404 Park Avenue South, 16th Floor, New York, NY 10016 • (212) 889-2306

LDRC LIBELLETTER

April 1998

In this Issue . . .

ASNE Makes Passage of Uniform Correction and Clarification Act a 1998 Priority, page 17

Starr Must Show Compelling Need to Subpoena Monica's Bookstores, page 25

Investigative Reporters Sue Former Station Over Unaired Reports. Claim Whistleblower Status, page 27

America Online Wins Summary Judgment in Drudge Case

Finding that the Communications Decency Act "effectively immunizes providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others," Judge Paul Friedman of the federal district court in Washington, DC granted summary judgment to American Online, Inc. (AOL) in the highly publicized libel case filed by White House Aides Sidney Blumenthal and his wife against the on-line gossip columnist Matt Drudge and AOL, the service provider who carries his column. *Blumenthal and Jordan Blumenthal v. Drudge and American Online, Inc.*, Civil Action No. 97-1968, slip op. at 9 (PLF) (D. D.C. April 22, 1998). The court found that America Online was subject to neither publisher nor so-called "distributor" liability.

This ruling is consistent with those of the other courts which, to date, have looked at the question of on-line service provider tort liability for third-party material. In each, the court has held that immunity was afforded by the CDA. *See, e.g., Zeran v. AOL*, 25 Media L. Rep. 1609 (E.D. Va. 1997); *Doe v. AOL*, 25 Media L. Rep. 2112 (Fla. Cir. Ct. 1997); *Aquino v. Electriciti Inc.*, 26 Media. L. Rep. 1032 (Cal. Super. 1997).

Drudge himself lost his motion to dismiss or transfer the case for lack of personal jurisdiction. In that context, and in a footnote Drudge and his counsel must have found rather disturbing, the court rejects as "merit[ing] no serious consideration," the argument that Drudge could rely upon the "newsgathering exception" courts have found to the D.C.

(Continued on page 2)

America Online

(Continued from page 1)

long-arm statute. Having referred to the Drudge Report throughout the opinion as "gossip" or "rumor," the court states, flatly, "Drudge is not a reporter, a journalist or a newsgatherer. He is, as he himself admits, simply a purveyor of gossip." *Blumenthal,* slip op. at 26, n. 18.

The Blumenthals sued Drudge for writing an allegedly defamatory column in which he said that "top GOP operatives" had confided in him that Sidney Blumenthal was a spouse abuser. *Id.* at 1. Drudge retracted the story within a day of receiving a letter from the Blumenthals' attorney (and within two days of the initial posting). Some time later he issued a public apology to the Blumenthals.

AOL Mere Provider of Drudge Report

Much of the summary judgment ruling focused on analyzing whether AOL's relationship with Drudge made it more than just a mere "provider," so that it was not shielded from liability under Section 230 of the Communications Decency Act, which reads that "[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider." Drudge has a license agreement with AOL under which he receives $36,000 per year from the company to "create, edit, update and 'otherwise manage' the content of the Drudge Report," which is then made available to AOL subscribers via the Internet. *Blumenthal*, slip op. at 5. Drudge authors the report in California and e-mails it to his subscribers and to AOL. The plaintiffs alleged that this arrangement made AOL more than just a "provider."

The court found, however, that though "plaintiffs suggest that AOL is responsible along with Drudge because it had some role in writing or editing the material in the Drudge Report, they have provided no factual support for that assertion." *Id.* at 10. Further, the court found, "there is no evidence to support the view originally taken by plaintiffs that Drudge is or was an employee or agent of AOL, and plaintiffs seem to have all but abandoned that argument." *Id.*

The court did grant that Section 230 would not immunize AOL if it had on its own or in collaboration with another developed or created the report. But, the court concluded, "AOL was nothing more than a provider of an interactive computer service on which the Drudge Report was carried, and Congress has said quite clearly that such a provider shall not be treated as a 'publisher or speaker' and therefore may not be held liable in tort." *Id.* at 11 quoting 47 U.S.C. § 230(c)(1).

No AOL Liability Despite Active Marketing

In reaching its decision, the court rejected plaintiffs' argument that Section 230 does not immunize AOL because Drudge was not just an anonymous person who sent a message over the Internet through AOL. The plaintiffs pointed out that AOL courted Drudge, paid him money, and then promoted his report as a reason to subscribe to AOL. Further, plaintiff argued, the licence agreement called for AOL to have more than a passive role. The company reserved the "right to remove, or direct [Drudge] to remove, any content" which AOL found objectionable. In its promotion of Drudge as a gossip-and-rumor journalist, AOL indicated that it was on notice that he might defame another.

The court found these arguments convincing, saying that "[i]f it were writing on a clean slate, the Court would agree with plaintiffs . . . . Because [AOL] has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor." *Blumenthal*, slip op. at 14. In the end, however, the court conceded that "Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others." *Id.* at 14.

The court cited to Section 230(c)(2) of the Communications Decency Act, in which Congress wrote that no provider or user of an interactive computer service shall be held liable on account of "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." *Blumenthal*, slip op. at 15 quoting 47 U.S.C. §

(Continued on page 3)

America Online

(Continued from page 2)

230(c)(2).

This grant of immunity by Congress, the court said, is predicated on Congress' belief that in granting Internet service providers immunity from tort liability, it removes the disincentives for the providers to self-police the Internet for obscenity and other offensive material, even where self-policing is unsuccessful or not even attempted. *Blumenthal*, slip op. at 14. In protecting the broad category of "otherwise objectionable" material, the court found that Congress intended to include defamatory statements such as Drudge's. *Id.* at 15, n. 13.

No "Liability"

Also unavailing, the court found, is the argument that Section 230 was only intended to immunize providers from "publisher" liability, not notice-based "distributor liability." *Id.* at 16. "Congress made no distinction between publishers and distributors in providing immunity from liability." *Id.* Congress made this choice again premised on the idea that self-policing is best. If computer services were subject to distributor liability, the court noted, they would face potential liability every time they receive notice of a potentially defamatory statement. That would put them in the position from which Section 230 aims to release them, viz., they would have to choose between suppressing controversial speech or sustaining prohibitive liability.

> ***"Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others."***

Under the policy choices made by Congress, the court concluded that "[w]hile it appears to this Court that AOL in this case has taken full advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended, the statutory language is clear: AOL is immune from suit, and the Court therefore must grant its motion for summary judgment." *Id.* at 17.

Court Finds Jurisdiction Over Drudge

After granting summary judgment to AOL, the court denied Drudge's motion to dismiss or transfer for lack of personal jurisdiction. *Id.* at 2. The court found that it could exercise jurisdiction over Drudge, a California resident, under the district's long-arm statute. After establishing that the Blumenthals suffered a tortious injury in the District of Columbia, and that Drudge was alleged to have caused the injury by his act outside of the District of Columbia, the only question before the court was whether Drudge had any of three enumerated contacts with the District of Columbia. The court asked whether he regularly does or solicits business there, or whether he derives substantial revenue from goods used or consumed or services rendered in the District, or whether he engages in any other persistent course of conduct in the District. *Id.* at 19.

The court held that the combination of the interactive nature of Drudge's web site and his non-Internet related contacts with the District of Columbia were sufficient to constitute a persistent course of conduct in the District. The court rejected Drudge's assertion that his site is passive, pointing to the fact that his readers can exchange ideas with him and request a subscription to his newsletter by directly e-mailing their requests to Drudge's host computer. *Id.* at 25. Furthermore, found the court, Drudge specifically targets readers in the District of Columbia by virtue of the fact that "the subject matter of the Drudge Report is directly related to the political world of the Nation's capital and is quintessentially 'inside the Beltway' gossip and rumor." *Id.* at 26. Finally, Drudge also solicited contributions from District residents via the Drudge report's homepage.

In addition to the Internet contacts with the District, the court found relevant to its analysis the fact that Drudge had traveled to the District to be interviewed by C-SPAN, and had visited the District on at least one other occasion. *Id.* at 27. The court noted that Drudge contacts people in the District via telephone and mail to collect gossip for the Drudge Report. Finally, the court found that exercising jurisdiction would not offend due process because "[w]hile in the Internet context there must be 'something more' than an Internet advertisement alone 'to indicate that the defendant purposefully (albeit electronically) directed his activ-

(Continued on page 4)

America Online

ity in a substantial way to the forum state,' such that he should 'reasonably anticipate being haled into court' there, the test is easily met here." *Id.* at 28 quoting *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d at 414 (9th Cir. 1997). The court also noted that its analysis under the District of Columbia long-arm statute "does not reach the outer limits of due process." *Id.* at 28.

As previously noted, the court rejected out of hand Drudge's argument that he came within the "newsgathering exception" to the D.C. long-arm statute adopted by the D.C. courts which have found that mere newsgathering does not constitute doing business in D.C. The exception arises from the nature of D.C. as the capital, the public interest in activities there, and the consequent need to avoid the result that countless news media with reporters and bureaus in D.C. would otherwise be subject to D.C. jurisdiction.

America Online was represented by Wilmer, Cutler & Pickering in Washington, D.C.

Texas Cattlemen Sue Oprah — Again!

Like a horror movie sequel where a slain ghoul mysteriously rises to kill again, Texas cattlemen have risen from their seeming demise at the hands of a Texas jury to do battle against Oprah Winfrey. One hundred thirty Texas cattle owners have filed suit against Oprah Winfrey and her production company for knowingly disseminating false and disparaging remarks about beef on her April 16, 1996 talk show. The lawsuit was filed on April 16, 1998, the second anniversary of the airing of the show entitled *Dangerous Food* that examined, among other issues, whether Mad Cow disease in humans could occur in the US.

In February, an Amarillo, Texas federal court jury unanimously found Oprah and her production company not liable on charges that her show disparaged Texas cattle under Texas common law disparagment. Claims under the Texas False Disparagment of Perishable Food Act -- Texas' so-called "veggie libel" statute -- were dismissed at the close of plaintiffs' case, as were claims for defamation and negligence. *Texas Beef Group, et al. v. Oprah Winfrey, et al.*, C.A. No.2 96 CV 208 (N.D. Texas 1998); *see also Libelletter* March 1998 at 1. In late March, plaintiffs, three cattle feeding operations and four ranches, filed an appeal with the Fifth Circuit.

As reported in the Dallas Morning News on April 17, 1998, the cattle owners in the new case, filed in state court in Dumas, Texas, 45 miles north of the site of the first trial, are seeking $1 million in damages. As in the first suit, they are alleging a violation of Texas' veggie libel law, common law disparagement and negligence. Also named as a defendant in the new suit is Howard Lyman, the former cattleman turned vegetarian, who appeared on Oprah's program and revealed the practice of using cattle remains in cattle feed. He too was a defendant in the first suit against Oprah and was found not liable.

LDRC April 1998 Bulletin on Agricultural Disparagement Laws

The soon to be published April Bulletin will be a timely and practical examination of the new trend in many states of trying to impose liability for critical commentary on the health and safety of food products through so-called agricultural disparagement laws. LDRC Bulletin 1998 Issue No. 2 reviews these state laws, including analyzing their constitutionality and examining the legal weaknesses in the elements of this newly created statutory cause of action. In addition, the Bulletin will contain tales from the front - firsthand reports from attorneys involved in litigating cases under such laws.

Mark-Up Scheduled On Federal Legislation To Limit Punitive Damage Awards

By Victor E. Schwartz, Esq. and Mark A. Behrens, Esq.

In the February 1998 edition of the *Libelletter* we told readers about federal legislation introduced by Senate Judiciary Committee Chairman Orrin Hatch of Utah and Connecticut Democratic Senator Joseph Lieberman to help reduce the problem of excessive punitive damages awards in defamation and other "financial injury" lawsuits that involve little or no physical injury. The legislation would cover a wide range of cases, including those in which the damages awarded are for reputational harm.

In general, the Hatch-Lieberman bill, S. 1554, the Fairness in Punitive Damage Awards Act, would limit the amount of punitive damages that could be imposed in "financial injury" cases - - those that involve little or no physical injury - - to three times the amount awarded to the claimant for economic loss or $250,000, whichever is greater. It would limit the amount of punitive damages that could be imposed against individuals and small businesses to three times the claimant's economic loss or $250,000, whichever is less. The bill would not affect lower punitive damage "caps" in the states.

The civil actions covered include cases in which "the claimant seeks to recover punitive damages under any theory of harm that did not result in death, serious and permanent physical scarring or disfigurement, loss of a limb or organ, or serious and permanent physical impairment of an important bodily function." Section 4(a)(1). There are exceptions for certain crimes of violence, terrorism, etc., but none would be relevant to media content-based claims.

Note the "Swing Votes"

Senator Hatch has tentatively scheduled an April 24 hearing on the bill and a May 7 mark-up. At the mark-up, the Committee will consider amendments to S. 1554 and then vote on whether to report the bill out of Committee. The vote at mark-up is likely to be very close. "Swing votes" are likely to include Republican Senators Arlen Specter (PA), Fred Thompson (TN) and Mike DeWine (OH), and Democratic Senators Herb Kohl (WI) and Dianne Feinstein (CA).

The other Members of the Committee are Committee Chairman Orrin Hatch (UT), Republican Senators Strom Thurmond (SC), Charles Grassley (IA), Jon Kyl (AZ), John Ashcroft (MO), Spencer Abraham (MI) and Jeff Sessions (AL), and Democratic Senators Patrick Leahy (VT), Edward Kennedy (MA), Joseph Biden, Jr. (DE), Russ Feingold (WI), Richard Durbin (IL), and Robert Torricelli (NJ).

Companies and groups interested in the legislation should contact Members of the Committee to indicate their support.

Victor Schwartz is a senior partner, and Mark Behrens is Of Counsel in the Washington, DC law firm of Crowell & Moring LLP. Messrs. Schwartz and Behrens serve as counsel to the American Tort Reform Association (ATRA).

Libel Suit Against G. Gordon Liddy Thrown Out

Plaintiff An Involuntary Public Figure

A libel suit against convicted Watergate burglar G. Gordon Liddy, now a popular right wing talk radio host, was thrown out on summary judgment by a Maryland federal district court. *Wells v. Liddy*, CV-No. JFM 97-946 (D.C. Md. April 13, 1998). The suit was brought by Louisiana resident Ida Wells who in 1972 was a secretary in the Democratic National Committee office burglarized by Liddy and his underlings. The alleged defamation concerns Liddy's theory of the Watergate break-in.

The court offers up not only a notable involuntary public figure ruling, but an open-minded and common-sensical application of actual malice. The court also finds that under Louisiana law even a private figure plaintiff must prove actual malice in a case against a media defendant involving a matter of public concern.

Watergate Break-in to Get Info on Call-girl Ring

According to Liddy, the goal of the break-in was not, as conventional wisdom has it, to tap the phone of then DNC chairman Larry O'Brien, but rather to obtain information about a call-girl ring that the DNC used to entertain important visitors. Liddy alleged that Well's kept in her desk a

(Continued on page 6)

G. Gordon Liddy

(Continued from page 5)

brochure containing photographs of the prostitutes and that visitors to the DNC would stop at her desk to consult the brochure and use her phone to arrange appointments. One key aspect of the theory that is the subject of a separate libel suit is that one of the prostitutes was Maureen Biner, the girlfriend and eventual wife of John Dean, counsel to President Nixon. Liddy suggests that the break-in took place because Dean learned of the photos and wanted to remove the pictures to protect his girlfriend. A lawsuit by the Deans against Liddy is pending in a federal court in Washington, D.C.

Plaintiff an Involuntary Public Figure

The first step to granting summary judgment was the court's finding that Wells was "one of those exceedingly rare instances" of an involuntary public figure plaintiff. *Id. slip op.* at 16. In addition to the "immense public importance of the Watergate controversy," Wells "had the misfortune to be working at the DNC at the time of the break-in; it is her desk and telephone that have been said (by others prior to Liddy) to have been used in connection with a prostitution ring; and it was the key to her desk that was seized by an arresting officer from one of the Watergate burglars. Unfortunate though the circumstances may be, before Liddy made any of the statements allegedly defaming her, Wells had been drawn by a series of events into the Watergate controversy." *Id. slip op.* at 17.

The court equated its decision to that in *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985), in which an air traffic controller, on duty at the time of an airplane crash, was found to be an involuntary public figure.

In addition, the court reasoned, after reviewing Louisiana law, that even if Wells were deemed a private figure, Louisiana law requires a private figure to prove actual malice against a media defendant on a matter of public concern. *Id. slip op.* at 20.

No Actual Malice

In concluding that Wells could not establish actual malice, the court engaged in an interesting review of the literature and sources for the call-girl theory. Wells argued that the call-girl theory emanates from a single unreliable source, Phillip Mackin Bailley, a convicted felon, with a history of substance abuse and mental illness who claims to have "managed" the prostitutes. In fact, the court concluded that two prior books that advance the call-girl theory, as well as a Geraldo Rivera production entitled "Now it Can Be Told"to the same effect, all relied on Bailley as their ultimate source. However, the court added, that "although Bailley's impeachability is an important element in the inquiry concerning Liddy's actual malice, it alone is not dispositive." Id. slip op. at 24.

The court found that there were enough independent facts corroborating the story to prevent plaintiff from meeting the actual malice standard. These facts include several other sources confirming that explicit sexual conversations were conducted on Well's phone; that tapping her phone was a goal of Watergate burglars; that one Watergate burglar had a key to Well's desk; deposition testimony in the Deans' suit against Liddy that there was a relationship between Wells and Bailley; and, finally, interviews with former DNC staffers that following the break-in there were rumors within the DNC of the operation of a call-girl ring involving Wells and that Wells was fired after the rumors began. *Id. slip op.* at 27.

The court acknowledged that rumors cannot be used to bolster the credibility of an unreliable source. Here, though, they showed that Bailley's claims, first disclosed to an author in 1984, had been discussed privately among DNC staff members more than a decade earlier. Thus, although these facts may fall short of affirmatively proving Liddy's theory, they are sufficient to prevent Wells from showing that Liddy spoke with reckless disregard as to the truth or falsity of his statements.

The Choice of Louisiana Law

Another interesting analysis engaged in by the court was that of choice of law. The lawsuit is in the federal court for the District of Maryland, Liddy's domicile. Louisiana, according to the court, is plaintiff's domicile. The statements at issue in the suit were made at various points in the U.S. and, in one instance, on shipboard. Maryland choice of law rules follow *lex loci delicti*, looking at the place of injury rather than where the wrongful act took place. Harm to reputation is itself not easy to locate, the court said, but finds that ordinarily it is sited at the plaintiff's domicile.

Tennessee Jury Finds for Plaintiffs Over Joke Copy

$950,000 for Copy Not Intended for Press

A Tennessee jury has awarded $950,000 in compensatory and punitive damages against a small-town tri-weekly newspaper for prank copy in a February 1997 edition, never intended for publication. The plaintiffs were then-student soccer player Garrett "Bubba" Dixon Jr. and his local high school soccer coach, Rufus Lassiter. On April 8 and 9, in separate deliberations on compensatory and punitive damages, a jury in Gallatin, Tennessee awarded Dixon $550,000 in compensatory and $300,000 in punitive damages, and Lassiter $150,000 in compensatory and no punitive damages, against the newspaper, the News-Examiner.

The claims arose out of fictitious quotes inserted by the reporter, Nick DeLeonibus, in an otherwise legitimate sports story. The quotes had Coach Lassiter charging Dixon, in language admittedly vulgar and sexually explicit, with bestiality and unsanitary habits. The reporter and his editor had previously engaged in prank copy, but the editor always cut it out of the story before it hit press. This time the copy was missed.

When the paper learned of the problem, it made an effort to retrieve all unsold copies of the paper. It fired the reporter. It suspended the editor, and put him on probation. It published an abject and full apology on the top, right-hand columns of its next edition.

The newspaper argued that the phony quotes about Dixon could not be understood as statements of fact. It further argued that the plaintiffs had failed to prove any damage to their reputations. In fact, Lassiter was promoted to assistant principal months later. Dixon is now a freshman at University of Tennessee-Chattanooga.

This case stands in contrast to the disposition of a recent case in Virginia, *Yeagle v. Collegiate Times,* No. 971304 (Va.Sup.Ct. Feb. 27, 1998), in which the Virginia Tech student newspaper went to press with the students having forgotten to delete a phony photograph caption, "Director of Butt-Licking", from under a picture of plaintiff, a college administrator. The trial court dismissed the claims, finding that the missed caption could not be understood as a statement of fact. Overruled by the appellate court, the Supreme Court of Virginia reinstated the dismissal in a decision in February agreeing with the trial court's analysis. (*LDRC LibelLetter,* March 1998 at p. 7)

Libel Trial Won in New Hampshire

— Jury Finds Substantial Truth —

By Linda Steinman

After a five week jury trial in federal district court in New Hampshire, Jim Kelly has won a libel case brought against him by his former agent A.J. Faigin concerning two short passages in Kelly's autobiography ARMED & DANGEROUS, published by Doubleday in 1992. After a mere two hours of deliberation, the jury of eight unanimously determined on April 16, 1998 that the passages were substantially true. Kelly was defended by his publisher in the action.

Jim Kelly led his team to the Super Bowl four times as quarterback of the Buffalo Bills. In his autobiography he wrote, "I learned my lesson the hard way about whom to trust and whom not to trust in business. I had had complete faith in my first agents, Greg Lustig and A.J. Faigin." Kelly wrote that his brother and some friends later started looking into his business affairs, "and the more they looked, the more they didn't like what they found." Kelly reported that he had fired his agents and filed a major lawsuit against them. "Fortunately I was able to catch the problem before it was too late, which made me luckier than a lot of other pro athletes," wrote Kelly in his book. The passages did not identify specifics of the problem with the agents.

Faigin defended the action principally by arguing that

(Continued on page 8)

Libel Trial Won in New Hampshire

(Continued from page 7)

it was his partner who was responsible for the mismanagement of Kelly's affairs and that he only handled Kelly's professional football contract negotiations. The testimony of Jim Kelly and his brother, four additional NFL players and former clients of Faigin, and Richard Berthelsen, counsel for the National Football League Players Association, helped defeat Faigin's claim.

Prior Public Figure Ruling Significant

Faigin originally brought suit against Kelly, co-author Vic Carucci and Bantam Doubleday Dell Publishing Group in Illinois, where his claim was barred by the statute of limitations. Faigin then re-filed the claim in Wisconsin, where the district court applied the borrowing statute to bar the claim and found that the court lacked jurisdiction over Kelly and Carucci. The Seventh Circuit later overturned the ruling under the borrowing statute. The claim against Bantam Doubleday Dell in Wisconsin was stayed pending the trial in New Hampshire.

Co-author Carucci was dismissed from the New Hampshire action following a summary judgment motion. *See* 26 Media L. Rep. 1208. The court found Faigin to be a public figure and determined that Carucci lacked actual malice. In reaching its public figure determination, the New Hampshire district court stated its belief that "controversies of interest to the public should be considered prima facie 'public controversies' unless the matter falls within a recognized sphere of privacy protecting the participants from intrusive and potentially harmful media attention," and found that there exists a public controversy surrounding sports agents' representation of professional athletes. In the summary judgment decision, the New Hampshire court also denied the defendants' efforts to have the case dismissed on grounds of opinion.

Linda Steinman, Director of Litigation at Bantam Doubleday Dell, defended Kelly in the lawsuit through all the pre-trial stages of the litigation. At the trial stage, she was joined by local trial counsel, Steven Gordon and Lucy Karl of Shaheen & Gordon of Concord, New Hampshire.

Illinois Cases Apply Official Report Privilege to News Reports of Victims' Accusations

By Mark Sableman and Michael Godsy

Two recent Illinois rulings have held that accurately-reported accusations are entitled to the protection of the official report privilege even when journalists obtain their information from the victims, not the police. In *Nealey v. Spicer*, No. 4-96-0936 (Ill. App. 4th Dist. Sept. 30, 1997) and *Wentzel v. Viacom Broadcasting of Missouri, Inc.*, No. 97-CV-0211-PER (S.D. Ill. Mar. 18, 1998), the courts applied the official report privilege to accurate reports of police and administrative investigations at the pre-arrest stage. In both cases, the media defendants reported on investigations of public school teachers; in both cases, the media relied on the accusers, not official records, for much of the stories.

Nealey v. Spicer: Charge Teacher Neglect

Nealey v. Spicer arose from a school teacher's after-school detention of a 10-year-old boy. When the teacher, Diana Nealey, left the boy at the school for two hours with only loose supervision, the boy's mother complained to Illinois child abuse authorities. The local newspaper, *The Pantagraph*, reported that the mother had charged Nealey with neglect. Later, the newspaper reported — based on further information from the mother — that the Department of Child and Family Services ("DCFS") had found probable cause for substantiating the claims. (Months later, the newspaper reported with equal prominence that Nealey had been cleared of the charges.)

Nealey sued for libel on all three *Pantagraph* articles, claiming they implied that she was guilty of child neglect and/or was an inept and incompetent teacher. The McLean County Circuit Court in Bloomington, Illinois dismissed the suit, finding that the complained-of statements variously were not libelous, substantially true, and/or protected by the official report privilege.

On the official report privilege point, Nealey had argued that the *Pantagraph* had lost the privilege because the published statements were mixed with allegedly defamatory statements made by Spicer. The Illinois Appellate Court rejected that argument and affirmed the dismissal in an unpublished opinion.

While acknowledging that there were no Illinois cases on point, the Appellate Court held that the official report privilege applied even though the *Pantagraph* reported more information than was contained in any official record. The basic facts reported about the initial investigation were true, and the information from the mother provided "background information that served to place the DCFS action in context for the reader," the court held. The court noted that "[a] terse statement that DCFS was investigating the incident, without more, would make no sense to a reader who had not been following the story."

Significantly, the court applied the privilege even though the *Pantagraph*'s primary source was the victim's mother. The court's primary concern was whether the reported information about the investigation was accurate. DCFS records disclosed during litigation had confirmed the initial "indicated" finding, and therefore the trial court's dismissal was affirmed. The Illinois Supreme Court has denied plaintiff's petition for leave to appeal, and the case is now closed.

Wentzel v. Viacom: Charge Teacher Abuse

Wentzel v. Viacom Broadcasting, a federal case in East St. Louis, involved similar facts. A third-grader complained of abuse by his teacher, Harlan Wentzel. The child's mother then reported the accusations to local police. The school board investigated the incident and suspended Wentzel for five days. On the evening of the suspension, St. Louis television station KMOV-TV reported on the allegations, drawing its information concerning the charges and investigation from the mother and the school's principal (both of whom provided KMOV-TV with essentially the same information as they had given the police).

A few days later, Wentzel was formally charged with battery, and police provided information on the incident to DCFS. That evening, KMOV-TV reported that police were receiving and investigating anonymous claims that the same teacher had mistreated numerous former students. The police chief was shown on camera confirming the nature of the anonymous tips.

(Continued on page 10)

News Reports of Victims' Accusations

(Continued from page 9)

Although DCFS initially found that the charges were "indicated," Wentzel was eventually acquitted at trial, and DCFS subsequently voluntarily unfounded its report. Wentzel then sued KMOV-TV for defamation.

The station moved for summary judgment as its initial response to the complaint, pointing out that the broadcasts accurately reported the fact of the police and DCFS investigations and the criminal charge. The court granted the motion on March 19, 1998. It first found several statements at issue to be substantially true or nonactionable opinion. The court also agreed that the official report privilege protected KMOV-TV's reports of the mother's accusations against Wentzel, because every reported accusatory statement was also reflected in later-disclosed police and DCFS investigation files.

Need Not Have Reports in Hand

Wentzel had argued "that every news report must be able to trace each statement to a specific government document in hand at the time of the broadcast" for the privilege to apply, relying on the statement in *Bufalino v. Associated Press*, 692 F.2d 266, 271, 8 Media L. Rep. 2384 (2d Cir. 1982) that the privilege "should not be interpreted to protect unattributed, defamatory statements supported after-the-fact through a frantic search of official records." The court rejected this analysis, implicitly following pro-media rulings cited by defendant such as *Medico v. Time, Inc.*, 643 F.2d 134, 147, 6 Media L.Rep. 2529 (3d Cir. 1981) which holds that "How a reporter gathers his information concerning [an official] proceeding is immaterial provided his story is a fair and substantially accurate portrayal of the events in question." The *Wentzel* court noted that the reported statements "were reflected in the official report of [the mother's] allegations and the ensuing official proceedings". Accordingly, because KMOV-TV's report had accurately related the nature of the allegations, Viacom was entitled to summary judgment on the basis of the official report privilege. Plaintiff has filed a notice of appeal.

Mark Sableman is a partner and Michael Godsy an associate with Thompson Coburn in St. Louis, Missouri, which represented the media defendants in both cases.

Reporter's §1983 Claim of Exclusion Rejected

The Fourth Circuit Court of Appeals dismissed a reporter's §1983 action against a Baltimore police official over restricted access to police personnel and information. *Snyder v. Ringgold*, 133 F.3d 917(Table), 1998 WL 13528 (4th Cir. 1998). Terrie Snyder, a print and television journalist, was excluded from a filmed interview held at police headquarters and defendant, Director of the Public Affairs Division, required her alone to submit requests for information in writing. The disparate treatment was allegedly in retaliation for critical reports Snyder wrote about the police department. Defendant claimed, to the contrary, that it was the result of plaintiff's publishing off-the-record remarks, abusing his staff with needless weekend requests, and other reportorial problems. The district court had granted Snyder summary judgment. The court reasoned that once the government makes information generally available to the news media it cannot treat members of the news media unequally. *Id.* at *2.

The Fourth Circuit held that the district court erred in denying defendant qualified immunity, finding that his conduct toward Snyder violated no clearly established statutory or constitutional right. The court reasoned that "no Supreme Court or Fourth Circuit case has held that reporters have a constitutional right of equal or nondiscriminatory access to government information that need not otherwise be made available to the public;" nor did defendant's conduct violate any core principle of the First Amendment, citing the widely accepted practice of public officials granting exclusive interviews, declining to give interviews at all to certain reporters, as well as the White House's practice of allowing only certain reporters to attend press conferences. *Id.* at *3-4. Plaintiff's equal access argument would, according to the court, confer an unwarranted privileged First Amendment status on the press.

Finally, the court rejected plaintiff's argument that the defendant's conduct amounted to impermissible viewpoint discrimination. The court contrasted regulating private speech on the basis of viewpoint from the situation here, which it characterized as a permissible attempt by the government to control the content of its own speech.

Corporate Spokesman Is Public Figure

The *National Catholic Reporter* has won summary judgment in a defamation and invasion of privacy action brought by a Milwaukee corporate executive who sued the publication for libel by implication from an article chronicling layoffs at the corporation. The executive, George Thompson, III, was the director of public relations at Briggs & Stratton, a national manufacturer of small engines. The court found the plaintiff a limited purpose public figure and then granted summary judgment because he could not make the actual malice showing. *Thompson v. National Catholic Reporter Publishing Company, et al.*, Case No. 96-C-641 (E.D. Wisc. April 10, 1998).

The litigation arose out of an article, editorial column and graphics discussing layoffs at Briggs & Stratton. The material addressed the moral, economic, and social implications of transferring union jobs from Milwaukee to non-union plants. It noted that some of the corporate executives were prominent Catholics, and reflected on the corporate layoff decisions in light of Church social teachings.

In its analysis of the public figure issue, the federal court noted that Wisconsin state courts have adopted the "federal analysis" for determining whether a defamation plaintiff is a limited purpose public figure. Under this analysis, the court: 1) isolates the controversy at issue; 2) examines the plaintiff's role in the controversy to ensure that it is more than trivial or tangential; and, 3) determines if the alleged defamation was germane to the plaintiff's participation in the controversy. *Thompson v. National Catholic Reporter Publishing Company et al.*, Case No. 96-C-641, slip op. at 6 (E.D. Wisc. April 10, 1998). This test de-emphasizes the voluntariness of the plaintiff's involvement and emphasizes plaintiff's access to the media for any rebuttal of the allegedly defamatory statements. *Id.* at 6-7.

The court concluded that Thompson's role in the layoff controversy was more than trivial in that he "frequently and publicly defended the company's layoff decisions." *Id.* at 8. His access to the local and national media was clearly substantial and important to this analysis. The court found further that the alleged defamation was germane to the plaintiff's role in the controversy because the article focused on issues for which plaintiff served as corporate spokesman. *Id.* at 8-9. The court pointedly noted that the corporation, through Thompson, had refused the newspaper's repeated requests for an interview, comment or even a written statement.

After finding the plaintiff a public figure, the court granted summary judgment on its finding that the plaintiff could not prove by clear and convincing evidence that the defendants had acted with actual malice. *Id.* at 9.

Earlier in the case, on the defendants' motion to dismiss, the court concluded that it lacked subject matter jurisdiction, under the First Amendment's religion clause, to decide issues involving Catholic principles or the suggestion that anyone was not a "good Catholic." The corporation itself, its chief executive officer, and its labor lawyer all were original plaintiffs, but they withdrew voluntarily from the case late last year after the defendants moved for summary judgment. That left only Thompson, the corporate spokesman, as a plaintiff.

Defendants were represented by Brady Williamson and Bob Dreps of LaFollette & Sinykin in Madison, Wisconsin, and Tennyson Schad of Norwick & Schad, New York.

Supreme Court Will Not Hear "Hit Man" Case

The Supreme Court last week denied without comment certiorari in the "Hit Man" case, *Paladin Enterprises, Inc. v. Rice*. The case arose when the relatives of three people who had been killed by a hit man who purchased the book on how to commit murder for hire sued the publisher of the book for wrongful death. In reinstating the case, in which defendants had been granted summary judgment by a Maryland district court, the Fourth Circuit rejected the argument that the First Amendment protected the book publisher from liability under *Brandenberg v. Ohio*, 395 U.S. 444 (1969).

Beauty Pageant Promoter A Public Figure In New York

By Charles J. Glasser, Jr.

Confirming New York's broad definition of "public figure," Justice Carol Huff of the New York Supreme Court granted summary judgment in late March to a broadcaster who had aired an expose of promises made and broken by the promoter of a beauty pageant. *Miss America Petite, Inc. v. Fox Broadcasting*, (No. 103394/94, Sup. Ct., New York County).

In September of 1993, the television program *A Current Affair* broadcast a segment which reported that winners of a beauty contest for petite women had not received the full value of the prize packages they were promised. The report stated that jewelry awarded to winners was wildly overvalued, clothing awarded to them was stamped "sample" and the promoters never offered modeling and personal appearance contracts promised to winners, and said that all the winners got "was a reign of pain." The plaintiffs stated that the statements were false.

Tried to Attract Attention

Relying in part on *James v. Gannett*, 386 N.Y.S.2d 871 (1976), the court found that "the essential element in determining public figure status is that the publicized person has taken an affirmative step to attract public attention." The plaintiffs had argued that they were not limited purpose public figures because their attempts to gain fame had not yet come to fruition, and in an admission surprising for a promoter of a nationwide beauty pageant, claimed that the national media ignored them and to the best of their knowledge no national wire service had reported their winners' names. The plaintiffs also reasoned that since they had never been in "any public controversy or received any unfavorable publicity," they couldn't be held to be public figures.

The court rejected these arguments, and pointing to plaintiffs' advertisements in magazines and mailing of press releases as evidence of attempting to voluntarily thrust themselves into the limelight, held both plaintiffs, Miss America Petite, Inc. and its President and Pageant Director, Cindy Zisk Salvo to be public figures.

Failure to Call Other Sources Not Actual Malice

Justice Huff parsed through the Plaintiffs attempts to create a triable issue as to actual malice, and rejected arguments that actual malice could be proven because defendants did not call third parties to verify the accuracy of statements made to them by past contest winners. The judge distinguished purposeful avoidance of the truth from a mere failure to investigate, and held that the former required "a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of the published statement." Because no such probable falsity presented itself to the reporters, the Plaintiffs failed to demonstrate a factual issue of either actual malice or gross irresponsibility on the part of the defendants.

Charles J. Glasser, Jr. is an associate at Squadron, Ellenoff, Plesent & Sheinfeld, LLP in New York City. Slade Metcalf and Jean Voutsinas of the firm represented defendants in this matter.

Talk Radio Defamation Suit Dismissed

Statements Were Protected Opinion

A Bronx County Court recently dismissed the suit brought against Bronx Borough President Fernando Ferrer by police officer Anthony Pellegrini, who claimed that Ferrer defamed him on a radio talk program hosted by former New York City Mayor David Dinkins. *Pellegrini v. Ferrer*, Index No. 18901/97 (N.Y. Sup. Ct. March 12, 1998). Plaintiff Pellegrini shot and killed Kevin Cedeno while attempting to apprehend him while on duty and responding to a "shots fired" call. The Cedeno shooting attracted the attention of the media, in part, because Cedeno was shot in the back. The court found that Ferrer's allegedly libelous comments concerning that shooting were protected and nonactionable opinion.

Plaintiff sued after Ferrer said on air that "[i]t runs against the grain of the American psyche to shoot someone in the back. To shoot someone in the back is an execution, and that's precisely what occurred here." *Pellegrini v. Ferrer*, Index No. 18901/97, slip op. at 2. Ferrer made this statement ten days after the shooting, and before a Grand Jury cleared officer Pellegrini of any criminal charges.

Based on the above statement, plaintiff sued alleging that he had been falsely accused of committing intentional homicide. *Id.* Defendant moved for dismissal arguing that his statement was protected opinion.

The court applied the test for opinion set out in *Gross v. New York Times*, 82 N.Y. 2d 146 (1993), which requires that the court examine the "challenged statements with a view toward . . . whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to 'signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.'" *Pellegrini v. Ferrer*, Index No. 18901/97, slip op. at 3 quoting *Gross v. New York Times*, 82 N.Y. 2d 146 (1993). Viewing Ferrer's statement in context, the court concluded that "a reasonable listener would perceive Mr. Ferrer's comments to be opinion." *Pellegrini v. Ferrer*, Index No. 18901/97, slip op. at 3.

The court held that plaintiff's interpretation of the statement ignores the fact that the "shooting was the subject of public debate, including newspaper commentary, editorials, and comment by many public officials within New York City." *Id.* at 4. In filling out the context in which the statement was made, the court considered the fact that both the show's host and Ferrer are known adversaries of Mayor Giuliani, and that the use of excessive force by the police was a major campaign issue in the New York City mayoral election, which was being contested when the statement was made. The court also noted that the forum in which the statement was made, a radio talk show, "would lead the listener to perceive that Mr. Ferrer's statement was one of opinion rather than fact." *Id.*

Defendants were represented by Victor A. Kovner and William S. Adams of Lankenau Kovner Kurtz & Outten LLP.

Federal Court Strikes Criminal Statute That Penalizes Criticism of Judges

By Juan R. Marchand

In a thirty-one page opinion and order issued March 3, 1998, the U.S. District Court for the District of Puerto Rico held Article 247 of the Puerto Rico Penal Code unconstitutional under the First Amendment, because it would make punishable as a felony any writing or publication prepared with the purpose of persuading or influencing a judge in a pending case.

The plaintiff, San Juan daily El Vocero and its editor Gaspar Roca, obtained the declaratory judgment invalidating Article 247 even though the Puerto Rico Attorney General insisted that (1) the court should abstain to let the commonwealth courts decide the issue; (2) El Vocero lacked standing; and (3) there was no specific threat of enforcement, and hence no "case or controversy." However, an uncontroverted affidavit by Mr. Roca pointed to the suspension of an investigation into a local supreme

(Continued on page 14)

Federal Court Strikes Criminal Statute That Penalizes

(Continued from page 13)

court justice's finances, after his attorneys advised him that publishing articles and editorials on that subject could be seen as an illegal attempt at persuasion under Article 247, since El Vocero has several cases pending before that court.

El Vocero submitted that private parties and entities were publicly claiming that a series of articles on judicial corruption, already published, ran afoul of the statute. The Puerto Rico Bar Association had issued a resolution criticizing as "illegal" the delivery of a copy of a judgment obtained by El Vocero, to all active judges. The judgement, establishing the truth of El Vocero articles regarding a corrupt judge, was mailed in book form which contained nothing except the judgment.

Judge Hector M. Laffitte made specific determinations as to the "chilling effect" already suffered by El Vocero and Mr. Roca, and proceeded to the merits of the case. The court found "the absence in Article 247 of a requirement that a defendant act corruptly or improperly to be significant[,]" because it "substantially broadens the scope of activity covered by the statute." After an exhaustive exposition of similar state statutes which unanimously require a criminal intent or corrupt motive, the Court went further to conclude that "[a]s the statute currently reads, a newspaper editorial by Plaintiff which severely criticizes a judge's rulings in an ongoing case could be covered by any of the three subsections of Article 247."

In dismissing the proposition advanced by the Attorney General that the statute was "narrowly tailored," the Court concluded otherwise, and found it "unduly encroaches upon the press' protected First Amendment rights." Article 247 had no legislative history, and was simply grafted upon an existing "jury tampering" statute. The Attorney General argued that the law was necessary to protect the independence of Puerto Rico judges. However, El Vocero prevailed in pointing out the ample margin for abuse available in the ambiguous law against the press.

The Attorney General filed a notice of appeal to the First Circuit Court of Appeals, but later voluntarily dismissed the appeal.

Juan R. Marchand practices in San Juan, Puerto Rico.

Be a Part of History in the Making. . .

The Central and East European Law Initiative (CEELI), a public service project of the American Bar Association, is seeking an experienced attorney to serve as a Media Law Legal Specialist in Tbilisi, Georgia for one year beginning October 1998 to: develop and implement training workshops on media law related subjects; provide input to the Parliament on drafts pertaining to media legislation; and organize interactive training workshop on topics such as freedom of the press, freedom of speech, and media and the judiciary.

All participants receive a generous benefits package covering travel, housing, general living, and business expenses. To learn how you can "export your skills," contact CEELI at: ceeli@abanet.org, 1-800-98CEELI or (202) 662-1754.

Canadian Criminal Libel Upheld Against Charter Challenge

***R. v. Lucas* (2 April 1998), File No.: 25177 (S.C.C.)**

By Roger D. McConchie

In a ruling that could chill vigorous criticism of law enforcement authorities and other public officials, the Supreme Court of Canada on April 2, 1998 upheld the criminal convictions of a husband and wife, who were active in a prisoners' rights group, for defamatory libel of a police officer contrary to section 300 of the federal Criminal Code. The accused, John Lucas and his wife Johanna Lucas, had picketed with a small group of others outside the Provincial Court of Saskatchewan and the police headquarters where the officer worked with signs that read:

> "Did [the police officer] just allow or help with the rape/sodomy of an 8 year old?; "If you admit it [officer] then you might get help with your touching problem"; "Did [the police officer] help/or take part in the rape/sodomy of an 8 year old? The T[] papers prove [the officer] allowed his witness to rape". Mr. and Mrs. Lucas have been sentenced to 18 months and 12 months imprisonment respectively.

This appears to be the first time the Supreme Court of Canada has considered section 300 of the Criminal Code, which has been carried forward in almost unaltered form (save as to penalty) since the first Criminal Code was enacted in 1892. Even then, that enactment was no more than a codification of a law first adopted by the Canadian Parliament in 1874 (An Act Respecting the Crime of Libel, S.C. 1874, 37 Vict. c. 38) and revised and re-enacted in 1886 (An Act Respecting Libel, R.S.C. 1886, 49 Vict. c. 163).

The preamble to the 1874 legislation stated its purpose was "for the better protection of private character, and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty." Those words were reproduced verbatim from Lord Campbell's Act, 1843, the United Kingdom statute which modified the common law of criminal libel by permitting, inter alia, a defence of truth.

The Statute

Section 300 of the Criminal Code provides that "Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years." The term "defamatory libel" is defined by section 298 as "matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published." Pursuant to section 299, a person "publishes" a defamatory libel when he or she "(a) exhibits it in public; (b) causes it to be read or seen; or (c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person."

Trial Judge Applies Objective Test

At their trial in the Saskatchewan Court of Queen's Bench, Mr. Lucas testified that he believed the placards, all of which he had prepared, were true. He said he believed that the police officer investigating allegations of sexual abuse made by three children knew that one of them, Michael R., had raped, sodomized and tortured his sister Kathy and repeatedly participated in sexual activities with his other sister, Michelle. Mr. and Mrs. Lucas were concerned about the officer's decision to leave Michael in the same special care foster home where Kathy and Michelle were staying. Mr. and Mrs. Lucas felt the police officer had a duty to intervene. They complained to the Police Commission, the Premier's office, and the office of the Attorney General, but Michael R. was not moved from the foster home. Mrs. Lucas did not testify at all in the criminal trial.

(Continued on page 16)

Canadian Criminal Libel Upheld Against Charter Challenge

(Continued from page 15)

The trial judge noted that s. 300 of the Code requires the prosecution to demonstrate the person charged knew the published defamatory libel was false. Nevertheless, despite acknowledging the need to apply a subjective test, the trial judge applied an objective test and held that Mr. and Mrs. Lucas should have known the messages on the placard were false. They were convicted and given sentences of imprisonment. Their appeal to the Saskatchewan Court of Appeal was dismissed.

On further appeal to the Supreme Court of Canada, the majority held (5-2) that there was sufficient evidence that Mr. and Mrs. Lucas had subjective knowledge of the falsity of the defamatory statements they displayed to uphold their convictions despite the trial judge's erroneous application of an objective test. The dissenting judges would have set aside Mrs. Lucas' conviction on the ground there was no direct evidence she had the necessary subjective knowledge of falsity.

Charter Attack Fails

The lasting significance of *R. v. Lucas*, however, lies in the unanimous conclusion (7-0) of the Supreme Court of Canada that (subject to "reading out" one unconstitutional phrase) the defamatory libel provisions in ss.298, 299 and 300 of the Criminal Code are justifiable limitations on the guarantee of freedom of expression contained in s. 2(b) of the Canadian Charter of Rights and Freedoms. The entire Court held that protection of an individual's reputation from a wilful and false attack must take priority over free speech rights because of "the innate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian society."

On the premise that defamatory expression is of "negligible value", the Supreme Court held the prosecution had satisfied its obligation under the Charter to prove the defamatory libel provisions at issue met a pressing and substantial social objective, were rationally connected to that objective; and were "minimally impairing" of free speech. The key factor which made ss.298, 299 and 300 "minimally intrusive on freedom of expression" was the implied requirement that the prosecution prove beyond a reasonable doubt that the accused intended to defame the victim, in addition to the requirement to prove falsity.

The Supreme Court's only concession to free speech rights in this judgment is the conclusion that a portion of ss.299(c) is unconstitutional because it defines publication of a defamatory libel to include showing or delivering it to "the person whom it defames." That wording was therefore struck down and severed from the Code. The Court's reasoning on this point is that a fundamental element of libel is publication to a person other than the one defamed.

The Supreme Court rejected the Lucas' submission that the availability of the civil remedy in libel which also protects the reputation of individuals meant the defamatory libel provisions in the Code are overbroad. The Court held that "perpetrators who wilfully and knowingly publish lies deserve to be punished for their grievous misconduct." The principal object of criminal law is the recognition of society's abhorrence of a criminal act and the punishment of criminal behaviour.

Civil law has as its main goal compensation through awards of damages. Further, the Court said, a civil action will have little, if any, deterrent effect on impecunious defendants.

Police Need Protection From Libel

Perhaps the most puzzling statement in the Supreme Court of Canada's ruling is found in the principal majority judgment of Cory J. (at para 74), where he states that those "whose work makes them especially vulnerable to criminal libel, like social workers, police officers or nurses, require the protection which only the criminal law can provide. When they are victimized by someone with no means of satisfying a civil judgment, a criminal recourse may be their only means of vindication and the only solution that offers a first step on the road to restoring their good reputation in the community." [emphasis added].

In Canada, police officers already wield special powers far beyond those available to the average citizen. Historically, the criminal law has devised special protection for the accused to reflect the tremendous imbalance between the

(Continued on page 17)

Canadian Criminal Libel Upheld Against Charter Challenge

(Continued from page 16)

coercive powers of the state and the resources of the individual. Justice Cory's observation (in which four other judges including the Chief Justice concurred) could well be read by people in the criminal justice system - particularly the police - as conferring special protection from unsubstantiated criticism. If this judgment has that effect, it will not auger well for those who make accusations of police brutality or other misconduct, particularly where it is their word against the officer's.

With this decision in *R. v. Lucas*, the leading cases in the law of civil and criminal libel in Canada both involve, as victims of the defamatory statements, public officials in the criminal justice system. In *Hill v. Church of Scientology of Toronto*, [1995] 3 S.C.R. 1130, the plaintiff was a Crown prosecutor who was awarded the unprecedented sum of $1.6 million (Cdn) in damages after he successfully sued Scientology for defamation in a civil proceeding where his legal expenses through trial and appeal were paid for by the Ontario taxpayer.

In *Hill v. Scientology*, the Supreme Court of Canada unequivocally rejected defence submissions that it was time to adopt the "actual malice" requirement prescribed for civil actions concerning the defamation of public officials by the United States Supreme Court in *New York Times v. Sullivan*. In *R. v. Lucas*, the Supreme Court of Canada now has unequivocally signalled that 19th century criminal libel law is still fit for Canadian society in the 21st century.

Roger D. McConchie is with the firm Ladner Downs in Vancouver, British Columbia.

ASNE Will Push for Uniform Correction or Clarification of Defamation Act

The incoming president of the American Society of Newspaper Editors, Edward L. Seaton, has announced that the organization will push for the state-by-state adoption of the Uniform Correction or Clarification of Defamation Act. Seaton, who is editor in chief of the Manhattan Mercury of Kansas, was quoted by *Editor & Publisher* in its April 18 edition as saying that the Act, if passed in all 50 states, "would change the landscape of libel laws." (P. 42)

The Act, which received strong support from LDRC and many within the membership, is intended to provide an incentive to those who publish allegedly defamatory statements to make a prompt correction or clarification of the offending statement. The Act provides that if a requisite correction or clarification is published within 45 days of a request, then plaintiffs can recover only provable economic loss. The 45-day period can be extended if the publisher requests information from the plaintiff to prove that the statement complained of is materially false; in that case the correction is considered timely if it is published within 25 days of receipt of the requested materials. Those plaintiffs who do not make a good-faith effort to request a correction are also limited to recovering provable economic losses. The Act would apply to all actions for defamation, including not only those against publishers and the news media, but, for example, suits involving employers furnishing recommendations and suits involving private conversations concerning third parties.

The *Editor & Publisher* story cites LDRC's recent Damage Survey (LDRC Bulletin 1998:1), in which we report on the increased number of libel cases going to trial, as a factor in the decision. Citing industry spokesmen, *Editor & Publisher* states that the size of libel awards concerns those in the news industry as well because it may motivate more suits against news organizations, regardless of their merits.

LDRC understands that ASNE may target several states for this action. LDRC has offered assistance and hopes LDRC members, where appropriate, will also assist ASNE in this effort.

No First Amendment Bar to Orange County's Suit Against S&P

In one of several complex litigations arising out of Orange County's declaration of bankruptcy in 1994, a California federal district court rejected a claim by Standard & Poor's ("S&P") that the First Amendment bars Orange County from pursuing a professional malpractice action against the financial ratings service. *County of Orange v. McGraw-Hill Companies, Inc.*, SA CV 96-765 GLT (C.D. Cal. March 16, 1998). Orange County alleges that S&P's ratings of its debt offerings, rendered under agreements with the county, misrepresented the county's financial condition, constituting professional malpractice.

In an interesting prior ruling, the same court held that since the county's debt offerings were matters of public concern and S&P's ratings are speech, the actual malice standard might apply, absent special circumstances such as contracting away First Amendment protection. *Id. slip op.* at 2. The court noted that other courts have applied the actual malice standard when plaintiffs seek damages arising from First Amendment protected speech regardless of the tort pleaded. Thus, "unless the County alleges facts separating [S&P's activities as an advisor and its constitutionally protected expression,] . . . S&P is constitutionally protected from the County's claim for professional negligence unless there was actual malice." *Id. slip op.* at 4.

On the instant motion for summary judgment, S&P argued that the First Amendment absolutely bars claims over speech concerning a governmental entity. The court denied S&P's motion on two grounds. First, Orange County submitted evidence that S&P provided separate analytic and ratings services, apart from publication services, to Orange County that are therefore not covered by the First Amendment.

Second, as to the protected speech of S&P, the court reasoned that while a government entity cannot bring a defamation action, it can bring a professional malpractice action, even one about a widely disseminated opinion of public concern, because such an action does not pose the same threat to democratic speech as a defamation action. *Id. slip op.* at 9.

> "The underlying complaint in this action does not seek to punish S&P for any self-motivated expression. Here the county requested S&P to speak and paid S&P to speak accurately."
>
> *Id. slip op.* at 10.

The court concluded that the county's suit for professional negligence will not as a practical matter chill S&P or similar organizations.

S&P is represented by Paul, Hastings, Janofsky & Walker in Los Angeles, CA.

PRIVACY

Manhattan Jury Awards Model $100,000

Argued Posed Photos Used in False Fashion

On March 27th a Manhattan federal court jury awarded $100,000 to a model who sued *YM Magazine* (*YM*) for placing her picture next to an unsigned letter in such a way as to make it appear, she argued, that she had authored the letter. The letter ran in an advice column in this magazine designed for teenage girls, and contained an admission that the author got drunk and had sex with three men simultaneously.

This same case made news in last month's *LDRC LibelLetter* (p. 12) when the court refused to grant summary judgment to the defendant, and held that the newsworthiness exception to §§ 50-51 of the New York Civil Rights Law, New York's privacy law, could be defeated by a showing that the use of the plaintiff's photograph was "infected with material and substantial falsity," provided that the defendant acted with the requisite degree of fault. *Messenger v. Gruner + Jahr USA Publishing et al.*, 97 Civ. 0136 (LAK) (S.D.N.Y. February 23, 1998).

In arriving at its verdict, the eight-person jury found first that the plaintiff had established by a preponderance of the evidence that the article in question was understood by the ordinary and average *YM* reader to have been authored by plaintiff. It then found that the plaintiff had established by a preponderance of the evidence that *YM* was grossly irresponsible with respect to whether the letter would be understood by its average reader to have been authored by her. Finally, the jury found that the plaintiff had established by a preponderance of the evidence that she was injured as a proximate cause of the publication.

Though the jury concluded that plaintiff had been injured, it only awarded her damages for emotional distress that she alleged to have suffered as a result of the publication. The jury awarded her nothing for injury to her reputation or any economic injury that she alleged she had suffered.

JNOV Filed

Attorneys for Gruner + Jahr filed a motion for judgment as a matter of law or, in the alternative, a new trial on April 13th. In it, the attorneys argue that no reasonable juror could have found that the letter had been understood by the ordinary and average *YM* reader to have been authored by the plaintiff. The photos are, the brief argues, obviously after-the-fact and posed; no reasonable juror could conclude that an anonymous author posed for the magazine. The brief also points out that *YM*'s readers know that it, like many other magazines, uses models' photos to illustrate articles.

Finally, the magazine points to the results of an independent research consultant's survey introduced at trial that showed that 92 % of 168 *YM* subscribers who responded to the survey said that they did not believe that the girl in the picture had written the letter.

Gruner + Jahr's attorneys also argue that no reasonable juror could have found that *YM* acted with gross irresponsibility, given that in using the model photo and in not including a disclaimer that identified it as such, the magazine was following a standard practice that had never been complained about by a model before.

Gruner + Jahr's attorneys further argue that the article was not for "trade" or "advertising " purposes as required to be actionable under§§ 50-51, and that, in any event, there is no "falsity" exception to §§ 50-51 in the context of a non-public figure whose "person" is not inherently commercially valuable.

California Legislature Aims for Paparazzi Again

Introduced by Sentate Leader

Yet another bill aimed at the paparazzi is making its way through the California legislature. Last month we reported that state Senator Charles Calderon had proposed a Personal Privacy Act (SB 1777) that would make reporters and photographers personally liable if they commit any of several enumerated acts "with the intent to obtain information about, or photographs of, another, or to print, publish, or broadcast the information or photographs, without the written or verbal consent of the other." *LDRC LibelLetter*, March 1998 at p. 15. Now it is state Senator and President pro Tem of the California Senate John Burton who has introduced a bill (SB 262) that creates the tort of invasion of privacy to capture a physical impression.

Burton is a San Francisco liberal who, according to the California Newspaper Publishers Association, is respected on both sides of the political divide. As the longtime Chairman of the Senate Judiciary Committee, Burton has a strong record on press access issues, supporting press views on open meetings, public records, defamation and other freedom of information issues. He did, however, recently express the notion that "there may be something the Legislature can do to better protect peoples' privacy." This sentiment is popular with the important Democratic constituency of the Screen Actors Guild, which is supporting his bill.

The California Newspaper Publishers Association (CNPA) is taking this bill very seriously because the perception is that if Burton backs it strongly, he can make it law. CNPA has worked in the past with the Motion Pictures Association of America and the ACLU to defeat these types of bills. CNPA is currently obtaining input from media law attorneys on both constitutional and policy issues created by the bill.

Under Burton's proposed legislation, which, according to a Burton legislative aide, is now pending before the Assembly Judiciary Committee, a person is liable for invasion of privacy to capture a physical image when the plaintiff proves any one of the following:

> - - The defendant persistently physically followed or chased the plaintiff in a manner to cause the plaintiff to have a reasonable fear of bodily injury in order to capture a visual image, sound recording, or other physical impression by the sue of a visual or auditory instrument;
>
> - - the defendant committed an act of trespass in order to capture any type of visual image, sound recording, or other physical impression of the plaintiff; or
>
> - - even if the defendant does not actually trespass, he or she can be liable for attempting to capture any type of visual image, sound recording, or other physical impression through the use of a visual or auditory device that makes it possible to capture images that could not otherwise be captured without trespassing. In order for a defendant to be liable under this last provision, plaintiff would have to show that he or she had a reasonable expectation of privacy.

The Burton bill grants this cause of action to the owner or any other person who has an interest in the property trespassed, the person whose visual, auditory, or physical impression has been captured, or both.

The Burton bill would make the person who commits the tort of invasion of privacy to capture a physical impression liable for treble damages, including, but not limited to, general damages, special damages, and punitive damages. Further, if the plaintiff proves that the tort was committed for a commercial purpose, "the defendant shall also be subject to disgorgement of any proceeds or other consideration obtained as a result of the violation." In addition to monetary remedies, the legislation provides that a court can grant equitable relief including but not limited to an injunction. The prevailing party under the legislation is entitled to attorneys' fees and costs.

Privacy Trumps Freedom of Expression In Canada

— Damages Stand for Photograph Taken In Public Without Permission —

On April 9, 1998, the Supreme Court of Canada, upholding a verdict in plaintiff's favor, ruled that a photographer and magazine publisher were liable in damages for taking and publishing Without Her Permission a photograph showing the plaintiff, then aged 17, sitting on a step in front of a building on Ste-Catherine Street in Montreal "Because [T]he Artistic Expression of the Photograph Cannot Justify the Infringement on the Right of Privacy it Entails." *Aubry v Editions Vice-Versa Inc.*; CBC intervenor, File No. 25579. Full text at http://www.droit.umontreal.ca

The court held that an individual's right to privacy under s.5 of the Quebec Charter of Human Rights and Freedoms includes the ability to control the use made of one's image. The rights inherent in the protection of privacy may be infringed even though the published image and associated text is not reprehensible and in no way injures the plaintiff's honour or reputation, as long as the individual is identifiable.

Freedom of Expression Trumped

The Quebec Charter of Human Rights and Freedoms, R.S.Q., c. C-12 sets up the competing rights. It provides IN s.5 that "Every person has a right to respect for his private life." it provides as well, however, in s.3 that "[e]very person is the possessor of the fundamental freedoms" including "freedom of expression." The defendant publisher and photographer unsuccessfully argued that the artistic expression of the photograph, which served to illustrate contemporary urban life, took precedence over the plaintiff's privacy rights by virtue of section 5 of the Quebec Charter. The balance instead tipped toward the subject.

Context Determines Liability

Context determines whether the public's interest in being informed about a person's private life, including his or her personality traits, overrides a person's right to "respect for his or her private life."

The Supreme Court of Canada recognized, however, that the public's interest in being informed about a person's private life, including personality traits, will override a person's right to privacy in certain situations:

People in the Limelight

Artists, politicians, professional athletes, and all others whose professional success depends on public opinion, will enjoy a lesser expectation of privacy. "[C]ertain aspects of the private life of a person who is engaged in a public activity or has acquired a certain notoriety can become matters of public interest."

Similarly, people who ordinarily have a low public profile may lose privacy protection where they play a high-profile role in a matter within the public domain "such as an important trial, a major economic activity having an impact on the use of public funds, or an activity involving public safety."

A face in the Crowd

A photographer "is exempt from liability . . . when an individual's own action, albeit unwittingly, accidentally place him or her in the photograph in an incidental manner. . . One need only think of a photograph of a crowd at a sporting event or a demonstration."

Part of the Scenery

If the individual appears in an incidental manner in a photograph of a public place, he or she will be regarded as an "anonymous element of the scenery" even if identifiable. The same applies to a person in a group photographed in a public place, if he or she is not the principal subject of the photograph.

The Nature of Damages in Quebec Law

The Supreme Court of Canada held (5-2) that the plaintiff had suffered "prejudice" within the meaning of section 49 of the Quebec Charter which entitles a victim to compen-

(Continued on page 22)

Privacy Trumps Freedom of Expression In Canada

(Continued from page 21)

sation for "moral or material prejudice." Reaching for a means of defining that "prejudice," the court found that the plaintiff suffered a violation of "dignity" in the sense described in J. Ravanas, La protection des personnes contre la realisation et la publication de leur image (1978), No. 347, at pp. 388-89:

> The camera lens captures a human moment at its most intense, and the snapshot "defiles" that moment. The privilege instant of personal life becomes "this object image offered to the curiosity of the greatest number". A person surprised in his or her private life by a roving photographer is stripped of his or her transcendency and human dignity, since he or she is reduced to the status of a "spectacle" for others....This "indecency of the image" deprives those photographed of their most secret substance.

The two dissenting judges (Lamer, C.J.C. and Major J.), while agreeing there had been an unjustifiable invasion of the plaintiff's privacy, concluded the action should have been dismissed on the ground there was no evidence of damage. Asked if the photograph had caused her any "difficulties," the plaintiff had simply testified that her friends, the people at her school, had laughed at her. The dissenting judges conceded there would have been sufficient evidence of damage if the plaintiff had stated she felt "humiliated." Further, no evidence was adduced to support the plaintiff's argument that she had become a "well-known figure," thereby losing her anonymity.

Quantum of Damages Awarded

The trial judge awarded the plaintiff $2,000 damages. The majority judgment, written by L'Hereux-Dube and Bastarache JJ., thought that sum was high but declined to reduce the award, honouring the principal that an appellate court should not intervene unless the trial judge has applied an erroneous rule of law or the amount awarded was palpably incorrect.

What Does it Portend?

Although Quebec's civil law regime differs substantially from that of the nine common law provinces and territories, this decision of the Supreme Court of Canada could well have implications for the four provinces which have privacy statutes, namely British Columbia, Manitoba, Saskatchewan and Newfoundland, in which concepts of public interest are applicable.

The British Columbia Privacy Act, for example, does not specifically exempt persons engaged in newsgathering from its provisions, but it provides that publication is not a violation of privacy if the matter published was of public interest or was fair comment on a matter of public interest, or if the publication was privileged in accordance with the rules of law relating to defamation. [s. 2(3)]

Thorny questions could arise, however, where a news media photographer captures the image of an average citizen in an unguarded moment and none of the exemptions defined by the Supreme Court of Canada in *Aubry* apply.

Unfortunately, in *Aubry* the Supreme Court of Canada appears to have concluded that the "public interest" is not engaged when a photograph of an identifiable individual, who is the central subject of the photograph, is published merely because of its artistic value. Accordingly, the reasoning in *Aubry* could expose news media to potential liability for invasion of privacy if:

> (a) the photograph depicts an identifiable individual;
> (b) that individual is the central subject of the photograph;
> (c) the photograph is published by the news media without that individual's consent;
> (d) the individual photograph depicted in the photograph has no logical connection to a news story or opinion column concerning an event or incident of public interest.

Marc Andre-Blanchard of the firm Lafleur Brown in Montreal, Quebec represented defendants in this matter

Roger McConchie with the firm Ladner Downs in Vancouver, British Columbia was a substantial contributor to this article.

Congressman Seeks Dismissal of Eavesdropping Suit

Calling the suit against him "not a private dispute, but a political one," which would be better resolved in the "halls of Congress, not a courtroom," Rep. James McDermott (D-Wash.) has moved to dismiss the eavesdropping suit brought against him by Rep. John Boehner (R-Ohio).

Boehner, who filed the complaint last month after receiving permission from the Federal Election Commission to use campaign funds, alleged that under Federal and Florida law, McDermott was liable for disclosing the contents of an illegally taped cellular phone conversation involving GOP House leaders to *The New York Times*, the *Atlanta Journal Constitution* and *Roll Call*. The conversation, during which Boehner and other House GOP leaders discussed strategies to deal with the announcement of a settlement in the ethics committee investigation of Speaker Newt Gingrich, was intercepted by a Florida couple on a police scanner.

In his motion, McDermott does not concede that he was, in fact, the source of the leak, but rather argues that Boehner's suit should be dismissed because it failed to allege that McDermott, himself, had taped the call. Pointing out that "[n]either the federal nor the state statute proscribes the receipt or possession of a recording of an unlawfully intercepted communication," McDermott argues that Boehner's suit impermissibly seeks to punish him for "providing the news media with truthful and lawfully obtained information on a matter of substantial public concern." Citing *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), McDermott argues that the provisions of the Federal and Florida statutes that make punishable the disclosure of any intercepted wire, oral or electronic communications violate the First Amendment, "[a]t least . . . where the allegedly disclosed information is truthful, was lawfully obtained, and unquestionably involves matters of substantial concern . . . ."

Boehner, who was precluded by the Federal Election Commission from receiving any "direct or indirect tax or other financial benefit" from the lawsuit and did not claim any actual injury from the disclosure, does seek statutory and punitive damages.

John and Alice Martin, who intercepted the December 1996 call on a police scanner pleaded guilty in April 1997 to intentionally intercepting the radio portion of a cellular telephone call. They were fined $500 each.

Outrage and Privacy Claims Dismissed over Footage of Child Victims

By Leon Holmes

In a short but significant Order, the United States District Court for the Eastern District of Arkansas has granted summary judgment to Home Box Office, Creative Thinking International (a firm that produces documentary films), and Creative Thinking's owners, Joe Berlinger and Bruce Sinofsky. *Hobbs v. Creative Thinking International*, No. J-C-97-210 (E.D. Ark. 2/19/98). Creative Thinking produced and HBO aired the award-winning documentary "Paradise Lost: The Child Murders at Robin Hood Hills." The subject of the documentary was the mutilation and murder of three small boys in West Memphis, Arkansas. Three teenage boys were charged with and convicted of the murders. Evidence was presented that the murders were performed as part of a satanic ritual.

The mother of one of the victims sued Creative Thinking, its owners, and HBO, alleging, among other things, the tort of outrage and the tort of invasion of privacy. Her claim focused on the opening scene of the documentary, which showed footage of the victims' bodies at the crime scene. The plaintiff alleged that the publication of this crime-scene footage invaded her privacy and caused her extreme emotional distress. The footage was filmed by the West Memphis Police Department when the bodies were discovered; and it was a part of the police department's investigation file, although it was not introduced into evidence at trial.

Legitimate Public Concern

Judge James M. Moody granted the defendants' motion for summary judgment, finding that the defendants were entitled to judgment as a matter of law. With respect to the invasion of privacy and outrage claims, Judge Moody held that summary judgment should be granted for two reasons. First, the footage was a matter of public

(Continued on page 24)

Outrage and Privacy Claims Dismissed over Footage

(Continued from page 23)

record, so, following *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), publication of the footage is protected by the Constitution. Second, Judge Moody held that the publication of information in which there is a legitimate public interest cannot give rise to a claim for invasion of privacy. The Supreme Court of Arkansas held in *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989), that crime scene photographs and other investigatory materials are matters of legitimate public concern that should be released to the public even if they are graphic and gruesome in nature.

In that case, Mercedes McCambridge sought to prevent release to the public of crime-scene photographs showing her deceased son, daughter-in-law, and grandchildren in what police concluded was a murder/suicide committed by Ms. McCambridge's son. Since the Supreme Court of Arkansas held in *McCambridge* that the public has a legitimate interest in seeing even gruesome crime scene photographs, it follows, according to Judge Moody, that no claim for invasion of privacy or for outrage can be maintained based on the publication of such material.

Other Precedent

Judge Moody's holding echoes the holdings of a handful of cases from the 1950's in which courts found that no invasion of privacy claim can be based on the publication of crime-scene photographs of the bodies of murdered children. *See, e.g., Waters v. Fleetwood*, 91 S.E.2d 344 (Ga. 1956); *Bremmer v. Journal-Tribune Publishing Co.*, 786 N.W.2d 762 (Iowa 1956); *Kelly v. Post Publishing Co.*, 98 N.E.2d 286 (Mass. 1951). Although the cases are few in number, it seems well-settled that tort liability cannot be based on the publication of crime scene photographs of the bodies of murder victims, even when the victims are children.

Leon Holmes is with the firm Williams & Anderson LLP in Little Rock, AR, which represented defendants in this matter.

Journalists' Shield Law Restored in Minnesota

On April 7th the Minnesota legislature passed into law Senate File No. 1480, which restores protection for unpublished information acquired by journalists in the course of their reporting. This legislation effectively overturns the decision of the Minnesota Supreme Court in *State v. Turner*, 550 N.W.2d 622 (Minn. 1996), in which the court rejected the argument that journalists had a privilege against compelled testimony and disclosure of unpublished information.

The new law provides protection for journalists against compelled disclosure of unpublished information procured in the course of their work. The privilege applies whether or not the information would tend to identify the person or means through which the information was obtained. The new privilege is absolute in all civil cases except for defamation actions, where a qualified privilege continues to apply.

The privilege can only be overcome in criminal cases by a clear and convincing showing that there is probable cause to believe that the information sought is clearly relevant to a criminal violation, that the information cannot be obtained by any alternative means or remedies less destructive of First Amendment rights, and that there is a compelling and overriding interest requiring the disclosure where the disclosure is necessary to prevent injustice.

If this three-part test is met and the underlying crime is a gross misdemeanor or felony, then a court can compel disclosure of both confidential sources and unpublished information. If, however, the crime is only a misdemeanor, then the court can only disclose unpublished information that would not tend to identify the source of the information or the means through which it was obtained.

Federal Judge Finds Starr Must Show Compelling Need to Subpoena List of Books Purchased

By Ann M. Kappler and Jodie L. Kelley

On April 6, 1998, United States District Court Judge Norma Holloway Johnson ruled that the Office of Independent Counsel cannot subpoena information on Monica Lewinsky's book purchases unless it can demonstrate a "compelling need" for such information, and "a sufficient connection between that information and the grand jury's investigation." *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, Misc. Action No. 98-135 (NHJ) and *In re Grand Jury Subpoena to Barnes & Noble, Inc.*, Misc. Action No. 98-138 (NHJ) (Apr. 6, 1998) at 6.

> ***"Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. . . . "***
>
> **Order at 3, *quoting United States v. Rumely*, 345 U.S. 41, 57 (1953) (Douglas, J., concurring).**

In March 1998 the Independent Counsel issued a subpoena to Kramerbooks & Afterwords, Inc., an independent bookstore and cafe in Washington, D.C. The subpoena requested "all documents and things referring or relating to any purchase by Monica Lewinsky" from November 1995 to the present. A similar subpoena was issued shortly thereafter to a Barnes & Noble bookstore, also located in Washington. In order to comply with the subpoena, the bookstores would have had to provide information that would reveal the titles of all books purchased by Ms. Lewinsky.

Kramerbooks, Barnes & Noble, and Monica Lewinsky all moved to quash the subpoenas. The American Booksellers Foundation for Free Expression, along with associations representing libraries, publishers, and distributors of books, magazines, and recorded materials, filed a brief *amicus curiae* with the Court supporting the motions to quash; the American Civil Liberties Union of the National Capital Area also filed an *amicus* brief in support of Kramerbooks, Barnes & Noble, and Ms. Lewinsky.

In the papers filed with the Court, and during a subsequent hearing held by the Court, the parties and *amici* highlighted the extraordinary nature of the subpoenas. The subpoenas impacted directly on constitutionally protected rights: in selling books Kramerbooks and Barnes and Noble were engaged in activity squarely protected by the First Amendment. And in purchasing constitutionally protected reading material, Ms. Lewinsky was also exercising her First Amendment rights.

Indeed, the parties and *amici* noted, the rights at issue are at the core of the rights protected by the First Amendment. People purchase and read books, and form ideas and opinions about the material contained within the books, secure in the knowledge that the government may not demand a list of the books they read, or inquire about the beliefs they form, without demonstrating a compelling need to do so. If the books an individual chooses to purchase can be easily scrutinized by the government simply by issuing a grand jury subpoena, that will clearly have a chilling effect on the purchase of books that are controversial or potentially offensive. This result, the parties and *amici* argued, is anathema to the protections afforded by the constitution, raising the specter of the government as "big brother," free to intrude upon individuals' privacy and thoughts.

During the public hearing on the matter, the government asserted that it did not need to demonstrate a particularized need for the information. Instead, the government asserted, because it was investigating "the relationship" between the President and Ms. Lewinsky, and because the President had acknowledged that Ms. Lewinsky had given him one or two books, the government was therefore entitled to subpoena information about all books she had purchased from any bookstore. The government did not dispute that First Amendment rights were impacted; nor did it dispute that its subpoena could have a chilling effect. Instead, the government asserted that, because courts have found that a broad range of material is potentially relevant

(Continued on page 26)

Book Subpoena

(Continued from page 25)

to a grand jury investigation, it is entitled to any material that is even tangentially relevant, and that the fact that First Amendment interests might be adversely impacted simply did not matter.

The court disagreed. In its Order issued April 6th, the Court agreed that the subpoenas at issue seriously impacted First Amendment rights -- "A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. . . . Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. . . . The purchase of a book or a pamphlet today may result in a subpoena tomorrow." Order at 3, *quoting United States v. Rumely*, 345 U.S. 41, 57 (1953) (Douglas, J., concurring).

Nor, the Court found, was this concern merely hypothetical -- in this case First Amendment rights had already been chilled. Customers, upset at the prospect of a bookstore releasing private information on the books they had purchased, had informed Kramerbooks that they would no longer shop at the bookstore; sales at the bookstore had declined; and Ms. Lewinsky indicated that she feared purchasing books because she feared intrusion and embarrassment. Order at 3-4.

The Court then affirmed that First Amendment constraints apply in the grand jury context. Order at 4 ("grand juries must operate within the limits of the First Amendment"), *quoting Branzburg v. Hayes*, 408 U.S. 665, 710 (1972). Thus, when a grand jury subpoena impacts First Amendment rights, as the subpoenas at issue in this case did, the Court found, the government must make a heightened showing. First, the government must "demonstrate a compelling interest in the information sought or a compelling need for the information sought." Order at 5. If it can do so, it must then show "a sufficient connection between the information sought and the grand jury investigation." *Id.*

Because the government had not yet made such a showing, the Court ordered the Office of Independent Counsel to "submit to the Court *ex parte* a filing describing its need for the materials sought by the subpoenas to Kramerbooks and Barnes & Noble and the connection between the information sought and the grand jury investigation. . . ." Order at 6. A final decision on the motions to quash is expected soon.

Ann M. Kappler and Jodie L. Kelley are with Jenner & Block in Washington, DC and represented the American Booksellers Foundation for Free Expression in this matter.

Update on Access Motions

On April 8th, the D.C. Circuit Court heard the appeal of Judge Norma Holloway Johnson's denial of a media coalition's motion for access to filings and hearings on the invocation of executive privilege by the President. Circuit Court Judges Robinson, Tatel and Roberts vigorously questioned the media's lawyer and appeared concerned that a First Amendment right of access to grand-jury-related material would impose a heavy burden on ordinary criminal proceedings. The President's personal lawyers, White House lawyers, and Monica Lewinsky's lawyer, William Ginsberg, all opposed the media's appeal. The Office of Independent Counsel did not oppose the media's motion, filing no brief in the case. A decision by the D.C. Circuit is pending.

The *Washington Post* reported, though, that Judge Johnson has agreed to release an edited transcript of a March hearing on executive privilege and is awaiting proposed versions from the White House and the Independent Counsel's office. Johnson has refused, however, to release edited transcripts of hearings concerning the attorney-client privilege of Monica Lewinsky's prior lawyer Frank Carter, as well as transcripts on the contempt motion against Kenneth Starr for alleged leaks of grand jury material. *Clinton, Lewinsky Lawyers Want Closed Court*, *Washington Post*, April 9, 1998, A20. Also on Judge Johnson's docket is a media motion filed April 23, 1998 for access to material on the Secret Service's privilege claim.

On another front, after the grant of summary judgment to the President in the Paula Jones case, the Eighth Circuit sua sponte remanded to the trial court the media's appeal of the denial of a motion to lift a protective order on pretrial depositions. On remand, Judge Susan Weber Wright will consider whether the protective order should remain in effect.

Reporters Sue Former Station Over Investigative Report

Station Ends Relationship with Reporters After Editing Dispute
Reporters Claim Whistleblower Status

The husband-and-wife investigative news team of Jane Akre and Steve Wilson have filed suit in Florida state court against their former employer, the Fox-owned television station WTVT Channel 13 in Tampa, Florida. The reporters allege that the station refused to air their four-part series linking Bovine Growth Hormone (BGH) -- a hormone injected into dairy cows to increase milk production -- to cancer and then pressured them to falsify information in the report. The reporters say that both acts were initiated to appease the Monsanto corporation, a maker of BGH under the trade name Prosilac.

In September 1997, the station notified the reporters that it was exercising the out in their contracts, effective December 1997. The reporters allege that this decision followed their threat to report the station to the FCC. The reporters are suing for breach of contract and an alleged violation of Florida's whistleblower statute.

The reporters were hired in November of 1996 to head the investigative team at WTVT Channel 13. Fox acquired the station in January 1997. According to the complaint filed by Wilson and Akre, shortly after beginning her employment at the station, Akre started work on the BGH story. Wilson joined her later and the two compiled a four-part series for February sweeps in which they reported on a controversy that is not new in America. Some scientists believe that BGH can be linked to cancer, and that it should not be used in dairy cows because it makes the milk supply dangerous. Canada, New Zealand, and most European countries do not approve of the drug's use. The hormone has, however, been approved for use in animals by the Food and Drug Administration.

The Akre/Wilson report also pointed out that while Florida supermarkets had asked dairy farmers not to use the hormone until it gained wider public acceptance, the supermarkets had done nothing to enforce that request.

After the station paid for ads promoting the story, attorney John Walsh of Cadwalader, Wickersham & Taft contacted the station on behalf of the Monsanto Company to complain about the accuracy and fairness of the report. The story was pulled, a tug of war between Fox station lawyers, station editors, and the reporters ensued, during which time, according to the reporters' complaint, the story was rewritten 73 times over 9 months. The culmination of the conflict led to the reporters' suspension, as the two sides could not agree on a version of the story to air. Fox released a statement to the press in which it said that "[t]he station ended the employment of the Wilson/Akre team when it became apparent that their journalistic differences could not be resolved despite the station's extraordinary efforts to complete this story."

The reporters allege in their complaint that they were asked by the station to add demonstrably false information to their report in contravention of the Federal Communications Act and FCC regulations. Fox categorically denied this accusation in its press release, saying that "the reporters were not willing to be objective in the story nor accept editorial oversight and news counsel." The reporters allege that it was their threat to go to the FCC to complain about the station's handling of the story that prompted their termination. Such a retaliatory firing, the reporters assert, violates the state's whistleblower law. The station contends that the reporters did not threaten to complain to the FCC until after they received notification that the station was exercising the outs in their employment agreements.

In their complaint, the reporters further allege that they fulfilled their duties under their employment contracts and that their refusal to "participate in the preparation and broadcast of the BGH news report containing false or misleading information is not reasonable or valid and cannot predicate a charge of misconduct or insubordination within the meaning" of their contract. Therefore, they urge the court to clarify both parties' rights under the employment contract. The two ask that the court order them reinstated or that Fox pay them about $125,000, which is the amount that they stood to earn in the second year of their contract.

This lawsuit has its own web site: www.foxbghsuit.com.