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MEDIALAWLETTER

Reporting Developments Through February 28, 2007

MLRC

NEWSGATHERING

DEFAMATION

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Jury Rules Against Plaintiffs in Texas Wiretap Case

By Chip Babcock

At the conclusion of a two week trial a Harris County (Texas) jury ruled against a former Houston Deputy Controller and a Houston police officer who claimed that a local television station and two reporters violated their rights under the Texas wiretap statute, Tex. Civ. Prac. & Rem. Code Ann. §§123.001 et seq. *Stephens v. Dolcefino et al.*

The jury of eight women and four men found that the statute had not been violated and that the plaintiffs had no reasonable expectation of privacy when one of the reporters, using a camera and microphone designed to look like a pager captured on video the plaintiffs engaged in discussion during a break in an open air courtyard at a Continuing Legal Education seminar.

Defendants emphasized that the conversation took place in a open air courtyard of a hotel and that there were 50 or more people in the immediate vicinity.

Background

The plaintiffs, Deputy Controller William Stephens and policeman Ray Jordan, were recorded by KTRK Television in Houston as part of a four part investigative series in 1997 about Houston City Controller Lloyd Kelley. The station had heard that Kelley was not showing up at the office during normal working hours.

So KTRK's undercover unit, led by reporter Wayne Dolcefino, placed the City Controller under surveillance and discovered that he was often at home during normal work hours doing such things as yard work and walking his dog. The City Controller was also captured going to an amusement park with his children and his executive assistant and traveling to a book store to purchase a book in a city owned vehicle with members of his staff during working hours.

The Controller and his Deputy, plaintiff William Stephens, registered for a CLE seminar in San Antonio. The video at issue in the trial was taken during the first break of the seminar. During the break, police sergeant Ray Jordan joined the Controller and Deputy.

Stephens and Jordan sued KTRK and individual reporters for violating the Texas wiretap statute. The trial court granted summary judgment to the defendants, but the appellate court reversed, finding there were issues of fact on whether KTRK violated the wiretap statute by recording in the courtyard. *See Stephens v. Dolcefino, et al.*, 126 S.W.3d 120, 32 Media L. Rep. 1685 (Tex.App.-Hous. (1st Dist.) Jun 12, 2003), *rev. denied,* 181 S.W.3d 741 (Tex. Jul 1, 2005), *reh'g denied,* (Feb 3, 2006).

The investigative series gave rise to several other litigations that the KTRK media defendants also won. *See Dolcefino v. Randolph*, 19 S.W.3d 906 (Tex.App.-Houston [14th Dist.] 2000, pet. denied) (granting summary judgment to KTRK defendants on libel claims brought by Controller Lloyd Kelley and his assistant); *Randolph v. Jackson Walker L.L.P.*, 29 S.W.3d 271 (Tex.App.-Houston [14th Dist.] 2000, pet. denied) (affirming order striking libel claims against KTRK's attorneys); *Dolcefino v. Randolph*, No. 14-00-00602-CV, 2001 WL 931112 (Tex.App.-Houston [14th Dist.] Aug. 16, 2001, pet. denied) (granting summary judgment on appeal to KTRK-related defendants on defamation and wiretap claims by Controller Kelley).

Trial

The plaintiffs asserted that their conversation was private and that they took measures to protect its confidentiality by moving to a remote corner of the courtyard. The reporter moved into position close to the group but appeared to be reading a newspaper.

The reporter testified that he thought that he heard snatches of a conversation but when he listened to the audio recording no intelligible conversation was captured by the pagercam. The television station sent the tape to an outside audio specialist, who testified at trial that he was unable to make out any conversation on the tape. The tape was recycled prior to suit.

The plaintiffs contended that the tape had been intentionally destroyed and that the destruction amounted to spoliation of evidence. The recorder that the pagercam fed into was damaged when it was run over by a bus when being used on a subsequent story about Houston's bus system.

The plaintiffs contended that this was an additional act of spoliation and precluded them from testing the equip-

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ment to determine whether it would pick up intelligible conversation in similar conditions.

At trial the plaintiffs referred to the pagercam as a "spycam" and argued that the reporter was sneaking around eavesdropping on a private conversation. They emphasized the subterfuge he employed by appearing to read the paper when in fact he was recording the plaintffs' activities.

The defendants emphasized that the conversation took place in a open air courtyard of a hotel and that there were 50 or more people in the immediate vicinity. They also obtained concessions from the plaintiffs that they could either not recall what was discussed or that the conversation was of "courtesy type" matters such as the sports or the weather. The defendants argued that the statute required the plaintiffs' conversation to be conducted with the aid of a wire or cable (ie a telephone) and there was obviously no such instrument at issue here.

The plaintiffs argued for an interpretation of the statute that would do away with the wire or cable requirement which, defendants argued, would subject ordinary citizens to liability for using such things as cell phones which had recording capability or camcorders or home video devices. The defendants argued that the plaintiffs were putting a tortured reading of the statute with the intent to open up an entire new area of liability where the real danger to the defendants was the threat of attorneys fees (allowed under the statute).

The plaintiffs conceded that they had no actual damages (the statute permits $10,000 per violation) but asked for punitive damages of up to $25,000,000 plus attorneys fees.

The jury did not reach the issue of damages. Its vote was 10-2 on the issue of liability.

The case was tried by Chip Babcock, Bob Latham and John Edwards of Jackson Walker with the assistance of Tanya Mention of ABC, Inc. Plaintiffs were represented by Marc Hill and Terry Yates.

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MLRC Bulletin Analyzes Media Trials of 2006

9 Wins, 5 Losses at Trial; But Damage Awards Relatively High

In 2006 there were 14 trials against media defendants on libel, privacy and related claims based on gathering and publishing information. Defendants won nine out of the 14 trials, an impressive 64 percent win rate. But the average damage award for the five losses was relatively high – an average of $2.5 million.

These results are reported and analyzed in MLRC's annual REPORT ON TRIALS AND DAMAGES released this week. The REPORT is an ongoing study of libel, privacy and related claims against media defendants, showing the results and trends in this area of First Amendment litigation in trials from 1980 to the present.

Overall, MLRC's 2007 REPORT analyzes 557 trial verdicts from 1980 through 2006. The study shows a long-term trend of fewer trials against media defendants and more media victories at trial. In the 1980s there were an average of 27 trials a year; that dropped to 19 a year in the 1990s. And in this decade, the average number of trials a year has dropped to 14.

While the media victory rate at trial has steadily increased over the course of the study, from 36 percent in the 1980s, 40 percent in the 1990s, and 54 percent so far in the 2000s, defendants who lose are facing higher damage awards. In the 1980s, only 22 percent of damage awards topped the million dollar mark. That has risen to 39.5 percent so far this decade.

MLRC's Report also tracks the results of post trial motions and appeals from trials. These statistics should send a cautionary signal to plaintiffs, since there is a relatively low percentage of victories for plaintiffs at the end of the legal process.

The MLRC REPORT is mailed to all Media and DCS members, and is available to Media and Enhanced DCS members on MLRC's web site, www.medialaw.org. Additional print copies are available for $35 by calling (212) 337-0200.

Defense Wins in 2006

Florida

Lusczynski v. Tampa Bay Television, No. 03-11424 (Fla. Cir. Ct., Hillsborough County jury verdict for defendant Sept. 11, 2006). The jury returned a verdict in favor of a television station on a police officer's false light claim over a news report that discussed complaints by some police officers about the Tampa Police Department's promotions process, including allegations of favoritism and corruption.

Kentucky

Lassiter v. Lassiter, 456 F.Supp.2d 876 (E.D. Ky. bench verdict for defendant Sept. 26, 2006). The federal district court granted a bench verdict to the defendant who authored a book about how her religious faith helped her overcome an abusive marriage. The court applied a strict liability standard to the libel claim brought by the defendant's ex-husband, but found that the allegations were true or opinion.

Missouri

Continental Inn v. Lake Sun Leader, No. 26V050400241 (Mo. Cir. Ct., 26th Cir. directed verdict for defendant, Aug. 18, 2006). The trial court granted a directed verdict in favor of *The Lake Sun Leader*, in a libel suit over its report about the closure of a local motel for building code violations.

Ohio

Young v. Russ, No. 02 CV 974 (Ohio Ct. C.P., Lake County jury verdict for defendant Feb. 17, 2006). The jury returned a verdict in favor of WKCC-TV in a libel trial over the station's reports that plaintiff, an elementary school custodian/lunchroom monitor, used excessive force in disciplining students. In a negligence trial, the jury concluded that the reports were substantially true.

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Rhode Island

Trainor v. State of Rhode Island, No. WC/2003-295 (R.I. Super. Ct., Washington County directed verdict for defendant Feb. 13, 2006). The trial court granted a directed verdict to *The Standard Times*, a weekly community newspaper, over a crime blotter report. The court ruled that report was covered by the fair report privilege, was substantially true, and there was no evidence of malice.

South Carolina

Tuttle, et al. v. Marvin, No. 04-948 (D. S.C. jury verdict for defendant Jan. 30, 2006). The jury returned a verdict in favor of the author and publisher of "Expendable Elite: One Soldier's Journey Into Covert Warfare." The jury also rejected the defendants' counterclaim for libel filed against plaintiffs, six Vietnam War veterans who served with the author.

Johnson v. Lexington Pub. Co., Inc., No. 02-CP-40-6064 (S.C. C.P. directed verdict for defendant, July 2006). The trial court granted a directed in favor of the *Lexington County Chronicle and Dispatch News* in a libel suit over a series of articles and editorials describing instances of abuse, neglect and exploitation of the clients at a state funded care facility.

Texas

Lowry v. Hastings Entertainment, Inc., No. 2003-30333-211 (Tex. Dist. Ct., Denton County jury verdict for defendant, June 26, 2006). The jury returned a verdict in favor of the producer of the Girls Gone Wild video series on a fraud claim by two women who alleged that defendant promised that a taped scene of plaintiffs exposing themselves would not appear in the video series.

Root v. Ellis County Press, No. 03-3487-F (Tex. Dist. Ct., 116th Dist., Dallas County jury verdict Jan. 26, 2006). The jury returned a verdict in favor of the Ellis County Press and reporter Joey Dauben over an article reporting this incident, and against the alleged authors and distributor of a flyer that repeated information from the newspaper article. After a four-day trial, the jury found for the defendants.

Plaintiff Wins in 2006

Illinois

Thomas v. Page, No. 04-LK-013 (Ill. Cir. Ct., Kane County jury verdict for plaintiff Nov. 14, 2006) ($ 7,000,000 compensatory damage award). The jury returned a verdict in favor of Illinois Supreme Court Justice Robert Thomas in his libel suit over opinion columns in a local newspaper that discussed Thomas' handling of an attorney disciplinary hearing.

Kansas

Brandewyne et al. v. Author Solutions, Inc. d/b/a AuthorHouse, No. 04 CV 4363 (Kan. Dist. Ct., Sedgwick County jury verdict $230,000 May 8, 2006; bench punitive award $240,000 Aug. 4, 2006). The jury returned a verdict in favor of romance author Rebecca Brandewyne and several family members on libel and privacy claims against a "self publishing" company that released a book written by Brandewyne's ex-husband.

Valadez v. Emmis Communications, No. 05 CV 0142 (Kan. Dist. Ct., Sedgwick County jury verdict for plaintiff Oct. 20, 2006) ($1,100,000 compensatory damage award). The jury returned a verdict in favor of a Kansas man who alleged that reports on KSNW-TV falsely implied he was suspected of being the notorious BTK serial killer.

Pennsylvania

Joseph v. Scranton Times, Inc, No. 3816-C of 2002 (Pa. C.P., Luzerne County bench verdict for plaintiff Oct. 27, 2006) ($3,500,000 compensatory damage award) The trial court ruled in favor of a businessman and his company on libel claims against the *Citizens' Voice* newspaper for a report that the company was under federal criminal investigation.

Puerto Rico

Kran Bell v. Santarrosa, No. KDP 2002-0545 (P.R. Super. Ct. jury verdict March 7, 2006) ($260,000 compensatory damage award). The jury ruled in favor of plaintiff, the former husband of Puerto Rico's then-Governor, on libel and related claims over statements made on a popular news and gossip television show that plaintiff was having an extramarital affair.

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New York Times Awarded Summary Judgment in Lawsuit Over Anthrax Columns

Plaintiff a Public Figure, No Actual Malice, Discrete Statements Substantially True

By Chad R. Bowman

The New York Times was entitled to summary judgment in bioterrorism expert Steven Hatfill's libel suit because he failed to produce evidence of actual malice, according to the court's January 30th opinion in *Hatfill v. The New York Times Company*, No. 1:04-cv-807, 2007 WL 404856 (E.D. Va. Jan. 30, 2007) (Hilton, J.). The lawsuit arose from a series of columns by Pulitzer Prize-winning columnist Nicholas Kristof about the FBI investigation of the 2001 anthrax mailings. In granting summary judgment, the court also held particular challenged statements were properly dismissed under the "subsidiary meaning doctrine" and, in any event, were substantially true. The court also dismissed Dr. Hatfill's claim for intentional infliction of emotional distress.

As described in the January 2007 *MediaLawLetter*, U.S. District Judge Claude M. Hilton entered an order striking the case from the trial docket on January 12, two weeks before trial was set to begin, because "summary judgment should be granted." The court entered the order dismissing the case on January 30 and filed an opinion.

By virtue of his reputation in the field of infectious disease and bioterrorism preparation and his many efforts to publicize these topics, he qualified as a limited purpose public figure.

Background

The court noted that the columns at issue highlighted "specific mistakes made in the FBI's investigation" of the anthrax attacks, using as an example "the FBI's failure to adequately investigate … Steven Hatfill." While the FBI conducted two well-publicized searches of Dr. Hatfill's properties during the summer of 2002, and then-Attorney General John Ashcroft thereafter described Dr. Hatfill as a "person of interest" to the investigation, neither he nor anyone else has ever been charged in connection with the mailings.

Dr. Hatfill sued the *Times* for defamation, alleging that the columns falsely implied that he was responsible for the anthrax mailings. He separately alleged that eleven "discrete false and reckless allegations" in the columns were separately actionable because they were false and "would tend to incriminate Dr. Hatfill" in the mailings. Finally, he brought a claim for intentional infliction of emotional distress arising from the "public identification of Dr. Hatfill with the anthrax murders." Earlier developments in the case, including an initial dismissal (principally on the issue of defamatory meaning) and subsequent reversal by a split appellate panel, *see* 2004 WL 3023003, 33 Media L. Rep. 1129 (E.D. Va. Nov. 24, 2004), *rev'd by 416 F.3d 320* (4th Cir.), *reh'g en banc denied* 427 F.3d 253 (4th Cir. 2005), *cert. denied* 126 S. Ct. 1619 (March 27, 2006), have been the subject of prior reports in the *MediaLawLetter*.

Following the disposition of the first appeal, the parties engaged in extensive discovery and motions practice, including litigation over confidential sources. Ultimately, the district court barred the *Times* from relying on two confidential FBI sources whose identities the *Times* declined to identify.

Public Official Status

Reviewing a comprehensive record on summary judgment, the court concluded that Dr. Hatfill "qualifies as a public official both in fact and in appearance" under the Fourth Circuit's standard for those who participate in a "governmental enterprise" and have or appear to have "substantial responsibility for or control over the conduct of government affairs." 2007 WL 404856, at *5 (citing *Baumback v. Am. Broad. Co.*, No. 97-2316, 1998 U.S. App. LEXIS 18770, at **13-14 (4th Cir. Aug. 13, 1998)).

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Dr. Hatfill was cleared to study exotic pathogens such as plague and monkeypox as a fellow at the U.S. Army Medical Research Institute of Infectious Diseases at Fort Detrick, Maryland from 1997-99, during which time he "provided briefings to government officials and to various military, intelligence, and law-enforcement agencies within the federal government on issues of biological weapons and the country's preparedness for an attack," the court found.

After the fellowship, Dr. Hatfill joined Science Applications International Corporation, one of the nation's largest private defense contractors. There, he "served as a lecturer for the State Department on the medical effects of chemical and biological agents," "designed and gave classified lectures on biological weapon production to the CIA, the DIA, and special operations units of the armed forces," and on "at least one occasion, delivered a lecture on weaponizing anthrax."

"Based on all the information he had gathered, Mr. Kristof had no reason to seriously doubt that Plaintiff could have been the anthrax mailer"

Pursuant to a contract with the Joint Special Operations Command at Fort Bragg, he also "supervised the creation of a simulated biological weapons laboratory inside [a] shipping container and trained forces how to recognize and destroy such containers." After leaving SAIC in early 2002 following the loss of his government security clearance, Dr. Hatfill took a position working on a federally funded program dealing with "biological weaponry and training of federal and state governments in the proper response to a bio-terror event," a program he described as having "national importance."

The court concluded that because Dr. Hatfill "regularly made recommendations to highly-ranked government officials with respect to biological weaponry" and exercised significant discretion in developing federal training programs and protocols, he qualified as a public official for purposes of deciding the constitutionally required standard of fault in a defamation action.

Public Figure Status

The court further concluded that, by virtue of his reputation in the field of infectious disease and bioterrorism preparation and his many efforts to publicize these topics, he qualified as a limited purpose public figure. For example, Dr. Hatfill posed for a picture demonstrating how a terrorist could create pathogens in a home laboratory that was published by *Insight* magazine, gave interviews relating to biological terrorism and preparedness to *Insight*, the *Washington Times*, a nationally syndicated radio program, and the author of a book titled "The Hot Zone," penned and registered a bioterrorism novel, and spoke at conferences.

After the anthrax attacks – but before the columns at issue – Dr. Hatfill spoke to members of the press and became a subject of media reports. After being identified as a "person of interest" by the FBI, he held two press conferences to proclaim his innocence, drawing national press attention.

As such, the court held that Dr. Hatfill, like the plaintiffs in *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666 (4th Cir. 1982), *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703 (4th Cir. 1990), and *Carr v. Forbes, Inc.*, 259 F.3d 273 (4th Cir. 2001), met the test for a limited-purpose public figure. 2007 WL 404856, at *6. He had access to the media, was a vocal critic of biodefense preparedness and voluntarily assumed a role in this debate and sought to influence government policy. This controversy predated the columns and was expressly addressed by the columns.

Finally, the court agreed with the *Times* that Dr. Hatfill also fell within the narrow class of involuntary public figures as someone who become a central figure in a significant public controversy because they "choose a course of conduct which invites public attention." 2007 WL 404856, at *7 (citing *Reuber*, 925 F.2d at 710). In this case, the court concluded, Dr. Hatfill "should have foreseen that by providing interviews, delivering lectures, and publishing articles on the subject of the bioterrorism threat, a public interest in him would arise." As such, he "cannot now claim that he was a private figure who was dragged into this controversy unwillingly."

No Evidence of Malice

Turning to the question of whether plaintiff had come forward with clear and convincing evidence that the *Times* had published the columns with actual malice – and in particular, published the alleged implication that Dr. Hatfill was involved in the anthrax mailings – the court surveyed the fruits of discov-

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ery and concluded that the *Times* was "entitled to summary judgment because there is no evidence to establish that Mr. Kristof knew of the falsity of his statements, or that he harbored a 'high degree of awareness' of the probable falsity of his statements."

Rather, the record reflected that the columnist researched news reports about Dr. Hatfill and about the anthrax investigation, reviewed hundreds of pages of other documents such as Dr. Hatfill's own resume, knew that an FBI profile and private profiles of the anthrax mailer matched Dr. Hatfill closely, and "consulted with prominent scientists and friends and colleagues of Plaintiff." At most, the court concluded, Mr. Kristof was uncertain of the alleged implication of guilt but believed that Dr. Hatfill should be investigated further – which is as a matter of law insufficient to support a finding that the Mr. Kristof was highly aware of probable falsity.

Where a plaintiff cannot prove an alleged overall defamatory implication, liability cannot be premised separately on individual statements.

"Based on all the information he had gathered, Mr. Kristof had no reason to seriously doubt that Plaintiff could have been the anthrax mailer," the court concluded.

Counsel for Dr. Hatfill in opposing summary judgment devoted significant attention to attacking one of Mr. Kristof's sources, Dr. Barbara Hatch Rosenberg, as purportedly untrustworthy and, as the court described it, "attempt[ed] to paint Dr. Rosenberg as a conspiracy theorist with absolutely no credibility." Judge Hilton found this criticism "contrary to the evidence on record" in light of the fact that Dr. Rosenberg was "considered an expert in the field of bioweaponry," "headed a working group for bioweapons for the Federation of American Scientists," and briefed both FBI officials and Senate members in connection with the anthrax investigation. Even if some other experts disagreed with her theories, he wrote, there was no obvious reason for Mr. Kristof to doubt Dr. Rosenberg's veracity.

Subsidiary Meaning Doctrine

The plaintiff's second claim alleged that discrete false statements in the columns also supported an implication that Dr. Hatfill committed the anthrax mailings. For example, Kristof noted, among other things, that "Mr. Z" – a pseudonym he used until after Dr. Hatfill held press conferences – had expertise working with dry biological weapon agents, had access to the U.S. Army labs where anthrax spores were kept, had access to an isolated residence and gave Cipro (an anthrax antidote) to those who visited, failed three polygraphs after January 2002, and was angry with the government, providing him with a motive to conduct the mailings.

The court applied the "subsidiary meaning doctrine" adopted by the Second Circuit in *Herbert v. Lando*, 781 F.2d 298 (2d Cir. 1986), holding that where a plaintiff cannot prove an alleged overall defamatory implication, liability cannot be premised separately on individual statements the plaintiff alleges support that alleged implication. 2007 WL 404856, at *9. Because, in Dr. Hatfill's case, the "alleged defamatory impact of the columns in the aggregate is no different from the defamatory implication allegedly conveyed by each of the individual statements," the claim based on the particular statements necessarily failed along with the first claim, according to the court.

Substantial Truth

Judge Hilton further found that the claims based on the individual statements would be barred in any event because the statements are all substantially true. For example, Dr. Hatfill challenged a statement that he had "access" to anthrax because "Plaintiff points out that he only had access to a storage closet at Fort Detrick in which wet anthrax was kept, but that he did not know that anthrax was contained therein." Judge Hilton found this parsing unconvincing: "The allegation that Plaintiff had access to anthrax is not rendered false simply because Plaintiff did not know he had access to anthrax. The fact that it was wet anthrax as opposed to the dry anthrax used in the anthrax mailings would likely not change the mind of an ordinary reader."

The court concluded that a statement that Dr. Hatfill had expertise in dry biological weapons was supported by "substantial evidence" and indeed "Plaintiff touted himself as having working knowledge of wet and dry biological weap-

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ons agents, and even bragged to a colleague about his ability to make anthrax." The evidence similarly supported the substantial truth of other challenged statements.

No Intentional Infliction of Distress

Finally, the court awarded the *Times* judgment on Dr. Hatfill's claim for intentional infliction of emotional distress on two grounds. First, Dr. Hatfill failed to adduce necessary evidence that Mr. Kristof intentionally or recklessly caused distress. As noted by the court, "[t]he record is void of any evidence tending to show that Mr. Kristof intended to cause Plaintiff severe distress or that he was reckless in this regard."

Indeed, the columns identified Dr. Hatfill by name only after the press conferences – which Mr. Kristof testified was calculated "so as not to direct unwarranted attention to Plaintiff." Second, where the conduct was protected by the First Amendment, it was simply not "outrageous" enough to support liability: "Plaintiff has failed to satisfy his burden of showing that Defendant engaged in any form of misconduct."

On February 2, Dr. Hatfill noticed an appeal to the Fourth Circuit.

Chad Bowman is an associate with Levine Sullivan Koch & Schulz in Washington, D.C. The New York Times was represented by David McCraw, Vice President and Assistant General Counsel of The New York Times, and by Levine Sullivan Koch & Schulz, L.L.P. of New York and Washington, D.C. Dr. Steven Hatfill was represented by Harris, Grannis & Wiltshire, P.C. of Washington, D.C.

California Supreme Court Strikes Bulk of Claims Against Researchers

But Claim Over Alleged Misrepresentation to Obtain Interview Survives

At press time, the California Supreme Court issued a lengthy 100 page divided decision in a libel and privacy case against university researchers who published articles and made public statements challenging a study about recovered memories of abuse. *Taus v. Loftus*, No. S133805, (Cal. Feb. 26, 2007).

Plaintiff was the unnamed subject of a scientific case study on repressed memories of child abuse. Defendants are the authors and publishers of two subsequent articles that challenged the prior study and the basic theory of recovered memories. The defendants did not identify plaintiff, but used her real initials, said she was now in the Navy and also interviewed plaintiff's foster mother.

In an unpublished decision, the Court of Appeals affirmed denial of the researchers' anti-SLAPP motion to strike the complaint, ruling that plaintiff had made out a prima facie case for libel, publication of private facts and intrusion. *See* No. A104689, 2005 WL 737747, 33 Media L. Rep. 1545 (Cal. App. 1st Dist. April 1, 2005).

The appellate court held that while the issue of recovered memory was a matter of public interest, there was no public interest in knowing plaintiff's identity which it presumed could be pieced together from the defendants' remarks and articles. It also found that defendants' statements could be found to falsely imply that plaintiff was unfit to serve in the military, stating without citing any authority, that defendants would bear the burden of proving truth under the circumstances because there is no public interest in plaintiff's fitness to serve in the military.

And the court also allowed intrusion claims to go forward based on allegations that defendants misrepresented themselves as colleagues of plaintiff's psychiatrist to interview plaintiff's foster mother.

The California Supreme Court reversed most of these holdings, allowing only one claim of intrusion to go forward based on the alleged misrepresentation to obtain the interview. "It is important to recognize," wrote Chief Judge Ronald George, "that there are at least some types of misrepresentations that are of such an especially egregious and offensive nature — and are quite distinguishable from the types of ruses that ordinarily may be employed in gathering news."

A more detailed report on the case will be published in next month's *MediaLawLetter*.

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Reality Slapped

Denial of Anti-SLAPP Motion Affirmed in Defamation Action Involving Motion Picture "Reality Bites"

By David Aronoff

In a troubling decision, the California Court of Appeal affirmed the denial of a motion to strike libel and false light claims brought by a plaintiff over a like named fictional movie character. *Dyer v. Childress*, B187804 (Cal. App. Feb. 26, 2007) (Klein, PJ, Kitching, Aldrich, JJ).

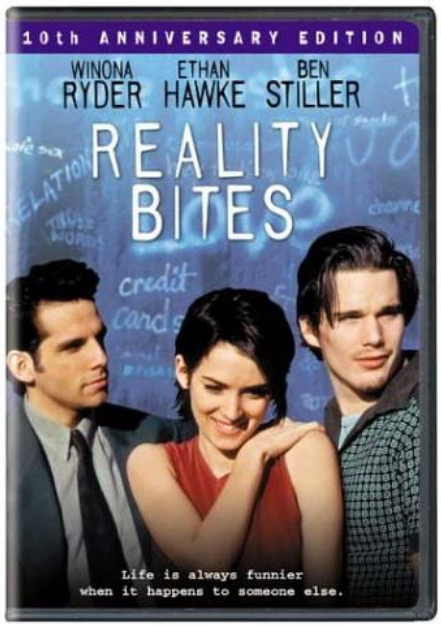
The decision is inconsistent with other recent California anti-SLAPP opinions and carries disturbing implications as to the reach of the state's anti-SLAPP statute.

Background

In June 2005, plaintiff Troy Dyer filed a complaint in Los Angeles Superior Court alleging that the June 2004-released 10th Anniversary Edition DVD of the feature motion picture "Reality Bites," starring and directed by Ben Stiller, and also featuring actors Winona Ryder and Ethan Hawke, was "of and concerning" him, defamed him, and depicted him in a false light – because the fictional character portrayed by Ethan Hawke in the Film carried the same name, "Troy Dyer," as the Plaintiff.

The Court focused on whether the use of the "Troy Dyer" name was in itself a matter in the public interest, separate and apart from the film as a whole.

Because "Reality Bites" was first distributed for theatrical exhibition to the public in 1994, over 10 years ago, the action ordinarily would have been barred by the one-year statute of limitations governing defamation actions. *See* C.C.P. § 340 (c). Plaintiff based his claims, however, on the republication of the motion picture through the release in June 2004 of the 10th Anniversary Edition DVD of the film. *See, e.g., Kanarek v. Bugliosi*, 108 Cal. App. 3d 327, 333, 166 Cal. Rptr. 526 (1980) (holding that, under the Uniform Single Publication Act, Cal. Civil Code § 3425, the subsequent paperback republication of an allegedly libelous book may give rise to a new cause of action).



Although the fictional "Troy Dyer" was the protagonist of the film and "got the girl," plaintiff averred that the character was defamatory because the character allegedly smoked pot, was unchaste, did not hold steady employment, and was depicted stealing a candy bar from a newsstand where he worked.

The fictional character was not based on plaintiff and had numerous distinguishing characteristics that ensured that the fictional character was not recognizable as plaintiff. As plaintiffs often do in "defamation by fiction" cases, however, plaintiff pointed to many of these different characteristics as simply being the alleged false and defamatory statements.

The plaintiff had attended film school with the screenwriter of "Reality Bites," and at that time they had been personal friends. As a result, at about the time that the screenwriter left school and started working on her "Reality Bites" screenplay she decided to use the "Troy Dyer" name for her fictional character, in part, as an "inside joke." The evidence was disputed as to whether the plaintiff had consented in advance to the use of the "Troy Dyer" name (the screenwriter believed that she had obtained such consent, which plaintiff denied).

However, the Plaintiff admitted that, one day before the theatrical release of the film, his screenwriter friend had called him on the phone to tell him about the "Troy Dyer" character, urged him to see movie, and that he did so within the next month without later complaining to his friend.

In addition, both sides were in agreement that during 1994, following the release of "Reality Bites," plaintiff had treated his screenwriter friend and her husband to dinner at Patina, one of the most expensive restaurants in Los Angeles, and had congratulated her on the success of her film – which had performed moderately well at the box office, went on to generate

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respectable sales on VHS and DVD, and attracted substantial media attention focusing on the film's depictions of the challenges (such as the threat of AIDS and bleak economic prospects) facing "Generation X" twenty-somethings during the early 1990's.

Nonetheless, things change. In June 2005, plaintiff filed his complaint alleging three causes of action against, among others, the screenwriter, producers and distributor of the film – defamation per se, defamation per quod, and false light invasion of privacy.

Anti-SLAPP Motion

Defendants responded to the action by filing motions to strike under the California's Anti-SLAPP Statute, Cal. Code of Civ. Pro. § 425.16, arguing that both of the two essential "prongs" of the statute had been satisfied, thereby requiring the entry of an Order striking Plaintiff's Complaint, because (1) the 10th Anniversary Edition DVD of "Reality Bites" constituted "free speech in connection with ... an issue of public interest," and (2) plaintiff could not carry his burden of proving a "probability of prevailing" with competent, admissible evidence because, among other things, the fictional "Troy Dyer" was not "of and concerning" plaintiff – i.e., the fictional character was not recognizable to a reasonable person as being, in actual fact, the Plaintiff. *See, e.g., Polydoros v. Twentieth Century Fox*, 67 Cal. App. 4th 318, 79 Cal. Rptr. 2d 207 (1997); *Middlebrooks v. Curtis Pub. Co.*, 413 F.2d 141 (4th Cir. 1969).

Under § 425.16, previous California cases had held that such cultural milestones as the scatological syndicated Tom Leykis radio talk show, and radio discussions concerning the "reality" television show "Who Wants to Marry a Millionaire" are issues of public interest. *Ingels v. Westwood One Broadcasting*, 129 Cal. App. 4th 1050, 28 Cal. Rptr. 3d 933 (2005); *Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798, 119 Cal. Rptr. 2d 108 (2002).

The trial court, however, denied defendants' anti-SLAPP motions. In finding that the defendants had not met the "first prong" of the anti-SLAPP Statute, which requires a showing that the speech at issue relate to a matter of public interest, the trial court improperly relied on an impressionistic evaluation of the popularity of the "Reality Bites" 10th Anniversary Edition DVD, holding:

> *It is not "Star Wars" or the "Godfather*," both of which have been in constant public view since their releases and involve film characters of continuing public interest. The audience for "Reality Bites" is substantially more limited.

Order dated October 31, 2005 at 4 (emphasis added).

Similarly, at oral argument the trial court commented: "I mean, we are not dealing with 'Ben Hur' or something. We are dealing with a minor movie, but [one] that had circulation."

As to the "second prong," under which it was plaintiff's burden to prove a probability of prevailing on the merits, the trial court incorrectly lightened plaintiff's burden of proof by holding that an anti-SLAPP motion is "similar to a demurrer," under which "the focus must be on plaintiff's evidence only" while the facts and arguments of defendants "must be disregarded." Order at 5-6. After the trial court's denial of the motion, defendants appealed.

Court of Appeals Decision

The Court of Appeal decision does not address "second prong" issues at all and did not adopt the trial court's "first prong" reasoning – which conflicted with numerous case authorities holding that the protection of free speech rights cannot turn on the popularity of that speech or the aesthetic sensibilities of the court.

Moreover, the Court of Appeal conceded that the motion picture "Reality Bites" concerned "Generation X" matters that are in the public interest. This was not the end of the "first prong" analysis for the Court, however, which then focused on whether the use of the "Troy Dyer" name was in itself a matter in the public interest, separate and apart from the film as a whole:

> Here, the specific dispute concerns the asserted misuses of Dyer's persona. However, the representation of Troy Dyer as a rebellious slacker is not a matter of public interest and there is no discernable public interest in Dyer's persona. Although *Reality Bites* may address topics of widespread public interest, the defendants are unable to draw any connection between those topics and Dyer's defamation and false light claims.

Opinion at 7.

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The Court concluded that because no public interest exists in the "Troy Dyer" name, the trial court's Order would be affirmed:

> In sum, assuming the issues facing Generation X at the start of the 1990's are of significant interest to the public, Dyer, a financial consultant living in Wisconsin who happened to have gone to school with [the "Reality Bites" screenwriter], was not connected to these issues in any way. Thus, the defendants failed to meet their initial burden of showing the activity underlying Dyer's lawsuit was in furtherance of the defendants' constitutional right of free speech in connection with a public issue or an issue of public interest.

Opinion at 11.

Analysis

This conclusion, however, is inconsistent with the language of the anti-SLAPP statute, § 425.16, and the Court of Appeal decision in *M.G. v. Time Warner, Inc*., 89 Cal. App. 4th 623 (2001).

First, there is no requirement that the "first prong" of C.C.P. § 425.16 can only be satisfied if the plaintiff has voluntarily subjected himself or herself to public scrutiny; rather, the statute is to be "construed broadly" to protect any "conduct in furtherance of the exercise of ... the constitutional right of free speech in connection with ... an issue of public interest."

Here, the "conduct" of public interest was the 10th Anniversary Edition DVD of the motion picture "Reality Bites." Illustrating this point, in *M.G*., the plaintiffs were non-public figures who brought claims for invasion of privacy and infliction of emotional distress when a photograph disclosing their identities was used to illustrate both a "Sports Illustrated" article and an HBO television show concerning the topic of child molestation in youth sports.

In finding that the defendants' anti-SLAPP motion satisfied the "first prong" of § 425.16, the Court rejected plaintiffs' argument that no "public issue" existed because the plaintiffs had neither been victims of molestation nor had they otherwise inserted their own identities into any public debate or controversy. As stated by the Court:

> Although plaintiffs try to characterize the "public issue" involved as being limited to the narrow question of the identity of the molestation victims, that definition is too restrictive. The broad topic of the article and the program was not whether a particular child was molested but rather the general topic of child molestation in youth sports, and issue which . . . is significant and of public interest.

M.G., 89 Cal. App. 4th at 629.

In its Opinion, the Court of Appeal in *Dyer* conceded similarly that the general topics of the "Reality Bites" 10th Anniversary Edition DVD are of widespread public interest, yet the Court failed to reach the conclusion that this satisfies the "first prong" as the Court had held in M.G.

The Court of Appeal's narrow focus on the "Troy Dyer" name is also erroneous because the use of the name "Troy Dyer" in the film was not "of and concerning" the plaintiff.

The Court of Appeal's narrow focus on the "Troy Dyer" name is also erroneous because the use of the name "Troy Dyer" in the film was not "of and concerning" the plaintiff. In the context of fictional works, the "of and concerning" test is not satisfied merely because a fictional character and the plaintiff happen to share the same name. "[A]s a matter of law, mere similarity or even identity of names is insufficient to establish a work of fiction is of and concerning a real person." *Aguilar v. Universal City Studios, Inc*., 174 Cal. App. 3d 384, 388, 219 Cal. Rptr. 891 (1985).

Instead, the "of and concerning" test for a work of fiction is determined by whether, in light of any dissimilarities between the fictional character and the plaintiff, "a reasonable man would understand that the fictional character *was a portrayal of the plaintiff*." *Id.*; *Polydoros*, 67 Cal. App. 4th at 322; *see also Middlebrooks v. Curtis Pub. Co.*, 413 F.2d 141 (4th Cir. 1969); *accord Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 78, 155 Cal. Rptr. 29 (1979) (citing *Middlebrooks*).

Notwithstanding the "of and concerning" requirement, in *Dyer* there existed no competent, objective evidence that a "reasonable person" viewing the "Reality Bites" 10th Anniversary Edition DVD, which was not released

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until 2004, would believe that the fictional Ethan Hawke character situated in Houston, Texas, was portraying the "real" Troy Dyer – who graduated from USC film school years earlier and by 2004 was working in a financial planning business located in Lake Geneva, Wisconsin.

Conclusion

In short, by focusing myopically on the identity of the plaintiff, discounting the importance of the general topics of the "Reality Bites" 10th Anniversary Edition DVD, and reaching the unsupported implicit conclusion that the fictional "Troy Dyer" was "of and concerning" the plaintiff (a critical issue that the Court incredibly failed to even acknowledge), the decision in *Dyer* is erroneous and inconsistent with both the language of § 425.16 and such established case authorities as *M.G.* and *Polydoros.*

The application of the Court's incorrect reasoning in *Dyer* could deleteriously limit the scope of § 425.16 protection in any California defamation action where a non-public figure is the plaintiff.

David Aronoff, a partner with Fox Spillane Shaeffer LLP in Los Angeles, represented the defendants in this case together with Lou Petrich, Leopold Petrich & Smith. Plaintiff was represented by Kreindler & Kreindler.

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Seventh Circuit Affirms Summary Judgment for Paramount Pictures In "Hardball" Movie Litigation

By Debbie Berman and Wade Thomson

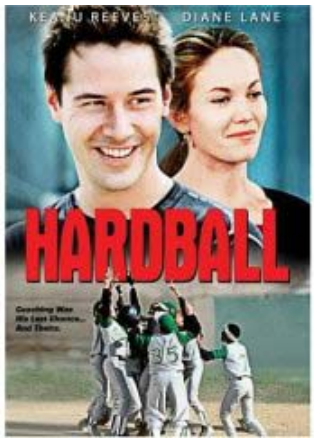
In an important ruling for movie studios and TV networks that produce features "inspired by a true story," and for all defendants of defamation *per se* claims in Illinois, the U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment for Paramount Pictures, SFX Tobbins/ Robbins, Inc., and Fireworks Pictures in a suit brought by a plaintiff who claimed that Paramount's 2001 movie, "Hardball," was based on his life story and, among other things, defamed him. *Muzikowski v. Paramount Pictures Corp.*, Nos. 05-3004, 05-3005, 2007 WL 416983 (7th Cir. Feb. 8, 2007) (Kanne, Wood, Sykes, J.J.).

The Seventh Circuit, reviewing this case for a second time, concluded that the Illinois innocent construction rule defeated, and the First Amendment's protection of artistic works outweighed, plaintiff's claims that the Keanu Reeves character negatively portrayed him.

The movie could reasonably be construed to pertain to someone other than Muzikowski or no real person at all.

Background

In 1992, Daniel Coyle wrote a nonfiction novel, entitled *Hardball: A Season in the Projects*, which tracked the season of an inner-city youth baseball team. Paramount purchased the rights to the book and based its film "Hardball" loosely on the team highlighted in the book.



Robert Muzikowski, the plaintiff in the Paramount case, was one of several league coaches discussed in Coyle's book. The film stars Reeves as a down-and-out gambler who finds redemption coaching an inner-city team to a Hollywood ending.

Based on preliminary information about the content of the film, Muzikowski filed suit in California in 2001, claiming that the Reeves character was actually a portrayal of Muzikowski and that the film defamed him through the unflattering acts of the Reeves character. After voluntarily dismissing that complaint, Muzikowski refiled in Chicago, the home of Muzikowski and the setting of the film.

In 2001, U.S. Chief District Judge Charles Kocoras dismissed Muzikowski's claims of defamation *per se* and false light because the Reeves character was significantly different than Muzikowski and the film was subject to the Illinois innocent construction rule: the film could reasonably be construed to pertain to someone other than Muzikowski. 2001 WL 1519419 (N.D. Ill. Nov. 29, 2001).

The Seventh Circuit reversed, holding that the issue of whether the movie could be innocently construed was an issue of fact in federal court, not an issue of law, despite long-standing precedent to the contrary. Applying this new standard, the court held that differences between Muzikowski and the Reeves character were not sufficient at the motion to dismiss stage for the innocent construction, and that some of Muzikowski's claims, including the imputation of criminal activity and unlicensed business practices stated a claim for defamation per se. 322 F.3d 918 (7th Cir. 2003).

On remand, Muzikowski added defamation claims based on additional scenes in the movie as well as claims for false advertising, false endorsement, commercial disparagement, intentional infliction of emotion distress, and unjust enrichment.

In 2005, the district court granted Paramount summary judgment, holding that the movie could be innocently construed not to portray Muzikowski and that the First Amendment outweighed Muzikowski's non-defamation claims. 2005 U.S. Dist. LEXIS 13127 (N.D. Ill. June 10, 2005).

Seventh Circuit Decision

Implicating an inherent tension, Muzikowski claimed that the Reeves character, Conor O'Neill, was a portrayal of him, but some of the acts and characteristics of O'Neill were so off base that they defamed Muzikowski. The Seventh Circuit resolved this tension in favor of Paramount, finding that the movie could reasonably be construed to pertain to someone other than Muzikowski or no real person at all.

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The differences and alleged similarities between the Muzikowski and O'Neill were key to the court's innocent construction resolution. The court noted that some of the differences, such as O'Neill's drinking habits, were themselves defamatory and questioned whether Illinois "would adopt a rule under which the more defamatory the movie was, the better the studio's defense would be."

However, the court found the record was "not so one-sided" and acknowledged other key "non-defamatory" differences between Muzikowski and O'Neill, including their names, family status, and levels of involvement in youth baseball leagues.

The court held, "the significant differences between O'Neill and Muzikowski could just as easily have led a reasonable viewer who knew about Muzikowski to conclude that O'Neill represented either a composite of the coaches described in Coyle's *Hardball* book (a possibility that Muzikowski recognized in some early court documents he filed) or an amalgam of these real-life figures with a stock Hollywood leading man."

The ruling was significant for defamation cases in Illinois because it highlighted the recently re-affirmed vitality of the innocent construction rule, which required that Muzikowski show the only reasonable construction was that the O'Neill character was Muzikowski. Thus, even though reasonable viewers may have seen the connection between Muzikowski and O'Neill, it was not the *only* reasonable construction, a fact made clear by Muzikowski's original California claims – based on early scripts of the film – that there were several characters in the film that moviegoers could have confused for Muzikowski.

The Seventh Circuit based its holding in large part on the recent Illinois Supreme Court decision in *Tuite v. Corbitt*, No. 101054, 2006 WL 3742112 (Ill. Dec. 21, 2006) . The *Tuite* case involved a frontal attack on the innocent construction rule in Illinois and the court wrestled with the fact that Illinois is in the minority of states that employ the rule. But the Illinois Supreme Court upheld the innocent construction rule in part because of the presumed damages in defamation *per se* actions.

Non-Defamation Claims Rejected

The court rejected Muzikowski's claim that Paramount falsely advertised the film – by advertising it as based on a true story when in fact it was so far from the truth that the story could no longer be classified as true – for insufficient evidence. The court concluded that the eighteen affidavits of moviegoers (many of whom knew Muzikowski personally for years) Muzikowski presented, in the context of a film that grossed more than $40 million, constituted the type of "*de minimis* evidence of confusion" that is insufficient to withstand summary judgment.

The court rejected Muzikowski's intentional infliction of emotional distress claim holding that, assuming that O'Neill was a defamatory portrayal of Muzikowski, "[e]ven O'Neill was redeemed in the end, after all, and the behavior the movie portrays falls well short of 'extreme and outrageous.'"

The court rejected Muzikowski's unjust enrichment claim because Paramount obtained the rights to Coyle's book legitimately and adapted its script from the book. Thus, Muzikowski could not prove that Paramount was unjustly enriched by any use of details about Muzikowski's life in the *Hardball* movie.

The Seventh Circuit also affirmed over $50,000 in sanctions that the district court awarded Paramount stemming from Muzikowski's counsel's non-compliance with a contention interrogatory.

Defendants Paramount Pictures Corporation, SFX Tobbins/Robbins, Inc., and Fireworks Pictures were represented by Debbie L. Berman, Barry Levenstam, Michael A. Doornweerd, and Wade A. Thomson from the Chicago office of Jenner & Block LLP. Berman is a partner in the Chicago office and a member of the firm's Media and First Amendment Practice Group. Thomson is an associate in the Chicago office and a member of the firm's Media and First Amendment Practice Group. Plaintiff was represented by Schuyler, Roche & Zwirner of Chicago.

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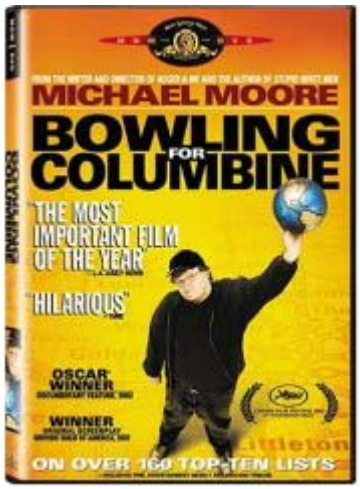
Bomber's Brother Strikes Out As Michael Moore Rolls Perfect Game in 'Columbine' Suit Win

By Herschel P. Fink

If lawsuits were scored like bowling, filmmaker Michael Moore would have rolled a 300 game with his February 20, 2007, Sixth Circuit victory in a libel suit resulting from his Academy Award winning film, "Bowling for Columbine." *James Nichols v Michael Moore*, No. 05-2075, 2007 WL 507045 (6th Cir. Feb. 20, 2007) (Martin, Guy, C.J., Rose, U.S.D.J.).

Background

The 2002 film was the subject of a suit by James Nichols, whose brother Terry, along with their friend Timothy McVeigh, were convicted of bombing the Oklahoma City federal building in 1995, killing 168. The film explored the topic of gun violence in America. In one part, Moore interviewed James Nichols, a reclusive gun fancier, at his farm in Michigan where the bombers spent a month practicing their skills before carrying out the bombing.



James, who sleeps with a .44 Magnum under his pillow and believes that the government itself bombed the Oklahoma City federal building, refuses to pay taxes or to recognize the federal government. He speaks on camera with wide-eyed passion that the American people will "revolt with merciless anger" against the "tyrannical" government, and "there will be blood running in the streets."

In addition to a 10 minute excerpt of his three hour interview with James, Moore included this brief narration regarding the Oklahoma City bombing that James claimed was defamatory:

(1) On this farm in Decker, Michigan, McVeigh and the Nichols brothers made practice bombs before Oklahoma City.
(2) Terry and James were both arrested in connection to the bombing.
(3) (female voice over) U.S. Attorneys formally linked the Nichols brother of Michigan with Oklahoma bomb suspect, Timothy McVeigh.
(4) Officials charged James, who was at the hearing, and Terry, who was not, with conspiring to make and possess small bombs.
(5) Terry Nichols was convicted and received a life sentence. Timothy McVeigh was executed. But the feds didn't have the goods on James, so the charges were dropped.

James claimed Moore's statements about him were false, and that, taken together, they falsely implied that he himself was "complicit" in the bombing plot with his brother, Terry, and McVeigh.

To Moore, particularly following the firestorm of controversy over his next film, "Fahrenheit 911," accusations of inaccuracy in his reporting were particularly troublesome, and were seized upon as evidence by his often politically motivated critics.

While it seemed clear that James Nichols – who frequently spoke to the media and even self-published a book about his bombing conspiracy theories – was a quintessential public figure, and that the case could be won by showing the filmmaker had no conscious awareness of falsity, it was essential to Moore that his reporting be vindicated.

On summary judgment in the Eastern District of Michigan (396 F.Supp.2d 783 (E. D. Mich. 2005)), Moore's lawyers emphasized that Moore's narration was both true, and an accurate account of the events in 1995. U.S. District Judge Paul D. Borman agreed, and, while also finding James to be a public figure and evidence of actual malice lacking, his focus was a careful analysis of each of the allegedly false statements, and his conclusion that the statements were true.

On appeal, James Nichols claimed Judge Borman "wrongfully made factual determinations in concluding that Moore's allegedly defamatory statements were substantially true."

Again, the emphasis of Moore's argument in the Sixth Circuit on November 28, 2006, was preservation of the finding that the narration was true and accurate.

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Sixth Circuit Decision

The resulting opinion did just that. In its six page "for publication" opinion, the Sixth Circuit held: "In resolving defendant's motion for summary judgment, the district court analyzed each of the allegedly damnatory statements and concluded that each was substantially true. We agree."

Again in analyzing the public figure status of James Nichols, the actual malice test took a back seat to truth in the Sixth Circuit's opinion:

> "As we have already concluded that defendant's statements were substantially true, it is not necessary to provide detailed analysis of this issue. Instead, we affirm the district judge on this issue and incorporate his sound analysis."

Moore greeted the news of his courtroom victory with a tongue-in-cheek posting on his website, michaelmoore.com: A broadly grinning Michael Moore, rifle on one shoulder and camera on the other, over the headline "Factual and True."

Herschel P. Fink and Brian D. Wassom of Honigman Miller Schwartz and Cohn LLP, Detroit, represented Michael Moore in this action. Plaintiff was represented by Stefani C. Godsey and Kenneth G. McIntyre, Williamston, Michigan.

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Libel and Misappropriation Claims Over The Daily Show Parody Dismissed

By Christina Stanland

In a defamation and misappropriation action filed by local Dallas body-builder Phillip Busch against Viacom Inc., the parent of MTV Networks, and Jon Stewart, the anchor of Comedy Central's *The Daily Show*, a Texas federal court reaffirmed the *Calder* "effects test" for personal jurisdiction in media cases, as well as the First Amendment's protection for parody. *Busch v. Viacom*, 3:06 CV 0493, 2007 WL 548760 (N.D. Tex. Feb 21, 2007) (Lindsay, J.).

Background

Plaintiff Busch sued Viacom and Stewart over a segment on *The Daily Show* which aired in October 2005 as part of the show's satirical "This Week in God" series. In the segment, reporter Stephen Colbert introduced a new "sponsor" for "This Week in God" – a nutritional shake promoted by televangelist Pat Robertson.

Part of the segment Busch challenged from *The Daily Show* featured a six-second clip from *The 700 Club* showing Busch with Robertson discussing the diet shake. In that clip, Robertson shakes Busch's hand and exclaims, "Thanks for using the shake!"

Busch admitted that the challenged clip was simply part of a "fake endorsement." Although Busch admitted that he had voluntarily appeared on *The 700 Club* to promote the use of "Pat's Weight Loss Challenge," he later sued Robertson and the Christian Broadcasting Network, claiming that they had impermissibly used his before-and-after weight-loss images to promote Robertson's for-profit diet shake. This separate suit against Robertson and CBN is pending in the Eastern District of Virginia.

Viacom and Stewart filed motions to dismiss, arguing both that the court lacked personal jurisdiction over Stewart, a resident of New York, and that Busch failed to state a claim for defamation or misappropriation. The court agreed with all of Viacom's and Stewart's arguments.

District Court Decision

In dismissing Stewart for lack of personal jurisdiction, the court determined that Stewart lacked minimum contacts with Texas and that the challenged broadcast did not satisfy the "effects test" enunciated in *Calder v. Jones*, 465 U.S. 783 (1984). The court concluded that the challenged piece was not directed at viewers of *The Daily Show* in Texas because it was broadcast nationwide. The court also concluded that because Stewart did not visit, call or conduct interviews or research in Texas, Stewart had not aimed any conduct at Texas.

In dismissing the claims against Viacom, the court held that the six-second segment of the broadcast challenged by Busch was not defamatory as a matter of law. The court explained that, "because Plaintiff's image appears in a 'fake endorsement' of Robertson's diet shake on *The Daily Show*, a satiric program, no reasonable viewer would have believed that the challenged clip contained assertions of fact about Plaintiff."

> ***"[N]o reasonable viewer would have believed that the challenged clip contained assertions of fact about Plaintiff."***

Alternatively, the court held that because the challenged *Daily Show* segment constituted parody and satire protected under the First Amendment, there is no set of facts under which Busch could have stated a viable defamation claim and allowing Busch to amend his complaint therefore would have been futile.

On Busch's claim for misappropriation of image, the court held that because Busch's image was in the public domain after he voluntarily appeared on *The 700 Club* and because the First Amendment protects parody, "such as the 'fake endorsement' of Pat's Diet Shake at issue," the claim must be dismissed. Again alternatively, the court also concluded that there were no allegations that Viacom appropriated Busch's image for commercial gain, a necessary element of the claim.

Mike Raiff, Stacey Doré, and Christina Stanland of Vinson & Elkins LLP in Dallas represented Viacom, MTV and Jon Stewart. Plaintiff proceeded pro se.

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Seventh Circuit Declines to Recognize Expert Witness Exception to Judicial Proceedings Privilege

In an interesting non-media case, the Seventh Circuit affirmed dismissal of a neurosurgeon's libel claim against another neurosurgeon who had testified against plaintiff as an expert witness in a prior medical malpractice case. *MacGregor v. Rutberg*, No. 06-CV-3018 (7th Cir. Feb. 27, 2007). Plaintiff won summary judgment in the malpractice case and then sued defendant, alleging his testimony was false and defamatory.

In an opinion written by Judge Richard Posner, the Court affirmed dismissal and declined to depart from the general rule that testimony at trial is covered by an absolute privilege in defamation actions. Judge Posner noted that Illinois has carved out an exception for cases where the testimony is "unarguably irrelevant" to the case. *See, e.g., Spaids v. Barrett*, 57 Ill. 289, 291 (1870). Testimony at an anti-trust trial that "by the way, my ex-husband is a murderer, a thief, a deadbeat, and a purveyor of child pornography," was Judge Posner's illustration of the exception. But he declined to recognize another exception for expert witness testimony.

While the judicial proceedings privilege was designed for "lay witnesses" and expert witnesses "could be paid to assume the risk" of defamation liability, Judge Posner concluded that "litigation is costly enough without judges' making it more so by throwing open the door to defamation suits against expert witnesses."

Moreover, the requirement that expert testimony satisfy reasonable standards of acceptance provides a better check on abuses "than allowing every unsuccessful lawsuit to be turned into two or more lawsuits as the winner goes after the expert witness who testified unsuccessfully against him."

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MySpace Wins Dismissal in "Sexual Predator" Suit

By Michael D. Marin and Christopher V. Popov

On February 13, 2007, the federal district court for the Western District of Texas dismissed a highly publicized case arising from the statutory rape of a 14 year-old girl by a man she met on MySpace.com, the world's largest social networking website. *Doe v. MySpace, Inc.*, No. A-06-CA-983-SS, 2007 WL 471156 (W.D. Tex. Feb. 13, 2007) (Sparks, J.).

The 14 year-old and her mother sued MySpace, Inc. and its parent company, News Corporation, alleging that the companies were negligent and grossly negligent for failing to implement safety measures to prevent "sexual predators" from communicating with minors on MySpace.com. The plaintiffs further alleged that MySpace and News Corporation fraudulently and negligently misrepresented the nature and effectiveness of the site's existing safety features, which the plaintiffs argued were useless without effective age verification.

The court's sweeping application of CDA immunity and common law "no duty" principles constitutes a landmark development in Internet law.

District Court Decision

In a thorough and expansive opinion, Judge Sam Sparks dismissed the plaintiffs' negligence and gross negligence claims based on the Communications Decency Act of 1996, 47 U.S.C. § 230 ("CDA"), which provides immunity for interactive computer services from claims flowing from the online publication of third-party content.

The court also held that the plaintiffs' negligence and gross negligence claims were barred under Texas common law, which provides that a person generally has no duty to protect another from the criminal acts of a third party. Finally, the court dismissed the plaintiffs' fraud and negligent misrepresentation claims for failure to satisfy the heightened pleading standards of Rule 9(b).

The court's sweeping application of CDA immunity and common law "no duty" principles constitutes a landmark development in Internet law. While previous cases have held that the CDA bars claims based upon a website's publication of defamatory or otherwise harmful content, *Doe* is the first case to hold that the CDA bars claims based on seemingly innocuous online communications that lead to injuries in the offline world. Furthermore, *Doe* is the first case to hold that a free website, like MySpace.com, has no duty to implement age verification or other safety measures.

Section 230

The district court began its analysis by considering whether the immunity afforded to "interactive computer services" under the CDA barred the plaintiffs' claims. Section 230(c)(1) of the CDA provides that "[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."

It was undisputed that, under the CDA, MySpace was an "interactive computer service" and that the 14 year-old plaintiff and the man who allegedly assaulted her were "information content providers."

After establishing that the plaintiffs and defendants were the type of parties to which Congress intended the CDA to apply, the court discussed the purpose of the CDA's immunity provision as set forth in its preamble. The court concluded that Congress intended for the CDA to promote "the continued de-

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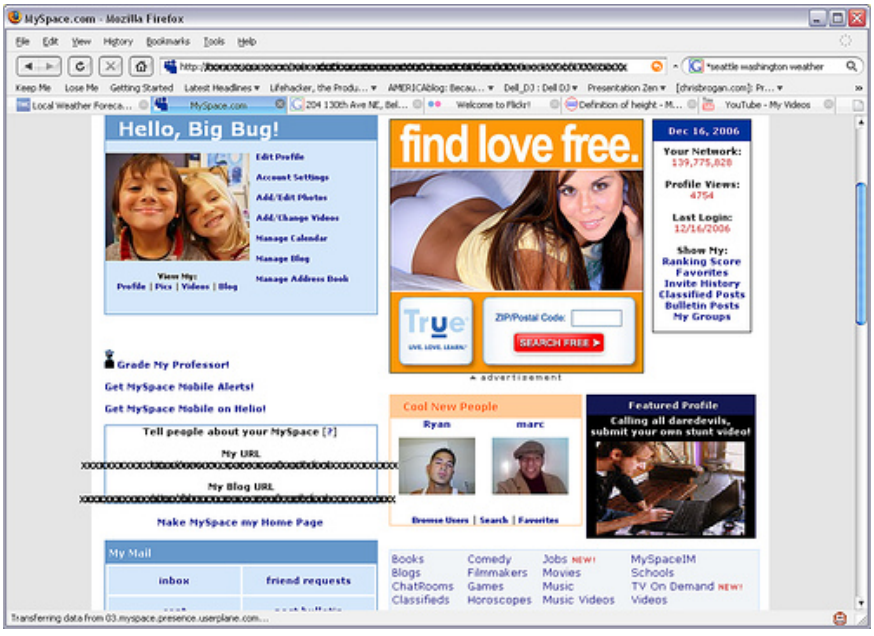

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velopment of the Internet" by ensuring "that web site operators and other interactive computer services would not be crippled by lawsuits arising out of third-party communications."

Quoting from the Fourth Circuit's opinion in *Zeran v. America Online*, 129 F.3d 327, 330-31 (4th Cir. 1997), the court recognized that by "enacting the CDA, 'Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.'" In furtherance of this policy, the court recognized that federal courts have uniformly rejected attempts to hold interactive computer services liable for claims arising from the publication of third-party content.

The plaintiffs attempted to distinguish their claims from *Zeran*, 129 F.3d 327, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003), and other seminal CDA cases by arguing that their case was based not on the particular content posted on MySpace.com, but instead, on MySpace's general failure to implement safety features to prevent sexual predators from contacting minors. The court rejected this distinction as "disingenuous," noting that the underlying basis for the plaintiffs' claims was that MySpace was negligent for publishing communications between the plaintiff and the alleged sexual predator, and that had MySpace somehow blocked those communications, the alleged sexual assault would have never occurred.

The court also rejected the plaintiffs' attempt to hold MySpace liable for the inadequacy of its existing safety measures. The court held that the CDA's Good Samaritan provision, 47 U.S.C. § 230(c)(2)(A), which bars claims based on an interactive computer service's voluntary efforts to restrict harmful content on its website, precluded the plaintiffs from holding MySpace liable for maintaining ineffective security measures relating to age verification. Accordingly, the court held, "No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward MySpace in its publishing, editorial, and/or screening capacities. Therefore, . . . Defendants are entitled to immunity under the CDA."

Texas Common Law

In addition to holding that the plaintiffs' claims were barred under the CDA, the court held that traditional common law principles prevented the plaintiffs from holding MySpace liable for the criminal acts of its users. The court noted that, "[a]s a general rule, a person has no legal duty to protect another from the criminal acts of a third person."

While the court acknowledged that there are exceptions to this general "no duty" principle – *e.g.*, where there is a parent-child, employer-employee, host-invitee, or other special relationship between the actor and third person – it held that MySpace's relationship with its users did not give rise to such an exception. Furthermore, the court rejected the plaintiffs' novel "cyber premises" liability theory, in which they argued that MySpace, like the owner of a physical premises, should have a duty to prevent foreseeable injuries from occurring on its website.

The court's refusal to create a new exception to the common law "no duty" rule in this context was motivated by practical considerations for the social networking industry and for MySpace in particular, which now maintains over 150 million user profiles. The court reasoned that "[t]o impose a duty under these circumstances for MySpace to confirm or determine the age of each applicant, with liability resulting from negligence in performing or not performing that duty, would of course stop MySpace's business in its tracks and close this avenue of communication, which Congress in its wisdom has decided to protect." In concluding its common law analysis, the court recognized that the only special relationship giving rise to a duty in this case was the relationship between the victim and her parents: "If anyone had a duty to protect Julie Doe, it was her parents, not MySpace."

Other Lawsuits

Judge Sparks's analysis will soon be tested. Four families represented by the same plaintiffs' counsel involved in the *Doe* case recently filed similar complaints against MySpace, Inc. and News Corporation in the Superior Court of California in Los Angeles County. The California court has yet to consider the viability of the plaintiffs' claims in this new round of cases.

Michael D. Marin and Christopher V. Popov of the Austin office of Vinson & Elkins, LLP and Cliff Thau of the Vinson & Elkins New York office represented MySpace, Inc. and News Corporation in the litigation.

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First Circuit Applies Section 230 To Dismiss Claims Against Lycos

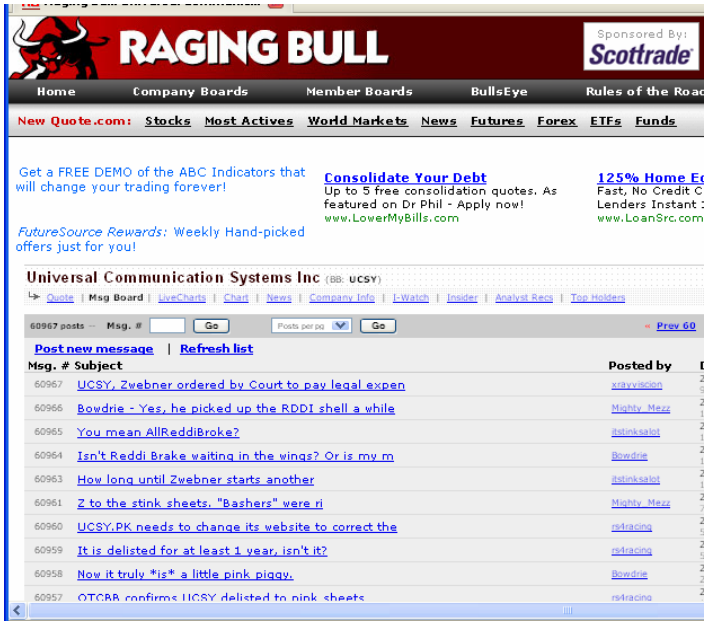
Adopts Prevailing Standard to Grant Immunity in Suit Over Third Party Postings

In February, the First Circuit interpreted Section 230 of the Communications Decency Act for the first time, affirming a Massachusetts District Court decision to dismiss claims against Lycos for third party postings on an investors message board. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, No. 06-1826, 2007 WL 549111 (1st Cir. Feb. 23, 2007) (Boudin, Selya, Lynch, JJ.).

In a lengthy and thoughtful analysis, the Court concluded that "it is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech.... We confirm that view and join the other courts that have held that Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content." *Id.* at *6.

Background

The plaintiffs Universal Communications Systems, Inc. ("Universal"), a Florida-based telecommunications service, and its CEO Michael Zwebner, sued Lycos, Terra Networks (Lycos' corporate parent at the time), Roberto Villasenor, Jr (an alleged poster), as well as several John Doe defendants. At issue were postings on Lycos' Raging.Bull.com website which provides forums for investors to post comments about publicly traded companies.



Plaintiffs sued in Florida federal district court, asserting claims for (1) fraudulent securities transactions under Fla. Stat. § 517.301; (2) cyberstalking under 47 U.S.C. § 223; (3) dilution of trade name under Fla. Stat. § 495.151; and (4) cyberstalking under Fla. Stat. § 784.048. The Florida securities claim was made against all of the defendants, and the remaining claims were made against Lycos and Terra Networks only.

The case was transferred to the District of Massachusetts, based on a user agreement forum selection clause. The district court dismissed the claims against Lycos and Terra Networks holding that Section 230 immunized them from all four counts in plaintiffs' complaint.

Lycos's conduct in operating the Raging Bull web site fits comfortably within the immunity intended by Congress."

Section 230

On appeal, the First Circuit noted that this was the first time the Court was called upon to interpret Section 230, but that it was not deciding the issue on "a blank slate." "Other courts that have addressed these issues," Judge Lynch wrote, "have generally interpreted Sec. 230 broadly, so as to effectuate Congress's policy choice." *Id.* at *4 quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997)).

The Court adopted this broad reading and had "no trouble finding that Lycos's conduct in operating the Raging Bull web site fits comfortably within the immunity intended by Congress."

Lycos qualified as an "Interactive Computer Service" provider under the statute. While Lycos does not offer internet access to its users, it does provide websites, such as Raging-Bull.com, which "'enable computer access by multiple users to a computer server,' namely the server that hosts the web site." *Universal Commc'n Sys.*, at *5 (quoting 47 U.S.C. §230(f)(2)).

The Court also found that the message board postings were "information provided by another information content provider" and the Court held that it would "join the other courts that have held that Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content."

It further found that the Lycos Network was set up in a way that was "standard for message boards and other web sites,"

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First Circuit Applies Section 230 To Dismiss Claims Against Lycos

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and there was nothing about the web site format to make the Court believe that the alleged "misinformation" at issue was Lycos's misinformation.

The Court rejected plaintiffs' argument that Lycos had "provided 'culpable assistance' to subscribers wishing to disseminate misinformation" – citing *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) for this argument. The Court found it doubtful that a culpable assistance exception existed to Section 230 immunity. Moreover, even assuming arguendo that active inducement could negate Section 230 immunity, plaintiffs did not "come close" to pleading any facts in support of the theory.

Plaintiff's cyberstalking and securities claims were thus barred under Section 230. The cyberstalking claims arose from the postings on RagingBull.com and the securities claims were "based on the theory that individuals were taking a short position in [Universal] stock and then spreading misinformation to depress the stock price, so as to profit from their short position."

To address either of these claims, the Court noted, would require it to look at Lycos as the "publisher" of the alleged misinformation or defamatory information, which had been provided by a third party.

Trademark Dilution

The First Circuit also addressed plaintiffs' trademark dilution claim, which the district court had dismissed as "a defamation claim in the guise of an antidilution claim."

The Court affirmed dismissal, but found that the claim could be dismissed as a matter of trademark law. Plaintiffs alleged that since Lycos suggested that its users identify publicly traded companies by their stock symbol, Lycos used plaintiff's mark "UCSY," and "caused injury to [Universal's] business reputation and dilution of its UCSY trade name."

The Court rejected the argument. The alleged injury would ultimately be derived from the criticism on RagingBull.com, and "to premise liability on such criticism would raise serious First Amendment concerns." Consequently "whether Lycos's use of the 'UCSY' trade name is viewed as a noncommercial use, as a nominative fair use, or in some other way, we hold that using a company's trade name to label a message board on which the company is discussed is not a use covered by the Florida anti-dilution statute."

Lycos, Inc. was represented by Daniel J. Cloherty, David A. Bunis, and Rachel Zoob-Hill, of Dwyer & Collora, LLP, of Massachusetts. Plaintiffs were represented by John H. Faro, of Faro & Associates, of Florida.

Michigan Federal Court Dismisses Libel Claims Against Microsoft

Section 230 Bars Claims Over Message Board Postings

A Michigan federal district court this month dismissed libel claims against Microsoft over alleged defamatory third party postings on MSN message boards. *Eckert v. Microsoft Corp.*, No. O6-11888, 2007 WL 496692 (E.D. Mich. Feb. 13, 2007) (Edmunds, J.) (adopting magistrate judge's report and recommendation).

Acting pro se, plaintiff sued Microsoft for postings on a message board called "Joe's Christian Debate," including one that accused him of being a pedophile. He also alleged that Microsoft was liable for not closing out the link between his MSN screen name and his work e-mail. The court dismissed the claims, holding that Microsoft was protected by Section 230.

Although the Sixth Circuit has not yet considered the scope of Section 230, the district court relied on "near-unanimous case law" to hold that Section 230 immunized Microsoft against defamation claims over third-party content. *Id.* at *3 *citing Chicago Lawyers' Committee For Civil Rights Under The Law, Inc. v. Craigslist, Inc.*, 461 F.Supp.2d 681 (N.D. Ill. 2006).

Moreover, Microsoft could not be held liable for failing to remove the link between plaintiff's screen name and his work e-mail because Section 230 forecloses this type of notice-based liability under these circumstances. *Citing Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir.1997).

Microsoft was represented by Charles G. Calio, Joanne G. Swanson, of Kerr, Russell, in Detroit.

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Arizona Applies *Doe v. Cahill* Standard to Anonymous Internet Speakers

Subpoena Quashed Where Plaintiff Could Not Meet Summary Judgment Standard

Last month, the Superior Court of Arizona, Maricopa County, dismissed a complaint for defamation, invasion of privacy and copyright infringement against an anonymous website publisher, holding that plaintiff failed to meet a summary judgment standard. *McMann v. Doe*, No. CV 2006-092226 (Ariz. Super. Ct. Jan. 18, 2007) (Whitten, J.).

In a brief decision, the court endorsed the summary judgment standard as set forth by the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) – a decision which recognized that heightened protection is necessary to protect anonymous speakers who are sued for libel and related claims.

Background

Plaintiff Paul McMann, a Massachusetts real estate developer, brought the underlying complaint against a John Doe web critic, who created the website www.paulmcmann.com.

The website features McMann's name over a large picture of a jack o' lantern, a statement that McMann has 'turned lives upside down," and a warning to the reader to 'Be afraid. Be very afraid.'" The site also has a number of links, including one to a blog or message board, where readers are invited to "sound off about your own experiences."

In motion papers, the unidentified defendant stated that he created the website because he was "extremely dissatisfied" after a business transaction with McMann.

To attempt to determine the identity of the publisher, McMann issued subpoenas to GoDaddy and Domains by Proxy, the hosts of the website. Defendant filed a motion to quash the subpoenas. After briefing and a hearing, the court granted the motion and dismissed the case without prejudice, applying the *Doe v. Cahill* standard.

"Under that standard," the Arizona court noted, "the Plaintiff must show that its claim would survive a Motion for Summary Judgment before being entitled to discover the identity of an anonymous speaker through any compulsory discovery process." *See Doe v. Cahill*, 884 A.2d at 457 ("we hold that a defamation plaintiff must satisfy a summary judgment standard before obtaining the identity of an anonymous defendant.").

The Arizona court simply stated that "[b]ased upon the extensive pleadings by the parties…Plaintiff cannot meet [the *Cahill*] standard for all the reasons argued in Defendant's briefs."

Massachusetts Action

Plaintiff had previously brought suit in Massachusetts federal court. *See McMann v. Doe*, No. 06-11825-JLT, 2006 WL 3102986 (D. Mass. Oct. 31, 2006). The court held that the complaint failed to plead sufficient facts to warrant diversity jurisdiction. But it then went on to examine in detail the issue of protecting anonymous speech in the context of Internet libel suits. The district court agreed that anonymous speech is entitled to First Amendment protection but it questioned whether the standard employed in *Cahill* struck the right balance.

Under *Cahill*, a public figure could unmask an anonymous critic without a showing of actual malice. *Cahill* only required plaintiff to produce evidence in its control to "substantiate the actual malice element." On the other hand, "requiring a preliminary showing of fault would mean no subpoenas would ever issue, and character assassins would be free to trumpet hurtful lies from all corners of the internet."

Regardless, the Massachusetts court concluded that "it is reasonable to apply some sort of a screen to the plaintiff's claim" finding that the statements on the website were opinion, and "plaintiff's affidavit merely contains an assertion that the statement is not true."

Plaintiff was represented by Joseph E. Holland of Holland Law Firm, in Mesa, Arizona.

Defendant was represented by Louis J. Hoffman of Hoffman & Zur, in Scottsdale, Arizona and by Gregory A. Beck of the Public Citizen Litigation Group in Washington, D.C.

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Website Complaining About Plastic Surgeon Protected by Anti-SLAPP Statute

"Before and After" Photos and Complaints Not Actionable

On January 26, 2007, a California appellate court granted an anti-SLAPP motion and dismissed a libel suit brought by a prominent plastic surgeon against an unhappy patient who took to the web to air her complaints. *Gilbert v. Sykes*, 53 Cal. Rptr. 3d 752 (Cal. App., 3d Dist. 2007) (Butz, Cantil-Sakauye, J.J.).

The court held that plaintiff was a limited purpose public figure and that he failed to make a prima facie showing that the complained of statements on defendant's website were false and published with actual malice.

Background

This case stemmed from a medical malpractice action: Georgette Gilbert had received five plastic surgery procedures on her face under Dr. Jonathan Sykes's care, and was "extremely unhappy" with the outcome. Gilbert claimed that following the surgeries "she could not fully close her eyes, her eyebrows were higher than she expected, one eyebrow was higher than the other and she had a permanently 'surprised' look on her face." Gilbert went to other doctors to fix these problems and had four revision surgeries.

Gilbert sued Dr. Sykes for medical malpractice and set up a website, www.mysurgerynightmare.com, on which she posted "before and after" photos, links to information about plastic surgery, a "Selecting a Doctor" section with tips, and a "Red Flags" section with ideas for what to watch for and "Doctors I would be cautious of[.]" Gilbert also included a "Final Thoughts/Contact Me" link, in which she discussed her treatment by Dr. Sykes.

Dr. Sykes requested that Gilbert take down the site, and when she refused Sykes filed a cross-complaint in the malpractice action, alleging defamation, intentional infliction of emotional distress, and loss of business. Gilbert, in turn, filed a motion under California's anti-SLAPP statute, Cal. Civ. Code § 425.16 .

The trial court denied the motion to strike Sykes's complaint, ruling that he was a private figure. "The fact he has published articles and books on plastic surgery and appeared on television shows does not mean there is a public controversy relating to Ms. Gilbert's plastic surgery," the court concluded.

Appeal: The Anti-SLAPP Issue

The appellate court first addressed the application of the anti-SLAPP statute, noting that in California a claim meets the criteria under the statute if it constitutes an act "in furtherance of free speech or petition [.]" (*Gilbert*, 53 Cal. Rptr. 3d at 760 (quoting section 425.16, subsec (c)). To be an "act in furtherance," under the statute, the statement must be "made (1) in a public forum and (2) in connection with an issue of public interest." *Id.* (citing section 425.16, subd (e)).

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Gilbert's website, the court held, qualified under this standard. The Internet is obviously a "public forum." Further, the "issue of public interest" element is to be "construed broadly" under California law. *Gilbert*, 53 Cal. Rptr. 3d at 761 (quoting *Seelig v. Infinity B'casting Corp.*, 91 Cal. App. 4th 798, 808 (Cal. Ct. App., 4th 2002)).

The court found that a simple Google search shows the vast public interest in plastic surgery, for it reveals "a virtual deluge of articles and Web sites devoted to the well-known controversy surrounding plastic surgery." Further, television shows such as *Extreme Makeover*, and revelations regarding celebrities' plastic surgery procedures have "generated a firestorm of negative publicity and comment."

Gilbert's website in particular contributed to this public debate, the court held. The descriptions of her own "nightmare" experience with Dr. Sykes – a distinguished plastic surgeon, as will be discussed below – "contributes toward public discussion about the benefits and risks of plastic surgery in general." Additionally, Gilbert included advice, a place for readers to post testimonials and other information; it was not designed solely to "attack[] Sykes." Thus, the court found, Gilbert's speech was within the scope of the statute.

Public Figure Status

Reversing the trial court, the appellate court held that "Sykes stands out as an archetypical example of a 'limited purpose' or 'vortex' public figure." Dr. Sykes had "thrust himself" into the public debate about plastic surgery by achieving a certain level of prominence. He had been quoted or profiled in magazines and medical journals, appeared on television, and published three books and over 90 articles on plastic surgery.

The court noted: "Once he places himself in the spotlight on a topic of public interest, his private words and conduct relating to that topic become fair game."

Falsity

The court went on to hold that Dr. Sykes was unable to show that defendant's statements were false. The before and after photos were, indeed, of defendant. That defendant might have been slightly off in stating how many months after the procedures the "after" shots were taken was of little significance to the court.

Plaintiff also argued that the site falsely implied he performed procedures that defendant did not "need" or "want." The court rejected this interpretation of defendants' words:

> That she did not "need" the procedures, read in the proper context, simply indicates her regret at her eagerness to go ahead with the surgery without becoming fully informed, and her sorrow at the unfortunate consequences that ensued. No injurious falsehood can be extracted from Gilbert's statement that she did not "need" five procedures.

Plaintiff also alleged that Gilbert "misstate[d] the content of communications" between them, but the court held that the allegation was "far too vague and amorphous to support a cause of action for defamation."

Finally, under the "Red Flags" section of her website, defendant offered tips for choosing a doctor and stated, among other things, that one should "*RUN if a doctor asks you to pay cash under the table* for any part of the surgery. This says a lot about their ethics." Dr. Sykes alleged that this statement insinuated that he was paid "under the table" for defendant's procedures, and he included this in his defamation claim.

The court held that this phrase was not reasonably susceptible to a defamatory interpretation. The "Red Flags" section included several tips and none of them were specific to Gilbert's experience with Sykes.

Indeed, "[n]owhere on the Web site does Gilbert ever state or imply that Sykes accepted cash under the table. Further, the court noted that Sykes "offered no evidence that [the charge of "under the table" payments] was *false.*" Thus, "Sykes has tacitly admitted that the challenged statement was substantially true."

Plaintiff was represented by Wilke, Fleury, Hoffelt, Gould & Birney in Sacramento. Defendant was represented by James Chadwick and Guylyn Cummins, Sheppard Mullin Richter & Hampton; and Kathryn E. Karcher, Megan Whyman Olesek, Jerold L. Hersh, and Gregory Lundell, DLA Piper Rudnick Gray Cary US.

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N.J. Court Dismisses Political Group's Libel Complaint

By Bruce S. Rosen

A Bergen County, N.J. trial court judge this month dismissed libel allegations against a weekly newspaper for reporting the revoked corporate status of a local "good government" political group based upon information posted on a state government website. *Bardinas v. Delaney*, BER-L-8291-06 (Feb. 8, 2007) (Harris, J.).

The Court found, in a dismissal by motion that is becoming increasingly rare, that the report was true, even though there was evidence that the government website was not trustworthy and that the revocation had been rescinded at some point before publication.

"The revelation of a corporate revocation, even of only temporary duration and even only based upon a past failure to abide the ordinary niceties of corporate reporting, is of legitimate public interest in the context of a municipal election for members of a municipal council who will be charged with the administration of a municipal corporation," wrote Judge Jonathan N. Harris, agreeing that plaintiffs were public figures who must prove actual malice.

Background

Plaintiff Independent Coalition for a Better Edgewater, Inc., ("ICBE"), and two ICBE officers – who were also running for elective office as independents – filed defamation claims against the *Bergen News/Sun Bulletin*'s publisher, the Bergen Newspaper Group, Inc., and its editor, Douglas Hall, claiming that the publication had an ulterior motive in publishing the allegation and its editor had a personal bias against the group's president, who was his next-door neighbor. Plaintiffs also sued six Democratic activists who republished the article and commented upon it in campaign literature.

Plaintiffs argued that they had rectified the infirmity months before that and the state had failed to correct the website to reflect their submissions and had the *Bergen News* looked up the ICBE corporate entry sometime shortly before publication on October 25, the ICBE web entry would have been updated and would have shown their registration to be active and up to date.

Thus the complaint alleged a negligent failure to investigate against the *Bergen News* and common law malice against Mr. Hall.

The media defendants maintained that plaintiffs were all public figures requiring they plead and prove actual malice by clear and convincing evidence, not simply negligence or ill-will. They also argued that under New Jersey law plaintiffs must show and specifically plead the defendants knew or should have known that the material from the website was false at the time they published it. The judge never reached additional arguments that the news story was a fair report.

A good portion of plaintiffs' complaint concerned allegations concerning the timing of the story, which came two weeks before the municipal election; plaintiffs pled a cause of action for "heightened responsibility" by the media when writing about issues such as these shortly before an election.

In addition, plaintiffs claimed that Hall libeled them by describing the ICBE as a "political party," rather than as "a corporation which advocates for government reforms ... [and which] actively supports candidates," as it describes itself.

Trial Court Decision

"Plaintiffs line of attack conflates several strands of the story into a single putative malicious act," Judge Harris wrote. He added:

> It is simply common sense that in the world of hard-ball politics, any failing may be fodder to political foes and become an offering to the public maw. The failure of Hall and Bergen to include in the first article more timely and readily available information that would have clarified ICBE's then-current status does not bespeak maliciously libelous conduct. At most, the publisher's and editor's conduct was slapdash and negligent.

Plaintiffs argued in their opposition brief that they should be given an opportunity to depose media defendants to determine their biases, even though the state's newsperson's shield specifically protects defendants from inquiry into the editorial processes. The Bergen Newspapers Group subsequently filed a motion for sanctions against plaintiffs and their counsel under state law and court rules and that motion is pending.

Bruce S. Rosen of McCusker, Anselmi, Rosen, Carvelli & Walsh in Chatham, N.J. represented the media defendants. The non-media defendants were represented by Kevin P. Kelly of Kelly, Kelly & Marotta of Maywood, N.J. Plaintiffs were represented by Michael B. Kates of Nashel, Kates, Nussman, Rapone & Ellis LLP in Hackensack, NJ.

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Agreement in High Profile Murder Trial Protects Reporters' Jailhouse Interview Notes

By John C. Greiner

Based upon an agreement between counsel for *The Cincinnati Enquirer* and the prosecution in a high-profile Ohio criminal case this month, two reporters were not required to produce notes from a jailhouse interview with the defendant.

Background

Marcus Fiesel was a three year old foster child, whose death last August stunned the Greater Cincinnati community unlike any event that most residents could recall. Marcus allegedly was killed by his foster parents, Liz and David Carroll. The body was later burned by David Carroll and Amy Baker, the Carrolls' live in girlfriend. The Carrolls then staged a disappearance, claiming that Marcus wandered off in a park when Liz Carroll fainted.

The state's case against the Carrolls is based on the testimony of Amy Baker, who received immunity. Baker contends that David and Liz Carroll bound Marcus and put him in a closet so that they could attend a family reunion. She claims that when they returned from the reunion, Marcus was dead.

Because the interviews did not implicate confidential sources, Ohio's statutory shield law did not apply.

Jailhouse Interviews

Sheila McLaughlin and Eileen Kelley, two reporters with *The Cincinnati Enquirer*, have covered the case from the beginning. They managed to obtain jailhouse interviews with David and Liz Carroll. They placed the blame on Amy Baker, saying that she actually bound Marcus on the morning of the family reunion, while Liz Carroll was out of the house, so that Baker and David Carroll could have sex.

The Enquirer ran a story about the interviews on Sunday, February 11, 2007. On Monday, February 12, 2007, Liz Carroll's trial began in Clermont County Ohio Common Pleas Court, and the prosecutor served both reporters with subpoenas, seeking testimony as well as production of notes and other materials relating to the interviews.

Newspaper Moves to Quash

The Enquirer filed motions to quash on Monday February 12, 2007, and the court heard argument on the motions the following day. The court denied the motions, and ordered that the reporters turn over their notes related to the interview for an in camera review by 1:00 pm Wednesday, February 14, 2007.

The trial judge also indicated that if the state moved for a witness separation order, he would require the reporters to remain outside the courtroom up until the time they testified. The trial judge denied a request that he stay the order requiring turn over of the notes.

Because the interviews did not implicate confidential sources, Ohio's statutory shield law did not apply. It was not entirely clear whether the judge applied the three part test (relevancy, compelling need and lack of alternative sources) and found that the state satisfied it, or whether he found that there is no qualified privilege.

The intermediate Ohio Appellate Court which oversees the Clermont County courts, in 2005, had ruled that there is no qualified privilege for a reporter subpoenaed to provide grand jury testimony. It is an open question whether that ruling applies to trial testimony.

The *Enquirer* filed a notice of appeal on Tuesday afternoon. Overnight, an ice storm moved through the region, and the appeals court was closed on Wednesday. As a result, the trial judge agreed to push the deadline for the notes back to 5:00 Wednesday.

By mid afternoon Wednesday, counsel for *The Enquirer* reached an agreement with the prosecutors. The prosecutors agreed to withdraw the duces tecum subpoena and issue a subpoena only for the testimony. The reporters would not be required to turn over their notes. In addition, the prosecutors agreed that the reporters would not be subject to a separation order. The reporters agreed not to contest the testimony only subpoena, and further agreed to participate in a conference with the prosecutors and defense counsel to answer questions regarding statements contained in the interviews that counsel needed clarified.

Testimony ended on February 20. The defense did not call Liz Carroll, and the prosecution did not call either reporter in its rebuttal. On February 22, Carroll was convicted and sentenced to 54 years in prison.

John C. Greiner of Graydon Head & Ritchey in Cincinnati represented the reporters in this matter.

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Supreme Court Strengthens Constitutional Protections Against Arbitrary and Excessive Punitive Damage Awards

By Theodore J. Boutrous, Jr. and James C. Ho

In a 5-4 opinion issued last week, the United States Supreme Court struck down a $79.5 million punitive damage award as unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

In *Philip Morris USA v. Williams*, No. 05-1256 (Feb. 20, 2007), the Court held for the first time that a jury may not issue a punitive damage award in order to punish a defendant for injuries suffered by nonparties to the litigation. Moreover, the Court set aside the Oregon jury verdict on the ground that the trial court had failed to establish sufficient procedural safeguards to prevent the issuance of such an award based on harm to nonparties.

This decision is an important development that is likely to have a significant impact on a wide spectrum of major civil litigation across the country.

"[T]o permit punishment for injuring a non-party victim would add a near standardless dimension to the punitive damages equation."

In an opinion authored by Justice Stephen G. Breyer, the Court squarely held for the first time that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." Such awards, the Court reasoned, deny defendants the opportunity, guaranteed by due process, to present every available defense, as they would ordinarily be able to do when specific plaintiffs present specific circumstances in pursuit of relief.

Moreover, such awards magnify the potential for arbitrary decisionmaking and lack of notice that animates the Court's Due Process jurisprudence with respect to punitive damages: "[T]o permit punishment for injuring a non-party victim would add a near standardless dimension to the punitive damages equation. . . . The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer – risks of arbitrariness, uncertainty and lack of notice – will be magnified."

The Court acknowledged that a plaintiff may submit evidence of harm to nonparties in order to demonstrate the degree of the defendant's reprehensibility in its conduct against the plaintiff, consistent with the Court's earlier decisions in *BMW v. Gore* and *State Farm Mutual Automobile Ins. v. Campbell*, so long as that evidence is not also used to punish the defendant for harms inflicted upon nonparties to the litigation.

However, because the trial court failed to establish procedures to ensure that the jury used evidence of harm to non-parties in a constitutionally appropriate manner, the Court set aside the jury award.

As the Court explained, "state courts cannot authorize procedures that create an unreasonable and unnecessary risk" that juries will misuse such evidence, and that "[a]lthough the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases."

Moreover, the Court placed the burden directly on the States to ensure that juries are given sufficient, meaningful guidance on the critical issues: "[T]he Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking . . . to punish for harm caused strangers."

Accordingly, the Court vacated the punitive damage award in its entirety and remanded the case to the Oregon Supreme Court to determine whether a new trial or reduction of the award was the appropriate remedy.

Last week's decision is the latest in a series of recent rulings by the U.S. Supreme Court strengthening constitutional protections against arbitrary or excessive punitive damage awards. For example, in *BMW v. Gore*, 517 U.S. 559 (1996), the Court noted that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."

Accordingly, the Court held that the Due Process Clause provides three guideposts for determining whether a punitive damage award is unconstitutionally excessive:

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Supreme Court Strengthens Constitutional Protections Against Arbitrary and Excessive Punitive Damage Awards

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the degree of reprehensibility of the defendant's conduct, the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award, and the difference between the punitive damages award and the civil penalties and awards authorized or imposed in comparable cases.

In *State Farm Mutual Automobile Ins. v. Campbell*, 538 U.S. 408 (2003), the Court expanded on and strengthened the three guideposts set out in *BMW v. Gore*. In particular, the Court established a general constitutional presumption against awards that exceed a single digit ratio between punitive and compensatory damages.

Following on the heels of *BMW v. Gore* and *State Farm*, the *Philip Morris* ruling is especially noteworthy, as it may portend a significant new trend in the Supreme Court's punitive damages jurisprudence. While *State Farm* and *BMW v. Gore* focused on the failure to provide fair notice of the severity of the punishment that could be imposed, the right to fair notice of the conduct that can give rise to punishment is even more fundamental.

Whereas *BMW v. Gore* and *State Farm* require courts to examine the size of a particular punitive damage award to determine whether it is unconstitutionally excessive, *Philip Morris* requires courts to establish certain procedural safeguards, without which a punitive damage award of any size will be treated as constitutionally suspect.

In addition, the concerns with standardless, speculative civil jury verdicts expressed by the Court in *Philip Morris* could have implications for defamation cases. Although damages may be presumed in defamation cases where the plaintiff has satisfied the heightened standards required under the First Amendment and *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court has also described the doctrine of presumed damages as "an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

It remains to be seen whether the Court will consider imposing even stricter requirements on defamation plaintiffs under the Due Process Clause than those already imposed under the First Amendment, especially where presumed damages also provide the compensatory damage predicate for an additional award of punitive damages.

Finally, the *Philip Morris* decision is especially significant because it marks the first time since their confirmation to the U.S. Supreme Court that Chief Justice John G. Roberts, Jr. and Justice Samuel A. Alito, Jr. have expressed their views on whether and to what extent the Due Process Clause protects defendants against arbitrary and excessive punitive damage awards. First, they declined to join Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg, who dissented in *Philip Morris* and have traditionally opposed the development of stronger constitutional protections against punitive damage awards.

Second, although Justice John Paul Stevens authored *BMW v. Gore* and joined the majority in *State Farm*, he dissented in last week's ruling, although he reiterated in *Philip Morris* his agreement with the earlier decisions. The *Philip Morris* decision thus not only confirms that there is now a 6-3 majority on the U.S. Supreme Court in favor of robust constitutional protections against arbitrary and excessive punitive damage awards.

It also suggests that Chief Justice Roberts and Justice Alito may be prepared to expand upon the Court's modern punitive damages jurisprudence even further than Justice Stevens, one of the original framers of this jurisprudence, is willing to do – especially in the context of requiring that clear standards and meaningful procedural safeguards exist before such punishments may be imposed.

Theodore Boutrous is a partner, and James Ho, of counsel, with Gibson, Dunn & Crutcher LLP. Mr. Boutrous filed a brief amicus curiae on behalf of the Product Liability Advisory Council in Philip Morris USA v. Williams.

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THE OTHER SIDE OF THE POND

UK and European Law Update

By David Hooper

UK Privacy Law

I drew attention in December's *MediaLawLetter* to the striking decision of Mr Justice Eady in *CC v AB* [2006] EWHC 3083 (QB) (04 December 2006), where the Judge held that even an adulterous relationship may attract a legitimate expectation of privacy at the request of the adulterer.

A temporary injunction was granted restraining the cuckolded husband from publicizing details of an adulterous affair his wife had with a celebrity. It was perceived as an extension to the law of privacy and a departure from previous English authorities (in particular the case of *A v B* [2002] EWCA Civ 337).

The betrayed husband was initially refused leave to appeal by Lord Justice Buxton, and an oral application for leave to appeal was scheduled to be heard between February 16 and March 9. However, a settlement has now been reached on confidential terms and the injunction against the husband remains in place.

The case turned on the husband's admitted harassment of the celebrity, the husband's desire to exploit publication explicitly for financial gain and the possible damage to the celebrity's wife's mental state. As the injunction was only a temporary one pending trial, it remains to be seen if it will be followed. On balance it seems a further move in favour of Article 8 at the expense of Article 10.

Ash v. McKennitt

I also discussed the implications of the Court of Appeal's ruling in *Ash v McKennitt* (2006) EWCA 1715 (Dec. 14 2006), which was a ringing endorsement of Mr Justice Eady's first instance decision. Canadian folk-singer Loreena McKennitt claimed that Ms Ash's book about her, "Travels with Loreena McKennitt: My Life as a Friend," was a breach of confidence and infringed her privacy rights.

Ms Ash has now lodged a petition for leave to appeal to the House or Lords, arguing that the decision represents "a significant shift in favour or privacy at the inevitable expense of freedom of expression." The petition asserts that the Court of Appeal's decision sets a worrying precedent and could lead to more pre-publication injunctions, stifling the press's right to freedom of expression and limiting the amount of information available to the public.

The ruling means that publication of any private information about public figures may not be permitted unless it has some public interest value. The fact that the information may be available to the public will not necessarily be fatal to a claim for privacy. It is a case which has caused considerable concern to the publishers of unauthorised biographies. It remains to be seen if the House of Lords accept the case.

Copic Presse and Google

On February 13, there was a decision in Belgium which highlighted the differences in approach to the law of copyright between continental Europe and the United States. The decision of the Brussels First Instance Court in favour of a group of Brussels newspapers against Google News is being appealed.

The use of the headline link amounted in the Belgian view to a breach of copyright and of the database rules. The use of cached material was also held to be a breach of copyright. It appears to be an early stage in what may prove to be long-drawn litigation which is likely to produce an interesting examination of the European and American approaches to whether the use of headlines and a small extract of text can infringe copyright and, if so, whether it is fair use or fair dealing and whether search engine technology and the robot exclusion standard gives rise to an implied licence to use the headlines, if the newspaper does not request the removal of its material from the search engine by giving it a no-archive instruction.

Last year a federal district court in Nevada reached the opposite conclusion to the Belgian court. *See Field v Google Inc.*, 412 F.Supp.2d 1106 (D. Nev. 2006). In a copyright infringement suit against Google for caching plaintiff's website as part of its search engine, the court had no doubt that the robots.txt metatag which could result in a no-archive instruction being given to the Google search engine effectively resulted in an implied licence for Google to list the claimant's website, unless instructed to the contrary. Furthermore, the use of the small amount of material from the site by way of indexing amounted to fair use and the court granted summary judgment to Google.

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Criminal and Continental Libel

Sir David and Sir Frederick Barclay, the owners of the Telegraph Group, have withdrawn their criminal libel claim in France against the *Times*' after the newspaper published a clarification. The action was brought in relation to a *Times* article published in November 2004 stating that the Barclay twins "often take advantage of owners in distress to pick up assets on the cheap."

The Barclays brought their claim in France seemingly because they felt that British justice was too slow and inefficient, and possibly also because libel is a criminal offence in France. The fact that such a claim had been brought by a newspaper proprietor had attracted its share of controversy.

It followed a similar claim they had brought when they were owners of the *Scotsman* and *European* newspapers against BBC Radio Guernsey and the journalist John Sweeney when they were awarded 20,000 Francs (£2,200). A certain piquancy had been added to the claim by the fact that the editor of the business section where the offending article at the *Times* had appeared, had in the intervening period, become editor of the *Sunday Telegraph*, a Barclay owned newspaper.

After preliminary hearings, the French court accepted jurisdiction. In its clarification, the newspaper declared that "[i]t was not our intention to suggest, as some people may have understood it, that the Barclays frequently exploit vulnerable people in financial difficulty in an underhand and unfair way for commercial gain or to impugn their business ethics or integrity."

The case had been fiercely contested by the *Times* and it remains to be seen whether this was in reality the climb-down many believed it to be and whether the Barclays, as newspaper proprietors, will desist from any such litigation against other newspapers particularly in the libel-friendly climate of France.

CFAs

The unsatisfactory nature of Conditional Fee Agreements was further illustrated by a case brought by a woman, Patricia Tierney, complaining about a story in the *Sun* newspaper linking her with a brothel and a well-known English footballer, Wayne Rooney.

Just before the trial it was discovered that she had some years previously admitted to the police that she had worked as a prostitute – precisely what she was complaining about against the *Sun*. This revelation brought the case to a dramatic stop and exposed the claimant to the risk of prosecution. However, the newspaper's costs, which they are unlikely to recover, were over £150,000.

If Ms Tierney had won her case, her lawyers would have claimed a success fee of 100% which was estimated to have been likely to work out at £500,000. As it happened, justice was done but at considerable expense bearing in mind the tawdry nature of the allegations. That such costs are incurred in relatively uncomplicated libel litigation does add to the chilling effect of such claims and to the likelihood of their being settled – quite possibly contrary to the justice of the case.

Ironically, claimants losing cases such as this can assist claimants' lawyers generally in that they can point to the risk of such litigation in support of their claim for 100% success fee – a point not lost on Carter-Ruck, the well-known claimants lawyers (who were not involved in the case) in their comment after the case.

Protection of Sources

On February 21, the Court of Appeal upheld an investigative journalist's right to keep secret his source for an article published seven years ago about a mental hospital's alleged mistreatment of Moors murder Ian Brady. *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101 (21 February 2007).

The Court held that journalist Robin Ackroyd's right to protect his source outweighed the hospital's legitimate aim to seek redress against the source. The article had already been the subject of an earlier legal battle between the hospital and the article's publisher, Mirror Group Newspapers ("MGN"), over Robin Ackroyd's identity. The Court held that it was a "false assumption" to think that because Mr Ackroyd's identity had been disclosed, it would automatically follow that the underlying source would also be disclosed.

The Court criticised the protracted litigation in the MGN case, where it had been assumed that if the anonymous freelance journalist's name (Robin Ackroyd) had been revealed this would necessarily lead to the disclosure of *his* underlying source.

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In the long-running litigation brought by the Mersey Care National Health Service Trust, the decision of Mr Justice Tugendhat in favour of the investigative journalist Robin Ackroyd (cross-refer to my article of February 2006) was upheld. *See MediaLawLetter* Feb. 2006 at 39.

Earlier litigation brought by the Health Trust against Mirror Group Newspapers had gone to the House of Lords in consequence of which the Mirror had had to disclose the identity of Robin Ackroyd as the journalist source of the original story. He had provided the information to the paper but he had himself got it from an undisclosed source at the hospital.

It was assumed that the Trust would then be able to compel Mr Ackroyd to disclose who was his source within the hospital who had disclosed confidential medical information in connection with an allegation of a mental hospital's mistreatment of a notorious child murderer.

Despite the importance of upholding patient confidentiality, Mr Justice Tugendhat had concluded that it was *not* in the public interest to compel Mr Ackroyd to disclose his source. The Court of Appeal could not fault the reasoning of Mr Justice Tugendhat and dismissed the appeal while expressing surprise that there had been so much litigation to so little avail and noting that it appears to have been assumed in the earlier House of Lords litigation that the upshot would be the revelation of Mr Ackroyd's source.

The upshot was an endorsement of both Article 10 and Section 10 Contempt of Court Act 1981 which provides for the protection of journalist sources. Those in the United States who criticise the UK libel laws may care to contrast the UK's protection of journalists' sources with the position in the United States. Journalists such as Richard Ackroyd do not get thrown in jail in such circumstances.

Misuse Of Personal Information

The Secretary for Constitutional Affairs, Lord Falconer, announced on February 8, 2007 that the government is to introduce legislation providing for prison sentences of up to two years for those who illegally trade in or misuse individual's personal information. At present the penalty under Section 55 Data Protection Act 1998 is £5,000. The abuse of private information had been highlighted by the Information Commissioner's Report What Price Privacy Now? (http://www.ico.gov.uk/upload/documents/library/corporate/research_and_reports/what_price_privacy.pdf and he had called for such an increase in penalties.

The penalties are aimed at "blaggers" who through corruption or deception persuade information holders to pass their information over. Taken with the recent case where the royal editor of the *News of the World* received a prison sentence for unlawfully intercepting voicemails on royal and other celebrity mobile phones (a straightforward criminal case rather than one raising issues of journalistic freedom) and another case where in a separate case a wealthy businessman and enquiry agents were likewise jailed for the purchase and sale of such intercepted information, it is clear that the laws protecting confidential data are going to be more strictly enforced.

David Hooper is a partner with Reynolds Porter Chamberlain in London.

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German Constitutional Court Rules Newsroom Search Illegal

In a strong affirmation of journalists' right to protect confidential sources, the German Constitutional Court, the country's highest court, held this month that the search and seizure of materials from the editorial offices of a magazine as part of a leak investigation violated the magazine's free press rights.

The German Constitutional Court held that "searches and seizures in criminal investigations against journalists are inadmissible under constitutional law, if their exclusive or prevailing purpose is the identification of the journalist's source."

In April 2005, the German political magazine CICERO published an article about terrorist leader Abu Zarqawi and included information from a classified intelligence document. Following publication, the German Criminal Investigation Office began investigating the author the article and the magazine's editor for violating Germany's state secrets law under section 353b of the German penal code. German police later raided the editorial offices of the magazine to identify the source of the leaked report.

A more detailed report by European counsel will be published in next month's newsletter.

RECENTLY PUBLISHED

Defamation Comparative Law and Practice By Andrew Kenyon

A recently published book by Andrew Kenyon, of the University of Melbourne Law School, collects and reports the results of his investigation into defamation law and litigation practice in England, Australia and the United States.

Based on extensive interviews with media law practitioners in all three jurisdictions, the book focuses in particular on how the element of defamatory meaning drives litigation decisions in the England and Australia, as compared to the U.S. The book also looks at the comparative effectiveness of privilege defenses under English and Australian law.

The contents and first chapter of the book are available for complimentary download from Melbourne University's Centre for Media and Communications Law: www.law.unimelb.edu.au/cmcl

The book is also available through amazon.com and routledge.com.

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Newspaper Wins Access to Sentencing Letters

Letters Submitted to Sentencing Judge for Consideration are "Public Judicial Documents"

This month the Superior Court of Pennsylvania held that a sentencing court abused its discretion when it denied the *Pittsburgh Post-Gazette* access to letters that had been submitted to the court prior to the sentencing of a Pittsburgh city official for a number of narcotics offenses. *Commonwealth of Pennsylvania v. Martinez*, No. 724 WDA 2004, 2007 PA Super 33 (Pa. Sup. Ct. Feb. 6, 2007) (Bowes, Panella, Popovich, J.J.).

Background

The underlying criminal case involved Gilbert Martinez, who had pled guilty in 2003 to "multiple counts of delivery of a controlled substance and possession with intent to deliver a controlled substance." Martinez worked in the Controller's Office in Pittsburgh's City-County Building.

Before Martinez was sentenced, people wrote letters on his behalf, asking that the sentencing court show leniency when determining the sentence. Some of these letters were from government officials. The defense attorney submitted them to the court and gave copies to the prosecution. At the sentencing hearing, the judge stated:

> I have been in receipt of a number of letters that were filed in your behalf, from everybody from family to government officials. I have reviewed those letters. This is the time set for sentencing.

About a month later, the *Pittsburgh Post-Gazette* sought to obtain copies of the letters. It filed a petition to intervene and argued that the public had an interest "in knowing whether any elected or appointed officials wrote to the [c]ourt in an attempt to excuse or minimize Mr. Martinez's breach of the public trust ...." Neither the prosecution nor Martinez objected. The trial court denied the motion, finding that the letters were not public judicial documents for they "were not introduced into evidence at the time of the hearing[]" and had not been filed.

Appeals Court Decision

The appellate court framed the issue as follows: "Does the news media enjoy a common law right of access, after sentencing, to letters submitted on a defendant's behalf by defense counsel, which were presented to and reviewed by the sentencing court in preparation for sentencing?" It applied an abuse of discretion standard.

First, the court found that the sentencing letters were "judicial documents" and were "public":

> [g]iven the open nature of criminal trials, and sentencing proceedings in particular, we find that letters submitted to a sentencing court by defense counsel at the time of sentencing, which the sentencing court explicitly reviews in preparation for sentencing, are public judicial documents regardless of whether the sentencing court formally dockets the letters.

The sentencing letters were "judicial documents" and were "public."

Consequently, there existed a presumption of access to these letters. Since the letters were submitted to the sentencing judge for consideration prior to sentencing, "our citizenry would have no basis to assess the discretion exercised by elected judicial officers[]" if they were not made available to the public.

Though the trial court has discretion regarding the common law right of access to public judicial documents, the sentencing court in Martinez's case "failed to identify *any* countervailing factors." The sentencing court had merely stated that it could deny "access to a judicial record 'when court files might ... become a vehicle for improper purposes.'" This, the court held, constituted an abuse of discretion. The lower court was directed to allow the *Pittsburgh Post-Gazette* to make copies of the sentencing letters.

Save the Date

November 9, 2007, New York City

Defense Counsel Section Breakfast

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UPDATE: Mayor of Toledo Permanently Enjoined from Denying Broadcaster Access to Press Conferences

Court rules in favor of "more sunshine" and "a better informed public"

Last month the Northern District of Ohio issued a preliminary injunction against the mayor of Toledo, Ohio and his public information officer to prevent them from excluding a radio broadcast reporter from public news conferences. On January 31, 2007, the court issued a permanent injunction in that case. *Citicasters Co., v. Finkbeiner*, No. 07-CV-00117 (N.D. Ohio Jan. 31, 2007) (Carr, J.).

Background

Radio talk show host and reporter Kevin Milliken and WSPD Radio 1370, filed a complaint and motion for a temporary restraining order in early January, alleging that Milliken had been purposely excluded from public press conferences because of critical statements he had made about the mayor. Milliken also argued that the public information director was purposely neglecting to inform the station's news director that press conferences were being held.

Judge Carr granted a TRO, ruling that WSPD showed a strong likelihood of success on the merits, and ordering that Mayor Finkbeiner, his spokesman "and their officers, agents, and employees and all other persons associated with or acting in active concert or participation with them, be and are, enjoined and restrained from (1) excluding or refusing to admit Plaintiff Kevin Milliken to the Defendants' public press conferences and (2) failing to give advance notice, equivalent to that given to other similar organizations, to the News Director of Plaintiff WSPD 1370 of Defendants' public press conferences."

Following a hearing, the court granted a permanent injunction. The court concluded that the mayor and his public information officer had indeed violated the First Amendment. During that hearing, defendants had attempted to argue that Milliken was "not a reporter ... [but rather] an entertainer ... for talk show radio." They also argued that the mayor was allowed to hold "press briefings" to which he could invite a select group of reporters. Neither of these arguments was persuasive to the court.

Indeed, in its permanent injunction order, the court stated that it found the "City's excessive or exclusive focus on the idea of a briefing [ ] 'troublesome'" and was "concerned that some how every future media opportunity of Defendant would be labeled a 'briefing' necessitating future court hearings."

The court concluded its order with the following excerpt from the hearing:

> The Court observed, when counsel for the Defendants expressed concern that an Order would be 'a sword of Damocles hanging over [their clients' head]' that 'the purpose of a restraining order is to make clear to a public official that you disregard the First Amendment at your risk and peril. That's the whole point. And maybe it's not such a bad thing ... to the extent that there might be some restraint on the part of any public official developing that kind of relationship with members of the press to the exclusion of others, I happen to think that's not all bad. More sunshine, more disinfectant, more light, more knowledge, a better informed public. That's a risk that I think is well worth imposing.

Defendants were ordered to "admit Plaintiff Kevin Milliken to the Defendant's public press conferences" and to "give advance notice to the News Director of Plaintiff WSPD 1370 Radio equivalent to that given to other news organizations of Defendants' public press conferences."

Plaintiffs were represented by Thomas G. Pletz of Shumaker, Loop & Kendrick, LLP. Defendants were represented by William H. Bracy of the City of Toledo Law Department.

Now available online....

A collection of **CLOSING ARGUMENT** transcripts from recent media trials is now available on the MLRC website at

http://www.medialaw.org/LitigationResources/ClosingArguments

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ETHICS CORNER

Should Judges Decide Motions to Recuse Themselves?

By Patricia Foster

Can biased judges be trusted to admit their own bias, and decide their own recusal from cases? Michigan Court Rules presume that they can. Michigan is not unique in that sense as judges in federal and state courts are often charged with deciding their own bias or prejudice.

All federal court justices, judges, and magistrates must recuse themselves from cases where their impartiality might reasonably be questioned because of personal bias or prejudice against a party. While district court judges challenged with affidavits must turn the decision for recusal over to another judge, all other federal judges facing motions for disqualification for bias or prejudice must make the call themselves. *See* 28 USCS § 144; 28 USCS § 455.

Can biased judges be trusted to admit their own bias, and decide their own recusal from cases?

Where the law provides for no referral to an impartial judge, courts have steadfastly determined that the challenged judge is the best arbiter for decisions involving his or her own disqualification. *Union Independiente de Empleados de Servicios Legales v Puerto Rico Legal Servs., Inc.*, 550 F.Supp. 1109 (D. Puerto Rico 1982).

Similarly, state court rules around the country provide for the challenged judge to decide motions for recusal in the first instance. Once decided, recusal decisions may be subject to a review process under court rules and to appellate review under an abuse of discretion standard. *See* MCR 2.003; *Wasko v. Moore*, 122 Fed. Appx. 403, 407 (10th Cir. 2005). However, where the challenged justice sits on the highest court, no such review is available.

Recusal of Supreme Court Justices

Contentious, and unreviewable, recusal decisions have been made in the U.S. Supreme Court. Justice Black declined to recuse himself from a case argued by his former law partner. *Jewell Ridge Coal Corp. v. Local No. 6167 U. M. W. A.*, 325 U.S. 161 (1945) *rehearing denied*, 325 U.S. 897 (1945). Justice Rehnquist declined to recuse himself from a case reviewing the U.S. Army's surveillance of civilian gatherings, a policy he endorsed as a White House attorney. *Laird v. Tatum*, 408 U.S. 1 (U.S. 1972).

More recently, Justice Scalia made news by declining to recuse himself. He refused to be disqualified from a case where his duck-hunting companion, Vice President Dick Cheney, was a party. *Cheney v. United States Dist. Court*, 542 U.S. 367 (U.S. 2004).

Constitutional Challenge to Michigan's Rule

In December 2006, the Sixth Circuit Court of Appeals considered a constitutional challenge to Michigan's Court Rule on recusal, claiming that the rule, as written and as applied, offends due process. The Court determined that the constitutionality of the Michigan rule and its application to future cases is a question that can be decided by the federal courts. *Fieger v. Ferry*, 471 F.3d 637 (6th Cir. 2006).

The case was brought by an aggressive trial attorney, Geoffrey N. Fieger, who has become renowned for his outspoken criticism of the Michigan Supreme Court. His animosity would seem mutual as several of the justices on that court have publicly criticized Fieger. Claiming that these justices are biased against him, Fieger moved (unsuccessfully) for their recusal in two recent cases.

In one, Fieger achieved a substantial jury verdict for his client that was upheld by the Michigan Court of Appeals. *Gilbert v. Daimler-Chrysler Corp.*, 2002 Mich. App. LEXIS 1168 (Mich. Ct. App. 2002), *rev'd* 470 Mich. 749 (Mich. 2004). In the other, Fieger again won a favorable judgment at trial, but was reversed by the appellate court. *Graves v. Warner Bros.*, 253 Mich. App. 486 (Mich. Ct. App. 2002), *cert. denied* 542 U.S. 920 (U.S. 2004).

As both cases approached the Michigan Supreme Court, Fieger moved to disqualify four of the Supreme Court justices, citing personal, derisive, public remarks made about him during judicial elections. *See, e.g.*, Molly McDonough, *Feisty Feiger Carries On His Fight: He Vows To Depose Michigan Supreme Court Justices Over Recusal Policy*, ABA JOURNAL eREPORT, Jan 12, 2007 (available at http://www.abanet.org/journal/ereport/j12feiger.html).

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Disqualification is warranted when a "judge cannot impartially hear a case . . . [because] the judge is personally biased or prejudiced for or against a party or attorney." MCR 2.003. To Fieger's dismay, Michigan Court Rules expressly empower challenged judges to decide for themselves whether to grant motions seeking their disqualification. MCR 2.003.

As described above, while the rules provide a review procedure for a judge's denial of a recusal motion, no such review is available when the judge at issue is a Michigan Supreme Court justice. *Id.*

In both of Fieger's cases, the challenged justices ruled that recusal was not necessary. *Gilbert v. Daimler-Chrysler Corp.*, 669 N.W.2d 265 (Mich. 2003); *Graves v. Warner Bros.*, 669 N.W.2d 552 (Mich. 2003). They then went on to decide both cases against Fieger's clients. In one case the Michigan Supreme Court reversed the trial court verdict for Fieger's client and the appellate court affirmation; in the other, the court denied Fieger's client's application for appeal. *Gilbert v. Daimler-Chrysler Corp.*, 126 S. Ct. 354 (U.S. 2005); *Graves v. Warner Bros.*, 542 U.S. 920 (U.S. 2004).

If Fieger wins, the decision will be the first in the country to find that an uninvolved justice must review denied recusal motions as a constitutional prerequisite.

Fieger took his case to federal court where he claimed that the challenged justices and the Michigan Rules violated his due process right to a fair hearing on the issue of recusal. *Fieger*, 471 F.3d at 640. Fieger's challenge was initially stymied by the *Rooker-Feldman* doctrine that prevents a federal court from sitting in direct review of a state court's ruling. *Id.* at 642-43.

The district court determined that the due process claim was so intimately involved with the recusal decision that neither could be reviewed. The Sixth Circuit determined that any review of the recusal decisions in Fieger's past cases was, indeed, beyond the subject matter jurisdiction of the federal court. *Id.* at 644. However, the Sixth Circuit found Fieger's constitutional challenge to the Michigan Rules to be prospective in nature, thus allowing Fieger's challenge to be heard. *Id.* at 646.

The various interests involved are now preparing to litigate this matter, and things are getting ugly. Fieger hopes to depose Michigan's Supreme Court justices to expose their "evil deeds." McDonough, *supra* ¶ 6. The justices are fighting publicly, and amongst themselves. Adam Liptak, *Unfettered Debate Takes Unflattering Turn in Michigan Supreme Court*, N.Y. TIMES, Jan. 19, 2007, at 21.

Four of the Michigan Supreme Court justices were appointed by Governor John M. Engler, the victor over Fieger in a bitter 1998 campaign for that position. *Id.* Those four justices are the ones Fieger sought to disqualify from ruling on his cases. Those same four recently voted over three dissenters to reprimand Fieger for referring to several appeals court justices with unrestrained language. Even more recently, those four adopted a new rule over three dissenters to prohibit justices from publicly exposing written or spoken deliberations regarding cases. J. Weaver, Dissent to Administrative Order No. 2006-8, *available at* http://www.justiceweaver.com.

The dissenters have jumped into the fray by flagrantly disobeying that rule to make public the barbs being exchanged between the justices. These include accusations of bullying, childish behavior, difficult behavior, and soap opera dramatics. *See* Liptak, *supra* ¶ 10. In one draft opinion, the court's Chief Justice called upon one dissenter to escalate her protests through a hunger strike, thus affording a happy ending for both of them. *Id.*

No one knows how these antics within the Michigan Supreme Court will play out nor the fate of Fieger's constitutional challenge in federal court to Michigan's Court Rule on recusal.

If Fieger wins, the decision will be the first in the country to find that an uninvolved justice must review denied recusal motions as a constitutional prerequisite. McDonough, *supra* ¶ 6. With the prevalence of partisan wrangling and bravado in hotly contested elections, the facts that prompted Fieger's allegations of bias might easily crop up elsewhere.

Patricia Foster is an associate in the Cincinnati office of Frost Brown Todd LLC.

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