becoming involved in

criminal activity or violence. However, defamatory statements must be read in context to ascertain their defamatory meaning and effect. In *Peck v. Tribune Co.*, 214 U.S. 185, 190 (1909), a picture of plaintiff was placed in an advertisement extolling the medical benefits of whiskey. The Court found that the advertisement defamed plaintiff, even though the name ascribed to the image was not plaintiff's name. *Id.* at 188. The Court held that reasonable persons would believe the advertisement was "of and concerning" plaintiff Peck and defamed her by attributing to her an affinity for liquor. *Id.* at 188-89. Likewise, the spatial context of Miller's post on Nelson's profile would lead a reasonable person to conclude that her/his statements were about Nelson specifically. Therefore, Miller's post was of and concerning Nelson.

2. The posting was defamatory because it imputed specific criminal conduct and an arrest to plaintiff Nelson.

Four categories of words constitute libel per se in most jurisdictions: (1) words imputing the commission of a criminal offense, (see Utah Civ. Code § 571), (2) words imputing a loathsome communicable disease, causing the victim's exclusion from society, (3) words imputing incompetence or "want of integrity" in the victim's profession, and (4) words prejudicing the victim in his profession. *Lowe*, 534 N.E.2d at 552.

One result of labeling something libel per se is that, with respect to such statements, the plaintiff is presumed to have been injured, so s/he is excused from providing proof of injury at trial. Utah Civ. Code § 571. Miller's statements should be found to constitute libel per se because the statements fit squarely in category (1), implying that Nelson has committed a crime, punishable in the State of Utah. Here, Miller imputed to Nelson robbery and association with a violent gang, both accusations of criminal conduct and offenses signifying moral turpitude, which also serves as a basis for libel per se under Utah Civ. Code § 571.

Miller's post on Nelson's profile both implies that Nelson robbed a convenience store and suggests that s/he endorses criminal behavior. Even though Miller did not specifically state that Nelson committed robbery or was a gang member, her/his suggestions are sufficient to render the post capable of defamatory meaning. In *Lowe*, the defendant newspaper had published an article that suggested plaintiff, an automobile repossessioner, had attempted to steal a car from a local couple. 534 N.E.2d at 551. The article was entitled, "Would-be repo man draws blank," and included language indicating the plaintiff had threatened the couple with a razor. *Id.* The court held that the article was incapable of innocent, non-

defamatory construction, and, considered in context, implied that the plaintiff had committed or attempted to commit theft. *Id.* at 553. The court noted that although the article never explicitly accused plaintiff of stealing, the language used by the newspaper “clearly implied that plaintiff was something other than a legitimate automobile reposessor.” *Id.* The court also rejected the defendant’s contention that the use of “apparently,” “nearly,” and “appeared,” warned the reader that the author’s statements were unproved assertions of facts. *Id.* The court concluded that the article was libelous per se because it imputed criminal activity to the plaintiff. *Id.* at 553.

Likewise, a reasonable reader of Miller’s post would understand the post to confirm Nelson’s criminality by imputing gang membership and an arrest record to him/her. Nelson had posted personal photographs open to a number of different interpretations on his/her MySpace profile. However, just like the plaintiff in *Lowe*, Nelson’s conduct was lawful, yet misinterpreted by defendant. Therefore, the fact that Miller’s post was not explicit does not absolve her/him of liability for defamation. Further, a reasonable person viewing Nelson’s MySpace profile and the spatial positioning of Miller’s post, directly underneath the photographs, would assume that Miller was accusing Nelson of gang membership and of having been arrested for robbery, not merely expressing her/his opinion of his/her behavior.

In *Hale v. City of Billings*, the Supreme Court of Montana held that the police department’s list entitled “Most Wanted” “fugitives,” which included plaintiff’s name and picture as well as stating that plaintiff “may be armed and dangerous,” could not constitute protected opinion. 986 P.2d 413 (Mont. 1999). The court held that “the term ‘armed and dangerous,’ although qualified with ‘may be,’ nevertheless implies to viewers that there are undisclosed, potentially defamatory facts upon which the opinion is based.” *Id.* at 419-20. Here, Miller argues that her/his statements merely demonstrate her/his disgust with conduct s/he perceived to be glorified on Nelson’s MySpace profile. However, a reasonable person viewing the profile would believe that Miller knew of additional, undisclosed facts suggesting that Nelson had committed a robbery.

B. Miller’s post on Nelson’s MySpace profile falls short of the actual malice standard, and, therefore, there is no per se liability for libel.

If Evan Nelson is found to be a limited purpose public figure, s/he must prove with convincing clarity that Miller acted with constitutional malice, or knowledge of falsity, by posting allegedly defamatory statements on her/his MySpace profile.

1. Miller’s post on Nelson’s MySpace profile merely expressed her/his opinion and is not an actionable basis for a defamation claim.

Although there is not express constitutional protection for statements of opinion, the Supreme Court has held that to be actionable, a statement must be “sufficiently factual to be susceptible of being proved true or false.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). A court also must examine “the statements themselves to determine whether they are too imprecise” to be interpreted as making factual assertions. *Henry v. Halliburton*, 690 S.W.2d 775, 789 (Mo. 1985). The statements included in Miller’s post were not defamatory assertions of fact but merely expressions of Miller’s opinions concerning Nelson’s MySpace profile.

Miller’s post was an opinion and not a statement implying defamatory facts. Where charges of criminal conduct are at issue, a court must examine whether the statements contain accusations of a crime or whether “the assertion . . . only suggest[s] to the ordinary reader that the defendant disagrees with the plaintiff’s conduct and used pejorative statements or vituperative language to indicate his or her disapproval.” *Henry*, 690 S.W.2d 788-89. Here, Miller’s statements merely expressed disapproval at what s/he perceived to be a glorification of violence and crime. See, e.g., *Henry*, 690 S.W.2d at 789 (holding that allegedly defamatory statements of the plaintiff as a “crook” and “fraud” were non-actionable statements of opinion where the statements occurred in the context of the publisher expressing his disapproval of certain practices performed by the plaintiff). Additionally, Miller’s final admonition, “[d]on’t think that your parents, your principal, and future employers won’t see this,” suggests that Miller was warning Nelson that his/her profile could be easily misinterpreted. Therefore, because Miller’s post can only be reasonably interpreted as stating Miller’s opinions and not as implying any defamatory facts, the statements are non-actionable in defamation as a matter of law.

2. Even if Miller’s post on Nelson’s MySpace profile can be viewed as implying defamatory facts, her/his conduct in publishing it did not rise to the level of actual malice because her/his comments were a result of a rational interpretation of the “Wears the Floods” and “QuikMart” photographs.

If Nelson is a limited purpose public figure, s/he is required to prove that Miller’s post was made with knowledge of the statement’s falsity. “Constitutional malice” requires the plaintiff to prove that the defendant entertained serious doubts as to the truth of her/his publication or acted with a “high degree of awareness of probable falsity” in publishing the statement. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991). Miller’s posting was not made with constitutional or actual malice. In the context of defamatory statements arising from misinterpretation, there can be no constitutional malice where the defamatory statement was a result of the publisher’s rational interpretation of an ambiguous document or photograph. *Masson*, 501 U.S. at 519 (“The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources.”).

For example, in *Cibenko v. Worth Publishers, Inc.*, a Sociology textbook featured a picture of the plaintiff, a police officer, handcuffing an African American. 510 F. Supp. 761, 764 (D.N.J. 1981). Under the photograph, the caption read: The social status of the offender seems to be the most significant determinant of whether a person will be arrested and convicted for an offense and of the kind of penalty that will be applied. In this picture, a police officer is preventing a black male from falling asleep in a public place. Would the officer be likely to do the same if the “offender” were a well-dressed, middle-aged white person? *Id.* at 764.

The court held that the caption did not defame the plaintiff because it merely phrased a rhetorical question for educational purposes as to what appeared to be happening in the photograph. *Id.* at 765. Further, the court held that even if the statements were understood as innuendo, implying that the plaintiff was racist because the plaintiff was a public official, there contained no false assertion of fact to satisfy the actual malice standard. *Id.*

Likewise, Miller’s posting does not satisfy the constitutional malice standard. A rational person could interpret the ambiguous photograph of Nelson in the parking lot, coupled with his/her allusions to gang affiliation, to be indicative of criminal involvement. The post was

merely Miller's rational interpretation of the photographs. At best, the posting was an innuendo that Nelson participated in the criminal activity which Miller disparaged. Further, even if the statements arguably constitute libel per se because this Court has ruled that Nelson is a limited purpose public figure, s/he must prove that Miller's post was made with knowledge of its falsity. S/He has failed to do so here.

APPENDICES

APPENDIX I

TABLE OF AUTHORITIES

CASES

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Peck v. Tribune Co., 214 U.S. 185 (1909)

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Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)
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ISSUE TWO

Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991)
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Hale v. City of Billings, 986 P.2d 413 (Mont. 1999)
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Lowe v. Rockford Newspaper, Inc., 534 N.E.2d 549 (App. Ct. Ill. 1989)

UNITED STATES CONSTITUTION

Amendment I.

UTAH STATUTES

Utah Civ. Code §§ 570, 571 (2000).

ARTICLES

Hoover's. (2005, Aug. 9). MySpace.com. Hoover's In-Depth Company Records, retrieved September 12, 2005 from Westlaw.

Janet Kornblum, Teens Hang Out At MySpace: Web Is Now A Real Place to Socialize. *USA Today*. January 9, 2006.

Janet Kornblum, Adults Question Its Safety. *USA Today*. January 9, 2006.

APPENDIX II

UNITED STATES CONSTITUTION FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX III

UTAH STATUTES

Utah Code Title 45 - Chapter 2 - Libel

Section 45-2-2. Libel and slander defined.

As used in this chapter:

- (1) "Libel" means a malicious defamation, expressed either by printing or by signs or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt or ridicule.
- (2) "Slander" means any libel communicated by spoken words.

Utah Code Sections 570 & 571

§ 570. Defamation

An individual will be liable for defamation where an individual negligently publishes a false and unprivileged statement concerning another to a third party, that subjects the individual to hatred, ridicule, obloquy, or causes other persons to refrain from dealing with him. Defamation can be effected by either libel (written defamation) or slander (verbal defamation).

§ 571. Libel per se

One who publishes a defamation that imputes to another conduct constituting a criminal offense is subject to liability to the other if the offense imputed is of a type which, if committed in the place of publication, would be

- (a) punishable by imprisonment in a state or federal institution, or
- (b) regarded by public opinion as involving moral turpitude.

If plaintiff establishes that the defamatory statement was libelous *per se*, plaintiff is exempt from proving injury at trial.

APPENDIX IV

Hoover's In-Depth Company Records

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August 9, 2006

MySpace.com

Overview

Don't want people getting all up in your space? Then maybe you shouldn't join MySpace.com. The social networking site was created in the fall of 2003 by Tom Anderson and Chris DeWolfe (CEO), as a looser, music-driven version of Friendster. MySpace quickly surpassed Friendster--its membership of mostly teens and twenty- and thirty-somethings has grown to some 75 million users, making it the eighth-most popular Web property in April of 2006. In 2005, News Corp. paid \$580 million to buy the site's parent company, Intermix Media, which operates as a part of Fox Interactive Media. News Corp. is working on transforming MySpace.com from a social-networking site into a full-featured, advertising supported portal that competes with Yahoo! and Apple's iTunes. Along these lines, it has announced plans to offer episodes of its FOX drama 24 available for download on MySpace.com. In 2006, MySpace formed an agreement with Google in which the search giant will provide the search listings for MySpace.com.

APPENDIX V

1/9/06 USA TODAY 01D // 2006 WLNR 455658

USA Today (USA) // Copyright 2006 USA TODAY

January 9, 2006 // Section: LIFE

Teens hang out at MySpace

Janet Kornblum

Shanda Edstrom can't stop herself.

Every day--pretty much no matter where she is--she's just gotta go to MySpace. Her friends are there. Her former high school classmates hang out there. Heck, these days it seems like every teen and twenty-something in the USA is there. "I'm on it every day for like two hours at a minimum," says Edstrom, 18, of Clackamas, Ore., who works at a Kinko's in Portland. "It's just crazy." Forget the mall. Forget the movies. Forget school. Forget even AOL. If you're a teen in America today, the place to be is the social networking site MySpace, which has virtually exploded in the past few months. Google just named it the top gainer for 2005, and, in only two years, MySpace has shot from zero to 47.3 million members, say founders Chris DeWolfe, 39, and Tom Anderson, 29. They launched MySpace in January 2004.

In July, Rupert Murdoch's News Corp. bought MySpace for \$580 million, but DeWolfe and Anderson still are CEO and president. "This site caught us by surprise," says Pete Blackshaw of market researcher Intelliseek. "I honestly was flabbergasted by the numbers." For those who didn't grow up with the Internet, it might seem strange to think of a website as an actual place. But for people like Edstrom and Michael Edwards, a high school senior from San Diego who can't remember when there was no Internet, cyberspace is a real place, even if the entry gates come in the form of a PC.

And at least these days, a teen's MySpace page is not just a home in that place, it's actually who he is online. "Your page is like your personality," Edwards, 17, says. Judging from his, Edwards is a hip guy who is as much into music as he is into his family. (Two of his 10 pictures are family shots.) He likes open-minded and cool people but not nerds and liars. And he really likes Hilary Duff: He plays a song Ode to Hilary Duff on his page.

What do people do on MySpace? They redecorate their pages, adding new pictures (often sexy). They spruce up their surroundings with new colors, backgrounds, and images. Serious MySpace users brag about knowing a thing or two about HTML coding. They write poetry and put up their own art. They write about themselves. They play music for friends and post music videos.

Some are from well-known artists. Many are from virtual unknowns. MySpace is fast becoming an avenue for musicians to reach out directly to fans and become stars. Wired magazine recently featured the band Hawthorne Heights, which became a success after signing up with MySpace. And MySpace recently started its own record label with Hollywood Undead, a rap band that launched on MySpace in June and now has developed a MySpace following of 111,000 “friends” --people who have joined their network.

Edwards is so into MySpace that he and fellow high school senior Joyce Pace, 18, recorded an ode to MySpace--rewritten lyrics to the Black Eyed Peas' song My Humps--and posted it on the site. “Whatchu gonna do with all them friends, all them friends that's on your page,” the song begins. “I'm m-m-m-mmake them comment, make them comment on MySpace, MySpace . . . OMG (Oh My God) it's MySpace.” Then there's the purely social part of it: Instead of the antiquated teen ritual of talking on the phone for hours, MySpace members spend hour upon hour sending each other instant messages and short messages called bulletins.

But mostly what they do is cruise, big time, wandering from page to page in a tangled network that allows people to create links to one another's pages by naming each other a “friend.” The process of finding new friends--often complete strangers--is called “friending.” And for many teens, it's the glue that makes them stick with MySpace. “Teens are narcissistic and exhibitionist,” says Anastasia Goodstein, who publishes online news and commentary site Ypulse, about Generation Y. “For teens, especially, who are going through this stage where they're constantly looking for that affirmation and validation and response for everything they are, it's just addictive.” Right place at the right time MySpace users are often measured by the status of their friends, in the same way high school students are judged by whom they hang out with in the halls.

MySpace says James Katz, a professor of communications at Rutgers University, “is the kind of place that in earlier generations, kids dreamed about--where they could go and be with their friends, meet new people with similar tastes and find out what's cool, what's hot, and what's not.”

Of course, MySpace isn't the only place for teens to hang out online. Other sites, such as the social site Facebook, aimed at college students, and blogging sites LiveJournal and Xanga, also are popular.

But thanks to its easy-to-use tools and being at the right place at the right time, MySpace is by far the most popular, says Peter Klaus, a marketing strategist with Fleishman-Hillard. Web measurement company comScore Media Metrix ranked MySpace the 18th-most-visited site on

the Web for November. When measured by the number of pages viewed, MySpace came in fourth, ahead of eBay and Google. Supported through ads, MySpace is free to users, who are mostly ages 14 to 34. Membership is growing by 5 million a month, according to MySpace's numbers. In addition to the record label, MySpace is expanding offline with local event planning --including large-scale concerts and festivals--and plans to bring MySpace to mobile devices and satellite radio. Numbers aside, for hard evidence of MySpace's popularity, walk in on any teen using a PC with unrestricted Internet access, and you're likely to see the chaotic world of MySpace splashed across the screen. Or turn on a popular radio station and hear the disc jockeys talk about MySpace.

It's now replacing the ritual of giving out phone numbers or even e-mail addresses.

"MySpace has gotten to the point where instead of 'What is your phone number?' it's like 'What is your MySpace profile?'" Edwards says. "Like every single person has one. It's like 'Oh, what's your MySpace page?'" Too popular? Pace, Edwards' song partner, says she remembers when only the hippest were on MySpace. "Now that it's gone all mainstream, it's kind of weird," she says. "A lot of people get profiles because they feel obligated to have one. Like 'Everybody in my class has a MySpace, so I should get one, too.'" But having a MySpace profile is still OK, even if it has caught on, she says. "It's cool in a sense, because it does help you stay connected with people who you don't really talk to, especially if they live far away." Edstrom, who also models on the side and posts provocative pictures of herself, says MySpace has totally changed her social life.

"I go to parties and a lot of people recognize me from MySpace," she says. "Which is weird. 'Hey, you're MySpace girl.' I've gotten a lot more friends from it. I wasn't the popular girl in high school. And now it's like when I see those people, they know me because they know me from my MySpace. They're more inclined to talk to me than they would be just seeing me on the street."

APPENDIX VI

1/9/06 USA TODAY 02D // 2006 WLNR 455627

USA Today (USA) // Copyright 2006 USA TODAY

January 9, 2006 // Section: LIFE

Adults question its safety

Janet Kornblum

As MySpace booms in popularity among teens, it also is drawing the wrath of parents and school officials who are concerned about the off-color nature of some pages and the safety of young users who give too much information about themselves. Many schools have blocked MySpace so students can't access it from school computers. And at least one private school, Pope John XXIII High School in Sparta, N.J., recently made headlines when it told students that they could face suspension for using the site even off campus. "Parents aren't happy," says Internet safety expert Parry Aftab. "Schools are unhappy." Aftab, of the non-profit group WiredSafety, began advising MySpace after parents complained about the site, worried that their kids' pages were too explicit and gave out too much personal information. Aftab says she gets about 1,000 e-mail messages a day from parents who are upset about the site. A simple scan of MySpace pages clearly shows that four-letter words and sexy pictures are standard features on most pages. And there's no question that kids divulge personal information online. Though MySpace specifically prohibits anyone under 14 from joining, younger teens often lie about their ages. MySpace tries to educate its users about online safety. It also regularly monitors users' pages and removes photos that contain nudity and hate icons--although sexually explicit pictures sometimes get through. And profanity is the norm. If the site discovers that users are under 14, it will kick them off. Aftab says parents should focus on safety. Though Internet sex crimes represent only 1% to 2% of all sex crimes against children, the danger is real and likely growing because of the Internet's increasing popularity, says David Finkelhor, director of the Crimes against Children Research Center at the University of New Hampshire. Internet predators almost always are older men who correspond extensively with victims (75% of them young teenage girls) before meeting them, Finkelhor says. But simply telling kids not to post personal information and to refrain from meeting strangers may not be enough. Parents should teach teens that relationships with adults are both illegal and doomed to failure, he says. More safety tips are posted on MySpace and at WiredSafety.org.

WITNESS STATEMENTS

The following pages are the witness statements for the 2007 Utah Mock Trial problem.

Students and teachers should be aware that witnesses will be responsible to know not only the facts and statements contained in their specific witness testimony, but they will also be held responsible to know the references made to each witness in the trial materials.

Witnesses, you may be questioned and cross-examined, or impeached as a witness, based on either something stated directly in your witness statement, or based on an item contained in the story and court documents of the case. Please read and understand both points of view about the situation described before taking the stand to testify at trial.

Good luck !

PLAINTIFF WITNESS STATEMENT
EVAN NELSON, PLAINTIFF/STUDENT

1 I am a student at Canyon View High School, and I am the person who began this lawsuit.
2 I didn't want to start any trouble at school, and I definitely didn't want to cause any trouble
3 for myself or my parents, but now this situation has gone beyond my control. I am a normal
4 kid who likes to use the Internet for entertainment and to learn about what is going on in the
5 world. I can understand why adults and teachers are worried about our safety and
6 responsibility in using the Net but I don't think that I did anything wrong. I just made a post
7 on my own Blog about how I was feeling and what I think about our community. That's all.

8
9 I don't think it is right for our teachers or school to check up on us; our parents might not
10 even do that. I think that the opinions of young people are just as important as adults' views.
11 MySpace just gives us a place to put those opinions out there for others to see and learn
12 from. I don't want to be responsible for what other people do or think because of what I say.
13 I am just a regular person that's all, who has the right to say what I think, don't I?

14
15 Being in a gang is your own choice; it should have nothing to do with what your school
16 or classmates think. And talking about being in a gang or accusing someone of being part of
17 a gang when they're not can sometimes happen. But it should not mean that someone's
18 private thoughts can they be read by everyone or that they should be censored. We don't do
19 that in America.

20
21 I hereby attest under penalty of perjury that the above-presented testimony is true, to the
22 best of my recollection.

Evan Nelson

PLAINTIFF WITNESS STATEMENT
LYNN DONNELLY, CLASSMATE/STUDENT

1 I attend Canyon View High, and I live in the same area as Evan Nelson. I know Evan from
2 school and from seeing Evan in the neighborhood. I think Evan is a good person, and I am
3 not sure why all of this is happening.

4
5 All students use the Internet and play on the Internet. Most of us have MySpace pages, and
6 we share all kinds of information. It is just a way of getting to know each other, what we
7 think, and what we like. It is not about telling each other what to do or think, though, like
8 what the school is trying to tell us now. We know how to be safe, and we watch out for weird
9 posts on our own. Evan's post was not the kind of thing we would worry about; just a post of
10 someone who was sharing an opinion.

11
12 As for Evan belonging to a gang, who knows? Everyone wants to be bigger than they are.
13 We all are trying to fit in and want a group of people to accept us. If Evan found that and it's
14 in a gang, who am I to say anything? Would I do that? No way, but Evan can.

15
16 I think that being in the news is a good thing; we all want to be important. But this is not at
17 all what we thought of when we knew Evan might be in the *Daily Red Rock* or that our
18 school might be on the news. This is much bigger than any of us expected.

19
20 I hereby attest under penalty of perjury that the above-presented testimony is true, to the
21 best of my recollection.

Lynn Donnelly

PLAINTIFF WITNESS STATEMENT
MATTY STRAUSS, INTERNET and NEWS EXPERT

1 My name is Matty Strauss. I am a former reporter for *The Metropolitan Times*, one of the
2 five largest newspapers on the East Coast. I am also a former correspondent for **CNC**, the
3 Cable News Channel, a 24-hour/7-day-a-week online and television news agency.

4
5 I have been working in journalism for the past 17 years, since obtaining a Masters in
6 Journalism from Ivy League University. I have repeatedly testified in court proceedings
7 about the value of news, the sanctity of news sources, and the need for independent
8 journalism standards.

9
10 I believe that the Internet is the news outlet of the next century. We are only beginning to
11 see what young people can do to use the Net to share information, to learn information, and
12 to change the way we communicate with each other. The next generation of Netties, as I call
13 them, post daily to the web and particularly to sites like MySpace. Stopping it may not be an
14 option, so we are obligated to find a way to change it and deal with it. We must make it safe
15 to use the Net, but we ought not make it un-usable or lose its value.

16
17 What do I think a public figure is? Being in news for so long, it seems almost anyone can
18 become a public figure. But you need to do that for yourself, put your ideas and image out
19 there and make people aware of your contribution before you become public property.

20
21 Is the average teenager who posts something to the Net and thinks that his or her opinion
22 ought to be shared by everyone a public figure? No. Is a person who posts to the Web about
23 a specific topic and constantly shares his or her own image and views in news about this
24 topic a limited public figure? That's debatable. I don't think Evan falls quite into that
25 category, but I can see where a colleague might think so.

26
27 I hereby attest under penalty of perjury that the above-presented testimony is true, to the
28 best of my ability.

Matty Strauss

DEFENSE WITNESS STATEMENT
CHRIS MILLER, DEFENDANT/SCHOOL PERSONNEL

1 My responsibility in this case is clear and my duty to our community is clear—keep our
2 kids safe. That is all I have tried to do by following Red Rock District policy.
3 I am Chris Miller, the District employee responsible for Internet, specifically MySpace,
4 monitoring and analysis. I am also a former computer technology teacher in the Red Rock
5 School District. I have over fifteen years of experience dealing with young people, the school
6 system, and technology issues.

7

8 Typically, I spend my time now surfing the Net to check on the activity of our students
9 and also to enhance how we use our District resources to provide good web access, website
10 resources, and information to our community. Parents use our sites to learn more about their
11 children's schools and community members use our sites to think about what Red Rock
12 District can offer them. Students need to access their teachers, assignments, and yes, their
13 peers. But we need to ensure that they do this in a healthy, controlled way. I help manage
14 that and help the schools handle situations that arise based on web comments.

15

16 MySpace is a constant worry for adults. We don't know who is out there talking to our
17 kids anonymously and we can't sit with them every minute while they're on the Net. And we
18 don't want to do that either; we hope that they learn and grow in their use and understanding
19 of technology. We just want some assurance that it can be safe and well-regulated. Red Rock
20 District's policy of monitoring posts and MySpace profiles is cutting-edge, and I hope it
21 continues.

22

23 Comments by a student about violence, drugs, sex, or violations of District policies are not
24 to be taken lightly or tolerated. All students have been instructed about the proper use of the
25 Internet and have been asked to sign, along with their parents, a disclosure statement
26 agreeing to their responsibility in accurate and safe web postings, even on personal accounts.
27 I post or add comments only in response to what students say and only in an effort to keep
28 them safe.

29

30 I hereby attest under penalty of perjury that the above-presented testimony is true, to the
31 best of my recollection.

Chris Miller

DEFENSE WITNESS STATEMENT
RONNY BERNSTEIN, THE *DAILY RED ROCK* REPORTER

1 I am Ronny. I am a reporter for *The Daily Red Rock*, the largest circulation newspaper in
2 our state. I have a degree in journalism from Western State University and have been work-
3 ing at the paper since I was an intern in college. I have risen in the ranks of the staff because
4 of good reporting and being in touch with the community. My columns are well-read and
5 well-respected.

6
7 I wrote an article profiling Red Rock County MySpace users for the September 5 edition.
8 I was hoping in the article to showcase the different types and ages of people who all use and
9 value the Internet. I think it is a good cross-section of our community who might fit into this
10 category, and sometimes the group is stereotyped for being troublesome. I wanted to show a
11 different side to the reality of MySpace.

12
13 I learned that Canyon High sent home a letter telling students and parents that a veteran
14 teacher would be monitoring MySpace posts and student Internet use. For the story, I
15 interviewed several people, including one of the students involved in this lawsuit, Evan
16 Nelson. I didn't know Evan until the interview but found Evan to be very open and willing to
17 be a newspaper subject. Evan indicated in our discussion how "letting loose" on the Net is
18 useful and fun; Evan is also a web designer and artistic. Evan's skills and creativity can be
19 seen in the web posts and websites features Evan has developed.

20
21 Evan is a free-spirit and a bit of a rebel, in my observation, so I wasn't at all surprised to
22 learn of the trouble in this lawsuit. I was surprised to learn that my article was the prompt
23 though for referring to Evan in one way or another. I deliberately tried to leave out my
24 personal views or concerns and to present Evan in a way that the community could decide
25 for itself what it thinks of MySpace users. Evan came across as open and candid in the
26 interview and in the article; that is all that should be judged.

27
28 I hereby attest under penalty of perjury that the above-presented testimony is true, to the
29 best of my recollection.

Ronny Bernstein

DEFENSE WITNESS STATEMENT
ALEX HAWES, SCHOOL PRINCIPAL

1 My name is Alex Hawes, and I am the principal at Canyon View High. I have been a
2 principal for the past 4 years, after having served on the Red Rock County School District
3 Faculty for 12 years and obtaining my Masters Degree from Mid-State College. I believe our
4 education system has a duty to parents, students, teachers, and the community to keep our
5 schools safe and productive; if I can do that by enforcing an unpopular policy, I will.

6

7 Canyon View High has approximately 2,000 students enrolled and in September 2004, as
8 a result of concern about Internet safety, we issued a Protocol. The policy requires all Red
9 Rock County schools to install filters on school computers to block social networking sites,
10 like MySpace, from student or teacher/staff use on school computers. All students and
11 parents received the policy in writing as a disclosure statement that is signed at the time of
12 registration.

13

14 The problem with social networking sites is that sometimes the controversy and discus-
15 sion from the site spills over into our classrooms. Arguments turn into violence in our
16 school, a threat becomes acted upon, or a discussion turns to a debate in the hallway. The
17 disruption to our learning environment should be avoided. On August 25, to express Canyon
18 View's efforts to curb these problems, we asked parents in a letter to discuss proper Internet
19 use with their students and to understand that Chris Miller's role would be to monitor such
20 Internet usage by Canyon View students.

21

22 MySpace profiles can create a social phenomenon in our schools. They make a
23 "celebrity" out of an ordinary student based only on a photo or post. People are built-up or
24 thought of as well-known for some behavior or idea, just because other students are attracted
25 to what the student says on the Internet. This is dangerous and can interrupt our educational
26 goals. While we hope our students get to know each other socially and that we improve their
27 life-skills in interacting with each other, we also hope to instill some discerning judgment
28 and critical thinking about the world around them. We hope that they use the Internet and are
29 not used by it.

30

31 I hereby attest under penalty of perjury that the above-presented testimony is true, to the
32 best of my recollection.

Alex Hawes

EXHIBITS

EXHIBIT ONE
CANYON VIEW HIGH SCHOOL

RED ROCK COUNTY SCHOOL DISTRICT

Red Rock, Utah

August 25, 2005

RE: MySpace

Dear Parent:

We at Canyon View High are concerned about our students and know that you as parents share in that concern. There has been a lot of publicity recently about the internet site called MySpace and similar social networking sites. We urge you to talk with your student about the appropriate use of such sites. Many students may not be aware of the dangers in posting information on such sites and the potential for personal attacks being posted. Such negative postings can have very emotional consequences for teens.

We have appointed one of our faculty members to monitor the MySpace sites of students at Canyon View High and to keep the administration informed as to any potential cyber-fights that may be brewing among Canyon View students. We hope that you as parents will continue to support our efforts to keep your students safe and provide a quality education. Thank you for your support.

Sincerely,

Alex Hawes

Principal, Canyon View High

EXHIBIT TWO

MySpace Not Unknown to Red Rock Residents

Ronny Bernstein

Staff Reporter

The Daily Red Rock

September 5, 2005

Red Rock - Some may think that MySpace, an internet based social networking site, is only for teens. MySpace and other similar sites have sparked a nationwide controversy. There has been lots of publicity about such sites lately, not all of it positive. In fact, our local Canyon View High School administration recently sent a letter to parents of its students cautioning them about the potential problems of MySpace use.

This reporter decided to find out how MySpace is used by the residents of Red Rock County. Profiles of some local MySpace users revealed the following:

Jennifer Spillane, 30: Jennifer is a singer and finds MySpace to be a good place to connect with musicians both in and outside the Red Rock area. She feels MySpace has increased her creative potential.

Omri Schmidt, 50: Omri is a plumber by trade. He uses MySpace to track down long-lost family members. He also discovered that he had an inner poet he wouldn't have known

existed if not for time spent on MySpace.

Erika Newhouse, 19: Erika is a college student who finds MySpace a "really easy and great way to meet guys - oh, and other like minded people."

Evan Nelson, 17: A junior at Canyon View High, Evan finds MySpace a great way to "let loose." S/He has been using the site for about a year and enjoys practicing his/her website designs skills as well as having a place to showcase his/her artistic endeavors.

So maybe MySpace isn't just for teens. Local residents with MySpace profiles seem to come from all age ranges and from all walks of life. So, put your stereotypes aside and give it a try. Who knows; it just may change your life.