

CAUSE NO. 2018-45639

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FFCLX

DR. O. HOWARD "BUD" FRAZIER,
PLAINTIFF

v.

PROPUBLICA, INCORPORATED;
HEARST NEWSPAPERS, LLC d/b/a
THE HOUSTON CHRONICLE,
CHARLES ORNSTEIN, &
MICHAEL HIXENBAUGH,
DEFENDANTS

§ IN THE DISTRICT COURT OF
§
§ HARRIS COUNTY, TEXAS
§
§ 234TH JUDICIAL DISTRICT
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~~PLAINTIFF'S PROPOSED~~ FINDINGS OF FACT
AND CONCLUSIONS OF LAW

~~Plaintiff, Dr. O. Howard "Bud" Frazier ("Dr. Frazier" or "Plaintiff") file~~
~~these proposed findings of fact and conclusions of law. Plaintiff reserves the right~~
~~to amend, supplement, or withdraw each of these proposed findings and conclusions.~~
~~To the extent that a proposed finding of fact is actually a conclusion of law, and vice~~
~~versa, Plaintiff hereby submits it as such.~~

~~PROPOSED~~ FINDINGS OF FACT

1. Plaintiff, Dr. O. Howard "Bud" Frazier, is one of the world's leading heart transplant surgeons and has played a crucial role in the development of the Left Ventricular Assist Device ("LVAD"), a device which pumps blood through the heart when the heart can no longer pump blood on its own. He is the Director

of Cardiovascular Surgery Research at Texas Heart Institute (“THI”). THI is affiliated, housed, and supported by St. Luke’s Episcopal Health System (“St. Luke’s”).

2. Defendant Charles Ornstein (“Ornstein”) is a Senior Editor of Defendant ProPublica, Inc.

3. Defendant Michael Hixenbaugh (“Hixenbaugh”) is an investigative reporter employed by Defendant Hearst Newspapers, LLC, doing business as *The Houston Chronicle* (hereinafter “*The Houston Chronicle*”).

4. A company called Thoratec developed a continuous-flow implantable LVAD called the HeartMate II. Dr. Frazier was the first to implant the HeartMate II and advised Thoratec about its design and function.

5. In 2005, a nationwide FDA Clinical Study was conducted for the HeartMate II. Patients were placed in one of two categories: Bridge to Transplant (BTT) and Destination Therapy (DT). The BTT meant that the LVAD would keep the patient alive until a donor heart could be found. DT meant that the patient would not have the LVAD removed for a transplant and would live as long as possible with his own heart supported by the LVAD.

6. THI and Dr. Frazier participated in the HeartMate II study. Thoratec

selected Dr. Frazier, Chief of the Center for Cardiac Support and Director of Cardiovascular Surgery Research at THI, and his team, to provide that training.

7. Thoratec, pursuant to FDA requirements, developed and implemented a strict “Approval Protocol” for patients to be admitted into the HeartMate II study. The FDA required participating surgeons and researchers—including Dr. Frazier—to complete rigorous Approval Protocol training before the study began.

8. St. Luke’s Medical Review Board had to approve each LVAD implant under the Approval Protocol. The FDA monitored Thoratec’s compliance with the Approval Protocol.

9. The FDA audited the program twice in 2006 and 2009. The first audit determined NAI—No Action Indicated—meaning that the FDA investigator found no violations of FDA rules and regulations. The investigator for the 2009 audit found “minor discrepancies” in the HeartMate II Clinical Study, but concluded: “The regulatory documents, patients records, and study files I reviewed indicated the study was well controlled and documented. I did not observe any unreported adverse events for any of the subjects enrolled.”

10. On April 21, 2008, the FDA approved the HeartMate II for the BTT

indication. Two years later, on January 20, 2010, the device was approved for use as Destination Therapy.

11. In concert with a reporter from *ProPublica*, Defendant Charles Ornstein, Defendant Michael Hixenbaugh wrote an article entitled “A Pioneering Heart Surgeon’s Secret History of Research Violations, Conflicts of Interest and Poor Outcomes” (“2018 Article”).

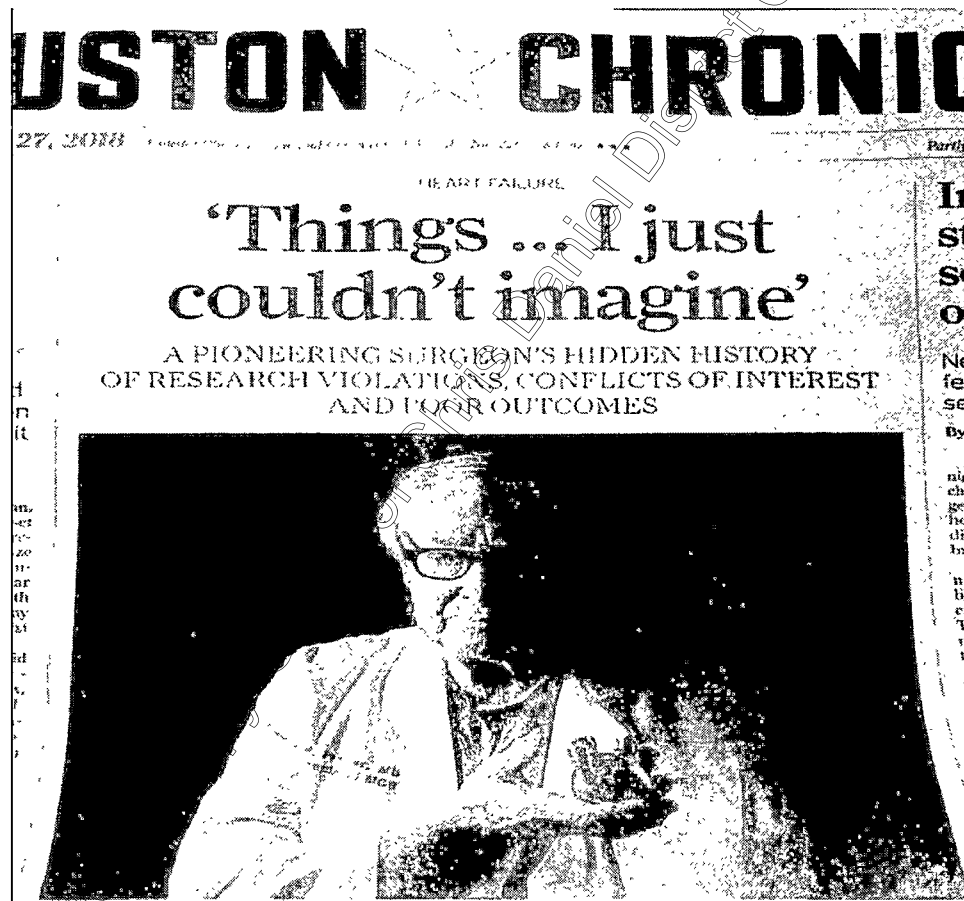
12. The 2018 Article ran first on Thursday, May 24, 2018, on *ProPublica*’s website, with both reporters’ bylines and a credit to the *Houston Chronicle*.



HEART FAILURE

**A Pioneering Heart Surgeon’s Secret
History of Research Violations,
Conflicts of Interest and Poor
Outcomes**

13. The same day, the *Houston Chronicle* created a link to the story in its online edition. The next Sunday, May 27, 2018, the story ran in the *Houston Chronicle's* hard copy edition. The *Houston Chronicle* added to the headline, but ran an identical story:



14. The 2018 Article publicized false statements of fact to a third party by creating false impressions about Dr. Frazier and by publishing substantially false statements. For the foregoing reasons, Dr. Frazier has met his burden of

proving by clear and specific evidence his *prima facie* case of defamation and intentional infliction of emotion distress.

DEFAMATION

Elements

15. To survive a challenge under the Texas Citizens Protection Act of a defamation claim, a plaintiff must present clear and specific evidence of the following elements

- (1) the defendant publicized a false statement of fact to a third party;
- (2) the statement(s) were defamatory concerning the plaintiff,
- (3) the statement(s) were made with actual malice, and
- (4) the statement(s) were defamatory per se or caused damages.

16. Defendants only challenged elements 1 and 3 of Dr. Frazier's defamation claim in the motion to dismiss. Because Defendants unilaterally stipulated that there is clear and specific evidence of actual malice "for purposes of the anti-SLAPP motion, and the appeal of the anti-SLAPP motion," Dr. Frazier need only provide clear and specific evidence of element 1 that Defendants publicized a ***false*** statement to a third party.

17. Dr. Frazier has met his burden based on the ***five*** false impressions

and *ten* false statements identified below.

Clear and Specific Evidence

False Impressions 1 and 2 and False Statements

18. Defendants created material false impressions in the 2018 Article that Dr. Frazier had (1) federal research violations and (2) ethical violations.

19. Dr. Frazier presented clear and specific evidence that this impression is false.

20. Dr. Frazier presented clear and specific evidence that the federal government, specifically the Food and Drug Administration, found no federal research violations.

21. Dr. Frazier presented clear and specific evidence that there were no ethical violations.

22. To create a false impression that Dr. Frazier had federal research violations and ethical violations, Defendants omitted from the 2018 Article facts about the FDA 2006 and 2009 audits, particularly statements that directly contradict the false impressions, as well as any discussion of the FDA Clinical Study Approval Protocols. Instead of including this information, Defendants misleadingly relied on reports authored by a law firm (“St. Luke’s Summary”)

and a consulting group (“Anson Report”). Notably, Defendants published the following false statements in bold from the St. Luke’s Summary:

In one of the reviews commissioned by the hospital, a prominent Cleveland Clinic cardiologist, Dr. James Young, *concluded* that St. Luke’s heart failure program ***pushes the limits***, according to the summary document. Dr. Young found the ***documentation to be poor*** and ***noted that Dr. Frazier was not up-front.***

None of the statements in bold are in Dr. Young’s report about his review of St. Luke’s. Dr. Frazier’s counsel, David Berg, informed Defendants in an email, prior to publication of the 2018 Article, that that the alleged statements from Dr. Young’s report were false by quoting directly from Dr. Young’s actual report.

23. To create a false impression that Dr. Frazier had federal research violations and ethical violations, Defendants misleadingly juxtaposed statements. Specifically, Defendants quoted statements made by Dr. Frank Smart, a cardiologist that worked with Dr. Frazier from 2003 to 2006, ***and then*** placed those quotes—that were unrelated to Dr. Frazier—next to statements about Dr. Frazier alleging serious ethical and research violations. For example, Dr. Frazier pointed to the 2018 Article headline from the *Houston Chronicle* hard copy edition: “‘Things . . . I just could not image.’ A Pioneering Heart Surgeon’s Secret History of Research Violations, Conflicts of Interest and Poor Outcomes.” This

headline contains a quote from Defendants' first telephone interview with Dr. Smart. The way that the statement is juxtaposed, with a clear statement about Dr. Frazier, gives the false and misleading impression that the quote is about Dr. Frazier—that the accusation of his “hidden history” is true.

24. To create the false impression that Dr. Frazier had federal research violations and ethical violations, Defendants misleadingly reported the 1994 federal False Claims Act lawsuit filed by former St. Luke's nurse, Joyce Riley. Specifically, Defendants made the following false statement:

“Frazier allowed a researched who was not licensed [“Dr. Brano”] to practice medicine in Texas to treat heart failure patients in his program.”

Dr. Frazier presented clear and specific evidence that he bore no responsibility for verifying the credentials or licensure of doctors or staff he worked with, or for permitting anyone to practice medicine. That responsibility belonged to the hospitals at which Dr. Brano worked: St. Luke's and Baylor College of Medicine.

25. Dr. Frazier presented clear and specific evidence—in the form of an expert report and the impressions of focus group participants—that an average reader would not have agreed with the false impression that Dr. Frazier had research violations and ethical violations if the reader had known the truth and

full context.

False Impression 3 and False Statements

26. Defendants created the material false impression in the 2018 Article that Dr. Frazier hid research showing an increased rate of stroke in LVAD patients. Specifically, to create this false impression, Defendants made the following false statements (noted in bold) in the 2018 Article:

A former top St. Luke's cardiologist said **he** believes that Frazier favored experimental heart pumps over more proven treatments and that Frazier was reluctant to acknowledge when the devices led to serious complications. Two other doctors made similar observations. In one instance, one of them said Frazier discouraged publication of research that found a high rate of strokes in the first group of patients implanted with a pump he championed.

Two physicians familiar with the research told reporters that they believed those findings should have been published in a medical journal, but they were not. One of the doctors said Frazier argued against it because doing so would "kill the field" of mechanical heart pumps.

[Billy] Cohn, the surgeon who worked closely with Frazier after joining the program in 2004, recalled the disagreement. He said doctors had already figured out a way to more accurately measure patients' blood pressure and, as a result, better manage the pump settings to reduce the risk of brain bleeding.

Frazier didn't want to needlessly "freak people out" with research showing a high rate of serious complications, Cohn said. "That would just pour water on the smoking ember of this new important field," Cohn said, adding that, in hindsight, the team "probably should have" published the stroke findings alongside their solution. Dr. Biswajit Kar,

the former St. Luke's cardiologist who led the effort documenting the high rate of strokes, declined to comment.

In a written response, Frazier said he did not recall any effort to turn the stroke research into a paper and "never opposed [Kar] publishing anything."

Frazier said he was the first to diagnose hemorrhagic strokes in patients who had received HeartMate II devices, years earlier in 2006, and he recalls organizing a meeting in Chicago with leading cardiologists from other hospitals and the device's maker to discuss the issue. "I recommended to the company that they require that blood pressure be controlled and that all new implanting centers be required to do the same."

Nevertheless, the initial stroke findings were never published.

Kar presented a summary of the report at a 2009 cardiology conference, with Frazier listed among the authors of the presentation. But other than a ***short abstract*** included in the conference program — ***which is not available online*** — there is ***no public record*** of the research.

27. Defendants also made the following statement in a "correction" made to the 2018 Article after Dr. Frazier filed this suit:

[T]he initial stroke findings were never published in a formal study.

28. Dr. Frazier presented clear and specific evidence that the impression and statements above are false.

29. Specifically, Dr. Frazier presented clear and specific evidence that, early on in the HeartMate II Clinical Study, he observed that HeartMate II patients suffered an increased incidence of strokes. Dr. Frazier published an

abstract disclosing the issue and called a conference to present the finding.

30. Dr. Frazier presented clear and specific evidence that he published *four* articles based on data about the high rate of strokes from the HeartMate II Clinical Study in *three* peer-reviewed medical journals.

31. Dr. Frazier presented clear and specific evidence—in the form of an expert report and the impressions of focus group participants—that an average reader would not have agreed with the false impression that Dr. Frazier hid the high rate of stroke had the reader known the truth and full context.

False Impression 4 and False Statements

32. Defendants created the false impression in the 2018 Article that Dr. Frazier had conflicts of interest that impacted the accuracy of his research about the HeartMate II.

33. To create the false impression that Dr. Frazier had conflicts of interest, Defendants made the following false statement in bold in the 2018 Article's Headline:

A Pioneering Heart Surgeon's Secret ***History of*** Research Violations,
Conflicts of Interest and Poor Outcomes

Defendants also made the following statement in the 2018 Article:

Frazier disclosed ***conflicts of interest*** in less than 10 percent, and those

disclosures often were inconsistent and incomplete.

34. Dr. Frazier presented clear and specific evidence that these statements are false because he had no conflicts of interest.

35. Dr. Frazier presented clear and specific evidence that he correctly reported any potential conflicts of interest and that Defendants' statements were taken out of context. Specifically, Dr. Frazier presented clear and specific evidence that he followed industry standards for reporting conflicts and reported potential conflicts of interest for the papers that he wrote and that most of the money Dr. Frazier was "paid" were for food and travel to lecture at various industry meetings.

36. Dr. Frazier presented clear and specific evidence—in the form of an expert report and the impressions of focus group participants—that an average reader would not have agreed with the false impression that Dr. Frazier had conflicts of interest that impacted his research had the reader known the truth and full context.

False Impression 5

37. Defendants created the false impression in the 2018 Article that Dr. Frazier was an old and incompetent surgeon who should not have been operating

in his seventies.

38. To create the false impression, Defendants omitted facts and stated facts out of context. Specifically, Defendants reported that, during the last five years of his career as a surgeon, Dr. Frazier had “one of the highest mortality rates in the nation.” Additionally, Defendants state in the 2018 Article:

Dr. Frazier’s “Medicare outcomes ranked among the worst in the country”;

“From 2010-15, about half of the traditional Medicare patients who received an implantable heart assist device from Frazier died within a year, nearly double the national mortality rate for such patients, according to a ProPublica analysis of federal data”; and

In his latter years of practice, Dr. Frazier’s “LVAD outcomes lagged far behind those of his peers, Medicare data shows” and “nearly half” of the patients did not survive a year, one of the highest mortality rates in the nation[,] . . . nearly double the 25 percent one-year mortality rate for Medicare patients who received LVADs from other St. Luke’s surgeons during the same period[.]”

39. Dr. Frazier presented clear and specific evidence that these statements create a false impression because Defendants failed to “risk adjust” the raw Medicare data that they relied on to show Dr. Frazier’s one-year mortality rates that were cited in the 2018 Article. “Risk adjusting” takes into account that a physician’s patients may have multiple co-morbidities or be gravely ill—like **all** of the patients Dr. Frazier treated. Dr. Frazier presented clear and specific

evidence that it is custom and practice in the medical community to risk adjust a physician's one-year mortality rate.

40. Dr. Frazier presented clear and specific evidence—in the form of an expert report and the impressions of focus group participants—that an average reader would not have agreed with the false impression that Dr. Frazier was an old and incompetent surgeon who should not have been operating in his seventies if they had all of the facts and context.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Elements

41. To establish a *prima facie* case for an intentional infliction of emotional distress (IIED) claim, a plaintiff must present clear and specific evidence that:

- (1) the defendant acted intentionally or recklessly;
- (2) its conduct was extreme and outrageous;
- (3) its actions caused the plaintiff emotional distress; and
- (4) the emotional distress was severe.

Hersh v. Tatum, 526 S.W.3d 462, 468 (Tex. 2017). Because Defendants unilaterally stipulated that there is clear and specific evidence of intent “for

purposes of the anti-SLAPP motion, and the appeal of the anti-SLAPP motion,”
Dr. Frazier need only provide clear and specific evidence of elements 2-4.

42. Dr. Frazier has met his burden.

Clear and Specific Evidence

43. Defendants acted extreme and outrageous by contacting the *New England Journal of Medicine* and triggering an investigation.

44. Defendants’ actions in triggering an investigation by the *New England Journal of Medicine* caused Dr. Frazier severe emotional distress.

45. Dr. Frazier also suffered severe emotional distress immediately upon reading the 2018 Article. His distress continued throughout the Defendants’ other publications regarding Dr. Frazier, THI, and St. Luke’s.

46. Dr. Frazier’s severe emotional distress culminated in an episode of tachycardia.

47. It is Plaintiff’s burden at this stage to show a *prima facie* case for falsity, and he has met that burden.

~~48. Defendants’ Motion to Dismiss Pursuant to the Texas Citizens’ Participation Act is frivolous and is intended solely to delay proceedings in this matter.~~

CONCLUSIONS OF LAW

49. Dr. Frazier has met his burden to show clear and specific evidence to establish *prima face* claims for defamation and intentional infliction of emotion distress.

50. Defendants have not met their burden to establish their defenses by a preponderance of the evidence.

51. Defendants cannot raise the “substantial truth” defense at this stage of the proceedings as a matter of law. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 441 (Tex. 2017); *see also Van Der Linden v. Khan*, 535 S.W.3d 179, 200 (Tex. App.—Fort Worth 2017, pet. denied).

52. Defendants are not entitled to dismissal based upon an “opinion” defense because the defamatory implications made by the Defendants are not opinions.

53. Defendants are not entitled to dismissal based upon the third-party-allegations defense because the false impressions created by the 2018 Article are a separate accusation unrelated to the individual statements of a third party. Furthermore, Defendants inaccurately reported the relevant third party allegations.

54. Defendants are not entitled to dismissal based upon the fair reporting privilege or the fair comment privilege, because neither privilege applies when a

defendant acts with actual malice, as was unilaterally stipulated for purposes of this motion, and when a plaintiff establishes that defendants published false statements and impressions to a third party.

55. Defendants are not entitled to dismissal based upon defenses raised to Plaintiff's claim of intentional infliction of emotional distress because such defenses are dispositive legal questions and the Texas Citizens Participation Act does not provide a procedural avenue for raising such questions.

~~56. Plaintiff is entitled to recover attorneys' fees and costs from Defendants in the sum of \$ _____, because Defendants submitted a frivolous motion solely intended to delay.~~

December 18, 2018



JUDGE PRESIDING

~~Respectfully submitted,~~

~~BERG & ANDROPHY~~

~~/s/ David H. Berg~~

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