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LDRC Libel Defense Resource Center

LIBELLETTER

Reporting Developments Through February 27, 2001

In This Issue...

		PAGE
	LDRC Report Shows Fewer Media Trials in 2000 *Defendants' win rate grows, but so do damage awards*	2
LIBEL		
Nev.	**Nevada Supreme Court Reverses and Remands Verdict Against Publisher** *Limits fair report privilege – refuses to apply it to non-public, "non-official" report*	3
Ill.	**Radio Broadcasters Taking Syndicated Chicago Show Are Subject to Illinois Jurisdicition** *Points to choice of law and warranty provisions in support of its conclusion*	5
Ohio	**Appellate Court Upholds Dismissal of Claims Against Radio Station and Talk Show Host** *Allegations of biased sources and conspiracy insufficient to prove actual malice*	7
N.J.	**Appellate Court Applies Public Interest Privilege** *Covers tax problems of home heating fuel company*	9
D.C. Cir.	**Much of New Republic Article on "Robespierre of the Right" Is Not Libelous** *Calling Paul Weyrich "paranoid" was hyperbole and protected opinion, court rules*	11
D.Va.	**District Court Dismisses Libel By Implication Case Against Redskins Owner** *Victory for defendant, but troubling footnote regarding matters of public concern*	13
Tex.	**Federal Judge Awards Win to CBS and 48 HOURS** *Dismisses libel and privacy claims over report on Texas lottery win*	15
Conn.	**Libel Claim Dismissed Over Column That Was "Pure Opinion"** *Author stated facts supporting opinion which were confirmed by plaintiff*	17
INTERNET		
Ohio	**Appeals Court Questions Webmaster's Immunity Under CDA** *Holds that CDA immunity may be not apply if defendant acted in "bad faith"*	19
France	**Holocaust Survivors Seek 15 Cents From Yahoo! For Selling Nazi Items**	22
9th Cir.	**Federal Wiretap Act Applies to Data Stored on Web Site** *Decision on electronic bulletin board creates conflict with other circuits*	29
NEWS & UPDATES		
11th Cir.	**Dismissal of Privacy Claims For Hidden Camera Footage Affirmed** *Coverage of religious recruiting meeting on public college was matter of public interest*	31
N.Y.	**Real-life Costanza's "Seinfeld" Claims Amount to Nothing In Appeals Court** *TV show is not "advertising or trade use" under N.Y. Civil Rights law section 51*	27
	Gannett's $14 Million Settlement with Chiquita Revealed; *Inquirer* Settles with Reporter	23
S. Ct.	**High Court Denies *Cert.* in Times Warner's Appeal of FCC Cable Rules** *Rules limit companies to 30 percent of U.S. market, require most channels carried be owned by others*	23
Ga.	**Appeals Ct Reverses Judgment For Accused Attorney Grouped With Convicted Felons** *Plaintiff accused of improperly soliciting clients grouped with lawyers convicted of stealing funds*	24
2d Cir.	**Workers of Subcontractor May Make Statements Tying Opera To Union Fight** *Appeals court strikes down injunction barring leafletting outside opera house*	25
Cal.	**Cal. Supreme Court Gives Commercial Speech Broad Protection Under State Constitution** *Compelling speech violates state provision, despite U.S. Sup. Ct. decision on First Amendment grounds*	25
Wash.	**Court of Appeals Invoked Reporters Privilege To Shield Reporter's Notes** *Fellow journalists sought notes in connection with libel case* against their former newspaper	26
S. Ct.	**High Court to Consider Virtual Child Porn** *Can law criminalize speech based on impact on reader?*	35
	Pulitzer Winner Rejects Claims Relating Media Violence to the Real Thing *Article points out flaws with research claiming a connection*	37

Report Shows Fewer Media Trials in 2000

Defendants' Win Rate Grows, but So Do Damage Awards

There were fewer trials on libel, privacy and related claims against the media in 2000 than in the past several years, and media defendants won a greater percentage of cases than in previous years, according to the LDRC's 2001 REPORT ON TRIALS AND DAMAGES, published this month. But the average and median damage awards against the media in 2000 were among the highest in the 21-year history of the REPORT.

There were only 11 trials against the media on libel, privacy and related claims in 2000, reflecting a long-term downward trend in the number of trials over the last two decades. While the number of trials each year varied throughout the 1990s, the overall average for the decade was 17.9 trials a year. In the 1980s, the average was 26.1 trials a year.

Media defendants won 46 percent of the trials in 2000 (five of 11), up from a third of the 12 trials in 1999 and above the win rates for the 1990s (38 percent) and 1980s (35 percent).

The average award in the six trials won by plaintiffs in 2000 was $5.6 million, one of the highest annual totals in the 21-year period covered by the REPORT. The median award for 2000 – $2.5 million – is the highest since the LDRC began studying these trends. But LDRC suggests caution in trying to place too much meaning in the damage results from only six awards.

These high figures are in part attributable to the $24.5 million award in the Missouri state court case of *Doe v. TCI Cablevision*, a misappropriation invasion of privacy claim. The award has already been set aside by the trial court, which granted judgment for the defendants after the trial, a decision that is currently on appeal.

The plaintiff has filed a post-trial motion in *Wolfe v. Troy Publishing Co.*, a Pennsylvania libel and false light case which is one of the five cases in 2000 that was won by the media defendants at trial.

Punitive damages awards in 2000 were at a record low, making up less than four percent of the total damages awarded. Punitive damages were over sixty percent of total damages in both the decades of the 1990s and the 1980s. Whether 2000 suggests a downward trend in punitive damage awards for the next decade or is simply an anomaly will have to await the results of the next few years.

The LDRC report also shows the success that media defendants have on appeal. During the 21 years covered by the REPORT, defendants successfully reduced awards in more than two-thirds of the cases that they appealed. In these successful appeals, the total of final awards appealed was 95 percent less than the total of the amounts initially awarded after trial.

Despite this success on appeal, the rate at which media defendants appeal verdicts against them is declining. Twice as many cases went without appeals in the 1990s as in the 1980s, and cases were far more likely to be settled post-trial in the 1990s than in the 1980s.

The LDRC REPORT contains descriptions of all of the cases tried in 2000 and updates the outcomes of cases tried in earlier years. In tables, figures and written analysis, the REPORT presents a complete picture of media trials held over the last 21 years. It includes trials in which a judge or jury reached a liability verdict; it does not include cases with hung juries, cases settled before verdict or cases in which defendants defaulted.

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The Wheel Spins: Nevada Supreme Court Reverses and Remands Verdict Against Lyle Stuart But the Fair Report Privilege Is the Loser

By Laura R. Handman

In August, 1997, a Nevada jury awarded $2.1 million in compensatory damages and over $1 million in punitive damages to Stephen A. Wynn, the major casino operator in Nevada, against Barricade Books, Inc., a small publisher based in New York, and its 75 year-old co-owner, Lyle Stuart. After more than three and a half years and defendants' declaration of bankruptcy, on January 29, 2001, the Supreme Court of Nevada reversed judgment and remanded for a new trial. While handing a victory to defendants, at least for now, the Court dealt a serious blow to the fair report privilege. *Wynn v. Smith*, P.3d 424 (Nev. S. Ct.).

Catalogue Causes Issues

The action arose out of Barricade's Catalogue promoting an upcoming biography, *Running Scared: The Life and Treacherous Times of Las Vegas Casino King Steve Wynn*, written by John L. Smith. Smith was sued as well but won summary judgment when he showed that he provided the source material to Barricade but did not prepare the Catalogue copy.

The suit originally involved 4 statements in the Catalogue; on appeal, only one statement was at issue. One statement, involving Wynn's father's alleged ties to the Genovese crime family and illegal gambling, was dismissed when Wynn conceded it was of and concerning his father and not him. Another, that Wynn "has waltzed precariously close to the gangster world throughout his meteoric career," was dismissed before trial as non-actionable rhetorical hyperbole. The third statement in the Catalogue, that Wynn's investment in a Las Vegas hotel would "blow up when investigators discovered that the true owners of the hotel were members of the Detroit mob" was found "not false" by the jury.

The fourth statement — the only one at issue on appeal — states:

> It [the Book] details why a confidential Scotland Yard report called Wynn a front man for the Genovese family.

As to this statement, the jury found defendants Barricade and Stuart published with actual malice, despite defendants' reliance on various government reports. In this particular reference, the Catalogue was describing the Book's account of a report prepared by the New Scotland Yard (the "Report"). The 129-page Report had stated that a "strong inference" "can be drawn" that Wynn "has been operating under the aegis of the Genovese crime family." The Report said that while some of the data "is not conclusive," "the connections are so numerous and significant that it would be impossible to accept coincidence as a reasonable explanation."

Of the multitude of issues raised on appeal, the remand ultimately turned on the absence of one word in the jury instruction — "serious." The actual malice instruction allowed a finding "where the publisher entertained doubt as to the veracity of an informant or the accuracy of a report and the defendant failed to make reasonable efforts to investigate." The failure to require "serious doubt" "effectively reduced the standard of proof required to establish malice." Since the verdict hinged on a finding of actual malice, this error was fatal.

Author Dismissal Affirmed

The Court also affirmed the grant of summary judgment for Smith, rejecting plaintiff's argument that by providing the report to Barricade with the intent that it be the basis for publication, Smith should be liable for the Catalogue copy he did not create. The Court held that the Report's language was "much more qualified and couched in statements of investigative opinion than the ultimate phraseology that marks the advertisement published by Barricade." The Court said it was Barricade, not Smith, that "recast the subject of the report into a representation of the contents that is arguably factual rather than mere opinion."

Fair Report Rejected

The issue which rallied 15 *amici* to support the appeal was the application of the fair report privilege. At

(Continued on page 4)

Nevada Supreme Court Reverses and Remands Verdict Against Lyle Stuart

(Continued from page 3)

the time the appeal was briefed, the Nevada Supreme Court had not recognized the fair report privilege in a published opinion. The Court did, for judicial proceedings, in the intervening months, *Sahara Gaming v. Culinary Worker*, 115 Nev. 212, 984 P.2d 164 (1999). In the *Barricade Books* decision, the Court extended the fair report privilege to non-judicial official proceedings.

However, the Court refused to apply the fair report privilege to the Report because it was not public and it was not "official." The fact that the Report was a confidential investigatory report never intended to be made public, took it outside the privilege, the purpose of which, the Court said, "is to obviate the chilling effect on the reporting of statements already accessible to the public."

[T]he Court refused to apply the fair report privilege to the Report because it was not public and it was not "official."

In so holding, the Court relied on dicta in a footnote in a Third Circuit decision, (*Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069. 1092-93 n.26 (3d Cir. 1988)) and rejected the Third Circuit's earlier holding, widely followed, in *Medico v. Time, Inc.*, 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981), which applied the privilege to a summary of an FBI report that identified a prominent political figure as a member of an organized crime family. The fair report privilege has been applied by other Circuits to grand jury proceedings and family court proceedings which, by law, are confidential, non-public proceedings.

The Report was not final since it was not forwarded to the British Gaming Control Board which had requested the Report because it was, the Court said, "substandard and unsubstantiated." The Court held that, therefore, the Report was not "official." To apply the privilege would "allow the spread of common innuendo" and "bring to light information that the government had no intention of releasing."

Amici Argued Need For Privilege

Of course, it is exactly information which the government may not want to be made public which may be critical for the press to bring to the public's attention. If an investigation is deep-sixed because of political connections or because of the incompetence of the investigators, the press should not have to guarantee the truth of the allegations made in the investigation, in order to report on it or the reasons it never became final.

Among the examples cited by *amici* of news stories that might have been dropped or at least delayed was *The Washington Post*'s scoop reporting that the Office of the Independent Counsel was investigating charges that the President of the United States had committed perjury and obstruction of justice. Under the Nevada Supreme Court's decision, to enjoy the security of the fair report privilege, *The Post* would have had to wait eight more months until the Independent Counsel made his final report to Congress and until Congress made the report public. But for every Lewinsky, there is a Wen Ho Lee, an example of how arguably premature reporting of an investigation can be what the Court called "a powerful tool for injury." This issue, therefore, remains the subject of serious legal and journalistic debate.

Privilege for Foreign Report?

Because the Nevada Supreme Court found that the privilege did not apply on the grounds the Report was not "official," the Court did not reach whether the fair report privilege would still apply even though the official action was of a foreign government agency and not a U.S. agency. While the weight of authority clearly favors the extension of the privilege to non-U.S. proceedings, the Fourth Circuit in *Lee v. Dong-A Ilbo*, 849 F.2d 876 (4th Cir. 1988), *cert. denied*, 489 U.S. 1067

(Continued on page 5)

Nevada Supreme Court Reverses and Remands Verdict Against Lyle Stuart

(Continued from page 4)

(1989), refused to apply the privilege to a South Korean governmental action, out of concern that Americans would not have "sufficient knowledge with regard to the due process procedures of foreign courts or the accountability of foreign government agencies."

Given the globalization of the communications industry, this isolationist view is clearly outmoded. Its impact would be most felt by small newspapers and publishers like Barricade Books which would not be able to field reporters to do foreign investigations in remote parts of the world. Here, where it was a report by the justly celebrated Scotland Yard about a major American businessman seeking to operate casinos overseas, the Court appears to have assumed, without deciding, the applicability of the privilege to such foreign governmental actions.

Laura R. Handman, a partner in the New York and D.C. offices of Davis Wright Tremaine LLP, with Rebecca R. Reed, represented amici on this appeal. Defendants were represented by David Blasband of Deutsch Klagsbrun & Blasband LLP in New York and JoNell Thomas in Las Vegas. Stephen Wynn was represented by Barry B. Langberg and Deborah Drooz of the Los Angeles office of Stroock, Stroock & Levan and Schreck Morrison in Las Vegas.

Illinois Court Finds Mancow Radio Broadcasters Are Subject to Illinois Jurisdiction

On January 19, 2001, an Illinois circuit court ruled that the six radio stations broadcasting the syndicated *Mancow Muller's Morning Madhouse* are subject to suit in Illinois, denying the broadcasters' motion to dismiss and motion to quash service. *Dahl v. Muller et al.*, No. 99L6585 (Ill. Cir. Ct., Cook County, Jan. 19, 2001). The *Mancow Muller* program is produced and distributed out of Chicago.

The plaintiff, Janet Dahl, claims that the defendant radio stations published defamatory remarks regarding her during radio and Internet broadcasts of the *Mancow* radio show. Dahl is an attorney in Chicago and the wife of a rival radio personality of Muller's, Steve Dahl. She included as defendants Chicago radio station WKQX-FM (101.1) and six stations in Milwaukee; Des Moines; Phoenix; Albany, Georgia; Monterey, California; and Chico, California.

Dahl's defamation lawsuit, filed in 1999, claims that Mancow's morning show "repeatedly and falsely referred to [her] as engaging in adultery, fornication and sexual promiscuity in the vilest of terms." Specifically, the lawsuit alleges eight separate slanderous comments, including that Muller and an unidentified person who called the station to impersonate Dahl imputed that Dahl was a "slut" and a "whore," claimed that she had a sexually transmitted disease, alleged that Muller was the father of her children, and said that she had sexual relations with a mailman. In addition to the defamation claim, Dahl also alleged false light and intentional infliction of emotional distress.

Analysis Under Illinois Long-Arm Statute

In deciding that the defendants had conducted sufficient business in Illinois as to be subject to jurisdiction there, the court reviewed several factors favoring Illinois jurisdiction.

(Continued on page 6)

Illinois Court Finds Mancow Radio Syndicators Are Subject to Illinois Jurisdiction

(Continued from page 5)

The court noted that the Mancow show is based in Illinois, although the contract the defendants were working under was created through an agreement with Mancow's agent, who is located in California. The court noted that the show aired for almost five hours every weekday in Illinois, and found that the eight allegedly slanderous comments were reviewable by defendants' employees and therefore were not "random, fortuitous, or attenuated," citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 at 474-475.

The court also took notice of other factors that showed that the defendants were subject to the Illinois long-arm statute: the choice of law provision in the contract selecting Illinois law and an Illinois forum, and the warranty provision in the licensing agreement that Mancow would not violate the rights of third parties. The fact that there was such a warranty provision, the court said, evidenced that defendants knew that this type of defamatory conduct might arise when they entered into the contract with the program distributor. In addition, the court ruled that when the defendants agreed to a portion of the licensing agreement stating that defendants would not edit or interfere with the broadcast in any way, they assumed the risk that litigation such as this case might arise in Illinois, since they gave up the right to monitor and prevent possibly defamatory remarks from being published.

The fact that there was such a warranty provision, the court said, evidenced that defendants knew that this type of defamatory conduct might arise when they entered into the contract with the program distributor.

Internet Broadcast Not Sufficient

Although the court found that all of the defendants transacted business in Illinois, it said that five of the six defendants had not conducted tortious activity within the state despite internet broadcasts of the show — in addition to over-the-air — by three of the stations. Two defendants did not broadcast the programs over the Internet, and thus committed no tort there. The other three defendants did broadcast the programs over the Internet, but there was no evidence that they had promoted their web sites or publicized their web site addresses in Illinois in a way that would allow Illinois residents to find them. The court ruled that the only defendant who had conducted tortious conduct in Illinois was The Milwaukee Radio Alliance, a Wisconsin corporation that broadcast the radio show directly into Northern Illinois.

Due Process Considerations

The court said that the finding of jurisdiction in Illinois satisfied due process considerations, because the choice of law and forum provisions within the licensing agreement provided sufficient notice to the defendants that they could be haled into an Illinois court for any disputes arising from the contract. The court also noted that although several defendants had created web sites to broadcast the radio show, those Internet ties alone would not be enough in this case to confer jurisdiction.

Finally, the court was also satisfied that Illinois jurisdiction was compatible with notions of fair play and reasonableness. Both the plaintiff and defendant Muller reside in Illinois. In addition, the court said that judicial economy favors litigating the case in Illinois, since it would be too heavy of a burden on the plaintiff to litigate claims against each of the claims against defendants separately, and it would be unreasonable to force the defendant to litigate the case in every forum where the radio program was broadcast.

Paul M. Levy, Phillip J. Zisook and Brian D. Saucier of the Chicago law firm of Deutsch, Levy & Engel represented the plaintiff. Defendants were represented by Steven P. Mandell of Davidson Mandell & Menkes, and by Brian W. Troglia of Cowen, Crowley, Nord & Staub.

Ohio Appellate Court Upholds Dismissal of Claims Against Radio Station and Talk Show Host

Allegations of Biased Sources and Conspiracy Insufficient to Prove Actual Malice

By Jill Meyer Vollman

In a long-awaited and lengthy opinion, an Ohio Court of Appeals upheld the right of the media to scrutinize the qualifications of and challenge local government officials' fitness for office. In doing so, the court upheld a summary judgment dismissal of the libel, conspiracy to defame, and infliction of emotional distress claims asserted against Lima, Ohio talk radio station WIMA, and its talk show host, Dennis Shreefer.

Challenged Public Official

In *Bacon v. Kirk*, Case No. 1-99-33 (October 31, 2000), Clayton Bacon, a former elected County Engineer of Allen County, Ohio, brought charges against a number of defendants for defamation, conspiracy to defame, infliction of emotional distress, and malicious prosecution (malicious prosecution was not asserted against WIMA or Shreefer). At the core of Bacon's complaints was the claim that he was defamed on WIMA's local talk show, *Topical Heatwave*, by talk show host, Dennis Shreefer.

On a regular basis over an extended period of months, Shreefer openly questioned Bacon's ethics, discussing the appearance that Bacon was using his political position to financially benefit his related private business. Shreefer challenged Bacon to defend some of his actions and repeatedly called for his resignation.

Bacon was the elected part-time County Engineer at the time who, on the side, was running a private land development business. Shreefer, with the assistance of many sources — including a competitor who Bacon claimed was obviously biased — delved into volumes of records and talked to many different people, piecing together questionable private land deals that Bacon closed, which appeared to have been made more lucrative for him privately by his approvals of county fund expenditures at or near the sites. Shreefer also solicited on-air comments from listeners who had dealings with Bacon or questioned his conduct otherwise.

After Shreefer's comments and the wide-spread public discussion on *Topical Heatwave* took off, Bacon was investigated by special investigators appointed by the County Sheriff and eventually was indicted by a grand jury on charges relating to his conduct in office and private development activities. Shortly after the appointment of the special investigators, Bacon sued WIMA and Shreefer alleging defamation. Bacon was acquitted of any criminal wrongdoing. Shortly thereafter, he was defeated in his bid for re-election to the position that he had held for twenty-two years.

Claimed Conspiracy to Defame

The claim Bacon asserted against WIMA and Shreefer accused Shreefer and the radio station of conspiring with their co-defendants — the Allen County Sheriff, the Allen County Recorder, and a private, but well-known resident of the county (the alleged biased source) — to "destroy" Bacon's reputation, remove him from office, and move forward with their plan to damage other members of Bacon's local political party. Bacon included allegations that WIMA brought Shreefer to the station for the express purpose of instituting a public campaign to destroy Bacon's reputation and get him out of office. Throughout and after that time period, Shreefer continued to question Bacon's activities, despite legal threats and other challenges from Bacon and his supporters.

The appellate court (after listening to volumes of tapes of the broadcasts at issue) described the show and the speech at issue this way:

> The basic format of the show is familiar to most radio listeners: a host employs an audience call-in-format where listeners are en-

(Continued on page 8)

Ohio Appellate Court Upholds Dismissal of Claims Against Radio Station and Talk Show Host

(Continued from page 7)

couraged to call in and ask questions, give their opinion, debate, and/or solicit the host's opinions about local, state and national politics, elected public officials, and other matter of public interest . . . . Like many talk shows, *Topical Heatwave* is a form of entertainment designed to capitalize on the public's interest in politics and matters of public concern. Shreefer is known for his close examination of issues of local concern. Shreefer is an opinionated, controversial talk show host whose style is free-wheeling, jocular, often abrasive, and rude. . . . According to Bacon, Shreefer is the local 'shock jock.'

Shreefer is an opinionated, controversial talk show host whose style is free-wheeling, jocular, often abrasive, and rude. . . .

No Actual Malice

After the trial court dismissed the Bacons' claims, finding no evidence of actual malice, the Bacons appealed. On appeal, the appellate court undertook a very detailed review of the record and analysis of Bacon's claims under the *New York Times* actual malice test, as Bacon was undisputedly a public official. Finding that Bacon failed to raise any genuine issues of material fact regarding the existence of actual malice, despite claims of known biased sources and claims of conspiracy for the purposes of political destruction, the appellate court upheld the dismissal of the defamation claims and noted:

> The ability of Shreefer to express his views and debate with his listeners whether Bacon should hold a public office while being investigated for ethical violations and his subsequent acquittal on two misdemeanors cut to the very core of first amendment principles of free speech and debate on public officials and public issues.

The court reviewed the particular statements alleged to be defamatory, finding "the central theme running throughout the majority of the broadcasts is Shreefer calling for Bacon to resign based upon the appearance of or the perception of a conflict of interest and the possible abuse of his political power as county engineer. . . . Shreefer constantly reminded his listeners that he was stating his opinion and that what Bacon had done was probably not illegal."

After an analysis of the "evidence" that the Bacons claimed constituted the necessary clear and convincing evidence of actual malice, the court stated:

> Conspicuously lacking from the Bacons' arguments are any of the usual bases for inferring the guilty state of mind of a defendant. . . . The Bacons do not make any contentions that these statements are so inherently improbable that only a reckless man would have put them into publication, or that they are based upon a fabricated story, or that they are based wholly upon an unverified anonymous caller. . . . Nothing referred to by the Bacons . . . indicates Shreefer knowingly published false information or acted with reckless disregard of the truth. Shreefer had a reasonable basis upon which to base his statements.

Therefore, held the court, no actual malice was possible as a matter of law and, as a result, the Bacons' claims against WIMA and Shreefer, including the infliction of emotional distress claims, failed.

Richard M. Goehler and Jill Meyer Vollman of Frost Brown Todd LLC represented the media defendants in this case.

New Jersey Court Extends Public Interest Privilege

By Peter G. Banta

A recent appellate division decision rejected a libel suit by a retail business against a newspaper on the grounds of the common law public interest privilege *(Finch and Countryside Oil Corp v. The New Jersey Herald*, et al., (No A-569-99, App. Div. Nov. 20, 2000). The plaintiffs were Countryside Oil Corp., a retail fuel oil dealer, and its principal owner. The defendants were a daily newspaper in rural Sussex County, New Jersey, a reporter and several editors. The plaintiff company for several years had ongoing federal tax problems which had not been previously reported. A Notice of Public Sale by the IRS was then published as to a parcel of real estate owned by the plaintiff oil dealer.

Report of IRS Sale

The newspaper wrote an article about the pending sale, but the article stated in effect that the whole company would be sold, not just a piece of real estate. The article appeared the day of the sale, in November 1997, early in the winter heating season. According to the plaintiffs, their customers erroneously believed the company was going out of business. The cash customers stopped ordering and the prepaid customers, under advance payment plans, all demanded at once to have their tanks filled.

The reporter had spoken to the IRS representative, and looked up federal tax liens in the local filing office. She had left messages for the principal of the oil company at his office, but these were not returned.

Paper Repeats Error

The sale was postponed for six weeks, and a follow-up story a week after the original story perpetuated the error. Plaintiffs still had not called the newspaper back. The follow-up article referred to some of the frantic efforts by customers to get oil they had already paid for.

The plaintiffs sought a retraction. The newspaper printed a correction a week later acknowledging it had referred to sale of the business when only a real estate parcel was involved. It also referred to the oil company's problems with its customers.

The oil company and principal sued the newspaper, reporter and editor. Also named were several competing fuel oil dealers which allegedly falsely claimed the plaintiff oil company was out of business; these claims were settled or dismissed.

Origins of the Privilege

The newspaper defendants moved for summary judgment on the basis of the New Jersey common law public interest privilege. First announced in 1986 by the New Jersey Supreme Court, it protected statements by a newspaper about a sale of bottled water on the basis that bottled water implicated public health concerns, which affected the public interest. *Dairy Stores, Inc. v Sentinel Publishing Co.*, 516 A. 2d 220 (1986). In a separate case, the privilege was applied to an article about a bank and a loan to its former president on the basis that banking was highly regulated, and therefore affected the public interest. *Sisler v. Gannet Co., Inc.*, 516 A. 2d 1083 (1986).

In 1995, the New Jersey Supreme Court rejected a lower court ruling that any retail business doing business with the general public affected the public interest. *Turf Lawnmower Repair v. Bergen Record Corp.*, 655 A. 2d 417 (1995), cert. den. 516 U.S. 1066 (1996). The Supreme Court ruled for the newspaper, because the activities of the business, if true as alleged, violated the Consumer Fraud Act, which in turn involved the public interest.

Public Interest in Taxes and Fuel

In the current case, the newspaper defendant argued that the tax problems of a retail business, first publicized in a legal advertisement, raised a public

(Continued on page 10)

NJ Court Extends Public Interest Privilege

(Continued from page 9)

interest question as to the business's ability to serve its customers. Also, home heating oil was an essential element, as a source of heat for shelter, and the financial problems of a vendor of heating oil involved the public interest.

The plaintiffs objected that reference in the motion to the prepaid oil plan and its problems were irrelevant, since it was not discussed in the two articles under suit. Plaintiffs argued that the hardships to customers unable to get oil that they had paid for was the result of the false newspaper article drying up the company's cash flow.

After extensive argument, the trial judge granted summary judgment to the newspaper defendants. He found that the financial problem of the business, requested by a published legal advertisement and filed federal tax liens was a subject of public interest. He also held that the nature of the business, sale of home heating oil to residential customers, many of limited means and elderly, also involved the public interest.

The case was appealed to the Appellate Division; the arguments below were repeated to the appellate court. In November 2000, in a ten page, unpublished opinion, the court affirmed the rulings below. There never was a serious issue before either court as to whether the reporter acted with actual malice or reckless disregard of the truth, which if proven would have overcome the privilege.

The deposition of the reporter made clear that she misunderstood the nature of the sale despite speaking with a representative of the IRS. She had reached out to the oil company for comment but the calls where never returned. She had never heard of the oil company before this article. She was assigned the article because she covered the courthouse "beat," but had little experience with lien filings and tax sales.

Although the New Jersey Supreme Court has rejected a blanket public interest privilege for articles about retail businesses, the lower courts will extend the limited privilege where a proper case has been made. New Jersey Courts are still encouraged to grant summary judgement in defamation cases.

Peter G. Banta is the author of the New Jersey Chapter of LDRC's 50 State Survey of Libel Law and is a senior partner of the Hackensack, New Jersey law firm of Winne, Banta, Rizzi, Hetherington & Basralian, P.C. Mr. Banta was attorney for the newspaper defendants in the New Jersey Herald litigation discussed above. He was also counsel for the Bergen Record newspaper defendants in the 1995 New Jersey Supreme Court Turf Lawnmower decision discussed in the article.

Paul Weyrich: The Robespierre of the Right?

D.C. Circuit Finds Much of New Republic Article is Not Libel

By Alexandre de Gramont and Bridget Allison

On January 5, 2001, the United States Court of Appeals for the District of Columbia affirmed most aspects of the District Court's dismissal on Rule 12(b)(6) grounds of Paul Weyrich's libel complaint against The New Republic, Inc. and several of its contributors and editors. *Weyrich v. The New Republic, Inc.*, 235 F.3d 617 (D.C. Cir. 2001). *See also LibelLetter*, August 1999 at 11. Despite remanding several limited aspects of Weyrich's claim to the District Court, the D.C. Circuit's decision reaffirms and reinforces the high level of protection afforded by the First Amendment to political commentary and criticism.

The Article at Issue

Paul Weyrich is a prominent conservative political activist, who, among other accomplishments, founded the Heritage Foundation and the National Empowerment Television cable network. Weyrich's complaint in this case arose from a cover article profiling him in the October 27, 1997 edition of *The New Republic*, entitled "Robespierre of the Right: Paul Weyrich and the Conservative Quest for Purity."

The article chronicles Mr. Weyrich's career as a key player in conservative politics inside Washington, and discusses his relationship with a variety of prominent figures, including Newt Gingrich, Orrin Hatch, Trent Lott, John McCain, and the late John Tower. The article theorizes that Mr. Weyrich exemplifies a type of zealotry that is commonplace in — yet also harmful to — the conservative movement from which it arises. According to the article, Mr. Weyrich "has become, in many respects, a case study of the conservative mind — a metaphor for the right's deep-seated inability to accept the compromising nature of power."

The article further suggests that Mr. Weyrich has become "a kind of K Street Robespierre," a reference to the famed French revolutionary who, in his quest for ideological purity, unleashed the Reign of Terror. The magazine's cover features an illustration of Mr. Weyrich operating a guillotine, surrounded by the heads of Jack Kemp, Trent Lott, Newt Gingrich, John Tower, and others. A second illustration accompanying the article depicts Mr. Weyrich gleefully eating conservatives off a skewer, evoking the article's supertitle, "What I ate at the revolution."

A key metaphor used throughout the article involves the self-destructive tendencies — and the "suspicion, pessimism, and antagonism" — that commonly accompany revolutionary movements. Consistent with its thesis of Mr. Weyrich as a case study of the conservative mind, the article uses the same metaphor in describing him, for example: "[W]hile his friends were still basking in power, Weyrich began to experience sudden bouts of pessimism and paranoia — early symptoms of the nervous breakdown that afflicts conservatives today."

Weyrich's Complaint

Mr. Weyrich filed suit in state court in Orlando, Florida in September 1998 against The New Republic, Inc., author David Grann, editor-in-chief Martin Peretz, and cartoonists Taylor Jones and Vint Lawrence. The complaint alleged counts of libel, invasion of privacy/false light, and civil conspiracy. The heart of the complaint was its allegation that the article and cartoons falsely portrayed Mr. Weyrich as "mentally unsound and paranoid." The complaint also alleged that the Defendants' conduct was part of a "conspiracy" against "notable conservative persons and organizations," including Justice Antonin Scalia and Larry Klayman — the Chairman of the conservative group Judicial Watch, who is also Mr. Weyrich's counsel in this lawsuit.

Defendants removed the case from Florida state court to the U.S. District Court for the Middle District of Florida, based on diversity jurisdiction under 28 U.S.C. § 1332. Defendants then filed a motion to transfer the action to the U.S. District Court for the District of Columbia pursuant to 28 U.S.C. §§ 1404 (transfer for the convenience of the parties and witnesses) and 1406 (transfer based on improper venue), or, in the alternative, a motion to dismiss the individual Defendants for lack of personal jurisdiction pursuant to Federal Rule of

(Continued on page 12)

D.C. Circuit Rules in Favor of *the New Republic* On Most Libel Claims

(Continued from page 11)

Civil Procedure (FRCP) 12(b)(2). Additionally, Defendants moved to dismiss the case in its entirety under FRCP 12(b)(6) (failure to state a claim upon which relief can be granted).

On May 17, 1999, the Florida federal court granted Defendants' motion to transfer the case to the District of Columbia on section 1404 grounds, without reaching any of the other issues raised in Defendants' motions. Once transferred to the District of Columbia, the case was assigned to Judge Thomas Penfield Jackson, who, following oral argument, granted Defendants' Rule 12 (b)(6) motion to dismiss in its entirety. Judge Jackson concluded that neither the article as a whole — nor any of the statements contained in the article, when viewed in the context of the article — were capable of supporting a claim for defamation.

The Decision of the Court of Appeals

On October 11, 2000, a panel of the D.C. Circuit consisting of Chief Judge Harry T. Edwards, Senior Circuit Judge Laurence H. Silberman, and Circuit Judge Judith W. Rogers, heard oral argument. Larry Klayman of Judicial Watch argued on behalf of Mr. Weyrich. Andrew H. Marks of the D.C. office of Crowell & Moring LLP argued for *The New Republic* defendant-appellees.

The D.C. Circuit issued its unanimous opinion in a decision dated January 5, 2001. Writing for the Court, Chief Judge Edwards rejected the heart of Weyrich's claim - *i.e.*, "that the article attributes to him [the] diagnosable mental illness" of paranoia. 235 F.3d at 620. The Court of Appeals reiterated the principles set forth by the Supreme Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990): "[F]or a statement to be actionable under the First Amendment, it must at a minimum express or imply a verifiably false statement about [the plaintiff]." *Id*. at 624 (citing *Milkovich*, 497 U.S. at 19-20). The Court of Appeals held that in this case:

> "Paranoia" is used in the article as a popular, not clinical, term, to embellish the author's view of Weyrich's political zealotry and intemperate nature. The author's musings on these scores are protected political commentary, for, in context, it is clear that his comments are meant only to deride Weyrich's political foibles and, relatedly, to attack what the author sees as the inability of the conservative movement "to accept the compromising nature of power."

Id. at 620. The Court therefore concluded that "these comments cannot reasonably be understood as verifiably false, and, therefore potentially actionable, assertions of mental derangement." *Id*.

Hyperbole, Not Diagnosis of Paranoia

The D.C. Circuit specifically distinguished *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), in which the Court of Appeals for the Second Circuit upheld a defamation judgment against media defendants for reporting that Senator Barry Goldwater had a paranoiac personality. The authors in *Goldwater* published what was intended to be a "psychobiography" of Senator Goldwater; it offered a medical diagnosis of a psychological illness.

In *Weyrich*, by contrast, "references to 'bouts of pessimism and paranoia,' 'habits of suspicion, pessimism, and antagonism,' and the fact that other conservatives have acted 'as nutty as Weyrich,' cannot be so understood." 235 F.3d at 624. In the context of the entire article, the D.C. Circuit concluded, these phrases were protected as rhetorical hyperbole and expressions of opinion. *Id*. at 625.

The D.C. Circuit also held that the two cartoons accompanying the article could not be reasonably construed as stating "verifiable facts" about Mr. Weyrich, and were therefore protected by the First Amendment. *Id*. at 626.

The D.C. Circuit further held that a number of allegedly defamatory statements contained in the article were not reasonably capable of defamatory meaning —

(Continued on page 13)

D.C. Circuit Rules in Favor of *the New Republic* On Most Libel Claims

(Continued from page 12)

even if they could be taken as stating "actual facts" about Mr. Weyrich. For example, Mr. Weyrich claimed that he had been defamed by the article's assertions that Newt Gingrich refused to sign another contract with National Empowerment Television, that Trent Lott had revoked his Capitol parking privileges, and that John McCain would not speak to him. According to the D.C. Circuit, "even if false, these facially innocuous statements are not themselves defamatory" — that is, they do not make the plaintiff appear "odious, infamous, or ridiculous." *Id*. at 627 (quoting *Howard v. Best*, 484 A.2d 958, 988 (D.C. 1984)).

One Possibly Factual Claim

The D.C. Circuit reversed Judge Jackson's dismissal of the case in only one limited respect. According to the Court of Appeals, at least one anecdote contained in the article was capable of both defamatory meaning and being understood as stating actual facts about Mr. Weyrich. As such, the Court of Appeals concluded that Mr. Weyrich's claims relating to at least this anecdote were not appropriate for resolution at the pleading stage of the case, *i.e.*, on a Rule 12(b)(6) motion to dismiss. *Id*. at 627.

The particular anecdote identified by the Court describes Mr. Weyrich's response to a perceived betrayal by White House staffer Bill Pascoe. According to the article, Mr. Weyrich "snapped," erupted in a "volcano of screaming," "froth[ed] at the mouth," and "dispatched a letter to Pascoe's fiancée, questioning Pascoe's loyalty and implying that he was unfit for marriage." *Id*. at 627 (quoting Article at 22).

The Court noted that "to be actionable, the story must be materially false. If the author has merely hyperbolized, provided colorful rhetorical description of appellant's anger, that will not suffice." *Id.* In other words, Mr. Weyrich must overcome a "number of difficult hurdles" to proceed to trial on a claim concerning such an anecdote, *e.g.*, that it was false; that it defamed Mr. Weyrich; and that it was made with "actual malice." *Id*. at 628. (Mr. Weyrich concedes that he is a "public figure" for purposes of defamation law.)

Limited Discovery on Remand

In remanding the case in this limited respect, the D.C. Circuit recognized that "trial courts are understandably wary of allowing unnecessary discovery where First Amendment values might be threatened." *Id*. at 628. Accordingly, the D.C. Circuit suggested that the District Court "limit discovery to the threshold issue of falsity, thereby delaying and possibly eliminating the more burdensome discovery surrounding evidence of 'actual malice.'" *Id*. (citation omitted).

Alexandre de Gramont and Bridget Allison practice media law in the Washington, D.C. office of Crowell & Moring LLP, which represents the defendants in the Weyrich case.

Virginia District Court Dismisses Libel By Implication Case Against Redskins Owner

Victory for Defendant, With One Troubling Footnote

On February 6, a Virginia district court dismissed a libel by implication suit brought by two former groundskeepers for the Washington Redskins. In their suit, the plaintiffs alleged that their former employer, Redskins owner Daniel Snyder, had defamed them in an interview published in a national sports magazine. *Jenkins v. Snyder*, No. 00-2150-A (D. Va. Feb. 6, 2001).

Father and son John Jenkins, Sr. and John Jenkins, Jr. had been employed at Redskin Park, the team's practice facility, and were two of three groundskeepers terminated from their jobs as part of an organizational overhaul in 1999 after Snyder became the new owner of the Redskins. Snyder discussed the reconfiguration of personnel, and de-

(Continued on page 14)

Virginia District Court Dismisses Libel By Implication Case Against Redskins Owner

(Continued from page 13)

fended his firing of more than two dozen employees, in a November 15, 1999 article in *Sports Illustrated*.

In the article, Snyder is quoted as saying, "'At Redskin Park the fields were in bad shape. There were three guys trying to kill the players with their crappy fields, so I brought in the head of the grounds crew at the stadium to oversee the fieldwork. Shame on me for trying to make the fields perfect.'"

Rejected Implied Libel Claims

Taking the statement most literally, plaintiffs claimed that Snyder's statements were defamatory because they implied that the groundskeepers were unfit to perform their duties, carried an intent to hurt the players, and were responsible for actual injuries to the players. The court noted that the standard for libel by implication cases in Virginia is that the "language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference," citing *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 at 1092-93 (4th Cir. 1993).

The court examined each possible implication that could reasonably be understood from the statement, finding them all to be non-defamatory.

The court first found that Snyder's implied dissatisfaction with the "crappy" fields was a "subjective and unverifiable statement of opinion, making it non-actionable as a matter of law." Similarly, Snyder's implied displeasure with the Jenkins' job performance was also protected opinion, despite the Jenkins' insistence that they were not to blame for the poor conditions, and regardless of whether they were actually at fault.

As for the inference that the plaintiffs were responsible for making the fields "crappy" and that they created or failed to fix potentially dangerous conditions because they had been reckless in performing their duties, the court held that Snyder's statement could not reasonably support such an inference. The court found the phrase "trying to kill someone" to be protected hyperbole that "negates any serious accusation of unfitness or wrongdoing."

The court concluded that since it would have to stretch the context and meaning of the statement in order to support the inference alleged, the court would not participate in guessing what Snyder meant, absent a clear signal that he endorsed such an inference.

Curious Footnote on Public Concern

Such a decision would have signaled a clear victory for the Virginia defense bar, were it not for one troubling afterthought of the court. In neglecting to go so far as to adopt the defendant's suggestion that the statements should automatically be characterized as protected opinion because they were subjective "sports talk" during an interview, the court issued a footnote that is cause for concern.

In it, the court rejected the defendant's argument that the statements were protected because they involved matters of "public concern." According to the court, "[s]tatements made by an NFL owner, published in a nationally distributed sports magazine and involving a national football team are not necessarily matters of public concern," since "[p]laintiffs and many other fired employees are private individuals who worked outside the local and national spotlight." Since Snyder was not discussing a referee call or a player's performance but merely commenting on his dissatisfaction with "the organization and some of its employees," the court said, the matters did not rise to the level of public concern.

Plaintiffs had sought an injunction to force Snyder to issue both a retraction and compensation for damages to their reputation and for mental distress.

Laura R. Handman and Connie Pendleton of Davis Wright Tremaine, LLP represented the defendant. Benjamin DiMuro and Jonathan Mook of DiMuro, Ginsgerg & Mook, P.C. represented the plaintiffs.

CBS and 48 HOURS Win Summary Judgment on Libel and Privacy Claims in Texas

By Mike Raiff

A Texas federal judge has entered summary judgment for CBS, its reporters, and its producers in a case involving 48 HOURS's report on the "Roby 43" – the 43 West Texans who won a $46 million lottery jackpot. The ex-wife of one of the Roby 43 and her daughter sued CBS, anchor Dan Rather, correspondent Bill Lagattuta, executive producer Susan Zirinsky, and producer Chuck Stevenson for libel and invasion of privacy. Federal Judge Robert B. Maloney dismissed all claims brought by both plaintiffs. *Green v. CBS Broadcasting, Inc.*, et al., No. 3:98-CV-2740-T (N.D. Tex., Dec. 19, 2000).

The Roby Millionaires

In 1996, 43 people from the small west Texas farm town of Roby won $46 million in a Texas lottery. The town, struggling at the time, struck it rich and made headlines around the world. Over the next year, 48 HOURS chronicled the events and the dramatic changes in Roby. Following the lives of lottery winners and the lives of those who did not win, 48 HOURS explored the age-old question: "Does money buy happiness?"

For one winner – Lance Green – the events that unfolded during that year answered this question with a clear "No." His life changed dramatically as the cotton gin hand found himself in the spotlight, went through a divorce, campaigned unsuccessfully for mayor, and faced criminal charges of sexual abuse. Already separated from his wife (Plaintiff Mitzi Green), Lance was within days of finalizing his divorce when he won the lottery. Then, in the words of Mitzi's divorce lawyer, "all bets were off": Mitzi demanded part of the lottery winnings in connection with the divorce settlement. During the divorce proceedings, Lance accused Mitzi of denying him access to his step-daughter in order to get him to give her money and pay for expenses. Mitzi denied the charges, and ultimately they reached a financial settlement that awarded Mitzi some of the lottery proceeds.

Lance launched himself into local politics, ran for mayor of Roby, and lost by only two votes. Around the time of the election, Lance's life took perhaps the sharpest turn. Lance was accused of sexually abusing his step-daughter and was indicted. The sexual abuse charges and indictment of the lottery winner/mayoral candidate became big news in Roby. Lance denied the abuse charges and defended himself by counter-charging that his ex-wife made up the allegations to get more money from him, perhaps through a later civil lawsuit.

The 48 HOURS Broadcast

In January 1998, approximately 13 months after the lottery win, the 48 HOURS broadcast aired, reporting on the changes in the lives of a number of residents in Roby over the course of the intervening year – some of those who won the lottery, their families and friends, and others who did not win a dime. As for Lance, the broadcast reported on his divorce dispute, the charges and countercharges, the election, the indictment, and Lance's defense to the indictment. The broadcast also included portions of an on-camera interview with Lance in which he showed 48 HOURS some of his personal pictures of his step-daughter he was accused of sexually abusing.

The Lawsuit and Summary Judgment Motion

Later in 1998, Lance's ex-wife, Mitzi Green, and her daughter sued for libel and invasion of privacy. For their libel claims, Plaintiffs challenged several excerpts from the broadcast and claimed that the media defendants falsely accused her of lying, being a "gold digger," and extorting money from Lance Green. For their privacy claims, the plaintiffs primarily challenged the inclusion of the step-daughter's name and pictures in the 48 HOURS broadcast.

The media defendants filed a motion for summary judgment arguing, among other things, that the broadcast was a classic case of reporting on allegations, charges, denials, and countercharges. As explained in the motion, the media defendants reported on Lance and Mitzi's cross-allegations without adopting those allegations as their own.

As for the privacy claim, the media defendants submitted evidence showing that the sexual abuse allegations and the step-daughter's identity as the alleged victim were in no way private facts. To the contrary, the

(Continued on page 16)

CBS and 48 HOURS Win Summary Judgment

(Continued from page 15)

fact that Lance's step-daughter was the alleged victim of sexual abuse was big news in Roby and contained in public court records, including records filed by Mitzi herself. Thus, the media defendants argued that plaintiffs could not satisfy an essential element of their private-facts claim – that defendants disclosed "private facts" about the plaintiffs. Further, the media defendants argued that the broadcast's disclosure of the identity of the alleged victim was protected by the First Amendment under the *Cox Broadcasting v. Cohen* line of cases and the *Florida Star v. B.J. F.* / *Smith v. Daily Mail Publishing* line of cases.

The District Court's Opinion: Libel

Before addressing the merits, the Court first granted the media defendants' motion to strike the affidavit of plaintiffs' journalism expert. The plaintiffs' expert, Dr. Frederick R. Blevens, had submitted an affidavit opining that the defendants had defamed the plaintiffs, invaded their privacy, acted negligently, and acted with actual malice. In striking the affidavit, the district court agreed with the media defendants that the expert's opinions were nothing more than inadmissible legal opinions and legal conclusions.

The Court then turned to the defamation claims. In addressing the third-party allegations (e.g., the allegations made by Lance and his criminal defense attorney), the Court concluded that the media defendants did not need to demonstrate that the underlying allegations were substantially true. Rather, when the challenged statement is a third-party allegation, the Court determined that the defendants merely need to show that the third-party allegations were in fact made. The Court agreed that the media defendants had met their burden of showing that they were simply reporting on charges and counter-charges between Lance and his ex-wife.

The Court further rejected plaintiffs' claim that the broadcast omitted certain facts favorable to her which would have undermined Lance's allegations and bolstered her own allegations against Lance. The Court explained that defendants' editorial decisions and news judgments concerning the content of the broadcast should not be subject to review by the Court. The Court noted that the plaintiffs could not prevail by simply suggesting that the media defendants should have included other, more favorable information about them in the broadcast. Finally, in addressing plaintiffs' defamation claims, the Court rejected plaintiffs' attempts to establish a defamation claim through "libel by implication."

[W]hen the challenged statement is a third-party allegation, the Court determined that the defendants merely need to show that the third-party allegations were in fact made.

No Privacy Claim on Public Facts

As for the privacy claim, the Court recognized that "the publication of facts, no matter how intimate or embarrassing which are a matter of public record, does not set forth a cause of action for invasion of privacy." The Court then concluded that the step-daughter's name and likeness in and of themselves were not private facts, and that her identity as the alleged victim of sexual abuse also was not a private fact.

The Court noted that the sexual abuse allegations were discussed in open court and presented in court documents. The Court further explained that the fact that the media defendants published the information globally was immaterial – once the fact is no longer "private" it does not matter whether the media publishes the information globally or to a single individual.

Mitzi Green and her daughter have filed their notice of appeal to the United States Court of Appeals for the Fifth Circuit, while the media defendants seek to recover their court costs from the plaintiffs.

Mike Raiff is a partner at Vinson & Elkins L.L.P. in Dallas, Texas. Susanna Lowy and Anthony Bongiorno of CBS Inc. and Tom Leatherbury, Mike Raiff, and Dan Petalas of Vinson & Elkins L.L.P. represented all of the defendants in the Green case.

Federal Court Reaffirms First Amendment Protection for Newspaper Editorials

By Daniel Klau and Mark Kravitz

In a recent decision dismissing a libel claim against a local newspaper, its editor and a reporter, the United States District Court for the District of Connecticut reaffirmed that editorials commenting on true, disclosed facts enjoy absolute protection under the First Amendment. *See Colon v. Town of West Hartford*, 2001 WL 45464 (D.Conn., Jan. 5, 2001).

Critical Editorial

The editorial, which appeared on the "Opinion & Comment" page of the *West Hartford News*, chastised the plaintiff, a local police officer, whose name did not appear in the editorial, for his rudeness and insensitivity while attempting to calm a young female victim of a male flasher.[1] In particular, the editorial criticized the officer for using the term "woody" to refer to the flasher's erection. The author of the editorial, a reporter for the paper, was also the wife of the police chief of the department in which the plaintiff had worked.

Before the editorial was published, the police department had reprimanded the plaintiff for the incident. In response, the plaintiff filed a discrimination complaint with the state Commission on Human Rights and Opportunities (CHRO), alleging that the police department had discriminated against him because he was Hispanic. The plaintiff admitted in his CHRO complaint that he had used the offensive term while speaking with the victim. The CHRO complaint, along with the officer's admission, were reported in a different newspaper a week before the editorial in question.

Allegedly Defamatory

Plaintiff sued the newspaper, the reporter, the local police department and its police chief under a variety of theories, including claims under 42 U.S.C. § 1983, Title VII and state law claims for defamation and intentional infliction of emotional harm. Each of the plaintiff's claims against the newspaper, its editor and reporter were premised on his claim that the editorial was defamatory.

In particular, the plaintiff challenged as defamatory three statements that appeared in the editorial: 1) "what he said was something to the effect that the victim must have excited the man;" 2) "[the plaintiff] doesn't think he should have gotten in trouble for making such a comment. . . What galls me most of all is that he thinks what he said was no big deal, not worth getting in trouble for;" and 3) "[the plaintiff] has filed a complaint with the [CHRO] because he thinks that he has been punished for actions based on the fact that he is Hispanic." The court rejected the plaintiff's claim that these statements were defamatory. "After considering the article in its entirety and in the context in which it was published," the court concluded the writer was "making a statement of opinion, not fact, and as such, the article enjoy[ed] an absolute privilege." 2001 WL at * 4.

Pure Opinion

The court began its analysis by recognizing that expressions of pure opinion are, in its words, "unqualifiedly protected by the First Amendment." *Id. citing Gertz v. Robert Welch*, Inc., 418 U.S. 323 (1974). The court defined "pure opinion" as a "personal comment about another's conduct, qualification or character that has some basis in known or disclosed facts . . . However, an opinion that criticizes or comments on facts that are not stated or known is not protected as pure opinion." *Id.* The court also emphasized that an "author is constitutionally permitted to use exaggeration, hyperbole, ridicule, sarcasm, stylistic touches and figurative expressions to embellish disclosed facts. Id. at *5 *citing Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

In concluding that this editorial constituted "pure opinion," the court focused on the following factors. First, the article appeared on a page entitled "Opinion & Comment." Second, the editorial expressly stated that its author was "commenting on" and "taking a stand" on the actions and conduct of the unnamed officer. According to the court, "This type of cautionary language is a strong signal to an average reader that he is reading the writer's opinion, not statements of fact." *Id.* at *5.

Third, there was nothing in the tenor of the language used that would cause a reader to believe that the remarks went beyond the expression of an opinion into the realm of fact. Indeed, much of the language the plaintiff found offensive would not be taken literally by a reasonable reader,

(Continued on page 18)

Federal Court Reaffirms First Amendment Protection for Newspaper Editorials

(Continued from page 17)

or represented "stylistic device[s] designed to convey her opinion."

Finally, and most importantly, the author disclosed the factual basis for her opinion, and the plaintiff himself had admitted the substance of those facts.

Other Claims Fall With Libel

The court also dismissed the plaintiff's claims for intentional infliction of emotional distress and for violation of the Connecticut Fair Employment Practices Act. The defendants argued that both of those claims were merely derivative of the defamation claim and should suffer the same fate. The court agreed. Relying principally on *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the district court held that the plaintiff could not "do an end run around the First Amendment by recasting a meritless defamation claim against the media as another cause of action." 2001 WL at *6. To hold otherwise would "circumvent the established and carefully balanced framework of constitutional and state libel law." *Id.* at *7.

The court also dismissed the plaintiff's § 1983 claim against the newspaper and its reporter. In his complaint, plaintiff baldly alleged that these defendants had "conspired" with the police chief and the police department to deprive the plaintiff of his constitutional rights by publishing the allegedly defamatory editorial. Defendants challenged this claim on two grounds. First, like the emotional distress claim, it was derivative of the failed defamation claim. Second, although a private party involved in a conspiracy with state actors can be liable under § 1983, a plaintiff must allege specific facts showing an agreement or meeting of the minds between the state actor and the private actor to engage in a conspiracy to deprive the plaintiff of a constitutional right. *See Marion v. Groh*, 954 F. Supp. 39, 45 (D. Conn. 1997). Conclusory allegations of such an agreement are not enough. *See e.g., Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993). The court agreed with the defendants that the plaintiff had offered only conclusory allegations in support of the existence of a conspiracy. As a consequence, the court dismissed plaintiff's action against the media defendants in its entirety.

[1]The full text of the editorial stated:

> Okay, this column may upset some people, so I want to prepare you.
>
> I want to make it clear what I am taking a stand on here.
>
> A police officer has filed a complaint with the Commission on Human Rights and Opportunities because he thinks that he has been punished for actions based on the fact that he is Hispanic.
>
> Okay, he's got a right to file a complaint, and he's got a right to his opinion, and I am not commenting at all on whether or not his punishment was justified.
>
> I am also not commenting on whether his complaint is valid.
>
> That isn't my purvue, and as they say, "I ain't touching that one."
>
> However, I am taking hard, serious, close to outraged offense at something he has included in his complaint.
>
> This officer received some sort of reprimand for using the word "woody," which refers to a male erection, to be blunt, in talking to the victim of a flasher.
>
> This was a young woman to whom a man exposed his private body parts.
>
> This police officer doesn't think he should have gotten in trouble for making such a comment.
>
> Maybe to some people it doesn't seem like a big issue. But if you are the victim and you are upset by it, you are entitled to your feelings.
>
> Certainly in this day and age, we have all learned that it is wrong to make a victim feel responsible for sexual harassment or sexual assaults, right? Especially in jobs like those of a police officer, where sensitivity training has been incorporated into the job for some time, a person is supposed to know how to handle a victim.
>
> But not this guy. What he said was something to the effect that the victim must have excited the man.
>
> I don't know about you, but I can draw the next inference easily – his behavior must be excused by the fact that he couldn't help his reaction to her beauty....
>
> And this police officer was way out of line to make such a rude, thoughtless and insensitive comment to the victim.
>
> What galls me most of all is that he thinks what he said was no big deal, not worth getting in trouble for.
>
> That kind of comment is simply unacceptable, particularly from a professional who should know better ...
>
> I'm offended, outraged, insulted, disappointed and, frankly embarrassed for the department, and I think every woman in town, and every man in town who cares about a woman, should be upset at the very least.
>
> With this man's badge comes a great deal of respect from the general public, but with it also comes a great deal of responsibility. It comes with a sworn oath to protect and serve – everyone.

Dan Klau and Mark Kravitz are partners at Wiggin & Dana, in Hartford and New Haven, Connecticut (respectively) and represented the media defendants in Colon.

Ohio Court: Can Allegations of Webmaster's Bad Faith Undo Section 230 Immunity?

By Brian A. Ross

A recent decision by the Ohio Court of Appeals, *Lori Sabbato v. James Hardy, et al*., 2000 Ohio App. LEXIS 6154 (5th App. Dist., Dec. 18, 2000), appears to rein in the blanket immunity that providers and users of interactive computer services have come to expect under Section 230 of the Communications Decency Act of 1996 ("CDA"), for defamatory content posted online by a third party. This is apparently the first published opinion (post-CDA) concerning a webmaster where the court, after first acknowledging that a webmaster generally enjoys immunity under Section 230(c)(1) of the CDA, has then required evidentiary proceedings be conducted to determine whether or not the webmaster waived that immunity — as the plaintiff has alleged — by not acting in "good faith" when restricting access to objectionable material online, under Section 230(c)(2).

Anonymous Accusations of Drug Dealing

In *Sabbato v. Hardy*, Lori Sabbato, a resident of Jackson Township, Ohio, discovered that she was being accused online of dealing drugs, among other things, in messages posted by someone using the pseudonym "O.S.P. (Truth.com)." The messages were posted on an Internet message board run by webmaster James Hardy, a chemistry professor at the University of Akron. The message board is on a website maintained on a server owned by the university.

According to Sabbato, Hardy strictly controlled the message board, issuing passwords and identities at his discretion, removing posts and revoking passwords at his discretion, and frequently posting there himself. He also posted a set of Frequently Asked Questions ("FAQs"), where he allegedly encouraged users to post libelous remarks by explaining that, although they could be sued for libel, it would be virtually impossible to be caught if they post anonymously; and he even offered that, if users wanted to post a particularly questionable message, they could route it through the website's own confidential email address before posting it, to further obscure their identity.

Section 230 Wins at Trial Court

In late December 1999, Sabbato sued Hardy, O.S.P. (Truth.com), and John Does for libel and other claims arising out of O.S.P. (Truth.com)'s offensive posts. Hardy filed a motion to dismiss the lawsuit, claiming failure to state a claim for relief on the ground that he was a provider of interactive computer services, and thus entitled to immunity under the CDA. Sabbato opposed the motion, arguing it should be denied on the grounds that:

> it would be premature to grant "blanket" statutory immunity to Hardy as a "webmaster" because (a) it is not expressly decided whether the CDA applies to webmasters, (b) the term "webmaster" does not even have a settled definition yet, and (c) Hardy's actual role with respect to the website and ISPs is not yet fully known through discovery;
>
> even if CDA immunity is available to "webmasters," there is a justiciable issue as to whether or not Hardy's actions restricting website access/availability were made in "good faith" under 47 U.S.C. §230(c)(2)(A);
>
> even if Hardy is immunized from liability for defamation, the CDA does not protect him from Sabbato's other claims, including spoliation of evidence; and
>
> alternatively, Hardy's motion to dismiss should be converted to a motion for summary judgment.

On April 11, 2000, the court granted Hardy's motion to dismiss. Sabbato then filed an appeal, asserting five assignments of error, the first of which was that the trial court had erred in granting the motion because it was based on an affirmative defense — statutory immunity — not enumerated in Rule Civ. R. 12(b) (the Ohio rule analogous to Fed. R. Civ. P. Rule 12(b)). Sabbato further asserted that the trial court should have accepted her allegations as true for purposes of adjudicating Hardy's motion, should have

(Continued on page 20)

Ohio Court: Can Allegations of Webmaster's Bad Faith Undo Section 230 Immunity?

(Continued from page 19)

treated the motion as a summary judgment motion, and should have conducted evidentiary proceedings before finding that Hardy has CDA immunity and, assuming he does have immunity, that he did not act in bad faith. The Ohio Court of Appeals granted the first assignment of error and reversed and remanded, mooting the four other issues.

"The Automatic Cloak Of Immunity" Under Section 230(c)(1)

Under the CDA, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. §230(c)(1). An "interactive computer service" is defined as:

> any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

47 U.S.C. §230(f)(2). Most cases considering the automatic immunity afforded by the CDA have dealt with large Internet Service Providers ("ISPs") that provide or enable user access to the Internet. *See*, *e.g.*, *Zeran v. America Online*, 129 F.3d 327, 25 Media L. Rep. 2526 (4th Cir. 1997)(negligence action styled as distributor liability claim preempted by CDA, because conflicts with Congress' intent to avoid placing ISPs in the impossibly burdensome role of publisher or distributor obligated to investigate every complaint of a defamatory posting); *see also Blumenthal v. Drudge*, 992 F. Supp. 44, 26 Media L. Rep. 1717 (1998) (CDA provides immunity even when ISP has active role in making available content provided by others — e.g., by independent contractor that AOL paid and promoted — provided that ISP did not share responsibility for creating the content).

More recently, CDA protections were expressly extended to ISPs that provide web-hosting services (*i.e.*, lease web-server space) to websites that post objectionable material. *See John Does 1 through 30 v. Franco Productions, et al.*, 2000 U.S. Dist. LEXIS 8645 (N.D. Ill. June 21, 2000).

However, until *Sabbato v. Hardy*, apparently no published opinion had expressly considered the application of CDA immunity to "webmasters," persons who operate websites (*e.g.*, run the message boards, chat rooms, or other discussion fora) where objectionable material was posted. Unlike ISPs, webmasters do not provide users with Internet access. But they do provide an "interactive computer service" under the CDA, because they enable "computer access by multiple users to a computer server," namely the server on which the website resides. *See* 47 U.S.C. §230(f)(2).

[U]ntil Sabbato v. Hardy, apparently no published opinion had expressly considered the application of CDA immunity to "webmasters."

The *Sabbato* court acknowledges this, holding that Hardy has immunity and citing *Zeran v. America Online* in support. (Note though: the court appears to contradict itself at the end of the opinion, when it holds that the trial court's characterization of Hardy as a "provider" entitled to "good faith" immunity could not have been made without some evidence. However, it seems that the court was focusing on evidence of Hardy's "good faith," not his status as a "provider.")

Waiver Of Immunity Due To Failure To Act In "Good Faith"

Whatever clarity the decision had up to this point, however, is lost in the subsequent fog of the court's application of this provision and Section 230(c)(2). First, the

(Continued on page 21)

Ohio Court: Can Allegations of Webmaster's Bad Faith Undo Section 230 Immunity?

(Continued from page 20)

court finds that an "automatic cloak of immunity" is improper when it is alleged that the provider "participated in the libelous remarks" without converting the motion to dismiss to one of summary judgment. 2000 Ohio App. LEXIS 6154 at *6. If what the court is finding is that allegations that the defendant himself acted as publisher of the defamatory statements takes him outside the immunity of Section 230, that is unexceptional. However, it should be noted that the facts cited by the court do not readily lend themselves to that interpretation.

More difficult to parse is the court's application of Section 230(c)(2). After providing blanket immunity to service providers and users in Section 230 (c)(1), the CDA provides immunity to those who restrict or enable the restriction of objectionable material online. Section 230(c)(2) provides that

> No provider or user of an interactive computer service shall be held liable on account of -
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 U.S.C. §230(c)(2).

Sabbato v. Hardy is apparently the first published opinion in which a court has first held that a person or entity (specifically, a webmaster) is a service provider immunized under the CDA, but has then ruled that evidentiary proceedings are required to determine whether that service provider waived its immunity by acting in "bad faith." To figure out the basis for this ruling, one has to return back in the opinion, presumably to where the court noted the allegations of affirmative misconduct in Sabbato's latest amended complaint, namely, that Hardy "exercises exclusive discretion over who may or may not post" and that

- Hardy "knowingly and/or negligently" encouraged and facilitated anonymous postings thereby encouraging anonymous "libelous postings";
- Hardy participated in the actions leading to libel, menacing/stalking, spoliation and infliction of emotional distress; and
- Hardy engaged in spoliation and acted in concert with the posting third parties.

The court seems to say in its ruling, which is notably terse, that the trial court should not have characterized Hardy as a "provider" under the CDA, thereby affording him "good faith" immunity, without some evidence of his "good faith" (which evidence was not present on the face of the third amended complaint). Therefore, the trial court erred in granting Hardy's motion to dismiss on the basis of immunity. *Id*. at *7. On that basis, the court reversed and remanded. *Id*.

With this ruling, the Ohio Court of Appeals appears to suggest, for the first time, that the blanket immunity provided to service providers and users under the CDA for defamatory remarks posted by a third party, is not *de facto* absolute, but is dependent on whether or not the provider or user is found to have acted in "good faith" while acting as an editor or exercising a gatekeeper function.

Any Precedent Here?

The ultimate precedential impact of the opinion is uncertain for at least three reasons. First, this is a state mid-level appellate court case. Second, the opinion itself is somewhat confusingly drafted. In considering the "good faith" requirement of Section 230(c)(2), it is unclear whether the court properly

(Continued on page 22)

Ohio Court: Can Allegations of Webmaster's Bad Faith Undo Section 230 Immunity?

(Continued from page 21)

focused on (a) Hardy's gatekeeper function as webmaster, *i.e.*, restricting access to or availability of objectionable material, which is covered by the CDA; (b) Hardy's other alleged misconduct, which seems less applicable to libel than to Sabbato's claims of menacing/stalking and harassment, which are not covered by the CDA; or (c) both.

Third, the case involves a fairly colorful set of facts, with extreme claims of "bad faith" conduct that are probably easy to distinguish from the claims that are typically asserted against providers and users of interactive computer services. Nonetheless, if the reasoning of *Sabbato v. Hardy* is adopted by other courts, it does not bode well for providers and users of interactive computer services.

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UPDATE: Yahoo! Sued By Holocaust Survivors for 15 Cents

On January 22, a group of Holocaust survivors in France filed suit in Paris against the chief executive of Yahoo!, claiming the Internet company justified war crimes by auctioning Nazi artifacts online.

The suit comes on the heels of a November ruling by a French court that Yahoo! was in violation of French laws prohibiting the sale of racist merchandise, and giving Yahoo! three months to establish a filtering system to prevent French Web users from accessing auctions selling Nazi memorabilia (*See LibelLetter*, December 2000 at 31). Yahoo! announced in January that it would stop the online auctioning of Nazi and Ku Klux Klan items, although the company said that it would oppose the ban legally through the United States court system.

In the current suit, the Association of Deportees of Auschwitz is suing Yahoo! Chair Tim Koogle for a symbolic 1 franc, worth about 15 cents. Apparently unsatisfied with Yahoo!'s earlier action to curb the auctioning of racist items, the group charges Yahoo! with "justifying war crimes and crimes against humanity."

UPDATES

11th Circuit Upholds Dismissal of Undercover Tape Claims

By Robert L. Rothman

Agreeing with the district court that a plaintiff cannot state invasion of privacy claims arising out of her public activities, the Eleventh Circuit Court of Appeals has affirmed dismissal of invasion of privacy claims premised on a January 1999 broadcast of a *Fox Files* report entitled "Cults on Campus." *Lucas v. Fox News Network, et al.*, (11th Cir., January 16, 2001)(unpublished decision).

The report profiled college and university campus activities of the International Church of Christ. A short segment of the report showed hidden camera footage of the plaintiff - a member of the Atlanta International Church of Christ and the Women's Campus Ministry Leader at Georgia State University - conducting what she described in the lawsuit as the Church's "sin and repentance study" for prospective members. In the study, the plaintiff asks an undercover *Fox Files* producer to reveal intimate details of her past sex life.

Noting that Georgia restricts invasion of privacy claims involving matters of public interest, the Eleventh Circuit held that,

> Whether or not Fox correctly characterized the Church as a 'cult,' its activities on the campus of a state university are undoubtedly matters of public interest, whether the purpose of publishing those activities is to inform or entertain. As such, plaintiffs have failed to state a cause of action for invasion of privacy simply by stating that defendants secretly recorded and broadcast the Sin and Repentance Study session.

The court noted that its decision is buttressed by the fact that Georgia has a one-party consent statute permitting any party to a conversation to record and divulge a conversation without the consent of the other party.

The Eleventh Circuit also affirmed dismissal of plaintiff's claim under the civil damages provision of the Federal Wiretap Act, 18 U.S.C. § 2520. The court noted that the plaintiff failed to state a claim since it did not allege that Fox intercepted a communication for an illegal or tortious purpose. The plaintiff could not state a Federal Wiretap Act claim based upon intent to commit the tort of invasion of privacy since it was held that plaintiff failed to state a claim for invasion of privacy under Georgia law. Nor could the plaintiff base a claim upon allegations that Fox intended to commit an "injurious act" since a 1986 amendment to the Federal Wiretap Act eliminated that language from the exception to the one-party consent provision of the Act. 18 U.S.C. § 2511(2)(d).

Robert L. Rothman is a partner in Arnall Golden & Gregory, LLP, Atlanta, Georgia, and represented the plaintiffs in this matter.

NY Appellate Court Affirms Dismissal of *Costanza v. Seinfeld*

By Elizabeth McNamara

Mike Costanza recently suffered a second indignity from the courts that "George Costanza" could surely identify with. As a Queens College buddy of Jerry Seinfeld and someone who actually took pains to reveal that his high school coach called him "Cantstanza" and that he had a "thing" about bathrooms, Mike Costanza contended that "George" of *Seinfeld* was actually modeled on him. Yet, for eight years he never complained. Instead, he actually appeared in an episode of the show.

In a move worthy of George, Mr. Costanza turned to litigation *only* after his self-published book (taunting his alleged connection with Jerry and *Seinfeld)* fell several thousand copies shy of best-sellerdom. The court below summarily dismissed his right of publicity, privacy and libel claims and awarded sanctions, concluding that a successful television show can be about nothing, but a meritorious lawsuit must have more substance.

Same Name Isn't Enough

On appeal, Mr. Costanza did not fare much better. The Appellate Division of the New York Supreme Court (First Department) in a January 4, 2001 decision, affirmed the dismissal of all his claims. And, in the process, Mr. Costanza even managed to create some helpful law. The decision underscores that works of fiction do not fall within the scope of the "advertising or trade" uses prohibited by Sections 51 of New York's Civil Rights Law. It also adds new gloss to the statute by

(Continued on page 24)

UPDATES

NY Appellate Court Affirms Dismissal

(Continued from page 23)

holding that the mere confluence between plaintiff's last name, "Costanza," and the last name of the character did not, by itself, state a claim: "the similarity of last names … is not cognizable under the statute."

First Run Starts Limitations

As an independent basis for dismissing the right of publicity claim, the decision holds that the statute of limitations on a Section 51 claim does not begin to run anew with each new publication of the allegedly infringing use. Thus, the appellate court held that the limitations period on plaintiff's Section 51 claim began to run from the first broadcast of *Seinfeld* featuring the Costanza character and expired one year later — despite the fact that defendants continued to create new episodes featuring the character long after this period and notwithstanding the fact that the show continues, today, to be broadcast in syndication.

The decision underscores that works of fiction do not fall within the scope of the "advertising or trade" uses prohibited by Sections 51 of New York's Civil Rights Law.

Mr. Costanza's libel claim arose out of comments made by *Seinfeld*-co-creator Larry David in reaction to the news that plaintiff had published his book titled, "The Real Seinfeld, As Told By the Real Costanza." David characterized plaintiff as a "flagrant opportunist," noting that Jerry only knew Costanza for a year and that he "merely remembered his name." Notwithstanding plaintiff's argument that David's comments tarred him as a liar, the appellate decision affirmed the trial court's conclusion that the statements were non-actionable opinion.

Despite the clear lack of merit to plaintiff's claims, however, the Appellate Division took pity on plaintiff and his counsel and lifted the sanctions that the trial court had imposed on them. The lower court and appellate court opinions can be found at: *Costanza v. Seinfeld*, 181 Misc.2d 562, 693 N.Y.S.2d 897, 27 Media L. Rep. 2177, 1999 N.Y. Slip Op. 99348 (N.Y.Sup. Jun 21, 1999) and *Costanza v. Seinfeld*, – N.Y.S.2d – , 2001 WL 8962, 2001 N.Y. Slip Op. 00003 (N.Y.A.D. 1 Dept. Jan 04, 2001), respectively.

The creators and producers of *Seinfeld* were represented by Elizabeth McNamara and Carolyn Foley of Davis Wright Tremaine, New York

Gannett's Settlement With Chiquita Revealed: $14 Million

On January 23, a settlement number that has been the subject of much speculation was finally revealed: Gannett Co. Inc. paid Chiquita Brands International $14 million as part of an out-of-court settlement arising from an expose of Chiquita conducted by the Gannett-owned *Cincinnati Enquirer*.

Documents filed in Superior Court for the District of Columbia in the suit by former *Enquirer* Editor Lawrence K. Beaupre against the *Enquirer* contained the settlement figure, which Gannett confirmed, according to *Editor & Publisher* magazine. The 15-page settlement agreement also contained conditions regarding the paper's published apology to Chiquita, and the removal of the series at issue from the *Enquirer's* web site.

Beaupre's suit alleges that he was scapegoated by Gannett after the *Enquirer* mishandled an investigation into Chiquita's alleged wrongful business practices (*See LibelLetter*, June 2000 at 23). Gannett responded that Beaupre was trying to evade his role in the debacle, that if anything, Gannett spared Beaupre civil and criminal liability under the settlement, and that Gannett continued to employ Beaupre.

The settlement amount, first reported by *Editor & Publisher*, had been confidential for two years. Previous speculation had placed the figure around $10 million.

And Philadelphia Inquirer Settles

In another recent report of a newspaper settlement, *The Philadelphia Inquirer* said on January 5 that it reached an agreement in a libel suit begun two years ago by a then,

(Continued on page 25)

UPDATES

Gannett's Settlement With Chiquita Revealed

(Continued from page 24)

but now ex- reporter at the paper who claimed that the head editor had defamed him. The amount of the settlement was undisclosed.

Ralph Cipriano, a reporter in 1998 with the *Inquirer*, had wrangled with *Inquirer* Editor Robert J. Rosenthal over an article Cipriano wrote that was critical of the Philadelphia Roman Catholic archdiocese's spending decisions and closure of churches and schools. Capriano claims that *Inquirer* editors refused to publish articles unflattering of the archdiocese. After the *Inquirer* failed to print his story, Cipriano then gave the article to *The National Catholic Reporter* for publication.

Commenting to *The Washington Post* on the *Inquirer's* failure to publish Capriano's articles, Rosenthal said, "there were things we didn't publish that Ralph wrote that we didn't think were truthful." Cipriano was fired by the *Inquirer* after he sued the paper for defamation based upon Rosenthal's comment.

Supreme Court Turns Down Time Warner's Appeal

On February 20, the U.S. Supreme Court declined to hear Time Warner's challenge to government limits on the number of customers the largest cable operators can serve. *Time Warner Entertainment v. FCC*, No. 00-623. The Court, without comment, turned down Time Warner's argument that such limits violated the company's First Amendment free speech rights.

Time Warner had objected to the provision of the Cable Televison Consumer Protection and Competition Act that limited the numbers of customers that operators may service, as well as to the portion of the law limiting the number of channels a cable system may fill with networks in which it has a financial stake.

The law, crafted with the goal of ensuring diverse cable television programming and enacted by Congress in 1992, also permitted the regulation of cable television rates and prohibited companies from being granted exclusive franchises.

The Supreme Court's refusal to grant cert will allow the decision of a federal appellate court in the District of Columbia to stand. The D.C. court upheld the Congressional limits, finding that Congress did not show preference for one type of speech over another. Instead, the D.C. court ruled, "[Congress] merely expressed its intention that there continue to be multiple speakers."

In 1997, the Supreme Court upheld another portion of the Act which required cable companies to set aside one-third of their channels for local broadcast stations, despite the cable companies' arguments that the law was violative of their free speech rights since it forced them to carry stations which they would prefer to drop.

While this suit was a facial challenge to the authority of Congress to direct the FCC to set limits, a separate suit is contesting the lawfulness and constitutionality of the actual limits the Federal Communications Commission set following the 1992 Act. Those limits proscribe individual cable operators from serving more than 30% of the nation's subscribers, and preventing cable systems from serving more than 40% of their channels with affiliated programming. That case has been fully briefed and argued in the D.C. Circuit, where a decision is expected soon.

A Scenario to Watch out for…

The somewhat common article or broadcast report on misconduct by a group of professionals or others who share a common line of work can cause trouble by mixing and matching the sins they allegedly have committed. In *Nix v. Cox Enterprises, Inc.*, 2001 Ga. App. LEXIS 91 (Third Division Jan. 25, 2001), the appellate court reversed judgment for the defendants on libel claims based upon an article in which a lawyer accused of attempting to solicit clients from another attorney was listed in a newspaper article directly after the accounts of six lawyers charged with stealing their clients' money or convicted of felonies.

The court found it was an issue to be tried whether the juxtaposition of plaintiff Nix's conduct, which the paper was arguing should be a matter of attorney discipline and currently is not, with the criminal and allegedly criminal conduct of other attorneys impugned plaintiff likewise, suggesting his conduct was criminal as well.

2nd Circuit Panel Overturns Injunction Barring Union Protests at the Met

On February 2, a three-judge panel of the 2nd Circuit Court of Appeals in Manhattan threw out an injunction that stopped a union from denouncing the Metropolitan Opera as part of the union's effort to organize the workers who staff the Met's restaurant. *Metropolitan Opera Assoc., Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 2001 U.S. App. LEXIS 1489 (2d Cir. 2001).

In striking down the injunction, the court agreed with the union that the order presented "serious questions under the First Amendment and libel law," but found it did not need to reach those issues since the injunction was invalid due to its ambiguous scope and meaning.

The injunction was issued by a district court in Manhattan last June, when Local 100 of the Hotel Employees and Restaurant Employees International Union was attempting to organize the 95 restaurant workers, whose employees of Restaurant Associates, the Met's food subcontractor. The order prevented the union from protesting or handing out flyers in front of the Lincoln Center opera house, and restrained the union from harassing, threatening, or "engaging in fraudulent or defamatory representations regarding" the Met during the union's organization campaign.

Restaurant Associates has resisted the union's activities to organize in the past, drawing enforcement action against it from the National Labor Relations Board. When Restaurant Associates refused to allow the recognition of the union by the accelerated method of collecting employee signatures, rather than by means of holding an election, the union attempted to put pressure on the Met so that the Met would in turn influence Restaurant Associates to agree to the union's position.

In striking down the preliminary injunction, the Court of Appeals noted that the First Amendment has a heavy presumption against such broad prior restraints on speech. The appeals court said that the district court was wrong to enjoin and put the union at risk of contempt sanctions for speech that may ultimately be found to be constitutionally protected, including union chants of "No more lies" and "Shame on you." Similarly, the vagueness of the injunction would leave the union unable to discern whether future chants and statements would be grounds for sanctions.

Since preliminary injunctions are reserved for cases where there is no remedy at law, the court said, they should not be ordered in libel cases, which may be remedied by damages. The court cited *American Malting Co. v. Keitel*, 209 F. 351 (2d Cir. 1913) for the long-held principle that "equity will not enjoin a libel," absent exceptional circumstances, which the court found were not present in this case. Even though the *American Malting* court found tactics such as intimidation and coercion to be "exceptional circumstances," the appellate court noted that "current First Amendment principles may prohibit granting an injunction even when such factors are present," especially when union speech critical of labor conflicts is involved.

The appellate court overturned the district court's directive that the union pay $10,000 to the Met to compensate it for "its damaged reputation and good will," since the statements had wrongly been determined to be defamatory.

Any developments you think other LDRC members should know about?

Call us, send us an email or a note.

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Gerawan Farming: California Supreme Court Expands Commercial Speech Protection

By Rex Heinke and Laura Boudreau

Recently, in a 4-3 decision, the California Supreme Court announced that California's free speech clause (Article I, section 2(a)) protects commercial speech more broadly than the First Amendment. *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 12 P.3d 720, 101 Cal. Rptr. 2d 470 (2000). *Gerawan* set off a sonic boom, and it is too early to tell what California commercial speech statutes and regulations will remain standing.

Gerawan involved a plum producer's dispute with California's Secretary of Food and Agriculture over the state's plum marketing program, which assessed fees on plum producers to cover expenses for generic advertising and sales promotions. *Id.* at 479-80. Gerawan claimed that the program compelled it to fund commercial speech, and therefore violated both the First Amendment and Article I, section 2 of the California Constitution. *Id.* at 480-81, 482.

Rather than looking to the First Amendment for guidance on Gerawan's [California's free speech clause] Article I claim, the California Supreme Court majority looked to the clause's language and history.

Federal Precedent Unpersuasive

During the *Gerawan* litigation, the United States Supreme Court changed the constitutional playing field. In *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997), fruit producers (including Gerawan) had challenged a federal fruit marketing program that, like California's program, assessed fees on fruit producers for generic advertising.

In a 5-4 opinion, the Supreme Court decided the program did *not* violate the fruit producers' First Amendment rights. *Glickman*, 521 U.S. at 467-77. As a result, the California Supreme Court declared Gerawan's First Amendment challenge to California's program dead in the water. *Gerawan*, 24 Cal. 4th at 505-08.

Three of the seven California Supreme Court justices would have applied *Glickman*'s holding to Gerawan's state constitutional free-speech claim, viewing the California marketing order, made "in this heavily regulated setting," as simply a species of economic regulation that did not implicate either the First Amendment or Article I, section 2. *Id.* at 523, 526, 536 (George, C.J., dissenting, joined by Chin, J., and Hanlon, J.). But that view was roundly repudiated by the four remaining justices. Justice Mosk, writing for the California Supreme Court's majority, characterized *Glickman* as "open to serious question," "lack[ing] persuasiveness," and driven "by ad hoc distinguishing." *Id.* at 503. The majority absolutely "reject[ed] the *Glickman* majority's construction of the First Amendment's free speech clause as our construction of article I's." *Id.* at 510.

From a historical perspective, *Glickman* is the most recent fruit of a shallow-rooted commercial speech jurisprudence, which dates back only sixty years. In *Valentine v. Chrestensen*, 316 U.S. 52, 54-55, 62 S. Ct. 920, 921-22, 86 L. Ed. 1262 (1942), the United States Supreme Court first announced its commercial/noncommercial speech dichotomy and awarded commercial speech *no* protection. Thirty-four years after this inauspicious beginning, the Court issued *Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 748, 770-73, 96 S. Ct. 1817, 1829-31, 48 L. Ed. 2d 346 (1976), which extended constitutional protection to truthful, non-misleading messages about lawful products and services.

Soon after, in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), the Court pruned *Virginia* back, permitting government regulation of truthful, non-misleading commercial messages if the

(Continued on page 28)

Gerawan Farming: California Supreme Court Expands Commercial Speech Protection

(Continued from page 27)

regulation "directly advances" a governmental interest and is "not more extensive than . . . necessary." *Id.* at 566. Finally, in *Glickman*, the Court (in the California Supreme Court's view) damaged the commercial speech doctrine by deciding, as a tautological matter, that the First Amendment does not provide *any* protection against compelled funding of commercial speech. *Gerawan*, 24 Cal. 4th at 503.

Look to California History

Rather than looking to the First Amendment for guidance on Gerawan's Article I claim, the California Supreme Court majority looked to the clause's language and history. Article I, section 2(a) provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." By its very language, the clause confers an affirmative right to speak "unbounded in range," "'unlimited' in scope." *Id.* at 491-93. By contrast, the First Amendment's language grants a right "merely by implication," which runs only against governmental actors, and "does not embrace all subjects." *Id.*

And Article I's wild-west origins support a liberal reading of the clause. In 1849, when the California Constitution was drafted, California was swarmed by men who were "essentially individualistic, greedy, and acquisitive gold-seekers." *Id.* at 495 (quoting Fritz, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions* (1995) Rutgers L.J. 969, 975). What their Jacksonian individualism "presuppposed, and produced, was wide and unrestrained speech about economic matters generally, including, obviously, commercial affairs." *Id.* And what these men did was keep commercial speech free from state regulation, except for unlawful products and services such as lotteries. *Id.* at 496.

Thus, under *Gerawan*, commercial speech about lawful products and services is constitutionally protected under Article I, section 2. *Id.* at 509. The California plum marketing program compelled Gerawan to fund, against its will, commercial speech in the form of generic advertising about plums as a commodity. That reduced the amount of money available for its own advertising, and therefore implicated Gerawan's free speech rights. *Id.* at 510.

Thus, under Gerawan, commercial speech about lawful products and services is constitutionally protected under Article I, section 2.

Left Test to Lower Courts

Ultimately, however, *Gerawan* is more portentous than precedential. The Court left to the lower court the hard task of developing the constitutional test for determining whether and how Gerawan Farming's rights are actually infringed by the plum marketing program. *Id.* at 517. It remains to be seen what test, *e.g.*, strict scrutiny, will be adopted.

Potentially, *Gerawan* could demolish current regulations against lawful and nonmisleading advertisements of products like alcohol and tobacco. It could, potentially, overturn the current law in any area where the protection given to speech has been reduced because the speech is "commercial." For example, if *Gerawan* ultimately adopts a stringent test, California's right of publicity laws (Cal. Civ. Code §§ 3344, 3344.1) could be unconstitutional. In any event, the California Supreme Court's rejection of *Glickman* means that the scope of the California Constitution's free speech protection will be fertile ground for litigation for years to come.

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Ninth Circuit First Court to Hold Federal Wiretap Act Applies to Stored Electronic Communications

By Mark A. Perry and Amy L. Neuhardt

In a recent decision, the United States Court of Appeals for the Ninth Circuit held that the federal Wiretap Act, 18 U.S.C. §§ 2510-22, applies to information stored on an Internet web site. The court thereby created a direct conflict with every other court that has considered the question. In light of the severe civil and criminal penalties for Wiretap Act violations, the ruling poses grave risks for reporters, law enforcement personnel, and others who gather information on the Internet.

An Employee Only Website

Konop v. Hawaiian Airlines, Inc., 236 F.3d 1035 (9th Cir. 2001), was a *pro se* civil action by an employee against his employer. Mr. Konop maintained a website where he posted bulletins critical of Hawaiian Airlines, its officers, and the incumbent union. He required visitors to log in with a user name and password, which he provided to certain Hawaiian employees but not to managers or union representatives. Two Hawaiian pilots to whom Mr. Konop had supplied user names authorized a Hawaiian manager to log on to the site using their user names. After the manager did so, Mr. Konop sued Hawaiian, alleging among other things that the manager's access to his website violated the Wiretap Act.

The Wiretap Act prohibits unauthorized "interception" of "wire communications" and "electronic communications." The statute defines "wire communication" to include "any electronic storage of such communication," but the definition of "electronic communication" does not include any reference to stored communications. 18 U.S.C. § 2510. Rather, another statute, the Stored Communications Act, regulates access to stored electronic communications. 18 U.S.C. §§ 2701-10.

Prior Law

Prior to the *Konop* case, the leading decision interpreting the Wiretap Act in this context was *Steve Jackson Games v. United States Secret Service*, 36 F.3d 457 (5th Cir. 1994), which involved federal agents' seizure of a computer bulletin board. The Fifth Circuit explained that "unlike the definition of 'wire communication', the definition of 'electronic communication' does not include electronic storage of such communications." *Id.* at 461. Thus, the court concluded that "Congress did not intend for 'intercept' to apply to 'electronic communications' when those communications are in 'electronic storage.' *Id.* at 461-62.

Like the Fifth Circuit in Steve Jackson Games, every other court to have considered the question had previously held that the Wiretap Act does not apply to stored electronic communications.

Like the Fifth Circuit in *Steve Jackson Games*, every other court to have considered the question had previously held that the Wiretap Act does not apply to stored electronic communications. *United States v. Meriwether*, 917 F.2d 955 (6th Cir. 1990); *Wesley College v. Pitts*, 974 F. Supp. 375 (D. Del. 1997), *aff'd*, 172 F.3d 861 (3d Cir. 1998); *United States v. Moriarty*, 962 F. Supp. 217 (D. Mass. 1997); *Bohach v. City of Reno*, 932 F. Supp. 1232 (D. Nev. 1996); *United States v. Reyes*, 922 F. Supp. 818 (S.D.N.Y. 1996).

Moreover, the Ninth Circuit had previously approved the reasoning of *Steve Jackson Games* in *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998), *cert. denied*, 525 U.S. 1071 (1999), in which the court explained that "in cases concerning 'electronic communication[s]' — the definition of which specifically includes 'transfer[s]' and specifically excludes 'storage' — the 'narrow' definition of 'intercept' fits like a glove; it is natural to exempt non-contemporaneous retrievals from the scope of the Wiretap Act." *Id.* at 1057.

(Continued on page 30)

Ninth Circuit Becomes First Court in Country to Hold Federal Wiretap Act Applies to Stored Electronic Communications

(Continued from page 29)

Abandons Precedent

In *Konop*, the Ninth Circuit departed from these precedents, and from the plain language of the statute, to hold that the Wiretap Act was applicable to information stored on an Internet web site. The only authority cited by the panel was two student law review notes and the "purpose" of the Wiretap Act as divined by the panel.

The court said that it would be "irrational" to draw a distinction between stored wire communications and stored electronic communications, and asserted that "[w]e know of no reason why Congress might have wished" to do so. The panel concluded that "[i]t makes no . . . sense that a private message expressed in a digitized voice recording stored in a voice mailbox should be protected from interception, but the same words expressed in an e-mail stored in an electronic post office pending delivery should not." On this basis, the panel held that the Wiretap Act extends to stored electronic communications.

The decision in *Konop* is of significant concern to employers, because it restricts their ability to monitor their employees' activities on the Internet and via e-mail. Hawaiian has filed a petition for rehearing en banc of the court's decision, in which it argues that the panel's conclusion cannot be reconciled with the terms of the Wiretap Act.

Problems for Law Enforcement and Press

The *Konop* decision also creates problems for law enforcement officials. Investigators and prosecutors rely on informants and undercover operations to combat child pornography, illegal gambling, and other criminal and fraudulent activity on the Internet. The United States Department of Justice, which has labeled the panel's decision "plainly incorrect," has filed an *amicus* brief in support of Hawaiian's petition for rehearing. The California District Attorneys' Association has also filed a brief contending that the decision is wrong and will hamper the efforts of law enforcement.

The *Konop* decision also has potential adverse effects for journalists. It will undoubtedly have a chilling effect on the ability of reporters and news organization to gather information from the Internet. Moreover, the Supreme Court is currently considering the constitutionality of a provision of the Wiretap Act that permits the victim of an illegal wiretap to sue a journalist or other person who discloses the contents of the illegally obtained information. *Bartnicki v. Vopper*, No. 99-1687. An adverse decision by the Court, coupled with the *Konop* decision, could lead to imposition of liability on any media organization that publishes or broadcasts information obtained through unauthorized access to a website and that "knows or has reason to know" that the access was unauthorized.

This is not the first time that the Ninth Circuit has ignored the plain language of the Wiretap Act in an effort to expand its scope. In 1991, a panel concluded that the statute prohibited silent video surveillance even though such surveillance was not included in the definition of prohibited "interceptions." The en banc court reversed that decision, holding that "we are not empowered to impose on clear statutory language our own notions." *United States v. Koyomejian*, 970 F.2d 536, 541 (9th Cir.) (en banc), *cert. denied*, 506 U.S. 1005 (1992). It remains to be seen whether the full court will similarly correct the panel's decision in *Konop*.

Mr. Perry is a partner in the San Francisco office of Gibson, Dunn & Crutcher LLP, which represents Hawaiian Airlines in the Konop case. Ms. Neuhardt is an associate in Gibson, Dunn's New York office.

"A Dog's Walking on His Hind Legs"

The Strange and Curious Story of Some Arizona Reporters Who Filed a Defamation Suit and Sought to Destroy the Reporters Privilege

By Bruce E. H. Johnson

A libel case brought by reporters is a strange and somewhat curious circumstance. Indeed, as Dr. Johnson might have observed, a reporter suing for defamation "is like a dog's walking on his hind legs. It is not done well; but you are surprised to find it done at all."

Even if it were done well, a challenge by these same reporters to the reporters' privilege is even more surprising.

These unique factors made the recent Doug Underwood subpoena case — *In the Matter of the Request of Plaintiffs Alfredo Azula, et al*., No. 46314-4-I, 2001 Wash. App. LEXIS 219 (Wash. Ct. App. Feb. 5, 2001) — a very strange and curious story.

Began With a CJR Article

The case had its origins in the fall of 1997, when Doug Underwood, a former *Seattle Times* reporter who is a journalism professor at the University of Washington, was asked by the *Columbia Journalism Review* to write an article on the influence of local business interests on local newsrooms. The article was prompted by recent news stories involving a controversy at the *Los Angeles Times*. In preparation for his *CJR* article, Underwood interviewed sources at several newspapers that combined their business and news reporting departments.

The *Arizona Republic*, then owned by Phoenix Newspapers, Inc. ("PNI"), was one of those newspapers. Earlier in 1997, the *Republic* had laid off 29 reporters, some of whom claimed they had opposed increasing influence by local businesses and advertisers on the *Republic* newsroom.

In investigating the controversy at the *Republic*, Underwood spoke with Kim Sue Lia Perkes, one of the laid-off reporters who spoke critically about the business department's influence in the PNI newsroom, and Ed Foster, another laid-off reporter. He also interviewed, by telephone, Steve Knickmeyer, who was the managing editor of the *Arizona Republic* and a proponent of this controversial practice. Underwood took notes during these interviews, which he later used to write his article.

Underwood's article, entitled "It's not just in L.A," appeared as *CJR*'s cover story in the January / February 1998 issue. In the last column of the *CJR* article, Underwood recounted the PNI reporters' allegations against their former employer and wrote that

> For his part, Knickmeyer says that most of the laid off reporters were "*fat, lazy, incompetent and slow* . . . . People don't want to say that they were not very good at this. They want to say that [the layoffs were] all a conspiracy with the sacred cows and the power brokers. It's just not true."

A few months later, 18 of the 29 former *Arizona Republic* reporters, including Foster and Perkes, filed a defamation action in Arizona based on the quoted material. They named PNI and Knickmeyer as defendants and claimed that the statement "fat, lazy, incompetent and slow" referred to them. Early in the case, the defendants sought to dismiss the claims on "of and concerning" grounds but were unsuccessful.

Sought Author's Notes

In July 1999, the plaintiff-reporters apparently decided to add the insult of breaching the reporter's privilege to the injury caused by their libel lawsuit. They obtained and served a Washington subpoena *duces tecum* that ordered Underwood, a Washington state resident, to testify at a deposition in Seattle, and demanded that he produce:

> all writings, . . . that evidence, refer or relate to the article entitled, 'it's not just in L.A.,' published in the January/February 1998 issue of the

(Continued on page 32)

"A Dog's Walking on His Hind Legs"

(Continued from page 31)

> Columbia Journalism Review, . . . including, but not limited to: (1) all writings contained in any file; (2) all writings which evidence, refer or relate to interviews, oral or written, for the Article; (3) all drafts of the Article; (4) all writings which evidence, refer or relate to the assignment of the Article; (5) all writings of any notes whatsoever which evidence, refer or relate to the Article; and (6) all writings which evidence, refer or relate to communications of any nature with any individuals currently or previously employed with Phoenix Newspapers, Inc. or the Arizona Republic.

Underwood timely objected to the compelled production of his journalist work-product, but in an effort to avoid unnecessary cost and controversy agreed to be deposed without waiver of those rights.

It may surprise many readers in other states, but Washington State has no statutory or constitutional shield law.

Author Agreed to Deposition

Underwood's position may seem curious to some, but there was logic behind his decision. It may surprise many readers in other states, but Washington State has no statutory or constitutional shield law. In fact, when Underwood received his subpoena, no Washington appellate case had ever considered whether the First Amendment protected reporters from a compelled deposition or their notes from compelled production.

But, despite Underwood's willingness to provide oral testimony, which consumed a full day, the reporters decided that a deposition was not sufficient. They moved to compel production of his notes.

In his testimony, Underwood had confirmed that Knickmeyer made the "fat, lazy, incompetent and slow" remark. A few weeks later, Knickmeyer also confirmed the quotation. In his deposition, however, he insisted that when he said those words he intended to criticize unknown *Republic* reporters who had leaked stories to a competing weekly newspaper. The reporters insisted that Underwood's notes might shed some light on whether Knickmeyer had accurately testified about his intent. This argument – that Underwood had managed to divine Knickmeyer's intent and recorded it in his notes – seemed implausible on its face. Underwood, joined by PNI, opposed the reporters' motion to compel.

Motion on the Notes

On March 22, 2000, a Seattle trial judge conducted a short hearing on the reporters' motion to compel Underwood's compliance with their subpoena *duces tecum*. Underwood's lawyers argued, citing federal cases, that Washington should adopt the same privilege rules and that the First Amendment precluded disclosure of his notes. The reporters opposed this argument, arguing that there was no First Amendment privilege for journalists' notes and that, in any event, they had shown sufficient need to use them as potential impeachment material in their defamation suit against PNI and Knickmeyer.

Trial Court Finds Privilege and It Is Overcome

At the close of the hearing, finding the unknown contents of the notes relevant to the reporters' Arizona lawsuit, the trial court ruled that a First Amendment privilege was recognized in Washington State but that the reporters had overcome the privilege for the Knickmeyer notes. She ordered Underwood to turn over to the reporters all of his interview notes relating to Knickmeyer. In response to Underwood's motion to reconsider, the trial court refused to conduct an *in camera* review of the notes she had ordered produced to the reporter-plaintiffs.

The trial judge also refused to stay her order, so Underwood immediately sought review in the Washington Court of Appeals, which ordered emergency

(Continued on page 33)

"A Dog's Walking on His Hind Legs"

(Continued from page 32)

briefing. As part of his successful stay application to the Court of Appeals, Underwood furnished a copy of his notes, enclosed in a sealed envelope. The Court of Appeals commissioner reviewed the notes *in camera* and ruled that debatable issues existed for appeal and that the balance of harms favored granting the stay.

The parties then submitted briefing on the merits. The reporters again argued that no First Amendment privilege existed for reporters' notes and that, even if there was some sort of qualified privilege, they needed the notes to impeach Knickmeyer's testimony in their Arizona lawsuit.. The *Republic*'s lawyers, David Bodney, Peter Swan, and Peter Kozinets of the Phoenix office of Steptoe & Johnson, joined with Underwood's lawyers (Bruce Johnson and Esther Bartfeld of Davis Wright Tremaine's Seattle office) in opposing production. Lucy Dalglish, Gregg Leslie, and Greg Kahn of the Reporters Committee for Freedom of the Press submitted an amicus brief supporting Underwood.

Appeals Court Holds Privilege Applies

On February 5, 2001, the Court of Appeals issued its decision, ruling that Underwood's notes were privileged, that *in camera* review should be conducted to determine "whether a document is exempt from disclosure or sufficiently relevant to even merit disclosure" and that the trial court had "erred when it refused to conduct an *in camera* review." The opinion further noted that "this court has undertaken such a review" and concluded that the "information contained in the notes at issue are [*sic*] not relevant to any issue in the case. Accordingly, we reverse and remand."

The court's opinion is unusual in three respects. First, although urged by the parties, it does not explain the basis for the journalist's privilege that it recognizes. Again, to outsiders this approach may seem strange, but in fact Washington courts have a well-established tradition of recognizing under their common law powers what other jurisdictions consider to be First Amendment privileges. For example, Washington courts recognize the confidential-source privilege as a common law, not constitutional, privilege. *See Senear v. Daily Journal-American*, 97 Wash.2d 148, 641 P.2d 1180 (1982) (civil cases); *State v. Rinaldo*, 102 Wash.2d 749, 689 P.2d 392 (1984) (criminal cases). Perhaps the Court of Appeals was mindful of this tradition when it recognized the journalist's privilege but failed to discuss the source.

The court's opinion is unusual in three respects. First, although urged by the parties, it does not explain the basis for the journalist's privilege that it recognizes.

Second, the Court of Appeals does not offer a detailed test for reporter's privilege. The Ninth Circuit, for example, has articulated a three-part standard, by requiring proof that the information sought is "(1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995). The Washington court, by contrast, was comfortable flunking the reporters' demand for another reporter's notes merely because they failed to satisfy the basic relevance test.

Third, rather than articulate the legal principle and ask the trial court to apply it, the Court of Appeals itself undertook independent appellate review of Underwood's notes, which he had submitted to them *in camera* when he requested the stay, and ruled that they were exempt from disclosure. Again, this may seem somewhat unusual, but if one assumes that the notes simply contain the quoted language that appeared in the article ("*fat, lazy, incompetent and slow*") and included no words or notations referring this description to any individual reporter. If the task is as simple as that, why remand? The Court of Appeals recognized that the task was simple:

All facts relevant to this narrow legal ques-

(Continued on page 34)

"A Dog's Walking on His Hind Legs"

(Continued from page 33)

tion are before this court and undisputed by the parties. The determination of the relevance of Underwood's notes for purposes of clarification is a mixed question of law and fact which we review de novo.

In Camera Review May Be Required

The court's decision to utilize *in camera* review, in the context of this decision, is wholly unremarkable. Underwood had submitted his notes and asked for such review. But the decision suggests, in a footnote, that such review is mandatory before any trial court orders production of any privileged documents. Supporting this viewpoint are Washington cases applying public disclosure act and attorney-client privileges, so the extension of this rule to other types of privilege is quite consistent. But, for a reporter facing hostile subpoenas, a court's sudden demand for a copy of the reporter's notes may seem unnecessarily intrusive and intimidating.

The reporters had told the Court of Appeals they were seeking the notes to avoid summary judgment in their Arizona defamation case by obtaining some evidence to support their allegations that Knickmeyer had not made a generalized comment about the 29 laid-off reporters but was discussing the inadequate job skills of specific reporters. As the Court of Appeals noted:

> The Arizona court has determined, and the parties agree, that the essential remaining issue in the case is whether Knickmeyer's statements were 'of and concerning' the group of plaintiff journalists such that the statements 'reasonably relate to specific individuals' as required by the Arizona law of defamation.

But the notes offered them nothing.

> After a careful review of the notes we conclude that they have no relevance to clarifying possible discrepancies in the testimony of Knickmeyer and Underwood. The notes provide no additional information regarding the context in which Knickmeyer's statements were made nor do they identify any specific persons or groups to whom Knickmeyer's statements might refer.

Bruce Johnson, a partner in Davis Wright Tremaine, Seattle, Washington, and Esther Bartfield, represented the author, Doug Underwood, in this matter.

Supreme Court to Hear Virtual Child Porn Case

In January the U.S. Supreme Court granted certiorari in *Reno v. The Free Speech Coalition*, 198 F.3d 1083 (9th Cir. 1999), agreeing to decide whether so-called "virtual" child pornography can be criminalized under the First Amendment. Since such material is created without the use of real children, the case raises the interesting First Amendment issue of whether entirely fictional computer creations can be criminalized based primarily on the material's secondary effect on viewers.

The question is ripe for Supreme Court review. The Ninth Circuit, in a 2-1 decision, found the federal law against virtual child porn facially unconstitutional, a determination that conflicts with decisions from the First, Fourth and Eleventh Circuit Courts of Appeal rejecting First Amendment challenges to the relevant law. *See U.S. v. Hilton*, 167 F.3d 61 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999); *U.S. v. Mento*, 2000 WL 1648878 (4th Cir. Nov. 3, 2000); *U.S. v. Acheson*, 195 F.3d 645 (11th Cir. 1999).

[T]he case raises the interesting First Amendment issue of whether entirely fictional computer creations can be criminalized based primarily on the material's secondary effect on viewers.

At issue are portions of the federal Child Pornography Prevention Act of 1996 ("CCPA") that criminalize visual depictions that "appear to be" or "convey the impression" of child pornography even where no child is actually used. 18 U.S.C. 2252A, 2256(8)(B)-(D). CCPA was enacted to combat the rise of computer generated and computer manipulated images that are virtually indistinguishable from those of real children – or, as the Ninth Circuit phrased it, "to stifle the use of technology for evil purposes." *Reno*, 198 F.3d at 1089.

The rationale for the Act was that even though virtual child pornography does not involve the exploitation of children in its creation it still has the same secondary effects as real child porn. It is used to lure children into sexual activity, creates a demand for child pornography and it desensitizes the viewer to the pathology of sexual abuse or exploitation of children. Thus Congress concluded that "the effect is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by computer." *Id.* at 1091. Moreover, Congress found that technological advances could render enforcement impossible since the government would have difficulty meeting its burden of showing that pornographic images involved real children as opposed to computer-created images. *Id.*

In striking down these sections of CCPA, the Ninth Circuit, in an opinion by Judge Molloy, squarely rejected the secondary effects arguments, finding they did not provide a compelling reason to criminalize what the court described as "images that are, or can be, entirely the product of the mind." *Id.* at 1092. According to the decision, criminalizing child pornography "is

(Continued on page 36)

Supreme Court to Hear Virtual Child Porn Case

(Continued from page 35)

not justified by consideration of the effects such images have on others . . . . Instead the focus of analysis is on the harm to the children actually used in the production of the materials." *Id*. at 1092.

In reaching this decision the court relied on *New York v. Ferber*, 458 U.S. 747 (1982), the Supreme Court's first decision on child pornography. *Ferber* held that child pornography receives no First Amendment protection. The Court found that such material is "intrinsically" related to the criminal abuse of children, effectively treating child pornography not as speech but as the product of a crime. Judge Molloy relied on this aspect of *Ferber* to conclude that CPPA can only be constitutionally applied to pornographic images involving real children.

The government, in its petition for certiorari to the Supreme Court, argues that the Ninth Circuit simply misread the scope of the *Ferber* decision. The government contends that under *Ferber* the compelling interest in suppressing child pornography extends to all children who may be abused as a result of the dissemination of child pornography and not just the participants in the creation of the material.

In *Ferber* a New York State child pornography law was challenged on the grounds that it criminalized not only obscene photographs, but also sexually explicit nonobscene photographs that were presumptively protected by the First Amendment under prevailing doctrines. The Supreme Court's answer was simply to read child pornography as outside the First Amendment entirely rather than to parse the doctrinal and complicated distinctions between obscenity and pornography. In a more recent decision, the Supreme Court also disregarded the doctrinal distinction that had protected the possession of obscene materials in the home, upholding the constitutionality of a blanket prohibition against the possession and viewing of child pornography. *Osborne v. Ohio*, 495 U.S. 103 (1990).

When the Supreme Court decided *Ferber* nearly 20 years ago it did not anticipate the development of virtual child porn, to be sure, but given the Court's sympathy to combating child porn, virtual or real may be a distinction without a difference. As Ninth Circuit Judge Warren Ferguson in dissent noted, "Why should virtual child pornography be treated differently than real child pornography? Is it more valued speech?" *Reno*, 198 F.3d at1100.

The government's effort to single out child pornography for complete suppression is surely incompatible with the First Amendment principle that awareness is not harmful in itself. But up to now this principle has yielded to efforts to destroy the child pornography market. Whether the Court will pull back from this path in the new digital age remains to be seen.

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Studies Finding Media Violence Related to Real Violence Are Denounced

As support grows on Capitol Hill and around the country to censor violence in the media, a highly esteemed writer is speaking out against the commonly held perception that there is a causal connection between fictional violence portrayed in the media and real violence.

In a recent interview published on the web site of the American Booksellers Foundation for Free Expression ("ABFFE") (www.abffe.com), Pulitzer-prize winning author Richard Rhodes, an expert in science and technology, noted that there is "much that I believe is unethical and even fraudulent" in media research he investigated that purports to find a connection between media violence and an individual's commission of violent acts. Although he says it was not surprising to learn that the studies "have essentially no evidential support," he was startled to learn that the research was "poorly conceived, scientifically inadequate, biased and sloppy if not actually fraudulent."

[T]he research was "poorly conceived, scientifically inadequate, biased and sloppy if not actually fraudulent."

In the interview, Rhodes also discussed the theories of criminologist Dr. Lonnie Athens, whose thesis that serious violent behavior is the result of having been violently socialized is central to his own 1999 book, *Why They Kill*. Athens' research, Rhodes says, provided the groundwork for him to disprove the media violence hypothesis. Rhodes notes that although he intuitively found the media violence hypothesis wrong, Athens' work "shows causally (not merely correlationally) that serious violent behavior is always the result of having been violently socialized."

Rhodes has also published an article available on ABFFE's web site, *The Media Violence Myth*, which details the numerous flaws he discovered when analyzing several studies frequently cited by proponents of media censorship. Rhodes cites one study, conducted by University of Michigan psychology professor Dr. L. Rowell Huesmann and presented to the Senate Judiciary Committee in 1986, which claimed to find that there was a "strong relation" between early violence viewing and later adult criminality. When Rhodes analyzed the data, he found the sample so small as to make the findings meaningless – they were based upon the violent behavior of only three men out of one hundred and forty-five. Rhodes points out that the journal *Developmental Psychology* refused to publish the study because the independent scientists who analyzed the data in peer review did not believe that Huesmann's data supported his conclusions.

Rhodes also criticizes the conclusions of Dr. Brandon Centerwall, a Seattle psychiatrist whose work supported the Senate Judiciary Committee's 1999 report, "Children, Violence and the Media; A Report for Parents and Policy Makers." Centerwall found that the murder rate doubled in the United States and Canada when television was introduced, claiming that if television had never been invented, there would be thousands of fewer homicides, rapes, and violent assaults. These charges have provided a foundation for the American Medical Association and Congressional claims that television harms American youth.

Rhodes, however, contradicts Centerwall's theory by citing evidence that despite increased exposure to television after 1975 in the U.S. and Canada, the homicide rates leveled off and even declined. Rhodes also notes that murder rates in France, Germany, and Japan actually declined with increased exposure to television.

Rhodes also highlights one study of the positive effects of viewing violence on television. Conducted by a psychologist named Seymour Feshbach, the study concluded that for aggressive boys from relatively low socioeconomic backgrounds, exposure to violence on television actually reduced or controlled the expression of aggression.

Rhodes' thoughtful analysis of frequently unquestioned studies leads him to the conclusion that "there's no evidence that mock violence makes people violent, and there's some evidence that it makes them more peaceful."

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