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LDRC Libel Defense Resource Center

LIBELLETTER

August 1995

Semco, Inc. v. Amcast, Inc.: A TROUBLESOME LANHAM ACT § 43(a) DECISION

P. Cameron DeVore

Media lawyers who keep a weather eye on the expanding reach of Lanham Act § 43(a) should note an April 18 decision of the Sixth Circuit in *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, holding that a self-serving article in an independent trade journal by a CEO lauding his company's products was classifiable as commercial speech and thus potentially actionable under § 43(a).

The journal, *Die Casting Magazine*, invited Amcast's CEO to submit an article on manufacturing beryllium-copper plunger tips for use in aluminum die casting. "After removing the more blatantly self-serving statements about Amcast products," the magazine published the article. Amcast obtained reprints and used them as promotional brochures at trade shows. Alleging that the article misrepresented Amcast's own products, its competitor Semco sued under § 43(a), which provides as follows:

(a)(1) Any person who . . . uses in commerce . . . any . . . false or misleading description of fact, or false or misleading representation of fact, which – ...(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographical origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C.§ 1125(a).

The district court ruled that the

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Canada's Supreme Court Rejects Actual Malice

Reasoning that the Canadian *Charter of Rights and Freedoms* shall only apply indirectly to cases involving purely private litigants, the Supreme Court of Canada found the common law of libel not to be inconsistent with the values of the *Charter* and refused to adopt the *New York Times v. Sullivan* standard of actual malice.

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Groden v. Random House, Inc. Lanham Act and Privacy Claims Dismissed

On July 23, 1995, the federal Court of Appeals for the Second Circuit affirmed the dismissal of privacy and Lanham Act claims resulting from the use of plaintiff's name and picture in a book advertisement. *Groden v. Random House, Inc.*, — F.3d — (2d Cir. 1995). Significantly, in connection with its holding as to both claims, the court took pains to emphasize that its decision not only advanced but may have been required by First Amendment considerations.

The advertisement was placed by Random House to promote *Case Closed*, a new book in which Gerald Posner argued that the Warren Commission had correctly concluded

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AND WITH THIS EDITION OF THE LDRC LIBELLETTER...

1. A Summary of the Supreme Court's Response to Cert. Petitions in the 1994 Term LDRC has summarized the petitions involving libel, privacy and related issues, indicating the Supreme Court's disposition of each petition. Note the number of cases which raise the issues of defining and protecting "opinion" under libel law. A further analysis will appear in the LDRC BULLETIN in November.

2. The first *LDRC LibelLetter* Index -- our way of making this publication a more "practitioner-friendly" resource.

NAA/NAB/LDRC LIBEL AND PRIVACY CONFERENCE SIGN UP NOW!

Included with this month's *LDRC LibelLetter* is a sign-up form for the NAA/NAB/LDRC Libel & Privacy Conference, scheduled for September 20-22 in Tysons Corner, Virginia. It will be an extraordinary event, offering the benefits of small workshops -- where each of you can share with and learn from your LDRC colleagues -- and interesting panel appearances. Indeed, on Wednesday night the panel will include Geraldine Ferraro, Bert Lance, George Stephanopolous and Nina Totenberg in a panel entitled "Are the media -- and the libel laws -- fair to public figures?" and on Thursday night, Judge Abner Mikva will deliver the keynote address.

Workshop topics include:

- PRE-PUBLICATION/TELECAST REVIEW AND HANDLING PRE-LITIGATION COMPLAINTS (print and video)
- EARLY DISPOSAL OF THE CASE
- TRIAL STRATEGIES

But it is important that each of you sign up now. We look forward to working with (and perhaps even having a bit of time for socializing with) all of you there.

Ninth Circuit Follows *Goldwater v. Ginsburg* On Standard of Proof of Falsity: Holds That Falsity Must Only Be Proved By "Preponderance of Evidence"

A panel of the Ninth Circuit Court of Appeals, in a 2-1 decision, has held that a plaintiff in a defamation case needs to prove the falsity of the allegedly defamatory statement only by a preponderance of the evidence, not with "clear and convincing" evidence -- the standard necessary to prove actual malice under *New York Times v. Sullivan*.

In *Rattray v. City of National City*, 36 F.3d 1480, 23 Media L. Rep. 1779 (9th Cir. 1995), plaintiff, a male police officer, was accused of sexual harassment by a female co-worker. Plaintiff denied making any such comments, and he resigned after the police department decided to terminate him for dishonesty. He filed suit against the city, alleging civil rights violations and an invasion of privacy based on a surreptitious tape recording made during the investigation into his conduct.

After the suit was filed, the defendant city's police chief was quoted in local press accounts as saying the department had "clear, convincing and strong evidence about something he did and he lied about it." This prompted plaintiff to add a claim for defamation to his other claims. At trial, the plaintiff won a $300,000 jury verdict on his defamation claim while the defendants won on the other claims. The judge denied the defendant city's motion for JNOV on the defamation claim, but ordered a new trial because the jury verdict on it had been against the great weight of the evidence.

At the start of the new trial, the district court judge required plaintiff to prove the falsity of the defendant's statements by clear and convincing evidence, not just by a preponderance of the evidence. Unable to meet this standard, the plaintiff accepted summary judgment against him and appealed all of his claims to the Ninth Circuit Court of Appeals.

The Ninth Circuit reinstated plaintiff's privacy claim, but upheld the district court's dismissal of his civil rights claim. On the defamation claim, however, Judge Schroeder, writing for himself and Judge Boochever, reversed the trial court's grant of summary judgment because the trial court erred in setting the standard of proof of falsity at "clear and convincing evidence" instead of at the lower "preponderance of the evidence" standard.

Judge Schroeder, noting that the case presented an issue of first impression in the circuit, followed the Second Circuit's lead in *Goldwater v. Ginsburg*, 414 F.2d 324, 1 Media L. Rep. 1737 (2nd Cir. 1969), and held that the correct standard of proof for all elements of a defamation claim is preponderance of the evidence -- with the exception of actual malice, which, under *New York Times v. Sullivan*, must be proven by clear and convincing evidence.

The majority specifically rejected the main contrary view on this issue -- that of Chief Judge Bell of the Fifth Circuit, who, in a concurring opinion filed in *Firestone v. Time Inc.*, 460 F.2d 712, (5th Cir.), *cert. denied*, 409 U.S. 875, 93 S.Ct. 120, 34 L.Ed.2d 127 (1972), argued that the standard of proof of falsity should be "clear and convincing" evidence. Bell, citing *New York Times v. Sullivan*, "conclude[d] for the same constitutional reasons giving rise to this stringent proof requirement [that actual malice must be proven by clear and convincing evidence] that the clear and convincing proof standard would also apply to proving that the statement was false in the first instance." *Firestone* 460 F.2d at n2.

In *Rattray*, Judge Schroeder used the same argument the Second Circuit had used in *Goldwater* to dispose of Chief Judge Bell's application of the higher evidence standard. "The Second Circuit noted in *Goldwater v. Ginsburg* that '[t]here is nothing

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CAMERAS IN THE COURTROOM: AN INFORMATIONAL BROCHURE

Court TV has produced a 24-page pamphlet analyzing the arguments for and against cameras in the courtroom, generally countering the criticism generated both generally and as a result of the O.J. Simpson trial.

While the pamphlet is a clear promotional piece for Court TV, and has some commentary other LDRC members may find contrary to their specific interests, the booklet offers a shorthand look at arguments and source material that anyone interested in the camera issue would find useful.

Copies of this booklet will be distributed to all LDRC members compliments of Court TV. For any questions regarding the material please contact Jeffrey Ballabon, Court TV's Vice President, Government Relations/ Public Affairs, at (212) 973-2642 .

THANK YOU!

LDRC wants to thank two member firms which provided much legal expertise to LDRC on important corporate matters. Thank you to **Rogers & Wells**, for offering assistance on issues related to LDRC's office lease. And thank you to **Patterson, Belknap, Webb & Tyler** for their assistance on certain non-profit tax issues. LDRC simply could not have managed effectively on these issues without the exceptionally valuable volunteer efforts of these two law firms.

New LDRC Study: Already High Summary Judgment Success Rates Move Higher

Just released, Issue 95(3) of the LDRC BULLETIN analyzes the results of more than 900 reported motions for summary judgment by media defendants in over 500 defamation actions reported between June 25, 1986 — the date of the Supreme Court decision in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) — and December 31, 1994. Recognizing the limitations on any summary judgment study, namely that analysis is confined to reported decisions, the new LDRC study nevertheless found that by all measures defendants have improved on already high success rates on summary judgment motions. Also, as was anticipated in the prior LDRC summary judgment study, which covered summary judgment motions reported during 1980–86, the decision in *Liberty Lobby* had a positive effect on the rate at which summary judgment was granted.

LDRC's new summary judgment study considered not only the ultimate disposition of media defendants' motions for summary judgment, but also the results separately at the trial court and appellate levels. In addition, at each stage of the litigation the study tracked a number of potentially significant variables, including plaintiff status, venue of the motion, and, when available, court's overall attitude towards awarding summary judgment.

Among the key findings of the new summary judgment study are the following:

Ultimate Disposition of Summary Judgment Motions. Summary judgment was awarded in 76.7% of all reported decisions involving media defendants during 1986–94, up from the 74.6% previously reported for 1980–86. Over the entire 15-year period studied by LDRC, 1980–94, summary judgment motions were resolved in media defendants' favor in 75.8% of cases reported.

Results of Summary Judgment Motions in the Trial Court. Summary judgment was awarded to media defendants on 83.1% of reported motions made at the trial court level during 1986–94, up from the 79.5% grant rate in 1980–86. Over the entire period covered by LDRC studies, 1980–94, media defendants obtained summary judgment on 82.2% of reported trial court motions.

Appellate Results of Summary Judgment. Appeals were resolved in media defendants' favor in 72.6% of all reported cases during 1986–94, up slightly from the 72.3% success rate reported for 1980–86. Over the entire 15-year period studied by LDRC, appeals were resolved in media defendants' favor in 72.5% of cases reported.

Plaintiff Categories. Media defendants were successful in obtaining summary judgment in 82.8% of reported cases in which the plaintiff was a public figure during 1986–94, up from the 77.8% rate reported for 1980–86. Although the media's success rate was lower in reported cases involving private figure plaintiffs, it too increased over the rate found in prior studies, rising from 57.6% in 1980–86 to 65.0% of cases in 1986–94. Over the entire 15-year period included in the LDRC studies, media defendants obtained summary judgment in 81.5% of reported cases in which the plaintiff was a public figure and 63.2% of reported cases involving private figure plaintiffs.

Venue of Motions. Regardless of whether the motion was decided in federal or state court, media defendants were again more successful in obtaining summary judgment in the post-*Liberty Lobby* period than they had been in the

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San Francisco Chronicle Wins Anti-SLAPP Motion: Court Rules Statute Applies to Media

In an opinion dated August 9, 1995, a California Court of Appeal ruled that California's Anti-SLAPP Statute, California Code of Civil Procedure Section 425.16, applies to newspapers reporting on matters which are being considered by governmental bodies, holding that those suing newspapers for libel because of articles relating to official proceedings must establish the probable validity of their claims at the outset of litigation. *Lafayette Morehouse, Inc., et al., v. The Chronicle Publishing Company, et al.*, No. 952459, (Cal. Ct. of Appeal- First App. Dist, August 9, 1995). (For a report on the lower court decision see, *LDRC LibelLetter*, July 1994.)

The court affirmed the dismissal of a libel suit filed by More University and affiliated entities against *The San Francisco Chronicle* on a special motion to strike authorized by the Anti-SLAPP provisions.

More University, which describes itself as a "sensuality school," filed the libel suit against The Chronicle Publishing Company based on several articles published in *The San Francisco Chronicle* concerning More's educational activities and public zoning controversies. The plaintiffs asserted that California's Anti-SLAPP Suit statute did not apply to the media nor was it intended to apply outside the context of efforts to

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In this issue . . .

GRODEN v. RANDOM HOUSE, INC. AFFIRMED

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that Lee Harvey Oswald had acted alone in assassinating President Kennedy. Under the headline "Guilty of Misleading the American Public," Random House published the names, photographs, and quotations from plaintiff Robert Groden and five other "conspiracy theorists," who had rejected the Warren Commission findings. (On January 26, 1995, in a related action, the D.C. Circuit Court of Appeals affirmed the dismissal of a suit brought by Mark Lane, also pictured in the Random House ad. *See LDRC LibelLetter* (March 1995, p. 1).)

Groden brought suit against Random House, Posner, and the New York Times Company for misappropriation under §§ 50 and 51 of the New York Civil Rights Law and false advertising under § 43(a) of the Lanham Act. The district court dismissed all claims, as well as Groden's subsequent amended complaint, which added a paragraph to the Lanham Act claim and The New York Times Sales Inc. as another defendant. The district court also denied Groden's motion for reconsideration and two motions for recusal.

Privacy Claims

Chief Judge Newman's opinion for the Second Circuit opens by observing that under New York State law, the right of privacy is extremely limited in scope. There is no common law right of privacy in New York, and §§ 50 and 51 — which provide criminal and civil penalties, respectively, for the unauthorized use of a living person's "name, portrait, or picture" for advertising purposes or the purposes of trade — have been narrowly interpreted by New York courts. In the context of ads for books and periodicals, a long-standing judicially created exception to the statute, termed "incidental use," permits the use of material that "prove[s] [the] worth and illustrates [the] content of the works being advertised."

Groden argued that the incidental use exception may be invoked only when the likeness or quotation used in the advertisement has appeared in the original book, and that it was inapplicable in his case because neither had appeared in *Case Closed*. Although conceding that in most instances the incidental use exception involved republication of a photograph from the underlying publication, the court ruled that such republication did not appear to be a requirement under New York law.

In a leading case on incidental use, for example, the exception was applied even though the plaintiff's name had not been included in the text of the book itself. *See Rand v. Hearst Corp.*, 31 A.D.2d 406, 298 N.Y.S.2d 505 (1st Dep't 1969), *aff'd*, 26 N.Y.2d 806, 309 N.Y.S.2d 348 (1970). In upholding the right of the publisher to compare the writing style of its author to that of the more well-known plaintiff, the court had observed that a contrary result would impermissibly restrict a publisher's right to "inform[] the public of the nature of his book and compar[e] it with the works of other authors."

Judge Newman concluded that the court's rationale in *Rand* applied equally to Groden's claim, for Random House's purpose in including Groden's name, photograph, and quotation in the advertisement was to contrast Groden's views with those presented in *Case Closed*. That Groden's photograph was not included in *Case Closed* in no way altered this goal or converted a permissible use into an impermissible use.

Judge Newman also noted that the D.C. Circuit had reached the same conclusion in dismissing a common law misappropriation claim arising from the same advertisement. *Lane v. Random House, Inc.*, 1995 WL 46376 (D.D.C. Jan. 26, 1995). And in a recent decision by a New York State Supreme Court justice, the use of plaintiff's photograph to advertise a new on-line service inviting commentary on plaintiff's candidacy for governor of New York was held to be an incidental use. *See Stern v. Delphi Internet Services Corp.*, 626 N.Y.S.2d 694 (Sup. Ct. N.Y. Co. 1995); *see also LDRC LibelLetter* (May 1995), p. 1.

The court also rejected Groden's argument that the incidental use exception does not apply when the plaintiff finds the use to be "objectionable." Even if New York placed any such limitations on the incidental use doctrine, Judge Newman noted that "it does so sparingly." The hyperbolic accusation that Groden had misled the American public would clearly not strain the boundaries of incidental use.

In concluding, the court underlined the constitutional implications of its holding: "Our conclusion that appellees' ad falls within the 'incidental use' exception implements, *and might even be required by, First Amendment considerations*" (emphasis added).

Lanham Act Claims

Section 43(a) of the Lanham Act prohibits false designations of origin or false or misleading descriptions of fact in connection with any goods in commerce that are likely to cause confusion or that misrepresent the nature, characteristics, qualities, or geographic origin of goods. Groden contended that the statements "guilty of misleading the American public" and "one man, one gun, one inescapable conclusion" were false and thus violated the Lanham Act. The court rejected this argument, not only based on a literal construction of the Lanham Act but also on the basis of the "substantial free speech issues" implicated.

As a matter of statutory interpretation, the court noted that the Lanham Act "does not prohibit false statements generally" but "only false statements about one own or another's goods or services." Neither of the statements in the advertisement was false or misleading with respect to the book being advertised; indeed, they accurately summarized the thesis of *Case Closed*, namely that Lee Harvey Oswald had acted alone and that conspiracy theorists were guilty of misleading the public. Thus nothing false was stated about Posner's book, regardless of the actual facts surrounding the Kennedy assassination. Moreover, with respect to the ultimate truth or falsity of such statements, Judge

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THE NORTHWEST NEWS COUNCIL: A SUCCESSFUL STORY REVIEW

The following is an article about a mechanism for alternative dispute resolution for media claims. Rodney E. Lewis, of Davis Wright Tremaine, writes of its success in resolving disputes that otherwise might have gone to more extensive and expensive litigation.

Alternative dispute resolution is not a very popular subject in media circles. Members of the press have rejected more than one such mechanism in the past. But it may be worth giving a serious look again at what is available, what has worked and what hasn't and why.

At the September Libel & Privacy Conference, the Defense Counsel Section Executive Committee and LDRC staff may well be asking you if there is any value in our establishing a special advisory committee to do some research into the subject with the goal of formulating proposal(s) for the LDRC membership to consider.

If you have views on the subject, or experiences with alternative dispute resolution that you think might be of use to the LDRC membership, or wish to comment on the material provided here by Rod Lewis, please convey it to LDRC -- Editor.

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By Rodney Lewis

Willamette Week, a Portland, Oregon, alternative news weekly, published an article about the inadequate number of women and minority firefighters in Portland. The story concerned efforts to recruit, hire and retain women and minority fire fighters and the obstacles that have been encountered with those efforts. The Portland Firefighters Union and its president objected to the story's portrayal of the union's role as one of the obstacles, and complained that it failed to recognize the union's efforts in support of female and minority hiring.

The Firefighters Union and its president served a formal demand for retraction on the newspaper, claiming the story was inaccurate and misleading. The newspaper stood behind the story, written by one of its staff writers, and responded that a retraction would not be appropriate. The union and its president then filed a $3 million lawsuit against *Willamette Week* and the staff writer for defamation.

News organizations and their insurers are increasingly aware of the high costs of defending defamation claims. Despite the protections afforded the media by the First Amendment and state constitutions, the time and expense involved in defending a defamation claim can be forbidding. Because of these legal protections, including the actual malice standard, the shifted burden of proof, and privileges such as fair comment, many complaints are doomed to fail even if it takes an appellate court to apply the legal protection.

Many other complaints do not rise to the level of actual defamation, but are made simply because the complainant feels he or she, or the subject matter, has been treated unfairly or that the coverage is biased or misleading. Because of the legal protections for the media, a

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Doe v. Daily News: New York's "Anonymous" Public Figure And A Shield Law Ruling

In a lengthy and historically detailed ruling that challenges the constitutional validity of libel law as against the news media, New York Supreme Court Justice Charles E. Ramos refused to allow a "Jane Doe" plaintiff to add Morton Zuckerman, publisher of the Daily News as a co-defendant with the paper and its reporter Mike McAlary. *Memorandum Order* of August 1, 1995, Index No. 119461/94. While taking on constitutional libel law jurisprudence since *New York Times v. Sullivan* as inadequate and inconsistent with constitutional requirements under both the Federal and New York State Constitutional protections for the press, Judge Ramos ultimately decided the case on the basis of New York limited partnership and related law and the utter lack of evidence (or even serious allegations) against Zuckerman under the actual malice standard.

The Justice also found the "anonymous plaintiff" in the case to be a public figure in determining the application of the requisite actual malice standard of fault for purposes of this decision and, presumably, for purposes of the case.

In a related ruling issued the same day, the court held that under New York's Shield Law, reporter-defendant McAlary would enjoy an absolute privilege from being forced to reveal his confidential sources in discovery in the libel suit.

The plaintiff, who had been earlier granted permission by the court to proceed with the libel claim under the assumed name "Jane Doe," claimed in early 1994 to have been raped in a Brooklyn park. New York Daily News columnist Mike McAlary reported that police officials believed the plaintiff had in fact not been raped, but instead filed the false police report to bring public attention to bear on the problems of anti-women violence and to enhance her stature as an activist. McAlary relied upon confidential sources inside either the New York City Police Department or another city agency for the factual basis of his story.

Although McAlary did not name the plaintiff, his column described her in some degree of detail, particularly her

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Canada's Supreme Court Rejects Actual Malice Standard

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The case, *Church of Scientology v. Hill*, File No. 24216 (Supreme Court of Canada, July 20, 1995), was the first case to be heard by the Court in the thirteen years since the *Charter* became part of Canada's constitution which involved the question of whether the common law of libel should be altered in light of the constitutional protection for freedom of expression.

The action, brought by S. Casey Hill, a former Crown attorney, now a senior level judge, against the Church of Scientology and one of its attorneys, arose after Scientology called a press conference on the courthouse steps and had its lawyer read from papers subsequently filed with the court alleging that the crown attorney had committed contempt by violating a court order. The order had sealed documents seized from Scientology under a disputed search warrant. After the contempt motion was later thrown out for insufficient evidence, the attorney commenced the libel proceeding subsequently receiving a jury award of $1.6 million comprising general, aggravated and punitive damages.

The Court began its analysis by stating that the *Charter* only directly applies to cases involving government action. Scientology had argued that Hill, as crown attorney, was acting on behalf of the Attorney General of Ontario and that the defamatory comments made about him were in relation to acts undertaken by him in that capacity. Further, Scientology contended that Hill commenced the law suit at the direction of and with the financial backing of the Attorney General.

The Court rejected these arguments, stating "the fact that persons are employed by the government does not mean that their reputation is automatically divided into two parts, one related to their personal life and the other to their employment status." The Court went on to state that such a distinction "would mean that identical defamatory comments would be subject to two different laws, one applicable to government employees, the other to the rest of society." *Slip op.* at 27.

Pointing to *New York Times v. Sullivan*, the Court showed it was not inclined to create the public official/private figure distinction, stating, "While it might be easy to differentiate between the extreme examples set forth by the appellants, the grey area between those extremes is too extensive and the functions of the officials too varied to draw any effective line of distinction." *Slip op.* at 28.

The Court countered Scientology's arguments regarding the possible involvement of the Attorney General's office by stating, "the appellants impugned the character, competence and integrity of Casey Hill, himself, and not that of the government. He, in turn, responded by instituting legal proceedings in his own capacity. There was no evidence that the Ministry of the Attorney General or the Government of Ontario required or even requested him to do so. Neither is there any indication that the Ministry controlled the conduct of the litigation in any way." *Slip op.* at 29. Even the possibility of government funding for the lawsuit "does not alter his constitutional status or cloak his personal action in the mantle of government action." *Slip op.* at 29, citing *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

After holding that there was no government action involved in the lawsuit, the Court turned its attention to the question of what effect the *Charter* should have on the common law. The Court determined that "the common law must be interpreted in a manner which is consistent with *Charter* principles." *Slip op.* at 37.

Drawing the distinction between cases involving government action and those involving purely private litigants, the Court held that, "Private parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right. The party challenging the common law cannot allege that the common law violates a *Charter* right because, quite simply, *Charter* rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values." *Slip op.* at 38.

Under such an approach the Court admitted that a more flexible balancing of "*Charter* values, framed in general terms . . . against the principles which underlie the common law" is appropriate in order to "provide the guidelines for any modification to the common law which the court feels is necessary." *Slip op.* at 39. Further, the Court stated that "the party who is alleging that the common law is inconsistent with the *Charter* should bear the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified." *Slip op.* at 39-40.

The Court then turned to the balancing test between freedom of expression and the reputation of the individual. Pointing out that "freedom of expression has never been recognized as an absolute right," the Court stated that along with propaganda and obscenity, defamatory statements "are very tenuously related to the core values which underlie [the *Charter*]," indeed, the Court continued, "they are inimical to the search for truth." *Slip op.* at 43. On the other hand, the value of protecting the reputation of the individual according to the Court is of "fundamental importance to our democratic society." *Slip op.* at 49.

Examining the possibility of adopting the *New York Times v. Sullivan* rule, the Court put considerable emphasis on the criticism of the actual malice standard. Among the concerns that the Court reiterated are (1) *Sullivan* has shifted the focus of defamation suits away from falsity and reputational harm to the plaintiff to the defendant's level of culpability, (2) the actual malice standard "necessitates a detailed inquiry into matters of media procedure," which, in turn, lengthens discoveries and trials, (3) "it dramatically increases the cost of litigation," and (4) "the fact that the

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Banks Enjoy Special Protection Under State Libel Laws

In earlier *LDRC LibelLetters*, we chronicled the growing trend of state governments to provide special protection from defamation for their state's produce. It seems, however, that banks and savings and loan associations have long enjoyed the protection of special libel laws. At least eighteen states have laws on the books which criminally punish defamatory statements made about financial institutions.

The statutes generally fall into two categories. One model applies to any person who knowingly makes or disseminates to another any false statement of fact, derogatory to the financial condition of a bank, with intent to injure, or anyone who counsels, aids, procures, or induces another to do so.

The second, more of interest to the media, are those statutes which purport to punish anyone who willfully and maliciously makes or transmits, "any false, libelous or slanderous, statement, rumor or suggestion written, printed or by word of mouth which is directly or by inference derogatory to the financial condition of any bank." AL ST s 5-5A-46, *see also* KY ST Sec.434.310, ND ST 6-08-15, MI ST 750.97. These statutes do away with the "intent to injure" requirement which would make it easier for a bank to use the bank libel law in response to critical news coverage. In Michigan and Puerto Rico, the bank's burden would even be easier to surmount as the element of falsity has apparently been eliminated, thus apparently allowing for a criminal conviction for a true, albeit derogatory, report.

Penalties under the laws vary from Kentucky's limits of a $1,000 maximum fine or imprisonment for up to 100 days, or both, to Texas' "civil" statutory penalty of a maximum fine of $5,000 or up to five years imprisonment, or both. Illinois, in turn, provides for a civil money penalty of $10,000, which can go up to $100,000 if the bank suffers actual financial loss, while making the offense punishable as a misdemeanor under a separate statute. *Compare* IL ST CH 205 sec. 205/11010 *and* IL ST CH 720 sec. 300/1.

Research also revealed that the use of these bank libel laws against the media is a rare, but real possibility. In *Ohio Savings Association v. Business First of Columbus, Inc.*, 43 Ohio App.3d 215, 540 N.E.2d 320, a savings and loan association attempted to raise claims based on alleged statutory violations of Ohio's banking law, in conjunction with an action for libel, against a weekly business newspaper which reported that several savings and loan associations were near insolvency.

The Ohio state court of appeals affirmed the lower court's grant of summary judgment for the newspaper, holding on the issue relating to the bank libel laws that the alleged defamatory statements were not actionable because they did not come within the statutory definition of "rumor." Since the court had found that some of the alleged defamatory statements were accurate, true, and based on a discernible source, the statements could not be considered rumors within the meaning of the statute.

Additionally, the court held that other allegedly defamatory statements were constitutionally protected assertions of opinion which "cannot be considered to be 'rumor'" as included in the state's bank libel law. 43 Ohio App.3d at 220-21.

Further, Louisiana's attorney general called that state's bank libel laws into doubt by issuing an opinion challenging the constitutional validity of the law. The attorney general stated that since the statute along with other sections of the Banking

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San Francisco Chronicle Wins Anti-SLAPP Motion

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chill citizen grievances on governmental issues.

California's Anti-SLAPP Suit statute provides that "a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." The statute not only shifts the burden on the initial motion to the plaintiff, but also stays all discovery upon filing of the motion, and requires that the plaintiff must pay the defendant's attorneys' fees and costs if the defendant prevails on the motion to strike.

In support of its motion, *The Chronicle* submitted public records upon which many of the reports were based. *The Chronicle* asserted the articles could not be proven to be substantially false, they were not defamatory in many aspects, there was not sufficient evidence of constitutional malice, and California's privilege for reporting from public records and proceedings rendered the libel suit without merit under Civil Code Section 47(b).

San Francisco Superior Court Judge William Cahill had dismissed the suit and awarded attorney's fees and costs in the amounts of $64,086.50 and $1,726.50, respectively. The Court of Appeal affirmed Judge Cahill's dismissal. The appellate court did not rule on the attorneys' fees which are being appealed separately.

Thomas Howlett of Ross, Dixon & Masback reports that there are no fewer than six Anti-SLAPP cases involving the media working their way through the California courts. Of these, *La Prensa Munoz Incorporated Publications, Inc. v. Superior Court of California for the County of San Diego*, involving a newspaper defendant, and *Pressman v. Superior Court of California for the City and County of San Francisco*, involving a non-fiction book author, are currently on appeal.

The San Francisco Chronicle was represented by Mark Tuft and James Wagstaffe of Cooper, White & Cooper.

Canada's Supreme Court Rejects Actual Malice Standard

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dissemination of falsehoods is protected is said to exact a major social cost by deprecating truth in public discourse." *Slip op.* at 53-54.

Other Commonwealth Decisions

The Court partly justified its decision not to adopt the actual malice by looking to the United Kingdom and the International Law Reform Commissions, which have refused to adopt the actual malice standard.

The Court also relied on the Australian High Court's decision in *Theophanus v. Herald and Weekly Times Ltd.*, (1994), 124 A.L.R. 1 (H.C.), which it characterized as also rejecting the actual malice standard. As was reported in the *LDRC LibelLetter*, however, the Australian High Court actually adopted a modified form of *Sullivan* that altered the common law of libel in Australia. *See LDRC LibelLetter* (February 1995), at 13.

Moreover, the Supreme Court of Canada either overlooked or ignored the fact that India has recently also adopted the *Sullivan* rule. *See LDRC LibelLetter* (February 1995), at 13.

Finally, in reaching its decision not to adopt the actual malice standard the Court concluded by stating that it does not "see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish." *Slip op.* at 58.

Distinguishing Sullivan

The Court stated that "none of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America are present in the case at bar." *Slip op.* at 59. The Court continued, "First, this appeal does not involve the media or political commentary about government policies . . . Second, a review of jury verdicts in Canada reveals that there is no danger of numerous large awards threatening the viability of media organizations . . . [and] finally, in Canada there is no broad privilege accorded to the public statements of government officials which needs to be counterbalanced by a similar right for private individuals." *Slip op.* at 59.

Court Document Privilege

In addition to the actual malice question the Court also addressed whether the defense of qualified privilege should be expanded to include reports based upon pleadings and court documents that have been filed or are at the point of being filed. Although the Court did extend the qualified privilege to reports based on courts documents not yet acted upon by the court, it found that in the case at bar the defendant had exceeded the privilege by failing to confirm the allegations that were being made. The Court commented that in light of the seriousness of the attack upon Hill's professional integrity, the defendant was "duty bound" to wait until Scientology had completed an investigation pertaining to access to the sealed documents before reading the statement, especially in the presence of representatives from several media organizations. *Slip op.* at 65. The defendant's "highhanded and careless" conduct "exceeded any legitimate purpose the press conference may have served." *Slip op.* at 66.

Damages

Regarding defendants' argument that damages were excessive, the Court upheld the judgment stating that "an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure." *Slip op.* at 66-67. Regarding the general damages specifically, the Court justified the award by resorting to a somewhat extravagant and imaginative forecast of the likely effect of the statement on the plaintiff's mental well-being: "All who read the news reports would be left with a lasting impression that Casey Hill had been guilty of misconduct. It would be hard to imagine a more difficult situation for the defamed person to overcome. Every time that person goes to the convenience store, or shopping centre, he will imagine that the people around him still retain the erroneous impression that the false statement is correct. A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil." *Slip op.* at 69.

The Court also refused to adopt a cap to be placed on general damages in defamation as cases as was done in Canada in the personal injury context. Pointing out that of the 24 reported libel judgments from 1992 to 1995 the average award was less than $20,000, the Court stated that "there is no indication that a cap is required in libel cases." *Slip op.* at 71. The Court also upheld the awards granted as to aggravated and punitive damages, holding that "every aspect of this case demonstrates the very real and persistent malice of Scientology." *Slip op.* at 82.

LDRC would like to thank the following Summer Interns for their contributions to this edition of the LibelLetter:

John Maltbie, Brooklyn Law School, and Sarah Edenbaum, Brendan Healey and William Schreiner, Jr., all from New York University Law School

GRODEN v. RANDOM HOUSE, INC. Affirmed

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Newman remarked that "statements of opinion are generally not the basis for Lanham Act liability." He went on to characterize the phrase "guilty of misleading the American public" as "obviously a statement of opinion that could not reasonably be seen as stating or implying provable facts about Groden's work."

Although thus adverting to the Supreme Court opinion in *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990), under which statements that are not provably false cannot be the subject of a defamation suit, the court declined to determine whether *Milkovich* applies to suits brought under the Lanham Act, observing in a footnote that it was unnecessary to reach the issue because the statements did not violate the Lanham Act. Of course, even if unnecessary, it would arguably have been appropriate had the court invoked *Milkovich*, for by recasting what was essentially a defamation suit as a claim for false advertising under the Lanham Act, Groden was attempting to circumvent the constitutional protections applicable to libel law.

Nevertheless Judge Newman was clearly both cognizant and protective of the free speech interests raised by Groden's claim, concluding that "any attempt to apply the Lanham Act to appellees' ad would raise substantial free speech issues." In support of its view of the limited reach of the Lanham Act in such cases, the court cited from the legislative history to the 1989 amendments to § 43(a)(2), which *inter alia* had extended the Lanham Act to cover false statements regarding a competitor's product: "[T]he proposed change in section 43(a) should not be read in any way to limit political speech, consumer or editorial comment, parodies, satires, or other constitutionally protected material . . . The section is narrowly drafted to encompass only clearly false and misleading commercial speech."

Noting that the Second Circuit had "been careful not to permit overextension of the Lanham Act to intrude on First Amendment values," Judge Newman concluded by cautioning that "ample leeway must be accorded to statements that advertise books by expressing opinions, however extravagantly worded, about the merits of opposing viewpoints."

Banks Enjoy Special Protection Under State Libel Laws

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Code provide for criminal sanctions to be enforced by the Commissioner of Financial Institutions, the due process rights and the constitutional authority delegated to the attorney general and the district attorney would be violated. Op.Atty.Gen., No. 90-172, July 5, 1990.

Generally, most of the statutes date from the 1920s and 1930s, but have been regularly amended and updated through the present, while Illinois' civil penalty statute, effective August 30, 1990, was the most recent addition. It should also be noted that both Alaska and Rhode Island had similar laws protecting their financial institutions, but Alaska repealed its law in 1978, while Rhode Island eliminated its statute in 1995.

Statute Citations	
Alabama	AL ST sec. 5-5a-46
Arizona	AZ sec. 6-134
Colorado	CO ST sec. 11-40-107
Delaware	DE ST TI 5 s. 927
Illinois	IL ST CH 205 sec. 205/11010 (civil money penalty)
Illinois	IL ST CH 720 sec. 300/1 (misdemeanor)
Kentucky	KY ST sec. 434.310 (banks)
Kentucky	KY ST sec. 289.810 (savings and loan associations)
Louisiana	LA R.S. 6:930
Michigan	MI ST 750.97
New York	NY BANK sec. 671
North Carolina	NC ST sec. 53-128
North Dakota	ND ST 6-08-15
Ohio	OH ST sec. 1155.21
Oklahoma	OK ST T. 6 sec. 1413
Puerto Rico	PR ST T. sec. 1360g
South Carolina	SC ST sec. 34-3-70
Texas	TX CIV ST Art. 342-907
Virginia	VA ST s. 61-194.94

"Preponderance of Evidence" is Enough in Ninth Circuit

(Continued from page 2)

in *New York Times v. Sullivan'* to support the 'novel theory' that other elements of a defamation claim must be proved by clear and convincing evidence." *Rattray*, 23 Media L. Rep. at 1785; quoting *Goldwater v. Ginsburg*, 414 F.2d 324 at 1487, 1 Media L. Rep. at 1749.

However, Judge Hug, dissenting from the majority opinion, argued for applying the higher standard of convincing clarity to both actual malice and plaintiff's burden of proving falsity. "[U]nder the bifurcated standard announced by the majority, a defendant could be held liable for knowingly making a false statement that a jury under the same clear and convincing standard of proof would not have found to be false. These two elements of the cause of action are necessarily interwoven; it is illogical to separate them." *Rattray*, 36 F.3d at 1490, 23 Media L. Rep. at 1788.

Additionally, Hug went back to *New York Times v. Sullivan*, where Chief Judge Bell had originally found support for applying the higher standard. "It is apparent Justice Brennan was concerned with the difficulty the *defendant* would have in establishing the truth of a statement. . .[t]he majority misapplies this statement to justify easing the burden on the *plaintiff* in proving the falsity of a statement." 23 Media L. Rep. at 1788.

The split between the circuits and the lack of direction from the Supreme Court on the standard of proof for falsity is potentially problematic for media defendants. For example, in a recent district court decision from the Tenth Circuit, *Tilton v. Capital Cities/ABC, Inc.*, *see p.* 11 in this issue, the court pointed to the split between the circuits on the issue and chose to utilize the "preponderance of the evidence" standard. Although this factor did not affect the result of the case, as full summary judgment was granted to ABC, it suggests that without direction cautious courts may choose to operate under the less rigorous evidentiary standard, thus depriving media defendants of an effective weapon against libel claims.

On June 16, 1995, the defendant, National City, filed a petition for certiorari (63 USLW 3908, no. 94-2062); *see also* Supreme Court Report in this month's *LDRC LibelLetter*.

Doe v. Daily News: New York's "Anonymous" Public Figure

(Continued from page 5)

being a Brooklyn public activist in the field of lesbian rights. After McAlary's columns appeared, "Doe" held several well-publicized news conferences to decry McAlary's stories. Coverage of those news conferences included the same details as McAlary's stories, but also did not name her.

Judge Ramos found that the plaintiff was a public figure, and five days later issued a "clarifying" opinion as to his reasoning. Ramos based his reasoning on the fact that "Doe" ought to be treated as a public figure because by holding press conferences with other newspapers she had underscored her desire to "project herself into the public debate" and to "publicize her victimization."

The specific issue before the court was the addition of Zuckerman to the case. The plaintiff contended that the publisher had hired McAlary for the paper knowing his propensity for writing false material. The court found that because the plaintiff was a public figure and the evidence in the record of the case to date indicated that police officials on the day of the incident may have had doubts about plaintiff's account and that these doubts were passed on to McAlary, plaintiff simply could not show with clear and convincing evidence that the publisher-Zuckerman acted with actual malice. The court noted initially that there was no evidence that Zuckerman had anything to do with the writing, editing and dissemination of the specific McAlary columns at issue in the suit.

The plaintiff also failed to meet New York law requirements for holding Zuckerman liable under New York limited partnership law or agency law (Zuckerman did not have an otherwise necessary agency relationship with the reporter) or under other New York law principles.

What is unusual about the opinion, and which suggests that the judge is seeking to provoke some discussion about libel law generally as applied to the press, is his lengthy analysis of free press issues and philosophy throughout history. Ultimately he concluded that *New York Times v. Sullivan* is inadequate to the task and that the press should be immune under both the Federal and New York State Constitutions from libel claims: "even libelous and malicious reports by the press must be privileged."

Shield Law Ruling: Implied Promise of Confidentiality

In response to plaintiff's demand that defendant McAlary reveal his source or sources for the articles, McAlary asserted the protections of the New York Shield Law. That statute, Civil Rights Law 79-h, provides that reporters are immune from contempt charges for refusing to disclose sources who have been promised confidentiality by the reporter.

The court found, from the language of the statute and "New York's traditional respect for freedom of the press," that McAlary has an absolute privilege against disclosing confidential sources or information received under a promise of confidentiality.

Further, the court found that even if a confidential relationship did not exist between McAlary and his source or sources, the law provides a qualified privilege that plaintiff has not met by her failure both to exhaust alternative

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Doe v. Daily News

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sources or to show at this stage of the litigation that the identity of the source(s) is necessary to her claim.

What was of some unique interest in this argument was that plaintiff had deposed the individual who was police chief spokesman at the time, John Miller, and who plaintiff suspects was the confidential source for the articles. McAlary has not indicated whether or not this is the case. Miller testified that he did indeed speak with McAlary about the plaintiff and about the doubts police had about her and her alleged attack. He further testified that although he did not expressly request confidentiality during the first conversation, he did so in their second conversation and reflecting back. Further, because of their longstanding relationship, both McAlary and Miller testified to having understood that the conversations they were having were "unofficial" and that confidentiality was sought.

The judge both accepted the contention that confidentiality between McAlary and Miller was sought explicitly and, as a result of their long-standing relationship, implied. He also rejected plaintiff's contentions that (1) a police spokesman could never seek confidentiality for information provided a reporter; (2) the privilege was waived by McAlary announcing he had sources or (3) by Miller's testifying at his deposition.

Plaintiff Argues Limits to Shield Law

Counsel for the plaintiff also asserted that the Shield Law should not apply to McAlary's columns because they were a "mixture of fact and opinion" and that opinion is not privileged. The court rejected such a distinction, both on precedential and policy reasons. Even if the columns were opinion and not fact, the court noted that the same public interest is served by their publication, and "the statute does not categorically create a bias toward certain forms of journalism, and protects any news without specifying which types of news are protected by the statute."

Use of Confidential Material at Trial

The plaintiff also requested a preclusion order that would have barred the use of any confidentially-derived information in his defense at trial. Limiting the extent of such a sanction, Judge Ramos issued an order stipulating that McAlary must disclose any confidentially derived information to be used for defense 10 days prior to use at trial. Defense counsel Ken Caruso and Gadi Weinreich of Shaw, Pittman (New York and Washington, D.C.) indicated that it was not clear at this time how such a procedure might work at trial.

LDRC Intern Charles Glasser (NYU'96) is a Summer Associate at the New York law firm of Townley & Updike.

Televangelist's Claim Against ABC is Dismissed

ABC may finally be clear of litigation arising out of a 1991 *PrimeTime Live* broadcast concerning televangelist Robert Tilton, as United States District Judge for the Northern District of Oklahoma Michael Burrage granted the media company's motion for summary judgment on June 19, 1995. In an exhaustive opinion grounded mainly on Tilton's inability to raise any material issues of fact with regard to actual malice, Judge Burrage disposed of Tilton's third attempt of recovering damages from ABC before a scheduled June trial date. *Tilton v. Capital Cities/ABC Inc., et al.*, No. 92-C-1032-BU, (N.D.Okla. June 19, 1995).

For Tilton, the loss follows on the heels of the dismissal of a RICO claim filed in the United States District Court for the Northern District of Texas in February of 1995 (reported in the April 1995 *LibelLetter*), and the March 1994 dismissal of claims brought against ABC under 42 U.S.C. Secs. 1985 (2) and (3) which alleged that ABC conspired to deprive Tilton and the church of the right to freely exercise their religious beliefs, as well as, conspiring to prejudice them in federal court. *Word of Faith World Outreach Center Church, et al., v. Diane Sawyer, et al.*, (No.3:93-CV-2310-T (N.D.Tex. Mar. 15, 1994; Feb. 6, 1995).

In his decision, Judge Burrage utilized a combination of actual malice, falsity, opinion, and substantial truth to strike down each of Tilton's claims. Actual malice provided the touchstone as the judge returned time and time again to the conclusion that Tilton simply did not show with convincing clarity that ABC knew that the challenged statement was false or had serious doubts as to its truth. In addition, Judge Burrage pointed out that although the circuit courts are split on the appropriate standard for proof of falsity, Tilton, in the instant case, often did not meet even the lesser standard of preponderance of the evidence with regard to several of his claims.

Northwest News Council

(Continued from page 5)

complainant who feels he or she has been treated unfairly must nevertheless phrase their demand for retraction and complaint as defamation and then undertake the burden of proving the matter false and, in many cases, proving actual malice, or other applicable fault standards.

Similarly, the news organization will respond to the complaint by analyzing it in terms of defamation and, if it does not threaten to rise to that level, may reject the retraction demand and vigorously oppose any ensuing lawsuit.

What the complainant and the news organization may have missed is that the complainant is actually concerned about inaccuracy, bias in coverage, or unfairness, even if no defamation action could succeed. If there were a means for dealing with this type of complaint which could offer a complainant a forum, any number of lawsuits might be avoided.

One alternative in Oregon and Washington is the Northwest News Council, which will hear complaints brought by readers, listeners or viewers concerning news or editorial content appearing in any Oregon or Washington news presentation. These complaints involve perceived inaccuracy, unfairness or unethical conduct. The News Council was formed by the Western Washington and Oregon Chapters of the Society of Professional Journalists and has received support from several news organizations, including the Seattle Times, Vancouver Columbia and Bend Ore. Bulletin.

Since 1992, the News Council has provided a neutral forum to allow the complainant to register his or her complaint and tell his or her story. The News Council hears both sides, and makes findings regarding the accuracy or fairness of the article, but does not award any money damages or order any other remedies. The complainant must agree in advance that a hearing before the Council precludes any lawsuit on the subject of the complaint. The news organization typically agrees to publish the panel's findings. Although many complaints have been brought, to date the Council has held only a total of five hearings.

Williamette Week is the most recent hearing of the five complaints which have been heard by the News Council. To date, the News Council has found in favor of the complainant in two of the five hearings. Other complaints filed either failed to fall within the specifications set out by the Council, or were resolved through mediation between the parties.

Here is how it works. A reader, listener or viewer must first attempt to resolve his or her complaint directly with the management of the news organization. Such attempts include letters, phone calls, or in-person visits. If those efforts are unsuccessful, complainants are encouraged to document their complaint and the attempts to resolve it and send those to the Northwest News Council.

Once a complaint is submitted, all of the information is provided to a panel of three, selected from the list of named News Council members, to determine whether the complaint merits a hearing by the Council.

The News Council panels address issues involving fairness, accuracy and journalistic ethics as they relate to alleged unfairness. The panels will not address issues which relate to the business or advertising side of the publication; to any opinions published, whether in articles or editorials; to any internal disputes (such as between staff writer and editor); or to editor's choices of which events, subjects or issues to cover or publicize.

If the News Council determines it is the type of complaint they deal with, they first try to work with the news organization and the complainant to see if it can be resolved without a public hearing. If not, a separate hearing panel will be appointed and a hearing at a location convenient to the parties will be scheduled. The Council's philosophy is that hearings are a last resort, only provided when the parties have been unsuccessful in resolving their differences.

Although previously both parties would have been obligated to participate, hearings are no longer precluded if a newspaper fails to cooperate in participating in the hearings or publishing the results, providing the News Council believes a fair hearing can take place without the party.

Each hearing panel consists of three council members who are nominated by the News Council to be named as members, one from the field of journalism education, one from the journalism profession, and one from the public at large. The candidates sought are ethnically diverse, have a degree of prestige in the media industry, and have a record of interest in bettering the community. A list of names of eligible panelists chosen from the named News Counsel members are sent to both parties, who each have an opportunity to eliminate one name. The three-person panel is formed from the remainder of those on the list and a hearing is scheduled.

The proceedings themselves are quick and inexpensive. Hearings only take a few hours. Attorneys may not participate, although they may be present with their client. No written documentation is required other than the initial description of the complaint and a copy or a transcript of the news item in question.

At the hearing, the complainant and the media representative will each be given the opportunity to summarize their respective positions. The parties may also submit written evidence, such as the reporter's notes of interviews. The panelists have the opportunity to ask questions of the parties and to discuss the issues among themselves. These discussions are held in front of the parties.

Legal elements and standards are not applied and do not form the basis of

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Northwest News Council

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the panel's decisions. After the panel has asked its questions and fully discussed the issues, it votes on the question presented. A press release is generally issued discussing the complaint, the process, and the conclusions of the panelists.

In the court case brought by the Firefighters Union and its president against *Willamette Week*, it was apparent from the outset that the gravamen of their complaint was their perception that the story inaccurately portrayed their views and that it failed to report their past support for efforts to hire women and minorities. The union's attorney recognized that if the matter were taken to court, the union would be required to prove that the article matter was false and had been printed with actual malice.

Recognizing the difficulty of that courtroom battle, the union and its attorney were receptive to a suggestion that this would be an appropriate matter for resolution by the Northwest News Council. The union and its president would be able to present their side of the story in a public hearing before a neutral panel, and would not be bound by problematic legal standards and burdens. They could simply have a determination of whether the article was fair and accurate. The union was willing to give up its claim for money damages and agreed to dismiss the lawsuit in return for an agreement by *Willamette Week* to participate in the hearing and to publish the panel's conclusion and decision. To prepare for the hearing, and as part of an overall agreement, the parties took the depositions of the staff writer, the editor, and the union president.

While the attorneys assisted the parties in preparing their presentations, and sat with their clients, they did not make presentations or participate orally in the hearing itself.

The hearing was over in less than three hours, and after a thorough discussion of the presentations and the issues, the panelists voted two-to-one that the story published by *Willamette Week* was both accurate and fair. As agreed, the lawsuit was dismissed with prejudice and both parties were responsible for their own costs.

The advantages of this procedure to *Willamette Week* or to any news organization are apparent. First, any threat of money damages was eliminated. Second, the expense of a full-blown defense of a lawsuit was eliminated. Third, the makeup of the panel, with a journalism educator and a journalism professional, should have sufficient journalism background to be able to separate claims of a disgruntled news subject from actual violations of journalistic standards. Last, within an open forum, the news organizations may develop a better understanding of the public's perception through this process, which serves to promote communications to reach a resolution. Not every news story can cover every relevant fact and it is not journalism's role to flatter all those it covers. News stories are compressed and are often summaries of current news and developments. As such, it is perhaps inevitable that someone will feel that part of the story was not given sufficient coverage or feel that it tends to mislead the reader on points the complaining party feels are important, even if not necessary to the story.

From the complainant's point of view, the Northwest News Council also has much to offer. Where the complainant is unable to convince a news organization that it can successfully plead or prove a case of defamation because of the legal protections for the media, the complainant may often be frustrated by the news organization's blanket rejections of claims of defamation. The complainants may be forced into the filing of a lawsuit in order to take some action to defend themselves, even if they have little chance of prevailing. The News Council procedure allows the complainant to challenge the news organization's coverage even where a defamation claim will not prevail and it allows the complainant to have a neutral party hear their side of the story. In addition, the arbitration is an educational process itself which may provide the complainant insight into the manner in which news organizations operate.

A news organization that participates shows that it is willing to address issues of fairness and journalistic ethics and will not be perceived to be unfairly hiding behind constitutional protections not always understood by the public. Over time, this could improve both the news organization's performance, and the public's perception of the news media. As a result of the *Willamette Week* hearing, many have reported to the Northwest News Council their pleasant surprise that NWNC proved so effective in avoiding litigation.

Finally, support of the News Council emphasizes that the news media should make every effort to avoid inaccuracy and unfairness, even where a complaint does not rise to the level of defamation or other tort. That support is a recognition that the public should be protected from media bias, inaccuracy, or unfairness.

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Semco, Inc. v. Amcast, Inc.

(Continued from page 1)

complaint did not state a cause of action under § 43(a) because the article was not properly classifiable as commercial speech, and thus did not constitute "commercial advertising or promotion" under the Act.

The Sixth Circuit reversed and remanded. First rehearsing the legislative history of § 43(a), the panel noted that, while the Senate apparently intended the word "commercial" simply to eliminate possible application of § 43(a) to political speech, the House intended the word to limit the coverage of the statute strictly to "commercial speech." Here, the circuit court held that it need not decide between these interpretations because the *Amcast* piece met both; it was not political speech, but was commercial speech.

Conceding that the article exceeded the classic definition of commercial speech in *Virginia Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), as speech "which does no more than propose a commercial transaction," the court relied on the more expansive example of the contraceptive informational pamphlets held to be commercial speech in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (the pamphlets were "conceded to be advertisements, ... [they referred] to a specific product, ... and [had] an economic motivation"). Here, the court brushed off the fact that Amcast did not concede that the article was an advertisement and applied an aggressive and expansive definition of commercial speech:

"[t]he district court in this case viewed the . . . article as more article than advertisement, but we cannot ignore the promotions of Amcast, also evident in the article, which do not contribute to its intellectual or technical value. There is no question that [the CEO] could have submitted an article which did not contain commercial speech -- in fact, [he] could have written precisely what the editor requested, a detailed description and explanation of the new process for manufacturing plunger tips. Instead, [he] presented an article peppered with advertising for Amcast -- and that advertising, which the trade publication did not solicit, allegedly contained material misrepresentations of Amcast products."

The court also disagreed with the district court's view that the fact that Amcast did not pay to have the article printed was an important distinction:

> Nonetheless, it is not difficult to infer a consideration or a quid pro quo in circumstances such as this: procurement of material for a publication in exchange for advertising the author's product. . . . We see no reason, however, why Amcast should not be liable for its own misrepresentations, even though it was not required to pay for their publication. New products or techniques may often be newsworthy, but that status does not permit their manufacturers to lie. The phrase "free advertising," far from being an oxymoron, aptly describes the publicity manufacturers may receive in press releases, news interviews, or trade publications.

The bottom line of the *Amcast* decision is an expansive reading of the reach of § 43(a), already extended in 1988 to include the phrase in question, "commercial advertising or promotion." The court's loose definition of commercial speech, which clearly exceeded the example in *Bolger*, risks transforming such communications as routine interviews of company spokesmen about concededly newsworthy products into vehicles for § 43(a) lawsuits by competitors that would survive summary judgment. *Semco*, therefore, is a cautionary tale for media lawyers who advise advertising clients.

Indeed, the most adverse impact of the decision may come from application of an as-yet-not-resolved segment of commercial speech case law. The reigning *Central Hudson* (447 U.S. 557 (1980)) four-part test for commercial speech asks whether the subject matter is false or misleading (part one), whether government's purpose for its regulation on speech is real and substantial (part two), whether the restriction "directly and materially" advances the interest (part three), and whether the regulation is more extensive than necessary (part four). Because meeting part one may be a prerequisite for application of the balance of the test, asserted violations of § 43(a), based on allegedly false or misleading speech, may lose the protection of the balance of the test.

Indeed, a broader question is whether speech deemed to be "commercial" could, based on an allegation in pleadings that it is "misleading," be deprived of all First Amendment protection. This draconian result could be asserted under a criticized but extant line of cases holding that defamation and other allegedly misleading speech fail part one of the *Central Hudson* test, and consequently, in the Lanham Act context, that false or misleading speech, or speech about illegal products, not only should not qualify for further application of parts two, three or four of the *Central Hudson* test, but also should be deprived of any other First Amendment protection such as provided under *Sullivan* and *Gertz*. See *U.S. Healthcare, Inc. v. Blue Cross of Philadelphia*, 898 F.2d 914, 17 Med. L. Rptr. 1681 (3d Cir.), cert. denied, 498 U.S. 816 (1990) (allegedly defamatory statements made in comparative advertising war between healthcare providers not entitled to First Amendment protection merely because matters of public concern were involved since statements were commercial speech); but see *National Life Ins. Co. v. Phillips Pub., Inc.*, 793 F. Supp. 627, 20 Med. L. Rptr. 1393 (D. Md. 1992) (criticizing the *Healthcare* decision).

In short, *Semco* is a troublesome precedent, lowering the commercial speech threshold for speech about products and thus potentially depriving such speech of further First Amendment review and protection.

P. Cameron DeVore is with the firm Davis Wright Tremaine in Seattle, WA.

THE LDRC ANNUAL DINNER
Presenting LDRC's *William J. Brennan, Jr. Defense of Freedom Award* to

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LDRC is truly honored to be able to invite all of you to spend this evening with Justice Blackmun as our esteemed guest.

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THE ANNUAL DINNER HAS MOVED --

* New Night: Thursday
* New Location: The Sky Club Atop the Metropolitan Life Building

LIBEL DEFENSE RESOURCE CENTER

NINTH ANNUAL MEETING OF THE DEFENSE COUNSEL SECTION

THE MORNING AFTER THE ANNUAL DINNER

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Friday, November 10, 1995
7:00 a.m. to 9:00 a.m.

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Stay tuned for sign-up information and further details.

SUMMARY JUDGMENT BULLETIN

(Continued from page 3)

1980–86 period, with grants rising from 73.7% to 75.0% of reported decisions in federal court and 74.9% to 77.8% of reported decisions in state court. Over the entire 15-year period studied by LDRC, defendants were successful in 74.4% of reported decisions in federal court and 76.6% of reported decisions in state court.

The Effect of Liberty Lobby. Summary judgment was awarded to media defendants at a significantly higher rate than in the overall sample when courts explicitly cited *Liberty Lobby* for the proposition that to survive a summary judgment motion when "actual malice" is at issue, plaintiffs must demonstrate at the summary judgment stage that they will be able to offer a jury "clear and convincing evidence" of actual malice. In cases thus citing *Liberty Lobby*, media defendants prevailed on 96.9% of trial court motions (63 of 65 motions) and 88.7% of appellate motions (47 of 53 appeals). Defendants' success generally on the issue of actual malice also rose during the new study, from 76.1% of decisions reported in 1980–86 to 81.6% of decisions reported in 1986–94.

The Effect of the Court's Attitude to Summary Judgment. Courts that referred to the particular value of summary judgment in protecting First Amendment interests or in preventing the chilling of expression granted summary judgment in 23 of 24 reported cases (95.8%) and affirmed grants in 29 of 32 plaintiffs' appeals (90.6%) reported during the new study period. Conversely, the very few courts that referred to summary judgment as a "drastic remedy," or that expressed concern about taking cases from the jury, ruled in media defendants' favor in two of nine decisions (22.2%) in which such language was found.

Other Torts. Finally, the LDRC study found an even higher rate of success on claims against media defendants ancillary to defamation, such as the privacy torts and intentional infliction of emotional distress. Overall, defendants succeeded in securing summary judgment on 85.6% of reported motions involving such other claims.

The 900+ cases charted in the new summary judgment study have been entered into the LDRC database. LDRC members interested in obtaining information beyond that presented in the new survey should contact LDRC with their requests.

For those DCS members who do not already subscribe to the BULLETIN, single copies of the Summary Judgment Study are available for $35. Subscriptions and other back issues are, of course, also available. Contact Melinda Tesser at (212) 889-2306.

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SUPREME COURT REPORT

1994 TERM: SUMMARY OF THE COURT'S RESPONSE TO CERTIORARI PETITIONS WITH LIBEL, PRIVACY AND RELATED ISSUES

The 1994 Supreme Court term proved to be advantageous to media organizations in libel cases as the high court let stand all seven favorable libel judgments brought to the Court by denying review of every plaintiffs' petition. The Court did not receive any petitions from media organizations based upon loss in an action for libel or privacy, with the exception of one case in which a radio station has sued another station for libel.

In the 1993 term, the Court let stand five favorable decisions and two decisions that were unfavorable to the media, including a $1.5 million judgment against Globe International.

Non-media defendants in the 1994 term saw the Court refuse to review the favorable results in nine cases, one less than in 1993, and unfavorable results in three cases, up from one case last term.

Of particular interest are the contentious cases arising in the area of opinion in the post-*Milkovich* era. Of the twenty-one petitions in libel, privacy, and related areas summarized in this report, five cases involved interpretations of opinion, three media and two non-media. Perhaps, most troubling, or, at least most indicative of the difficulties encountered by courts when wrestling with the opinion issue are the two cases out of Colorado with their disparate results. In *Stewart v. Keohane*, the Colorado Supreme Court upheld a damage award, denying the defendant the protection of opinion, in an action based on "off-the-cuff" remarks made by a city councilman to a reporter, who then repeated the statement to the plaintiff, while in *Living Will Center v. NBC Subsidiary*, the same court granted full constitutional protection for opinion to a news report which alleged plaintiff's living will kit was a "scam."

In another area of contention this term, three petitions for review were based upon jurisdiction issues. Of particular interest to our media members is *Wilson v. Belin* in which the United States Court of Appeals for the Fifth Circuit denied an attempt by the plaintiff to gain Texas jurisdiction over an Illinois resident who merely served as a source for a Dallas newspaper.

Four petitions were carried over to next term. Of these, *McKnight v. American Cyanamid*, a non-media case, looks to be the most important, placing a corporation as public figure issue squarely before the court.

Also summarized below are petitions for certiorari in the areas of newsroom and access issues, commercial speech, obscenity, picketing, trade regulation and more general First Amendment and free speech issues.

MEDIA DEFENDANTS – FAVORABLE DECISIONS LEFT STANDING - 7

Benigni v. Cowles Media Co., 22 Media L. Rep. 2120 (Minn. Ct. App. 1994), *cert. denied*, 63 U.S.L.W. 3369 (11/08/94, No. 94-485). The Minnesota Court of Appeals in a defamation case had ruled that plaintiff's subjective opinion of article concerning himself in defendant's newspaper was not enough to make the article defamatory but must, rather, harm plaintiff's reputation in the community. The court also held that plaintiff's displeasure with the article is unwarranted, as, while it is unflattering in some respects in its portrayal of him as a loud and opinionated individual, it does not reasonably suggest that plaintiff is mentally ill. The questions presented by the petition were: (1)

May media use its First Amendment right to freedom of press to suppress citizen's First Amendment right to freedom of speech without losing protection of privilege of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964)? (2) If media defendants have lost protection of *New York Times* privilege through abuse of purpose for which that privilege was given, does action become subject to common law standards whereby burden of proof shifts to defendants to prove truth of their defamatory statements, rather than it being on plaintiff to prove falsity of defamatory statements? (3) May plaintiff, claiming to be private figure, be held to public figure standards of proof without court ever ruling on its status? (4) Did lower courts err, or violate petitioner's rights, by denying him equal protection of laws by: (a) holding that article was not defamatory when record showed ample evidence to contrary and article was capable of defamatory interpretation? (b) simply ignoring petitioner's motion to compel discovery whereby media defendant's escaped without producing documents and evaded answering interrogatories? (c) granting defendants' motions for summary judgment when there were several genuine issues of material fact precluding summary judgment; and (d) granting defendants' motions for summary judgment before petitioner had adequate time for discovery?

Freeman v. Johnston, 84 N.Y.2d 52, 637 N.E.2d 268, 22 Media L. Rep. 1929 (N.Y. 1994) *cert. denied*, 63 U.S.L.W. 3420 (11/29/94, No. 94-566). In an action for defamation the New York Court of Appeals had granted defendant author's motion for summary judgment stating that plaintiff, a financial advisor, failed to show by clear and convincing evidence that the defendant author's misstatement in book of the plaintiff's remarks at a meeting was made with actual malice. Evidence that one of the author's sources said the statements were an accurate reflection of what plaintiff said and another source could not remember did not establish a significant conflict to create doubt as to accuracy of the statement. The questions presented by the petition were: (1) Should the court establish legal obligations for media when reporter has inconsistent information from that which he plans to publish but avoids inquiring of known accessible sources with knowledge so as to ascertain truth of information? (2) In the "purposeful avoidance of the truth" analysis set forth in *Harte-Hanks Communications Inc. v. Connaughton*, 491 U.S. 657, 57 LW 4846 (1989), is the threshold level of "doubt" in the "obvious reason to doubt" test, which is necessary to trigger reporter's responsibility to check with known accessible sources, lower than "serious doubt" required by New York Court of Appeals? (3) In the "purposeful avoidance of the truth" analysis, is threshold level of "doubt" in "obvious reason to doubt" test, which is necessary to trigger reporter's responsibility to check with known accessible sources, lower than high degree of awareness of probable falsity that is equivalent to entertaining serious doubt?

Living Will Center v. NBC Subsidiary (KCNC-TV) Inc., 879 P.2d 6, 23 Media L. Rep. 1417 (Colo. 1994), *cert. denied*, 63 U.S.L.W. 3689 (03/21/95, No. 94-990). In affirming the trial court's grant of defendant television station's motion for summary judgment, the Colorado Supreme Court had held that medical ethicist's statements that plaintiff company's living will package was a "scam" were opinion and constitutionally privileged. The context the statement was made in, and the imaginative and hyperbolic substance of the statement itself, neither contain nor imply a verifiable statement of fact and cannot be reasonably understood as anything but subjective opinion. Furthermore, the gist of the broadcast was constitutionally privileged as it did not contain a verifiable

assertion of fact nor could it be reasonably understood to do so. The worth of a given service is inherently subjective turning on personal considerations and judgments. The questions presented by the petition were: (1) Did statements broadcast during investigative television news report on regularly scheduled news program that private business is a "scam" and that the customers of business are being "taken . . . totally taken" contain, or imply, verifiable fact, or can they reasonably be understood as assertions of fact about conduct of business, so that statements or implications are not protected against libel claim by First Amendment under "verifiability test" announced by this court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 58 LW 4846 (1990)? (2) Must a court take into account the broad social context of a defamatory statement (i.e., whether statement occurs in "hard news" format as opposed to opinion forum such as critic's review or editorial commentary), when determining if statement, or its implications, is actionable under "verifiability test" announced in *Milkovich*? (3) Was statement broadcast during investigative television news report on regularly scheduled news program that private business' product is "unnecessary--certainly not worth paying for," "inherently subjective," and did it contain or imply verifiable factual assertion so that the statement, or its implication, was protected against libel claim by First Amendment under "verifiability test" announced in *Milkovich*?

Moldea v. New York Times Co., 15 F.3d 1137, 22 Media L. Rep. 1673 (D.C. Cir. 1994) *cert. denied*, 63 U.S.L.W. 3263 (10/03/94, No. 94-192). The United States Court of Appeals for the District of Columbia had upheld--after reconsideration-- a grant of summary judgment in a defamation and false light suit brought by an author, reasoning that statements made in a review of author's book are not actionable because the context in which they appear is one in which readers would expect to find statements that can be rationally interpreted as opinion, and which do not present verifiable issues of fact. A book reviewer's criticism and commentary are only actionable if their interpretations cannot be rationally supported by reference to the book itself. Questions presented by the petition were: (1) Does the First Amendment require application of "broader context" factor when challenged statements appear in certain formats or genres, such as book reviews, thereby permitting finding that statements, which are otherwise verifiable under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 58 LW 4846 (1990), are nonactionable based solely upon effect of that factor? (2) Does the First Amendment require application of a "supportable interpretation" standard whenever defamatory statements appear in certain formats or genres, such as book reviews, regardless of whether the book in question is an ambiguous source? (3) Does the First Amendment require applications of different procedural principles in deciding issues of verifiability and falsity on motion for summary judgment brought by media defendant, whereby non-moving libel plaintiff is derived of benefit of all favorable inferences and favorable weighing of the evidence, which benefits *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505 (1986) held were required in deciding issues of malice?

Rhinehart v. Seattle Times, Inc., 798 P.2d 1155, 59 Wash.App. 332 (Wash. Ct.App. 1990), *cert. denied*, 63 U.S.L.W. 3420 (11/29/94, No. 94-599). On appeal by plaintiff religious organization from a decision dismissing their libel action for failure to produce requested documents, the Washington State Court of Appeals had held that there was no error in forcing disclosure of membership lists , donation records and a videotape of a performance to be used by newspaper in defending against plaintiff's libel action. A protective order indicating that the documents could only

be used for purposes of the litigation is adequate to protect plaintiff's constitutional rights, and rendered unnecessary any balancing of plaintiff's First Amendment rights and defendant's interests. The questions presented by the petition were: (1) Are First Amendment rights to privacy and association denied when court imposes protective order and orders discovery, in lieu of performing balancing test to determine whether membership lists of spiritualist religion should be produced? (2) Is it a denial of due process and equal protection when fee statute is interpreted to award fees without requiring party to segregate fees unrelated to action dismissed for lack of merit? (3) Is it a denial of due process and equal protection when the subjective criterion, "possibility of success," is used in finding case frivolous and awarding terms?

Romero v. Thomson Newspapers (Wisc.) Inc., 648 So.2d 866, 23 Media L. Rep. 1528 (La. Sup. Ct. 1994), *cert. denied*, 63 U.S.L.W. 3873 (06/13/95, No. 94-1712). In a decision reversing the trial court's denial of summary judgment for the defendant, the Supreme Court of Louisiana had held that statements in defendant's newspaper concerning the high rates of Caesarean section births were not defamatory of plaintiff obstetrician, and were constitutionally protected speech on a matter of public interest. Statement that women were being "butchered" by unnecessarily high rates of C-sections was general opinion that did not imply any false or defamatory fact about plaintiff and statement that plaintiff was near retirement was made without actual malice and was substantially true. The question presented by the petition was: Did the Louisiana Supreme Court violate constitutional law in its interpretation of the First Amendment?

Woodcock v. Journal Publishing Co., 230 Conn. 525, 646 A.2d 92 (Conn. 1994), *cert. denied*, 63 U.S.L.W. 3625 (02/21/95, No. 94-1023). Upon making an independent examination of the record, the State Supreme Court of Connecticut had found that the defendant newspaper did not act with the necessary actual malice when it published articles accusing the plaintiff, a zoning board member, of "urg[ing]" a subdivision application in order to benefit a business associate. The court found that there was no evidence which, with the requisite "convincing clarity," showed that defendants had any serious doubts concerning the truth of the articles and that at most the defendants were negligent and were willing to correct any specific errors. Additionally, the court held where language chosen is "one of a number of possible rational interpretations" of an ambiguous event, the choice of such language is protected by the First Amendment. The questions presented by the petition were: (1) Does proper standard of review in public official libel action mandate that reviewing court conduct de novo review of entire record, making independent assessment of whether facts it found demonstrate clear and convincing evidence of actual malice, or that reviewing court first determine whether jury's findings of fact supportive of actual malice are clearly erroneous, and if not, then independently assess whether those facts establish actual malice by clear and convincing proof? (2) By conducting de novo review of entire record and making its own findings of fact, did Connecticut Supreme Court apply incorrect standard of appellate review when it reversed judgment for plaintiff?

MEDIA RELATED DEFENDANTS – FAVORABLE DECISIONS LEFT STANDING - 2

Underwager v. Salter, 22 F.3d 730, 22 Media L. Rep. 1852 (7th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3294 (10/11/94, No. 94-314). The United States Court of Appeals for the Seventh Circuit

had held that the authors of two controversial books on child sexual abuse were limited purpose public figures for the purposes of their libel action against a psychologist who had prepared a monograph highly critical of their work. The court had also noted that nothing in the record suggested that the defendant acted with actual malice since the defendant had spent eighteen months reading all the papers that plaintiffs had cited in their books. In addition, the court found that there was no actual malice on the part of the defendant prosecutor for playing a tape of an Australian television program critical of plaintiffs' at workshops for prosecutors. Further the court had held that continued publication by defendants does not establish actual malice. Questions presented by the petition were: (1) Are non-media defendants who are claimed to have defamed "limited purpose" public figure entitled to "actual malice" heightened protection of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny ? (2) May federal court of appeals establish heretofore undetermined qualified privilege under state common law of defamation and require plaintiff to meet "actual malice" test set forth *New York Times Co. v. Sullivan* and its progeny in order to prove abuse of qualified privilege? (3) Does repetitious sale and presentation of defamatory videotape satisfy "actual malice" requirement of *New York Times v. Sullivan* and its progeny?

Wilson v. Belin, 20 F.3d 644, 22 Media L. Rep. 1748 (5th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3292 (10/11/94, No. 94-302). In a defamation action brought by a Pennsylvania resident, the federal district of Texas held it did not have personal jurisdiction over Illinois resident defendant or Indiana resident defendant because the foreseeability of media publication of these sources comments was not enough when the defendants did not purposely direct their activities or opinions into the Texas forum, nor initiated any contact with the Texas forum. The defamation action arose from comments made by defendants in unsolicited telephone interviews by a Dallas newspaper reporter in reaction to a speech made by the plaintiff in Dallas concerning his theories of the Kennedy assassination. Question presented by the petition was: Are non-resident respondents subject to personal jurisdiction in Texas when they knew that their defamatory statements would be published in Texas while petitioner was appearing in Texas?

NON-MEDIA DEFENDANTS -- UNFAVORABLE DECISIONS LEFT STANDING - 3

Nova Biomedical Corp. v. Rice, 38 F.3d 909, (7th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3817 (05/16/1995, No. 94-1635). In a defamation action brought by an Illinois plaintiff, against his former employer, a Massachusetts based company, arising out of his discharge and his being compelled to disclose the grounds of his discharge to other prospective employers, the United States Court of Appeals for the Seventh Circuit had affirmed the application of Illinois law allowing punitive damages, which Massachusetts does not allow, because the tortious incident took place in Illinois. The court based its decision on the fact that the defamatory statements were originally made in Illinois, republished in Illinois by plaintiff himself to prospective employers, and thus caused injury in Illinois, or alternatively, because Illinois law applies law of plaintiff's domicile in multi-state defamation cases. Punitive damages were proper as there was sufficient evidence of actual malice. Additionally, defendants cannot object to inconsistency in the jury's awarding of punitive damages but not actual damages since they failed to object to confusing jury instructions which produced the inconsistent result and because ultimately, it would not have changed jury verdict or dollar amount awarded. Further defendants waived any objection to personal jurisdiction in failing to bring up the

applicability of the "fiduciary shield" law to defendant at trial. The question presented by the petition was: Did Seventh Circuit violate Tenth, First and Fifth Amendments and relevant mandates of this court by failing to apply proper state law, by upholding defamation verdict contrary to petitioner's right to freedom of speech, and by depriving petitioners' due process rights under Fifth Amendment by upholding award of punitive damages against each of them?

Oliver v. Lewis, 873 P.2d 668, 178 Ariz. 330 (Ariz.Ct.App. 1993), *cert. denied*, 63 U.S.L.W. 3292 (10/11/94, No. 94-241). In reversing a grant of summary judgment, the Arizona Court of Appeals had held, in an action for defamation, intentional infliction of emotional distress, intentional interference with business relationships and conspiracy, that complaints made by defendant, the president of an air transportation provider, concerning plaintiff, a safety inspector for the Federal Aviation Administration, to his superiors concerning safety inspector's job performance after safety inspector turned in a negative report, were only protected by a qualified privilege. Abuse of such a privilege may be shown by either evidence of actual malice or excessive publication. A safety inspector for the FAA is a public official as his job performance has a direct effect on air transportation which is a matter of justified public interest. Questions of material fact regarding presence of actual malice are raised by the defendant's statements that he was out to get inspector, that defendant persisted in his accusations after plaintiff was exonerated, that defendant shows a pattern of defaming those who criticized him, and that defendant was aware that there were legitimate safety problems. The question presented by the petition was: Did Arizona Court of Appeals correctly decide that "actual malice", as defined by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny, can be shown, in defamation action brought by public official, solely by evidence of spite or ill will alone?

Stewart v. Keohane, 882 P.2d 1293, 22 Media L. Rep. 2545 (Colo. 1994), *cert. denied*, 63 U.S.L.W. 3563 (01/24/95, No. 94-1001). The Colorado Supreme Court had upheld a damage award granted in favor of a judge in a suit for defamation against a city councilman. The action arose out of comments the councilman made to a reporter questioning whether the judge had been paid off with drugs or money following a controversial verdict in a highly publicized sexual assault bench trial over which the judge presided. The councilman's statements were held to be implied verifiable assertions of fact and could reasonably be understood as assertions of actual fact and not opinion because (1) the statements were not phrased in such a way as to be rhetorical but to imply that the judge had taken a bribe, the only question was in what form, (2) the context of the remark suggest that the statement was fact as it was made by a public official who would have knowledge of such facts concerning criminal activity and had previously been quoted as suspecting such criminal activity. Accordingly, damages awarded to plaintiff were upheld, despite absence of evidence of injury to reputation, based solely on evidence of the emotional distress suffered by the plaintiff upon hearing the remarks repeated by the reporter. The questions presented by the petition were: (1) Under circumstances of this case, was speech protected under First Amendment? (2) Does the First Amendment allow judge to recover emotional distress damages in defamation action in absence of harm to reputation?

NON-MEDIA DEFENDANTS – FAVORABLE DECISIONS LEFT STANDING - 9

Asam v. Harwood, unpublished (11th Cir. 03/16/94), *cert. denied*, 63 U.S.L.W. 3258 (10/03/94, No. 93-2090). The United States Court of Appeals for the Eleventh Circuit had affirmed, without comment, the district court's grant of summary judgment for the defendant, plaintiff's opponent in judicial election, based on grounds of lack of evidence to support actual malice. Question presented by petition: Did libel plaintiff prove that defendant's statements were made with actual malice?

B & A Marine Co. v. American Foreign Shipping Co., 23 F.3d 709 (2d Cir. 1994), *cert. denied*, 63 U.S.L.W. 3346 (11/01/94, No. 94-268) . The United States Court of Appeals for the Second Circuit had affirmed a grant of summary judgment for the defendant, a government contractor, in a libel action brought by a subcontractor over a letter to the subcontractor's sureties which stated that the subcontractor was in default. The court reasoned that the contractor was a specifically appointed agent of the United States, and was thus a "government employee" within the meaning of the Federal Tort Claims Act, which bars actions against United States employees acting within the scope of their employment. The subcontractor's claim for libel was thus precluded. Questions presented by the petition were: (1) Does Federal Tort Claims Act, 28 U.S.C. 2671 et seq., exclude from its application a contractor with the United States, under general agency governing sea-going vessels, whose day-to-day activities are not supervised? (2) Should motion for summary judgment have been granted in favor of defendant, in whose sole possession facts rest, and who has refused to appear for deposition in face of motion in district court to compel such appearance, which motion remained undecided, despite plaintiff's requests, for several years and at time of decision on summary judgment? (3) Can determination that plaintiff was acting within scope of employment for purposes of Federal Tort Claims Act be made without opportunity given to opponent to participate in evidentiary hearing?

Biegeleisen v. Jacobson, 198 A.D. 2d 57, 603 N.Y.S. 2d 148 (N.Y. App.Div. 1993), *cert. denied*, 63 U.S.L.W. 3263 (10/03/94, No. 94-175). New York Appellate Division Court affirmed dismissal of physician's defamation case against another physician who testified against him as an expert witness in a medical malpractice suit. Although the statements were blunt and negative, they were expressions of opinion and not statements of fact which were directly relevant to defendant's opinion as an expert on scleropathy in cosmetic surgery. The statements also did not constitute falsehoods "so obviously irrelevant as to warrant an inference of actual malice." The question presented by the petition was: Is it lawful for New York State to refuse, without cause or explanation, to uphold legal precedent--specifically denying testamentary immunity to physician who testifies that another physician is "quack", when use of term is justified only by physicians' different schools of thought--that state itself set over 130 years ago, and that has been cited as caselaw as recently as 1975?

Breedlove v. Phillips, unpublished (Va. Cir. Ct., Fairfax Cty, 1993), *cert. denied*, 63 U.S.L.W. 3257 (10 / 03 / 94, No. 93-1910). The Virginia Circuit Court of Fairfax County had sustained a demurrer to counts alleging defamation of title stemming from the filing of a mechanics' lien and denied a motion for sanctions, without prejudice. The court had also granted a protective

order and the court had not required defendants to respond to discovery until further order of the court or until the parties are at issue, whichever comes first. Questions presented by the petition: (1) Is Virginia judicial procedure for redress of libelous mechanic's liens repugnant to Fourteenth Amendment's Due Process and Equal Protection Clauses? (2) Are Virginia's mechanics' lien statutes, as applied in this case, repugnant to Fourteenth Amendment's Due Process Clause?

Caputo v. Compuchem Labs, Inc., unpublished (3d Cir., 08/17/94), *cert. denied*, 63 U.S.L.W. 3515 (01/09/95, No. 94-853). The United States Court of Appeals for the Third Circuit had affirmed grant of defendant's motion for summary judgment in suit for negligence and defamation brought by plaintiff, a terminated employee, against an independent laboratory which accurately reported that employee's drug test showed evidence of low levels of morphine. Court found no justification to support claims in that the report from the lab was absolutely accurate and disclosed only to the client. Further, the court held that the lab owed no duty to explain that the report number was low and could be attributable to causes other than substance abuse as the report was transmitted to a doctor who it would be reasonable to assume could accurately interpret the results. The question presented by the petition was: Does employee who is subjected to mandatory drug test have claim against private laboratory in negligence or defamation for flagrant reporting error resulting in loss of employment because laboratory failed to follow federal standards?

Jenkins v. Weis, 868 P.2d 1374, 230 Utah Adv. Rep. 25 (Utah 1994), *cert. denied*, 63 U.S.L.W. 3642 (02/28/95, No. 94-1192). The Utah Court of Appeals had affirmed an unfavorable jury finding and a directed verdict for the defendant in a defamation, intentional infliction of emotional distress and invasion of privacy suit based on remarks made by defendant psychologist alleging that plaintiff was "mentally deranged" and a "paranoid schizophrenic." The court held that even if ruling that plaintiff was a public figure for purposes of libel was in error, it was harmless error as the jury reasonably found that defendant's statements were true, an absolute defense to the defamation claim. By not taking the affirmative action at trial by objection, plaintiff failed to preserve for appeal claims that his causes of action for emotional distress and invasion of privacy were improperly dismissed by directed verdict after plaintiff presented his case, that the jury instructions were confusing, and that the trial court improperly allowed state Attorney General to represent defendant, and allowed members of Attorney General's staff to testify at trial. The questions presented by the petition were: (1) Did Utah appellate courts err in upholding trial court's determination that petitioner was public figure without appropriate findings or legal basis for such determination? (2) Did Utah appellate courts err in upholding the trial court's dismissal of two of petitioner's three causes of action without motion by opposing party during trial on those matters and without affording petitioner opportunity to present evidence, memorandum, or argument thereon? (3) Did Utah appellate court's err in upholding trial court's jury instructions that required jury to make determinations and rulings as to matter of law? (4) Did Utah appellate courts err in upholding trial court's allowance of Utah Attorney General to represent respondent and in allowing members of Utah Attorney General's staff to testify at trial? (5) Did Utah appellate courts err in upholding trial court's allowance of untimely pretrial motions in derogation of rules of Utah Code of Judicial Administration?

Norris v. Oklahoma City University, unpublished (9th Cir., 04/12/94), *cert. denied*, 63 U.S.L.W. 3514 (01/10/95, No. 94-976). The United States Court of Appeals for the Ninth Circuit had dismissed a defamation claim based on transcripts sent by the defendant, an Oklahoma university, to California law schools at the request of the plaintiff, an Oklahoma resident, which allegedly contained libelous statements concerning plaintiff's grades and achievements. The court held that plaintiff failed to make prima facie case of personal jurisdiction. The defendant's actions were not "expressly directed" at California as the transcripts were sent at plaintiff's request and exclusively concerned and benefitted the plaintiff and that the brunt of the harm was suffered in Oklahoma not California. The questions presented by the petition were: (1) Is specific jurisdiction reasonable when based on libel in three transcripts that out-of-state schools purposefully directed into forum state? (2) Is specific jurisdiction over out-of-state schools reasonable when based on libel in transcripts they purposefully directed at state even though plaintiff student asked schools to send transcripts to forum state? (3) Is brunt of reputational injury by libel located in state where libel has its greatest circulation even though person whose reputation libel injures is not present when libel is circulated there?

Patterson v. State (Matanuska Maid), 880 P.2d 1038 (Alaska 1994), *cert. denied*, 63 U.S.L.W. 3562 (01/23/95, No. 94-979). In a wrongful discharge, breach of contract and defamation action, the Alaska Supreme Court had ruled that the claims were time-barred by the six month limitations period of the Labor Management Relations Act. In addition, the court had found the allegedly defamatory letters concerning the plaintiff to be absolutely privileged following the Ninth Circuit rule that " statements made by parties during the course of grievance proceedings conducted pursuant to the provisions of a collective bargaining agreement subject to the Labor Management Relations Act are absolutely privileged". The questions presented by the petition were: (1) Did Alaska Supreme Court deny due process and equal protection in upholding dismissal of petitioner's claim for libel under state law on basis that claim was preempted by LMRA and publication of defamatory letter was absolutely privileged in labor controversy? (2) Did Alaska Supreme Court err in holding that petitioner's suits for defamation and wrongful discharge were time-barred?

Reynolds v. International Amateur Athletic Federation, 23 F.3d 1110 (6th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3347 (10/31/94, No. 94-410). In a tortious interference with business relations, breach of contract, and defamation action brought by the world record holder in the 400 meters, based on the publication of the runner's drug test, the United States Court of Appeals for the Sixth Circuit had ruled that Ohio lacked personal jurisdiction over defendant IAAF, or its agent TAC. The court found that the IAAF did not purposefully direct its activities towards Ohio and thus did not establish the minimum contacts sufficient to permit Ohio to exercise personal jurisdiction consistent with IAAF's due process rights. IAAF is based in England and owns no business or property in Ohio. IAAF also does not train or supervise athletes in Ohio, nor does it transact business there, having only superficial contacts via mail and telephone. As to this specific set of claims the court based its conclusion on the following: (1) the organization did not publish the test results in Ohio, (2) while the IAAF could foresee possible results of their publication, the IAAF had no knowledge of or role in the Ohio-based product endorsements which were lost by the plaintiff, and (3) the plaintiff is an international athlete whose reputation is not based solely in Ohio. The question presented by the petition was: Does state's exercise of personal jurisdiction over non-resident defendant (with

participating U.S. agent) who, acting abroad, intentionally directs tortious acts at resident plaintiff and promotes widest possible dissemination of defamatory statements, predictably causing devastating financial injury to plaintiff in forum state, comport with "traditional notions of fair play and substantial justice" as required by Due Process Clause?

MEDIA DEFENDANTS -- PETITIONS FILED BUT NOT YET ACTED UPON-1

Stolz v. KSFM 102, 30 Cal.App.4th 195, 23 Media L. Rep. 1233 (Cal. App 1995), *cert. filed*, 63 U.S.L.W. 3908 (05/17/95, No. 94-2049). In a defamation action between two radio stations concerning derogatory statements made by defendant about the quality of journalism plaintiff practiced, the California Court of Appeal for the Third District had held the plaintiff radio station to be an all-purpose figure because it occupies a position of general fame and has pervasive influence in the community through advertisements and charity work. For purposes of such a defamation suit, relating to station's operations, the court also held that the station owner and general manager are limited purpose public figures, and thus have the burden of proving actual malice. Comments concerning the station's irresponsible journalism or on-air comments are an issue of public concern and plaintiff has the additional burden of proving falsity. There was no mistake in jury instructions stating that to establish falsity of the alleged defamatory statements the "gist" of the information must be false and that minor inaccuracies are not sufficient to amount to falsity. The court also held that none of the statements made unambiguously asserted as fact that the plaintiff radio station took part in shoddy journalism and thus remarks were not slander per se. The questions presented by the petition were: (1) Does fact that plaintiff that is slandered per se is a radio station conclusively make it public figure shifting burden of proof on proving falsity and forcing it to prove actual malice merely because as broadcaster it has ability to rebut slanderous statement? (2) Does fact that plaintiff that is slandered per se is radio station make unrelated subject it is slandered about of public concern, thus shifting the burden of proving falsity of statement merely because responsibility in broadcasting is of public concern? (3) Is owner of radio station limited purpose public figure merely by his ownership thereof in absence of showing that he has interjected himself into particular public controversy?

NON-MEDIA DEFENDANTS -- PETITIONS FILED BUT NOT YET ACTED UPON - 3

McKnight v. American Cyanamid Co., unpublished (4th Cir. 1995), *cert. filed*, 63 U.S.L.W. 3861 (05/26/95, No. 94-1942). The United States Court of Appeals for the Fourth Circuit had held that a contractual dispute between two pharmaceutical companies over American Cyanamid's (the larger firm) efforts to market a drug developed by the smaller company was not a public controversy since it is not an issue that would potentially affect the public. Therefore, the court held, the larger firm is not a public figure for purposes of the libel counterclaim against the smaller firm's executive officers. The court then reinstated the counterclaim for additional proceedings under standards applicable to private individuals. Questions presented by petition: (1) Is respondent all-purpose public figure? (2) Is respondent limited-purpose public figure with respect to speech about its corporate conduct in marketing hypertension drug used by hundreds of thousands of people throughout the country?

National City, Calif. v. Rattray, 51 F.3d 793, (9th Cir. 1994), *cert. filed*, 63 U.S.L.W. 3908 (06/16/95, No. 94-2062). The United States Court of Appeals for the Ninth Circuit had affirmed in

part and reversed in part the verdicts for defendants in an action for discrimination, invasion of privacy and defamation. The action brought by plaintiff arose out of remarks made by the chief of police of the defendant city after the plaintiff resigned his position and filed an invasion of privacy action in response to being secretly taped as part of a sexual harassment investigation. The chief of police was quoted as saying that there was, " clear, convincing and strong information and evidence," that plaintiff lied. The court affirmed the jury verdict for the defendants on the discrimination claim. The court reversed the district court's directed verdict for the defendants on the invasion of privacy claim, holding that Cal. Penal Code Section 633 was intended only to permit law enforcement officials to use prohibited electronic listening devices for criminal investigations. Furthermore, the court affirmed the district court's original grant of a new trial on the defamation claim because the clear weight of the evidence was against the original jury finding of actual malice. In doing so, however, the court of appeals reversed the district court's subsequent grant of defendant's motions for summary judgment, stating that it was error to hold the plaintiff to the "clear and convincing" standard of evidence on the issue of falsity. Falsity, the court held, unlike actual malice, need only be proved by a preponderance of the evidence. The question presented by the petition was: Did the Ninth Circuit err in holding that public official who brings defamation action need only prove falsity of allegedly defamatory statement at issue by preponderance of the evidence in light of this court's imposition of "convincing clarity" standard of proof in *New York Times Co. v. Sullivan*, and Second Circuit's view that falsity must be proven by clear and convincing evidence?

Williams v. Garraghty, 455 S.E.2d 209, 249 Va. 224 (Va. 1995), *cert. filed*, 63 U.S.L.W. 3874 (05/31/95, No. 94-1959). The Supreme Court of Virginia had upheld a $177,000 damage award in a defamation suit brought by a prison warden against a subordinate employee over a memorandum written by the employee alleging sexual harassment. The court held that while her statements regarding the fact that she was being sexually harassed may be characterized as mere opinion, "the statements supporting her opinions are factual in nature . . . [and] can form the basis of a defamation suit." Applying independent review the court also upheld the punitive damage award against the defendant finding that " the record supports a finding of actual malice with convincing clarity ". Question presented by petition: Can protection afforded employees by opposition clause of Title VII of 1964 Civil Rights Act for voicing concerns about sexual harassment in workplace, recognized by federal circuit courts, be limited by more restrictive definition of qualified privilege under state defamation law adopted by highest court of state?

OTHER AREAS OF INTEREST

I. Newsroom Issues

A. Review Denied

Pacific Gas and Electric Co. v. Savage, 21 Cal.App.4th 434, 26 Cal.Rptr.2d 305 (Cal.App. 1993), *cert. denied*, 63 U.S.L.W. 3258 (10/03/94, No. 93-1999). The California Court of Appeals had ruled that a public utility violated state law when it refused to cooperate with a reporter in retaliation for the reporter's earlier published criticism of the utility. According to the court, the law, which provides that "no public utility shall, as to rates, charges, services, facilities, or in any other respect, make or grant preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage," precludes retaliation against journalists or

newspapers based on content of their reporting on matters lying within the exercise of the utility's franchise. The refusal to cooperate with the newspaper's "stringer," who had been critical of the utility in past articles, was held to have no legitimate purpose and thus violated state law. The questions presented by the petition were: (1) Is public utility's conduct when dealing with the news media a "state action"? (2) Does public utility have the First Amendment right not to assist in dissemination of views that are antithetical to its beliefs and interests?

Sluys v. Grant, unpublished, (2nd Cir. 09/29/94), *cert. denied*, 63 U.S.L.W. 3658 (03/06/95, No. 94-1324). The United States Court of Appeals for the Second Circuit had affirmed the dismissal of a 42 U.S.C. 1983 action brought by newspaper publishers/editors seeking to enjoin the Rockland County district attorney from investigating whether the newspaper had committed any acts of commercial bribery relating to its editorial policy. The court ruled the action was properly dismissed as moot since the district attorney had announced that the investigation was terminated because "constitutional problems" made prosecution impossible. The questions presented by the petition were: Are newspaper publishers, reporters, and editors threatened with prosecution for decisions that are protected by the First Amendment entitled to a trial by jury on their complaint that the district attorney of Rockland County, N.Y., whose indictment is now pending before the United States District Court for the Southern District of New York, conspired and acted to deprive them of their rights protected under the United States Constitution?

II. Access to Criminal Proceedings

A. Review denied

T.B. Butler Publishing Co. v. U.S. District Court for the Eastern District of Texas, ruling below, *U.S. v. Restrepo*, unpublished (5th Cir. 03/31/94), *cert. denied*, 63 U.S.L.W. 3312 (10/17/94, No. 94-300). The United States Court of Appeals for the Fifth Circuit had affirmed, without opinion, the district court's order denying reporter's motion to unseal the records of sentencing proceedings that were closed to the public. The questions presented by the petition were: (1) Did district court violate petitioner's First Amendment right of access to criminal trials when it excluded press and public from two sentencing hearings and sealed records of those hearings? (2) Does First Amendment right of access apply to sentencing hearings? (3) May trial court comply with procedural requirements for closure of criminal trial by making only sealed findings for appellate court review?

III. Commercial Speech

A. Review Granted

44 Liquormart v. Rhode Island, 39 F.3d 5, 22 Media L. Rep. 2409, (1st Cir. 1994), *cert. granted*, 63 U.S.L.W. 3786 (05/01/95, No. 94-1140). The Supreme Court has shown that it will remain active in the area of commercial speech by granting review in this case. Below, the United States Court of Appeals for the First Circuit had upheld Rhode Island laws which forbid liquor price advertising except at the point of sale, reasoning that under the four-part test of *Central Hudson*, the laws did not violate the First Amendment. The court distinguished its result from *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council*, Inc., 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976), which struck down a law forbidding pharmaceutical price advertising, by

stating that Rhode Island's "regulation is directed toward regulation of the intoxicants themselves, rather than speech." The Supreme Court granted the petition limited to the following question: "Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages?"

B. Review Denied

Moser v. Federal Communications Commission, 46 F.3d 970, 63 U.S.L.W. 2505 (9th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3906 (06/26/95, No. 94-1833). The United States Court of Appeals for the Ninth Circuit had upheld a decision ruling that 47 U.S.C. 227(b)(1) of the 1991 Telephone Consumer Protection Act, which banned automated, pre-recorded phone calls to residences, did not violate the First Amendment because it is content-neutral and narrowly tailored to achieve the state interest of protecting residential privacy while leaving open many alternative channels of communication. The question presented by the petition was: By prohibiting the use of automated dialing-announcing devices (ADADs) for commercial speech, while authorizing Federal Communications Commission to allow use of ADADs for non-commercial speech, does 1991 Telephone Consumer Protection Act, Pub. L. No. 102-243, 105 Stat. 2394-2402 (1991), violate petitioners' First Amendment right to engage in truthful commercial speech under the test set out in *Central Hudson Gas & Elec. Corp. v. Public Service Com'n*, 447 U.S. 557 (1980), or their right to equal protection of the laws protected by the Fifth Amendment?

Naegele Outdoor Advertising Inc. v. Durham, N.C., unpublished (4th Cir. 05/01/94), *cert. denied*, 63 U.S.L.W. 3292 (10/11/94, No. 94-109). The United States Court of Appeals for the Fourth Circuit affirmed the district court decision that a municipal ordinance which, after a five and a half year grace period, bars all commercial, off-premises advertising signs except those along interstate or federally aided primary highways does not amount to a "taking" of private property under the Fifth and Fourteenth Amendments. The Court of Appeals had previously affirmed a district court decision which held that the ordinance did not violate the First Amendment. The questions presented by the petition were: (1) Is municipal ordinance that seeks to advance interests of safety and esthetics by prohibiting outdoor commercial advertising signs, while permitting physically identical non-commercial advertising signs and numerous other signs with other types of content, consistent with the First Amendment? (2) Is municipal ordinance that denies property owner all economically beneficial use of particular pieces of property a "taking" within the meaning of the Fifth Amendment even though owner has other similar property that is not affected by ordinance?

Shaffer v. New York State Association of Realtors Inc., 27 F.3d 834, 63 U.S.L.W. 2021, (2nd Cir. 1994), *cert. denied*, 63 U.S.L.W. 3386 (09/21/94, need case no.). In an action concerning advertising and solicitation by real estate agents, the United States Court of Appeals for the Second Circuit had held that a regulation which banned solicitation by real estate agents in particular geographic areas is an impermissible restriction of commercial speech and First Amendment rights because the restriction is not reasonably tailored to meet the substantial government interests of combatting blockbusting. The question presented by the petition was: Did the court of appeal, in striking down non-solicitation orders aimed at preventing blockbusting, and limited both geographically and in duration, depart from decisions of this court by (a) refusing to defer to the judgment of state public officers who formulated the orders after holding extensive public hearings

and finding evidence of oversolicitation and blockbusting activity, and (b) instead, effectively requiring state to demonstrate that restriction chosen is least severe that will achieve the desired end, notwithstanding evidence, based on experience, that cease and desist orders were an insufficient alternative?

IV. First Amendment/Free Speech Issues

A. Judgment vacated

Harleston v. Jeffries, 21 F.3d 1238 (2nd Cir. 1994), *judg. vac.*, 63 U.S.L.W. 3385 (11/14/94, No. 94-112). The Supreme Court vacated a decision by the United States Court of Appeals for the Second Circuit which held that a professor's First Amendment rights were violated when university administrators reduced his upcoming term as chairman of the black studies department to one year from the customary three year term, due to several "hateful and repugnant" comments made about Jews in a speech addressing bias in New York State's public school curriculum. The court of appeals ruled that absent disruption of educational operations, the university should have known that they could not sanction the department chairman for speaking on issues of social or political concern. The questions presented by the petition were: (1) Does the First Amendment require university administrators to retain, in position of leadership, person who has engaged in speech containing "hateful, poisonous and reprehensible" comments, reasonably believed by administrators to be harmful to the university? (2) For purposes of First Amendment analysis, may speech containing such comments be parsed or is "each and every sentence" constitutionally protected, even if speech touches only in part on matters of public concern? (3) Was it clearly established, as of March 23, 1992, that university administrators who reasonably believed that such speech would cause disruption of were precluded by the First Amendment from removing the speaker from a leadership position?

B. Review denied

Bongiovanni v. Filippo, 30 F.3d 424, 63 U.S.L.W. 2075 (3rd Cir. 1994), *cert. denied*, 63 U.S.L.W. 3515 (01/09/95, No. 94-872) The United States Court of Appeals for the Third Circuit had reversed a grant of summary judgment for state university in an action brought by a dismissed professor for violation of his First Amendment rights under 42 U.S.C. 1983. The court held that the professor's non-sham grievance filed with the university is protected by the First Amendment's Petition Clause regardless of whether it involves a matter of public concern, and thus cannot be the basis of a discharge. Further, the court found genuine issues of material fact over whether the university acted with deliberate indifference in dismissing the professor were created by evidence pointing to a personal vendetta against the professor held by members of his department, that professor's prior First Amendment activities were well known to the university, and that other professors had engaged in similar activities without being disciplined. The questions presented by the petition were: (1) Must public employee's petition, like speech, involve a matter of public concern to invoke First Amendment protection against discharge from public employment? (2) Is failure to "tread with a certain amount of care" an insufficient degree of culpability to make government entity liable under 42 U.S.C. 1983 for an unconstitutional act of its non-decision-making subordinate? (3) Does First Amendment retaliatory discharge claim under 42 U.S.C. 1983 require public employee to show that public employer decision-maker acted with purposeful intent to retaliate against him for his exercise of First Amendment rights?

Cabool, Mo. v. Casey, 12 F.3d 799 (8th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3292 (10/11/94, No. 94-375). The United States Court of Appeals for the Eighth Circuit had upheld a decision holding defendant municipality liable for damages under 42 U.S.C. 1983 and awarding the plaintiff, a former city employee, attorneys' fees. The court ruled that the discharge of the employee for criticizing fire department policies and city officials violated the employee's right to free speech. The court held that the comments concerned a matter of public interest and, since the employee had a substantial interest in making the statements and the comments did not jeopardize the effectiveness of the city's operations or the employee's effectiveness at carrying out his duties, the employee's interests in free speech outweighed the interests of the city. The questions presented by the petition were: (1) Was the discharge of the police dispatcher (who earlier had resigned as fire chief and agreed to stay out of fire department operations, but who continued to disrupt the fire department, and confronted city administrator with false allegations of dishonesty against city clerk and mayor in an attempt to coerce petitioner to allow dispatcher to set fire department policies) for insubordination, breach of his agreement, breach of chain of command, and disruption, violation of dispatcher's First Amendment free speech rights and actionable under 42 U.S.C. 1983? (2) Did federal courts below, under *Connick v. Myers*, 461 U.S. 138 (1983), and *Waters v. Churchill*, 62 L.W. 4397 (U.S. 1994) fail to defer to local government officials? (3) Is conversation to be divided into "public concern" and "private concern" categories, or must it be considered as whole to be either "public concern" or "private concern," an issue on which there is an acknowledged split among circuit courts as recognized in *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134 (2d Cir. 1993)? (4) Did Eighth Circuit err in failing to consider, and find, under *University of Tennessee v. Elliot*, 478 U.S. 788 (1986), that discharge appeal hearing decision, in which dispatcher's free speech challenges were denied, constituted final decision, when not appealed under Missouri Administrative Procedure Act (RSMo. Sections 536.010 et seq.), and that such decision cannot be collaterally attacked under 42 U.S.C. 1983? (5) When dispatcher sued for $200,000 and received jury verdict and judgment for only $18,888 (less than 10 percent of amount claimed), did federal courts below err, under *Farrar v. Hobby*, 61 L.W. 4033 (U.S. Sup.Ct. 1992), in awarding more than $80,000 in attorneys' fees?

Schenck v. Oregon Commission on Judicial Fitness and Disability, unpublished (Ore.Sup.Ct. 03/10/94), *cert. denied*, 63 U.S.L.W. 3263 (10/03/94, No. 94-121). The Oregon Supreme Court had upheld an Oregon circuit court judge's 45 day suspension without pay for violations of Canons 1, 2A, and 3A(6) of the Oregon Code of Judicial Conduct. The court ruled that applying the Canons to public statements made by the judge, in a letter to the editor and in a guest editorial concerning pending or impending cases and the competence, training, experience and maturity of the district attorney for a county within the judge's district, did not violate the judge's free speech rights under either the Oregon or the United States constitutions. The questions presented by the petition were: (1) Does discipline of judge for his harsh criticism in local newspaper of the performance in office of the district attorney violate the First Amendment? (2) Are Canons 1A, 2A, and 3A(6) unconstitutionally vague as applied to judge's newspaper criticism in office of the district attorney?

V. Obscenity

A. Review denied

Illinois v. Page Books Inc., 235 Ill.App.3d 765, 601 N.E.2d 273, 175 Ill.Dec. 876 (Ill. 1994), *cert. denied*, 63 U.S.L.W. 3263 (10/03/94, No. 94-151). The Illinois Court of Appeals reversed the defendant's conviction for state obscenity offenses holding that the lower court erred during defendant's obscenity prosecution by charging all three videos at issue in one count of the indictment, combining all 25 magazines at issue in the second count and by using general verdict forms. These errors constituted an unconstitutional prior restraint on the defendant's freedom of expression because it failed to provide the defendant with a precise judicial determination of which materials were obscene. The question presented by the petition was: Does the opinion of the court below undermine the authority of *Miller v. California*, 413 U.S. 15 (1973), by finding that failure to give special interrogatory verdict forms in obscenity case created a prior restraint by failing to instruct bookstore as to what materials it could offer in the future?

VI. Picketing

A. Judgment Vacated

Lawson v. Murray, 136 N.J. 32, 642 A.2d 338, 63 U.S.L.W. 2647, (N.J. 1994), *judg. vac.*, 63 U.S.L.W. 3256 (10/03/94, No. 94-45). The Supreme Court vacated an opinion of the New Jersey Supreme Court which held that an injunction which bars anti-abortion picketing within three-hundred feet of the residence of a physician who performs abortions does not violate the First Amendment or a protestor's right to free speech. The Supreme Court vacated the judgment based upon its decision in *Madsen v. Women's Health Center Inc.*, 62 U.S.L.W. 4686 (U.S. 1994). The New Jersey court had reasoned that the injunction was a neutral time, place and manner restriction which was narrowly tailored to further the state interest in protecting residential privacy while leaving open alternative avenues of communication and expression. The questions presented by the petition were: (1) Should decision of court below be reversed as directly inconsistent with subsequent decision in *Madsen v. Women's Health Center Inc.*, 62 L.W. 4686 (U.S. 1994)? (2) Did court below err by holding that state courts have "inherent authority" to ban peaceful expressive activities in residential neighborhoods? (3) Did court below err by reviewing injunction banning peaceful expressive activity under test for "time, place and manner" restrictions instead of doctrine of prior restraints? (4) Did court below err by holding that injunction restricting only pro-life demonstrations is content neutral? (5) Do injunctive restrictions at issue violate rights to freedom of speech and freedom of assembly under the First Amendment?

B. Review denied

Williams v. Burnham Broadcasting Co., 629 So.2d 1335, (La.Ct.App. 1993), cert. denied, 63 U.S.L.W. 3257 (10/03/94, No.93-1914). The Louisiana Court of Appeals ruled that a non-denominational church organization was properly enjoined from conducting boycotts targeting a television station's advertisers. The court held that the boycotts, intended to force the station to give the organization free air time or news coverage of its activities, essentially amounted to extortion, which is a criminal activity not protected by the First Amendment. The questions presented by the petition were: (1) Is injunction issued by district court enjoining and prohibiting petitioner's protest of WVUE-TV 8 and boycott of its advertisers constitutionally infirm? (2) Do lower court's affirmance of injunction and denial of petitioner's writ application conflict with United States Supreme Court and Fifth Circuit precedent? (3) Was preliminary injunction issued by district court overbroad?

(4) Is injunction issued by district court content based and insufficiently narrow to serve any compelling state interest?

VII. Trade Regulation

A. Review denied

Anderson v. Nidorf, 26 F.3d 100 (9th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3705 (03/27/95, No. 94-770). The United States Court of Appeals for the Ninth Circuit had ruled that a state statute making it unlawful to advertise, sell, or rent a sound recording or audiovisual work without disclosing its origin does not, on its face, violate First Amendment rights because it is narrowly tailored to achieve the state's content-neutral interests of preventing piracy and protecting consumers. The possibility that the statute may apply to recordings whose performers and manufacturers may wish to remain anonymous is not a substantial enough interest as to render the statute overbroad. The questions presented by the petition were: (1) May the state, consistent with the First Amendment guarantees of freedom of speech and caselaw requirements of *Talley v. California*, 362 U.S. 60 (1960), outlaw anonymous speech in the commercial marketplace by requiring the true name and address of the manufacturer and the name of the actual author on all sound recordings as prerequisite to offering them for sale? (2) Because piracy is not at all addressed by the statute, and consumer protection could be accomplished by much narrower identification requirement that would not impinge on protected speech, is the statute unconstitutionally overbroad?

The attached index categorizes the LDRC LibelLetter since its first edition in April 1994. With this index -- and annual updates in future years -- the LDRC hopes to make the *LibelLetter* a more "practitioner-friendly" resource.

The index breaks down articles into three sections: by case name (where the case is featured prominently, or is the subject of, the article); by topic; and by state (for statutes and articles about current legislative trends). The index indicates the month and year in which the article appeared and, in parenthesis, the page on which the article began. We welcome your comments on ways to improve the index before its next edition.

Back issues of the *LibelLetter* are available for $5 (to cover duplication and postage & handling costs) upon request.

LibelLetter Case and Topic Index

UPDATED THROUGH JULY 1995

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