

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 5/07/2019 11:33:51 AM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
File Number:	NSD679/2019
File Title:	NATIONWIDE NEWS PTY LIMITED & ANOR v GEOFFREY ROY RUSH
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



A handwritten signature in blue ink, reading "Warwick Soden".

Dated: 5/07/2019 11:50:19 AM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 122
Rules 36.01(1)(b); 36.01(1)(c)

Further Amended Notice of appeal

No. 679 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

On appeal from the Federal Court

Nationwide News Pty Limited and another named in the schedule

Appellants

Geoffrey Roy Rush

Respondent

To the Respondent

The Appellants appeal from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Law Courts Building, Queens Square, 184 Phillip Street, Sydney NSW 2000

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of	Nationwide News Pty Ltd and Jonathan Moran, Appellants		
Prepared by	Robert Todd		
Law firm	Ashurst Australia		
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The Appellants appeal from the whole of the following judgments of the Federal Court at Sydney:

1. Judgment given on 11 April 2019 (*Rush v Nationwide News Pty Limited (No 7)* [2019] FCA 496) (**Primary Judgment**);
2. Judgment given on 10 October 2018 (*Rush v Nationwide News Pty Limited (No 4)* [2018] FCA 1558) (**Judgment No 4**);
3. Judgment given on 29 October 2018 (*Rush v Nationwide News Pty Limited (No 5)* [2018] FCA 1622) (**Judgment No 5**);
4. Judgment given on 6 November 2018 (*Rush v Nationwide News Pty Limited (No 6)* [2018] FCA 1851) (**Judgment No 6**).

The Appellants appeal from the following orders of the Federal Court at Sydney:

1. Orders 1, 2(a) and 2(b) of the orders entered on 23 May 2019.

Grounds of appeal

1. The trial miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the following, taken as a whole:
 - (a) The manner in which the primary judge approached the issue of credit as between witnesses called by the Respondent and witnesses called by the Appellants.
 - (b) The primary judge's reliance on an email of Annelies Crowe, tendered by the Respondent as a business record, as a significant basis for his credit finding against Eryn Jean Norvill, in circumstances where the Respondent did not call Ms Crowe, although she was available and subject to subpoena.
 - (c) [Not used]
 - (d) The primary judge's finding at Primary Judgment [389] to the effect that Mark Winter's recollection of the incident in rehearsal was prompted by someone at a conference with the Appellants' lawyers and Ms Norvill's lawyers, in circumstances where that allegation was not put to Mr Winter or to the Appellants in order to give them an opportunity to respond.
 - (e) The primary judge's finding at Primary Judgment [416] which referred to Robyn Nevin and Helen Buday's "impeccable character and integrity", matters which are irrelevant to the issue of credit and in respect of which there was no evidence.



- (f) The primary judge's statement at Primary Judgment [447] that there was no evidence to suggest that the Respondent had in fact sexually harassed anyone in the past, and that that proposition was not put to the Respondent in cross-examination, in circumstances where the truth of this matter was not a matter in issue on the pleadings.
- (g) [Not used]
- (h) The primary judge's finding, at Primary Judgment [773], that the Appellants' pleading of allegations in the amended defence on the basis of the contents of Ms Crowe's email or a hearsay account of that email (see Primary Judgment [771]) was unjustified and warranted an award of aggravated damages, in circumstances where the primary judge relied upon that email as a significant basis for his credit finding against Ms Norvill.
- (i) The primary judge's finding that the Respondent's evidence in relation to his withdrawal from *Twelfth Night* could be admitted into evidence in relation to his special damages claim in circumstances where this had not been pleaded.
- (j) The award of special damages on the basis that the Respondent was unable to work due to the emotional effect the articles had on him, in circumstances where:
 - (i) the case was not pleaded this way and the Respondent himself gave no evidence to this effect; and
 - (ii) there was no evidence in support of the case as pleaded and advanced through the Respondent's expert evidence, namely that the Respondent had received no offers of work, such that the Respondent would have failed in his claim for special damages.
- (k) The primary judge's award of special damages for a period of two years after judgment (on a sliding scale) in circumstances where the expert evidence called on behalf of the Respondent by his agent, Fred Specktor, was that the Respondent would receive offers at the same rate in about 12 months.
- (l) In consequence of the matters referred to in (i), (j) and (k) above, the primary judge's award of excessive special damages which was not supported by the evidence.
- (m) Repeated references to the Appellants and the matters complained of by the primary judge, orally and in written judgments, in derogatory terms, and the tone in which certain of those references were delivered, as indicated below:



- (i) The primary judge's remarks at [17] of the judgment of 20 March 2018 [2018] FCA 357, in circumstances where statutory qualified privilege, malice and aggravated damages were in issue.
- (ii) The primary judge's remarks at [1] and [2] of the judgment of 20 April 2018 [2018] FCA 550 which suggested impulsiveness and recklessness, in circumstances where statutory qualified privilege, malice and aggravated damages were in issue.
- (iii) The primary judge's remarks in [71] and [152] of the same judgment which constituted an unjustified finding that the Appellants' application to amend was an abuse of process; and in circumstances where the proposition was not put to the deponent of the Appellants' affidavit in support of the application.
- (iv) The primary judge's remarks in [5] of Judgment No 54, and the tone in which the primary judge delivered the oral judgment.
- (v) The primary judge's remarks in [10], [29], [33], [37] – [39], [66], [71], [111] of Judgment No 6.
- (vi) The primary judge's remarks at T203 – 204 and the tone in which they were delivered.
- (vii) The primary judge's remarks at T830827 – 834 suggesting an abuse on the part of the Appellants and the tone in which they were delivered.
- (viii) The primary judge's remarks at T8586 – 8601 in the course of the application to amend on 2 November 2018, and the tone in which they were delivered.
- (ix) The primary judge's remark at T1123 that part of the third matter complained of was "fundamentally misleading" in the course of submissions about defamatory meaning and the tone in which it was delivered.
- (x) Unnecessary remarks disparaging the Appellants that, regarded singly, would not give rise to an apprehension of bias, but did so in combination with the other matters in this ground: T133.17 – 20; T863.09 – 15; T1080.33 – 1081.08; T1102.33 – 43 and the tone in which they were delivered.
- (xi) Other observations and comments giving the appearance of hostility towards the Appellants and pre-judgment of the issues, and the tone in which they were delivered: T401.01 – 402.43; T561.33 – 36; T563.01 –



13; T622 – 627; T629.16 – 29; T873 – 876; T1032.14 – 16; T1067 – 1068.

(xii) The primary judge's remarks about the Appellants' "recklessly irresponsible journalism" at page 17 of the judgment summary of the Primary Judgment and the tone in which they were delivered.

- (n) The primary judge's decision in Judgment No 4 to disallow the evidence of Colin Moody.
 - (o) The primary judge's decision in Judgment No 5 to admit as expert evidence opinions of two close associates of the Respondent.
 - (p) The primary judge's decision in Judgment No 6 refusing the Appellants' leave to amend the defence and to rely upon the evidence of Witness X.
2. The primary judge's decision in Judgment No 4 miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the matters referred to in ground 1.
 3. The primary judge's decision in Judgment No 5 miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the matters referred to in ground 1.
 4. The primary judge's decision in Judgment No 6 miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the matters referred to in ground 1.
 5. The Appellants were denied procedural fairness by reason of:
 - (a) The primary judge's finding at Primary Judgment [389] to the effect that Mr Winter's recollection of the incident in rehearsal was prompted by someone at a conference with the Appellants' lawyers and Ms Norvill's lawyers, in circumstances where that allegation was not put to Mr Winter or to the Appellants in order to give them an opportunity to respond.
 - (b) The primary judge's finding at Primary Judgment [416] which referred to Ms Nevin and Ms Buday's "impeccable character and integrity", matters which are irrelevant to the issue of credit and in respect of which there was no evidence.
 - (c) The primary judge's statement at Primary Judgment [447] that there was no evidence to suggest that the Respondent had in fact sexually harassed anyone in the past, and that that proposition was not put to the Respondent in cross-examination, in circumstances where the truth of this matter was not a matter in issue on the pleadings.



- (d) The primary judge's finding that the Respondent's evidence in relation to his withdrawal from *Twelfth Night* could be admitted into evidence in relation to his special damages claim in circumstances where this had not been pleaded.
 - (e) The award of special damages on the basis that the Respondent was unable to work due to the emotional effect the articles had on him, in circumstances where the case was not pleaded this way and the Respondent himself gave no evidence to this effect.
 - (f) The primary judge's decision in Judgment No 4 to disallow the evidence of Colin Moody.
6. The primary judge's decision in Judgment No 5 to admit as expert evidence opinions of two close associates of the Respondent.
 7. The primary judge erred in the exercise of his discretion refusing the Appellants leave to amend their defence in Judgment No 6.
 8. The primary judge erred in finding that the imputation "the Applicant is a pervert" was conveyed by the second and third matters complained of.
 9. The primary judge erred in finding that the Appellants had not established each of the imputations is substantially true:
 - (a) The primary judge erred in finding (at Primary Judgment [459]) that the groping and fondling gesture (allegation one) did not occur. For the reason set out at 10(e) below, the primary judge was in error in finding at Primary Judgment [462] that Mr Winter's evidence did not corroborate Ms Norvill's evidence. For the reasons set out at 10(a) below, the primary judge was in error in finding at Primary Judgment [464] – [465] that Ms Norvill's public praise of the Respondent, for promotional purposes, was inconsistent with allegation one occurring. The primary judge also relied on his erroneous finding that Ms Norvill was an unreliable witness (ground 10, below), and that the incident was merely unseen by two other witnesses (Primary Judgment [461]).
 - (b) The primary judge erred in finding (at Primary Judgment [502]) that allegations two and three did not occur;
 - (c) The primary judge erred in finding (at Primary Judgment [576]) that allegation five did not occur;
 - (d) The primary judge erred in finding (at Primary Judgment [610]) that allegation six did not occur;
 - (e) The primary judge erred in finding (at Primary Judgment [634]) that allegation seven did not occur;



- (f) The primary judge erred in finding (at Primary Judgment [634]) that the sending of the text of 10 June 2016 was not inappropriate.
10. The primary judge erred in finding that Ms Norvill was an unreliable witness prone to exaggeration and lacking in credibility:
- (a) The primary judge at Primary Judgment [332] relied on a supposed inconsistency between Ms Norvill's evidence about the Respondent and positive statements made by her about the Respondent to the press for the purpose of promoting "King Lear", in circumstances where it was fanciful to expect Ms Norvill to publicly express any reserve about working with the Respondent, or to do other than characterise their collaboration as a highly positive experience;
 - (b) The primary judge at Primary Judgment [333] erred in relying on inconsistencies between Ms Norvill's evidence and exhibit A68, for the reasons set out in ground 11;
 - (c) The primary judge at Primary Judgment [334] – [336] relied on differences between Ms Norvill's evidence and the contents of a statement prepared by her solicitors for the purpose of allowing the Appellants to make an application to amend their defence. The primary judge did not explain how he took into account the matters he set out at Primary Judgment [328] in assessing Ms Norvill's credit in light of Primary Judgment [334] – [336], and it appears from those paragraphs that he did not do so.
 - (d) The primary judge at Primary Judgment [337] erred in relying on the fact of a number of social interactions between Ms Norvill and the Respondent as grounds for doubting the reliability of her evidence, and in finding (at Primary Judgment [338]) that her explanations were "not particularly persuasive".
 - (e) The primary judge erred in finding (at Primary Judgment [339]) that "Mr Winter's evidence, when closely analysed, provided little support for Ms Norvill's version of events". In relation to allegations of groping and fondling gestures during rehearsal, the primary judge accepted Mr Winter's description of the Respondent's gestures as "boob squeezing" (at Primary Judgment [385]).
 - (f) The primary judge erred in finding that Ms Norvill's evidence as to her conversations with Ms Nevin (Primary Judgment [432] – [449]), in which the Respondent was discussed, was unreliable (at Primary Judgment [448]). In circumstances where Ms Nevin knew that Ms Norvill was the complainant referred to in the first matter complained of, and had therefore made a most serious, unexpected and unfounded allegation of misconduct against her close friend, she texted Ms Norvill in highly sympathetic terms entirely consistent with



the matter having been previously discussed between them as deposed to by Ms Norvill. Ms Nevin's evidence was glaringly improbable.

- (g) The primary judge erred in finding (at Primary Judgment [339]) that the fact some of Ms Norvill's evidence was uncorroborated supported a finding, in combination with the foregoing matters, that she was an unreliable witness prone to exaggeration and lacking in credibility.
- 11. The primary judge erred in relying on an email of Ms Crowe, tendered by the Respondent as a business record, as a significant basis for his credit finding against Ms Norvill, in circumstances where the Respondent did not call Ms Crowe, although she was available and subject to subpoena.
- 12. The primary judge erred in holding, at Primary Judgment [389], that Mr Winter's recollection of the incident in rehearsal was prompted by someone at a conference with the Appellants' lawyers and Ms Norvill's lawyers, in circumstances where that allegation was not put to Mr Winter or to the Appellants in order to give them an opportunity to respond.
- 13. The amount of general damages awarded was excessive.
- 14. The primary judge erred in finding, at Primary Judgment [773], that the Appellants' pleading of allegations in the amended defence on the basis of the contents of Ms Crowe's email or a hearsay account of that email (see Primary Judgment [771]) was unjustified and warranted an award of aggravated damages, in circumstances where the primary judge relied upon that email as a significant basis for his credit finding against Ms Norvill.
- 15. The primary judge erred in admitting into evidence the opinions of Fred Spektor and Fred Schepisi as expert evidence (Judgment No 5).
- 16. The primary judge erred in following the decision of *Wilson v Bauer Media* (2018) 361 ALR 642. The Appellants contend that that decision is plainly wrong and ought not be followed.
- 17. The primary judge erred in awarding special damages on the basis that the Respondent was unable to work due to the emotional effect the articles had on him, in circumstances where:
 - (a) the case was not pleaded this way and the Respondent himself gave no evidence to this effect; and
 - (b) there was no evidence in support of the case as pleaded and advanced through the Respondent's expert evidence, namely that the Respondent had received no offers of work, such that the Respondent would have failed in his claim for special damages.



18. The primary judge erred in awarding special damages for a period of two years after judgment (on a sliding scale) in circumstances where the expert evidence called on behalf of the Respondent by his agent, Mr Specktor, was that the Respondent would receive offers at the same rate in about 12 months.
19. In consequence of the matters referred to in grounds 17 and 18 above, the primary judge erred in making orders 2(a) and (b) on 23 May 2019.
20. The primary judge erred in failing to recuse himself before hearing the Respondent's application for injunctions on 23 May 2019.

Orders sought

1. Allow the appeal.
2. Set aside orders 1, 2 and 3 of the Court below entered on 11 April 2019, orders 2(a) and 2(b) made on 23 May 2019 and any further orders in relation to special damages.
3. Enter judgment for the Appellants.
4. Alternatively to order 3:
 - (a) remit the proceedings to the Court for a re-trial before a different trial judge;
 - (b) set aside orders 1 and 2 entered on 10 October 2018;
 - (c) set aside order 1 made on 29 October 2018;
 - (d) set aside order 1 entered on 6 November 2018;
 - (e) remit the Appellants' applications determined in the following judgments for determination by a different judge:
 - (i) Judgment No 4;
 - (ii) Judgment No 5;
 - (iii) Judgment No 6.
5. Set aside order 1 of the Court below entered on 23 May 2019 and any orders made by the primary judge subsequent to 23 May 2019.
6. Order the Respondent to pay the Appellants' costs of the appeal.
7. Order the Respondent to pay the Appellants' costs of the proceedings below.

Appellants' address

The Appellants' address for service is:

Place: Ashurst Australia, Level 9, 5 Martin Place, Sydney NSW 2000

Email: Robert.Todd@ashurst.com

The Appellants' address is 2 Holt Street Surry Hills NSW 2010



Service on the Respondent

It is intended to serve this application on the Respondent.

Date.

5.7.19
Robert Todd

Signed by Robert Todd
Lawyer for the Appellants

**Schedule**

No. 679 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Appellants

Second Appellant: Jonathan Moran

Date: 5/7/19