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Reporting Developments Through April 29, 2005

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Florida Supreme Court Confirms That Misappropriation Statute Does Not Apply to "Perfect Storm"

By Gregg D. Thomas and Deanna K. Shullman

The Florida Supreme Court has cleared the way for the Eleventh Circuit to affirm summary judgment in favor of Warner Bros. and other defendants in a case arising out of the motion picture "The Perfect Storm." *Tyne, et al. v. Time Warner Entertainment Co., L.P. d/b/a Warner Bros. Pictures, et al.*, Case No. SC03-1251, 2005 WL 914193 (Fla. Apr. 21, 2005) (Wells, J.). The state's highest court reviewed the case on certified question of state law from the federal appeals court.

Background

In 1997, Sebastian Junger authored the best-selling book "The Perfect Storm." The book recounts the unprecedented convergence of meteorological forces into a massive storm off the coast of New England in October 1991. Among the hugely powerful storm's causalities: a sword-fishing boat – known as the *Andrea Gail* – and her six-man crew, who were caught in the storm and lost at sea. Warner Bros. purchased the rights to Junger's best-selling book, and in June 2000 released the movie by the same name. The opening scene of the movie proclaims that the film is "based on a true story." The closing credits explain that the movie is, in part, fiction.

Applying the term "commercial purpose" to a movie or other expressive work "raise[s] a fundamental constitutional concern" because such works are clearly entitled to First Amendment protection under the law.

After the movie's release, a storm of controversy ensued. Children and ex-wives of two of the *Andrea Gail's* lost crewmembers and one former crewmember sued Warner Bros and others involved in the production of the movie. The plaintiffs objected to their own depictions in the movie as well as the depictions of decedents Bill Tyne, the ship's captain, and Dale Murphy, a crewmember. They claimed that the movie, while based on a true story, contained some fictional elements, including characters, dialogue, and events.

The plaintiffs claimed the movie commercially misappropriated their names and invaded their privacy by depicting them without their permission and without compensating them. They filed their original complaint in August 2000, in the wake of the film's release, and sought in excess of $10 million in damages, plus punitive damages.

The plaintiffs based their claims on three theories: (1) Florida's commercial misappropriation statute; (2) common law false light invasion of privacy; and (3) common law public disclosure of private facts invasion of privacy. On May 9, 2002, Judge Anne C. Conway of the Middle District of Florida granted summary judgment on all counts in Warner Bros.' favor and awarded Warner Bros. its costs in defending the action. *Tyne, et al. v. Time Warner Entertainment Co., L.P. d/b/a Warner Bros. Pictures, et al.*, 204 F. Supp. 2d 1338 (M.D. Fla. 2002). The plaintiffs appealed the court's ruling on the commercial misappropriation and false light claims.

Fourteen months later, the Eleventh Circuit affirmed summary judgment on the false light claim but asked the Florida Supreme Court to determine whether Florida's commercial misappropriation statute, Section 540.08, applies to the film. *Tyne, et al. v. Time Warner Entertainment Co., L.P. d/b/a Warner Bros. Pictures, et al.*, 336 F.3d 1286 (11th Cir. 2003).

Florida's commercial misappropriation statute prohibits the use of a person's name or likeness "for purposes of trade or for any commercial or advertising purpose" without the person's consent. *See* Fla. Stat. § 540.08 (2000). The Florida Supreme Court heard oral argument on the Section 540.08 claim on February 4, 2004.

Commercial or Advertising Purpose?

Rephrasing the certified question, the Florida Supreme Court examined whether the statutory phrase "for purposes of trade or for any commercial or advertising purpose" includes publications which do not directly promote a product or service. The Court held that it does not. Justice Charles T. Wells wrote the opinion for the Court. Justice R. Fred Lewis dissented without opinion.

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Florida Supreme Court Confirms That Misappropriation Statute Does Not Apply to "Perfect Storm"

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In determining that the statute does not apply, the court relied heavily on a 1981 decision of the Fourth District Court of Appeal, *Loft v. Fuller*, 408 So.2d 619 (Fla. 4th DCA 1981). In *Loft*, the wife and children of a deceased airline pilot brought an action for violation of Section 540.08 against the publisher of a book that chronicled sightings of the airline pilot's ghost in the aftermath of the 1972 crash that killed him.

The Fourth District held that the statute did not apply to the book because the pilot's name was not used to "directly promote" a product or service of the book's author or publisher. According to the *Loft* Court, the publication of someone's name is actionable under the statute not simply because it is included in a publication that is sold for profit but because of the way the use of the name associates the person with something else.

The state appellate court further explained that the publication of a book "does not amount to the kind of commercial exploitation prohibited by the statute," and to hold otherwise would "result in substantial confrontation between the statute and the First Amendment." *Loft*, 408 So. 2d at 622-33.

The Florida Supreme Court agreed. Noting that in the more than twenty years since *Loft* was decided no court had ever questioned its logic, the Court detailed the Florida state and federal courts' consistent refusal to apply the statute to songs, videos, and other expressive works. *Tyne*, 2005 WL 914193 at *3-4.

The Florida Supreme Court further noted that since the statute was enacted – in 1967 – the Legislature had never altered its substantive language. *Id.* at *5. Approving *Loft*, the Florida Supreme Court held "the term 'commercial purpose' as used in section 540.08(1) does not apply to publications, including motion pictures, which do not directly promote a product or service." *Id.* at *7.

The Court further rejected plaintiffs/appellants' argument that to exclude publications from the purview of Section 540.08 would render two of its exemptions superfluous. The statute provides an exception for the use of a person's name or likeness "as part of any bona fide news report or presentation having a current and legitimate public interest" (540.08(3)(a)) or "in connection with the resale or other distribution of literary, musical, or artistic productions" where the person consented to the initial use (540.08(3)(b)). Fla. Stat. § 540.08(3)(a) – (b).

Citing specific examples from case law under the statute, the Court held "the newsworthiness exemption serve[s] an entirely practical, nonredundant function." *Tyne*, 2005 WL 914193 at *5. The Court further held that the resale exemption "permits retailers and other distributors of artistic works to promote and advertise their products and establishments by using the names and likenesses of the artists and celebrities whose work they are selling." *Id.*

Finally, the Florida Supreme Court held that applying the term "commercial purpose" to a movie or other expressive work "raise[s] a fundamental constitutional concern" because such works are clearly entitled to First Amendment protection under the law. *Id.* at *6-7 (citing *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501-02 (1952) and several other state and federal opinions that recognize that motion pictures are noncommercial expressive works entitled to First Amendment protection).

The Court noted that its construction of Section 540.08 to exclude such works adheres to the Court's obligation to construe statutes in such a way as to avoid confrontation with the First Amendment. *Id*. at *7.

The case will now head back to the Eleventh Circuit for final determination. It is expected that the federal appellate court, upon review of the Florida Supreme Court's opinion defining the scope of the statute, will affirm summary judgment in favor of Warner Bros. and the other defendants on the Section 540.08 claim, which will provide full resolution of the lawsuit in Warner Bros.' favor.

Gregg D. Thomas is a partner in the Tampa office of Holland & Knight LLP. Deanna K. Shullman is an associate in the Ft. Lauderdale office of Holland & Knight LLP. Along with partner James J. McGuire and associate Rachel E. Fugate, Holland & Knight LLP represented all three defendants, Time Warner Entertainment Co., L.P., d/b/a Warner Bros. Pictures, Baltimore/Spring Creek Pictures, L.L.C., and Radiant Productions, Inc.

N.Y. Appellate Division Affirms Dismissal of Libel-in-Fiction Claim Against *Primary Colors*

By Linda Steinman and Elizabeth A. McNamara

Over eight years ago, Plaintiff Daria-Carter Clark sued Joe Klein and Random House alleging a libel-in-fiction claim arising out of the novel *Primary Colors*. Carter-Clark asserted that the book was widely perceived as a roman a clef, and that she was recognizable as the librarian depicted in the book's opening chapter. In an opinion dated April 21, 2005, the New York Appellate Division, First Department affirmed the lower court's decision granting summary judgment to the defendants. *Daria Carter-Clark v. Random House, Inc. and Joseph Klein*, 2005 N.Y. App. Div. LEXIS 4202 (1st Dept. Apr. 21, 2005).

Background

Primary Colors, written by Joe Klein ("Klein") and originally published under the name "Anonymous," was released in 1996 and spent twenty-five weeks on the *New York Times* hardcover bestseller list. Several of the characters and events in the novel were inspired by people and events drawn from the 1992 presidential campaign.

Most particularly, the candidate Jack Stanton and his wife, Susan, were plainly inspired by Bill and Hillary Clinton. While the book was clearly based on the campaign, it was subtitled "A Novel of Politics," and included a prominent "Author's Note" that read:

> Several well-known people — journalists, mostly - make cameo appearances in these pages, but this is a work of fiction and the usual rules apply. None of the other characters are real. None of these events ever happened.

The book's storyline combined elements of political satire, comedy of manners, and raucous farce to create an exaggerated and fictional world far divorced from the actual campaign.

Carter-Clark's libel action emanated from the first chapter of *Primary Colors*, in which Jack Stanton visits a Harlem Library and attends a literacy class taught by "Ms. Baum." At the close of the chapter, Stanton emerges from a hotel room with Ms. Baum, buttoning his shirt.

During his 1992 Presidential campaign, then-Governor Clinton visited the Center for Reading & Writing program housed at the Harlem Branch of the New York Public Library and attended a literary class there. Although Carter-Clark was not the teacher of the class, she was the Site Advisor of the literacy program at the branch and acted as one of the hosts during Clinton's visit.

Joe Klein was present during Clinton's visit to the Harlem branch. When Clinton was elected President, Carter-Clark was invited to the inauguration as one of the "Faces of Hope" Clinton had met on the campaign trail. Based on these facts, Carter-Clark alleged that reasonable readers would associate the "Ms. Baum" character with her, and would think that she had engaged in an affair with Bill Clinton.

"Although the book was inspired by real-life personalities and events, it was still fiction, and must be analyzed as such in this libel suit."

Several witnesses – none of whom had read the full book – testified that there was gossip in the library system linking Carter-Clark with Ms. Baum.

The First Chapter of Primary Colors

A brief review of the first chapter is critical to understanding the Appellate Division's affirmance of the summary judgment dismissal. *Primary Colors* begins as the narrator Henry Burton describes Stanton's entourage "sweeping up into the library" with a female librarian, Ms. Baum, explaining her program to Stanton.

Ms. Baum, as Burton briefly describes her, is "middle-aged, pushing fifty, hair dyed auburn to blot the gray, unexceptional except for her legs, which were shocking, a gift from God." Burton wonders whether Stanton noticed her legs when he "reached out [and] steadied her" after she "missed a step" and "almost went down on the stair." Burton also questions the reason for Stanton's visit to Harlem, because this is "the serious money-bagging stage of the campaign." As they enter the library, Burton describes it as "a dark, solemn place — a WPA library" with tall oak

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N.Y. Appellate Division Affirms Dismissal of Libel-in-Fiction Claim Against *Primary Colors*

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bookshelves and a distinctive mural above. Ms. Baum introduces Stanton to the assembled group.

The emotional heart of the first chapter exists in two "speeches" given during the literacy class. The first involves the last student to read, "Dewayne Smith," who "weighed three hundred pounds easy and was a short-order chef." Dewayne tells how he got through school without anyone ever telling him he could not read and at graduation was humiliated when he received "a certificate of attendance." Stanton thanks Dewayne for his story and tells his own utterly improbable story about his "Uncle Charlie," a Medal of Honor winner who was unable to read.

The students respond enthusiastically to Stanton's story, and Burton marvels at Stanton's gift for connecting with his audience. The class ends and Ms. Baum pitches Stanton for more funding. Then everyone, including the librarian, follows Stanton back out to the street. Stanton asks Burton to show up at his hotel at 11 p.m. that night.

Burton goes to the hotel suite at the appointed time to find "a handful of pols in shirtsleeves" doing routine campaign tasks. At this point, Stanton emerges from his bedroom, buttoning up his shirt. To Burton's surprise, Stanton is followed by the librarian who taught the adult literacy class that afternoon. Ms. Baum departs from the hotel room and from the novel. Stanton explains to Burton, "Ms. Baum is on the regional board of the teachers union." This clears up for Burton the mystery of why Stanton "chose that particular library ... in Harlem" – namely, the quest for the endorsement of the teachers union.

Governor Clinton's Visit to the Harlem Branch

As discovery in the case established, plaintiff Carter-Clark was one of about 75 people who attended the event, and several others also testified that they themselves had been identified as the inspiration for Ms. Baum. While Carter-Clark claimed to have been one of the "hosts" of Clinton's visit, she conceded that the teacher who ran the adult literacy class visited by Clinton was *not* her but rather a woman with died reddish-blonde hair.

Further, she did not greet Clinton outside the library, did not walk up stairs from the street into the library with Clinton, and did not introduce Clinton – all of which occurred in the Novel. Carter-Clark also conceded that she was not a union official nor active in her union.

None of the tales told by Dwayne Smith or Stanton actually occurred during Clinton's visit. Carter-Clark – who is African American – also conceded that Ms. Baum is usually a Jewish name. In the face of these facts, Carter-Clark rested her claim primarily on the contention that she, like Ms. Baum, ran the adult literacy program, and was middle aged, pushing fifty, dyed her hair and had "exceptional" legs.

The Appellate Division's Decision

In a brief but forceful decision, the New York Appellate Division affirmed the lower court's decision granting summary judgment on two grounds. First, it held that Carter-Clark could not demonstrate that the Ms. Baum character was "of and concerning" her. As an independent ground, it further held that plaintiff had failed to demonstrate gross negligence on the part of Random House.

The Appellate Division began its decision by rejecting Carter-Clark's argument that, since the book was widely perceived as a roman a clef, a different legal analysis should apply in contrast to ordinary works of fiction. The court held that, "Although the book was inspired by real-life personalities and events, it was still fiction, and must be analyzed as such in this libel suit." In reaching this conclusion, the Appellate Division emphasized the sub-title of the book, the fact that it was "publicized as fiction and appear[ed] on the fiction best seller lists, and the contents of the book as a whole.

Relying closely on *Springer v. Viking Press*, 90 A. D.2d 315 (1982), aff'd 60 N.Y.2d 916 (1983), the Appellate Division then ruled that, "There has been no demonstration that the librarian character is 'of and concerning' plaintiff, i.e., that the description of the fictional character is so closely akin to her that a reader of the book, knowing the real person, would have no difficulty linking the two." The court labeled any similarities between Carter-Clark and Ms. Baum merely "superficial."

Finally, the court examined whether Carter-Clark had been able to demonstrate fault on the part of Ran-

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N.Y. Appellate Division Affirms Dismissal of Libel-in-Fiction Claim Against *Primary Colors*

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dom House. Carter-Clark had argued that Random House was negligent and/or grossly negligent in failing to make pointed inquiries of the author about the book's factual bases, given (1) the publisher's alleged understanding that the work was a roman a clef closely inspired by the 1992 campaign, (2) the fact that Random House's publicity allegedly underscored the close correlation between the book and the campaign; and (3) Random House's lack of knowledge of the author's identity and hence reliability.

In response, Random House argued that its editor had understood the work to be fictional and that no further inquiries of the author were necessary. The Appellate Division agreed, holding that, "In view of the relevant case law and the fact that the record demonstrates this book was a work of fiction . . . the court properly dismissed plaintiff's claim of negligence against Random House since, in dealing with a work of fiction, the publisher was not obligated to take any greater steps than it did (cf. *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 382-83 (1977), *cert denied*, 434 U.S. 969 (1977)).

This is one of the very few decisions to examine the contours of the fault requirement for a publisher in the context of a fictional work regarding a private figure.

Elizabeth A. McNamara, Linda Steinman and Greg Welch of Davis Wright Tremaine represented Random House and Joe Klein in this litigation. Plaintiff was represented by Sandra R. Schiff of the Law Offices of Regina Darby.

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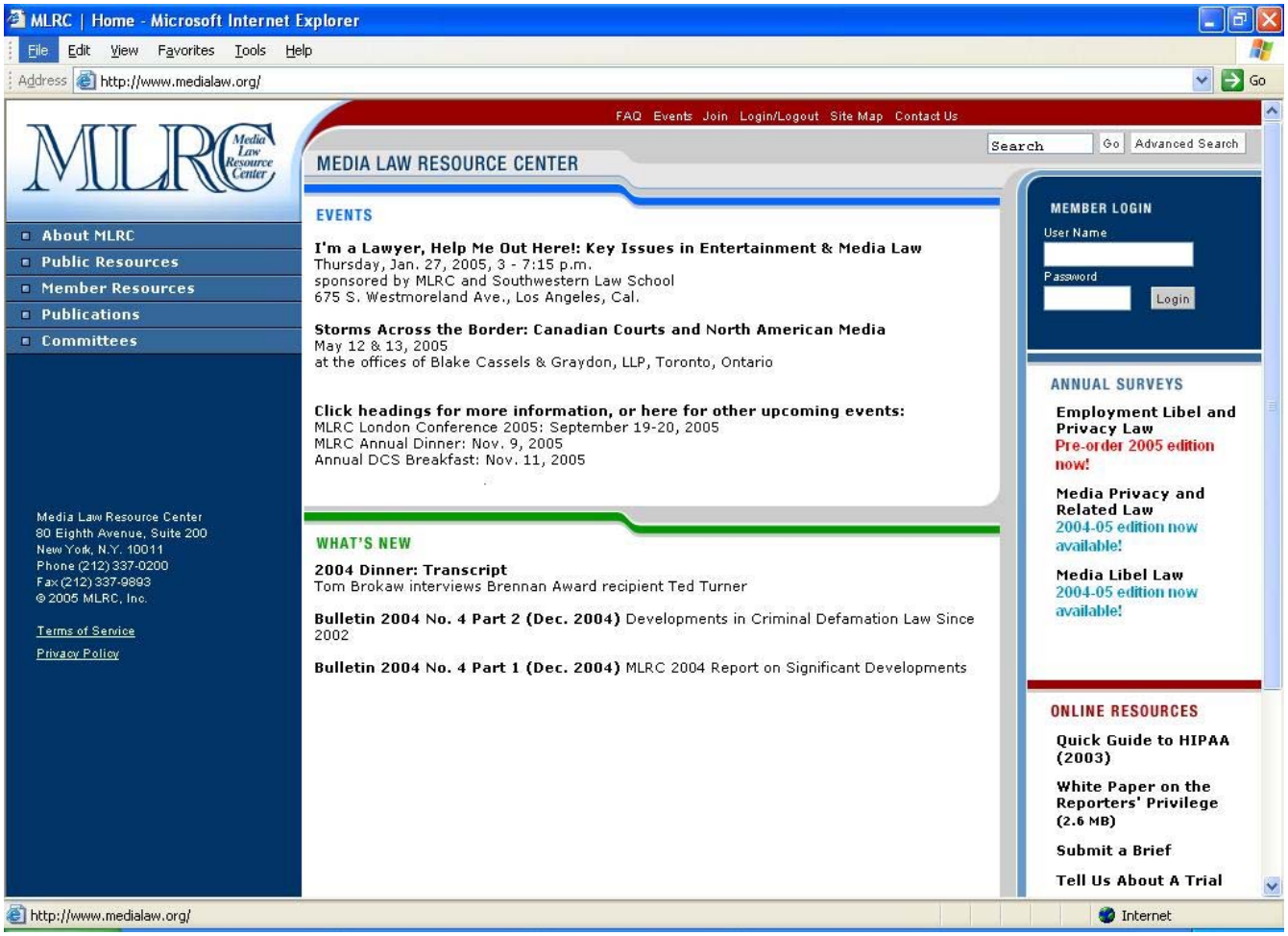

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California Appeals Court Allows Actress's Libel and False Light Claims Over Edited Comedy Sketch to Proceed

Anti-SLAPP Motion Denied

In an interesting decision on libel in fictional programming, a California appellate court held this month that a woman who played a brief role in a comedy sketch program had viable claims for libel and false light – at least to withstand an anti-SLAPP motion to strike – where the obviously fictitious sketch allegedly created the false impression that she was the type of actress "willing to engage in a simulated sex scene." *Burns v. MTV Networks Enterprises, Inc.*, No. BC307620, 2005 WL 775758 (Cal. App. Apr. 7, 2005) (unpublished).

Background

In March 2003, plaintiff appeared in a sketch on MTV's "Doggy Fizzle Televizzle," a comedy sketch and interview show hosted by rapper "Snoop Dogg." Plaintiff and a male actor portrayed a husband and wife in bed about to have sex when they are interrupted by their daughter bursting into the room. Snoop Dogg then appeared on screen to tell the audience that children are the ultimate form of birth control.

Plaintiff alleged that she had expressly refused a director's request that she do the scene lying on top of the male actor or in any other way that would suggest simulated sex or nudity. Instead, "she agreed to sit up on the bed with her back against the headboard next to the male actor with her legs positioned toward him, to hold the male actor's hand and to smile at him."

When plaintiff (and her 10-year-old son) saw the sketch on TV she was "shocked" to discover that she was digitalized in the sketch to make it appear as if she was naked and fondling the male actor's genitals.

Plaintiff sued MTV for libel, false light, breach of contract, fraud, misrepresentation and intentional infliction of emotional distress. MTV moved to strike the complaint under the California anti-SLAPP statute, Civil Code § 425.16, and the motion was denied in its entirety by Los Angeles Superior Court Judge Marvin Lager.

Appeals Court Decision

The appellate court affirmed in part and reversed in part. It ruled that the breach of contract and related fraud claims failed for lack of damages and evidence of intent to harm, and the allegations could not support a claim for severe emotional distress. But the court affirmed that plaintiff had established a probability of prevailing on her libel and false light claims to withstand the motion to strike.

> ***The factual assertion communicated by the scene was that plaintiff agreed to do a nude or simulated nude scene.***

Relying on plaintiff's own declaration describing what she agreed to do in the scene, the court ruled that she established that MTV deliberately placed her in a false light and libeled her by "portraying her as willing to engage in a simulated sex scene .... which is the type of scene that is just not done by certain types of actors and actresses."

The court brushed aside MTV's argument that there were no factual assertions about plaintiff in the fictional sketch. According to the court, the factual assertion communicated by the scene was that plaintiff agreed to do a nude or simulated nude scene. Moreover, this assertion would damage plaintiff professionally and she therefore had no need to plead or prove special damages.

MTV was represented by Melvin Avanzado of White O'Connor Curry & Avanzado. Plaintiff was represented by Ben Williams, Williams & O'Donnell.

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$3.7 Million Libel and False Light Verdict Reversed

News Website Published Sex Offender Records

By Jon Epstein and Robert D. Nelon

On April 1, 2005, the Oklahoma Court of Civil Appeals reversed a $3.7 million libel and false light judgment rendered against a newspaper and television station for making the state's sex offender registry available online. *Stewart v. The Oklahoma Publishing Co., et al.*, No. 100,099 (Okla. Ct. Civ. App. April 1, 2005).

Fortunately, the opinion was no April Fool's joke. The court determined that the defendants' website was immune from liability under § 230 of the Communications Decency Act and was privileged under state law to provide the public with access to Oklahoma's Sex Offender Registry.

Background

NewsOK was a joint website of The Oklahoma Publishing Co. (*The Oklahoman*) and Griffin Television OKC, L.L.C (KWTV) in Oklahoma City. From the time NewsOK.com went online in August 2001 until mid-February 2002, it made available information about registered sex offenders that was maintained by the Oklahoma Department of Corrections ("DOC").

The DOC had a website but at the time it had not yet developed software to make its sex offender registry available to the public. It supplied the sex offender information electronically to NewsOK, which uploaded the data onto its server. NewsOK did not edit the data except when asked to do so by the DOC between monthly e-mail updates of data.

The plaintiff claimed that he was defamed and placed in a false light because one of the sex offenders listed among the 4,500 entries in the DOC database – Ron Wesley Lyon – had registered his address as 351 South Ave. F in Collinsville, Oklahoma. Although that address belonged to Lyon's sister at the time he registered, she later sold the property to plaintiff and his wife in May 2001.

Lyon did not inform the DOC of any change of address, and the DOC did not update its sex offender records on Lyon until its annual verification process resulted in a new address for him in May 2002.

Three months before that update, in early February 2002, a resident of Collinsville, Donna Taylor, searched for registered sex offenders in her ZIP Code. The search revealed 13 names, including Lyon. Taylor, who did extensive online research about sex offenders, got additional information about Lyon, including a full-color photograph, from the DOC's main website (that did not include the separate Sex Offender Registry at that time).

Later that month, Taylor took the photograph to several of her neighbors and told them that Lyon was registered at an address in the neighborhood. Taylor also reported to city code enforcement officials that the house at which Lyon registered did not have house numbers as required by city ordinance. As a result, a police officer visited the house and asked Stewart's wife whether Ron Wesley Lyon lived there. She told the officer he did not and that she did not know Lyon. The officer instructed the Stewarts to put visible numbers on their house and did not take any further action in the matter.

Plaintiff Won at Trial

Stewart and his wife testified at trial that the visit from the police officer greatly upset them. They said the officer indicated that a neighbor had gotten the information about Lyon from the Internet, and they were distressed to think that the world at large might think Stewart, rather than Lyon, was a sex offender.

However, there was no evidence at trial that anyone other than Taylor saw the information about Lyon on NewsOK's site or made any immediate connection between Lyon and the Stewart's house. Neither Taylor nor any of the seven neighbors with whom Taylor shared the information about Lyon knew Stewart.

Despite the lack of evidence of actual reputational harm and the defendants' arguments to the jury that the DOC sex offender information about Lyon was not "of and concerning" Stewart, Stewart successfully argued to the jury that he worried that people might think he was a sex offender.

His psychiatrist was allowed to testify that while Stewart had an "over-valued belief" that people thought nega-

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$3.7 Million Libel and False Light Verdict Reversed

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tively about him, he still suffered from depression as a result. The plaintiff's evidence with respect to the defendants' alleged fault was two-pronged.

First, he claimed, supported to some extent by the testimony of DOC officials and indirectly from previously-published articles in *The Daily Oklahoman*, that the defendants knew or should have known generally that information about sex offenders is often not current, because the statutory verification process employed by law enforcement cannot keep up with the current addresses of offenders.

He then presented testimony of Lisa Jones, a former television anchor. Jones, who was permitted to testify over the defendants' *Daubert* objection, said that she did not believe that NewsOK should make information about sex offenders available online because the government data is by its very nature always out of date.

She conceded that the information was a public record available for inspection and copying under both the sex offender registry statutes and the Oklahoma Open Records Act, but she said it should be the DOC's, not the media's, job to make the information public. At the very least, Jones said, if NewsOK was going to make the sex offender registry available online, it should have put some kind of disclaimer on the website that some of the information was likely out of date.

Privilege Defenses Were Rejected

The defendants argued in a motion to dismiss, a motion for summary judgment, and at trial that under both Oklahoma common law and by statute (Okla. Stat. tit. 12, § 1443.1), they had an absolute fair-report privilege to make the DOC sex offender data available to the public. The evidence at trial was undisputed that the information about Ron Wesley Lyon accessible through NewsOK.com was exactly the same as that maintained by the DOC—in February 2002, the verified registered address for Lyon was 351 South Ave. F in Collinsville.

There was no evidence at trial that either DOC officials or NewsOK staff were aware in February 2002 that the DOC data about Ron Wesley Lyon's address was not current. The defendants objected to Jones' opinion about liability on the grounds, among others, that the media have no duty to verify the accuracy or currency of the government data, nor any independent duty to warn the public about any perceived inaccuracies, and that they were privileged to publish the information even if they knew that some of the information was out of date.

The trial court refused to instruct on the privilege defense, saying that he did not think it had any bearing on the case.

The defendants also asserted in dispositive motions and at trial that they were immune from liability under §230 of the Communications Decency Act (47 U.S.C. § 230) because NewsOK, as an interactive computer service or access software provider, could not be liable for a publication tort where the content of the information was supplied by a third party, in this case the DOC. The trial court rejected the defendants' requested instruction on CDA immunity and instead gave a nearly incomprehensible instruction requested by the plaintiff.

On September 18, 2003, Dennis Stewart prevailed after a nine-day trial on defamation and false light claims based on NewsOK's decision to make public data from the Oklahoma Department of Correction's Sex Offender Registry available via its website. *Stewart v. The Oklahoma Publishing Co., et al.*, No. CJ-02-490 (Dist. Ct., Creek County, Oklahoma).

The jury awarded Stewart $200,000 in compensatory damages and $3.5 million in punitive damages.

Court of Appeal Reverses

The Oklahoma Court of Civil Appeals reversed, finding that NewsOK merely republished a public government document and that "such a publication is privileged and immune from liability." The court rejected as irrelevant plaintiff's evidence that NewsOK should have known it published outdated information, concluding that the trial court should have directed a verdict in defendants' favor.

The court then held that even if the privilege did not apply, the defendants were immune from liability under § 230. The Court held that a website like NewsOK is an "interactive computer service" under §230(f)(2) of the Act.

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$3.7 Million Libel and False Light Verdict Reversed

(Continued from page 14)

The court recognized that the Act provides immunity from liability for service providers or users when an "information content provider" like the DOC creates or develops information and furnishes it to the service provider under circumstances where a "reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other 'interactive computer service.'" *Batzel v. Smith*, 333 F.3d 1018, 1034 (9th Cir. 2003).

The court determined that there was no doubt that the DOC's registry was provided to NewsOK for publication on the Internet. In fact, the Legislature required that the DOC registry be made public.

The plaintiff has until April 21 to petition the Oklahoma Supreme Court for certiorari.

Robert D. Nelon and Jon Epstein of Hall, Estill, Hardwick, Gable, Golden & Nelson, Oklahoma City, Oklahoma represented the defendants. The plaintiff was represented by Douglas E. Stall of Latham, Stall, Wagner, Steele & Lehman, Tulsa, Oklahoma, and Steven E. Chlouber of Fuller, Chlouber & Frizzell, Tulsa, Oklahoma.

Trial Judge Dismisses Punitive Damage Claim in *Pensacola News Journal* Case

$18.3 Million Compensatory Award Will Be Appealed

After two mistrials on the issue, a Florida judge has dismissed a punitive damages claim in a false light case against the *Pensacola News-Journal*, while upholding a jury's award of $18.28 million in compensatory damages. *Anderson Columbia Co. v. Pensacola News Journal*, No. 2001 CA 001728 (Fla. Cir. Ct., Escambia County order April 7, 2005) (granting defendants' motion to dismiss plaintiff's claim for punitive damages). (Jones, J.).

After the ruling, the newspaper announced that it would appeal the compensatory award, which is apparently the first for "false light" in Florida.

"Anderson's violation of the court's order and instructions is both unjustified and inexcusable."

Background

The suit stemmed from a series of articles in late 1998 and early 1999 that explored paving company Anderson Columbia's environmental record and state contracts. Although the company's libel claims were eventually dismissed, a personal false light claim by company owner Joe Anderson, Jr. survived.

One article included several paragraphs on a 1988 hunting accident in which Anderson, shooting at a deer, accidentally shot and killed his wife. Anderson claimed that the article placed him in a false light by making it appear that he had intentionally killed his wife. (The text of this section appears in *MLRC MediaLawLetter,* Dec. 2003, at 13.)

After a nine-day trial and five hours of deliberation, in December 2003 the six member jury awarded $18.28 million in compensatory damages. But the jury was unable to agree on punitives, leading Circuit Judge Michael Jones to declare a mistrial on that issue. *See MLRC MediaLawLetter*, Dec. 2003, at 11.

A second attempt to try the punitive damages issue in June 2004 also ended in a mistrial when two jurors were dismissed for failing to disclose relevant information.

After the second mistrial, the newspaper asked Jones to reconsider his denial of the motions for directed verdict and judgment not withstanding the verdict that he had denied after the compensatory award in the initial trial.

Punitive Damages Claim Dismissed

The newspaper also moved to dismiss the punitive damages claim on the ground that the plaintiff had violated

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Trial Judge Dismisses Punitive Damage Claim in Pensacola News Journal Case

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a court order by improperly using the names of individuals questioned in pretrial polling by the defense. During the compensatory damages trial, plaintiff claimed that a "push poll" was underway, the asserted purpose of which was to taint the seated jury. In response to the allegation, the court had ordered that the defense reveal the identities of the people questioned in a pre-trial poll.

The court found that no polling was taking place during the trial, and found that no potential jurors were contacted during the pretrial survey. It then ordered the plaintiff to return the list. But instead of returning the list, plaintiff used it to contact the poll participants to gather evidence for a separate slander suit based on the questions used in the poll. *See Anderson v. Gannett Co., Inc*. No. 2004 CA 001351 (Fla. Cir. Ct., Escambia County filed July 13, 2004).

Plaintiff and his attorneys admitted violating the court order during argument of the motions on March 29, but urged the court to impose a fine rather than dismiss the punitive damages claim.

On April 7, Judge Jones denied the renewed post-trial motions regarding the compensatory award, but granted the motion to dismiss the punitive claim. "Anderson's violation of the court's order and instructions is both unjustified and inexcusable," Jones wrote in his ruling.

The *Pensacola News Journal* is represented by Dennis Larry of Clark, Partington, Hart, Larry, Bond & Stackhouse, Bob Kerrigan of Kerrigan, Estess, Rankin & McLeod, LLP, both in Pensacola, and Robert Bernius of Nixon Peabody LLP in Washington, DC. Anderson is represented by Willie Gary and Madison McClellan of Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, in Stuart, Fla.

Second Circuit: Proof of Falsity in Defamation Action Must Be "Clear, Convincing"

In a non-media libel case, the Second Circuit Court of Appeals affirmed a $610,000 damage award, but in doing so held that a public figure plaintiff must prove falsity in a defamation action by clear and convincing evidence under New York law, providing guidance in an area of law that New York State's highest court has yet to address. *DiBella v. Hopkins*, No. 03-7012, 03-9095, 2005 WL 752555 (2d Cir. Apr. 4, 2005) (Cardamone, McLaughlin, and Wesley, JJ.).

Plaintiff Lou DiBella, a former HBO executive who now runs an independent boxing promotions company, brought a libel suit against Bernard Hopkins, the world middleweight boxing champion, over statements Hopkins made to an online boxing magazine and later repeated to three other media outlets. In statements to a reporter for MaxBoxing.com, Hopkins complained that he had to secretly pay DiBella to participate in matches televised on HBO even while DiBella was employed by HBO.

Hopkins repeated the allegations to the *Boston Globe*, *Philadelphia Daily News* and ESPN radio.

The claim went to trial in the Southern District of New York in November 2002. The jury found that the statements Hopkins made to MaxBoxing.com were defamatory and awarded DiBella $110,000 in compensatory damages in $500,000 in punitive damages. The jury rejected plaintiff's claims over the statements made to the newspapers and sports radio station.

Both sides appealed. Seeking a new trial on the rejected libel claims, plaintiff argued that the trial court erred in instructing the jury that it was required to find falsity by "clear and convincing evidence," contending that the standard for falsity in defamation actions under New York law was by "a preponderance of the evidence."

Defendant appealed, arguing there was insufficient evidence of actual malice and challenging several evidentiary rulings.

"Clear and Convincing" Evidence of Falsity

Recognizing that New York's highest court has yet to address the issue of the standard of proof required for falsity in defamation actions brought by public figures, the Second Circuit looked to the decisions of the state's intermediate appellate courts, as well as opinions from other jurisdictions.

The Court found that with the exception of the Fourth Department, which has not ruled on the issue, New York's intermediate appellate courts have "uniformly stated that a public figure in New York must prove falsity by clear and convincing evidence" (citations omitted).

Although noting that the courts at times stated their conclusions in dicta and absent any relevant authority, the Second Circuit found that such cases were nonetheless "persuasive evidence," as well as "helpful indicators" of how the Court of Appeals would rule.

The Court also noted that most other state and federal cases require clear and convincing evidence of falsity. Although some of these cases also stated the standard in dicta and absent "authoritative citation," the Second Circuit found that these decisions would nonetheless be "taken into account" by the Court of Appeals in deciding the standard under New York law.

Finally, the court looked to a number of secondary sources – such as the New York Pattern Jury Instructions and scholarly writing – in concluding that "significant and persuasive evidence" justified its holding that the New York Court of Appeals would require "clear and convincing" evidence of falsity in defamation actions brought by public figures.

Sufficient Evidence of Actual Malice

The Court went on to affirm the damages award, holding there was sufficient evidence of actual malice where plaintiff and his witnesses "painted a completely different picture" of the parties' dealings. Plaintiff's evidence showed that the payments were not secret, were not made while plaintiff was still employed by HBO, and were not designed to get defendant's fights televised.

The jury was therefore entitled to find that "DiBella and his witnesses were credible and that Hopkins was not."

The court also went on to reject defendant's appeal of evidentiary issues and affirmed that the punitive damage award was supported by the finding of actual malice.

Plaintiff was represented by Judd Burstein, Law Office of Judd Burstein, P.C., New York. Defendant was represented by Stephen A. Cozen of Cozen O'Connor, P.C., Philadelphia.

Minnesota Appeals Court Affirms Dismissal of Libel Case Under Anti-SLAPP Statute

By Eric Jorstad

In a non-media case, the Minnesota Court of Appeals recently affirmed dismissal of a defamation claim under the Minnesota anti-SLAPP statute, called Minnesota's participation-in-government statute, Minn. Stat. secs. 554.01 - .05 (2004). *Marchant Investment & Management Co. v. St. Anthony West Neighborhood Org., Inc.*, 2005 WL 757612 (Minn. Ct. App. Apr. 5, 2005).

In *Marchant Investment*, a real estate developer sued a neighborhood organization concerning statements in a letter from the organization to the city planning department opposing a proposed project. The letter noted "countless" meetings where the developer "refused to listen to our concerns."

On a motion to dismiss under Rule 12 and the anti-SLAPP statute, the court held that the developer's allegations did not clearly and convincingly demonstrate that the organization's statements declare or imply a provably false assertion of defamatory fact. The court also dismissed all non-defamation claims (tortious interference, etc.) because they were not viable without a defamation claim.

The anti-SLAPP statute has also been applied to claims against the media, *see, e.g., Special Force Ministries v. WCCO Television,* 576 N.W.2d 746 (Minn. 1998). This recent case is an example of how the Minnesota anti-SLAPP statute can be used at the earliest stage of litigation, in the right case, to dismiss a defamation-based complaint under its standard of "clear and convincing" evidence of an actionable tort.

Utah Supreme Court Holds News Reporter Is a Private Figure

By Sean Reyes

The Utah Supreme Court reinstated a libel case brought by a television reporter against her former station/employer, holding that plaintiff was not a limited or all purpose public figure notwithstanding her notoriety. *Wayment v. Clear Channel Broadcasting, Inc.*, No. 20030854, 2005 WL 858167 (Apr. 15, 2005) (Durham, CJ.).

Although the decision arises out of an employment dispute, it raises important issues for the media in reporting on the termination of high-profile employees.

Background

Plaintiff was asked to resign from KTVX in Salt Lake City because of a conflict between her duties as a health reporter and her private support of a non-profit pediatric cancer program. She sued the local television station regarding statements allegedly made by the station news director and assistant director (also named as defendants) about the reasons for plaintiff's departure from the station. Plaintiff alleged that after her departure the news directors falsely accused her of improperly taking money from a cancer center and "using her reporter status in an attempt to create a foundation."

Notwithstanding her local notoriety and fame, the Utah Supreme Court found that she was not an all-purpose public figure.

The district court granted summary judgment as to all defendants, holding that 1) plaintiff was a public figure who failed to demonstrate evidence of actual malice; 2) plaintiff lacked any direct evidence that the news director made any of the disputed statements; and 3) the alleged statements made by the assistant director were not the same ones plaintiff pled in her complaint.

Utah Supreme Court Decision

On appeal, the Utah Supreme Court affirmed the dismissal of claims against the news director based on the absence of any evidence linking him to the challenged statements other than unidentified rumors and double or triple hearsay.

In so doing, the court also rejected plaintiff's argument that the director's alleged failure to quash newsroom rumors about her departure amounted to a hearsay exception that exposed him to liability. As to the assistant news director, the court reversed the district court based on two points.

First, the court found that the alleged statements made by the assistant director were close enough in substance for plaintiff to maintain her defamation claim. (Of the numerous witnesses deposed by plaintiff, only one, a former cameraman for the station, testified that he actually heard the assistant director make some of the alleged statements.)

Second, and most importantly, the court found that plaintiff was not a public figure and, therefore, had no need to demonstrate actual malice. Finally, the court rejected defendants' alternative argument for dismissal on the grounds that the alleged statements of the assistant director were protected by a qualified privilege protecting employer-employee communications. While the court found the privilege applied to the alleged statements, it also held that the plaintiff had demonstrated the requisite common-law malice to overcome the qualified privilege.

Interestingly, while recognizing the distinction between actual malice and common-law malice, the court found that evidence of actual malice sufficed to prove common-law malice as well.

Reporter Not a Public Figure

In its public figure analysis, the court found that plaintiff was not a limited or all-purpose public figure. As to the former, defendants argued that plaintiff's public work in assisting children with cancer and whether that work constituted a conflict with her news reporting was a public controversy. But taking a narrow view of the public controversy component of the public figure inquiry, the Court reasoned that there was "no public debate" over plaintiff's activities prior to the litigation.

The Court's ruling on all-purpose public figure status may be of greatest interest to the industry and signals a continuing trend of hostility by Utah courts towards the constitutional rights of the news media.

In addressing the issue of whether plaintiff was an all-purpose public figure, the Utah Supreme Court recognized the following facts about the plaintiff: she had been a health

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Utah Supreme Court Holds News Reporter Is a Private Figure

(Continued from page 19)

reporter in Utah for the local affiliate of one of the four major broadcast companies, during her three years in that role she broadcasted more than a thousand stories and a number of special reports in Utah and surrounding states, she was featured in hundreds of station promotional spots, she had reported live from local health-related special events such as the Utah AIDS Foundation Oscar Night Gala, she had participated in and was master of ceremonies for high profile public charitable events, she served on the board of the Candlelighters for Childhood Cancer, local newspapers had covered the filing of her lawsuit, and she even referred to herself as a "local celebrity."

Notwithstanding her local notoriety and fame, the Utah Supreme Court found that she was not an all-purpose public figure. The court cited language from *Gertz* that a court "must not lightly assume that a citizen's participation in community and professional affairs render[s] him a public figure for all purposes." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

Likewise, the court quoted *Waldbaum* for the proposition that "only a well-known celebrity, his name a household word" could appropriately be deemed an all-purpose public figure and that "the public recognizes such a person and follows his words and deeds." *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1294 (D.C. Cir. 1980). As examples of "true" public figures, the Utah Supreme Court referenced nationally renowned individuals such as Clint Eastwood, Wayne Newton and William F. Buckley, Jr.

The Court's holding in *Wayment* sets an extremely high threshold for establishing all-purpose public figure status in Utah and narrows considerably the pool of individuals likely to be found a public figure for purposes of defamation and libel claims.

The court in *Wayment*, again citing to *Gertz* and *Waldbaum*, suggested that a defamation defendant alleging that the plaintiff is a general purpose public figure, must prove by "clear evidence" the plaintiff's status through means such as "statistical surveys ... that concern the plaintiff's name recognition, previous coverage of plaintiff in the press, whether others in fact alter or reevaluate their conduct or ideas in light of plaintiff's actions, and whether the plaintiff has successfully been able to shun the attention that the public has given her."

Sean Reyes and Randy Dryer of Parsons Behle & Latimer in Salt Lake City, Utah represented Clear Channel in this case. Plaintiff was represented by Elizabeth King Burgess, Don L. Davis, Robert C. Alden, and Derek L. Davis of Salt Lake City.

Michigan Appeals Court Affirms Summary Judgment for Rapper in False Light Action

A Michigan appellate court affirmed summary judgment for rapper Marshall Mathers III, a/k/a "Eminem" in a false light action stemming from the lyrics of his song "Brain Damage" as well as statements Mathers subsequently made in *Rolling Stone* magazine. *Bailey v. Mathers*, No. 252123, 2005 WL 857242 (Mich. Ct. App. Apr. 14, 2005) (Whitbeck, C.J. and Zahra, Owens, JJ.).

Among the lyrics at issue in Mathers' song were those stating:

> I was harassed daily by this fat kid named D'Angelo Bailey …so everyday he'd shove me in the lockers … One day he come into the bathroom while I was pissin/ And he had me in the position to beat me into submission/ He banged my head against the urinal til he broke my nose/ Soaked my clothes in blood, grabbed me and choked my throat.

The song went onto describe how Mathers later got back at Bailey by beating him with a broom until he "broke the wood." In *Rolling Stone*, Mathers stated that "[e]verything in the song is true."

Bailey brought an action for two counts of false light invasion of privacy. The trial court granted Mathers' motion for summary judgment. *See* 2003 WL 22410088, 31 Media L. Rep. 2575 (Mich. Cir. Ct. Oct 17, 2003).

Summarizing its conclusions in rhyming verse, the trial court found that the allegations were substantially true where plaintiff admitted to being "a bully" in school and, alternatively, that the lyrics were hyperbole.

> Bailey also admitted he was a bully in youth Which makes what Marshall said substantial truth This doctrine is a defense well known And renders Bailey's case substantially blown. The lyrics are stories no one would take as fact They're an exaggeration of a childish act Any reasonable person could clearly see That the lyrics could only be hyperbole.

Id. at *5 n. 11.

Court of Appeals Decision

On appeal, the court recognized that "[t]he tort of false-light invasion of privacy cannot succeed if the challenged statements are true." Under the doctrine of substantial truth, the court is required to examine the overall "sting" of the publication in determining falsity, in that "minor inaccuracies in expression are immaterial if the literal truth produces the same effect."

Turning to the lyrics at issue, the court found that although a factual dispute may have existed over whether the incident involving the parties in the bathroom had actually occurred, "it was the characterization of plaintiff as a bully, rather than the specific factual statements about the bathroom assault," that constituted the "sting" of the story.

The literal truth of the parties' experiences resulted in the same sting as the song lyrics.

When putting the lyrics in context, the court found that reasonable listeners would have been able to conclude that the song should not be taken literally, and that adequate evidence – including the plaintiff's own admissions – existed to substantiate defendant's claims that plaintiff had bullied him even if the incidents described in the song had not occurred.

Holding that the literal truth of the parties' experiences resulted in the same sting as the song lyrics, the appellate court affirmed the trial court's grant of summary judgment.

Plaintiff was represented by Byron Nolan of Detroit, Michigan. Defendant was represented by Mary Massaron Ross of Detroit, Michigan.

Any developments you think other MLRC members should know about?

Call us, or send us a note.

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Virginia Supreme Court Throws Out Libel Award Over Campaign Ads

The Virginia Supreme Court reversed a jury damage award to a public official over negative campaign advertisements. *Jordan v. Kollman*, No. 041885, 041861, 2005 WL 925692 (Va. April 22, 2005) (Agee, J.). The Court found that there was no evidence of actual malice where the defendant relied on a newspaper report to form his criticism of plaintiff. Indeed, the Court found that the reliance on the newspaper report showed defendant had a "good faith" belief in his charges.

Plaintiff is the former mayor of Colonial Heights, Virginia. In 2002, the defendant, a local resident, bought two advertisements in the Sunday edition of *The Progress Index*, two days before local elections. Defendant's ads criticized plaintiff and other local officials for having "voted to approve construction of over 200 ... federally subsidized, low income rentals ... certainly the worst Council action in our City's history."

Plaintiff was narrowly reelected to the city council, but was replaced as Mayor. He sued defendant for libel, arguing the ads were false because he "actively opposed" the construction project. Defendant argued, among other things, that the ads were matters of opinion, substantially true and published without fault.

The trial court rejected these defenses and the case went to trial in March 2004. At trial plaintiff testified that he and the city council opposed the project. Defendant testified that he relied on the local newspaper article's recitations of facts which also reported that the city had declined to purchase the property itself. The jury returned a verdict for plaintiff, awarding him $75,000 in compensatory damages and $125,000 in punitive damages. These amounts were reduced on remittitur to $15,000 and $35,000 respectively.

On appeal, the Virginia Supreme Court found absolutely no evidence of actual malice to support the verdict under the facts. Defendant's reliance on the newspaper article showed he had an objective basis to charge that plaintiff supported the housing development – and there was no actual malice "merely because he failed to comprehend the intricacies of City Council voting procedure."

Illinois Appeals Court Holds That Fair Report Privilege Is Defeated By Actual Malice

Defendant Seeking Amicus Support for Petition to Illinois Supreme Court

An Illinois appeals court reinstated a libel claim against a magazine headline "Conspiracy of a Shakedown" that referred to an antitrust complaint, holding that an allegation of actual malice is sufficient to defeat the fair report privilege at the motion to dismiss stage. *Solaia Technology, LLC v. Specialty Pub. Co.*, No. 1-03-3089, 2005 WL 736256 (Ill. App. Mar 31, 2005) (unpublished) (Burke, Wolfson, Cahill, JJ.).

Illinois appellate courts are split on whether the state's common law fair report privilege is qualified or absolute (the position of the current *Restatement*) and the state supreme court has not squarely addressed the question.

The defendant is seeking amicus support for a petition to the Illinois Supreme Court to decide the question.

"Illinois law still allows allegations of actual malice to defeat the fair report privilege."

Background

Defendant Specialty Publishing Company is the publisher of *Start* magazine, a business publication for manufacturing executives. *Start* published several articles about defendants' use and enforcement of a patent on a manufacturing processing device. One article entitled "Chaos in Manufacturing" reported that plaintiff Solaia was "on a legal campaign targeting manufacturers who might be infringing on its patent" and that this "mess" was caused by "deeply greedy people who wanted to make more money despite the costs."

Another article entitled "Conspiracy of a Shakedown" reported that one manufacturer "turned the tables" on Solaia and its lawyers by filing an antitrust lawsuit against them alleging they conspired to "shakedown ... customers with baseless patent infringement claims."

Solaia and its lawyers, the Chicago law firm Niro, Scavone, Haller & Niro, Ltd., sued *Start* for libel, false light and tortious interference. The trial court dismissed the complaint finding that the complained of statements were either subject to an innocent construction or subject to the fair report privilege.

Appeals Court Decision

On March 31, 2005, the Illinois Appellate Court, First District, affirmed the trial court's dismissal of the claims against the publisher except as to the article headlined "Conspiracy of a Shakedown."

The court held that while the headline and the article itself was a fair report of the allegations in the federal antitrust complaint, the privilege was defeated because "Illinois law still allows allegations of actual malice to defeat the fair report privilege."

In a lengthy survey of law on the question, the court noted that while the *Restatement (Second) Torts* § 611 considers the privilege absolute, it was unclear whether the state supreme court would follow the *Restatement*. The court also found that the majority of state appellate court decisions considered the privilege absolute, but several cases in the First District allowed allegations of actual malice to defeat the fair report privilege.

The court chose to follow this line of cases, stating:

> *We believe that our finding that allegations of actual malice defeat the fair report privilege will aid in preventing schemes in which a person files a complaint solely for the purpose of establishing a privilege to publish its content and then immediately drops the action, which is a concern set forth in the Restatement (Second) of Torts § 611, comment e.*

Defendants are represented by Frederick J. Sperling, Sondra A. Hemeryck, and Anne H. Burkett of Schiff Hardin LLP in Chicago. Plaintiffs are represented by Paul Vickrey of Niro, Scavone, Haller & Niro in Chicago.

MLRC Members interested in more information about the amicus effort can contact Sondra Hemeryck at 312-258-5743 or Fred Sperling at 312-258-5608.

Arkansas, Washington Repeal Criminal Defamation Provisions

Arkansas has repealed its criminal slander statutes, including a provision making it a crime to falsely accuse someone of fornication or adultery. The state of Washington, meanwhile, repealed its statute making it a misdemeanor for any person to maliciously charge a woman with unchastity.

Arkansas Statute

Ark. Code § 5-15-101, *et. seq*., criminalized, among other things, false charges of fornication or adultery and accusations of cowardice for refusing a challenge to a duel. It remained on the books even though Arkansas' criminal libel statute was repealed almost 30 years ago after it was declared unconstitutional in *Weston v. State*, 258 Ark. 707, 528 S. W.2d 412 (Ark. 1975).

The criminal slander statute was repealed as part of a 454-page bill to revise the state's criminal code to remove archaic language and provisions. *See* 2005 Ark. Acts 1994, § 512. Arkansas Governor Mike Huckabee signed the legislation on April 11.

Washington Statute

Wash. Rev. Code § 9.58.110 makes it a misdemeanor to make a statement to a third party falsely charging a woman over age 12 with unchastity, or exposing her to hatred, contempt or ridicule.

The bill to repeal the statute was sponsored by State Sen. Jeanne Kohl-Welles (D-Seattle), a women's studies lecturer at the University of Washington. Washington Gov. Christine Gregoire signed the bill on April 8, and it will go into effect on July 7.

"When the slander of a woman law was first passed, civility laws protecting a woman's virtue were quite common," Kohl-Welles told the Associated Press. "But now they're just quaint. Protecting a woman's virtue also usually meant 'protecting' them from equal rights, too."

According to the House report on the bill, charges had been brought under the statute in 23 cases during the past 20 years, but all were eventually dismissed.

Washington still has a criminal libel statute on the books. Wash. Rev. Code § 9.58.010 makes it a misdemeanor "(1) to expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or (2) to expose the memory of one deceased to hatred, contempt, ridicule or obloquy." There have been no recent reported cases under the statute.

Tenth Circuit to Hear Challenge to Colorado Criminal Libel Statute

The Associated Press, Bloomberg News, the Colorado Press Association, Dow Jones & Company, MLRC and the Reporters Committee for Freedom of the Press filed an amicus brief to the Tenth Circuit Court of Appeals this month arguing that Colorado's criminal libel statute violates the First Amendment.

The brief was filed in *Mink v. Suthers*, a civil suit challenging the constitutionality of Colo. Rev. Stat. § 18-13-105. The statute provides that:

> A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel.

Plaintiff in *Mink* filed a civil suit after he was threatened with a felony prosecution for mocking one of his college professors on a website. The suit was dismissed on grounds of official immunity and standing and the district court did not address the constitutional issues. *See* 344 F. Supp. 2d 1231 (D. Colo. 2004).

The amicus brief argues, among other things, that the statute is facially unconstitutional because it permits the prosecution of truthful statements and statements of opinion and is unconstitutionally vague.

The brief was prepared by Steven D. Zansberg and Thomas B. Kelley of Faegre & Benson LLP in Denver, Colorado with support from MLRC Staff Attorney Dave Heller.

U.S. Supreme Court May Dismiss Libel Case Following Plaintiff's Death

The U.S. Supreme Court may dismiss *Tory v. Cochran* – a case raising the issue of post-trial libel injunctions – following the death last month of the plaintiff, lawyer Johnnie Cochran. Cochran died on March 29 from an inoperable brain tumor. Only seven days earlier the Court heard oral argument in the case. *See MediaLawLetter* March 2005 at 5.

The issue before the Court was whether a post-trial permanent injunction barring a disgruntled former client and his wife from making any statements about Cochran or his firm violated the First Amendment. At oral argument several Justices appeared to side squarely with the defense position that the injunction constituted an impermissible prior restraint.

Following Cochran's death the Court requested that the parties file supplemental briefs under Rule 35 of the Rules of the Supreme Court which sets out procedures if a party dies during the pendency of a case. See www.supremecourtus.gov/ctrules/rulesofthecourt.pdf.

Plaintiff's lawyers, in a filing formally captioned "Suggestion of Death," argue that the case is now moot, that it should be dismissed by the Court and that any questions about the scope or constitutionality of the injunction be decided first by the trial court. Alternatively, they argue that even if the case is not moot, the injunction should be affirmed to prevent the defendant from making "extortionate" demands against Cochran's law firm.

The defendants have asked the Court to decide the case, notwithstanding Cochran's death, because the injunction specifically bars defendants from making statements about Cochran and his law firm. As stated in defendants' brief:

> *[Defendants] can speak about the Law Offices of Johnnie Cochran or Johnnie Cochran only if they first go to the California Superior Court and seek permission through modification of the injunction. This, of course, is the very essence of censorship.*

Update: Supreme Court Denies Certiorari in Neutral Reportage Privilege Case

By Amy B. Ginensky & Michael E. Baughman

On March 28, 2005, the U.S. Supreme Court declined to consider the question of whether the First Amendment protects the accurate publication of remarks public officials make about each other, irrespective of the reporter's belief in the truth of those remarks. *Norton v. Glen*, 860 A.2d 48, 32 Media L. Rep. 2409 (Pa. 2004), *cert. denied sub nom., Troy Publishing Co. v. Norton*, 2005 WL 153308 (NO. 04-979)

As reported in previous issues of the MediaLawLetter, the case arose from a dispute in a small Pennsylvania town between members of the Parkesburg Borough Council. A special meeting had been called by the President of Council, James Norton, to call an end to the disruptive behavior of another council member, William Glenn.

Because Glenn was precluded from making a statement during the course of the meeting, he provided a reporter for West Chester's Daily Local News with a press release in which he said, among other things, that Norton and the Mayor, Alan Wolfe, were homosexuals conspiring to remove him from office, and implied that they were "queers" and "child molesters."

The Daily Local News reported the charges, as well as the outraged responses of the Council President and Mayor, under the headline "Slurs, Insults Drag Town Into Controversy." Glenn, who testified that he made the statements in an effort to gain some publicity for his upcoming re-election campaign, lost the primary a month after the article was published.

The Mayor and President of Council sued Glenn, as well as the paper. At trial, the jury found against Glenn

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Update: Supreme Court Denies Certiorari in Neutral Reportage Privilege Case

(Continued from page 25)

and awarded damages. The jury also found that the newspaper had accurately reported the charged without espousing or concurring in them, and was thus protected by the "Neutral Reportage Privilege."

On appeal, the Pennsylvania Supreme Court held that there is no First Amendment protection for the accurate publication of charges by public officials, and that the appropriate test is one of actual malice – the reporter can be liable if he subjectively believes that the charges made by the official are probably false. The Pennsylvania Supreme Court remanded for a new trial.

The media defendants filed a petition for certiorari with the U.S. Supreme Court, which was supported by an amicus brief filed on behalf of numerous media organizations. The case now returns to the Court of Common Pleas for Chester County, Pennsylvania, for further proceedings.

MLRC BULLETIN 2005:2

THE TWENTY-FIRST CENTURY ANTI-INDECENCY CRUSADES:

TAKING UP GOVERNMENT SWORDS AGAINST RADIO, TELEVISION AND SUBSCRIPTION SERVICES

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MLRC REPORT

"The Substantial Truth Defense and Third Party Allegations"

See p. 47 of this issue for a special MLRC report on using the "substantial truth" doctrine to defend reporting newsworthy allegations.

Justice Kennedy Denies Stay of Prior Restraint in Otherwise Pro-First Amendment Decision

By Jennifer A. Mansfield

While noting that "informal procedures ... designed to chill expression can constitute a prior restraint," Justice Anthony M. Kennedy on April 15 issued a written opinion denying an application for stay filed by a Florida television station that a trial judge had threatened with prosecution. *Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County*, No. 04A773 2005 WL 873411 (Apr. 15, 2005) (Kennedy, Circuit Justice, in Chambers).

Background

Multimedia Holdings Corporation d/b/a First Coast News, a Gannett station in Jacksonville, Florida, asked Justice Kennedy, as the Circuit Justice over Florida, to stay two orders entered after it had published a grand jury transcript handed to it by a prosecutor. The station sought the stay of the orders, entered by a St. Augustine judge in a murder prosecution, pending a petition for certiorari review before the Court. *See also MediaLawLetter* March 2005 at 7.

In 2004, First Coast News was covering pretrial proceedings for a murder defendant in St. Johns County, Florida. Under state public records law, a document given to a criminal defendant becomes public record. After state Circuit Judge Robert K. Mathis ordered the prosecutor to have the defendant's grand jury testimony transcribed and turned over to his attorney, a First Coast News reporter obtained a copy and broadcast a story with details of the testimony.

When Judge Mathis learned of the broadcast, he *sua sponte* and without notice or a hearing entered an order on July 30, 2004 enjoining First Coast News and others from further publishing information from the transcript. The order also threatened criminal prosecution and criminal contempt of court against anyone who further published the transcript. After entering the order the judge immediately left for a one week trip to Europe. After the chief judge of the state circuit refused to intervene, First Coast News appealed the order to the Florida Fifth District Court of Appeal.

During briefing at the appellate level, Judge Mathis returned to the bench and entered a second order on August 9, 2004. In the August 9 order, he said that he had not enjoined First Coast News from publishing matters in the public record. Rather, in the trial court's view, First Coast News was placed on notice, along with all others who might have obtained copies of the grand jury transcript, that publication or broadcast or disclosure of such information is a crime and may be punished as contempt of court. The trial court then denied First Coast News' motion to intervene in the trial court proceedings.

After more than six months without ruling, on March 2, 2005, the Fifth District Court of Appeal denied First Coast News' petition to review the trial court's order. Under Florida's appellate rules, the court of appeal's decision did not constitute a ruling on the merits, which cut off any further review by the Florida Supreme Court. First Coast News therefore petitioned Justice Kennedy for a stay pending the filing of a certiorari petition to the U.S. Supreme Court.

First Coast News argued that the trial court's orders were unconstitutional prior restraints, by first restraining it from further broadcasting material lawfully in its possession and threatening prosecution based on past and future broadcasts. First Coast News also argued that the specter of criminal punishment for speech on matters of public concern is just as much a threat to First Amendment Rights as an outright injunction.

Amici Support

Eleven news organizations and journalism nonprofits filed an *amici curiae* brief in support of First Coast News' stay application. The *amici* focused on the historical underpinnings of the First Amendment protections. They also argued that the trial court "appears to have framed its judicial orders for the obvious purpose of restraining speech while seeking to evade the immediate appellate review that this Court has declared to be an essential procedural safeguard for the imposition of prior restraints," and the Florida appellate court endorsed the trial court's actions when it denied review.

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State's Brief

When briefing the matter before the Florida appellate court, the local prosecutor had taken the unusual position of agreeing with First Coast News that the trial court's orders were a prior restraint. Justice Kennedy asked the state to submit a brief on the application, but he specifically asked the Florida Attorney General's Office, and not the local prosecutor, to weigh in.

In that brief, Florida reversed position and argued for the first time that neither of the two trial court's orders were prior restraints because the orders, which commanded "parties" not to further publish the transcript, did not pertain to First Coast News, which is not a "party" to the criminal case. The state also argued that as to First Coast News, the trial court's orders were merely advisory in nature, amounting to a threat of possible prosecution for violation of statute, rather than a prior restraint.

Justice Kennedy's Opinion

On April 15, 2005, Justice Kennedy denied the application for stay. In a five-page opinion, he wrote that the record did not sufficiently establish that First Coast News was enjoined by the orders, or that any threat to the station was real or substantial. His decision, however, contained language that indicated his concern over the threats of prosecution, and he focused on two factual issues that he said blunted any potential danger of prosecution.

With regard to the trial court's first order, Justice Kennedy held "a threat of prosecution or criminal contempt against a specific publication raises special First Amendment concerns, for it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability." Justice Kennedy also found that the first order "bears many of the marks of a prior restraint" and was particularly troubling because it singled out First Coast News.

But Justice Kennedy also held that the trial court's second order diminished any chilling effect the first order may have had on First Coast News' speech rights. In the second order Judge Mathis said that the first order only applied to parties to the case, and First Coast News is not a party. Thus, Justice Kennedy found that the orders did not clearly prohibit speech by First Coast News.

He also noted that, to the extent the court's orders might suggest a particular animus towards First Coast News, the threat from the trial court had abated because: 1) Since entry of these orders, the trial judge had retired from judicial service, and 2) Florida, while not guaranteeing immunity from prosecution for future publication, in its brief to the Court "has suggested that further publication will not be prosecuted."

Accordingly, the Justice found that there was no imminent threat of prosecution, and that it therefore was unlikely that four justices would vote to grant certiorari in the case.

Justice Kennedy made clear, however, that had the case been brought to the Court with what he deemed to be a real threat of prosecution, the outcome may have been very different.

Justice Kennedy made clear, however, that had the case been brought to the Court with what he deemed to be a real threat of prosecution, the outcome may have been very different:

> True, informal procedures undertaken by officials and designed to chill expression can constitute a prior restraint. Warnings from a court have added weight, and this too has a bearing on whether there is a prior restraint. If it were shown that even the second order might give a reporter or television station singled out earlier any real cause for concern, the case for intervention would be stronger.

Because the two trial court's orders "appear to have been isolated phenomena," and the state had indicated that it would not prosecute First Coast News, and the trial court had since retired since issuing the orders, Justice Kennedy declined to issue the stay.

Jennifer A. Mansfield and George D. Gabel, Jr. of Holland & Knight LLP's Jacksonville, Florida's office and Charles D. Tobin of the firm's Washington, DC office represented First Coast News. Nathan E. Siegel, Ashley I. Kissinger, and Chad R. Bowman of Levine, Sullivan, Koch & and Schulz, LLP, Washington, DC were counsel for amici curiae.

Massachusetts Federal District Court Issues, Then Backs Away From, Prior Restraint Order

By Howard Merten

On March 31, 2005, federal court Judge Robert E. Keeton entered a prior restraint order forbidding *Standard-Times* reporter Ray Henry from publishing anything he heard while sitting in a federal courtroom during a hearing. Ottaway Newspapers, publisher of the *Standard-Times*, and the reporter challenged the order. The Court refused to vacate the order, but did modify it so that the restraint would expire in less than 24 hours unless extended by the First Circuit. *United States v. Dossantos*, CR No. 01-10279 REK (D. Mass., order entered Mar. 31, 2005) (Keeton, J.).

The reporter attended a proceeding in a marijuana distribution and money laundering trial pending in Massachusetts Federal District Court. Henry arrived at the courtroom before the hearing started, said hello to one of the lawyers present who knew him to be a reporter and sat in the gallery, along with a woman he did not know. At no time during the hearing did the District Judge or anyone else announce that the proceedings were closed to the public. No attempt was made to clear the courtroom. No one questioned the reporter's presence or asked him to identify himself.

After the proceedings concluded and the District Judge had left the bench, an attorney for one of the defendants asked Henry if he was a reporter. Henry said he was. Judge Keeton returned to the bench and ordered Henry not to disclose or publish anything that had been said during the court session.

No hearing was held before the order entered. No written order issued. After the hearing, the District Court entered a docket notation indicating that the hearing had been sealed.

Emergency Motions to Vacate

On April 1, 2005, Ottaway Newspapers and Henry filed emergency motions to vacate the prior restraint with the District Court. Ottaway also moved to unseal the transcript of the March 31, 2005 proceedings or at least those portions constituting the order to seal the proceedings and restraining Henry as the paper had never seen the actual order nor any evidence that the hearing had actually been sealed.

Sua sponte and without hearing, the District Court immediately sealed all three of those motions and all supporting papers, thereby sequestering the fact of the prior restraint order and the attempts to overturn it. Immediately upon learning that the pleadings had been sealed, the newspaper moved to unseal all of the filings.

The District Court held a hearing on Ottaway Newspapers' motions to vacate and to unseal on April 5, 2005. At that hearing, the District Court agreed that the reporter had been in the courtroom "lawfully," but refused to vacate the prior restraint order. Instead, the court determined that the issues were "too important" to be decided by one district court judge. The court modified its order so that it would expire by the next morning unless extended by the First Circuit Court of Appeals. It also unsealed all of the filings respecting the prior restraint order.

During the hearing, the lawyer for the government had argued that if the contents of the earlier March 31st hearing were divulged, the lives and safety of persons would be jeopardized, as would ongoing investigations. Despite those representations, none of the parties to the criminal proceeding, including the government, appealed. The order expired the next morning.

Thereafter, *The Standard Times* published a story detailing the contents of the March 31 hearing, including reports that a criminal defendant was cooperating with police. Ironically, the very same defendant had filed an affidavit two years earlier in the same case revealing that he had cooperated with the FBI. *The Standard Times* pointed Judge Keeton to these earlier published stories, to no avail.

The Standard Times later ran an editorial noting that Judge Keeton should have known better.

Howard Merten, Gordon Cleary and Eric Sommers of Vetter & White, Providence, Rhode Island represented Ottaway Newspapers, Inc. and Raymond Henry.

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The New York Times Wins Release of Additional 9/11 Materials

By David McCraw

The New York State Court of Appeals, the state's highest court, ruled in March that the New York City Fire Department is required to make public virtually all of the oral history interviews that the department conducted with its employees to document the department's emergency response at the World Trade Center on September 11. *The New York Times Co. v. City of New York Fire Dep't*, 2005 WL 673573 (N.Y. Mar. 24, 2005) (Smith, J.).

Background

The ruling came in a freedom of information suit brought by *The New York Times* and later joined by eight families who lost relatives during the 9/11 attacks. In addition to ruling on the oral histories, the Court of Appeals affirmed by a 4-3 vote a lower court's decision that the FDNY could redact the words and voices of callers (but not those of operators) from the tapes and transcripts of 911 calls from the morning of the attacks.

The court also affirmed the FDNY's right to redact limited portions of tapes and transcripts from the department's internal radio dispatch system on the basis of the "intra-agency" exemption under New York's freedom of information law ("FOIL").

As a result of the ruling, the public will now have access to large portions of the FDNY's records documenting the events of September 11. Prior to being sued by *The Times*, the FDNY had taken the position that none of the material was available to the public under FOIL.

Court of Appeals Decision

Before the Court of Appeals, the FDNY asserted that the oral history interviews constituted advice being given by employees to their supervisors, and therefore the opinions and recommendations contained in them could be redacted under the intra-agency exemption to FOIL.

The court rejected that argument, finding that the FDNY had failed to show that the oral histories were intended to be confidential and noting evidence in the record that some participants thought they were creating a public historic record.

The FDNY also argued for the right to redact expressions of personal feelings from the oral histories. The court held that such redaction is allowable under FOIL's privacy exemption, but only if the FDNY can show that an interviewee will suffer "serious pain or embarrassment as a result of disclosure." The Court of Appeals left it to the trial court to review any redactions the FDNY wanted to make under that standard.

Turning to the 911 tapes and transcripts, the Court of Appeals for the first time adopted a balancing test to determine when FOIL's privacy exemption applied. Several Appellate Division decisions had previously endorsed the test, which weighs the public's interest in disclosure against the potential harm to an individual's privacy interest.

The Court of Appeals for the first time adopted a balancing test to determine when FOIL's privacy exemption applied.

In a second precedent-setting ruling, the court also held that under New York law relatives of the deceased have a privacy interest in their decedents' affairs and that an agency could recognize that interest in deciding whether FOIL's privacy exemption applied.

The court rejected the argument that any privacy interest ended with the death of the person who was the subject of the records sought under FOIL. In so doing, the court embraced the position adopted by the U.S. Supreme Court in *National Archives and Record Admin. v. Favish*, 541 U.S. 157 (2004), which involved the Vincent Foster autopsy photos.

The majority then found, in an opinion by Judge Robert Smith, that it was reasonable for the FDNY to think that grieving families would be offended by disclosure of the tapes and transcripts. The majority reasoned: "[I]f the tapes and transcripts are made public, they will be replayed and republished endlessly, and ... in some cases they will be exploited by media seeking to deliver sensational fare to their audience."

While the only evidence in the record of reactions from 9/11 families was the affidavits of the eight intervenors – all of whom supported full disclosure – the court ruled that those families and others who shared their view were entitled to have access only to the part of the tape or transcript containing the call of their relative.

The three judges dissenting on the 911 holding said they would have allowed disclosure of the transcripts, albeit with

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NY Times Wins Release of Additional 9/11 Materials

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certain restrictions. The dissent found that there was a significant public interest in knowing how emergency operations were handled on September 11. "Precisely because of the importance of the September 11th attacks, Americans deserve to have as full an account of that event as can be responsibly furnished," Judge Albert Rosenblatt wrote. "Indisputably, the 911 tapes would shed light on the effectiveness of the City's disaster response."

The dissenters acknowledged the privacy interest of surviving family members, but said the public and private interests could be appropriately balanced by directing the FDNY to release the written transcripts, but not the audiotapes, with the identities of "non-official callers" redacted.

The Times had also sought full release of the internal dispatch tapes and transcripts. The trial court had rejected the FDNY's claim that the materials could be withheld under the privacy exemption. Instead, that court ruled that the tapes and transcripts must be released, but did permit the FDNY to redact any advice or recommendations caught on the tapes under the intra-agency exemption.

While the FDNY did not appeal the privacy ruling, *The Times* did challenge the FDNY's right to invoke the intra-agency exemption. Before the Court of Appeals, *The Times* argued that a tape of an emergency operation was not the sort of advisory communication that should be shielded by the intra-agency exemption.

The exemption is designed to encourage agency employees to give forthright advice to their employers in the formulation of policy. *The Times* urged the court to bar agencies from invoking the exemption unless they could show that the communications at issue were deliberative in nature and part of a decision-making process.

The court declined to adopt that standard and held that as long as public employees were exchanging opinions, advice and criticism, the exemption could be applied to those parts of the communications. Under the ruling, the FDNY must still release all the rest of the tapes and transcripts, and the department has said that only a small portion of the tapes and transcripts will require redaction.

In a final section of the decision, the Court addressed whether the FDNY could withhold six unspecified documents that the U.S. Justice Department claimed had to be kept secret because they were to be used in the prosecution of Zacarias Moussaoui, the accused conspirator in the 9/11 attacks. FOIL's law enforcement exemption applies when disclosure will interfere either with a prosecution or with a defendant's fair trial rights. Both courts below had rejected the FDNY's claim that disclosure of the FDNY documents would prejudice Moussaoui's fair trial rights or interfere with his trial.

The Court of Appeals also expressed doubt about the FDNY's claim, but said it would give the Justice Department the opportunity, if it wanted, to explain to the trial court why the documents needed to be withheld under FOIL's law enforcement exemption. While the court acknowledged that the current record – which included an affidavit from the federal prosecutor – did not support withholding the documents, the court said it wanted to make certain that the issue was properly considered because of the "enormous importance to the public interest of an orderly and fair trial for Moussaoui."

The court did not address the question of the statutory interpretation that *The Times* had raised in respect to the law enforcement exemption. By the terms of FOIL, the exemption applies only to documents "compiled for law enforcement purposes." The parties agreed that none of the documents at issue in this case were *created* for law enforcement purposes.

The Times argued that the words of the exemption should be read to mean that the exemption applies only if the agency created or compiled the documents as part of law enforcement activities. The FDNY took the position that even previously public documents could become exempt once they became part of an investigation or prosecution.

The trial court had accepted the FDNY's position. The Appellate Division did not rule on the question because it found that, whatever the scope of the exemption, it did not apply here where the FDNY had failed to show that disclosure would interfere with the prosecution of Moussaoui or his fair trial rights. The Court of Appeals likewise sidestepped the question when it sent the matter back to the trial court for possible supplementation of the record by the Justice Department.

David McCraw, in-house counsel at The New York Times Company, represented the The Times in this matter. The intervening families were represented by Norman Siegel of New York. The FDNY was represented by John Hogrogian and Marilyn Richter of the New York City Law Department.

Newspaper Not Liable For Publishing Juvenile Arrest Report

The Third Circuit Court of Appeals this month affirmed that the First Amendment shielded a newspaper from liability for publishing accurate and lawfully obtained information about a juvenile's arrest. *Bowley v. City of Uniontown Police Dep't*, No. 04-2352 (3d Cir. Apr. 26, 2005) (Nygaard, McKee, Rendell JJ.).

The Court held that plaintiff failed to state a claim for common law or statutory invasion of privacy against the newspaper

Background

Plaintiff James L. Bowley, a minor at the time the suit was filed, sued the *Uniontown Herald Standard* ("*Herald Standard*") after the newspaper reported that plaintiff was arrested for allegedly raping a 7-year-old girl.

According to plaintiff, the *Herald Standard* received the information about the arrest from a Uniontown police officer who was also named as a defendant. Bowley claimed that the publication of the article was a breach of confidentiality under 42 Pa. Cons. Stat. § 6308, a Pennsylvania law that generally prohibits the disclosure of juvenile law enforcement records, as well as an invasion of his privacy.

The Western District of Pennsylvania granted the newspaper's motion to dismiss, holding that plaintiff failed to state a claim.

First Amendment Shields Newspaper

On appeal, the Third Circuit recognized that although the Supreme Court "has declined to hold that publication of truthful information is *per se* protected by the First Amendment," as a general matter "'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" (citations omitted).

To determine whether the newspaper would be liable under the facts at issue, the Court found it was necessary to consider: 1) whether the published information was truthful and lawfully obtained; 2) whether the information involved a matter of public significance; and 3) whether imposition of liability would be the most narrowly tailored means of serving a state interest of the "highest order."

After noting that the truthfulness of the article was not in dispute, the court went on to conclude that – drawing from Supreme Court precedent – even if the police officer who had provided plaintiff's arrest information to the *Herald Standard* had violated the Pennsylvania statute, this would not make receipt of the information by the newspapers unlawful as the statute only prohibited the disclosure – and not receipt – of the records. *Citing Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989); *Bartnikci v. Vopper*, 532 U.S. 514, 535 (2001).

Even if the police officer who had provided plaintiff's arrest information had violated the statute, this would not make receipt of the information by the newspapers unlawful.

Turning next to the issue of whether the article concerned a matter of public significance, the court recognized the Supreme Court's holding that the commission and investigation of violent crimes are matters of "paramount public import," and went on to hold that "the legitimacy of public concern regarding the rape of a minor cannot seriously be doubted, regardless of the accused."

Finally, the court found that imposing liability on the *Herald Standard* for publication of the article would not be the most narrowly tailored means of serving the interest plaintiff claimed was at issue in the case – protecting the anonymity of arrested juveniles – even if the court assumed it was an interest of the "highest order."

The court held that when the government has stewardship over confidential information, a more narrowly tailored means of protecting the interest at issue existed in "not releasing the information to the media in the first place."

The court held that because the First Amendment shielded the *Herald Standard* from liability under the fact at issue, it was unnecessary to address plaintiff's state law claims and affirmed dismissal of the complaint.

The *Herald Standard* was represented by Charles Kelly and Kristin L. Anders of Sinclair, Kelly, Jackson, Reinhart & Hayden of Canonsburg, Pa. Plaintiff was represented by Peter M. Suwak of Washington, Pa.

South Carolina Supreme Court Sides With Newspaper In FOIA Case

By John J. Kerr

In a decision this month the South Carolina Supreme Court strengthened the public's right to inspect public documents by limiting the application of a FOIA exemption available to public bodies. *Evening Post Publishing Company d/b/a The Post and Courier vs. City of North Charleston*, No. 25962, 2005 WL 762259 (S.C. Apr. 4, 2005) (Pleicones, J.).

The Post and Courier requested access to a 911 tape recording in the shooting death of a citizen by North Charleston police officers. Police officers were dispatched to a convenience store where four Caucasian men had chased an African-American man (victim). The victim had a pistol he had taken from his automobile to defend himself. Upon entering the store the officers saw the victim holding the pistol. They shot him several times, killing him instantly.

Eight months after the shooting, the solicitor held a press conference where he stated he would not prosecute the police officers involved in the shooting. He cited the 911 tape recording as a reason for his decision. The solicitor charged the attackers with lynching.

The newspaper filed a FOIA request to inspect the 911 tape. The city denied the request, citing an exemption which allows a public body the option of denying access if it would "cause harm to the agency" by the premature release of information to be used in a "law enforcement action," i.e., a criminal trial.

Newspaper Files DJ Action

The newspaper filed a declaratory judgment action asking the court to enjoin the city from withholding the 911 tape. The newspaper contended there could be no harm to the city and solicitor because the criminal defendants already had copies of the tape. The lower court sided with the city's contention that pre-trial publicity associated with the release of the 911 tape would harm the prosecution of the attackers.

The Court of Appeals affirmed the lower court's ruling on harm from pre-trial publicity. The court also held the city did not have to show harm if the public documents were to be used as evidence in a criminal trial.

Supreme Court Sides With Newspaper

The state Supreme Court granted the newspaper's petition for review and reversed, holding that problems emanating from pre-trial publicity were not the type of harm the FOIA exemption was intended to prevent. Rather, the exemption was to prevent harms "such as those caused by a release of a crime suspect's name before arrest, the location of an upcoming sting operation, and other sensitive law-enforcement information."

Problems emanating from pre-trial publicity were not the type of harm the FOIA exemption was intended to prevent.

The Supreme Court also agreed with the newspaper that harm should not be presumed when the subject of the FOIA request will be evidence in a prospective criminal trial. The Supreme Court rejected the categorical rule in favor of the usual case-by-case approach.

The Supreme Court remanded the case back to the circuit court for a determination whether any further relief should be granted. Newspaper management declined its right to pursue attorney's fees and costs.

John J. Kerr of Buist Moore Smythe McGee in Charleston represented the Post and Courier. The city was represented by J. Brady Hair, Derk Van Raalte and Richard Lingenfelter of its legal department.

DID YOU GO TO TRIAL RECENTLY?

If you know of a libel, privacy, or case with related claims that went to trial recently, please let us know. It will be included in our annual report on trials, which is published each year. E-mail your information to erobinson@ldrc.com.

California Appeals Court Affirms Most Documents to Remain Sealed in Jackson Criminal Trial

A California Court of Appeal has affirmed most of Judge Rodney Melville's orders sealing numerous documents in the criminal case currently pending against pop singer Michael Jackson, reversing only the judge's order sealing the indictment. *People v. Jackson*, No. B176587 (Cal. App. Ct. Apr. 27, 2005) (Gilbert, P.J.).

The court, however, did not discuss or strike down the procedures that led to the sealing of the documents. A coalition of major media organizations had attacked the court's approach and sought to have the documents unsealed, arguing that Judge Melville's orders violated the First Amendment, the California Constitution, the California Rules of Court, and the common law.

Recognizing that many of the documents at issue had already been leaked to the media and were available to "hundreds of millions of people through the Internet," the court agreed to "journey in an imaginary judicial time machine" and decide the appeal as though the documents had not been publicized.

After determining it was required to apply an "independent" standard of review to the order, the court went on to recognize the conflicting interests at issue in the matter – the public's First Amendment right of access to judicial proceedings and documents and a defendant's right to a fair trial – which it characterized as "'two of the most cherished policies of our civilization.'" (citations omitted).

Limiting public access to judicial proceedings and records would require a finding that "'(i) there exists an overriding ... interest supporting closure and/or sealing; (ii) there is a substantial probability ... that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.'" *Citing NBC Subsidiary, Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999) (footnotes omitted).

In concluding that the search warrant affidavit at issue should remain sealed, the court first ruled that protecting the privacy interests of minors and unindicted purported co-conspirators in a child molestation investigation as well as preventing Jackson from experiencing the prejudice of "moral judgments and public outrage" amounted to an overriding interest.

Due to the "highly prejudicial" details of the crime alleged as well as defendant's celebrity status and the documented "torrent of pretrial publicity," the court further found that sealing the documents would aid in preventing prejudice to these rights. In determining whether the order to seal the documents was "narrowly tailored," the court concluded there existed no "workable alternative," as "prejudicial information" that could be revealed even if the affidavit was redacted could compromise the prosecution's ongoing investigation.

Finally, the court held that no "less restrictive means" existed for protecting the overriding interests. While recognizing that admonitions and instructions may at times be adequate to stop jurors from considering inadmissible evidence, the court ruled that the inherently prejudicial nature of the evidence at issue rebutted the presumption that potential jurors would be able to disregard any pretrial disclosures.

Turning to Jackson's motion to set aside the indictment and related documents – included the grand jury transcript – the court held that such materials would also remain sealed. Although recognizing that under California law the public will normally have a right of access to grand jury materials once an indictment has been returned, the court found that, like the search warrant affidavit, the briefs of the parties and transcript contained information that could be "highly prejudicial" to Jackson if revealed, and that redacting portions of the documents would yield only "unintelligible" paragraphs.

Finally, the court held that the portions of the indictment that had not previously been unsealed would no longer be subject to the order. Although noting that the indictment also had the "potential" to prejudice Jackson, the "general" nature of the information – which had already been discussed in open court – "may be cured through appropriate admonishments to the jury."

Theodore J. Boutrous, Jr., and Michael H. Dore

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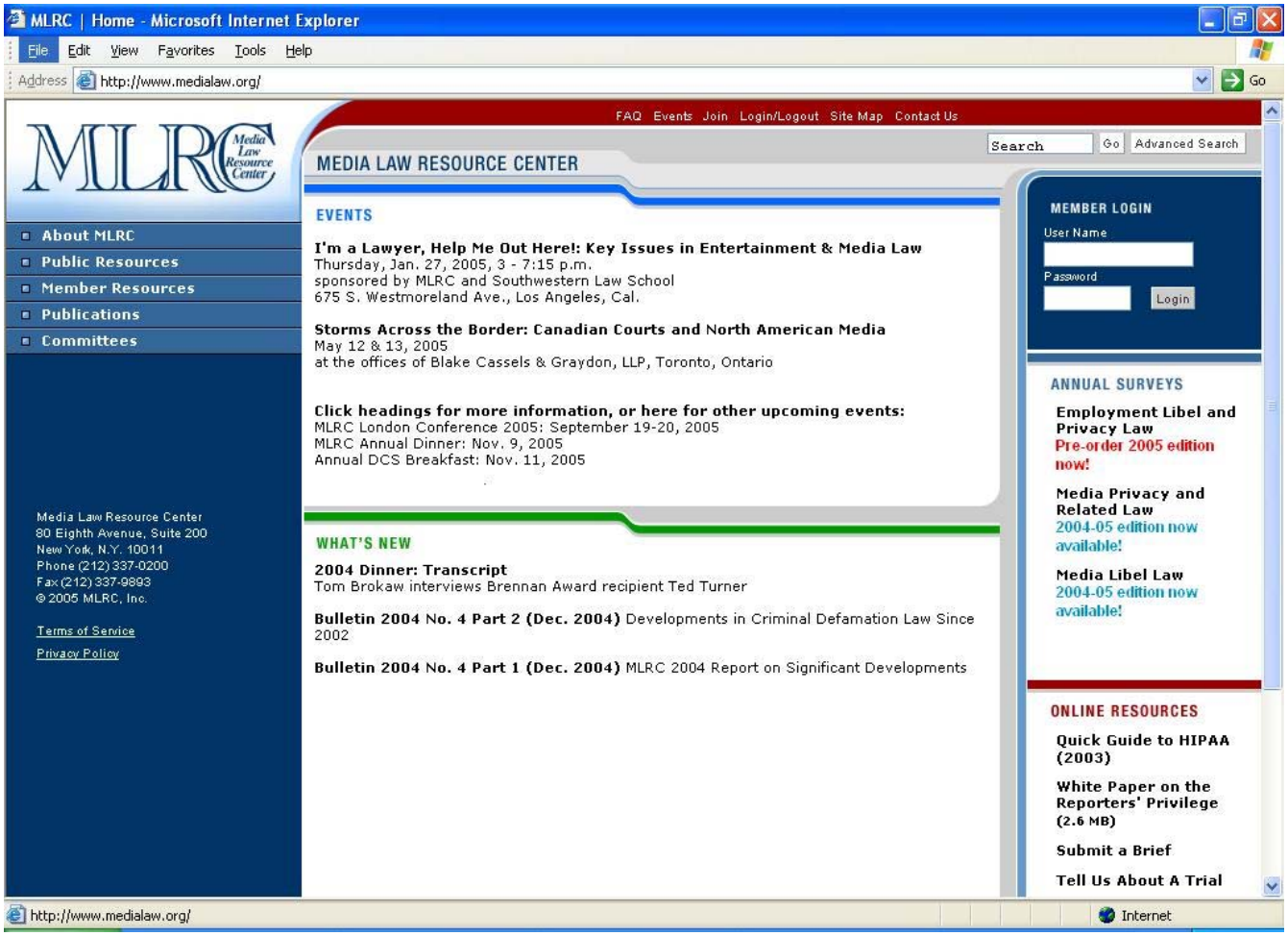

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Pennsylvania Court Rejects Right of Access To Juror Names and Addresses

By David Strassburger

On March 31, 2005, the Superior Court of Pennsylvania ruled that there is no constitutional or common law right of access to the names and addresses of jurors seated in a criminal case. *Commonwealth v. Long*, No. 123 WDA 2004, 166 WDA 2004, 2005 WL 729656 (Pa. Super. Mar. 31, 2005). (Musmanno, J.).

The decision rejected or ignored authority favoring a right of access, and could negatively impact the practice followed in many Pennsylvania counties of routinely providing access to juror identities.

Background

Karl Long, a successful podiatrist practicing in the affluent Borough of Ligonier outside of Pittsburgh, killed his wife Elaine on October 3, 1999 in the course of a domestic dispute. The killing received widespread media attention.

Jury selection in the subsequent murder prosecution lasted for three days in July 2003, and was open to the public. A reporter for *The Tribune-Review*, a newspaper of general circulation in Western Pennsylvania, attended the proceeding. During *voir dire*, the trial judge referred to the jurors by number to protect their privacy.

On August 20, 2003, while the jury was deliberating, *The Tribune-Review* and WPXI, Inc., a television station owner, petitioned the court to unseal the jury list or otherwise provide access to the names and addresses of the seated jurors. The trial judge deferred ruling on the petitions until after the jury returned its verdict.

The following day, the jury returned a verdict of guilty on the charge of third-degree murder. Nevertheless, the trial judge refused to entertain the petitions at that time.

After four months of further argument, motion practice, and an evidentiary hearing, the trial court denied the petitions in their entirety, finding no constitutional or common law right of access to juror identities.

Access to Proceedings Only

The Superior Court affirmed. Relying on *Gannett Co. v. Delaware*, 571 A.2d 735 (Del. 1990), the Court determined that *Press-Enterprise Company v. Superior Court*, 464 U.S. 501 (1984), merely established a First Amendment right of access to proceedings, and nothing else.

There was no dispute that all proceedings in the *Long* case were open to the public. Therefore, the Court rejected the media's argument that their First Amendment rights were violated because the trial court had failed to disclose information that historically and logically had been made public, including the jury list.

Specifically, the *Long* Court rejected the decision of the Ohio Supreme Court in *State ex rel. Beacon Journal Publishing Co. v. Bond*, 781 N.E.2d 180 (Ohio 2002), which found a First Amendment right of access to the names and addresses of empanelled jurors.

The Court also ignored the admonition of the Third Circuit in *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994), that: "At the heart of the Supreme Court's right of access analysis is the conviction that the public should have access to *information*." *Id.* at 1360.

Instead, the Court found "additional support" for its constitutional analysis in the American Bar Association's *Principles for Juries and Jury Trials*, which were adopted by the ABA Board of Governors in February 2005. Principle 7(a)(8) states that: "Following jury selection and trial, the court should keep all jurors' home and business addresses and telephone numbers confidential and under seal." But the ABA *Principles* in no way condone or suggest that seated jurors should remain anonymous to the public.

The Court in *Long* also rejected the assertion that the common law required public access to the jury list or juror identities. Despite substantial authority to support the media's position, *see, e.g., In re Baltimore Sun*, 841 F.2d 74 (4th Cir. 1988), the Court determined that the jury list is not a judicial record because it is not filed with the Clerk of Courts or otherwise made part of the permanent court record.

The media intend to seek allowance of appeal in the Supreme Court of Pennsylvania.

David Strassburger of the Pittsburgh law firm of Strassburger McKenna Gutnick & Potter, P.C. represented The Tribune-Review *in this matter. Walter DeForest of the Pittsburgh law firm of DeForest Koscelnik Yokitis & Kaplan represented WPXI.*

Pennsylvania Court Rules Autopsy Reports Not Subject to Disclosure

Court holds report not an "official record or paper"

A Pennsylvania appellate court recently ruled that coroners are not required to file autopsy reports as part of their "official records and papers" under the state's Coroner's Act. *Johnstown Tribune Publishing Co. v. Ross*, No. 654 C.D. 2004 (Pa. Commw. Ct. Mar. 30, 2005) (Leavitt, J.).

Background

Appellant Johnstown Tribune Publishing Company ("Tribune") requested that the autopsy reports, notes, and records for a 31-year-old homicide victim be made available through the county coroner's office. The Coroner's Office denied the request, finding that it had already filed a "view of forms," a short document that stated the cause and manner of the victim's death. The trial court upheld the decision and denied appellant's motion for post-trial relief.

Discussion

Under Pennsylvania's "Coroner's Act,"

> [e]very coroner, within thirty (30) days after the end of each year, shall deposit all of his official records and papers for the preceding year in the office of the prothonotary for the inspection of all persons interested therein.

16 P.S. § 1251.

On appeal, the Tribune argued that the coroner should be required to release the autopsy report at issue as an "official record and paper" under § 1251.

In addressing appellant's argument, the court recognized that a coroner's statutory duty under Pennsylvania law consists of ascertaining the cause and manner of "suspicious" deaths, and that the "official" papers for purposes of disclosure under § 1251 are only those "that state the cause of death and whether such death was caused by criminal activity or criminal negligence."

The court found that by employing the term "official," the legislature had necessarily recognized that additional "unofficial" papers and reports would not be subject to disclosure.

The court further found that considering an autopsy report to be an "official record" subject to mandatory public disclosure would conflict with § 1236.1(c) of the Coroner's Act, which allows coroners to charge a fee of up to $100 for releasing an autopsy report.

Finally, the court agreed with the coroner that requiring disclosure of the autopsy report would allow private and potentially privileged medical information – such as an individual's HIV status – or graphic autopsy photographs to be revealed to the public.

Rejecting appellant's reliance on two Superior Court cases that it deemed "neither persuasive nor binding," the court thus held that the coroner had fulfilled her statutory duty by filing the view of forms stating the cause of the victim's death and ruling it a homicide. The court found that requiring the coroner to additionally release the autopsy reports and any potentially privileged or embarrassing information contained therein "fulfills no purpose other than to satisfy a prurient interest."

The Johnstown Tribune Publishing Co. was represented by Michael Sahlaney of Johnstown, Pa.

D.C. Cir. Denies Reporters' Petition for Rehearing En Banc in Plame Investigation

In a per curiam opinion, the D.C. Circuit summarily denied a petition by Judith Miller, Matthew Cooper, and Time Inc. seeking a rehearing en banc of the Court's February panel decision holding that the reporters can be compelled to testify before the Plame grand jury investigation. *In re: Grand Jury Subpoena, Judith Miller*, No. 04-3138 (D.C. Cir. Apr. 19, 2005) (per curiam). *See also MediaLawLetter* Feb. 2005 at 5.

Judge Tatel, who concurred in the result of the Court's February decision, wrote a separate opinion concurring in the denial of rehearing en banc, addressing the reporters common law, First Amendment and due process arguments.

Judge Tatel again expressed support for a common law privilege, but concluded that no issue of "exceptional importance" existed to reconsider the issue in the case since the Court had not ruled out the privilege and could address the issue in another case.

He also recognized that the D.C. Circuit had issued conflicting decisions interpreting *Branzburg v. Hayes*, 408 U.S. 665 (1972), but concluded that the similarities between the instant case and *Branzburg* prevented the court from recognizing a First Amendment privilege, in that only the Supreme Court could "limit or distinguish *Branzburg* on these facts."

Finally, Tatel rejected the reporters' argument that they have a due process right to review the government's ex parte submissions to the court regarding the grand jury investigation. In addition to emphasizing the importance of grand jury secrecy, Tatel concluded that ex parte review protects journalists by permitting the court to determine whether the government has satisfied the criteria for overcoming any applicable privilege.

Judge Tatel did not directly address the argument made in a Media Amicus brief that the reporters' testimony was unnecessary because there is insufficient evidence that any government official violated the Intelligence Identities Protection Act of 1982.

The reporters will seek an expedited appeal to the U.S. Supreme Court. The Special Prosecutor leading the investigation, Patrick J. Fitzgerald, has agreed not to oppose the reporters' request for a stay of the contempt finding pending appeal.

Belgium Enacts Reporters' Privilege Law

Protection Adopted in Wake of Tillack Case

The Belgian Chamber of Deputies unanimously approved a law that protects journalists from being compelled to disclose their sources. The law, passed on March 17, 2005, would require journalists to reveal the identity of sources only in criminal cases to prevent serious physical injury.

Such disclosure, however, must be ordered by a court upon showing that the information is of "crucial importance" to prevent the crime and may not be obtained elsewhere.

An unofficial translation of the law by Professor Dirk Voorhoof, professor of Media Law and Journalistic Ethics at Ghent University, is available at: www.psw.ugent.be/dv/.

The law defines a journalist as someone who regularly contributes to the "gathering, editing, production or distribution of information" to the public, either as an employee or as an independent contractor. The unofficial translation does not make any reference to a news organization or media company in defining a "journalist." The law also covers editorial staff who may have information relating to the identity of sources.

Unless required in a criminal case, the law explicitly prohibits authorities from conducting searches and tapping telephones as a roundabout way of obtaining the information. It further protects journalists from prosecution for refusing to divulge sources and also for any complicity in violation of professional secrecy by a third party.

The statute was adopted in the wake of last year's controversial seizure of reporter Hans-Martin Tillack's notes as part of an EU leak investigation with strong parallels to the *Plame* case. *See MediaLawLetter* Nov. 2004 at 33. Next month's *MediaLawLetter* will contain a detailed update on the Tillack case and the impact of the Belgian shield law.

Storms Across the Border: Canada/United States Cross-Border Issues

Toronto (May 12-13, 2005)

Presented jointly by Media Law Resource Center and Advocates In Defence of Expression in the Media

The first seminar devoted to media law issues affecting Canadian and American publishers and broadcasters. Intended for counsel advising media on risks under Canadian law and procedure when their content is distributed in Canada – or is simply accessible on the Internet. Recent cases, such as Bangoura v. Washington Post provide a wake-up call for U.S. publishers and broadcasters. There may be more to fear just to the north, across the world's longest undefended border, than across the oceans in England or Australia.

What you will learn?

- When will Canadian courts take jurisdiction over claims against U.S. media?
- Can access on the Internet be enough for Canadian lawsuits against U.S. media defendants?
- What are the key differences under Canadian libel and privacy law?
- What advantages do plaintiffs have under Canadian law and procedure?
- Is it true that publishing a photograph taken in public can result in liability under Quebec law?
- What special defences are available under provincial libel legislation?
- What standards of fault apply?
- When can covering Canadian court cases get you into trouble?
- How to reduce the risks of being at the wrong end of Canadian lawsuit? Why is pre-publication/broadcast review different in Canada?
- What does Canadian litigation mean for discovery, protection of sources, trial conduct, damage awards and legal costs?

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Trademark Claim Against Noncommercial Website Dismissed, But Cybersquatting Claim Might Survive

The Ninth Circuit has ruled that while the noncommercial use of a trademark as a website's domain name does not amount to trademark infringement or dilution under the Lanham or Federal Trademark Dilution Acts, it still may be actionable under the Anticybersquatting Consumer Protection Act. *Bosley Medical Institute Inc. v. Kremer,* No. 04-59962 (9th Cir. Apr. 4, 2005) (Silverman, J.).

Background

Defendant Michael Kremer, dissatisfied with the hair restoration services provided by plaintiff Bosley Medical Group ("Bosley"), purchased the domain name www.BosleyMedical.com. Before developing a website for that address, defendant wrote a letter to plaintiff's president stating that he was planning a website to disclose the "true operating nature of BMG." Defendant also offered to discuss the matter with plaintiff before negative information posted on the Internet had a "snowball effect."

Defendant subsequently created a website featuring information highly critical of plaintiff's company. The site, however, contained no links to any of plaintiff's competitors, sold no goods or services, and earned no revenue.

Bosley sued for trademark infringement, dilution, unfair competition, and state law trademark claims. An additional libel claim was subsequently settled. The federal district court granted summary judgment to defendant on the federal claims and dismissed the remaining state law claims under California's anti-SLAPP statute.

No Infringement, Dilution

In affirming dismissal of plaintiff's federal trademark infringement and dilution claims, the Ninth Circuit recognized that to succeed on a Lanham Act claim, Bosley would have to establish that defendant had the mark "in connection with a sale of goods or services" in a way that was likely to cause "confusion, … mistake, or to deceive." *See* 15 U.S.C. § 1114.

Under the Federal Trademark Dilution Act, liability is premised upon "another person's commercial use in commerce of a mark or trade name," language the court found "roughly analogous" to that used in the Lanham Act. *See* 15 U.S.C. § 1125(c)(1).

The Court affirmed that defendant's site was "noncommercial" because it contained no links to plaintiff's competitors; there was no evidence that defendant attempted to sell the domain name to plaintiff as part of an "extortion scheme;" and plaintiff could not establish Kremer's site used the mark "in connection with goods and services" by arguing that defendant had "prevented users from obtaining the plaintiff's goods and services."

The Court concluded the website would not mislead consumers into buying competitors' services nor had defendant capitalized on the "goodwill" of plaintiff's mark to market his own services.

Anticybersquatting Claim

The Court went on to hold, however, that the district court had erred in dismissing the Anticybersquatting Consumer Protection Act ("ACPA") claim.

> [C]ybersquatting occurs when a person other than the trademark holder registers the domain name of a well known trademark and then attempts to profit from this by either ransoming the domain name back to the trademark holder or by using the domain name to divert business from the trademark holder to the domain name holder.

15 U.S.C. § 1125(d).

The Court recognized that the ACPA contains no "commercial use" requirement, and held that the district court erred in grouping the ACPA claim in the summary judgment motion without giving Bosley notice or a chance to conduct discovery, particularly on the issue of whether defendant had a bad faith intent to profit through the use of Bosley's mark in his domain name.

Anti-SLAPP Motion

Finally, the Ninth Circuit reversed the district court's decision to strike plaintiff's state law claims under the California anti-SLAPP statute. While the district court

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Trademark Claim Against Noncommercial Website Dismissed, But Cybersquatting Claim Might Survive

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concluded that Bosley's lawsuit sought to limit defendant's free speech, and thus was within the scope of the statute, the Ninth Circuit held that "[a]n infringement lawsuit by a trademark owner over a defendant's unauthorized use of the mark as his domain name does not *necessarily* impair the defendant's free speech rights," and recognized that it had previously ruled that a "source identifier" such as a trademark is not entitled to full protection under the First Amendment.

Although the court stated that a summary judgment motion may have been "well-taken," dismissal under the anti-SLAPP statute was in error.

Plaintiff was represented by Diana M. Torres, O'Melveny & Myers, Los Angeles. Defendant was represented by Paul Alan Levy, Public Citizen Litigation Group, Washington, DC.

NOW AVAILABLE

MLRC REPORTER'S PRIVILEGE SYMPOSIUM TRANSCRIPT

Last November, the MLRC held a symposium on the reporter's privilege. A number of very significant issues were addressed in the symposium. We believe that the members may wish to review the transcript of the symposium and are now making it available for that purpose.

You may view the Reporter's Privilege Symposium Transcript on our website, www.medialaw.org

(You will need to enter your website password in order to gain access to the transcript. Contact Kelly Chew at kchew@medialaw.org for more info).

Claims for Libel and Misappropriation Stated Over "Case History" on Company's Website

In a recently published non-media case, a Virginia federal district court denied a motion to dismiss libel and statutory misappropriation claims over the posting of a hacking "case history" on a computer security company's website. *Wiest v. E-Fense, Inc.,* 356 F. Supp. 2d 604 (E.D. Va. 2005) (Lee, J.).

Plaintiff, a former Air Force Academy cadet, was convicted under18 U.S.C.A. § 1030 for damaging a computer system by circumventing a firewall that prevented Internet relay chatting. Plaintiff's conviction and dishonorable discharge were reversed on appeal.

Defendant E-Fense, Inc. is a computer security and forensics company. Defendants' website, www.e-fense.com, included detailed information about the company and its services, as well as a section entitled "case histories" – summaries of security cases the company or its employees had handled.

In a "case history" of plaintiff's matter, defendants reported that plaintiff engaged in "hacking," was convicted of violating several laws and was dishonorably discharged from the Air Force. It did not include the fact that plaintiff's conviction was reversed.

The district court denied defendant's motion to dismiss, holding that the report was not a fair and accurate summary of plaintiff's case. "It is a misleading half-truth to say that a person was convicted ... without including the fact that his conviction was overturned on appeal." 365 F. Supp. 2d at 610.

Moreover, the court found that plaintiff stated a claim for statutory misappropriation under Va. Code Ann. § 8.01-40. The statute prevents the unauthorized use of a person's name or likeness for "advertising purposes." If a name or likeness is used without consent in connection with matters that are "newsworthy" or of "public interest," the statute does not apply.

The court noted that "E-Fense is not a news organization, but rather a private organization that provides services to clients." Thus, at the motion to dismiss stage, plaintiff's allegation that his name was used as an advertisement to solicit business was sufficient to state a claim – notwithstanding the mix of commercial and non-commercial speech on the website.

Plaintiff proceeded pro-se. Defendants were represented by William F. Coffield, Lankford, Coffield & Reid, in Alexandria, Va.

Proposed Settlement in Post-*Tasini* Freelance Writers Class Action

The American Society of Journalists and Authors, the Authors Guild, the National Writers Union, and 21 freelance writers have announced a proposed settlement worth up to $18 million in a class action filed on behalf of thousands of freelance writers whose work appeared on online databases without their permission. *In re Literary Works in Electronic Database Copyright Litigation*, MDL No. 1379 (S.D.N.Y., preliminary approval of settlement granted, Mar. 31, 2005).

The class action was filed in 2000, the year before the Supreme Court in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), held that electronic compilations and CD-ROM databases of articles previously published in periodicals did not constitute permissible "revisions" under the Copyright Act and thus infringed the copyright of the original authors of the works.

Under the proposed settlement entered on March 29, 2005, numerous publishers and database companies have agreed to compensate eligible freelance writers on a sliding scale depending in part on the copyright status of the work at issue and the year of original publication.

Freelancers whose works were properly registered under the federal copyright statute and were eligible for statutory damages under 17 U.S.C. § 412(2) stand to receive as much as $1,500 per work for the first 15 works written for a single publisher. The terms of the settlement further dictate that no eligible claimant will receive a settlement check for less than $5.00.

Those writers who choose to have their works removed from electronic databases will receive only 65% of the amount otherwise payable for the subject work.

Further information concerning the settlement as well as the text of the proposed settlement agreement and preliminary approval may be found at http://www.freelancerights.com.

Missouri High School Journalism Students Hear "Free Press in a Free Society" Seminar

By Russell Hickey

On April 22, the latest installment of the MLRC Institute's Free Press in a Free Society program for high school students was presented to student journalists in Columbia, Missouri as part of the Missouri Interscholastic Press Association's "J-Day" Convention.

The moderated seminar program focused on the practical issues of covering a crime, promising confidentiality and other ethical dilemmas journalists face in gathering and reporting the news on a daily basis.

The panel was comprised of Jean Maneke, of The Maneke Law Group in Kansas City, Kevin Crane, the current Boone County (Mo.) prosecuting attorney, Jim Robertson, managing editor of the *Columbia (Mo.) Daily Tribune*, and Dr. Earnest Perry, associate professor of journalism at the University of Missouri – Columbia.

The seminar was based on a hypothetical school shooting. The discussion began with the journalists describing how they would scramble to cover the story. Robertson, whose newspaper is an afternoon newspaper, noted that his deadline would be three hours away and the newsroom would be "in a panic" to get as many reporters and photographers to various locations to gather information and pull together the story.

The conversation became particularly interesting as the facts of the hypothetical revealed that one of the shooter's victims was pregnant. Perry described the delicate situation he would be facing if the pregnant victim was one of the students – as opposed to the teacher. Perry described the ethical dilemma of approaching the student's parents not knowing whether they knew their daughter was pregnant.

When the hypothetical turned to a source requesting confidentiality and an illegally intercepted cellphone call, an interesting discussion ensued regarding subpoenas for reporters, shield laws, and the possibility of reporters going to jail to protect their sources.

As the discussion focused on the tape, illegally intercepted by the confidential source, the prosecutor admitted that he would very much want to learn the identity of the source, but he didn't think the media would be willing to give him the information and said "Sometimes you have to do things the hard way."

He then shared a story about taking two weeks to interview everyone who had been in a local restaurant where a murder occurred.

The seminar concluded with panelists discussing a student's question regarding other ethical concerns for journalists.

Russell Hickey, claims counsel for Media/Professional Insurance in Kansas City, moderated the seminar program.

For more information about the MLRC Institute's High School Education Program go to the MLRC Institute page on www. medialaw.org.

LEGISLATIVE UPDATE

Reporters Privilege and FOIA

By Kevin M. Goldberg

The federal reporter's shield law and two bills proposing major reforms to FOIA remain the focal point of legislative efforts on Capitol Hill. Both require significant efforts simply to get their committees of jurisdiction to hold hearings and even more effort (and some luck) to pass.

MLRC members can be integral to the success of both bills by contacting their members of Congress to express their support for the bills.

Free Flow of Information Act (HR 581 and S 340)

- On February 2, 2005, Rep. Mike Pence (R-IN) introduced the "Free Flow of Information Act" (HR 581), which is largely based on existing Department of Justice guidelines for issuing subpoenas to members of the press. On February 9, 2005 Senator Richard Lugar (R-IN) introduced the same bill in the Senate as S 340.
- The main provisions of this bill include:
  - An absolute privilege against compelled testimony before any federal judicial, legislative, executive or administrative body regarding the identity of a confidential source or information that would reveal the identity of that source
  - A qualified privilege against the production of documents to these bodies unless clear and convincing evidence demonstrates that the information cannot be obtained by a reasonable, alternative non-media source and:
    - In a criminal prosecution or investigation:
      - There are reasonable grounds to believe a crime has occurred and
      - The information sought is essential to the prosecution or investigation
    - In a civil case, the information is essential to a dispositive issue in a case of substantial importance
  - The protections discussed above apply to information sought by a third party but related to a "covered entity", such as telephone toll records or E-mail records and, in the event that they are sought, the party seeking the information shall give the covered entity reasonable and timely notice of the request and an opportunity to be heard before disclosure
  - A "covered entity" includes
    - The publisher of a newspaper, magazine, book journal or other periodical; a radio or television station, network or programming service; or a news agency or wire service, with a broad listing of media such as broadcast, cable, satellite or other means
    - Any owner or operator of such entity, as well as their employees, contractors or any other person who gathers, edits, photographs, records, prepares or disseminates the news or information
- The bill's sponsors in both Houses are currently trying to get co-sponsors, especially among the members of the Senate and House Judiciary Committees. Washington representatives of major media organizations and companies have met with the staffs of these Committees and members of these committees, urging them to co-sponsor the bill and demand that the Chairs of these Committees (Sen. Arlen Spector (R-PA) and Rep. James Sensenbrenner (R-WI)) hold hearings on the bill. MLRC members are urged to do the same. A list of members of the Senate Judiciary Committee can be found at: http://judiciary.senate.gov/members.cfm; a list of House Judiciary Committee members can be found at: http://judiciary.house.gov/CommitteeMembership.aspx.
- A hearing will be held in the House Judiciary Committee's Subcommittee on Courts, Internet, and Intellectual Property on May 12, 2005.

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LEGISLATIVE UPDATE

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Open Government Act of 2005 (S 394 and HR 867)

- The Open Government Act was introduced by Senators John Cornyn (R-TX) and Patrick Leahy (D-VT) as S 394 on February 16, 2005; Rep. Lamar Smith (R-TX) introduced the bill as HR 867 in the House on the same day.
- Among the changes proposed in this bill are:
  - A broader definition of the "news media" for purposes of fee waivers
  - An increase in the circumstances where "fee shifting" would occur to award attorneys' fees to a litigant who must go to court to obtain documents from a federal agency
  - Creation of an annual report to track the use of the FOIA exemption for critical infrastructure information that was created in the Homeland Security Act of 2002
  - Stricter enforcement of the 20 day deadline by which agencies must respond to a FOIA request and the penalties for non-compliance
  - Maintenance of accessibility of records that have been given to private contractors for storage and maintenance
  - The creation of a "FOIA Ombudsman" within a new Office of Government Information Services to oversee FOIA
- The House Government Reform Committee will hold a hearing on the topic of FOIA generally, though this bill and the FASTER FOIA Act (discussed below) are expected to be the focal points of this hearing. This hearing is scheduled for May 11 at 2 p.m.

Faster FOIA Act

- Senators Cornyn and Leahy also introduced the "Faster FOIA" Act as S 589 on March 10, 2005. This bill is intended to support the Open Government Act by establishing an advisory commission on Freedom of Information Act processing delays.
- The bill was introduced in the House of Representatives on April 6, 2005 by Reps. Brad Sherman (D-CA) and Lamar Smith (R-TX). It was given bill number HR 1620.
- The 16 member commission would report to Congress and the President with recommendations for ways in which delays can be reduced in FOIA processing. This report would be due no later than one year after the date of enactment of the law, and would include recommendations for legislative and administrative action to enhance FOIA performance. The Commission would also have to produce a study to ensure the efficient and equitable administration of FOIA throughout the federal government, which would include an examination of the system for charging fees and granting fee waivers.

For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Chairman, Kevin M. Goldberg of Cohn and Marks LLP at (202) 452-4840 or Kevin.Goldberg@cohnmarks.com.

Campaign for Reader Privacy

The MLRC encourages its members to sign the petition at www.readerprivacy.org and show their support for the Campaign for Reader Privacy, an effort to restore privacy safeguards for bookstore and library records that were eliminated by Section 215 of the USA Patriot Act. A joint initiative of the American Booksellers Association, the American Library Association, the Association of American Publishers and PEN American Center, the Campaign seeks to challenge portions of the Patriot Act that allow FBI agents to obtain court orders to search the records of anyone who they believe may have information relevant to a terrorism or espionage investigation, without giving a bookseller or librarian the opportunity to object on First Amendment grounds, through "secret proceedings." The Campaign has already delivered over 200,000 signatures to Congress, and has issued a statement endorsed by organizations representing an overwhelming majority of the nation's booksellers, librarians, and writers.

MLRC Report: The Substantial Truth Defense and Third Party Allegations

By Jennifer O'Brien[1]

Introduction

As plaintiffs have exercised increased ingenuity in framing libel actions, the print and broadcast media have compiled in tandem an increasingly varied arsenal of privileges and other defenses with which to combat allegations of defamation. Among the thorniest claims defendants have been forced to confront over the years are those arising under the common law republication doctrine, by which an entity may be held liable in defamation for "republishing" allegedly defamatory statements concerning a plaintiff that have originated from a third party. While both the fair report privilege and the doctrine of neutral reportage – as well as defenses based upon failure to prove the requisite fault – have emerged as valuable tools in protecting defendants engaged in such republication, media entities in those jurisdictions that have adopted the doctrine of "substantial truth" should also remain mindful of a number of key cases in which the defense has been employed to shield defendants from liability for publishing third party allegations.

As the Supreme Court has long recognized, because a defamation claim requires a showing of falsity, the truth of the statements at issue will operate as a complete defense in a defamation action. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 1 Media L. Rep. 1527 (1964). While defendants would ideally be able to prove the absolute truth of the allegedly defamatory material at issue, the Court has further recognized that the media should be granted a measure of leeway in reporting in recognition of the fact that

> [t]he common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. . . . It overlooks minor inaccuracies and concentrates upon substantial truth. . . . . Minor inaccuracies do not amount to falsity so long as the 'substance, the gist, the sting, of the libelous charge be justified.' . . . Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'

Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516-17, 18 Media L. Rep. 2241 (1991) (quoting R. Sack, Libel, Slander, and Related Problems 138 (1980)).[2]

Within the context of the publication of third party allegations, the substantial truth defense has been used to shield defendants from liability in those situations in which it can be established that they have accurately reported the "gist" or "sting" of the allegations against or investigation into a plaintiff – even if minor inaccuracies exist in their reporting.

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[1] *Jennifer O'Brien is the 2004-2005 Media Law Resource Center Legal Fellow.*

[2] Courts have also applied the "gist" or "sting" analysis pivotal to the substantial truth defense in determining whether a plaintiff has adequately pled a claim for defamation. *See, e.g.*, *Herron v. King Broadcasting Co. d/b/a King TV Channel 5*, 776 P.2d 98 (Wa. 1989) ("The 'sting' of a report is defined as the gist or substance of a report when considered as a whole. . . . In terms of the elements of defamation, [we require] the plaintiff to show that the falsehood affects the 'sting' of a report as part of his showing of damage.") (citing *Mark v. Seattle Times,* 96 Wash. 2d 473, 494-97 (1981)); *Love v. William Morrow and Co.*, 597 N.Y.S.2d 424 (N.Y. App. Div. 1993) (finding that plaintiff had failed to carry his burden of pleading and proving statements at issue were "substantially false" in that "when an appropriate inquiry is made, *i.e.*, 'whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced' . . . it can be concluded that the effect would be the same in all important respects") (citing *Fleckstein v. Friedman*, 266 N.Y. 19, 23 (1934)).

Caselaw

As the substantial truth doctrine has gained acceptance in courts across the country, Texas has emerged at the forefront of those jurisdictions employing the defense.

In *McIlvain v. Jacobs*, 794 S.W.2d 14, 17 Media L. Rep. 2207 (Tex. 1990), the Texas Supreme Court set the precedent for employing the substantial truth doctrine in an action brought by employees of a municipal water facility against defendant broadcasters. During the broadcast at issue, defendants reported that the municipal facility was under investigation by the Public Integrity Review Group ("PIRG") for assigning city workers private work at the home of the city water maintenance manager and then allowing them to collect overtime pay in order to complete their city jobs. Additionally, the report claimed that during an inspection of the facility police had discovered liquor bottles, and that a city employee had reported that drinking on the job was not uncommon.

In considering the plaintiffs' defamation claim, the court set forth the salient and oft-cited principle that "[t]he test used in deciding whether the broadcast is substantially true involves consideration of whether the alleged defamatory statement was more damaging to [plaintiffs'] reputation, in the mind of the average listener, than a truthful statement would have been." *Id.* at 16 (citations omitted). In comparing the broadcast of defendants' news report to the evidence concerning PIRG's investigation and findings, the court ruled that the broadcast was "factually consistent . . . substantially correct, accurate and not misleading." *Id.* Ruling that defendants had established the substantial truth of their broadcast as a matter of law, the court held that such finding negated an essential element of plaintiffs' claim – the falsity of the statements at issue – and thus affirmed the trial court's entry of summary judgment for defendants.

In the years since *McIlvain*, lower courts have continually drawn upon its reasoning in adjudicating actions involving media outlets that have been sued for reporting on third party allegations. In *KTRK Television v. Felder*, 950 S.W.2d 100, 25 Media L. Rep. 2418 (Tex. App.–Houston [14th Dist.] 1997, no writ), defendant television station broadcast a report concerning allegations brought by parents claiming plaintiff, a middle school teacher, had subjected their children to physical threats and verbal abuse. Defendant further reported that plaintiff was under investigation by the Houston Independent School District, and would be reassigned to a different school while the investigation was pending. Plaintiff brought suit against the station for, *inter alia*, libel and slander, and the trial court denied defendant's motion for summary judgment.

In ruling on plaintiff's claims, the appellate court recognized that under Texas law, defendant would be shielded from liability upon a showing that the broadcast was a substantially accurate summary of the allegations, in that "[i]f the underlying facts as to the gist of the defamatory charge are undisputed, then we can disregard any variance with respect to items of secondary importance and determine substantial truth as a matter of law." *Id.* at 105-06. The court went on to hold that the "uncontroverted summary judgment proof" established that defendants had accurately conveyed the abuse allegations at issue. *Id.* at 107.

Significantly, the *Felder* court rejected plaintiff's argument that in establishing substantial truth defendants were required to prove not only that they had accurately reported that plaintiff was under investigation, but that the parents' underlying abuse allegations were true as well. The court found that adopting plaintiff's argument would result in an environment in which

> the media would be subject to potential liability everytime it reported an investigation of alleged misconduct or wrongdoing by a private person, public official, or public figure. Such allegations would never be reported by the media for fear an investigation or other proceeding might later prove the allegations untrue, thereby subjecting the media to suit for defamation. . . . First Amendment considerations aside, common sense does not indicate any conclusion other than the one we reach today.

Id. at 106.

In *Barbouti v. Hearst Corp.*, 927 S.W.2d 37, 24 Media L. Rep. 2313 (Tex. App.-Houston [1st Dist.] 1996, writ denied), plaintiff brought suit over two articles published in the *Houston Chronicle* involving the U.S. Defense Intelligence Agency's investigation into possible ties between plaintiff and a Libyan terrorist, as well as a state court's finding that plaintiff was liable for conspiring to steal technology and causing $12 million in damages. The Court of Appeals initially reversed and remanded the trial court's grant of summary judgment to defendants, but after a rehearing by the panel the appellate court affirmed the lower court's order.

While the appellate court recognized that the articles at issue were not "100 percent accurate in every detail," it nonetheless held them substantially true for purposes of the summary judgment motion after finding that the allegedly inaccurate statements were no more damaging to plaintiff's reputation than true statements would have been. *Id.* at 65 (*citing McIlvain)*.

In *Dolcefino v. Turner*, 987 S.W.2d 100 (Tex. App.-Houston [14th Dist.] 1998), *aff'd,* 38 S.W.3d 103 (Tex. 2000), the appellate court rejected a defamation claim brought by a mayoral candidate after defendant television station ran broadcasts concerning plaintiff's involvement in a large-scale life insurance scheme. Defendants were alerted to plaintiff's possible involvement in the scam through a private investigator's tip, and in preparing for the segments interviewed, among others, a court-appointed investigator who confirmed that plaintiff "was aware of the insurance fraud conspiracy, … refused to cooperate in her investigation, . . . was involved in attempts to get insurance companies to pay off, and [that plaintiff] 'was in it up to his eyeballs.'" *Id.* at 106.

Citing *McIlvain* and *Felder*, the court reaffirmed the principle that the media would only be held liable upon a finding that any allegedly defamatory statements were "more damaging to the plaintiff's reputation, in the mind of the average listener, than a truthful statement would have been." *Id.* at 109. The court further noted that *McIlvain* had been interpreted as requiring the media only to prove that third party allegations in a broadcast were in fact made and under investigation – not that the allegations themselves were substantially true. *Id.*

The following year, the same appellate court handed down in its decision in *Dolcefino v. Randolph*, 19 S.W.3d 906, 28 Media L. Rep. 2189 (Tex. App.- Houston [14th Dist.] 2000, pet. denied) in which the City of Houston Controller and a staff member claimed they were defamed by a broadcast concerning an investigation into the controller's allegedly improper work habits. While the trial court denied defendants' motion for summary judgment the appellate court reversed, recognizing that substantial truth is considered an "absolute defense" in a libel action, and that "[w]here the facts are undisputed as to the gist of the libelous charge, we disregard any variance regarding items of secondary importance and determine substantial truth as a matter of law." *Id.* at 921. The court went on to find that defendants had provided adequate evidence to substantiate that the allegations in the broadcast were accurately reported, again recognizing that the media's burden did not extend to proving the truth of the allegations themselves. *Id.* at 918.

More recently, a Texas appellate court employed the substantial truth doctrine in dismissing defamation charges stemming from a broadcast reporting that roaches had been found at plaintiff's childcare facility. *UTV of San Antonio, Inc. v. Ardmore, Inc.*, 82 S.W.3d 609 (Tx. App. - San Antonio, 2002, no pet.). The report included an interview with a former employee of the facility, as well as information gleaned from a report filed by the Texas Department of Protective and Regulatory Services (DPRS). Plaintiff claimed that statements made during the broadcast contradicted the DPRS's inspection report, which was unclear as to whether the inspector herself saw the roaches, or whether the inspector was only repeating the staff's allegations. The court ruled that such discrepancy was insufficient to establish falsity for purposes of plaintiff's defamation claim, finding instead that the relevant gist of the broadcast – that the daycare center had confronted a problem which had been inspected by DPRS – was substantially accurate, and that the defendants was not required to determine whether any of the allegations – including those of the former employee- were true before reporting on them. *Id.* at 612 (*citing McIlvain* and *Dolcefino*).

In *Basic Capital Management, Inc. v. Dow Jones & Co.*, 96 S.W.3d 475, 32 Media L. Rep. 1955 (Tx. App.-Austin 2002, no pet.), a Texas appellate court again applied the substantial truth defense in finding a defendant not liable for statements published in two *Wall Street Journal* articles concerning a federal indictment handed down over a conspiracy to manipulate stock prices. Although plaintiff, an investment firm, was not named as a defendant in the indictment, the *Journal* articles alluded to the role plaintiff allegedly played in the conspiracy, and included the statements that "[f]ederal authorities allege that the enterprise laundered most of its bribe money through [plaintiff]" and that "two men associated with [plaintiff] were charged with participating in a moneylaundering scheme with alleged mob ties." *Id.* at 479. The *Journal*, upon the request of plaintiff's counsel, later issued a correction stating that although two of the plaintiff's former advisors who had recently resigned were charged with wire fraud and conspiracy to pay illegal kickbacks through the plaintiff, they had not been charged with money laundering. Plaintiff nonetheless brought suit for defamation and business disparagement based on the statements in the two articles, claiming that they falsely reported that plaintiff was involved in money laundering.

As the court recognized, "[b]ecause the parties agree that the challenged statements only characterize the allegations of the indictment, and do not purport to portray the underlying events described therein, our task is necessarily limited to determining whether the articles accurately report the charges set forth in the indictment." *Id.* at 480. In comparing the statements plaintiff alleged were defamatory with the charges in the indictment, the court concluded that the portions of the articles characterizing plaintiff's activities were substantially true as a matter of law, in that the "gist" or "sting" of the published statements reporting on the indictment was no more damaging to plaintiff than the portions of the indictment discussing plaintiff's role in the enterprise. *Id.* at 482-83.

Texas has also employed the substantial truth doctrine on the federal level. In *Mullens v. New York Times Co.*, No. 3-95-CV-0368-R, 1996 WL 787413 (N.D. Tex. July 30, 1996), the court sustained the defense in a defamation action brought against *The New York Times* and reporter Kurt Eichenwald by a plaintiff disputing "the factual accuracy of various portions" of an article discussing the FBI's investigation into plaintiff's possible role in a bank fraud scheme involving his employer. The plaintiff argued that the article suggested that plaintiff had participated in the scheme and was about to be charged with criminal activity. Defendants countered that they should be shielded from liability because the information

contained in the article was based upon an FBI affidavit that specifically named the plaintiff, and that the newspaper had simply reiterated the agent's conclusions.

The court agreed with defendants, holding that because the allegations which plaintiff claimed were defamatory "did not originate with the New York Times, but rather with [FBI] Agent Condit's affidavit" and "the overall 'gist' of the Times article accurately summarized the FBI's investigation of . . . [p]laintiff's alleged involvement," the substantial truth defense was applicable and defendants' summary judgment motion would be granted. *Id.* at *4.

On the federal appellate level, the Fifth Circuit Court of Appeals used the defense in affirming a summary judgment motion for the media defendants over a defamation claim. *Green v. CBS Inc.*, 286 F.3d 281, 30 Media L. Rep. 1701 (5th Cir. 2002). In *Green*, defendant CBS aired a story on *48 Hours* entitled "Lotto Town," which reported on the lives of lotto millionaires living in a small Texas community. Plaintiffs, the ex-wife and stepdaughter of Lance Green, one of the winners profiled, sued defendants, alleging that statements in the broadcast falsely implied the ex-wife was a liar and a "gold digger."

Analyzing the portions of the broadcast that plaintiffs alleged were defamatory – including Lance Green's statement that plaintiff was keeping his stepdaughter from him until he pays her more money, and the statements of Green and his attorney that plaintiff had fabricated charges of abuse against her daughter in an effort to get more money – the court held that under Texas law defendants would not be held liable for merely reporting the allegations made by third parties. *Id.* at 284. The court also recognized that the burden did not rest on the media to prove the truth of the underlying allegations, and concluded that "the reported statements reveal only the opinion of the speaker, and are not defamatory." *Id.*

A number of other federal courts have also employed the substantial truth doctrine in actions involving third party allegations.

In *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985), the Eighth Circuit addressed the claims of a former state Attorney General alleging he was defamed by an article in *Newsweek* magazine concerning claims that he had raped a 15-year-old Indian girl and that a tribal court had found "probable cause" supported the charges. Although the appellate court ultimately reversed the district court's entry of summary judgment for the media defendant, the court adopted the trial court's finding that defendant had established the substantial truth of the basic facts underlying the rape charges against the plaintiff. While plaintiff identified a number of specific errors he claimed existed in the article, including the year in which the rape allegation occurred and the fact the victim had not been a babysitter for plaintiff's children, the court found that *Newsweek* would not be held liable for such alleged discrepancies. The court instead ruled that "we do not believe that the District Court erred in finding that in the present case there is no issue as to the truth or falsity of any *material* fact with regard to Newsweek's statements concerning the rape allegation." *Id.* at 647 (emphasis in original).

In addition, the appellate court rejected plaintiff's argument that defendant should face liability on the grounds that the article implied that plaintiff was actually guilty of the alleged rape merely because it had reported the allegations at issue. The court ruled that any damage to plaintiff's reputation had resulted solely from "a materially accurate report of historical fact, not of an assertion by Newsweek that [plaintiff] committed the alleged crime." *Id.* at 649 (proceeding to find that the entry of summary judgment for *Newsweek* should be reversed on the grounds that defendant did not prove additional statements contained in the article were opinion and not assertions of fact).

In a case providing an excellent analysis of the doctrine, *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998), plaintiff Richard Jewell, a security guard during the 1996 Olympic games, brought an action against the publisher of the New York Post ("NYP") alleging, *inter alia,* that the NYP libeled him in a column discussing the FBI's investigation of a bomb explosion in Centennial Olympic Park. Although Jewell admitted in his complaint that he "was investigated by the FBI" in connection with the bombing and that he was in fact considered "a suspect," he alleged that the NYP's statements that he was the "main" or "prime" suspect under investigation amounted to defamation.

As the district court recognized, the substantial truth defense will defeat a charge of libel under New York law so long as a defendant can establish that the "gist or substance" of the challenged statements is true. *Id.* at 366 (citations omitted). Although the court recognized the dearth of precedent addressing the "intensely factual" issue raised by the phrasing of the article, it found that cases grappling with the question of substantial truth fell along a spectrum ranging from those considering statements that were nearly "completely true" to those in which "a defendant simply asks too much in asserting that a statement is substantially true because the difference . . . is plainly substantial." *Id.* at 367-68.

The court placed the statements in the NYP article in the middle of the spectrum, where "the stretch between the statement and the admitted truth becomes more tenuous, but still the overall 'gist' or 'sting' cannot be said to be 'substantially' different." *Id.* at 368 (citations omitted). The court recognized that while naming Jewell as the "prime" or "main" suspect under investigation differed from recognizing him as only "a" suspect, the "gist" of the statements – that plaintiff was suspected of having planted the bomb and was subsequently under investigation by the FBI – would have had the same effect on the minds of reasonable readers.

The court found its conclusion was buttressed by placing the isolated statements in the context of the column in which they originally appeared. While the plaintiff claimed that the inclusion of the terms "main" and "prime" conveyed the false notion that he was the leading suspect of the FBI's investigation, the court found that such an implication was not emphasized as a "central focus" of the column when read in its entirety. *Id.* at 369. [3]

In *Basilius v. Honolulu Publishing Co.*, 711 F. Supp. 548, 16 Media L. Rep. 1759 (D. Haw. 1989), plaintiff brought an action against the publisher of *Honolulu* magazine and a reporter, alleging he had been libeled in an article discussing the assassination of former Palau president Haruo Remeliik. According to the article, members of the victim's family had received an anonymous letter stating that plaintiff and a second man had paid to have Remeliik killed as part of an effort to ensure the passage of the Compact of Free Association in exchange for $18.5 million. Plaintiff's complaint claimed that the paragraph of the article discussing the correspondence implied that he was guilty of the crimes enumerated in the letter, and defendants moved for summary judgment on the grounds that the article was substantially true.

In granting defendants' motion, the court identified the "gist" of the paragraph at issue as the fact that the victim's family had received an anonymous letter discussing plaintiff's possible involvement in Remeliik's assassination. The

[3] A discovery ruling by a Georgia trial court in 2004 has cleared the way for consideration of a six-year-old summary judgment filed by the *Atlanta Journal-Constitution* in a second case involving a libel claim brought by Richard Jewell concerning his alleged involvement in the Olympic Park bombing. *Jewell v. Cox Enterprises, Inc.* No. 97-VS0122804-G (Fulton County State Court, Ga.). Similar to the *Post,* the *Journal-Constitution* has argued that Jewell is unable to prove the substantial falsity of the allegedly libelous statements published in newspaper articles discussing the FBI's investigation into Jewell as a suspect in the bombing.

court went on to recognize that the parties did not dispute that the letter at issue existed, and that "[t]he paragraph does *not* allege that these underlying accusations are true; it simply reports that the relatives did receive such a letter." *Id.* at 551. The court held that regardless of whether the allegations contained in the letter were true, the article had conveyed the "gist" of the letter accurately, which merited the entry of summary judgment in favor of defendants. *Id.* at 552.

In *Hickey v. Capital Cities/ ABC, Inc.*, 792 F. Supp. 1195, 19 Media L. Rep. 1980 (D. Or. 1992), plaintiff James Hickey claimed he was defamed by an episode of *20/20* concerning his alleged involvement in a "black market operation" in which stolen pets were delivered to medical research facilities. Specifically, plaintiff characterized as libelous three categories of statements: that "more than 300 people in Central Oregon have complained that their pets were stolen and delivered to Hickey's operation;" that plaintiff is "dealing in" and "accepting" stolen pets; that "other[s] charge that the Hickeys not only accept stolen pets, they actively encourage people to do the stealing for them" and that plaintiff "solicited or permitted stolen pets to be brought to him." Defendants moved for summary judgment, arguing that the statements at issue were substantially true.

In evaluating plaintiff's claim, the court recognized that while truth is a complete defense in a defamation action, defendants were not required to prove the absolute and literal truth of each of the factual statements at issue. *Id.* at 1197. The court went on to hold that defendants had proffered adequate evidence – including the affidavits of a deputy sheriff and police officer concerning over 400 telephone calls the sheriff's officer had received from citizens reporting stolen pets that they feared had been delivered to plaintiff's animal facilities – to prove that the allegations against the plaintiff as reported in the broadcast were substantially true. *Id.* at 1197-99.

The Western District of Missouri employed the substantial truth defense in granting summary judgment for a media defendant in an action involving a news broadcast concerning the location of a missing sixteen-month-old child. *Kenney v. Scripps Howard Broadcasting Co.*, No. 98-1079-CV-W-BD, 2000 WL 33173915, 28 Media L. Rep. 2512 (W.D. Mo. June 28, 2000). In *Kenney,* the broadcast at issue stated that a missing child had last been seen with plaintiff, her paternal grandmother, and that "family members believe the girl's father and grandmother are now with her at an unknown location." *Id.* at *1. Plaintiff alleged she was defamed by the broadcast, which she contended falsely accused her of kidnapping her granddaughter.

The court disagreed, holding that the broadcast media could not be held liable for repeating the family's conclusions in the broadcast:

> All the critical facts in the news broadcast were substantially true and not in dispute. The 'gist' of the newscast is that [the child] was last seen with plaintiff (a true fact) and that *family members* believe she *may be* with plaintiff and her son (a true fact). Therefore, this Court finds no actionable defamation here.

Id. at *4 (italics in original) (citation omitted).

Similar to their federal counterparts, state court decisions provide additional examples of instances in which defendants have allegedly mischaracterized allegations or claims against plaintiffs brought by third parties.

In *Pritchard v. Times Southwest Broadcasting, Inc.*, 642 S.W.2d 877, 9 Media L. Rep. 1048 (Ark. 1983), the Supreme Court of Arkansas confronted a suit involving allegedly defamatory statements in a television news broadcast concerning appellant, a sheriff. The broadcast reported, *inter alia*, that a lawsuit was pending against the sheriff stemming from an altercation he had had with a citizen named Eveld, and detailed Eveld's allegation that appellant had hit him on the head

with his pistol during the scuffle. While appellant admitted he had been in an altercation with Eveld, he argued that it was untrue that he had hit him with the pistol, and that the report was thus defamatory.

Turning to the issue of whether the broadcast's coverage of the lawsuit was false for purposes of a defamation action, the court acknowledged that

> [i]t is now generally agreed that it is not necessary to prove the literal truth of the accusation in every detail, and it is sufficient to show that the imputation is substantially true, or as it is often put, to justify the 'gist', the 'sting' or the 'substantial truth' of the defamation.

Quoting Prosser, Handbook of the Law of Torts 798-99 (4th ed. 1971).

Although the court recognized that the statements in the broadcast may not have been "precise," it found that the issue of whether or not appellant's gun came in contact with Eveld's head would not change the gist or sting of the broadcast – that plaintiff was involved in a lawsuit stemming from a fight with a citizen – and thus affirmed the directed verdict in defendants' favor. *Id.* at 880.

In Kentucky, the substantial truth defense has been applied by a circuit court considering a libel claim brought over broadcasts concerning alleged improprieties in plaintiff Housing Director's administration of a federal loan program. *Hodge v. WCPO Television News*, No. 97-CI-02516, 2001 WL 1811681, 29 Media L. Rep. 2597 (Ky. Cir. Ct. Oct. 1, 2001). Specifically, the broadcasts reported that there was a "perception" in plaintiff's community that he used his position to favor a female developer who was a personal friend. Plaintiff sued for defamation and false light invasion of privacy.

In granting defendants' motion to dismiss, the court noted that plaintiff conceded that he shared a close relationship with the developer at issue, and admitted that there were "rumors" in the community of favoritism in the way plaintiff administered loans. *Id.* at *2. Additionally, the court recognized that an investigation of complaints against plaintiff by the Department of Housing and Urban Development had in fact acknowledged an appearance of favoritism after finding that plaintiff's friend benefited from the loan program to a greater extent than other developers. The court thus concluded that the evidence established the substantial truth of the broadcasts at issue, and that the media defendants would not be held liable in defamation for "merely reporting" on the opinions or perceptions of third parties. *Id.* at *2.

Recent Cases Involving Reports on Terrorism

Recently, two key federal court decisions adjudicating cases arising over the media's coverage of the United States' "war on terror" have reaffirmed the proposition that media defendants should not be held liable for merely reporting the allegations of third parties – regardless of whether those allegations ultimately prove true.

In *Global Relief Found., Inc. v. New York Times Co.*, 390 F.3d 973 (7th Cir. 2004),[4] plaintiff Global Relief Foundation ("GRF"), incorporated as a charitable organization in Illinois, sued a number of reporters and news agencies over re-

[4] Previously, in *Vachett v. Central Newspapers, Inc.*, 816 F.2d 313 (7th Cir. 1987), the Seventh Circuit affirmed a grant of summary judgment for a newspaper defendant claiming that the substantial truth of an article pertaining to defendant's arrest shielded it from liability in a defamation action. The court recognized that minor inaccuracies in defendant's story based on information received from the police department did not negate application of the defense in that the "gist" or "sting" of the article would have been the same had the incorrect information not been included. *Id.* at 316-17.

ports concerning the United States government's post-9/11 investigation into organizations allegedly linked to terrorism and the freezing of the organizations' assets. While plaintiff was not named in an Executive Order listing 27 individuals and organizations whose assets would be frozen, defendants identified plaintiff as a potential target of the investigation. Based on its blanket denial that it had ever provided money or assistance to terrorist organizations, plaintiff claimed defendants' reports were false and defamatory and sought $125 million in damages.

While the appeals court found that GRF apparently conceded it had been investigated by the government for possible financial ties to terrorism, plaintiff claimed that the salient issue for the court to decide was whether the trial court properly held that "defendants' defamatory reports were substantially true when defendants only established that they accurately repeated defamatory suspicions held by the government and not that GRF was guilty of aiding terrorists[.]" (Pl. Br. at 1-2). GRF argued that "[d]efendants' reference to 'investigations' or 'suspicions' was merely an 'inoffensive detail' qualifying the actual defamatory sting arising from their accusations that GRF was a front for al Qaeda," and that defendants could not escape liability by "simply republish[ing] defamatory statements made by others prefaced by qualifying language attributing the statements to those other persons." (Pl. Br. at 8, 9) (citations omitted). Plaintiff argued that such conduct would violate the "repetition rule," under which a defendant cannot escape liability by "simply (a) identifying the originator of a defamatory statement; (b) qualifying the defamatory statement with language such as 'it is alleged', 'it is rumored', or 'it is predicated'; and (c) expressing disbelief about a defamatory statement made by another." *Citing Dubinksy v. United Airline Master Exec. Council*, 708 N.E.2d 441, 448-49 (Ill. App. Ct. 1999) (additional citation omitted).

Defendants countered that the articles truthfully reported on the government's investigation into and subsequent freezing of plaintiff's assets, and that imposing the additional burden of proving that plaintiff was actually guilty "would dramatically and improperly chill the ability of the press to report on the actions of government and deny the public information about matters of vital public concern." (Def. Br. at 13). Additionally, defendants argued that the reports at issue did not endorse the government's concerns regarding GRF, but simply "reported on the highly newsworthy conduct of the federal government. The rule of republication does not apply to reports that the government was investigating GRF for possible links to terrorism and considering a freeze of GRF's assets." (Def. Br. at 45).

In reviewing the six media reports at issue, the court first held that no reasonable jury could find that the substantial truth of the reports had not been established. The court held that the "gist" or "sting" of defendants' reports accurately reflected the government's investigation, and that any "minor inaccuracies"—such as the timing of when GRF was placed on the government's list of designated terrorists – were insubstantial. *Id.* at 986-87. Additionally, the court agreed with defendants that the media should not bear the burden of proving the truth of the underlying allegations involving plaintiff's purported terrorist affiliations. Citing to a number of Illinois cases "directly on point," the court ruled that once the defendants had proven the substantial truth of their publications, "[w]hether the government was justified in its investigation or correct in its ultimate conclusion is irrelevant to a suit against news media defendants for accurately reporting on the government's probe." *Id.* at 990. The district court's grant of summary judgment in defendants' favor was therefore affirmed.

Although not employing the substantial truth defense, a recent opinion by the Eastern District of Virginia in *Hatfill v. New York Times Co.*, No. 1:04cv807, 2004 WL 3023003, 33 Media L. Rep. 1129 (E.D. Va. Nov. 24, 2004) affirms the underlying premise that a newspaper should not be held liable for accurately recounting an investigation into a plaintiff's conduct.

In 2002, *The New York Times* Op-Ed columnist Nicolas Kristof wrote a series of columns detailing the FBI's sub-par investigation into a string of anthrax mailings that had taken place the previous year. Kristof's early columns admonished the FBI for not adequately investigating a scientist dubbed "Mr. Z," and detailed a series of questions and comments about Mr. Z that Kristof stated warranted investigation.

After news of plaintiff Steven Hatfill's potential ties to the anthrax mailings spread, he held a press conference denying his involvement. Kristof's column following Hatfill's public statements acknowledged that Hatfill was in fact "Mr. Z," and "repeated a number of the legitimate issues that warranted full investigation by the FBI . . . ." Throughout his columns, however, Kristof continually stated Hatfill was only a suspect in the investigation, did not "accuse him of guilt," and cautioned that Hatfill "deserved the presumption of innocence."

Hatfill filed a defamation action against both Kristof and The New York Times Company alleging, *inter alia*, that the columns "collectively state or imply that Dr. Hatfill was the anthrax mailer, and that Kristof wrote the columns to impute guilt for the anthrax letters to Dr. Hatfill in the minds of reasonable readers." *Id.* at *4.

After finding that none of the columns accused Hatfill of having conducted the anthrax mailings or endorsed a belief in his guilt, the court found that defendants could not be held liable for defamation in light of the oft-cited principle that

> an accurate report of ongoing investigation or an allegation of wrongdoing does not carry the implication of guilt has long been recognized at the common law, and it is mandated by the First Amendment. Indeed, for this reason, courts routinely dismiss libel claims against defendants who accurately report on investigations or charges made by others.

Id. at 6 (citations omitted).

While Kristof's columns described plaintiff as "someone who experts in the field have identified as deserving scrutiny by the FBI" and identified Hatfill as the focus of the FBI's investigation, the court found that critiquing the FBI's investigation and "raising questions of legitimate concern to the public" could not be equated with a blatant accusation of guilt, and that Kristof's columns merely "accurately report questions being raised in the context of an ongoing public controversy." *Id.* at *7.

Additionally, the court held that because plaintiff brought his first cause of action on a theory of libel-by-implication, the allegedly defamatory language "'must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference.'" *Quoting Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1110 (4th Cir. 1993). Finding that Kristof's columns "specifically and repeatedly disavow" the conclusion that Hatfill was guilty of the anthrax mailings, the court held that Hatfill's claims also failed as a matter of law on the ground that plaintiff had failed to prove that Kristof intended for readers to conclude that Hatfill was guilty.

Cautious Optimism

Clearly, defendants facing libel allegations should be encouraged to take advantage of the growing precedent rejecting defamation claims against the media for restating third party allegations. Both *Hatfill* and *Global Relief* disavow reliance on the republication doctrine, and emphasize that defendants should not bear the burden of proving that allegations asserted against a plaintiff are true. As cases such as *Jewell* underscore, the "substantial truth" defense further shields defendants from liability in those instances in which the "sting" or "gist" of a report containing minor inaccuracies is the same as that which a completely accurate report would have conveyed. Defendants must remain cognizant, however, of the lessons to be taken from those cases in which substantial truth has failed as a defense.

In *St. Surin v. Virgin Island Daily News, Inc.*, 21 F.3d 1309, 22 Media L. Rep. 1545 (3d Cir. 1994), the Third Circuit rejected the defense in a defamation action brought by an official with the Department of Public Works ("DPW") over allegedly defamatory statements in two newspaper articles.

In *St. Surin*, plaintiff claimed that an article in the *Daily News*, headlined "Charges near against DPW official – prosecutor," incorrectly cited a federal prosecutor as saying that federal charges were to be filed against plaintiff within a week in connection with allegations plaintiff had granted government contracts in exchange for personal favors. *Id.* at 1311-12. Two weeks before the *Daily News* story was published, a political gossip column in the *St. Croix Avis* ran a similar item alleging that "the Inspector General is recommending to the U.S. Attorney that criminal charges be filed" against plaintiff. *Id.* at 1312.

The district court granted the summary judgment motions of both defendants, holding that "[i]t is clear, beyond legitimate dispute that the challenged articles do no more than report, in advance and in retrospect, investigations of the plaintiff's official conduct which did occur, and that the accounts were true and accurate in all material respects." *Id.* at 1315. Plaintiff appealed, and only the *Daily News* defended the lower court's judgment.

While the appeals court recognized that "[m]inor inaccuracies regarding factual information will not make an article untrue and libelous so long as the statement would not materially mislead the reader," it went on to find that plaintiff had adequately proved falsity for purposes of defeating a summary judgment motion. *Id.* at 1316 (citations omitted). As summarized by the court, the "sting" of the *Daily News* article under consideration included the statements that: 1) a federal prosecutor's investigation was targeting plaintiff; 2) the government would charge that plaintiff had traded favors for contracts; and 3) it was imminent that charges would be filed. While the court found it was undisputed that the Environmental Protection Agency was conducting an investigation of the plaintiff at the time the article was published and later proposed to "disbar" plaintiff, the court found that such facts failed to substantiate the substantial truth of the article in that

> [p]ublic knowledge that one is the subject of an administrative investigation does not harm one's reputation as much as public knowledge that one is about to be charged with a crime. The 'sting' of the article is the intention of the United States Attorney to file criminal charges against [plaintiff] within a week. The article does not mention any potential EPA sanctions but focuses instead on statements about 'charges' falsely attributed to [the source] in his capacity as 'prosecutor.'

Id. at 1317.

The court concluded that the *Daily News* article could be found to have falsely implied that a prosecutor had stated that criminal charges were soon going to be filed against the plaintiff, and thus reversed the trail court's entry of summary judgment for defendants.

In *Herron v. King Broadcasting Co.*, 776 P.2d 98, 17 Media L. Rep. 1289 (Wa. 1989), plaintiff, a prosecutor, brought a defamation action over a broadcast detailing an FBI investigation into allegedly improper bail bond procedures at the Prosecutor's Office. According to the segment, individuals who were arrested and charged were encouraged to have their bail posted by a specific bail bonding company, but if those individuals subsequently "skipped town," the bail bondsmen were not required to forfeit the amount of the bond to the county. Plaintiff primarily took issue with a statement claiming bail bondsmen had contributed "approximately half of all of the campaign money" collected by plaintiff in an earlier election, a statement the reporter claimed had been made during an interview with a former prosecutor. *Id.* at 100. According to campaign contribution records however, only $825 of the $38,000 collected by plaintiff came from bail bondsmen, and the former prosecutor subsequently did not remember making the statement to the reporter. The trial nonetheless granted summary judgment to the media defendants on the reasoning that the "sting" of the broadcast was substantially true because plaintiff was being investigated with respect to practices concerning bail bonds, and had accepted "substantial sums" from a bondsman to finance his election campaign. *Id.* at 102.

Upon hearing the case on plaintiff's appeal the Washington Supreme Court reversed, concluding that the statement that half of plaintiff's campaign contributions came from bail bondsmen "added a distinct and separate implication that [plaintiff] had bargained away his ethics and integrity in exchange for campaign contributions." *Id.* at 103. After defendants moved for reconsideration, the Supreme Court reaffirmed its finding that the statement that half of plaintiff's campaign contributions had come from bail bondsmen altered the "gist" of the story. The court reasoned that while a supporter of the plaintiff who saw that bail bondsmen had contributed $825 to plaintiff's campaign would merely say "so what" and continue to support him, one who heard that bail bondsmen had contributed one half of plaintiff's campaign money

> would assume that [plaintiff] was dishonest and in the pocket of bail bondsmen. He would never again vote for such a public official, especially a prosecutor, who has so much discretion in administering justice and setting moral standards in the county; '50 percent of all his campaign contributions' is the *sting*. . . . The latter statement, but not the former, implied that [plaintiff] had taken a bribe.

Id. at 104.

The court found that the inclusion of the allegedly false statement "had a distinct and damaging implication not otherwise conveyed by the report" discussing the FBI investigation and held that the trial court had erred in granting defendants summary judgment.

A New York appellate court similarly denied a television station's bid to assert a substantial truth defense in a lawsuit over a news broadcast discussing an indictment brought against the plaintiff, an attorney. *Dibble v. WROC TV Channel 8*, 530 N.Y.S.2d 388, 15 Media L. Rep. 2293 (N.Y. App. Div. 1988). Under the indictment, plaintiff was charged with one count of grand larceny after procuring a line of credit from a Barbados bank later used by a corporation to obtain com-

puter equipment. When the corporation was unable to meet its obligation, it came to light that the letter of credit was worthless. According to the broadcast aired by defendant television station, "plaintiff had been 'indicated on charges of fraud, embezzlement, and securities violations' and was 'accused of misuse of clients' escrow accounts and stock fraud.'" *Id.* at 388.

In considering defendants' substantial truth defense, the court found that while the worthless line of credit could properly be characterized as "fraudulent," no justification existed for defendants' statements that plaintiff had been indicted for embezzlement and security violations, or for the claims that plaintiff had been accused of misuse of clients' escrow funds and stock fraud. *Id.* at 389. The court thus affirmed the trial court's holding that defendants were not entitled to assert a substantial truth defense based on the information contained in the record.

Neutral Reportage Privilege

Although decided on the grounds of the "neutral reportage privilege," media defendants should also be aware of the Pennsylvania Supreme Court' decision in *Norton v. Glenn*, 860 A.2d 48, 32 Media L. Rep. 2409 (Pa. 2004), which circumscribes the protection granted the media in Pennsylvania in accurately repeating statements made by third parties – even when those third parties are public officials.

In *Norton*, an article published by media defendants in the *Chester County Daily Local* ("*Daily Local*") detailed hostility among members of the Parkersburg Borough Council, including allegedly defamatory statements made by defendant William T. Glenn, a member of the Council, about plaintiffs, the borough council president and the mayor, outside of the Council chambers. The article detailed a written statement by Glenn expressing his belief that he had a duty to make the public aware of a number of his convictions about the plaintiffs, including his belief that they were homosexuals and child molesters.

Plaintiffs brought an action alleging invasion of privacy and defamation against the *Daily Local*, the reporter who wrote the story, and the newspaper's owner and publisher. Defendants argued that the article was protected under the neutral reportage doctrine, which the trial court stated would shield defendants from liability in accurately reporting the "charges of a public official involved in an ongoing controversy and concerning other public officials" when the media did not "espouse" or "concur" in the statements. *Id.* at 51 (citing tr. ct. slip op. dated 1/19/2001 at 3-4).[5]

The trial court instructed the jury that the doctrine negated the application of the traditional actual malice analysis in defamation claims, finding that under the privilege "the subjective awareness of the publisher, of the truth or falsity of the statement, is irrelevant." *Id.* at 50 (citing tr. ct. slip op. at 12). The jury returned a verdict in favor of the media defendants. On appeal, a panel of the Pennsylvania Superior Court vacated the judgment, stating that "we find the neutral reportage privilege was borne out of a misconstruction of [an earlier Supreme Court opinion] and we are not persuaded to

[5] The Pennsylvania Supreme Court contrasted the neutral reportage privilege with the fair report doctrine, "a common-law privilege protecting media entities which publish fair and accurate reports of governmental proceedings." *Id.* at 53 n.6. The court stated that in the present the case, the issue was whether "there is a constitutional privilege to publish accounts of statements that were not made in the course of official proceedings." *Id.*

adopt this privilege in the Commonwealth of Pennsylvania. Since the trial court found that this privilege applied . . . it committed an error of law that controlled the outcome of the case." *See Norton v. Glenn*, 797 A.2d 294, 298 (Pa. Sup. 2002). In granting allocatur, the Pennsylvania Supreme Court agreed to answer the limited question of whether a constitutional basis exists for extending a neutral reportage privilege to the media.

After finding that the United States Supreme Court has yet to squarely address the validity of the neutral reportage privilege, the Pennsylvania high court looked to whether the privilege would be a "logical extension" of related defamation decisions rendered by the Court. The court, ignoring a wealth of precedent from other jurisdictions, concluded that it would not, finding that the media bears a "minimal burden" to avoid publication of material it knows to be false or which is published with a reckless disregard for its truth, which would not be "abandoned" in favor of the neutral reportage privilege. The court went on to address the issue of whether such privilege would be embraced under the Pennsylvania Constitution's free expression provision, again rejecting the privilege after reasoning that "the Pennsylvania Constitution's protection of free expression is no broader than its counterpart in the federal Constitution. And, since we have found that the First Amendment does not encompass this privilege, we conclude that the Pennsylvania Constitution does not as well." *Norton*, 860 A.2d at 58 (*citing Sprague v. Walter*, 543 A.2d 1078 (Pa. 1988)).

The United State Supreme Court rejected the media's petition for certiorari on March 28, 2005. *See Troy Publishing Co., Inc. v. Norton*, 125 S. Ct. 1700, 2005 WL 153308 (Mar. 28, 2005).

Conclusion

As recent opinions such as those rendered by the courts in *Global Relief* and *Hatfill* make clear, media entities and the attorneys who fight on their behalf should remain optimistic about recent examples of courts' readiness to embrace the defense of substantial truth and reject the republication doctrine within the context of reports chronicling third party allegations against plaintiffs. At the same time, however, the precedent established by opinions such as *St. Surin* and *Norton* must serve as a reminder that defendants may still be held liable in jurisdictions unwilling to shield the media from liability for repeating the allegations of third parties even when such statements touch upon an issue of public concern or are uttered by a public official.