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LDRC Libel Defense Resource Center

LIBELLETTER

January 1997

Green v. Chicago Tribune: ILLINOIS APPELLATE COURT REVERSES DISMISSAL OF PRIVACY, EMOTIONAL DISTRESS CLAIMS AGAINST MEDIA

By Samuel Fifer and Greg Naron

In a December 30, 1996 opinion, the Illinois Appellate Court, over dissent, reversed a trial court's dismissal of privacy and emotional distress claims based on a truthful newspaper report. The Appellate Court's decision is a disturbing departure from previously settled law with respect to the "public concern" limitation on such actions.

The Tribune Article

Around 11 p.m. on December 30, 1992, Calvin Green was shot in the back by a large-caliber bullet as he walked on the South Side of Chicago. Police said the shooting "appeared to be gang related." Calvin was rushed to Cook County Hospital, "where a team of

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Fly-Along: Rescue Helicopter is Hospital Room In Privacy Analysis

By Gayle Sproul

An air rescue is irresistibly dramatic, but a recent California case proves that it can be weighed down by the same precedents that hamper its land-based counterparts. In *Shulman v. Group W Productions, Inc.*, 1996 WL 718183 (Dec. 13, 1996), the Los Angeles-based Second District Court of Appeal hands a mixed bag to media defendants involved in a "fly-along" helicopter medical res-

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January Juries:

•Food Lion awarded $5,545,750 in punitive damages, in addition to $1,402 compensatory, p. 3

•Time, Inc. wins before a New York federal court jury in a libel trial, p. 3

Parties Reach Agreement in Crime Scene Photo Case TRO Sought Against the *Globe*

Following argument on a motion for a temporary restraining order to bar the *Globe* from further publishing crime scene photos of a murdered six-year old girl, and prior to a decision on the motion, the parties in *Meyer v. Globe Communications Corp.*, (Dist. Court for the County of Boulder, Co., 1997) entered into a stipulation in which the defendant agreed to return the original photos to the Boulder County Coroner, retained the right to republish the photos and reserved the right to publish photos and information it obtains in the future and plaintiffs agreed to dismiss the request for a temporary restraining order and to dismiss the civil complaint that they had also filed against *Globe*.

On January 11, 1997, the date of the release of the issue of *Globe* containing the photos, plaintiff, the Boulder County Coroner and other public officials, informed *Globe* they would seek

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Over The Transom: Is Nothing Safe Anymore?

By Laura Peterson Elkind and Stuart F. Pierson

How often has this happened: A reporter receives an anonymous letter without a return address; the letter contains self-authenticating tapes, documents or other materials disclosing obviously newsworthy information; the reporter, knowing nothing about the origin of the *materials, manages to confirm* their authenticity, but cannot get the subjects to talk; the reporter then asks: Why can't I use them?

There was once a time when the risk of using such material seemed low. As the Gingrich-McDermott firestorm in *Florida and Washington is demonstrating,* the risks are rising.

The Federal Wiretap Statute, 18 U.S.C. § 2510, *et seq.*, prohibits the disclosure or use of the contents of any wire, oral or electronic communication "knowing or having reason to know that the information was obtained" in violation of the law. 18 U.S.C. § 2511(1). The statute imposes civil and criminal liability for the interception of any wire, oral or electronic communication.

There is, however, a qualified "one-party consent" exception: Where one of the participants in the communication has given prior consent to the interception, there is no violation, so long as the conversation was not intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United Sates or of any state. 18 U.S.C. §§ 2511(1), (2)(d), 2520. A person claiming her wire, oral, or electronic communication was intercepted, disclosed, or intentionally used in

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In This Issue . . .

Please Note. . .

Attached to this month's *LDRC LibelLetter* is an updated outline of the Pre-Publication/Pre-Broadcast/ Pretrial Committee's *Survey of Case Law Concerning Pre- Publication and Pre-Broadcast Review*.

The survey addresses various issues relating to the legal effect of pre-publication review in libel cases and attorney-client privilege issues arising from the pre-publication review process.

The original outline was distributed at the 1995 NAA/NAB/LDRC Libel Conference.

IT'S NOT TOO EARLY TO MARK YOUR 1997 CALENDARS FOR THE FOLLOWING LDRC EVENTS:

1997 NAA/NAB/LDRC BIENNIAL LIBEL CONFERENCE
SEPTEMBER 10-12, 1997
HYATT REGENCY, RESTON TOWN CENTER
RESTON, VA

LDRC FIFTEENTH ANNUAL DINNER
WEDNESDAY, NOVEMBER 12, 1997
WALDORF ASTORIA
WITH PRESENTATION OF THE *"WILLIAM J. BRENNAN JR. DEFENSE OF FREEDOM AWARD"* TO FRED FRIENDLY

Food Lion Wins Over $5.5 Million From ABC in Fraud andTrespass Suit

Without contesting the accuracy of ABC's report, in which undercover video showed employees selling out-of date meat and rat-gnawed cheese, Food Lion, a grocery chain, has convinced a North Carolina federal jury to award $5,545,750 in punitive damages against ABC and two senior ABC producers. The verdict follows the $1,402 in compensatory damages awarded last month in the grocery chain's fraud, trespass and breach of loyalty and duty suit against the network.

A North Carolina federal jury last month found that ABC *PrimeTime Live* field producers Lynne Dale and Susan Barnett, who faked references and hid their identities as reporters in order to obtain employment with Food Lion, liable for committing fraud, breach of loyalty and duty, and trespass. In addition, the jury also found that Richard Kaplan, *PrimeTime Live*'s former executive producer, producer Ira Rosen, and ABC, through the actions of its in-house attorney in approving the undercover operation, were all liable for fraud for their roles in putting the story together.

At the close of the liability phase of the trial, the jury turned to consider the amount of compensatory damages Food Lion should receive. The jury awarded Food Lion $1,402 in actual damages to compensate for the fraud and trespassing.

The case then entered the punitive phase during which Food Lion attorney Mike Mueller focused on the salary increases each of the individuals involved in the Food Lion story received after it had aired. Mueller argued that the increases revealed ABC's bias and motives for using the undercover approach. Food Lion suggested that it should receive anywhere from $52.5 million to $1.9 billion in punitive damages.

ABC, in turn, put *PrimeTime Live* anchorwoman, Diane Sawyer, on the stand to defend the use of hidden cameras and undercover reporting. "There are some stories that are so important that we should try to verify questions being raised and see it and document it for the viewer so the viewer can make up his own mind," she testified.

Apparently unconvinced, the jury returned the $5.5 million dollar award after six days of deliberations. Although the jury said three times that it was unable to make progress, word came late on January 21, that progress was finally being made. On Wednesday, January 22, the jury returned its verdict.

Of the total award, Capital Cities/ABC Inc. was ordered to pay $4 million to Food Lion while ABC, Inc. was assessed $1.5 million. Former executive producer Richard Kaplan was ordered to pay $35,000 in punitive damages, while Ira Rosen, the head of the show's investigative unit, was ordered to pay $10,750 to Food Lion.

The jury did not return a punitive damage award against either Lynn Dale or Susan Barnett, the producers who actually performed the undercover work.

ANOTHER VICTORY AT TRIAL FOR TIME

By Margaret Blair Soyster

Following its victory in Atlanta in April 1996, this is the second time in less than a year that Time Inc. has prevailed before a jury in a federal court libel case. Time Inc. won a libel trial before a Manhattan federal jury this month, with a verdict for defendants returned on January 17th.

Time's recent victory was in a case which concerned the lead photograph published in TIME magazine's 1993 cover story about a boom in prostitution worldwide and the plight of the increasing number of poor women who turn to prostitution to survive. The photograph showed a late-night scene outside a bar in Recife, Brazil, with the plaintiff, Jacqueline Da Silva, walking in a short, tight dress. The caption to the photograph referred to "Jacqueline, 18, looking for customers."

The plaintiff claimed that she was falsely depicted as a prostitute. After initially denying during the first day of her deposition that she had ever been a prostitute, the plaintiff ultimately acknowledged that she had turned to prostitution at age 12 and continued to earn her meager living through prostitution until shortly after her eighteenth birthday. She insisted, however, that by the time her photograph was taken, she had been fully rehabilitated and was preparing to move to a new town with her husband with whom she had a son shortly after her photograph appeared in TIME.

The freelance photographer who took the photograph stated, on the other hand, that she had twice been introduced to Jacqueline as a working prostitute and had observed her soliciting men at a seedy bar near the Recife docks on more than a dozen nights over the course of 2½ months. The photographer had gotten to know Jacqueline and several of her prostitute friends as the photographer tried to document

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Crime Scene Photo Case

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an order barring distribution and sale of the tabloid. When county officials were informed that the issue containing the photos had already been published and was on sale, they then filed an emergency request for a temporary restraining order to prohibit future publication of the photographs and filed a civil suit alleging common law copyright infringement, replevin and conversion.

As the tabloid appeared on local newsstands for sale, the motion for the temporary restraining order was being heard by the court. Arguing that publication of the photos would result in "immediate and irreparable" harm in the homicide investigation and, in the event of an arrest, the ensuing trial, plaintiffs sought a temporary restraining order and an injunction barring further publication of the photos. Defendant, in turn, argued that an injunction would constitute a prior restraint and that plaintiffs had not met their burden of proving that "publication would be so dangerous to fundamental governmental interests as to justify a prior restraint." (*Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996)).

Before the judge ruled on the motion, however, the parties entered into a stipulation. In exchange for plaintiffs' withdrawal of the request for a temporary restraining order and the civil lawsuit, the defendant agreed to return the original photos it obtained from its source. *Globe* also denied any liability, wrongdoing and criminal activity. It retained the right to republish the photographs it had already published and reserved the right to publish any photographs or other information it subsequently obtains. *Globe* also agreed to refrain from publishing two photos it had not published. It should be noted, however, that those two photographs were identical to a third photograph that was published and for which *Globe* retained republication rights.

Globe was represented by Thomas B. Kelley of Faegre & Benson in Denver.

ANOTHER VICTORY AT TRIAL FOR TIME

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how women struggle to survive in Brazil.

On a summary judgment motion, we had relied on *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987), to argue that even if the plaintiff had given up prostitution, as she claimed, in the months just before her photograph was taken, it was still substantially true to portray her as a prostitute in view of her long-time involvement in prostitution. In *Guccione*, the Second Circuit held that the "extremely long duration of Guccione's adulterous conduct, which he made no attempt to conceal from the general public, and the relatively short period of time since his divorce" made it substantially true to label him an adulterer. The Court reasoned that the published statement would have no worse effect on the mind of the reader than the actual literal truth. Judge John E. Sprizzo denied the motion for summary judgment, rejecting any comparison between an allegedly rehabilitated teenaged prostitute and a notorious pornographer.

At trial, the issue of falsity was squarely framed and presented to the jury in a special interrogatory. After requesting all of the trial exhibits, a dictionary, a copy of the Court's charge, and hot drinks, the jury reported its finding that the plaintiff had not proven that the photograph, with its caption, was false. Discussions with jurors after the verdict revealed that the jury did not accept the plaintiff's argument that the photograph and caption should be considered false if the jury believed that the plaintiff was not a prostitute at the time of publication, which was several months after the photograph was taken. The jury concluded that no finding of falsity could be made because the caption accurately described what was depicted in the photograph.

The jury's determination that Time did not get it wrong made it unnecessary for the jury to reach the question of fault or to grapple with whether the plaintiff had established actual injury or could prove damages in light of her testimony that she knew no one who had seen the issue of Time magazine which included her photograph other than a few social workers who already knew about her life as a prostitute.

Time Inc. was represented at trial by Paul G. Gardephe, Associate General Counsel of Time Inc., and Margaret Blair Soyster of Rogers & Wells.

Rhode Island Court Upholds Negligence Claim Against TV in Suicide Case

Holding that the media can be subject to the same claims of negligence as the general public, the Supreme Court of Rhode Island has reinstated claims for negligence in a wrongful death action against a local television station whose reporter interviewed a man while he was on the brink of committing suicide. *Clift v. Narragansett Television*, No. 94-594 (12/23/96).

"It's Over"

On May 17, 1993, Bruce Clift, known to be mentally ill, telephoned his wife at work to announce that "it's over" and that he was going to commit suicide. When she arrived home, she found him perched in an upstairs window. In an apparent attempt to persuade his wife of his intentions, he cut his throat with a shard of glass from a broken window, wounding, but not killing, himself.

Shortly thereafter, state and local police arrived, surrounding the house as one officer attempted to dissuade him from committing suicide. In the sensitive period that followed, members of the media likewise began to congregate around the scene. A reporter from Narragansett Television, without first obtaining approval from the police, persuaded the decedent sometime after 5 p.m. to talk to her in a taped telephone interview to be broadcast during the six o'clock news. At 6:04, the reporter announced live from the scene that "[w]hat you're about to hear is a man who is angry at the world and could be on the verge of suicide," followed by a news report containing an edited version of the interview with the decedent on the telephone, concluding that, "Mr. Clift told me he would not surrender, and after he made that very clear to me, he hung up the phone." At 6:07 the decedent committed suicide. When the police entered the home moments later, they found the television sets on and tuned to the defendant's station.

The Lawsuit

The decedent's wife commenced a wrongful death action against the TV station for, among other things, negligence,

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Wrongful Death Claim Survives Motion to Dismiss in Kersis Case

In one of four suits to arise out of an ABC hidden camera report on a psychic telephone counseling service, the United States Court of Appeals for the Ninth Circuit has ruled that the parents of Naras Kersis, a.k.a. Paul Highland ("Highland"), may proceed with their wrongful death claim against the network for its alleged role in the "descending spiral of tragedies that ultimately led to [their son's] death." *Kersis v. American Broadcasting Companies, Inc.*, 1996 WL 675879 (9th Cir., 11/21/96) (*Kersis II*). The case was before the court on appeal from a district court's dismissal for failure to state a claim under Fed.R.Civ.P. 12(b)(6).

The Kersises contended that as a result of an ABC *PrimeTime Live* report which included surreptitiously recorded videotape of Highland, a recovering alcoholic, he relapsed into drinking and died, just two days before the jury completed its deliberations in his suit against the network. The plaintiffs argued that "Highland's death was caused as a direct result of the wrongful act of negligence of the defendants in using the hidden camera." 1996 WL at *1.

In a short opinion, with little discussion, the Ninth Circuit noted that the plaintiffs need only plead "a short and plain statement of the claim showing that the pleader is entitled to relief." The appellate court then ruled that "[w]hile the Kersises may ultimately be unable to prove a causal connection between the defendants' negligence and Highland's injury under California law, we cannot say that appellants fail to state a cause of action under California substantive law." 1996 WL at *1. The panel cited *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Cal. 1988), a California case suggesting that "outrageous conduct

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"Berate The Bride" Redux: Emotional Distress Claims Survive Motion to Dismiss Following "Ugliest Bride Contest"

Judge Finds That *Hustler v. Falwell* Does Not Apply

Stating that "[t]he First Amendment was not enacted to enable wolves to parade around in sheep's clothing, feasting upon the character, reputation and sensibilities of innocent private persons," New York State Judge Joseph Harris has denied an Albany radio station's motion to dismiss intentional infliction of emotional distress claims arising out of an on-air "Ugliest Bride Contest" conducted by two of the station's disc jockeys. *Esposito-Hilder v. SFX Broadcasting, Inc.*, No. 4417-95 (N.Y. Sup. Ct., 12/31/96). In reaching the decision, Judge Harris found that *Hustler Magazine v. Falwell* -- barring an intentional infliction of emotional distress claim absent proof that the defendant published a falsehood with actual malice -- was inapplicable because the plaintiff in the instant case was a private figure.

The decision here echoes *Murray v. Schlosser*, 17 Media L. Rep. 2069, a 1990 Connecticut Superior Court decision in which plaintiff's emotional distress claims for two radio dj's "Berate the Bride" routine survived the station's motion to strike. In both cases the dj's referred to the bridal pictures published weekly in local newspapers.

The Shock Jock Aims at a Competitor

During the Albany station's "Ugliest Bride Contest," the dj's would normally refer to the bridal pictures without disclosing the names and invite their listening audience to vote for the "Ugliest Bride" pictured. According to the complaint the dj's would also

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Kersis Case

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that causes a suicide can be the basis of a wrongful death action." *Id.* "Thus," the court continued, "we reverse the district court's 12(b)(6) dismissal of appellant's wrongful death claim." *Id.*

The court went on to hold, however, that the claims for intentional and negligent infliction of emotional distress brought by the Kersises were barred by the one-year statute of limitations. The parents had argued that the statute of limitations on these claims should have been tolled while their son pursued his emotional distress claims in state court. The court disagreed, however, ruling that "the district court correctly noted that Highland's emotional distress claims were distinct from those of his parents." 1996 WL at *1.

Three Other Cases in Litigation

The suit is one of four to arise out of the ABC report. In July of 1994 a California state court jury awarded Highland and Mark Sanders, both psychic telephone counselors who were surreptitiously videotaped for the report, a total of $1,087,478 in damages for invasion of privacy claims arising out of the taking of surreptitious videotape. The jury did not find a violation of the eavesdropping laws. Sanders was awarded $335,000 in compensatory and $300,000 in punitive damages while Highland was awarded $225,000 in compensatory and $225,000 in punitive damages. *See generally Kersis v. Capital Cities/ABC Inc.*, 22 Media L. Rep. 2321, (Cal. Super. Ct., 04/25/94) (denying ABC's motion for summary judgment).

Highland died of alcohol poisoning, however, two days before the jury returned a verdict on the punitive component of his claim. Because his death occurred before the damage award, his estate could not claim the money. The estate has reportedly filed a new lawsuit.

Sanders' case was argued before the California Court of Appeal on November 19, 1996. In addition, in May 1995, Los Angeles Superior Court Judge Bruce G. Geernaert ordered the network to pay fees of $561,658 to Sanders' attorney, Neville L. Johnson.

Johnson has since filed a lawsuit against ABC on behalf of 17 other employees of the telepsychic operation, following the success of the *Kersis* and *Sanders* cases before the jury. A motion for summary judgment is pending in that case.

ABC has filed a motion for re hearing en banc with the Ninth Circuit in the *Kersis* wrongful death case.

Rhode Island Court Upholds Negligence Claim

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trespass, negligent and intentional infliction of emotional distress, alleging that the phone call and broadcast contributed to the decedent's suicide. Defendant moved to dismiss. Plaintiff responded and included an affidavit of a psychoanalyst. As a result, the hearing justice treated the motion as one for summary judgment. She granted defendant's motion in its entirety, dismissing the complaint.

The Rhode Island Supreme Court Reverses

The opinion of the Rhode Island Supreme Court focused primarily on the claim that the TV station was negligent in connection with the suicide. The court recognized that "there is interwoven in those facts fundamental First Amendment considerations." *Id.* At the same time, however, the court made clear that "the press 'has no special immunity from the application of general laws,'" (*Slip op.* at 12); that the media is neither "entitled to any greater protection" nor "deserving of anything less" than the standard applicable to the public generally. "[N]otwithstanding First Amendment constitutional protections," the court held, "everyone, including the press, should be answerable for unprivileged negligent actions that proximately result in suicide." *Slip op.* at 13.

Reviewing non-media cases involving suicide, as well as the *Restatement (Second) Torts*, Sec. 455 (1965), the court noted the requirements for such an action; namely, that "unless a special relationship existed between the defendant and the deceased, liability exists for negligent conduct which (1) brings about delirium or insanity in another and; (2) prevents the affected person from realizing the nature of his or her condition or makes it impossible for him or her to resist the suicidal impulse by depriving that person of the capacity to reasonably control his or her conduct and not carry out the suicidal impulse." *Slip op.* at 10.

Applying these principles, the court went on to conclude that the trial court erred in granting summary judgment on the negligence count because "facts alleged in the medical affidavit...suggest that the decedent's suicide resulted from an uncontrollable impulse that was brought about by a delirium or insanity caused by Narragansett's negligence." *Id.*

The court, however, upheld (over the dissent of one justice) the grant of summary judgment on the claim of intentional infliction of emotional distress, holding, among other things, that in suicide cases, there must be proof that a defendant's intentional conduct was a "substantial factor" in bringing about the suicide and that there was an intent to cause injury.

The court also upheld the grant of summary judgment on the privacy claim, holding, with respect to the decedent, that the right of privacy "dies with the person " (*Slip op.* at 19) and that, with respect to the family, "one telephone call by the reporter did not invade any area of the family's seclusion that could reasonably have been expected to remain private." *Id.* Nor did the telephone call reveal anything that was not or would not have come to the attention of the public.

Despite the similar results, the Rhode Island court did not allude to *Risenhoover v. Mark England*, Civ. No. W-93-CA-138 (U.S. Dist. Ct. W.D. Tex. Waco Div. 1996), which upheld negligence claims against the media for having alerted Waco residents of an impending raid by federal agents.

Minnesota Court of Appeals Liberally Construes Shield Law In Libel Case

In an opinion stong on free press language and principles, the Minnesota Court of Appeals has reversed an order to libel-defendants, a reporter and a local television station (KARE 11), requiring them to disclose the confidential sources for an investigative report, remanding to the trial court to address the factors set out in the state's shield law. In *Bauer v. Gannett Co.*, No. C9-96-1694 (1/14/97), plaintiff, Ramsey County special courts' administrator, brought a defamation against a local TV station based on an expose of the Ramsey County Special Courts. The segment specifically accused plaintiff of taking long smoking breaks and aired a video of him playing golf during business hours. "[T]his what Bauer does for an average of five hours a week," the reporter said in a voice-over. "That would mean more than eight thousand dollars, in taxpayer money, *** going up in smoke every year."

In the court below, plaintiff successfully obtained a discovery order requiring defendants to disclose the identities of all confidential sources used for the report, including the individuals who allegedly "disclosed" the plaintiff's work hours. On appeal, the Minnesota Court of Appeals reversed and remanded for further findings.

The Minnesota Statute

The Minnesota Free Flow of Information Act, Minn. Stat. section 595.021-.025 (1994), provides that "[n]o [reporter] shall be required by any court *** to disclose in any proceeding the person or means from or through which information was obtained" except where "clear and convincing evidence shows that (1) there is probable cause to believe the source has clearly relevant information; (2) the information is not available through any alternative means; and (3) a compelling interest requires disclosure to prevent injustice."

The statute also has a specific provision regarding defamation suits, providing for disclosure where the plaintiff can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice. That provision has limits that incorporate the factors (1) and (2) above. But the court here, discussing the First Amendment imperatives for protecting sources, incorporates all of the factors in the analysis.

In an earlier opinion also authored by Judge Lansing, *Heaslip v. Freeman*, 22 Med. L. Rep. 1347 (Minn. Ct. of App. 1994), the Minnesota Court of Appeals had narrowly construed the statute, affirming an order requiring disclosure in a personal injury case of a newspaper's unpublished photos which did not implicate confidential sources. Subsequently, as reported in the August 1996 *LDRC LibelLetter*, the Minnesota Supreme Court in *State v. Turner*, No. C5-95-2668 (1996), likewise upheld disclosure of unpublished photos not relating to confidential sources, although the court did require *in camera* inspection of the materials prior to disclosure.

As applied to *confidential* sources, however, the Minnesota Court of Appeals appears to have taken a more media-friendly view of the statute.

Court Adopts Balancing Test

In remanding the case to the lower court for further consideration and findings, the court adopted a balancing test which would require a court to carefully weigh a number of factors before requiring disclosure of confidential sources.

First, a court should consider "the nature of the litigation and whether the reporter or news organization from whom disclosure is sought is a party to the litigation." In cases where the defamation plaintiff is a public figure, the court noted, "the balance may tip more in favor of disclosure." Slip op. at 7-8.

Second, the party seeking disclosure of a confidential source must demonstrate that the source's identity is clearly relevant to the action. Although the "heart of the claim'" standard is satisfied when the district court has "probable cause" to believe that the source has information clearly relevant to defamation, the constitutional standard nonetheless requires the district court to perform an "exacting analysis" rather than merely issuing a "blanket order." In evaluating relevance, important considerations include "whether the allegedly defamatory publication referred to confidential sources and whether the information gained from those sources was used directly in the publication." Slip op. at 9.

A third consideration in the balance focuses on "the efforts made by party seeking disclosure to obtain alternative sources." Slip op. at 9. The Act requires a showing that the information cannot be obtained by "any alternative means or rememdy less destructive of first amendment rights." *Id.* While declining to endorse any particular formula, the court held that this requirement "places a burden on the movant to demonstrate that substantial efforts have been made to obtain the information through other means". The court added that "what constitutes substantial efforts will necessarily vary from case to case." Slip op. at 9-10.

Fourth, the court must consider whether there is a "compelling interest in the information or source" as well as the "necessity of any information a confidential source may have." Slip op. at 10. "There may be no need," the court held, "to disclose the identity of relevant confidential sources: evidence of malice may be available from non confidential sources, or the defendant may have sufficient evidence of truth...to prevail on a motion for summary judgment." *Id.*

Next, "when the circumstances merit, the court may first require the plaintiff to make a prima facie showing that the alleged defamatory statements are false.....". "A

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"Berate The Bride" Redux: Emotional Distress Claims Survive Motion to Dismiss Following "Ugliest Bride Contest"

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"encourage the listening audience to volunteer their own unkind and slanderous remarks concerning the brides so pictured." *Slip op.* at 3.

On June 17, 1996, a bridal photograph of the plaintiff, Annette Esposito-Hilder, who worked for a competing radio station in Albany, appeared in the wedding section of the *Daily Gazette*. According to the complaint, the dj's that morning "varied from their customary and past routine of the 'Ugliest Bride Contest' and intentionally and recklessly expanded their offensive, vindictive, disparaging, derogatory, depreciatory, atrocious, contemptuous, derisive, contumelious, ridiculing, abusive, calumnious, scurrilous, demeaning and outrageous remarks to include plaintiff's full name, her place of employment, her position of employment and the names of her supervisors with full knowledge that plaintiff was employed at a competing broadcasting company who owned and operated competing radio stations." *Slip op.* at 3-4.

While an original complaint had apparently alleged only defamation, the plaintiff's motion for leave to serve an amended the complaint, alleging intentional infliction of emotional distress was granted by Judge Harris because the defendants had not yet answered the initial complaint.

Hustler Inapplicable

The court then turned to decide the station's motion to dismiss by noting that if the claim had been based on the law of defamation, "it is clear that the challenged speech would not be viewed by a reasonable listener as conveying actual facts about plaintiff, but at the most, an opinion." *Slip op.* at 6. "But," the court continued, "plaintiff's claim is not based on the law of defamation. It is based on the law of intentional or reckless infliction of emotional distress, even though overtones of defamation are present." *Slip op.* at 6.

The court continued to outline the development of the actual malice standard and its application to emotional distress claims. Citing the U.S. Supreme Court's decision in *Hustler Magazine v. Falwell*, Judge Harris noted that while the Supreme Court applied the actual malice standard to emotional distress claims, it did so, "only because plaintiff was a public figure." *Slip op.* at 9. Thus, Judge Harris reasoned, "[b]y implication the rule does not apply to private persons." *Slip op.* at 9. Judge Harris then held that the "plaintiff is a private person; neither marriage nor newspaper bridal photographs convert a private person into a public figure." *Slip op.* at 9.

No Ideas To Protect Here

The judge then blasted the defendants for their behavior, likening them to wolves "feasting upon the character, reputation and sensibilities of innocent private persons." *Slip op.* at 9. Judge Harris continued, "[the First Amendment] was enacted to ensure a free interchange of ideas. Such is not the case here. In the instant case the speech is in no way ideational and not being ideational it cannot give rise to an opinion that would create a privilege under the First Amendment, neither absolute nor qualified. For an opinion cannot exist without an 'idea' on which to attach itself. At the most it is a feeble and bad taste attempt at humor." *Slip op.* at 9-10.

The court further noted that because the plaintiff worked at a competing radio station, it "raises the specter of a possibly high level of vindictiveness on the part of the defendants, raising the reasonable possibility that plaintiff was unfairly transformed by defendants into a pawn in a battle between competing broadcasters, with a specific intent to injure." *Slip op.* at 10.

The court also negated the defense of humor by citing to a New York State Appellate Division opinion which stated that while humor may protect a defendant from liability "'even where the comic attempt pokes fun at an identifiable individual . . . [t]he line will be crossed, however, when humor is used in an attempt to disguise an intent to injure; at that point a jest no longer merits protection because it ceases to be a jest.'" *Slip op.* at 10, *quoting*, *Frank v. National Broadcasting Co., Inc.*, 119 A.D.2d 252 (1986).

Concluding, Judge Harris stated "[p]laintiff was demeaned and injured by the speech and conduct of defendants, not only as a woman, but as a bride, and a human being at what ought to be one of the most beautiful and memorable occasions of life. The Court cannot say as a matter of law that the speech and conduct of the defendants did not exceed the bounds of decency. That once again, must be determined by a jury as a matter of fact." *Slip op.* at 11.

It should be noted that *Murray v. Schlosser*, the Connecticut "Berate the Bride" case was settled for an undisclosed amount on the eve of trial.

Minnesota Court of Appeals

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showing of falsity is not a prerequisite to discovery," the court held, "but it may be essential to tip the balance in favor of discovery." Slip op. at 11, *quoting Mitchell v. Superior Court*, 690 P. 2d 625, 633 (Cal. 1984).

Finally, in order to protect the First Amendment rights of the press, even when *all* factors point towards disclosure, a "court has the duty, where applicable, to review in camera any evidence . . . and to take reasonable measures to protect informants from harmful consequences when it orders their identities disclosed." Slip op. at 12.

Kato Kaelin's Libel Suit Against the *Globe* Dismissed

Finding that the Globe had no reason to doubt the veracity of its sources or the accuracy of its report concerning suspicions of criminal conduct on the part of Kato Kaelin, United States District Court Judge Dickran Tevrizian granted summary judgment in favor of the tabloid on January 6, 1997. *Kaelin v. Globe Communications Corp.*, No. CV96-2935 DT (Ctx) (C.D. Cal., 01/06/97).

Kaelin had alleged that an October 10, 1995 *National Examiner* article which appeared under the headline, "Cops Think Kato Did It," was libelous on its face as it accused him of the commission of a crime. Defendants, who had refused to run a correction or retraction before the suit was filed, moved for summary judgment on December 4, 1996.

Judge Tevrizian began his decision by outlining the summary judgment standards laid down in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which provide that the moving party has the burden of demonstrating the absence of a genuine fact for trial, while the non-moving party must establish a genuine dispute of fact with respect to those elements of which it will bear the burden of proof at trial.

Turning to the issue of actual malice, as Kaelin did not dispute his public figure status, the court found that Kaelin failed to show that the Globe acted with actual malice. Specifically, Judge Tevrizian wrote that the "article was based on both information provided by Kevin O'Sullivan, a freelance reporter who had submitted information to Globe on numerous occasions throughout the O.J. Simpson trial, as well as other previously published articles and reports on the same topic." *Slip op.* at 6.

Looking more closely at O'Sullivan's role the court found that "[d]ue to his prior working relationship with Globe on the O.J. Simpson case as well as other stories, O'Sullivan had become a trusted and reliable source of in-

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Summary Judgment Upheld in "War of Words" On RadioTalk Show

The Superior Court of New Jersey Appellate Division upheld summary judgment in favor of the controversial New York radio talk show host, Bob Grant, and his then-employer, WABC Radio and CapCities/ABC, in a libel and privacy action brought by a self-styled crusader against "hate radio," finding that the context of the program generally, as well as the specific content of the slurs against plaintiff, led to the conclusion that the reasonable listener would find the speech name-calling, hyperbole, and epithet and not defamatory. *Wilson v. Bob Grant*, A-3864-95TS, (12/12/96).

The Crusade against "Hate Radio"

The underlying controversy began in January, 1992, when plaintiff, who described himself as "engaged in the business of monitoring radio broadcasts," began taping Bob Grant's weekday afternoon radio program. Initially, plaintiff expressed his displeasure with the program--which, he claimed, "contributed to the climate of racism"--through a series of increasingly heated and controversial on-air calls. Thereafter, he began to write letters to WABC's president, requesting that Bob Grant be replaced, denouncing WABC Radio and Bob Grant for "engag[ing] in overt racism against people of African ancestry" and announcing that he was commencing a "public campaign" against the defendants. Plaintiff then wrote a series of newspaper articles and letters to various publications, describing Grant's show as a "hatefest" against Black people laced with "occasional invocations to violence."

In his campaign against Grant, plaintiff also distributed copies of Grant's tapes to political and other organizations, including a school district whose teacher, subsequently suspended, had called into the program complaining about Black History month and the school's required curriculum. An article about plaintiff in *The Daily Challenge* described plaintiff's activities as monitoring "hate radio programs" and quoted unnamed sources who described him, among other things, as "crazy."

Grant Fights Back

On October 26, 1994, after a tape of Grant's show became an issue during the New Jersey Senate race,

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Pretrial Press Release Leads to Libel Claims in $100 Million Software Piracy Suit

The January 1997 issue of the ABA Journal has reported that a David and Goliath software piracy suit has led to the filing of a libel claim due to the release of a "blow-by-blow" pretrial press release. Mark Hansen, *Playing Against Hype*, ABA JOURNAL, January 1997, at 36.

The libel suit, brought by Palo Alto, California based computer giant Hewlett-Packard, came in response to Computer Aid, Inc.'s, a software design firm, "five-page, single-spaced, blow-by-blow account" of the firm's $100 million software piracy suit against Hewlett-Packard.

According to the ABA Journal's report, the press release issued by Anderson Kill & Olick, co-counsel for Computer Aid, "essentially accused Hewlett-Packard of having pirated network management and diagnostic software Computer Aide had helped develop for the cable television industry." The release described the suit as a dispute "about the ethics and the lengths [to which] a division of one of the country's leading computer companies has gone in muscling out potential rivals before the

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Kato Kaelin's Libel Suit Dismissed

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formation for Globe." *Slip op.* at 6. The court also noted that there was little evidence to show that Globe should have doubted its sources because, "the information contained in the article had been the subject [of] similar *National Examiner* articles which were source checked at the time of publication, and was also contained in articles appearing in other tabloid magazines. The subject had also been discussed in a book which had been the subject of numerous articles as well." *Slip op.* at 6.

Kaelin also argued that Globe "hid from the truth," citing *Alioto v. Cowles*, 519 F.2d 777 (9th Cir.), *cert. denied*, 423 U.S. 930 (1975), which held that a jury could find actual malice because the defendant newspaper refused to change a story after the plaintiff had called requesting a meeting to clarify the facts before publication because the paper had already gone to press. Judge Tevrizian disagreed with this assertion, however, finding that unlike Alioto "there is no evidence to show that any source challenged the information previously given." *Slip op.* at 8.

Finally, Kaelin contended that the deposition testimony of John Garton, News Editor of the *National Examiner*, in which he expressed "some concerns" with the part of the headline that read "Cops Think Kato Did It," provided some proof of actual malice. Judge Tevrizian disagreed, however, noting that Garton's testimony continued to point out that Garton believed the rest of the headline, ". . . he fears they want him for perjury, say pals," eased his concerns. *Slip op.* at 8.

Seemingly coming out of nowhere, Judge Tevrizian concluded his opinion with a backhanded swipe at the Globe, stating that "[w]hile Globe employees might not have acted with the professionalism that would be expected at a more reputable journalistic institution before running the article about ['Kato' Kaelin], the failure to act reasonably is not enough to establish malice." *Slip op.* at 8.

Summary Judgement Upheld in "War of Words"

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Grant launched an on-air attack against the plaintiff, accusing him, among other things, of being a "virtual stalker", and further claiming that plaintiff was supported by his wife and had been hospitalized in Marlboro Psychiatric Hospital. On February 13, 1995, after the suspended high school teacher died of cancer, Grant announced that he'd signed a book deal with Simon & Schuster and intended in his book to blame the plaintiff for the teacher's suspension. Referring to plaintiff as the "Westfield media monitor," but not mentioning his name, Grant went on to call him a "sick, no good, pot smoking, wife-beating skunk."

Thereafter, plaintiff commenced an action, alleging libel based on the " wife-beating" portion of Grant's statement as well as invasion of privacy based on Grant's disclosure that plaintiff had been confined in a psychiatric institution. The lower court granted summary judgment in favor of the defendants on all of plaintiff's claims.

The Appellate Division's Decision

Having determined that the designation "Westfield media monitor" sufficiently identified the plaintiff, the court went on to determine whether the statement at issue—"wife-beating"—was defamatory. The court's analysis was to include consideration of content, verifiability, and context of the challenged statements, citing a 1994 New Jersey Supreme Court decision, *Ward, v. Zelikovsky*, 136 N.J. 516, 529 (1994).

While the actual words could be understood to be defamatory and verifiable, the court easily concluded that they fell more readily into the categories of vituperation, name-calling and like protected speech.

As for context, adopting the test laid out in *Ollman v. Evans*, 750 F. 2d 970, 982 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985), the court held that the statement must be examined in its totality and within context and that "the context to be considered is both narrowly linguistic and broadly social." Accordingly, the court considered the phrase "wife-beating" in the context of the entire program, a controversial radio talk show, as well as in the context of the ongoing "war of words" between the parties.

Thus viewed, the court held that the statement was not defamatory. Grant's listeners knew, based generally on the format of the show, that "he would make provocative and caustic remarks" during his broadcasts and were "aware of his public feud with the plaintiff", including plaintiff's attempts to have Grant removed from the airwaves and the suspension of the high school teacher. Moreover, the statement at issue was made during a conversation with a caller about the death of the high school teacher, whose suspension Grant attributed to plaintiff's actions. "In this context," the court held, "we conclude that any listener 'must have perceived that the word[s] [were] no more than rhetorical hyperbole, a vigorous epithet....'" *Slip op.* at 14, *quoting Greenbelt Coop Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970).

Relying on *Gertz v. Welch*, 418 U.S. 323 (1974), and *Ollman v. Evans*, *supra*, the court further found that having "voluntarily injected himself into a public controversy," plaintiff became a limited public figure and, as such, "must be willing to bear criticism, disparagement, and even wounding assessments." *Slip op.* at 12, *quoting* Judge Bork's concurrence in *Ollman, supra*, 759 F. 2d at 993.

Employing similar reasoning, the court likewise affirmed summary judgment on plaintiff's claim that disclosure of his confinement in a psychiatric facility was an invasion of privacy. Acknowledging that plaintiff's hospitalization was, in fact, "private" and that the "dissemination of this information would be offensive to a reasonable person," the court nevertheless found that given the public nature of the controversy and the fact that plaintiff had voluntarily thrust himself into the controversy, "the public had a legitimate interest in being apprised of these facts. " *Slip op.* at 17.

Counsel for defendants were Patterson, Belknap, Webb & Tyler, LLP, and Lowenstein, Sandler, Kohl, Fisher & Boylan.

Reporter Faces Jail in Criminal Libel Suit, Case May Present Opportunity for Taiwan to Accept Sullivan-type Fault Standard

By Charles J. Glasser, Jr.

Ying Chan, an Asian-American reporter for the New York Daily News and a freelance writer for the Hong Kong-based newsweekly Yazhou Zhoukan, has been sued by Liu Tai-Ying, the Chief Financial Officer of that nation's ruling Kuomintang Party (KMT), for criminal libel after the Chinese-language magazine broke a story that Liu offered a $15 million donation to President Clinton's re-election campaign.

Taiwanese procedure provides private citizens with the right to bring suit on criminal charges resulting in jail terms. Liability under the Republic of China's Criminal Code 310 is punishable by a jail sentence of up to two years, compulsory service, or a maximum fine of 1000 yuan. The statute provides that the offense of criminal libel is committed when a person "points out or circulates a fact which will injure the reputation of another with intent that it be communicated to the public." While the statute allows for truth as a defense, that defense is available only in the event that the story is related to a matter of pubic concern, and the defendant has the burden of proving truth.

There has already been one day of testimony in the Ying Chan case, and the trial is scheduled to resume on January 28, 1997. The case is being heard and will be decided by a single judge, instead of a jury. Reporters in Asia have expressed concern that because Taiwanese judges are mostly members of the KMT and the plaintiff is the Chief Financial Officer of the KMT, there are potential conflict problems.

In late October, Yazhou Zhoukan published Ying's story about Mark Middleton, a former White House aide and Clinton associate who allegedly solicited funds in Taiwan for Clinton's re-election campaign. U.S. law prohibits receipt of campaign donations from foreign governments or political parties.

Ying's story, which was picked up by the *Wall Street Journal* and *The New York Times*, reported that Middleton and Arkansas restaurateur Charles Trie shuttled between Washington and Taipei and met frequently with businesspeople in Taiwan. Trie is currently under investigation by the US Justice Department for possible campaign violations. Middleton recently gained notoriety in the US press as the aide who made a get-well visit on Clinton's behalf to Hashim Ning, an Indonesian businessman whose daughter and son-in-law contributed $425,000 to the Democratic National Committee in the US.

According to the story, Liu Tai-Ying, a ranking officer in the KMT, offered the former Clinton aide a donation of $15,000,000. The reporter's source, present at the meeting, says that Middleton was enthusiastic about the offer, and suggested ways that the money could be funneled to the US. Both Middleton and Liu deny the solici-

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Supreme Court Update:

Baugher v. California, No. CO18626, (Cal. Ct. App., 3/19/96), *cert. denied*, 65 U.S.L.W. 3486 (1/13/97, No. 96- 572).

The U.S. Supreme Court has let stand a California Court of Appeal reversal of a $4.5 million non-media libel judgment arising out of a controversy over research into the effects of pesticide exposure on humans. Douglas G. Baugher, a scientific researcher who directed one of the studies, alleged that California officials falsely accused him of violating professional ethics.

In 1988, Baugher and his research company, Orius Associates, were hired by Rhone-Poulenc, a pesticide manufacturer, to develop a protocol and conduct an independent study of the effects of an insecticide called Zolone on grape harvesters.

Following the completion of the Baugher's work, the California Department of Agriculture announced that it planned to investigate the Zolone study. In conjunction with the announcement of the investigation, the Department issued a press realease stating that it was investigating whether the researchers who conducted the study violated approved procedures and professional ethics and exposed people to excessive levels of the pesticide. Although the Department press release did not "name names," a department spokeswoman later identified Baugher and Orius as being among those under investigation to reporters.

In 1990, Baugher filed suit, accusing state officials of libel and causing emotional distress, and at trial was awarded $5 million in damages which was subsequently remitted to $4.5 million by the trial judge.

On appeal, however, the California Court of Appeal, in an unpublished decision, dismissed the verdict finding that Baugher failed to prove actual malice. In its decision the appellate court held that Baugher was a public figure for the limited purpose of his conduct as director of the human exposure study.

Borrowing largely from Rodney Smolla's checklist for public figures in *Law of Defamation*, the court stated,

> "[i]n this case the Zolone controversy existed before the defamatory speech, had a significant effect on the interests of nonparticipants, and engendered a high degree of public divisiveness. Dr. Baugher, an affluent professional with some experience in the uses of media, had resources allowing him some access to channels of communication for counter-speech. He was not prominent in the preexisting controversy concerning Zolone. However, he did

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PreTrial Press Release

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game has even started." The press release continued to accuse Hewlett-Packard of "milking" Computer Aid for its expertise and attempting "to strip [Computer Aid] of its rights to [the software]."

In response, Hewlett-Packard filed a motion to dismiss Computer Aid's suit in the federal court in Philadelphia while it filed its own action for libel and declaratory relief against both Computer Aid and Anderson Kill in a San Francisco federal court. The libel complaint alleged that several statements in the press release were "intended to impugn the [Hewlett-Packard] and to cause others to believe that [the company] had engaged in unethical, dishonest or illegal activities in its business."

Jonathan Marshall, one of the lawyers for Hewlett-Packard, stated in the ABA Journal's article that "[t]he problem is [the complaint] went well beyond the confines of the complaint and the bounds of responsible advocacy."

But Jay Spievack, who filed Computer Aid's suit but has since left Anderson Kill, argued that the press release merely mirrors the allegations in the complaint, and that Hewlett-Packard brought its libel claim in order to get the case moved out of Philadelphia. Further, Mr. Spievack stated that the claim sets a dangerous precedent because it creates a potential conflict between client and attorney. In Mr. Spievack's words, "[a] lawyer shouldn't have to worry about getting sued for anything he says on behalf of a client as long as it bears some resemblance to the allegations in the court file."

As of press time, however, allegations of Hewlett-Packard's forum shopping may be ringing less true, as the computer company's libel complaint has been transferred to federal court in Pennsylvania. While the two actions have not yet been consolidated it is anticipated that they eventually will be heard together.

Reporter Faces Jail in Criminal Libel Suit

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tation or offer. Liu has also sued Chen Chao-Ping, the source for the story who claims to have been present at the meeting at which the offer took place.

According to Ying's US counsel, Robert Balin of DCS member Lankenau Kovner Kurtz & Outten, L.L.P., the time may be ripe for Taiwan to recognize a *Sullivan*-type of fault standard. Criminal Code 311 provides a privilege for certain statements made "with good intent" and enumerates self-defense, statements made by public officials in their official capacity, fair comment on public affairs and a fair report on official proceedings as qualifying for the "good intent" defense. Balin says that in light of the fact that Australian and South African courts have recently recognized some form of actual malice as a fault standard, there is a possibility that this case may bring the higher fault standard to Taiwan. Balin notes that Chen, the source in the story, has already testified at the initial hearing that he attended the meeting at which the campaign offers were allegedly made, and this should motivate the court to find that Ying's reportage was without knowing falsity or reckless disregard for the truth. "It was entirely reasonable for Ying to rely on Chen as a source," says Balin.

The institution of criminal charges against Ying in Taiwan has brought considerable worldwide protest from media groups such as the Reporter's Committee for Freedom of the Press and the Society of Professional Journalists, and is also the subject of an Internet Web Page at http:\\www.yingchan.com. The plaintiff in the suit is represented by James Tseng of Baker & McKenzie in Taiwan. Ying Chan is represented overseas by Anthony Lo of Lo & Partners in Taiwan and Thomas So of Johnson, Stokes & Master in Hong Kong.

Former LDRC Intern Charles Glasser is an associate at Preti, Flaherty, Beliveau & Pachios in Portland, Maine.

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> engage in significant efforts to attempt to influence the controversy. He undertook the role of study director for a human exposure study that he and his client Rhone-Poulenc hoped would resolve the controversy in favor of the use of Zolone on grapes. In that capacity he responded to media questions in a manner calculated to cast doubt upon the view that Zolone was the cause of the illness suffered by grape harvesters in 1987."

Cert. petition at app. 24.

In other words, the court continued, "[Baugher] was adequately placed on notice that his actions in that capacity would be subject to the risk of intense media scrutiny and commentary by partisans and observers of the controversy." *Cert. petition* at app. 26.

The court also ruled that the California state privilege accorded to state agency press releases extended not only to the press officer who drafted the release but also to the agency personnel with whom she consulted in drafting the document.

In his petition for certiorari, Baugher argued that the appellate court's decision has created a new test for status as a limited purpose public figure which only considered the following questions: "(1) Did the scientist undertake a study which is or later became a public controversy? (2) Did the scientist attempt to influence the outcome of a public controversy by doing a study? (3) Does the scientist, as a result of his success as a businessman, have media skills, access to channels of communication, and overall ability to mount an effective counter-speech campaign." *Cert. petition* at 25. Such a test, Baugher contended would lead to wide applicability and danger as "almost any researcher can involuntarily be made a public figure . . . if partisans disparage him or his work." *Id.*

Barber v. Gillett Communications: Defense Verdict Affirmed

Rejecting the plaintiff's contentions that the trial court improperly permitted opinion testimony on the issue of whether he had committed a crime, the Court of Appeals of Georgia recently affirmed a jury verdict for the defendant Gillett Communications of Atlanta in a case brought by former Georgia Public Service Commissioner, Jack Barber. *Barber v. Gillett Communications, Inc.*, No. A96A1077 (Ga. Ct. App., 12/05/96).

At the center of the case was a 1992 report by WAGA-TV which examined whether federal prosecutors were unfairly targeting black officials with "sting" operations. The report discussed prior prosecutions against both black and white officials, showing clips of several black officials, then five white officials. Barber's picture was among this latter group and while his image was on the screen a voice said, "A Public Service Commissioner was forced into quitting . . . after investigators turned up allegations of impropriety."

Barber's claim, however, was not based upon that statement but upon a statement made by State Representative Billy McKinney, several seconds after Barber's picture was on the screen. McKinney was shown saying, "Not a single white case was as a result of a sting operation. Every one of those white people were violating the law, and they were caught violating the law."

Barber sued alleging that McKinney's statement implied that he had committed a crime. While Barber never was officially charged or indicted with a crime, he did agree to resign rather than face prosecution for allegedly accepting $800 from two officials of a trucking company.

Following trial, at which State Attorney General Mike Bowers testified for the defendant, the jury found for Gillett Communications.

On appeal, Barber argued that (1) the trial court erred in permitting opinion testimony as to whether he had engaged in any criminal activity; (2) the

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Reporter Allowed to Proceed With §1983 Action Against Village Officials By Sixth Circuit

Retaliation Aimed at Chilling News Reporter Not Permitted

Finding that "at the time of the alleged retaliatory actions, Supreme Court and Sixth Circuit precedent had clearly established that retaliation aimed at chilling fundamental rights was improper," the United States Court of Appeals for the Sixth Circuit has ruled that village officials could not claim qualified immunity in a suit brought pursuant to 42 USC §1983 by a reporter alleging that the officials interfered with her rights of free speech and free press and retaliated against her for the attempted exercise of those freedoms. *McBride v. Village of Michiana*, 100 F.3d 457 (6th Cir., Nov. 14, 1996).

Alleged Displeasure with Reporter's Disclosures

Apparently unhappy with reporter Noreen McBride's reports covering the political happenings of the Village of Michiana in Berrien County, Michigan, which discussed the mishandling of public funds, violations of the Michigan Open Meetings Act, and efforts by village officials to encourage non-residents to vote in village elections, the village board allegedly undertook a series of actions between the fall of 1989 and 1992 in retaliation for McBride's unflattering coverage.

"[s]imply because no government official has heretofore deemed it acceptable to retaliate against and threaten a reporter for relating the activities of a local governmental body does not mean that the rights of a member of the press to be free from such retaliation has not been 'clearly established.'"

Specifically, McBride alleged that the village officials repeatedly contacted her employers and urged them not to allow McBride to report on Michiana political news, threatened to boycott the newspaper McBride worked for if she was not removed from the political beat, took out an advertisement in a competing paper urging readers to cancel their subscriptions to McBride's paper, and contacted potential employers to strongly suggest that McBride not be hired.

In addition, McBride also alleged that the officials threatened her with physical removal from council meetings if she did not obey their command to leave the press table, verbally abused her during council meetings, improperly refused to produce documents, intentionally destroyed government documents that she sought access to, and on one occasion an official hurled a chair at her and other members of the press at a public meeting.

Sixth Circuit Reverses Dismissal

This decision is the second time the Sixth Circuit has reviewed this case, and the second time the court has rejected defendants efforts to have the claims dismissed. Following a district court dismissal on the ground that McBride "failed to set forth a claim recognized under the United States Constitution," the Sixth Circuit reversed and remanded holding that "the harassment alleged against the officials was 'sufficient to state a cause of action for retaliation' for exercise of a constitutionally protected activity." *McBride v. Village of Michiana*, 30 F.3d 133 (6th Cir. 1994).

After the remand the defendants then moved for summary judgment arguing that McBride's claims should be dismissed on the basis of qualified immunity because of their belief that "there was no clearly established law that their alleged actions were violative of the Plaintiff's constitutional rights." The district court rejected the defendants arguments and on appeal the Sixth Circuit had its second opportunity

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trial court should not have permitted testimony regarding the indictments against the trucking officials for bribing other Commissioners; and (3) the trial court erred by not instructing the jury that actual malice may be found where statements are broadcast implying the commission of a crime when there has been no indictment or conviction.

The Georgia Court of Appeals rejected each of Barber's contentions in turn. First, while the court acknowledged that the trial court had ruled on a motion in limine to prohibit witnesses from giving their opinions as to whether a crime had occurred or whether Barber would have been convicted if tried, the prohibition was not intended to prevent witnesses from testifying as "to facts discovered in the investigation of the allegations against Barber." *Slip op.* at 3.

Thus, the appellate court ruled the trial court's order was not violated when reporter Jim Kaiserski testified that he was told by Attorney General Bowers that Barber had broken the law and that Barber had resigned rather than face prosecution. Likewise, the appellate court reasoned that the testimony of Attorney General Bowers stating that he "believed a case could be made against Barber but. . . a conviction would probably not result in punishment greater than removal from office," did not violate the court order. *Slip op.* at 6. As the appellate court explained, "the witnesses do not contend Barber committed a crime," rather, "these are statements evaluating the evidence against Barber." *Slip op.* at 6-7.

Barber's contention that evidence of the indictments handed down against the trucking company officials for the bribery of other Commissioners was improperly introduced was also rejected by the appellate court. Barber had argued that evidence of the indictments should have been excluded because he was not one of the actors in the other transactions.

The appellate court disagreed stating that, "[e]ven if the 'other transactions' rule of OCGA § 24-2-2 applies to the actions of non-parties [the trucking company officials], evidence of their transactions with [the other Commissioners] was admissible to show their intent and motive in approaching commissioners." *Slip op.* at 9.

Finally, the court rejected Barber's argument that the trial court should have instructed the jury that evidence of actual malice could be found where a broadcast implies the commission of a crime when there has been no indictment or conviction. According to the appellate court such an instruction "would have the effect of court pointing to one factual issue and stating that malice could be found therefrom, emphasizing it over all other evidence." *Slip op.* at 11.

According to the attorneys for Gillett, Judson Graves, Daniel Kent and Cynthia Counts, of Alston & Bird, the time for the plaintiff to appeal to the decision to the state's supreme court has passed.

Reporter Permitted to Proceed With §1983 Action

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to hear the case.

As the Sixth Circuit pointed out, "as a general principle, 'government officials performing discretionary functions enjoy qualified immunity from liability for performance of their official duties.'" *Id.* at 460. The court continued to state that "if the constitutional right 'the government official allegedly violated was clearly established at the time of the challenged conduct, "the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."'" *Id.* at 460, *quoting, Thomas v. Whalen*, 51 F.3d 1285 (6th Cir.). In determining whether the right was clearly established the court stated that, "'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 460, *quoting, Anderson v. Creighton*, 483 U.S. 635 (1987).

On appeal, the defendants argued that they were entitled to qualified immunity in this case simply because there is "no Supreme Court or Sixth Circuit authority . . . applying retaliation principles in the context of public officials' dealings with a member of the press." *Id.* at 460.

The court of appeals rejected the argument outright, stating, "[s]imply because no government official has heretofore deemed it acceptable to retaliate against and threaten a reporter for relating the activities of a local governmental body does not mean that the rights of a member of the press to be free from such retaliation has not been 'clearly established.'" *Id.* at 460-61. The court continued to state that "[b]oth the Supreme Court and this court have, in fact, consistently recognized 'that retaliation by public officials against the exercise of First Amendment rights is itself a violation of the First Amendment.'" *Id.* at 461, *quoting, Fraternal Order of Police Lodge No. 121 v. City of Hobart*, 864 F.2d 551, 553 (7th Cir. 1988).

Further, the court went on to conclude that "the consistent condemnation by the Supreme Court and by this court of all governmental reprisals against such individuals for improper purposes clearly established that, in 1989 or 1992, as in 1994, '[n]o reasonable official could possibly believe that it is constitutionally permissible to retaliate against a political opponent with physical threats, harassment and violence.'" *Id.* at 461, *quoting, Zilich v. Longo*, 34 F.3d 359 (6th Cir. 1994).

The court noted, however, that on remand that "[t]he proper exercise by the defendants of their own free speech rights cannot serve as the basis for imposition of liability upon those individuals." *Id.* at 462. Thus, the court instructed the district court to "differentiate between those alleged improprieties by the defendants that constitute protected expressions of the defendants' own ideas and positions and those allegations that involve intimidation, harassment, and retribution directed toward McBride solely to punish her for choosing to exercise one of the basic freedoms upon which our society is founded." *Id.* at 462.

Eighth Circuit Releases Opinion in Clinton Deposition Access Case

On December 20, 1996, the United States Court of Appeals for the Eighth Circuit released the opinion supporting its August 12, 1996 order denying several media organizations' applications for access to the videotaped deposition of Bill Clinton used in the federal government's prosecution of Jim Guy Tucker and James and Susan McDougal. *United States v. McDougal*, ___ F.3d ___, 1996 WL 734412 (8th Cir., 12/20/96).

The videotaped deposition was made after the defendants in the case requested that the court issue a witness subpoena to President Clinton. The President responded by seeking the district court's permission to testify by videotaped deposition. Despite the fact that one of the defendants had moved to compel the President to testify in person, the district court granted Mr. Clinton's request to testify on videotape.

Following the deposition, which was taken on April 28, 1996, a number of media organizations, including Reporters Committee for Freedom of the Press, Radio-Television News Directors Association, Dow Jones and Company, ABC, NBC, CBS, and CNN, filed an application for immediate physical access to the videotape, or at the time of its presentation to the jury.

On May 6, the district court ordered that it would provide public access to the transcript of President Clinton's deposition after the videotape had been played for the jury. Meanwhile, counsel for the defense and prosecution had agreed that certain portions of the videotape and transcript, that generally contained objections and arguments of counsel, be deleted. On May 9, the edited videotape was played before the jury but only the edited transcript was admitted into evidence and made available to the public.

After the videotape was shown, the media organizations requested that a copy of the unedited transcript and videotape be made available. The President filed a motion to keep all copies of the videotape, whether edited or unedited, under seal. The district court then granted the request for access to the unedited transcript but denied all requests for access to the videotape.

As the court of appeals noted, "[t]he district court concluded that, on balance, the circumstances favored keeping the videotape under seal because: (1) substantial access to the information provided by the videotape had already been afforded; (2) release of the videotape would be inconsistent with the ban on cameras in the courtroom under Fed.R.Crim.P. 53; (3) in other cases involving videotaped testimony of a sitting president, the tapes were not released; and (4) there exists a potential for misuse of the tape, a consideration specifically recognized in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 601 (1978). 1996 WL at *2.

On appeal, the media organizations argued that the denial of access to the videotape violated both the common law and First Amendment rights of access to judicial records, and also the common law right to public information. The court of appeals entered an order affirming the district court's decision on August 12, 1996 and issued its reasoning in the December 20 opinion.

Access to Judicial Records

In its opinion, the court of appeals disagreed with the media organizations' basic contention holding "as a matter of law that the videotape itself is not a public record to which the common law of access attaches." 1996 WL at *4. Rather, the court held that the videotape "is merely an electronic recording of witness testimony." 1996 WL at *5. The court further explained that "[a]lthough the public had a right to hear and observe the testimony at the time and in the manner it was delivered to the jury in the courtroom, we hold that there was, and is, no additional common law right to obtain, for purposes of copying, the electronic recording of that testimony." 1996 WL at *5.

In fact, the court continued to state that "[e]ven if we were to assume that the videotape is a judicial record subject to the common law right of public access, we would hold that the district court did not abuse its discretion in denying access in the current case." 1996 WL at *5. The court then stated that, "[a]lthough we recognize that there is a common law presumption in favor of public access to judicial records, we note that this court in *Webbe* specifically rejected the strong presumption standard adopted by some circuits." 1996 WL at *5. Under this standard the court will give deference to the decision of the district court.

In addition to the district court's reasons for denying access, which are listed above, the appellate court found other reasons supporting the denial of access. Specifically, the court noted that as a matter of public policy, "courts should avoid becoming the instrumentalities of commercial or other private pursuits." 1996 WL at *6. The court also reasoned that "granting access to the videotape of President Clinton's deposition could harm the strong public interest in preserving the availability of material testimony in criminal trials." 1996 WL at *6. Finally, the court asserted that the fact that as a matter of historical interest and public policy "there has never been compelled in-court testimony of a former or sitting president, nor has there ever been compelled dissemination of copies of a videotape recording of a sitting president's testimony," also supported the denial of access.

Access to Public Information

Turning to the contention that the videotape was public information and thus should be turned over to the media, the court again agreed with the district court's denial of access, finding that since members of the public, including the press, had already been given access to the information on the tape when it was played in open court, the media had "received all the information to which they were entitled under

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Jewell Files Misappropriation/False Light Claims Against Radio Station

In what appears to be the first lawsuit actually filed by former Olympic park bombing suspect, Richard Jewell, he has filed a complaint in a Georgia state court alleging that 96rock/WKLS, an Atlanta radio station, misappropriated his image and placed him in a false light in the public eye. *Jewell v. Jacor, Inc.*, No. 96-13708-3 (Ga. Super. Ct., filed Dec. 16, 1996)

Jewell's complaint arises out of the placement of approximately 100 billboards throughout Atlanta which featured Jewell's likeness next to the words, "Freebird, Lynyrd Skynyrd," and 96rock's logo. The Jewell billboards were part of a recent advertising campaign that paired the images of celebrities with classic rock song titles.

According to the complaint, the station had contacted Jewell twice requesting his cooperation with the campaign. Both times, however, Jewell refused to cooperate with the station which allegedly led the station to act on its own and put up the billboards regardless of Jewell's consent.

Jewell's three count complaint first alleges that the billboard "commercially exploited Mr. Jewell by appropriating his likeness without lawful authorization in order to advance Defendant's own monetary interests and to increase its listening audience by falsely portraying Mr. Jewell as being associated in some fashion with 96rock."

The second claim, for "false portrayal in the public eye," alleges that the billboard "depict[s] [Jewell] as an evil sinister person." Further, the complaint alleges that "[t]he use of the term 'freebird' has a criminal connotation in that it implies that Mr. Jewell had been, or should have been, charged with the commission of a criminal offense in connection with the Centennial Olympic Park bombing."

Finally, Jewell's third claim is for punitive damages alleging that the "[d]efendants actions show willful misconduct and that entire want of care which raises a presumption of conscious indifference to consequences."

The complaint against 96rock is the first of what are expected to be several lawsuits brought by Jewell against media defendants in the aftermath of the investigation into the Centennial Olympic Park bombing. Jewell's complaint against the Atlanta Journal, which has been dubbed by Jewell attorney L. Lin Wood Jr., "the mother of all defamation and invasion of privacy complaints," is expected to be filed soon.

Clinton Deposition Access Case

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the First Amendment." 1996 WL at *7.

The court likened the case to *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), where the U.S. Supreme Court found that "the press's First Amendment right was adequately protected because members of the public, including the press, were (1) permitted to listen to the audiotapes as they were played to the jury in the courtroom and (2) furnished with copies of the written transcript." 1996 WL at *7. Following this reasoning the appellate court stated that while the right of public access extends to the information on the videotape, "the right does not extend to the videotape" itself. 1996 WL at *7.

Estate of Martin Luther King Sues CBS Over Use of "I Have A Dream" Speech

The estate of Martin Luther King has filed suit against CBS, claiming copyright infringement based on CBS's inclusion of excerpts from Dr. King's "I Have a Dream" speech in a five-tape videotape set entitled *The Twentieth Century with Mike Wallace. Estate of Martin Luther King Jr. Inc. v. CBS Inc.*, No 1:96-evidence-3052-WCO (N.D. Ga., filed Nov. 19, 1996). The tapes include historical footage of Dr. King delivering the famous speech at the Lincoln Memorial during the March on Washington in 1963.

The King estate, which recently entered into a multimillion dollar agreement with Time Warner Inc. to market material contained in the King estate archives, has been aggressive in protecting its intellectual property. The estate has previously brought actions involving the "I Have a Dream" speech, suing *USA Today* in 1993 after the newspaper published the entire text of the speech on the thirtieth anniversary of the Civil Rights March. The newspaper subsequently settled the suit by paying a $1700 licensing fee as well as attorneys' fees to the estate.

CBS claims that by including the excerpts from Dr. King's famous speech it is providing the public with news material of the greatest historical and social significance.

Over The Transom: Is Nothing Safe Anymore?

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violation of the act can recover from a violator in a civil suit. 18 U.S.C. § 2520.

The legislative history of the prohibition and exception expressly states that those provisions were not intended to prohibit the disclosure of the contents of an intercepted communication that had already become "public information" or "common knowledge." 28 Cong. Rec. at 2181.

Three years ago a New York case indicated a heightened risk in using "over-the-transom" material. That risk has now resurfaced in Texas with four separate but related cases.

In *Natoli v. Sullivan*, 606 N.Y.S.2d 504 (N.Y. App. Div. 1993), 21 Media L. Rptr. 2097, *aff'd.*, 616 N.Y.S.2d 318 (N.Y. 1994), two newspapers received a tape recording of a telephone conversation between two local politicians. Recognizing that the content was newsworthy, one newspaper published portions of the recording, reporting on the political importance of what they said and who was saying it. The other newspaper waited and then ran an article relying on the content published by the first. The two participants in the recorded conversation sued, alleging that it was recorded without their consent, and that the newspapers knew or should have known that the recording was made in violation of the Federal Wiretap Statute.

The second newspaper avoided liability on the court's holding that it had published no more than was already in the public domain. The first newspaper, however, was required to defend, as the court rejected all constitutional arguments, holding that, even considering *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 106 (1979), *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *Oklahoma Publishing Co. v. Oklahoma County Dist. Ct.*, 430 U.S. 308 (1977), and *The Florida Star v. B.J.F.*, 491 U.S. 524 (1994), "[t]he governmental interest in protecting the privacy of telephonic communications from unauthorized intrusion is sufficiently substantial to permit the punishment of the publication of truthful information lawfully obtained in this case." 606 N.Y.S.2d at 509.

The *Natoli* court also issued some prescient observations for the Texas cases that have followed: 1) As the wrongful information had been in private hands, there was no governmental custody; 2) there had been no reliance upon the government's having first placed the information in the public domain; 3) although the material published was of public interest, it was not of "paramount public significance or import"; and 4) the newspapers knew they were dealing with recorded conversations between unconsenting parties.

In the Texas cases, print and television news media reporting on local politics find themselves the next subjects of federal wiretap claims for reporting on recordings they had no participation or responsibility in recording or distributing.

The first Texas case arose in the heat of a racial division on the school board. In September 1995 members of the school board received an anonymous package with a tape of a telephone conversation in which a readily identifiable white board trustee named Dan Peavy directed racial slurs and vulgar language at fellow school board members. Both Peavy and the other party later denied recording the conversation. Some school board members transcribed the tape and then read portions of it into the official minutes at the next board meeting. The next day, *The Dallas Morning News* ran a front-page story discussing the substance of the tape and the board's reaction to it. Radio and television outlets then obtained copies of the tape under the state open records law and played portions over the air. *The Dallas Morning News* subsequently published excerpts from the transcript, deleting, however, most of the offensive language. A week later, the *Dallas Observer*, a weekly newspaper, obtained a copy of the transcript from the school board under the open records law and published the transcript in full, including Peavy's slurs and vulgarities. Succumbing to protests and pressure, Peavy resigned.

Peavy then sued only the *Observer* and its editor, claiming in state court violations of the federal and state wiretap laws and unjustified publication of private facts. After the defendants removed the suit to federal court, Peavy amended the complaint to assert only the federal claim. Using the broad definition of mens rea from the federal statute, Peavy alleges that "[d]efendants disclosed or used the contents of the communication knowing, or having reason to know, that it had been obtained through the interception of a wire, oral or electronic communication in violation of 18 U.S.C. § 2511." He demands any profits made by the defendants as a result of their conduct or statutory damages in the sum of $10,000, whichever is greater, in addition to punitive damages and attorney's fees.

The defendants have moved for summary judgment arguing that illegal interception has not been established, that the defendants did not know nor did they have reason to know that the transcript was from an illegally intercepted communication, that the contents of the intercepted communication had already become public information or common knowledge, and that application of the statute to the conduct at issue would violate the First Amendment and its state counterpart, Article I, section 8 of the Texas Constitution. As the defendant did in *Natoli*, the defendants particularly rely on *Florida Star v. B.J.F.*, 491 U.S. 524, 530 (1994), for the proposition that there can be no liability consistent with the federal or state constitutions for publication of truthful information lawfully obtained by the defendants from the public record. The also rely on *New York Times v. Sullivan*, *Gertz* and *Hustler v. Falwell*, 485 U.S. 46 (1988), for

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the argument that the federal wiretap statute is unconstitutional to the extent it permits liability for negligent or faultless conduct, especially where the media had no role in procuring the information about a public official, and the information has been derived from a public document.

In the second Texas case, a month after Peavy's resignation various news media in the Dallas area received a tape of a telephone conversation in which an apparently identifiable black Dallas City Council member named Charlotte Mayes disparaged fellow African Americans and vowed to support a white successor. Some news media reported that Mayes' defeated black political opponent had distributed the tape. The day after receiving it, *The Dallas Morning News* published a front-page story discussing the tape and its contents. Two local television stations also aired stories about the tape.

Mayes sued *The Dallas Morning News*, two *News* reporters and the two local television stations in federal court claiming violations of the federal wiretap statute, alleging that the news outlets intentionally and maliciously disclosed and published or broadcast quotations from the tape to the general public with knowledge that it had been illegally intercepted. Mayes also claimed intrusion into seclusion and intentional infliction of emotional distress.

The news organizations have responded that the information was already in the public domain, that application of the wiretap statute to the alleged conduct would be a violation of the First Amendment and/or Article I, section 8 of the Texas Constitution, that the defendants neither knew nor should have known that the taped conversation was illegally obtained, and that the defendants cannot be held liable for the publication of truthful information lawfully obtained. No motions have yet been filed. Court ordered mediation did not result in a settlement, and the case is currently in discovery.

Peavy returns as the plaintiff in the third suit, filed three months ago in federal court against a local television station and its reporter. This case arises from dozens of tapes, none broadcast by the defendant television station, of Peavy telephone conversations while he was using a cellular or cordless telephone. The tapes were made by his neighbor from interceptions on a common radio scanner. While Peavy was using a cellular or cordless telephone at a time when it is unclear whether the federal law protected such radio-telephone signals. As a further warp to the facts, the tapes were then used by federal prosecutors to charge Peavy with bribery for actions taken while he was a school board trustee. And as the last twist: It was a television investigative report about Peavy's conduct that led to the federal investigation and indictment.

Peavy claims that the station and the reporter not only conspired with the government and the neighbor to illegally intercept the conversations, but also illegally used the contents of the taped conversations in preparing and airing the station's investigative report. The station has publicly denied that its investigative report was based on any of the tapes recorded by the neighbor. In the criminal trial, meanwhile, Peavy has been acquitted, after the government declined to introduce the neighbor's tapes, even though the court ruled them admissible.

Peavy's business associate and co-defendant in the criminal trial -- who was also acquitted -- has recently filed a nearly identical suit, complaining that he was a party to several of the conversations intercepted by Peavy's neighbor.

While it is complicated by facts that pull in many directions, the last Peavy case highlights the warning first appearing in *Natoli* and repeated in the other Texas cases.

Most recently, the Gingrich conference call tape made in Florida from a regularly marketed police scanner illustrates the problems courts would create with an absolute or virtually absolute rule that ignores congressional intent and constitutional concerns. While the sources (the Martins) may reasonably assert their interception was not a violation of the statute, their recording and their transmitting the tape to others (including McDermott) was plainly intentional and therefore a facial violation of the statute. McDermott's subsequent use appears similarly to have been a technical violation; and *The New York Times* surely confronted a risk, as a consequence, when it published excerpts from a transcript of the tape. Yet, the substance of the recording, the political issues and public officials to which it relates are clearly of substantial public import.

If courts ignore or deprecate the congressional admonition that the wiretap statute was not intended to impose liability on publication of public information or matters of common knowledge, and if they require the highest public import to implicate First Amendment protections, they are likely to follow the New York court's lead to the simple proposition that news journalists have no special protection from privacy-protecting laws of general applicability. As all of these cases illustrate, the courts may come to this conclusion despite the presence of core speech -- news reports about the performance of elected politicians -- and in the face of strong constitutional arguments against a constructive-knowledge standard of fault and the imposition of liability for publication of truthful information.

Careful use of over-the-transom material and thoughtful approaches to litigation are now plainly required.

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Fly-Along: Rescue Helicopter is Hospital Room In Privacy Analysis

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cue. The opinion is notable for its exposition of California privacy and summary judgment law and its suggestion that newsgathering may be entitled to a lesser level of First Amendment protection than publication.

The court held that no cause of action for intrusion or publication of private facts exists where the media has simply recorded sound and image of a rescue that occurs in public on public property. On the other hand, the court held that triable issues of fact remain as to whether an intrusion has occurred when the media records the scene inside a rescue helicopter where a conscious plaintiff is being treated for injuries. Similarly, the court held that summary judgment could not be granted to the media on a publication of private facts issue when it had broadcast excerpts of the footage taken in the helicopter of a plaintiff-patient who may be recognizable. Finally, the court held that no misappropriation claim could stand, regardless of a plaintiff's recognizability, because of the statutory exemption for news and public affairs.

Ruth and Wayne Shulman were among four family members involved in a serious automobile accident on an interstate highway in California. Ruth and Wayne were both airlifted by helicopter to a local hospital from the gully into which the car had overturned. What distinguished this air rescue was that among the paramedical team on board was a cameraman employed by defendants Group W Productions, Inc. and 4MN Productions ("the media defendants") who produced a television show called "On Scene: Emergency Response."

The cameraman recorded video footage and audio at the accident scene and inside the helicopter, where the victims, both conscious, were treated by paramedics and a nurse. Their rescue attempt was later featured in an episode of "On-Scene." The focus of the segment on the Shulmans' accident was the dramatic rescue of Ruth Shulman, who was cut free from the car by a device known as the "jaws of life." The court describes that Ruth was seen either from a distance or with her face obscured with an oxygen mask. Her voice is heard at several points in the segment, including her inquiries about her family and statement that she wished to die. Wayne's voice was never heard and the segment included "just two brief glimpses [of him] from a distance."

The Shulmans alleged six causes of action: two counts alleging invasion of privacy based on intrusion into seclusion and the publication of private facts; two counts based on misappropriation of likeness; Ruth's count of intentional infliction of emotional distress; and one count for injunctive relief seeking a bar to any repeats of the original broadcast. Summary judgment was entered in favor of the media defendants and Mercy Air in late 1993 and plaintiffs appealed. The unanimous opinion of the Court of Appeal, written by Associate Justice Goody Perez, contains no explanation for the three-year period between that judgment and resolution of the appeal.

California Privacy Claims: Constitutional and Common Law Claims "Identical"

In California, privacy claims arise both from the Prosser formulation of common law and from the state constitution, which contains the so-called "Privacy Initiative." The court discussed at length the factors to be analyzed under both and concluded that they were, for analytical purposes, "identical." The court analyzed the intrusion and publication of private facts claims using the balancing language of the constitutional test: "whether appellants had a reasonable expectation of privacy and whether their claims are outweighed by a competing First Amendment interest."

The court then broke the case into two factual chunks. The first was the recording of images and sound at the accident scene. The second was the recording of images and sound inside the helicopter.

No Privacy Claims Arise from Taping a Public Accident Scene

The court had little difficulty deciding that no privacy claims arose from the taping at the accident scene or the broadcast of that tape. "[A]n objectively reasonable expectation of privacy is a key component of a privacy claim based upon an intrusion," said the court, noting that the "accident occurred on a heavily-travelled public highway"; that the car came to rest on property owned by the state; and that the videotape showed "onlookers peering down" at the car, who might easily have overheard what was said below.

The court also based its decision on "the strong First Amendment policy favoring news coverage of auto accidents and other catastrophes" and held, since the broadcast at issue occurred about three months later, that "the mere lapse of time" did not defeat this policy.

Finally, the court rejected plaintiffs' contention that any privacy claim should be based on their allegation that the media defendants recorded confidential communications at the accident scene or in the helicopter. First, the court noted that plaintiffs had no doctor-patient relationship with anyone at the scene or in the helicopter. Second, while ruling that plaintiffs had waived their argument under California's Confidentiality of Medical Information Act by failing to brief it adequately, the court hinted that such an argument would fail by noting that paramedics acting during an emergency were exempted from the Act.

A Flying Hospital Room is a Private Place

On the other hand, the court equated the rescue helicopter with "an airborne ambulance," and ultimately to a hospital room, sounding the death knell for the media defendants' summary judgment on these claims: "[O]nce the ambulance doors swing

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Fly-Along: Rescue Helicopter is Hospital Room In Privacy Analysis

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shut, the unfortunate victim can and should reasonably expect privacy from prying eyes and ears." The court found ample justification for this in its own sensibilities and in the precedent of *Noble v. Sears, Roebuck & Co.*, (1973) 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (privacy claim survives where plaintiff has "exclusive right of occupancy of her hospital room" insofar as defendants are concerned); *Miller v. National Broadcasting Co.*, (1986) 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668 (privacy claim survived where news crew taped events without permission in deceased's bedroom while paramedics unsuccessfully attempted to revive him); and *Hill v. National Collegiate Athletic Assn.*, (1994) 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834 (privacy tort protects "freedom to act without observation in a home, hospital room or other private place . . . .").

The court thus found that plaintiffs had a reasonable expectation of privacy in the events transpiring in the helicopter and that they had not waived it by consenting to the cameraman's presence. He was dressed in the same uniform as the other members of the medical crew and was not identified as a member of the media.

No Trespass Needed for Intrusion Claim

Next, the court rejected the media defendants' argument, based on *Miller*, that a trespass must be proven to support an intrusion claim. Since Mercy Air had permitted the media defendants to be present and to videotape within the helicopter, no trespass could be proven. While the court acknowledged that the *Miller* court "threw NBC's trespass into the mix when discussing invasion of privacy," it concluded it was not a necessary condition precedent. Instead, the court read the decision more broadly and concluded that the *Miller* court "was only considering the effect of that trespass in light of [the surrounding circumstances] and did not intend to announce a rule that a trespass was required in all intrusion cases."

Second, the court concluded that permitting Mercy Air to waive the plaintiffs' privacy rights would "undermine the law of privacy." The court made little secret of its disdain for Mercy Air's decision to permit the media along, but noted that plaintiffs waived any argument against Mercy Air on this ground.

Recognizes "Some First Amendment Protection for Newsgathering"

Plaintiffs argued, citing *Miller*, that there is no First Amendment "defense" to an intrusion claim, since it does not involve publication. The court disagreed with this construction of *Miller* and of the law in general, holding that "there is some First Amendment protection for newsgathering . . . ." But the court also rejected the media defendants' contention that they were absolutely protected by the First Amendment from liability for intrusion. Citing *Hill*, the court concluded that the law required a balancing between plaintiffs' privacy rights and the media defendants' First Amendment protection which had not been conducted by the lower court. The court thus remanded the intrusion claims for trial.

Remands for Trial on Publication of Private Facts Claim

The court recognized at the outset of its opinion that in cases involving the First Amendment, summary judgment is "a favored remedy which will be granted unless the plaintiff opposing the motion shows a high probability of prevailing at trial." But the court never referred to this standard again. The desertion of this rule was fatal to the media defendants' judgment on Ruth Shulman's publication of private facts claim. The court simply concluded that triable issues of fact existed on all of the elements of the claim, and remanded. However, it also held that judgment was properly entered for the media on Wayne Shulman's claim since he was not "shown, heard or mentioned" in the helicopter phase of the broadcast.

Exemption for News and Public Affairs Bars Claims for Misappropriation

The court easily affirmed the judgments in favor of the media on the misappropriation claims, finding that the "On Scene" fit within the exemption to the Civil Code's misappropriation statute since it concerned a matter of public affairs.

Plaintiffs argued that the broadcast contained errors, such as the number of people involved in the accident, which prevented defendants from invoking the exemption. However, the court determined that the errors that plaintiffs cited "were trivial and did not rise to the level of knowing or reckless falsehood required to destroy the public affairs exemption . . . ."

Finally, the court held that Ruth Shulman's claim for intentional infliction of emotional distress had been waived and that the award of costs to the media defendants must be reversed. Without any discussion, the court left standing Ruth Shulman's claim for injunctive relief, while dismissing Wayne's.

The California Court of Appeal denied the defendant's motion for rehearing, but did issue a modification changing among other items, a subsection heading from "Triable Issues Remain As To A First Amendment Defense," to "Unresolved Issues Remain . . ." suggesting that additional questions of law exist which could be resolved by the trial court on motion.

Defendants have filed a petition for review with the California Supreme Court.

Green v. Chicago Tribune

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a dozen doctors, nurses and other medical personnel" awaited him. The Hospital trauma center's "feverish" efforts failed, and Calvin was pronounced dead at 12:10 a.m. on New Year's Eve.

In an Article published New Year's Day, 1993, the *Chicago Tribune* reported the tragic demise of Calvin Green. The Article was published on the front page of the *Tribune*, and featured a color photograph of Calvin's body on a gurney, taken at Cook County hospital the night of his death. The Article also accurately reports Calvin's mother's expressions of grief while viewing her son's body at Cook County Hospital.

The Article reports: "Calvin's name is one of the last on a grim list that has grown every year since 1988. In the last four years, homicides in Chicago have soared more than 40 percent." The New Year's Day Article was part of the *Tribune's* "Killing Our Children" series. The series, which won a Pulitzer Prize, sought to put a human face on the statistics of gang warfare. Another article in the "Killing Our Children" series, published in the January 3, 1993 *Tribune*, contained another photograph of Calvin taken at the Hospital the night of his death.

The Lawsuit

Calvin's mother, Laura Green, sued the Tribune and Cook County. Her Complaint against the Tribune claimed intentional infliction of emotional distress and invasion of privacy by the public disclosure of private facts. Green alleged the same facts in support of both claims:

* that Tribune employees photographed Calvin while he was receiving treatment in the trauma center;
* *entered a "private" room where* Calvin's body awaited the Cook County Coroner;
* "prevented" Green from entering that room, yet
* "eavesdropped" on the statements Green was making to her deceased son there; and that the Tribune published the photographs of Green's son and the statements she made to him.

Green also claimed – upon "information and belief" – that certain unspecified Tribune employees committed a "battery" upon her by barring a door.

Green expressly disclaimed any reliance on the "intrusion upon seclusion" branch of the privacy tort, choosing to rely solely upon a "disclosure of private facts" theory. The First Appellate District -- which includes Cook County -- does not recognize intrusion[1], and the Illinois Supreme Court has declined to rule on whether the tort exists in Illinois.[2]

The Tribune initially moved for a bill of particulars, seeking more details with respect to Green's allegation that she was "prevented" from entering the room where her son's body awaited the coroner. Green successfully opposed that motion, and the Tribune moved to dismiss all of the claims against it.

The Circuit Court's Dismissal on "Legitimate Public Interest" Grounds

In Illinois, the "right of privacy is a limited one in areas of legitimate public interest."[3] Illinois follows the *Restatement (Second) of Torts'* definition of the "private facts" tort, which includes the requirement that the matter publicized be of no "legitimate public concern."[4]

Consistent with the Supreme Court's instruction to "proceed with caution" in defining the limits of the privacy tort[5], Illinois courts have defined legitimate public concern broadly, and decided the issue as a matter of law. "The only question" is "whether the [depiction] complained of has so tenuous a connection with the article that it can be said to have no legitimate relationship to it."[6]

Likewise, Illinois -- a fact pleading jurisdiction -- has consistently applied a strict standard to emotional distress pleadings, and has not hesitated to dismiss such claims against the media.[7]

Following this settled law, the Circuit Court of Cook County, McGann, J., dismissed Green's Amended Complaint as against the Tribune. The court found the complained-of elements in the news report were connected to a matter of public interest, and the newsgathering conduct alleged failed to state a claim under the strict pleading requirements for emotional distress under Illinois law. Transcript of Proceedings, Aug. 30, 1994, *Green v. Chicago Tribune Co.*, No. 93 L 08676 (Cir. Ct. Cook Cty.) Green appealed the dismissal to the Illinois Appellate Court.

The Appellate Court's Reversal

The Appellate Court, in a 2-1 decision, affirmed in part and reversed in part the Circuit Court's order, and remanded for further proceedings.

The Majority reversed dismissal of Green's invasion of privacy and emotional distress claims, insofar as they were based on the January 1, 1993 Article. The Majority held that, unlike the January 3 Article[8], the January 1 Article "substantially publicized" Green "by publishing a photograph of her dead son, Calvin, *and* by identifying her as Calvin's mother and publishing her statements to Calvin." (*Green v. Chicago Tribune Co.*, No. 94-3130 (Ill. App. 1st Dist.), Dec. 30, 1996 Slip Op.)[9]

In sustaining this part of Green's Complaint, the Majority held that legitimate public concern was a jury question, because a jury could find the Article "did not need plaintiff's intimate statements to Calvin or his photograph to convey the human suffering behind gang violence." The Majority opinion is in direct conflict with *Beresky v. Teschner*[10], a 1978 decision of the Appellate Court. Like Mrs. Green, the Bereskys claimed that defendant newspaper "did not confine itself to merely reporting the fact of their son's death" -- by a drug overdose -- but engaged in a "campaign" to "expose to the public the grief, humiliation and shame experienced by plaintiffs at the death of their son." Among other things, the newspaper printed facts about the plaintiff mother's cancer surgery. But dismissal of privacy and emotional distress claims was affirmed, because the facts related in the newspaper bore some connection to the subject of drug use, a matter

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of obvious public concern.[11]

Instead of *Beresky*, the Majority relies principally on *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975). Of course, on remand, the *Virgil* District Court granted judgment for defendant as a matter of law. While finding "no compelling reason" for defendant to include some of the facts about plaintiff in its article, the District Court held that "`[c]ompelling need' . . . is not the test for newsworthiness."[12]

The Majority also held the Circuit Court erred in finding Green's statement to her son, in the presence of the Tribune reporter, not to be a "private matter." The Majority, focusing on Green's allegation that she told the reporter she did not wish to make a statement, finds the Tribune was "on notice it was not to disclose to the general public the statements she made in the hospital to her son."[13]

The dissenter, Justice Cahill, would have affirmed the trial court's dismissal in all respects. Justice Cahill took the Majority to task, observing that the Majority was recognizing *sub silentio* the intrusion branch of the privacy tort, and had created an analytical muddle. "When the elements of the torts are mingled as they are here, we are led down an analytical path that ignores the distinction between the way information is gathered and its subsequent publication . . . That Calvin and his mother were tragic involuntary public figures in a story of grim but legitimate public interest is self-evident. The alleged intrusion cannot change their status or diminish the newsworthiness of the story."

The dissent also sharply criticizes the Majority's handling of the "legitimate public concern" issue: "it is not for a jury to decide how a news story should be edited. To question whether the newspaper should have omitted certain details from a story of legitimate public concern amounts to editorial second guessing rather than legal analysis."

As the dissent indicates, the Majority's opinion is a radical departure from Illinois law's traditionally narrow interpretation of the common law privacy tort; obviously, it is deeply problematic from a First Amendment perspective. To our knowledge, no other Illinois case has allowed a claim to proceed against the media based on a truthful publication.[14] The Tribune is seeking leave to appeal to the Illinois Supreme Court.

ENDNOTES

1 *Kelly v. Franco*, 72 Ill. App. 3d 642, 391 N.E.2d 54 (1st Dist. 1979).

2 *Lovgren v. Citizens First National Bank*, 126 Ill. 2d 411, 417 534 N.E.2d 987, 988 (1989).

3 *Leopold v. Levin*, 45 Ill. 2d 434, 440, 259 N.E.2d 250, 254 (1970).

4 *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 978, 560 N.E.2d 900, 903 (1st Dist. 1990); *citing Restatement*, § 652D.

5 *Leopold v. Levin*, 45 Ill. 2d at 440, 259 N.E.2d at 254.

6 *Buzinski v. DoAll Company*, 31 Ill. App. 2d 191, 196, 175 N.E.2d 577, 579 (1st Dist. 1961), *quoting Lahiri v. Daily Mirror*, 162 Misc. 776, 295 N.Y.S. 382, 389 (N.Y. Super. 1937) (emphasis added). *See Beresky v. Teschner*, 64 Ill. App. 3d 848, 381 N.E.2d 979 (2d Dist. 1978) (dismissing private facts and emotional distress claims against newspaper).

7 E.g., *Beresky v. Teschner*, *supra*; *Galvin v. Gallagher*, 81 Ill. App. 3d 927, 401 N.E.2d 1243 (1st Dist. 1980) (newspaper article stating author's opinions on teenagers' problems with drugs and alcohol in connection with recent overdose death of plaintiff's son did not state emotional distress claim).

8 The Majority affirmed the Circuit Court's holding that, since privacy is a personal right, for which relatives cannot recover, Green had no invasion of privacy claim based on the January 3, 1993 Article, which published photographs of Calvin Green only. The Majority also affirmed dismissal of Green's battery claim, finding no "offensive touching" of Green by any Tribune employee.

9 The Majority also reversed dismissal of Plaintiff's intentional infliction of emotional distress claim based on the allegation that Tribune personnel "barred her from seeing her dead son."

10 64 Ill. App. 3d 848, 381 N.E.2d 979 (2d Dist. 1978).

11 The Majority also failed to address Judge Posner's opinion -- applying Illinois law -- in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993). There, Haynes complained that instances of his familial neglect, drunkenness and adultery in the 1960's were not themselves matters of public concern, nor did they "need" to be included in a book of social history about the twentieth-century migration of black Southerners to Chicago. But because of the logical nexus of these embarrassing facts to the matters of public interest discussed in the book, no claim would lie: "No detail in the book claimed to invade the Haynes' privacy is not germane to the story the author wanted to tell, a story not only of legitimate but of transcendent public interest." *Id.* at 1233.

12 *Virgil v. Sports Illustrated*, 424 F. Supp. 1286, 1290 (S.D. Cal. 1976).

13 The Majority cites no Illinois law for that proposition; it analogizes to *Virgil's* finding that plaintiff, having granted a reporter an interview, could withdraw his consent to its publication. Of course, *Virgil* did not hold that such withdrawal meant the reporter could not gather information about, or utterances of, the subject independent of an interview with him. And, as *Virgil* ultimately found, the "legitimate public interest" limitation bars a privacy claim even if the publication is arguably "private" or "highly offensive" to a reasonable person. *See Virgil*, 424 F. Supp. at 1289-90; *see also Beresky*, 64 Ill. App. 3d at 856, 381 N.E.2d at 984; *Haynes*, 8 F.3d at 1232. Simply because a subject refuses to make a formal statement on the record does not mean a reporter must, on pain of damages, close her eyes and ears to anything else the subject says or does.

14 *Compare Kolegas v. Heftel Broadcasting Co.*, 154 Ill. 2d 1, 607 N.E.2d 201 (1992) (sustaining false light-libel-emotional distress claims against media); *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1st Dist. 1958) (reversing privacy claim based on "fictionalized" treatment).

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