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LIBELLETTER

June 1997

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Fifth Circuit Reverses $4.5 Million Libel Judgment Against TriStar Television Arising From "Sludge Train" Segment on "TV Nation"

By William J. Boyce

The United States Court of Appeals for the Fifth Circuit overturned a $4.5 million libel judgment against TriStar Television, Inc., holding that the "Sludge Train" segment of TriStar's "TV Nation" series on NBC was not false and was not broadcast with actual malice.

In *Peter Scalamandre & Sons, Inc. v. Kaufman*, 1997 WL 256081 (5th Cir. June 3, 1997), the Fifth Circuit rendered a take-nothing judgment against plaintiff Merco Joint Venture on its libel and disparagement claims against TriStar Television, which produced TV Nation, and Hugh B. Kaufman, an Environmental Protection Agency official and sludge critic who was quoted on the program.

TV Nation was conceived as a reality-based television show that would use humor and satire to explore public issues and current events using a "60 Minutes"-type format featuring short, individual segments. TV Nation's creator and host, Michael Moore, produced the highly successful independent documentary film "Roger and Me."

Merco comprises two New York trucking and construction companies and a third waste-hauling company. It was formed to dispose of sewage sludge generated by New York City's wastewater treatment plants after a federal court consent decree halted the practice of dumping sludge in the ocean.

The Sludge Train segment examined Merco's controversial project to ship

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New York City sewage sludge by train to Texas and spread it as a fertilizer on a cattle ranch in Sierra Blanca, a small town near El Paso. The segment included clips from interviews with Kaufman, local residents opposed to the sludge project, Merco employees, and local public officials, punctuated with commentary and observations of a TV Nation correspondent.

Merco sued TriStar for libel and business disparagement in Texas based upon the August 1994 broadcast, claiming the segment was false and unbalanced; contained unfair criticism of its sludge project; and failed to include interviews and information from pro-sludge sources. Merco stipulated to its public figure status for purposes of the lawsuit, and stipulated that its Sierra Blanca sludge project is controversial.

Merco attacked nine portions of the Sludge Train segment:

– a view attributed to Kaufman that sludge contains "high levels of lead, mercury, and PCBs;"

– Kaufman's statement that "[t]his hazardous material is not allowed to be disposed of or used for beneficial use in the state of New York and it's not allowed to be disposed of or used for beneficial use in Texas either. So what you have is an illegal haul and dump operation masquerading as an environmentally beneficial project, and it's only a masquerade;"

– Kaufman's statement that "the people in Texas are being poisoned;"

– TV Nation's "portrayal" of Kaufman as an EPA "official" and the implication that "he was speaking on behalf of EPA;"

– Kaufman's "impli[cation] that Merco improperly obtained approval for the Merco Project from the state of Texas;"

– an "impli[cation] that Merco committed arson by setting fire" to a lumberyard owned by Sierra Blanca resident and sludge opponent Billy Addington;

– Addington's statement that the odor from Merco's ranch "burns your eyes" and made his two-year-old son sick;

– a statement that "New York City sludge cake isn't made of just toilet refuse. In fact anything that goes down the drain or sewer ends up here;" and

– references by sludge opponent and Merco neighbor Sam Dodge, who called the ranch a "dumping ground," and a reference to the "Merco dump."

"Merco's objections to the 'Sludge Train' broadcast result from its tendency to stretch every implication it finds in the broadcast to its farthest limit, then draw dubious conclusions from these unrealistic interpretations. It assumes viewers will automatically reach these same illogical conclusions."

TriStar and Kaufman contended the segment presented a true and substantially true picture of the public and scientific controversy surrounding Merco's Texas sludge ranch, and that nothing in the segment was broadcast with knowledge of falsity.

A jury in Pecos, Texas returned a verdict in favor of Merco in March 1996 awarding $1 in actual damages and $4.5 million in punitive damages against TriStar; and $1 in actual damages and $500,000 in punitive damages against Kaufman, an outspoken critic of Merco's Sierra Blanca project. The district court signed a judgment awarding these amounts to Merco.

No Malice/No Falsity

Applying the independent appellate review mandated by *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984), the Fifth Circuit reversed the district court judgment because Merco had "not met its burden of proving actual malice as to either TriStar or Kaufman." *Scalamandre*, 1997 WL 256081 at *5. The court concluded that "Merco presented no proof that TriStar and Kaufman knew, or should have known, that any part of the Sludge Train' broadcast was false. Indeed, Merco failed to show any part of the broadcast actually was false." *Id.*

Under the jury charge, Merco's recovery of actual and punitive damages for both its libel and disparagement claims was predicated on a finding of actual malice. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The holding that no evidence of actual malice existed defeated both claims asserted by Merco against both defendants and

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resulted in a take-nothing judgment on appeal.

The court noted that "Merco's objections to the 'Sludge Train' broadcast result from its tendency to stretch every implication it finds in the broadcast to its farthest limit, then draw dubious conclusions from these unrealistic interpretations. It assumes viewers will automatically reach these same illogical conclusions." *Scalamandre*, 1997 WL 256081 at *5.

From there, the court analyzed the challenged statements individually. In rejecting Merco's contentions, the court made a number of helpful observations that can be applied to the defense of a wide range of defamation claims arising from public controversies — especially those involving scientific disputes.

– Kaufman's "figurative reference to 'poison' is hyperbolic, but exaggeration does not equal defamation." *Id.*

– The endorsement of a controversial practice by one expert "does not mean all reasonable debate on the merits or safety of that practice is foreclosed." *Id.*

– The vagueness of a reference to "high levels of lead, mercury and PCBs" makes actual malice more difficult to prove; moreover, the existence of articles and reports questioning the safety of sludge and its contents provided "adequate support" for the statement. *Id.*

– It was not reckless to report Billy Addington's belief that "his involvement in a contentious dispute in his hometown provided the motive" for arson. *Id.* at *6.

– "[W]hile it is true the Sludge Train' segment hardly endorsed the land application of sludge, it does not follow that TriStar libeled Merco because it chose to present an unenthusiastic account of Merco and the sludge ranch. The segment was not so onesided, or without basis in fact, as to constitute defamation." *Id.* at *7.

At trial, Merco relied heavily upon a series of videotaped exhibits in which it juxtaposed pro-sludge outtakes from TV Nation's raw footage with edited clips from the segment as broadcast that were critical of sludge and Merco's project. Merco pointed to the videotapes as evidence that TriStar intended to do a hatchet job on Merco and its project by broadcasting mostly criticism from Merco's opponents, and by using videotape editing tricks to misrepresent favorable comments from pro-Merco sources. As evidenced by the award of punitive damages, these videotapes were effective in creating juror animosity towards TriStar even in the absence of actual damages.

Highlighting the importance of independent appellate review, the Fifth Circuit dismissed the videotape evidence by observing, "It is common knowledge television programs such as TV Nation shoot more footage than necessary and edit the tape they collect down to a brief piece." *Id.* at *6. "TV Nation was entitled to edit the tape it shot to fit into the short time frame allotted to the sludge segment." *Id.*

The significance of Merco's public figure status, and the controversial nature of its sludge farm, weighed heavily in TriStar's favor on appeal. As the Fifth Circuit noted, "Merco is a public figure engaged in a controversial business and should not be shocked that some disagree with its practices." *Id.* at *7.

The Fifth Circuit concluded its actual malice analysis by noting that "TriStar and Kaufman are not liable for defamation because they refused to corroborate the Merco party line." *Id.* "Defamation law should not be used as a threat to force individuals to muzzle their truthful, reasonable opinion and beliefs. To endorse Merco's version of defamation law would be to disregard the constitutional protections that allow individuals to hold and express unpopular or unconventional opinions." *Id.*

In focusing on actual malice, the Fifth Circuit bypassed an alternative ground for reversal that would have eliminated the punitive damage awards against TriStar and Kaufman while leaving the $1 actual damage awards and the actual malice findings against them intact.

As recognized in *Brown v. Petrolite Corp.*, 965 F.2d 38, 48-49 (5th Cir. 1992), Texas law at the time of trial precluded exemplary damages when the factfinder awards only nominal actual damages. *See also Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1334-35 (5th Cir. 1993). On this basis, the $4.5 million punitive damages award against TriStar and the $500,000 award against Kaufman probably would have fallen even if the court had found evidence of actual malice in the record.

The Fifth Circuit noted in passing that it did not need to address the relationship between punitive and actual damages in light of its holding on actual malice. It nonetheless stated,

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"[O]ur resolution of this case on the ground of insufficient evidence in no way signals a retreat from the reasoning embraced" in *Brown v. Petrolite. Scalamandre*, 1997 WL 256081 at *7. The court further stated that "[s]uch a disproportionate award of punitive damages may also be unconstitutional" under *BMW of N. America, Inc. v. Gore*, 116 S.Ct. 1589 (1996).

TriStar's appeal elicited amicus curiae support from National Broadcasting Company, Inc., Dow Jones & Company, Inc., Fox, Inc. and The Texas Association of Broadcasters. Accuracy in Media, Inc. submitted an amicus brief in support of Merco.

The Fifth Circuit's opinion is available on the Internet at http://www.ca5.uscourts.gov

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Judgment N.O.V. in *MMAR v. Dow Jones*

$200 Million Punitive Award Set Aside

Liability and Punitive Award Against Reporter Upheld

A federal district court in Texas last month threw out a jury's $200 million punitive damages award in a libel case against Dow Jones & Company, Inc. The Court held that the plaintiff had failed to establish by clear and convincing evidence that Dow Jones had acted with actual malice or that any of its managerial agents had authorized or ratified the publication by a *Wall Street Journal* reporter of knowingly false statements. But the court let stand the jury's award of $22.7 million in compensatory damages to the Houston-based investment firm MMAR Group Inc., as well as $20,000 in punitive damages against the author of the article found to be defamatory. *MMAR Group v. Dow Jones & Co.*, No. H-95-1262 (S.D. Tex. May 23, 1997).

The $222.7 million verdict had been the largest ever levied against a libel defendant in the United States. Even after District Judge Ewing Werlein's decision to cut the punitive damages, the remaining $22.7 million would be one of the 10 largest libel judgments ever.

MMAR's suit stemmed from an Oct. 21, 1993 *Wall Street Journal* story written by *Journal* staff reporter Laura Jereski. The story reported on state and federal investigations into MMAR's business relations with its largest client and particularly on whether MMAR, which specialized in mortgage-backed securities, had contributed to losses suffered by Lousiana's state pension fund.

Standard of Review for the Jury's Verdict

After the jury returned its verdict, Dow Jones moved for a judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure, challenging the jury's finding of liability as well as its awards of compensatory and punitive damages. *MMAR slip op* at 1, 4, 7, 22. The general standard for deciding such a motion, Judge Werlein noted, is whether, given all the evidence, a reasonable jury could have found for the non-moving party. *Slip op.* at 1-2, *citing Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc). Under this standard, Judge Werlein gave "great deference" to the jury on the issues of liability and compensatory damages. *Id.* at 3, *citing Gross v. Black & Decker (U.S.), Inc.*, 695 F.2d 858, 865 (5th Cir. 1983).

But the district judge indicated that he would apply a more stringent standard of review to the jury's verdict on punitive damages, apparently following the United States Supreme Court's holding in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 515 (1984) that, in reviewing a finding of actual malice, a court must "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity" to ensure that the verdict accords with the constitutional standard set forth in *New York Times Co. v. Sullivan*, 84 S.Ct. 710 (1964). While not mentioning *Bose Corp.* directly, Judge Werlein seemed to adopt a version of its "independent appellate review" standard on the punitive damages issue by way of the Fifth Circuit's decision in *Brown v. Petrolite Corp.*, 965 F.2d 38 (1992). In *Brown*, the Fifth Circuit held that in a libel case, a reviewing court must not "defer to the jury but, instead, must conduct an independent review of the record to determine whether it presents clear and convincing evidence of [the defendant's] actual malice." *MMAR slip op.* at 7-8, *citing Brown*, 965 F.2d at 46.

But MMAR did not have to prove actual malice--nor, importantly, survive independent review of its evidence--to collect compensatory damages. *Slip op.* at 4. Judge Werlein had found earlier in the litigation that MMAR was a private figure. Under Texas law, MMAR merely had to show that Dow Jones and Jereski were negligent in publishing the libelous state-

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ments in order to win compensatory damages. *Id.* And the jury's verdict on liability and compensatory damages would stand, Judge Werlein said, if "there was substantial evidence of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions" on those issues. *Id.*

The Punitive Awards

Under Texas law, punitive damages cannot be awarded against a corporate entity simply on the basis of *respondeat superior*. Citing Texas cases, one of which dated back more than 70 years, Judge Werlein held that "Texas law precludes the imposition of punitive damages upon the publisher of a libelous statement without independent proof that the publisher, here the corporation, authorized or ratified the publication with the requisite state of mind." *Id.* at 9. The Texas standard, as articulated by Judge Werlein in the context of constitutional libel law, meant that for MMAR to win punitive damages, the bond firm needed to show by clear and convincing evidence that Dow Jones as a company, or one of its "managerial agents," had acted with actual malice in publishing the defamatory statements. *Id.* at 8, 11.

In striking the $200 million in punitives, the court first observed that Jereski had worked for only seven months as a reporter at the Journal, and wasn't a managerial agent. *Id.* at 12. The next question was whether Jereski was an unfit journalist, such that Dow Jones had been reckless in employing her to write the article. *Id.* Judge Werlein noted that Jereski had reported or edited stories about business and finance for *Forbes* and *Business Week* for eight years before coming to the Journal, and brushed aside MMAR's argument that Jereski was unfit because she never had taken formal journalism classes. *Id.* at 12-13. The accuracy of Jereski's Journal stories had never been questioned before, the judge added, and there wasn't "a scintilla of evidence" that Dow Jones had been reckless to employ Jereski. *Id.* at 13.

No Malice in Actions of Editors

MMAR also argued that Journal editors had acted with actual malice when they approved two of the five statements that the jury had found libelous. *Id.* at 14. The bond firm said that Jonathan Clements, a Journal reporter who helped edit Jereski's story, had authorized Jereski to include in her article a former MMAR employee's statement that MMAR had run up $2 million in limousine bills in one year, even though Clements had a high degree of awareness of the statement's probable falsity. *Id.* Judge Werlein, after expressing doubt that Clements was a managerial agent (*Id.* at 11, n.1), assumed for the sake of argument that Clements did have managing authority. *Id.* at 15. The judge found no evidence that Clements had asked Jereski about the limousine bill statement (which Jereski had included to illustrate MMAR's "free-wheeling atmosphere"). *Id.* at 15. Under *Harte-Hanks Communications, Inc. v. Connaughton*, 105 S.Ct. 2678, and its progeny, Judge Werlein held, Clements's failure to investigate didn't establish reckless disregard. *Id.* at 15-16.

MMAR argued that Clements and another editor, Gay Miller, had acted with actual malice when they failed to question Jereski's insertion of the adjective "unusual" in the sentence "The frenetic trading prompted [an MMAR client] to take the unusual step of assigning a trader to track MMAR's complex deals." *Id.* at 14. Again citing *Harte-Hanks*, and after expressing doubt that Miller was a managerial agent, Judge Werlein found that not investigating the word "unusual" wasn't clear and convincing evidence that Dow Jones had acted recklessly. *Id.* at 16.

As for the Journal's failure to print a retraction, Judge Werlein noted that none of the three letters the Journal received alleging that Jereski's story contained innacuracies clearly demanded retraction of specific statements. *Id.* at 20. The judge then said that, while comment d to the Restatement (Second) of Torts s. 580A indicates that failure to retract may be evidence of recklessness at time of publication, *Sullivan*, 84 S.Ct. at 729, states that failure to retract is not by itself dispositive of constitutional malice. *Id.* Holding that Dow Jones's failure to retract didn't establish actual malice, Judge Werlein said that not running a retraction instead may "indicate that the publisher believed and still believes that the falsehood was true." *Id.*

MMAR alleged that the trial testimony of Byron Calame, a *Journal* deputy managing editor, as well as the *Journal's* failure to publish a retraction, showed that Dow Jones had ratified the publication of five false statements in Jereski's article after its publication. *Id.* at 17. Judge Werlein disagreed. He found that Calame, although probably a managing agent (*id.* at 11, n.1), simply had "predictably defended his newspaper" and "emphasized the importance of accuracy" without ratifying the publication of any statement that evidence showed he had rea-

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son to believe was false. *Id.*

Reporter's Malice: Little Judicial Analysis

Compared to the independent investigation of specific facts that he undertook in overturning the punitive damages award against Dow Jones, Judge Werlein made few specific factual findings in upholding the $20,000 punitive award against Jereski. Rather, the court simply stated a conclusion, with no reference to the *de novo* review required under *Bose*, that there was "evidence of discrepancies between what [Jereski] was told and what she wrote" (*Id.* at 22.), and observed that a reasonable jury could have found "personal hostility" between MMAR and Jereski based on complaints MMAR had made to the Journal's lawyer about Jereski, MMAR's refusal to grant her an in-person interview, and the "hostile tone" of some written questions Jereski had submitted to the bond firm. *Id.* at 22. This evidence, Judge Werlein found, was sufficient to convince the jury that Jereski "was motivated to retaliate against MMAR with the pen as her weapon," and thus that she had demonstrated actual malice. *Id.* at 23.

Liability and Compensatory Damages

The court also devoted little space to upholding the jury's verdicts against Dow Jones on the issues of liability and the $22.7 million in actual damages. After briefly stating that the jury could have found by a preponderance of the evidence that Dow Jones was negligent, and thus liable, in publishing the five defamatory statements, Judge Werlein rejected in five paragraphs Dow Jones's argument that MMAR failed to present to the jury any evidence that any of the statements found false by the jury had caused MMAR to go out of business. *Id.* at 4-6. (MMAR expressly gave up any claim for damages to its reputation and sought damages only for the decline in the value of its business.)

Judge Werlein gave great deference to the jury's verdict on compensatory damages. Addressing Dow Jones's argument that MMAR still would have gone out of business even if Jereski's article had omitted the five statements found libelous, he said that "unliquidated damages proximately caused by an event are rarely ever capable of being proved with exactitude, much less with the kind of precision for which Defendants now argue." *Id.* at 5-6. He added that Dow Jones hadn't objected when the court intructed the jury to award damages only for injuries caused by false and defamatory statements. *Id.* at 6. Observing that MMAR's revenues dropped precipitously after Dow Jones published the statements adjudged libelous, and that the jury didn't award MMAR the full amount of actual damages that it sought, Judge Werlein concluded that there was enough evidence reasonable jurors to find that the firm had suffered quantifiable damages from the five statements. *Id.*

Post Judgment Motions Filed by Both Sides

Both sides have now filed post-judgment motions. Down Jones has renewed its motion for judgment as a matter of law, or in the alternative for a new trial or substantial remittitur. MMAR has filed a motion to alter or amend the judgment to reinstate the punitive damage award.

Dow Jones also filed a motion to stay execution of the judgment which Judge Werlein has granted.

Calling Kevorkian a "Killer" is a Statement of Fact

Calling someone a "killer" is a statement of fact and not an opinion ruled Judge Sharon Finch in her denial of a motion to dismiss the libel case brought by Dr. Jack Kevorkian against the American Medical Association (AMA). *Jack Kevorkian v. AMA et al,.* No 96-605162 NZ, (Mich. Cir. Ct., Wayne County, May 21,1997). The suit brought was based on allegedly defamatory statements published by the AMA in press releases which referred to Kevorkian as a "criminal" who "kills" "victims." The court found that statements referring to someone as a criminal and a killer could lead to the inference that the named individual is a murderer. Judge Finch stated that because murder is "among the most heinous of crimes," the allegation of murder is "so strong and so unequivocal" that the statements constitute *libel per se* and are not protected opinion. *Slip op.* at 2. The Court noted that the plaintiff, although having been charged with the crime, had never been convicted of murder.

The AMA had argued as well that the statements were privileged because they were released in conjunction with communications with the Michigan Attorney General and were allowable as part of their right to "petition to the government." The court, however, disagreed and clarified that press releases are designed to communicate with the press and are not necessary to communicate with the government. As to the AMA's arguments that the statements were protected by the First Amendment, Judge Finch disagreed; free speech, she noted, can "still carry a price tag." *Slip. op.* at 3.

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A NUMBER OF NEW LIBEL TRIALS...

In what is proving to be a busy spring for media libel and privacy cases, LDRC has learned of three wins and four losses in recent months. These are in addition to the verdict in *MMAR v. Dow Jones*, the $125,000 award against the *Bangor Daily News* and a former reporter of the paper, decided on May 15 and previously reported in the *LDRC LibelLetter* (May at p. 3), and the bench trial resulting in a defendants' verdict on false light in former Black Panther Bobby Seale's suit against Gramercy Pictures, reported in this issue of the *LDRC LibelLetter* at page 16.

Rumph v. Sutherland

In South Carolina Court of Common Pleas, Dorchester County, a jury on May 1 found in favor of the defendant, The Post And Courier, Inc. The lawsuit was brought by a former employee of the Sheriff's office, Barbara Rumph, an administrator who had left the Sheriff's office after her boss had been defeated by John Sutherland, the then-elected Sheriff of Dorchester County and the source for the story. She sued over the newspaper's report that Sutherland had requested a State Law Enforcement Division investigation into what appeared to be missing funds collected by the office under the prior Sheriff. According to Sutherland, the money's trail at that point stopped with plaintiff. Sutherland told the newspaper that he had been asked to locate the money by the individual on whose behalf the fund were collected. Several days after the initial news report ran, it was determined that the initial complaint was erroenous, that the money had been received by the complainant from the Sheriff's office in a timely fashion. Because the former Sheriff was in a political race at the time of these reports, a race which he lost, the suggestion was made that the call for an investigation was prompted by political motives.

Ms. Rumph alleged that the article implied that she had stolen the money. The plaintiff was held to be a public official for purposes of the suit and the report was found to be qualifiedly privileged. There apparently was no evidence of actual malice. While the case went to the jury, they were able to return a defendant's verdict in 10 minutes -- perhaps not a record, but rewarding for the defendant nonetheless.

Marsico v. The Patriot-News

And a Dauphin County, Pennsylvania jury deliberated five hours on May 6 before rendering a verdict in favor of defendants, The Patriot-News of Harrisburg and its reporter, in a libel suit. The case arose out of a series of articles on changes to the child support collection procedures in the Dauphin County Domestic Relations office that resulted in a substantial drop in collections. Marsico alleged that the newspaper implied that the was a "deadbeat dad" and further, that his brother, a state legislator, had use his political influence to help him avoid child support payments. Lawyers for the defendants had argued not only the import of the stories, but that they were fair and accurate reports of the changes in county policy and of the facts regarding plaintiff. The judge in the case had dismissed a false light claim and had disallowed any claim for punitive damages.

Michael v. Morgantown Dominion Post

Similarly, on May 1, 1997, a West Virginia jury in *Michael v. Morgantown Dominion Post* found for the defendant in a case arising out of a report concerning the indictment of a corporation which was engaged in the operation of a strip club. The newspaper was unwilling to tell LDRC about the case, and so we have little to report on the matter at this time.

Wayne Elder v. Gaffney Ledger Inc.

In Court of Common Pleas, Cherokee County, South Carolina at the end of May, a jury found the Gaffney Ledger Inc. liable to Wayne Elder for $10,000 in actual and $300,000 in punitive damages. At issue was a call-in letters-to-the-editor column in the newspaper in which was published an anonymous letter contending that there was a drug crime problem in the area, that the Sheriff knew who the drug dealers were, and questioning whether there was a pay-off to the Sheriff that allowed the dealers to continue operating. The first two points were, by the Sheriff's admission, true. He had, in fact, applied for federal aid to assist in combating the problem, noting

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that the city had too few resources to do it on its own. Defendant's post-trial motions have been denied. Defendants plan an appeal.

Valdez v. Champion Broadcasting

In Massachusetts, Superior Court, Middlesex County, a jury awarded $100,000 in compensatory damages to Marino Valdez ($70,000) and his wife ($30,000) against Champion Broadcasting and the two hosts of a radio broadcast in a trial in May. Mr. Valdez asserted that he was libeled on a Spanish language talk radio program broadcast by the hosts on leased time from the station. Plaintiff sold advertising time for a company that operated a Spanish language newspaper and radio station that competed with the defendant-hosts, and plaintiff was reportedly making negative comments about the host-defendants in their community. The defendant-hosts told their audience about plaintiff's conduct, and stated that they felt the plaintiff was acting in an unprofessional and unethical manner. They also laughed at the plaintiff, mockingly stating "Who is Marino Valdez?" Claims for intentional infliction of emotional distress against the station (although not against the hosts) and tortious interference were knocked out at the summary judgment stage.

Plaintiff's only proof of injury was damage to his marriage and all of his damages were premised on emotional harm. His wife sued for loss of consortium. A post-trial motion is pending before the trial judge on behalf of the radio station, challenging the finding that the station was negligent in not using the delay switch to prevent broadcast of the statements and seeking dismissal of the claim under a Massachusetts statute that by its terms may bar libel suits against stations for statements made by those who the station is not under an obligation to control by virtue of federal law.

Bueno v. Rocky Mountain News

And in Colorado, a jury awarded $53,250 compensatory and $53,250 punitive damages to the plaintiff Eddie Bueno against the *Rocky Mountain News* based upon a false light claim. Plaintiff's defamation, negligence, and related claims for libel were dismissed by the court at the close of the plaintiff's case for failure to prove a false statement of fact. Additionally, the court found that the plaintiff had failed to establish any special damages. Despite these rulings, the judge allowed a false light claim to go to the jury. The case resulted from an article in the *Rocky Mountain News* about "Denver's Biggest Crime Family," a family of 18 children in which 16 had criminal records. The article featured a family tree and traced the criminal history of the family. While much of the criminal activity occurred between 10 and 20 years ago, five of the brothers are currently in prison; three serving life sentences. Plaintiff was one of two siblings without a criminal record, a fact which was noted in the article. The *Rocky Mountain News* will be filing post-trial motions.

Yow v. Journal Newspapers, Inc.

Finally, on March 13, 1997 a Virginia jury ordered Journal Newspapers, Inc. to pay $150,000 to Barbara Yow, a Public Health Nurse employed by the Commonwealth of Virginia's Department of Health, and who was assigned to provide nursing services to a public high school. Yow sued after the *Prince William Journal* published news articles, an editorial and a religious column which questioned whether Yow had violated Prince William County Public Schools Regulation 753, prohibiting nurses from counseling students about abortion on school grounds. The case went to the jury after the trial judge refused to find Yow to be a public official or the controversy surrounding her actions to be a matter of public concern. On post-trial motion the award was reduced to $75,000.

Tom Kelley and LDRC are cataloguing the trials of the year. Tom will be doing his biennial trial presentation and written materials for the NAA/NAB/LDRC Conference in September. If you know of recent trials, please give us a call. LDRC, of course, tries to keep track of all trial data for our now annual survey of damages in libel, privacy and related cases.

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Criminal Libel Proceedings Against Two New York Times Reporters in Mexico

On February 23, 1997, *The New York Times* published a front-page article entitled "Shadow on the Border: Drug Ties Taint 2 Mexican Governors." The article, relying on U.S. government documents and sources, discussed connections between two sitting Mexican governors and narcotics traffickers. The governors, Jorge Carrillo Olea of Morelos and Manlio Fabio Beltrones of Sonora, have each asked the Mexican Attorney General's Office to open a criminal investigation against *The Times'* Mexico City Bureau Chief, Sam Dillon, and *Times* Reporter Craig Pyes. Their goal is to have these reporters prosecuted for criminal libel.

Mexico's criminal defamation statute dates from 1917. Mexican politicians have recently been turning to it to suppress speech with alarming regularity. The two *Times* proceedings were preceded by a number of prosecutions of Mexican journalists.

In addition to allowing criminal prosecution for libel at all, the 1917 law contains other provisions unfamiliar to American libel lawyers: truth appears not to be a defense; public officials are subject to relaxed, not heightened, burdens; and defenses like actual malice and the privilege for fair and accurate reports of official proceedings do not exist. Libel as a criminal offense is punishable by up to 11 months in prison.

Mexican law apparently does bar prosecution of foreigners where the conduct in question is not criminal in their home countries. At a minimum this should allow for introduction of the actual malice standard, and more broadly, the argument that the United States does not have a national criminal libel provision. It may, however, present both sides with the opportunity to discuss the vitality of the surprising number of criminal libel statutes that remain on the books in many American states.

The Committee to Protect Journalists, a New York based organization that concerns itself with the safety and freedom of journalists around the world, sent a letter dated June 6, 1997 -- Freedom of Expression Day in Mexico -- to the President of Mexico, Ernesto Zedillo, expressing its concern about the use of criminal libel law in Mexico as a weapon to supress journalism on matters of public concern. The Committee to Protect Journalists reported also on violence and intimidation, as well as lesser limitations on the ability of journalists to function in the country.

Ninth Circuit Dismissed Mayor's Libel Lawsuit

By Jeffrey S. Portnoy and Peter W. Olson

A panel of the Ninth Circuit Court of Appeals has unanimously affirmed the dismissal of a libel lawsuit brought by the former mayor of Honolulu, Frank Fasi, against the *Honolulu Star Bulletin*. Fasi sued the newspaper over an editorial rebuking his opposition to a developer's request to rezone some land. The mayor was amenable to the rezoning request so long as the developer donated a nearby parcel of land to the city for the construction of a sports complex.

The editorial, entitled "Blackmail Incorporated," was highly critical of the mayor's effort to "extort" money from the developer and described his position as "legalized blackmail." According to the editorial, the mayor's quid pro quo approach interfered with responsible development and would ultimately only serve to drive up housing costs.

In his lawsuit against the newspaper Fasi claimed the editorial was libelous per se because the average reader might conclude that he was being charged with the actual commission of a crime. However, United States District Court Judge David Ezra granted the newspaper's motion to dismiss, holding that the editorial was a protected statement of opinion.

On appeal, the Ninth Circuit Court of Appeals issued a memorandum opinion summarily affirming the dismissal. Citing the U.S. Supreme Court's decisions in the *Milkovich* and *Greenbelt Publishing* cases, and the Ninth Circuit's decision in *Partington v. Bugliosi*, the court held that the First Amendment "protects the 'rhetorical hyperbole' and 'imaginative expression' that authors used to enliven their prose." The court said that the overall context of the editorial revealed that the phrases "extortion" and "blackmail" were rhetorical and referred to the zoning controversy. "Such speech falls clearly with the First Amendment's protection," the court said.

Fasi's lawyer, Neil Papiano, has stated he will seek further review of the Ninth Circuit's opinion.

Jeffrey S. Portnoy and Peter W. Olson are with the firm Cades Schutte Fleming & Wright in Honolulu, Hawaii and represent Gannett Company.

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Political Cartoon and Related Article Found Capable of Stating Actual Facts

In a relatively rare finding that a political cartoon could be defamatory, a Tennessee state Court of Appeals held that the trial court erred in granting the defendant's motion for summary judgment in a libel action by public figure Lincoln W. (Chips) Moman against the publishers of a weekly newspaper *The Memphis Flyer* (M.M. Corporation). The court found that genuine issues of material fact remain concerning the defamatory potential of the newspaper's cartoon caricature of and three of its statements about Moman, and whether the journalist's depositions demonstrate a reckless disregard as to whether portions of the article were true or false. *Moman v. M.M. Corporation*, 1997 WL 167210 (Tenn.App. April 7, 1997).

Chips Moman, a nationally renowned music producer, filed suit against *The Memphis Flyer* for allegedly defamatory remarks made in an article questioning the propriety of Moman's recording business in Memphis. In 1985, with the encouragement and support of the mayor of Memphis and the president of First Tennessee Bank, Moman moved to Memphis to open a recording studio. The mayor and bank president hoped that Moman's presence would rejuvenate an ailing Memphis music scene. To facilitate Moman's venture, First Tennessee Bank loaned him $720,000, and the city leased him an old fire station for $1.00 per year and no tax obligation. Though Moman produced several hit albums, the enterprise was unprofitable and he declared bankruptcy in 1989, just four years after opening the studio.

Shortly before Moman closed the studio, *The Memphis Flyer*, a weekly entertainment newspaper, published an article criticizing Moman's recording business and questioning the mayor's and bank president's support of Moman. Among other things, the journalist, H. David Lyons, criticized Moman and the city for using public funds and incentives in their ill-fated venture. On the front page of the newspaper and the first page of the article, the publishers included a caricature of Moman leaving Memphis with money stuffed in his pockets, suggesting that he took advantage of the city's generosity and walked away with its money. After Moman declared bankruptcy, *The Flyer* printed a second article confirming its predictions that Moman would close up shop and leave town.

Moman alleged that the caricature and 23 of the published statements disparaged his talent and integrity, falsely accused him of stealing public money, and generally defamed his character. The judge dismissed most of the statements as substantially true, non-actionable opinion or not capable of defamatory meaning. However, the court found that the caricature and three statements alleging improper use of public funds were misleading and thus a jury could find them capable of defamatory meaning.

Strict Definition of Defamation

Though he reversed the grant of summary judgment, Judge Brown nonetheless used a strict test to determine whether the newspaper's statements were capable of defamatory injury: the statements "must constitute a serious threat to plaintiff's reputation. . . They must carry with them an element 'of disgrace.'"

Coupled with this strict definition, Judge Brown used an equally strict understanding of fair comment, suggesting that the published statements must be both true and <u>non</u>-defamatory in order for the opinion to be protected.

Most Statements Dismissed as Non-Actionable Opinion

The court dismissed many of Moman's allegations as protected opinion. Relying on the standards set in *Gertz v. Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974), and *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970), the court found that "the First Amendment will not permit recovery in defamation for a statement which is the mere expression of an opinion and which does not assert by implication the existence of underlying false, defamatory facts." The court found that only two of the journalist's statements were opinions that implied the existence of underlying defamatory facts.

But the court found that the cartoon, in conjunction with the title -- "Goodbye, Mr. Chips," with the subtitle of "The City Fathers brought him back to save Memphis music. But will Chips Moman just take the money and run?" -- and the article itself could be understood as stating as actual fact that Moman took money from the public and moved to Nashville. It should be noted that the court states that these "actual facts"

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are an implication from the cartoon and article.

This finding is reminiscent of *McDermott v. Biddle*, No. 46 E.D. Appeal Docket, 1995, 24 Med. L. Rptr. 1980, where the Pennsylvania Supreme Court held that otherwise true articles can take on defamatory meaning and falsity when "read through the screen of editorial and cartoon comment." See *LDRC LibelLetter*, April 1996, p.3.

Also capable of defamatory meaning was a statement that there were rumors that Moman had "shortchanged one musician too many." That, the court found, implied that Moman cheated musicians and ran a "quick and dirty operation." Because defendants refused to reveal the source(s) for the statement, a question existed as well as to whether or not there were any rumors to that effect.

Not defamatory, the court found, were statements that the interest on Moman's loan was 4% when it was 10%, that his "trademark chart-toppers were getting farther and farther apart," that he was a "guy with an answering machine who produces just three or four albums a year" and other statements that Moman asserted were either false with respect to his relationship to the City and/or with respect to his business. Without having the entire article set out in the opinion, it is difficult to evaluate the subject judgments of the court as it parses through the many disparaging statements made about plaintiff and his operation. It may be noted that many of the phrases found to be susceptible of summary judgment may prove useful to other defendants seeking analogies in their own arguments about defining what is defamatory, opinion, and hyperbole.

Actual Malice Could Be Attributed to the Journalist

Finally, because Moman is a public figure, the court applied the actual malice test of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d. 686 (1964), which it easily resolved in favor of Moman. In his deposition, Lyon stated that it was not his job to determine the truth or falsity of the information he wrote. Moreover, he said that he "didn't think that the truth or falsity of an item affects its newsworthiness." The court found that Lyons acted with "reckless disregard of whether the article was true or false." As a result, the judge remanded the case for further consideration of the offending statements.

Sports Complaints On The Rise: Sports Talk A Main Target

The first half of 1997 has been marked by a number of highly publicized defamation complaints filed by sports figures against media organizations. In all, LDRC is tracking seven complaints filed by athletes or their teams against the media. Sports talk radio, sometimes accused of having its free-wheeling, shoot from the lip hosts working without the benefit of the fact-checking found in more traditional journalism, has drawn a good deal of the fire with three complaints (and a fourth possibly on the horizon) filed over the sometimes flippant remarks made by the stations' hosts.

Philadelphia Flyers v. WIP-AM

The Philadelphia Flyers have brought a libel suit against WIP-AM, a sports-talk radio station, for comments made about Flyers captain Eric Lindros by WIP host Craig Carton. In an announcement made March 6, Flyers chairman Ed Snider also announced that he would seek to terminate the team's relationship with WIP, which currently airs all of the Flyers games. Lindros, the subject of the comments by Carton, was also reported to be considering his legal options.

On February 28, Carton reported that Lindros had been "suspended" from a February 15 game because he was either hungover or drunk. Carton has said that four sources confirmed his story, including two within the organization. At the press conference held to announce the filing of the suit, Snider vehemently denied the accusation stating that Lindros missed the game due to a lower back strain. WIP-AM found itself the subject of a fair amount of criticism and not much sympathy in local newspapers for its general talk radio style and on-air personalities, characterized in one article as "bullies."

Phelts v. KCTE 1510 AM

In February, Patrick Phelts, a Boston College football player, filed suit against One-On-One Sports On-Site, Inc., a syndicator of talk-radio shows, KCTE 1510 AM, a Kansas City radio station, and on-air personality Johnny Renshaw for defamation, false light invasion of privacy, and outrageous conduct. The complaint alleges that on November 6, 1996, in the midst of an investigation into athlete gambling at Boston College, Renshaw announced that Phelts's name was included on a list of players involved in the scandal, which Renshaw

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claimed to have in front of him, and continued to note that "[Phelts] was one of the ringleaders."

Later that afternoon, in a nationally televised news conference, it was disclosed that thirteen Boston College athletes had admitted to impermissibly betting on sports events, but as the complaint pointed out, "Patrick Phelts was not among the 13 players identified as being involved in the gambling scandal and, in fact, was never implicated in it, or in the Middlesex County investigation, in any way." The three count complaint demands $40,000 in compensatory damages in addition to "fair and reasonable" punitive damages.

Renshaw later claimed he was only "joking" about his comments concerning Phelts.

Cox v. WIOD-AM

Former Miami Dolphin and current Chicago Bear, Bryan Cox, has filed suit against WIOD-AM, a Miami-based sports talk radio station, alleging that one of the station's hosts implied that he was a homosexual. The case is reportedly "in litigation."

Another possible sports talk complaint . . .

Another sports figure case which has been talked about in the press but has not actually been filed involves former Pittsburgh Penguin Mario Lemieux. Lemieux is reported to be seriously considering filing a libel suit against WTAE-AM, a Pittsburgh-based sports talk radio station, whose host "jokingly suggested" that Lemieux wanted the team to acquire Petr Klima because Klima's wife and Lemieux's wife were lesbian lovers. While Lemieux's attorney has requested and received a tape of the broadcast, it is unclear if Lemieux will actually bring suit.

Other Sports Complaints:

In addition to the sports figure complaints filed against talk-radio stations, a number of athletes have also brought suit over reports in more traditional media contexts.

Garner v. Philadelphia Daily News

In March, ESPN reported that Philadelphia Eagles running back Charlie Garner filed a libel suit against the *Philadelphia Daily News* and reporter Kevin Mulligan. In July 1995, the paper reported that Garner had tested positive for marijuana during an unannounced drug test. The NFL subsequently issued a statement which said that Garner had not tested positive for any illegal substance.

Washburn v. CBS

On April 10, 1997 *The New York Times* reported that former Golden State Warrior and Atlanta Hawk Chris Washburn was suing CBS and Warner Brothers. Washburn alleged that the CBS movie, "Never Give Up: The Jimmy V. Story," inaccurately depicted Washburn as a drug addict while in college. Washburn argued in his complaint that it was not until after he began playing in the NBA that he began using drugs.

Young v. The Fresno Bee

In another suit arising out of a college gambling scandal, Fresno State basketball point guard Dominick Young has filed a libel suit against *The Fresno Bee* over allegations that Young is the focus of a point-shaving investigation. Young's complaint, filed April 14, 1997, charges that the *Bee* articles falsely accuse Young of criminal activity and "consort[ing] with illegal bookies, gamblers, criminal and other scoundrels."

The $11.2 million suit follows *Bee* articles which reported that Young was seen at a nightclub after a game talking to a businessman who was described as a major local sports bettor and bookie.

Williams v. KXAS

Dallas Cowboy Erik Williams has filed a pair of lawsuits over the media coverage of and police investigation into the allegations of rape leveled by Nina Shahravan, a young woman who often hung around the team. Shahravan, who claimed that she was raped in late December 1996 by Williams while another teammate held a gun to her head, eventually confessed that the allegations were made up and was subsequently charged with perjury. Williams' suit against the city of Dallas and its police department alleged that his civil rights were violated by the publicity the police sought to bring to the accusations and because they allegedly ignored evidence which contradicted her story.

Williams also sued KXAS-TV and reporter Martin Griffin, alleging that Griffin and Shahravan agreed to report to the police a story about the assault. In addition, the complaint alleged that Griffin and KXAS, among other things, aided and abetted fraud by acting "with willful blindness to the falsity of Shahravan's actions." Griffen is alleged to be well known" for his tabloid style attacks on the Cowboys and Shahravan is alleged to have been a regular source enlisted by Griffen to provide information on the players. Williams' complaint also included causes of action for defamation, invasion of privacy, infliction of emotional distress and trespass.

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Polygraphic Evidence Ruled Admissible to Corroborate Libel Defendant's Version of Controversy with Plaintiff

By Juan R. Marchand Quintero

The Puerto Rico Circuit Court of Appeals ruled in favor of admitting the results of a polygraph test, offered by defendant newspaper El Vocero, which tends to corroborate published allegations of sexual harassment by the plaintiff in a libel case. The ruling is of first impression in a defamation case in Puerto Rico, and it abandons prior case law totally banning the use of polygraphic evidence. *Vega v. El Vocero de Puerto Rico*, Civ. No. 92-0754 (Cir. Ct. App. San Juan 3/26/97)

In the underlying action, plaintiff district attorney Iris Meléndez alleged that the El Vocero articles defamed her, and that codefendant Mrs. Martha Marrero, her former legal secretary, had lied from the start. The series focused on the administrative charges filed by Mrs. Marrero against her boss, which were dismissed in due course. The plaintiff denied that any incidents of harassment occurred between her and Mrs. Marrero.

El Vocero retained the services of Dr. David Raskin, who administered the polygraph test to Mrs. Marrero. The results were very positive for defendants' version of the facts, as published in the articles, and they were offered for admission into evidence. The San Juan Superior Court denied the petition, but the Circuit Court of Appeals reversed the denial, ruling in favor of El Vocero.

The opinion by Judge Roberto Córdova, for a unanimous panel, traces the evolution of the case law respecting polygraphic and scientific evidence, as well as the technical development of the machine and computer software now available. The court analyzed the applicable standards for the admission of scientific and expert evidence, recently set forth in *Daubert v. Marrell Dow*, 509 U.S. 579, 125 L.Ed. 2d 469 (1993). *See also*, Honts and Quick, *The Polygraph in 1995, Progress in Science and the Law*, 71 N.D. Law Rev. 987 (1995).

The court held that the use of the polygraph has gained acceptance in the scientific community, and has been the object of peer review as well as publication. Therefore, it reasoned, exclusion of polygraphic evidence should not be automatic; each decision should be analyzed on its merits.

"[T]he courts should not turn their backs on the scientific advances which promote a greater factual certainty," the court concludes. It proceeded to distinguish prior case law which had excluded the use of polygraph tests in the labor field, since such tests performed on employees were not really "voluntary." Mrs. Marrero, on the other hand, submitted voluntarily to the test.

The court concluded by remanding the case "to allow the parties to carry out discovery with the participation of a polygraph expert." Trial in the case is set for December.

The decision opens up the possibility of bolstering the defense of cases in which credibility of witnesses is pivotal. It also opens the possibility of performing polygraphic tests in the pre-publication stage as part of a journalist's due diligence.

Juan R. Marchand Quintero's law firm is located in Puerto Rico and is representing El Vocero in this matter.

Greek Airline Executive's Libel Claim Against Greek Language Paper Dismissed

Declining to follow the recommendation of a magistrate judge, Judge Shirley Wohl Kram of the Southern District of New York last month granted summary judgment to a Greek-language daily on actual malice and neutral reportage grounds in a libel suit brought by a high-ranking executive of Greece's national airline. *Coliniatis v. Dimas*, No. 92 Civ. 8372 (SWK), 1997 WL 283389 (S.D.N.Y. May 28, 1997) at *5.

A crucial element in Judge Kram's decision – and one point upon which she and Magistrate Judge Ronald J. Ellis agreed -- was her finding that plaintiff Nicholas Coliniatis, who was Olympic Airways's Director of Operations for North and South America when the supposed libel was published, was a public official or public figure within the Greek-American community.

Coliniatis sued *The National Herald*, a New York newspaper, over an October 1992 story that reported the contents of a letter to Olympic from its law firm, Dimas & Johnston. The letter said that Coliniatis may have been demanding a kickback from a real-estate broker involved in the purchase of Olympic's new New York offices. *Id.* at *2-*3. The story also reported that the real-estate broker had denied being asked for kickbacks when *The National Herald* interviewed him, and that Simos C. Dimas, the partner at Olympic's law firm who wrote the letter, had refused to comment on the alleged scheme to the newspa-

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per. *Id.* at *3. A few months after the story in *The National Herald* appeared, Coliniatis was recalled to Greece by Olympic and fired. *Id.* at *1,*3.

Status in the Relevant Community

It is unclear from Judge Kram's opinion whether she and Magistrate Judge Ellis found Coliniatis to be a public official or public figure, as Judge Kram uses both terms in different sections of her opinion. *See id.* at *3,*4,*5. She writes that Magistrate Judge Ellis applied the actual malice standard of fault for four reasons: First, that "Coliniatis had or appeared to have substantial responsibility for, or control over, government affairs" -- the operations of an airline owned by the Greek government; second, that "the public had an independent interest" in the plaintiff's performance; third, that Coliniatis had some access to means to rebut the accusations; and fourth, that he had "assumed the risk of greater public scrutiny." *Id.* at *3.

Judge Kram offers another reason to use the actual malice standard. Noting that Coliniatis testified that the operations of Olympic Airways are important to many Greek Americans, she finds that "[w]hen an alleged libel is addressed to a particular ethnic community in its own language, as here, the plaintiff's status should be determined based on his status in that community." *Id.* at *5. To support this reasoning, Judge Kram cites *DeCarvalho v. DaSilva*, 414 A.2d 806 (1980), in which Rhode Island's highest court held that a libel plaintiff was a public figure for purposes of a lawsuit against a Portuguese-language broadcaster because of his prominence in the Portuguese-American community.

No Willful Blindness to Truth

Judge Kram's opinion diverges from the Magistrate Judge's report on the issue of reckless disregard. Magistrate Judge Ellis found that a reasonable jury could find that *The National Herald* had acted with reckless disregard for its story's truth or falsity because the paper knew that the real-estate broker had denied being asked for a kickback and that Simos Dimas had refused to comment. *Coliniatis*, 1997 WL 283389 at *3. The magistrate judge also found evidence of reckless disregard in the fact that *The National Herald* did not try to ask Coliniatis about the letter's allegations until one day before it published its story, even though one of the paper's reporters had interviewed Coliniatis about another subject four days earlier. *Id.* at *3-*4.

But the district court, after quoting the *Anderson v. Liberty Lobby*, 477 U.S. 242, 255-56 (1986) requirement that a plaintiff present enough evidence at the summary judgment stage to show that a reasonable jury could find actual malice by clear and convincing evidence, holds that Coliniatis failed to meet his burden on showing reckless disregard. *Coliniatis*, 1997 WL 283389 at *6. Judge Kram says that *The National Herald*'s failure to ask Coliniatis about the letter until shortly before publication did not show the sort of willful blindness to the truth that, she says, the reckless disregard standard demands. *Id.* at *7.

She distinguishes this case from *Harte-Hanks Communications, Inc. v. Connaughton*, where the U.S. Supreme Court found actual malice in a newspaper's failure to investigate fully bribery charges against a candidate for judicial office. Judge Kram says that, unlike the paper in *Harte-Hanks*, *The National Herald* did not evidently try to avoid the truth by refusing altogether to interview a key source or listen to important tapes. *Id.* at *8.

She also says that, contrary to the magistrate judge's finding, *The National Herald*'s decision to publish despite the broker's denials and Dimas's refusal to comment are not evidence of reckless disregard because "emphatic denials are part of the landscape of journalism." *Id.* at *7. Judge Kram suggests that including the denial and "no comment" was a good idea because it shows that *The National Herald* did not intend to avoid the truth or mislead its readers about the solidity of the charges against Coliniatis. *See id.* at *8.

Neutral Reportage Applies

Again disagreeing with Magistrate Judge Ellis's recommendation, Judge Kram says that *The National Herald* story is protected by the neutral reportage doctrine advanced in *Edwards v. National Audubon Soc'y*, 556 F.2d 113 (2d Cir. 1977). She finds that, like the National Audubon Society, Dimas & Johnston was a responsible and prominent organization whose accusations against Coliniatis were newsworthy in themselves. *Coliniatis*, 1997 WL 283389 at *8-*9. Judge Kram adds that she found no evidence that *The National Herald* subscribed to or distorted the letter's allegations. Rather, she says, the paper's report was "accurate and disinterested," reporting only the truth of the matter at hand: that the letter was written, what it said, how *The National Herald* conducted its investigation, and the fact that two players in the controversy denied the letter's allegations or refused to comment. *See id* at *8.

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Chuck Jones Is Libel Proof

Federal Judge Bemoans Rise in Pro Se Complaints

Few of us would like to walk a mile in Charles Jones's shoes. In 1994, a New York jury convicted the former publicist of Marla Maples Trump of burglary and other offenses, finding that Jones had broken into Trump's apartment and apparently absconded with quite a few pairs of the sometime actress's footwear. At his criminal trial, Jones acknowledged that he had a physical, sexual relationship with Trump's pumps. *See Jones v. The Globe Int'l Inc.*, 24 Med.L.Rptr. 1267, 1268 (D.Conn. 1995). He became the frequent subject of tabloid reports and something of a national laughingstock. His reputation, it seemed, could not have been worse.

And now, for the second time in two years, a federal court has indicated that, indeed, Jones's reputation with regard to the shoes conviction is so low that allegedly false statements about the subject cannot do his reputation any more harm. Judge Schira Scheindlin of the Southern District of New York dismissed defamation claims that Jones had brought against a number of non-media defendants, including his former employer and her (now estranged) husband Donald. *Jones v. Trump*, Nos. 96 Civ. 2995 (SAS), 96 Civ. 6927 (SAS), 1997 WL 277375 (S.D.N.Y. May 27, 1997) at *4. Judge Scheindlin held that Jones was collaterally estopped from litigating the defamation issues because the federal District Court of Connecticut, in *Jones v. Globe*, already had found Jones to be libel-proof. *Id.*

54 Claims in 125-Page Complaint

In his opinion, Judge Scheindlin expressed frustration with Jones's voluminous pro se complaint, whose 125 pages set forth 54 claims, based on legal theories ranging from breach of contract to invasion of privacy to violations of the RICO statute, 18 U.S.C. s. 1962. *Id.* at *1. Jones named 25 defendants, including the Trumps, the Plaza Hotel and the City of New York. *Id.* Along the way toward dismissing all of Jones's claims, Judge Scheindlin wrote that Jones's case brought "into sharp contrast the tension between the long-standing statutory right of access to the United States courts by pro se litigants and the increasing need to protect scarce judicial resources." *Id.* (footnote omitted). He noted that courts must liberally construe pro se claims, and give them credence even if they "appear to be fantastic and delusional." *Id.* But the judge also complained that if he were to address each of Jones's claims and the defendants' responses individually, his "opinion would be the length of a Tom Clancy novel." *Id.* at *2. He also observed that the number of pro se complaints filed in the Southern District rose by 12% to 2,293 between 1994 and 1996, and that the number of pro se complaints in the district generally has risen by 10% to 15% yearly since 1989. *Id.* at *9, n.3.

LDRC Complaint Study Sample Shows 16% of Complaints in 1996 Were Pro Se

While it is not clear if the number of pro se complaints against media defendants is rising at a rate comparable to the figures cited by Judge Scheindlin, an upcoming LDRC complaint survey shows that in our sample pool 54, or 16%, of 342 complaints in defamation and related areas against media defendants were filed pro se last year. Like Jones, many pro se plaintiffs in media cases name several defendants in their complaints, increasing the duration and cost of litigation. In the LDRC survey, on average, each pro se complaint named seven media defendants, while complaints brought by represented plaintiffs averaged 3.5 defendants. Of the 54 pro se complaints against media defendants, 20 were brought by prisoners, criminal defendants or criminal suspects.

Jones also represented himself when he sued three national tabloids for defamation and was found to be libel-proof by a federal court in Connecticut. *Jones v. The Globe Int'l Inc.*, 24 Med.L.Rptr. 1267. Although he has has had little success as a civil plaintiff, Jones did mount a successful habeas petition: Judge Scheindlin has granted Jones a new criminal trial on grounds that the state trial court erred in preventing Jones from consulting his attorney during the trial. *Jones v. Trump*, 1997 WL 277375 at *2, *citing Jones v. Vacco*, No. 96 Civ. 4907, 1996 WL 535544 (S.D.N.Y. Sept. 19, 1996).

LDRC would like to thank the following interns for their contributions to this month's LDRC LibelLetter:

Erik Bierbauer, NYU Law School

Patrick McCabe, NYU Law School

Ted Smoot, Columbia Law School

and Jason Zedeck, Boston University School of Law

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Former Libel Plaintiff Arrested for Planning to Kill Husband and Trial Witnesses

Had Paladin Press Book on Silencers

Former Maryland U.S. Senate candidate and libel plaintiff, Ruthann Aron, was arrested on June 9 for allegedly plotting to kill her husband and two witnesses who testified against her during her 1996 libel lawsuit against U.S. Labor Secretary William E. Brock III.

Police seized an assault rifle, catalogs for ordering false identification cards, and a stolen Virginia license plate along with Paladin Press's "How to Make a Disposable Silencer," and "The Hayduke Silencer Book: Quick and Dirty Homemade Silencers," which Aron was allegedly using to plan the murder of her husband, Barry Aron, and two Baltimore lawyers, Arthur Kahn and John Harrison.

Kahn and Harrison, who had represented clients who had sued Aron, also testified against her in Aron's defamation suit against William E. Brock III. Aron sued Brock, her opponent in the 1994 Republican primary for U.S. Senate, after Brock told reporters that Aron had been "found guilty, convicted by a jury of fraud," and had paid "hundreds of thousands of dollars in fines," in addition to running negative campaign ads which stated that Aron had "trouble obeying the law" and had been "ruled out of bounds" by the courts.

While Aron had, in fact, never been convicted on any criminal counts, she had lost two lawsuits brought against her by business partners. Both suits were, however, eventually settled - - one while the verdict was on appeal and the other after it had been set aside. The Maryland jury hearing Aron's libel suit in April 1996, however, decided that the harsh negative campaigning did not cross the line into defamation.

On May 29, 1997 a Maryland appeals court ruled that Aron has the right to request a new trial, finding that the lower court judge should not have denied Aron's lawyers the chance to review a juror's notes on the trial, which Aron alleged were used to influence the other jurors.

Former Black Panther Loses Docudrama False Light Claim

Possible False Portrayal Found, But No Actual Malice

A federal judge in Pennsylvania found that a 1995 docudrama about the Black Panther Party did not tortiously portray former Black Panther Chairman Bobby Seale in a false light when it depicted fictionalized scenes of Seale buying guns and arguing with fellow Black Panther Eldridge Cleaver. *Seale v. Gramercy Pictures*, No. 95-CV-2174, 1997 WL 275471 at *5 (May 15, 1997).

After a bench trial, Judge Raymond J. Broderick of the Eastern District of Pennsylvania found that the film *Panther*, released by defendant Gramercy Pictures and three other defendant film companies, fit the definition of docudrama advanced in *Davis v. Costa-Gavras*, 654 F.Supp. 653, 658 (S.D.N.Y. 1987) because it used simulated dialogue, composite characters and telescoping of events. Unlike a documentary, the court went on, a docudrama is primarily a work of entertainment that does not purport to adhere strictly to facts. *Id.*

The court also noted that, as an undisputed public figure who had written books and lectured about the Black Panthers, Seale had a weaker right to privacy than someone who was not in the public eye, at least in regard to his Black Panther activities. *Id.* at *5, *citing* J. Thomas McCarthy, The Rights of Publicity and Privacy s. 5.9(b)(1) (March 1996 insert).

A False Light: What the Film Didn't Show

Judge Broderick said that *Panther* did create the false impression that Seale lost control of the Black Panthers to Cleaver after the assassination of Martin Luther King, Jr. in April 1968, and it failed to depict him as an advocate of nonviolence, but that this did not rise to the level of tortious invasion of privacy because Seale failed to prove by clear and convincing evidence that the filmmakers had acted with actual malice. *Id.* at *10-*11.

The problematic scene showed the actor playing Seale trying unsuccessfully to convince the actor playing Cleaver that it was a bad idea for the Black Panthers to initiate violence against the police. *Id.* at *8. *Panther* producer Melvin

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Van Peebles, a defendant, testified that he made up the argument scene to dramatize the schism that developed between Seale and Cleaver in the days before Cleaver engaged in a shootout with police, and to show that Seale was thinking of the Black Panthers' long-term interests. *Id.* at *10.

First Amendment Lawyers should note: a failure to depict the plaintiff in the "light he deserved" constituted false light.

The court found that, because the scene did not set out Seale's position as the advocate of non-violence against the police, nor include a depiction of Seale leading an April 7, 1968 rally in which he successfully urged Black Panther members to forgo violence – what the court characterizes as "perhaps his finest hour" – the argument scene portrayed him in a false light *Id.* at *10. It is an analysis that should give First Amendment lawyers some pause: that the failure to "depict Bobby Seale in the light he deserved" constituted a false light. *Id.*

No Actual Malice

But the court, noting that Pennsylvania follows § 652(e) of the Restatement (Second) of Torts in false light cases, held that the *Seale* defendants had not acted with the level of fault– knowledge or reckless disregard of the false light--that the Restatement requires. *Id.* at *11. Key to Judge Broderick's finding was the fact that the filmmakers had hired a former Black Panther and a historian to verify the accuracy of the film. *Id.* at *11. The court also found it significant that producer Melvin Van Peebles testified that he and his son Mario, who co-produced, sympathized with the Black Panthers and had tried to show them in "the best light possible." *Id.*

Seale had also claimed false light invasion of privacy by another scene, in which the actor playing him was shown buying firearms in a windowless room. *Id.* at *6-*7. Seale said the scene suggested that he had furtively purchased illegal guns for the Black Panthers, when in fact he had always bought legal guns out in the open. *Id.* But the court, citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991) for the proposition that "minor inaccuracies do not amount to falsity," held that the gun-purchasing scene was substantially accurate, in that the dialogue indicated that the Seale character was buying only legal guns. *Seale*, 1997 WL 275471 at *7-*8. Thus, the scene did not show Seale in "a false light" that "would be highly offensive to a reasonable person," as the Restatement requires. *Id.* at *8, *citing* Restatement (Second) of Torts § 652(e).

Publicity Claims Dismissed

In addition to his invasion of privacy claims, Seale had alleged that photographs of the actor playing him in *Panther* that appeared on the liner notes of the film's soundtrack compact disc violated his common-law right to publicity as well as the false advertising provision of the Lanham Act, codified at 15 U.S.C. § 1125(a). *Id.* at *12. Judge Broderick noted that no Pennsylvania cases clearly set forth the elements of a right to publicity claim, but he predicted that the Pennsylvania Supreme Court would adopt the formulation published two years ago in the Restatement (Third) of Unfair Competition. *Id.* The court held that Seale failed to prove by a preponderance of the evidence that the two photographs had used his name or likeness solely to attract attention to a work unrelated to him, so comment C to § 47 of the Restatement (Third) of Unfair Competition indicated that the defendants had not infringed Seale's right to publicity. *Id.* at *13.

As for the false advertising claim., Judge Broderick held that Seale failed to show that the liner notes implied to consumers that Seale endorsed or was otherwise affiliated with the CD. *Id.* at *14.

Last December, Judge Broderick granted summary judgment to the *Panther* filmmakers on Seale's claims for false advertising and right to publicity violations in regard to the film itself, as well as an accompanying book and home video. 949 F.Supp. 331, 337, 339-40 (E.D.Pa. 1996). In that opinion, Judge Broderick reasoned that the film, book and video clearly enjoyed strong First Amendment protection because they were works of artistic expression, rather than pure commercial speech. But the liner notes, he wrote, were closer to commercial speech and thus he refused to dispose of Seale's claims about them without a trial. *Id.* at 337, 340.

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CYBER-LINKING LIABILITY

TotalNews Settles

German Prosecution For Linking

By Charles J. Glasser, Jr.

Several of the nation's largest media outlets last week settled a copyright suit against web page publisher TotalNews, Inc. after the web publisher used "frames" technology to link to the on-line version of the publications. Plaintiff publications included the *Washington Post*, *CNN*, *Entertainment Weekly*, *The Wall Street Journal* and *Times Mirror*.

"Frames" browsers allow a web page publisher to create a picture window that is surrounded by other text, called "wrap-arounds" which can include links. When the user clicks on one of these links, the wrap around frame of the web page remains on-screen, but the text of the target site appears in the picture window. In the TotalNews case, these links brought users the content of Plaintiffs' web sites, surrounded by the advertisements and additional editorial content of TotalNews. TotalNews brought the site on-line in October of last year, and the suit was filed in February. TotalNews is an Arizona corporation, and the suit was brought in the Southern District of New York, before Judge Peter K. Leisure.

The plaintiffs complained that TotalNews' use of wraparound frames misappropriated their copyrighted material and trademarks in a manner which not only violated copyright, but falsely indicated origin, implied endorsement or association in violation of the Lanham Act.

The settlement, reached on June 5, does not prohibit TotalNews from providing links to other publications, but instead stipulates that TotalNews may provide "clean links," which would allow a user to jump directly from TotalNews to one of the plaintiff's web sites without additional advertising or editorial content. In addition, the defendants agreed to refrain from "intermittent jumping," a method by which a party is temporarily deposited at an advertiser site and then brought to the web site of the plaintiff publication.

In a joint press release issued by the parties in the settlement, the defendants contended that it should be a user's choice as to how he or she wishes to view a web site. That would include appearance with or without graphics, in a large or small screen or within or without a frame. The agreement allows TotalNews to provide a "clean" plain-text link to the plaintiffs' web sites but may not frame them with their own material. The settlement agreement was reached early in the case, before defendants answered the complaint in the Southern District of New York. By agreement of the parties, the settlement will be submitted to Judge Leisure for approval, which all parties expect will be forthcoming.

Linking Liability for Content?

Prosecutors in Germany began criminal proceedings last week against a woman for linking her personal home page (which resides on a server in Germany) to a banned magazine which is published on-line in the Netherlands. The magazine, a left wing publication called The Radikal, advertises itself as "a newspaper from and for the radical left" and recently offered guidance on how to sabotage railroad tracks. The defendant, Angela Marquardt, is a 25-year old member of the German Party for Democratic Socialism and the Berlin trial is believed by many to be the first world wide which has tackled the issue of regulating content through linking. Germany has codified strict laws banning particular publications, usually under the rubric of protecting the nation from terrorist-aligned, Neo-Nazi, or other politically forbidden positions. Marquardt insists in interviews that she should not be held liable for material which she has not herself written. The proceedings have been delayed until the end of the month in order to schedule the testimony of expert witnesses.

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

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Summary Judgment for Time Warner on Common Law Claims in *Fox News Network v. Time Warner*

Fox Antitrust Claims Transferred to SDNY

Holding that the parties involved in the negotiations were "hard bitten executives steeled in such hagglings," Senior District Judge Jack B. Weinstein granted summary judgment to Time Warner and dismissed the claims of fraud and promissory estoppel brought by Fox News Network. *Fox News Network, L.L.C. v. Time Warner, Inc.*, 1997 WL 271720 (E.D.N.Y.). Fox had brought these common law claims, in addition to antitrust claims, against Time Warner and Ted Turner in response to Time Warner's decision last year not to put the Fox News Channel on Time Warner cable systems.

These claims are among many that have arisen out of Time Warner's decision to carry MSNBC and not to carry either Fox News or Bloomberg News on its New York City cable system at present. Back in November 1996, Judge Denise Cote of the Federal District Court for the Southern District of New York preliminarily enjoined the City of New York from placing Fox News and Bloomberg on PEG (public, educational and government)-designated channels on the Time Warner systems in New York City. *Time Warner Cable of New York City v. City of New York*, 943 F.Supp. 1357 (S.D.N.Y. 1996)

The "honeyed phrases and assurances that are to be expected in major negotiations between parties of this sort in this media-entertainment field" were "guileful rather than mendacious."

The City had determined to use the PEG-designated channels as a means of getting Fox and Bloomberg on the air after the soon to be merged Turner Broadcasting Systems, Inc.-Time Warner announced its decision in favor of MSNBC. Carriage of a non-affiliated 24-hour news service on fifty percent of its cable systems was a condition accepted by Time Warner from the FTC in order to obtain approval of the merger with Turner.

Time Warner charged the City of New York with violating the Cable Act, its franchising agreements with Time Warner, Time Warner's First Amendments rights and various other state and city violations. Judge Cote's decision to enjoin the City is on appeal to the Second Circuit.

On the day prior to the filing of Time Warner's suit against the City, Fox sued Time Warner and its cable systems for antitrust violations and for fraud and promissory estoppel based upon the contract negotiations for carriage that preceded Time Warner's decision to carry MSNBC. Time Warner filed counterclaims contending that Fox conspired with the City of New York to violate its constitutional rights in violation of 42 U.S.C. Section 1983. In a decision issued April 10, Judge Weinstein denied Fox's motion to dismiss Time Warner's counterclaims. *Fox News Network, L.L.C. v. Time Warner Inc.*, 1997 WL 177508 (No. 96-CV-4963 E.D.N.Y. 1997).

Fraud/Promissory Estoppel Claims Dismissed

Fox based its common law claims on alleged oral assurances by Time Warner to the effect that "we are in agreement" and "all the details are set," that there are "no open terms" and that the "deal is on track." Judge Weinstein, however, stated that these assurances are expected in major negotiations and do not rise to the level of fraud or promissory estoppel under the circumstances. He concluded that "the parties knew or should have known that they don't have a deal until they have a deal" (Transcript of Oral Argument, May 15, 1997 at 37), that there was inadequate proof of misleading statements sufficient to mislead a company of the size and sophistication of Fox, that there was insufficient proof of reliance (Id. at 34), and that the court should not encourage fraud and estoppel claims out of failed contract negotiations (Id. at 21).

The "honeyed phrases and assurances that are to be expected in major negotiations between parties of this sort in this media-entertainment field" were "guileful rather than mendacious." Fox News Network, 1997 WL 271720. The court found that there was no fiduciary role assumed, the law was not broken, and the "morals of the market place" were not violated and as such, there was no issue to be presented to a jury.

The Antitrust Action is Transferred to Judge Cote

Judge Weinstein transferred venue of the remaining Fox

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antitrust claims and the counterclaims from the Eastern District of New York to the Southern District because of the judicial efficiency of having all of the claims concerning this series of events decided in one court. Judge Weinstein noted that many of the events giving rise to the issue have already been dealt with in the preliminary injunctive proceeding in the Southern District of New York before Judge Cote. *Time Warner Cable of New York City v. City of New York, 943 F.Supp. 1357.* (S.D.N.Y. 1996). Judge Cote has set a trial date of January 12, 1998.

And in an Unrelated Development, Bloomberg Gets Over-the-Air Carriage...

A recent news article reported that Bloomberg's service will be carried from 6 A.M. to 6 P.M. starting June 30 on the New York television station recently acquired by Paxson Communications Corporation from Dow Jones and ITT. Fox Sports News and live sporting events, according to the story, will fill out the rest of the schedule.

California Supreme Court Agrees to Hear Four Media First Amendment Cases

The California Supreme Court, which has not heard a media-related First Amendment case in several years, will soon hear four important ones. This sets the stage for a series of decisions that may have a substantial impact on California's laws concerning privacy, libel, and access to civil cases. The cases to be heard are the following: *Shulman v. Group W. Productions*, 1996 WL 718813 (Dec. 13, 1996), *see LDRC LibelLetter*, January 1997 at p. 1, April 1997 at p. 26; *Sanders v. ABC, Inc.*, 97 CDOS 803, No. BO94245 (Cal. Ct. App. Jan. 31, 1997), *see LDRC LibelLetter*, February 1997 at p. 1; *Khawar v. Globe*, No. BO84899 96 D.A.R 6549 (Cal. Ct. App. June 5 1996), *see LDRC LibelLetter*, March 1995 at p. 11, June 1996 at p. 1, October 1996 at p. 19; and *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (Eastwood), No. S056924, *see LDRC LibelLetter*, September 1996 at p. 15.

PRIVACY

Shulman v. Group W. Productions presents the California Supreme Court with a question concerning the intersection of newsgathering practices and the right to privacy. Ruth and Wayne Shulman sued after Group W. Productions filmed them being rescued from a serious car accident. The Shulman rescue featured scenes of both the accident site, to which the public had access, and of Mrs. Shulman being transported inside of a rescue helicopter. It was broadcast on the television show, *On Scene: Emergency Response.*

The district court judge entered summary judgment against the Shulmans in late 1993. Just this year a California appeals court partially reversed the summary judgment. The court held that though the Shulmans had no cause of action for intrusion or publication of private facts arising from the recording of their public rescue near a freeway, a triable issue of fact exists concerning whether the reporters intruded on Mrs Shulman's privacy when they filmed her being transported inside of the rescue helicopter.

The appeals court further held that summary judgment could not be granted on the issue of publication of private facts when the media had broadcast excerpts of the footage taken in the helicopter of a plaintiff-patient. The California Supreme Court will now hear the defendant's appeal from this decision.

After agreeing to hear *Shulman*, the Court took the *Sanders* case, staying it pending the outcome of *Shulman. Sanders* arose out of a *Primetime Live* hidden-camera investigation into the telepsychic industry.

During the course of *Primetime's* investigation, its reporters surreptitiously recorded, filmed, and subsequently broadcast conversations between themselves and two telepsychic operators, Mike Sanders and Narsis Kersis (a.k.a. Paul Highland). Sanders and Kersis sued alleging a number of offenses. Prior to trial, the court dismissed all plaintiff claims but that of invasion of privacy by surreptitious taping.

The trial proceeded on the privacy claim and the jury found that Sanders and Kersis had no "objectively reasonable expectation" that their conversations were confidential. Despite that finding, the trial court re-instructed the jury regarding a "sub-tort" of "the right to be free of photographic invasion." The jury then awarded plaintiffs $1.2 million in compensatory and punitive damages for the "sub-tort." Kersis died of alcohol poisoning before the jury reached its verdict, so only Sanders' claims now remain.

A California appeals court, in a 2-1 decision, reversed the trial court, holding that the jury's finding that the plaintiffs had no "objectively reasonable expectation of privacy" barred any recovery. The California Supreme Court will now hear

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argument on the same issue.

LIBEL

Apart from the two privacy cases to be heard, the Supreme Court of California will also decide whether to affirm a $1.17 million libel judgment entered against the *Globe*, a nationally distributed tabloid. In *Khawar v. Globe*, plaintiffs Khalid Khawar and his father, Ali Ahmand, sued the *Globe* after it reported on a then-recently published book by Robert Morrow in which he contended that a man who called himself Ali Ahmand as the assassin of Robert F. Kennedy. Morrow is a former CIA agent and author of a best-selling book on the assassination of John F. Kennedy.

In its piece, the *Globe* republished a photograph from Morrow's book that identifies Khawar as Ahmand. Ali Ahmand's libel claims were dismissed. on the ground that the *Globe* article was not of and concerning Ahmand. Khawar won a libel judgment of $675,000 in compensatory and $500,000 in punitive damages.

At trial, the jury found that the article was a neutral and accurate report of the statements made in the book. It also found that Khawar was a private figure and, seemingly inconsistent with the finding of neutral reportage, that the *Globe* had reported the story negligently and with constitutional and common law malice. The appeals court upheld the judgment, holding that Khawar was a private person and that if a neutral reportage privilege exists in California (an issue the court did not decide), then it does not extend to reports regarding private figures. The appeals court also affirmed that the *Globe* had published with actual malice.

The California Supreme Court will be reviewing a couple of aspects of the Khawar decision. First, the appeals court found that the *Globe* had acted with actual malice because it failed to reinvestigate the subject matter of the previously published book. Finding, albeit without explanation, that the book's allegations were "glaringly false" and "improbable," it placed a burden to reinvestigate on the *Globe* that, appellants will contend, is unconstitutional, especially when the jury found the *Globe's* report to be neutral and accurate and the book's author to be a responsible and prominent source. The court may also take up the question concerning the existence and reach of a neutral reportage privilege.

ACCESS TO CIVIL CASES

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (Eastwood) raises the fundamental issue of whether the public and press have a constitutional right to attend civil trials. In the underlying lawsuit between actor Clint Eastwood and actress Sondra Locke, the trial court barred the press and public from the courtroom at all times when the jury was not present, and it ordered delayed disclosure of transcripts until after the trial. The press appealed and won a reversal. The appellate court, relying upon such Supreme Court decisions as *Richmond Newspapers v. Virginia and Press Enterprise*, as well as the long historical tradition of open criminal and civil trials, found that the trial judge's order was inconsistent with the First Amendment. The parties have submitted their briefs to the California Supreme Court and amici briefs will be submitted on both sides. It is not known when the State Supreme Court will render a decision.

With these four cases before it, the Supreme Court of California is now poised to significantly affect the way that news is gathered and reported in that state.

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GAYLE SPROUL IS NEW LDRC BULLETIN EDITOR

LDRC is very pleased to announce that Gayle Sproul has agreed to become the Editor of the LDRC BULLETIN starting with the 3rd Quarter issue, due to be published in July/August. She succeeds Henry R. Kaufman, who will remain as an editorial advisor to the publication through 1997. Henry currently is General Counsel to SESAC, the music licensing society, and will assist LDRC in the transition to a new Editor.

Gayle has served previously as General Attorney in the NBC Law Department, where she handled litigation, as well as some pre-publication review issues, FOIA, copyright, trademark, music licensing and other of the many issues that face a major broadcast organization. Prior to that she was an associate with the Philadelphia firm of Schnader, Harrison, Segal & Lewis. She is a graduate of Villanova Law School. In addition to serving as Editor of the LDRC BULLETIN, Gayle is working on various litigation matters in private practice.

PLEASE MARK YOUR CALENDARS FOR THE FOLLOWING LDRC EVENTS:

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

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

LDRC DEFENSE COUNSEL SECTION ANNUAL BREAKFAST
THURSDAY, NOVEMBER 13, 1997
CROWNE PLAZA MANHATTAN

JOHN MALTBIE IS NEW LDRC STAFF ATTORNEY

JOHN MARGIOTTA IS NEW LDRC FELLOW

LDRC also wishes to announce that John Maltbie, LDRC's first Fellow, has become a Staff Attorney for LDRC. And, John Margiotta has started this month with LDRC as its second LDRC Fellow. He will be with LDRC through September 1998.

John Maltbie is a graduate of Brooklyn Law School and New York University. He has served as an intern for LDRC as well as an LDRC Fellow. He is an exceptional addition to the LDRC staff, as any of you who may have worked with him undoubtedly have learned.

John Margiotta graduated this May from Columbia University School of Journalism. He holds a law degree from Harvard University Law School. He was a summer associate at Cahill Gordon & Reindel after his second year in law school, and with The Lawyer's Committee for Civil Rights after his first year.

* *

LDRC started the LDRC Fellow program in September 1997. The LDRC Fellow is a one year, post-graduate position. LDRC Fellows join in on all LDRC projects and services, but we hope to have each Fellow contribute to a specific research and/or writing project over the year. We believe, and found support in the number of extraordinary applicants we reviewed last Fall, that the position offers a unique opportunity for a new graduate to explore First Amendment issues and to contribute to the large body of research and writing, as well as litigation support services and other projects and services of LDRC. LDRC will be posting the 1998 LDRC Fellow position in the Fall of 1997.