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LDRC Libel Defense Resource Center

LIBELLETTER

April 1996

NEWSGATHERING ENJOINED BY PA FEDERAL COURT

In an unprecedented decision, a federal district court judge in Philadelphia enjoined *Inside Edition* reporters from various newsgathering activities as they pertain to two executives of U.S. Healthcare and their families. *Wolfson v. Lewis*, Civil Action No. 96-1162 (E.D.Pa. April 8, 1996)

Clearly concerned about modern television newsgathering equipment -- videocameras, zoom lenses, and directional mikes, for example -- the court enjoined an old-fashioned stake out of plaintiffs.

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NEGLIGENCE THEORY PERMITTED TO PROCEED IN WACO WRONGFUL DEATH SUITS

United States District Judge Walter S. Smith, Jr., has let stand negligence claims in a wrongful death action brought by ATF agents (or their surviving family members) who were injured in the ill-fated February 28, 1993 raid on the Branch Davidian Compound in Waco, Texas, against Cox Enterprises, Inc., KWTX Broadcasting Co., and American Medical Transport, a local ambulance service. *Risenhoover, et al. v.England, et al.*, Civil No. W-93-CA-138 (W.D. Tex. April 2, 1996), see also LDRC *LibelLetter* July, 1994 at p. 3.

Although Judge Smith dismissed the causes of action against the newspaper based upon breach of contract, intentional infliction of emotional distress, conspiracy and interference with a law enforcement officer's duties, he ultimately denied

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BUSINESS WEEK EN BANC SOUGHT P. 9.

FIFTH CIRCUIT REVERSES SCHOOL CASE SECRECY ORDERS

By Jack M. Weiss

On March 15, a unanimous Fifth Circuit panel invalidated two "confidentiality orders" entered in the forty-year old Baton Rouge, Louisiana school desegregation case at the request of the local elected school board. *Davis v. East Baton Rouge Parish School Board*, --F.3d--, 1996 WL 115722, 64 USLW 2588 (5th Cir. 1996). Both district court orders were directed at the school board itself.

Capital City Press, which publishes the Baton Rouge *Advocate*, and the Louisiana Television Broadcasting Corporation, licensee of WBRZ-TV, successfully challenged the orders. The Fifth Circuit granted the news outlets' emergency motion for an expedited appeal. National and Texas amici filed separate briefs in support of the *Advocate* and WBRZ.

The March 1 Gag Order.

The first order struck down by the Fifth Circuit was entered by District Judge John V. Parker, Jr. on March 1, 1996 ("the March 1 Order"). The March 1 Order gagged the twelve elected school board members, ranking school system officials, school board lawyers and consultants from making "any written or oral comment" concerning "any aspect of any draft school desegregation plan" being prepared by the School Board for submission to adverse parties in the

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JUDICIAL CONFERENCE PANEL SHELVES FRCP 26(C) AMENDMENTS SEE PAGE 9.

SECOND CIRCUIT SAFEGUARDS OUT-TAKES

Applies New York Law to New York Based Broadcast/Broadcaster

By Susan Weiner

The United States Court of Appeals for the Second Circuit has resoundingly reaffirmed that out-takes and other unpublished news gathering material are protected from compelled disclosure unless a party's claim "virtually rises or falls with the admission or exclusion of the proffered evidence" sought by a subpoena. The Court's decision in In re Application to Quash Subpoena to NBC (Krase v. Graco), Docket No. 95-9118 issued on April 4, 1996, strictly applied the New York State Shield Law's three-part test and held that evidence is "critical or necessary" within the meaning of the Shield Law only when a claim or defense "virtually rises or falls" on the evidence.

Rejecting an argument routinely

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MINNESOTA COURT OF APPEALS ISSUES BROAD OPINION DECISION

In an opinion that can only be characterized as a sweep for the media defendants, a Minnesota Court of Appeals panel held that a sports doctor was a public figure and that allegedly defamatory statements made by a sports commentator on a talk radio program were, in their context, substantially true, hyperbole oropinion. *Hunter v. Hartman*, C2-95-2143 (Filed April 16, 1996)

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In This Issue.....

TIME WINS ATLANTA LIBEL TRIAL

By Robin Bierstedt

Time Inc. defied the odds and won a libel trial in federal court in Atlanta -- concerning a misidentified photograph published in TIME magazine's 1992 cover story about the bombing of Pan Am 103. A picture of the plaintiff Michael Schafer was mistakenly identified as David Lovejoy, a reported double agent who allegedly told terrorists that a team of CIA agents would be on the flight. In the inflammatory words of Schafer's attorney Dennis J. Webb, "What TIME magazine did in this case was to put Mr. Schafer's picture on a 'WANTED' poster and publish it to 20 million people around the world."

Time's reporter, Roy Rowan, obtained plaintiff's picture (with the mistaken identification) from the affidavit of a Pan Am lawyer in the civil class action suit filed by the victims' families. But Time never prevailed on a "fair report" defense; Judge Willis B. Hunt Jr. disallowed it as a matter of law on the ground that the caption to the photograph did not clearly attribute it to the Pan Am affidavit.

The case therefore went to the jury on the question of negligence and, for purposes of presumed and punitive damages, on "actual malice."

We always believed the evidence would show that Time and Roy Rowan acted in a responsible journalistic manner, since Rowan confirmed the photograph with two other sources. But unfortunately one of those sources, who appeared at trial through a videotaped deposition, disputed in part what Rowan said he told him. Also, plaintiff's attorney managed to put on trial Time's entire Pan Am 103 story -- which had been criticized in published reports and was controversial because it presented a theory of the crash that differed from the official government theory. (Jurors heard testimony

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LDRC DECIDES TO RETAIN NAME

A Note from Robert J. Hawley, LDRC Chair

As many of you will recall, at the annual meeting last November, the Executive Committee proposed that LDRC change its name to Media Defense Resource Center. It was felt that a new name was important to reflect the broader mission that LDRC has assumed concerning media torts other than libel, and to attract as members those media companies that may not perceive themselves to be threatened by libel actions. Somewhat to our surprise, the proposed new name was promptly criticized. Some members thought that Media Defense Resource Center suggested a lack of independence and proposed various alternatives, while others questioned whether a new name was necessary.

Given the response, the Executive Committee withdrew its proposal and decided to solicit the membership's views through a more formal balloting process. The results were mixed. Although Media Law Resource Center drew the most votes, other choices also received support, and a strong and quite emphatic group argued that the name should not be changed at all.

During its last two meetings, the Executive Committee considered the issues surrounding the proposed name change at length. Given the lack of consensus about a new name and the strength of the good will associated with the old name, we have decided, at least for the time being, that we should remain the Libel Defense Resource Center. We appreciate your input -- no other issue has generated such a vigorous response -- and we look forward to continuing to serve you however we can, regardless of the name under which we operate.

Robert J. Hawley, of the Hearst Corporation, is Chair of the LDRC Executive Committeee.

Pennsylvania Supreme Court Holds Contrary Jury Verdicts As to Original Article and Reprint of Article "Not Inconsistent"

On April 12, the Pennsylvania Supreme Court ordered a Philadelphia trial court to enter a $6 million verdict on a defamation claim brought by a late justice of the same court. *McDermott v. Biddle*, No. 46 E.D. Appeal Docket 1995. Because the Pennsylvania Supreme Court was deciding the narrow question of whether the original jury verdict contained fatal inconsistentcies, the defendants are free to appeal from the $6 million verdict on other grounds.

The issue before the Pennsylvania Supreme Court, on plaintiff's appeal from the grant of a new trial, was whether the jury verdicts on the two separate defamation cases brought by the plaintiff were so inconsistent as to require a new trial. *Slip op.* at 1-2. The claims in *McDermott* resulted from a series of articles originally written by Biddle and published in the *Philadelphia Inquirer* in May 1983 about the Pennsylvania Supreme Court. The *Inquirer* subsequently republished the articles in tabloid form for use in promotional mailings to journalism schools and newspaper throughout the country. Copies were also distributed at a February 1984 national conference of the American Bar Association and the American Judicature Society. *Id.* at 2-3.

The articles accused Justice McDermott of improper favoritism toward the coal industry, allegedly the result of contributions to McDermott's campaign for the Supreme Court from lawyers representing coal companies, as well as nepotism in connection with McDermott's use of his position to pressure the Philadelphia District Attorney to hire his son. After McDermott brought a suit for libel, the defendants reprinted the articles in tabloid form, along with an editorial and two cartoons. Neither the cartoons nor the editorial, which were critical of

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PRESS WINS SJ STANDARD IN PA

By Michael D. Epstein

Despite some recent rulings that had alarmed media defendants, the Pennsylvania Supreme Court on April 17, 1996 held that the Harrisburg Patriot-News was entitled to summary judgment in a defamation action asserted against it by former Lycoming County District Attorney and U.S. Congressman Allen E. Ertel. In *Ertel v. The Patriot News Co.*, Nos. 91 and 92 Eastern District Appeal Docket 1994, the Court held that the case must be dismissed because Ertel failed to meet his burden of proving falsity when he was unable to produce any evidence demonstrating that any statement published by the Patriot-News was false.

The opinion confirms the importance of summary judgment in libel cases and ensures that the burden of proof set forth in *Hepps* applies at the summary judgment stage.

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Sprague Settled After 23 Years

Exactly 23 years after publication the Philadelphia Inquirer has settled a long-standing libel suit brought by Richard Sprague, former chief of the homicide unit in the Philadelphia District Attorney's Office. The terms of the settlement were not disclosed.

The libel claim was based on a April 1, 1973 front page article which questioned Sprague's handling of a murder investigation in which the son of a friend and former State Police Commissioner was questioned.

Ten years later, in 1983, a Pennsylvania Common Pleas Court jury awarded Sprague $4.5 million in damages. In 1988, the Pennsylvania Supreme Court overturned the verdict and ordered a new trial holding that Inquirer reporters were improperly barred from testifying about information received from confidential sources.

In 1990, the second trial ended with a jury award of $34 million -- $2.5 million in compensatory damages and $31.5

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PA SUPREME COURT REVERSES LIBEL DISMISSAL ON OPINION GROUNDS

In a decision issued on April 19, the Supreme Court of Pennsylvania, in another disappointing turn at that court for the *Philadelphia Inquirer*, reversed the dismissal of a libel claim, finding, contrary to the courts below, that the statements at issue could be defamatory. *MacElree v. Philadelphia Newspapers, Inc.*, [J-187-95] (The lower courts had found the statements to be no more than opinion or name-calling.

At issue was a report in the *Philadelphia Inquirer* about an altercation at a local college. All of the participants in the fracas were African-American. The plaintiff, now-Judge, then district attorney of Chester County, was mentioned in the article:

"Writing to a local newspaper [University President] Sudarkasa questioned remarks by the Chester County district attorney that one of the New Yorkers [in the altercation] had been stabbed. When D.A. James MacElree replied with quotations from police reports, the university's lawyer, Richard Glanton, accused him of electioneering -- 'the David Duke of Chester County running for office by attacking [the college]." Slip op. at 2.

Defendants, the newspaper and its reporter, filed a demurrer, which was sustained by the trial judge and affirmed by the appellate court. The appellate court rejected plaintiff's contention that the language accused him not merely of being a racist, but of abusing his public office and committing state and federal offenses; that the article effectively accused plaintiff of using his office to harass a black college in order to appeal to white voters. The lower courts noted that the reference to the plaintiff was but a small piece of the news report and that overall, the college officials came off as dissembling.

The Supreme Court, on the other hand, found "a reasonable person could conclude that plaintiff's characterization of the news report was valid. "Such an

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Contrary Jury Verdicts

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the Pennsylvania Supreme Court, specifically mentioned McDermott or referred to his conduct. McDermott brought a second suit, and the two actions were consolidated and tried together. *Id.* at 2–4.

Although the jury found for the defendants as to the initial articles, on the ground that McDermott had failed to prove them false, they concluded that McDermott had proved the tabloid reprint was false and awarded $3 million in compensatory damages and $3 million in punitive damages. The trial court held that these verdicts were fatally inconsistent and granted a new trial on both publications, a ruling that was affirmed by the intermediate appellate court. *Id.* at 3–4.

The Supreme Court began its consideration by stating the applicable standard of review in Pennsylvania, namely that jury verdicts are to upheld unless there is no reasonable theory to support them. *Id.* at 5.

The intermediate appellate court had concluded that it was simply not possible to find that the original articles were not false and at the same time find that the tabloid reprint containing these same article *was* false. The intermediate court rejected the possibility that the jury might have found a separate false defamatory statement about McDermott based on the cartoons and the editorial that were included in the tabloid reprint because McDermott had never contended that these publications were separately false. *Id.* at 5–6.

The Supreme Court disagreed, however, stating that "it is impossible to say that the . . . articles had precisely the same meaning in the two publications when the reprinted articles are read through the screen of editorial and cartoon comment." *Id.* at 7. Noting that the trial court had instructed the jury to consider the cartoons and editorials with respect both to the issues of defamatory meaning and falsity, the Pennsylvania Supreme Court concluded that the jury might have found two different defamatory meanings, one of which could not be proven false but the other of which McDermott succeeded in proving false. *Id.* at 7–9.

As Justice Cappy noted in dissent, however, the issue was not whether the jury might have ascribed different defamatory meanings to the two publications but whether it was reasonable to have done so. *Dissenting op.* at 2.

Justice Cappy drily observed that as neither the complaints nor the evidence presented at trial suggested that the article and the tabloid reprint were capable of two different defamatory meanings, to conclude that the jury had uncovered two different meanings was to conclude that the jury "possessed significantly more legal talent that any of the professionals involved in the case." *Id.* at 2–3. In his view, creating "a new theory of defamation, one on which apparently no evidence was offered and on which the jury was not charged" was an "eminently unreasonable theory, and therefore, violative of our standard of review." *Id.* at 3 (emphasis in original).

Sprague

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million in punitive damages. The Superior Court upheld the jury's liability finding while reducing the punitive damages from $31.5 million to $21.5 million.

In January 1996, the Pennsylvania Supreme Court refused to review the case and in February refused to reconsider that decision.

The settlement came eight days before a petition for certiorari to the United States Supreme Court would have been due. Had the Supreme Court denied review the verdict would easily have been the largest finally affirmed libel verdict, outdistancing the next highest amount, a $3.05 million award in *Brown & Williamson v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), by more than $20 million.

According to the Philadelphia Inquirer, PNI publisher Robert J. Hall stated, "We are confident that the United States Supreme Court would have ruled in our favor if it took the case, but we also are aware that the court takes very few cases." After 23 years of litigation, Hall stated "it's time to move on."

PA SUPREME COURT REVERSES LIBEL DISMISSAL

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accusation amounts to a charge of misconduct in office, as appellant alleges in his complaint." Slip op. at 8.

The Supreme Court rejected the analysis engaged in by the lower courts that the portion about plaintiff in the report was slight and that the overall coverage may have been sympathetic. These factors did not mean that the statements about plaintiff could not be understood to be defamatory.

The Court recognized that there was precedent to the effect that a charge that someone was a "racist" was not defamatory. But in addition to suggesting that such a charge of racism in certain circumstances could support a defamation claim, the Court found that the statements at issue could be interpreted as more than a simple accusation of racism. [Indeed, there is a concurring opinion by Justice Cappy emphasizing his view that a simple charge of racism was not, as a matter of law, action in defamation; that he did not understand the holding of the court to be different, and to the extent it suggested otherwise, it was no more than dicta.]

The opinion just came down, and requires more review and contrasting with some of the other more recent, and seemingly more expansive, analysis of opinion from other state and federal courts.

Hit Man: New Test for First Amendment Protection

By Bruce W. Sanford and James E. Houpt

To plaintiffs, it's a case that tests the boundaries of the First Amendment – to defendants and a group of *amici curiae*, it's a case that threatens First Amendment protections to the core. The subject of dispute is a pair of cases, *Rice v. Paladin Enterprises, Inc.* (Civil No. 95-3811) and *Saunders v. Paladin Enterprises, Inc.* (Civil No. 96-444) pending in the United States District Court of Maryland.

A 1993 murder-for-hire is the unlikely impetus for the potential new chapter in First Amendment jurisprudence. An intruder in a suburban Washington, D.C. home shot and killed an in-home nurse and a 43-year old divorced mother, then disconnected the respirator and suffocated the woman's 8-year-old retarded and quadriplegic son.

Suspicions quickly focused on the boy's father who, police believed, wanted his ex-wife and son killed to claim the boy's $1.7 million settlement from alleged medical malpractice that had left the boy permanently disabled. The father, Lawrence T. Horn, an audio engineer from the glory days of Motown Records, had been down on his luck for years. But the father had an ironclad, albeit suspicious alibi – a videotape showing him at home in Los Angeles at the time of the homicides.

By tracking phone records, police identified a suspected accomplice. James Perry, an ex-con and itinerant minister from Detroit, went on trial last year with only circumstantial evidence linking him to the crimes. Among the evidence were records of Paladin Press, a Boulder, Colorado publisher, showing that Perry had purchased two books a year before the murders, *Hit Man: A Technical Manual for Independent Contractors* and *How to Make Disposable Silencers (Vol II): A Complete Illustrated Guide.* Using *Hit Man* as their star witness, prosecutors convinced jurors that Perry had follow 22 specific instructions in the book, Jurors convicted Perry and sentenced him to die for the murders.

Not long after Perry's conviction, families and estates of the murder victims sued Paldin and owner Peder Lund, claiming that the publisher was liable for the murders under theories of aiding & abetting, civil conspiracy, negligence and strict liability. One of the plaintiffs' co-counsel had won a groundbreaking case against the manufacturers and sellers of "Saturday night specials," cheap guns often used in crime, and argues that the same principles should apply to publishers of "dangerous" books.

Plaintiffs claim that any book purportedly written for would-be assassins is beyond First Amendment protection. Notwithstanding disclaimers that the book was "for academic study only," plaintiffs claim the books were "intended" to encourage and instruct readers to murder in an effective manner. The complaint states, for example, that defendants "specifically and maliciously intended, and had actual knowledge that [the books] would be used by murderers." The books, plaintiffs charge, lack any redeeming social value.

Defendants are filing summary judgment this month, arguing that product liability theories, like plaintiffs' other claims, are inappropriate against a publisher. The sole basis to overcome constitutional protection for freedom of speech, defendants protest, is the test of *Brandenburg v. Ohio* (1969), requiring that speakers intend that their speech be "directed to inciting or producing *imminent* lawless action, and is *likely* to incite or produce such action" (emphasis added).

A group of *amici*, including the Society of Professional Journalists and the Freedom Forum, is supporting summary judgment in the case by arguing that controversial, even "dangerous" speech, has enjoyed a long pedigree in American history. *Amici* predict that liability against *Hit Man* would spawn lawsuits for other expression, from reports in the newspaper that inspire "copycat" crimes, to detective novels that describe murder too accurately, to entertainment such as graphic movies or controversial music like "gangsta rap." *Amici* argue that there is no principled way to draw lines between *Hit Man* and countless other publications for purposes of First Amendment protection.

Judge Alexander Williams, a recent Clinton-appointee to the new Southern Division in the District of Maryland, was expected to receive the summary judgement motion and a supporting brief from the *amici* in mid-April. The court has set no date for arguments on summary judgment.

Opening arguments in the case against the remaining defendant in the murder case were April 7th in a Maryland state trial court. The case against Horn is expected to take a month.

Mr. Sanford is a partner and Mr. Houpt is an associate in the Washington, D.C. office of Baker & Hostetler. Along with Henry S. Hoberman, they are representing a group of amici in support of summary judgment in the case.

Thomas B. Kelley of Faegre & Benson and Lee Levine of Ross, Dixon & Masback are representing the defendants in this case.

HIT MAN
An Editor's Note:

The notion that a book or magazine or television program or record should be held accountable for the acts of those who have read or seen or heard is not a new one. But I sincerely believe that it is a notion that the media should rise up and defend against. "Hit Man" is a particularly agregious publication. It is the way of the world that the defendants in litigation may not represent the highest discourse. But this case is one that I believe all LDRC members should be following and even participating in when appropriate. If the precedent is set that the publication can be liable for what was learned from its contents, it is difficult to imagine what practical and acceptable lines would be drawn to protect other publication and speech from similar attack -- some of which may be published by your clients.

— Sandra Baron

Oregon Supreme Court Order: Vacate Prior Restraint

On April 5, 1996, the Supreme Court of Oregon issued a writ of mandamus to the Circuit Court for Washington County, Oregon, commanding the trial judge to vacate a prior restraint that she previously had imposed on Sporting Goods Intelligence, a newsletter that is widely read in the sporting goods industry, or to show cause within 14 days why she had not done so. The Oregon Supreme Court took the action following expedited briefing on the newsletter's Emergency petition for a Writ of Mandamus. (*See LDRC LibelLetter, March 1996, p. 15*)

The suit began in March after SGI published a two-sentence article in its newsletter about design trends in the product line of Adidas America, Inc. Filing suit in Oregon state court under the Oregon trade secret statute, Adidas sought and obtained an ex parte order that prohibited SGI from publishing any "alleged trade secret" of Adidas and that sealed all proceedings in the case. SGI immediately challenged the order as invalid under both the Oregon and United States constitutions. Although a circuit court judge subsequently unsealed the pleadings on file in the case, she prohibited SGI from publishing any article containing information from an alleged "proprietary booklet" prepared by Adidas without her prior permission. Adidas did not proffer, and the judge never reviewed, the alleged booklet before the judge imposed the order.

Arguing that the order constituted an impermissible prior restraint, SGI initiated mandamus proceedings in the Oregon Supreme Court, which imposed an expedited briefing schedule. Briefs in support of SGI were filed by a host of amici curiae, including the Newsletter Publishers Association, Dow Jones & Company, Inc., The McGraw-Hill Companies, Inc., the National Association of Broadcasters, the Reporters Committee for Freedom of the Press, the *Oregonian*, Oregon Television, Inc., the Magazine Publishers of America, Inc., the Oregon

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GAG ON DEFAMATION IS UNCONDITIONAL PRIOR RESTRAINT

In *Gilbert v. National Enquirer, Inc.*, 96 Daily Journal D.A.R. 3336 (Cal. Ct. App. Mar. 22, 1996), the California Court of Appeal reversed on First Amendment grounds the lower court's preliminary injunction order issued against defendant - Brinkman in a defamation and privacy action barring him from making public certain types of information about the plaintiff. The appellate court also affirmed the lower court's denial of plaintiff's motion to seal the record.

The plaintiff Melissa Gilbert, a well-known actor, commenced this action against defendants Brinkman, her ex-husband, and the National Enquirer. Plaintiff's claim stemmed from the Enquirer's publication of a "scathing exclusive interview" with Brinkman where he asserted that plaintiff was a "deadbeat mother" and had failed to care for their son properly. *Id.* at 3336-37. Plaintiff sought an injunction against Brinkman, arguing that it was necessary in order to protect the sanctity of their marital relations and to prevent intrusions upon her right to privacy.

The lower court issued an ex parte preliminary injunction that prevented Brinkman from making any statements or disclosing any information related to plaintiff's drug or alcohol use, or to her sexual or physical relationships, except under limited circumstances. *Id.* at 3338. The court reasoned that the preliminary injunction was necessary to protect the parties' "family fiduciary relationship" and their child's welfare. Also noted was that Brinkman was judgment proof and his motives for threatening to reveal information about Gilbert included retaliation and financial gain.

The court also referred to "the growing and insatiable media culture in society whereby tremendous efforts are taken to obtain a[nd] publish very private information about people in general, and celebrities in particular.

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Greater Access to California Executions Sought

On April 9, 1996, the ACLU-NC commenced an action in the California district court on behalf of various news organizations and First Amendment advocacy groups against the San Quentin prison asserting the prison's execution procedure, which precludes witnesses from observing the initial stages of an execution, violates the media's First Amendment right to observe complete executions. The case, *California First Amendment Coalition v. Calderon*, arose from prison officials' February 23 decision to prevent witnesses including the press from observing the entire execution of William Bonin, the first prisoner executed by lethal injection in California.

Prison officials had prevented witnesses and journalists from observing Bonin being led to the execution chamber, strapped to a gurney, and having intravenous tubes inserted into his arms. The ACLU contends the journalists were deprived of an opportunity to observe Bonin's demeanor during this highly problematic aspect of a lethal injection execution. The ACLU further asserted that since execution is the most severe criminal sanction and a matter of tremedous public concern, journalists have an obligation to provide accurate and complete first-hand reports. By compelling journalists to rely upon prisoner officials' reports, prison officials have eviscerated the media's obligations to the public and have violated the media's constitutional right to observe complete executions.

The suit is not the first attempt by California media organizations to gain complete access to executions. In 1991, when California still used the gas chamber at San Quentin, KQED sought permission to videotape an execution as part of a documentary on capital punishment. After receiving the request, the warden imposed a new rule barring all reporters from executions. Upon review, a federal district judge held that while the complete bar to reporters was unconstitutional, the prohibition on

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PREBROADCAST/PREPUBLICATION REVIEW COMMITTEE ROUNDTABLE DISCUSSION ON INDEMNIFICATION OF SOURCES

Following the decision by CBS "60 Minutes" to drop an interview with former tobacco executive, Jeffrey Wigand, the Defense Counsel Section Prebroadcast/Prepublication Review Committee recently convened a conference call -- roundtable discussion to discuss issues relating to the media's indemnification of sources, including, the extent to which the media enters into either express or implied indemnification/hold harmless agreements with sources or potential sources. The roundtable participants generally reported that the use of such prebroadcast/prepublication indemnification agreements by their media clients was still relatively rare. Some questioned the legal wisdom of entering into such agreements while others indicated that their clients tended to question the journalistic propriety of such agreements. The conference call/roundtable discussion identified several other issues for consideration by the media and its counsel on this subject.

(A number of participants indicated that they had never litigated a suit in which a source was named as a defendant along with the publication (although counsel had seen suits against the source(s) alone). Others had, and suggested that this may be an up and coming trend for a number of reasons. One, newsgathering generally is more subject to suit. Two, plaintiffs may view suing a key source as a means of creating tension between the source and the publication.)

Issues Relating To Utilization Of Indemnification Agreements

Generally, the roundtable participants believed that during the ordinary course of day-to-day newsgathering, an indemnification agreement may help solidify the relationship between the reporter and the source. Moreover, as a practical matter, it was felt that if litigation does result, the media defendant may need to represent the source or, at the very least, have the source clearly on the media's side. Therefore, the existence of an indemnification agreement may help ensure that result.

On the other hand, some of the roundtable participants expressed and identified a number of concerns relating to the use of indemnification agreements. For example, some were particularly concerned that if a lawsuit is filed, the existence of an indemnification agreement may result in the impairment of the credibility of the source.

Others speculated that if the existence of the indemnification agreement is disclosed or discovered, there may be a greater likelihood that the source will also be named as an individual defendant in the litigation. As a result, the media defendant may find it more difficult and/or awkward to effectively utilize a defense of reliance on a source, who now is a co-defendant in the case.

A number of participants also raised the related practical ramification that during litigation the dynamic of the "little guy source" may be removed by the existence of an indemnification agreement. That source is now at trial defended and protected by a large deep pocket media entity.

The roundtable discussion also raised the reservation that during the course of litigation an argument may be made that the existence of an indemnification agreement is itself evidence of actual malice. In other words, a source's request for indemnification and/or the media's willingness to provide indemnification may be twisted around to form the basis of an argument that there must have been some reason to doubt the accuracy or reliability of the information provided.[1]

Proposed Language Of Indemnification Agreements, If One Is To Be Used[2]

Roundtable participants agreed that indemnification agreements, if used, are best provided only under the express condition that the source tells the truth. An indemnification agreement should provide protection for the source only if the source is named as a defendant in a defamation suit, as a result of the publication, not if a dispute arises between the source and the subject of the news report, e.g., a lawsuit against the source for breach of employment agreement or confidentiality agreement.

Participants generally felt that the indemnification agreement should provide counsel, not any damages that may be awarded, thus providing assistance but not indemnity if the source has acted wrongfully.

Some participants advised that the indemnification agreement should state, to the extent possible, the reason for its existence, such as that the source feared retribution or that the plaintiff had been known to sue or threaten suit in the past. This may later provide a valuable explanation for the judge or jury.

Additional Committee Perspectives

Finally, the committee discussed a variety of broader contexts and concluded that the present interest in the subject of source indemnification (and the related topic of tortious interference with contracts) is part of a much broader trend in which libel plaintiffs attack the newsgathering process and allege a variety of tort claims such as trespass, misrepresentation, infliction of emotional distress. In fact, in tortious interference cases, an indemnity agreement may help lay the foundation for that claim.

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[1] Under the Rules of Evidence, the existence of an indemnification agreement will probably not be admissible on the issue whether the source acted wrongfully, but may be admissible if offered for other purposes, such as bias or prejudice.

[2] The following provision was requested by a source:

> In return for your agreeing to provide a statement of the circumstances giving rise to the

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Oregon Supreme Court Order: Vacate Prior Restraint

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Newspaper Publishers Association, the Oregon Association of Broadcasters, and Station KOIN.

Attempting to defend the lower court's order, Adidas asserted that its interest in maintaining the confidentiality of its alleged trade secrets outweighed any concerns regarding the prior restraint imposed by the lower court. Nevertheless, the Supreme Court issued the writ , which commands that circuit court judge to vacate her order or show cause within 14 days why she has failed to do so.

Sports Management News, Inc., which publishes SGI, is represented by Lee Levine and Daniel J. Standish of Ross, Dixon & Masback, L.L.P.

Prebroadcast/Prepublication Roundtable

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> [media defendant's] report of [date] and appearing as a witness in any court proceedings between [the media defendant] and [plaintiff] concerning the [story], [the media defendant] assure you that regardless of the outcome of the matter between [the media defendant] and [plaintiff], [the media defendant] would not look to you for any loss or expense arising out of the matter which [the media defendant] may have to bear.

Susan Grogan Faller of Frost & Jacobs is the Chair of the Prepublication/Prebroadcast Committee. Special thanks to Richard Goehler for his coordination of this Roundtable project.

Unconstitutional Prior Restraint

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Oftentimes, little use is made of such private information and is obtained and disseminated for entertainment and commercial purposes only." *Id.*

Upon review, the appellate court ruled that as a threshold matter, "prior restraints are disfavored and presumptively invalid ." *Id.* at 3339. Further, "prior restraints are not permitted to stop the publication of a defamatory statement." *Id.*

Moreover, the injunction was overly broad and was not limited to "communications made by Gilbert during the marriage." *Id.* While prior restraints may be issued in family law cases, where one parent is restrained from making unfavorable statements concerning the other parent, the appellate court distinguished those cases — all involving child custody — from defamation and privacy issues.

In addition, the appellate court noted that plaintiff's family and personal affairs are matters of public interest in view of plaintiff's public figure status and prior publications related to her private affairs. Accordingly, plaintiff's interest in preventing potential harm to her reputation and right to privacy did not outweigh Brinkman's constitutional right to free speech.

Similarly, the appellate court rejected plaintiff's contention that the trial court abused its discretion in denying her motion to seal the record. It ruled that since plaintiff is a public figure, her personal life is a newsworthy event and protected under a diminished right to privacy. To prevail in a privacy action, plaintiff must establish that the "public disclosure was an unwarranted publication of intimate details of her private life which were outside the realm of legitimate public interest . . . ." *Id.* at 3341. In light of numerous prior publications regarding plaintiff's private life, the appellate court ruled that plaintiff failed to show that the published statements exceeded the scope of legitimate newsworthy events. Furthermore, court records generally are available to the public and in the absence of a specific exception to this rule, sealing the record would constitute an unlawful prior restraint on the press. *Id.*

Paul Martin Wolff, Richard S. Hoffman, Paul B. Gaffney, and N. Reid Neureiter of Williams & Connolly represented defendants Brinkman and National Enquirer.

Greater Access to California Executions Sought

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videotaping withstood constitutional scrutiny. In upholding the ban, the judge cited concerns that the taping might incite violence among the prison population or that the identities of staff members who participate in the executions would be exposed as well as the fear that the heavy television cameras might accidentally break the glass of the gas chamber releasing the deadly gas inside. *KQED, Inc. v. Vasquez*, 18 Media L. Rep. 2323 (N.D.Cal. 1991).

The California First Amendment Coalition and the Society of Professional Journalists are represented by ACLU-NC attorneys Alan Schlosser and Kelli Evans; Jeffrey S. Ross, Jill Hersh, David M. Fried, and Michael J. Kass of Friedman Ross & Hersh; and, Lynne S. Coffin of the Law Offices of Coffin & Love.

En Banc Review Sought by Bankers Trust in *Business Week* Decision

Bankers Trust's Brief

Bankers Trust has moved for a rehearing en banc of the decision in *The Proctor & Gamble Company v. Bankers Trust Company v. The McGraw-Hill Companies, Inc.*, No. 95-4078, in which a Sixth Circuit panel reversed Judge Feikens's decision permanently enjoining *Business Week* from publishing an article based on material obtained from sealed court records. *See LDRC LibelLetter* (March 1996), at 1.

Bankers Trust raises three questions for en banc rehearing: (1) whether the panel erred in questioning the propriety of the underlying stipulated protective order; (2) whether the dispute is moot, as the panel dissenter would have held; and (3) whether a district court is, in Bankers Trust's words, "powerless" to issue a TRO barring publication in order to buy time for review.

Bankers Trust's brief in support of its motion opens by arguing that the panel opinion "impairs a common and salutary practice and threatens to increase the burdens imposed upon district courts in regulating discovery" by questioning the propriety of the protective orders to which parties have stipulated. Bankers Trust states that the propriety of such orders is not material to the outcome of *Business Week's* appeal but does have the potential for far-reaching impact on litigation generally.

Bankers Trust contends that such stipulated orders are not only common in civil commercial suits but, by allowing the parties to anticipate and resolve disputes in advance, free courts from having to resolve the disputes that frequently arise during the discovery process. Finally, it suggests that protective orders are not immutable but can be challenged, and fault *Business Week* for failing to intervene in the cases, choosing instead to "knowingly violate[] the Stipulated Protective Order." *Appellant's Brief* at 3–4.

Bankers Trust warns that every stipulated protective order entered by a trial court in the Sixth Circuit has been called into question by the panel's statement that the district court had "abdicated its responsibility for supervising the discovery process" in allowing the protective order in the first place. *Id.* at 5.

Claiming that the protective order was neither raised in the district court nor briefed on appeal, Bankers Trust argues that the issue should not have been addressed by the panel. Moreover, it claims that since the panel opinion failed to offer any guidance as to when stipulated protective orders are appropriate, "district courts may refrain from allowing any stipulated protective orders in any cases." *Id.* at 6 (emphasis in original). Bankers Trust also invokes *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), for the proposition that there is no general public right of access to discovery materials. *Id.* at 7.

Finally Bankers Trust claims that "the panel's ruling is inconsistent with the notion that the parties themselves should regulate the discovery" and that it violates the Federal Rules and the local rules of the district courts in the Sixth Circuit, which "require parties to attempt to resolve discovery disputes themselves, before presenting their disputes to court." *Id.* at 9 (emphasis in original). Bankers Trust does not mention or reconcile its approach to Rule 26(c) of the Federal Rules of Civil Procedure.

Bankers Trust further attacks the panel opinion on the ground that once Judge Feikens removed the sealing order, the appeal from the original restraining order became moot. *Id.* at 10. Characterizing the case as unprecedented and unique, they argue that the "capable of repetition yet evading review" exception to the mootness doctrine is not applicable because "[t]here is no 'reasonable expectation' or 'demonstrable probability' that Business Week will

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JUDICIAL CONFERENCE PANEL SHELVES FRCP 26(C) AMENDMENTS

On April 18, 1996, an advisory panel of the U.S. Judicial Conference decided not to recommend proposed amendments to Rule 26(c) of the Federal Rules of Civil Procedure. The proposed amendments, among other things, would have allowed for the issuance of protective orders in discovery on stipulation of the parties, and would have disposed of the requirement of a judicial determination of "good" cause. See also ***LDRC LibelLetter***, December 1995 at p.1 and March 1996 at p. 1.

As the Business Week/Bankers Trust/Procter & Gamble dispute has certainly proven, stipulated protective orders are intended to limit access to the press and the public and may result not only in limits on access to discovery materials, but to court records which contain such discovery materials.

LDRC, thanks to the extraordinary efforts of Laura R. Handman and Robert D. Balin of Lankenau, Kovner & Kurtz, LLP; Peter Canfield and James W. Kimmell, Jr. of Dow, Lohnes & Albertson; and Robert Lystad of Baker & Hostetler, filed comments with the Judicial Conference in opposition to the proposed amendments on behalf of itself, Associated Press, Dow Jones & Company, Inc., Magazine Publishers of America, Inc., National Association of Broadcasters, Newspaper Association of America, Radio-Television News Directors Association, and Society of Professional Journalists.

Although the result is clear, the advisory panel will not publish its report stating the reasons behind their decision until late May, approximately a month prior to the meeting of the Standing Rules Committee of the Judicial Conference on June 19. LDRC will report on these findings when they are available.

Business Week

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confront this same situation again." *Id.* at 12.

Additionally Bankers Trust argues that the mootness in the instant case resulted not from the transitory nature of the initial order but the district court's unsealing of the documents in question. They contend, moreover, as did Judge Brown in his dissent from the panel opinion, that despite the transitory nature of the temporary restraining order, Judge Feikens's order was — and future TROs would be — capable of review via a writ of mandamus. *Id.* at 12-13.

In the final section of the brief, in a position at odds with the actual opinion, Bankers Trust characterizes the panel opinion as suggesting that temporary restraining orders are never permissible, even to maintain the status quo pending a hearing and then cites case law rejecting such broad a rule of general application.

Business Week's Opposition Brief

Business Week opens its brief in opposition by noting that Bankers Trust did not dispute the panel's holding that the permanent injunction issued by the district court was patently unconstitutional. Because rehearings en banc are granted in the Sixth Circuit only when a panel has made a "precedent setting error of exceptional public importance," and Bankers Trust does not challenge the panel's holding on the central issue in the case, a fortiori it fails to meet the standard for a rehearing by the full circuit. *Reply Brief*, at 1.

Business Week next responds to Banker Trust's mischaracterization of the panel opinion as having held that "temporary restraining orders may never be granted in the First Amendment context." The panel did not hold that such restraints are never permissible, but rather that they may be granted only under "the most compelling circumstances." This standard accurately reflects controlling Sixth Circuit and Supreme Court precedent on the issue. *Id.* at 2-3.

Business Week next contends that there is no basis for an en banc rehearing of the mootness issue since the majority correctly applied the correct legal standard and, under the operating procedures of the Sixth Circuit, alleged "errors in the application of correct precedent to the facts of the case" are not proper matter for en banc rehearings. Additionally, *Business Week* argues that, in any event, the panel correctly held that the appeal was not moot. *Id.* at 4.

In arguing that the panel correctly determined that the TRO was "capable of repetition yet evading review," *Business Week* points to (1) numerous examples in the case law of sealed documents obtained by the press in the course of newsgathering, (2) the fact that the parties in the instant case are continuing to file memoranda of law and motions under seal, and (3) the fact that the TROs at issue were of too short a duration to be fully litigated prior to their expiration. The availability of an expedited review via mandamus does not alter this conclusion because, as the panel majority had concluded, the writ is "discretionary in nature and does not guarantee a remedy." *Id.* at 4–5.

Finally, *Business Week* argues that the panel's discussion of the protective order was not only dicta but was fully in accord with existing Sixth Circuit precedent. In its effort to obtain en banc review, Bankers Trust mischaracterized the panel's comments regarding stipulated protective orders. Contrary to Bankers Trust's contention that the panel had articulated a broad "policy effectively banning stipulated protective orders," the panel had addressed only the defects in the particular order at issue. And in so doing, the panel had committed no error, let alone the "error of exceptional public importance" required for an en banc review. *Id.* at 6.

The initial error identified by the panel was that the order allowed the parties to unilaterally modify its terms without prior approval of the district court, a power that is exclusively vested in the court. Secondly, the order permitted the parties, again without any judicial oversight, to unilaterally file any pleading or motion under seal if it contained or referred to discovery material, contrary to existing precedent that such discovery material loses it "private" nature and is subject to the public access absent the most compelling of circumstances. In the instant case, not only was there no demonstration of compelling circumstances but the parties were permitted to file court papers under seal without any judicial review or showing at all. *Id.* at 6–9.

In a footnote, *Business Week* responds to Bankers Trust's "gross mischaracterization" that the panel opinion suggested "there is a general public right of access to discovery material," in contravention of the holding in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). Not only was no such broad suggestion made by the panel but the relevant provision of the stipulated protected order in the instant case had involved the sealing of court papers that incorporate discovery, not, as in *Rhinehart* the sealing of "raw discovery." *Id.* at 9, n.5.

In its final point, *Business Week* rebuts Bankers Trust's claim that the panel lacks authority to comment on the protective order because the order supposedly had not been directly challenged below. Although appellate courts ordinarily do not consider issues not presented below, under Supreme Court and Sixth Circuit precedent, it is within their discretion to do so. Moreover, under the law of the circuit, requiring that the district court remedy the defects in the protective order was an appropriate exercise of the court's "supervisory authority over the administration of justice." *Id.* at 9–10.

SDNY: LIBEL CONFLICTS DECISION

In a recent libel decision, the US District Court for the Southern District of New York, on transfer from the Eastern District of Pennsylvania, found that the application of New York choice of law rules was appropriate and dictated the use of New York substantive law. Applying that law, the Court in *Joshua Weinstein v. Robert Friedman, et al.*, 94 Civ. 6803 (LAP), granted the defendants' motion to dismiss on libel claims under New York and federal opinion analysis. Privacy claims were dismissed under New York law. The Court, however, was quick to point out that, had it applied Pennsylvania's choice of law rules, as the plaintiff argued it should, the outcome would not have changed, as both states choice of law rules would have mandated the use of New York substantive law.

Joshua Weinstein, a onetime domiciliary of Pennsylvania, brought suit in Pennsylvania state court claiming that he was defamed in a book written by defendant Friedman, published by defendant Random House and excerpted by defendant V V Publishing Co, publisher of *The Village Voice*, a weekly newspaper published in New York City. The case was removed by defendants to the United Stated District Court for the Eastern District of Pennsylvania (Honorable J. Curtis Joyner) on diversity grounds.

On defendants' motion to transfer the action to the Southern District of New York, or in the alternative, to dismiss, Judge Joyner transferred the action to the Southern District finding that it was the only forum in which venue properly lay for the case.

At issue were plaintiff's allegations that the book and article defamed him and invaded his privacy by inaccurately portraying him as a militant activist, politically affiliated with far-right groups which advocate violence on behalf of Jewish settlements in the occupied territories in Israel, and holding distorted and dangerous views.

Plaintiff was a resident of Israel, having lived there since 1989. His family lived in Pennsylvania, and he had spent his childhood there. Certain of his mail was sent to his family's home. But Plaintiff had not lived in Pennsylvania since 1983, when he graduated from high school. He was not registered to vote in Pennsylvania and maintained no professional or religious memberships in the state. In fact, he had voted most recently in Israel, and was serving in the Israeli military. He was an Israeli as well as an American citizen and traveled with both passports. He was one of the founding members of a community in Israel.

As a general rule, a federal court sitting in diversity applies the forum state's choice of law rules to decide which state's substantive law applies. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). However, if an action was transferred from a forum in which the action could have been maintained, then the transferee court must apply the choice of law rules of the transferor court. *Van Dusen v. Barrack*, 376 U.S. 612, 638-39 (1964); *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1086 (S.D.N.Y. 1984).

But Judge Joyner, who determined that Pennsylvania was an inappropriate venue for this case, also held that the Southern District of New York was the only proper venue for the case, thus paving the way for the implementation of New York choice of law rules. Judge Preska found however, after an extensive review and comparison of Pennsylvania and New York choice of law rules, that the result was the same.

Pennsylvania Conflicts

Pennsylvania utilizes a combination of the "most significant relationship test' and the "interest-analysis approach' when advancing toward a solution to a choice of law problem. In employing this method, the Court will look at both states' policies with regard to the issue at hand to determine which state has the most significant interest, and will also examine the totality of the contact of the states to decide the most significant relationship. Weinstein argued that the nature and extent of his Pennsylvania ties supported an application of Pennsylvania's choice of law analysis.

The plaintiff placed great emphasis on *Fitzpatrick v. Milky Way Prods.*, 53 F. Supp. 165 (E. D. Pa. 1982), a defamation case in which the Court applied Pennsylvania's choice of law rules, and ultimately, Pennsylvania's substantive law. The Court in *Fitzpatrick* explained that the plaintiff's domicile had a policy interest in "protecting the individual reputation of its citizens". At least where the plaintiff was a private figure and the matter not one of public concern, the interest of the publisher's state, New York -- the protection of free and uninhibited press and its financial integrity -- were not interests that were as significant. *Fitzpatrick v. Milky Way Prods.*, 53 F. Supp. at 171-72.

In *Weinstein*, Judge Preska found that the plaintiff was now a domiciliary of Israel and therefore no longer a Pennsylvania domiciliary. Thus, Pennsylvania's strong interest in protecting him was considerably reduced. Preska, again quoting the *Davis* court, further explained that New York, as the home of the defendants, had a strong policy in protecting its media defendants. Therefore, held Preska, even if Pennsylvania's choice of law rules had been followed, the substantive law of New York would be applied because New York had the greater interest and possessed the more significant relationship with the issue at hand.

N.Y. Conflicts

New York employs an issue-by-issue interest analysis approach to conflicts of law situations. Further, New York courts have refined their interest analysis to develop more specialized choice of law rules in the context of defamation suits. Under New York's approach, the "law of the jurisdiction having the greatest interest in the litigation will be applied and the [only] facts or contacts which obtain

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SDNY: LIBEL CONFLICTS DECISION

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significance in defining State interests are those which relate to the purpose of the particular law in conflict." *Istim, Inc. v. Chemical Bank*, 78 N.Y.2d 342, 347, 575 N.Y.S.2d 796, 798 (1991).

Davis v. Costa-Garvas, a leading case in this area, listed nine contacts of particular importance in multistate libel actions. Among these are: the plaintiff's domicile, the state of plaintiff's principal activity to which the alleged defamation related, the state in which plaintiff suffered the most harm, the defendant's domicile, the publisher's domicile, the state of the main publishing office, the state of principal circulation, the state the libel was first seen and the law of the forum state. *Davis v. Costa-Garvas*, 580 F. Supp. at 1091. Applying the above factors to the Weinstein case, Judge Preska found that "the facts and principles of *Davis* mandate the application of New York law." *Weinstein* at 20.

The *Davis* court noted as well and Judge Preska also took into account that New York is a state that places considerable emphasis on its status as "the national center of the publishing industry," that libel is "less plaintiff-centered than other torts" and that policy reasons supported using the law of the defendant's jurisdiction to govern defendant's behavior.

The common law private facts or false light invasion of privacy claims were summarily dismissed as New York does not recognize such claims.

The Libel Claims

Plaintiff's defamation claims, while requiring more detailed analysis, fared no better. They fell under determinations that they either were (1) not defamatory; (2) not "of and concerning" the plaintiff; (3) opinion, under New York's more expansive protection of such speech, as well as the federal protection; and/or (4) hyperbole.

Judge Preska, refusing to accept the interpretation that plaintiff placed on isolated sentences in the book and article, looked instead both to the overall context of the publications and the specific contexts in which the statements arose. Interestingly, while Judge Preska indicates that the New York analysis for determining whether speech is protected opinion or not "employs a slightly different method of analysis, perhaps with an ear toward Justice Brennan's dissent in *Milkovich*," (Slip op. at p.42), an analysis which begins with context, she also states that the Supreme Court of the United States in *Milkovich*, although not expressly adopting the *Ollman* factors, "applied an analysis largely similar to that in *Ollman*." *Id.* Thus you find her looking heavily at the context in which the alleged statements are found, clearly part of the analytical test in New York, and the precision of the meaning, the general tenor of the article and the "loose, figurative" quality of the language derived from the federal analysis. Under both analytical frameworks, even assuming as Judge Preska does that New York intends to afford greater protection for opinion than provided by federal law, the language is found to be non-actionable.

[LDRC members should also note the Minnesota Court of Appeals opinion reported upon in this edition of the *LDRC LibelLetter* at page 1. It too deals with the issue of opinion in defamation claims, adopting as well an expansive, contextually based analytical framework and basing it on post-*Milkovich* decisions from the Federal courts.]

Having looked at context, however, the statements themselves were not difficult for Judge Preska to dismiss. Plaintiff complained that he was accused of behaving in a drunken and otherwise defamatory fashion in college. Judge Preska, by looking at the statements in context and not in the total isolation proposed by the plaintiff, concludes that the statements suggest (if not outright state) the opposite. Other statements, which concern the community in which Plaintiff resides in Israel, its founder and plaintiff's associates in Israel, and which by their terms apply only to others, were not only not "of and concerning plaintiff" -- he could not be tarred by statements about those with whom he associates -- but were not defamatory even of those named.

Finally, certain statements made by one who knew plaintiff and his colleagues in college, even if defamatory and even if found to be "of and concerning" the plaintiff, were found to be nothing more than opinion. The paragraph at issue was preceded by the phrase "my perception" and stated that the students he knew (including presumably the plaintiff) "needed a fixed belief system," that "some of them come from troubled homes" and that "black and white views" were easier for them then having to see the world in shades of gray, "which, for my money, is what adult-hood is about." Slip op at p. 44. None of these statements, according to Judge Preska were objective facts.

As with most, if not all, decisions on the issue of what is or is not defamatory, it is worth reading the details and how the court applies the broader principles to the actual words complained of. What is of note here is the acceptance and application of a context-based analysis -- one more federal court to accept an *Ollman*-like approach to this issue.

THANK YOU INTERNS . .

LDRC wishes to acknowledge spring interns John Maltbie, Cindy Moy, Christine O'Donnell, Jennifer Hampton and William Schreiner for their contributions to this month's LDRC LibelLetter.

A STATE CANNOT SUE FOR LIBEL

A government agency cannot maintain an action for libel, confirmed a federal district court in New Jersey, which granted a motion to dismiss counterclaims for defamation, product disparagement, and trade libel. The counterclaims were filed by a Florida state agency as part of its lawsuit with a privately-owned New Jersey bank. *College Savings Bank v. Florida Pre-Paid Postsecondary Education Expense Board*, 1996 WL 134310 (D. N.J. March 22, 1996).

The counterclaims were made in the context of a lawsuit that College Savings Bank (CSB), located in Princeton, NJ, filed against the Florida Pre-Paid Postsecondary Education Expense Board (Florida Pre-Paid), a Florida state agency that runs a tuition prepayment program for Florida state colleges and universities. College Savings Bank sells the CollegeSure CD, which is guaranteed to provide a return adequate to satisfy college education expenses. CSB claimed Florida Pre-Paid violated the patent for CollegeSure's investment formula, and engaged in false advertising and unfair competition in the claims it made in its literature.

Florida Pre-Paid filed suit over comments made by Peter Roberts, CSB's president and CFO. In an article in the *Miami Daily Business Review*, Roberts was quoted as saying Florida Pre-Paid's claims "at best ... are half-truths, and at worst, they're outright lies."

The court held that Florida Pre-Paid, because it is part of the state government, cannot maintain a defamation suit. In his decision, Judge Garrett E. Brown relied on a long history of precedents holding that the government cannot maintain an action of libel. He held that the proscription against defamation suits by government applied even when government was acting in a proprietary as opposed to a governmental capacity. 1996 WL 134310 at *3-4.

Florida Pre-Paid argued strenuously that it was not barred from suing over speech about a commercial service, which it claimed did not involve a matter of public concern. As a threshold matter, Judge Brown rejected this argument because Pre-Paid's status as a government entity barred it from bringing a defamation counterclaim. Additionally he held that the speech *did* involve an issue of public importance. 1996 WL 134310 at *5.

Florida Pre-Paid had also argued that its counterclaims for product disparagement and trade libel were not barred by the prior analysis because they involved different bodies of law and implicated different concerns than the defamation counterclaim. The court rejected this argument, holding that these distinctions were irrelevant to the current dispute, as it involved speech on a matter of public concern. Indeed, Judge Brown concluded that "it would be anomalous to hold that the Free Speech Clause protects statements about a government or government agency against a defamation claim, but not against a trade libel or product disparagement claim concerning the services that a government or one of its agencies provides." 1996 WL 134310 at *7.

Finally, although Pre-Paid had not briefed the issue, Judge Brown analyzed whether there might be a viable counterclaim under § 43(a) of the Lanham Act. Although the 1988 Amendments to the Act permitted claims for misleading statements about another party's goods or services, essentially permitting a claim for commercial defamation, to preserve the constitutionality of the amendment, Congress had expressly limited such *suits to statements* involving commercial speech. Because Judge Brown had already held that Roberts's statements involved speech on matters of public concern, Pre-Paid was precluded from bring a counterclaim under the Lanham Act. 1996 WL 134310 at *9.

Negative Campaign Spawns Defamation Suit in Maryland

A jury in Maryland has decided that harsh negative campaigning -- even to the point of saying, falsely, that the opponent has been convicted of fraud -- didn't cross the line into defamation.

The civil suit brought by Ruthann Aron, candidate for the 1994 Republican nomination for U.S. Senate, alleged that her primary opponent, William Brock, knowingly told reporters that Aron had been "found guilty, convicted by a jury of fraud" and had paid "hundreds of thousands of dollars in fines." The remark was coupled with television and radio ads Brock ran saying Aron had "trouble obeying the law" and had been "ruled out of bounds" by the courts.

Indeed, Aron had lost two civil lawsuits brought by her business partners, but she was never convicted on any criminal counts. Nor did she pay any fines: instead, both judgments against her had been settled out of court, one while the verdict was on appeal and the other after it had been set aside.

While Brock beat Aron in the heated GOP primary, the former Tennessee senator and labor secretary went on to lose the general election to Democratic incumbent Paul Sarbanes.

In her suit, Aron claimed Brock knew his statements and ads were false. She asserted that Brock was present at a debate where she clarified that the judgments against her were civil, not criminal, and that she had never paid any sort of fines. In response, Brock has said he didn't hear that part of the debate, and his remarks at a press conference were made when he was under pressure from reporters and not speaking from prepared remarks. According to press accounts, Brock has also testified that the civil/criminal distinction is irrelevant: that "most people think that when you lose to a jury you've been convicted, that's what most people think," and "people think

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Defamation Suit in Maryland

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it's even worse to defraud a partner than someone you don't know."

Testimony during four weeks of trial in Anne Arundel County Circuit Court essentially was a rehashing of a very bitter primary, where polls showed Aron pulling neck-in-neck with Brock during the last week of the campaign. Campaign consultants for both Aron and Brock were called to the stand with Brock consultant Alexander Ray testifying that the "trouble obeying the law" ads weren't defamation because "they weren't hard enough."

Aron had "gone negative" in the campaign as well. She ran ads calling Brock a carpetbagger and asserting that he could not beat Senator Sarbanes. However, she testified at trial that the "convicted" statement and ads had a very personal effect: shortly after the ads ran, a woman approached the candidate in a supermarket calling her a crook and saying she was not fit to run for public office. Many of her campaign contributors also were upset that they had given money to an alleged crook.

Even the six-member jury in the case was chosen for a reenactment of the primary. Media suggest the four women and two men on the panel were selected with an eye to which candidate they may have supported in the primary, with Brock's lawyers leaning toward older jurors. And local GOP officials were called to testify that Aron went negative first, thus prompting Brock's attack on Aron's business dealings.

However, Aron needed to show actual malice, a difficult burden to meet under any circumstances, but more difficult in an area where the Supreme Court has said a candidate must "expect that the debate will sometimes be rough and personal." *Harte-Hanks v. Connaughton*, 491 US 657 (1989) *quoting Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984). Her counsel tried to prove that Brock planned his misstatements by introducing poll results showing Aron pulling ahead, and memoranda from Brock advisors counseling him to get rough on his fellow Republican. Aron's lawyers also made much of the destruction of some records by Brock staffers at the end of his campaign.

After the verdict was rendered, one juror was quoted as saying that while she was upset by the negative campaigns of both candidates, "There will be a time and place when negative campaigning will have to be altered, but I don't think this was the place." In an editorial, the Baltimore Sun hailed the verdict as an "endorsement of the need for vigorous, robust debate, even if that debate occasionally skirts the line of propriety." In a letter to the newspaper in reply, Aron said the paper's editorial smacked of bias, and said politicians should be held to the same "truth in advertising" standards as consumer products.

TIME WINS ATLANTA LIBEL TRIAL

(Continued from page 2)

from a former CIA agent who claimed the government never lied.) Plaintiff's attorney also took issue with the correction that Time published in the case, claiming it was insufficient.

After deliberating for less than four hours, the jury returned a verdict saying that Michael Schafer was not entitled to any damages because of the misidentification. We subsequently learned from several jurors that the eight member panel believed that Time had done everything it could to verify the identity of the man in the photograph. One unanswered question in the case was whether plaintiff, having called no reputation witnesses in his defense (and having withdrawn his case for business injury), had made out a case for actual damages.

Time was fortunate to have had excellent witnesses. Roy Rowan is a 50-year veteran journalist and author who prepared the piece on a free-lance basis, but had previously been an accomplished writer and editor at several Time Inc. magazines; even plaintiff's lawyer called him a "marquis journalist." Over our adversary's objections, we had Mr. Rowan sit at counsel table with us throughout the trial and in effect put his reputation up against that of the plaintiff -- a convicted felon (on cocaine and obstruction of justice charges) with two social security numbers who had not paid taxes in ten years, among other transgressions.

We also won the battle of the experts. Plaintiff called Edwin Diamond, an NYU journalism professor and former media critic of *New York* magazine who asserted that the article should never have been published. Mr. Diamond's expertise was challenged by Henry Muller, the Managing Editor of TIME at the time of publication, who testified, among other things (including about Diamond's past reporting practices vis a vis TIME), that Mr. Diamond "had a lot of gall to present himself as an expert in this case when he is so manifestly bad at what he does."

Time's expert was Claude Sitton, a former *New York Times* editor and, until his retirement, the editor of the *Raleigh News and Observer* (known as the "nuisance and disturber" during his reign). Mr. Sitton is a true luminary in the field, having won a Pulitzer prize, served on the Pulitzer prize committee, and chaired the ethics committee of the American Society of Newspaper Editors, among other accomplishments. And contrary to Mr. Diamond, Mr. Sitton sat in the courtroom during the entire trial and could therefore comment on what he actually heard and saw -- something the jurors apparently appreciated.

Robin Bierstedt is Vice President and Deputy General Counsel of Time Inc. Time Inc. was represented by Peter C. Canfield, Sean R. Smith, and Thomas M. Clyde of Dow Lohnes & Albertson.

NEW FEDERAL TRADEMARK DILUTION ACT

By Thomas Leatherbury

Through a combination of broad definitions and expansive remedies, Congress legitimized a new strain of prior restraints beginning on January 16, 1996, when the Federal Trademark Dilution Act of 1995 took effect. This Act amends Sections 45 and 43 of the existing Lanham Act, 15 U.S.C. §§ 1127, 1125, which a number of plaintiffs have already begun to use against the media to circumvent traditional First Amendment protections.

While a number of states have so-called "anti-dilution" statutes, this Act now affords broad nationwide protection against dilution of famous trademarks. It constitutes a significant expansion to existing trademark protection.

Section 45, as amended, defines "dilution" as "the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of . . .

(1) competition between the owner of the famous mark and other parties, or

(2) likelihood of confusion, mistake, or deception." (emphasis added)

As amended, Section 43(c) provides that the "owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use . . . of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the quality of the mark. . . ."

The statute then lists eight non-exclusive factors which the Court may consider in determining whether the plaintiff's mark is "distinctive and famous":

* "the degree of inherent or acquired distinctiveness of the mark;
* the duration and extent of use of the mark in connection with the goods or services with which the mark is used;
* the duration and extent of advertising and publicity of the mark;
* the geographical extent of the trading area in which the mark is used;
* the channels of trade for the goods or services with which the mark is used;
* the degree of recognition of the mark in the trading areas and channels of trade. . . ;
* the nature and extent of use of the same or similar marks by third parties; and
* whether the mark was registered. . . ."

In addition to injunctive relief, the owner of a famous mark can recover damages, costs, and attorneys' fees, subject to the discretion of the court and principles of equity, if he can prove defendants willfully intended to trade on the owner's reputation or to cause dilution of the famous mark.

While the statute contains exemptions for "fair use" in comparative advertising, noncommercial uses, and "all forms of news reporting and news commentary," media defense lawyers should anticipate seeing a federal anti-dilution claim along with false endorsement and commercial disparagement claims which are already being brought under the Lanham Act with increasing frequency.

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SURREPTITIOUS VIEWING BILL SEEN AS DEAD IN MARYLAND

A bill which would have criminalized "deliberate, surreptitious viewing" of another person in a private home died in a committee of the Maryland State Senate. The bill had earlier passed the state House of Delegates. *See* March 1996 *LibelLetter*, page 11.

Agricultural Product Disparagement Bill Fails to Pass Maryland Legislature

By Lee Levine and Seth D. Berlin

Proposed legislation creating a cause of action for agricultural product disparagement, which recently had passed in the Maryland Senate by a narrow margin, has failed to pass the House of Delegates' Judiciary Committee.

After being introduced by Senator Richard Colburn (R-Cambridge) on February 1, 1996, Senate Bill 445 was approved by the Maryland Senate in late March by a vote of 25-22. The bill would have created a cause of action for "disparagement" for "a producer or an association representing producers of perishable agricultural products." Under the proposed legislation, disparagement was to be defined as "the willful or malicious dissemination to the public in any manner of information that a perishable agricultural food product is not safe for human consumption if: (1) the information is not based on reliable, scientific facts or data; and (2) the person disseminating the information knows or should have known the information to be false."

The bill was presented to the House Judiciary Committee by Senator Colburn on April 3, 1996, but no other witnesses were permitted to testify at that hearing. On April 5th, Senate Bill 445 was reported "unfavorably" by that Committee by a vote of 12-8.

Lee Levine and Seth D. Berlin are with the firm Ross, Dixon & Masback, L.L.P., which authored the media amicus brief in the appeal of Auvil v. CBS "60 Minutes".

MINNESOTA COURT OF APPEALS ISSUES BROAD OPINION DECISION

(Continued from page 1)

The appellate court afforded great weight to context in the analysis of and in deciding that the statements were not actionable, citing *Moldea v. New York Times Co*, 22 F.3d 310 (D.C.Cir. 1995), *Phantom Touring v. Affiliated Publications*, 953 F.2d 724 (1st Cir.), cert. denied, 504 U.S. 974 (1992) and *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995), among other decisions. Indeed, the court noted that sports talk radio was a context in which there was not only spontaneity but "often exaggerated and uncareful exchange of vehemently held opinions; listeners understand the atmosphere of overstatement and 'take such railings with a grain of salt.' *Moldea*, 22 F.3d at 313 [and other cites]" Slip op. at 21.

The appellate court's decision upheld a grant of summary judgment to the defendants by the trial judge who found plaintiff a limited purpose public figure and that plaintiff had failed to meet his burden as to actual malice. The appellate court never reaches the issue of actual malice, having found that the statements were not actionable.

The plaintiff is an orthopedist and former orthopedic consultant to the University of Minnesota football program. He was fired by a new head coach, who himself was subsequently subject of a book that created substantial controversy. Plaintiff-Hunter was quoted in the book as extremely critical of the coach's handling of injured players, accusing him of callous treatment of the student athletes. Plaintiff also appeared on an edition of ABC's *Nightline* dedicated to the book's allegations, repeating much of what he had been quoted as saying in the book.

Defendant-Hartman is a well-known sports writer and radio commentator in Minnesota. His radio talk show is on a CBS owned station in Minnesota. CBS was also named as a defendant in the suit.

The statements at issue were made in Hartman's weekly radio sports talk show, which included a call-in format. Hartman had been critical of the book and of the plaintiff's statements, indicating that plaintiff bore the coach ill will because the coach had replaced plaintiff with another doctor.

The actual statements at issue, however, were Hartman's reporting that plaintiff had operated on 12 students in one year as team orthopedist and that none of them had returned to play, or that hardly any of them had returned to play, or that some had played, but at half their ability, etc. -- "so there was a good reason, Mr. Hunter, why [the coach] discharged ya." The statements were made over the course of the program, growing, as the court notes, increasingly less equivocal, in response to various listener comments and challenges. The verbatim text is in the opinion.

PLAINTIFF IS A PUBLIC FIGURE

The appellate court upheld the trial court's holding that the plaintiff was a limited purpose public figure. Further, the court rejected plaintiff's argument that the statements were not related to the same reasons that plaintiff was ostensibly a public figure, finding that the alleged defamation proposed a motive for plaintiff's having entered the controversy about the coach in the first place, and reflect upon plaintiff's credibility with respect to his comments.

HYPERBOLE

The court cites *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990) for the proposition that context is important to a determination of whether a defamatory comment may be protected hyperbole. The court also cites a number of cases for the proposition that the hyperbole analysis has been applied to protect remarks made in the context of sports talk publications or television, reducing *Milkovich* to a "cf" cite.

OPINION

Similarly, starting from *Milkovich* the court finds that "context is relevant to the process of distinguishing nonactionable statements of opinion from actionable statements." Slip op. at 15.

AND SUBSTANTIAL TRUTH

The court also adds what it characterizes as a "more recent doctrine extend[ing] First Amendment protection to statements that are "'substantially true' --that is, 'supportable interpretations' of ambiguous underlying situations. *Moldea*, 22 F.3d 316-19 [and other cites]" Slip op. at 15-16. Combining this analysis from *Moldea* with the analysis from *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) and *Time, Inc. v. Pape* (as cited in *Bose*) and with material from the recent decision in *Washington v. Smith*, 893 F.Supp. 60 (D.D.C. 1995), the appellate court finds that a commentator who chooses one of several feasible interpretations of an event:

"is not liable in defamation 'simply because other interpretations exist. Consequently, remarks on a subject lending itself to multiple interpretations cannot be the basis of a successful defamation action because as a matter of law no threshold showing of 'falsity' is possible in such circumstances."

Slip op. at 16.

While the application of these doctrines to the facts at hand is a marvelous thing to behold, it is perhaps better read than summarized. With context -- the court "detect[s] at least five layers of context" that negate the defamatory sting suggested by plaintiff -- the court finds the statements ambiguous and open to several reasonable interpretations.

Counsel for defendants were John P. Borger and Eric E. Jorstad of Faegre & Benson, and Susanna Lowy and Anthony Bongiorno of CBS, Inc.

OUT-TAKES

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made by parties seeking out-takes and other news material for use in pending lawsuits, the Court ruled that "ordinarily, impeachment material is not critical or necessary to the maintenance or defense of a claim." The Court made clear that the information contained in the subpoenaed out-takes must be truly unavailable elsewhere before production can be compelled. The Court also underscored the narrow scope of its opinion in *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993).

The Second Circuit's decision reversed an order of the District Court (Duffy, J.) denying NBC's motion to quash a subpoena for out-takes served by Graco Children's Products, Inc. Graco sought the out-takes in connection with its defense of products liability and wrongful death suits pending in Massachusetts and Texas arising from the deaths of infants in Graco converta-cradles. In May 1995, NBC's news program DATELINE broadcast a report on Graco's converta-cradles, the fourteen infants who had died in the cradle during the two years it had been on the market, the product's recall and the lawsuits filed by parents of infants who had died, including Ruth Marden. Several months after the broadcast, and after deposing the plaintiffs, Graco subpoenaed the out-takes of the interviews with Ruth Marden and her attorney, and another set of plaintiffs, the Krases, and their attorney, whose case settled while NBC was appealing the denial of its motion to quash.

Motion to Quash

NBC moved to quash the subpoenas, relying primarily on the New York State Shield Law's qualified privilege which requires a party seeking non-confidential news gathering material to show that the material is (1) highly material and relevant to its claim or defense, (2) critical or necessary to the maintenance of its claim or defense, and (3) not obtainable from an alternative source. NBC argued that Graco could not satisfy the second and third requirements of the three-part test.

Graco argued that it needed the out-takes for impeachment because they might contain statements that were inconsistent with the plaintiffs' deposition testimony, an argument Graco sought to bolster by claiming that the plaintiffs' broadcast statements were inconsistent with their depositions and other evidence.

Judge Duffy summarily denied NBC's motion to quash, calling it a "useless proceeding," labeling NBC's argument "absurd" and asserting that NBC had "no interest in the out-takes." Judge Duffy ordered NBC to produce the out-takes of the interviews with both the plaintiffs and their lawyers. NBC declined to comply with the order pending appeal and was held in contempt, a procedural prerequisite to an appeal from the denial of a motion to quash. Judge Duffy then imposed a $5,000 per day fine which he refused to stay. In response to NBC's motion, the Second Circuit immediately stayed imposition of the fine pending NBC's expedited appeal.

The Second Circuit

The Second Circuit agreed with NBC's argument that New York law applied in these diversity actions (where privileges are determined by state, not federal, law) because DATELINE is produced in New York by a New York-based broadcaster, and the subpoenas were served in New York. The Court adopted a stringent formulation of the "critical and necessary" requirement, holding that production of news gathering material can be compelled only if the party's claim "virtually rise or falls" on the admission or exclusion of the evidence. The Court carefully compared the plaintiff's broadcast statements with her deposition and concluded that there were "serious questions" whether the broadcast statements were inconsistent with her prior testimony. But of consequence for future decisions, the Court further held that there was no basis to conclude that any inconsistent statement would be critical to Graco's defense, and thus meet the "critical and necessary" requirement, because impeachment material is not ordinarily critical.

Finally, the Court ruled that the information in the out-takes was not unavailable from other sources, including the plaintiff herself. The Court rejected the oft-cited claim that out-takes necessarily satisfy the no alternative source requirement because they are "unique" and contain statements "frozen in time." The Court held: "it cannot be said that pertinent material is not obtainable elsewhere just because it is included in some out-takes."

The Court also rejected Graco's reliance on United States v. Cutler, a decision that had troubled some media lawyers by signaling in dicta a possible retrenchment in the protection afforded news gathering material. Cutler, a criminal contempt proceeding, concerned production of out-takes of his statements to the press, the statements themselves forming the basis for the alleged contempt. The Court readily distinguished Cutler as involving critical evidence not obtainable from other sources. The Court described Cutler as "applying a standard identical to that embodied in the New York Shield Law," a very favorable description of that decision.

At oral argument, the questions of the panel (Miner, Van Graafeiland and Cabranes) focused on in camera review, an issue neither addressed by the parties in the lower court proceedings nor discussed by the District Court. NBC argued that in camera review should not be ordered absent a showing that the material was critical, necessary and otherwise unavailable, a showing that Graco could not possibly make. Otherwise, every subpoena would prompt in camera review, a result clearly at odds with the Shield Law and the policies protecting news gathering material. The Second Circuit's decision does not mention in camera review.

The Second Circuit's decision guaranteeing broad protection for unpublished, non-confidential news material should discourage litigants from trying to use the media as a discovery device.

The news organizations supporting NBC's appeal as amici curiae included American Broadcasting Companies, Inc., CBS Inc., Daily News, Dow Jones & Company and Fox News, Inc.

Counsel for the amici was Robert LoBue of Patterson, Belknap, Webb & Tyler, New York.

Susan E. Weiner, NBC Senior Litigation Counsel, represented NBC on the motion to quash and on appeal.

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summary judgment on the negligence theory holding that the First Amendment does not protect the media in this instance and that the summary judgment proof did not make clear that the defendants were not a proximate cause of the plaintiff's injuries.

Thus, despite the fact that Judge Smith's recitation of the facts makes clear the numerous leaks in the ATF's supposedly secret operation, the opinion paves the way for holding the media responsible for the deaths and injuries of ATF agents for activities which allegedly tipped off the Davidians to the ATF's impending raid.

Facts

In December 1992, the ATF instituted plans to obtain and execute a arrest warrant for Koresh and a search warrant for the Compound. The planning of the mission was in the hands of Phillip Chojnacki and Chuck Sarabyn, now among the plaintiffs in the current action. The ATF decided to conduct a "dynamic" entry into the compound, depending largely on the element of surprise for the ultimate success of the mission. In fact, ATF Director Stephen Higgins ordered Chojnacki and Sarabyn to cancel the operation if they learned that the secrecy of the raid had been compromised. To further the mission, ATF agent Robert Rodriguez, also a plaintiff, was placed in a house directly across from the Compound in January 1993 to serve as an undercover agent.

During the same period, the Waco Tribune-Herald, a morning edition newspaper, owned by parent company Cox Enterprises, Inc., began an in-depth investigation of the of the cult, which was ultimately published as a three-part series beginning on February 27, 1993, the day before the raid. The newspaper's investigation was far from secret, with David Koresh, himself, knowing that publication was imminent.

The ATF also knew of the paper's plans and met with the paper on two occasions to request that the paper delay publication of the planned series on Koresh and his cult. During the first meeting with the newspaper's managing editor on February 1, 1993, Sarabyn admitted that the ATF investigation would eventually culiminate in the execution of warrants but would not disclose when such an operation would occur. The paper, in turn, declined to delay publication of the series.

Despite the fact that the ATF agents at the meeting would not confirm a date for the execution of the warrants, Charles Rochner, a former Secret Service agent and current Vice-President of Corporate Security for Cox, had already learned from Chojnacki that a raid was echeduled for March 1. At no time, however, did Rochner disclose this information.

Staffers at KWTX and the Tribune also learned from unnamed sources of the proposed raid on the Compound.

In early February the ATF also contacted American Medical Transport to inquire as to the availability of ambulance services in connection with a law enforcement operation in the area. On February 24, 1993, the ATF again met with the newspaper to request a delay in publication. On this occasion Chojnacki would not inform the newspaper exactly when the ATF operation would occur or whether it would occur at all. In fact, Chojnacki indicated that he had not yet obtained the search and arrest warrants.

On the same day ATF agents began arriving at Fort Hood. The next day, February 25, Chojnacki obtained the warrants.

The Tribune decided, fearing retaliation by the Davidians, to begin running what was supposed to be a seven-part series on the group entitled "Sinful Messiah" on Saturday, February 27, when fewer employees would be in the newspaper building. Realizing the ATF's concerns that the articles would cause heightened security at the Compound, the paper decided to notify the ATF of their plans on Friday afternoon. After learning of the paper's decision, the ATF changed the date of the raid to Sunday, February 28.

On Saturday, the date of publication, Witherspoon of the Tribune learned from an confidential source that the raid had been moved to Sunday. Agent Rodriguez was, at the same time, at the Compound ascertaining the effect of the article on Koresh and his followers. Rodriguez noted that Koresh was upset about the article and told the other Davidians that the authorities would be coming.

The ATF also contacted American Medical Transport to request availability on Sunday rather than Monday, but did not inform the ambulance service of the purpose of the law enforcement operation. A dispatcher for the company called KWTX cameraman, Mulloney, with the information. Later that day, Mulloney and Witherspoon confirmed with each other that the raid would occur on the following day. Both the newspaper and the television station made plans to cover the raid at the Compound.

That night Brian Blansett, of the Tribune, received a call from one of Koresh's senior deputies, who told the reporter that Koresh was upset and wanted an opportunity to tell his side of the story. Blansett informed Rochner of the call, who, in turn, told Chojnacki. At this time, Chojnacki recommended against sending reporters to the Compound that evening, but he did not attempt to dissuade Rochner from sending a reporter out the next morning. Based upon this discussion with Chojnacki, Rochner told Blansett that he did not believe that the raid would be carried out the next day. Blansett, nevertheless, continued preparations for covering the raid.

The next morning, around 7:30 A.M., two vehicles from KWTX headed towards the Compound which was located along the two mile stretch of the Double EE Ranch Road between FM 2491 and Old Mexia Road. Mulloney, with another reporter, set up on FM 2491 over two miles from the Compound. KWTX cameraman, Jim Peeler wearing a KWTX jacket, was assigned to a roadblock Mulloney believed would be set up approximately four miles away at the intersection of Double EE Ranch Road and Old Mexia Road.

The Tribune's reporters set out in intervals for FM 2491 beginning around 8:30 A.M. in three separate vehicles. Only one of the vehicles driven by Blansett with Darlene McCormick, however, actually headed toward the Compound before turning around and parking on FM 2491. The second vehicle

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parked alongside the KWTX vehicle on FM 2491, while the third Tribune vehicle was directed upon its arrival to continue to the ATF command post.

Unable to find any roadblocks, Peeler continued further away from the Compound on Old Mexia Road. While consulting a map on the roadside a mailman pulled alongside Peeler's vehicle to ask if he was lost. Unbeknownst to Peeler, the mailman was, in fact, David Jones, brother of Koresh's legal wife.

Although there is some to dispute as to what was actually said, Jones reportedly referred to the increased traffic on the road. There were, however, no other media vehicles on Old Mexia Road. For his part, Peeler has admitted that when asked if something was going to happen, he responded, "it might." Dick DeGuerin and Jack Zimmerman, attorneys who interviewed the Davidians during the siege, have indicated that according to Jones, who did not survive the fire, Peeler was much more communicative regarding the impending raid. Regardless, after the meeting Jones drove straight to the Compound to warn Koresh.

The Davidians Know

After Koresh returned from talking to Jones, ATF Agent Rodriguez noted that Koresh was visibly nervous and shaking. Koresh told Rodriguez that the National Guard and ATF were coming and said, "They got me once, they'll never get me again." Looking at the undercover house, Koresh continued, "They're coming Robert. The time has come."

Rodriguez returned to the undercover house and reported to Sarabyn that Koresh knew that the ATF were coming. Although, other agents in the house noted that there was increased traffic in the area, realized that some of the vehicles were news vehicles, and observed the roadside meeting between Peeler and Jones, the information regarding the usual activity, the presence of the media, or the meeting between Jones and Peeler was never reported to any of the agents in command.

Chojnacki and Sarabyn conferred on the airport tarmac and decided that despite the fact that Koresh apparently knew that they were coming, there was no reason not to go ahead with the raid. The ATF agents were herded into two cattle trailers and set off for the ranch.

The roads surrounding the Compound were, in fact, far from secure. The ATF had not set up any roadblocks and when Tribune reporters, following standing orders to obey law enforcement officials, stopped to ask for a State Highway Trooper's permission to proceed on FM 2491, at approximately 9:30 A.M, fifteen minutes before the raid, the Trooper indicated that he had not been assigned to stop any vehicles from moving in the direction of the Compound.

Upon their arrival at the Compound, one of the KWTX vehicles followed the trailers up onto the Compound property. The newspaper vehicles stayed back. Koresh appeared briefly at the door but slammed it shut before any of the agents could reach him. Shortly thereafter gunfire inside the Compound erupted from the windows.

Four ATF agents were killed with numerous others injured. Inside the Compound many were also dead and wounded. The FBI eventually took over the operation which ended on April 19, 1993 when the Compound was set ablaze by the Davidians during an attempt by the FBI to take control.

The Claims

This suit followed with Chojnacki, Sarabyn, Rodriguez and others, as well as those who survived the dead ATF agents, suing the newspaper, KWTX, and American Medical Transport for wrongful death. The plaintiffs asserted causes of action based upon negligence, breach of contract, intentional infliction of emotional distress, interference with and/or obstruction of a law enforcement officer in the performance of his official duties and conspiracy. The defendants moved for summary judgment arguing that (1) their actions were neither a proximate cause nor a cause in fact of any of the injuries suffered by the plaintiffs, and (2) the actions of the media defendants were protected by the First Amendment, which immunizes them from a suit for damages.

No First Amendment Bar to Suit

After stating that the press must abide by laws of general applicability, Judge Smith went on to base his refusal to extend coverage of the First Amendment protections to the media in this case mainly on *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). As Judge Smith stated, "As in the *Cohen* case, the law at issue here, the Texas law of negligence, is a law of general applicability. 'It does not target or single out the press. Rather, . . . the doctrine is generally applicable to the daily transactions of all the citizens of [Texas].'" *Slip op.* at 27-8, *citing Cohen v. Cowles Media Co.*, 501 U.S. at 670.

Further, Judge Smith stated, "Any burden placed upon the press by its application 'is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law' that requires those who injure others through negligence to make them whole." *Slip op.* at 28, *citing Cohen v. Cowles Media Co.*, 501 U.S. at 670.

Judge Smith went on to state, "Defendants are no more free to cause harm to others while gathering the news than any other individual. As Plaintiffs note, it would be ludicrous to assume that the First Amendment would protect a reporter who negligently ran over a pedestrian while speeding merely because the reporter was on the way to cover a news story." *Slip op.* at 28.

In addition, Judge Smith found that KWTX's argument that the conversation between Peeler and Jones was an exercise of free speech was "a distinction without a difference." *Slip op.* at 28. According to Judge Smith, "Practically every tort claim involves some form of communication. A plaintiff is not divested of a cause of action by the First Amendment merely because a tortfeasor speaks." *Slip op.* at 28.

Negligence

Judge Smith then turned to whether Texas recognizes a cause of action for negligence under the facts of this case. While neither party could identify a case that has held a journalist liable for actions taken during a law enforcement operation,

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Judge Smith relied on cases in which police officers have been able to recover for injuries caused by the negligence of other parties.

Finding the so-called "fireman's rule" inapplicable -- the principle that fire and police officers cannot sue at least the premises owner who seeks assistance absent intentional misconduct -- the court found a negligence acton could be maintained.

Under Texas law, the court stated, "The common-law doctrine of negligence consists of three essential elements: 'a legal duty owed by one person to another, a breach of that duty, and damages proximately resulting from the breach.'" *Slip op.* at 33, *citing El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987).

Eimann Applied

Applying *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 834 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990), which looks to "(1) whether the defendant owes an obligation to this particular plaintiff to act as a reasonable person would in the circumstances; and (2) the standard of conduct required to satisfy that obligation," and pointing to a "number of criminal statutes under both federal and state law [which] establish that society has a duty not to interfere with a law enforcement officer during the course of his responsibilities," Judge Smith concluded that the "statutes create a duty upon all individuals, including the media, not to negligently interfere with the execution of arrest or search warrants." *Slip op.* at 34.

Further, Judge Smith held that the equities in this case "would require a common-law duty" even if no statutory duty existed. In order to make this determination, Judge Smith utilized the risk-utility balancing test set out in *Eimann*. Under the test, "'The court must consider several factors, including risk, foreseeability, and likelihood of injury weighed against the social utility of the defendant's conduct, the magnitude of the burden of guarding against the injury and consequences of placing that burden on the defendant.'" *Slip op.* at 34, *citing Rodriguez v. Spencer*, 902 S.W.2d 37, 41 (Tex. App. -- Houston [1st Dist.] 1995, no writ).

In making this determination, however, Judge Smith specifically chose not to include the social utility of newsgathering as it relates to freedom of the press, but rather factored in the social utility of the press leaking to the Davidians that the ATF was on its way. Thus, the test becomes incredibly stilted against the media defendants. In Judge Smith's words, "The issue is whether the actions of the Defendants in failing to exercise some degree of caution to avoid warning the Davidians of the impending raid outweighs the risk that compromising the secrecy of the operation would result in death and injury to a number of law enforcement agents." *Slip op.* at 36. In other words, Judge Smith has created a balancing test which weighs the "benefit" of warning the Davidians against the "harm" of the deaths of four ATF agents -- hardly a test the defendants could win.

Nevertheless, Judge Smith stated that "demanding the press to act responsibly in such a unique situation will not "chill" first amendment rights, no more so than demanding that any individual citizen act responsibly." *Slip op.* at 37.

Causation

Judge Smith next turned to whether the plaintiffs could show that the defendants were a cause in fact of the plaintiff's injuries. Originally, the plaintiffs had claimed that the defendants caused their injuries by "(1) publication of the "Sinful Messiah" articles; (2) presence of a number of newspaper reporter [sic] in vehicles near the Compound on the morning of the raid; and (3) a telephone call from Mark England [a Tribune reporter] to the inhabitants of the Compound on the morning of the raid." *Slip op.* at 37-38.

By the time of the motion, however, plaintiffs had dropped the claim based upon negligent publication. Judge Smith also disposed of the claim against England finding that the call on the morning of the raid was from the place and not the person.

No Press Guidelines

As to the remaining theory, however, Judge Smith sided with plaintiffs. Relying in part on the expert testimony of Joseph Goulden who testified that "the media Defendants committed serious professional errors when they established no guidelines for their staff to follow to enable them not to undermine the law enforcement operation," Judge Smith found that rather than observe the dictates of common sense, "the media arrogantly descended on the Compound as if the First Amendment cloaked them with immunity from acting as reasonable individuals under the circumstances." *Slip op.* at 41.

In addition to Peeler's unfortunate inadvertance, Judge Smith made much of the traffic that was caused by the media defendants on the road in front of the Compound. Except for a statement allegedly made by David Jones to Peeler outside the Compound, however, there was no evidence presented that showed that anyone inside the Compound took note of the increased traffic, realized they were media vehicles, or connected their presence to an imminent raid by the ATF. In addition, the interviews by DeGuerin and Zimmerman indicate that any possible warning of the impending raid came from Peeler's statement alone.

ATF as Intervening Cause

Judge Smith then addressed the defendants' arguments that the ATF's decision to go ahead with raid, which was in the hands of two of the plaintiffs, despite knowing that the element of surprise had been compromised, and apparently in direct conflict with ATF Director Huggins orders, was an intervening, superseding cause which should cut off any liability.

Judge Smith dismissed the argument stating that "an intervening act by a third party may destroy the 'casual connection between the defendant and the plaintiff's injury,' if the act of the independent agency 'was the immediate cause of the plaintiff's injury and was not reasonably foreseeable.'" *Slip op.* at 42, *citing Urbach v. United States*, 869 F.2d 829, 833 (5th Cir. 1989). Since, according to Judge Smith's reasoning it was "arguably foreseeable" that the lack of guidelines for the reporters would lead to tipping

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SECRECY ORDERS

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litigation (including the United States) or to the district court. The March 1 Order, however, explicitly permitted the gagged officials to communicate freely with other parties to the litigation and their counsel. The order also allowed the "gagees" to state that they could not comment publicly on draft desegregation plans because they had been ordered by the court not to do so. The order purportedly was intended to facilitate settlement of difficult issues in the desegregation case.

The March 1 Order replaced an earlier order, entered on February 6, which imposed an identical gag on all of the more than seven thousand employees of the Baton Rouge school system. On February 22, following a hearing on the news outlets' motion to vacate the February 6 order, the district court upheld the order in its entirety. On February 26, after the news outlets had noticed an expedited appeal, the district court entered "Supplemental Reasons" in support of the February 6 order. There, Judge Parker acknowledged that the February 6 Order had been "inartfully drawn" to gag all 7,000 school employees. Judge Parker directed the School Board to submit a revised order gagging only Board members and other officials involved in preparing a desegregation plan. That numerically revised order was entered on March 1.

The March 8 Private Sessions Order.

The second order struck down by the Fifth Circuit was entered by Judge Parker on March 8, 1996 ("the March 8 Order"). On March 7, less than twenty-four hours earlier, the Fifth Circuit had granted the news outlets' motion for expedited appeal of the February 6 and March 1 orders. Despite the prior proceedings before it (including a hearing) and the pendency of the expedited appeal, the district court entered the March 8 Order (again at the School Board's request) without notice to the *Advocate* or WBRZ. The March 8 Order directed the Board to meet in "private confidential sessions" to discuss draft desegregation plans; authorized the Board to meet privately with other parties to the desegregation case; and required those meetings and discussions (as well as related documents) to be kept confidential pending further orders of the court. The effect of this sweeping order was to preempt, in wholesale fashion, for an indeterminate period of time, any application of Louisiana's Open Meeting Law, La. R.S. 42:4.1 *et seq.*, and Public Records Act, La. R.S. 44:1 *et seq.*, to the Board's development of a new desegregation plan.

The March 8 Order was filed in the district court record shortly after 2 p.m. on March 8; by 4:50 p.m., the news outlets had moved the Fifth Circuit to stay the order, and shortly after 6 p.m., the order was stayed. The School Board promptly cancelled private meetings it had called for Saturday and Sunday, March 9 and 10, in reliance on the March 8 Order.

The Fifth Circuit Opinion

Appealable Collateral Orders. In its opinion, the Fifth Circuit panel (King, Garwood, and Dennis, J.J.), per Judge King, first held that the March 1 and March 8 Orders were appealable under the collateral order doctrine. Opinion at Westlaw p. 5. In holding that the orders were appealable, the Court put to rest tentative suggestions in earlier opinions that mandamus might be the appropriate procedure for contesting closure or confidentiality orders in the Court of Appeals, *e.g.*, *United States v. Chagra*, 701 F.2d 354, 358 (5th Cir. 1983). Indeed, because of these earlier suggestions, the news outlets had framed the proceeding in the alternative as an appeal or application for writ of mandamus.

Standing Upheld. The Court next addressed the School Board's contention that the news organizations lacked standing to contest the orders. "To establish standing," the Court began, "the news agencies must show an injury in fact that is fairly traceable to the challenged act and that is likely to be redressed by the requested remedy." The Court then noted that "the only element of standing that is disputable is whether the news agencies have alleged an injury in fact." It found that "the combined effect of these orders . . . is to severely impede the news agencies' ability to discover information about the Board's process in formulating a proposed desegregation plan." Opinion at Westlaw pp. 5-6.

The School Board argued that it was not a "willing speaker" -- after all, the Board had asked the district court to gag it -- and that the gag order was not curtailing the flow of information to the news outlets or otherwise injuring them. The news outlets countered that, even if the Board were not a willing speaker, the news outlets would have standing by virtue of their independent First Amendment right to gather the news. The Court acknowledged that "[t]he First Amendment provides at least some protection for the news agencies' efforts to gather the news" and that "[t]he First Amendment protects the news agencies' right to receive protected speech." The Court also recognized that "many circuits have found media standing to challenge confidentiality orders without expressly finding the existence of a willing speaker." The Court found it unnecessary, however, to decide "whether in every case, the media must demonstrate the existence of a willing speaker to establish standing to challenge a court's confidentiality order" because, on the record before it, the Court was satisfied that "a willing speaker exists." Opinion at Westlaw p. 6. The Court cited the School Board's stipulation below that, prior to entry of the orders, members and employees of the Board were willing to speak to the news organizations about desegregation plans. The Court concluded that the news organizations had established standing, and turned to the merits of the March 1 and March 8 Orders.

The March 1 Order Held Unconstitutional. The news organizations contended that the March 1 gag order should be analyzed as a prior restraint, citing *CBS Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975). Alternatively, the news organizations argued that even if prior restraint analysis were not applicable, the case law required the School Board to show that the order was necessitated by a compelling governmental interest, that it was

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narrowly tailored to serve that interest, and that no alternative remedy less intrusive of First Amendment interests would suffice.

The Fifth Circuit found it unnecessary to decide whether prior restraint analysis applied because "even assuming that the order is not a prior restraint, its effect on the news agencies' First Amendment rights must still be justified . . . . We need not decide whether to employ the strict scrutiny standard . . . or some variant of the reasonable likelihood standard . . . because the district court's March 1 order would not satisfy either standard . . ." Opinion at Westlaw p. 7. The Court elaborated:

> The March 1st order is not justified, on this record, by any important governmental interest or countervailing individual right. First, we emphasize that this is not a criminal trial, nor even a civil jury trial. There is no possibility that publicity will prejudice potential jurors. The Board argues that the confidentiality order is necessary because the Fourteenth Amendment rights of the East Baton Rouge Parish school children to attend schools free of racial inequality outweighs any First Amendment rights of the news agencies. Indeed, the students' constitutional right to desegregated schools is compelling; however, the confidentiality order does not necessarily further their interests. The removal of the confidentiality order would in no way prevent the Board from desegregating the school system.
>
> The purpose of the confidentiality order, as explained by the district court in relation to the February 6th order, is to allow the Board members privately -- without interference from the public or the media -- to discuss and formulate a proposed desegregation plan. Whatever the validity of this rationale for conducting private meetings may be, it does not, on this record, justify the sweep of the March 1st order prohibiting Board members and employees from making any written or oral comments to any other person or entity in connection with any aspect of any drafts of any desegregation plan.
>
> The Board argues that the damage to the news agencies' First Amendment rights is mitigated because the Board plans to disseminate the final draft of the proposed desegregation plan to the public and the press. The short answer to this argument is that the parties have stipulated that the process itself is newsworthy.

In a footnote, the Court also observed:

> In the absence of the confidentiality order, publicity and public discourse about the drafting of a proposed desegregation plan may lengthen the process of formulating a plan. However, this possibility, inherent in the exercise of First Amendment rights, cannot justify the order.

Opinion at Westlaw p. 8, n.8.

March 8 Order Also Invalidated. Relying upon its First Amendment analysis of the March 1 Order, the Court held unconstitutional the "gag" portion of the March 8 Order, which required that "all . . . private sessions and all preliminary version(s) of the draft [plan] shall remain confidential and private until further order of the Court." Opinion at Westlaw p. 8. The Court then turned to the "main portion" of the March 8 Order, which directed the Board to meet in private sessions to formulate a desegregation plan and to negotiate the plan with the adverse parties to the litigation. The news organizations argued that this portion of the March 8 Order overrode Louisiana's Open Meetings Law and Public Boards Act without any consideration of the extent of necessity of doing so, directly contrary to the Third Circuit's holding in *Pansy v. Borough of Stroudsburg* 23 F.3d 772, 791 (3d Cir. 1994).

The Fifth Circuit agreed:

> We express no opinion on whether the private sessions contemplated by the March 8th order would comply with the Louisiana Open Meetings Law. We note that, at least on the surface of it, the district court entered the March 8th order without even considering the Louisiana Open Meetings Law. In entering a confidentiality order protecting a public entity, or an order such as this requiring a public entity to meet in secrecy, the district court should consider the effect of the order on state freedom of information laws. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3d Cir. 1994) ("where a governmental entity is a party to litigation, no protective, sealing or other confidentiality order shall be entered without consideration of its effect on disclosure of government records to the public under state and federal freedom of information laws" (citations and alterations omitted)).

The district court made no findings concerning whether the meetings contemplated by the March 8th order fit within any of the exceptions to the Louisiana Open Meetings Law. L.R.S. § 42:61(A)(2); *see Pansy*, 23 F.3d at 786. The court made no effort to explain why the need for confidential Board meetings outweighed the news agencies' interest in attending Board meetings protected by the Louisiana Open Meetings Law. *See id.* Furthermore, the Board, although aware of its duty as a public entity to comply with the Louisiana Open Meetings Law, did not request that the district court determine whether the

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exceptions to the open meeting requirement covered the private sessions contemplated by the March 8th order.

Opinion at Westlaw pp. 8-9

Procedural Prudence. Finally, the Court briefly addressed the news organizations' contention that the March 8 Order was invalid because it had been entered without notice to the news organizations. Interestingly, the Court noted that the district court had not only failed to notify the intervenor news organizations of the requested order, but "also gave no notice of the March 8th order to the District Attorney, who is required by law to enforce the . . . Open Meetings Law." The Court was unwilling to hold, however, "that notice to the press or the district attorney is always required before entry of an order implicating state sunshine laws." Instead, the Court held only that "[a]t a minimum, such notice, under the *circumstances that obtained here [i.e.*, the news organizations had already been permitted to intervene to oppose related orders] would have been prudential." The Court then added a roundabout rebuke:

> In any event, the absence of such notice in this case had the effect of eliminating any opposition to the secret meetings aspect of the March 8th order. Because there was no opposition to the entry of the order, the district court took the wholly unacceptable step of entering the order without making any findings.

Finally, the Court concluded with this summary of its *Pansy* holding:

> In short, the district court entered a sweeping order requiring a public entity to conduct confidential meetings which may or may not comply with state law. The court should not have entered this order without considering whether the meetings that it ordered complied with the Louisiana Open Meetings Law, or demonstrating compelling reasons for preempting Louisiana law. We conclude that the district court abused its discretion in entering the March 8th order without considering its effect on Louisiana law. *See Pansy*, 23 F.3d at 783 ("We review the grant or modification of a confidentiality order for abuse of discretion."). Accordingly, we vacate the March 8th order.

Opinion at Westlaw p. 9.

Some Observations.

By design or otherwise, the March 1 and March 8 Orders would have silenced meaningful reporting on the evolving Baton Rouge school plan, a matter of immense community concern. Perhaps not coincidentally, the orders also would have insulated the elected School Board members from accountability for the positions they took on controversial elements of the desegregation plan. Entirely apart from the precedential value of its opinion, the Fifth Circuit should be given full credit for diagnosing, swiftly treating, and promptly curing, on an expedited appeal, this poisonous overdose of judicial secrecy.

Although not dramatic or sweeping, the Fifth Circuit opinion in *Davis* makes a useful and, in some respects, important contribution to the case law on civil gag and confidentiality orders. Perhaps the opinion can best be understood by noting briefly what the Court's opinion did and did not do:

What the Fifth Circuit Did Do.

* Held gag orders and similar access-restricting orders appealable under the collateral order doctrine.

* Implicitly, but clearly, held alternative mandamus applications unnecessary, at least in the Fifth Circuit.

* Acknowledged the precedent supporting a doctrine of newsgatherer standing to contest gag orders that is independent of the litigants' support for or opposition to the orders.

* Held that if there is a "willing speaker" standing requirement, it can be satisfied by a showing that the gagged litigant was providing information before a gag order was entered.

* Acknowledged, but did not approve or disapprove, prior case law applying prior restraint analysis to civil gag orders even when a news organization, not the party directly gagged, is contesting the order.

* Held explicitly that even if a prior restraint analysis doesn't apply, a civil gag order (at least in the circumstance where no jury trial is involved) must be supported by an important governmental interest or individual right countervailing the First Amendment right to gather news.

* Held implicitly that facilitating settlement of litigation - even complex, intractable, constitutional litigation with a unique jurisprudence supporting broad and innovative equitable remedies - does not constitute an important governmental interest justifying an encroachment on litigant freedom of speech and/or the ability of the media to report on that speech.

* Held implicitly that a civil gag order in these circumstances must also be narrowly tailored to serve the requisite governmental interest or countervailing right ("Whatever the validity of this rationale...it does not...justify the sweep of the March 1st order prohibiting the Board members from making *any* written or oral comments to *any* other person or entity in connection with *any* aspect of *any* desegregation plan.")(my emphasis)

* Followed and consolidated *Pansy* and squarely held that before entering a confidentiality order preempting state sunshine laws, a federal district court must consider whether its order is consistent with state law, and, if not, whether "compelling reasons" for preempting state law have been demonstrated.

* Held that, at least where media opposition to a sunshine-abridging confidentiality order has been

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specifically identified, notice to those media organizations and to any state officials charged with enforcement of state sunshine laws is "prudential" and that, in the absence of such notice, entry of a confidentiality order without findings to support it is "wholly unacceptable."

What the Fifth Circuit Didn't Do.

* Did not, as the news organizations asked it to, categorically recognize an independent newsgather basis for standing and reject the "willing speaker" test for standing, but chose instead to hold that the stipulated evidence showed the gagged litigants in this case to be "willing" in any event.

* Did not hold that prior restraint analysis applies to civil gag orders, even in the unusual context of a proceeding in which there was to be no jury trial and in which the gagged party was an elected public body that had requested a self-gag.

* Did not adopt a mandatory procedural framework for consideration of gag orders or related confidentiality orders that may conflict with state sunshine laws.

* Did not hold that the portion of the March 8 Order which mandated confidential School Board meetings violated the First Amendment, but instead held that the order was invalid as an abuse of discretion because the district court failed to address the effects of the order on state sunshine laws.

Future Directions

Where does *Davis* leave us? First, in the murky waters of gag order litigation, *Davis* can be cited with *Dow Jones* as requiring a substantial framework of justification (compelling interest, narrowly tailored, no alternatives) even in the absence of prior restraint analysis. This, I think, is important, for too often courts tend to leap from a rejection of prior restraint analysis to an unarticulated test that is at best a reasonable-relation standard and at worst wholly discretionary. *See, e.g., United States v. Davis*, 902 F.Supp. 98 (E.D.La. 1995).

Second, in a variety of access settings, *Davis* should be read and cited forcefully for the proposition that facilitating settlement of lawsuits does not justify restrictions on newsgathering. That *Davis* repudiates this justification in the hallowed context of school desegregation litigation should make the repudiation particularly weighty -- if not there, then where? -- a kind of mini - *Pentagon Papers* of settlement-related access restrictions.

Third, *Davis* supports a continuing effort to persuade the courts that prior restraint analysis is the appropriate standard by which at least some gag orders (civil, no jury; possibly all civil) should be judged. *CBS v. Young* is alive and kicking after *Davis*. (Alive anyway; maybe not exactly kicking).

Fourth, we should take note that even the favorably-inclined *Davis* court was not willing to cast aside entirely the "willing speaker" test for standing. The Fifth Circuit's refusal to jettison "willing speaker" leaves open the possibility of future mischief on this front. The "willing speaker" doctrine stands ready to bite whenever the gagged litigants are timid, or complicit, and a gag order has been entered early enough in the case that there is no established record of "willing speech", as there was (fortuitously) in *Davis*. We argued vehemently that the "willing speaker" requirement should be rejected categorically, because, among other reasons, whether a gagged party has the chutzpah to contest an order or can be proved willing to speak to the press in the absence of a gag order may have nothing to do with the actual impact of the gag order on newsgathering. Too often, "willingness" will depend on such extraneous factors as the resources of the gagged party or the party's willingness to incur the wrath of the trial judge. To paraphrase our reply brief, to require a "willing speaker" is often to require a "well-heeled speaker" or a "willing loser". *See, e.g., Focus v. Allegheny County Court of Common Pleas*, --F.3d--, 1995 WL 38233 (3rd Cir. 1995), at Westlaw p. 3 ("Derzacks are willing but restrained speakers who dare not challenge the gag orders, for fear of reprisal from the judge").

Finally, we must begin to think through the consequences of *Pansy's* sunshine law analysis, reinforced in *Davis*. The doctrinal basis for this analysis is unclear. Must a federal court make careful determinations about the impact of its orders on state sunshine laws as a matter of "our Federalism", i.e., just because state sunshine laws are, after all *state* laws? Or must this particular category of state laws receive careful handling by the federal courts because they are state *sunshine* laws and at least touch on First Amendment or related state constitutional interests? (In Louisiana, for example, as in many other states, the sunshine laws are reflective of a constitutional guarantee of access to the deliberations of government.)

The answer to these questions are not merely academic. There will, no doubt, arise a case in which a federal district court jumps through the prescribed *Pansy-Davis* hoops and concludes that a secrecy order that broadly abrogates state meetings or records laws nevertheless is necessary to the proper trial of a federal criminal or civil case. The validity of that order may well turn on whether the underpinnings of *Pansy-Davis* are a matter of general federal-state comity only; a matter of "special" comity that takes into account the importance of particular state constitutional provisions protecting access to government; or, far more profoundly, a matter of federal constitutional law recognizing that the First Amendment affords at least some additional dignity or stature to comity concerns, or possibly even direct protection for access, when state legislation explicitly protects newsgatherers' access to institutions of state government.

Mr. Weiss and Mark B. Holton acted as counsel for the intervenor news organizations in this case. Mr. Weiss serves as one of the Vice-Chairs of LDRC's Advisory Committee on New Legal Developments.

NEWSGATHERING ENJOINED BY PA FEDERAL COURT

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Defendants are enjoined from engaging in conduct "which invades the privacy" of the plaintiffs and their children, "including but not limited to actions of: harassing, hounding, following, intruding, frightening, terrorizing or ambushing" Plaintiffs or their children. The vagueness and the breadth of this injunction are grounds for objection alone. But a review of the journalists activities, as well as the concerns of the court, from which the injunction arises suggest the disturbing insufficiency and irrelevancy of the evidence in this case and the degree to which the decision by its terms expands the scope of unlawful newsgathering activities.

The Parties

The reporters, both experienced and award-winning journalists, were pursuing a story on the high salaries of executives in the health care industry, particularly as contrasted with reduced benefits being offered to their patient-subscribers. They sought an interview with Leonard Abramson, chairman of U.S. Healthcare and father of plaintiff-Mrs. Wolfson. Mr. Abramson's compensation is a matter of public record, reported in SEC documents. Because Mr. and Mrs. Wolfson are both executives with the company and related to Mr. Abramson, their compensation is reported as well.

The reporters were told by the company's press department that no executive of U.S. Healthcare would respond to defendants' inquiries. The defendant reporters decided to go to Philadelphia, where the company is headquartered, take some pictures of Mr. Abramson and the Wolfsons and their elegant residences, the Wolfsons and Mr. Abramson, and then try again for interviews. Indeed, their crew form indicated that they were prepared to attempt ambush interviews of Mr. Abramson and the Wolfsons if the opportunity came open. Mr. Abramson, however, left town shortly after the reporters arrived.

At a point in time prior to the reporters' interest in Mr. Abramson, he had received some unspecified threats to himself and his family. U.S. Healthcare has a security force, and at least some of its members were assigned to the Wolfsons.

The Stake-Out

As a result of the stake-out by defendants of the Wolfson's home and the corporate headquarters -- with unidentified, rental vans parked at each location -- members of the security team became alarmed and notified the Wolfsons. Mrs. Wolfson first, and then her husband, came to believe that they and the children were at risk.

What the Wolfsons and the security forces saw that morning was an unknown jeep parked in the next door driveway with tinted windows. Security personnel had previously seen a suspicious car in the neighborhood of Mr. Abramson's home. The *Inside Edition* producer was in the car. The opinion suggests that he followed the Wolfson's child at least a short distance as a security guard drove her to school. (It would appear that, in reality, the cars actually passed one another going in opposite directions with the drivers of each vehicle carefully eye-balling the other.)

The court reports that when the strange jeep then followed Mrs. Wolfson in her car as she headed off to work, followed as well by a security guard, she and the security guard became intensely alarmed. The producer in the car did follow both her as she pulled out of the driveway at least far enough for him to determine that she was going in the direction of U.S. Healthcare offices. The producer then notified the crew at the headquarters who were to take pictures of Mrs. Wolfson as she arrived at work. The crew had previously shot pictures of Mr. Wolfson at the headquarters. The crew came to the Wolfson house that afternoon, got out of the van, shot pictures of the house from the end of the driveway, and left.

Apart from parking near the Wolfson's home, however, and approaching their driveway, no one from *Inside Edition* attempted to approach or enter the home. They did not approach the Wolfsons or their children and never came in personal contact with anyone in the Wolfson family other than by telephone.

U.S. Healthcare officials relatively quickly discovered that the jeep parked outside the Wolfson's home had been rented by *Inside Edition*. Corporate public relations officials spoke with *Inside Edition* personnel in New York, who in turn contacted the crew. As a result, the correspondent with the crew called Mrs. Wolfson to assure her that he was a reporter and intended her family no harm; that he had no interest in following or taping her child.

Despite now knowing that the people who were following her were news personnel pursuing a news story -- and despite the fact that U.S. Healthcare public relations personnel knew and had known for some time that *Inside Edition* was seeking to interview executives -- Mr. and Mrs. Wolfson apparently continued to be concerned for everyone's safety. Another round of calls was placed, with U.S. Healthcare personnel trying to persuade the show, in various ways, to abandon the Wolfsons. They informed *Inside Edition* that Mrs. Wolfson was pregnant.

In Florida

The result of the family concerns, however, was that they packed up their children that afternoon and followed Mr. Abramson (who had left the day before) to his home in a private community in Florida. The reporters had previously decamped, having moved on to try to tape Mrs. Wolfson's sister, whose company, also in the Philadelphia area, had obtained significant financial backing from U.S. Healthcare.

Two days later the reporters went to Florida themselves and camped themselves for a few hours on a boat anchored in the public waterway just off shore from the Abramson house. They did not know, and the court noted did not

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NEWSGATHERING ENJOINED BY PA FEDERAL COURT

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attempt to ascertain, that the Wolfsons and their children were in the house. The reporters had a videotape camera and a shot-gun mike, which with its accompanying apparatus is several feet long and is capable of picking up sounds up to a distance of approximately sixty yards in one direction, whileminimizing interfering sounds.

Later that day the crew staked out the highway that led to the access road to the community. In both locations, the security guards with the Abramson/Wolfson families checked out the identity of the crew -- in fact, sent police to talk to them -- and determined that they were a news crew. In none of the encounters with the police were the crew told that they were doing anything unlawful; they, of course, were not. The court states that as a result of the crew's activities, "the Wolfsons' were prisoners" in the Abramson house. The crew left, according to the opinion, sometime during the day.

Mr. and Mrs. Wolfson testified at the hearing that they remain fearful, still keep the blinds of their house closed and keep the children away from the windows.

The Court's Analysis

From these facts, the court finds that the plaintiffs had presented evidence sufficient to support a finding of reasonable likelihood of success on the merits of an intrusion invasion of privacy claim. Among the court's conclusions are that a jury could reasonably find that defendants' intrusion was intentional; that defendants' acts were designed to convince Mr. Abramson to consent to an interview in order to spare his daughter and her family from continued harassment.

In the opening section of the opinion the court recognizes the First Amendment protection for newsgathering. But he clearly signals his concerns when he explores the potential conflict between First Amendment freedoms and a constitutionally based right of privacy with a lengthy discussion of the *Galella* and *Dietemann* decisions. (*Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 487 F.2d 986 (2d Cir. 1973), *A.A.Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971))

And while noting that watching or photographing someone from a public place is not generally an invasion of privacy, he cites *Galella* for the proposition that "[c]onduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of invasion of privacy based on intrusion upon seclusion." Slip op. at 13.

The standards for the tort of intrusion under both Pennsylvania and Florida law, the court seems to be saying, are basically the same -- drawn from the Restatement (Second) of Torts Section 652B. It requires, among other things, that the intrusion must be substantial, must be offensive to an ordinary, reasonable person, and must be intentional.

The court believes that a meaningful distinction can be drawn between the "legitimate purpose of gathering and broadcasting the news," and activities that are no more than efforts to obtain "entertaining background for [a] T.V. expose concerning the high salaries paid to executives at U.S. Healthcare." Slip op. at 45-46. The court expresses its skepticism that the activities of the defendants, which it characterizes as "hounding, harassing, and ambushing" (Slip op. at 46), would "advance the newsworthy goal of exposing the high salaries paid to U.S. Healthcare executives or how such conduct would advance the fundamental policies underlying the First Amendment...." *Id.*

While acknowledging that the reporters had a right to take pictures of plaintiffs' home from a public street, he chastises them repeatedly for insensitivity to the Wolfson's fears for the security and safety of their family. Because the reporters saw security personnel at Mr. Abramson's home, he charges them with knowledge that there were concerns about safety and security in the family. And he notes how the defendants' acts caused the plaintiffs to dramatically alter their routine and that their continued anxieties have made it difficult for them to continue with their normal lives.

The use of television equipment -- and most particularly, the shotgun mike -- "aimed directly at the home," (Slip op. at 48), was clearly difficult for the court to accept as reasonable. With respect to the microphone, the court raises as a consideration the Pennsylvania and Florida eavesdropping statutes, although ultimately basing his conclusions on intrusion privacy grounds.

Clearly, the court found, a jury could find that the defendants' actions were substantial, intentional and offensive as required by the tort of intrusion.

The court's expressed concern about Mrs. Wolfson's pregnancy, and that "further harassing and intrusive conduct" by the reporters could harm both her and her unborn child, served to support the irreparable harm element of the preliminary injunction standard. The reporters, however, would not be irreparably harmed, he concluded, because they were free to continue with "legal newsgathering" and to publish their story. The public interest was served as well, because it had an interest in protecting citizen privacy and in being informed about high executive salaries, both of which were served by the court's decision.

Defendants Seeking Expedited Appeal

The defendants are seeking an expedited appeal from the Third Circuit. The defendants, in a brief filed on April 18th, told the court that they plan to broadcast the now-completed news report, and hence have not sought a stay. The overly broad and vague preliminary injunction will interfere, however, with their ability to do follow-up pieces, which the recently announced merger of U.S. Healthcare with Aetna suggest will be required.

Defendants argue, among other things, that the district court judge first drew a constitutionally insupportable distinction between news and entertainment, and then allowed his own

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INSIDE EDITION

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determinations of what was newsworthy and what was not to further cloud his judgment on whether the reporters' activities were protected. The defendants point out that no court has ever concluded that the kind of activities engaged in by the reporters was tortious and that the court's opinion amounts to a radical expansion of the invasion of privacy tort.

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Stake-outs are not a pretty part of journalism. But they are not the stuff of *Galella* either. These reporters never came face to face with the plaintiffs, and had no interest in their children. And while it was undoubtedly distressing to have reporters outside their home and their father's Florida home, it is impossible to accept that the Wolfsons (or their "highly trained security personnel," as the court describes them) had any legitimate concern about their security or that of their children once they learned that the stalkers were nothing more than reporters.

Yet the court allows the over-wrought nature of the plaintiffs to overcome what common sense might otherwise have told him was, for plaintiffs, not much more than an annoying imposition for a portion of two days. More importantly, he allows these subjective fears, albeit objectively unfounded, to constitute the basis for an invasion of privacy claim and to seemingly overcome the basic First Amendment rights of reporters to gather news in outdoor and public places.

PRESS WINS ON SUMMARY JUDGMENT STANDARD

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High Profile Murder Case

The case arose from a newspaper article published by the Patriot-News in 1985. The article reported the findings of an investigation undertaken by William Costopoulos, a prominent criminal defense attorney, into a high-profile murder case that Ertel had successfully prosecuted while serving as District Attorney for Lycoming County. The article explained that Costopoulos had been hired to conduct his investigation by the family of Kim Hubbard, the convicted defendant, and had concluded that the family's claim "of a strong pattern of prosecutorial manipulation and/or tampering of evidence has significant merit."

The article accurately reported that Costopoulos "concentrated attention on what he called the five areas of disputed evidence. They were the condition of the victim's body when found Oct. 28, 1973, the body's location in a South Williamsport cornfield, tire casts presented as evidence that Hubbard's car was driven on a lane through the field, casts of boot prints said to have been made by Hubbard and said to have been found beneath the body and the victim's clothing." Id. The article presented a discussion of Costopoulos' report of his investigation into these five areas.

The article also noted that the Hubbards previously had made these claims in judicial proceedings through the Pennsylvania Supreme Court, the U.S. District Court for the Middle District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit, and that all of the Hubbards' claims had been rejected.

There was no dispute that the Patriot-News article fairly and accurately reported the contents of Costopoulos' report. The article expressed no view as to the accuracy of Costopoulos' report and in fact included Ertel's earlier quotation that he believed that Hubbard was guilty and that there was no prosecutorial misconduct during the trial. There was also no dispute that, prior to the publication of the article, the Patriot-News and other area publications had published at least six other articles concerning the Hubbard case.

Nevertheless, Ertel argued that the publication of Costopoulos' findings defamed him and brought suit against the Patriot-News, the reporter who authored the article and Costopoulos. Ertel claimed that the article falsely accused him of prosecutorial misconduct and tampering with evidence.

The trial court granted summary judgment in favor of the Patriot-News, holding that Ertel had not shown that he could establish actual malice by clear and convincing evidence.

The Superior Court reversed, however, ruling that Ertel had set forth enough evidence as a matter of law to support a finding of actual malice. Although the Superior Court reversed based on the actual malice issue alone, the court went out of its way to reject the other arguments made by the newspaper defendants in support of the trial court's judgment and concluded, among other things, that there was a factual issue regarding whether the article was false and that the article did not warrant protection as "pure" opinion.

On the falsity issue, the Superior Court held that the Patriot-News, as the moving party on a summary judgment motion, was required to submit evidence that the claimed defamatory material was true -- even though the newspaper would not have that burden at trial -- before Ertel would be obligated to offer any evidence that the article was false in opposing the newspaper's motion.

Before the Supreme Court, the Patriot-News argued that the Superior Court's decision wrongfully allowed Ertel to circumvent his constitutionally-mandated burden of proving falsity and would, if upheld, permit him to reach a jury without any evidence on an issue on which he bore the burden of proof. Such a ruling, the Patriot-News argued, would cast a chilling effect on publication of true, newsworthy information, since a publication would be threatened with a costly and time-

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PRESS WINS ON SUMMARY JUDGMENT STANDARD

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consuming trial even where there was no evidence that the article contained any false statements.

The Patriot-News argued that the Superior Court's decision ran afoul of the United States Supreme Court's rulings in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986), in which the Court held that a plaintiff bore the burden of proving falsity in a defamation action against a media defendant, and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), in which the Court held that a plaintiff in a defamation action could not survive summary judgment without producing evidence sufficient for a jury to return a verdict for that party.

The Penn Supreme Court

The Pennsylvania Supreme Court agreed with the Patriot-News and reversed the Superior Court's decision. Before addressing the question of the parties' burdens of proof at the summary judgment stage, the Supreme Court first recognized that it is "axiomatic that the United States Constitution dictates that certain limits be placed on `a State's power to award damages in a libel action brought by a public official against critics of his official conduct' in order to secure the freedom of speech guaranteed by the First Amendment." (Slip op. at 5) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964)).

The Court next reiterated the now well-established principle that public figures such as Ertel bear the burden of demonstrating that the statements at issue are false. Quoting from *Hepps*, the Pennsylvania Supreme Court explained that although "`requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so,' this result was justifiable since placing the burden on media defendants to prove truth would create fear of liability and deter free speech." (Slip op. At 5.)

In applying this important principle to a summary judgment proceeding, the Court held that allowing non-moving parties such as Ertel to avoid summary judgment where they have no evidence to support an issue on which they bear the burden of proof runs contrary to the spirit of Pennsylvania's Rule of Civil Procedure which governs summary judgment motions (Pa.R.Civ.P. 1035).

According to the Court, the Superior Court's ruling did not advance the goal of dispensing with a trial of a case "where a party lacks the beginnings of evidence to establish or contest a material issue." (Slip op. at 7) The Court stressed that "[f]orcing parties to go to trial on a meritless claim under the guise of effectuating the summary judgment rule is a perversion of that rule." (Slip op. at 7)

Adopting the federal summary judgment standard enunciated by the U.S. Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson* as law in Pennsylvania, the Court held that in Pennsylvania a party moving for summary judgment is no longer required to negate elements of the non-moving party's case until the non-moving party introduces evidence to support elements of its claims. (Slip op. at 8) To survive a summary judgment motion, a non-moving party must now adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict in its favor. (Slip op. at 8)

No Ruling on Neutral Reportage

Because of its ruling on falsity, the Supreme Court declined to address the other arguments made by the Patriot-News. For example, the Patriot-News had also urged the Court to adopt the neutral reportage doctrine and hold that the article was shielded from attack because it was merely a fair and accurate report of a prominent citizen's opinion on an issue of public concern. The Court's decision not to reach this question in this case leaves the neutral reportage doctrine open in Pennsylvania; no appellate couart has yet adopted or applied it, nor has the doctrine been expressly rejected.

May Help on Implied Libel

In addition to an important ruling on summary judgment, the decision may also be important because it suggests a limitation of the doctrine on implied libel under Pennsylvania law. Despite the fact that he was unable to produce any facts demonstrating that the article was false, Ertel contended that he was entitled to a recovery because, he claimed, the general tone of the article implied that he himself had tampered with evidence or committed prosecutorial misconduct. In dismissing Ertel's claim on the ground that he had failed to present evidence that any specific statement was false, the Supreme Court appeared to reject the notion that a libel plaintiff has a valid claim that he was defamed by the tone or general implications of a communication.

[Ed. Note: But see Pennsylvania Supreme Court decision handed down two days later in *Macelree v. Philadelphia Newspapers*, Inc., *LDRC Libelletter*, April 1996 at p. 3.]

Michael D. Epstein, an associate with the Philadelphia law firm of Montgomery, McCracken, Walker & Rhoads, worked with partners David H. Marion and Jeremy D. Mishkin and associate Richard M. Simins in representing the Patriot-News before the Pennsylvania Supreme Court. The case was argued by David H. Marion, who also presented the winning argument to the United States Supreme Court in Hepps.

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off the Davidians and that it was also "arguably foreseeable" that the ATF would continue with the raid despite Koresh's awareness, Judge Smith held that the "summary judgment proof presented is sufficient to present a material issue of fact as to whether the ATF's decision to continue with the raid was an intervening cause of the Plaintiff's injuries, or merely a contributing factor under comparative negligence." *Slip op.* at 43.

A trial in the case is scheduled to begin this summer.

Jonathan D. Hart of Dow, Lohnes & Albertson is counsel for the newspaper defendants.