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LIBELLETTER

Reporting Developments Through June 28, 2000

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Mixed Verdict for *The New York Times*

Reporter Wins Libel/Loses False Light

By Adam Liptak

On June 9, 2000, a New Hampshire jury awarded \$480,000 to the founder and former chairman of Presstek Inc. in a lawsuit against former *New York Times* reporter Susan Antilla. The case arose from a 1994 *New York Times* article. It discussed rumor that Robert Howard, then Presstek's chairman, might actually be Howard Finkelstein, a convicted felon. The article presented the rumor neutrally, setting out evidence for and against it. The rumor was, however, false. Indeed the same day's *Wall Street Journal*, in matching the *Times* report in a late edition, ran the story under the headline "Presstek Chairman Howard is Dogged by False Rumors of Mistaken Identity."

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Mixed Verdict for *The New York Times*

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In an editors' note the next day, *The Times* said that Mr. Howard's representatives had presented it with additional information after publication, that it now found no credible evidence to support the rumor, and that *The Times* regretted having printed it.

Mr. Howard sued in 1997, accusing Ms. Antilla of defaming him by implying the rumor was true and of casting him in a false light. The jury ruled in her favor on the defamation claim. It awarded damages, however, on the false light claim. *The Times* was not named in the lawsuit.

Lessons on Law and Strategy

There are lessons here. One concerns substantive libel law, the other litigation strategy.

The libel law principle, which many journalists find counterintuitive, is that, as a general matter, the neutral presentation of a defamatory allegation may well subject the republisher to liability as though it had spoken the statement itself. The folksy maxim lawyers like to cite is that "tale bearers are as bad as tale makers." This is so in the case of attributed quotations, even where the fact that something has been said is newsworthy in itself. It is also true in the case of rumors, even where the mere existence of a rumor is newsworthy. In the *Howard* case, it was undisputed that the rumor was in wide circulation and was driving down the price of Presstek stock.

Notwithstanding this general principle, known as the republication doctrine, the New Hampshire federal judge hearing Mr. Howard's case made a number of rulings helpful to Ms. Antilla. He denied Mr. Howard's request that Ms. Antilla be compelled to disclose her sources. He held Mr. Howard to be a public figure and thus that he had to prove actual malice. And he charged the jury that Mr. Howard had to prove that the article implied the rumor was true, that Ms. Antilla intended or endorsed the de-

famatory implication, and that Ms. Antilla entertained serious doubts about its truth. That's a lot for a plaintiff to prove.

These rulings were the key to defeating the defamation claim. While the jury was not required to complete a detailed questionnaire, it seems tolerably clear that they ruled in Ms. Antilla's favor on intent and/or actual malice. That is, they did not believe that she had formed an opinion about the truth of the rumor or that she intended to convey the impression that the rumor was true.

The litigation strategy lesson in the case is that the main claim is not always the most dangerous claim.

Although the false light claim also required proof that the article conveyed a false statement or impression and that Ms. Antilla published it with actual malice, the very term "false light," with its inherent mushiness and ambiguity, seemed to have given the jury an opportunity to express its displeasure with the article.

Results Don't Jive

The two results are very difficult to reconcile. The amount of the damages is also plainly excessive, particularly given that Mr. Howard had limited his damages claim to injury incurred in 1994 in order to exclude evidence of significant later problems with the Securities and Exchange Commission.

Mr. Howard had made his own eccentric litigation decision in failing to sue *The Times*. This was particularly odd given the editor's note. His counsel told the *Concord Monitor* after the trial that this decision had been a mistake. "In the future, if it were me, I wouldn't do that," he said. "It's harder because you're more sympathetic to the reporter. She was a very nice person. She didn't come across as an evil person."

Adam Liptak is Senior Counsel at the New York Times Company. Susan Antilla was represented by Jonathan M. Albano of Bingham Dana and William C. Chapman of Orr & Reno.

The litigation strategy lesson in the case is that the main claim is not always the most dangerous claim.

Massachusetts High Court: Cops Are Public Officials

Reverses \$200,000 Libel Award for Police Officer

By Robert A. Bertsche

Police officers — even those at the patrol level — are public officials, and cannot prevail on libel or intentional infliction of emotional distress claims without

The court found that law enforcement officials “necessarily exercise State power,” and do so in a manner that broadly affects citizens’ daily lives.

proving actual malice by clear and convincing evidence, the Massachusetts Supreme Judicial Court ruled on June 20.

With that ruling, in the case of *Rotkiewicz v. Sadowsky*, No. SJC-08117, Massachusetts’ highest court joined the vast majority of appellate courts that have considered the status of police officers. The decision reversed a trial court ruling that had enabled a western Massachusetts jury to award more than \$200,000 to a police officer who had sued over critical comments made by a 53-year-old bricklayer.

The court found that law enforcement officials “necessarily exercise State power,” and do so in a manner that broadly affects citizens’ daily lives. In part because they have the “ability and authority to exercise force,” police who abuse their powers have a particular potential for causing social harm. Moreover, police have “high visibility within and impact on a community.” For all those reasons, the court ruled, police officers suing for defamation must satisfy the actual malice standard set down in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-271, 279-280 (1964).*

Officer William Rotkiewicz sued Walter Sadowsky, a Deerfield, Massachusetts resident, after Sadowsky complained that the state police officer had harassed him and suggested that Rotkiewicz may have been involved in illegal activity. Following an internal investigation by state police of that and another complaint, Rotkiewicz resigned from the force.

When Rotkiewicz later applied for a job as a municipal police officer in Deerfield, Sadowsky appeared before selectmen there and urged them not to appoint him. Sadowsky told selectmen he believed he had been targeted by Rotkiewicz, and he illustrated his concerns by sporting a T-shirt bearing a large bull’s-eye. Rotkiewicz nevertheless got the job, then sued Sadowsky in 1991 for libel and slander.

In 1994, the case went to a jury in Franklin County, which awarded Officer Rotkiewicz \$156,000 in damages plus \$53,636 in interest. Sadowsky obtained new counsel and appealed, and the American Civil Liberties Union of Massachusetts filed an amicus curiae brief arguing the public-official issue — an issue of first impression in Massachusetts.

The ACLUM’s brief hearkened back to the *Sullivan* case, even quoting a portion of Andrew Young’s

The ACLUM’s brief hearkened back to the Sullivan case, even quoting a portion of Andrew Young’s speech to the Libel Defense Resource Center annual dinner in 1992.

speech to the Libel Defense Resource Center annual dinner in 1992. At a tribute to the late Justice William

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LDRC Dinner — A NEW NIGHT

20 Years: What Law and Lawsuits Have Wrought For News

A conversation with —
Ben Bradlee • Diane Sawyer • Mike Wallace
 and led by *Floyd Abrams*.

THURSDAY, November 9, 2000

Celebrate LDRC’s 20th Anniversary!

MA High Court Reverses \$200,000 Libel Award

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Brennan, Young noted that “violence is the language of the unheard,” and that had Sullivan not provided “this peaceful outlet to the challenges and frustrations of a people living in the midst of worse oppression than we like to remember,” then the civil rights movement could never have proceeded.

For similar reasons, in order to protect public comment on the conduct of police, the actual malice rule must extend to even patrol-level officers, the group wrote.

Agreeing with that position, the Supreme Judicial Court concluded that the rule it was articulating “strikes an appropriate balance between the individual’s and society’s interests in protecting reputation with society’s interest in freedom of speech and expression.”

The ACLUM brief also noted that the trial court’s private-figure ruling contradicted the overwhelming weight of authority from virtually every jurisdiction that has addressed the issue, citing several U.S. Supreme Court cases, seven federal courts of appeal, the supreme courts of 28 states, and the intermediate appellate courts of 10 more.

In its ruling, the Supreme Judicial Court relied on the public-official test set out in *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966), and quoted decisions from the 10th Circuit Court of Appeals and the highest courts of Maine and Illinois. At the heart of its decision, the SJC concluded

because of the broad powers vested in police officers and the great potential for abuse of those powers, as well as police officers’ high visibility within and impact on a community, that police officers, even patrol-level police officers such as the plaintiff, are ‘public officials’ for purposes of defamation.

The court also reversed the jury’s finding for the plaintiff on a claim of intentional infliction of emotional distress, relying on *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

The *Rotkiewicz* decision contained language that augurs ill for the plaintiff police officer on retrial. The

Supreme Judicial Court reminded the lower court that “the term ‘actual malice’ does not mean the defendant’s dislike of, hatred of, or ill will toward, the plaintiff.” It pointed out that the defendant’s wearing of a bull’s-eye on his shirt was “symbolic speech,” not actionable as slander. It also noted that many of the defendant’s statements to the selectmen “were, as a matter of law, not actionable, either because they were true, or because they were subjective statements of opinion, and as such were not susceptible of being proven false.”

The Supreme Judicial Court did not address a second argument raised by the ACLUM: that the defendant’s speech was independently immunized under the actual malice standard because it was petitioning activity protected under the United States and Massachusetts constitution. The court held that the argument had not been preserved and was not necessary to a ruling for the defendant.

In making their ruling, the SJC justices found themselves overruling one of their newest colleagues. The trial judge whose ruling they reversed has, since trial, been appointed to the Supreme Judicial Court, and recused himself from consideration of the appeal.

Robert A. Bertsche, with his colleague Carol V. Rose of Hill & Barlow, Boston, and William Newman of the ACLUM Western Regional Office in Northampton, wrote the amicus curiae brief for the American Civil Liberties Union of Massachusetts. The defendant was represented on appeal by Wendy Sibbison of Greenfield.

* The Supreme Judicial Court made its ruling despite plaintiff’s argument that trial counsel for the defendant had not preserved his objection to the trial court’s jury instruction that the plaintiff officer was a private figure who needed only to prove negligence. The reviewing court noted that the issue of public-official status was first raised by the trial judge; only then did the defendant orally request a public-official instruction. Just before closing arguments, the judge told counsel at sidebar that he would not give such an instruction, and the defendant objected — but failed to renew his objection at the end of the jury charge.

While finding that “the better practice would have been for defense counsel to renew the objection, with specificity, at the end of the charge,” the Supreme Judicial Court ruled that the objection and the underlying grounds for it had been brought clearly to the attention of the judge, satisfying the requirement of the state rules of civil procedure, Mass. R. Civ. P. 51(b). Other grounds for objection, the court said, had not been preserved, including that the statements at issue were true as a matter of law, were protected opinion, or were protected symbolic speech.

Politician Suing Over Radio Advertisement Must Show Proof Of Actual Injury: Slander *Per Se* “On Its Last Legs In New Jersey”

By Stacy Alison Fols

In a precedent setting opinion, an appellate panel in New Jersey reversed an award of \$16,000 in compensatory damages and \$250,000 in punitive damages assessed against the public relations firm that produced a radio advertisement allegedly defaming a political candidate. In *McLaughlin v. Rosanio, Bailets & Talamo, Inc.*, ___N.J. Super. ___(App. Div. 2000) (A-7428-97T5, slip op. at 22), the Superior Court of New Jersey, Appellate Division held that “[a]bsent any colorable claim of reputational injury,” this libel case never should have reached a jury.

I. Background

“Negative” campaign advertising has been an integral part of the American political scene at least since the 1796 campaign for U.S. President, when John Adams distributed handbills disparaging Thomas Jefferson’s character. The 1994 race for the office of Sheriff of Camden County, New Jersey, between Republican incumbent William J. Simon and his Democratic opponent Michael W. McLaughlin, was no exception to this mudslinging tradition. One advertisement distributed by McLaughlin, for example, stated that Simon had been “named in a federal racketeering indictment,” but it neglected to note that Simon had been named as a witness, not charged with any wrongdoing.

This case arose when McLaughlin sued Simon over another political advertisement used during the 1994 campaign — a radio advertisement written by the Simon campaign and critical of McLaughlin’s record as an officer of the New Jersey State Police. The allegedly defamatory sentence was: “When he was a State Trooper, Mike McLaughlin jeopardized an organized crime investigation by leaking confidential information to the Scarfo crime family syndicate.”

A. The Basis For The Radio Advertisement

In 1985 and 1986, while an officer of the State Police, McLaughlin was involved in an ongoing investigation of the organized crime activities of Nicodemo

Scarfo. “Operation Tigershark” was the code name given to the police investigation of Thomas DelGiorno, a suspected high-ranking member of the Scarfo crime syndicate. In November 1986, DelGiorno was arrested, and he agreed to cooperate in gathering evidence against other members of the Scarfo crime family.

In spite of efforts to keep DelGiorno’s assistance confidential, The Camden *Courier Post* newspaper published a front-page article on December 7, 1986, disclosing that DelGiorno was cooperating with state prosecutors. Among other things, the article reported that DelGiorno had linked Scarfo to sixteen murders. The reporter who wrote the article characterized his sources as “close to the investigation,” and “familiar with the debriefing of DelGiorno.”

The New Jersey State Police Internal Affairs Bureau (“IAB”) investigated the “leak,” and its report concluded that “it was obvious” that the reporter “had received some of the information from someone close to the investigation.” McLaughlin was identified as one of five police officers “considered principals in the investigation.” Ultimately, McLaughlin was charged with the disciplinary infractions of (1) willfully disclosing official information “not generally available to members of the general public,” and (2) knowingly making “false and misleading official statements” and intentionally misrepresenting the facts to the IAB investigator. McLaughlin pled guilty to both charges and was suspended without pay for a four month period.

B. The Radio Advertisement.

During the 1994 campaign for Camden County Sheriff, Simon learned about the disciplinary charges against McLaughlin from material sent to him anonymously. Based on that information, the Simon campaign prepared and aired a radio advertisement that stated, in part:

Michael McLaughlin is the Democratic candidate for Camden County Sheriff . . . He wants you to trust him to be the highest-ranking law enforcement official in Camden County. But how far

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Slander *Per Se* “On Its Last Legs In New Jersey”

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can you trust a man who breaks the rules of the New Jersey State Police . . . And then tries to cover it up? When he was a State Trooper, Mike McLaughlin jeopardized an organized crime investigation by leaking confidential information to the Scarfo crime family syndicate. For this he was found guilty and suspended by the N.J. State Police.

That was bad enough. But then he was found to have made “false and misleading statements” about the incident to the State Police’s own internal affairs bureau. We have enough problems with our criminals . . . The last thing we need is problems with our cops. The choice is clear. We’re safe with Simon.

When the radio advertisement aired, McLaughlin immediately and very publicly blasted it as “false,” although he admitted that he had been suspended for breaking a rule forbidding officers from talking to reporters without prior authorization. Simon stood by the contents of the radio advertisement as substantially correct, saying that he regarded leaking sensitive information about an organized crime investigation to the media as tantamount to leaking it to the criminals themselves because their awareness of the investigation would still jeopardize it.

C. The Radio Advertisement Causes No Harm

Although the parties disputed whether the statements in the radio advertisement were “true,” one fact that McLaughlin effectively acknowledged from the start is that he suffered no harm. He suffered no pecuniary loss. He was not shunned by anyone, nor did he lose any business associates. Although many people called him to say they were “outraged” by the broadcast, McLaughlin acknowledged that no one, either friend or stranger, ever said that the radio advertisement affected that person’s opinion of him. McLaughlin won the election by a landslide, receiving 75,813 votes to Simon’s 48,032 votes.

Notwithstanding the absence of any actual harm,

McLaughlin filed suit against Simon, several individuals associated with the Simon campaign, and the public relations firm that had produced the advertisement from a script written by a Simon campaign staffer. The other individual defendants were no longer in the case by the time of trial. Simon settled with McLaughlin during the pendency of the appeal, so only the judgment against the public relations firm remained for the appellate court’s determination.

Prior to trial, the court rejected defendants argument that the absence of actual harm entitled them to summary judgment. The jury trial resulted in judgments against Simon for \$24,000 in compensatory damages and \$250,000 in punitive damages, and against the public relations firm for \$16,000 in compensatory damages and another \$250,000 in punitive damages.

II. Can Libel Be “Slander *Per Se*?” Appellate Panel Says “No!”

A. Slander *Per Se* “All But Abandoned”

The appellate court reversed, holding that because a radio broadcast is libel rather than slander, the slander *per se* doctrine did not apply and McLaughlin needed to establish a “colorable claim of reputational injury” in his *prima facie* case. Because McLaughlin had not done so, “defendants should have been granted summary judgment.”

The appellate court noted that New Jersey eliminated the general rule of “presumed damages” in libel cases in 1986. It then turned its analysis to a review of the slander *per se* doctrine, still (at least technically) the law in New Jersey slander cases.

Although not yet officially abrogated, the slander *per se* doctrine has been severely criticized by New Jersey courts. In 1994, the New Jersey Supreme Court called the slander *per se* doctrine “a relic from tort law’s previous age” and noted that “the trend should be toward elimination not expansion of the *per se* categories.” *Ward v. Zelikovsky*, 136 N.J. 516 (1994). Three years later, the Appellate Division opined that “lower courts should invoke the slander *per se* doctrine only in cases where it clearly applies.” *Biondi v. Nassimos*, 300 N.J. Super. 148 (App. Div. 1997). Both courts had noted that the slander *per se* doctrine had been

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Slander *Per Se* “On Its Last Legs In New Jersey”

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roundly criticized by commentators.

Given this precedent, the appellate panel noted that “the subcategory of slander *per se* arguably has been all but abandoned.” It stated:

[W]e distill a shift in favor of the rule that a plaintiff in a libel or slander action must adduce concrete proof that he or she was harmed, either by way of pecuniary losses or injury to his reputation. We are of the view that slander *per se* is on its last legs in New Jersey, and may no longer be a viable jurisprudential basis for awarding damages when there is no demonstrable harm.

(citations omitted). Even assuming that the doctrine retains some viability, the appellate court reiterated that it should be used “only in cases where it clearly applies.”

B. Defamatory Radio Broadcast Is Libel

According to the New Jersey Appellate Division, the slander *per se* doctrine cannot be said to “clearly apply” to libel cases or to libel/slander hybrids.

Although New Jersey had never addressed this specific question, the Appellate Division noted that “[t]he consensus elsewhere seems to be that radio and television broadcasts should be categorized as libel.” At the very least, the statement in this case was of a “hybrid nature.” In any event, because the radio advertisement was *not* “clearly slander,” the court held that the much-discredited slander *per se* doctrine should not be applied. The court reversed and remanded for the entry of an order vacating the judgment in McLaughlin’s favor and for entry of dismissal in favor of the remaining defendant.

McLaughlin has filed a petition for certification (discretionary review) by the New Jersey Supreme Court.

Richard S. Hyland, of counsel, and Stacy Alison Fols, associate, both of Montgomery, McCracken, Walker & Rhoads, LLP, represented defendant/appellant Rosanio, Bailets & Talamo in this matter.

Consumers Union Wins Summary Judgment in Remaining SUV Case

Evidence of Predisposition, Financial Motives Insufficient to Show Actual Malice

In another case involving its reporting on dangers of sports utility vehicles, the publisher of *Consumer Reports* has avoided liability for product disparagement. The United States District Court for the Central District of California granted the watchdog publisher summary judgment in the Suzuki Motor Corporation’s suit over an article which judged the Suzuki Samurai vehicle “Not Acceptable” in terms of safety. *Suzuki Motor Corporation Japan v. Consumers Union of the United States, Inc.*, No. SA CV 96-340 AHS (AN) (C.D. Cal. May 25, 2000).

Based on a finding that Suzuki failed to present clear and convincing evidence of actual malice, this decision corresponds with a jury verdict in another recent case involving Consumers Union and an SUV manufacturer. There, Isuzu Motors Ltd. sued CU over similar criticism of the Isuzu Trooper’s safety. After a two month trial, the jury awarded no damages to the plaintiff, finding that although some false and disparaging remarks were contained in the subject article, none of those statements were published with actual malice. See *LDRC LibelLetter*, April 2000 at 6.

In the 1988 article leading to the Suzuki case, *Con-*

“This pre-testing concern is not an impermissible mindset for a publisher, particularly one which proclaims its mission as protecting the consumer . . .”

sumer Reports reported that tests conducted by Consumers Union on the Suzuki Samurai showed a tendency to roll over during an accident avoidance maneuver. When this report was republished in a later edition of *Consumer Reports*, Suzuki initially sued for product disparagement as well as libel, later omitting the libel claims from its amended complaint. Much pre-trial discovery followed, from which Suzuki culled evidence of the following facts:

- initial tests of the Samurai found no roll-over

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Consumers Union Wins Summary Judgment

(Continued from page 7)

tendency;

- following standard testing, CU's editor in chief remarked, "If you can't find someone to roll this car, I will;"
- the car tipped up on the standard course only after nine successful runs;
- the Samurai was then subjected to a modified testing course, on which it tipped up after several runs;
- CU employees cheered the test driver during whose run the vehicle tipped up;
- a federal government body, the National Highway Transportation and Safety Administration, had discredited the testing procedures used by CU; and
- at the time of the testing, CU was experiencing financial difficulties.

Upon CU's motion for summary judgment, Suzuki asserted that these facts were sufficient to establish actual malice, the fault standard undisputedly applicable in the case. In a concise opinion issued in late May, District Judge AliceMarie Stotler held to the contrary. The applicable burden of proof, also undisputed, was clear and convincing evidence.

First, the judge held that although some evidence might point to "pre-testing concern" on the part of CU that the Samurai was unsafe, such concern must be taken in the context of CU's business. As the opinion noted,

This pre-testing concern is not an impermissible mindset for a publisher, particularly one which proclaims its mission as protecting the consumer, and particularly given the background information already known about the Samurai (the opinion did not elaborate on the relevant "background information").

Nor did CU's contemporaneous financial problems, which Suzuki had pointed to as evidence of a financial motive for disparaging the Samurai, provide sufficient evidence of malice. The court looked to *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1991), and held, "While a motive in publishing material may bear on malice, the Supreme Court has settled the issue by holding that a goal of increasing one's profits through

publishing material is not sufficient to prove actual malice."

Finally, the court refused to find actual malice in CU's use of testing procedures of which the NHTSA disapproved. Judge Stotler characterized CU's use of the tests as stemming not from a reckless disregard for the truth but from a difference of opinion with the government body, the expression of which was protected by the First Amendment. The court further held that the NHTSA evidence was not due any greater weight than any other non-governmental opinion regarding automotive testing methods.

Looking at the evidence as a whole, the court found that a reasonable jury could not find that Suzuki had met the burden of proof of actual malice, and therefore ordered judgment for the defendant. In a Consumers Union Press Release, CU's chief trial counsel, Joseph W. Cotchett, labeled the collective outcome of the Suzuki and Isuzu cases "a great victory for Consumers Union

UPDATE

Help Me Howard Dismissal OK'd

The New York Supreme Court Appellate Division recently affirmed motions to dismiss for both defendants in a suit brought for defamation, violation of privacy and intentional infliction of emotional distress caused by a television news segment on a dispute between a homeowner and her contractor. *Sermidi v. Battistotti*, 2000 N.Y. App. Div. LEXIS 6337 (June 8, 2000); see *LDRC LibelLetter*, September 1999 at 25. Additionally, leave to replead was properly refused, the appellate court held, since all the dismissed causes of action arose out of the objectionable broadcast.

The court determined that statements concerning a contract dispute between the plaintiff and the defendant, a home improvement contractor, made in the media defendants' news show segment "Help Me Howard" did not imply that the plaintiff was not creditworthy. Therefore, the statements were not capable of a defamatory construction. The court also reasoned that since the contract dispute was a matter of public interest, this precluded the plaintiff's claim for invasion of privacy. Furthermore, the court determined that the defendant reporter's conduct in the broadcast was not so outrageous as to support a claim for intentional infliction of emotional distress. The order was unanimously affirmed, without costs.

Superior Court Order Dismisses Klayman's Suit Against the *Washington Post*

The Superior Court of the District of Columbia dismissed plaintiff Larry Klayman's complaint that a *Washington Post* news column written by David Segal 1) defamed him and 2) placed him in a false light. The court agreed with the defendant that the statements at issue were not defamatory and dismissed the suit pursuant to Civil Procedure Rule 12 (b)(6).

At issue in the suit was a published statement about Klayman the *Post* reporter had attributed to a former employee of Klayman's. The statement appeared in the context of a story that suggested that Klayman's frequent appearances on television news shows owed much to his own efforts to solicit invitations to appear from the shows' producers.

He would come in each morning and ask, "Who have you called and why haven't you called?" . . . If the show was doing Hollywood that night, he'd say call anyway. If they were doing Tiananmen Square he'd say, "Well, I'm an international lawyer, try to pitch that." If there was a school shooting he'd say, "So what, We're doing important things here."

David Segal, *Guess Who's on the Line*, WASH. POST, Oct. 25, 1999. Klayman asserted that the statement about the school shooting, which he denied ever making, made him look odious and insensitive to the murder of children. The *Post*, on the other hand, argued that the statement, interpreted in context, could not be construed as defamatory.

The court rejected the defamation claim after determining the statement was not reasonably capable of a defamatory meaning.

In the District of Columbia, a publication is defamatory if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of this community. An alleged defamatory statement must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous.

In the court's view, the *Post's* statement was not defamatory because it did not say, "directly, or by implication, that Mr. Klayman does not care about the murder of children or about school shootings." Rather, the court took the view that the statement attached to Mr. Klayman a belief that his work was important and on a par with the day's leading stories.

The court also rejected Klayman's assertion that the statement was grounds for a "false light" tort action, noting that "the defamation and false light claims . . . are essentially the same," and for the same reasons, therefore, rejected. The court remarked that to suggest that Klayman believes his work is important enough to merit news coverage even on a day when there has been a school shooting does not place Klayman in a false light that would be offensive to a reasonable person.

Tortious Interference Claim Falls With Libel Action in Georgia Federal Court

By Thomas M. Clyde

In late May, a federal district court in Atlanta granted summary judgment to Emory University on a variety of speech-based tort claims filed by former business school professor Jeffrey A. Sonnenfeld. *Sonnenfeld v. Emory Univ.*, No. 1:98-CV-1555 (May 24, 2000 N.D. Ga).

The case arises from Sonnenfeld's sudden resignation from Emory's Goizueta School of Business in 1997 just weeks before he was scheduled to leave to become dean of the business school at cross-town rival Georgia Tech and from Georgia Tech's just-as-sudden withdrawal of its invitation to Sonnenfeld to become its dean. After vague allusions to an unspecified medical condition, media reports disclosed that Sonnenfeld had been captured on a hidden security camera committing what Emory officials had

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Tortious Interference Claim Falls With Libel Action

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concluded was vandalism to business school walls and doors.

Left without an academic position, Sonnenfeld set up a private company to operate his acclaimed CEO school and filed a multi-count complaint against Emory in federal district court in Atlanta. Sonnenfeld, a frequently quoted expert on business issues, repeatedly pled his case to the public, most notably on *60 Minutes*, contending that in retaliation for Sonnenfeld's planned move, Emory's president had maliciously leaked trumped up charges of vandalism first to Georgia Tech's president and then to the press.

Grainy Tape Blurs Truth

The grainy security videotape at the heart of the dispute was subject to radically different interpretations by the parties. Emory claimed that the videotape caught Sonnenfeld red handed scratching and kicking newly painted walls in a manner that corresponded to a pattern of vandalism at the business school. Sonnenfeld, on the other hand, asserted that the videotape shows nothing more than an absent-minded professor lost in thought accidentally brushing the hallway wall and then attempting to fix the sole of a troublesome shoe.

Finding Sonnenfeld to be at least a limited purpose public figure, Judge Clarence Cooper dismissed Sonnenfeld's various claims for defamation for lack of actual malice.

Tortious Interference Dismissed

Revisiting an earlier oral ruling, Judge Cooper also reconsidered on rehearing and dismissed for the same reason Sonnenfeld's claim for tortious interference. After a close examination of the complaint, and citing

- *Beverly Hills Foodland v. Union*, 39 F.3d 1919 (8th Cir. 1994) (dismissing tortious interference claims: "plaintiff may not avoid the protection

afforded by the Constitution and federal labor law merely by using creative pleading");

- *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (dismissing tortious interference claim because it is "subject to the same first amendment requirements that govern actions for defamation"); and
- *S&W Seafoods Co. v. Jacor Broadcasting*, 194 Ga. App. 233, 390 S.E.2d 228 (1989) (dismissing tortious interference claim based on "derogatory statements" where court had found they were not actionable as defamation),

Judge Cooper concluded that the tortious interference claim and the defamation claims were "premised on the same or substantially similar allegedly defamatory statements." As a result, the court held that Sonnenfeld's failure to meet the actual malice burden was dispositive of both claims.

Cohen v. Cowles Won't Save Claim

In a footnote to the opinion, Judge Cooper expressly rejected Sonnenfeld's contention that his tortious interference claim was saved by *Cohen v. Cowles Media*, 501 U.S. 663 (1991). He found that the claim was not premised on a law of general applicability, nor was it being applied in a way that would have only an incidental impact on speech. "Such a holding would limit a private university from making statements . . . to another university (professional peer or colleague) where it believes it is professionally justified to make such statements based on the available information at the time."

Judge Cooper allowed to proceed Sonnenfeld's claims against Emory for breach of contract and for deprivation of procedural due process rights. No trial date has been set.

Tom Clyde is an associate with Dow, Lohnes & Albertson in Atlanta, Georgia.

Doctor Peer Review Records Privileged

Libel Defendant Broadcaster Denied Access

In a recent appeal from a contempt order, the Supreme Court of Virginia reversed the decision of the Circuit Court of Fairfax County concerning the scope and application of the statutory privilege from disclosure accorded peer review records possessed by certain medical organizations. In reversing, the court held that (1) the statutory privilege was not limited only to medical malpractice actions; (2) that the privilege did not belong to the physician who was the subject of the peer review and could not be unilaterally waived by that physician; and (3) that the defendant, WJLA-TV, did not demonstrate a "good cause arising from extraordinary circumstances" to justify disclosure of the confidential records. VA. CODE ANN. § 8.01-581.17. *HCA Health Services of Virginia v. Levin*, 2000 Va. LEXIS 102 (June 9, 2000).

The surrounding case, an action by Stephen M. Levin, M.D. against WJLA-TV, among others, for defamation, conspiracy, trespass, and unauthorized use of his name and picture, was brought when the defendants allegedly defamed Levin during a news story. The story characterized him as the "Dirty Doc" and the "X-Rated Doctor" as well as reporter alleged sexual assaults upon female patients in connection with his use of internal pelvic examination and "intrapelvic stretching techniques."

During subsequent discovery proceedings WJLA-TV served Reston Hospital Center, Pentagon City Hospital, and INOVA Health Systems with subpoenas duces tecum to compel production of confidential review records about the plaintiff. After a motion to quash was denied, the appellants, wishing to generate an appealable order, refused to comply with the discovery order and were held in civil contempt. This appeal ensued.

In articulating their opinion, the Supreme Court determined that the privilege statute under consideration was clear, unambiguous, and unqualified. Contrary to WJLA-TV's argument that it applied only to medical malpractice actions, the court stated that the statute showed clear legislative intent that the privilege should be applied to all kinds of litigation.

Additionally, in holding that the privilege did not belong to the physician who was the subject of the peer review, the court noted that to allow the subject of peer

review to waive the privilege by bringing a libel suit, would run counter to the purpose of the statute, namely encouraging physicians to participate candidly in peer review of other physicians with the expectation that the information would remain confidential.

Lastly, the court concluded that the lower court erred in finding the claim of WJLA-TV justifiable because the statute itself established that the action was justifiable only under "extraordinary circumstances." The court held that there was nothing "extraordinary" about WJLA's need to defend the lawsuit. Accordingly, the contempt order was set aside, the respective motions to quash were granted, and the daily fines were annulled and dismissed.

Summary Judgment Against Involuntary Public Figure in Pennsylvania

A Strategy in the Complex Case

By Joyce S. Meyers

On May 4, 2000, a court in Chester County, Pennsylvania granted summary judgment to two newspaper defendants against a construction contractor and his company after finding that plaintiffs were limited purpose public figures who could not show actual malice. The ruling is noteworthy for two reasons. First, the court held plaintiffs to be public figures although it was undisputed that they did not voluntarily seek public attention. Second, the case illustrates a successful strategy for obtaining summary judgment in a complex libel case with a voluminous factual record.

Libel Spans Years of Events

The case, captioned *Peter D. Melchiorre, et al. v. William J. McCauley, III, et al*, commenced with an 83 page, 50 count complaint against the borough manager of Phoenixville, Pennsylvania; two newspapers, *The Mercury* and *The Phoenix*; and a reporter for *The Mercury*. Plaintiffs Peter D. Melchiorre and his company, Melchiorre Construction Company, alleged that they had been defamed

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by Phoenixville borough manager William J. McCauley III in a memorandum that McCauley presented to the Borough Council in June, 1993.

McCauley alleged in the memo that, under the prior administration, plaintiffs had benefited from favoritism, no-bid contracts, and payment for work that could and should have been done by borough employees. McCauley charged that plaintiffs received these benefits as a result of Melchiorre's personal relationships with borough officials and employees. Both newspapers reported on the McCauley memo.

After reporting McCauley's allegations, *The Mercury*, the larger of the two defendant newspapers, investigated further by collecting and reviewing all the records relating to Melchiorre's work for the Borough of Phoenixville during the nine year period referred to in McCauley's memo. *The Mercury* published follow-up reports on the content of those records and the extent to which they supported McCauley's allegations. The reporter reviewed council meeting minutes, contract documents and correspondence and interviewed present and former borough officials, as well as other knowledgeable sources, concerning those issues. In the succeeding months, other issues arose in connection with the quality of plaintiffs' work on a recently completed major construction project in the borough, and *The Mercury* investigated and reported on these issues as well.

In October 1993, *The Mercury* learned that the FBI was investigating the relationship between Melchiorre and the Borough of Phoenixville. A few days later, McCauley announced at a council meeting that he had received a grand jury subpoena requiring him to produce for a grand jury all records of transactions with Melchiorre Construction. Both newspapers reported on the FBI and grand jury investigations.

Plaintiffs' complaint alleged that the newspapers defamed them by stating or implying that plaintiffs' business relationship with the borough was "dishonest, fraudulent, evil, unethical and corrupt." The publications at issue included twelve articles in *The Phoenix* and 25 articles, eight editorials and one political cartoon

in *The Mercury*. The publications in *The Mercury* extended over a nine-month period and covered events and issues over a nine-year period.

Discovery Massive

Discovery in the case was extensive and produced thousands of pages of documents, many of which had already been collected by the reporter, who also had extensive notes of her many interviews. In addition, there were thousands of pages of deposition testimony. The record established that the reporting was accurate and that the editorial opinions were based on disclosed facts accurately reported in the news stories. Moreover, most of the information reported could be traced directly to

The numerous grounds for summary judgment created both an opportunity and a challenge.

public records such as contract documents, council meeting minutes and FBI files. Although the reporter did not have access to the FBI documents before the case was filed, these documents and the FBI agent's deposition verified that the FBI was indeed investigating the relationship between plaintiffs and the Borough of Phoenixville and that the subject of the investigation was defined as "political corruption." The investigation was still ongoing at the time the last of the articles in question was published.

The record created in discovery provided strong support for a summary judgment motion on multiple grounds, including substantial truth and the fair report privilege. In addition, there were many constitutional defenses for statements that could be characterized as figurative language, rhetorical hyperbole, or subjective non-verifiable opinion. Defense counsel also believed that plaintiffs could fairly be characterized as limited purpose public figures, who would not be able to prove actual malice.

The Challenge: Focus for Court

The numerous grounds for summary judgment created both an opportunity and a challenge. While defense counsel believed that summary judgment for the newspaper defendants was warranted, properly addressing all of the defenses as they applied to each of the publications and supporting those defenses with evidence from

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the voluminous record would have required a brief of hundreds of pages supported by thousands of pages of exhibits.

The sheer volume of the record and the number of factual and legal issues to be addressed were sufficient to cause any judge to conclude that, somewhere in that massive pile of paper, there had to be a genuine issue of material fact sufficient to justify denying summary judgment. The challenge for defense counsel, therefore, was not only to marshal the facts and argue the law but to find a strategy to assure that the court would be able to focus sufficiently to recognize that plaintiffs' claims had no merit and should not proceed to trial.

Defense counsel addressed this challenge by devising a strategy that would permit serial summary judgment motions on separate issues, beginning with a determination of whether plaintiffs were public figures and, if so, whether plaintiffs could meet the burden of proving actual malice. Initially, the court was very resistant to this approach, accusing defense counsel of trying to get "multiple bites at the apple."

It took three case management conferences over a number of months to persuade the court that this approach would serve the interest of judicial economy by allowing the court to focus initially on limited issues that might be dispositive without requiring it to determine whether all the facts reported in more than forty publications were true or false. This approach would avoid the need to review the entire voluminous record at one time and could potentially dispose of the case with a considerable saving in time, effort and money for the parties and the court. At the very least, the court was persuaded that this approach would result in substantially narrowing the issues that would have to be considered if the case went to trial.

Three-Step Summary Judgment Is Success

The court then entered a case management order that established a three-step approach to summary judgment.

Initially, each newspaper would submit a motion for summary judgment solely on the ground that plaintiffs were limited purpose public figures who could not prove actual malice. The briefs to be submitted by the parties, however, would address only the public figure issue. If the court found that plaintiffs were public figures, plaintiffs would then submit a brief identifying the specific evidence on which they would rely to prove actual malice, and defendants' briefs would address the sufficiency of that evidence. If any issues remained after that point, defendants would be permitted to file further summary judgment motions addressing any other relevant defenses as to any claims that survived the first set of briefs.

The strategy worked. By limiting the focus to one issue at a time, the case management order permitted the court to deal with a manageable body of information,

apply the law to the relevant facts, and reach the right result.

Involuntary Public Figure

The public figure issue presented a significant challenge because it was undisputed that plaintiffs had not voluntarily sought to thrust themselves into the center of the public controversy resulting from the borough manager's allegations. Indeed, plaintiff Peter Melchiorre had made every effort to avoid the spotlight. Although the reporter for *The Mercury* had attempted to reach him dozens of times, he had never returned a phone call or otherwise made himself available for comment on the subjects covered in the publications at issue. It was clear that he had filed the lawsuit, at least in part, to pressure the defendant newspapers to stop writing about his activities.

The newspapers argued, however, that plaintiffs were public figures because their activities were at the center of a controversy involving the conduct of public officials and the use of public funds. The newspapers relied on the language in *Gertz v. Robert Welch*, 418 U. S. 323, 351 (1974), which recognized that a person can become a public figure by being "drawn into a particular public controversy," and the four-part test for a lim-

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Defense counsel addressed this challenge by devising a strategy that would permit serial summary judgment motions on separate issues . . . the strategy worked.

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ited purpose public figure articulated in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980).

Several courts have applied the *Waldbaum* test to find that plaintiffs were public figures because their actions invited attention even if, like the plaintiffs in this case, they neither sought nor welcomed the attention. Most helpful was *McDowell v. Paiewonsky*, 769 F.2d 942, 949 (3d Cir. 1985), a case almost directly on point, holding an architect who had been involved in controversial public construction projects to be an involuntary public figure.

Plaintiffs argued that they could not be deemed public figures because they did not thrust themselves into a public controversy or seek to influence its outcome, relying on the trilogy of U.S. Supreme Court cases rejecting involuntary public figure status for the plaintiffs involved. See *Wolston v. Readers Digest Ass'n*, 443 U.S. 115 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). Plaintiffs also argued that media defendants cannot “bootstrap” a plaintiff into becoming a public figure in a controversy that the media themselves create.

Their arguments failed, however, for two reasons. First, the nature of the controversy involved the conduct of public officials and the expenditure of public funds and was brought to the attention of the public by statements of a public official. Second, the defendant newspapers supported plaintiffs’ public figure status with prior media reports over more than a decade in their own and other newspapers raising precisely the same issues about plaintiffs: no-bid contracts, quality of work, and political favoritism arising out of personal friendships with public officials.

These dozens of prior reports, many of which included plaintiffs’ name in headlines, persuaded the court that the public controversies surrounding plaintiffs’ activities predated the publications at issue and made plaintiffs limited purpose public figures with respect to all of the subjects at issue in the publications.

Actual Malice Motion Followed

The effect of this ruling under the case management order was to shift the burden to plaintiffs to come forward with sufficient evidence of actual malice to defeat sum-

mary judgment. In an attempt to meet this burden, plaintiffs narrowed their claims to three issues covered in *The Mercury* publications: the FBI investigation, the grand jury investigation, and a construction project that resulted in substantial cost overruns. Plaintiffs also argued that the repetition of certain statements in multiple news stories somehow strengthened their claim of actual malice.

The issues surrounding the construction project and the FBI investigation were easily defeated by the records documenting the cost overruns and the FBI’s own investigation file. At oral argument plaintiffs focused primarily on the grand jury investigation. They claimed that reports of a grand jury investigation were false because discovery established that witnesses who would have been central to such an investigation had not been subpoenaed to testify.

Plaintiffs, however, could not get around the grand jury subpoena for documents relating to Melchiorre Construction Company that was served on the borough manager and announced at a public council meeting. Plaintiffs argued that the subpoena, without more, did not prove the existence of a grand jury investigation and was not a sufficient basis to publish articles allegedly implying that plaintiffs were the targets of a grand jury investigation, thereby further implying that plaintiffs had engaged in criminal conduct.

The court totally rejected plaintiffs’ argument. The court noted that the repetition of allegedly defamatory statements in different contexts does not in any way meet plaintiffs’ burden of proof on either actual malice or falsity. The court concluded that plaintiffs had failed to “state the evidence from which the jury could conclude that the statements are not true and, more importantly, that defendants knew of such falsity or were reckless in their disregard of whether the statements were true or not,” explicitly rejecting plaintiffs’ argument that an “absence of evidence” to support allegedly defamatory statements is sufficient to meet plaintiffs’ burden of proof. Instead, the court placed the burden of proving both falsity and actual malice squarely on plaintiffs, where it belongs, and granted the newspaper defendants’ motion for summary judgment. It is not yet known whether plaintiffs will appeal.

Joyce S. Meyers and Michael D. Epstein, partners at Montgomery, McCracken, Walker & Rhoads, LLP in Philadelphia, represented The Mercury and its reporter.

Recent Developments in Online Defamation Law

By Patrick J. Carome and Laura A. Heymann

Although the case law in the area of online defamation is still in its formative stages, a trio of recent online defamation cases suggest that the trend in the United States is continuing to develop in ways that are favorable to media defendants. In two of these cases, one applying federal statutory law and one applying state common law, the courts held that an Internet service provider (ISP) could not be held liable for content that originated with a third party. And in the third case, the court applied the single publication rule to bar a suit trying to evade the statute of limitations by claiming that each day of availability on the Internet constituted a new publication. Despite these welcome developments in the United States, however, the law is not developing as favorably across the Atlantic, where a recent case suggests that the British courts will not follow the U.S. trend.

ISP Liability for Online Defamation

Ben Ezra, Weinstein & Co. v. America Online, Inc.,
206 F.3d 980 (10th Cir. 2000), *petition for cert. filed*
(June 19, 2000)

Lunney v. Prodigy Services Co.,
723 N.E.2d 539, 28 Media L. Rep. 1090 (N.Y. Ct.
App. 1999), *cert. denied*, 120 S. Ct. 1832 (2000)

In *Ben Ezra*, the Tenth Circuit became the third appellate court (after the Fourth Circuit in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) and the District Court of Appeal of Florida for the Fourth District in *Doe v. America Online, Inc.*, 718 So. 2d 385, 27 Media L. Rep. 1119 (Fl. Dist. Ct. App. 1998), *rev. granted*, 729 So. 2d 390 (Apr. 12, 1999)) to recognize that 47 U.S.C. § 230 broadly immunizes ISPs against defamation and other types of suits based on content provided by a third party. (Section 230's key provision states, "No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.")

In 1997, Ben Ezra, Weinstein, and Company sued

AOL for defamation and negligence, alleging that AOL published incorrect information on Ben Ezra's stock price and share volume. The stock quotation information on AOL, however, was provided to AOL by two independent third parties. The court held that Section 230 barred Ben Ezra's suit because the law "creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party." Because Ben Ezra had failed to present evidence showing that AOL was the source of any of the allegedly erroneous stock quote information — as opposed to simply making available content created and developed entirely by third parties — the court affirmed the lower court's grant of summary judgment to AOL.

While the clear language of Section 230 provides a simple and effective defense to defamation suits against ISPs, traditional tort law can provide an equally strong defense. In May, the U.S. Supreme Court denied certiorari in *Lunney*, thus ending Alexander Lunney's long-running effort to hold Prodigy liable for threatening and vulgar e-mail and bulletin board postings that an imposter using the service had sent as if from Lunney.

The decision of the New York Court of Appeals in the case was based on traditional defamation doctrine: the court stated that because Lunney's claim was "grounded in New York common law," it should be evaluated in accordance with "established tort principles" in the state. Because there was no evidence that Prodigy had acted as anything other than a conduit or distributor for the statements at issue, traditional defamation principles required that Lunney's claim against Prodigy be denied. Having held that Prodigy could not be held liable under New York common law, the court declined to reach the applicability of Section 230.

Media lawyers should keep in mind that even though both cases resulted in victory for the ISP, the defenses upheld in *Ben Ezra* and *Lunney* do not confer an absolute shield from liability in all circum-

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stances. Section 230 immunity does not extend to content that a defendant created and developed on its own. Moreover, although the Tenth Circuit specifically held in *Ben Ezra* that an ISP's decision to delete erroneous third-party content from its service does not impair its immunity defense, the court did not reach the question of the extent to which Section 230 immunity would be lost for content that was jointly created and developed by an ISP and a third party. Similarly, although the New York Court of Appeals suggested in *Lunney* that an ISP's general policy of editorial control over third-party content would not defeat common law protection in and of itself, it left open whether liability might exist if editorial control actually had been exercised over the particular posting at issue.

The Single Publication Rule on the Internet

***Firth v. State*, No. 97999, 2000 WL 306865 (N.Y. Ct. Cl. 2000)**

While *Firth* did not involve a media defendant, the case still has significant implications for ISPs and other media entities seeking defenses against online defamation suits. (Similar questions are at issue, for example, in *Van Buskirk v. New York Times*, a case now pending in the U.S. District Court for the Southern District of New York.)

In *Firth*, the plaintiff filed suit against the state of New York, claiming that an inspector general's report published both in hard copy and on the Internet had defamed him. One of the state's affirmative defenses was that *Firth's* suit, brought two years after the report was released, did not satisfy New York's one-year statute of limitations. *Firth* contended that because each day that the report continued to be available on the Internet constituted a new publication, the one-year limitations period started only when the report ceased to be available online.

The Court of Claims rejected *Firth's* claim. Relying on *Lunney's* directive that traditional defamation claims should be evaluated in accordance with estab-

lished state tort principles, the court held that the traditional "single publication rule" should be applied to publication on the Internet. Under the rule, the publication of a defamatory statement in a single issue of a newspaper, magazine, or book edition constitutes one publication, no matter how many copies of the publication are distributed. On the Internet, therefore, "publication occurs at the time the defamatory article is made available to the public and actual sales of the article (the equivalent of 'hits' on the Internet) are unnecessary."

Here, too, however, the scope of the holding was limited to the circumstances before the court, in which the report had been made continually available on the Internet in identical form. The court suggested that a different result might obtain if "some alteration or change in form" of the report had occurred. ISPs and media entities should be aware, therefore, that just as with traditional media, a new format or a new edition of an Internet publication (such as might occur when an article is updated or moved to a different website) may be deemed to constitute a new publication of the work, thus starting plaintiffs' clocks running anew.

The Law Abroad: U.K. Rejection of U.S. Law

***Laurence Godfrey v. Demon Internet Ltd.*,
High Court of Justice, Queen's Bench Division
(1999)**

Just as important for ISPs or other media entities with operations or assets abroad is whether other countries will follow the trend of the U.S. courts. In the U.K., the *Godfrey* case illustrates that media defendants in courts outside the U.S. may not enjoy either immunity from defamation claims relating to third-party content or the protections of the Internet single publication rule recognized in *Firth*.

Laurence Godfrey filed suit against Demon Internet Ltd., claiming that he had notified Demon's managing director that a particular third-party posting to Demon's news server was defamatory. Demon did not remove the posting, and it remained on the server

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until it was deleted automatically after two weeks. Godfrey sought damages for defamation accruing after the date on which Demon had notice of the posting.

Demon attempted to rely on the Defamation Act of 1996, which permits a defense to a claim of defamation if three conditions are met: (1) the defendant was not “the author, editor, or publisher” of the statement; (2) the defendant “took reasonable care in relation to its publication”; and (3) the defendant “did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.” The court held that Demon could not avail itself of this defense because it could not meet conditions (2) and (3): Demon chose not to remove the posting at issue once notified even though it had the capability to do so.

The court’s holding was due largely to the fact that defamation law in the U.K. differs considerably from the law in the United States, where the defendant is offered more protection from liability. The *Godfrey* court acknowledged, but rejected, the U.S. line of online defamation cases, noting that English courts would have reached a different result in *Lunney* and that the 1996 Act was not intended to provide the same immunity as Section 230 in the United States.

Similarly, implicit in the court’s decision was a rejection of the single publication rule as applied to the Internet. Under U.S. law as recognized in *Firth*, publication on the Internet takes place only once — when the article is first made available to the public. Under English libel law, however, each communication constitutes a separate libel; thus, every time a Demon customer accessed the newsgroup and saw the posting at issue, the court held, a publication to that customer occurred. Accordingly, once it had notice of Godfrey’s claims, Demon could no longer assert that it was not contributing to the publication of a defamatory statement, since it was doing so as long as it continued to make the post available.

How great a threat *Godfrey* poses to American media defendants is still unclear. Demon abandoned

its appeal, choosing instead to settle with the plaintiff (for an estimated £200,000 in damages and costs), although the resulting outcry from ISPs may inspire a legislative response.

In the meantime, however, if *Godfrey* is viewed as precedential by other U.K. courts, ISPs and other media entities in the United States may be exposed to liability for material available via the Internet in the U.K. (even if that material is maintained on a server in the United States). The House of Lords’ recent decision in *Berezovsky v. Michaels* (in which two Russian citizens were permitted to bring a libel suit against an American magazine in England notwithstanding the fact that the magazine’s circulation in the United States and Canada dwarfed circulation in England and Wales) suggests that any plaintiff who can claim a reputation to protect in England can take advantage of the region’s plaintiff-friendly libel law. And although a judgment rendered in the U.K. may not be enforceable in this country, see *Telnikoff v. Matusевич*, 702 A.2d 330 (Md. Ct. App. 1997) (British libel judgment contrary to public policy and thus denied recognition), many ISPs and media entities no doubt have assets in the U.K. against which a successful defamation plaintiff could seek to enforce a judgment issued there.

Conclusion

As these cases suggest, ISPs and other media entities remain on fairly safe ground in the United States with respect to liability for third-party content. For multinational entities — or even U.S. entities with content accessible abroad — things are much less certain. If *Godfrey* turns out to be a warning of things to come, the protections afforded to media defendants by U.S. law may become small comfort, as plaintiffs merely find more amenable fora abroad in which to bring suit.

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Berezovsky v. Forbes: A False Dawn for Forum Shoppers

By David Hooper

On May 11, 2000, by a majority of 3-2, the House of Lords allowed Boris Berezovsky, former Deputy Secretary of the Security Council of Russian Federation and a billionaire businessman, and Nikolai Glouchkov, Deputy Manager of Aeroflot, to bring a libel action in England. *Berezovsky v. Michaels and Others*.

Background

They had taken exception to an article in *Forbes* describing the two men as “criminals on an outrageous scale.” The Russians had to show that England was clearly the appropriate forum in which the case should be tried in the interests of all the parties and the ends of justice (*Spiliada Maritime Corporation v. Cansulex Limited* [1987] AC460). They had failed to do so before the judge at first instance, Mr Justice Popplewell, who ruled that their links with England were “tenuous.” See *LDRC LibelLetter* December 1997 at 1.

The Court of Appeal Decision

The Court of Appeal reversed. It had allowed evidence to be introduced from their close business associates who claim that business deals outside the United Kingdom had been hampered by these allegations of Berezovsky’s dubious reputation. This led Lord Justice Hirst to conclude that Berezovsky had “a substantial reputation with [England], and an important business reputation to protect [t]here.” [1999] EMLR 278, 290. See *LDRC LibelLetter* November 1998 at 39.

The House of Lords Decision

In the House of Lords decision, the majority judges appeared influenced by the dislike of the American tone of the article which Lord Nolan described as being written in “colourful and explicit terms.” Be that as it may, 98% of *Forbes*’ circulation was in the United States and Canada with 1,915 cop-

ies sold by subscription or on newsstands in England and Wales as opposed to the 785,710 in the USA and Canada. Sales in Russia amounted to 13.

In the majority judgment, Lord Steyn indicated that the US Uniform Single Publication Act did not assist in selecting the most suitable court for the trial. It existed to prevent a multiplicity of suits. Here the issue was not a multiplicity of suits but whether the Russians could confine their action simply to the small publication in England and Wales. Lord Steyn rejected the defense argument that in multi-jurisdictional libel claims there should in truth be one cause of action and that it was artificial for the plaintiffs to confine their claim to the number of copies sold in a particular jurisdiction. Lord Steyn thought that the Russians did have reputations in England to protect and that it was not unfair that a foreign publisher should be sued there.

The House of Lords did not, however, consider, as Lord Justice Hirst of the Court of Appeal appeared to have, that the fact that there had been a tort within the jurisdiction by the act of publication raised a *prima facie* presumption that England was the appropriate jurisdiction. It was simply one of the factors to be taken into account in assessing the factors which tell in favour of a trial in England against the factors which tell in favour of a foreign trial. *The Albaforth* [1984] 2 Lloyd’s Rep 91. A different regime applies as between members of the European Union where a plaintiff can, under the Brussels Convention, effectively forum shop by selecting a claim in a jurisdiction where the harmful event occurred

Lord’s Decision Narrow

The majority judgments were in fact narrow in application and broke no new ground. They simply upheld one of the final judgments given by Lord Justice Hirst before his retirement. That judgment was a shot in the arm for those who in this era of global publication can establish a degree of distribution in England and who hanker after what has been

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called without apparent irony the beguiling superiority of English law. Cynics, however, would contend that its most beguiling feature is the ease with which plaintiffs can use the plaintiff-friendly presumptions of English libel law to establish a claim for damages at the cost of free speech. The upshot is that there will be a fiercely contested libel action next year which will, no doubt, benefit not only libel lawyers but Russian translators and bodyguards and, ironically, Aeroflot, as the English Court hears tales of gangland killings and the decapitation of Berezovsky's chauffeur when his car exploded with him inside it.

Appeal to the European Court

The House of Lords' ruling will be challenged under Articles 6 and 10 relating to the right to a fair trial and to freedom of speech of the European Convention of Human Rights. That challenge is unlikely to be heard before the trial takes place. If Forbes is successful in Europe, it would recover damages from the UK Government for allowing such a restrictive law of libel to remain in place.

Impact of the Decision

While the judgment may encourage forum shoppers the forceful judgments of the two dissenting judges, Lord Hoffmann and Lord Hope, are likely to be viewed as by some way the most intellectually compelling. This may well be a decisive factor in the European Court. As the implications of the new media and the expansion of global publishing filter through to the senior judiciary the Hoffmann and Hope arguments are likely to prevail.

As it is, there will continue to be hard-fought battles at first instance to prevent the service of claims abroad. American defendants without a place of business in the UK would be well-advised to decline to accept service of proceedings in England. This places the burden of proving the appropriateness of the English forum on the claimant.

Lord Hoffmann had little doubt that the Russians

were forum shoppers in the most literal sense. They wanted English law, English judicial integrity and the international publicity which would attend any success in an English libel action to vindicate their international reputations.

Neither Lord Hoffmann nor Lord Hope had any doubt that Mr Justice Popplewell had reached the correct decision when he held that the Russians' links with England were "tenuous." The sort of people who engage in forum shopping are always able to establish some links with England. However, they were Russians who came here only on business and their reputation in England was based entirely on their activities in Russia. As Lord Hoffmann trenchantly put it, President Yeltsin's connections with England could be said to be tenuous or non-existent, although he was of course a well-known figure in England. Berezovsky has a truly international reputation – but that was not necessarily enough. He has lectured at Princeton, dined with George Soros and attended Rupert Murdoch's wedding in the United States. He is in the newspapers and no doubt had media contacts all over the world. His reputation in England however was merely an inseparable segment of his reputation worldwide. But whatever the reputation of the plaintiffs in England it was a reputation based on their activities in Russia.

Dissenters' View May Prevail

The majority in the House of Lords were essentially giving a judgment on the facts and upholding Hirst's judgment which they appeared to think met the justice of the case. The lasting point of principle is likely to be Lord Hoffmann's observation that the English Courts should decline the role of

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SAVE THE DATE/Note New Day

Annual Defense Counsel Section Breakfast

FRIDAY, November 10, 2000

Berezovsky v. Forbes

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“international policemen” in adjudicating upon jurisdictional disputes between foreign countries. The English Court should not be an international libel tribunal for a dispute between foreigners which had no connection with this country.

In the view of Lord Hoffmann and Lord Hope the Court of Appeal had been wrong to interfere with Mr Justice Popplewell’s exercise of discretion. He had dealt with the matter with commendable expedition and had taken into account all the relevant factors. In effect the Court of Appeal was substituting its own view of the merits of the case on the basis of less than compelling evidence from Berezovsky’s business associates, suggesting Popplewell had got the law wrong, when he had not.

In Lord Hoffmann’s view, although this was not a case involving the multiplicity of suits, it was the plaintiffs who were, for practical purposes, treating the publication as a “global tort” by calling upon the English Court (and only the English Court) to vindicate their reputations. Lord Hope gave an equally powerful judgment pointing out that the origin of the plaintiffs’ reputation was Russian, that the Court of Appeal had been wrong to interfere with Mr Justice Popplewell’s judgment. The Russians’ connection with this country was ephemeral and it was not unreasonable to describe it as “tenuous.” Lord Hope gave some guidance as to how the search for the jurisdiction where substantial justice could be done was to be achieved.

One of the factors which a judge should take into account is to consider evidence that publication has taken place elsewhere as well as in England. He highlighted the dangers of the plaintiff being able to rely in vindicating his reputation on extra territorial publications upon which he had not sued. How is one, the Judge asked, in such a case to separate the plaintiffs’ international reputation and the effects of the article on transacting of business by Russian companies internationally from the effect on such reputation, if any, as they may claim to have in England. It would, Lord Hope said, be a matter for re-

gret if orders for service on publishers out of the jurisdiction were to be regarded as available on demand to those who have established international reputations by things said or done elsewhere and who have no long standing or durable connections with England. In the *Berezovsky* case Lord Hope considered that the interests of all the parties and the ends of justice suggested that the case should be tried elsewhere.

The narrow majority decision in *Berezovsky* gives some continuing comfort for forum shoppers. However, in the short term foreign defendants should not be deterred from arguing that the interests of justice require that the case should be heard abroad. In the medium term the days of the forum shoppers may be numbered by the judgments of Lord Hoffmann and Lord Hope and by the eventual decision of the European Court of Human Rights. A copy of the decision can be found through www.publications.parliament.uk/pa

David Hooper is a solicitor with Biddle in London and represents Forbes in this matter.

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Jakarta Court Rules in Favor of *Time* Magazine on Suharto Libel Claims

By Robin Bierstedt and Michael Quinn

On June 6, 2000 a three judge panel of the Jakarta Central District Court rejected former president Suharto's \$27 billion dollar libel suit against *Time* magazine. The decision is being hailed as a victory for the rights of a free press in Indonesia.

Suharto's lawsuit arises from a May 24, 1999 cover story published in *Time's* Asian edition entitled "Suharto Inc." The 14-page article detailed how Suharto and his six children amassed a \$15 billion dollar fortune through corruption, collusion and nepotism during Suharto's 32-year rule.

Suharto did not challenge the bulk of the allegations in the article, but disputed four parts:

- (i) the title of the article, because "Suharto Inc." does not exist;
- (ii) artwork accompanying the article that showed him embracing a house (belonging to one of his children);
- (iii) a quote that the "Suharto companies" had not paid their fair share of taxes; and
- (iv) an allegation that Suharto transferred \$9 billion from a Swiss bank to one in Austria; he claims he has no money outside of Indonesia.

A Different System

Legal proceedings in Indonesia do not resemble American litigation. Indonesia does not have a common law system, and judges are not bound by precedent. As a former Dutch colony, Indonesian courts sometimes look to Dutch legal texts for authority, but they mainly rely on legislative enactments, most of which were created during Suharto's rule.

After *Time* lost a motion to dismiss on jurisdictional grounds, the case proceeded to trial in a series of one-day hearings that took place every few weeks. *Time* put on four witnesses — journalism and linguistic experts who testified that the magazine had been

responsible in reporting the story. During cross examination of these witnesses, each of the three judges on the panel, and all of Suharto's six lawyers, engaged in lengthy and unlimited questioning. Suharto, on the other hand, put on no witnesses.

Upheld Time Defense

The court agreed with the testimony of *Time's* witnesses and found that the article had been published in the public interest, which is a defense to defamation in Indonesia, and that Suharto had presented insufficient evidence to support his claims. The three-judge panel

*The decision is being hailed as a victory
for the rights of a free press in Indonesia.*

also held that *Time* followed accepted journalistic practices. *Time* had repeatedly requested interviews with Suharto and his children and, when they declined,

interviewed Suharto's lawyers and published their denials. *Time* also published the fact that neither Suharto nor his children had been convicted of doing anything wrong. Relying on these facts, the court ruled that *Time* had "covered both sides." Therefore, there was no evidence that *Time* intended to defame Suharto. Intent is an element of defamation in Indonesia.

More significantly, the court said it respected *Time's* decision to refuse to disclose the identity of its confidential source (a high level Indonesian official who told *Time* that he had investigated published reports about the \$9 billion dollar transfer and found them to be true). This was a major concession on the part of the court, since under Indonesian law the court can require journalists to reveal their sources and, if they refuse, presume that they have no support for their story.

A New Indonesia?

When Suharto's lawsuit was originally filed, few people believed that a foreign publication could get a fair trial in Indonesia when its adversary was the former president who had himself appointed the judges

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Jakarta Court Rules in Favor of Time

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hearing his case. During Suharto's reign the courts of Indonesia were notoriously corrupt and most judges took bribes. As a former justice of the Indonesian Supreme Court stated in an affidavit prepared for *Time*, "corruption is rampant at all levels of the Indonesian court system" and bribery of judges is "so prevalent" that many lawyers "openly brag" about it. Prior to the court's decision in favor of *Time*, neither Suharto nor any of his children had ever suffered a loss in an Indonesian courtroom.

But much has happened in Indonesia since the filing of Suharto's lawsuit. Indonesia has a new freely elected President and legislative body and Suharto has been placed under house arrest by the Attorney General who is investigating corruption during Suharto's reign. It has been a bumpy road for the new government, which has been struggling with a judicial and political infrastructure put in place by — and still often controlled by — Suharto. But the court's ruling in *Time's* case has perhaps finally removed the former strongman's aura of invincibility in the Indonesian courts and left him vulnerable to the government's corruption proceedings against him.

Time was represented in this matter by Michael Quinn, Robin Bierstedt, Nick Jollymore and Paul Gardephe of *Time Inc.*; Greg Diskant, Peter Tomlinson, Will Shih and Kerry Abrams of *Patterson, Belknap, Webb & Tyler*; Mulya Lubis and Andrew Sriro of *Lubis, Santosa & Maulana (Jakarta)* and Kunarti Santosa (*Jakarta*).

LDRC would like to thank Summer interns — Mark Mendoza, Columbia Law School, Class of 2002 and Brian Levine, St. John's Law School, Class of 2002 — for their contributions to this month's LDRC LibelLetter.

Yahoo! Subpoenaed for User Identities

Cummins Engine Co. of Columbus, Indiana recently filed suit against Yahoo! Inc., an Internet portal, in order to obtain a subpoena asking for the account information attached to seven pseudonymous user names. The company contends that Yahoo! subscribers used the names to post proprietary company information on an Internet bulletin board. The subpoena was issued on May 11. Yahoo! has a policy of protecting the identities of its users, up to a point. It will comply with subpoenas.

Recently, a user sued Yahoo! in a California federal court, raising claims of invasion of privacy, breach of contract, negligent misrepresentation and unfair competition, when, in response to a subpoena, Yahoo! revealed his identity to his employer without first notifying him. See *LDRC LibelLetter*, May 2000 at 26. The Associated Press now reports that Yahoo! has changed its policy of late, and now will not release names until 14 days after sending email notifications to affected users that a subpoena has been received.

UPDATE: Certiorari Granted in *Bartnicki*

The U.S. Supreme Court will review the Third Circuit's decision in *Bartnicki v. Vopper*, 200 F.3d 109 (3rd Cir. 1999), in which the Court of Appeals held certain provisions in federal and state (Pennsylvania) anti-wiretap statutes unconstitutional as applied to those who knowingly disclose the contents of illegally intercepted communications without having participated in their interception. That court dismissed civil claims brought against radio stations which broadcast the contents of an illegally intercepted mobile phone conversation and against the individual who provided the tape to the broadcasters. See *LDRC LibelLetter*, January 2000 at 7. None of the defendants had actually intercepted the call; rather, a recording was left anonymously in the nonmedia defendant's mailbox, and he gave it to the media.

The Third Circuit, applying *O'Brien* intermediate scrutiny, held that in imposing private rights of action

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Cert. Granted in *Bartnicki*

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for any disclosure of illegally intercepted material, the wiretap statutes prohibited more speech than necessary to achieve the avowed governmental interest of preventing illegal wiretapping. The court was also unconvinced that the government could meet even the intermediate scrutiny burden with regard to how these provisions which punished third party recipients met that stated purpose.

In so ruling, the court took up the First Amendment-friendly side of an apparent circuit split. The D. C. Circuit, on the other side, ruled in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999) that the First Amendment would not preclude a civil suit, under the same federal statutory provision at issue in *Bartnicki*, against a congressman who allegedly disclosed to newspapers a tape of a conversation he knew to have been illegally intercepted by others. See *LDRC LibelLetter*, October 1999 at 7. The defendant in that case also filed a petition for Supreme Court review. See *LDRC LibelLetter*, May 2000 at 11.

Latest Chiquita Fallout: Ex-Cincinnati Enquirer Editor Sues Gannett and Lawyers

In the latest fallout from the *Cincinnati Enquirer's* 1998 publication of articles examining Chiquita's business practices, Lawrence Beaupre, the former editor-in-chief of the *Enquirer*, has filed a lengthy nine count complaint against the Gannett Company, owner of the *Enquirer*, and several of its in-house and outside lawyers over the settlement they reached with Chiquita Brands in November 1998. *Beaupre v. Nixon Peabody LLP, et al.*, Civ. No. 00CA3020 (D.C. Super. Ct. April 2000). Named as defendants are Nixon Peabody partners Robert Bernius and Henry DiPippo, and Gannett lawyers Barbara Wall and Thomas Chapple. The nine claims are for fraud, conspiracy to injure reputation and profession, tortious interference, breach of fiduciary duties, breach of contract,

breach of implied covenant of good faith and fair dealing, and declaratory judgment. Although Beaupre claims damages for injury to reputation, there is no defamation claim.

On a non-legal level, Beaupre's complaint is an interesting narrative — albeit from an aggrieved participant — of one of journalism's biggest debacles. Leaving aside the actual merits of the action, Beaupre's complaint raises interesting issues regarding the obligations and potential conflicts of interest that can arise when in-house lawyers and their outside counsel represent reporters and editors. Whether lawyers who engage in the prepublication review of an article would

On a non-legal level, Beaupre's complaint is an interesting narrative — albeit from an aggrieved participant — of one of journalism's biggest debacles.

have a conflict with the journalists and editors responsible for the article if litigation is threatened or ensues appears to be an untested question.

Beaupre was the editor of the *Cincinnati Enquirer* in May 1998 when it published investigative articles about Chiquita's business practices — articles which were withdrawn the next month when it came out that one of the reporters involved, Mike Gallagher, had illegally accessed Chiquita's voice mail system. In addition to repudiating the articles, Gannett paid Chiquita \$10 million to settle potential civil claims. See *LDRC LibelLetter* July 1998 at 16; November 1998 at 13.

A special prosecutor was named to investigate potential criminal law violations. The reporter, Mike Gallagher, pled guilty to unlawful interception of communications and unauthorized access to computer systems and was sentenced to five years probation. He also cooperated with prosecutors in revealing his confidential source for the articles, George Ventura, one of Chiquita's in-house attorneys. Ventura also pled guilty to accessing voice mail communications without authorization and is now suing Gannett because Gallagher disclosed his identity even though the disclosure took

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Latest Chiquita Fallout

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place after Gallagher was fired. See *LDRC LibelLetter* April 1999 at 23; May 1999 at 5; and July 1999 at 23.

Beaupre's Complaint

In his complaint, Beaupre essentially alleges that the settlement damaged his reputation by wrongly making him a scapegoat in the affair. According to Beaupre, he was pressured to give up the editorship of the newspaper and to accept a transfer to Gannett's corporate offices in Arlington, Virginia. Thereafter, Gannett allegedly failed to fulfill a promise to provide him with another editorship, to maintain his compensation, and to protect his reputation — i.e., a promise that he would not be punished for the affair. In fact, according to Beaupre, his transfer out of Ohio was a secret term in the settlement between Chiquita and Gannett that he was not privy to. The last count of his complaint seeks to declare this portion of the agreement unenforceable.

According to Beaupre, Gannett news executives, in-house lawyers and outside counsel were all involved in carefully vetting the Chiquita articles. Thus, when the firestorm broke, the lawyers' interests conflicted with Beaupre's because they would have been essential witnesses to his defense. In another unusual theory, Beaupre argues that Gannett executives and their lawyers were also subject to a conflict of interest because Mike Gallagher might have falsely accused them of knowing of his illegal activities.

Thus, he claims the lawyers involved failed to properly advise him to retain separate counsel (a claim the defendants vigorously deny), leading to his transfer and damage to his reputation. Beaupre did retain separate counsel when he was later identified as a target of the special prosecutor's investigation, though criminal charges against Beaupre were never brought.

Defendants Move to Dismiss

Gannett and Nixon Peabody, its outside counsel,

have already moved to dismiss the complaint for failure to state a claim and on forum non conveniens grounds. The forum argument posits Ohio as a preferable forum, considering access to witnesses, other sources of proof and Ohio's interest in the action. For instance, the settlement agreement — which Beaupre signed — is governed by Ohio law and the Federal District Court in the Southern District of Ohio is the designated forum for any disputes over the agreement.

Substantively, the defendants characterize the complaint as an attempt by Beaupre to evade his role in the debacle. Thus, the defendants argue that Beaupre suffered no damages at their hands since the settlement spared him a civil lawsuit and potential criminal liability. Moreover, Gannett

continued to employ Beaupre. Nixon Peabody notes in its brief that this case illustrates the maxim "no good deed goes unpunished."

An Attempted End-Run

Nixon Peabody's motion argues that Beaupre's action is essentially one for defamation and that the fraud, malpractice and fiduciary duty claims are an attempt to end-run the First Amendment, citing *Food Lion, Inc. v. Capital Cities/ABC*, 194 F.3d 505 (4th Cir. 1999). Beaupre's claim for conspiracy to injure reputation is based on a Virginia statute (Va. Code §18 2-499) which defendants argue is a type of injurious falsehood law that applies only to businesses — and the Virginia law would in any event not apply to the case. Beaupre's tortious interference claim is also attacked because it fails to allege a specific existing or prospective business relation with a third party.

Gannett also argues that Beaupre's breach of contract claim and breach of covenant of good faith and fair dealings claim — which are premised on an alleged promise that Gannett would protect his career and reputation — fail as a matter of law since Beaupre is an at will employee and because such a contract would violate the statute of fraud.

Substantively, the defendants characterize the complaint as an attempt by Beaupre to evade his role in the debacle.

Nike's Public Relations Campaign Held to Be Non-Commercial Speech by California Court of Appeal

California Supreme Court Agrees to Review Case

By Richard M. Goehler

In *Kasky v. Nike, Inc.*, 79 Cal. App. 4th 165 (1st Dist. 2000) a California Court of Appeal held that a public relations campaign by Nike, Inc. was non-commercial speech and therefore fully protected by the First Amendment from a civil private attorney general action pursued under that state's false advertising and unfair trade practices statute. Nike's public relations campaign was intended to refute allegations that its factories in Asian countries were sweatshops and portrayed Nike as being in the vanguard of responsible corporations seeking to maintain adequate labor standards in overseas facilities. Even though that public relations campaign constituted promotion for the company and its products, the campaign was found to be political expression addressed to a topic of public interest.

On June 20, 2000, the California Supreme Court agreed to review the case. The Supreme Court's decision to hear the appeal sets aside the Court of Appeal's decision.

I. Factual Background

Nike, an athletic shoes and sports apparel manufacturer and marketer, is a large multi-national enterprise which, in order to maintain its image, invests heavily in advertising and brand promotion, spending nearly \$1 billion per year in advertising. Its promotional activities include product sponsorship agreements with celebrity athletes, professional athletic teams and numerous college athletic teams.

As with other major marketers of athletic shoes and sports apparel, Nike contracts for the manufacture of its products in countries with low labor costs. In Nike's case, the actual production facilities are owned by South Korean and Taiwanese companies that manufacture the products under contract with Nike. The record in the *Kasky* case indicated that between 300,000 - 500,000 workers were employed

in Asian factories producing Nike products. The vast majority of these workers were alleged to have been women under the age of 24.

In the past, Nike has sought to develop an appearance and reality of good working conditions in the Asian factories producing its products. In 1997, the company retained a consulting firm, co-chaired by Andrew Young, the former Ambassador to the United Nations, to carry out an independent evaluation of the labor practices in its factories. The consulting firm issued a report (the "Young Report") that gave favorable marks to Nike on its working conditions and found no evidence of widespread abuse or mistreatment of workers.

Nevertheless, there were a number of reports, including an audit by an accounting firm, that contrasted sharply with the favorable review in the Young Report. These reports put Nike under public scrutiny as a company exemplifying a perceived social evil associated with economic globalization — the exploitation of young female workers in poor countries. Thereafter, a number of negative press reports surfaced as a result.

Nike countered with a public relations campaign that defended the benefits of its Asian factories and sought to portray the company as being in the vanguard of responsible corporations seeking to maintain adequate labor standards in overseas facilities. Press releases by the company responded to sweatshop allegations, addressed women's issues and stressed the company's code of conduct.

II. Procedural History

During the course of this public relations campaign, a complaint was filed by a consumer advocate alleging negligent misrepresentation and intentional or reckless misrepresentation. Claims were asserted alleging that Nike engaged in unlawful business practices in violation of California's false advertising

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Nike Campaign Held to Be Non-Commercial Speech

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and unfair trade practices statute.

Nike filed a motion to dismiss, contending that the complaint was barred by the First Amendment to the United States Constitution and Article I, Section 2A of the California Constitution. The trial court found that the constitutional distinction between commercial and non-commercial speech was dispositive and dismissed the complaint.

On appeal, the Court of Appeal was bound to assume that Nike, in fact, misrepresented facts regarding the labor practices in its Asian factories to induce consumers to buy its products. The plaintiff's theory was that these alleged misrepresentations fell within the category of commercial speech for which Nike could be held accountable under accepted constitutional principles.

The Court of Appeal's substantive legal analysis began with the United States Supreme Court decision in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). In *Bolger*, a condom manufacturer faced prosecution for unsolicited mailings regarding its product. Most of the mailings consisted of advertisements conveying price and quantity information about the plaintiff's brand which the Court held "fell within the core notion of commercial speech." In addition, the manufacturer also mailed two informational pamphlets about condom use containing no more than references to its brand of condoms. Ultimately, the Court found these pamphlets were also commercial speech after considering a series of relevant characteristics:

- whether the pamphlets were conceded to be advertisements;
- whether there was a reference to a specific product in the pamphlets;
- whether the plaintiff had an economic motivation for mailing these pamphlets;
- whether the combination of all of these characteristics established that the informational pamphlets were properly characterized as commercial speech.

The Court of Appeal also noted that the *Bolger* analysis had been applied by the Ninth Circuit in *Association of National Advertisers, Inc. v. Lungren*, 44 F. 3d 726 (9th Cir. 1994). In that case, the representations made had also appealed to a consumer's sense of social responsibility.

Ultimately, however, the Court of Appeal found that *Bolger* and other decisions like *Association of National Advertisers* were similar but differed in one important respect — those cases concerned communications conveying information or representations about specific characteristics of goods. In the case at bar, Nike's speech was intended to promote a favorable corporate image of the company so as to induce consumers to buy its products. Accordingly, the Court of Appeal found that the fact that the communications at issue served to promote a favorable corporate image through press releases and letters took them outside of two of the three characteristics of commercial speech noted in the *Bolger* decision, *i.e.* advertising format and reference to a specific product. As a result, the Court found that a public relations campaign focusing on corporate image called for a different analysis than that applying to a product advertisement.

This case, the Court noted, fell within familiar First Amendment territory — public dialog on a matter of public concern. Citing to cases like *New York Times v. Sullivan*, the Court of Appeal emphasized that freedom of expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values. Accordingly, the Court found that the press releases and public relations materials released by Nike formed a part of the public dialog on a matter of public concern within the core area of expression protected by the First Amendment and that, therefore, the trial court had properly sustained the motion to dismiss.

Richard M. Goehler is a partner in Frost & Jacobs, Cincinnati, Ohio and is co-chair of LDRC's Advertising and Commercial Speech Committee.

Third Circuit Upholds Ban on Alcohol Advertisements in College Newspaper

The Court of Appeals for the Third Circuit ruled that Pennsylvania liquor law 47 P.S. Sec. 4-498(e) (5), which forbids businesses from advertising alcoholic beverages in any publication produced by an educational institution, had only an “incidental economic effect” on the plaintiff’s newspaper and did not amount to a violation of the plaintiff’s First Amendment rights. *Pitt News v. Fisher*, 2000 U.S. App. LEXIS 12456 (3d Cir. 2000).

The court affirmed a lower court’s decision denying *The Pitt News*’ motion for a preliminary injunction, explaining that *The Pitt News* had failed to demonstrate that its First Amendment claim would likely succeed on the merits. The court found that the statute, known as Act 199, did not directly restrict the content of *The Pitt News*; rather, as a regulation directed at third parties, it had only incidental economic effects on the student newspaper. *The Pitt News*, which had also pressed the First Amendment rights of its readers and past advertisers, had its third-party standing claims rejected.

Paper Suffers Ad Decline

The Pitt News, a student-run newspaper at the University of Pittsburgh, brought this action after it suffered a decline in advertising revenue traceable to the 1996 enactment of Act 199. The Act provides criminal sanctions against businesses that advertise alcoholic beverages in any publication produced by an educational institution.

In December of 1997, one of *The Pitt News*’ advertisers, which placed alcohol-related ads in the paper, was cited for violation of Act 199. In response, the advertiser canceled its advertising contract with *The Pitt News*, an action followed by other advertisers.

As a direct result of these cancellations, *The Pitt News* lost more than \$17,000 in advertising revenue. The loss of revenue in turn forced the newspaper to scale back its news output, threatened its ability to

purchase equipment, and placed it at a competitive disadvantage in the marketplace. Approximately 75% of *The Pitt News*’ readers are 21 years of age or older.

Article III Standing, But No First Amendment Violation

The Court of Appeals acknowledged that Act 199 had worked an injury on *The Pitt News* sufficient for it to claim Article III standing. In order to gain Article III standing, a party must demonstrate that it has suffered an injury in fact, that the injury is traceable to an action of the defendants, and that the harm is redressable by a favorable court decision. The Court of

Appeals ruled that *The Pitt News* had satisfied each criterion. First, *The Pitt News* had suffered an injury in fact, established by its loss of \$17,000 in advertising revenue. Second, the injury was traceable to Act 199, which was designed to have the very effect it achieved: the elimination of alcohol-related advertising in publications such as *The Pitt News*. Finally, the harm suffered by *The Pitt News* was redressable: Were Act 199 to be struck down, it is to be “assumed” that the advertisers *The Pitt News* has lost would return.

The Pitt News’ failure to demonstrate that it was likely to succeed on the merits of its claim, however, persuaded the court that the publication was not entitled to prevail on its motion for a preliminary injunction.

The court reasoned that *The Pitt News* was unlikely to prevail on the merits because, in the court’s view, the publication had not suffered a violation of one of its constitutionally protected interests. Although *The Pitt News* had established a connection between enforcement of Act 199 and its loss of more than \$17,000 in advertising revenue and, indirectly, the reduction in length of its publication, such a connection “does not mean that one of its

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“Act 199 does not directly restrict the content of The Pitt News.”

3rd Cir. Upholds Ban on Alcohol Advertisements

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constitutionally protected interests has been injured.” The court refused to credit the argument that the statute had a direct effect on the publication, stating, “Act 199 does not directly restrict the content of *The Pitt News*.”

The publication, the court noted, is free to seek additional revenue from numerous sources, including alcohol purveyors, provided alcoholic beverages are not mentioned in the ads. The newspaper may also publish information related to alcohol consumption, for instance drink specials at various bars, so long as the paper receives no compensation for doing so.

The court observed that Act 199 applied “no direct limitation on the freedom of *The Pitt News* to publish alcohol-related information.” Concluding, the court noted

The fact that *The Pitt News* is a newspaper does not give it a constitutional right to a certain level of profitability, or even to stay in business at all.

No Third-Party Standing

The Court of Appeals premised its rejection of *The Pitt News*’ claim of third-party standing on the rule that “ordinarily, one may not claim standing . . . to vindicate the constitutional rights of some third party.” The court noted that a narrow exception to this rule is available where three requirements are satisfied. First, the plaintiff must have suffered an actual injury, though not necessarily one to a legally protected interest. Second, the plaintiff must have a close relationship to the party whose interest it is asserting. Finally, there must be some bar preventing the third party from asserting its rights. Thus, if a party lacks Article III standing, but satisfies all three of these elements, it may assert the rights of a third party.

The Pitt News, the court concluded, met the test’s first two criteria, but failed to satisfy the last, writing,

The Pitt News has not demonstrated that the advertisers actually subject to Act 199, or its adult readers, have any impediment to bringing their own suit to challenge the statute.

While *The Pitt News* failed to qualify for third-party standing under the narrow exception, the court recognized a more lenient standard applied to cases asserting First Amendment protection. This relaxed standard, expounded in *Secretary of State of Maryland v. Joseph Munson Co. Inc.*, 467 U.S. 947 (1984), loosened the narrow exception’s third criterion. As the *Pitt News* court interpreted it

[T]he [Supreme] Court concluded that when a plaintiff attempts to challenge a statute as an overbroad restriction of First Amendment rights, the requirement that an impediment exist to the third party asserting his or her own rights should be relaxed.

To succeed under *Munson*, however, a litigant must not only demonstrate that the third party has suffered a harm, but that the harm “substantially abridges the [third party’s] First Amendment rights.” The court indicated that the line of cases that culminated in *Munson* shares the distinctive and critical quality that the substantial threats to the third parties forced them to entirely forego their rights or face criminal prosecution.

The effect of Act 199, on the contrary, does not involve “the sort of dangers that have warranted relaxing prudential requirements in [these other] cases.” The advertisers continue to be able to advertise in other publications “available to the entire University of Pittsburgh community.” In short, Act 199 has rechanneled into other media the advertising *The Pitts News* had previously carried, but has not prevented either *The Pitt News*’ adult readers or previous advertisers from receiving or publishing alcohol-related advertising.

Mystery Writer Patricia Cornwell Obtains Preliminary Injunction Against Publicity-Seeking Novelist Who Called Her a Plagiarist

Federal Court Bars Use of Cornwell's Name on Book Cover Sticker, on Promotional Website, and in Advertising Materials

In mid-May, a federal court in Virginia enjoined local author Leslie Sachs from continuing to promote his own work by claiming it was the basis for a forthcoming novel by best-selling author Patricia Cornwell. *Cornwell v. Sachs*, No. 3:00cv229 (E.D. Va. May 18, 2000). The order prohibits Sachs from using Cornwell's name or identity for the purposes of selling his own book, after he claimed on a web site and on the book itself that Cornwell had copied from it and then threatened him with "destruction." The court found that Cornwell was likely to suffer irreparable harm to her book sales and reputation, and that she was "almost certain" to succeed on the merits of claims she brought against Sachs under the Lanham Act and Virginia's privacy statute.

An Ugly Run-Up to Litigation

The story behind the law suit began last December, when Sachs sent a rather curious letter to Alexander Gigante, corporate counsel for Penguin Putnam. Evidently Sachs had seen a Putnam advertisement in *Publisher's Weekly* announcing the forthcoming publication of Cornwell's latest murder mystery, *The Last Precinct*. The announcement described the novel's premise in one sentence. Sachs wrote that Cornwell's novel appeared to have the same theme as his self-published work *The Virginia Ghost Murders*, and that the phrasing of the ad in PW "echoed" his book's back cover. Gigante replied in a brief letter that he lacked sufficient information to comment on Sachs' allegations, and that at any rate literary themes are not protected by copyright.

Sachs responded with several letters to Gigante; Esther Newburg, Cornwell's literary agent; and David Wan, president of the publishing house, asserting that Cornwell had copied the plot of his novel and threatening to embark on a media campaign "piggybacking on

your publicity for Patsy." In one letter to Gigante, Sachs clearly indicated his intentions to turn the "dispute" into publicity for his novel:

My plan for the New Year is to have a large-scale web and media marketing campaign springing from the obvious similarities between Patsy's book and mine. She has millions of fans and the

Both the Virginia privacy statute and the Lanham Act authorize injunctive relief as a civil remedy, subject to the general standard applicable to a request for a preliminary injunction.

benefits of your giant marketing machine, and perhaps a chunk of those fans eager for her new book might like to take a look at my highly-praised book with the same main storyline, published in Patsy's own neighborhood two years before her.

When he received no response, Sachs sent on to Cornwell's representatives proposed copy for the cover of a reprint of *The Virginia Ghost Murders*, which would include Cornwell's name in a prominent position and would assert that the plot of her forthcoming work copied Sachs'. Sachs wrote that he would interpret a continuation of their silence as permission to use her name.

In response, Michael Rudell, an attorney representing Cornwell, wrote Sachs that he absolutely did not have permission to use Cornwell's name to promote *The Virginia Ghost Murders* and that the accusations of plagiarism were untrue and defamatory. This response provoked Sachs to publish a piece on his *Virginia Ghost Murders* web site entitled "The Patricia Cornwell Scandal: *The Last Precinct* & *The Virginia Ghost Murders*." Included was a section fashioned as a press release, which Sachs later posted in an Internet newsgroup.

In the release, he accused Cornwell of copying his book, and of then threatening the "burning and destruction" of it in response to Sachs' own professedly

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Mystery Writer Obtains Preliminary Injunction

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“gentle, constructive, and nonthreatening” approach to the issue. In further letters to Rudell and Newburg, Sachs labeled Cornwell a “book-burning Nazi.” Finally, he affixed a sticker to 350 copies of *The Virginia Ghost Murders* — of 2,000 copies currently in circulation — which read “The book that famous PATRICIA CORNWELL threatened to destroy.” Before litigation commenced, Sachs reworked his web site; however it still referred to a “fuss” associated with Cornwell and to her “threat to burn our books.”

Cornwell Sues

Cornwell brought suit in the Eastern District of Virginia, raising claims of libel *per se*, of violation of Virginia’s privacy statute (V.C. § 8.01-40), and of false and misleading advertising in violation of the Lanham Act. She claimed compensatory damages of one million dollars and punitive damages of \$350,000, and moved for a preliminary injunction preventing Sachs from using her name in any way to advertise his book, and from making false statements in the promotion of the books, and requiring him to destroy all existing materials not compliant with those demands.

Both the Virginia privacy statute and the Lanham Act authorize injunctive relief as a civil remedy, subject to the general standard applicable to a request for a preliminary injunction. U.S. District Judge Robert E. Payne applied the Fourth Circuit balance of hardships test as laid out in *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F. 2d 802 (4th Cir. 1992). In order to obtain a preliminary injunction under this standard, a plaintiff must show that the likelihood of irreparable harm to the plaintiff absent the injunction is greater than the likelihood of harm to the defendant if the relief is granted; that the plaintiff is likely to succeed on the merits; and that the public interest is best served by granting the injunction.

Likelihood of success must be shown by clear and convincing evidence where mandatory (not merely pro-

hibitive) relief is requested, as was true of Cornwell’s demands that Sachs destroy existing material bearing her name, amend his web site, and instruct booksellers to remove the offending stickers from copies of his book.

Court Finds For Cornwell

Federal District Court Judge Payne saw the facts presented in the record as supporting Cornwell’s position in all respects. In assessing the likelihood of irreparable harm to her if Sachs’ crusade were not arrested, he found that the web site, the press release and the sticker contained many false and misleading descriptions and representations of fact. Among these were the web site’s reference to a “scandal,” which the

“Of course, Sachs’ appeal to the First Amendment is illusory because he seeks to protect speech activity which is not protected by the First Amendment.”

judge found Sachs had “concocted” to sell his book; statements that Cornwell had threatened Sachs to extort silence regarding her supposed act of plagiarism; and the sticker’s pronouncement that Cornwell had threatened to destroy Sachs’ novel, as well as other colorful allusions to “nazi-style bookburning” and “mafia-style stonewalling.”

The judge determined that these falsities were likely to cause confusion among potential buyers of Cornwell’s book, finding support in Sachs’ own assertion that people had told him they would consider boycotting Cornwell’s works. Sachs contended that lost book sales would be compensable by money damages, but the judge agreed with Cornwell that the potential losses would be impossible to determine, noting that Fourth Circuit precedent equates indeterminate future injury with irreparable harm. Furthermore, Judge Payne noted, by his own admission Sachs is judgment proof. And harm to Cornwell’s reputation caused by the false statements, harm which Sachs directly threatened in letters to her representatives, could not be remedied through a damage judgment.

As for the likelihood that Sachs would suffer harm should the court grant the injunction, the judge found it nonexistent. Sachs argued that he would suffer an

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Mystery Writer Obtains Preliminary Injunction

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abridgment of his First Amendment right to free speech. Judge Payne did not agree, stating

Of course, Sachs' appeal to the First Amendment is illusory because he seeks to protect speech activity which is not protected by the First Amendment. The Lanham Act's prohibition of false and misleading advertising does not arouse concerns under the free speech clause of the First Amendment."

Thus, Sachs had essentially shown no likelihood of harm to himself and the balance tipped "decidedly" in favor of Cornwell.

"Virtually Certain" Success on Merits

Turning to the third prong, Judge Peyton found Cornwell "virtually certain" of success on the merits of her privacy and Lanham Act claims. Sachs had engaged in false advertising, as prohibited by the Lanham Act, in claiming in the press release that Cornwell copied the plot of his novel for use in *The Last Precinct*. The record showed that Cornwell had neither read nor even heard about *The Virginia Ghost Murders* before Sachs began his attacks. At any rate, Sachs could not know whether or not the plots of the two books corresponded at all, because Cornwell has revealed very little concerning the plot of her still unreleased book.

Other statements contained in the press release and on Sachs' web site, as well as on the sticker, accusing Cornwell of attempted extortion and the like, were clearly discredited by the correspondence between Sachs and Cornwell's representatives, the judge determined through a detailed comparison of Sachs' descriptions to the facts.

Virginia Code § 8.01-40 provides a private right of action to prevent the use of one's name or likeness by another for advertising purposes without consent. The judge found that Sachs had clearly used Cornwell's name for such purposes in affixing the challenged sticker to his book after Cornwell's attorney specifically denied permission for any such use. Sachs attempted to argue the First Amendment-informed

"newsworthiness" exception that New York courts have read into that state's privacy statute, which is very similar to Virginia's.

Notably, Judge Payne did not hold that the exception does not apply in Virginia. However, he paid the defendant's arguments scant heed, holding that

It is plainly frivolous and fanciful for Sachs to equate the sticker affixed to the cover of his book — or, for that matter, the cover itself — to the types of media entities which have successfully shielded their activities from scrutiny under New York's privacy laws."

Furthermore, Sachs used Cornwell's name on the sticker strictly for promotional purposes, a use for which the Supreme Court of Virginia explicitly rejected a constitutional defense in *Town & Country Properties v. Riggins*, 249 Va. 387 (1995).

With a note of outrage at Sachs' gall in proposing this defense, the judge held that the "newsworthiness" exception could not reasonably apply to false statements:

If the First Amendment can be thusly abused, no public figure can ever be safe from damage to his or her reputation caused by unscrupulous profiteers who endeavor to enhance their own financial success by spreading false and misleading statements about the public figure. Nor could they be protected against the non-consensual use of their names for advertising the works of others.

In the context of such vituperative discourse, it is hardly surprising that Judge Payne went on to assess the fourth prong of the *Direx* test, the public interest, in favor of the plaintiff. The existence of protective statutes sufficed to show a public interest in "restricting the forms of abuse visited upon Cornwell."

As all factors warranted an injunction, the judge ordered Sachs, pending further litigation, to instruct all booksellers holding stickered copies of his book to remove the stickers, to remove all references to Cornwell from his web site, and to refrain from using her name for advertising purposes in future.

NY Federal Court Orders Deposition Transcripts/Videos To Be Made Public in DVD Case

Signs Parties' Confidentiality Agreement and Bars Media Live Access to Depositions

By Martin Garbus

An attempt by Universal City Studios, Inc. and seven other media companies to bar public access to the deposition transcripts and to prevent publication of deposition transcripts on Internet sites was rejected on June 6, 2000 by Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York in *Universal City Studios, Inc., et al. v. Goldstein*, 00 Civ. 277 (LAK). Defendant, himself a publisher, and various media companies, including Times Mirror and the Village Voice Media, sought to have the depositions in this highly publicized case open to media coverage, as well as have the deposition transcripts and videotapes made available in a prompt manner for publication in traditional and Internet publications.

The plaintiffs did, however, succeed in convincing Judge Kaplan to bar access by the press to the depositions themselves. And, over objections of the media intervenors, the judge upheld entry of a confidentiality agreement agreed to by the parties with respect to discovery, covering such matters as trade secrets, subject to review by the court in the event of dispute.

DVD De-Encryption at Issue

The underlying action was brought by the movie companies in January 2000 against Goldstein and his *2600.com*, a website and printed quarterly journal that posted DeCSS, the de-encryption code for CSS, the safety system for movie DVD's. The suit asserts a violation of the new Digital Millennium Copyright Act based upon alleged use of a circumvention device to infringe copyright.

The plaintiffs originally objected to the motions to intervene filed by Times Mirror and the Village Voice. By the day of the argument, they withdrew their objection. Plaintiffs argued that release to the press, or the presence of the media at depositions, would (a) open representatives of MPAA and the plaintiffs to potential physical harm; (b) threaten their trade secrets; (c) threaten their anti-piracy efforts; and (d) embarrass their witnesses.

Balancing First Amendment Concerns

Judge Kaplan did not reach the issue raised by the arguments of whether or not there was any presumption, even a limited one, of access to discovery material and proceedings. He concluded that even if there was a presumption, it could be overcome by a showing of good cause.

He dealt with the concerns expressed by the media intervenors about the use of a blanket protective order that allows the parties to designate that which they feel should be confidential, at least during the discovery period. While he understood the procedural and First Amendment issues at stake in such a process, he also felt that he had to have an efficient means of getting this case to trial — one in which there is currently entered a preliminary injunction against the defendant barring publication of the de-encryption code, and which thus involves serious First Amendment concerns on the part of the defendant.

He gave short shrift to the “embarrassment or ridicule” argument as a reason for sealing a file or a deposition. He also gave short shrift to the argument that Internet journalists should be denied material made available to print journalists. He signed a confidentiality agreement he believes amply protected plaintiffs' interest and, in response to plaintiffs' concern for the lives and safety of its employees, permitted plaintiffs' attempt to mark confidential those portions of the testimony that could threaten those interests, as well as material that could expose anti-piracy techniques or trade secrets.

Intervenors Arguments

He denied the intervenors' request to be allowed to attend the depositions. Stephanie Abruytin, arguing on behalf of Times Mirror, said “there is a presumption of access; that Rule 26 means deposition discovery is open to the public unless there is good cause shown.” Arguing that the depositions should be open, she pointed to

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the deposition of Bill Gates in an auditorium open to members of the press in the government's case against Microsoft, when the federal judge worked out a procedure that protected Microsoft's "trade secrets," as well as cases in the Southern District and other federal courts.

Times Mirror argued that "given the significance of this case, given the fact that plaintiffs have invited public scrutiny," the files should not be sealed.

Barbara Cohen, arguing on behalf of the Village Voice, said "the plaintiffs have gone to great length to publicize this matter and to raise the public's awareness of grave concerns. They say that all consumers should be concerned and watch this case closely. But now, when it no longer behooves them, they want to select what the public should have access to." (Page 35 of the transcript of June 6, 2000).

The court concluded that "[i]t is conceivable that in another case, on a different timetable, where there was not a preliminary injunction barring publication and where there wasn't such a clearly demonstrated record of acrimony among the lawyers, it might work. Unfortunately, those circumstances do not apply here."

The court, concerned that the presence of the press at the depositions would result in disputes and difficulties, denied the media request but did compel the parties to produce transcripts and videotapes of several depositions of highly placed industry figures for public disclosure within 3 days of receipt (and he admonished counsel that they had best be getting daily copies of these transcripts from the court reporters), less any material they deemed covered by the protective order. Other depositions/videotapes were to be made public within 10 days of receipt of the transcripts. Disputes would be handled by him promptly, he assured all parties. He stated that the media should not find it difficult to determine, from counsel for the parties, who was going to be deposed in the case.

Martin Garbus, a member of Frankfurt Garbus Klein & Selz, New York, New York, is the lawyer for the defendants in the Universal case.

Sixth Circuit Holds That Retaliatory Conduct by City Officials Would Not Chill a Person of Ordinary Firmness from Criticizing Local Officials

By Donald L. Zachary

The United States Court of Appeals for the Sixth Circuit has held that, even though a reporter was engaged in constitutionally protected political speech, and even though there was sufficient evidence to show that the decision to deny the reporter access to public records was motivated, at least in part, by statements the reporter made in his newspaper column, the reporter's Civil Rights action against the city officials must fail because the actions taken by the city "would not chill a person of ordinary firmness from continuing to criticize local officials."

Refused Documents

Geoffrey Davidian, a freelance journalist who had spent over a year investigating an alleged murder in Cookeville, Tennessee, began publishing *The Putnam Pit*, a newspaper that reports on a variety of public issues involving local government in Cookeville and Putnam County, Tennessee. One of the articles in the paper criticized Cookeville's City Attorney. Shortly after the paper had been circulated, the City Attorney sent a letter to Davidian informing him that he would no longer be given access to the city's public records.

Davidian eventually filed suit in the Chancery Court for Putnam County in an attempt to get access to the records. The Chancery Court ruled that the city did not need to turn its records over to Davidian under Tennessee Open Records Act (which permits inspection of public records "by any citizen of Tennessee"), but it concluded that the city was required to turn public records over to Davidian's son (who is a Tennessee resident). In the current suit, Davidian acknowledged that, after the Chancery Court's decision, he was given access to all of the records that he requested.

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6th Cir. Holds That Conduct Would Not Chill a Person of Criticizing Local Officials

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Davidian eventually filed suit under 42 U.S.C. § 1983 seeking damages against the City of Cookeville, the City Attorney and the City Manager, alleging that his constitutional rights were violated when the defendants denied him access to the city's public records. The district court referred the case to a magistrate judge, who recommended that the district court grant the defendants' Motion for Summary Judgement on grounds that Davidian had failed to provide sufficient evidence to sustain his First Amendment claim and that the city officials were entitled to qualified immunity. The district court adopted the magistrate judge's report and recommendation and, on appeal, the decision was affirmed. *Davidin vs. O'Mara* (6th Cir. 2000), 2000 U.S. App. LEXIS 6767, *3-*8.

Sixth Circuit

Turning first to the legal standard, the Court of Appeals pointed out that a plaintiff cannot establish a claim that his First Amendment rights have been adversely affected by retaliatory conduct unless the plaintiff shows: (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendants' adverse action caused plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of plaintiff's constitutional rights. 2000 U.S. App. LEXIS at *10-*11 (*Bloch vs. Ribar* 6th Cir. 1998), 156 F.3d 673, 678; and *Mattox vs. City of Forest Park* (6th Cir. 1999), 183 F.3d 515, 520).

The Court pointed out that, in response to defendants' summary judgement motion, "Davidian has easily shown that he was engaged in constitutionally protected political speech when he published The Putnam Pit — a newspaper that contained articles that were critical of several local public officials." *Id.* at *11. Davidian also satisfied the third branch of the test: "Furthermore, there is sufficient evi-

dence, based on the fact that Davidian was denied access to the city's public records less than two weeks after The Putnam Pit was first published, to show that the decision to deny access was motivated at least in part by the statements that Davidian made in his newspaper." *Id.* at *11-*12.

Failed to Prove Chill

Davidian attempted to show that he had satisfied the second element of his retaliation claim by comparing the adverse action taken against him to those shown in *McBride vs. Village of Michiana* (6th Cir. 1996), 100 F.3d 457, a case in which the Court sustained a retaliation claim. The Appeals Court rejected the comparison, however, holding that

unlike the adverse actions taken in *McBride*, the adverse conduct in this case is not severe enough to chill a person of ordinary firmness from continuing to publish unfavorable articles about city officials. Indeed, Davidian has provided no evidence that city officials engage in the type of harassing and physically threatening behavior that went on in *McBride*. Moreover, the record, even when construed in the light most favorable to Davidian, shows that city officials were generally cooperative in providing Davidian with public information As this court explained in *Mattox*, "[A] constitutional tort — like any tort — requires injury, and allowing constitutional redress for every minor harassment may serve to trivialize the First Amendment.

Id. at *13-*14 (citing *Mattox*, 183 F.3d at 521).

Thus, while Davidian reaffirms the First Amendment protection available to those who would criticize local officials, the case also allows government officials to make it hard for reporters to get access to public records so long as the officials do not cross the line into severe harassment and physical threats in an effort to curb the criticism.

Donald L. Zachary is with Bass, Berry & Sims, Nashville, Tennessee.

Juvenile Judge Issues Gag Order *Sua Sponte* On Media

Holds Newspaper in Contempt

By John E. Tull III and Kris G. Baker

A juvenile court judge in Fayetteville, Arkansas *sua sponte* issued a gag order during the initial delinquency hearing for a juvenile defendant accused of assault with intent to kill a police officer. In subsequent proceedings, the trial court held an Arkansas newspaper in contempt for allegedly violating the prior restraint. The Supreme Court of Arkansas has refused to stay the gag order, but has agreed to expedite the appeal.

ARKANSAS SUPREME COURT GRANTS PETITION

On June 29, the Arkansas Supreme Court granted the petition filed by the media and held that the gag order was overly broad. A note on that decision will be included in the July LDRC LibelLetter.

Twelve-year old Michael Nichols was intercepted in a field adjacent to his middle school in Prairie Grove, Arkansas, by the police officer. When the police officer approached the youth, Nichols allegedly opened fire with a shotgun. The two exchanged gun fire, and both were wounded. After his release from the hospital, Nichols was placed into custody, and the matter was assigned to Judge Stacey Zimmerman.

The incident involving Nichols received widespread public attention on a regional, statewide and national basis. Both the identity of the juvenile defendant and his photograph were published by the media. Following the shooting, the parents of the juvenile defendant, as well as the victim, received widespread publicity and were identified by name on several occasions.

Broad Restraint on Media

At the detention hearing in the case of *State of Arkansas v. Michael Nichols*, Case No. J 2000-554 in the Chancery Court of Washington County, Juvenile Division, the court failed to provide notice of its intent to issue a gag order. Only two reporters for newspapers

and one reporter for a television station were present during the proceeding at the time the court ordered "that no information be released by media in this case except for what is stated on a record during hearings in juvenile court."

The court also ordered

that no names or pictures of the victim and the victim's family be disseminated in the media, that no names or pictures of this juvenile who is charged, Mr. Nichols, or his family be disseminated in the media. Furthermore, my order is that no pictures of any of the juveniles here today in the courthouse will be broadcast or released by the media.

Thereafter, as the family and juvenile defendant were exiting the courthouse, a reporter for the *Arkansas Democrat-Gazette* photographed the parents and the juvenile. At approximately 4:03 p.m., a written gag order was entered which tracked the earlier oral order. The written gag order was disseminated to the media by fax at approximately 5:30 p.m. on May 18, 2000.

Paper Publishes Photos

On May 19, 2000, in the morning edition of the *Arkansas Democrat-Gazette*, photographs of the juvenile defendant and of his family were published in the statewide edition of the paper. On that same day, the *Arkansas Democrat-Gazette*, the Arkansas Press Association, the Associated Press, the *Morning News of Northwest Arkansas*, the *Northwest Arkansas Times* and the New York Times Company through its station KFSM-TV in Fort Smith, Arkansas, sought to intervene in the juvenile case for purposes of asking Judge Zimmerman to reconsider her order of May 18, 2000.

On Saturday, May 20, 2000, a hearing was held before Judge Zimmerman concerning a motion to reduce time to respond to disclosure, which had been filed by counsel for the juvenile defendant. The media was not apprised of the hearing, nor was the media

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Juvenile Judge Holds Newspaper in Contempt

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apprised of the subject matter of the hearing.

Court Modifies But Continues Gag

At the May 20 hearing, upon motion of counsel for the juvenile defendant, the court ordered the *Democrat-Gazette* to show cause why it should not be held in contempt for violation of the court's order of May 18, 2000. Additionally, presumably in response to the motion to intervene, Judge Zimmerman modified her gag order in reliance upon the case of *Oklahoma Publishing Co. v. District Court*, which had been cited by the media coalition in its motion to intervene. The court modified its order to permit the media to publish information about, and photographs of, the defendant, the victim, and their immediate families that the media obtained prior to May 18, 2000.

The court, however, continued to impose the prior restraint by reiterating that the media were not to disseminate any additional photographs of the juvenile, the juvenile's family and the victim's family coming in and out of the courthouse. On May 25, 2000, a show cause hearing was held, and at the conclusion of the hearing, the court again reiterated its "no photograph" order, denied the media coalition's motion to intervene, found the *Democrat-Gazette* guilty of criminal contempt for publication of two photographs in its May 19, 2000, edition and fined the newspaper \$100. The court purportedly issued a written order dated May 20, 2000, but that order was not entered by the clerk until June 2, 2000, and was not provided to the media coalition until after that date.

The original written gag order of May 18, 2000, provided that the trial in the matter was scheduled for May 30, 2000. When the media attempted to confirm the trial date, neither the clerk's office nor the court would verify whether the trial was, in fact, scheduled for that date. Eventually, the media determined that all counsel involved were going on vacation, and the trial had, in fact, been continued until a later time.

A petition for writ of *mandamus* and for temporary relief was filed with the Arkansas Supreme Court

on May 31, 2000, together with a motion for an expedited hearing. The Arkansas Supreme Court directed the Attorney General, acting as counsel for Judge Zimmerman, to respond to the petition by noon on June 2, 2000.

The *Nichols* trial began on June 6, 2000, and at that time the counsel for the juvenile defendant requested that the trial be opened to the public. Because the Arkansas Juvenile Code gives the juvenile defendant an absolute right to an open hearing, the media were allowed to attend. After several hours of testimony, the trial was adjourned, pending a psychological evaluation of the defendant.

On June 6, 2000, the Arkansas Supreme Court voted 6-0 to expedite the appeal but denied the request for immediate suspension of the gag order. The court will issue an opinion in the case prior to the court's July 13, 2000, summer recess, according to the court's *per curiam* order of June 6, 2000.

John E. Tull III is a member of and Kris. G. Bakers is an associate with Quattlebaum, Grooms, Tull & Burrow, Little Rock, Arkansas.



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A Gag Order Victory in Northern California

By Thomas Burke and Susan Seager

Gag orders seem to be the order of the day in California, where Los Angeles Superior Court James M. Judge Ideman has issued a sweeping gag order in the bomb plot trial of Sara Jane Olson and has threatened to hold a civil attorney in contempt for filing a related civil lawsuit without sealing the pleading.

Teens Being Tried as Adults

But a small-town newspaper in Northern California won a big victory June 5 when it persuaded a judge to vacate a gag order in the criminal trial of an adult and three juveniles who are being prosecuted as adults under the state's new voter-approved initiative, Proposition 21. Western Communications, Inc., publisher of *The Daily Triplicate* newspaper in Crescent City, California, also persuaded the judge to deny the defense team's bid to close the preliminary hearing to the public and the press, and to reject the defense request to seal court documents filed in the case. *People v. Xiong*, 97-059, Del Norte County Superior Court.

The case involves four teens charged with attempted murder for allegedly spraying an apartment complex with gunfire following racial taunts between Asian-Americans and whites in the town of Crescent City, population 16,000. No one was injured. It is the first prosecution in Del Norte County under Proposition 21 — which allows juveniles to more easily be prosecuted as adults.

The day after the arrests one of the court-appointed public defenders filed an ex parte request for a gag order prohibiting the police, prosecution and court personnel from discussing the case, and prohibiting *The Daily Triplicate* from reporting about the case. The public defender gave no notice to the public or to the newspaper of the gag order request.

The public defender claimed that his client's right to a fair trial was jeopardized by one newspaper article and one editorial published by *The Daily Triplicate*. A visiting Del Norte Superior Court judge (there are only two judges in the entire county) issued a broad gag order prohibiting the police, prosecution and court

personnel from making any "statements" about the case. The judge did not gag the media, however. When the newspaper published a second news story and blasted the gag order in an editorial the following day, the defense counsel moved, again without notice, to extend the gag order to all witnesses, to close the preliminary hearing to the public and press, and to seal the preliminary hearing transcript and the entire court file.

The gag order had an immediate, adverse effect in the town. Complaints of additional gunfire near the apartment complex have been received, but people, including law enforcement personnel who were subject to the gag order, were afraid to talk privately, let alone to the press.

Paper Challenges Gag

The Daily Triplicate quickly filed challenges to the gag order and proposed closures. *The Daily Triplicate* argued that the gag order was unconstitutional because it was facially overbroad and was of an indefinite duration. The newspaper also argued that the court failed to make required findings that there was a reasonable likelihood that the prejudicial publicity would make it difficult to impanel an impartial jury, and that other alternatives, such as change of venue or voir dire, were insufficient to protect the defendants' fair trial rights. The newspaper also argued that the defendants' closure motion was flawed because defendants had failed to demonstrate that the newspaper's two articles and two editorials created a pattern of deep and bitter prejudice that jeopardized the defendants' fair trial rights.

On June 5, after a contested hour-long hearing, Del Norte Superior Court Judge Phillip Schafer vacated the May 12 gag order and denied the motions to close the preliminary hearing and to seal the record. Schafer simply reminded all counsel to follow the constraints of Rule of Professional Conduct 5-120, which prohibits attorneys involved in litigation from making out-of-court statements that the attorney knows or reasonably should know will have a substan-

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A Gag Order Victory in Northern California

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tial likelihood of materially prejudicing the proceeding.

The Daily TriPLICATE's editor, Fred Obee, who had been on the job for only one week when the legal battle erupted over the gag order and closure request, wrote an editorial praising the judge for making a "common sense" decision. "The truth is the *TriPLICATE's* coverage in the case was routine," Obee wrote on June 6. "A frightening crime was committed, we interviewed the victims and neighbors and we published two editorials on the case." Obee stated that the newspaper will "remain mindful that all people accused of a crime are innocent until proven guilty" and will continue to "seek the truth, as elusive as that might be. We do not give the government the right to decide what is good for the people to know and what is not good for the people to know. We insist on remaining informed so we can retain control of the systems we, the public, have created."

Thomas Burke, a partner, and Susan Seager, an associate, with Davis Wright Tremaine, San Francisco, California represented The Daily TriPLICATE in this matter.

In re Gaylord Broadcasting Co., Relator Dissenting Opinion from Petition for Writ of Mandamus

The Supreme Court of Texas denied a petition of mandamus brought by a television broadcasting station after a Texas criminal court judge barred the station from filming criminal proceedings through a courtroom door after the station had run a piece critical of him.

Justice Hecht, joined by Justice Owen, respectfully dissented from the decision of the Supreme Court of Texas summary denial of the mandamus petition. The dissenters argued that, given the significance of the press's interest and the potential intrusion on the television station's constitutional rights, they would have granted the petition, heard oral arguments, and decided

the case on its merits.

The petitioner, Relator Gaylord Broadcasting Co., which operates the television station KTVT, was denied permission to film criminal trial proceedings through a window in the back door of the courtroom of Judge Robert Pruitt after KTVT had aired an investigative news story that strongly criticized the work habits of certain criminal court judges, including Judge Pruitt, and had created a dispute between those judges and the county commissioner's office. The denial was explicitly based on the critical reports by the station concerning the judges. Judge Pruitt allowed other media crews to film the proceedings, but not KTVT. In denying KTVT's subsequent motion to reconsider the order, Judge Pruitt stated that he felt KTVT was not a reputable news organization. This mandamus petition followed.

In dissenting, Justice Hecht argued that the presumptive right of access to criminal proceedings is guaranteed by the United States Constitution and that this right can be denied only if "the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Justice Hecht further argued that KTVT had originally demonstrated that the denial was retaliatory, thus potentially violating the First and Fourteenth Amendments. Based upon the seriousness of such arguments, the relative importance of the rights of the press to report on proceedings in the courts, and the potential for Judge Pruitt to continue to selectively exclude KTVT from his courtroom, Judge Hecht stated that he would have granted the petition.

Any developments you think other LDRC members should know about?

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The Strange But Significant Case of Santiago and Bristol: *More on Televised Trials in New York*

By Jonathan Sherman

On May 25, 2000, an intermediate state appellate court in Rochester, New York reversed a trial judge who, just two weeks earlier, had agreed to permit televised coverage of a high profile capital murder trial pending before him. *Santiago v. Bristol*, Index No. OP 00-01131 (App. Div. 4 Dep. May 25, 2000). The trial judge had struck down as unconstitutional Section 52 of the New York Civil Rights Law, which imposes a *per se* ban on the televising of any trial in New York. The appellate court reversed, ruling not only that no constitutional right to televised trials exists, but that because no such right exists, the trial judge had exceeded his authority by permitting the media to intervene in the underlying criminal case in order to be heard on their access application.

[T]he case has the potential to make mischief for press access well beyond the "cameras in the courts" debate.

Trial Judge Takes His Own Appeal Pro Se

The decision itself was borne out of and created an odd (and, truth be told, vaguely entertaining) procedural posture. Under New York's arcane habeus corpus-like procedures, the defendant, who had opposed televised coverage, reacted to the trial court's decision by instituting a lawsuit against the trial judge in the appellate court (sitting in the case, by statute, as a court of original jurisdiction) in order to overturn the decision.

That petition having been granted, the trial judge himself lodged an appeal from it with the State's highest court, the New York Court of Appeals, an appeal that is currently pending. This blur of activity, moreover, took place during the pendency of the trial. Thus have the intensity of the cameras issue, the interstices of New York procedure and the high stakes of a capital trial combined to create the oddest of pictures: a sitting judge presiding over a trial in which the defendant may receive the death penalty at the very same time that the defendant and the judge are entangled in civil litigation with each other.

And, to top all of it off, the judge is proceeding in the civil action *pro se*: the Attorney General, who favors cameras in courts, has intervened in the case to defend the constitutionality of the state statute that bans cameras, and so has refused (despite a statutory command to the con-

trary) to provide representation to the judge. Citing the Attorney General's obligation to defend, the New York State Office of Court Administration, whose presiding administrative judge also favors cameras in courtrooms, has refused to pay for outside counsel for the judge. Got all that?

The *Santiago* case is much more than a procedural and political oddity. It is of course a setback for advocates of televised trials in New York, where, in the last few months, lower courts had begun to strike down as unconstitutional the statewide statutory ban on televised trials.

But because of the precise holding in *Santiago* — that the trial court was not empowered even to permit the press to intervene to be heard on their request to televise — the case has the potential to make mischief for press access well beyond the "cameras in the courts" debate. And, if the pending appeal from the ruling is accepted for review by the Court of Appeals, it sets the stage for an important — perhaps a landmark — free speech ruling.

Historical Background

The roots of the *Santiago* decision lie in the intersection of New York's legislative politics and constitutional doctrine. Section 52 of the New York Civil Rights Law bars, under all circumstances, the televising of trials in New York courts. Section 52 was enacted in 1952 against the backdrop of McCarthyite show trials and in an age when cameras could arguably be said to compromise the dignity of the proceedings and distract participants from single-minded devotion to their truth-seeking duties. See Message of the Governor, *reprinted in* 1952 N.Y. Legislative Annual, at 366.

By 1987, however, New York's legislature — following the lead of several other states in the wake of the Supreme Court's 1980 ruling approving of Florida's decision to permit televised trials, *Chandler v. Florida*, 449 U.S. 560 (1980) — had lifted the bar of Section 52. Under Section 218 of New York's Judiciary Law, cameras were permitted into trial courts for an 18-month "experiment."

One decade and three subsequent short-term experi-

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ments later, four legislatively-authorized commissions concluded that technology and attitudes of participants had advanced light years beyond the several decades of real time that had passed since Section 52 had been enacted, that cameras could and should routinely be admitted into New York courtrooms. See, e.g., New York State Committee to Review Audio Visual Coverage of Court Proceedings, "An Open Courtroom: Cameras in New York Courts, 1995-97," April 4, 1997. Nevertheless, the last of New York's experiments ended on June 30, 1997, when Section 218 sunset by operation of law. A flurry of last minute legislative negotiation could not overcome the opposition to cameras generated by the O.J. Simpson criminal proceedings in California, and a compromise could not be reached. See Gary Spencer, *Effort on Cameras in Court Dies*, N.Y.L.J., July 16, 1997 at 1. Section 52 again became the law of New York State.

Two and a half years passed without a single televised trial in New York. In January 2000, however, Albany Judge Joseph Teresi, presiding over the trial of the four New York City police officers accused of murdering West African immigrant Amadou Diallou, stunned many by permitting the trial to be televised. *People v. Boss*, 182 Misc. 2d 700, 701 N.Y.S.2d 891 (Sup. Ct. Albany Co. 2000). But, permitting Court TV to intervene in the criminal action, Judge Teresi granted its application to televise by striking down Section 52 as unconstitutional under both the First Amendment and its New York state constitutional counterpart. Judge Teresi characterized the *per se* ban as a "monument to politically created procrastination and inaction [that] arises not from scholarly debate but rather . . . the failure of the Legislature to maximize the press and public's legitimate constitutional access to the courts." 701 N.Y.S. 2d at 893, 895.

Boss ushered in a kind of judicial version of the civil rights movement. Like protesters popping up throughout the South two generations ago, trial courts across the state followed the decision by granting intervention motions in proceedings pending before them and declaring Section 52 unconstitutional. E.g., *People v. Strawbridge* (Albany Co.); *People v. Sabendra* (Otsego Co.); *People v. Hall*

(Warren Co.); *Coleman v. Shea*. (Nassau Co.); *People v. Payne* (Suffolk Co.). Inevitably, someone would seek to appeal along the way.

Enter Jose Santiago

Last year, Mr. Santiago was indicted for murdering two children outside of Rochester; the Monroe County District Attorney sought to impose the death penalty. In mid-February, five local television stations intervened to seek permission to televise the trial, and Gannett Co. sought permission to take still photographs. Over the objection of both defense and prosecution, County Court Judge William H. Bristol granted the requests, declaring

The court then went on to hold that Judge Bristol, in fact, had exceeded his authority, and should not have permitted intervention in the first place.

Section 52 infirm under the state constitution. *People v. Santiago*, Index No. 3903/99 (Monroe Co. Ct. May 5, 2000). Santiago immediately sought to overturn the order by instituting against Judge Bristol an "Article 78"

proceeding in the Fourth Department of the Appellate Division of New York's Supreme Court, seeking a writ of mandamus and/or prohibition or a declaration that Section 52 was constitutional.

On May 25, the Fourth Department issued an order granting a writ of prohibition barring Judge Bristol from enforcing his order. The basis for the decision appears at first glance procedural, but was in fact profoundly substantive. The court first rejected all assertions that the petition should have been dismissed on grounds that Santiago had an adequate remedy at law — namely, appellate review of any conviction, see *Chandler v. Florida*, 449 U. S. 560 (1981); appellate review, the Court said, "would not address the issue presented herein, whether [Judge Bristol] exceeded his authority in permitting the media to intervene over the objection of [Santiago] and the District Attorney." Slip op. at 2. The court then went on to hold that Judge Bristol, in fact, had exceeded his authority, and should not have permitted intervention in the first place.

But the court got there by reaching the substantive constitutional issue. "The right of the media to intervene in [the underlying criminal] action is premised upon its right of access to [Santiago's] trial." Slip op. at 2. Thus:

That right is protected by both the First Amendment and [New York] Judiciary Law § 4, which mandates public trials. The right of access, however, is not the

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right to broadcast the proceedings. [The press] have no right under the US Constitution to broadcast [Santiago's] trial, and there is no precedent in New York recognizing such a right. Indeed, Civil Rights Law § 52 prohibits televising, broadcasting or taking motion pictures of a trial *Because intervenors have no constitutional or statutory right to broadcast, [Judge Bristol] was without authority to permit them to intervene.* *Id.* at 2-3 (emphasis added; citations omitted).

“Rather than moving in County Court for an order permitting audiovisual coverage of [Santiago's] trial,” the court concluded, “intervenors should have commenced a declaratory judgment action . . . challenging the constitutionality of the statute . . . barring such coverage.” *Id.* at 3-4 (citations omitted).

Santiago Chills Other Courts

Left standing, the decision may in the short run snuff out whatever momentum toward returning cameras to New York courts was initiated by *Boss*. Indeed, although the court that issued it, the Fourth Department, hears appeals only from lower court cases in Western New York, the effect of the decision may be felt statewide. Some courts have ruled that because each of the four appellate departments in New York is part of a single, integrated state court, the rulings of one department are binding precedent on trial courts throughout the state, at least (as in this case) in the absence of contrary authority in any other department. *E.g., Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 476 N.Y.S.2d 918 (2 Dep. 1984). Sure enough, just a day or so following issuance of the ruling, a judge on Long Island *sua sponte* withdrew an order he had issued permitting cameras to cover a criminal trial, and did so on the grounds that he was bound by the *Santiago* decision. *People v. Payne*, Index No. 1043-98 (Suffolk Co.).

Even were that not so, however, an appellate court in New York (albeit, without apparent legal significance, sitting as a court of original jurisdiction), for the first time, has now plainly spoken on the substantive constitutional

issues. In itself, that will curtail momentum. *See In the Matter of E.P.*, No. QDS:28702679 (Fam. Ct. N.Y. Co.); N.Y.L.J., June 19, 2000 (refusing to permit cameras into family court and holding Section 52 constitutional in part on the authority of *Santiago*, “[t]he Appellate Division specifically held that the media ‘have no right . . . to televise or otherwise broadcast petitioner’s trial’” (ellipses added)).

To be sure, one might seek to distinguish the decision on procedural grounds — that the Fourth Department was saying only that the issue had been raised impermissibly in the trial court. But the court did not leave it at that: It avoided the substantive constitutional issues by reaching them. The right to intervene was “premised upon” the

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existence of a right of access, and it was only “because” the television stations were without constitutional rights to televise that they never should have been accorded the opportunity to intervene to vindicate that right in the

first place. Hence, the intervention holding was entirely dependent upon, and inextricably interwoven with, the substantive constitutional ruling.

Impact Beyond Camera Dispute

And the fact that that was so creates potential problems not merely for advocates of televised trials, but in other access contexts, as well. The Fourth Department has purported to curtail the use of a routinely employed — and judicially-blessed — mechanism for the vindication of constitutional rights: intervention. It has long been the case, in New York and elsewhere, that “courts should of course afford interested members of the news media an opportunity to be heard” on the question of whether they may have access to court proceedings and documents. *Gannett Co. v. DePasquale*, 43 N.Y.2d 370, 381 (N.Y. 1977), *aff'd*, 443 U.S. 368 (1979).

In *DePasquale*, the press were permitted to intervene before a New York county court judge, who then held that they had no right of access to a suppression hearing in a criminal case. The Court of Appeals affirmed the substantive ruling, but also emphasized the importance of the intervention process via “a preliminary proceeding adequate to determine the magnitude of any genuine public interest.” *Id.* In affirming, the Supreme Court made clear that

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among the reasons the closure order could be deemed consistent with the First Amendment was that “counsel for petitioner was given an opportunity to be heard at a proceeding where he was allowed to voice the petitioner’s objections to closure of the pretrial hearing.” 443 U.S. 368, 391 (1979).

Intervention in particular proceedings to obtain newsworthy information about court proceedings thus carries with it its own constitutional dimension. And it makes sense that it should. News about trials is most newsworthy while the proceedings are occurring, not days or months afterward. Declaratory relief, the procedure available after *Santiago*, cannot substitute for intervention precisely because by the time any such relief could be obtained, the underlying proceedings, in all likelihood, will have long since been concluded. *Cf. Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 437 (N.Y. 1979) (emphasizing that trials should not merely be open, but should be subject to “contemporaneous review in the forum of public opinion”) (citation omitted).

One might seek to distinguish *Santiago* on the grounds that the press sought to challenge the validity of a statute, as opposed to a discretionary closure order. But that fails, for a couple of reasons. First, *Santiago* not only barred television stations from intervening; it applied to Gannett’s request to take still photographs, as well. But the taking of still photographs is not barred by Section 52, which on its face covers only “televising, broadcasting and the taking of motion pictures.” Thus, the holding as applied to Gannett in effect imposes an individualized closure order of the sort dealt with in *DePasquale*. And yet, because no affirmative “right” could be identified, Gannett was denied not only access, but the well-established right to be heard on whether access should have been permitted.

More fundamentally, the nature of the constitutional challenge ought not, and cannot, dictate the procedural propriety of the method used to vindicate the asserted right. The U.S. Supreme Court has been no less charitable

to statutory challenges than individualized closure orders in approving of case-by-case intervention: *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Court held for the first time that the press and public possess federal constitutional rights to attend proceedings involving minor victims of sexual offenses. The trial court had barred access on the authority of a mandatory state statute; the Supreme Court reversed and struck down the statute, at least as applied to the closure of criminal trials. In so ruling, it reaffirmed the importance of the intervention process (which had been permitted by the trial judge himself): “[R]epresentatives of the press and

general public ‘must be given an opportunity to be heard on the question of their exclusion.’” 457 U.S. at 609 n.25 (citation omitted).

And so, *Santiago* imposes some burdens on the ability of the press to vindicate access

And so, Santiago imposes some burdens on the ability of the press to vindicate access rights in New York, at least where those rights have not yet been explicitly established, or recognized by higher courts.

rights in New York, at least where those rights have not yet been explicitly established, or recognized by higher courts. Will intervention to obtain information about ongoing grand jury proceedings be barred? What about requests to obtain documents potentially subject to protective orders? What of family court proceedings, or evidence deemed inadmissible and thus not made public during the course of a trial? The number of possible contexts is, one can surely agree, large.

Santiago’s trial began on May 15, and, as of this writing, continues. Cameras have not been permitted to cover any portion of the proceedings. On June 1, 2000, during the trial, Judge Bristol noticed an appeal to the New York Court of Appeals seeking reversal of both the Fourth Department’s intervention holding and its substantive constitutional ruling. The television stations followed on June 6, and Gannett on June 7. The Court of Appeals is expected by early summer to announce whether it will hear the appeals. If it does, it will have the opportunity not only to clean up the waters muddied by *Santiago*’s intervention holding, but to make landmark law by striking down Section 52 as a violation of the press’s and the public’s constitutional rights.

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Supreme Court Upholds Full First Amendment Rights to Cable Programming

By Burton Joseph

On May 22, 2000, in a 5-4 decision, in *United States et al. v. Playboy Entertainment Group, Inc.* (No. 98-1682) the U.S. Supreme Court held that programming on cable television is entitled to the highest level of First Amendment protection. In doing so, the Court rejected the argument that sexually explicit cable programming was entitled to lower levels of First Amendment protection against content-based restrictions and insisted that the government meet its burden.

Background

Section 505 of the Telecommunications Act of 1966 required cable television operators providing channels “primarily dedicated to sexually-oriented programming” either to “fully scramble or otherwise fully block” transmission, or, as an alternative, to limit programming only between 10:00 p.m. and 6:00 a.m. Since Playboy’s transmission was for premium programming, the signal was scrambled and could be received only by those subscribing to the service. A phenomenon known as “signal bleed” occasionally permitted momentary images or sound to transmit to non-subscribers, which was the problem Section 505 was intended to address.

Section 505

This provision was offered as an amendment, without debate, to the Telecommunications Act of 1996, under Title V of the Act, which is known as the Communications Decency Act. Section 505 required either complete scrambling of the visual and audio programming, which is extremely expensive under current technological constraints, or time channeling, allegedly to protect children during daytime who might be harmed as a result of momentary exposure to the unscrambled signal.

The Litigation

Playboy challenged the constitutionality of Section 505 as an unnecessarily restrictive, content-based law in violation of the First Amendment. After an exten-

sive trial, a three-judge District Court concluded that Section 504 of the Act provides that every household may receive free of charge from the cable operator a set-top blocking device which effectively eliminates signal bleed. On direct appeal to the Supreme Court, the decision was affirmed. This ruling and the opinion have significant First Amendment implications and clarify important issues.

The Significance of the Supreme Court Opinion

Justice Kennedy delivered the opinion of the Court in which Justices Stevens, Souter, Thomas and Ginsburg concurred. Justices Stevens and Thomas filed concurring opinions. Justice Scalia filed a dissenting opinion, and Justice Breyer filed a dissenting opinion in which Chief Justice Rehnquist and Justices O’Connor and Scalia joined.

The majority opinion makes several interesting observations: 1) Although society has an independent interest in protecting children, any legislative effort must be consistent with First Amendment principles. 2) The government has a significant burden of proof to justify any content-based restriction and must prove the legislative scheme was the least restrictive means necessary to accomplish a legitimate legislative goal. Specifically, in *Playboy*, the Court found that the government must support its assumption regarding the existence of a problem that momentary signal bleed could not be successfully addressed by a less restrictive means other than full blocking or time-channeling. 3) The “secondary effects” doctrine applicable in zoning cases did not apply to cable transmission. 4) So-called “low value” speech is entitled to full First Amendment protection. 5) Significant restrictions on speech have the same effect as a complete ban for First Amendment purposes. 6) Any content-based restriction on protected speech must pass “strict scrutiny.”

The Court found that Section 505 imposed a con-

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content-based restriction; that is, it was aimed at a certain class of speech and applied only to a certain class of programmers who provide channels primarily dedicated to “sexually explicit adult programming or to other programming that is indecent.” Since it was the content of the expression that was regulated, the restriction could stand only if it satisfied strict scrutiny and was “narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”

The Court observed that “the general rule is that the right of expression prevails, even when no less restrictive alternative exists,” and “we are expected to protect our own sensibilities simply by averting [our] eyes.” Under this analysis, the Court rejected the “secondary effects” applied in zoning cases such as *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), and *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), and clearly stated that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effect of protected speech.

The approach, offered by the set-top blocking devices which can be accomplished on a household-to-household basis constitutes a less restrictive means of achieving the legislative purpose without affecting those households that do not have a signal bleed problem, or which contain only adults (which constitute two-thirds of the affected households) and without interfering with the broadcast signal on a 24 hour a day basis.

The Court concluded that society’s independent interest in protecting children does not, in itself, justify censorship and, significantly, that the First Amendment is not diminished for what the government characterizes as “low value” speech.

The government argued that it need not demonstrate the true extent of signal bleed or the presumption of ineffectiveness of voluntary measures such as

found in Section 504. The Court rejected that position, and held the government had the burden of proof beyond merely articulating the nature of the problem. In this respect, the opinion in *Playboy* contrasts sharply with the Court’s recent decision in *City of Erie vs. Pap’s A.M.*, 120 S. Ct. 1382 (2000). In that case, the Court upheld a ban of nude dancing without any evidence of an actual problem, and the plurality decision accepted the city’s judgment as to secondary effects in the absence of any reason to believe it was incorrect.

“Low Value” Speech

Perhaps the most significant part of the Court’s opinion was its analysis of what the government claimed was “low value” speech which, it argued, permitted relaxed constitutional scrutiny. A reading of *Pap’s A.M.* could have led to the conclusion that sexually-oriented expression generally is entitled to less First Amendment protection, and the majority opinion in *Playboy* confronted this argument directly and rejected such conclusion.

“We cannot be influenced, moreover, by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly. It follows that all content-based restrictions on speech must give us more than a moment’s pause. If television broadcasts can expose children to the real risk of harmful exposure to indecent materials, even in their own home and without parental consent, there is a problem the Government can address. It must do so, however, in a way consistent with First Amendment principles.”

In a ringing defense of First Amendment values,

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the opinion goes on to state that:

“When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. The Constitution no more enforces a realistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.”

The Dissent

Justice Breyer, with whom the Chief Justice and Justices O'Connor and Scalia joined dissented. The dissent rejected the majority's conclusion that the Government failed to prove the seriousness of signal-bleed on adult channels by children whose parents did not order or request the broadcast. The dissent concluded that since cable operators could choose time channeling, rather than complete blocking, that in itself justified the conclusion that there was a significant problem. The dissent also found that the majority conclusion that there was a “less restrictive alternative” was a close question, but that the alternative selected in Section 505 was within the bounds of legislative discretion in light of what the dissenters found was a pervasive problem.

Conclusion

It appears that the decision in *United States v. Playboy Entertainment Group, Inc.*, will have important ramifications in First Amendment jurisprudence beyond the limited issue of signal bleed and the development of cable television technology. For one, the opinion provides clear expression that limitations on speech are as odious as a total ban will prove a serious counter to government arguments in support of content-based restrictions. The majority opinion is strongly supportive of traditional First Amendment analysis.

Burton Joseph, of Joseph, Lichtenstein & Levinson, Chicago, Illinois, and Robert Corn-Revere, of Hoagn & Hartson, L.L.P., Washington, D.C. represented Playboy Entertainment Group, Inc.

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LDRC First Amendment Education Project

Would You Like to Participate?

LDRC is developing an education program for high school students together with the First Amendment Center of the Freedom Forum. The broad goal of the program is to teach students about First Amendment (free press) values and to do so in a creative and dynamic way. To this end, we worked on developing a Fred Friendly-style seminar for high schools students. In May, LDRC produced a pilot seminar at the Freedom Forum's facilities in New York. This session was very well-received and we are now exploring ways to develop this into a nationwide program relying on LDRC's membership throughout the country, as discussed below.

The Pilot Seminar

Jay Ward Brown of DCS member firm Levine, Sullivan & Koch moderated the pilot seminar. The hypothetical that Jay developed for the session explored issues and conflicts that arise in the course of newsgathering between media and law enforcement. The panelists were Louis Anemone, former Chief of the Department in the NYPD, Eve Burton, Vice President & Deputy General Counsel New York Daily News, Neil Herman, former head of the FBI's joint terrorist task force, Chris Isham, ABC News producer, Leonard Levitt, Newsday reporter and columnist, and Larry Seary, WNBC assignment desk editor and former cameraman.

Among the themes that were explored was the conflict between the press's duty to report the news and law enforcement's concern for public safety. The audience for the seminar was a diverse group of about 100 New York City public high school students. The Freedom Forum videotaped the seminar and copies are available for viewing by interested members.

Developing the Program Further

We are planning to produce another pilot seminar on Wednesday November 8, 2000. This is one day before LDRC's annual dinner and the PLI Communications Law Conference. Because so many members will be in New York City for these events, we thought a seminar on this day would provide an opportunity for

LDRC members interested in the program to attend a seminar and discuss the project.

To make this project a success on a broader scale, we will need to rely on interested members to produce seminars at the local level, drawing on their media and community contacts. In addition, some members might also like to act as seminar moderators. We would plan to discuss both these aspects of and may run a workshop on the project at the session.

We will publish additional updates as plans are finalized, but member should indicate their interest in advance to LDRC. Based on our initial pilot, this project is not only substantively interesting, but it is also an excellent project to develop community relationships.

If you are interested in producing and/or moderating these programs in your area, please contact LDRC at:

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