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MEDIALAWLETTER

Reporting Developments Through January 31, 2007

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MLRC

DEFAMATION

Correction: The Judicial Plaintiffs sidebar in the November 2006 *MediaLawLetter* at page 9 inaccurately stated the final result of the *McDermott v Biddle* case. The newsletter said the case was "settled for costs." The case was, in fact, dismissed upon the agreement of the parties, each side to bear their own costs.

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New York Times Wins Summary Judgment in Anthrax Columns Libel Case

By Ashley I. Kissinger

Two weeks before trial was set to begin in the Eastern District of Virginia in *Hatfill v. The New York Times Company*, No. 1:04-cv-807 (Hilton, J.), a defamation action arising from a series of opinion columns by Nicholas Kristof published in *The New York Times*, the court entered an order striking the case from the trial docket, indicating that "summary judgment should be granted."

The brief order noted that an opinion would be forthcoming. The background and issues addressed in the summary judgment motion are discussed below. When the opinion issues, the MediaLawLetter will provide a follow-up discussion.

Background: The Summer of 2002

In May through August 2002, Nicholas Kristof, a Pulitzer Prize winning Op-Ed columnist for *The New York Times*, wrote a series of columns concerning the deadly anthrax mailings that occurred in the wake of the September 11, 2001 attacks.

The columns concerned what Kristof perceived as the FBI's "lethargic" investigation of the anthrax mailings and the bio-defense industry's inadequate efforts to safeguard deadly pathogens. Among other examples, Kristof cited the Bureau's failure to investigate thoroughly a man he denominated "Mr. Z," a government contractor in the bio-defense industry that some in the industry were saying was a "likely culprit."

In June 2002, the FBI conducted a highly publicized search of the apartment of Dr. Steven Hatfill, a medical doctor who, because of the loss of his security clearance, had been terminated three months earlier from Science Applications International Corporation ("SAIC") where he had worked on government contracts related to bio-defense, and who had previously worked at the United States Army Medical Research Institute of Infectious Diseases ("USAMRIID") studying deadly viruses.

On August 6, a few days after another search of Dr. Hatfill's property, and in response to questions from reporters, Attorney General John Ashcroft confirmed on national television that Dr. Hatfill was a "person of interest" to the anthrax investigation. A week later, Dr. Hatfill held a televised press conference disclosing his identity as a person described in Kristof's earlier columns and passionately disclaiming involvement in the anthrax mailings.

The next day, Kristof published a column acknowledging that Dr. Hatfill, who had disclosed his own identity the day before, was, in fact, the "Mr. Z" of his previous columns. Kristof emphasized that the presumption of innocence must be applied to Dr. Hatfill, noting that there was "not a shred of traditional physical evidence linking him to the attacks" and that "it must be genuine assumption that he is an innocent man caught in a nightmare." He also called on the government to "end this unseemly limbo by either exculpating Dr. Hatfill or arresting him."

The anthrax investigation continues to this day, and nobody has been arrested or indicted in connection with the mailings.

Plaintiff's Claims

Dr. Hatfill commenced an action for defamation and intentional infliction of emotional distress against Kristof and *The Times* in Virginia state court in June 2003, but never served that complaint. He voluntarily dismissed the action the next year and refiled it in federal court in the Eastern District of Virginia.

He alleged that the columns falsely implied he was responsible for the anthrax mailings, and that eleven "discrete false and reckless allegations" made in the columns constituted actionable defamation. Among those were statements in the columns that either Mr. Z or Dr. Hatfill had expertise working with dry biological weapon agents, had access to the U.S. Army labs where anthrax spores were kept, had access to an isolated residence and gave Cipro (an antibiotic used in treating exposure to anthrax) to those who had visited there, had failed three polygraphs since January 2002, and was angry with the government over the loss of a security clearance.

Motion for Summary Judgment

On December 1, 2006, as discovery was concluding, *The Times* moved for summary judgment. With respect to the overall alleged implication that Dr. Hatfill was the anthrax mailer, *The Times* argued that, because Dr. Hatfill is both a public official and a public figure, his claims failed for two independent reasons.

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First, he could not carry his burden of demonstrating that *The Times* was aware of and intended the implication he alleged the columns conveyed, and second, he could not carry his burden of demonstrating that any such implication was published with constitutional malice.

The Times further argued that the "discrete" statements alleged to be false were, in fact, substantially true, and were not independently defamatory in any event. Finally, *The Times* argued, the conduct at issue was not sufficiently "outrageous" to sustain an intentional infliction claim, *The Times* did not intend to cause such distress, and discovery revealed that Dr. Hatfill's alleged injuries were not, in fact, sufficiently severe to sustain such a claim in any event.

Hatfill's Public Official / Figure Status

The Fourth Circuit has held that the "lack of [a] formal government position" is not determinative of whether one is a public official – a plaintiff may become a public official for the purposes of defamation law simply by "participat[ing] in some governmental enterprise" in a manner that demonstrates or appears to demonstrate that he has "substantial responsibility for or control over the conduct of governmental affairs." *Jenoff v. Hearst Corp.*, 644 F.2d 1004, 1006 (4th Cir. 1981).

In an extensive submission of evidence in support of its motion, *The Times* argued that Dr. Hatfill was a public official because from 1996 forward, he consciously sought out and, as he himself had claimed, steadily gained substantial responsibility for performing critical government functions.

The Times also argued that Dr. Hatfill was both a limited purpose public figure – *i.e.*, an individual who "voluntarily injects himself or is drawn into a particular public controversy," and an involuntary public figure – *i.e.*, a person who becomes "a public figure through no purposeful action of his own." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 351 (1974). The Fourth Circuit has identified in a series of cases "five requirements for a limited purpose public figure" that govern the resolution of the issue. Specifically, the court has explained, the evidence must show that:

> (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation.

Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982).

The Times submitted evidence in support of its contention that Dr. Hatfill made various media appearances in the years before the anthrax mailings on matters relating to germ warfare generally, and spoke with reporters for ABC News, *The New York Times* and *The Baltimore Sun* about the investigation of the anthrax mailings specifically.

The Times argued that, by virtue of his previous media appearances and his other efforts to speak publicly on the topic, Dr. Hatfill voluntarily assumed a role of special prominence in the public debate over national preparedness for bioterrorism.

The Times argued that, by virtue of his previous media appearances and his other efforts to speak publicly on the topic, Dr. Hatfill voluntarily assumed a role of special prominence in the public debate over national preparedness for bioterrorism and was known for being outspokenly critical of the state of national preparedness.

The Times further argued that Dr. Hatfill falls within the "narrow" class of involuntary public figures because (1) he had become a "central figure" in a "significant public controversy" before the Kristof columns were published; (2) the columns were published "in the course of discourse regarding" that controversy; and (3) he had "assumed the risk of publicity" – *i.e.*, he "pursued a course of conduct from which it was reasonably foreseeable, at the time of the conduct, that public interest [in him] would arise." *See Wells v. Liddy*, 186 F.3d 505, 539-40 (4th Cir. 1999), *aff'd in part, rev'd in part*, 37 Fed. Appx. 53 (4th Cir. 2002).

By the time the columns were published, *The Times* noted, the government's efforts to identify, apprehend, and prosecute the perpetrators of the anthrax attacks had become a full-blown public controversy. Dr. Hatfill had already become a central figure in that controversy because he had been

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the regular focus of media reports on it, particularly from June 26, 2002 (the day after the FBI searched his apartment), through July 2, 2002 (the day *The Times* published the first of the columns actually at issue), during which time he had been the subject of substantial press coverage from all manner of media all over the world.

Moreover, *The Times* observed, "it was reasonably foreseeable" at the time he sought to obtain media appearances, publish articles, speak at conferences and the like "that public interest [in him] would arise." *Id.* at 539-40.

Defamation By Implication

Given Dr. Hatfill's public status, *The Times* argued that he was required to establish three things to succeed on his claim for defamation by implication: that (1) the columns can reasonably be read to convey the defamatory implication, (2) the publisher was aware of the implication and intended to convey it, and (3) the implication was published with "constitutional malice," *i.e.*, a high degree of awareness by the defendant that the implication was probably false. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *see, e.g., Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993).

Kristof had personally reviewed documents that seemed to confirm plaintiff's ability to make anthrax and his potential access to the type of anthrax used in the attacks.

Although an earlier appeal in this case (see below) foreclosed dismissal on the first ground, *The Times* argued that summary judgment was nevertheless appropriate because Dr. Hatfill could not carry his burden of demonstrating either that *The Times* was aware of and intended to convey the defamatory implication, or that the implication was published with constitutional malice.

Every federal circuit to address the issue has held that a public official or public figure must demonstrate by clear and convincing evidence that the defendant was aware of and intended the defamatory meaning the plaintiff attributes to the publication at issue. *See, e.g., Howard v. Antilla*, 294 F.3d 244, 252 (1st Cir. 2002); *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1318 (7th Cir. 1988); *Woods v. Evansville Press Co.*, 791 F.2d 480, 487-88 (7th Cir. 1986); *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1063-64 (9th Cir. 1998); *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 680 (9th Cir. 1990).

The reason for the rule, as *The Times* explained, is that a journalist cannot be held to have published a defamatory implication with "a high degree of awareness of [its] probable falsity," *Garrison*, 379 U.S. at 74, when he does not either understand or intend to communicate the allegedly defamatory implication in the first place.

Kristof testified that he never intended to accuse Dr. Hatfill of guilt and that he was not aware when he published his columns that any of them could reasonably be so construed. The language of the columns supported Kristof's testimony.

The columns (1) stressed Dr. Hatfill's denial of any wrongdoing, (2) reported that his friends "are heartsick at suspicions directed against a man they view as a patriot," (3) emphasized the FBI's failure to "systematically polygraph" all scientists at key labs, and (4) urged the FBI either to go after plaintiff "more aggressively" or "exculpate him and remove this cloud of suspicion."

In the only column to identify plaintiff by name, *The Times* noted, Kristof urged his readers genuinely to assume that he "is an innocent man caught in a nightmare," noted that "there is not a shred of traditional physical evidence linking him to the attacks," and pushed the FBI to "end this unseemly limbo by either exculpating Dr. Hatfill or arresting him."

As a result, *The Times* urged, Dr. Hatfill was unable as a matter of law to carry his burden of proving, by clear and convincing evidence, that *The Times* published the columns at issue with the requisite subjective awareness of and intent to communicate the defamatory implication that he was the anthrax mailer.

No Actual Malice

The Times also argued that Dr. Hatfill was unable to demonstrate that Kristof acted with constitutional malice – *i.e.*, that he knew it would be false to imply that Dr. Hatfill

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was the anthrax mailer or had a "high degree of awareness" of the "probable falsity" of such an accusation. *See Garrison*, 379 U.S. at 74.

By the time Kristof wrote the columns at issue, a number of media outlets had published facts raising suspicion about Dr. Hatfill's possible connection to the mailings, Kristof had personally reviewed documents that seemed to confirm plaintiff's ability to make anthrax and his potential access to the type of anthrax used in the attacks, and he had spoken with a number of scientific experts and plaintiff's co-workers, virtually none of whom disputed Dr. Hatfill's expertise or potential access to anthrax and nearly all of whom agreed that he was appropriately the subject of further investigation.

In short, *The Times* asserted, based on all the information he had gathered, Kristof had no reason seriously to doubt that Dr. Hatfill could have been the anthrax mailer and certainly did not know that any such accusation was probably false.

Subsidiary Meaning Doctrine

With respect to the various "discrete" facts set forth in the columns, *The Times* argued that summary judgment was appropriate under the "subsidiary meaning" doctrine: Where a plaintiff is unable to demonstrate that a publication conveys an alleged overall defamatory implication, liability cannot be premised separately on individual statements the plaintiff alleges support that alleged implication. *See Herbert v. Lando*, 781 F.2d 298 (2d Cir. 1986); *Church of Scientology v. Behar*, 238 F.3d 168 (2d Cir. 2001); *Tavoulareas v. Piro*, 817 F.2d 762, 788 (D.C. Cir. 1987).

Because the Fourth Circuit had earlier held, in connection with plaintiff's appeal of a Rule 12(b)(6) dismissal of his claims (see below), that the individual statements were not time-barred precisely because they "are capable of incriminating Hatfill in the anthrax mailings," – *i.e.*, they are actionable only because they potentially convey the same overall defamatory implication – *The Times* argued that the subsidiary meaning doctrine applied to the individual statements and required dismissal of this libel claim along with the implication claim.

No Material Falsity

In addition, *The Times* argued, Dr. Hatfill could not meet his burden of demonstrating that the individual statements were materially false. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772-73 (1986).

Specifically, *The Times* pointed to undisputed evidence that, *inter alia*, Dr. Hatfill

(1) had access to an unlocked storage area where anthrax was kept while he worked at USAMRIID;
(2) had expertise in dry biological weapons agents,
(3) had visited the residence of his friend in a rural area of Virginia, which contained a separate cabin or guest house, at least a dozen times, and had discussed taking Cipro to combat anthrax infection with others there in October of 2001;
(4) gave Cipro to various people during that period;
(5) conceded he took a multipart polygraph examination in January of 2002, but failed to offer any evidence that he "passed" it, other than his own hearsay statement that the FBI told him so; and
(6) had lost his security clearance less than a month before the anthrax attacks and had been openly critical of government agencies he believed to be insufficiently vigilant in assessing and preparing to combat the threat of bio-terrorism.

Intentional Infliction of Emotional Distress

Finally, *The Times* argued that summary judgment was warranted on the claim for intentional infliction. In earlier reinstating the case, the Fourth Circuit had expressly recognized that, "[i]f Hatfill ultimately cannot prevail on his defamation claims because he is unable to satisfy the constitutional requirements for recovery, then he likely will be unable to prove that *The Times'* misconduct was intentional or reckless or that such misconduct was sufficiently outrageous to warrant recovery." *Hatfill*, 416 F.3d at 336-37.

The Times asserted that controlling constitutional law plainly requires that result, *see Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988), as does the common law of any of the jurisdictions whose law arguably applies to the case – Virginia, New York and Maryland.

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As of publication, the district court had not issued its opinion explaining the reasons for its decision to award summary judgment. The plaintiff has stated through his counsel that he intends to review the opinion before deciding whether to appeal.

Prior Events in the Case

Earlier developments in the case have been the subject of reports in the MediaLawLetter. They are briefly summarized below for the benefit of readers not familiar with the earlier history.

At the outset of the case, *The Times* moved to dismiss the complaint for failure to state a claim. On November 24, 2004, the district court granted *The Times'* motion, holding that "the columns are not reasonably capable of being understood to convey either an accusation that plaintiff is the anthrax mailer, or an intention by the author to make such an accusation," and that claims based on the "discrete false facts" were time-barred because plaintiff had not set forth those allegations in the initial state court action, and that none was independently capable of a defamatory meaning in any event.

The Times was also deprived of using in its defense any evidence obtained from two of Kristof's confidential sources.

The court also dismissed the intentional infliction claim as "an impermissible effort to evade the constitutional limits on damage claims arising solely out of an act of publication," as well as for failure to plead the requisite elements of the tort.

Fourth Circuit's Divided Decision

On Dr. Hatfill's appeal, a panel of the Fourth Circuit largely reversed on a 2-1 vote, holding that plaintiff had "adequately pled the elements of his claims under Virginia law." *Hatfill v. The New York Times*, 416 F.3d 320, 324 (4th Cir. 2005). Specifically, the Court of Appeals held that, because "a reasonable reader" could conclude from reading the columns that plaintiff "was responsible for the anthrax mailings in 2001," a jury should determine whether the columns in fact conveyed such an implication. *Id.* at 333.

In addition, the court concluded that all but one of the "discrete" false statements "are capable of incriminating Hatfill in the anthrax mailings" and, as a result, are not time-barred because they fall within the "'set of operative facts'" alleged in the initial complaint. *Id.* at 335. Finally, the Fourth Circuit recognized that, "[i]f Hatfill ultimately cannot prevail on his defamation claims," he likely will be unable to prove conduct by *The Times* "sufficiently outrageous to warrant recovery" for infliction of emotional distress, but held that he had pled sufficient facts to constitute "intentional and outrageous misconduct." *Id.* at 336-37. Judge Niemeyer dissented. *Id*. at 337-38.

The Times petitioned for rehearing and for rehearing *en banc*, which was denied on a 6-6 vote. *Hatfill v. The New York Times*, 427 F.3d 253 (4th Cir. 2005). Judge Wilkinson filed a dissenting opinion in which Judges Michael and King joined. "In short," he wrote, "I believe that defendant was simply doing its job. It is a job that the Constitution protects, and I would not construe gray areas of Virginia law to punish it and deter others from performing it." *Id.* at 259.

On March 27, 2006, the Supreme Court denied *The Times'* petition for a writ of certiorari.

Limitations Placed on The Times' Defense

On remand, the parties engaged in extensive and highly contentious discovery. In all, the parties took nearly 40 depositions, including that of Dr. Hatfill, Kristof, several persons he interviewed, numerous others at *The Times*, and several of Hatfill's friends, employers and former coworkers.

The federal government, however, refused to disclose, and the court declined to compel, any information concerning the continuing anthrax investigation – including those aspects of the investigation relating directly to Dr. Hatfill. The court also denied *The Times'* request for access to certain classified information, including information about his work in connection with United States biowarfare programs.

The Times was also deprived of using in its defense any evidence obtained from two of Kristof's confidential sources. Kristof initially declined to identify five confidential sources

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he relied on in writing the columns. Three sources ultimately came forward, releasing Kristof from his promise, and Dr. Hatfill moved to compel disclosure of the remaining two sources.

The court held that he had made a sufficient showing to overcome the qualified constitutional reporters' privilege recognized in Virginia, ordering *The Times* to disclose the identities of the sources, who had been identified only as FBI officials. When *The Times* declined to identify the two sources, Dr. Hatfill moved for sanctions, asking that the court bar all further discovery by *The Times* (including his own deposition), barring *The Times* from filing any summary judgment motion, and imposing a coercive penalty of $25,000 per day.

The court rejected those sanctions, instead ruling – as *The Times* had suggested was a more appropriate sanction – that *The Times* could not rely on the two unidentified sources to any extent in its defense. Whether plaintiff will seek to appeal from this pre-trial ruling remains an open question.

Ashley Kissinger is a partner with Levine Sullivan Koch & Schulz, L.L.P. The New York Times is represented by David McCraw, its Vice President and Assistant General Counsel, and by attorneys at Levine Sullivan Koch & Schulz, L.L.P. of New York and Washington, D.C. Dr. Steven Hatfill is represented by Harris, Grannis & Wiltshire, P.C. of Washington, D.C.

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Pennsylvania Appellate Court Affirms Absolute Protection of State Shield Law

By Robert C. Clothier

In a decision that has Pennsylvania media lawyers breathing a sigh of relief, the Pennsylvania Superior Court reversed a controversial trial court decision carving out a "crime-fraud" exception to the Pennsylvania Shield Act. *Castellani v. The Scranton Times, L.P.*, 2007 PA SUPER 2 (filed January 3, 2007) (Popovich, Lally-Green, Todd, JJ.).

In a unanimous ruling, the Superior Court held that The Times-Tribune (Scranton, Pa.) and its reporter, Jennifer Henn, cannot be compelled to disclose their confidential source in a defamation action filed by two county officials who, the paper had reported, had been "vague, effusive, and less than candid" when testifying before a state grand jury.

While "mindful and sympathetic to the trial court's concern about possible criminal violations of the Grand Jury process," the Court found that it was "forbidden from reading into the Shield Law an exception neither enacted by the General Assembly nor found by the Supreme Court as a result of the developing body of law."

Background

The Superior Court decision arose out of a defamation lawsuit based on an article published in *The Scranton Times* that reported that "an unnamed source close to the investigation" had revealed that the plaintiffs Randall A. Castellani and Joseph J. Corcoran, two Lackawanna County commissioners, had been "less than candid" and gave "vague, evasive answers" during testimony before a grand jury investigating allegations of wrongdoing at a county prison.

The two officials thereafter sued the paper for defamation, claiming that the article's characterization of their testimony was false and defamatory. The officials trumpeted a report submitted by a special prosecutor appointed to investigate a possible leak of grand jury information, who concluded not only that "there was no breach of secrecy" but also that the newspaper's account of the officials' testimony was "totally at variance with the transcript of their testimony before the Grand Jury."

During discovery, the county officials sought a court order compelling the paper to disclose the identity of its confidential source. They argued that because the leak of grand jury information was illegal, the Shield Law should not apply.

The newspaper opposed the request, asserting rights under the Pennsylvania Shield Law and First Amendment Reporter Privilege. The trial court granted the officials' motion to compel, concluding that when interest in the free flow of information "clashes with the need to enforce and protect the foundation of the grand jury purpose, the Shield Law should relinquish its priority."

The Newspaper's Appeal

The newspaper filed both a notice of appeal and a petition for permission to appeal the trial court's interlocutory order. The Superior Court ruled that the trial court's order was appealable under the collateral order doctrine.

In so ruling, the Superior Court held that the Pennsylvania Shield Law and First Amendment reporters' privilege are:

> "deeply rooted in the public policy of this commonwealth and the public policy of the United States. It cannot be gainsaid that these privileges exist to preserve the free flow and exchange of ideas and information to the news media and that such inter course is essential to the existence of a democratic republic."

This sweeping endorsement by a Pennsylvania court of the policy grounds for these privileges is heartening if not extraordinary, given that the Pennsylvania Supreme Court, in 2003, *assumed, but did not actually decide*, that Pennsylvania recognizes a First Amendment reporter's privilege. *See Commonwealth v Bowden*, 838 A. 2nd 740 (Pa. 2003) ("we need not reach the broader, thornier question of whether the Third Circuit [in, *e.g.*, *Riley v. City* of Chester, 612 F.2d 708 (3d Cir. 1979)] properly interpreted *Branzburg* in recognizing a privilege.").

The Pennsylvania Shield Law

The Pennsylvania Shield Law states, in relevant part, that "[n]o person engaged on, connected with, or employed by any newspaper of general circulation … shall be required to dis-

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close the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit." 42 Pa.C.S.A. § 5942.

The Superior Court found that the Pennsylvania Shield Law has "few exceptions," one written into the statue itself (applicable to television and radio stations) and one recognized by the Pennsylvania Supreme Court in *Hatchard Westinghouse Broadcasting Company*, 532 A.2d 346 (Pa. 1987). *Hatchard* was a defamation action where the court held that a libel plaintiff may obtain a media defendant's unpublished documentary information "to the extent that the documentary information does not reveal the identity of a personal [i.e., confidential] source of information or that the documentary information may be redacted to eliminate the revelation of a personal source of information."

The Superior Court noted that "it is obvious that if the Court (in *Hatchard*) extended its exception to include the identity of a confidential source, it would have re-written to Shield Law entirely, and no Court in this Commonwealth may undertake such an action."

"The fact that a crime may have occurred by virtue of the alleged disclosure of certain grand jury testimony does not necessitate or empower this Court to craft a new exception to the Shield Law."

Thus, the Superior Court concluded, "the trial court's crafting of 'crime-fraud' exception to the Shield Law, which requires the revelation of the identity of the confidential source of the news agencies' information, runs afoul of *Hatchard*."

The Superior Court explained that "the fact that a crime may have occurred by virtue of the alleged disclosure of certain grand jury testimony does not necessitate or empower this Court to craft a new exception to the Shield Law." In relying on the Shield Law, the Court never addressed the First Amendment reporter's privilege.

The Court's holding was not that surprising. Indeed, the real surprise was the trial court's decision, not the Superior Court's reversal. But the Court's analysis appeared inconsistent with the Supreme Court's holding in *Commonwealth v Bowden*, 838 A. 2nd 740 (Pa. 2003). In that case, two reporters argued that *Hatchard* limited the Shield Law's absolute protections to confidential source information *only* to defamation cases; in all other cases, they argued, the Shield Law protected all unpublished information regardless of its confidentiality.

The Pennsylvania Supreme Court in *Bowden* categorically rejected that position, holding that the Shield Law protects only confidential source information in *all* cases. In the *Scranton Times* decision, the Superior Court called the *Hatchard* ruling an "exception" to the general rule. According to *Bowden*, however, the rule in *Hatchard* is the general rule in all cases, not an exception applicable only to defamation cases.

Concurring Opinion

A troubling concurring opinion, while agreeing with the panel's analysis, emphasized that the efforts to uncover a confidential source took place in the context of a defamation lawsuit, not a criminal prosecution. The opinion stated that it would "not foreclose the possibility, as does the majority, that in a future case – for example where, in a criminal prosecution of a grand jury leak, a reporter's evidence about the source of that leak is sought – the Shield Law may have to yield."

In that case, and "only in such case, where the interest of the state and the public in disclosure is at its zenith, can we consider creating an exception to what is, on its face, an unambiguous Shield Law." Although the concurring opinion implies that this would be consistent with the panel's decision, that is far from clear, as the panel decision expressly stated that the possible commission of a crime does not permit a court to create an exception to the Shield Law.

Robert C. Clothier is a partner in the Philadelphia office of Fox Rothschild LLP.

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MLRC Calendar

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September 17-18, 2007

London, England
MLRC London Conference

International Developments in Libel, Privacy, Newsgathering & New Media

Stationers Hall, London.

September 19, 2007

London, England
MLRC London Conference

International In-House Counsel Breakfast

Reynolds Porter Chamberlain
Tower Bridge House
St Katharine's Way
London

November 7, 2007

New York City
MLRC ANNUAL DINNER

November 9, 2007

New York City
Defense Counsel Section Breakfast

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MLRC Bulletin Examines 2006 Media Law Developments

This Bulletin is available to enhanced DCS members and Media members at our website www.medialaw.org (click *here* to access Bulletin). For more information, please contact us at medialaw@medialaw.org.

MLRC's year-end BULLETIN 2006:3/4 contains a series of articles on the leading issues of the year in reporter's privilege law, copyright, Internet law, media libel & privacy and related claims, and criminal libel law and practice. In each of these areas, 2006 has been a year of significant developments.

The reporter's privilege issue continued to loom large this past year. In "Reporter's Privilege Issues: Continuing Attacks in 2006," MLRC attorney Maherin Gangat reviews the year's developments in reporters privilege law, from the settlement in the Wen Ho Lee case and the jailing of video blogger Josh Wolf, to the pending contempt appeal in the BALCO case.

The article dispels the legal "myths" that courts have used to block the development and momentum for common law privilege.

MLRC publishes a strong counter to the resistance journalists are facing in these cases to the establishment of a common law privilege. In "The Four Myths Surrounding The Common Law Reporter's Privilege," Theodore J. Boutrous, Jr., Thomas H. Dupree, Jr., and Michael Dore of Gibson Dunn & Crutcher LLP argue the case for a common law reporter's privilege. The article dispels the legal "myths" that courts have used to block the development and momentum for common law privilege, especially in the criminal investigative context.

"The case for a federal common law reporter's privilege is compelling," they conclude. And despite recent set backs "the path remains clear to recognizing a common law privilege." Their article will be a "must read" for journalists and their advocates.

Among the most interesting issues of the year on the copyright front are the copyright infringement lawsuits over the Google Library project. In "The Google Library Project," Allan Adler of the Magazine Publishers Association discusses the cases and the challenges the project poses for authors and publishers' copyright interests.

In "The Google Library Project: Both Sides of the Story," technology lawyer *Jonathan Band* offers a responsive piece discussing and defending the Google Library project and how fair use arguments might be raised to defend Google's ambitious project to create a comprehensive book search index.

Section 230 of the Communications Decency Act – the federal law that gives broad immunity to interactive computer service users and providers for disseminating material originating from others – continues to generate interesting case law. In "New Challenges And Familiar Themes In The Recent Case Law Considering Section 230," Samir Jain and Colin Rushing, of Wilmer Cutler Pickering Hale and Dorr LLP, look at the latest decisions applying § 230, including a discussion of the California Supreme Court's recent decision in *Barrett v. Rosenthal* reaffirming the broad scope of protection under the statute.

Part II of BULLETIN 2006:3/4 contains MLRC's annual review of the significant developments of the year in media libel, privacy and related law. And Part III contains an update on recent developments in criminal libel in the United States.

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Kentucky Court of Appeals Affirms Summary Judgment and Trial Verdict for Talk Show Host and Broadcaster

By Joseph A. Tomain

In an unpublished opinion, the Kentucky Court of Appeals this month affirmed the trial court's summary judgment findings and a jury verdict all in favor of Clear Channel d/b/a 84 WHAS Radio and its former talk show host John Ziegler. *Divita v. Ziegler*, No. 2005 CA 001343 (Ky. Ct. App. Jan. 5, 2007). (Johnson, Schroder, Miller, JJ). In large part, the jury based its verdict on plaintiff's failure to prove that defendants acted with actual malice.

Background

Plaintiff Darcie Divita, an undisputed all-purpose public figure in Louisville, Kentucky, sued her former dating partner and controversial radio talk show host, John Ziegler, and his employer Clear Channel. She claimed that statements Ziegler made on the air defamed her and invaded her privacy.

His statements included his belief that Divita was a "pathological liar" and comments about her genital grooming habits, breast implantations, and other sexually charged comments. Divita admitted the truth of many of the statements in her deposition and at trial, but the trial judge did not grant summary judgment or a directed verdict as defendants hoped once Divita admitted the truth of the statements.

Nonetheless, the trial judge did provide a complete and accurate jury instruction on actual malice, which was probably critical to success at trial.

Divita's complaint alleged claims for defamation, all four invasion of privacy torts, intentional infliction of emotional distress, and negligent hiring/supervision. The trial court granted summary judgment to Clear Channel on the negligent hiring/supervision, intentional infliction of emotional distress, and misappropriation of likeness claims. The trial court granted summary judgment to Ziegler on the misappropriation claim.

This month the appellate court affirmed all the summary judgment findings.

Negligent Supervision Claim

In discussing the negligent hiring / supervision claim, the Kentucky Court of Appeals unequivocally stated that "summary judgment is favored in cases involving defamation claims against media defendants." Then, the court noted that negligent hiring /supervision claims are derivative torts. Thus, the court held that the this issue was moot because the jury found that Divita failed to prove that defendants acted with actual malice.

But, the court went on to state that even if Ziegler had been found liable for the underlying torts, summary judgment was still proper for the broadcaster. Evidence showed that Ziegler had been instructed by his employer to refrain from talking about Divita's personal life a few months prior to the broadcast giving rise to the lawsuit.

When news broke that Divita would no longer be employed as an anchor for a local morning show, Ziegler violated that instruction. This broadcast gave rise to the lawsuit. This broadcast also resulted in Ziegler's termination for violating his employer's instruction.

Because Ziegler had obeyed his employer's instruction for a period of months and because he was terminated after the broadcast, the court affirmed that Clear Channel did not know and did not have any reason to know of the risk of Ziegler's employment.

Importantly, the court did not accept evidence that Ziegler had been warned to refrain from talking about other people or subjects in the past as proof to support the negligent hiring / supervision claim.

This aspect of the decision is helpful because it respects the importance of free speech and is consistent with the Illinois Supreme Court decision *Van Horne v. Muller*, 705 N.E.2d 898 (Ill. 1998). In *Van Horne*, another case involving a controversial radio show host, the Illinois Supreme Court

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held that a narrow interpretation of employer notice must be adopted in negligent supervision cases based on speech because it would run afoul of First Amendment principles to "hold a media employer liable for its decision to hire or retain a broadcaster simply because the broadcaster was a controversial figure." *Id.* at 907.

This Kentucky Court of Appeals decision bolsters *Van Horne* and helps maintain First Amendment protections for controversial speech.

Intentional Infliction of Distress

Another major aspect of the Kentucky Court of Appeals' decision is the express acknowledgment that Kentucky applies actual malice to intentional infliction of emotional distress claims based on speech about a public figure. Divita tried to argue on appeal that Kentucky had never applied *Hustler v. Falwell* to intentional infliction claims. She also argued that her intentional infliction claim was based in part on true statements and therefore, *Hustler* did not apply.

The court soundly rejected both arguments. First, the court stated that *Hustler* is clearly the controlling precedent and courts across the nation uniformly apply actual malice to a variety of claims based on speech when brought by a public figure. Second, the court seemed to accept Clear Channel's argument that "First Amendment principles require more –not less – protection for true statements about public figures than obviously false statements." Thus, the Kentucky Court of Appeals expressly accepts that *Hustler* applies in Kentucky and that it can apply to a variety of claims based on speech.

This Kentucky Court of Appeals decision bolsters* Van Horne *and helps maintain First Amendment protections for controversial speech.

Although unpublished, this opinion shows strong support for First Amendment protection in a public figure defamation and invasion of privacy case under Kentucky law, including the important value of summary judgment to avoid the chilling effect on free speech.

Joseph A. Tomain is an attorney at Frost Brown Todd LLC in Cincinnati, Ohio. Sheryl Snyder, Griffin Terry Sumner, Dick Goehler and Mr. Tomain represented Clear Channel Communications in the Divita appeal.

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Massachusetts Supreme Judicial Court Reaffirms Narrow Scope of State Anti-SLAPP Law

In an interesting non-media case, the Massachusetts Supreme Judicial Court this month reaffirmed the narrow scope of the state's anti-SLAPP statute, holding that it did not apply to a lawyer's statements about an ongoing litigation. *The Cadle Company v. Schlichtmann*, SJC-09790, 2007 WL 92736 (Mass. Jan. 17, 2007) (Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, & Cordy, JJ.).

Although the statements at issue appeared to fall within the literal scope of the statute as statements about matters under judicial review, the court concluded this was not "petitioning" activity as required by the statute, since the lawyer was either simply speaking to the public or promoting his own law firm to obtain clients.

Background

The defendant in the case is the high profile Massachusetts lawyer Jan R. Schlichtmann who was profiled in the book and movie *A Civil Action.* Schlichtmann had been involved in a bitter and long running litigation with The Cadle Company, a collection firm that had been pursuing debts of Schlichtmann's predecessor firm.

In 2003, Schlichtmann filed several complaints against Cadle with the Massachusetts Commissioner of Banks on behalf of himself and individual clients, accusing Cadle of fraudulent business practices under Massachusetts law. Schlichtmann spoke extensively to the news media about his allegations which were covered by the AP and Boston Herald among others.

Schlichtmann also created a website that restated the allegations against Cadle, provided links to press coverage of the dispute and linked to court filings in the case. The website invited readers to: "To find out more or if you believe you have been victimized by The Cadle Company, contact us directly: 877.CADLETRUTH (1.877.223.5387)."

In 2005 Cadle sued Schlichtmann and his law firm for libel, tortious interference and unfair and deceptive business practices for the statements on the website. The trial court denied Schlichtmann's motion to dismiss under the Massachusetts anti-SLAPP statute, finding that Cadle's complaint was not based "solely" on Schlichtmann's petitioning activities.

Mass. Anti-SLAPP Statute

The Massachusetts anti-SLAPP statute, Gen. Laws ch. 231, § 59 H, provides in relevant part:

> In any case in which a party asserts that the civil claims ... against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss.... The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

The statute identifies five types of statements that constitute the exercise of the right of petition:

1) Any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding;

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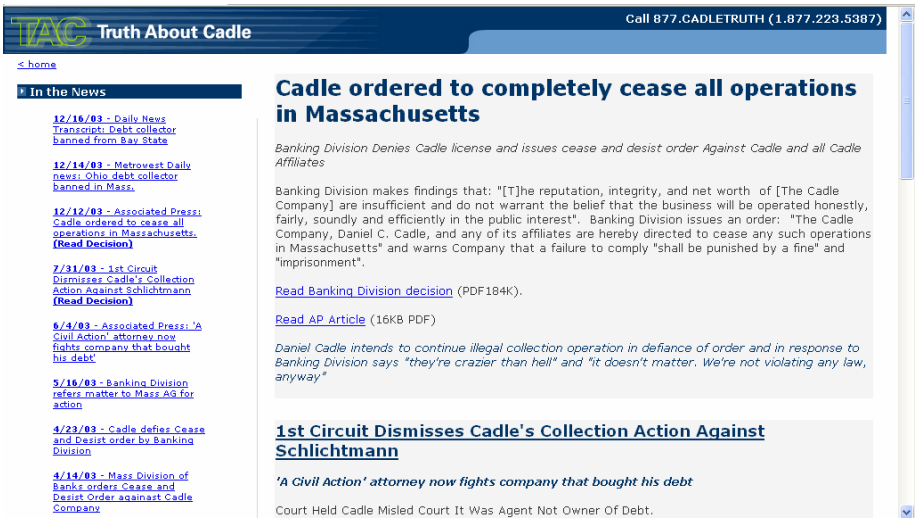

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2) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding;
3) any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding;
4) any statement reasonably likely to enlist public participation in an effort to effect such consideration; or
5) any other statement falling within constitutional protection of the right to petition government."

In *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935 (Mass. 1998), the Massachusetts Supreme Judicial Court noted that "by protecting one party's exercise of its right of petition ... the [anti-SLAPP] statute impinges on the adverse party's exercise of its right to petition." It went on to narrow the application of the statute to claims based *solely* on petitioning activity.

The trial court here found that Schlichtmann had set up the website "as an informational center that would 'direct[] people to his own legal practice to attract business.'" Therefore plaintiff's complaint "could not be deemed to be based solely and exclusively on the defendants' petitioning activity."

Supreme Judicial Court Decision

The Massachusetts High Court agreed that the anti-SLAPP statute did not protect Schlichtmann. While the statements and links on his website appeared "to fall within the literal scope" of the statute, the court found that the website was designed to attract clients. The court dismissed as "self-serving" Schlichtmann's denial that he was seeking clients through the website. "It is the palpable commercial motivation behind the creation of the Web site that so definitely undercuts the petitioning character of the statements contained therein." "Aggressive lawyering of this sort," the court concluded, "is not protected petitioning activity."

Plaintiff is represented by Howard M. Cooper and Ian Crawford of Todd & Weld LLP in Boston. Defendant was represented by Professor Rodney A. Smolla on appeal of the anti-SLAPP ruling.

Last summer a Massachusetts trial court similarly reaffirmed the narrow scope of the state's anti-SLAPP statute in an interesting media case. *Islamic Society of Boston v. Boston Herald, et al.*, No. 05-4637, 21 Mass. L. Rptr. 441, 2006 WL 2423287 (Mass. Sup. Ct. July 21, 2006).

The Islamic Society of Boston sued the *Boston Herald*, a local television station, several sources and community groups for libel following the publication of articles alleging that the organization was connected to and funded by terrorist organizations.

The articles and news reports arose out of a public controversy surrounding plaintiffs' plan to construct a mosque and educational center in Boston. The project received local approval, but several of the non-media defendants began a protest campaign against the project, contacting local officials and the media and supporting a lawsuit challenging the project's approval.

The court denied the non-media's defendants' anti-SLAPP motion to dismiss, relying on *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935 (Mass. 1998) (holding that anti-SLAPP statute, Gen. Laws ch. 231, § 59F, applies only where defendants can demonstrate that the claims against them are based *solely* on petitioning activity).

Here the trial court held that the non-media defendants' statements and actions were not "petitioning" activities since they were primarily directed to the media and their "complaints were not of the sort capable of being reviewed by any governmental agency at all."

"In the final analysis, to accept the defendants' arguments and conclude that the conduct which is the subject of this litigation constitutes "petitioning activity" shielded by the Anti-SLAPP statute would essentially obliterate the tort of defamation and unfairly tip the scales so as to impinge upon the plaintiffs' right to themselves petition the government for relief." *Id.* at *12.

Because the non-media defendants' statements were outside the scope of the statute, the court noted that "clearly the media defendants cannot claim the protections of the anti-SLAPP statute."

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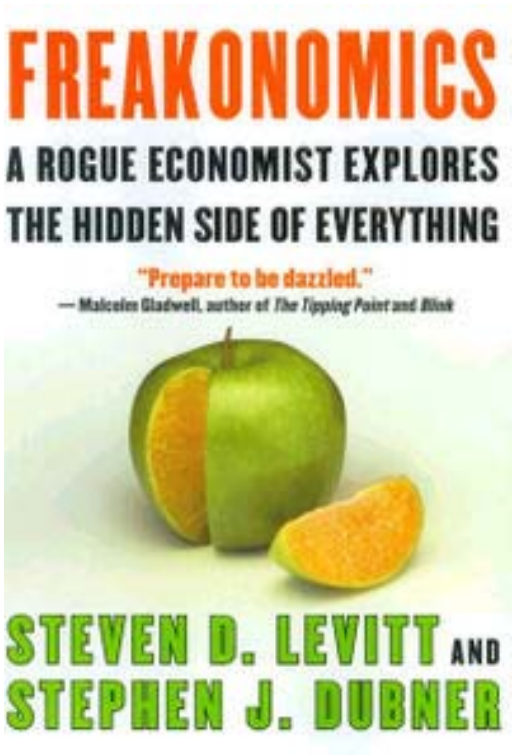
Libel Suit Against *Freakonomics* Publisher Dismissed Based on Innocent Construction Rule

But Claim Over Author's E-mail Survives

Noting that "judges are not well equipped to resolve academic controversies," an Illinois federal district court this month dismissed a libel suit filed by an economics professor over a passage in the best selling book *Freakonomics* that criticized his theory about concealed weapons and crime rates. *Lott v. Levitt and HarperCollins Publishers*, No. 06-C-2007, 2007 WL 92506 (N.D. Ill. Jan. 11, 2007) (Castillo, J.).

The plaintiff, Professor John Lott, alleged that a passage in the book implied he had falsified his research results. But the district court ruled that the passage could be innocently construed to mean that other academics simply disputed and rejected plaintiff's conclusions.

The court, though, refused to dismiss a separate libel count in the lawsuit solely against the book's co-author, Steven D. Levitt, over an e-mail he wrote that criticized Lott's scholarship. That e-mail could not be innocently construed or interpreted as opinion because it directly challenged the integrity of plaintiff's work.



Background

Freakonomics, by Steven D. Levitt and Stephen J. Dubner, was published by HarperCollins in 2005. The surprise best-seller applies economic incentive theories to a variety of social issues, such as cheating, crime and child safety.

Economics Professor John Lott sued the publisher over a passage in a chapter entitled "Where Have All the Criminals Gone?" The passage criticized plaintiff's theory that laws which allow people to carry concealed weapons result in a provable reduction in serious crime.

The book passage stated in relevant part:

> "Then there is an opposite argument – that we need more guns on the street, but in the hands of the right people.... The economist John R. Lott Jr. Is the main champion of this idea. His calling card is the book *More Guns, Less Crime*, in which he argues that violent crime has decreased in areas where law-abiding citizens are allowed to carry concealed weapons.... There was the troubling allegation that Lott actually invented some of the survey data that support his more-guns/less-crime theory. Regardless of whether the data were faked, Lott's admittedly intriguing hypothesis doesn't seem to be true. When other scholars have tried to replicate his results, they found that right-to-carry laws simply don't bring down crime."

Lott alleged that this passage implied that he falsified his results. The term "replicate" he argued "has an objective and factual meaning in the world of academic research and scholarship."

Count two of the complaint was brought solely against Levitt over an e-mail he sent to John McCall, a Texas economist, regarding the above passage. McCall sent Levitt an e-mail saying that Lott's research had been replicated in The Journal of Law and Economics, noting the journal was "not chopped liver."

In response Levitt wrote:

> It was not a peer refereed edition of the Journal. For $15,000 he was able to buy an issue and put in only work that supported him. My best friend was the editor and was outraged the press let Lott do this.

District Court Ruling

Granting the motion to dismiss the first count of the complaint, the court stated that the applicable standard is not that of the "world of academic research and scholarship," but

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rather how a "reasonable reader" would interpret the passage and the word "replicate."

Under the reasonable reader standard there were several innocent constructions of the passage. In everyday language, "replicating results" does not necessarily mean analyzing identical data in identical ways.

> "In fact, it is more reasonable to read the sentence as stating that other scholars testing the same hypothesis have done separate research, with possibly different data and statistical analyses, and come to different conclusions, thus disproving Lott's theory; or simply, that other scholars attempted to arrive at the same conclusions as Lott had, but were unable to do so."

2007 WL 92506 at *4.

This interpretation was reenforced by the chapter and the book as a whole which criticized other academics in a general way without specifically challenging their specific research protocols and methodology.

Claim Over E-Mail Survives

Levitt's e-mail, though, fared differently under this analysis. His statement that the Journal of Law & Economics was "not peer refereed" and that Lott essentially bought the issue could not be innocently construed. The statements could only be read as "attacking Lott's skill and integrity in his profession, especially in light of Levitt's suggestion that the Journal's editor was 'outraged' by this practice."

The court also held that the e-mail was not protected as opinion or hyperbole since it appeared to state objectively verifiable facts: that the journal was not peer reviewed, that Lott paid $15,000 to control the content of the issue and that this outraged the journal's editor.

HarperCollins and Steven Levitt were represented by Slade R. Metcalf and Gail Gove of Hogan & Hartson LLP, New York; and David P. Sanders and Wade Thompson of Jenner & Block, LLC, Chicago. Plaintiff was represented by Stephen H. Marcus of Washington D.C. and Thomas A. Vickers of Vank, Vickers & Mansini, P.C., Chicago.

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Florida Appellate Court Affirms Summary Judgment for Florida Newspaper

Fair Report Privilege and Opinion Defense Protect Paper

By Mark I. Bailen and Laurie A. Babinski

Summary judgment was affirmed December 13 for the *Naples Daily News* ("*Daily News*") in a libel action brought by the founder of the ESPN cable network against the paper for statements in 26 articles and editorials published over a two-year period. *Rasmussen v. Collier County Publ'g Co.*, No. 2D05-6144, 2006 WL 3615189 (Fla. 2d DCA Dec. 13, 2006) (LaRose, Northcutt, Silbermann, JJ.).

In affirming the trial court's grant of summary judgment, the Second District Court of Appeal of Florida held that there was no genuine issue of material fact because the articles and editorials were true and were otherwise protected speech under the fair report privilege or as opinion.

Background

Plaintiff William Rasmussen sold his stake in ESPN in the 1980s and moved to Naples, Florida where he assumed control over the annual Senior PGA Golf Tournament in Collier County and secured public funding through the county for the tournament.

> ***"In conveying news and comment to its readers, the* Daily News *need not describe legal proceedings in technically precise language."***

In October 1996, Rasmussen announced a new golf stadium concept that he envisioned as serving as a permanent venue for the golf tournament. Rasmussen turned to the chairman of the Collier County Commission, John Norris, for assistance, along with local real estate developers and a financier. The project, which was never built, was dubbed "Stadium Naples" by Rasmussen and his partners.

When Rasmussen and his partners announced publicly in June 1997 that Norris, the highest elected public official in the county, had a financial stake in the stadium project, allegations of favoritism and corruption swirled through the community. Amidst the growing controversy, Rasmussen and his partners abandoned their efforts to build Stadium Naples. But shortly thereafter, Rasmussen teamed with A.S. Goldmen & Co., a brokerage house with offices in Naples, in a second attempt to finance and build Stadium Naples.

After the disclosure of Norris' involvement in the stadium deal, local, state, and federal investigators, including a special prosecutor appointed by Governor Bush, probed into the financial dealings between county commissioners, local developers and others. In 2001, the special prosecutor charged Rasmussen and nine others – including four county officials, three real estate developers, and a local lawyer – with corruption and racketeering.

The special prosecutor brought additional charges against Rasmussen for stock fraud relating to his involvement with A.S. Goldmen brokers who were convicted in New York courts for, among other things, defrauding investors in the second Stadium Naples project. Nine of the ten defendants – including Rasmussen – pleaded guilty or no contest to the charges.

As part of his plea agreement and in exchange for his cooperation, Rasmussen pleaded guilty to reduced charges in the stock fraud case. The charges against him in the corruption case were dismissed.

The *Daily News* published hundreds of articles about Stadium Naples from October 1996 through January 2004. The newspaper reported on the proposal of the stadium development as well as the subsequent investigations and prosecutions, based in large part on thousands of documents obtained by the *Daily News* through public records requests to the special prosecutor in the Stadium Naples criminal cases.

The "nub" of Rasmussen's claim for defamation against the *Daily News* was that the newspaper's description of the disposition of the criminal charges against him falsely suggested that he pleaded guilty to charges in the corruption case when, in fact, those charges were dismissed. He also labeled as defamatory certain articles and editorials about his alleged misspending and mishandling of public funds and to his dealings with county commissioners, charities, and investors.

The *Daily News* filed for and was granted an early summary judgment. No. 04-1962-CA (Fla. Cir. Ct. Nov.

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21, 2005) (Schoonover, J.). *See MediaLawLetter*, Nov. 2005 at 37-38. The Circuit Court found that the paper's references to his pleading to "reduced or related charges" were substantially true because the charges were indeed related, and protected based on the fair report privilege. The court also found that the editorials addressing Rasmussen's misuse of public funds and dishonest dealings were based on publicly disclosed facts and were thus protected opinion.

Appellate Court Affirms Summary Judgment

In affirming the Circuit Court's grant of summary judgment in favor of the *Daily News*, the Second District Court of Appeal analyzed and supported each of the lower court's findings.

It agreed that the corruption and stock fraud charges "certainly" were related, and that the *Daily News* had "a qualified privilege to report accurately on government officials." The court noted that "in conveying news and comment to its readers, the Daily News need not describe legal proceedings in technically precise language."

The appellate court also agreed that the editorials in question were based on publicly disclosed facts and were protected expressions of opinion.

In conclusion, the court held that "the trial court thoroughly addressed each article and editorial that Mr. Rasmussen charged as libelous. Our de novo review leads us to the same conclusion that the trial court reached: no genuine issue of material fact remained for trial and the *Daily News* was entitled to judgment in its favor as a matter of law."

Bruce W. Sanford and Mark I. Bailen of Baker Hostetler LLP in Washington, D.C., along with Denis L. Durkin and Celina Candes in the firm's Orlando, FL office, represent the defendants. Joel Magolnick and Farah Martinez of De La O, Marko, Magolnick & Leyton, P.A. in Miami, FL represent the plaintiff.

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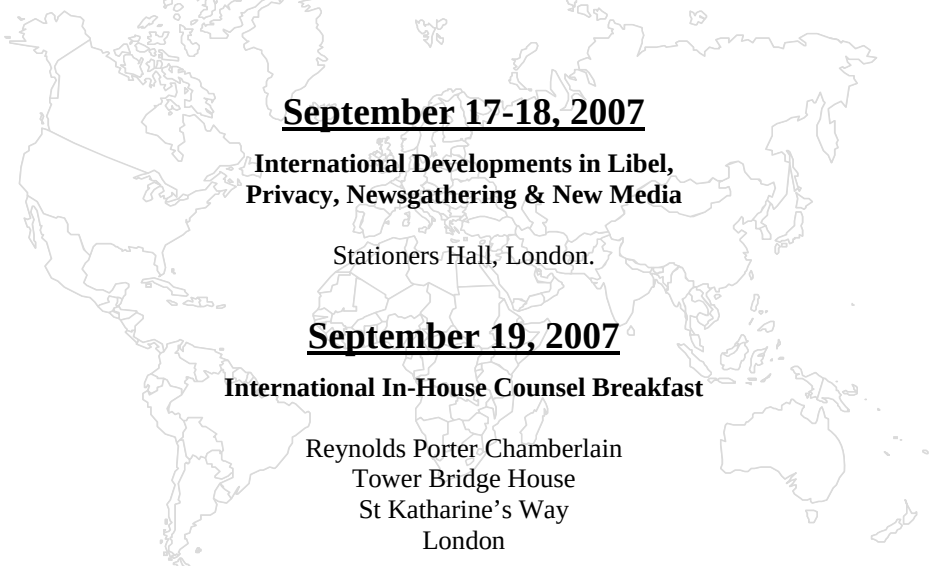

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Fair Report Privilege Protects Article Based on Petition for Protective Order

No Judicial Action Required

In a strong endorsement of the fair report privilege, the Court of Appeals of Washington affirmed dismissal of a libel complaint against a local newspaper based on its republication of allegations contained in a petition for a protective order. *Clapp v. Olympic View Publishing Co.*, No. 34473-4-II, 2007 WL 102504 (Wn. App. Jan. 17, 2007) (Armstrong, Bridgewater, Penoyar, JJ.) (unpublished). Notably, the court held that no judicial action on the petition was required for the privilege to attach.

Background

At issue in the case was an October 2004 article published in the *Sequim Gazette* entitled "Lavender farm employees quit," with the subhead "Allege owner strong-armed them to commit perjury." The allegations against plaintiff were drawn from a petition for protective order filed against plaintiff by one of his former employees.

In the petition, the employee attached, among other things, letters that plaintiff had sent to his employees discussing a pending lawsuit. In one letter, plaintiff wrote that employees had to decide "whether you consider yourself part of a ranch or whether you think you can find a better employer.

A second letter stated:

> "You needn't concern yourself that what you say may not be a[sic] accurate or even that subsequently it might be proved false; you are asked only to testify to what you believe to the best of your knowledge is true... If we find that you, being the witnesses the court would expect the most affirmative and full testimony from, that your equivocation or unwillingness to become involved on behalf of Sequim Valley Ranch damages the case our legal team has worked hard to build, then I will have to make the determination whether it is workable for me to run the ranch with staff that can't be counted on when the ranch really needs them."

The newspaper quoted from both letters, but omitted the portion from the first sentence above stating that "you are asked only to testify to what you believe to the best of your knowledge is true."

The trial court granted a 12(b)(6) motion to dismiss, holding that the article was a fair summary of an official judicial proceeding.

Appeals Court Decision

On appeal plaintiff raised for the first time the argument that the privilege should not apply because the protective order had only been filed with the court and no judicial action had been taken on it. The court noted that it generally does not consider new arguments made for the first time on appeal, but stated that plaintiff's argument fails because "the fair reporting privilege attaches to pleadings even if the court has yet to act on them." Citing *O'Brien v. Tribune Publishing Co.*, 7 Wn.App. 107, 117, 499 P.2d 24 (1972).

This is the rule followed in the majority of jurisdictions that have considered the question. *See Sack on Defamation* (3d ed. 2006) § 7.3.2.2.4; *Solaia Technology, LLC v. Specialty Pub. Co.*, No. 100555, 2006 WL 1703487 (Ill. June 22, 2006). But this rule is rejected in a comment in the Restatement which would require judicial action "to prevent implementation of a scheme to file a complaint for the purpose of establishing a privilege to publicize its content and then dropping the action." *See Restatement (Second) Torts* § 611 cmt. e. (1977).

Fair Report Privilege Applied

The court then compared the newspaper article to the court filing and concluded it was a fair and accurate summary. The court rejected plaintiff's argument that the newspaper had completely reversed the meaning of his letter by omitting the portion of it which stated "you are asked only to testify to what you believe to the best of your knowledge is true."

Read in context, this was not "an exhortation to tell the truth." Moreover, the clear gist of the pleading was

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that a former employee flatly accused him of instructing employees to commit perjury.

> "[T]o finely parse the sentence, as Clapp and Sequim Valley urge, would largely destroy the First Amendment protection of the fair reporting privilege. The news media should not have to worry about how a court would rewrite or edit the article in search of a perfect balance between the litigants. Our role in applying the fair reporting privilege is simply to ask whether the article in general fairly summarizes the court documents. As we have explained, it does."

2007 WL 102504 at *4.

Bruce E.H. Johnson, Davis Wright Tremaine, in Seattle, represented the defendant. Plaintiff was represented by Rodney Q. Fonda, Melissa O'Loughlin of White, Cozen O'Connor, in Seattle.

Amici curiae Allied Daily Newspapers of Washington et al. were represented by Signe Brunstad, Seattle. Amici or respondents may move to have the decision published

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Reporter's Research Of Forum Law Supports Exercise of Personal Jurisdiction

But Court Grants Forum Non Conveniens Motion

By Paul C. Watler

A South Carolina reporter's Internet research of Texas wiretap laws supported a finding of personal jurisdiction over her in Texas in a suit brought by a neurosurgeon who complained he was libeled by a series of reports on "Bad Medicine." *Epstein v. Gray Television, Inc.*, No. 06-CV-431 (W.D. Tex. Jan. 5, 2007) (Furgeson, J.).

Despite finding personal jurisdiction in Texas, Judge Furgeson ordered the case transferred to South Carolina as a more convenient forum.

Background

The suit was brought by Dr. Franklin M. Epstein, chief of neurosurgery at South Texas Veteran's Administration Hospital in San Antonio. Dr. Epstein alleged he was libeled by a series of reports broadcast in November and December, 2005 and February, 2006 by WRDW-TV of the Aiken, South Carolina-Augusta, Georgia market, which focused on lawsuits against the doctor by former South Carolina patients.

Plaintiff moved in 2003 to Texas from South Carolina, where he had practiced neurosurgery for 15 years. The WRDW-TV reports indicated that at least 11 malpractice or personal injury cases had been filed against the plaintiff while practicing in Aiken County, South Carolina. While at least five of these claims had settled at the time of the broadcasts, the reports highlighted a 1998 malpractice suit against plaintiff resulting in a $3 million verdict.

The series included on-air interviews with several of the plaintiff's former patients and part three informed viewers of a proposed investigation of plaintiff by the Veteran's Administration Inspector General. In addition to over-the-air broadcasts of the series, the station posted versions of the reports on its website. Dr. Epstein contended that the web postings were viewed by family and colleagues in Texas.

The reports were prepared by WRDW-TV reporter Domonique Benn, then a resident of Georgia. She interviewed many sources including former patients in South Carolina but also sought information from Texas sources. Benn interviewed the plaintiff by telephone call from South Carolina to Texas. Before recording this telephone call, Benn used the Reporter's Committee for Freedom of the Press website to research Texas law on the consent requirements for taping telephone conversations. She also searched the Texas Medical Board website for claims against plaintiff.

Personal Jurisdiction

The Court found that though the broadcasts only reached the WRDW-TV coverage area in South Carolina and Georgia, Benn's actions exceeded that geographical region. Benn reported concerns that citizens of San Antonio were unaware of plaintiff's South Carolina malpractice cases and she questioned the plaintiff's reporting of his history to the Texas Board of Medical Examiners and the Veteran's Administration. The VA began an investigation of the plaintiff in Texas after Benn supplied the agency with copies of the web postings and video. Benn sent a videotape of the broadcast to a San Antonio television station.

Judge Furgeson began the analysis of Benn's motion to dismiss for lack of personal jurisdiction by looking to the "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984). The opinion noted that under *Calder* a forum state may exercise jurisdiction when the defendant expressly aims allegedly tortious acts at the forum state, such that the forum serves as the focal point for the effects of the conduct.

The Court also looked to the Fifth Circuit's application of *Calder* in *Revel v. Lidov*, 317 F.3d 467 (5th Circ. 2002). In *Revel*, the 5th Circuit refused to permit personal jurisdiction based solely on the posting of an allegedly defamatory article on a website where the article contained no references to Texas or to the Texas activities of the plaintiff. Judge Furgeson found the case at bar "something of a mix between the facts of *Calder* and *Revel*."

The Court noted that the broadcast primarily focused on plaintiff's South Carolina's activities and was predominantly based on South Carolina sources. The Court noted that Benn urged the Court to deny jurisdiction based on *Young v. New*

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Haven Advocate, 315 F.3d 256 (4th Cir. 2002). In *Young*, the 4th Circuit rejected personal jurisdiction based on articles posted on the Internet, finding that the articles were not targeted at the forum state. However, the Court distinguished *Young* by focusing on the direct harm alleged to the plaintiff in Texas. The Court found that Benn interacted with the state of Texas more directly than the defendants in *Young*, including by sending the video tapes to the television station in San Antonio.

Perhaps the decisive factor found by the Court was that Benn reasonably anticipated being held into a Texas court. Judge Furgeson reached this conclusion based on the fact that the reporter had researched Texas consent law concerning recording telephone conversations before she interviewed plaintiff by long-distance. In doing so, "Defendant Benn purposely availed herself of the benefits and protections of the state of Texas."

The reporter had researched Texas consent law concerning recording telephone conversations before she interviewed plaintiff. In doing so, "Defendant Benn purposely availed herself of the benefits and protections of the state."

Motion for Transfer

Having found personal jurisdiction over Benn, the Court next turned in a separate order to the motions by Gray Television, Inc. and Gray Television Group, Inc., the parent corporations of WRDW, and of Benn to transfer the case to South Carolina under 28 U.S.C. § 1404(a). (The Gray corporate defendants did not contest personal jurisdiction; the group indirectly owns three Texas television stations.)

In determining the motion to transfer venue, the Court first found that venue would be proper in the district of South Carolina as a district where the action might have been brought and in which a substantial part of the events giving rise to the claim occurred.

The Court next proceeded to balance the public and private interests contemplated in Section 1404(a). Finding that while San Antonio was more convenient for the plaintiff, the Court concluded that South Carolina was more convenient for most others involved in the case.

Of all the factors in determining venue, the convenience of non-party witnesses strikes this Court as particularly important. Specifically, a Court should focus on the convenience of key non-party witnesses. In a libel case, the key non-party witnesses are those having knowledge relevant to the liability of the defendant. The witnesses which will testify as to liability in this case are those that can shed light on the issues of falsity of the Bad Medicine report in the negligence or malice of the defendant to making the allegedly defamatory statements. Those witnesses -- patients, former patients, former colleagues, colleagues of Defendant Benn, employees of WRDW-TV, the interviewees in the report -- overwhelmingly reside in South Carolina.

After discussing various other public and private factors, the Court determined to grant the motion of the Gray Defendants' to transfer venue to South Carolina.

Paul C. Watler of Jenkens & Gilchrist in Dallas, Texas represented the media defendants in this case. Plaintiff was represented by Joe Chumlea of Bragg Chumlea McQuality, in Dallas.

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Ohio Appeals Court Denies Street Preacher's Libel Appeal

By Kevin T. Shook

An Ohio appellate court recently affirmed a trial court decision granting two media defendants summary judgment against libel claims brought by an "open-air street preacher." *Spingola v. Sinclair Media II, Inc.*, No. 06AP-402, 2006-Ohio-6950, 2006 WL 3805680 (Franklin County App. Dec. 28, 2006) (Brown, J.).

Background

The case related to Sinclair Media II, Inc.'s (TV6) and Outlet Broadcasting, Inc.'s (TV4) coverage of Charles Spingola's arrest after he burned a gay pride flag at the 2001 Pride Parade in Columbus.

Spingola argued that the TV6 news report that "violence erupted," a "fight" occurred, and Spingola "would be charged with a felony - either aggravated assault or arson," were defamatory. Similarly, Spingola claimed that he was defamed by TV4's statement that "Spingola sprayed [a security guard] with gasoline" and would be charged with "either aggravated assault or aggravated arson." In an attempt to defeat the media defendants' motions for summary judgment, Spingola filed affidavits in the trial court that disputed the accuracy of these reports. Significantly, Mr. Spingola stipulated in the trial court that he was a "limited purpose public figure" and he was therefore required to prove that TV6 and TV4 reported the events at the parade with "actual malice," defined as "reckless disregard for the truth." The Court of Appeals affirmed the trial court's decision because there was no evidence that either media defendant reported the news with actual malice.

No Actual Malice

The Court found that both TV6 and TV4 reports that Mr. Spingola would be charged with certain crimes were based upon interviews with "trusted" and "reliable" sources, such as the City of Columbus police, fire department and prosecutor. The fact that the City changed its mind and eventually charged Spingola with different crimes (for which Spingola was acquitted) did not mean that TV6 and TV4 recklessly disregarded the truth.

Similarly, the Court found that the TV6 statements that "violence erupted" and a "fight" occurred were "reasonable interpretations of the entire incident," both in the "physical and non-physical senses of the words." As the Court noted, Spingola himself stated in his interview at the scene that he was going "to fight them" and the undisputed video showed "an angry crowd screaming" and the "police very forcefully taking the flag from two teenage girls."

With respect to TV4's statement that a security guard claimed Spingola sprayed her with gasoline, the Court stated that the issue was not whether the security guard was actually sprayed with gas. The issue was whether the TV4 reporter knew Spingola did not spray gasoline or recklessly disregarded the truth.

The Court found that TV4 did not recklessly disregard the truth because TV4's reporter testified that she was also sprayed with gasoline and she witnessed the security guard screaming and paramedics washing the security guard's legs.

The decision is good precedent for media defendants seeking to establish that public figure libel plaintiffs are required to do much more than file self-serving affidavits denying the accuracy of a news report.

Kevin T. Shook is an attorney at Frost Brown Todd LLC in Columbus, Ohio. Susan Grogan Faller, Dick Goehler and Mr. Shook represented the media defendants in the Spingola litigation. Plaintiff was represented by Thomas W. Conditt.

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Georgia Trial Court Dismisses City Manager's Libel Suit Against Local Newspaper and its Reporters

By Lesli Gaither

On January 5, 2007, the Superior Court of Richmond County, Georgia, Judge Carlisle Overstreet, granted summary judgment against a city manager who alleged he was wrongfully accused of drug use and being connected to a local man's death. *Torrance v. Suwyn et al.*, No. 2004-RCCV-390 (Richmond Co. Super. Ct. Jan. 5, 2007).

Background

In 2003, the *Savannah Morning News* published a series of articles entitled "Justice Betrayed" that chronicled the 1997 death of a 28 year-old man found at the bottom of a pool at the home of the city attorney, and the ensuing investigation by the police and Georgia Bureau of Investigation. Part of the series addressed the belief that the deceased had been outside the window of the daughter of the plaintiff, city manager William Torrance, the night before he died.

The articles communicated true or privileged facts and raised relevant questions, but stated no conclusions."

(Torrance's daughter had also filed an action against the same defendants. The trial court granted summary judgment in favor of the defendants, which was affirmed on appeal. *Torrance v. Morris Publ'g Group*, 2006 Ga. App. LEXIS 1172 (2006)).

Torrance filed suit against the *Morning News* and certain of its reporters, alleging, among other things, that the articles improperly reported that Torrance:

(1) was the subject of a "probe" or "investigation" by the Georgia Bureau of Investigations for cocaine use;
(2) was rumored to be involved with drugs while working in another city, "then let go by a divided city council";
(3) "used the transcripts" of home telephone calls intercepted by a police scanner "to get [the investigator] removed from the investigations";
(4) was "question[ed] the afternoon Dickerson's body was discovered," but later "denied he was interviewed by the" Georgia Bureau of Investigations; and
(5) informed "police he chased away a shadowy figure he thinks was Dickerson from the bedroom window of [his] teenage daughter."

Overall, Torrance asserted that the articles, both in specific statements and by implication, portrayed Torrance as being illegally involved with cocaine and with the death of the found man.

The Court's Decision

Having been previously found to be a public figure by a prior court (before removal to Richmond County), the court emphasized the "extremely high" standard of proof required of any public figure in a defamation action and the necessity that the plaintiff "pierce" the statements of the reporters that there was no actual malice.

Using this standard, the court first rejected Torrance's "overriding contention of actual malice" stemming from the reporters alleged statements to Torrance, rejecting Torrance's unsupported assertion that the reporters told him he ought to be in prison for his actions.

The court then addressed each allegedly defamatory statement asserted by Torrance. The court concluded, among other things, that:

(1) the reports of Torrance's investigation for cocaine use were a privileged account of an affidavit filed in a federal court action, were unrefuted by the Bureau and therefore substantially true and lacked actual malice;
(2) the report that Torrance had been "let go" by another city counsel was substantially true based on the statements of council members;
(3) the reports of Torrance's involvement in the wiretapping of home telephone calls of a Georgia investigator were a privileged account of an affidavit filed in federal court and lacked actual malice;
(4) the reports of Torrance's daughter "let[ting] boys in through" her window were not of and concerning Torrance; and
(5) the reports relating to Torrance's knowledge of the found man's last known whereabouts and death did not support a claim for defamation because the statements raised only questions which could not be construed as defamatory and lacked actual malice.

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Finally, the Court rejected Torrance's libel by implication claim that the articles portrayed Torrance as "illegally involved with cocaine use and with the death of Henry Dickerson." The Court noted that in a libel by implication case, a public figure must show by clear and convincing proof that the defendants intended to convey the defamatory impression.

The Court found no such proof, finding that "reasonable readers could not conclude from the series of articles that the articles intended to convey that Mr. Torrance actually committed the crime of cocaine use or committed illegal acts in connection with the death of Henry Dickerson. The articles communicated true or privileged facts and raised relevant questions, but stated no conclusions."

Lesli Gaither is an associate in the Atlanta offices of Dow Lohnes. David E. Hudson of Hull, Towill, Norman, Barrett & Salley, P.C. represented the defendants. The plaintiff was represented by Brent J. Savage of Savage, Turner, Pinson & Karsman.

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Radio Station Gets TRO Against Toledo Mayor

Denial of Access to Public Press Conferences a Likely First Amendment Violation

On January 16, U.S. District Judge James G. Carr, of the Northern District of Ohio, granted a temporary restraining order to Toledo's WSPD Radio 1370, ordering that the station and its reporter, Kevin Milliken, be provided regular access to public press conferences. *Citicasters Co., d/b/a WSPD, Radio 1370 v. Finkbeiner*, No. 07cv117 (N.D. Ohio Jan. 16, 2007) (Carr, J.).

The station and reporter had filed a complaint for injunctive and declaratory relief pursuant to 42 U.S.C. § 1983, in which they alleged that Toledo Mayor Carleton Finkbeiner had "instituted [a] discriminatory policy in retaliation for statements made by WSPD personnel," and was purposely excluding the reporter from otherwise public press conferences.

Background

According to the complaint, Kevin Milliken is both a news reporter for WSPD Radio 1370 and the host of "Eye on Toledo," a news talk show. As such, he and the station's news director would receive regular notice of Mayor Finkbeiner's press conferences, and Milliken would routinely attend.

In the summer of 2006, however, the WSPD plaintiffs allege that Mayor Finkbeiner "became especially upset with WSPD regarding criticisms related to the Mayor's plan to use City funds to build a bike path near his home, criticism the Mayor apparently believed was unfair."

The WSPD plaintiffs allege that because of these comments, Mayor Finkbeiner "instituted a policy whereby WSPD was no longer notified of City officials' public news conferences." The mayor also allegedly "forbade" Kevin Milliken from attending these news conferences, though other media outlets and members would continue to receive routine notification.

The mayor's spokesman, Brian Schwartz – also a defendant in the case – was allegedly charged with implementing this "policy," and plaintiffs provide, as an appendix to the complaint, a copy of an email between spokesman Schwartz and the WSPD news director, in which Schwartz states: "I will notify who I choose to notify about press conferences."

§ 1983 Complaint

As to specific allegations, the WSPD plaintiffs claim that Schwartz and others refused Milliken entrance to Mayor Finkbeiner's Martin Luther King, Jr. Day press conference, on January 9, 2007. They also argue that, on the following day, Schwartz attempted to deny Milliken access to the mayor's public press conference on Toldeo's economic developments, and that when Milliken and WSPD staffers made it into the conference room "the Mayor cancelled the press conference and instead met individually with selected members of the media, again excluding Mr. Milliken."

Following this treatment, WSPD and Milliken brought suit in the Northern District of Ohio, alleging that they had been discriminated against by government officials, acting under color of state law, in contravention of § 1983 and in violation of the First and Fourteenth Amendments.

WSPD showed a strong likelihood of success on the merits.

Temporary Restraining Order

The plaintiffs also moved for a temporary restraining order against the mayor and his spokesman. They argued that Mayor Finkbeiner was discriminating against the station because of the nature of Miliken's reports, and that denying the station the equal access to a press conference for that reason constituted a First Amendment violation.

"A policy that discriminates against particular reporters or news organizations by public officials who are dissatisfied with the contents of news coverage is unconstitutional unless the policy furthers a compelling state interest and is the least restrictive means available to achieve the asserted governmental purpose," plaintiffs argued. (quoting *Times-Picayune Publ'g Corp. v. Lee*, No. 88-1325, 1988 U.S. Dist. LEXIS 3406 (E.D. La. April 15, 1988)). Mayor Finkbeiner, WSPD claimed, would not be able to meet that burden.

Further, exclusion from the press conferences was an "irreparable harm" for Milliken and WSPD Radio: "As a reporter, Mr. Milliken suffers real harm, which is not subject to redress through money damages, each and every

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Radio Station Gets TRO Against Toledo Mayor

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time the Defendants wrongfully deny him access to a press conference."

Public interest, too, weighed in favor of a TRO, for as plaintiffs argued, "public interest is served by allowing all members of the media, especially those that disagree with the Mayor's viewpoint, to attend the City's public press conferences and to report on the information obtained there – free from retaliation by the Mayor and the City."

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

Mayor Finkbeiner and Mr. Schwartz were also directed to notify the agents and employees of the City of Toledo of the TRO, and "notify them to observe its limitations, restrictions and requirements."

Plaintiffs are represented by the firm of Shumaker, Loop and Kendrick in Toledo, Ohio.

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Pennsylvania Supreme Court Nixes Surrender of Newspapers' Computer Hard Drives

By Robert C. Clothier

The Pennsylvania Supreme Court last year reversed a judge's order requiring several Pennsylvania newspapers to surrender two of their reporters' computer hard drives to the state attorney general and also vacated the judge's $1,000 per day contempt sanction against the papers. *In re 24th Statewide Investigating Grand Jury*, 907 A.2d 505, 35 Media L. Rep. 1054 (Pa. 2006) (Cappy, C.J., Castille, Newman, Saylor, Baer & Baldwin, JJ.)

The Court found that the outright surrender of the hard drives was overbroad and presented a "chilling effect" on the reporters' ability to gather information and utilize confidential sources. The Court, however, did not foreclose the use of a "neutral, court-appointed expert" to review the hard drives for information relevant to the grand jury's investigation.

While the result was a modest victory for the media, the legal grounds for the Court's ruling were far from clear. The newspapers argued that the surrender of the hard drives violated the First Amendment to the U.S. Constitution, the First Amendment Privacy Act, 40 U.S.C. §§ 2000aa-2000aa-12, and the Pennsylvania Shield Law, § 5942.

The Court did not address these arguments in its decision, instead referencing general First Amendment concerns that are "heightened" when materials are sought from the "news media."

The Grand Jury Subpoenas

The grand jury subpoenas arose out of a probe by the attorney general into a county coroner's dealings with the press. A statewide grand jury subsequently investigated whether the coroner gave reporters for the *Intelligencer Journal* his password to a part of the county's website restricted to law enforcement and other authorized persons. (No charges have been filed, and the coroner has denied turning over the password.)

In early 2006, Lancaster Newspapers, Inc., which owns the Lancaster *Intelligencer Journal*, the Lancaster *New Era* and the Lancaster *Sunday News*, was served with a subpoena demanding the production of four computer workstations. Though the newspapers' motion to quash was denied, the supervising judge permitted review of the hard drives only for historical information concerning internet access. The papers appealed to the Pennsylvania Supreme Court, which, in a prior decision, ruled that it lacked jurisdiction because the papers were never held in contempt.

Later in 2006, the attorney general procured additional subpoenas for two more computers. The newspapers offered to give the investigators printed versions of the items they requested, including emails, but prosecutors turned down the offer because they wanted to scan the computers for additional information.

Petition to Quash

The newspapers and reporters responded by filing a petition to quash the grand jury investigation, arguing that the subject matter was not appropriate for a statewide investigating grand jury. That petition was denied. The newspapers and reporters also filed a motion to quash the subpoenas, and that motion was also denied, though the judge again limited the Attorney General's search of the hard drives to Internet history and cached content of the hard drives. This time, the newspaper refused to comply with the order and was held in contempt. The judge imposed a sanction of $1,000 per day.

The newspapers and reporter filed with the Pennsylvania Supreme Court an emergency application for review. In addition to arguing that the grand jury lacked authority, they claimed, on the merits, that the grand jury subpoena was "overbroad" in that, by ordering the surrender of entire hard drives, it required the production of information irrelevant to the grand jury investigation.

The newspapers asserted that such a production would have a "chilling effect" on their ability to gather information and utilize confidential sources because, even though the information relevant to the grand jury investigation (Internet history, cached content) did not implicate confidential course, the other information on the hard drives had to have such information. The papers argued that less intrusive means were available to obtain the information sought by the subpoenas.

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The newspapers asserted four legal grounds. First, they claimed that the subpoena violated the First Amendment Privacy Protection Act, 40 U.S.C. §§ 2000aa-2000aa-12, which they said makes it unlawful for a governmental entity to "search for or seize" a newspaper's "work product materials" in connection with the investigation of an alleged crime if the crime consists of the newspaper's possession or access to the materials or information contained therein.

Second, they argued that the subpoena sought confidential source information on the hard drives that is absolutely protected from disclosure under the Pennsylvania Shield Law, § 5942, citing *In re Taylor*, 193 A.2d 181 (Pa. 1963).

Third, they argued that the subpoena violated the First Amendment reporter's privilege because the hard drives contained confidential source information and the attorney general made no showing of a sufficient need for that information to overcome the privilege.

Lastly, they argued that the subpoena would intrude on the newspaper's First Amendment right to newsgathering set forth in *Branzburg v. Hayes*, 408 U.S. 665 (1972).

In response, the state attorney general contended that the newspapers had failed to offer "one shred of evidence" that the computer hard drives contained protected information, that the newspapers had conceded that the information specifically sought was not protected, and that the judge's safeguards were adequate.

Pennsylvania Supreme Court Decision

In a decision authored by Justice Thomas Saylor, the Supreme Court first rejected the newspapers' contention that the statewide supervising grand jury lacked jurisdiction. Turning to the merits, the Court agreed with the newspapers' contentions.

Analogizing the surrender of hard drives to the turning over of "entire media file cabinets," the Court ruled that the judge's ruling was overbroad and that "measures were available to obtain the information subject to the investigation short of outright surrender of the hard drives to the Commonwealth," citing *In re Grand Jury Subpoena Duces Tecum*, 846 F. Supp. 11 (S.D.N.Y. 1993) (quashing as overbroad a grand jury subpoena requiring production of computer hard drives to investigate potential securities trading violations).

The Court held that "a careful balancing of the respective interests involved leads us to the conclusion that this particular method of disclosure is unduly intrusive in the circumstances presented." But the Court said that "[w]e do not foreclose ... the utilization by the supervising judge of a neutral, court-appointed expert to accomplish the forensic analysis and report specific, relevant results," as was suggested *In re Grand Jury Subpoena Duces Tecum*, 846 F. Supp. 11 (S.D.N.Y. 1993).

The dissent by Justice Castille observed that "the Majority does not specifically identify whether it bases its decision on a particular ground raised by Lancaster Newspapers, all of their constitutional and statutory arguments or some combination thereof." But, the dissent noted, the fact that the majority "adverts to a potential chilling effect and overbreadth ... suggests that the decision is powered by First Amendment concerns."

The dissent, however, believed that none of the subpoenaed information "is protected by any of the privileges claimed by the newspapers, a point the newspapers conceded below," and believed that the safeguards adopted by the supervising judge "were perfectly reasonable."

Justice Castille concluded: "In my mind, the fact that the subpoena could be narrower and more to the liking of the newspapers does not render it unconstitutional."

Robert C. Clothier is a partner in the Philadelphia office of Fox Rothschild LLP. Media counsel in the case were George Werner of Barley Snyder in Lancaster, William DeStefano of Buchanan Ingersoll & Rooney in Philadelphia, and Ted Chylack of Sprague & Sprague in Philadelphia.

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Government Drops Subpoena to ACLU Seeking Return of Classified Document

By Charles Sims, Emily Stern & Elizabeth Figueira

On December 21, 2006, U.S. District Court Judge Jed S. Rakoff issued a final order closing a whirlwind case where federal prosecutors had attempted unsuccessfully to pressure the ACLU to turn over a classified document, and then sought to accomplish that same goal with an overbroad grand jury subpoena. *In re Grand Jury Subpoena Served on the ACLU*, Order, No. M11-188 (Dec. 21, 2006).

The victory for the ACLU came less than two weeks after it filed a motion a quash a subpoena from the U.S. Attorney in the Southern District of New York demanding "any and all" copies of a document that the ACLU had received from a confidential source. The ACLU withdrew its motion after the government's suddenly declassified the document and recalled its subpoena in the midst of critical public opinion about the heavy-handed, unprecedented, and obviously unlawful subpoena.

The subpoena alleged violations of 18 U.S.C. § 793(e) of the Espionage Act, which punishes possession, distribution, or control of information relating to the national defense.

Background

In October 2006, the ACLU received the unsolicited document, and was studying it in connection with its ongoing advocacy work in civil liberties and the Administration's conduct of its war on terror. The ACLU's advocacy and educative activities makes it comparable to more traditional news agencies and entitles it to the same First Amendment protections.

Nearly a month later, the U.S. Attorney's Office for the Southern District of New York contacted the in-house counsel at the ACLU, demanding the return of the classified document. After ensuing conversations with the Assistant U.S. attorney, it became apparent that the government already had a copy of the document in its possession and also knew the source who had originally provided the document to the ACLU.

When the ACLU refused to return the document to the government without legal intervention, the U.S. Attorney's Office served the organization with a subpoena demanding "any and all copies" of the specific document. The subpoena alleged violations of 18 U.S.C. § 793(e) of the Espionage Act, which punishes possession, distribution, or control of information relating to the national defense.

As the two sides conversed, it became clear that the all-inclusive language of the subpoena sought to eliminate all copies from the ACLU's files, precluding the ACLU and its counsel even from retaining a copy of what might, for example, be provided in compliance with the subpoena – a request unheard in the case law or treatises on grand jury practice, which routinely advise that counsel's retention of an exact copy of any materials submitted in response to subpoenas is essential.

Motion to Quash

Believing the subpoena to be an illegitimate use of the broad grand jury powers, the ACLU filed a motion to quash the subpoena on December 11, 2006. The ACLU argued that the subpoena exceeded the traditional investigatory powers extended to grand juries by requiring the organization to surrender "any and all" copies of the classified document.

The filing papers described how enforcement of a subpoena would act as a prior restraint on speech and would allow the government to avoid the rule of the *Pentagon Papers* case, which prevents the government from obtaining an injunction barring publication of classified documents unless publication would cause "direct, immediate, and irreparable damage to our Nation or its people."

The ACLU also maintained that the request for even one copy of the document the rules established by *Branzburg v. Hayes*, which (in Justice White's majority opinion, echoed by Justice Powell's concurrence) prohibits government entities from using the grand jury investigatory powers to harass or impede First Amendment activity.

While the motion did not need to rely on the broader privilege that many courts discerned in *Branzburg*, which have lately been under attack, the motion noted that Second Circuit precedent, reviewed in *New York Times v. Gonzales*, 459 F.3d 160 (2d Cir. 2006), also supported quashing the subpoena.

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The ACLU asserted that the demand for "any and all copies" was inescapably suppressive and confiscatory, not investigatory, noting that in that the Assistant U.S. Attorney already knew the contents of the document and the source who provided the document to the ACLU.

The government argued from the outset that the motion to quash and all proceedings should be secret; but after a hearing held on the day of filing the district court ordered that the ACLU's motion could be publicly filed, and advised the government that it would want to see the document (which the ACLU had contended was grossly misclassified) in connection with its decision on the merits of the motion to quash.

At the moment when the government's brief on the motion to quash was due, the government submitted, in lieu of a brief opposing the motion, a letter to the court advising that it had decided over the weekend to declassify the document and withdraw the subpoena, and urging the dismissal of the motion as moot.

The ACLU declined to agree that the matter was moot as a matter of law, but withdrew its motion in view of having received all the relief it had sought. The document that days before was too dangerous to leave in the ACLU's files was published over the Internet that same afternoon.

Charles Sims of Proskauer Rose represented the ACLU in this matter.

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Congress Passes Telephone Records and Privacy Protection Act of 2006

Law Prohibits "Pretexting" and Fraudulent Attempts to Obtain and Sell Phone Records

Last fall, revelations regarding Hewlett-Packard's alleged spying on members of the press spurred Congressional hearings and a renewed interest in protecting the privacy of telephone records. *See MediaLawLetter* Oct. 2006 at 57-58.

Protection of telephone records and information became the subject of legislation in California – where former Hewlett-Packard Chairwoman Patricia Dunn and others – were charged with various criminal fraud and privacy-related charges – Cal. Penal Code § 638 (2006), and in New York, N.Y. Gen. Bus. Law § 399-dd(2) (2006). At that time, federal legislation, in the form of H.R. 4709, "The Telephone Records and Privacy Protection Act of 2006," was still awaiting action by the Senate.

New Federal Law

H.R. 4709 became law on January 12, 2007. Congress cited the need to prevent "pretexting," which it defined as a method "whereby a data broker or other person represents that they are an authorized consumer and convinces an agent of the telephone company to release the data[.]"

Also listed in the Congressional findings were the observations that "call logs may include a wealth of personal data[]" and "may reveal the names of telephone users' doctors, public and private relationships, business associates, and more."

The unauthorized release of such information could further crime and domestic violence and place in danger confidential informants, members of law enforcement, victims of crime and potential witnesses.

Finally, the Congress found that "pretexting" has occurred, and telephone record information has also been fraudulently obtained both via the Internet, by improperly using a phone company's website, and by "telephone company employees selling data to unauthorized data brokers[.]"

The new law specifically protects the "confidential phone records information" maintained by a "telecommunications carrier" (47 U.S.C. 153 § 3) or "IP-enabled voice service. "Confidential phone records information" is defined as information "relat[ing] to the quantity, technical configuration, type, destination, location, or amount of use of a service offered by a covered entity, subscribed to by any customer of that covered entity, and kept by or on behalf of that covered entity solely by virtue of the relationship between that covered entity and the customer[.]" It also includes the information included in a bill, itemization or account statement that the telecommunications carrier provides to the customer.

The new law adds the following section to 18 U.S.C. 47 ("Fraud and False Statements"):

Sec. 1039. Fraud and related activity in connection with obtaining confidential phone records information of a covered entity

(a) Criminal Violation- Whoever, in interstate or foreign commerce, knowingly and intentionally obtains, or attempts to obtain, confidential phone records information of a covered entity, by--

(1) making false or fraudulent statements or representations to an employee of a covered entity;
(2) making such false or fraudulent statements or representations to a customer of a covered entity;
(3) providing a document to a covered entity knowing that such document is false or fraudulent; or
(4) accessing customer accounts of a covered entity via the Internet, or by means of conduct that violates section 1030 of this title, without prior authorization from the customer to whom such confidential phone records information relates;
(5) shall be fined under this title, imprisoned for not more than 10 years, or both.

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(b) Prohibition on Sale or Transfer of Confidential Phone Records Information-

(1) Except as otherwise permitted by applicable law, whoever, in interstate or foreign commerce, knowingly and intentionally sells or transfers, or attempts to sell or transfer, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information relates, or knowing or having reason to know such information was obtained fraudulently, shall be fined under this title, imprisoned not more than 10 years, or both.

(2) For purposes of this subsection, the exceptions specified in section 222(d) of the Communications Act of 1934 shall apply for the use of confidential phone records information by any covered entity, as defined in subsection (h).

(c) Prohibition on Purchase or Receipt of Confidential Phone Records Information-

(1) Except as otherwise permitted by applicable law, whoever, in interstate or foreign commerce, knowingly and intentionally purchases or receives, or attempts to purchase or receive, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information relates, or knowing or having reason to know such information was obtained fraudulently, shall be fined under this title, imprisoned not more than 10 years, or both.

(2) For purposes of this subsection, the exceptions specified in section 222(d) of the Communications Act of 1934 shall apply for the use of confidential phone records information by any covered entity, as defined in subsection (h).

(d) Enhanced Penalties for Aggravated Cases- Whoever violates, or attempts to violate, subsection (a), (b), or (c) while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000, or more than 50 customers of a covered entity, in a 12-month period shall, in addition to the penalties provided for in such subsection, be fined twice the amount provided in subsection (b)(3) or (c)(3) (as the case may be) of section 3571 of this title, imprisoned for not more than 5 years, or both.

(e) Enhanced Penalties for Use of Information in Furtherance of Certain Criminal Offenses-

(1) Whoever, violates, or attempts to violate, subsection (a), (b), or (c) knowing that such information may be used in furtherance of, or with the intent to commit, an offense described in section 2261, 2261A, 2262, or any other crime of violence shall, in addition to the penalties provided for in such subsection, be fined under this title and imprisoned not more than 5 years.

(2) Whoever, violates, or attempts to violate, subsection (a), (b), or (c) knowing that such information may be used in furtherance of, or with the intent to commit, an offense under section 111, 115, 1114, 1503, 1512, 1513, or to intimidate, threaten, harass, injure, or kill any Federal, State, or local law enforcement officer shall, in addition to the penalties provided for in such subsection, be fined under this title and imprisoned not more than 5 years.

(f) Extraterritorial Jurisdiction- There is extraterritorial jurisdiction over an offense under this section.

(g) Nonapplicability to Law Enforcement Agencies- This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or political subdivision of a State, or of an intelligence agency of the United States.

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"Bragging Rights"

By Len Niehoff

One of the nation's leading media lawyers wins a big libel case. Her newspaper client publishes a short series of articles about the victory, recounting how things unfolded in the courtroom and profiling their attorney in glowing terms. In order to share some of the lessons learned in the course of the litigation with existing clients – and to promote herself to prospective clients – she mails her firm's brochure, her business card, and copies of the articles to a long list of media entities she represents or would like to represent. As a champion of free speech it never occurs to her that this republication of truthful information could run afoul of any valid state law or regulation. And then one day she receives a letter from the state bar association taking a disturbingly different position.

If this seems far fetched, then consider the case of *Florida Bar v. Gold* (No. SC04-1661, 2006). That case concerned one Mark Stephen Gold, a Florida lawyer whose practice focused on the defense of traffic and DUI charges and whose firm operated under the name "The Ticket Clinic." To secure clients, Gold obtained the names and addresses of those charged with traffic offenses from the clerk, mailed them a promotional brochure, and included in the envelope copies of three undated newspaper articles discussing him and his successes. The Florida bar charged Gold with violating several rules, the relevant ones for present purposes being Rule 4-7.2(b)(1)(B) and 4-7.2(b)(3). As the state Supreme Court noted, these rules define "statements that refer to past successes or results obtained, statements likely to create an unjustified expectation about the results the lawyer can achieve, and statements describing or characterizing the quality of the lawyer's services as inherently false, misleading, deceptive or unfair." The referee below concluded that the contents of the brochure were constitutionally protected and so granted summary judgment to Gold with respect to these alleged rule violations. The Florida Supreme Court disagreed.

The Court went a good deal further by suggesting that when an attorney includes a newspaper article in a mailing circulated for promotional purposes he or she "adopts" its contents in whole and converts it into "advertising copy."

The Court acknowledged that the initial publication of independently authored news articles does not violate the rules. "However," the Court cautioned, "we have never held that republication or circulation of news articles in direct mail solicitations completely insulates a lawyer from prosecution for ethical misconduct under the Bar's advertising rules." "In this instance," the Court added, "it is apparent that by taking the articles and including them in a direct mail solicitation for legal representation, Gold adopted the articles' contents and made them into advertising copy." The Court concluded that "the articles' contents [thereby] became subject to the strictures of the Bar's advertising rules."

Of course, it is at least theoretically possible that an attorney's circulation of newspaper articles could raise concerns under the ethics rules. An enterprising lawyer might plant a source to make puffing statements in a report that on its face appeared independent. An article could include statements the attorney knew to be untrue – or, at least, untrue at the time of redistribution if not at the time of initial publication. The circulation of an undated report might create a misapprehension about how recently the newspaper had printed it – indeed, in Gold's case the Court seemed distressed that at least two of the articles appeared to have been published some seventeen years before the mailing of the brochure in question. These sorts of considerations might provide a basis for concern under existing standards that prohibit the use of false or misleading statements in attorney advertising. Had the Florida Supreme Court limited its reasoning in this way its decision would provide little if any cause for alarm.

But the Court went a good deal further by suggesting that when an attorney includes a newspaper article in a mailing circulated for promotional purposes he or she "adopts" its contents in whole and converts it into "advertising copy." Indeed, the Court articulated no principle that limits this reasoning to republished media reports.

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So, for example, an attorney who mailed out a copy of a judicial opinion that, in passing, said something favorable about his or her handling of the case would be deemed to have "adopted" those statements, transformed a court order into "advertising copy," and thereby done something "inherently false, misleading, deceptive or unfair." In fact, since the Florida Supreme Court extends this analysis to any description of "results obtained" the same conclusion would follow with respect to the distribution of a judicial opinion that did nothing more that demonstrate that the attorney had won the case. Of course, the Court does appear to leave room for lawyers to circulate information about their grievous mistakes and embarrassing losses since that obviously would not do much to create "unjustified expectations" of success.

Still, it does not seem necessary, quite yet, for lawyers to begin revising their mailings to ensure they trumpet nothing but the firm's failures and blunders. Surely, the Florida Court's opinion will receive some later clarification and limitation that brings it within the strictures of the First Amendment and, for that matter, common sense. Until then, attorneys may wish to exercise caution about repeating anything good that's been said about them. Alas, for many of us that is just another theoretical possibility.

Len Niehoff is a partner with Butzel Long in Ann Arbor, Michigan.

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80 Eighth Avenue, Suite 200
New York, NY 10011

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