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MEDIALAWLETTER

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LIBEL & PRIVACY

MLRC Calendar

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MLRC London Conference
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swissotel The Howard
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Cocktail reception at 6pm sponsored by Media/Professional Insurance
Dinner at 7:30pm

November 11, 2005
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January 26, 2006
MLRC & Donald E. Biederman
Entertainment & Media Law Institute of
South Western Law School
Los Angeles

Legal Challenges of Creativity in a Changing
and Increasingly Regulated Media Environment

Fourth Circuit Reinstates Hatfill Anthrax Libel Suit Against *The New York Times*

Paper Seeks En Banc Review

By David McCraw

The New York Times has filed a petition seeking en banc review of a recent split decision in the Fourth Circuit reinstating the libel suit brought by Steven Hatfill, the biological warfare expert who is a "person of interest" in the FBI's still-incomplete anthrax investigation. *Hatfill v. New York Times Co.*, No. 04-2561, 2005 WL 1774219 (4th Cir. July 28, 2005).

By a 2-1 vote, the Fourth Circuit held that Hatfill's complaint adequately set out a claim for libel by implication in a case growing out of a series of op-ed columns that Nicholas Kristof wrote in 2002. Kristof's columns criticized the FBI's failure to investigate aggressively the deaths of several people who received anthrax in the mail in the aftermath of September 11.

The Fourth Circuit held that Hatfill's complaint adequately set out a claim for libel by implication.

Background

Hatfill's complaint asserts two basic theories to support his libel claim: first, that the columns as a whole imply that he is guilty of being the anthrax mailer, and, second, that individual false statements within the columns independently raise the same implication. The complaint also includes a cause of action for intentional infliction of emotional distress.

In the columns, published in 2002, Kristof questioned why the FBI was not looking more thoroughly into Hatfill, who was identified only as "Mr. Z" in the columns until Hatfill himself held a press conference in August 2002 and admitted that he was under investigation. The columns offered a summary of some of the evidence that Kristof believed deserved a closer look, including Hatfill's failure to pass a lie detector test, his administering of Cipro to visitors, his use of multiple passports, and his presence in Rhodesia in the late 1970s, when thousands died from an anthrax outbreak.

In November 2004, Chief Judge Hilton of the Eastern District of Virginia had dismissed the complaint, finding that the columns could not reasonably be read to convey the defamatory meaning that Hatfill was in fact the anthrax mailer, as the Complaint alleges. *Hatfill v. New York Times Co.*, No. 04-CV-807, 2004 WL 3023003, 33 Media L. Rep. 1129 (E.D.Va. Nov 24, 2004). Rather, the opinion columns used facts about Hatfill as an example to demonstrate the "ineptitude" of the FBI. The court noted that the columns included passages that Hatfill had to be presumed innocent, that there was no physical evidence against him, and that his friends thought he was the victim of a witch hunt.

Fourth Circuit Decision

The majority in the Fourth Circuit, Chief Judge Wilkins and Judge Shedd, found, however, that Hatfill's complaint adequately set forth a defamation claim. After noting that the columns focused only on Hatfill and no other possible suspect, the court said that "a reasonable reader of [Kristof's] columns could believe that Hatfill had the motive, means, and opportunity to prepare and send the anthrax letters."

The majority gave little credence to the passages that denied an accusation of guilt. They pointed to the Supreme Court's holding in *Milkovich* that placing the words "in my opinion" before a defamatory factual statement did not insulate the statement from liability. "Pairing a charge of wrongdoing with a statement that the subject must, of course, be presumed innocent" similarly provided no escape from liability, the court said.

The majority also rejected any requirement that the columns convey to a reasonable reader that Kristof intended to convey the implication that Hatfill was guilty. Applying *Chapin v. Knight-Ridder, Inc.,* 993 F.2d 1087 (4th Cir. 1993), the District Court dismissed the implication claim because the obvious objective of the columns was to criticize the FBI, not to accuse Hatfill of guilt.

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Fourth Circuit Reinstates Hatfill Anthrax Libel Suit Against *NY Times*

(Continued from page 5)

The Fourth Circuit majority concluded that *Chapin's* intent requirement did not apply because the Complaint alleged that the implication of guilt followed from facts that were themselves alleged to be false.

In reversing, the majority criticized what it perceived as the District Court's unduly elevated standard of review for assessing the sufficiency of a complaint on a motion to dismiss. The District Court had said that in reviewing defamation claims a court was to review the allegations with "particular care," but the majority at the Fourth Circuit concluded that the normal pleadings rule of federal practice applied: the plaintiff needed only to have a "short and plain statement of the claim" and it was up to the defendant to show that "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

The majority criticized what it perceived as the District Court's unduly elevated standard of review for assessing the sufficiency of a complaint on a motion to dismiss.

The Times had also argued that the statute of limitations barred Hatfill's libel claim to the extent it was based on the individual statements. Hatfill had initially filed the suit in state court but never served the complaint and ultimately withdrew the complaint. Under the Virginia rules, that tolled the statute of limitations and extended the time for bringing a new complaint.

Because the original state-court complaint did not explicitly identify the individual statements as a source of liability, *The Times* argued, and the District Court agreed, that the claims based on individual statements – as opposed to the overall implication of the columns – were time-barred.

The Fourth Circuit disagreed. It held that the original complaint tolled the statute of limitations for all claims arising from the "set of operative facts underlying" the complaint. Because the original complaint asserted that the overall implication of the columns was to accuse Hatfill of the anthrax crimes, he was free to bring new claims based on the individual statements relating to the anthrax mailings in his federal complaint.

Finally, the court found that the complaint adequately set forth a claim for intentional infliction. If Hatfill were able to prove his theory that *The Times* intentionally published false statements accusing him of such a notorious crime, and refused to allow plaintiff to publish a rebuttal, as the complaint alleged, that would be sufficient for a jury to conclude that the newspaper's actions had been "extreme or outrageous," according to the majority.

The dissenter, Judge Niemeyer, would have affirmed the District Court decision because the cautionary language used by Kristof made clear that the columns were not intended to accuse Hatfill of having committed the crime, and could not reasonably be read to convey that accusation. In the view of the dissent, "inaccurately reporting the suspicious circumstances surrounding a suspect does not amount to inaccurately accusing – either expressly or impliedly – the suspect of actually committing the crime."

Petition for En Banc Review

In petitioning for en banc review, *The Times* identifies three errors in the majority's decision. First, the opinion failed to follow the Fourth Circuit's holding in *Chapin*, that a court addressing a libel by implication claim must look at the whole context of a statement in determining whether it contains the implication alleged.

Second, *The Times* asserts that the majority erred in rejecting the *Chapin* requirement that the article must convey the writer's intent to impart the defamatory implication alleged.

Finally, *The Times* argues that the court's ruling on intentional infliction is contrary to well-established law finding that a defendant's publication of news articles of public interest does not meet the legal standard for "outrageousness" required to maintain such a claim, and in this case constitutes an impermissible "end-run" on the constitutional limits to a claim for libel.

David McCraw is Counsel at The New York Times Company. David Schulz and Jay Brown of Levine Sullivan Koch & Schulz. L.L.P., represented The Times in the Fourth Circuit. Plaintiff is represented by Thomas Connolly, Patrick O'Donnell, Mark Granis, and Christopher Wright of Harris, Wiltshire & Granis of Washington, D.C.

Multimillion Dollar Verdict Reinstated in Kentucky Libel Action

A divided Kentucky Supreme Court this month reinstated a $2.97 million defamation verdict against Belo Kentucky, Inc., d/b/a/ WHAS-TV ("WHAS") over a series of television broadcasts concerning an accident at plaintiff's amusement park. *Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc., D/B/A WHAS-TV (F/K/A Journal Broadcasting of Kentucky, Inc. D/B/A WHAS-TV)*, No. 2002-SC-0693-DG; 2002-SC-0697-DG; & 2003-SC-0634-DG (Ky. Aug. 25, 2005) (Wintersheimer, J.).

In a 4-3 decision, the court found the trial record "full of evidence" of actual malice to sustain the judgment. One of the dissenting judges pointedly referred to the majority decision as a "real tragedy" for the "breathing space" that is "imperative for a vigorous and competent press."

Background

In July 1994, a number of passengers were injured when two cars collided during the operation of plaintiff Kentucky Kingdom's "Starchaser," an indoor steel roller coaster. WHAS aired a number of broadcasts concerning the collision, and plaintiff brought suit alleging that three statements contained in the reports were libelous.

Following a comment by one of the passengers on the roller coaster that "everybody should know about how dangerous the ride is," a WHAS reporter transitioned to news of a written "stop operation order" with the phrase "State inspectors think the ride is too dangerous."

In another report a reporter referred to the Starchaser as "the roller coaster ride that malfunctioned earlier this week."

And in a report on a lawsuit against the amusement park, a report stated that "Kentucky Kingdom removed a key component of the ride" when describing the testimony of the park's maintenance supervisor.

A jury returned a $3,975,000 verdict in plaintiff's favor. That amount consisted of $1,000,000 in reputational damages, $ 475,000 in lost profits and $2,500,000 in punitive damages. The trial judge entered a JNOV with respect to the $1 million awarded for reputation damages after determining that any damages beyond loss of profits was speculative.

The Court of Appeals affirmed in part, but remanded for a new trial on damages. It found sufficient evidence of actual malice to support liability on the first of the complained of statements, that "state inspectors think the ride is too dangerous," but insufficient evidence to support actual malice on the remaining statements. Since damages were not apportioned among the statements, the Court of Appeals reversed and remanded for a new trial. The Court of Appeals also held that on retrial plaintiff would be entitled to general reputational damages so long as they were linked to specific statements.

Verdict Reinstated

On appeal, the Kentucky Supreme Court reinstated the trial court award. The Court first noted that there is no heightened standard of review on appeal for determinations of fact as to falsity. Thus the Court concluded it must accept the jury's findings of fact on falsity, including those that support the finding of actual malice.

As to fault, the Court found that taken as a whole, "this case is full of evidence from which the jury could conclude that WHAS-TV acted with actual malice."

This included evidence the station had "specific knowledge" that the statement the ride was "too dangerous" was false. Among other things, this statement was flagged prior to broadcast.

The statement that the ride had "malfunctioned" was made even though the station's own records reflected that state inspectors had not made the statement, and after the station had acknowledged to plaintiff that the statement was incorrect and would be corrected.

The court found that the station had "a continuing commitment to running and rerunning the same story line; that there was a significant failure to investigate or verify credibility; and the general makeup and presentation of the story exhibited hostility."

Other Issues

The Court also held that the trial court's instruction to the jury that they had to find defendants' statements "false" was proper. Defendants had asked the trial court to instruct the jury that they find the statements "not substantially true." According to the Court, such an instruction "would be in contradiction to the barebones approach used in jury instructions in Kentucky."

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Multimillion Dollar Verdict Reinstated in KY Libel Action

(Continued from page 7)

As to damages, the Court found the award for lost profits and punitive damages supported by the evidence. It also affirmed the trial judge's decision to JNOV the award for reputational damages. While a corporation "could suffer loss of reputation," here such damages would be speculative.

Finally, the court ruled that it was proper to allow a journalism expert to testify for plaintiff on the issue of actual malice. The expert criticized the station's journalist standards and ethics. Acknowledging that such testimony cannot by itself support actual malice, it was admissible to assist the jury "in understanding the circumstantial evidence of actual malice."

Dissent

Two separate and lengthy dissents were filed, with one pointedly referring to the majority decision as a "real tragedy."

The first dissent, written by Justice Cooper, and joined by Justice Graves, reviewed the facts at length and concluded that the statements broadcast were substantially true. Justice Cooper also concluded that the trial court improperly allowed the jury to return a verdict for defamation by implication – noting that many jurisdictions frown on such actions by public figure plaintiffs, and at a minimum require proof that the implication was intended.

Finally, Justice Cooper's dissent argued that the punitive damage award violated the general 4 to 1 ratio outlined by the Supreme Court in *State Farm v. Campbell*, 538 U.S. 408 (2003).

In a separate dissent, Justice Roach supported affirming the Court of Appeals decision, finding sufficient evidence to support actual malice as to only the first of the three complained of statements. But he too agreed that the punitive damage award violated the Supreme Court's rule from *State Farm*.

Defendants were represented by Thomas Leatherbury, Vinson & Elkins, in Dallas; and John Tate and Bethany Breetz, Stites & Harbison, Louisville, Kentucky. Plaintiffs were represented by Eric Ison and Mellissa Bork of Greenbaum, Doll & McDonald; Edmund Karem of Sitlinger, McGlincy, Steiner, Theiler & Karem; and Ann Oldfather and Lea Player of Oldfather & Morris, all in Louisville.

Directed Verdict on Political Candidate's Libel Suit Was Error

Sufficient Evidence That Newspaper Doubted Editorial

The South Carolina Supreme Court this month affirmed that a political candidate had presented sufficient evidence of actual malice at his case in chief at trial for the case to have gone to the jury. *Anderson v. The Augusta Chronicle, Morris Communications*, No.26031, 2004 WL 3486868 (S.C. Aug 22, 2005) (Toal, J.) (affirming reversal of a directed verdict for defendants).

At issue was a newspaper editorial that accused plaintiff of falsely claiming he had served in the National Guard. The Court affirmed that the paper had "obvious reason to doubt" the accuracy of its editorial.

Background

The plaintiff Tom Anderson lost an election for a seat in South Carolina legislature in 1996. A year later there was a special election in the district because of redistricting and plaintiff decided to run again.

A reporter from the *Augusta Chronicle* interviewed plaintiff and the *Chronicle* published an article, including the statement that plaintiff had being called to serve in the National Guard during the 1996 campaign. The newspaper then published a second article about plaintiff and how he "felt cheated for being called away to the National Guard" in the midst of his campaign.

Plaintiff allegedly he never read these articles and only learned of the mistake when the another reporter from the *Chronicle* later contacted plaintiff to ask him if he was going to withdraw from the race because "it had been proven that he had not served in the National Guard."

Plaintiff denied he had ever said he served in the National Guard and sent the newspaper documents confirming his work as an insurance appraiser for the National Flood Insurance Program. The *Chronicle* published a story that included plaintiff's denial of the accusation.

The *Chronicle* later published an editorial entitled, "Let the Liar Run" which stated:

> Clearwater Democrat Tom Anderson, running in November's court-ordered special election for South Carolina's House District 84 seat, has been exposed as a liar. He told this newspaper he was called away to National Guard duty in the last weeks of the 1996 election, his first race against incumbent state Rep. Roland Smith, R-Langley. (Anderson lost by a decisive margin.) It turns out, however, the state Guard has no record of Anderson ever serving – either then or any other time. State GOP director Trey Walker, saying Anderson has dishonored himself and the National Guard, demands that the Democrat withdraw from the race. Walker's right about the dishonor, but what about the withdrawal? If Anderson is the best the Democrats can come up with, they still have every right to run him. There's nothing in the election rules that says a political party can't nominate for public office a candidate who, in effect, lies on his resume. We are confident that an informed electorate won't vote into office a proven prevaricator. After all, he doesn't even have the long robes of one of Al Gore's Buddhist monks to hide behind!

Plaintiff lost the special election and later sued the newspaper and the State Republican Party Director for libel. The claim against the party official was dismissed before trial. The case against the newspaper went to trial in 1999.

Plaintiff's Evidence at Trial

At trial, Anderson testified he never told the *Chronicle* that he had served in the National Guard, though the reporter insisted at trial that plaintiff had. Plaintiff also submitted into evidence newspaper articles from another local paper published before the complained of editorial. One article stated that "Aiken County House candidate Tom Anderson has had to break off his campaign for House District 84 to help process insurance claims resulting from Hurricane Fran's destruction in North Carolina."

The owner of a Columbia, S.C. insurance claims adjusting firm also testified that the editorial led the company to drop plans to have plaintiff oversee expansion of the firm's business into Georgia.

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Directed Verdict on Political Candidate's Libel Suit Was Error

(Continued from page 9)

At the conclusion of Anderson's case, the Circuit Court Judge Costa Pleicones granted a defense motion for a directed verdict for insufficient evidence of actual malice.

Court of Appeals Decision

In 2003, the South Carolina Court of Appeals, in a 2-1, decision reversed and remanded for a new trial. 585 S. E.2d 506, 31 Media L. Rep. 1393 (S.C.App. Feb 03, 2003). The court found that the jury could reasonably have inferred that plaintiff had said National Flood, and that even a cursory investigation of his denial would have revealed the likelihood of a misunderstanding.

The court required a heightened investigation standard under the circumstances because the editorial was not "hot news," noting that more than six months had passed between the *Chronicle's* original story about plaintiff and the editorial.

South Carolina Supreme Court Decision

Affirming, the South Carolina Supreme Court found sufficient evidence in the record that the newspaper's editorial writer recklessly disregarded the truth when he published the article to place the question of actual malice before the jury.

Recognizing that failure to investigate, alone, is insufficient to support reckless disregard, the court identified other circumstantial evidence against the newspaper.

Among the evidence:

- Prior to publication of the editorial, plaintiff had already disputed the allegation and supplied the newspaper with documentary evidence supporting his version.
- Plaintiff sent the newspaper a letter from the supervisor of National Flood's claims field operations and a resume he prepared and used during his campaign. The resume detailed plaintiff's work as a flood insurance adjuster.
- Of particular import to the Court was that plaintiff's official campaign resume specifically referred to his military service in the Korean War, but made no mention of the National Guard.
- Moreover, the newspaper should have realized that plaintiff's purported statement that he was called to service in the National Guard "was highly questionable" since plaintiff was over sixty years old at the relevant time.
- The Court also found that the news articles from other local papers published before the editorial that described plaintiff as an adjuster for the National Flood Insurance Program was evidence from which a jury could reasonably infer that plaintiff had in fact said he was working with National Flood, not that he was serving in the National Guard.

These facts, known to *The Chronicle* before publication of its "Let the liar run," editorial could lead a reasonable jury to infer the paper had obvious reasons to doubt its own reporter's recollection of his conversation with plaintiff.

The Augusta Chronicle was represented by David E. Hudson, Hull, Towill, Norman, Barrett, & Salley, in Augusta, SC; and James M. Holly, of Hull, Norman, Barrett, & Salley in Aiken, SC. Plaintiff was represented by Douglas Kosta Kotti, of Columbia.

School Official's Libel by Implication Claim Over Editorial Survives Motion to Dismiss

A Virginia trial court denied a newspaper's motion to dismiss a libel complaint over an editorial. *Jackson v. Landmark Communications, Inc., d/b/a Virginian-Pilot*, No. CL05-657, 2005 WL 1862620 (Cir. Ct. Va. June 20, 2005) (Fulton, J.)

The court ruled that the editorial could be read to imply false facts about plaintiff and thus the claim could survive a motion to dismiss.

The editorial stated in relevant part:

> We have deep misgivings about Jackson's qualifications.... Jackson, a former police officer and Republican, was honored to be among the first citizens elected to the Virginia Beach School Board. It turned out badly. It was on his watch that the schools went millions of dollars in the red, a disaster that took years to overcome. Jackson was indicted for malfeasance, but was exonerated, then resigned. Jackson has given us no reason why voters should forgive this blot on his record. Now he wants voters to trust him to oversee a state budget 200 times as large as the School Board's. That's asking too much.

While the editorial accurately reported that plaintiff was exonerated, plaintiff argued that it nevertheless implied he was guilty of violating Va.Code § 22.1-91 – a state statute that makes it a crime for school officials to overspend budgets without express permission.

The court agreed, finding that "The average reader could have understood the whole of Defendant's editorial to say that Jackson is an unfit candidate for office because of his failure to comply with the budgetary restrictions, and consequent violation of Va.Code § 22.1-91."

But the court did note that a libel by implication claim would require that the newspaper intended or endorsed the defamatory inference. *Citing Lamb v. Weiss*, 62 Va. Cir. 259, 262 (2003) ("liability for libelous implications drawn from true facts attaches where there is by the particular manner or language in which the true facts are conveyed ... affirmative evidence suggesting that the defendant intends or endorses the defamatory inference").

Plaintiff was represented by Thomas Albro, Tremblay & Smith, Charlottesville, VA; and James Broccoletti, Zoby & Broccoletti, Norfolk, VA. Defendants were represented by Conrad Shumadine, Gary Bryant and Brett Spain, Wilcox & Savage, Norfolk, VA.

West Virginia Court Dismisses Judge's Libel Claim Over Campaign Ad

A West Virginia trial court last month dismissed a judge's libel complaint against a local television station for broadcasting a political advertisement that sharply criticized the judge's decision in a criminal appeal. *McGraw v. Blankenship*, No. 04-C-317 (Cir. Ct. W. Va. July 25, 2005) (Moats, J.).

The plaintiff Warren McGraw was a sitting justice on the West Virginia Supreme Court running for reelection in 2004. A political organization called "And For the Sake of the Kids" created and paid for two advertisements that aired on defendant's station WOWK-TV.

The first ad stated in full:

> Supreme Court Justice Warren McGraw voted to release child rapist Tony Arbaugh from prison. Worse, McGraw agreed to let this convicted child rapist work as a janitor in a West Virginia school. Letting a child rapist go free to work in our schools. That's radical Supreme Court Justice Warren McGraw. Warren McGraw, too soft on crime, too dangerous for our kids.

Plaintiff was defeated for reelection. He later sued over the ad, alleging that all but the last sentence was defamatory. He also sued over a similar ad that stated "Radical McGraw voted to let a child rapist go free."

Truth and Opinion

In dismissing the complaint against the broadcaster (and a lawyer who helped create the ad), the trial court held that the statement that plaintiff "voted to release child rapist Tony Arbaugh from prison" was true. Arbaugh was convicted of "sexual assault" for having intercourse with a minor under 12 years old. "In common terms such a victim is classified as a child." And plaintiff voted to reverse a lengthy jail sentence and grant probation that included working at a high school as a janitor.

Finally, the description of plaintiff as "radical" was non-actionable opinion. The term is not a factual assertion, but a description of "political behavior and thought" that is "relative to each person."

Defamation Complaint over Allegedly "Anti-Semitic" Ad Dismissed

By Damon Dunn

The *Chicago Sun-Times* and one of its advertisers obtained the dismissal of a defamation case brought by a competing advertiser who claimed the newspaper published an anti-Semitic advertisement. *Imperial Apparel Ltd. et al v. Cosmo's Designers Direct Inc. and Chicago Sun-Times, Inc.,* 05 L 677 (Ill. Cir. Ct. Cook Cty.) (July 29, 2005). (Lawrence, J.).

Background

Plaintiff, Imperial Apparel, and defendant, Cosmo's Designers, are competing menswear retailers that both advertised in the *Sun-Times.* The dispute began after Imperial published a "3 for 1 designer clothing advertising offer," similar to Cosmo's regular advertisements.

Cosmo's submitted a retaliatory advertisement. The complained of copy appeared under the banner "WARNING! Beware of Cheap Imitators Up North . . ." and proceeded to mock an entity by the name of "Empire."

The gist of Cosmo's ad was it originated 3 for 1 Sales for designer menswear in Chicago and that Empire was imitating Cosmo's marketing strategy. Cosmo's warned that Empire should "stop copying your neighbor's concepts or a hail storm of frozen matzo balls shall deluge your 'flea market style warehouse.'" The ad stated that its 3 for 1 sales were the better value, alluding to "the quality gap between dried cream cheese and real Parmigiano" and asserting that the highest quality menswear comes from Italy and Cosmo's is an Italian-American owned business, while "Empire" is not.

Imperial sued the Sun-Times for defamation *per se* and *per quod* as well as commercial disparagement and alleged additional statutory torts against Cosmo's. Imperial alleged that the "Empire" referred to it; that Cosmo's advertisement impugned the ethnic background of the owners' of Imperial through the use of anti-Semitic code words and defamed their business reputation and goods by charging, among other things, that Imperial inflated prices and compromised quality.

Imperial alleged that Cosmo's advertisement portrayed Imperial as "an ignoble, cheap Jewish business" and "Jewish whores and liars" while denigrating its merchandise as "rags."

The *Sun-Times* and Cosmos's both moved to dismiss the complaint, primarily on the grounds that the advertisement conveyed Cosmo's subjective viewpoint regarding its competitor's marketing tactics and Cosmo's superior values, citing *Brennan v. Kadner* (see MLRC Media Law Letter June 2004).

Judge Lawrence of the Cook County Circuit Court dismissed the complaint with prejudice. The Court ruled that, under Illinois law, the advertisement did not convey objectively verifiable facts. Imperial contended that the references to inflating prices and compromising quality could be objectively refuted through expert evidence. The Court disagreed and found that expert opinion could not establish falsity because terms such as "inflate" and "compromise" were too imprecise.

The Court ruled that, under Illinois law, the advertisement did not convey objectively verifiable facts...terms such as "inflate" and "compromise" were too imprecise.

The Court further held that, since the advertisement was not subject to objective verification, it ultimately precluded liability under all of the alleged causes of action.

Damon Dunn, a member of Funkhouser Vegosen Liebman & Dunn Ltd. in Chicago, Illinois represented the Chicago Sun-Times. Plaintiffs were represented by Edward Feldman of Miller Shakman & Hamilton LLP, and Defendant Cosmo's was represented by James Wolf of Wolf & Tennant.

Save the date!

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New York City

No Trespass in Undercover "Inside Edition" Story

A federal judge ruled July 29 that a reporter for the syndicated television magazine, "Inside Edition," had not committed the tort of trespass when he got hired by a company that sells magazines door-to-door. *Pitts Sales, Inc. v. King World Productions, Inc.*, Civ. No. 04-606664 (S.D. Fla. bench verdict July 29, 2005).

The bench verdict came after Judge James I. Cohn had dismissed the other claims in the suit, and after the parties stipulated to having him decide the case based on briefs and supplemental materials. *See MLRC MediaLawLetter* July 2005 at 35.

Undercover Story

The lawsuit stemmed from an "Inside Edition" story in which associate producer Matthew Yule was hired by Pitts Sales in 2003. During his brief tenure with the company, Yule used hidden microphones and cameras to record, among other things, sales managers berating sales agents for failing to make sufficient sales and forcing them to sleep on the floor of hotel rooms rented as accommodations.

A story based on Yule's experience was broadcast on "Inside Edition" on Feb. 3, 2004. In addition to the hidden camera footage, the story included an on-camera interview with a former Pitts Sales employee who alleged that the company's managers made employees work long hours to meet sales quotas, and instead of stopping drug and alcohol use, participated with the underage sales agents in those activities.

In addition to broadcasting the story on television, a narrative based on the TV report was posted on the "Inside Edition" website, where it is still available (see http://www.insideedition.com/Default.aspx?tabid=35).

As reported in last month's *MediaLawLetter* Judge Cohen granted a defense motion for summary judgment as to all claims except the trespass claim, finding it possible that Yule exceeded consent by making the recordings.

Bench Verdict on Trespass Claim

This left the trespass claim as the only claim remaining for trial. But the parties stipulated to having Cohn decide the issue after supplemental briefing.

In its brief on the issue, Pitts Sales argued that Yule's behavior constituted a civil trespass because he exceeded the consent given to him by the company to enter its premises. In support of this it cited *Food Lion*, in which the defendants were eventually awarded minimal damages because the reporters in that case had exceeded the consent they had been given as employees.

In its brief, King World distinguished *Food Lion*, arguing that, unlike the reporters in that case, Yule had not gained access to any non-public areas. It also cited *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345 (7th Cir. 1995), in which reporters posing as patients were held not to have trespassed because they entered areas that were open to anyone requesting medical services.

King World also argued that Yule had not trespassed because the meetings that Yule had recorded were open to employees of other magazine subscription companies.

Judge Cohn rendered a verdict for the defendants on the trespass claim in a July 29 order, holding that "Yule did not gain access to any special areas of Pitts Sales' business not easily accessible by others."

In support of this finding, the court cited Pitts Sales' informal interview process and the presence of other subscription companies' employees. Judge Cohn also found that since Yule was hired as an independent contractor for a two-week trial period, he owed no duty of loyalty to Pitt Sales.

Lawyers for Pitts Sales said they were considering an appeal.

King World and the other defendants were represented by Michael D. Sullivan and Jeanette Melendez Bead of Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C. Pitts Sales was represented by Cynthia J. Becker of Harrah, Oklahoma.

DID YOU GO TO TRIAL RECENTLY?

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

South Carolina Court Dismisses Public Official's Lawsuit Against Newspapers

By John J. Kerr

A South Carolina state circuit court judge dismissed a lawsuit against two weekly newspapers filed by a deputy county supervisor who accused the newspapers of falsely reporting a story that county workers were performing landscaping work at his private residence. *Robert William Metts v. Judy Mims, Berkeley Independent Publishing Company, Inc. d/b/a The Berkeley Independent and Summerville Communications, Inc. d/b/a The Goose Creek Gazette*, 3-CP-08-2177 (S.C. C. P. order granting summary judgment June 20, 2005).

In granting the newspapers' motion for summary judgment, the court ruled that plaintiff was a public figure and that he failed to present evidence that *The Berkeley Independent* and *Goose Creek Gazette* had acted with actual malice in reporting the story. The court also dismissed a claim for false light invasion of privacy on grounds that it has not been recognized as a viable action in South Carolina.

The evidence in the record fell far short of the clear and convincing standard necessary to infer that the reporter's actions were done to purposely avoid the truth.

Background

The source for the statement that county employees were working at the deputy county supervisor's home was an elected member of the county council – also named as a defendant in the case.

Although there was confusion among some of county council members, the county supervisor testified at his deposition that the council had approved a policy where county employees could work on private property at a rate to be charged by the county.

The supervisor said the policy was needed because citizens living in remote areas of the county were having trouble finding private contractors willing to do small jobs, most having to do with drainage issues.

The work policy was met with skepticism by private contractors, some members of council who claimed they knew nothing about the policy and others in the community who thought it wrong for public employees to compete with private contractors.

On the day the newspapers had a scheduled press run at their parent newspaper's press, a co-defendant council member came to one of the newspapers to place an advertisement for her private business. While in the offices, the council member talked with the reporter who was doing a story on the county's work policy.

During this interview, the council member made the contested statement about county workers being seen in the deputy county supervisor's yard. As paraphrased in the article, "Mims reports that a constituent called to tell her about seeing county trucks in Robbie Mett's driveway in Pinopolis, and employees cutting limbs from trees in his yard." The council member was willing to be quoted because her constituents had reported the incident to her.

The reporter learned of a list of people who had contracted for work to be performed on their private property. The reporter called the county offices and asked for the list. The list arrived at approximately 4:30 in the afternoon, a short time before the deadline to send the newspaper to press. The reporter admitted that she did not see the deputy county supervisor's name on the list and that she neither contacted him for comment nor revised the article, because of multiple duties for the newspapers and the approaching deadline.

The plaintiff contended that publication of the allegation, when the deputy county supervisor's name was missing from the list, amounted to a reckless disregard and a purposeful avoidance of the truth.

The circuit court disagreed, finding that it was "insufficient to show that the Defendant made an editorial choice or simply failed to investigate or verify information; there must be evidence at least that the Defendant purposely avoided the truth."

The court held that the evidence in the record fell far short of the clear and convincing standard necessary to infer that the reporter's actions were done to purposely avoid the truth.

After the plaintiff's motion for reconsideration was summarily denied, he filed an appeal.

(Continued on page 16)

South Carolina Court Dismisses Public Official's Lawsuit Against Newspapers

(Continued from page 15)

Appeal of Contempt is Pending

This was the second appeal filed in the case. During discovery and before any depositions were taken, the plaintiff asked the newspapers to produce financial information including all income statements, statements of cash flow, etc. The newspapers declined, and at the hearing on a motion to compel production, the newspapers tried to explain to an ill-informed judge that the newspapers' financial information was a confidential matter; that it was relevant only for an argument on punitive damages; and that plaintiff had to prove constitutional malice by clear and convincing evidence to have a charge on punitive damages, even if he was classified as a private figure.

At the hearing, the plaintiff offered no evidence on relevance. His argument was basically, "I asked for it and they refused to give it to me."

The judge agreed to hold the newspapers in contempt so they could appeal the discovery order, but imposed no sanctions.

Without requiring plaintiff to offer any evidence of actual malice, the judge ordered the newspapers to produce all the requested financial information. On a motion to reconsider, the newspapers pointed out the absence of logic in the ruling.

Basically, a competitor could sue another competitor and get the competitor's financial statements without any showing of a valid entitlement to such sensitive and confidential information. The judge refused to change the ruling.

Normally, a discovery order is interlocutory. However, an order of contempt is not interlocutory. The newspapers refused to give up their financial records.

When plaintiff filed a motion to hold the newspapers in contempt and impose "harsh" sanctions for their "willful disobedience," the hearing was before another, more experienced judge.

The newspapers pointed out their dilemma. They could comply with what they considered an illogical and unlawful order and waive any right to challenge it on appeal, or refuse to comply with the order, be cited for contempt, and appeal.

The newspapers chose the latter option and asked the judge to hold them in contempt. The judge agreed to hold the newspapers in contempt so they could appeal the discovery order, but imposed no sanctions. The newspapers filed an appeal of the contempt order (and the underlying discovery order).

Both the contempt appeal and plaintiff's appeal of the summary judgment should be decided by early 2007.

John J. Kerr of the Charleston, South Carolina law firm of Buist Moore Smythe McGee PA represented the newspapers. E. Paul Gibson of the Riesen Law Firm in North Charleston, South Carolina and Steve F. DeAntonio of DeAntonio Law Firm of Charleston, South Carolina represented the Defendant.

Indiana Anti-SLAPP Statute Applied to Dismiss Defamation Claim Against Newspaper

By Gerald F. Lutkus and Michael Anderson

Relying on the Indiana Anti-SLAPP statute, an Indiana trial court dismissed a defamation claim against a newspaper publisher and awarded the newspaper its attorneys fees. *Shepard v. Schurz Communications* (Ind. Super. Ct. July 12, 2005).

Background

Plaintiff Clifford W. Shepard, an attorney in Monrovia Indiana, sued Schurz Communications, Inc., the *Mooresville/ Decatur Times* newspaper, and town attorney, Steven C. Litz over a February 13, 2002 article headlined "Monrovia town attorney steamed over letter."

In essence, plaintiff's complaint arose from the *Times'* coverage of a verbal brawl between plaintiff and Litz, who were involved as adversaries in a small claims court case to collect a controversial sewer-user fee.

Plaintiff claimed three statements in the article were defamatory. It quoted Mr. Litz as stating "I guess that's why there's ambulance chasers (referring to plaintiff) and "Cliff Shepard is a Liar .... his statement is false." The article also stated that "Shepard alleges, in a letter dated Feb. 8, 2002, that Litz gave him a list of 52 of the town's sewer customers who are purportedly delinquent on their bills."

Anti-SLAPP Motion to Dismiss

The Times moved to dismiss plaintiff's complaint pursuant to Indiana Code § 34-7-7-1 *et seq.*, which is Indiana's anti-SLAPP statute.

The statute provides a defense to any lawsuit arising from an act or omission in furtherance of a person's right of 'free speech' in connection with a public issue, if the act or omission was taken in good faith and with a reasonable basis in law and fact. I.C. § 34-7-7-5. The statute also provides for a mandatory award of reasonable attorneys fees and costs to a defendant prevailing under the statute.

Only one decision has been published in Indiana under the statute. *See Poulard v. Lauth*, 793 N.E.2d 1120 (Ind. App. 2003) (affirming dismissal of libel action under anti-SLAPP statute; further finding that constitutional objections to statute were waived). However, *Poulard* did not address the merits of whether a media defendant can invoke the statute as a defense in a defamation action.

The Times argued that its reporting of Litz's statements was privileged neutral reportage. Specifically, *The Times* contended that it was merely a reporting observer in the spat that erupted between two lawyers, Litz and Shepard, regarding an issue of great consequence and interest to the citizens of Monrovia.

The Times argued that its statement regarding Shepard's letter was substantially true. In any event, *The Times* argued, Shepard could not demonstrate by a preponderance of the evidence that *The Times* published the Article with actual malice.

Therefore, *The Times* argued, the Article constituted 'free speech' on a public issue under the United States and Indiana Constitutions. Furthermore, the *Times* contended, the Article was published in good faith and with a reasonable basis in law and fact, which satisfied the elements of the anti-SLAPP statute.

The Times demonstrated that it published the article in furtherance of its free speech rights on a public issue.

The Court's Decision

The trial court agreed with *The Times*. On October 28, 2004, the court granted *The Times*. motion to dismiss, holding that *The Times* demonstrated by a preponderance of the evidence that it published the article in furtherance of its free speech rights on a public issue, and that the article was published in good faith with a reasonable basis in law and fact.

The court ordered that *The Times* was entitled to recover its reasonable attorneys. fees and costs from Mr. Shepard.

On July 12, 2005, the Court granted Schurz's Motion and awarded it $35,595.00 in fees and $1,318.00 in costs. Though plaintiff's case against Litz continues, the Court entered final judgment with respect to the claims against the media defendants. It is uncertain as of this time if Mr. Shepard will appeal the Court's ruling.

Gerald Lutkus is a partner and Michael Anderson an associate at Barnes & Thornburg, LLP, South Bend, Indiana. They along with Jan Carroll, a partner in Barnes & Thornburg's Indianapolis office, represented Schurz in this matter.

Employment Law Report: N.J. Courts Give Employers One More Reason To Avoid Employment References

By Gary J. Lesneski

Many employers have a policy whereby they do not provide references for former employees beyond confirmation of dates of employment and, sometimes, salary, fearing exposure if negative information is released which impacts the former employee's ability to obtain employment.

Recently, the Appellate Division of the Superior Court of New Jersey released an opinion which will probably motivate more employers to adopt the same restrictive approach. In *Singer v. Beach Trading Company, Inc.*, 379 N.J. Super. 63, 876 A.2d 885 (N.J. App. Div. July 19, 2005), the court held that an employer can be liable to a former employee for negligently providing false information to a subsequent employer which causes that employer to terminate the former employee's new position.

Singer was an appeal of a trial court grant of summary judgment to the employer, so the court's focus was on whether there was a legal basis for the claim and whether the facts were sufficiently in dispute to require a jury trial to determine liability. The court sided with the plaintiff, reversed the summary judgment, and sent the matter back for further proceedings.

The Appellate Division stopped short of imposing a duty on employers to provide a reference for former employees, but, in a case of first impression in New Jersey, held that where an employer voluntarily provides a reference (in this case, a verbal one) to a subsequent employer, communicates inaccurate information on which the subsequent employer relies, and the former employee suffers an economic loss as a result, the employer can be liable to the employee for negligent misrepresentation.

Singer presented a peculiar fact pattern, in that the plaintiff had already been employed by the subsequent employer. The subsequent employer was having performance issues and began to doubt the veracity of the employee's claims as to prior experience. The subsequent employer spoke to more than one individual at the former employer's office, and was told, erroneously, that the employee did not hold a certain job title with the former employer. This inaccurate information was then allegedly used by the subsequent employer to fire the employee.

In our view, the reasoning of the Appellate Division will apply equally to situations where there is an initial refusal to hire based on the inaccurate information supplied by the former employer.

There were other issues in *Singer* that warrant comment. One of the factual disputes was whether the individuals who gave the inaccurate information were authorized to speak for the company. The court's discussion of this issue counsels that employers who choose to give voluntary references should have a tight rein on who is authorized to provide information and this policy should be publicized and well known in the organization.

It is also important that whoever is designated as the corporate representative be mindful of who is requesting the information and the purpose of the request. In *Singer* the subsequent employer did not honestly identify himself to the former employee's staff, and one of the persons who supplied the inaccurate information thought he was dealing with a customer who was calling to praise the former employee's work.

The Appellate Division affirmed dismissal of both defamation and wrongful interference claims made by the plaintiff, finding that providing wrong information on an employee's job title and duties was not "defamatory" (in contrast to false information regarding and employee's competency or involvement in criminal or other conduct which undermine the employee's veracity or trustworthiness). As to wrongful interference, the court felt that there was no evidence that the inaccurate information had been intentionally, as opposed to carelessly, provided.

Employers can expect that *Singer* will create heightened interest by the plaintiffs' bar in bringing claims for improper references. Not taking on the responsibility of providing a reference in the first place is the safest course.

Gary Lesneski is the Chairman of the Labor & Employment Law Department of Archer & Greiner, P.C. in Haddonfield, N.J.

Appeal Filed to Sixth Circuit in Retaliation / Access Case

By Jill Meyer Vollman

In *Youngstown Publishing Co. v. McKelvey*, plaintiff sought relief pursuant to 42 U.S.C. § 1983 alleging that Mayor McKelvey of Youngstown, Ohio unlawfully retaliated against *The Business Journal* for exercising its First Amendment rights.

The dispute between *The Business Journal* and Mayor McKelvey began in February 2003 when *The Business Journal* published articles criticizing Mayor McKelvey and his administration for actions associated with planning and constructing a convocation center. In response, Mayor McKelvey issued an oral directive prohibiting City officials from speaking with reporters from *The Business Journal*.

Shortly thereafter, in a letter to the publisher of *The Business Journal*, Mayor McKelvey detailed his policy expressly forbidding City employees from discussing *any* City business with *Business Journal* reporters and representatives. The letter confirmed the Mayor's instruction regarding the No-Comment policy, and specified that City employees were not to make statements to *The Business Journal* except as necessary to respond to public records requests. As a result of Mayor McKelvey's issuance of the policy, City employees refused to speak with *Business Journal* reporters.

The Business Journal then filed a complaint asserting a § 1983 claim for unlawful retaliation for exercise of its First Amendment rights.

The trial court dismissed *The Business Journal*'s complaint, 2005 WL 1153996 (N.D. Ohio May 16, 2005). Following the trial court's dismissal of the retaliation claim in May, *The Business Journal* appealed to the Sixth Circuit Court of Appeals. On August 8, its appellate brief was filed focusing mainly on one key argument: that the trial court erred in its application and analysis of the three elements required to prove retaliation. Specifically, the trial court erred in holding that *The Business Journal* was required to prove that Mayor McKelvey's "adverse action" – preventing it from speaking with city employees - was a deprivation of a constitutional right. Instead, as set forth in *The Business Journal*'s brief:

> *The Business Journal* was punished by Mayor McKelvey for exercising its constitutionally protected right to criticize Mayor McKelvey in the pages of its newspaper. Period. The District Court was distracted from this crucial fact and embarked upon an irrelevant analysis of constitutional protection for newsgathering and communicating with public officials... Instead, it was *The Business Journal*'s criticism of Mayor McKelvey that motivated his retaliatory action. Therefore, nothing regarding newsgathering or access to the Mayor's office should or need be considered when determining whether the act that provoked the Mayor's retaliation – speech – was constitutionally protected.
>
> * * *
>
> No retaliation precedent requires the Paper to prove that the adverse action deprives it of a constitutional right. Any such analysis is entirely irrelevant. The Mayor's animus toward the Paper was born of the Paper's exercise of constitutionally protected speech – not its newsgathering or contact with his office.

Like the *Baltimore Sun*'s Fourth Circuit appeal on the same issue, *The Business Journal*'s appeal has been bolstered by a strong showing of amicus support. An impressive group of media companies and non-profit organizations, led by Chuck Tobin of Holland & Knight, filed an amicus brief expanding on the "adverse action" element, as well as on the importance of protecting the newsgathering rights of journalists. In addition, the American Civil Liberties Union, on behalf of a number of unions representing Youngstown city employees, filed a separate amicus brief urging the Sixth Circuit to reverse the trial court's decision also because of its unconstitutional impact on the First Amendment rights of the city employees who have been gagged.

Briefing will be finished by November, with oral arguments expected in the first half of 2006.

Jill Meyer Vollman represents The Business Journal, along with colleagues Richard M. Goehler and Maureen P. Haney.

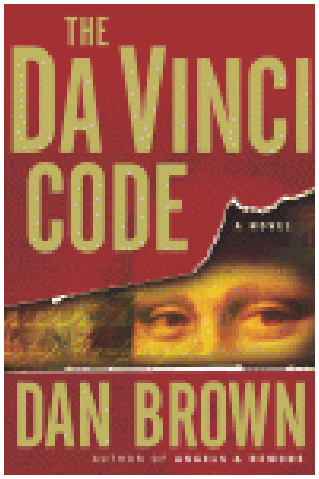
Court Rejects Copyright Challenge to *The Da Vinci Code*

By James Rosenfeld

A New York federal district court rejected author Lewis Perdue's claim that Dan Brown's popular thriller *The Da Vinci Code* infringed two of Perdue's own novels, granting summary judgment for Brown, publisher Random House, Inc. and related entities. *Brown et al. v. Perdue*, 04 Civ. 7417 (GBD) (S.D.N.Y. Aug. 4, 2005) (Daniels, J.).

The Court concluded that the two authors' novels were not substantially similar.

Background



Dan Brown's novel *The Da Vinci Code* was published by Doubleday, a division of Random House, in March 2003. In the book, protagonist Robert Langdon follows a trail of complex clues, several of them connected to the works of Leonardo Da Vinci, to unlock a centuries-old secret concerning Jesus Christ and Mary Magdalene.

The Da Vinci Code became a blockbuster bestseller almost overnight, debuting at number one on *The New York Times* bestseller list and remaining at or near that position for over two years. At the time that Brown and Random House moved for summary judgment, there were over 10 million copies of the book in print in the United States and 15 million copies in print abroad.

Amid this global success, defendant Lewis Perdue claimed that the *The Da Vinci Code* copied two of his own novels – *Daughter of God* (published in 2000) and *The Da Vinci Legacy* (1983). Perdue issued press releases, set up websites and spoke to various media outlets about the books' supposed similarities.

When Perdue threatened to sue for copyright infringement in September 2004, Brown and Random House filed a complaint in federal district court in New York, seeking a declaration that *The Da Vinci Code* did not constitute an infringement of Perdue's two novels under the Copyright Act.

Perdue counterclaimed, seeking at least $150 million in damages for copyright infringement and unjust enrichment, as well as an accounting of income derived from *The Da Vinci Code* and a permanent injunction barring Brown, Random House and companies associated with an upcoming motion picture based on *The Da Vinci Code* (Columbia Pictures Industries, Inc., Sony Pictures Entertainment, Inc., Sony Pictures Releasing Corporation and Imagine Films Entertainment, LLC) from distributing the book or film.

Plaintiffs moved for judgment on the pleadings, or in the alternative, for summary judgment, on their declaratory judgment claim, and to dismiss, or in the alternative for summary judgment, on defendant's counterclaims.

No Substantial Similarity

The gravamen of Perdue's complaint, the Court noted, was that *The Da Vinci Code* had copied from *Daughter of God* "notions of a divine feminine, the unity of male and female in pagan worship, the importance of Sophia, the 'Great Goddess' of the Gnostic Gospels, the fact that history is relative and is controlled by victors, not losers, and the importance of the Roman Emperor Constantine in requiring a transition from a female to a male dominated religion…."

Other alleged similarities included references to Christianity's adoption of pagan practices, Emperor Constantine and the Council of Nicea, the idea of "the wolf in sheep's clothing" and various other religious ideas, customs and commonplace literary devices. The Court held that "[a]ll of these similarities… are unprotectible ideas, historical facts and general themes that do not represent any original elements of Perdue's work."

The Court buttressed these conclusions with a detailed comparison of the "total concept and feel", theme, character, plot, sequence, pace and setting of the two books, finding a lack of substantial similarity with respect to each of these elements.

Thematically, the Court stated that although both books dealt with figures representing the "divine feminine," the authors' expression of their respective religious themes "differ markedly," since "[in] *The Da Vinci Code*, the divine feminine is expressed as Mary Magdalene, a

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Court Rejects Copyright Challenge to *The Da Vinci Code*

(Continued from page 20)

true biblical figure, while in *Daughter of God*, the divine feminine figure is Sophia, a fictional second Messiah crucified by Perdue."

The Court also found that the books differ in total concept and feel: *Daughter of God* features gunfights, violent deaths, "a perilous journey through an Austrian salt mine" and sex scenes, while *The Da Vinci Code* is "an intellectual, complex treasure hunt, focusing more on the codes, number sequences, cryptexes and hidden messages" which serve as clues. It further noted that *The Da Vinci Code* incorporates topics of art and religious history with much greater detail.

The Court further concluded that "the fundamental essence and structure of the plots" were not substantially similar. "*The Da Vinci Code* is simply a different story than that told by *Daughter of God*."

Nor did the Court find the main characters of the two novels to be substantially similar. For instance, the Court emphasized that *The Da Vinci Code*'s Langdon is a bookish professor of symbology from Harvard who "serves as the intellectual wheel that keeps the plot moving," solving many riddles and problems.

By contrast, Seth Ridgeway, the hero of *Daughter of God*, is an athletic former police officer. After retiring from the police force with multiple gunshot wounds, Ridgeway has become a professor of philosophy and religion, but *Daughter of God* does not rely primarily on his intellect. The Court likewise compared the heroines and villains of each book in detail, finding no substantial similarity.

Finally, the Court compared the two novels' sequence, pace and setting, noting differences in each respect, such as the significantly longer time frame of *Daughter of God* and the different geographical locations in which each story takes place.

Based on its consideration of these components of the two authors' works, the Court found that they were not substantially similar.

The Court noted that Perdue had based his arguments primarily on *Daughter of God,* and therefore refrained from undertaking such an extensive analysis with respect to Perdue's other novel, *The Da Vinci Legacy.* Nonetheless, it held that "[a] thorough review of *The Da Vinci Legacy's* plot, themes, characters and other elements supports a finding of noninfringement," and dismissed Perdue's infringement claim to the extent it relied on this work.

The Court also rejected Perdue's remaining counterclaims. It held that his unjust enrichment claim was preempted by the Copyright Act, and dismissed his two claims for an accounting and for a permanent injunction as derivative of Perdue's infringement claim.

Conclusion

Based on the Court's conclusion that Perdue's books were not substantially similar to Brown's novel, it granted summary judgment for Brown, Random House and the affiliated counterclaim defendants in all respects. The Court issued a declaratory judgment declaring that "plaintiffs' authorship, publication and exploitation of rights in and to *The Da Vinci Code* do not infringe any copyrights owned by defendant" and dismissed all of Perdue's counterclaims.

Elizabeth A. McNamara, Linda Steinman and James Rosenfeld of Davis Wright Tremaine LLP represented Plaintiffs Dan Brown and Random House, Inc. and Counterclaim Defendants Columbia Pictures Industries, Inc., Sony Pictures Entertainment, Inc., Sony Pictures Releasing Corporation and Imagine Films Entertainment, LLC. Charles B. Ortner of Proskauer Rose LLP was co-counsel for the Columbia, Sony and Imagine Counterclaim Defendants. Defendant/Counterclaimant Lewis Perdue was represented by Cozen O'Connor.

Save the Date

LEGAL CHALLENGES OF CREATIVIVITY IN A CHANGING AND INCREASINGLY REGULATED MEDIA ENVIRONMENT

January 26, 2006
Los Angeles, California

MLRC, in conjunction with the Donald E. Biederman Entertainment & Media Law Institute of Southwestern Law School, will have our third annual conference on media and entertainment law issues.

District Court Should Not Have Terminated Copyright Lawsuit

The Ninth Circuit reinstated a copyright infringement suit brought against the producers of the movie *Terminator II*. *Kourtis v. Cameron,* No. 03-56703 (9th Cir. Aug. 15, 2005) (O'Scannlain, Wardlaw, Lovell, JJ.).

Plaintiffs' "idea theft" lawsuit had been dismissed on grounds of collateral estoppel because an identical claim against the defendants had already been dismissed. But the Ninth Circuit held that dismissal was in error because although the claim was identical, the prior plaintiff and current plaintiffs were not "in privity" to establish collateral estoppel.

Background

In 1987, plaintiffs Filia and Constantinos Kourtis, residents of Australia, created a 30-page movie treatment called *The Minotaur* that included a character that could transform its appearance into human and nonhuman forms. They hired a writer, William Green, to develop a screenplay based on the treatment. The screenplay was then shopped around to various Hollywood producers, including producer/director James Cameron. But plaintiffs' screenplay was never produced.

In 1991, Cameron released *Terminator II: Judgment Day*. It included a character called T-1000 – a shape-shifting cyborg sent back from the future to do battle against Arnold Schwarzenegger.

William Green sued the producers for copyright infringement, alleging Cameron's movie copied the shape-changing character from *The Minotaur*. The district court dismissed, holding there was no substantial similarity between the two works. *Green v. Schwarzenegger*, No. CV 93-5893 (WMB) (C.D. Cal. July 1, 1994).

The Kourtises had knowledge of the copyright action but did not intervene. After Green's suit was dismissed, they sued Green (in Australia) and obtained a judgment that they are the sole owners of the copyright in *The Minotaur*.

They then filed another copyright infringement action against the movie producers. The district court dismissed ruling that the Kourtises were collaterally estopped from relitigating the copyright claim (and finding other claims time barred).

No Collateral Estoppel

Reversing, the Ninth Circuit ruled that for the district court's decision in *Green* to have a preclusive effect, it was necessary to establish that: "(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding."

The court recognized that the final decision in *Green* was identical to the current case, but the court held there was no privity between the two sets of plaintiffs. While both sets of plaintiffs had an interest in establishing that *Terminator II* had infringed upon *The Minotaur*, "'parallel legal interests alone, identical or otherwise, are not sufficient to establish privity," and "[b]oth 'identity of interests *and* adequate representation are necessary'" (citations omitted).

Since Green was not acting as the Kourtises' agent and had an adverse interest, he could not be held to have adequately represented plaintiffs' interests.

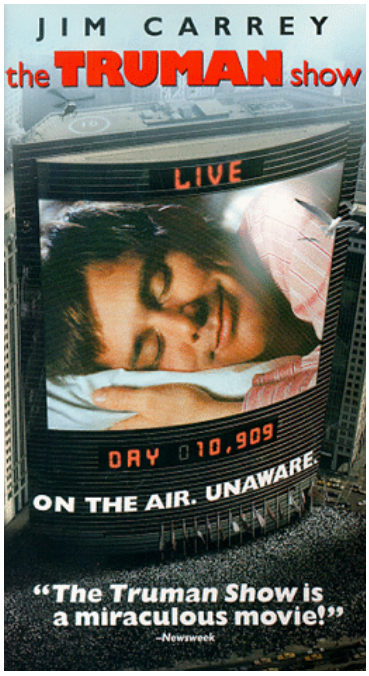
The court also rejected defendants' argument that the claim should be dismissed on the ground of laches, finding that plaintiffs had no obligation to intervene in the first suit against defendants.

Plaintiffs were represented by Patricia J. Barry of Los Angeles, California. Defendants were represented by Marisa G. Westervelt and Louis R. Miller of Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro LLP of Los Angeles, California, and Charles N. Shepard of Greenberg, Glusker, Fields, Claman, Machtinger & Kinsella, LLP of Los Angeles, and Howard L. Horwitz of Oberstein, Kibre & Horwitz LLP of Los Angeles.

Copyright Claim Over *The Truman Show* Dismissed

In another idea theft copyright claim, a New York federal court last month dismissed a copyright claim by a writer who alleged that the 1998 movie *The Truman Show* was based on his unproduced screenplay entitled *The Crew*. *Mowry v. Viacom International, Inc., et al.*, No. O3 Civ. 3090 (S.D.N.Y. July 29, 2005) (Peck, J.).

The court found that plaintiff had failed to provide sufficient evidence that defendants had access to his screenplay based on his allegation that he sent his screenplay to people in the entertainment industry. The "entertainment industry," the court noted, is a broad and amorphous term; and plaintiff's definition of the term "seems to include everyone in Los Angeles who may 'know' people in the industry." Plaintiff failed to establish any link in the chain to defendant.



Plaintiff also alleged that access could be inferred because of the "striking similarities" between the two works. *See, e.g., Seals-McClennan v. Dreamworks, Inc.*, 120 Fed. Appx. 3,4 (9th Cir. 2004) (striking similarity can give rise to inference of copying). The court compared plaintiff's screenplay to the movie and concluded that no rationale jury could find substantial similarity.

Expert Testimony Offered

Plaintiff had hired an expert linguistic analyst, Dr. Carole E. Chaski, who was prepared to testify that the two works "exhibit such similitude ... that it is impossible that *The Truman Show* was created without defendants having seen, and been influenced by, plaintiff's screenplay." The expert report relied on "cladistic" and "phylogenetic tree" analysis to purportedly show that the *The Truman Show* was "ancestrally related" to plaintiff's screenplay.

Defendants moved to exclude the expert's testimony on relevancy grounds and scientific reliability based on *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and the trial court agreed.

The court's Westlaw search for the terms "cladistic" and "phylogenetic tree" yielded not a single case and the expert admitted in deposition that her method had not been peer reviewed. Moreover, the expert's proposed analysis could not trump the court's own comparison of the works and the lack of substantial similarity.

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Models Win Right of Publicity Trial Against Advertising Agency

Restaurant Defendant Found Not Liable

By Lincoln D. Bandlow

This past spring, a jury in Los Angeles Superior Court, after a four-week trial, found in favor of two models, John DeSalvo and Donna DeCianni, on their right of publicity claim based on the use of their likenesses in a restaurant advertising campaign back in 2002. *DeSalvo v. Kerker & Buca, Inc.* (Cal. Sup. Ct. jury verdict March 18, 2005).

The jury found advertising agency Kerker & Associates, Inc. liable, but found Buca, Inc. (which operates the "Buca Di Beppo" restaurants) not liable. Plaintiffs had sought over $27,000,000 in purported "profits attributable to the use," several million dollars more in "emotional distress" and punitive damages, and over $300,000 each in allege "lost licensing fees," but the jury awarded each plaintiff $113,000 in damages.

Background

The action stemmed from advertising materials prepared by Kerker for Buca. In December of 2001, Kerker was trying to come up with new marketing ideas for Buca Di Beppo restaurants. One of the ideas that they developed was to do a parody of the covers of romance novels – the well-known image of two lovers locked in an embrace (with the man typically having somehow misplaced his shirt and usually having longer hair than the woman).

An art director at Kerker bought romance novels to get an idea of the look of these covers and noticed that the artist credited with creating the illustration on one of the books was Richard Newton. After contacting Newton, Kerker licensed from him (through his agent, Renard Represents Inc.) the right to use three illustrations. At the time these were licensed, Kerker believed that the images were just that – "illustrations" created out of the mind of Newton.

In fact, the illustrations had been prepared based on photographs that were taken of various models. One of the illustrations (the "Image") had been created by Newton back in August of 1998 for use on the cover of the romance novel "The Duke's Lady" a.k.a. "The Duke of St. Ives" and Newton had used DeSalvo and DeCianni as the models for that cover.

Indeed, DeSalvo has purportedly appeared on thousands of romance novel covers and DeCianni has also purportedly appeared on several hundred such covers. Nobody at Kerker or Buca, however, had ever heard of either of them or recognized them in any way.

Kerker added the Buca trademark and taglines to the illustrations (such as "Take Her Tonight"). The illustrations were then used by Buca in various formats, such as in-store posters and postcards, billboards, transit stops and print media, to advertise Buca Di Beppo restaurants and its new "Per Due" menu (Italian version of "for two") during 2002.

In September of 2002, a fan of DeSalvo noticed one of the billboards in Florida and sent DeSalvo an email informing him of it. DeSalvo, who then had recently moved out to California from New York to pursue acting, noticed several of the billboards and transit stops in the Los Angeles area. He then contacted DeCianni (she had never heard of the Buca campaign until his call) and the two of them filed a lawsuit against Buca and Kerker in July of 2003.

The action went to trial in February 2004. On the issue of liability, defendants introduced evidence showing that Newton and Renard Represents had warranted to Kerker that Newton had all rights to license the illustrations for advertising use, including the rights from any models used in the illustrations.

Moreover, after plaintiffs sent a "cease and desist" letter in November of 2002, Newton and Kerker again represented that they had all the rights to license the illustrations.

First Amendment Defense

In addition to this "it's not our fault, it's these people over here" defense, defendants argued that plaintiffs had not presented sufficient evidence that they were even

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Models Win Right of Publicity Trial Against Advertising Agency

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"recognizable" in the Image. The Image was initially created for the cover of a book and, as such, the plaintiffs had been dressed in costumes and made up to look like characters in that particular book, so it was not an image of them appearing as they normally appear.

DeCianni testified that not a single person came up to her and indicated that they had recognized her Image. Moreover, DeSalvo had been recognized by only a handful of people. Finally, the defense asked the Court to give two California Form Jury Instructions on the First Amendment defense as set forth in *Comedy III Productions, Inc. v. Gary Saderup, Inc*., 25 Cal. 4th 387 (Cal. 2001) and *Winter v. DC Comics*, 30 Cal. 4th 881 (2003) – arguing that plaintiffs' images had been sufficiently "transformed" to warrant First Amendment protection.

The plaintiffs strenuously objected to the giving of any such instructions, arguing that this was a purely commercial use of plaintiffs' images, i.e., to promote Buca restaurants. The defendants argued that there was a transformative use for two reasons: first, the artist who created the illustrations (from whom Buca had licensed the illustrations) had himself transformed plaintiffs' images by turning photographs of them into a stylized drawing (wind sweeping the hair, cutter ships in the background, etc.). Second, the advertising agency had transformed these illustrations by adding humorous text.

The judge agreed that the jury could decide the transformative use issue. In closing argument, the defense invited the jury to closely inspect those instructions during deliberations, but did not focus substantially on this defense.

Damages

Plaintiffs asserted that Buca made over $27,000,000 during the relevant period and that they were entitled to all of these profits. Defendants, among other things, pointed out that plaintiffs had not presented any evidence (as was their burden) demonstrating that any sales at Buca were "attributable" to the use of plaintiffs' images, such as a survey, a poll of past Buca customers or expert testimony on consumer behavior.

As for "emotional distress" damages, although plaintiffs testified that they were "upset" that their images were used without permission, plaintiffs themselves introduced into evidence their "cease and desist" letter that they sent to Buca in November of 2002. In that letter, plaintiffs offered to settle the matter for $325,000 for each plaintiff if Buca stopped using the Image, or $387,000 for each plaintiff if Buca wanted to continue to use the Image in perpetuity. Thus, plaintiffs were hard-pressed to convince the jury that they were "emotionally distressed" over a use of their likenesses that they were prepared to allow to continue until the end of time.

In addition, plaintiffs claimed that the source of their emotional distress was that they were purportedly "ignored" by defendants who never tried to resolve the matter with them and thus "forced" plaintiffs to go to trial. Based on this testimony, the Court ruled that defendants were entitled to introduce into evidence defendants' "Offer to Compromise" served pursuant to California Code of Civil Procedure Section 998, in which defendants offered each plaintiff $51,000 to settle the matter before trial. This amount would later play a roll in the jury's determination of damages.

On the issue of "lost licensing opportunity," plaintiffs presented expert testimony from an individual who brokers talent deals between talent agents and advertising agencies who testified that DeSalvo was going to be the "next Fabio" and, as such, could command a fee of $350,000 for the use made by Buca. In addition, although he recognized that DeCianni was of "lesser stature" than DeSalvo, this expert testified that DeCianni would be able to demand and obtain a "most favored nation" clause in her contract and therefore be paid the same amount as DeSalvo.

The defendants expert on celebrity licensing, testified that plaintiffs would not be able to command more than $5,000 in fees, and the defense counsel marched plaintiffs through their past licensing experience. Indeed, for appearing on the cover of a romance novel, plaintiffs are each paid a flat-fee of $150 to $180.

Closing Arguments & Verdict

Closing statements were completed at the end of the day on March 17, 2005. The jury deliberated the following day from 9:00 a..m. to 3:00 p.m. when it returned its ver-

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Models Win Right of Publicity Trial Against Advertising Agency

(Continued from page 25)

dict. By a vote of 12-0, it found in favor of defendant Buca. By a vote of 9-3, the jury found in favor of plaintiffs against the advertising agency Kerker. Each plaintiff was awarded $113,000.

After the trial, the jury indicated that it reached that amount as follows: Defendants offered $51,000 each to the plaintiffs to settle the amount. The jury felt that was the proper amount for the use up to the time that plaintiffs gave notice by sending a cease and desist letter. The jury then looked at that "cease and desist" letter and noticed that plaintiffs wanted $62,000 for the defendants to be able to continue the use of the Image ($387,000 minus $325,000). They added these two numbers and came up with $113,000 each.

The jury did not pay much attention to transformative use issue and did not feel it was a strong argument. In their view, this was a case about a restaurant using an image that they hoped would draw more customers.

The jury also indicated that they believed that the true "bad guys" in the case were Newton and Renard Represents, who had represented to Kerker that Newton had all rights, including the rights of any models, to license the illustrations for use in advertising.

The case settled for the amount of the Judgment and defendants are now pursuing a separate action against Newton and Renard Represents to recover the amount of the Judgment and the costs and fees incurred in defending the action.

Lincoln Bandlow and Joel McCabe Smith of Leopold, Petrich & Smith in Century City, California represented defendants.

Vermont Supreme Court Orders TV Station to Produce Unaired Tapes of Campus Riot

No First Amendment Right to Withhold Evidence from Criminal Investigations

The Vermont Supreme Court this month ordered local television station WCAX to produce unaired videotapes of a campus riot that took place last year. *In re Inquest Subpoena (WCAX)*, No. 2005-004, 2005 VT 103 (Aug. 26, 2005) (Johnson, J.).

Relying on *Branzburg*, as well as citing the D.C. Circuit's decision in the Miller/Cooper case, the Vermont court unanimously held that there is no First Amendment privilege, qualified or otherwise, for the press to refuse to disclose evidence that is relevant and material to a criminal investigation, when properly subpoenaed.

The stations manager has stated he will comply with the order.

Background

Following the Boston Red Sox's victory over the New York Yankees in last year's American League Championship Series, a campus "celebration" at the University of Vermont in Burlington turned into a riot. Signs and light poles were knocked down, a vehicle was overturned, windows were broken, and four fires were set. Damage amounted to $30,000.

WCAX, sent two camera operators and a reporter to the scene and took about forty-four minutes of videotape of the riot in progress. Of that material, only a few minutes were aired on the station's broadcast news program.

Following the riot, a state attorney applied to the superior court to initiate an inquest, a proceeding similar to a grand jury investigation. The state attorney asked the court to issue a subpoena to WCAX for the unaired video footage of the riot.

WCAX moved to quash the subpoena on First Amendment grounds since Vermont has no statutory shield law. The trial court heard the motion on December 9, 2004 and granted the motion. Relying on *State v.*

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Vermont Supreme Court Orders TV Station to Produce Unaired Tapes of Campus Riot

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St. Peter, 132 Vt. 266, 315 A.2d 254 (1974), the trial court held that the station was entitled to a qualified privilege that could be overcome only if the State had made sufficient efforts to exhaust other, nonprivileged sources of information.

The trial court found the state's efforts were not sufficient to overcome the privilege. The State did more investigation and asked the court to issue a second subpoena. The renewed request was again denied.

Vermont Supreme Court Decision

The Vermont Supreme Court reversed, finding the facts "essentially indistinguishable from those in *Branzburg v. Hayes,* 408 U.S. 665 (1972). Under the circumstances, WCAX had no basis to resist disclosing the unaired videotapes. Moreover, the state did not have to show that the materials were available from other sources.

The Vermont Supreme Court reversed, finding the facts "essentially indistinguishable from those *in* Branzburg.

Analyzing *Branzburg,* the Vermont Court swept aside in a footnote the argument that Justice Powell's concurrence modified the holding of the Court.

> Branzburg is an authoritative 5-4 decision with Justice Powell writing a separate "simple concurrence," expressing additional views in response to the dissent, but agreeing with the judgment and the rationale of the majority....The decision is, therefore, controlling. See In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 971 (D. C. Cir. 2005), cert denied, (No. 04-1507) ("White's [Branzburg] opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court. As such it is authoritative precedent.")

In re Inquest Subpoena (WCAX) at fn. 2.

Therefore, "while the press has the right to withhold whatever information from publication that it chooses, the exercise of that right does not grant the press a First Amendment exemption from the ordinary duty of all citizens to furnish relevant information to a grand jury." The Vermont court distinguished its prior decision in *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974). In that case the court quashed a subpoena issued to reporters by criminal defendants, stating that a reporter "is entitled to refuse to answer unless the interrogator can demonstrate to the judicial officer appealed to that there is no other adequately available source for the information and that it is relevant and material on the issue of guilt or innocence." 132 Vt. at 271, 315 A.2d at 256.

The court explained, though, that while "the holding of St. Peter may appear to be quite broad," it is limited to cases in which a news reporter is "legitmately entitled to First Amendment protection" such as where discovery "suggest[s] harassment of the reporter by the persons seeking it."

Citing again to *Branzburg,* and to the D.C. Circuit's decision in *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 970 (D.C. Cir. 2005), the court concluded:

> When evidence is sought pursuant to a criminal investigation undertaken in good faith, and when the connection to a law enforcement purpose is real and not tenuous, the evidence must be disclosed.

Mt. Mansfield Television, Inc., owner of WCAX, was represented by Eric S. Miller and Debra L. Bouffard of Sheehey Furlong & Behm P.C., Burlington. Amicus briefs in support of the station were filed by WPTZ-TV, Gannett Vermont Publishing, Times Argus Association and Herald Association, The Reporters Committee for Freedom of the Press, American Society of Newspaper Editors, Radio-Television News Directors Association and the Society of Professional Journalists.

Los Angeles Court Denies Motion to Compel Reporter's Testimony in Privacy Act Case

By Susan Seager

A Los Angeles freelance reporter won a court order denying an FBI agent's motion to compel the reporter's testimony and unpublished notes in the agent's civil Privacy Act case against the FBI. *Wright, v. Federal Bureau of Investigation, et al*., CV 05-1223 (C.D. Cal. August 15, 2005) (Klausner, J.).

LA Weekly reporter Jim Crogan argued that there was no need for him to testify because the allegedly leaked information had previously been made public by plaintiff and his Judicial Watch attorneys in press conferences, press statements, and the Internet. Therefore there was no Privacy Act claim. The court agreed.

Background

The reporter's battle began in November 2004, when he was subpoenaed in a civil Privacy Act lawsuit filed against the FBI by agent/whistleblower Robert G. Wright. Wright alleged that an FBI press spokesman had leaked private information about his numerous internal disciplinary proceedings to the reporter in violation of the Privacy Act. The reporter never published any articles about the allegedly leaked information.

Crogan faced an uphill battle because he seemed to be the only independent witness to the purported leak. Plaintiff's attorneys initially indicated that they were going to subpoena Judith Miller, Robert Novak, and other reporters, but in the end, they pursued only Crogan.

The underlying Privacy Act lawsuit was filed in the Seventh Circuit, where Judge Posner had recently declined to recognize a constitutional protection for subpoenaed reporters. Crogan asserted that the privilege issue was governed by Ninth Circuit law – not Seventh Circuit law – because he lives within the Ninth Circuit, where his subpoena was issued. *See, e.g., Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999). Plaintiff did not dispute this assertion.

Information Was Already Public

Crogan's opposition to the motion to compel resembled a summary judgment motion, packed with more than two dozen exhibits demonstrating that plaintiff and his attorney had publicly discussed his disciplinary record well before the supposed leak.

U.S. District Judge R. Gary Klausner of the Central District of California, applying Ninth Circuit law, held that Crogan's testimony could not be compelled unless the plaintiff could demonstrate that the testimony was: "(1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." *Citing Shoen v. Shoen*, 48 F.3d 412, 415-16 (9th Cir. 1995).

Crogan argued that his testimony and notes were not "clearly relevant" to a material issue – because there was no valid Privacy Act claim. Judge Klausner agreed. "The Court finds that ... Plaintiff's claim were already in the public domain," and thus, "[p]laintiff's argument that the information is crucial to establishing his claim is not persuasive." Order at 3.

The judge explained that "courts have held that there is no disclosure under the Privacy Act where the information is already placed in the public record." *Id., citing Barry v. United States Dep't of Justice*, 63 F. Supp. 2d 25, 27 (D.D.C. 1999), *Krowitz v. Dep't of Agric.*, 641 F. Supp. 1536, 1545 (W.D. Mich., 1986), *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 497 (1975).

Judge Klausner held that "plaintiff himself disseminated information [about his disciplinary record] to the press and public," and "issued press releases, held press conferences, and established a website discussing the information of which he now complains," well before the FBI spokesman allegedly discussed the topic with Crogan. Order at 4.

As Judge Klausner explained, because "Crogan did not witness a Privacy Act violation…. Crogan's testimony is not relevant to an issue in this case." *Id.*

Susan Seager and Alonzo Wickers IV of Davis Wright Tremaine LLP in Los Angeles represented reporter Jim Crogan in this matter.

Kentucky Television Station Held in Contempt for Failing to Turn Over Tapes

Kentucky television station WPSD-TV – part of the Paxton Media Group - has been held in contempt for failing to turn over unedited and unaired videotapes sought by the defense in a felony assault and wanton endangerment case.

The defense is seeking copies of three tapes containing interviews with witnesses that are alleged to contain crucial information for the defense. The station has declined to produce the tapes under Kentucky's media shield law, Ky. Rev. Stat. Ann. § 421.100.

The statute provides in relevant part:

> [n]o person shall be compelled to disclose in any legal proceeding or trial before any court, ... the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.

While McCracken County District Judge Bard Brian entered an order on August 12 holding the station in contempt and instituting fines of $10,000 per day until the tapes are handed over, a McCracken County Circuit Judge Jeff Hines – later that same day – issued an order placing the restrictions on hold.

Judge Hines subsequently entered a temporary injunction on August 22 barring Judge Brian from imposing additional sanctions on the station or holding additional penalty hearings.

As reported by the Associated Press, Judge Brian's attorney has stated that "Judge Brian believes news reporters and multimillion-dollar media companies have the same obligations as other citizens to respond to subpoenas and court orders." Judge Hines has not yet issued a ruling on the media's motion.

Paxton Media Group is represented by Mark Whitlow.

Ohio Appeals Court Orders Reporter to Testify Before Grand Jury

An Ohio appeals court ruled that a news reporter for the Cincinnati Enquirer who wrote an article about an alleged drug dealer could be subpoenaed by the state to testify about the article to a grand jury. *Ohio v. Jones, et al.*, No. CA2005-06-136, 2005 WL 1939805 (Ohio App. Aug. 15, 2005) (Powell, Young, Bressler, JJ.).

The alleged drug dealer's name was published in the article, and he was quoted as admitting he was a drug dealer. The trial court denied the motion to quash. The state shield law, Ohio Rev. Code 2739.12, applies only to confidential sources.

On appeal, the reporter argued that the subpoena violated Section 11, Article I of the Ohio Constitution – the state constitution's free speech provision. Several cases have held that the state constitution protects reporters from compelled disclosure of confidential and non-confidential information. *See, e.g., Slagle v. Coca Cola*, 12 Med.L.Rptr. 1911 (Ohio Ct. Comm. Pls. Mont. Co. 1986). The reporter also argued on appeal that the trial court should have applied a common law balancing test in deciding the motion.

The court rejected these arguments, finding that the subpoena was issued as part of a "legitimate" grand jury investigation. While "state constitutions can provide greater protection, we do not find it clear from the language of the Ohio Constitution or the cases interpreting that language, that the Ohio Constitution provides greater protection in this context."

John Greiner and Katherine Lasher of Graydon Head & Ritchey LLP, in Cincinnati represented reporter Sheila McLaughlin.

Ohio Supreme Court Rules Police Photographs Not Subject to Disclosure

The Ohio Supreme Court this month ruled that departmental photographs of police officers are exempt from disclosure under Ohio's Public Records Act, R.C. 149.43. *Plain Dealer Publishing v. Cleveland*, 106 Ohio St.3d 70 (Aug. 10, 2005) (Lundberg Stratton, J.) (denying writs of mandamus filed by newspapers).

The Court sidestepped the constitutional issues raised by both sides – right of access and privacy – and concluded that the photographs were statutorily exempt from disclosure.

Background

The *Plain Dealer* newspaper requested photographs of eight Cleveland police officers from photograph-identification cards maintained by the Cleveland Police Division. The photographs were requested in connection with two separate news articles; one on a police awards ceremony; the other, a report on police overtime. Under police department rules, no photographs would be released to the press without written consent of the officer. This procedure was established, according to the police, as a means of avoiding "civil-rights violations" that would lead to "numerous time-consuming and expensive lawsuits" filed by officers who did not want their photographs released.

The *Vindicator* newspaper sought the photographs of a Youngstown police officer in connection with a news report on a riot. The city refused the request after the officer advised the Youngstown Police Department not to release the photograph in accordance with its "standard departmental policy."

The two cases were consolidated for purposes of oral argument and decision.

Photographs of Police Officers

The Ohio Supreme Court ruled that while the departmental photographs of officers are "public records" for purposes of Ohio's Public Records Act, they are exempt from disclosure under R.C. 149.43(A)(7)(b). This subsection exempts from disclosure "any record that identifies a person's occupation as a peace officer, firefighter, or EMT."

The Court held that under the plain meaning of this section the photographs sought by the newspapers were exempt from disclosure. Moreover, the legislature's decision to exempt such photographs was supported by a concern for officers' privacy rights. *Citing, e.g., Kallstrom v. Columbus*, 136 F.3d 1055, 1063-64 (6th Cir. 1998) (police officers have a constitutional privacy interest in information in their personnel files).

Among other things, the newspapers argued that a literal interpretation would nullify state laws requiring peace officers to disclose their names and badge numbers upon demand. The Court reasoned that these laws "complement" the public records exemption in so far as they protect the people using police photographs to create false ids. The newspapers also argued that a literal construction of the statute exempting *any* records identifying persons as police officers would prohibit access to many records that the Court had previously held to be subject to disclosure, including incident reports, resumes of police chief applicants, and certain disciplinary records. The Court refused to address these claims, saying that to do so would be an "advisory" opinion.

Finally, the Court refused to address both sides' constitutional arguments, finding the right of access issue improperly raised, and the privacy issue unnecessary to decide.

Plain Dealer Publishing Company was represented by David L. Marburger of Baker & Hostetler, L.L.P. Vindicator Printing Company was represented by David L. Marburger of Baker & Hostetler, L.L.P. and Frederick M. Gittes of Gittes & Schulte.

Any developments you think other MLRC members should know about?

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Fourth Circuit Upholds Sealing of Post 9/11 Search Warrant Affidavits

On August 1, a Fourth Circuit panel unanimously denied a media petition for mandamus to direct a Virginia federal district court to unseal post 9/11 search warrant affidavits. *Media General Operations v. Buchanan*, 417 F.3d 424 (4th Cir. 2005) (Widener, Williams, Michael, JJ.).

The court ruled that the notice and procedures for the sealing order were adequate and the magistrate sufficiently stated her reason for the sealing (albeit after she issued her order) – namely that disclosure would compromise an ongoing federal investigation.

At issue, were search warrants executed on businesses and charities in Virginia in March 2002 as part of the post 9/11 investigations. The search warrants were supported by identical 100 plus page affidavits. The government filed a motion to seal the affidavits together with its warrant application and both were granted.

In April 2002 some of the occupants of the premises searched moved to unseal the affidavits. The *Tampa Tribune* and *New York Times* were granted permission to intervene. They sought access to the affidavits, but also complained that they were denied docket information about these cases.

A magistrate judge and the district court denied the motion. An appeal to the Fourth Circuit was argued in April 2003.

A little more than two years later the Fourth Circuit affirmed. The court recognized that the press and public have a common law right of access to judicial documents, but noted that the right of access is qualified and can be balanced against the interest of law enforcement. *See, e.g., Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64-65 (4th Cir. 1989).

The media petitioners argued that the sealing order violated the procedural standards set out in *Goetz* because the media had no opportunity to object to sealing prior to entry of order. The court, though, ruled that an *ex parte* application is necessary for law enforcement purposes, such as preventing destruction of evidence and tipping off suspects.

The court affirmed that the magistrate judge had sufficiently stated her reasons for sealing the affidavits.

As to docket information, the court noted that "there seems to be little doubt that personnel in the clerk's office made several unfortunate errors, but there is no hint that the errors were anything but inadvertent." To this extent, mandamus relief over these errors was inappropriate.

Judge Michael, concurring in judgment, wrote separately and concluded that the magistrate judge had not adequately justified her sealing order *at the time of sealing*. This was an error in his opinion, but not one to warrant reversal.

Charles Tobin, Holland & Knight LLP in Washington, D.C., represented the media petitioners in this matter. ABC, Allbriton Communications, The Baltimore Sun, Bloomberg News, CNN, CBS Broadcasting, NBC, RCFP, USA Today, The Washington Post and Hearst-Argyle Television supported the petitioners as amici.

Prisoner Health Care Records, Names of Disciplined Medical Staff Must Be Disclosed

By Andrew M. Mar and Alison P. Howard

Washington prison officials cannot withhold the names of disciplined health care providers under the public records act, the Washington Supreme Court held in July. *Prison Legal News v. Department of Corrections*, 115 P.3d 316, 2005 WL 1645586 (Wash. July 14, 2005) (Sanders, J.). The Court also held that the government cannot withhold related medical records without first proving that each piece of health care information readily identifies a specific patient.

Background

The case arose from a prison journalist's requests under Washington's Public Disclosure Act (PDA) for records regarding incidents of medical misconduct by prison medical staff in the treatment of inmates. These incidents resulted in serious injury, including inmate deaths. The requests specifically sought only the identities of the medical staff who were disciplined for misconduct but did not seek the names of individuals who were exonerated.

Further, the requests sought information about the incidents, including treatments, patients' preexisting conditions, medicine used and tests administered. In response, the Washington Department of Corrections (DOC) released heavily redacted records, withholding the names of the disciplined staff, names of patients, treatment information and other medical information related to the specific incidents of misconduct.

Washington's PDA, like many states' public records laws, allows a law enforcement agency to withhold investigative records whose release would interfere with the agency's law enforcement function.

Washington Supreme Court Ruling

The Washington Supreme Court, in a 6-3 ruling, limited what could be considered within the DOC's "law enforcement mission," finding that providing health care to inmates and disciplining medical employees were outside the DOC's core function.

As the Court recognized, under the department's view of its law enforcement mission, "investigations of all aspects of DOC's operations would be off limits from public disclosure."

The Court emphasized that the critical question was the nature of the investigation, not the nature of the agency, since clearly an agency administering prisons was a "law enforcement" agency. As a result, the Court found DOC could not simply characterize the medical and investigative records as essential to effective law enforcement and refuse to disclose the names of the disciplined staff. It had to release the unredacted investigative records.

The Washington Supreme Court, in a 6-3 ruling, limited what could be considered within the DOC's "law enforcement mission."

The Court also rejected DOC's assertion that all references to medical information, including treatments and medical conditions, should be redacted because it was "health care information" that could not be disclosed without the patient's written approval. *See* RCW 70.02.902, .901.

The burden was on the agency to "prove that each patient's health care information would be readily identifiable with that patient even if that patient's identity isn't known."

The Court remanded to the trial court to determine – on a case-by-case basis – whether specific medical information could be redacted because its disclosure would be readily associated with an inmate and to determine an award of attorney's fees and costs to Prison Legal News.

Prison Legal News was represented by Michele Earl-Hubbard, Alison P. Howard and Andrew M. Mar of Davis Wright Tremaine LLP in Seattle. (Currently, Ms. Howard and Mr. Mar are both attorneys at the Microsoft Corporation). The Department of Corrections was represented by Michael P. Sellars of the Washington Office of the Attorney General.

Cybergriper Can Keep www.fallwell.com Website

At press time, the Fourth Circuit issued an interesting ruling in favor of a "cybergriper" who used the domain name "fallwell.com" to criticize Reverend Jerry Falwell. *Lamparello v. Falwell*, Nos. 04-2011, 04-2122, 2005 WL 2030729 (4th Cir. Aug. 24, 2005) (Michael, Motz, King, JJ.).

Reverend Jerry Falwell had sent plaintiff cease and desist letters to stop him from using www.fallwell.com, or any other variation of Falwell's name as a domain name. Plaintiff filed an action seeking a declaratory judgment of non-infringement. Falwell counter-claimed, alleging trademark infringement, related state law claims, and cybersquatting under 15 U.S.C. § 1125 (d). The district court granted summary judgment to Falwell and ordered that plaintiff transfer the domain name to him.

The Fourth Circuit reversed, finding no likelihood of confusion. Among other things the court noted that the two websites were not similar and that plaintiff's site was intended as "a forum to criticize ideas, not to steal customers." Falwell's cybersquatting claimed failed because plaintiff did not have a bad faith intent to profit from using the domain name.

MLRC will publish a more detailed report on the decision in next month's issue.

Google Potentially Liable for Trademark Infringement for Sponsored Links

A Virginia federal court ruled this month that Google may be liable for trademark infringement for publishing "sponsored links" that included company trademarks. *Government Employees Insurance Co. v. Google, Inc.* No. 1:04cv507 (E.D. Va. Aug. 8, 2005) (Brinkema, J.).

Background

By entering terms into the Google search engine, users are able to generate "organic listings" of websites that contain "matches" for the requested terms. Through Google's "Adwords" advertising program, advertisers may purchase "Sponsored Links" that appear to the right of the organic listings and are triggered by the terms inputted into the search engine, even if the terms are trademarks of a competitor.

Plaintiff Government Employees Insurance Company ("GEICO") sued Google for trademark infringement and unfair competition under the Lanham Act and Virginia common law over the use of its trademarked names "GEICO" and "GEICO Direct" in triggering Sponsored Links.

December Ruling

In a December oral ruling granting in part Google's motion to dismiss, Judge Leonie Brinkema held that the use of the trademarked terms to trigger advertising did not amount to trademark infringement in that plaintiff had failed to prove "a likelihood of confusion stemming from Google's use of GEICO's trademark as a keyword."

Additionally, the court held that plaintiff produced insufficient evidence to proceed on the issue of whether Sponsored Links that do not contain plaintiff's trademarks in the heading or text of the advertisement create a sufficient likelihood of confusion to give rise to a claim of trademark infringement.

August Ruling

In an opinion entered this month, however, the court found that Google may be liable for trademark infringement for a practice – which has since been discontinued – of allowing advertisers that purchase Sponsored Links to use the GEICO marks in the heading or body of the advertisements.

In light of consumer survey evidence proffered by plaintiff, the court held that the percentage of survey respondents who had exhibited some degree of confusion when such ads appeared alongside the organic listings provided sufficient evidence to survive Google's motion to dismiss.

The court went on to enter a 30-day stay in which to allow the parties to enter into a settlement on the issue of liability and damages.

New Mexico Man Convicted of Criminal Libel

A New Mexico man was convicted on August 9 in the state's first criminal libel prosecution to proceed to trial since 1992. *State v. Mata*, No. M-47-MR-200500028 (N. M. Mag. Ct., Farmington jury verdict Aug. 8, 2005).

Protest Leads to Arrest, Conviction

Juan Mata was charged with criminal libel after he picketed Farmington, N.M. police headquarters, claiming that he was being harassed by an officer with the department.

It was the first time that such charges were brought in the state since 1998, when a Taos County commissioner filed criminal libel charges against a local gadfly who distributed letters questioning the commissioner's record. *See* "Criminalizing Speech About Reputation," 2003 MLRC BULLETIN No. 1 (March 2003), at 89. The charges in that case were dropped before trial.

The dispute in the instant case apparently began when Police Officer Mike Briseno and Mata exchanged words during a traffic stop on Nov. 29, 2002. Officer Briseno then went to Mata's home, and attempted to present a summons to Mata's brother for playing loud music. The incident ended with several officers on the scene, the door of one of the trailers on the property broken, the use of pepper spray by the police, and the arrest of Mata's brother.

Mata alleges that since then Officer Briseno has harassed him by tailgating his car, parking outside his home, and shining lights in his windows. In May 2003 Mata presented a petition with 188 signatures seeking an investigation of the police officer, but the department's internal affairs officer responded in a letter that there would no investigation since the signatures could not be verified.

In August 2004, an attorney wrote a letter on Mata's behalf accusing Briseno of 11 crimes against Mata. In October, Mata and two supporters picketed on the sidewalk in front of the police department, with a sign reading, "Briseno is a dirty cop." The next month, Mata filed a federal civil rights suit against the department.

In January 2005, Mata was arrested on charges of harassment, stalking, and criminal libel. New Mexico's criminal libel provision, N.M. Stat. § 30-11-1, dates from 1889 and was reenacted in 1963. It provides in relevant part that:

> Libel consists of making, writing, publishing, selling or circulating without good motives and justifiable ends, any false and malicious statement affecting the reputation, business or occupation of another, or which exposes another to hatred, contempt, ridicule, degradation or disgrace. Whoever commits libel is guilty of a misdemeanor.

The charges against Mata were filed at the request of Farmington City Attorney William Cooke, who was appointed special prosecutor in the case by the district attorney. According to Mata's attorney, the charges were based on the petition, the August 2004 letter, and the picketing.

The main witness in the trial before Farmington Magistrate William A. Vincent was Officer Briseno, who testified that Mata attempted to destroy his credibility, and that he frightened him, according to the Associated Press.

Briseno alleged that Mata had videotaped him when he drove by Mata's house, and drove past when the officer was issuing tickets. "I'm afraid Juan Mata will switch his focus from me to my family," he testified, according to the AP.

"I'm extremely thankful that we live in a country with free speech," the AP quoted City Attorney Cooke telling the jurors in arguing the case, "but certain kinds of speech are not free." Cooke argued that Mata had acted with actual malice.

After a one-day trial, the six-person jury found Mata guilty on all three charges. Criminal libel, harassment and stalking are also misdemeanors, each punishable by up to one year imprisonment and/or a fine of up to $1,000. *See* N.M. Stat. § 31-19-1.

Mata's attorney, Dennis W. Montoya of Albequerque, said that he would file an immediate appeal, arguing the prosecution was unconstitutional.

Constitutionality of New Mexico's Statute

In 1992, the New Mexico Court of Appeals found the statute to be unconstitutional as applied to statements on a matter of public concern, because it did not require

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New Mexico Man Convicted of Criminal Libel

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a finding of actual malice. *State v. Powell*, 114 N.M. 395, 839 P.2d 139, 20 Media L. Rep. 1841 (N.M. Ct. App. 1992). Without analyzing the issue, the court apparently adopted the rationale that the statute would be constitutional in purely private libels. But the court added the observation that "criminal libel laws serve little if any purpose." *Powell* at 140.

Former Oklahoma State Senator Makes Criminal Libel Complaint

In Oklahoma, a former state senator's complaint alleging that a political website is committing criminal libel against him has been referred by police to a local prosecutor.

State Senator Gene Stipe alleges that the website, McAlester Watercooler (www.mccooler.net), has published defamatory statements against him and his family. The site, operated by local gadfly and former McAlester mayoral candidate Harold King, includes comments from King and various users.

The comments that led to Stipe's complaint were posted by King using the name "Hal."

"It's opinions," King told the *McAlester News Capital & Democrat* about the website. "It's not intended to be factual."

On Aug. 20, the newspaper reported that McAlester Police had investigated the complaint and turned the case over to District 18 State's Attorney Chris Wilson. Wilson told the paper that it would take him several days to review the case.

The last known prosecution under Oklahoma's criminal libel statute, Okla. Stat. Tit. 21, § 771, resulted in a guilty plea in 1999 by a Tulsa police officer who posted a fake advertisement on the Internet naming a female neighbor as being involved in the "sex toy" business. He was sentenced to one year probation and 40 hours of community service, and ordered to pay $500 each to the court fund and the victims' compensation fund. *See* 2003 MLRC BULLETIN No. 1, at 99.

Criminal Libel Case in Tribal Court

Following a one day trial, a jury of the Citizen Potawatomi Nation tribal court in Shawnee, Oklahoma found a tribal member not guilty of criminal libel.

The defendant in the case, tribal member Leon Bruno, was charged with making a false complaint to the police about tribal Chairman John Barrett. Barrett and Bruno are long-time political rivals in the tribe. Bruno was chairman until 1985, when he was defeated by Barrett. Bruno challenged Barrett again in this year's election in June, but lost by a vote of 1,414 to 378.

In December 2004, Bruno wrote a letter to a member of the tribe's business committee inquiring about an article in a business magazine which implied that the committee member was going to assume ownership of the tribe-owned bank. Barrett called Bruno in response to the letter. According to testimony at trial, Barrett told Bruno, "you better tell [your wife] she better be worried about who's going to take care of you if you're gone."

Bruno filed a complaint with the tribal police, saying that he took the statement as a death threat. Barrett testified that he only meant that Bruno could be jailed for violating federal banking laws. During trial Barrett testified that Bruno filed the police report to damage his reputation and to affect the election. After 30 minutes of deliberation, the jury found Bruno not guilty.

The case is the second criminal libel case brought against opponents of Barrett in two years. In 1993, criminal defamation charges stemming from a political advertisement during a tribal election the previous year were dropped against seven tribe officials after the tribe's attorney general refused to prosecute the cases. The advertisement criticizing Barrett was posted on the Internet. *See MLRC MediaLawLetter*, Jan. 2004, at 43.

Criminal Libel Case in Thailand Draws International Attention

In recent months, media attorneys and advocates from around the world put a spotlight on a criminal libel prosecution in Thailand against Supinya Klangnarong, a Thai journalist and campaigner for media reform.

The trial, which began in July, and a related civil suit against the *Thai Post*, stem from statements Ms. Klangnarong made in the *Post* about political favoritism of the telecommunications conglomerate Shin Corporation. The case is being tried in a criminal court in Bangkok.

The case is unusual among journalist defamation cases in that it does not involve articles written by Ms. Klanganarong, but rather quotes of hers printed in the *Post*. In 2003, Ms. Klanganarong published a report based on her investigation into the relationship between Shin Corp. and Thailand's government, entitled "Communication under Shin's regime: the conflict of business and political interest?"

Shin Corp. was formerly headed by Thailand's Prime Minister Thaksin Shinawatra. Upon assuming office, Mr. Shinawatra handed his share of the firm and control over to relatives. In July, 2003 the *Thai Post* published an interview with Ms. Klanganarong, in which she reiterated allegations and conclusions drawn from her investigation to the effect that Shin Corp. had benefitted because of its ties to the Prime Minister. Shin Corp. is suing the *Thai Post* for libel in a separate civil action.

Amicus Effort

The Thai criminal court does not accept amicus briefs, but an amicus group offered to submit a witness statement addressing the international norms surrounding criminal libel prosecutions. The International Bar Association also sent a lawyer to observe and assess the fairness of the proceedings.

Several MLRC members contributed to a statement to be given by Toby Mandel, legal director of the British human rights group Article 19. Mandel was prepared to read the statement on August 19. At the last minute, attorneys for Shin Corporation objected, claiming that they needed additional interpreters in the courtroom.

The defense team had provided two in-court interpreters, but Shin Corp. argued that it needed additional help. Trial is set to resume August 30, but Mr. Mandel was not sure whether he would be able to return to Thailand and, if so, whether the court would allow his statement into evidence.

MLRC members, including Robert Balin of Davis, Wright, Tremaine, based their contributions to Mr. Mandel's witness statement in customary international law, as well as regional and Thai law.

The major legal issues they addressed included the validity of criminal libel, the higher burden on plaintiffs when the allegedly libelous speech concerns matters of public interest, a fair comment defense, under which they argue that Ms. Shinawatra's statements reflected opinion, and not statements of fact, and the application of a rebuttable presumption of truth on behalf of the defendants.

UK Court of Appeal Allows *Times* to Raise Reynolds Defense in Lance Armstrong Case

Trial court should have allowed newspaper to present defense

In a lengthy decision, the Court of Appeal of England and Wales reversed a trial court decision that had struck out a newspaper's *Reynolds* qualified privilege defense in a libel action filed by cyclist Lance Armstrong. *Armstrong v. Times Newspapers Ltd.*, [2005] EWCA Civ 1007 (July 29, 2005) (Brooke, Tuckey, Arden, JJ.).

Background

At the end of 2004, the trial judge, Mr. Justice Eady, ruled that the *Sunday Times* had no chance of successfully raising the Reynolds qualified privilege defense in the case. *Armstrong v Times Newspapers Ltd* [2004] EWHC 2928 (Dec. 17 QB).

At issue is a June 2004 article about Armstrong entitled "LA Confidential" that discussed allegations that Armstrong has taken performance enhancing drugs. Among other things, the article stated "there are those who fear that a man who has won five Tours de France in a row [now seven] must have succumbed to the pressure of taking drugs."

Striking out the qualified privilege defense, Mr. Justice Eady found that the newspaper had not sufficiently verified the information or contacted Armstrong for comment, that the allegations were "rumor and speculation," and found that the article had a "sensational" tone designed to "stir things up."

Court of Appeal Decision

After a lengthy discussion of the facts and the proposed basis for the defense, the Court of Appeal ruled that it was an error to strike out the defense without at least hearing testimony from the defendants.

Among other things, the reporters would have testified about the sourcing of the article and the timing of publication – relevant factors to the defense.

Lord Justice Brooke concluded that "fairness demands that the merits of the *Reynolds* defense in this action should be properly investigated at the trial and not disposed of in a summary way."

Armstrong is represented by barristers Richard Spearman QC and Matthew Nicklin, 5RB; and the firm Schillings. The Times is represented by barristers Andrew Caldecott QC and Heather Rogers; and in-house solicitor Gillian Phillips.

Canadian Court Rejects Single Publication Rule in Internet Libel Case

The Court of Appeal in British Columbia rejected the single publication rule in an Internet libel case. *Carter v. B.C. Federation of Foster Parents Association, et al.*, 2005 BCCA 398 (Aug. 3, 2005). At issue in the case were statements made about plaintiff in an online forum. The trial court held claims over certain online statements were time barred. The Court of Appeal reversed.

After reviewing UK and Australian cases rejecting the single publication rule, *see, e.g., Loutchansky v. Times Newspapers Ltd.*, [2002] Q.B. 783 (C.A.) and *Dow Jones & Company Inc. v. Gutnick*, [2002] HCA 56, the court concluded:

> If defamatory comments are available in cyberspace to harm the reputation of an individual, it seems appropriate that the individual ought to have a remedy. In the instant case, the offending comment remained available on the internet because the defendant respondent did not take effective steps to have the offensive material removed in a timely way. Although, for the reasons noted by the trial judge, legislatures may have to come to grips with publication issues thrown up by the new development of widespread internet publication, to date the issue has not been legislatively addressed and in default of that, I do not consider that it would be appropriate for this Court to adopt the American rule over the rule that seems to be generally accepted throughout the Commonwealth; namely, that each publication of a libel gives a fresh cause of action.

LEGISLATIVE UPDATE

Shield Bill & FOIA

By Kevin M. Goldberg

The biggest development in the past month was the hearing held on the Free Flow of Information Act in the Senate Judiciary Committee. Well attended by Members and the public alike, the only notable omission was the Department of Justice, which first submitted testimony on an earlier version of this legislation and then did not appear for the hearing itself, citing a need for Deputy Attorney General James Comey to appear before the House Judiciary Committee to discuss the USA Patriot Act instead.

Free Flow of Information Act (HR 3323 and S 1419)

- On February 2, 2005, Rep. Mike Pence (R-IN) introduced the "Free Flow of Information Act" (HR 581), which is largely based on existing Department of Justice guidelines for issuing subpoenas to members of the press. On February 9, 2005 Senator Richard Lugar (R-IN) introduced the same bill in the Senate as S 340.
- These bills were met with some minor concerns from House and Senate staff and the Department of Justice, especially where national security concerns would be implicated and, perhaps, threatened when the identity of a source could not be revealed. For that reason, the bills were redrafted and reintroduced by their original sponsors on July 18, 2005 as HR 3323 and S 1419; the bills now contain the following major provisions:
    - An absolute privilege against compelled testimony before any federal judicial, legislative, executive or administrative body regarding the identity of a confidential source or information that would reveal the identity of that source – unless there exists an "imminent and actual" harm to national security, in which case the reporter may be compelled to testify.
    - A qualified privilege against the production of documents to these bodies unless clear and convincing evidence demonstrates that the information cannot be obtained by a reasonable, alternative non-media source and:
        - (1) in a criminal prosecution or investigation, there are reasonable grounds to believe a crime has occurred and the information sought is essential to the prosecution or investigation or
        - (2) in a civil case, the information is essential to a dispositive issue in a case of substantial importance.
    - Protection for information about a reporter that is sought from a third party, such as telephone toll records or E-mail records, which provides that, in the event that such records are sought, the party seeking the information shall give the covered entity reasonable and timely notice of the request and an opportunity to be heard before the records are disclosed.
    - Definition of a "covered entity", which is the publisher of a newspaper, magazine, book journal or other periodical; a radio or television station, network or programming service; or a news agency or wire service, with a broad listing of media such as broadcast, cable, satellite or other means. It also includes any owner or operator of such entity, as well as their employees, contractors or any other person who gathers, edits, photographs, records, prepares or disseminates the news or information.

Open Government Act of 2004 (S 394 and HR 867)

- The Open Government Act was introduced by Senators John Cornyn (R-TX) and Patrick Leahy (D-VT) as S 394 on February 16, 2005; Rep. Lamar Smith (R-TX) introduced the bill as HR 867 in the House on the same day.
- Among the changes proposed in this bill are:

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LEGISLATIVE UPDATE

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- A broader definition of the "news media" for purposes of fee waivers
- An increase in the circumstances where "fee shifting" would occur to award attorney's fees to a litigant who must go to court to obtain documents from a federal agency
- Creation of an annual report to track the use of the FOIA exemption for critical infrastructure information that was created in the Homeland Security Act of 2002
- Stricter enforcement of the 20 day deadline by which agencies must respond to a FOIA request and the penalties for non-compliance
- Maintenance of accessibility of records that have been given to private contractors for storage and maintenance
- The creation of a "FOIA Ombudsman" within a new Office of Government Information Services to oversee FOIA

- The subcommittee on Government Management, Finance and Accountability of the House Government Reform Committee held a hearing on the topic of FOIA generally, this bill and the FASTER FOIA Act (discussed below) on May 11, 2005.

Identification of Statutes that Would Affect FOIA (S 1181)

Though the Open Government Act's momentum has slowed somewhat, discussion of the proliferation of the so-called "(b)(3)" exemptions to FOIA – when another statute exempts a specific class of information from disclosure upon request – led to Senators Cornyn and Leahy introducing S 1181, which simply consists of that section of the Open Government Act that would require any bill that seeks to exempt information from release under FOIA to specifically cite to 5 U.S.C. § 552 in order for that new exemption to become effective. This will allow those who track FOIA legislation to find all potential new exemptions that are often inserted as one paragraph of a much larger, non-FOIA specific, bill.

S 1181 was introduced on June 7, 2005 and passed the Senate Judiciary Committee just two days later. It has now passed the full Senate but its House prospects are uncertain; House members have indicated that they would prefer passing one comprehensive FOIA bill, which may or may not be the Open Government Act, rather than enacting piecemeal legislation.

Faster FOIA Act

Senators Cornyn and Leahy also introduced the "Faster FOIA" Act as S 589 on March 10, 2005. This bill is intended to support the Open Government Act by establishing an advisory commission on Freedom of Information Act processing delays. The bill was introduced in the House of Representatives on April 6, 2005 by Reps. Brad Sherman (D-CA) and Lamar Smith (R-TX). It was given bill number HR 1620.

The May 11, 2005 hearing touched on the importance of the Faster FOIA Act to proper FOIA functioning.

The Faster FOIA act has passed the Senate Judiciary Committee but has not been brought to the Senate floor.

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

MLRC Calendar

September 19-20, 2005
MLRC London Conference
Stationers Hall

September 21, 2005
In-House Counsel Breakfast
swissotel The Howard
Temple Place, London

Presented with the support of:
Bloomberg News, The Hearst Corporation and The National Magazine Company,
Media/Professional Insurance, Times Newspapers Ltd.
And the law firms of Covington & Burling, Davenport Lyons, Davis Wright Tremaine LLP,
DLA Piper Rudnick Gray Cary US LLP, Finers Stephens Innocent LLP,
Jackson Walker LLP, Prince Lobel Glovsky & Tye LLP and Reynolds Porter Chamberlain.

November 9, 2005
MLRC Annual Dinner
Sheraton New York Hotel and Towers
811 Seventh Avenue on 53rd Street

Cocktail reception at 6pm sponsored by Media/Professional Insurance
Dinner at 7:30pm

November 11, 2005
MLRC Defense Counsel Section Breakfast
Proskauer Rose Conference Center
1585 Broadway 26th Floor

January 26, 2006
MLRC & Donald E. Biederman
Entertainment & Media Law Institute of
South Western Law School
Los Angeles

Legal Challenges of Creativity in a Changing
and Increasingly Regulated Media Environment

Missouri Enacts Tort Reform Legislation

By Joseph E. Martineau

Missouri has joined the growing number of states enacting tort reform legislation. Although much of House Bill 393, signed by Governor Roy Blunt on March 29, 2005 and effective August 28, 2005, relates to medical malpractice reform, some provisions will apply to tort claims against journalists and to the communications/ media industry.

Punitive Damage Cap

Of principal significance is an amendment to Mo.Rev. Stat. §510.265, dealing with punitive damage awards. Under the new law, punitive damages may not exceed $500,000 or "five times the net amount of any judgment awarded to the plaintiff against the defendant." Mo.Rev. Stat. §510.265.1. (These limitations do not apply where the defendant has pled guilty or has been convicted of a felony arising out of the acts or omissions forming the basis of the plaintiff's claim.)

Related to this limitation on punitive damages is a limitation on discovery concerning a defendant's assets and net worth where the purported relevance of such discovery is based solely on a punitive damage claim. Under Mo.Rev.Stat. §510.263.8, such discovery is allowed "only after a finding by the trial court that it is more likely than not that the plaintiff will be able to present a submissible case to the trier of fact on the plaintiff's claim of punitive damages."

A mere pleading of entitlement to punitive damages is no longer sufficient to require a defendant to produce financial information.

Appeal Bonds and Costs

The new legislation also places a cap on appeal bonds to stay execution of any judgment during appeal. A court may not require any appeal bond greater than $50 million regardless of the amount of the underlying judgment. Mo. Rev.Stat. §512.099.

Another provision of the new legislation expands the type of costs recoverable by a prevailing party, with such costs to include reasonable fees for travel, expert witnesses, video taping and photocopying. Mo.Rev.Stat. §514.060.

Venue

While the legislation extensively overhauls venue provisions related to tort actions, it does not materially change existing Missouri venue provisions related to defamation and invasion of privacy actions where the publication emanates within Missouri. In such cases, venue lies in the county of first publication. Mo.Rev.Stat. §508.010.4 and 8.

However, if the publication emanates from outside of Missouri, then venue lies in the county where the plaintiff resides or where the defendant resides or has its registered agent in the case of a corporation. Mo.Rev.Stat. §508.010.4, 5 and 8.

This would seem to change previous law which permitted a non-Missouri publisher to be sued anywhere in the State. In other tort actions, if the plaintiff first suffered injury in Missouri, then venue is limited to the county where such injury occurred, but if the injury occurred outside of Missouri, then venue is limited to the location of the defendant's principal residence or registered agent or plaintiff's principal place of residence if he or she resides in Missouri. Mo.Rev.Stat. §510.010.4 and 5.

Joint and Several Liability

Finally, the legislation limits joint and several liability. Where a defendant is found to be less than 51% at fault, then that defendant's liability is limited to the percentage of the judgment equivalent to its percentage of fault. A defendant 51% at fault or more can still be liable for 100% of the judgment. Mo.Rev.Stat §537.067.

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MLRC would like to thank the MLRC Summer Interns — Michael Eskenazi, Fordham Law School; Miriam Osner, Columbia Law School, and Elizabeth Robertson, University of Houston Law School — for their contributions to this month's issue of the *MediaLawLetter*

City Official's Suicide Unleashes Debate on Media Law and Ethics Issues

By Johnita P. Due

The facts surrounding the suicide of former Miami City Commissioner Arthur Teele, Jr. in the lobby of *The Miami Herald* building on July 27, 2005 have unleashed a debate on media law and ethics relating to the wiretapping of sources and the journalist's privilege.

Background

Teele was an African-American leader who "served South Florida for more than two decades in public life at the federal and local levels" and "played a crucial role in many significant South Florida projects…." *See* "To Our Readers," *The Miami Herald* (July 28, 2005).

He was also the subject of state and federal investigations which resulted in state charges being filed against him last year for allegedly taking kickbacks from a contractor and a 26-count federal indictment on mail fraud, wire fraud, conspiracy and money laundering charges relating to allegations that he had helped a major electrical contractor win $20 million worth of airport contracts by setting up a front company. He was arraigned on and pleaded not guilty to the federal charges four days before his suicide.

Former Miami Herald metro columnist Jim DeFede, whom had known and covered Teele for more than a decade, was the last person to speak to Teele on the telephone before he shot himself.

Teele called DeFede from the lobby of *The Miami Herald* to tell him he had a package for him relating to his federal case. DeFede was working from home so Teele told him he would leave the package for him. By all accounts, after Teele hung up the lobby phone he told the security guard at the desk to tell DeFede to tell his wife that he loved her, pointed a gun at his head, and shot himself when police arrived.

Columnist Fired for Taping Conversation

The last telephone conversation of Teele's life was not the only conversation he had with DeFede that day. Approximately ninety minutes earlier, Teele had spoken to DeFede for almost thirty minutes about the charges and allegations against him, including allegations of relationships with prostitutes (including a transvestite) and drug dealers that had surfaced in police reports and been released by prosecutors.

An alternative weekly newspaper, the *Miami New Times,* published the reports in a cover story that hit the streets earlier that afternoon (it is still unclear whether Teele actually saw or was aware of *The Miami New Times* article). DeFede taped the conversation with Teele, even though Teele said it was off the record.

In the immediate aftermath of Teele's suicide, DeFede told *Herald* management that he had taped the conversation. A few hours later he was fired. In a public statement issued after he was fired, DeFede said: "In a tense situation I made a mistake. The Miami Herald executives only learned about it because I came to them and admitted it. I told them I was willing to accept a suspension and apologize both to the newsroom and our readers. Unfortunately, The Herald decided on the death penalty instead."

Miami Herald publisher Jesus Diaz Jr. and Executive Editor Tom Fiedler said they fired DeFede because it was illegal to tape a phone conversation without consent of the other party in Florida.

According to a *Herald* report, "Fiedler said that he supported the right of journalists to break the law only in extraordinary circumstances, where the story is of high public interest and cannot be reported without, for example, going undercover, using a hidden microphone or trespassing. In those cases, the reporting methods must be approved beforehand by editors." *See* Christina Hoag, "Herald bosses: Columnist violated ethical standards, *The Miami Herald* (July 29, 2005).

However, the law in this case is not so clear cut. Even state prosecutors have yet to decide whether DeFede committed a crime.

Under Florida law, anyone who without the consent of all parties "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire oral, or electronic communication…is guilty of a felony of the third degree . . .." Sec. 934.03 Fla. Stats. (2005).

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City Official's Suicide Unleashes Debate on Media Law and Ethics Issues

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The wiretap statute applies only to those oral communications "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation…." Sec. 934.02(2),Fla. Stats. (2005).

Some news media have raised the possibility that a business extension exception, which was recognized by a decision in the U.S. Court of Appeals for the Eleventh Circuit interpreting Florida law, could apply in this case.

The business extension exception requires that the communication must be intercepted by equipment furnished by the provider of the wire or electronic communication service in the ordinary course of its business and the call must be intercepted in the ordinary course of business.

It is unclear whether the exception would apply if DeFede was working from home and whether it would be considered "ordinary course of business" based on *Herald* or industry standards to tape a source without consent when the source said the conversation was off the record.

It is likely that if DeFede were to be charged with violating the wiretap statute, he would be charged only with a misdemeanor as a first offender if he can show that his taping was not done for an unlawful purpose or for commercial advantage.

DeFede has said that he did not tape the conversation with Teele with the intention of publishing its contents. He recounted the moments in *The Miami Times,* Miami's black weekly newspaper (and not associated with *Miami New Times)*:

> The tone of Art's voice scared me. Art sounded like he was falling apart. He was on the verge of crying…I hit the record button on my tape recorder, instinctively, impulsively, not thinking about whether it was legal or not legal, whether it was right or wrong. I wanted to preserve a conversation the same way 911 calls are recorded. Anyone who listens to the tape would realize I wasn't talking to Art like a journalist, trying to elicit information and good quotes from the man. I was trying to console and reassure Art with the obvious goal of calming him down. If Art had not taken his own life, I never would have written about this conversation.

DeFede published this article after he had disclosed the contents of his conversation with Teele to state prosecutors investigating whether Defede had violated the wiretap statute.

Herald Executive Editor Fielder explained DeFede's dismissal in a column called "A Tragedy of Multiple Dimensions." In that column, he did not conclude that what DeFede had done was illegal but said that DeFede *may* have broken the law and emphasized that the more important factor in the decision to fire him was that DeFede had breached the trust of Teele and the readers:

> Generally, tape recording someone without his or her knowledge is against state law. That factored in the firing decision; all of us are expected to act within the law. But the possibility that a law was violated was neither the only factor nor, I believe, the most important one in my decision….It's all about trust.

See T. Fiedler, "A Tragedy of Multiple Dimensions," *The Miami Herald* (July 31, 2005). Fielder also said: "Especially troubling to me was Jim's admission that he turned on his tape recorder at a moment when Teele was clearly agitated, when his thoughts were disconnected, rambling, incoherent."

Hundreds of *Miami Herald* current and former employees and journalists around the nation, including Pulitzer prize winners, have criticized the *Herald*'s decision and rallied in support of DeFede and implored the *Herald* to reinstate him. In "An open letter to Miami Herald Publisher Jesus Diaz and Executive Editor Tom Fiedler" dated July 28, 2005, they stated:

> We believe firing him was an overreaction to an offense that should be viewed in the context of an intense, immediate episode during which he had little time to consider his actions…Jim's actions

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> may not even have been a technical violation of the law upon closer examination, and whether or not it was an ethical violation is questionable, given the extreme circumstances. But in any case he came forward on his own and has admitted his mistake. The Herald should do likewise and take him back.

The Herald has not changed its decision.

Newspaper Gives Tapes to Police

Already reeling from the death at their doorstep and the firing of a revered columnist, *The Miami Herald* also had to deal with subpoenas for the tape of the conversation between Teele and DeFede.

The *Herald* said it was prepared to fight any subpoenas on the grounds that it was against Miami Herald policy to produce unpublished notes and the source had said and believed the conversation was off the record. *See* C. Hoag, "Herald bosses: Columnist violated ethical standards, The Miami Herald (July 29, 2005).

Even though the tape had been requested as part of the police investigation into the suicide, the *Herald* at first refused to turn it over. Publisher Diaz said at the time: "We expect we will get subpoenaed and we will say we will not meet the subpoena and we'll end up in court."

Ultimately, however, the *Herald* agreed to play the tape for the prosecutor conducting the investigation into whether DeFede had violated the wiretap statute. (*The Herald* is covering DeFede's legal expenses relating to this investigation).

DeFede had asked the paper to turn over the tape and had already waived the journalist's privilege by disclosing his notes to prosecutors investigating his case. *The Herald* made the tape available only after confirming that the contents of the tape were the same as what was in DeFede's notes and only after securing a promise that the prosecutor would not make a copy of the tape or record its contents. *See* Herald Staff Report, "Teele tape played for state prosecutors," *The Miami Herald* (Aug. 6, 2005).

Johnita P. Due is senior counsel for Cable News Network LP, LLLP.

ETHICS COLUMN

The Ugly Consequences of a Conflict of Interest Between Company and Reporter

By Luther T. Munford

The publisher calls. A psychiatric hospital has sued the news company and its reporter for trespass and conversion. Apparently the editor had a concern about how the hospital treated its patients, so he asked the reporter to "check it out."

The reporter had read that 30 years ago his newspaper had gotten a prize for a story written by a reporter who faked a mental condition and spent time in the hospital. This time the reporter did not go that far. He just lied and said he was an outpatient going to see a physician in the hospital.

As he walked through the hospital, he saw in a trash can a photograph of his next door neighbor in hospital garb. He took it, but just to show to his wife and not to use with the story.

The reporter's story said the hospital was giving adequate treatment, but it included details that revealed he had been inside.

There certainly was a time when a lawyer who got such a call might have simply gone to the newspaper, interviewed the editor, talked to the reporter about his intent to show the photograph to his wife, and proceeded to defend the case as best he could.

He would do discovery about how tight the hospital's entrance policies really were, and argue that picking up a discarded photograph doesn't amount to conversion. Of course, these torts can result in punitive damages, but the publisher's insurance covered those.

But today the lawyer who automatically undertakes a joint defense of the newspaper and its reporter potentially opens himself up to ethical discipline, a disqualification motion filed by the hospital, a malpractice claim from the newspaper, and a bad faith claim by the reporter against the insurer who ultimately paid the bill.

Ethics

The ethical problem is conflict of interest. The publisher called the lawyer, the company pays the lawyer's bill up to its deductible, and the insurer pays the rest. The lawyer is hired to defend the company. The company is a client of the lawyer.

But the lawyer is also representing the reporter and has an independent ethical obligation to him. The reporter's interests may differ from those of the company. The company's interests would be best served by taking the position that the theft of the photograph, and perhaps more, were outside the course and scope of the reporter's employment so that the company is not liable for them. On the other hand, the reporter does not want to have to pay damages out of his own pocket.

Similarly, if the company and reporter were ever charged with criminal trespass and theft, the company would deny criminal intent. The reporter's testimony might be critical evidence of the company's intent, if the reporter said no one told him to do what he did. But that, in turn, might undercut whatever good faith defense he might have to the criminal charges.

The ABA Model Rule of Professional Responsibility 1.7 says that, in order to represent a client who is adverse to another client a lawyer must "reasonably" believe that his relationship with the two clients will not be affected, and "each client [must have] given knowing and informed consent after consultation." A well-footnoted article on this subject suggests a form of waiver letter that might solve the problem in some circumstances. Richard M. Goehler, Bruce E.H. Johnson, and Thomas S. Leatherbury, *Representing Media Clients and Their Employees in Newsgathering Cases: Traps for the Unwary,* Communications Lawyer (ABA Summer 2002), found in Westlaw at 20-SUM Comm. Law. 10.

There are several problems with a waiver approach, however. If the reporter does not consult with an independent lawyer, some might question whether the reporter could give "knowing and informed consent."

To go further, for the lawyer to represent both clients, neither client can have any confidential information it does not want to share with the other, because sharing of information is necessary for informed consent. If the reporter asked the lawyer not to tell the editor the real

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ETHICS COLUMN

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reason he took the photograph, the lawyer would have to respect that confidence. In keeping the confidence, the lawyer necessarily cannot obtain a "knowing and informed" waiver of the conflict.

Another problem is whether the attorney "reasonably" believes the interests of his two clients are adverse. In *Wood v. Georgia*, 450 U.S. 261, 268-272 (1981), the U. S. Supreme Court held that the right to counsel in criminal cases means a right to counsel free from conflicts of interest. It remanded the case to the lower courts to determine whether a lawyer could simultaneously represent not only a movie theater where a pornographic movie was shown, but also the ticket-sellers arrested at the door. The court was concerned that defense counsel had taken actions in the case that benefitted the theater at the expense of the ticket-takers.

Wood is a criminal case where conflicts take on a constitutional dimension, and so is not strictly applicable to civil cases. But it illustrates that a "reasonable" belief regarding a potential conflict may not always be the same thing as what a lawyer might think was a "reasonable" attempt to save money for his client by not bringing another lawyer into the case.

But there is no *per se* rule. If there truly is no conflict, the lawyer may represent both. If the reporter wrote and the editor published a story resulting in a suit for libel damages, then the company is responsible and there is no question but that the reporter acted within the course and scope of his employment. But newsgathering torts with criminal overtones cloud the picture considerably.

Disqualification and Legal Malpractice

The lawsuit is important to the hospital because regulatory agencies and some litigious patients have demanded that it "do something" in response to the reporter's flouting of hospital and agency rules. The hospital attorney knows that the lawyer for the news company will do a good job. He has done that kind of work for years. He even goes to seminars in New York and subscribes to publications put out by the Media Law Resource Center.

When the company lawyer files pleadings for both parties saying all of the reporter's actions were outside the course and scope of his employment, the hospital lawyer smells a rat. He files a motion to disqualify the company attorney because there is a conflict of interest between that attorney's two clients.

The disqualification motion will succeed if the court believes that the reporter has not given knowing consent to the joint representation and does not fully understand the personal implications of what the lawyer has done. And if there are no such implications, because the company has secretly told the reporter it will pay for his individual damages, if any, things may get even worse. The disclosure of that secret agreement may impair the course and scope defense.

Moreover, if the lawyer has not talked to the company about the conflict problem, then that could be considered legal malpractice in some circumstances. The lawyer owed a duty to the company to counsel it on that subject. His failure to do so could be actionable even if ethical rules cannot themselves provide a standard of liability in a malpractice case. Well short of that, the lawyer may elect to forego billing for his services in order to placate a long-standing but angry client.

Insurance Bad Faith

But assume there is no secret agreement. The real doozy is what happens after the reporter is held individually liable. Then the insurance company refuses to cover the claim because the court found that the theft of the photograph was outside the course and scope of the reporter's employment. Then the reporter sues the lawyer for malpractice and the insurance company – who helped select the lawyer and paid for his services – for bad faith.

In many states, where coverage depends on the result of the underlying case, the insurer has a duty in the beginning to, at the very least, reserve rights and offer to pay for separate counsel for the reporter. The lawyer sent regular reports to the insurer so it knew something about the case and the potential for conflict. But when the insurer is sued for punitive damages it cross-claims

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against the lawyer for his failure to alert the insurer to the existence of confidential information that the lawyer got from the reporter but could not share with the company.

Lesson: Forewarned Is Forearmed

Look for conflicts, especially if there might have been a violation of criminal law. Tell the company and the reporter about the potential for conflicts, and, without asking what, find out whether they have anything confidential to tell you that you could not reveal to the other.

If there is a potential conflict, get a waiver if the reporter can obtain independent advice and the waiver passes the smell test. Tell the insurer as much as you can without giving it coverage advice or actually disclosing a confidence.

Otherwise, tell the company the reporter needs a separate lawyer. It may not save the client or the insurer wise pennies on the front end, but it may well save them – and you – foolish pounds on the back end.

Luther T. Munford practices with the Jackson, Mississippi office of Phelps Dunbar LLP. He regularly defends both news companies and lawyers. The suggestions in this article are based on a hypothetical and are not intended either to establish a standard of care or endorse a theory of liability.

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