[Cite as *Baxter v. Sandusky Newspapers, Inc.*, 2012-Ohio-1233.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Kevin Baxter	Court of Appeals No. E-11-006
Appellant	Trial Court No. 2009 CV 0281
v.	
Sandusky Newspapers, Inc., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: March 23, 2012

* * * * *

Jack Landskroner, Tom Merriman, Drew Legando,
and Paul W. Flowers, for appellant.

David Marburger, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶1} Plaintiff-appellant, Kevin Baxter, appeals the February 4, 2011 judgment of the Erie County Court of Common Pleas which granted defendants-appellees' motions for summary judgment and denied appellant's motions for summary judgment. Because we find that no issues of fact remain for trial, we affirm.

{¶2} This action stems from the 2008 investigation and ultimate firing of Sandusky Police Chief Kimberly Nuesse. Appellant, Erie County Prosecuting Attorney Kevin Baxter, was questioned during the external investigation commissioned by the municipality and conducted by Cleveland attorney Michael Murman and two former FBI agents. Appellant was one of several individuals questioned and his statement consisted of approximately four pages of the 224-page document known as the "Murman Report." On May 28, 2008, the report became public record. After reviewing the report, appellant contacted the Sandusky City Law Director, Donald Icsman, to inform him of multiple inaccuracies in the comments he made to the investigators as summarized by Murman. Appellant was told to handwrite the corrections on the report and sign it. He did so. The Sandusky Register's managing editor, Matt Westerhold, questioned Baxter about the alleged inaccuracies of the report.

{¶3} Following the investigation, Chief Nuesse was terminated. Nuesse appealed the firing to Sandusky's Municipal Civil Service Commission ("the Commission"). The hearing commenced in October 2008, and spanned 22 days of testimony received over six months. Appellee Jason Singer, a reporter for The Sandusky Register, covered the hearing.

{¶4} While the hearing was ongoing, on January 13, 2009, The Sandusky Register ("the Register") published an opinion column titled *Baxter Needs Integrity Probe* and written by managing editor appellee Matt Westerhold. The column focused on

appellant's corrections to the Murman Report and stated that the so-called "inaccuracies" were actually "lies" or "falsifications" and appellant should be held accountable.

{¶5} Appellant testified at the Nuesse hearing. On February 26, 2009, Nuesse's attorney attempted to attack appellant's credibility by questioning an Ohio Bureau of Criminal Investigation & Identification ("BCI") agent about an investigation conducted by the BCI in response to allegations that appellant used cocaine. The following discussion took place:

> Q: Okay. Prior to you testifying, Erie County Prosecutor Kevin Baxter testified in this case. And a part of his testimony was that he had been investigated by BCI & I a number of years ago based on some allegations by a Krista Harris, allegations that he used cocaine. You're aware of that investigation, right?
>
> A: I'm aware of it, but was not a part of it.

{¶6} At that point, the attorney representing BCI objected to the line of questioning stating that the records were considered confidential law enforcement records. The objection was sustained. Nuesse's attorney then attempted to introduce the BCI report and read the following from it while on the record: "Only one witness of the myriad of names provided to the investigators has provided reliable information regarding the subject's drug use." The attorney further read: "The information, however, is about cocaine usage five or more ago and is not sufficient for probabl[e] cause." The

court sustained BCI's objection and stated that Nuesse's attorney would have the opportunity to proffer the evidence privately, during a court recess.

{¶7} On February 26, 2009, the Register website published an update on the Nuesse hearing which stated: "An undercover narcotics agent from the Ohio Bureau of Criminal Investigation & Identification testified about Erie County prosecutor Kevin Baxter's alleged cocaine use, but it was stricken from the record." The next day, the Register published Singer's article recapping the day's testimony as follows:

> A high-ranking undercover narcotics agent from the Ohio Bureau of Criminal Investigation & Identification testified about Erie County prosecutor Kevin Baxter's alleged cocaine use.
>
> The testimony at Thursday's hearing was meant to rebut earlier testimony from Baxter.
>
> According to a document from the bureau [the BCI report], which was presented as evidence at the hearing, the government had a "credible witness" who confirmed Baxter's cocaine use.
>
> But since the witness could only testify to cocaine use from several years ago, the government chose not to press charges, the document said.

{¶8} Portions of the March 3, 2009 article provided:

> The allegations surfaced at fired police Chief Kim Nuesse's Civil Service hearing last week, when a high-ranking undercover narcotics agent

with the Bureau of Criminal Identification and Investigation testified there was a "credible witness" who could substantiate the accusations.

The agent said the BCI decided not to pursue charges because the alleged cocaine abuse occurred several years earlier.

{¶9} The article was published under Singer's byline. However, the next day the Register issued a correction clarifying that Singer was a contributor to the staff report. The above passages were taken from an email from appellee Westerhold which contained a sketch of the article.

{¶10} Thereafter, on March 5, 2009, the Register published the following article which provided, in part:

Last week, a high-ranking undercover narcotics agent from the bureau testified about the document [the BCI Report].

According to the BCI report, which was presented as evidence at the Kim Nuesse Civil Service hearing, the government had a "credible witness" who confirmed Baxter's cocaine use. But since the witness could only testify to cocaine use from several years ago, the government said it did not have probable cause to press charges, the document stated.

{¶11} The column and articles at issue were included in the print and the online editions. In addition, the articles also referenced prior allegations made by appellant's

brother, Edward Baxter, regarding appellant's alleged cocaine use and abuse of power. The BCI report at issue was eventually made available as a public record.

{¶12} Weeks later, on April 2, 2009, appellant commenced the instant action alleging that the above-referenced column and articles were defamatory. In addition to Sandusky Newspapers, Inc., Matt Westerhold, and Jason Singer, appellant named Douglas Phares, the publisher, as a defendant. Over the course of the next year, volumes of depositions were taken. The depositions were often contentious and rife with objections. The court was asked, on more than one occasion, to rule on the objections.

{¶13} On April 1, 2010, appellant filed a motion for leave to amend his complaint to include a spoliation of evidence claim against appellees based on the articles written by reporter Jason Singer. The motion alleged that Singer, who during his deposition admitted to taking notes during the questioning of the BCI agent and the attempted introduction of the BCI report, deleted the notes from his laptop after the commencement of the action. The notes were used to write the articles that appellant claimed were defamatory. According to appellant, the notes were critical because they could either support or discredit the testimony that Singer allegedly heard that was not contained in the hearing transcript. On August 3, 2010, the court granted the motion to amend.

{¶14} In the interim, the parties had begun filing motions for summary judgment. On May 4, 2010, appellant filed two separate motions for partial summary judgment. Specifically, appellant argued that he was entitled to judgment as a matter of law

claiming that the reporting in the February 27, March 3, and March 5, 2009 articles regarding the BCI report and the BCI's agent testimony at the hearing was clearly false. On May 24, 2010, appellant filed a motion for summary judgment as to appellee Jason Singer's affirmative defense of constitutional privilege. Appellant indicated that Singer expressly stated that he waived the defense.

{¶15} On April 30, 2010, appellees filed their motions for summary judgment with extensions of time to file their memoranda in support. Thereafter, on May 24, and June 1, 2010, appellees filed individual memoranda in support of their respective motions for summary judgment. Appellee Singer argued that as to the articles attributed to him, appellant failed to present evidence of material falsity required to sustain a libel claim. Further, because appellant is a public official he was required to show by clear and convincing evidence that the statements were made with actual malice.

{¶16} Appellee Westerhold argued that he was entitled to summary judgment as to the libel claims relating to the January 13, 2009 column because "opinion" speech is constitutionally protected. Further as to Westerhold's role in the March 3, 2009 article, he argued that appellant failed to demonstrate actual malice in the inclusion of the background information regarding Edward Baxter's allegations that appellant had used cocaine. Sandusky Newspapers, Inc. and Douglas Phares based their support for summary judgment on the arguments contained in Singer's and Westerhold's motions.

{¶17} On September 21, 2010 appellees Sandusky Newspapers, Douglas Phares, and Matt Westerhold filed motions to dismiss and motions for summary judgment on appellant's spoliation claim. Appellees essentially argued that, on its face, the complaint fails to state a claim for spoliation of evidence because appellant failed to allege that they willfully destroyed or directed Singer to destroy any evidence.

{¶18} On September 22, 2010, appellee Singer filed a motion for summary judgment of appellant's spoliation claim. Appellee argued that appellant failed to create an issue of fact as to whether appellee's notes would have assisted him in proving his libel claims. Specifically, appellee argued that Westerhold actually drafted the portion of the article attributing the testimony to the BCI agent; that because appellant failed to establish that the substance of the testimony was false, the notes were irrelevant; and that since Singer waived the affirmative defense of constitutional privilege and because appellant does not even reach the issue of falsity, Singer's state-of-mind as to whether there was actual malice did not need to be addressed. In response, appellant argued that appellee failed to demonstrate an absence of genuine issues of fact because the cases cited were inapposite and that appellee only addressed the fourth element of a spoliation claim, the disruption of a plaintiff's case.

{¶19} On February 4, 2011, the trial court entered its opinion and judgment entry as to the pending motions. As to appellant's first motion for summary judgment, the

court found that because the "gist" of the February 27 and March 3, 2009 articles was substantially true, the motions were denied.

{¶20} As to appellee Singer's motions for summary judgment, the court concluded that appellant could not meet his burden of proving material falsity of the statements. As to the agent's testimony, the court acknowledged that it did not appear that the BCI agent actually offered the testimony referenced in the March 3, 2009 article; rather, it was Nuesse's attorney who read from the BCI report. The court concluded, however, that attributing the reading of the report to the wrong individual was not sufficient to establish the falsity of the article.

{¶21} The trial court further granted appellee Matt Westerhold's motion for summary judgment as to the January 13, 2009 column where he alleged that appellant falsified his statement to investigators during the Nuesse investigation. The court concluded that the statements were opinion and, thus, constitutionally protected. As to the inaccurate statement attributed to the BCI agent, the court again stated that because it was consistent with the BCI report it was not actionable.

{¶22} Addressing the spoliation claim, the court first noted that appellant conceded that the claim is against appellee Singer, only, rendering any motions by the remaining parties moot. The court then concluded that because the articles in question were substantially true, destruction of the notes in question neither disrupted the case nor was the proximate cause of any damages in the case.

{¶23} Finally, the court determined that appellant's motion for summary judgment as to appellee Singer's constitutional privilege affirmative defense was moot. The court then granted summary judgment as to all appellees. This appeal followed.

{¶24} Appellant now raises the following assignments of error for our review:

I. The trial court erred, as a matter of law, by improperly granting the defendants' motions for summary judgment on the plaintiff's defamation claims.

II. The trial court erred, as a matter of law, by improperly granting defendant Jason Singer's motion for summary judgment on the plaintiff's spoliation claim.

{¶25} We first note that an appellate court's review of a trial court's ruling on a summary judgment motion is de novo. *Conley-Slowinski v. Superior Spinning & Stamping Co.*, 128 Ohio App.3d 360, 363, 714 N.E.2d 991(6th Dist.1998). A movant is entitled to summary judgment pursuant to Civ.R. 56(C) when it is demonstrated "that there is no issue as to any material fact, that the moving party is entitled to judgment as a matter of law, and that reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party." *Miller v. Bike Athletic Co*, 80 Ohio St.3d 607, 617, 687 N.E.2d 735 (1998); Civ.R. 56(C). The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some

evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle*, 75 Ohio App.3d 732, 735, 600 N.E.2d 791(12th Dist.1991).

{¶26} In appellant's first assignment of error, he argues that the trial court erroneously granted appellees' motions for summary judgment on his defamation claims. Defamation is a false publication either spoken or written that injures a person's reputation. *Dale v. Ohio Civ. Serv. Emp. Assn.*, 57 Ohio St.3d 112, 117, 567 N.E.2d 253 (1991). Specifically, slander is generally considered to be the result of a spoken statement, and libel is generally derived from written statements. Dobbs, Hayden, Bublick, *The Law of Torts*, Section 518, 170-171(2d Ed.2011). In order to prove defamation, the injured party must show that: (1) a false and defamatory statement was made about plaintiff; (2) the statement was published without privilege to a third party; (3) it was made with fault of at least negligence on the part of the defendant; and (4) it was either defamatory per se or caused special harm to the plaintiff. (Citation omitted.) *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.*, 81 Ohio App.3d 591, 601, 611 N.E.2d 955 (9th Dist.1992).

{¶27} Proving that the statements are true, obviously, is a defense to a defamation claim. *Scaccia v. Dayton Newspapers, Inc.*, 2d Dist. No. 22813, 2009-Ohio-809, ¶ 9. However,

> [t]he publication need not be literally true to receive protection. It is enough if the publication is substantially true. That means the gist or sting

> of the defamation must be true even if details are not. Read literally, some judicial statements seem to say that a publication is true if it generates no more opprobrium or distaste in the readers' minds than the truth. Dobbs, Hayden, Bublick at 217, Section 533.

{¶28} In his case, it is undisputed that appellant is a public official. Accordingly, appellant was required to show that the challenged statements were made with actual malice or, in other words, that the statements were false or made with reckless disregard of whether they were false. *Fuchs v. Scripps Howard Broadcasting Co.*, 170 Ohio App.3d 679, 2006-Ohio-5349, 868 N.E.2d 1024, ¶ 30 (1st Dist.).

{¶29} Appellant states that despite several examples of inaccurate statements in the record, he has chosen to focus on the most egregious examples. We will address appellant's arguments as to each statement in the order presented in his appellate brief. Appellant first argues that the March 3, 2009 article which stated that a "high-ranking undercover narcotics agent with [BCI] testified there was a 'credible witness' who could substantiate" appellant's drug use was not substantially true. Conversely, appellees assert that although the portion of the article attributing the statement to the BCI agent was literally false, it was not materially false and, accordingly, was not actionable.

{¶30} In arguing that reasonable minds could conclude that the article is materially false, appellant stresses that it purports to paraphrase or quote the BCI agent's testimony. In support, appellant cites *Murray v. Knight-Ridder, Inc.*, 7th Dist. No. 02 BE

45, 2004-Ohio-821. In *Murray*, the court found that issues of fact remained where a newspaper took quotations from a coal mine owner out-of-context. The quotes, when pieced together made it appear as though the plaintiff was dying which, he argued, had a negative effect on his company's profitability. He court noted that the fact that the defendant newspaper used quotation marks around the alleged defamatory statements worsened the negative effects. *Id.* at ¶ 88. The court noted:

> "In general, quotation marks around a passage indicate to the reader that the passage reproduces the speaker's words verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, quotations add authority to the statement and credibility to the author's work." *Id.* at ¶ 87, quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991).

{¶31} Conversely, appellees assert that where a publication misquotes a statement, no automatic liability exists. Appellees cite *Mann v. The Cincinnati Enquirer*, 1st. Dist. No. C-090747, 2010-Ohio-3963, for their proposition. The court therein, concluded that the offending quote, in isolation, did convey an inaccurate statement but that, looking at the gist of the article, it was not defamatory as a matter of law. *Id*. at ¶ 18.

{¶32} In the present case, only the phrase "credible witness" was quoted as testimony of the BCI agent. The rest of the article attributed statement to the unnamed agent. We agree with appellees that the "sting" or "gist" of the March 3, 2009 article was that the BCI had a reliable or credible source that appellant used cocaine. Thus, the article, though it was partly literally false in that it incorrectly attributed the quote to the testifying BCI agent, is substantially true.

{¶33} Appellant next makes arguments relative to the March 5, 2009 article published in the Register which stated that the BCI report indicated that the government had a "credible witness" who confirmed appellant's cocaine use but because the witness could only testify as to cocaine use from several years ago, the government said that it did not have probable cause to charge him.

{¶34} Appellant again argues that the passage is materially false because the BCI report failed to state that there was a "credible witness" or that the witness confirmed his cocaine use. Appellant relies on a defamation case where the court determined that the difference between a "convicted sex offender" and a juvenile court finding of delinquency based on the commission of the offense of disorderly conduct (stemming from an alleged sexual offense) was more than a terminology error. *Roe v. Heap*, 10th Dist. No. 03AP-586, 2004-Ohio-2504. In *Roe*, court concluded that the disparity between the substance of the communications and the truth were too disparate. *Id.* at ¶ 33. Specifically, that calling the juvenile a "convicted sexual offender" conveyed a sting

was substantially more injurious that the actual events surrounding the delinquency finding. *Id.* at ¶ 44.

{¶35} Unlike *Roe*, we do not find that the variances from the March 5 article and the BCI report are significant enough to demonstrably alter the gist so as to inflict additional injury upon appellant's reputation. First, the report stated that there was a witness with "reliable information," rather than a "credible witness." Credible is defined as "trustworthy; believable." Reliable means "fit to be trusted or relied on." See *The Merriam-Webster Dictionary* 169, 611 (2004). Appellant further argues that the charges were not pursued because there was no probable cause, not that the allegations were old and there were statute of limitations concerns. Again, the BCI report states: "The information, however, is about cocaine usage five years or more ago and is not sufficient for probable cause." We conclude that the Register article contained a reasonable interpretation of the report. It was logical to interpret the sentence as stating that because the cocaine usage was from five or more years ago, it was too old to provide a basis for probable cause.

{¶36} Appellant next argues that the materially false statements in the March 3, 2009 article were made with actual malice. As previously stated, because appellant is a public official, in addition to the elements of defamation, he was required to demonstrate that the offending statements were made with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.E.2d 686 (1964). Actual malice is defined as

statements being made either with knowledge of their falsity or with reckless disregard as to their truth or falsity. *Perez v. Scripps-Howard Broadcasting Co*., 35 Ohio St.3d 215, 218, 520 N.E.2d 198 (1988), quoting *New York Times* at 279-280.

{¶37} Appellant claims that the deposition testimony of Matt Westerhold, a large contributor to the article, demonstrates an issue of fact as to whether he had actual malice when drafting the sketch of the March 3, 2009 article. Appellant first argues that Westerhold attributed quotes to the BCI agent's testimony that were not contained in Singer's February 27, 2009 article. Further, appellant argues that Westerhold had reason to doubt the veracity of Edward Baxter's allegations against appellant.

{¶38} First as to the statement regarding the undercover agent's testimony, the agent was mentioned in the February 27 article; the only difference was that the later article attributed the source of the "credible witness" as the agent, rather than the report. Westerhold was not present at the February 26, 2009 hearing and the article did not purport to quote directly from the agent's testimony.

{¶39} Next, appellant argues that Westerhold had reason to know of the potential falsity of Edward [a.k.a. Ejay] Baxter's claims. The March 3, 2009 article specifically stated:

> Baxter's brother, Ejay Baxter, contends that his brother regularly abused cocaine and the power of his office during the estate case [of their parents] and other cases.

Some of the Baxter siblings have supported Ejay Baxter's allegations, while other siblings denied the accuracy of them.

{¶40} During his deposition, Westerhold admitted that through the end of March 2009, he had doubts about the allegations made by Edward regarding appellant. However, Westerhold stated that his thoughts began to change when he learned of the witness who had talked with BCI agents. Based on these statements, appellant failed to present an issue of fact as to whether Westerhold published the allegations of Edward Baxter with actual malice. Moreover, Westerhold did not indicate that Edward's statements were actually true; he just recounted the allegations in conjunction with the newly discovered material in the BCI report.

{¶41} Based on the foregoing, we find that because the statements at issue were substantially true and there is no compelling evidence of actual malice, the trial court did not err when it granted appellees' motions for summary judgment. Appellant's first assignment of error is not well-taken.

{¶42} In his second assignment of error, appellant contends that the trial court improperly granted appellee Singer's motion for summary judgment on appellant's spoliation of evidence claim. In Ohio, spoliation is recognized as an independent cause of action. *Mitchell v. Norwalk Area Health Serv.*, 6th Dist. No. H-05-002, 2005-Ohio-5261, ¶ 146. A party establishes a spoliation or destruction of evidence claim where there is:

(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts * * *. *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29, 615 N.E.2d 1037 (1993).

{¶43} In the present case, appellant argues that because Singer admitted to destroying the notes from the February 26, 2009 hearing, he is entitled to the evidentiary inference that the content of the notes were damaging to appellees. This inference, he contends, does not rely upon proof of disruption of appellant's case or damages from the loss of evidence. In support, appellant relies on *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 635 N.E.2d 331 (1994) and *Simeone v. Girard City Bd. of Edn.*, 171 Ohio App.3d 633, 2007-Ohio-1775, 872 N.E.2d 344 (11th Dist.). We find that these cases are inapposite. Both cases arise from motions for sanctions which, unlike a spoliation action, requires the moving party to show that the evidence is relevant, the offending party's expert had an opportunity to examine the evidence, and the evidence was intentionally or negligently destroyed. *Simeone* at ¶ 69. A sanction that a court can impose under this more "relaxed" discovery violation claim is permitting a jury to infer that the evidence would have been unfavorable to the spoliator. *Keen v. Hardin Mem.*

Hosp., 3d Dist. No. 6-03-08, 2003-Ohio-6707, ¶ 10, citing *Banks v. Canton Hardware Co.*, 156 Ohio St. 453, 103 N.E.2d 568 (1952).

{¶44} Reviewing the record in a light most favorable to appellant, we find no set of facts to establish an issue of fact as to whether Singer willfully destroyed evidence in order to disrupt appellant's case and any damages caused therein. Singer admitted to destroying the notes after the transcript of the hearing was made available. There is no evidence that, at that time, he was aware that the transcript failed to contain a full recitation of what he believed had transpired. Further, because we have found that the articles were substantially true, even inferring that the notes failed to support Singer's contention would not have changed the result in this case. Accordingly, appellant's second assignment of error is not well-taken.

{¶45} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

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A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCURS AND WRITES SEPARATELY. JUDGE

YARBROUGH, J.

{¶46} I agree in full with the well-reasoned opinion of the majority. I write separately only to express my concern with the actions of Jason Singer, the reporter and an appellee herein.

{¶47} A.J. Liebling, famed journalist and writer for *The New Yorker*, once wrote, "Freedom of the press is guaranteed only to those who own one." Liebling, *The Wayward Press: Do You Belong in Journalism?*, The New Yorker (May 14, 1960) 105, 109. Because I recognize and support the freedom of the press as being "essential to the

nature of a free state,"[1] I believe those who are privileged to be members of the press should act responsibly. In this case, although his actions did not result in liability, I find it irresponsible that Singer would destroy his notes from the February 26, 2009 hearing when he knew the ongoing litigation concerned articles that were written based on those notes. I expect one who, by trade, is so intimately associated with revealing and reporting the truth to know better than to take actions that tend to conceal it. Such conduct is unacceptable and demonstrates a disregard for the integrity of court proceedings, and for the responsibility that accompanies the exercise of a free press.

[1] William Blacksone, *Commentaries 4:150—53* (1769), The Founders' Constitution, Volume 5, Amendment I (Speech and Press), Document 4, http://press-pubs.uchicago.edu/founders/documents/amendI_speechs4.html (accessed Feb. 29, 2012).