

LDRC

Libel
Defense
Resource
Center

LIBELLETTER

Reporting Developments Through January 22, 2001

In This Issue . . .

<u>LIBEL</u>	PAGE
2nd Cir Time Magazine Wins Summary Judgment v. Scientology Church <i>Actual malice and application of subsidiary meaning doctrine key</i>	2
S.Ct Cert Denied in Gray v. St. Martin's Press <i>Gray sought discard of actual malice in public figure cases</i>	4
Tex Texas Sup. Ct. Upholds TV Station Win in Libel Appeal <i>But says plaintiff can sue for "broadcast as a whole" even if reported facts are true</i>	5
3rd Cir Affirms Dismissal of Libel Suit by Anti-Gansta Rap Activist Tucker and Spouse Against Time/Newsweek <i>Says statements could be defamatory but finds no actual malice in reports on their consortium claim</i>	9
WDArk Summary Judgment to Penthouse Magazine over Photo of Condom Contest Winner <i>Merely appearing in the magazine without consent is not tortious</i>	10
Utah Largest Libel Win in State's History for Dr. Over Hidden Camera <i>Use of "sneaky-cam" and journalism codes may be the key to verdict here</i>	11
2nd Cir Court Applies NY's Gross Irresponsibility Test to Published Corporate Internal Investigation <i>Discussion of differences between Chapideau standard and actual malice</i>	15
Md Libel Suit Settled After Award Reduction and Before Re-trial Public Official Sued Over Editorial	16
Cal Appellate Court Revives Discovery Rule in Non-Media Libel Case <i>Rule applied although publication was in mass media</i>	17
<u>NEWS & UPDATES</u>	
Cal Secret Settlements Under Fire <i>Statute proposed in California, already adopted in other jurisdictions, to restrict secrecy of settlement agreements in litigation</i>	19
9th Cir Damaging Opinion in Alpha Therapeutic v. NHK Withdrawn <i>Had allowed privacy claim for hidden taping of interview given reporter</i>	9
UK Injunction on Sneaky Douglas/Zeta-Jones Wedding Shots Lifted <i>But right of privacy argued and acknowledged</i>	23
UK London Firm Seeks Libel Plaintiffs Online	24
Ill. Trial Court Allows Claim on Parent Liability for Minor's Website <i>May hold father liable for negligence re site's content</i>	25
PA Philadelphia Reporters Fined \$100/Minute – \$40,000 Total – for Refusing to Testify at Criminal Trial <i>DA sought impeachment evidence from interviews with defendant</i>	27
1st Cir Unauthorized Use of Newsworthy Photos Held to be Fair Use <i>Photos were the story, use transformative, economic impact nil</i>	31

Summary Judgment for Time Magazine in Scientology Suit Affirmed by 2nd Circuit

By Robin Bierstedt

The Second Circuit Court of Appeals affirmed *Time* magazine's summary judgment victory in the libel case brought against it by the Church of Scientology International ("CSI") over the magazine's May 6, 1991 article "Scientology: The Cult of Greed." Affirming the five separate decisions of the district court, the Second Circuit held that the challenged statements were either not of and concerning the plaintiff, not published with actual malice, or subsidiary in meaning to the non-actionable statements. *Church of Scientology Int'l v. Time Warner Inc. et al.*

Time's eight-page cover story, written by Richard Behar, accused Scientology of being "a ruthless global scam" that "survives by intimidating members and critics in a Mafia-like manner," among other charges. Scientology challenged six passages from the article, of which several concerned the wrongdoing of individual church members.

Not "Of and Concerning" CSI

Time first moved to dismiss the complaint on the grounds that the statements, which did not refer to CSI by name, were not about CSI but about Scientology generally or individual Scientologists. The district court granted the motion in part, holding that two of the passages were not "of and concerning" CSI. The defendants then answered the complaint, and Behar asserted counterclaims against CSI for violation of the Fair Credit Reporting Act and harassment, alleging that CSI had waged a campaign of intimidation against him while he was working on the article.

Actual Malice Motion After Years of Discovery

The parties then engaged in two and a half years of discovery limited to the issue of actual malice. *Time* produced over 20,000 pages of documents, and Behar alone was deposed for 28 days – 16 and 1/2 days over a 12-month period in the main action and an additional 11 and 1/2 days in a companion

case brought by an individual Scientologist, *Baybak v. Time Warner Inc., et al.*

At the close of this discovery, *Time* moved for summary judgment based on the absence of actual malice, and the district court granted the motion as to all but one of the statements. The sole remaining statement was the following: "One source of funds for the Los Angeles church is the notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world." On *Time*'s motion for reconsideration, the district court dismissed this statement, holding that it was subsidiary in meaning to the non-actionable statements in the rest of the article.

CSI then moved for an order modifying the district court's order to reinstate its libel claim as one for nominal damages, which it claimed it should be awarded upon proof of falsity but regardless of actual malice. When the district court denied this motion as untimely, CSI tried again with a motion for leave to amend its complaint to add a claim for nominal damages – and this motion too was denied, based on unjustified delay and prejudice to defendants as well as the futility of allowing a noncognizable claim.

Second Circuit Affirms

The Second Circuit's opinion is a wholesale affirmation of the district court other than the issue of "of and concerning," which the court felt it did not have to reach in order to dismiss all of the claims. Focusing on the application of the actual malice standard, the appellate court reviewed the evidence considered by the district court and agreed in each case that plaintiff had failed to prove actual malice, characterizing Behar's research as "extensive" and "thorough" throughout the opinion's analysis of the issue.

Subsidiary Meaning Doctrine Explained/ Applied

The Second Circuit also adopted the lower court's dismissal of the one remaining statement under the subsidiary meaning doctrine, citing its own decision in

(Continued on page 3)

Summary Judgment for Time Magazine in Science Suit Affirmed by 2nd Circuit

(Continued from page 2)

Herbert v. Lando, 781 F.2d 298 (2d Cir. 1986).

In *Herbert*, we held that when a ‘published view’ of a plaintiff is not actionable as libel, other statements made in the same publication are not ‘actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held that there can be no recovery.

Quoting from *Herbert*, 781 F.2d at 312.

The Second Circuit rejected CSI’s argument that the subsidiary meaning doctrine should be treated like the incremental harm doctrine and be considered a creature of state, not federal, law under the Supreme Court’s holding in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). In *Masson*, the panel noted, the Supreme Court stated that the First Amendment did not compel adoption of the incremental speech doctrine because it “‘does not bear upon whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not.’” Quoting *Masson*, 501 U.S. at 523.

The Second Circuit distinguished the two doctrines, noting that under the incremental harm doctrine, “an additional statement, even if maliciously false, might be non-actionable because it causes no appreciable additional harm.” By contrast, “the subsidiary meaning doctrine does bear upon whether a defendant has acted with actual malice,” since a defendant’s overall view of the plaintiff rests on the evidence it has to support that view. The subsidiary meaning doctrine is therefore a question of federal constitutional law, and survives after *Masson*.

Robin Bierstedt is Vice President and Deputy General Counsel of Time Inc. and litigated this matter with Floyd Abrams, Dean Ringel and Janet Beer of Cahill Gordon & Reindel, New York. Burt Neuborne, Professor of Law at New York University, and lawyers from Rabinowitz, Boudin, Standard, Krinsky & Lieberman, represented the Plaintiff.

LDRC DINNER 2001

BACK TO WEDNESDAY NIGHT AND WITH AN ALL-STAR CAST!

BENJAMIN BRADLEE
THE WASHINGTON POST

DIANE SAWYER
ABC NEWS

MIKE WALLACE
CBS NEWS

MODERATED BY WALTER ISAACSON
TIME INC.

We know how many of you hoped we would re-schedule the roster we originally had planned for last year’s LDRC Annual Dinner. So...we have done just that, asking these extraordinary news people to join us in November 2001 for a discussion on news, reporting, law and lawyers ... and whatever else they want to talk about. Walter Isaacson, former Managing Editor of Time magazine, now Editorial Director, Time Inc., will lead a conversation with three of the most notable and articulate men and women in the news business. Put it on your calendar.

NOVEMBER 7, 2001

UPDATE: Libel Plaintiff's Cert Petition Denied In *Gray v. St. Martin's Press*

By Robert Balin

On January 8, 2001, the Supreme Court denied plaintiff Robert Gray's petition for certiorari, ending more than five years of libel litigation against publisher St. Martin's Press and author Susan Trento.

Gray — a well-known lobbyist and Republican party activist — brought suit in the District of New Hampshire over eight separate statements that appeared in a 1992 book entitled *The Power House: Robert Keith Gray and the Selling of Access and Influence in Washington*. The district court dismissed three statements as opinion and granted summary judgment dismissing a fourth on the ground that Gray was a limited-purpose public figure who could not establish actual malice as to that statement. The remaining four statements were then tried before a jury, which in June 1999 returned verdicts in favor of defendants. The First Circuit Court of Appeals subsequently denied Gray's appeal. *Gray v. St. Martin's Press*, 221 F.3d 243 (1st Cir. 2000). See *LibelLetter*, Sept. 2000, at 7.

In his cert. petition, Gray sought Supreme Court review of three questions. Asserting that the actual malice standard is "nearly impossible to overcome," Gray first asked the Court to simply discard the actual malice standard in limited public figure cases and replace it with a "professional negligence" test. A grant of cert. on this question would certainly have been a shock since, over the past 30 years, the Court has repeatedly reaffirmed the applicability of the actual malice standard to public figures.

Gray next asked the Court to consider whether public figure status (and the corresponding need to prove actual malice) should lapse in cases where the plaintiff, while a public figure at the time of the events commented upon, is no longer in the limelight at the time of the challenged publication. All lower courts that have considered this question have ruled that public figure status does *not* lapse by reason of the passage time, on the ground that historians and

biographers merit the same constitutional protection as journalists reporting on contemporaneous events.

The Supreme Court, however, in *Wolston v. Reader's Digest*, 441 U.S. 153 (1979) specifically declined to resolve the passage of time issue (since they found that Mr. Wolston was not a public figure to begin with), and two concurring justices (Blackmun and Marshall) expressed their view that a prolonged period out of the spotlight (in *Wolston*, 16 years) can extinguish public figure status. Whatever the Court may eventually decide when squarely presented with a true passage of time

Gray first asked the Court to simply discard the actual malice standard in limited public figure cases and replace it with a "professional negligence" test.

case, St. Martin's and Trento informed the Court that this was not that case. As found by the First Circuit, the record established that Gray remained an active public figure up through the time of the book's publication and, indeed, Gray was the subject of no less than 188 news articles from 1988 to 1992.

Finally, the Supreme Court declined to review Gray's assertion that the lower courts had erred in dismissing one of the statements in suit as non-verifiable opinion under *Milkovich v. Lorraine Journal Co.*, 497 U.S. 1 (1990). That statement reported the view of a former Gray and Company executive that "Gray completely faked his closeness with a number of senior [Reagan] administration officials." The book made it clear that Gray did indeed have professional and personal relationships with President Reagan and other White House officials. Accordingly, the lower courts found that, in context, the challenged statement did not mean that Gray made up these relationships, but rather that he faked the *degree* of "closeness" he had — a subjective judgment the lower courts held was incapable of being proven true or false.

The brief filed by St. Martin's and Ms. Trento in opposition to certiorari is available in the LDRC brief bank.

Texas Supreme Court Upholds Appellate Court Decision in Favor of TV Station But Opines Plaintiff Can Sue For a Broadcast "As a Whole"

By Robert P. Latham

In a confusing and divided 5-3 decision (with one member of the court recusing herself) that ultimately may be relegated to the facts of the particular case, the Texas Supreme Court held that former Houston mayoral candidate Sylvester Turner had not presented clear and convincing evidence of actual malice in the broadcast of a story by Houston television station KTRK. *Turner v. KTRK Television, Inc.*, ___ S.W.3d ___, slip op. 99-0419, December 21, 2000 (Tex.). In so holding however, the *Turner* court appeared to expand the scope of libel actions by allowing a public official to sue for the "false impression" created by a publication "as a whole" rather than requiring proof of the falsity of individual statements in the publication.

1991 Houston Mayoral Race

The broadcast at issue aired on December 1, 1991, six days before a run-off mayoral election between the plaintiff, Sylvester Turner, and the ultimate winner of the election, Bob Lanier. The broadcast revealed that Turner had a legal client in 1986 named Sylvester Foster. Foster, faced with criminal charges in Houston and in Las Vegas, disappeared from a sailboat off the coast of Galveston in June 1986 and was presumed dead.

Turner had drafted Foster's will shortly before the disappearance and, after Foster disappeared under suspicious circumstances, handled the probate matters on behalf of the independent executor named in Foster's will, Dwight Thomas – a mutual friend of Turner and Foster. The broadcast also revealed that Turner, for purposes of establishing legal residency within the Houston city limits for the

election, was currently sharing a house with Dwight Thomas.

Four days before the 1991 broadcast, KTRK received a tip that Foster was not dead but had turned up alive in jail in Spain, awaiting extradition to the United States. The broadcast discussed the Foster saga, revealed Turner's association with Foster and Thomas, and raised the question: "what did Sylvester Turner know and when did he know it?" Turner alleged in his lawsuit that the overall impression created by the broadcast was that he was a knowing participant in a multi-million dollar insurance fraud (Foster having taken out large amounts of life insurance in the months preceding his staged disappearance).

The case was tried in 1996 and a Houston jury returned a verdict against the media defendants, which was later reduced by the trial judge to \$3.2 million. KTRK and its reporter, Wayne Dolcefino, appealed from that judgment. In 1998, the Houston Court of Appeals reversed the trial court judgment based on the jury verdict and rendered judgment that Turner take nothing. The Court of Appeals held that KTRK and Dolcefino could not have acted with actual malice when the individual statements in the broadcast were true or substantially true. The Texas Supreme Court let stand the judgment rendered by the appellate court in favor of the media defendants on actual malice grounds but found that the broadcast as a whole had created a "false impression."

The Court's Analysis of Substantial Truth

KTRK had defended the broadcast, in part, on the basis that the statements contained in the broad-

(Continued on page 6)

The court held, however, that a publication "can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all of the story's individual statements" are substantially true

Texas Supreme Court Upholds Appellate Court Decision in Favor of TV Station

(Continued from page 5)

cast were true or substantially true. Indeed, in the majority opinion, the Texas Supreme Court twice acknowledged that an accurate broadcast would have raised “serious” and “troubling” questions about Turner’s associations and yet still would not have been actionable. The Texas Supreme Court also concluded “that most of the broadcast’s individual statements are literally true and that most of those not literally true are substantially true.” The court held, however, that a publication “can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all of the story’s individual statements” are substantially true. The court reasoned that since the substantial truth doctrine allows for defendants to support the truth of a story based on the story’s “gist” or “sting,” the converse should also apply — that a plaintiff should be able to impose liability based on the story’s “gist” or “sting.” In this case, the court opined that the gist of the broadcast was that Turner was a knowing participant in a multi-million dollar insurance fraud.

Did Not Call it Libel By Implication

The court took pains to avoid labeling such a cause of action “libel by implication,” instead authorizing a plaintiff to sue based on the impression created by the publication “as a whole.” This is perhaps a distinction without a difference, and not one that was developed by the majority opinion.

Likewise absent from the majority opinion was a discussion of the Texas libel statute which provides, as the Texas Supreme Court had previously found in *Randall’s Food Markets, Inc. v. Johnson*, 891 S.W.2d 640 (Tex. 1995), that “truth is a complete defense.” The Texas Supreme Court in the *Turner* opinion did not overrule or even question its previous holding in *Randall’s*, stating instead that *Randall’s* simply held that the defendant “cannot be held liable for presenting a true account of events, regardless of what someone might conclude from

this account.” It is hard to reconcile this language of the opinion with the court’s holding that “an allegedly defamatory publication should be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.”

The court also made clear that it was not restricting its previous opinion in *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994) either – a case which rejected the tort of false light invasion of privacy. The court found no inconsistency with *Cain*, and emphasized that a plaintiff claiming defamation based on a publication as a whole must nevertheless prove that the publication’s “gist” is false and defamatory and therefore the procedural and substantive safeguards in a libel cause of action are still intact, whereas they would not be in a false light case.

Rejected Views of Other States

The Texas Supreme Court acknowledged that the courts of several other states have disagreed with its analysis in the context of a public official or public figure. Specifically, in *Schaefer v. Lynch*, 406 So.2d 185 (La. 1981) and *Diesen v. Hessburg*, 455 N.W.2d 446 (Minn. 1990) the supreme courts of Louisiana and Minnesota, respectively, held that public figures could not claim defamation “based on the whole of a communication when all of its individual statements are literally or substantially true.” The court also cited the state supreme court cases of *Strada v. Connecticut Newspapers, Inc.*, 477 A.2d 1005 (Conn. 1984) and *Locriechieo v. Evening News Assoc.*, 476 N.W.2d 112 (Mich. 1991) which prohibit a public figure from suing for defamation on a publication as a whole unless that publication “omits material facts.”

The Texas Supreme Court rejected these state supreme court decisions and opined that the United States Supreme Court cases of *Milkovich v.*

(Continued on page 7)

Texas Supreme Court Upholds Appellate Court Decision in Favor of TV Station

(Continued from page 6)

Lorraine Journal Co., 497 U.S. 1 (1990) and *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) are consistent with the proposition that a public figure can sue for defamation “when a publication as a whole conveys a false and defamatory meaning either by omission or juxtaposition.”

Standard of Proof and Review for Actual Malice

The majority opinion and the dissenting and concurring opinions all recognized that the appellate courts had a duty to review the record for clear and convincing evidence of actual malice. One of the primary sources of contention on the issue of actual malice was how the court should view a jury’s apparent determinations of the lack of credibility of a witness.

The majority opinion rejected Turner’s argument that the United States Supreme Court’s decision in *Harte Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) limited the Supreme Court’s previous opinion in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). The Texas Supreme Court in *Turner* found, consistent with *Bose*, that a witness’s lack of credibility could not constitute clear and convincing evidence of actual malice. Rather, “the plaintiff must offer clear and convincing affirmative proof to support a recovery.”

Troubling Dissent on Malice

In a very troubling dissent on the issue of actual malice, three justices advocated relying upon the jury’s determination on credibility issues and would have supported a finding of actual malice against the TV station for presenting a false impression that Turner “participated in a conspiracy to commit insurance fraud.” The dissent urged that the jury must have found that the testimony

of reporter Dolcefino that he believed Turner was a knowing participant in an insurance fraud, as well as the testimony of a court-appointed private investigator who opined to Dolcefino before the broadcast that Turner was a knowing participant, was not credible. If appellate courts were to go as far as the dissent apparently suggests – that a jury, in finding actual malice, must have made a determination on the lack of credibility of witnesses – they seemingly would be bound to uphold a finding of actual malice in virtually every case.

The three justice dissent on the issue of actual malice presents additional analysis that would seem to weaken the actual malice standard. The dissent states that the “record raises a strong inference that Dolcefino, through omission and juxtaposition, manipulated the facts to increase suspicion about Turner” and then equates that “strong inference” with clear and convincing proof of actual malice. In another portion of the dissent, the three justices chastise Dolcefino for creating the impression that Turner hurriedly drew up the will for Foster three days before Foster’s disappearance when, the justices concluded, Turner had been working on the will for a period of several weeks. The dissent holds that Dolcefino “should have known” this fact by reading probate records – apparently applying a “should have known” standard to an analysis of actual malice.

The Standard of Proof Required for Falsity

The Texas Supreme Court recognized the debate acknowledged in *Harte Hanks*, 491 U.S. at 661 n.2 as to whether a public figure plaintiff must prove falsity by clear and convincing evidence or by a preponderance of the evidence. The *Turner* court assumed “without deciding” that the trial court properly instructed the jury to determine falsity by a preponderance of the evidence. Thus, this issue re-

(Continued on page 8)

Texas Supreme Court Upholds Appellate Court Decision in Favor of TV Station

(Continued from page 7)

mains unsettled in Texas.

A two justice dissent from the majority's finding of falsity advocated a standard whereby a plaintiff alleging that a publication is false because of "the omission or juxtaposition of facts" should be required to prove such falsity by clear and convincing evidence. This dissent from the falsity finding recognized that all news reports involve some editorial discretion and contended that the majority opinion fashioned too "lenient" a standard, since *any* facts omitted from a broadcast might have led a reasonable viewer to form a less adverse impression of a public official.

Legacy of Turner Opinion

The two justice dissent on the issue of truth stated that the majority's authorization of a public official's ability to bring a claim for a publication "as a whole" based on "omission or juxtaposition of facts," even though the individual statements in the publication may be substantially true, "significantly threatens open and vigorous discourse about matters of public interest." Whether that proves to be the case remains to be seen. What is clear is that it is extremely difficult to reconcile the *Turner* opinion with the Texas Supreme Court's previous opinion in *Randall's*.

The answer may lie in where the court in each case chose to protect in the interests of robust speech. In the *Turner* case, a case involving a public official, the court may have been willing to shift its protection of free speech to its analysis of the actual malice element rather than to make the falsity element the ultimate battleground. Indeed, in *Turner*, the court stated that a public official's burden of proving actual malice by clear and convincing evidence adequately protects the interest of "free expression and robust debate." That would not have been the case in *Randall's*, a case brought by a private individual against a non-media defendant. Thus, the court in *Randall's* may have been more inclined to apply a more rigorous test for falsity when it did not have the actual malice standard as a backstop, and required proof of falsity of the

statements themselves rather than proof of a false impression created by speech "as a whole." Nevertheless, the complicated *Turner* opinion is unsettling for journalists and private speakers alike, and the apparent inconsistency between *Turner* and *Randall's* may be the subject of further analysis from the court in future cases.

Bob Latham is a partner in the Houston and Dallas offices of Jackson Walker L.L.P. which represented KTRK and Wayne Dolcefino in the Turner case.

LDRC *LibelLetter* Committee

Adam Liptak (Chair)

Mike Giudicessi (Vice Chair)

Robert Balin

Jim Borelli

Jay Ward Brown

Peter Canfield

Thomas Clyde

Robert Dreps

Jon Epstein

Charles Glasser, Jr.

Richard M. Goehler

Karlene Goller

Steven D. Hardin

Rex S. Heinke

Beth Johnson

Debora Kristensen

Nory Miller

William Robinson

Bruce Rosen

Madeleine Schachter

Charles D. Tobin

Paul Watler

Third Circuit Affirms Dismissal of Libel Suit By Anti-Gangsta-Rap Activist Delores Tucker and Spouse Against *Time* and *Newsweek*

Claims Against Tupac Shakur's Attorney Left Standing

The Federal Court of Appeals for the Third Circuit upheld summary judgment for libel defendants *Time* and *Newsweek* based upon the failure of plaintiffs C. Delores Tucker and her husband, Williams Tucker, to show that the stories about their litigation against now deceased rapper Tupac Shakur were published with actual malice. *Tucker v. Fischbein*, 2001 WL 19679 (3rd Cir. 1/9/01).

Defendant Disputed Consortium Claim

The litigation against Shakur, prompted by his lewd lyrics about Mrs. Tucker, included a "loss of consortium" claim by Mr. Tucker. That claim, in turn, spawned a raft of coverage on the lawsuit that focused extensively, if not exclusively, on the consortium claim and on Shakur's lawyer's commentary on the claim, such as: "[I]t is hard for me to conceive how these lyrics could destroy her sex life...but we can only wait for the proof to be revealed in court."

Time reported that Shakur's lyrics caused Tucker "so much distress that she and her husband have not been able to have sex." *Newsweek* said the lyrics "iced their sex life." The Tuckers sued *Time*, *Newsweek*, and Shakur's lawyer, Richard Fischbein.

Federal District Court Judge Ronald L. Buckwalter, in the Eastern District of Pennsylvania, granted summary judgment to all three defendants, finding that the statements each made were not capable of defamatory meaning and, alternatively, that the Tuckers (who conceded that they were public figures) had failed to prove actual malice. See, LDRC *LibelLetter*, February 1999 at 4.

Capable of Defamatory Meaning

Remarkably, the Third Circuit held that the statements were capable of a defamatory meaning under Pennsylvania law. In part, they seemed to be saying that the threshold for "defamatory" under

Pennsylvania precedent was relatively low. But the court was itself apparently willing to reach out to find what that defamatory meaning might be:

Because of the inherent implausibility of the idea that lyrics alone could cause millions of dollars of damage to a couple's sexual relationship, the statements were capable of making the Tuckers look insincere, excessively litigious, avaricious, and perhaps unstable. Furthermore, the statements tended to suggest that the Tuckers are hypocritical, that after condemning the gansta rap industry for profiting from pornography, the Tuckers were only too willing to open up their own sex life for public inspection in order to reap a pecuniary gain. 2001 WL 19679, *4

No Actual Malice

The court could not, however, find that *Time* and *Newsweek* published the statements with actual malice. A loss of consortium claim, the court recognized, may concern damage to sexual relations and there was no evidence that anyone could have determined that sexual relations were outside the scope of plaintiffs' claims at the time *Time* and *Newsweek* published their accounts.

Fischbein was tagged by the court only for the statement he made after the Tuckers filed an Amended Complaint that a majority of the panel thought made clear that the Tuckers eschewed failed sexual relations as a basis for their claims.

There is useful precedential material to be found in the court's actual malice analysis of the claims against the magazines as the panel finds that ambiguous statements by plaintiffs' counsel, reliance upon other publications' accounts (even with some changes), and the various allegations of poor journalism, did not suffice to meet the plaintiffs' burden on actual malice. The conclusion that Fischbein

(Continued on page 10)

Third Circuit Affirms Dismissal of Libel Suit By Anti-Gangsta-Rap Activist Delores Tucker

(Continued from page 9)

might be found to have acted with actual malice seems more punishment for his having clearly poked fun at the Tuckers in his remarks about their consortium claim than based on actual evidence of malice — and see the dissent’s review of all of the evidence that supports Fischbein’s defense on this point, extensive enough to back the majority into the astonishingly weak fallback position that even if the Tuckers were originally suing for loss of sexual relations, the Amended Complaint put Fischbein on notice that they had changed their minds.

Over 100 Media Sued

After bringing the suit against *Time* and *Newsweek*, the Tuckers brought two more actions in state and federal court in Pennsylvania against more than 100 media organizations that published articles on the Tuckers and their consortium claim. The federal district court action was stayed pending resolution of the appeal in this case. A motion to dismiss before the Philadelphia trial court in the state court action was denied, with the court finding that the stories could be found to contain the defamatory suggestion that the Tuckers were “overly concerned with sexual matters.” *Tucker v. MTS Inc.*, No. 99-1169 (July 17, 2000) See *LDRC LibelLetter*, August 2000 at 19.

Counsel for *Time* included Paul Gardephe of the *Time* Legal Department, New York, and Laura E. Krabill of Wolf, Block, Schorr & Solis-Cohen. Counsel for *Newsweek* included Kevin T. Baine of Williams & Connolly, Washington, DC. Counsel for Richard Rischbein included Alan Davis and Stephen Kastenbergh of Ballard, Spahr, Andrews & Ingersoll, Philadelphia, Pa. and Donald N. David of Fischbein, Badillo, Wagner & Harding, New York, NY. Counsel for the Tuckers is Richard C. Angino of Angino & Rovner, Harrisburg, Pa.

This Month’s “The System Worked, Sort Of, On This One” Award . . .

Summary Judgment Granted To Penthouse For Photo of Condom Contest Winner

On January 12, 2001, the Federal District Court for the Western District of Arkansas granted summary judgment to General Media Communications and SSL America, Inc. in a suit brought by two Arkansas teenage girls after their photo appeared in *Penthouse* magazine when one of them won a condom-application contest that both entered while on a spring-break trip to Florida. *Stanley v. General Media Communications*, Case No. 00-1003 (WD Ark. 1/12/01)

The contest was sponsored by Durex Sheik and was entered into voluntarily by the girls. Indeed, one of their moms videotaped the event. As a matter of taste, we will not detail further the elements of this elementary test of manual dexterity.

The girls sued for misappropriation, false light, libel, and intentional infliction of emotional distress (“outrage” under Arkansas law). Finding that nothing about the photograph or the caption (which identified the girls, described the contest and, in an editor’s note, asked to be invited to any future contest prelims) was false and that the girls’ reputations were in no way damaged, that, indeed, the elements of none of the above torts was met, the court granted defendants’ motions. Good to see that merely appearing without permission in *Penthouse* isn’t sufficient basis for liability.

The decision actually is consistent with two other relatively recent decisions, *Fudge v. Penthouse*, 840 F.2d 1012 (1st Cir. 1988), cert. den., 488 U.S. 821 (1998) and *Grimmsley v. Guccione*, 703 F. Supp. 903 (N.D. Ala. 1988) both based on news articles reprinted and humorously commented on in *Penthouse*’s “Hard Times” feature, also finding that the appearance of one’s picture in *Penthouse*, in a newsworthy context, is not a tortious action.

Our only question here is why Rule 11 doesn’t apply...

Utah Doctor Wins Largest Libel Verdict in State History

by Randy L. Dryer

In an apparent repudiation of deceptive and surreptitious newsgathering techniques, a Utah jury has awarded a medical doctor a total of \$3.215 million for a series of TV news stories which the jury found defamed the doctor and cast him in a false light. It is the largest libel verdict in Utah history. Ironically, the three stories, which focused on the doctor's willingness to prescribe the diet drug combination Fen-Phen to the news reporter, won several awards for investigative reporting — including one from RTNDA and one from a national medical organization.

The Facts

KTVX Channel 4, an ABC affiliate, decided to do a story on Dr. Michael Jensen, a physician and former football player for a local university, after a former assistant news director told the station he witnessed the doctor prescribing Fen-Phen at a Fourth of July party to the party host. The station assigned news reporter Mary Sawyers, who regularly reports on health issues, to do the story.

Sawyers called the doctor's office and spoke with a receptionist. She identified herself as a reporter for Channel 4 who wanted to lose weight quickly because of her job and requested Dr. Jensen prescribe her diet pills over the telephone because she didn't have the time in her busy schedule to come in for an appointment. The receptionist said Dr. Jensen would not prescribe diet pills over the phone and she would need to make an appointment. Sawyers persisted, saying it was a "dog-eat-dog" world and "she could easily be replaced if she didn't lose weight quickly". The receptionist reiterated Dr. Jensen would not prescribe over the telephone and Sawyers subsequently scheduled an appointment to meet with Dr. Jensen.

The reporter secretly recorded the telephone conversation with the receptionist. Utah is a one-party consent state. Sawyers discussed the matter with her news director, who made the decision to

use a hidden camera. The news director testified he did so to protect both the reporter and the doctor and prevent a "he said, she said" situation. He testified he did not consult any ethical codes regarding the use of hidden cameras, nor did the station have any policies on the subject.

Hidden Camera of the Examination

Sawyers went to the clinic armed with a hidden camera in a day planner. In the examination room, Dr. Jensen discussed diet pills with Sawyers who falsely told the doctor that she had been on a diet, but was unable to lose weight and she was fearful of losing her job if she didn't. The following exchange is recorded on videotape:

Dr. Jensen: If Fastin [one of the Fen-Phen ingredients] didn't work for you [for weight loss], I would be willing to work with you *maybe* using Dexedrine. It is technically not legal for that reason (emphasis added).

Sawyers: For weight loss?

Jensen: Right. Dexedrine is used for attention deficit disorder. In other words, maintaining concentration. I took Ritalin for my boards. You can concentrate . . . (background voices on tape) . . . The other one is narcolepsy. People fall asleep at the wheel. So those are the legal reasons to use those medicines. I don't . . . (background noise) . . . I have quite a few adults with attention deficit disorder on Dexedrine and I haven't run into a problem once with drug addiction.

Sawyers: So, what, do you just put down attention deficit disorder?

Jensen: I usually, usually put narcolepsy in an adult. We all deal with fatigue and tiredness, and you can just say I am tired.

Sawyers subsequently met with a Utah state licensing official who viewed the videotape of the office visit and in an on-camera interview said Jensen's conduct

(Continued on page 12)

UT Doctor Wins Largest Libel Verdict in State History

(Continued from page 11)

was improper and that he was very concerned about it.

Thereafter, Sawyers did a lengthy, on the record videotape interview with Dr. Jensen where he recanted his earlier statement about “maybe” prescribing Dexedrine and said that subsequent research on his part revealed that he could not and would not prescribe Dexedrine to her for weight loss.

The September 5, 1995 Broadcast

About a week after the on-camera interview of Dr. Jensen, KTVX aired a story regarding how easy it is to get diet pills. The anchor lead-in to the story was

Are doctors prescribing these pills too freely, promising miracle weight loss, perhaps risking their patients’ health? News 4 Utah’s investigative reporter, Mary Sawyers, has been taking a look at the so-called miracle pills and the doctor [Jensen] who is prescribing them.

In Sawyers’ story she stated that Dr. Jensen failed to follow the law and Utah medical guidelines when he prescribed Fen-Phen to her without weighing her or giving her a physical, aired the videotape of the state licensing official expressing his concern about Dr. Jensen’s conduct and broadcast the statement by Dr. Jensen that he would “maybe” consider prescribing Dexedrine if the Fen-Phen didn’t work, despite the fact that Jensen had recanted his statement.

After the first story aired, Jensen was fired from the Orem clinic where he was employed and was denied privileges with Intermountain Health Care, the state’s largest health care provider.

The June 17, 1996 Broadcast

Nine months later the station ran a follow-up story after state licensing officials filed a disciplinary action against Dr. Jensen. The station claimed

credit for causing the state complaint to be filed. The state’s complaint accused Jensen of “unprofessional conduct,” based primarily on his statements made to Sawyers at her secretly recorded office visit, including his statement about “maybe” prescribing Dexedrine. The anchor lead-in to the story stated:

The state is going after the license of a Utah County Doctor.

Based on a News 4 Utah Investigation, the state charges that Dr. Michael H. Jensen violated the professional code of conduct.

News 4 Utah’s medical reporter Mary Sawyers follows up:

In the story, Sawyers’ says that last July Jensen prescribed her drugs “without following state law,” and that the state now says Jensen “also broke the law a second time: when he said he would maybe prescribe her Dexadrine.” The story rebroadcast Jensen’s recanted statement. The story concluded by Sawyers stating, “if found guilty, Jensen’s license could be revoked or suspended.” The doctor subsequently agreed to a public reprimand and admitted that he “failed to comply with some of the requirements of the Utah Controlled Substance Rules.” He agreed to attend education classes, but his license was never revoked or suspended.

The November 6, 1996 Broadcast

A third news story aired several months later and reported on the release of a national publication by a consumer watchdog group on “questionable doctors” who had been disciplined by the State of Utah and others. The anchor lead in to the story stated:

What would you do if you found out your doctor was passing out drugs to addicts . . . or worse yet, sexually abusing his patients?

Well, he may be, but you might never find out about it.

(Continued on page 13)

UT Doctor Wins Largest Libel Verdict in State History

(Continued from page 12)

News 4 Utah Medical Reporter Mary Sawyers joins us to tell us why.

Mary, isn't this information available to the public?

Sawyers: It is, but most people don't know how to find it. Tonight, I'll tell you how . . . and introduce you to some of these so called questionable doctors.

The story included a segment on Dr. Jensen who Sawyers referred to as "the one we caught on tape promising me illegal drugs." Sawyers lumped Jensen together with three other Utah physicians who were portrayed as "questionable doctors" one accused of homicide, one of sexual misconduct and one of disfiguring patients.

Plaintiff's Claims

Plaintiff alleged nine claims for relief, including libel, false light invasion of privacy, intrusion, intentional interference with prospective economic relations, fraud, negligent misrepresentation, violation of 18 USC § 2511 (Federal wire interception) and violation of UCA § 76-9-402 and 403 (Utah's Criminal Privacy Act), which, among its provisions, makes a misdemeanor the installation in "any private place [a defined term], without the consent of the person...entitled to privacy there, any device for observing, photographing, recording, amplifying, or broadcasting sounds or events in the place..."

Pretrial Rulings

On a Rule 12 motion, the Court dismissed the libel claims based on the September 5, 1995 and June 17, 1996 broadcasts as being barred under Utah's one-year statute of limitations and dismissed the fraud and negligent misrepresentation claims as legally insufficient. The Court refused to apply the one-year limitations period for libel to the false light claim. At the conclusion of discovery, the court denied defendant's motion for summary judgment,

rejecting arguments that the broadcasts were substantially true, were protected reports on matters of public concern and that the surreptitious newsgathering techniques were not an intrusion and were not highly offensive to a reasonable person.

The Experts

In addition to the usual array of damage experts, plaintiff offered expert testimony on the issues of false light, the applicable journalistic standard of care and whether the broadcasts were about an issue of public concern.

Two local university journalism professors opined that the reporter and station engaged in numerous ethical violations in both their newsgathering and editing techniques and that the defendants not only fell below the accepted standard of care of responsible journalism, but that their deceit, selected editing, and sensationalized anchor lead-ins suggested the station was trying to harm Dr. Jensen in order to boost their ratings. (The defendants also used experts, two journalism academics.)

The Verdict

After a five week trial, six causes of action were submitted to the jury on a special verdict.

In closing arguments, plaintiff's counsel emphasized that Dr. Jensen was a private, not public figure. He portrayed Jensen as a family doctor genuinely trying to help a patient who desperately wanted to lose weight and who falsely said she was afraid of losing her job. The reporter was portrayed as someone who "set up" and entrapped Dr. Jensen through deception and lies. Plaintiff's counsel acknowledged that Dr. Jensen was lax in his prescription practices, for which he was punished by the state. But, he did not deserve to be inaccurately and unfairly portrayed as a "questionable doctor", a doctor who prescribes "illegal drugs" and a doctor of the same ilk as doctors who sexually abuse, disfigure or cause the death of their patients.

(Continued on page 14)

UT Doctor Wins Largest Libel Verdict in State History

(Continued from page 13)

The jury found that Sawyers and KTVX placed Dr. Jensen in a false light in both the September 5, 1995 and June 17, 1996 broadcasts and awarded \$600,000 for pecuniary loss and \$100,000 as general damages. The jury allocated fault as follows: 15% to Dr. Jensen, 25% to Sawyers and 60% to KTVX. The jury also assessed \$300 punitive damages against Mary Sawyers and \$245,000 against KTVX for the two broadcasts.

On the November 6, 1996 broadcast, the jury found the story both defamed Jensen and case him in a false light. Oddly, the court combined the issue of defamation and false light in the same special interrogatory. The jury awarded \$1,000,000 as pecuniary loss and \$500,000 as general damages and attributed 25% fault to Sawyers and 75% fault to KTVX. Punitive damages were assessed in the sum of \$600 against Sawyers and \$450,000 against KTVX.

The jury found both KTVX and Sawyers were liable for common law intrusion and awarded \$50,000 general damages. Punitive damages on this claim were assessed in the sum of \$40,000 against KTVX and no award was made against Sawyers.

The jury also found that Sawyers and KTVX violated Utah's privacy statute and awarded \$100,000 in general damages and assessed \$80,000 in punitive damages against KTVX.

The intentional interference claim resulted in a \$25,000 general damages award against both Sawyers and KTVX and a \$25,000 punitive damages award against KTVX.

The only favorable verdict for the defendants was when the jury concluded that neither Sawyers nor KTVX were guilty of violating 18 USC § 2511, which prohibits the interception and disclosure of wire, oral or electronic communications.

Future Lessons?

Although it is always risky to draw long-term lessons from a single case, and particularly from a

case as fact specific as this one, it seems the following conclusions can be gleaned from this jury's verdict:

1. A doctor's examination room is considered a private area (even when it is the doctor and not the patient who is suing).
2. Jurors are as concerned about what is omitted from a broadcast as they are about what is actually broadcast.
3. Although ethical codes such as those adopted by SPJ or RTNDA may not have the force of law and, indeed, are not universally embraced by all journalists, they nevertheless may end up serving as the standard of care, especially where a news organization has adopted no internal policies or guidelines on reporting.
4. Gathering the news surreptitiously or through deception is a dangerous practice where the subject of the story is viewed as a sympathetic private individual and/or the story is not viewed as one of great public concern (the stories were broadcast before the dangers of Fen-Phen were widely known).
5. The winning of awards by journalism organizations is not the final word on what is appropriate journalism.
6. Fundamental fairness is the overarching standard in the juror's eye.

Post trial motions are pending and KTVX is expected to appeal if no post verdict relief is granted.

Randy L. Dryer is the author of the Utah Chapter of LDRC's 50-State Survey of Libel Law and is a shareholder of the Salt Lake City law firm of Parsons Behle & Latimer, an LDRC Defense Section member. Mr. Dryer was not involved in the KTVX litigation.

Second Circuit Applies Gross Irresponsibility Test to Nonmedia Investigative Report

The Second Circuit, in an opinion by Judge Sack, affirmed summary judgment in favor of a non-media defamation defendant based on its publication of an investigative report distributed to shareholders and the media. *Konikoff v. Prudential Insurance Co. of America*, No. 99-9185, 2000 U.S. App. Lexis 31307 (2d Cir. Dec. 7, 2000). The court affirmed based on New York's gross irresponsibility standard promulgated in *Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569, 379 N.Y.S. 2d 61 (1975), a fault standard higher than negligence which applies to private figure cases involving matters of public concern.

Investigation of Charges Commissioned

At issue in *Konikoff* was what the Second Circuit observed is the now common practice of businesses to commission from lawyers or other experts an investigative report to respond to charges of wrongdoing and then disseminate the report to shareholders, employees and the general public. *Konikoff* at *30. Here defendant Prudential engaged the law firm Sonnenschein, Nath & Rosenthal to investigate charges that two real-estate investment funds Prudential managed had been wrongly overvalued by inflated appraisals. Sonnenschein's report concluded that Prudential did not engage in any scheme to overstate property values, but the report noted a possible exception of one property, valued by plaintiff, an independent real estate appraiser, where circumstantial evidence indicated overvaluation. The report was disseminated to investors and the media. The gist of the report was repeated later at an investors meeting where it was also noted that plaintiff "no longer performs appraisals" for the funds as a result of the report.

The district court held that the statements were susceptible of defamatory meaning, noting for "an appraiser of real estate, whose reputation and livelihood depend on independent judgment and expertise, a suggestion that a specific valuation was the product of external pressure rather than reasoned deliberation disparages her professional reputation." *Id.* at *9. The district court later granted summary judgment on the grounds that the statements were protected by New York's common law self-interest and common-interest privileges. *Id.* at *14.

Declined to Decide on Common Law Privileges

In an interesting analysis of these privileges, Judge Sack noted that whether these privileges applied was a close question that New York courts had not yet resolved. In particular, Judge Sack noted that the common-interest and self-interest privileges have traditionally been tightly confined to cases where the statements were published to an extremely limited group of private persons with an immediate relationship to the speaker. Broader application of the privilege to the present case "could have significant ramifications" and cover all defensive statements made to or even by the media "since members of the media share with their audience a common interest in the events of the day." *Id.* at *22.

Judge Sack emphasized that "we do not hold that the common law privileges are unavailable. "Were we forced to reach the issue, we might be inclined to certify [the question] to the New York Court of Appeals" but the court declined to do so when it could affirm on the firmer grounds of lack of gross irresponsibility under the *Chapadeau* standard. *Id.* at *23.

Contrasting Chapadeau with Actual Malice

In analyzing the *Chapadeau* standard, the court noted that it applied to non-media private figure cases so long as the statements at issue are arguably within the sphere of legitimate public concern. Here "there is no doubt that a public controversy about allegedly improper valuations of substantial investments made by a publicly held company fits the description." *Id.* at *29. As for applying the standard to the facts, the court found no evidence that defendant was grossly irresponsible in the preparation or dissemination of the report. In fact, dissemination to the public "was plainly reasonable" to answer the charges of inflated valuation of the real estate investment funds.

Judge Sack's opinion also offers an interesting and in-depth analysis of the differences between actual malice and *Chapadeau's* gross irresponsibility standard and how *Chapadeau* may in some circumstances be more protective of defendants, indeed approaching a neutral reportage privilege. According to Sack, gross irresponsibility is not sim-

(Continued on page 16)

Maryland Libel Suit Settled After Award Reduction

Local attorney and political candidate John Greiber agreed in mid-December to accept an undisclosed sum to settle his libel lawsuit against the *Annapolis* (Md.) *Capital*, which was scheduled for a retrial in the new year. *Greiber v. Capital Gazette Communications*, No. C 98-50742 (Md. Cir. Ct. Anne Arundel County). The settlement came after an April 2000 trial in which the jury

awarded the plaintiff \$2.5 million (see *LibelLetter*, May 2000, at 5), which the judge later reduced to \$562,000.

The suit stemmed from a 1997 editorial which focused on attacks by then-Anne Arundel County Executive John Gary (R) against County State's Attorney Frank Weatherbee (D). The editorial alleged that Gary was motivated by Weatherbee's defeat in 1994 of John Greiber, who ran on the same Republican line as Gary. The editorial described Greiber as "an unqualified ally to whom Gary continues to feed county legal business."

Greiber filed suit in 1998, alleging that the use of the word "unqualified" had impugned his abilities as an attorney and negatively affected his law practice; the newspaper argued that the word referred to his ability to hold office, or to handle the county's legal business.

After the court ruled that Greiber was a public figure, the jury awarded Greiber \$2.5 million in compensatory damages: \$1.2 million for lost income and \$1.3 million of damage to his reputation. At the same time, however, the jurors answered "No" to a question of whether the newspaper had actual knowledge that the statements in the editorial were false.

This inconsistency formed the basis of defense motions for judgment notwithstanding the verdict, for remittitur, and for a new trial. The court denied the j.n.o.v. motion, but granted the new trial motion unless the plaintiff accepted a remittitur to \$562,000, consisting of \$270,000 in lost earnings and \$292,000 in reputational damages. In his ruling, the judge said that the jury's award was "extreme and excessive."

Greiber reportedly stormed out of the courtroom as the judge announced his decision; later he rejected the remittitur and a new trial was scheduled. But on Dec. 15 the parties agreed to settle the case for an undisclosed amount.

The newspaper was represented by Ray Mul-lady Jr. of Piper Marbury Rudnick & Wolfe in Washington, D.C.

Second Circuit Applies Gross Irresponsibility Test

(Continued from page 15)

ply a less onerous version of actual malice, from the plaintiff's perspective. Although ordinarily a statement made with actual malice would also be grossly irresponsible, Sack concludes this is not always necessarily the case.

If, for example, a television station were to rebroadcast a public official's news conference despite the broadcaster's knowledge that one of the speaker's statements, a defamatory one, was likely false, the rebroadcast would arguably have been made "with subjective awareness of probable falsity" of the defamatory remarks — "actual malice" — yet in accordance with standards of responsible journalism under *Chapadeau*. *Id.* at *36 - 37

In a footnote, Sack observes that *Chapadeau* therefore implies a form of neutral reportage protection. *Id.* at *37 n11. As to the seeming anomaly of a statement about a private figure not being actionable under *Chapadeau*, but an identical statement about a public figure being actionable under *Gertz*, Sack notes, "if presented with a case that is similar to the case at bar but is brought by a public official or public figure rather than a private person like Konikoff, New York courts may conclude that the plaintiff must establish gross irresponsibility under *Chapadeau* in addition to "actual malice" under *Sullivan* in order to recover." *Id.* at *38.

Defendant was represented by Jonathan Lerner of Skadden, Arps, Slate, Meagher & Flom; plaintiff, by Charles Schmerler of Golenbock, Eiseman, Assor & Bell.

California Court Revives the Discovery Rule in Defamation Cases Involving Mass Media Publications

By Stephen G. Contopoulos and Bradley H. Ellis

In a break with what was thought to be established California law, an appellate court in Los Angeles has held that the “rule of discovery” applies to toll the statute of limitations when a non-media defendant’s allegedly libelous statements are published in the mass media. The Court stated that it could find “no reason that the discovery rule should not be applied to toll the running of the statute of limitations on causes of action for defamation, even when the defamatory remarks have been republished in the mass media.” In ominous dicta, the Court stated that, although there was no mass media defendant before it, it was not persuaded “that the discovery rule should not apply to mass media defendants.”

[T]he case has an immediate impact on mass media defendants because, even if the statute of limitations as to them has run vis-à-vis the plaintiff, they can be brought into a lawsuit by the non-media defendant on cross-complaints for indemnity.

An O.J. Non-Witness Sues

The case, *Shively v. Bosco*, 2000 Daily Journal D. A.R. 13075 (Dec. 12, 2000), arose out of Joseph Bosco’s book, *A Problem of Evidence* published by William Morrow & Company, in which Bosco analyzes the O.J. Simpson criminal trial. The plaintiff, Jill Shively, received substantial notoriety when she claimed to have seen Simpson in his infamous Bronco driving away from the murder scene. Ostensibly because she had sold her story to *Hard Copy*, she was never called to testify before the Grand Jury considering whether to indict Simpson. In the book, Bosco relates comments by Peter Bozanich, a Deputy District Attorney in Los Angeles, in which Bozanich offers a different version of why Shively was not called to testify. According to Bozanich, his wife, also a Deputy District Attorney, received a call from Brian Patrick Clarke, Shively’s former boyfriend, in which Clarke allegedly defamed Shively. Bozanich then tells the O.J. prosecution team that they had better

“check out” Shively. They do, and as a result, according to Bozanich, they do not call her as a witness.

Based on these facts, Shively sued Clarke, Bozanich, the County of Los Angeles, the publisher and the author. The author was never served. The publisher filed a special motion to strike pursuant to California’s anti-SLAPP statute, Code of Civil Procedure § 425.16, or in the alternative, motion for summary judgment, based upon evidence that the book was on sale to the public more than one year before plaintiff filed her complaint. Before the hearing on the motion, plaintiff dismissed William Morrow from the case.

Clarke demurred to the complaint, also on the grounds that the statute of limitations had expired. In opposition, plaintiff argued that the rule of discovery had tolled the statute

of limitations until she discovered Clarke’s slander. The trial court declined to apply the rule of discovery and sustained the demurrer. The County and Bozanich moved for summary judgment on the same ground, which the trial court granted.

Appeals Court Reinstates Claim

The Court of Appeal reversed both orders, concluding that the discovery rule operated to toll the statute of limitations in cases against non-mass media defendants whose allegedly defamatory remarks are republished by a mass media defendant. According to the Court, whether plaintiff knew or should have known of the defamation is properly a question for the trier of fact.

When analyzing the issue, the court dismissed an earlier appellate court decision *McGuinness v. Motor Trend Magazine*, 129 Cal.App.3d 59, 61-62 (1982), as having been decided without “analysis.” The Court noted, but did not address, the several cases upon which the *McGuinness* court cited in support of its conclusion that the discovery rule did not apply. See, e.g., *Belli v.*

(Continued on page 18)

Ca. Ct. Revives Discovery Rule in Defamation Cases

(Continued from page 17)

Roberts Brothers Furs, 240 Cal.App.2d 284 (1966); and *Khaury v. Playboy Publications, Inc.*, 430 F.Supp. 1342 (S.D.N.Y. 1977). Nor did the Court address *Fleury v. Harper & Row, Publishers, Inc.*, 698 F.2d 1022, 1028 (9th Cir. 1983), in which the Ninth Circuit stated that “[i]t is [] the California rule that the statute of limitations will run on a libel action even if plaintiff does not realize that he has been defamed.”

It has always been the rule in California that the statute of limitations on a “private” defamation - for example, the libel hidden away in an employer’s personnel file - was tolled until the plaintiff knew or should have known of the defamation. *Shively* expands that rule to any defamation uttered by a non-mass media defendant, including when the defamation is republished in the mass media.

Shively does not change California law, however, with respect to whether the discovery rule tolls the statute of limitations against mass media defendants. For the moment, at least, California remains with the clear majority of jurisdictions which, in cases involving media defendants, have rejected the discovery rule. (Based solely upon review of LDRC’S 50-STATE SURVEY: MEDIA LIBEL LAW, of the states that have addressed the issue, twenty-six have rejected the discovery rule, and only five have applied it.) Nevertheless, the case has an immediate impact on mass media defendants because, even if the statute of limitations as to them has run vis-à-vis the plaintiff, they can be brought into a lawsuit by the non-media defendant on cross-complaints for indemnity.

Thus, cases against the media that were once quickly disposed of on statute of limitations grounds, may now live on through substantial discovery and perhaps trial. In addition, articles or books that, in California, were essentially claim free after one year from publication, could now be subject to suit for years. In *Shively*, for example, Clarke is alleged to have made his allegedly slanderous phone call in June 1994, yet the book, distributed, and, therefore, published in October 1996, could remain subject to suit for an indeterminate amount of time depending on when a plaintiff claims he or she could have reasonably learned of the defamation.

Finally, the Court’s observation that “applying the discovery rule . . . should be no more difficult than applying it in the other situations in which it arises [because] [t]he trier of fact will simply consider the evidence as to the delayed discovery, and decide whether plaintiff’s reasons therefore are believable” is of little solace to a mass media defendant facing a jury.

Messrs. Contopulos and Ellis, who are partners with Sidley & Austin in Los Angeles, represented William Morrow & Company in the case. They were not involved in the appeal.

SUBSCRIBE TO THE 2001



Did you miss the 2000:2 edition of the LDRC 2000 BULLETIN — **FAIR USE IN THE MEDIA: A DELICATE BALANCE** — a collection of articles taking a practical look at the Fair Use Doctrine in copyright law, investigating what can be used, what cannot, and why.

Now Available:

LDRC 2000 REPORT ON SIGNIFICANT DEVELOPMENTS

Or the other issues in 2000:

LDRC 2000 REPORT ON TRIALS AND DAMAGES

MEDIA TRIALS AT THE CLOSE OF THE CENTURY:
CHALLENGE AND CHANGE

LDRC 2000 REPORT ON APPELLATE RESULTS
*Including a Report on Petitions for Certiorari to
the U.S. Supreme Court in the 1999 term.*

Subscription fee for 2001 is \$100 if received by January 30, 2001 and \$110 thereafter. Subscriptions are included with membership of \$1,000 or more.

To order please send your check, payable to the Libel Defense Resource Center, Inc., to:

404 Park Avenue South, 16th Floor
New York, NY 10016
Phone (212)889-2306 Fax (212)689.3315

Secret Settlements Under Fire

By Karl Olson

The common practice of confidential settlements is under fire in California and across the country.

Two California lawmakers, in the wake of revelations that Bridgestone/Firestone hid information about defective tires through confidential settlements of prior lawsuits, have introduced legislation that would sharply restrict such secret settlements. The legislation, introduced in December 2000 by Democratic Senator Martha Escutia and Assembly-

man Darrell Steinberg, is similar to laws in many other states.

Other States Have Similar Rules

For example, Florida's Sunshine in Litigation Act provides that any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concealing a public hazard, or any information which may be useful to members of the public in protecting themselves from injury is void, contrary to public policy, and cannot be enforced. Fla. Stat. Ann. Section 69.081(4) (West 1997).

Louisiana passed a stringent law stating that a court cannot seal records "if the information or material sought to be protected relates to a public hazard or relates to information which may be useful to members of the public in protecting themselves from injury that might result from such public hazard." La. Code Civ. Proc. Ann. Art. 1426 (West 1998).

Other states with similar legislation include Delaware, Georgia, Indiana, New York, North Carolina, Oregon and Virginia. *See* Del. Sup. Ct. Civ. R. 5(g); Ga. Unif. Super. Ct. R. 21; Ind. Code Ann. Section 5-14-3-5.5 (Michie 1997); N.Y. Comp. Code R. & Regs. Tit. 22, section 216.1 (1998); N.C. Gen. Stat. Section 132-1.3 (1972); Ore. Rev. Stat. Section 30.402 (1996); Va. Code Ann. Section 8.01-420.01 (Michie 1997).

Texas likewise has a rule, Rule 76a of the Texas Rules of Civil Procedure, setting out a common law right to access judicial records. The rule states that court records "are presumed to be open to the general public and may be sealed" only after certain criteria are met. Included in the definition of court records are settlement agreements and discovery not filed on record which seek to restrict disclosure of information "concerning matters that have a probable adverse effect upon the general public health or safety." *See* Doggett and Mucchetti, *Public Access*

UPDATE

Damaging Decision is Withdrawn by Ninth Circuit

As a result of a settlement between the parties, the Ninth Circuit issued an order dated January 12, 2001, withdrawing its December 1999 opinion in this matter and dismissing the case. *Alpha Therapeutic Corporation v. Nippon Hoso Kyokai*, 199 F.3d 1078 (9th Cir. 1999). The withdrawn decision reversed the district court's dismissal of a privacy claim brought by an individual who voluntarily gave an interview to a clearly identified television news reporter who did not tell the subject that he was taping the interview. *See*, *LDRC LibelLetter*, January 2000, at 1.

The Ninth Circuit panel was relying upon the then-recent decision by the California Supreme Court in *Sanders v. American Broadcasting Companies*, 20 Cal.4th 907 (1999) in its finding that the taping alone — even when the subject had no reasonable expectation that what he said was not going to be reported on television — could, if found to be highly offensive and to otherwise meet the elements of intrusion, constitute an invasion of privacy. The decision, at best, was an illogical and ill-thought through extrapolation of the California Supreme Court decisions in the area.

(Continued on page 20)

Secret Settlements Under Fire

(Continued from page 19)

to *Public Courts: Discouraging Secrecy in the Public Interest*, 69 Tex. L. Rev. 643, 646-84 (1991).

California's Proposal

California Attorney General Bill Lockyer has been pushing to end the practice of secret settlements since 1992, when he was a state senator. An earlier California bill was vetoed by former Governor Pete Wilson, and another bill on the subject was tabled last year at

Governor Gray Davis' request. Although the Golden State doesn't have specific legislation on the subject now, the California Judicial

Council, effective January 1, 2001, codified the common law right of access to court records in Rule 243.1 of the California Rules of Court. But the new rule doesn't address secret settlements, leaving that issue for another day. It likewise doesn't address discovery motions and records filed or lodged in connection with discovery motions, although discovery materials used at trial or submitted as a basis for adjudicating non-discovery motions are covered by the rule.

Rule 243.1 sets forth a stringent standard for sealing records, based on the California Supreme Court's decision in *NBC Subsidiary v. Superior Court* 20 Cal. 4th 1178 (1999). The NBC case in turn rested its holding on the series of U.S. Supreme Court cases finding a right of public access to court proceedings and records.

The battle over confidential settlements is not new, but the move against such secret settlements gained momentum last year after the revelations about the Bridgestone/Firestone accidents involving tread separation on tires. The National Highway Traffic Safety Administration is investigating Bridgestone/Firestone, and the tire company recalled 6.5 million of its ATX, ATX II, and Wilder-

ness AT ties, which reportedly have been involved in accidents that have killed at least 119 people and injured more than 500. Most of the accidents involved the Ford Explorer. As is common with product liability lawsuits, prior settlements had been confidential and consumers were therefore blocked from learning about them.

The proposed California legislation, SB 11 and AB 36, specifically refers to the Bridgestone/Firestone debacle. It also cites the secrecy regard-

ing claims of victims of the Northridge earthquake and the contaminated drinking water involved in the story of Erin Brockovich, a real-

life California litigation story which turned into a hit movie.

[T]he move against such secret settlements gained momentum last year after the revelations about the Bridgestone/Firestone accidents involving tread separation on tires.

What is Covered

Cases based on injury, wrongful death or financial loss caused by defective products, financial frauds, unfair insurance claims practices, or environmental hazards would be subject to the proposed law. Information about the product, practice or hazard would be presumed public and could not be kept confidential merely by agreement.

Significantly, the bill would apply to both confidential settlements and "information acquired through discovery concerning the defective product, financial fraud, unfair insurance claims practice, or environmental hazard." The only way to keep information confidential would be to obtain a court order based on either

- (1) a finding of trade secret or privilege, or
- (2) meeting the traditional balancing test required to seal court records.

That balancing test, the result of Supreme Court cases such as *Press Enterprise v. Superior Court*,

(Continued on page 21)

Secret Settlements Under Fire

(Continued from page 20)

478 U.S. 1, and adopted by the California Supreme Court in 1999, requires an overriding interest overcoming the right of public access, a substantial probability that the overriding interest will be compromised if the information isn't kept confidential, a narrowly-tailored confidentiality order, and no less restrictive means to achieve the overriding interest. It's the same balancing test set forth in the new Rule 243.1 governing the sealing of court records.

The legislation is supported by the Consumer Attorneys of California, press groups and Democratic Attorney General Lockyer, but it has powerful and well-heeled opponents: manufacturers, Silicon Valley high-tech companies and venture capitalists, and the insurance industry. California's Democratic Governor, Gray Davis, was supported by trial lawyers (the CAOC), but he's also raked in contributions from the business groups. Davis has been reluctant to sign legislation opposed by business interests, as these bills are. He asked the author of a similar bill to table it last year, but the new bill is thought to have a good chance of reaching the governor's desk in some form.

Opening Civil Litigation is Needed

The new bills are a welcome attempt to give the public access to where much of the action is in civil litigation. While *Press Enterprise* and other cases have now firmly established the public's right of access to court proceedings and documents filed with the court, much of the action takes place behind the scenes. A great deal of discovery is turned over only after a party (particularly corporate defendants involved in product-liability litigation or the like) has insisted on a protective order. The party seeking discovery is normally more interested in getting documents needed for a particular client in a particular lawsuit than in protecting the abstract right of the public to know. Fortunately, many judges are now giving serious scrutiny to protective orders even when they've been agreed to by the parties. The bills would require that strict scrutiny.

Likewise, a corporate defendant in a product liability lawsuit will often have a powerful incentive to insist on settlement confidentiality to keep secret the amount of money paid and evidence of possible defects in a product. Plaintiffs in such lawsuits, while wanting in the abstract to reveal defects, often have a difficult time turning down a good settlement if the only thing that stands in the way of obtaining one is agreement on a confidentiality clause. It's one thing to want the public to know about corporate misdeeds or a history of product defects: it may be another thing altogether, however, for a seriously injured plaintiff to turn down compensation for that injury simply because a defendant wants confidentiality.

The proposed California legislation, and the laws already on the books in many other states, are welcome measures which require the public's voice to be heard before settlements are sealed and discovery documents deep-sixed. The courts are paid for by the public and conduct the public's business. They should not be used to further private gain at the expense of public knowledge. Legislation such as this will go a long way to ensuring that the public's voice is heard even when private parties have incentives to conduct court business under a veil of secrecy.

Karl Olson is a partner in Levy, Ram & Olson, LLP, California.

**Would you like to receive your
LibelLetter via e-mail?**

***This service is now available to
all LDRC members***

If interested, please contact:

Kelly Chew

kchew@ldrc.com

fax: 212-689-3315

Human Rights Watch

Editor's Note: We do not usually run classifieds or "Want Ads," but we thought these posts presented interesting and valuable prospects for public service.

Human Rights Watch is one of the largest international rights monitoring non-profits, based in New York with offices in Washington D.C., Los Angeles, Brussels, London, Moscow and other locations around the world.

We work to stop human rights abuses wherever we uncover them, through our accurate and detailed public reports and international advocacy, in areas as diverse as free speech, children's rights, discrimination, arms trade, corporate responsibility, the laws of war, torture, voting rights, and even economic, social and cultural rights. We have a staff of over 100 experienced researchers and advocates, and publish hundreds of reports, as books, newsletters, and electronic bulletins.

We are seeking volunteer attorneys to assist us in corporate legal matters in the following capacities:

Volunteer Legal Coordinator:

We are hoping to find someone who can give us a commitment of one year or more, in a job that we expect requires a day every week or two weeks, depending on seasonal needs. This individual will be responsible, in consultation with the human rights law experts in our Legal Department, for coordinating legal work that pertains to our corporate needs. The Volunteer Legal Coordinator will send out and follow up on major legal projects we have sent to attorneys in our pro bono network, with the option of handling independently legal projects on his or her own.

Typical projects that require coordination are: major libel review projects; libel training for our staff; trademark and tradename protection, etc...Smaller projects might include review of licensing or republishing agreements; drafting work-for-hire or co-publishing agreements; or providing waivers and releases to our researchers in the field. Ideally, the Volunteer Legal

Coordinator would have some media law background, and sufficient experience to serve as our corporate legal strategist, foreseeing where the organization needs legal work or new policies — for example, creating a photography publication policy, conducting a liability insurance review, etc. — and recruiting volunteers to handle such work.

Pro Bono Network Volunteers:

Volunteers in our pro bono network take on a wide variety of projects that relate to our "business" of publishing highly sensitive reports on serious human rights abuses. Projects vary widely in complexity and area. Volunteer attorneys help train our staff in libel standards, take on protection of our trademark and tradename, and advise on various aspects of our publishing work. Among our immediate needs for legal advice are:

- general insurance review for the organization, including accident, media, corporate;
- libel review of major reports scheduled for publication in 2001;
- periodic advice on use of photography;
- legal review for new web site to launch in 2001 (privacy policy; copyright; etc.);
- help creating standard releases, work-for-hire contracts, etc.;
- legal review of licensing and co-publishing agreements.

If you are interested in volunteering for any or all of these positions, please contact:

Mr. Andrew Ayers at (212) 216-1817 (ayersa@hrw.org) or

Ms. Dinah PoKempner at (212) 216-1210 (pokempd@hrw.org).

Injunction on Sneaky Photos of Douglas Wedding Lifted

But Right Of Privacy Is Here To Stay

By Mark Stephens

Imagine if you will New York's Plaza Hotel, setting for so many movies. Downstairs, last year's iconic celebrity wedding for the it-crowd. Upstairs a room rented by *Hello* magazine, packed with electronics for gathering, processing and disseminating the sneak photos of the bash below. Plaza security retained by *OK!* magazine — *Hello's* rival in the celebrity news business and holder of an exclusive on the wedding — burst in, thus setting in train legal proceedings between the two U.K. celebrity pull sheets, *OK!* and *Hello*.

Douglas v. Hello! Ltd.
(C.A. 21 Dec. 2000).

Injunction Lifted

On 23 November 2000, after a two-day hearing, the Court of Appeal in London discharged the injunction earlier granted, restraining *Hello* from publishing photographs of Michael Douglas and Catherine Zeta-Jones at their wedding in New York. This injunction had prevented copies of *Hello* magazine going on sale since they contained unauthorised photographs from a wedding to which its rival *OK!* had bought exclusive rights. Mr. Douglas, Ms. Zeta-Jones and *OK!* had advanced claims in breach of confidence, malicious falsehood, interference with contractual relations and, most interestingly, infringement of privacy.

Although the injunction was ultimately discharged in November, the reasons were reserved until December 21st. Lord Justice Brooke and Lord Justice Sedley agreed with "hesitation" and "misgiving," that the couple's rights in confidence and privacy should not be protected by an injunction at this stage, but could be compensated for by damages. They concluded it was a "close" question, but ultimately tipped by the fact that the injunction would have killed the entire week's issue of *Hello*.

UK Ripe for Privacy

The decision went on to review the law of privacy from the essays of Warren & Brandeis and noted the absence of such laws from English Jurisprudence. The Court concluded that the time is now ripe for England to have privacy laws, with Lord Justice Sedley in the most radical opinion concluding that Douglas and Zeta Jones have, "a powerfully arguable case" to a right of privacy.

Lord Justice Sedley went on to suggest that the case in privacy would be the more unanswerable, not the less, for the celebrity of the principal victims, had it not been for the fact that they had parted with a degree of

privacy by selling some carefully approved images to *OK!* magazine. He pointed to the fact that celebrities — and certainly the plaintiffs here — live and die by their images, and take great pains (as did Douglas and Zeta Jones through contract with *OK!*) to protect and control that image. The courts, he felt, when there was an effort as here to protect image, should be more solicitous to protect their privacy.

The team which represented the newly-wed celebrities and *OK!* Magazine was led by Counsel, Michael Tugendhat QC and David Sherborne. They advanced for the first time the arguments in favour of protection of privacy, taking the Court through the myriad of case law and academic comment which has long been discussed (some might say threatened) by judges extra-curricularly but not "in school" to demonstrate that the time for an English privacy law had come.

Just when the English Libel Bar thought it was gasping its last following a host of successful Defendant cases, the judiciary have thrown it the lifeline of privacy which gives the green light for any public figure to sue. This will now be routinely tacked onto

(Continued on page 24)

Injunction on Photos of Douglas Wedding Lifted

(Continued from page 23)

many libel claims: “This will undoubtedly have serious implications for both celebrities and the media. At the very least, it would appear that snatched or long lens photographs are now out of bounds,” says David Sherborne, Junior Counsel for Ms. Zeta-Jones, Mr. Douglas and *OK!*. “The Court of Appeal has effectively sanctioned the right to protect privacy, thereby removing the need to strain the law of confidence to fit circumstances where there is no relationship of trust or confidence with the person who discloses private information or invades your privacy.”

There is a serious concern now being voiced by Defendants that this decision will mean celebrity spin will win-out over free speech where public figures are concerned. Lord Justice Brooke also said that, if the case does succeed at trial, the damages that *Hello* will have to pay “are likely to be enormous”; with a concomitant chilling effect on free speech in future cases.

Press Code and Data Protection Factor In

The Court of Appeal also acknowledged that the new Human Rights Act gives statutory recognition to the Press Complaints Commission (“PCC”) Code. That (previously) self regulatory Code affords privacy, “in circumstances which individuals have a reasonable expectation of privacy”. The PCC gives as an example, the person nude sunbathing on a remote public beach.

Our privacy legislation, The Data Protection Act, also figured in the judgement. This Act has passed into law seemingly unnoticed by many. It was adopted in response to the European Directive on Data Protection, which has effect throughout the European Economic Area and has resulted in similar data protection laws being adopted throughout Europe.

“The Acts, and, in particular, the introduction of the EC Directive, means that had this wedding been in the UK (as opposed to the States) then there would have been a clear infringement,” comments David Sherborne. “We all need to be aware now, especially from the media’s point of view, of the impact data protection law has upon the way business is con-

ducted.” Robert Lands, Data Protection lawyer at Finers Stephens Innocent, said “If the photographs had been transmitted to London from New York by digital means then there would have been a breach of the criminal sanctions imposed by the Data Protection Acts.

There is little doubt that the implications of this far-reaching judgement will be both felt and discussed for months to come. Nevertheless, restrictions on the media continue to develop thick and fast in England, with the President of the Family Division, unusually sitting at first instance, stretching the law of confidence to issue an injunction at large against the media (including US media), in perpetuity, affording anonymity to Jon Venables & Robert Thompson the juvenile killers of a child called, James Bulger. This injunction might just as easily be developed in privacy and in the light of the *OK!* decision it just might if the Thompson & Venables decision is tested on appeal.

The full judgments may be obtained at: www.courtservice.gov.uk/judgments/judg_home.htm or hard copy is available from the author at mstephens@fsilaw.co.uk.

Mark Stephens is a partner in Finers Stephens Innocent, London, England.

London Firm Seeks Libel Plaintiffs Online

In a creative marketing ploy, London solicitors firm Russel Jones & Walker will use the Internet to find libel plaintiffs. On January 4th, the firm announced the launch of “LibelXpress” a web site at www.rjw.co.uk, where potential libel plaintiffs can have their claims evaluated for free. Potential plaintiffs are directed to read a short summary of defamation law. They can then go on and fill out a short questionnaire about the potential claim. The firm will respond within two days to discuss options, including contingency or so-called “no win-no fee” arrangements. Among the questions to be answered in the questionnaire: “What exactly was said about you and by whom?” And: “Is there any truth in what was said about you?”

Illinois Court Says Father May Be Liable for Son's Allegedly Tortious Website

By Samuel Fifer and Gregory R. Naron

An Illinois trial court has left the door open to a parent's potential negligence liability arising from a web site his son created, featuring a lewd, doctored picture of the minor plaintiff, and insulting commentary about her. *Jane Doe v. Ben Palenske and J. Bowen Palenske*, No. 00 LA 166 (Ill. Cir. Ct., McHenry County Nov. 28, 2000).

Background of Plaintiff's Claims

Plaintiff Doe and defendant Ben Palenske attended Marian Central Catholic High School in Woodstock, Illinois. In March of last year, Ben "created and contributed to" a web site entitled "Marian Sucks." The crux of the complaint is plaintiff's allegation that the "Marian Sucks" web site features "a picture of the plaintiff's face carefully put onto the body of a nude woman and engaged in a pornographic act," with the caption "[plaintiff] in a porn gone horribly wrong." Plaintiff also complains of statements on the web site that plaintiff is a "fat whore" and a "raving psychotic bitch."

Based on these allegations, plaintiff claimed Ben was liable for defamation and false light invasion of privacy. (Surprisingly, there was no claim of intentional or negligent infliction of emotional distress).

Plaintiff further alleged that previously, in February 2000, Ben's brother John had also created "a negative and harmful web site" – entitled "Marian Blows" – which "was terminated at the behest of Marian Central Catholic High School once it was discovered." Undaunted, Ben created the (somewhat derivative) "Marian Sucks" the next month.

Citing the apparently irrepressible mischief of the Brothers Palenske, plaintiff charged that their father, J. Bowen Palenske, was subject to negligence liability. Specifically, she asserted that Mr. Palenske "knew or should have known" that his sons "possessed the skill, knowledge and desire to create a negative and very harmful web site on his computer system in his home"; that he failed to properly supervise the use of the computer, and "entrusted" it to his sons when he knew or should have known they were "likely to commit defamatory acts on others."

Plaintiff also asserted Mr. Palenske was negligent in "knowingly" permitting Ben to use his computer to harass and make obscene comments, with the intent to offend plaintiff, in violation of 720 ILCS 135/1-2 (the "Harassing and Obscene Communications Act"). That statute makes it a Class B misdemeanor to use "electronic communication" for, *inter alia* the purpose of "[m]aking any comment, request, suggestion or proposal which is obscene with an intent to offend"; and "[k]nowingly permitting any electronic communications device to be used" for such purposes. *Id.*, subd. (a)(1), (5).

Furthermore, Plaintiff claimed that Mr. Palenske was liable in his own right for defamation and false light, since he "owned and controlled the computer" that Ben used "to create a web site entitled 'Marian Sucks.'"

Mr. Palenske Moves to Dismiss

Ben filed an answer to the complaint, denying all liability. Mr. Palenske filed a motion to dismiss the claims against him. That motion was heard and decided on November 28 of last year.

In his motion, Mr. Palenske argued that the direct claims against him for defamation and false light had to be dismissed because the complained-of actions were those of Ben, not "of J. Bowen Palenske," and "in Illinois, parents are not liable for the torts of their minor children merely because of the parent-child relationship." Rather, Mr. Palenske argued, to impose liability on him, plaintiff had to state a claim for negligent entrustment or negligent supervision – the two theories on which plaintiff's negligence claim against him was based.

The court apparently agreed, and dismissed the direct defamation and false light claims against Mr. Palenske.

The Negligence Claim

Turning to the negligence count, Mr. Palenske noted that, for a negligent entrustment action to lie, plaintiff had to plead and prove that defendant (1)

(Continued on page 26)

Illinois Court Says Father May Be Liable for Son's Allegedly Tortious Website

(Continued from page 25)

entrusted a dangerous article to another person, and (2) knew or should have known the person was likely to use the article in a manner causing an unreasonable risk of harm to others. See *Page v. Blank*, 262 Ill. App.3d 580, 634 N.E.2d 1194 (1994). Mr. Palenske argued that nothing in the complaint suggested that “the computer used by Ben Palenske is a dangerous article.” So far so good.

The negligent supervision theory, however, was more problematic. It only required plaintiff to plead and prove Mr. Palenske (1) was aware of specific instances of prior conduct sufficient to put him on notice that the complained-of act was likely to occur; and (2) had an opportunity to control his son. *Page*; see also *Teter v. Clemons*, 112 Ill. 2d 252, 492 N.E.2d 1340 (1986).

Mr. Palenske attempted to distinguish the case of *Duncan v. Rzonca*, 133 Ill.App.3d 184, 478 N.E.2d 603 (1985); there, defendant mother brought her three year old to the bank where she worked. Unsupervised, the child set off the alarm system. The bank specifically instructed defendant to keep the child away from the alarm in the future. Yet, subsequently, the child was again left unsupervised and set off the alarm. This time, the responding police officer was injured in an auto accident, and sued. These facts were held to state a negligent supervision claim.

Mr. Palenske argued this case was different, because he only had knowledge of his *other* son's prior conduct and did not know of any such conduct by Ben. According to Mr. Palenske, plaintiff had to plead facts showing “prior knowledge of specific conduct” by this particular child.

Evidently, the court did not find Mr. Palenske's attempt to distinguish *Duncan* very convincing, because it denied the motion with respect to the negligence claim. The order does not indicate the basis for the ruling, but the negligence claim could be sustained on either the entrustment or supervision theory. In other words, plaintiff did not have to prove that the computer was a dangerous article (a *sine qua non* for

entrustment liability) in order to state a negligent supervision claim.

Given the broad nature of the negligent supervision tort, and the procedural posture of the case, it is not altogether surprising that the court declined to throw out the negligence claim on Mr. Palenske's motion.

Coming Attractions?

Significantly, neither Mr. Palenske nor his son have yet attacked the merits of the underlying claims, *viz.*, that no defamation or false light claim will lie based on the complained-of publication. On that score, the plaintiff will no doubt rely on the Illinois Supreme Court's lamentable decision in *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 672 N.E.2d 1207 (1996) (using “slut” to describe fictional character that resembled plaintiff was defamatory per se as accusation of fornication, and jury could find it to be “of and concerning” plaintiff).

On the other hand, Illinois also has a long tradition of refusing to find mere “namecalling” actionable defamation, *see, e.g., Pease v. Operating Engineers Local 150*, 208 Ill.App.3d 863, 567 N.E.2d 614 (1991) (“he's dealing with a half a deck... I think he's crazy” not actionable); *Cozzi v. Pepsi-Cola General Bottlers, Inc.*, 1997 WL 312048 (N.D. Ill., June 6, 1997) (“bitch” was “too imprecise to be defamatory”), and the Illinois courts have protected statements (and pictorials) which could not reasonably be found to state actual facts about the plaintiff, *see Flip Side, Inc. v. Chicago Tribune Co.*, 206 Ill.App.3d 641, 564 N.E.2d 1244 (1991) (comic strip did not state actual facts about plaintiffs); *Polish-American Guardian Society v. General Electric Co.*, 27 Med. L. Rep. 1443 (Ill. Cir. Ct., Cook Cty. 1998) (finding “ethnic slurs” broadcast on various television programs – phrase “stupid polack,” skit in which two people rotate ladder while third changes light bulb, and portrayal of buffoonish Polish Pope – were not actionable).

(Continued on page 27)

Illinois Court Says Father May Be Liable for Son's Allegedly Tortious Website

(Continued from page 26)

Finally, no cases involving Internet speech have been decided under the Harassing and Obscene Communications Act (violation of which plaintiff cited as another ground for Mr. Palenske's negligence; *see above*). A challenge to the Act on First Amendment grounds may be in order. *Cf. People v. Sanders*, 182 Ill.2d 524, 696 N.E.2d 1144 (1998) (provision of "Hunter Interference Prohibition Act," criminalizing certain actions taken with "intent to dissuade" hunters, held to be a content-based speech restriction in violation of First Amendment). Moreover, allowing the Act to be used as the basis for tort liability – even if no actionable defamation exists – would "enabl[e] the plaintiff to avoid the specific limitations with which the law of defamation – presumably to some purpose – is hedged about." *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273-74 (7th Cir. 1983).

Again, these issues were not raised in the motion to dismiss, and the court did not rule or suggest how it might rule on them. We will continue to monitor the case for further developments in this regard.

Samuel Fifer is a partner, and Gregory R. Naron an associate, of Sonnenschein Nath & Rosenthal, Chicago, Illinois.

***Any developments you think
other LDRC members
should know about?***

Call us, send us an email or a note.

Libel Defense Resource Center, Inc.
404 Park Avenue South, 16th Floor
New York, NY 10016

Ph: 212.889.2306
Fx: 212.689.3315
ldrc@ldrc.com

Two Philadelphia Reporters Fined \$100 Per Minute — For A Total Of \$40,000 Each — For Refusing To Testify At Criminal Trial

By Robert C. Clothier III

Mark Bowden, a reporter for The Philadelphia Inquirer, and Linn Washington, a reporter for the Philadelphia Tribune, were recently held in civil contempt and fined \$100 per minute – for a total of \$40,000 per reporter – by a Philadelphia state court trial judge for refusing to obey the court's order requiring them to testify about statements given to them by a criminal defendant. Both reporters have appealed the trial judge's orders to Pennsylvania's intermediate appellate court, and a decision is not expected for at least several months. *See Commonwealth v. Brian Tyson* (Case No. 9710-0014; Order dated December 4, 2000).

The Underlying Criminal Prosecution

The trial court's orders came during the criminal prosecution of defendant Brian Tyson, who was charged with the first-degree murder of 23-year-old Damon Millner. After his arrest but years before trial, defendant Tyson was interviewed by both reporters and told them that he shot Millner in self-defense out of the belief that he was being shot at by men with guns. Tyson portrayed himself as a law-abiding resident of a drug-infested neighborhood who tried to discourage the local drug dealers from plying their trade in the tough North Philadelphia neighborhood they shared.

The prosecutors saw things differently. They contended that defendant Tyson was an urban vigilante who harassed the drug dealers and deliberately shot Millner without provocation. The prosecutors sought to contradict defendant Tyson's assertion of self-defense by subpoenaing reporters Bowden and Washington for any statements made by defendant Tyson and his wife about the incident or about his relations with the neighborhood drug dealers.

(Continued on page 28)

Two Philadelphia Reporters Fined

(Continued from page 27)

The Reporters' Motions to Quash

Bowden and Washington moved to quash the subpoenas. They contended that the Pennsylvania Supreme Court in *In re Taylor*, 193 A.2d 181 (Pa. 1963), established the rule that the Pennsylvania Shield Law absolutely protects all unpublished information from compelled disclosure, thereby protecting them from turning over their notes and from testifying about unpublished information. The reporters also asserted that the First Amendment reporter's privilege protects both published and unpublished information unless the prosecutors meet their burden of proving that the subpoenaed information was crucial to the case, that they had exhausted all other sources of the information, and that the reporters were the only source of the information.

The reporters claimed that the defendant — who was expected to testify — was another alternative source of the information. Until defendant Tyson testified, or declined to testify, the reporters argued, the prosecutors certainly could not meet their burden of proof.

The prosecutors contended that the Pennsylvania Shield Law protects only confidential source information and asserted that because defendant Tyson was a disclosed, non-confidential source, the Shield Law was inapplicable. For this proposition they cited *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (Pa. 1987); *Davis v. Glanton*, 705 A.2d 879 (Pa. Super. 1997); and *McMenamin v. Tartaglione*, 590 A.2d 802 (Pa. Cmwlth. 1991).

The reporters, however, responded that the *Hatchard* and *Davis* decisions affirmed the broad rule set forth in *Taylor* while carving out a limited exception in defamation cases based on the premise that the Pennsylvania Constitution's right of reputation would be violated if a libel plaintiff, in addition to bearing the burden of proving actual malice, did not have access to unpublished information and materials.

Under the First Amendment, the prosecutors argued that the information was crucial because it constituted statements made by a criminal defendant about the very incident at issue — statements that were purportedly inconsistent not only with what the prosecution's witnesses said but also with what the defendant told the police at the time. The defendant's credibility, the prosecutors contended, was "central to the case." At the same time, the prosecutors admitted that they did not and could not know what was in the unpublished information and, therefore, could not say that they would even use such information at trial.

They also claimed that the reporters were the only source of the information because no one else apparently was present in the interviews between the reporters and defendant Tyson. They wanted the information not only for "potential use" in their case in chief but also for cross-examining the defendant and rebuttal testimony.

The Trial Judge's Ruling

The trial court judge granted in part and denied in part the reporters' motions to quash. The judge ruled that the Pennsylvania Shield Law does not protect non-confidential source information. She based this ruling on the decisions in *McMenamin*, *Hatchard* and *Davis*, implicitly finding that the latter's holdings are not limited to defamation cases. Thus, because the defendant was not a confidential source, the trial judge concluded that the Shield Law did not apply.

Turning to the First Amendment reporters' privilege, the trial judge said that the prosecutor "is not entitled to a 'fishing expedition' through all the reporter's notes." As a result, she ordered the reporters to testify about any "verbatim or substantially verbatim statements of the defendant involving the incident itself or such statements of the defendant which speak to his relationship to drug dealers in the neighborhood." She explained:

(Continued on page 29)

Two Philadelphia Reporters Fined

(Continued from page 28)

Because only the reporter and defendant were privy to the conversations, these statements would not be obtainable from any other source.... Certainly the statements are relevant and necessary...[because they] are statements of the defendant and go directly to his guilt or to impeach his defense that the killing was justified.

In other words, the trial judge believed that *any* statements of the defendant about the incident were crucial, regardless of the nature of those statements.

The judge called her order extremely narrow and emphasized that she was not ordering the reporters to turn over their notes. But

she expected that the reporters would review their notes prior to giving testimony and bring their notes to court in case to refresh their recollections

if necessary. The trial judge also envisioned that the reporters would submit to an informal interview with the prosecutors in advance of the trial so that the reporters could say whether or not there were any unpublished statements of the defendant that were relevant to the case. The trial judge did this conceding that “there may not be” any reason to put the reporters on the stand.

The Reporters’ Attempts to Stay the Trial Judge’s Ruling

The reporters immediately requested the trial judge to stay her order, which she quickly denied. The reporters then filed their notices of appeal and moved the Pennsylvania Superior Court for a stay of the trial court’s order pending appeal. Supporting the reporters’ motions was an amicus curiae brief submitted by the Pennsylvania Newspaper Association (PNA). The Superior Court granted a temporary stay and then, without explanation, dissolved the stay.

The reporters, again with support from the PNA,

filed a motion for stay with the Pennsylvania Supreme Court, which, like the Superior Court, gave a temporary stay only to dissolve it a day later in a one-sentence order. That left the reporters faced with complying with the trial judge’s order or risking contempt.

The Reporters’ Refusal to Testify and Contempt

The reporters refused to testify about any unpublished information while agreeing to testify about defendant’s statements published in their articles. The prosecutors requested that the trial judge impose a

civil contempt sanction of incarceration until the reporters complied with the order; the prosecutors also reserved the right to seek criminal contempt. The trial judge decided against

imprisonment and instead imposed a severe fine to try to coerce the reporters into testifying. Although the prosecutors asked for a fine of \$1,000 per minute, she fined them \$100 per minute — what she called a “nominal” fine — until the prosecution rested its case. Fortunately, the temporary stays granted by the appellate courts meant that the trial was nearly over when this fine was instituted.

Toward the conclusion of the defendant’s testimony, the prosecutors again appealed to the judge to increase the fine to \$1,000 per minute. The prosecutors contended that the defendant’s testimony made the reporters’ testimony all the more important to the case. They gave examples of what they contended were “crucial” differences between the defendant’s testimony and the statements attributed to him in the reporters’ articles. For example, while the defendant testified he was with friends having only *one* beer a few hours before the incident, one of the articles said he had a *few* beers. While the defendant testified he bought the gun used in the shooting in 1993, one of

Although the prosecutors asked for a fine of \$1,000 per minute, she fined them \$100 per minute — what she called a “nominal” fine — until the prosecution rested its case.

(Continued on page 30)

Two Philadelphia Reporters Fined

(Continued from page 29)

the articles said he bought the gun in 1991. After argument, the trial judge rejected the prosecutor's request, saying that she did not think that incarceration would coerce the reporters into testifying about unpublished information.

Subsequently, Mark Bowden took the stand and testified about published information. The prosecutor did not call Linn Washington to testify. Shortly thereafter, the prosecution rested, and the reporters were each fined \$37,000, which the judge later increased to \$40,000 apparently after the judge recalculated the number of minutes at issue. The jury later returned a verdict of guilty of third-degree murder and possession of the instrumentality of a crime. The jury rejected the charge of first-degree murder. Shortly thereafter, the reporters appealed the contempt order and posted a bond staying any obligation to pay the fine.

The Ramifications of the Trial Judge's Ruling

The trial judge's order is troubling for several reasons:

- The trial court cut back the scope of the Pennsylvania Shield Law, concluding that it protects only confidential source information. This ruling is contrary to the Pennsylvania Supreme Court decisions in *Taylor* and *Hatchard* and the Superior Court's decision in *Davis*, which stand for the proposition that the Shield Law protects all unpublished information except in defamation cases, where the defamation plaintiff's right of reputation limits the Shield Law's protections to confidential source information.
- The trial court did not do the traditional First Amendment analysis. For example, she did not find that the defendant himself was an alternative source of the information and required the report-

ers' testimony even *before* the defendant testified. Just as discouraging, the trial judge felt that *any* statements made by the defendant about the incident at issue were crucial, even though it seems obvious that whether or not the defendant had one or several beers hours before the incident at issue is marginally relevant, if at all, to the case.

- Moreover, the trial court appeared to require the reporters to submit to an interview with the prosecutors to help them decide whether or not the unpublished information would help their case. That requirement was clearly beyond the powers of any trial judge. And it certainly was not permissible in light of the privileges afforded by the Shield Law and First Amendment.
- Finally, while it was a victory that the trial judge did not imprison the reporters, the judge's fine of \$100 per minute was extraordinary and excessive.

The trial court judge's rulings betray a basic misunderstanding about how compelled testimony about even non-confidential information will harm reporters' ability to do their jobs. Since the defendant was a disclosed source, the trial judge felt that the reporters "should talk to him at their peril" and was indifferent to the fact that this would obviously discourage the gathering and publication of this sort of information in the future. Indeed, both the judge and the prosecutor implied that a positive result of the ruling might be that reporters would not publish a defendant's story prior to trial. The Pennsylvania Shield Law and First Amendment privilege, however, place reporters on a different footing in light of the strong public policy promoting the free flow of information between reporters and their sources. Time will tell whether the Pennsylvania appellate courts will uphold these fundamental principles and reverse the trial court's rulings.

Robert C. Clothier III is a partner at Dechert Price & Rhoads in Philadelphia, Pennsylvania.

Indeed, both the judge and the prosecutor implied that a positive result of the ruling might be that reporters would not publish a defendant's story prior to trial.

First Circuit Finds Unauthorized Publication of Newsworthy Photos to Be Fair Use

A recent decision by the First Circuit held that a newspaper's unauthorized publication of photographs was protected by the fair use defense from a copyright infringement claim. *Nunez v. Caribbean International News Corp. (El Vocero de Puerto Rico)*, 2000 U.S. App. Lexis 33453 (1st Cir. Dec. 21, 2000) (affirming summary judgment in favor of a newspaper). The primary factor in finding fair use was the particular newsworthiness of the photos. Indeed, here the photographs were *the* controversy.

Controversy Over Models' Pictures

At issue in the case were several copyrighted modeling pictures taken by plaintiff, a professional photographer, of Joyce Giraud, who later became Miss Puerto Rico Universe of 1997. A controversy arose over photographs in which Miss Giraud appeared naked or nearly naked, which raised questions over whether it was appropriate for a Miss Puerto Rico Universe to have posed for such photos and whether she should retain her title. One local television program showed the controversial photos and asked random citizens whether the photos were pornographic. Other programs interviewed Miss Giraud and questioned her on whether she should retain her title. *El Vocero* published several stories about the controversy, using three of the controversial photographs in the articles.

The district court of Puerto Rico dismissed the copyright infringement complaint on fair use grounds, 17 U.S.C. §107. The court focused on the newsworthiness of the photos, the difficulty of presenting the story without them, and the minimal effect on plaintiff's business. In an opinion written by Chief Judge Torruella, the First Circuit affirmed after reviewing the four fair use factors (purpose and character of use, nature of the copyrighted work, the amount used, effect on the potential market or value of the work) as applied to the specific facts of the case.

The Purpose and Character of the Use

While rejecting a per se newsworthiness standard for fair use, the court found that the publication of the photos

together with editorial commentary was "transformative" weighing in favor of fair use, citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The court also credited the newspaper's good faith in crediting the photos to plaintiff and obtaining them lawfully.

(Continued on page 32)

Now Available

LDRC 50-STATE SURVEY 2001: EMPLOYMENT LIBEL AND PRIVACY LAW

*An essential reference on critical
employment issues.*

TOPICS INCLUDE: *Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort*

\$150

**For Ordering Information and
to Preview the
LDRC 50-State Survey 2001:
Employment Libel and Privacy Law
Outline**

Visit our Website — www.ldrc.com

First Circuit Finds Unauthorized Publication of Newsworthy Photos to Be Fair Use

(Continued from page 31)

Interestingly, though, the court noted that this first factor was not overwhelmingly in *El Vocero's* favor. In some unsettling dicta the court found that *El Vocero's* publication of photos on its cover was commercial and weighed against fair use. According to the court, "*El Vocero* used the photograph not only as an ordinary part of a profit-making venture, but with emphasis in an attempt to increase revenue." *Id.* at *6. However, on the whole the newspaper's informative use of the photos made this factor "either neutral" or in favor of fair use. *Id.* at *11.

Nature of the Copyrighted Work

As to the nature of the copyrighted work, the court found that this factor weighed in favor of fair use. It found that the modeling photos were commissioned for "the very purpose of semi-public dissemination" within the modeling industry. The plaintiff had not taken any prior steps to limit dissemination, such as requiring non-disclosure agreements or no-resale agreements, nor had he registered the copyright. Moreover, the photos had already been broadcast on television. Thus the newspaper's use of the photos did not threaten plaintiff's right of first publication.

Amount and Substantiality of Use

The amount and substantiality of use was a non-factor, according to the court. Even though the newspaper used the entirety of the photos the court acknowledged that "to copy any less than that would have made the picture useless to the story." *Id.* at *13.

Effect on the Market

Finally, the court examined the effect of the newspaper's use on the potential market for or value of plaintiff's work and concluded that this factor also favored fair use. First, the newspaper's use of

plaintiff's modeling photos to inform the public about a controversy would not effect the market for plaintiff's professional services. Moreover, the newspaper's publication would not effect the value or market for the particular photos. While recognizing that the sale of photos to newspapers is a potential market, it found no evidence that plaintiff sought to exploit this market nor that he had the right to do so under his contract with Miss Giraud. "Surely the market for professional photographs of models publishable only due to the controversy of the photograph itself is small or nonexistent." *Id.* at * 6-17.

El Vocero was represented by DCS member Juan Marchand-Quintero, San Juan, Puerto Rico. The plaintiff was represented by Jose Guillermo Gonzalez.

©2000

LIBEL DEFENSE RESOURCE CENTER, INC.
404 Park Avenue South, 16th Floor
New York, NY 10016
(212)889-2306
www.ldrc.com

BOARD OF DIRECTORS

Robin Bierstedt (Chair)
Dale Cohen
Anne Egerton
Harold W. Fuson, Jr.
Adam Liptak
Susanna Lowy
Kenneth M. Vittor
Mary Ann Werner
Susan Grogan Faller (ex officio)

STAFF:

Executive Director: Sandra Baron
Staff Attorney: David Heller
Staff Attorney: Eric Robinson
LDRC Fellow: Sherilyn Hozman
Legal Assistant: Kelly Chew

Media Company Barred by PGA From Syndicating Golf Stats.

By George Gabel

Morris Communications Corp. v. PGA Tour, Inc., 117 F.Supp. 2d 1322 (M.D. Fla. 2000), is the first reported decision to address how the publication of news via the Internet may be shaped by antitrust and intellectual property law. In denying a Motion for Preliminary Injunction, the Court in *Morris* noted that the development of a complete factual record and “an examination of both bodies of law and their proper application in a rapidly changing world” will be necessary to resolve the underlying controversy between the parties. *Id.*, at 1324.

The Plaintiff, Morris Communications Corporation, is in the business of publishing news. Morris publishes news in both the traditional print format and electronically via the Internet. As part of its news coverage, in 1996 Morris began publishing information about golf tournaments on its electronic newspapers. The most popular feature of its electronic coverage of these golf tournaments was its publication of real-time golf scores.

PGA Scores From the Course

As the term suggests, real-time golf scores are the scores of individual golfers published contemporaneously with, or as near as possible to, the actual pace of competition at a golf tournament. These scores are collected at each of the eighteen holes on the golf course, typically by volunteers organized by the tournament’s promoter. The scores are then transmitted, through wireless or other communication devices, to several locations including the media center located on the tournament premises.

Upon being published in the media center, the golf scores can then be “re-keyed” by media organizations into their own computers for further dissemination, including publication via the Internet. Although some scores are also published on television, radio, and leaderboards on the premises, the media center is the only location where the “official” scores for all the competing golfers are continuously updated and available. This is particularly true during the first two days of most golf tournaments when there is normally no television or radio coverage.

Cable News Network/ Sports Illustrated (“CNN/SI”) was impressed with Morris’ electronic coverage of golf tournaments and contracted with Morris to provide (i.e., syndicate) real-time golf scores. In 1999, this coverage included all of the professional golf tournaments promoted by the PGA Tour, Inc. Morris’ attempts to cover the PGA Tour in real-time, however, ran headlong into media restrictions being imposed by the PGA Tour.

Media Credentials and Websites

The PGA Tour, like other promoters of sports events, regulates the media coverage of its golf tournaments. These regulations, which typically concern television, photography, and print media, are contained in press credentials which are issued by the PGA Tour for each tournament. By obtaining a press credential, a news organization is permitted access to the tournament premises, including access to the media center, to report on the tournament.

The relationship between the media and the PGA Tour, as the court in *Morris* noted, is mutually beneficial: “the media are better positioned to satisfy the public’s demand for golf-related information, and [the PGA Tour] enjoys enhanced publicity, which in turn generates greater demand for its golf tournaments and related goods and services.” *Morris*, 117 F.Supp. 2d at 1324.

In January 1999, however, for the first time, the PGA Tour promulgated restrictions concerning the Internet. In particular, the PGA Tour restricted access to the media center upon the condition that all “[s]coring information appearing on a site may be provided no sooner than thirty minutes after the actual occurrence of the shots.” The admitted purpose of this regulation was to allow the PGA Tour to have the first opportunity to publish real-time scores on its own website.

The PGA Tour prohibits the use of wireless communication devices on the golf course by spectators or the media. Golf scores cannot, therefore, be collected and reported directly from the golf course by any party other than the PGA Tour and its volunteers. Moreover, any such independent effort to collect golf scores would unnecessarily duplicate the efforts of the PGA Tour’s volunteers. In short, access to the media center is essential for news or-

(Continued on page 34)

Morris Communications Corp. v. PGA Tour, Inc.

(Continued from page 33)

ganizations that wish to report “official,” real-time golf scores. The practical effect of the PGA Tour’s new restriction on Internet publication of golf scores was that reporters in the media center would be required to delay their reporting of golf scores by 30 minutes after the score’s publication in the media center.

Morris objected to the new regulation. After some discussion between the parties, the PGA Tour changed the regulation to add the phrase “or after the time such information is legally available as public domain information if sooner than thirty

minutes after the actual occurrence of the shots.” The term “public domain” had been raised as an issue in the parties’ discussion because of its application to basketball scores in the case of *National Basketball Ass’n*

v. Motorola, Inc., 105 F.3d. 841 (2d Cir. 1997). Morris believed that golf scores, like the basketball scores addressed in *Motorola*, are facts that are in the public domain as soon as they occur. Subsequent to the discussion between the parties, and the PGA Tour’s amendment of its press credentials, Morris continued to publish real time golf scores on its website and to provide scores to CNN/SI and other news organizations.

New Online Regs. 2000

In January 2000, however, the PGA Tour promulgated new “Online Service Regulations.” The new regulations provided that “no scoring information may be used by, sold, given, distributed or otherwise transferred to, any party other than the Credentialed Site in any manner whatsoever, without the prior written consent of PGA Tour.” The PGA Tour thus allowed Morris to publish real-time scores on its own website, but prohibited the syndication of this information to third-parties if not part of the Credentialed Site. Morris again objected to the new regulation; however, discussions between the parties to resolve their differences were unavailing.

Morris Seeks PI

In October 2000, Morris filed a lawsuit which, in part, sought a preliminary injunction to prevent the PGA Tour from restricting the publication of real-time golf scores via the Internet. The lawsuit is grounded on several anti-trust theories including the essential facilities doctrine, monopoly leveraging, and refusal to deal. In a nutshell, Morris alleges that the PGA Tour has monopoly power over PGA Tour golf tournaments and has used that power to stifle competition in the separate markets for the publication and syndication of real-time golf scores via the Internet.

In response, the PGA Tour argues that it has developed, at considerable expense, a system to collect and report golf scores. The PGA Tour argues that it enjoys a property right in its scoring system and the scores gathered through that system, and that its regulations restricting the syndication of real time golf scores are a reasonable safeguard against would-be free riders seeking to capitalize on their investment.

In a nutshell, Morris alleges that the PGA Tour has monopoly power over PGA Tour golf tournaments and has used that power to stifle competition in the separate markets for the publication and syndication of real-time golf scores via the Internet.

Court: Possible “Hot News” Right

The Court denied Morris’ request for a preliminary injunction finding that Morris had not made a sufficient showing to justify the extraordinary relief requested at that preliminary stage. *Morris*, 117 F.Supp. 2d at 1330. The critical issue for the Court was the existence, *vel non*, of a legitimate, pro-competitive reason for the PGA Tour’s restrictions. In particular, the Court was concerned that the PGA Tour may have a “hot news” property right as described in the seminal case of *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), in which the U.S. Supreme Court recognized a news publisher’s right in time-sensitive information for which the publisher had expended resources to collect if another party’s publication of that time-sensitive informa-

(Continued on page 35)

Morris Communications Corp. v. PGA Tour, Inc.

(Continued from page 34)

tion could cause the publisher to stop collecting it (thereby depriving the public of access to the information itself). If the PGA Tour has such a “hot news” property right in golf scores gathered during PGA events, it may then have a legitimate, procompetitive reason for restricting competitors from capitalizing, or free riding, on any investment in the system used to gather the scores.

In this regard, the Court identified two issues that will require further development by the parties in the course of litigation. First, the Court described the limits of the “hot news” property right:

A limited threat of free riding does not necessarily give rise to a “hot news” property right because, as the *Motorola* court noted, free riding only becomes detrimental to competition when “the ability of other parties to free-ride on the efforts of the [defendant] would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

Morris, 117 F. Supp. 2d at 1328-29. The issue here, simply put, is whether the PGA Tour would continue to collect and publish golf scores at its tournaments if *Morris* were permitted to then disseminate this information. The Court determined that this issue could not be resolved at the preliminary stage of the case without the benefit of a complete factual record.

Second, the Court observed that the PGA Tour’s restrictions, as a whole, may evince an anticompetitive intent:

Similarly, while the reasonableness of the Defendant’s rules prohibiting unauthorized use of wireless communications devices on the golf course might affect a determination regarding the asserted anticompetitiveness of Defendant’s conduct, that too will require a more complete record than is currently before the Court.

Id., at 1329. Arguably, the PGA Tour’s restrictions are broader than necessary to protect any property right that the PGA may have in its scoring system and the scores

collected with that system, and may unfairly eliminate competition in the market for real-time golf scores.

Who Will Control the Story?

In sum, this case stands at the intersection of anti-trust and intellectual property law as applied to the publication of news on the Internet. This case also raises important considerations about the control of news that extends beyond the reporting of facts from sporting events. Specifically, who will be responsible for reporting the news? Will it be traditional news media organizations which, since the foundation of our country, have a constitutionally recognized and protected role in our democracy for reporting the news, or will it be the news making entity itself that is allowed to self report and at the same time exclude traditional media? Would such a system lead to censorship and controlled dissemination of facts?

The PGA Tour has set itself up as a publisher via the Internet, as have many sports and other organizations, and directly competes with traditional news media with respect to reporting news about its own golf tournaments. Should the PGA Tour be successful in this case in preventing *Morris* from syndicating scoring information from the media center, the ripple effect may be far-reaching and could forever change the landscape of news reporting on the Internet and traditional media. A political party, for example, might require news organizations to agree to time and content restrictions as a condition of reporting news from that party’s national convention.

Although the Court in *Morris* did not award a preliminary injunction, it cautioned: “It bears repeating that the Court does not by its opinion foreclose the possibility that *Morris* might ultimately succeed in establishing an anti-trust violation. There is a difference, however, between success at trial and a success in meeting the standard for a preliminary injunction.” *Morris*, 117 F.Supp. 2d at 1330. Discovery is underway and the case is set to be tried in June 2002.

George Gabel is a partner in the Jacksonville office of Holland & Knight LLP which represents Morris.

SAVE THE DATES !!!

2001 NAA/NAB/LDRC LIBEL CONFERENCE

September 12-14, 2001

Alexandria, Virginia

LDRC 21ST ANNUAL DINNER

Wednesday, November 7th, 2001

Sheraton New York Hotel & Towers

ANNUAL DEFENSE COUNSEL SECTION BREAKFAST

Friday, November 9th, 2001

Sheraton New York Hotel & Towers