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MEDIALAWLETTER

Reporting Developments Through March 21, 2003

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INTERNET JURISDICTION

NEWS & UPDATES

MLRC Bulletin 2003:1 Criminalizing Speech About Reputation

The Legacy of Criminal Libel in the U.S. After Sullivan & Garrison

Coming out this month, MLRC's Bulletin 2003:1 examines the legacy of criminal libel in the U.S. in the decades since *New York Times v. Sullivan* and *Garrison v. Louisiana.* According to the Bulletin, since these cases were decided in 1964 the criminal defamation laws in 33 states have either been repealed or struck down. Today only 17 states have criminal libel statutes – and prosecutions are sporadic at best. MLRC's study finds only 74 criminal prosecutions initiated from 1965 through 2002.

But the recent convictions in Kansas of the editor and publisher of a alternative political newspaper show that despite robust First Amendment protections, criminal libel prosecutions can strike the press – surely an unexpected and even embarrassing fact at a time when American media lawyers are advocating law reform to eliminate criminal libel abroad.

The MLRC study shows that while criminal defamation prosecutions are extremely rare – the cases that are brought are highly selective and used most often as a political weapon. The overwhelming majority of recent prosecutions involve speech about public figures or matters of public interest. Law enforcement officers and elected public officials are the most frequent complainants.

Thus many criminal libel cases still echo the discredited prosecutions for seditious libel – showing that criminalizing speech about reputation is inherently troublesome under modern First Amendment principles since it involves the highly selective determinations of government prosecutors of whose reputation to protect and what speech to punish.

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In Part I, the Bulletin reviews the historical background of criminal libel from Colonial America through *Garrison*, the impact *Sullivan* and *Garrison* has had in constitutionalizing criminal libel law and the status of the law in those states that have retained criminal libel statutes. Part II contains an analysis of post-*Garrison* criminal libel prosecutions and a compendium of such cases. Part III reviews the prevailing law and historical background in all 50 states and U.S. territories.

New Criminal Libel Case in Kansas Against Newspaper

City Clerk Complains of Column and Mayoral Campaign Ad

Three weeks after an effort to repeal Kansas's criminal libel statute died in the state legislature, another small newspaper in the state has been charged with criminal libel for printing material critical of local elected officials. In another case, a man was charged with criminal libel for material he posted on a web site about his estranged wife.

In the newspaper case, the authorities are using a municipal provision rather than the state's criminal libel law.

On March 13, charges were filed in Baxter Springs, Kan. City Court against the twice-weekly *Baxter Springs News* publisher Larry Hiatt, columnist Ron Thomas, and city council candidate Charles How, Jr. *City of Baxter Springs v. Hiatt*, No. 03-CR000909 (Kan. Municip. Ct., Baxter Springs filed March 13, 2003). Baxter Springs is a city of 4,600 in the extreme southeastern corner of the state.

The defamation charges, which were filed at the request of Baxter Springs City Clerk Donna Wixon, stemmed from two items in the March 11, 2003 edition of the newspaper: a column by Thomas and an advertisement placed in the paper by How.

Both items related to city elections scheduled for April 1. The column said that, if elected, mayoral candidate Art Roberts would give Wixon free reign to run the city. "Those Roberts for mayor signs should be taken down and to (sic) read 'Wixon for Mayor,'" the column read as printed, "and then we have Mayor Wixon, Wixon Springs City Council." The political advertisement, apparently in support of incumbent Mayor John Murray, said,

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New Criminal Libel Case in Kansas Against Newspaper

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> "For mayor? Art Roberts voted to hire Donna Wixon and almost doubled her salary over the previous clerks pay in three years – plus bonuses. Palzy walzy with defeated council member Bob St. Clair. You folks want two more years of this hateful city clerk?"

Wixon told the *Joplin* [Mo.] *Globe* that while the *Baxter Springs News* has been critical of her before, the March 11 items went too far.

The charges are under a city ordinance which adopted the Uniform Public Offense Code for Kansas Cities, promulgated by the League of Kansas Municipalities. That code includes a criminal defamation provision with the same exact language as Kan. Stat. Ann. § 21-4004, which criminalizes statements made with knowledge of the statements' falsity and with actual malice that harm the reputations of both the living and the dead. The only difference is that the uniform municipal provision makes the offense a class A violation (see Sidebar), while the state statute makes it a class A misdemeanor.

Publisher Hiatt said that the criminal charges were "a continuation of the city's harassment of this newspaper."

A hearing is scheduled in the case on April 11 before City Judge Joe LaTurner. The same day, the same court will hear a case charging a *Baxter Springs News* advertising salesman with theft after he removed an advertiser's inserts from a competing newspaper's offices. The salesman claims that he took the inserts with the advertiser's permission.

In addition to the theft case involving the advertising inserts, Hiatt says that he was cited for keeping his car running. Last year, the Baxter Springs City Council voted to replace the *News* as the city's official newspaper of record with the competing *Baxter Springs Citizen.* Various council members cited "negative" articles and unsigned letters in the *Baxter Springs News* as reasons for the change.

"I think it's kind of comical," How told the *Globe*. "It's hard to slander that woman," he added, referring to Wixon. Asked if he felt that Wixon was trying to stifle his free speech rights, he said, "they're not that smart."

Last year, the editor and publisher of *The New Observer*, monthly political newspaper, were convicted on seven misdemeanor counts of criminal defamation. *Kansas v. Carson*, No. 01-CR-301 (Kansas Dist. Ct., Wyandotte County jury verdict July 17, 2002); *see LDRC MediaLawLetter*, Aug. 2002, at 5. They were each fined $3,500 and sentenced to one year unsupervised probation, although the sentences were suspended pending appeal. *See LDRC MediaLawLetter*, Dec. 2002, at 14.

Kansas' Other Criminal Libel Law

The conviction of the editor and publisher of *The New Observer* in Wyandotte County, Kan. raised new awareness in the media defense bar of the criminal defamation statutes that are on the books and still in force in Kansas and other states.

But the prosecution of the publisher, a columnist and an advertiser of *The Baxter Springs News* shows that there may also be municipal provisions which purport to enact criminal sanctions for defamatory statements.

The Baxter Springs, Kan. statute cited in the *Baxter Springs News* case is a general provision adopting the Uniform Public Offense Code for Kansas Cities, a model code promulgated by the League of Kansas Municipalities. The goal of the Code, according to Kim Gully, the League's Director of Policy Development and Communications, is to allow municipalities to prosecute offenses that state courts do not have the resources to handle.

The Code includes the same language as several Kansas state statutes, including criminal provisions regarding assault, selling motor vehicles without a license, and telephone harassment. Gully said that the criminal defamation provision has been included in the code since it was first created in 1985.

The League revises the Code each year to reflect changes in state statutes; to stay current, municipalities must readopt the Code after each revision. The League also has drafted a model enactment provision which allows individual municipalities to exclude provisions of the Code that they specify.

Web Posting Leads to Charges

The charges in the web site case alleged that an Overland Park, Kan. man had posted information supposedly about his estranged wife on a web site featuring sexually explicit personal advertisements. The information that Wesley Meixelsperger posted was not true, and the photographs were not of his wife. However, he also included a link to his wife's real employer.

The charges were filed on March 19, and Meixelsperger was ordered to appear for arraignment on April 23.

Customs and FBI Intercept and Seize AP Documents With No Notice

By David Tomlin

Last September, an AP reporter in Manila put an unclassified FBI lab report from a 1995 terrorism trial into an envelope and shipped it by Federal Express to a colleague in the news service's Washington bureau. The parcel never arrived, but it took AP several months and a tip from a source to learn what happened to it.

The Bureau of Customs and Border Protection now acknowledges that its agents opened the envelope during what the agency says was a random inspection of materials entering the country through a Federal Express hub in Indianapolis. Customs spotted the lab report and called the FBI, which promptly took possession of it.

Customs regulations contain no provision for seizure of a private parcel where the agency has no reasonable suspicion that it contains contraband. When agents do intercept and hold private property, Customs is required to notify the owner and conduct a hearing to determine whether the property should be returned.

No Warrant

In this case, Customs neither notified AP nor conducted any hearing. A spokesman said that when a routine examination produces materials that appear to be of special interest to another federal agency, Customs contacts that agency.

Customs regulations permit the surrender of intercepted private property to another agency, but only if the receiving agency produces a warrant. No warrant was obtained or sought by the FBI, which simply asked Customs to hand over the lab report.

The incident drew a sharp letter of protest from AP President Louis D. Boccardi to the heads of both agencies. "We are deeply concerned that agents of two federal departments responsible for enforcing the law saw fit to ignore AP's rights and their own departmental regulations to secretly expropriate AP's correspondence," Boccardi wrote.

Senator Charles Grassley of Iowa also expressed alarm in a critical letter of his own to the agency chiefs. "A preliminary review of the available facts suggests that the government overstepped its bounds by improperly seizing private property to censor and stymie the media," Grassley wrote. "Indeed, it now appears we are dealing with a violation of the First and Fourth Amendment."

The FBI report recounted details from an examination of materials taken from the apartment of Ramzi Yousef following his arrest with Abdul Hakim Murad. Both are now serving life sentences in a plot to plant explosives on a dozen airliners which were to be destroyed as they flew from Asian cities to the United States. Yousef was also a defendant in the 1993 World Trade Center bombing.

Records Were Public

The lab report contained pictures of some of the evidence, including batteries, explosive devices, bomb fragments and cell phones, as well as copies of a magazine and some phone directories.

The AP documents intercepted in September were not only unclassified but remain part of the public record in at least two court proceedings. An FBI spokesman in Indianapolis said that the agency is trying to be "more careful about the kind of information that's out there. We don't want criminals to get ideas as to how to cause more damage." AP tried to trace the package when it failed to arrive in Washington. Federal Express suggested it must have fallen from the back of one of its trucks. But in January, AP learned the truth when it heard from a source that the FBI was trying to find out how AP got its copy of the lab report.

The intended recipient of the AP shipment from Manila was John Solomon, assistant chief of AP's Washington bureau.

This was the second instance in which federal authorities are known to have taken a special interest in Solomon's communications. In the first, the Justice Department subpoenaed Solomon's home phone records in 2001 as they traced leaks from an investigation of Senator Robert Toricelli of New Jersey.

David Tomlin is a former reporter, editor and bureau chief for The Associated Press, where he now works in the president's office as an attorney.

UPDATE: Jury Awards $400,000 in National Geographic CD-ROM Case

A federal jury has awarded a photographer $400,000 for infringement of photographs he took for *National Geographic* magazine that were included in a CD-ROM compilation of every issue of the magazine since 1888. *Greenberg v. National Geographic*, Civil No. 97-3924 (S.D. Fla. jury verdict March 5, 2003).

The award, for four photographs, is the maximum statutory damages allowed under the version of 17 U.S.C. § 504 (c)(2) in effect when the CD-ROM collection was issued.[1] The jury award came after the U.S. Supreme Court declined to review a ruling by the 11th Circuit Court of Appeals that the CD-ROM collection was neither a reproduction nor a revision of the original *National Geographic* magazines, for which no additional copyright permission was required. *See Greenberg v. National Geographic*, 244 F.3d 1267, 29 Media L. Rep. 1599 (11th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001).

The photos at issue in the trial had been taken by Jerry Greenberg and appeared in the magazine in January 1962, February 1968, May 1971 and July 1990. They were also reproduced, along with the entire contents of each issue of the magazine, in the CD-ROM collection. In addition, one of Greenberg's photographs that was used on the cover of the January 1962 magazine appeared in an opening sequence to the collection in which a series of 10 National Geographic covers "morphed" into each other.

In addition to the non-profit National Geographic Society, the defendants included the society's for-profit subsidiary which produces products based on the society's magazine, and the computer company that programmed and produced the CD-ROM collection for the society.

In 1999, Judge Joan A. Lenard granted summary judgment for the defendants on the claims regarding these uses of the photographs. *Greenberg v. National Geographic*, 1999 WL 737890, 12 Fla. L. Weekly Fed. D 421 (S.D. Fla. 1999). The 11th Circuit reversed, finding that the CD-ROM collection was a new work – created in a new medium for a new market – and not simply a republication of existing work. Thus the appellate court held that the use of the photographs in the CD-ROM collection and in the opening sequence constituted infringement, and remanded with instructions for the district court to determine damages and attorneys fees.[2] *See LDRC LibelLetter*. April 2001, at 43.

Shortly after the 11th Circuit ruling, the U.S. Supreme Court ruled in *Tasini v. New York Times*, 533 U.S. 483 (2001). In that case, the Court held that storage of the text of newspaper articles in an electronic database constituted a new work, not a revision.

National Geographic filed a petition for certorari in its case, arguing that its CD-ROM was different from the databases at issue in *Tasini* because the collection contained images of the entire magazine issues as originally printed, complete with photographs and advertisements. But the Supreme Court declined to review the case. *See LDRC LibelLetter*, Oct. 2001, at 33.

The primary issue during the five-day trial on remand was whether the defendant's infringement – which they continued to deny – was "willfull," which is required for maximum damages under the statute. The plaintiff presented internal memos and e-mail messages discussing the copyright issues involved in producing the collection. The defense argued that there was no proof that any infringement had been committed willingly.

The primary issue during the five-day trial on remand was whether the defendant's infringement – which they continued to deny – was "willfull."

The damages trial was held before Magistrate Judge Andrea M. Simonton.

In response to the verdict, National Geographic Society stopped sales of the CD-ROM collection. "We believe that the public will be the loser, as this valuable educational archive will no longer be available to individuals, libraries and schools," a society spokeswoman told the Photo District News' PDNewswire.

In court, the defendants have filed a motion to set aside the verdict, and have vowed to appeal the verdict to a higher court.

The defendants are represented by Robert G. Sugarman, Naomi Jane Gray and Joanne M. McLaren of Weil Gotshal & Manges in New York; Edward Soto, Valerie Greenberg Itkoff, and Eric N. Assouline of Weil Gotshal & Manges in Miami; Stephen Zack and Jennifer G. Altman of Boise Schiller & Flexner in Miami. Norman Davis and Edwin G. Torres of Steel Hector & David represented the plaintiff.

[1] In 1999, the statute was amended to increase the maximum for statutory damages from $100,000 to $150,000 per work. *See* Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub.L. 106-160, § 2(2) (1999).

[2] The Supreme Court held in 1998 that the Constitution requires that jury trials be held to determine statutory damages under 17 U.S.C. § 504(c)(2). *See Feltner v. Columbia Pictures TV, Inc.*, 523 U.S. 340, 26 Media L. Rep. 1513 (1998).

Federal Court Rejects Islamic Charity's Libel Claim

By Michael M. Conway and Miki Vucic

In a vindication of journalists' ability to report about ongoing governmental investigations, a federal district court in Chicago on February 19 granted summary judgment to six national news organizations in a libel suit brought by an Islamic charity suspected after 9/11 of having ties to terrorists.

In *Global Relief Foundation, Inc. v. The New York Times Company, et al.,* 2003 WL 403135 (N.D. Ill.), Judge David H. Coar ruled that separate news reports published by The New York Times, New York Daily News, ABC, Associated Press, Boston Globe and San Francisco Chronicle between September and November 2001 reporting that Global Relief Foundation ("GRF") was under scrutiny by federal officials were substantially true under Illinois law. In doing so, the Court rejected GRF's position that, because the articles relied on confidential sources, the issue of truth turned on whether GRF actually had ties with Al-Qaeda or other terrorist organizations rather than whether the U.S. Government was investigating GRF for such ties.

In the aftermath of the September 11 terrorist attacks, pursuant to the International Emergency Economic Powers Act, as amended by the USA Patriot Act, President Bush issued Executive Order No. 13224 declaring a national state of emergency, authorizing the Treasury Secretary to freeze assets of groups that assist or provide financial or other support to terrorist organizations, and listing 27 people and organizations whose assets would be frozen. GRF, an Islamic charitable organization based in Bridgeview, Illinois, was not named.

Media Sued For Reporting on Government Investigation of GRF

In the next two months, the five newspapers and ABC reported that the Bush Administration was investigating GRF for ties to terrorism and was considering placing GRF on the list of organizations whose assets would be frozen. At that time, the investigation of GRF was not public. On November 15, 2001, GRF sued the news organizations and their reporters for defamation and commercial defamation for their reports about the investigation. Seeking $125 million in damages, GRF asserted that its assets had not been frozen, that the Government had not accused it of terrorist-affiliation, that it had no ties to terrorism, and that the Government was not investigating it for such ties. On December 14, 2001, the FBI raided GRF's offices and seized its property. Also on that day, the Office of Foreign Assets Control ("OFAC") of the Treasury Department froze GRF's assets pending the Government investigation.

Court Rejects Defendants' Rule 12(B) Motions

As discussed fully in the October 2002 issue of the LDRC Media Law Letter, on September 9, 2002, the Court denied the news organizations' motions to dismiss under Federal Rules of Civil Procedure 12(b)(2), for lack of personal jurisdiction over certain Defendants, and 12(b)(6), for failure to state a claim. The Defendants argued that the publications were not libelous *per se* under the Illinois innocent construction rule and, in any event, were substantially true.

Defendants asked the Court to take judicial notice of the Government seizure order, as well as allegations made by GRF in its separate lawsuit against the Government challenging the seizure in *Global Relief Foundation, Inc. v. Paul O'Neill, et al.*, No. 02 C 0674 (N.D. Ill.) ("*O'Neill Action*"). The Court refused to consider these documents for their truth on a 12(b)(6) motion. The Court also stated that even if it had considered these documents, they do not show that GRF was under investigation *at the time of the challenged publications*, but at most, that GRF was under investigation as of December 14.

While the Court dismissed the commercial disparagement count for failure to state a claim, it refused to dismiss the six remaining defamation counts.

Joint Summary Judgment Motion On Substantial Truth

On October 18, 2002, the Government officially designated GRF a "Specially Designated Global Terrorist" ("SDGT"). About that same time, one of GRF's co-founders (Rabih Sami Haddad) was subject to a deportation proceeding in Detroit, Michigan, which proceeding was supposed to be closed to the public for "national security" reasons.

In *Detroit Free Press, et al. v. Department of Justice*, No. 02-170339 (E.D. Mich.), several news organizations sought access to the proceedings. In a thoughtful opinion, the 6th Circuit affirmed the press' rights to access, unlike the 3rd Circuit opinion in *North Jersey Media Group v. Ashcroft*,

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Federal Court Rejects Islamic Charity's Libel Claim

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which held that immigration proceedings were properly closed. As a result of the press victory in Michigan, the sworn declaration of FBI Agent Brent E. Potter was made public, in which Potter stated that the FBI had been investigating GRF for ties to terrorist organizations, "including Al-Qaeda" since at least November 1997. OFAC Director, R. Richard Newcomb, made a similar statement in a declaration submitted in the *O'Neill Action*, stating that since at least September 2001, GRF had been the subject of a Government investigation.

Armed with the SDGT designation and the Potter and Newcomb declarations, on November 13, 2002, Defendants filed a joint motion for summary judgment, arguing that GRF cannot sustain its burden to show the falsity of the reports that it was being investigated by the Government for ties to terrorists. Defendants argued that while the news reports differed in detail, the gist of each was the same – the Government was investigating GRF for ties to terrorists and was considering placing it on the list of entities whose assets would be frozen. Defendants showed that since these facts were indisputably true, each of the articles was substantially true. Therefore, GRF could not meet its burden of proving falsity and Defendants were entitled to judgment.

The Court held that the news organizations only had to prove the substantial truth of the less damaging interpretation — that GRF was under investigation — not the more damaging claim that GRF was a terrorist.

The Court Rejects Literal Truth Standard

Unable to refute the evidence showing that the Government actually was investigating GRF of ties to terrorists at the time of the challenged reports, GRF attempted to create a factual dispute precluding summary judgment by claiming that the Government actually had no evidence linking it to terrorists. GRF argued that under the "republication rule", Defendants would have to prove the literal truth that GRF *in fact* had ties to terrorism. GRF also confused the fair report privilege with the defense of substantial truth, arguing that Defendants could not prevail because there was no public proceeding on which they were reporting, therefore, no privilege applied.

Relying on *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985) and *Jewell v. NYP Holdings*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998), among others, Defendants showed that truthful reporting of the Government investigation (whether public or not) was all that was needed to prevail.

The Court correctly rejected GRF's arguments and found that substantial truth, rather than literal truth, applied and found that the reports were substantially true. The Court opinion is significant in two respects. First, it acknowledges that the press can report on non-public Government investigations and need not rely on the fair report privilege to prevail in a defamation suit. Second, although the Court did not expressly note the interrelationship between the Illinois innocent construction rule and substantial truth, the Opinion nonetheless can be interpreted to show such relationship.

In denying the Rule 12(b)(6) motions to dismiss, the Court ruled that a report that GRF was a subject of criminal investigation cannot be innocently construed. However, in granting the summary judgment motion, the Court held that the news organizations only had to prove the substantial truth of the less damaging interpretation — that GRF was under investigation — not the more damaging claim that GRF was a terrorist. Therefore, while the Court employed the innocent construction rule to find there was no innocent construction, when it came to substantial truth the Court found, in essence, the lesser defamatory construction of several defamatory constructions, *i.e.,* the articles reported GRF as being suspects (a lesser defamatory meaning) compared to an interpretation that the articles reported GRF as being terrorists (a more defamatory meaning).

Michael M. Conway and Miki Vucic, Foley & Lardner, Chicago, represent The New York Times Company, Judith Miller, Kurt Eichenwald, Globe Newspaper Company, Mac Daniel, Daily News, L.P. and Zev Chafets. David P. Sanders, Jenner & Block, Chicago, represents American Broadcasting Companies, Inc. and Antonio Mora. David A. Schulz, Clifford Chance LLP, New York, and Sarah R. Wolff and Bruce Braverman, Sachnoff & Weaver, Ltd, Chicago, represent the Associated Press and Martha Mendoza. Roger R. Myers and Lisa Sitkin, Steinhart & Falconer, LLP, San Francisco, and Steven L. Baron and Nicole B. d'Aracambal, D'Ancona & Pflaum, Chicago, represent Hearst Communications, Inc., Scott Winokur and Christian Berthelsen.

Zuhair W. Nubani and Idrizi & Nubani, Chicago; Roger C Simmons, Victor E Cretella, III, Matthew H Simmons, Shawn P Cavenee, Gordon & Simmons, Frederick, MD, represented Global Relief .

First Circuit Upholds Defamation Summary Judgment Based on Fair Report Privilege

By Elizabeth A. Ritvo and Jeffrey P. Hermes

On February 26, 2003, in the matter of Docket Nos. 01-2131, 02-1434, the First Circuit Court of Appeals, upheld a decision granting summary judgment for the newspaper defendants on defamation and intentional infliction of emotional distress claims where the publications at issue were privileged fair reports of governmental conduct. The Court (Judge Torruella) also upheld the grant of summary judgment on the similar claims made against a police chief. *Yohe v. Nugent*, 321 F. 3d 35.

North Jersey Media Petition For Cert

The ACLU, on behalf of the North Jersey Media Group, Inc. and the New Jersey Law Journal, has petitioned the Supreme Court to review a United States Court of Appeals decision denying press access to deportation hearings that were closed to the public as part of the government's terrorism investigation.

Last fall, in *North Jersey Media Group, Inc. v. Ashcroft*, the Third Circuit decided that the press did not have a First Amendment right of access to attend deportation proceedings. Reversing a decision by the New Jersey District Court, the Third Circuit, over dissent by Judge Scirica, determined that the history of open deportation proceedings was not sufficient to satisfy the "experience prong" of the *Richmond Newspapers'* "experience and logic" test. The divided court further held that the "logic prong" of the test did not favor access to deportation proceedings because open proceedings in cases involving potential terrorists might threaten national security.

The Third Circuit decision is squarely at odds with the earlier Sixth Circuit decision, *Detroit Free Press v. Ashcroft,* holding that the First Amendment prohibited closure of deportation proceedings without case-specific findings that a closure order was necessary.

Lee Gelernt of the ACLU is counsel of record for petitioners, North Jersey Media Group, Inc. and the New Jersey Law Journal.

Police Chief on Local Arrest

Defendants Townsend Times and Worcester Telegram and Gazette each reported on a dramatic arrest arising from the report of a domestic disturbance and each quoting comments made by the Townsend police chief in separate interviews. The plaintiff's wife reported to the police that the plaintiff was threatening suicide and amassing an arsenal of weapons, including AK-47 rifles and 400 rounds of ammunition. She also indicated he had been drinking since the previous day and was in the family home alone with his son.

In response, the police chief dispatched thirty police cars, including a SWAT team and a hostage negotiator to the family home. Not finding him there, the police arrested him later that evening at an army facility. He was admitted to a hospital for treatment and psychiatric evaluation and discharged with no evidence of alcohol or suicidal tendency. These two articles in question were published after the plaintiff's arrest and hospital discharge.

Report on Basis for Arrest Not False

The plaintiff particularly complained of three statements made by the police chief, that the plaintiff was a "retired member of the Army Special Forces of the Green Berets and has been trained as a sniper," that the plaintiff "had threatened to kill himself and was reported to be armed with several large caliber weapons," and that "it was [May's] belief that [the plaintiff] was suicidal."

As to all of these statements, the Court found that the police chief was simply reporting on information he received in his official capacity and which served as the basis for the plaintiff's arrest. The Court noted that the chief made clear the information was derived from witness statements and that he qualified his statements with phrases such as "it was [my] belief" or "according to witnesses." The Court also found that the plaintiff had failed to meet his burden to show that each statement was materially false.

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First Circuit Upholds Defamation Summary Judgment Based on Fair Report Privilege

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News Accounts Were Fair Report

As to the chief's statement that he believed the plaintiff was suicidal, the Court found this was plainly the chief's opinion on the plaintiff's mental condition the night of his arrest. The Court also found that the opinion was based on disclosed nondefamatory facts.

As to his claims against the newspapers, the Court agreed with the district court that Yohe's arrest was a privileged fair report of governmental conduct. The Court found that the report of the police chief, made in interviews, was clearly an official statement, that the information in the articles was expressly attributed to the chief and that the articles accurately recounted the chief's statements.

The Court found that the fair report privilege permits a person to publish a report of an official action that deals with a matter of public concern, even though the report contains what he knows to be a false and defamatory statement.

The Court then addressed the question: can a newspaper reporter who accurately publishes the contents of an objectively inaccurate report of government activity still benefit from the fair report privilege? The Court noted that accuracy, for fair report purposes, refers only to the correctness of the events reported and not to the truth about the events that actually transpired. Thus, citing the Restatement (Second) of Torts § 611 cont. b. (2002), the Court found that the fair report privilege permits a person to publish a report of an official action that deals with a matter of public concern, even though the report contains what he knows to be a false and defamatory statement.

The Court also noted that although misconduct on the newspapers' part could vitiate the privilege, such misconduct must be something more than negligent or even knowing republication of an inaccurate official statement. Here, the plaintiff provided no evidence of malice sufficient to defeat the privilege.

On the plaintiff's intentional infliction of emotional distress claims, the Court dismissed those on the ground that a plaintiff cannot evade the protections of the fair report privilege merely by re-labeling his claim.

As the Court concluded, "[W]e cannot see how the challenged statements and articles constitute anything other than the legitimate and nondefamatory flow of information from a government official to an interested public."

Elizabeth A. Ritvo is a partner and Jeffrey P. Hermes is an associate at the Boston office of Brown Rudnick Berlack Israels LLP. They represented the Townsend Times (Nashoba Publication). Jonathan M. Albano of Bingham McCutchen LLP represented the Worcester Telegram & Gazette. Stephen C. Pfaff, with whom Douglas I. Louison and Merrick, Louison & Costello, were on brief for appellees William May and City of Townsend.

From Road Rage to Libel Claim

Three years ago, in a fit or road rage, Andrew Burnett seized a dog from another driver's car and threw it into the roadway, where it was run over and killed. The dog named Leo was a bichon frisé, a small, white puffball, from a breed known for its cheerful and affectionate disposition. He looked like a stuffed toy.

The case attracted international attention. In July, 2001, Burnett was convicted of felony animal cruelty and sentenced to the maximum term: three years in prison. Later that year he was tried and convicted of grand theft and vandalism in another case, and sentenced to an additional eight months.

Now Burnett has sued the dog's owner, Sara McBurnett, and the Mercury News. His complaint, filed *in pro per*, asserts that McBurnett and the Mercury News defamed him. He doesn't identify any defamatory statements, but he claims that he has suffered injuries, including "loss of parental consortium, false imprisonment, post-traumatic stress disorder, fright and shock, mortification." He seeks $1 million in damages.

"It's hard to imagine a more ludicrous lawsuit," said James Chadwick, an attorney at Gray Cary Ware & Freidenrich who represents the Mercury News. "It's like being sued by the hunter who killed Bambi's mother for reporting that he was convicted of poaching."

Appellate Court Finds Real Estate Developer Public Figure

Kentucky Court Affirms Judgments for I-Team Investigation

By Ralph G. Blasey, III and Mark I. Bailen

The Kentucky Court of Appeals recently affirmed two judgments in favor of Cincinnati television station WCPO-TV, Channel 9, owned by The E.W. Scripps Co. (Judge Buckingham in both decisions). Multiple claims of defamation and invasion of privacy were brought by a Covington, Kentucky, public official and a Covington real estate developer over three broadcast reports by Channel 9's I-Team. In separate opinions, the Court affirmed summary judgment for WCPO in the lawsuit brought by Howard Hodge, the Covington Housing Development Director, and affirmed a directed verdict in favor of WCPO in the lawsuit brought by Esther Johnson, a private real estate developer in the Covington community. *Hodge v. The E.W. Scripps Co.*, No. 2001-CA-2324-MR (Ky. Ct. App. Feb. 28, 2003); *Johnson v. The E.W. Scripps Co.*, No. 2001-CA-2086-MR (Ky. Ct. App. Feb. 28, 2003).

The Court affirmed the trial court's determination that Johnson was a public figure in what appears to be the first Kentucky appellate decision affirming a finding of public figure status.

Johnson, who the trial court found to be a limited-purpose public figure, had sought $18 million in damages during her three-week trial that involved the testimony of 43 witnesses. The Court affirmed the trial court's determination that Johnson was a public figure in what appears to be the first Kentucky appellate decision affirming a finding of public figure status.

The summary judgment ruling is also significant because under Kentucky law, a party moving for summary judgment must show that it would be "impossible for the respondent to produce evidence at trial against the movant." *Steelvest v. Scansteel*, 807 S.W.2d 476, 483 (Ky. 1991).

Dispute Over Favoritism Charge

Both lawsuits arose from three broadcasts by WCPO regarding a public controversy in Covington over the Housing Department's administration of a federal loan program. Local citizens and public officials criticized Hodge for what appeared to be favorable treatment toward Johnson, who received more public loan money than anyone else in the community. Hodge and Johnson also traveled together on a European vacation in June 1997, further fueling the controversy.

Local newspapers reported the controversy during the summer of 1997, followed by WCPO's broadcasts in September 1997. Like the newspaper coverage, WCPO reported the appearance of favoritism through interviews with Covington officials and citizens. WCPO sought comment from Hodge and Johnson on several occasions, but both refused to respond on camera or in writing.

In separate lawsuits, both Hodge and Johnson sued for defamation and false light invasion of privacy against WCPO, the *Kentucky Post*, employees of both the television station and the newspaper, and several members of the community who were quoted in the newspaper articles and the television broadcasts. The lawsuits alleged that statements that Johnson received favorable treatment from Hodge and more loan money than anyone else were false and defamatory.

Johnson also sued WCPO and its employees for invasion of privacy by intrusion upon seclusion based on WCPO's newsgathering practices. This claim was dismissed before trial and was not appealed.

The *Kentucky Post* and its employees obtained summary judgment against Johnson, which she did not appeal, and settled for a nominal amount with Hodge before trial. *Johnson v. E.W. Scripps Co.*, No. 97-CI-02512, 29 Med. L. Rptr. 2593 (Kenton Co. Cir. Ct. July 20, 2001). All but one of the citizen defendants settled with Hodge and Johnson for nominal amounts before trial.

Johnson's claims against WCPO and the remaining citizen defendant, Toni Allender, were tried before a jury for three weeks in August 2001. The trial court entered a directed verdict in favor of WCPO and the jury returned a verdict in favor of Allender. *Johnson v. E.W. Scripps Co.*, No. 97-CI-02512, 29 Med. L. Rptr. 2595 (Kenton Co. Cir. Ct. Aug. 28, 2001). The trial court entered summary judgment in favor of WCPO and Allender on Hodge's claims. *Hodge v. WCPO Television News*, No. 97-CI-02516, 29 Med. L. Rptr. 2597 (Kenton Co. Cir. Ct. October 1, 2001).

Johnson Ruled Limited-Purpose Public Figure

While Hodge conceded that as Director of the city's Housing Development Department he was a public official,

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Appellate Ct. Finds Real Estate Developer Public Figure

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Johnson contended that she was a private figure. Both the Court of Appeals and the trial court disagreed. The Court of Appeals stated that "Johnson was involved in the real estate development business for many years in the Northern Kentucky area" and likened her to the real state developer in *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970) where the Supreme Court found that Bresler, the plaintiff real estate developer, "clearly fell within the most restrictive definition of a 'public figure.'" 398 U.S. at 8-9.

The Kentucky Court of Appeals also applied the three part test for public figure status enunciated in *Warford v. Lexington Herald-Leader Co*., 789 S.W.2d 758 (Ky. 1990) and concluded that a controversy pre-existed the WCPO broadcasts; that Johnson was an "integral part of the controversy"; that Johnson had commented in a newspaper article about the controversy; that she further injected herself in the controversy by her own actions, including her commentary to the newspaper and her trip to Europe with Hodge and others; and that she had continuing access to the media which "escalated as the controversy escalated." The Court affirmed the trial court's finding that Johnson was a limited-purpose public figure.

There are few reported cases in Kentucky concerning a plaintiff's status as a public figure (as opposed to a public official) and this appears to be the first appellate decision holding that a libel plaintiff is a limited-purpose public figure.

No Actual Malice

The Court of Appeals concluded that neither Hodge nor Johnson cited sufficient evidence of actual malice. According to the Court, "the evidence of record illustrates the media defendants' diligent efforts to ensure an accurate, balanced report."

It rejected Hodge's claim that the broadcasts relied only on one source for certain statements or that the broadcasts did not present sources who supported Hodge. It agreed "with the trial court that no reasonable fact-finder could conclude from the evidence that the media defendants failed to properly investigate Johnson or the controversy." The Court noted that WCPO "interviewed nearly fifty people, including other developers, city officials and concerned citizens."

WCPO also "repeatedly gave Johnson the opportunity to give an on camera interview or provide her side of the story in writing before the broadcasts were aired. Johnson refused to do either." For these reasons, among others, the Court concluded that Hodge had not identified evidence of record of actual malice to overcome summary judgment and Johnson had not presented sufficient proof of actual malice to submit the issue to the jury.

No Falsity

The trial court found that both Hodge and Johnson's claims also failed because they had not shown sufficient proof of falsity. The Court of Appeals affirmed the trial court's grant of summary judgment to WCPO against Hodge, noting that the trial court found that the "evidence of record [] substantiated the 'gist' of the broadcasts."

The Court cited a federal Department of Housing and Urban Development investigation that found that Johnson "benefited from the loan program to a greater extent than any other investor." Hodge did not present any evidence to refute the HUD report.

Moreover, although Hodge denied that he showed any favoritism towards Johnson, the Court of Appeals noted that "Hodge acknowledged the close personal relationship with Johnson and the fact that there were rumors and a perception [among some in the community] that he favored her."

In reviewing the evidence presented at the Johnson trial, the trial court ruled at the close of the evidence that "reasonable jurors could not find that the broadcasts in question were false (not substantially true)." The trial court examined the evidence on each of the three broadcasts, and found that the "gist" of the broadcasts were substantially true. The Court of Appeals affirmed this ruling without discussion.

Excluded Evidence of "Harassment"

Johnson also asserted a claim for invasion of privacy by intrusion upon seclusion, allegedly based on WCPO's attempts to obtain video footage of Johnson and Hodge. In particular, Johnson complained that a WCPO cameraman "chased" her and Hodge in Hodge's vehicle at "high speeds." She also cited instances where WCPO photographers allegedly followed her on a vacation weekend and attempted to use video taken with a camera over a construc-

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tion wall in front of a Johnson rehabilitation project on Covington's Main Street.

The trial court dismissed this claim prior to trial because WCPO showed that Johnson's allegations of intrusion, even if true, all occurred in public places and therefore did not amount to intrusion upon seclusion. Nevertheless, Johnson attempted to introduce this so-called "harassment" evidence at trial under the rubric that it related to actual malice and WCPO's credibility. The trial court excluded this evidence and the Court of Appeals affirmed, finding that the newsgathering issues were collateral and "did not relate to a determination of whether the media defendants knew or should have known that their broadcasts were false."

The E.W. Scripps Co., WCPO-TV, and the Kentucky Post were represented by Bruce W. Sanford, Ralph G. Blasey, and Mark I. Bailen of Baker & Hostetler LLP, Washington, DC and Mark D. Guilfoyle, Deters, Benzinger, & LaVelle, Covington, Kentucky.

Esther Johnson was represented by Margo Grubbs, The Lawrence Law Firm, Cincinnati, Ohio and Roger Braden, Sutton, Hicks, Lucas, Grayson & Braden, Florence, Kentucky. Howard Hodge was represented by Stephen D. Wolnitzek, Wolnitzek, Rowekamp & Bonar, P.S.C., Covington, Kentucky.

Prosecutor Can Pursue Letter to the Editor Claim

A Virginia state court found that the libel claim of a Commonwealth Attorney could withstand a demurrer from the newspaper that published the letter, one of its editors, and its publisher. *Ziglar v. Media Six, Inc.,* 2003 WL 549977, No. CL02-132 (Circuit Court, 23rd February 18, 2003).

The letter, written by a prisoner, an admitted drug dealer of some substance, accused the prosecutor of bringing "trumped up" charges against him, including making a deal with a witness to lie at the grand jury. He claimed Ziglar did this because of a relationship he allegedly had with her sister resulting in several personal confrontations with Ziglar herself. Ziglar has no such sister and contended that there were no such confrontations. The newspaper's staff, while editing the letter to render it more readable, did not investigate any of the claims.

Finding that Ziglar was a public official, the court (Judge Weckstein) accepted as sufficient bare bones allegations of actual malice.

And while stressing that letters to the editor are an important forum for community comments and expression of concern, passionately held opinions, and comments, the court had little difficulty finding that the allegations in the letter were statements of defamatory fact charging the plaintiff with serious violation of her professional responsibilities.

Lesser Used Holding of *New York Times v. Sullivan* Results in Dismissal of Libel Case

By Michael D. Epstein

The bedrock principle set forth in *New York Times v. Sullivan*, that public officials cannot recover without proving that the statement at issue was published with knowledge of falsity or in reckless disregard of whether it was false, is perhaps the most frequently cited proposition in all of libel law. However, defendants Ronald Gospodarski, Bio-Recovery Corporation and the American Bio-Recovery Association recently relied on a much less frequently cited, holding of *New York Times* to obtain the rare dismissal of a libel claim on preliminary objections (Pennsylvania's equivalent to a motion to dismiss) in the Court of Common Pleas in Philadelphia, Pennsylvania.

In *Fisher v. Philadelphia Gay News, et al.*, the Philadelphia Gay News published an article concerning the transfer of Philadelphia Police Officer Donna Jaconi from the Crime Scenes Unit of the Philadelphia Police Department. In the article, Jaconi, a lesbian, accused her former supervisor, plaintiff Lt. Mark Fisher, of harboring "anti-gay bias that prompted a job transfer." The last two paragraphs of the article contained the statement of Ronald Gospodarski, then the president of the American Bio-Recovery trade association, that the "Philadelphia Police are making problems for Donna because of her status as a lesbian."

Fisher sued Jaconi, the Philadelphia Gay News and the author of the article, as well as Gospodarski, American Bio-Recovery Association, and Bio-Recovery Corporation (the company owned by Gospodarski), asserting claims of defa-

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Lesser Used Holding of *New York Times v. Sullivan* Results in Dismissal of Libel Case

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mation, false light and intentional infliction of emotional distress. Fisher's wife asserted a loss of consortium claim.

Gospodarski's counsel planned to seek dismissal on the grounds that Gospodarski's comments nowhere identified, referred to or concerned Fisher. Although the "of and concerning" argument seemed like a winner, given that Gospodarski unequivocally referred to the "Philadelphia Police" as opposed to Fisher and the Philadelphia Police Department has over 6,900 members, there was concern that the issue might be muddied – especially in a Pennsylvania state court – because plaintiff had alleged, albeit in conclusory fashion, that Gospodarski had intended the comment to be about Fisher and that Fisher was mentioned frequently and prominently in the other paragraphs of the article.

The alternative holding in *New York Times*, however, saved the day. After establishing the actual malice standard and dismissing plaintiff Sullivan's claims because he could not meet this high burden, the United States Supreme Court held that plaintiff's claims were fatally defective for the additional reason that "criticism of a governmental entity, without reference to any individual, cannot be transmuted into personal criticism and hence, potential libel of the officials of whom the government is composed." 376 U.S. at 292. Rejecting Commissioner Sullivan's claim that the advertisement, which referred to the "police," referred to him because he was the supervisor of the police department, the Court held that "an otherwise impersonal attack on governmental operations [may not be utilized to establish] a libel of an official responsible for those operations." *Id*. at 292.

The Court held that "an otherwise impersonal attack on governmental operations [may not be utilized to establish] a libel of an official responsible for those operations."

Only a handful of courts have cited *New York Times* for this proposition in the nearly 40 years since the decision was handed down. In *Fornshill v. Ruddy*, 891 F.Supp. 1062 (D. Md. 1995), aff'd 89 F.3d 828 (4th Cir. 1996), the court held that criticism of the park service in the investigation of the death of Vincent Foster did not give rise to a defamation claim by a park service officer, and in *Andrews v. Stallings*, 892 P.2d 611 (N.M. App. 1995), the court cited *New York Times* in holding that "criticism of a governmental entity … is not a proper basis for a defamation claim by a government official." Most recently, earlier this year the Virginia Supreme Court dismissed an individual police officer's defamation action based on the defendant's "statements alleging corruption, dishonesty, and felonious conduct by the Elkton Police Department," which had only eight members. *Dean v. Dearing*, 561 S.E. 2d 686, 688-89 (Va. 2003). Following *New York Times*, the court held that "reference to a governmental group cannot be treated as an implicit reference to a specific individual even if that individual is understood generally to be responsible for the actions of the identified governmental group." *Id*. at 689.

In addition to the "of and concerning" argument, Gospodarski's counsel argued, as did the other defendants, that the defamation and false light claims should be dismissed because the criticism of the police department constituted protected opinion. Gospodarski and the other defendants also sought dismissal of the false light claim on the grounds that the matter was one of public concern, and sought dismissal of the intentional infliction of emotional distress claim because the alleged conduct was not outrageous as a matter of law and there was no allegation of physical injury, as required under Pennsylvania law.

In a February 4, 2002 order (without an accompanying opinion), Judge Joseph I. Papalini of the Court of Common Pleas in Philadelphia County sustained the preliminary objections of Gospodarski, Bio-Recovery Corporation and the American Bio-Recovery Association and dismissed all of the claims against them. He sustained in part and overruled in part the preliminary objections of Jaconi and the newspaper defendants, dismissing the false light claim but allowing the other claims to go forward.

Plaintiffs are represented by James F. McHugh, Jr. of The Beasley Firm. Ronald Gospodarski and Bio-Recovery Corporation were represented by David H. Marion, Michael D. Epstein and Michael K. Twersky of Montgomery, McCracken, Walker & Rhoads, LLP. American Bio-Recovery Association was represented by William Conner and David S. Senoff of Billet & Conner. Philadelphia Gay News and Timothy P. Cwiek are represented by Robert C. Clothier of High, Swartz, Roberts & Seidel, LLP. Donna Jaconi is represented by James A. Rocco of Kolanski, Tuttle & Rocco, P.C.

The Libel Trial of G. Gordon Liddy: What, No Watergate?

By David J. Bodney

G. Gordon Liddy dodged another bullet.

On February 27, 2003, an Arizona jury found in favor of the former Watergate burglar in a libel case triggered by Liddy's on-air statements about a high-end electronics company known as Jerry's Audio. In his nationwide radio show, Liddy accused Jerry's Audio of failing miserably at installing stereo equipment in his Scottsdale home.

It was a private-figure negligence case, with Liddy relying on truth as his defense. In short order, the jury agreed with Liddy that his statements about Jerry's Audio were true, or substantially so.

But going into this case, none of these jurors had ever heard of Liddy's involvement in Watergate. And based on the judge's rulings, none of these jurors heard anything at trial about Liddy's Watergate conviction, disbarment and related tales of *Will*. Though the jury heard substantial evidence of Liddy's patriotism — his FBI, Justice Department and White House accomplishments — Watergate's reflection on Liddy's credibility never found its way into the courtroom.

But the trial of G. Gordon Liddy in Phoenix last month underscores the importance of managing the defendant's image on the stand – of making and winning key motions in limine.

The judge "kept it on the issues," observed Liddy, in a telephone interview a few weeks after the jury found in his favor. In Liddy's view, the court essentially said, "I'm not going to re-try Watergate in this classroom."

The facts of Liddy's case are mundane but amusing. They hardly involve matters of state. Rather, they reveal the state of G. Gordon Liddy's domestic sound system, and what happens when his wires get crossed.

But the trial of G. Gordon Liddy in Phoenix last month underscores the importance of managing the defendant's image on the stand – of making and winning key motions *in limine*.

Liddy Blasts Stereo Installer

On January 6, 1997, Liddy described his frustration with Jerry's Audio on *The G. Gordon Liddy Show*, a nationally-broadcast radio program. Having bought a new house in Scottsdale for his wife, Frances ("she who must be obeyed"), Liddy told his listeners that he wanted his audio/video system installed and fully operational by December 31, 1996 – in time to host a black-tie New Year's Eve reception for several hundred guests who had been attending a "Dark Ages" weekend at the Arizona Biltmore. On air, Liddy characterized the Dark Ages event as "our answer to the Renaissance weekend of the Clintons . . . ."

Liddy went on to blast Jerry's Audio for its poor performance. He criticized the front speakers, which "didn't work." He joked about Jerry's incompetence, saying, "Jerry does not know how to install anything. He couldn't install himself on a toilet." Liddy expressed relief that his son, Raymond, was present during the installation, because "he fixed 3/4th of the thing . . . ."

No Surprise: A Lawsuit

In January 1998, plaintiffs Sound Environments, Inc. (dba Jerry's Audio) and its owner, Jerry Kowitz, filed a libel lawsuit in Maricopa County Superior Court against Liddy, his wife Frances, Westwood One Radio Networks, Inc. and a few local radio stations over Liddy's broadcast. *Sound Environments, Inc. v. Liddy,* Ariz. Super. Ct., No. CV1998-000129. Plaintiffs complained that Liddy had used his "nationally broadcast radio show as a format to falsely and maliciously accuse" plaintiffs of incompetence and dishonest business practices. As causes of action, their complaint raised defamation, trade libel and false-light invasion of privacy claims. Plaintiffs also sought punitive damages and a declaration that Liddy's statements were "defamatory and provably false."

The Superior Court[1] denied cross-motions for summary judgment. Unpersuaded that Jerry's substantial advertising expenditures transformed plaintiffs into public figures, the court denied the Liddys' summary judgment motion and required proof only of negligence for plaintiffs to prevail at trial. However, the court did conclude that Liddy's memorable line about Jerry and the toilet

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The Libel Trial of G. Gordon Liddy

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was hyperbolic, and refused to permit the jury to consider the statement as actionable. It also tossed out plaintiffs' false light claim. The court set the matter for trial in 2001, but the trial date was twice continued.

Liddy's Watergate Role Barred

On February 5, 2003, Judge Cari Harrison heard several motions *in limine* from defendants. Importantly, the court precluded plaintiffs from offering any statements from Liddy's books without prior permission from the court. The court prohibited plaintiffs' counsel from reading excerpts from Liddy's books during voir dire, opening statement or on cross-examination. On day six of the eleven day trial, Judge Harrison "reaffirmed" her prior ruling precluding any references to Watergate or statements from books authored by Liddy. The court specifically admonished plaintiffs' counsel against making any references to "forgery."

Plaintiff's counsel said the jury was "young," and expressed amazement that most of the jurors were simply unaware of Liddy's preeminent role in the burglary of the Century – the last Century – a crime that occurred over 30 years ago.

In an interview after trial, plaintiffs' counsel, Kraig Marton, said his clients "strongly disagree with the Judge's refusal to allow us to present evidence of Mr. Liddy's Watergate conviction, his disbarment, time in jail or his own writings reflecting his philosophy of life." As a result of the court's rulings, he claimed his clients had not received a fair trial.

Because Judge Harrison allowed Liddy to testify for over an hour about his pre-Watergate government service, as well as his post-Watergate awards, Marton said plaintiffs should have been given a chance to ask Liddy about his criminal past and his commitment to the truth. Marton said the jury was "young," and expressed amazement that most of the jurors were simply unaware of Liddy's preeminent role in the burglary of the Century – the *last* Century – a crime that occurred over 30 years ago.

A. Melvin McDonald, Jr., the Liddys' lawyer, offered a different view. He said plaintiffs called 14 witnesses to the stand, but failed to find a single listener to Liddy's radio show who said he or she would *not* do business with Jerry's Audio after hearing the broadcast.

Found Substantial Truth

McDonald also said Marton had asked the jury to answer special interrogatories on the issue of truth. Six of the eight jurors rendered their verdict for defendants, and specifically found that "the statements made by G. Gordon Liddy on his January 6, 1997 broadcast were. . . substantially true. . . ." Asked to specify if any damage award related to the defamation or trade libel claim, the same six jurors specifically found against plaintiffs on both claims.

McDonald pointed to the testimony of Liddy's son, Raymond, as decisive. He said Jerry's Audio had attempted to blame Raymond for his father's stereo woes. Testifying the day before he shipped out to Kuwait, Raymond Liddy was asked by Marton whether he would "lie" for his father. According to McDonald, Raymond Liddy, a Marine, said he would "take a bullet for anybody in this courtroom, but I wouldn't lie for my Dad."

The testimony was "devastating," McDonald said.

The Liddys and their three sons were the only defense witnesses called at trial. Like Marton, Liddy agreed that the jury was "too young to have any idea of Watergate." If they recognized him, he said "it was for my acting in *Miami Vice* and *Perry Mason*."

Settlement Negotiations Admissible

As if Raymond's testimony were not powerful enough, the court also allowed defendants to introduce evidence of the parties' settlement negotiations. Judge Harrison found that plaintiffs' had introduced evidence of settlement talks and thereby "opened the door" for defendants' rebuttal. According to McDonald, Judge Harrison permitted defendants to show how Jerry's Audio was prepared to settle the case in exchange for "equal time" from Liddy. More precisely, the jury was permitted to hear Jerry's proposal to drop the suit if Liddy would admit his mistake and tell his listeners of Jerry's fine work. Liddy refused.

"I *never* settle a case . . . [and] I don't care about the

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The Libel Trial of G. Gordon Liddy

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cost," explained Liddy. "If I were to settle 'case one,'" he said, "I'd have five or six cases brought against me in the next week." Consequently, if someone sues him, he is prepared to "fight to the death – figuratively speaking," he added.

Plaintiffs listed as one of their trial witnesses Frank X. Gordon, a former Chief Justice of the Arizona Supreme Court. Evidently, Justice Gordon was a satisfied customer of Jerry's Audio. Judge Harrison denied defendants' motion *in limine* to exclude Justice Gordon, and explained she would "not preclude a witness based upon his occupation or standing in the community." In words that foreshadowed Liddy's trial strategy, Judge Harrison predicted that Liddy would surely "introduce the patriotic backgrounds and military service of [his] witnesses." Justice Gordon, who presided over the 1988 impeachment of former Arizona Governor Evan Mecham, was never called to the stand.

After less than a full day's deliberations, the jury rendered its verdict for Liddy. With six of the eight jurors finding for defendants, the requisite "concurrence of all but two" of the jurors was met. Jury fees were assessed against plaintiffs for nearly $2,000. It was a "very responsible jury," Liddy noted. "The ancient history of Watergate" was simply not at issue, he said. "And I was *very* impressed with Judge Harrison."

According to plaintiffs' counsel, Jerry's Audio and Mr. Kowitz are considering an appeal.

Mr. Bodney is the Managing Partner of the Phoenix office of Steptoe & Johnson LLP. He represented Westwood One Radio Networks, Inc. in this litigation. Kraig Marton represented the plaintiffs. A. Melvin McDonald, Jr. represented G. Gordon Liddy.

[1] In February 1998, Westwood One took steps to remove the action to the United States District Court for the District of Arizona based on diversity of citizenship. The other defendants, including the Liddys, joined in the notice of removal. In response, the Arizona plaintiffs moved to remand the case to the Maricopa County Superior Court, and argued that the Liddys – based on their new Scottsdale residence – were citizens of Arizona, and the case therefore was not subject to removal. In July 1998, plaintiffs stipulated to the dismissal of Westwood One and SFX Broadcasting of Arizona, Inc. with prejudice. The following month, U.S. District Judge Roslyn O. Silver granted plaintiffs' motion to remand the case to Maricopa County Superior Court, and Judge Silver ordered the Liddys to pay plaintiffs their costs and expenses of approximately $13,000.

VP Office Wants Lynne Cheney's Image Off Parody Site

Apparently, the Bush administration's war on civil liberties can get personal. At least as far as Vice President Dick Cheney is concerned.

John Wooden, editor-in-chief of parody website, Whitehouse.org, received a complaint from the Office of the Vice President, asking the site to remove pictures and a fictitious biographical sketch of Lynne Cheney, the Vice President's wife. Whitehouse.org is a satire of the real Executive branch web site, Whitehouse.gov.

David S. Addington, Counsel to the Vice President, cautioned the web site to "avoid using Lynne Cheney's name and picture for the purposes of trade without her written consent" and to "avoid portraying her in a false light." Whitehouse.gov posted the letter it received on February 13, to its web site. See http://www.whitehouse.org/administration/love_letter.asp. The letter also complained that the disclaimer link in the lower right-hand

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Justice Scalia To Receive Free Speech Award

Bans Broadcast Media from the Event

Is there any way to report, at least with a straight face, that Justice Antonin Scalia, who will receive an award for supporting free speech from the Cleveland City Club on March 19th, banned broadcast coverage of the event, according to a report from the Associated Press.

The City Club proceedings are usually taped, and are broadcast on public radio and television. Justice Scalia made it a requirement of accepting the City Club's Citadel of Free Speech Award that it bar electronic media coverage, reported the AP and quoting the City Club executive director.

According to a report in the Cleveland Plain Dealer of March 19th, Terry Murphy, Vice President and Executive Producer of C-SPAN, wrote to the City Club last week protesting the ban on broadcast media, which he said "begs disbelief and seems to be in conflict with the award itself...How free is speech if there are limits to its distribution?"

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VP Office Wants Lynne Cheney's Image Off Parody Site

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corner of the site was not prominent enough to warn viewers of the fictitious nature of the site, unlike the notice of "ad parody—not to be taken seriously" that appeared on the same page of the parody in *Flynt v. Falwell*, 485 U.S. 46 (1988).

Wooden took the Vice President's complaint to the New York Civil Liberties Union. NYCLU Executive Director Donna Lieberman said in a news releases,

> "The right to parody political figures like Lynne Cheney lies at the heart of the First Amendment, and we will defend the website against any effort to censor it by the Bush Administration."

The NYCLU issued a response on March 4, 2003, pointing out the to the Office of the Vice President the clear First Amendment protection afforded to satire of public figures.

The NYCLU issued a response on March 4, 2003, pointing out the to the Office of the Vice President the clear First Amendment protection afforded to satire of public figures, noting that the Supreme Court even protected *Hustler* magazine from claiming Falwell had sex in an outhouse with his mother, in the previously cited *Flynt v. Falwell*. Id. The NYCLU response also asked the Office of the Vice President to notify the NYCLU that it intends to take no further action against Whitehouse.org.

Whitehouse.org lampooned Lynne Cheney as the "daughter of a ruggedly masculine sheriff and her demurely erudite husband," characterized her tenure as Chairman of the National Endowment for the Humanities under President Reagan as "making art safe for Pat Buchanan." The site also mentioned that she will "tackle a host of important issues, including but not limited to the promotion of juvenile literacy, and the fight to halt proliferation of offensively bourgeois china patterns" for the duration of the Bush administration. Whitehouse.org also responded to the complaint by putting a clown nose on Lynne Cheney's nose and blackening her teeth in subsequent Whitehouse.org images. See http://www.whitehouse.org/administration/lynne.asp.

Justice Scalia To Receive Citadel of Free Speech Award

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At John Carroll University, also in Cleveland, where the Justice spoke on March 18th, broadcast coverage was also banned although he allowed a single camera to record the event for a University intranet broadcast. At John Carroll Justice Scalia apparently talked about the right of government to limit individual liberties during wartime – although his prepared speech was on religion. "The Constitution just sets minimums. Most of the rights that you enjoy go way beyond what the Constitution requires."

Scalia, according to several other newspaper reports, was responding to a question about the Justice Department's pursuit of terrorism suspects and whether their rights are being violated.

According to the Cleveland Plain Dealer, Justice Scalia said in response to another student question that it was "a wonderful feeling" to have led the Supreme Court's rejection of a recount of the Florida vote, thus handing the election to Bush.

Florida Appeals Court Reverses Jury Verdict for Reporter v. Newspaper

By Robert C. Bernius

Do newspaper reporters, when pursuing a news story, have a right to enter a private home without permission when the occupant is not there? That question, the answer to which most people would think pretty apparent, was recently answered by a divided Florida appellate court, albeit obliquely and only after a three week trial and an appeal. *Cape Publications, Inc. v. Reakes,* 2003 WL 201311, (Fla. App. 5 Dist., January 31, 2003). (The opinion can be found at http://www.5dca.org/Opinions/OpinionFrameset.htm).

Reporting on Murder Suspect

Kathy Reakes worked as a reporter for *Florida Today*. In late January 1996, the newspaper assigned Reakes to help another reporter work on a story about Anita Gonzalez, who at the time was under arrest for murder.

The two reporters went to Gonzalez's apartment complex to gather information for a "color" story about her. Approaching the rear of the building, they noticed that the apartment door was damaged and ajar, and that the interior was in disarray. They walked inside — without bothering to knock, to ring the doorbell, or to ask permission.

Once inside, the reporters explored what the trial court noted was an "obviously occupied" dwelling. They picked up personal papers to study them, and took with them a list of names and phone numbers, which they thought might identify people with information about Gonzalez's activities. Later that day, Reakes encountered her editor, who asked about the story's progress. Reakes admitted that she and her cohort had entered Gonzalez's house by "giv[ing] the door a little kick," and that they removed papers from it.

Editors Shocked, Fire Reporters

Though Reakes would later claim that her confession was only a "joke," the editor failed to see the humor and instead was shocked "that anyone . . . would enter a home that was not theirs when the person who lived there was not there, and they weren't invited in." She reported the matter to Managing Editor Melinda Meers. Meers reacted similarly, fearing that the newspaper had come to possess stolen property relating to the active police murder investigation.

Assembling the newspaper's supervisory staff at her home that night, Meers telephoned both reporters, who separately admitted that they had entered the apartment and taken the papers from it. Under the law of most, if not all, states, entering a dwelling without permission and taking something from it constitutes trespass, burglary and theft. Such is the law of Florida; the next morning, *Florida Today* fired both reporters. The following day, Meers explained the termination to her Assistant Managing Editor, who understood her to characterize Reakes's acts as "criminal."

> ***"The story has become so twisted that editors appear wrong for believing that newspaper people should not break the law, and the reporters appear to be heroes for admittedly having done so."***

Newspaper Criticized and Responds

After she was fired, Reakes vigorously criticized the newspaper's action in statements to local and national media outlets. Astonishingly, media commentators supported a reporter's right to trespass and condemned *Florida Today's* disciplinary action. The *Columbia Journalism Review* quoted one of the reporters as admitting that "we trespassed and we took something in the course of that trespass," but nonetheless supported that conduct and reported a pundit's condemnation of *Florida Today* for being "afraid" to support Reakes's foray into the apartment:

> "[T]he aggressive investigative reporter of the past is going to become extinct, because the people running newspapers are becoming more and more corporate. They're business people, not journalists. They're afraid of lawsuits, they're afraid of offending the public and their advertisers."

Responding to that criticism, Gannett News Executive Phil Currie gave a speech to Gannett editors about journalistic "principles that won't go away, and shouldn't." Mr. Currie opined that journalists should not break the law when gathering news, but instead "can get . . . information in other smart, aggressive, legal ways." He expressed his "frustration" at the widespread condemnation of *Florida Today* for trying to do the right thing:

> [My f]rustration: Reporting and commentary on a

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Fla. App. Ct. Reverses Jury Verdict for Reporter v. Newspaper

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case … involving two FLORIDA TODAY journalists. *The story has become so twisted that editors appear wrong for believing that newspaper people should not break the law, and the reporters appear to be heroes for admittedly having done so.*

Libel Claim Won at Trial

Basing her claim on those respective statements, Reakes sued the newspaper, Meers and Currie for libel (in addition to a range of employment and other torts). All other claims were dismissed on motion, but the libel claim went to trial, and the jury returned a verdict in favor of Reakes:

- against Meers and *Florida Today* for $400,000 (including $150,000 for past lost wages, $150,000 for future lost wages, and $100,000 for reputation injury);
- against Currie: $500 (for reputation injury).

On Appeal: It Was True

In a 2-1 decision filed January 31, 2003, the Florida Fifth District Court of Appeal reversed, thus indirectly concluding that journalists do not have an implied right to enter private dwellings when gathering the news.

The court (Judge Peterson) held that the characterizations of Reakes conduct as "criminal" were true:

> "In the instant case, Reakes, herself, admitted that she entered Gonzalez's apartment without permission from Gonzalez or the owner of the apartment. The unauthorized entry constituted the crime of trespass of a structure and the statements made by Meers and Currie appear to be true statements. Meers accurately stated that Reakes and McAleenan had committed "criminal acts." Currie stated that journalists were being celebrated for admittedly breaking the law. Although Reakes did not expressly admit that she broke the law, she admitted that she had entered a structure without permission, making Currie's statement substantially true."

Common Interest Privilege Applies

In addition, the court concluded that the statements were privileged by reason of the common interest privilege, and there was no evidence of the malice required to overcome that privilege:

> "Meers was outside the Florida Today office building on a break when she responded to the question of a fellow editor about the employees. Currie was making a speech to editors of Gannett newspapers. Neither side in this case disputes those circumstances and the trial court should have found that the privilege existed. There was no showing of malice in the instant case and the circumstances seem to be exactly those which the privilege was designed to protect."

Finally, the court agreed with the defendants' argument that the reporter had not proved defamation damages. The amount awarded as damages for Meers' statement was not shown to have been proximately caused by the statements at issue, and the jury "apparently ignored" the trial court's admonition that the case was not a wrongful termination claim.

The unauthorized entry constituted the crime of trespass of a structure and the statements made by Meers and Currie appear to be true statements.

The court thus reversed and dismissed the libel claims against all defendants.

Dissent Relied On Fletcher

The dissenter (Judge Griffin) observed that the "rule of law established in the majority opinion is that …a reporter's entry into a structure without the owner's permission, no matter how brief or how slight, …no matter whether the purpose is to gather news, is criminal trespass …." The dissenter relied on the Florida Supreme Court's 1976 *Fletcher* decision to conclude that the longstanding newsgathering practice of reporters' entering into sites "where calamity has occurred" was sufficient to sustain the verdict of the jury. The dissent, however, neglected to recognize that in *Fletcher*, government authorities had *invited* the news photographer into the private home – a crucial element absent from the Reakes situation. That is the core difference between the cases, and it is a distinction that the newspaper carefully noted in all of its briefs to the court.

Kathy Reakes is represented by Douglas Beam of Melbourne, Florida. Melinda Meers and Cape Publications are represented by Jack Kirschenbaum of Gray Harris in Melbourne. Phil Currie is represented by Robert C. Bernius of Nixon Peabody LLP in Washington D.C.

Seventh Circuit Reverses Dismissal of Defamation Claim Based On Fictional Movie Portrayal

Reversing dismissal of a defamation claim complaining of plaintiff's portrayal in a fictional motion picture, a recent decision of the United States Court of Appeals for the Seventh Circuit puts an unwelcome federal gloss on the Illinois innocent construction rule. *Muzikowski v. Paramount Pictures Corp.*, ___ F.3d ___, 2003 WL 755874 (7th Cir., March 6, 2003).

Hardball: Fact or Fiction

Robert Muzikowski "devoted years of his life to coaching Little League Baseball teams in economically depressed areas of Chicago." A non-fiction book entitled *Hardball: A Season in the Projects*, was written about the 1992 season of the league Muzikowski co-founded. The book focuses primarily on the children, "although it also devotes some attention to the coaches. Prominent among those coaches is Muzikowski; sprinkled throughout the book are passages mentioning Muzikowski and various personal details about Muzikowski's life." *Id.* at *1.

Muzikowski contended the movie defamed him, "on the theory that one particular character easily identifiable as himself [O'Neill] was portrayed in a negative way.

Paramount Pictures produced a movie, entitled *Hardball,* based on the book. The movie tells the story of a coach named Conor O'Neill (played by Keanu Reeves).

> "No character in the movie is named Robert or Muzikowski and there are no references to Little League Baseball."

If you had the patience to sit through the credits, at the end of the last reel of *Hardball* you would have seen the following,

> "While this motion picture is in part inspired by actual events, persons and organizations, this is a fictitious story and no actual persons, events or organizations have been portrayed." *Id.*

On the other hand, in publicizing the movie, Paramount "also emphasized the fact that the movie was based on the true account found in" the book that prominently featured plaintiff. (This was not unlike what took place in another case involving a fictionalized motion picture based on real-life events, *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E. 2d 250 (1970), based on Meyer Levin's novel, *Compulsion*.) Moreover, at least one news story about the upcoming film mentioned Muzikowski by name, stating that Keanu Reeves "plays Bob Muzikowski, a former addict turned devout Christian, who coaches a Little League baseball team." *Id.* at *2.

Character Identifiable with Plaintiff

Muzikowski contended the movie defamed him, "on the theory that one particular character easily identifiable as himself [O'Neill] was portrayed in a negative way, and that this amounted to disseminating falsehoods about him and about his league." *Id.*

The "O'Neill" character in the movie "experiences almost exactly the same things as the real Muzikowski"; among other things Muzikowski/O'Neill dropped out of college after his father died; became an alcoholic and drug user; and, after being arrested for involvement in a bar fight, "began to turn his life around," and became active in Little League. In addition, both Muzikowski and "O'Neill" don't always mind their language, and occasionally "fly off the handle." *Id.* at *2.

"The only differences, in Muzikowski's opinion, are unflattering and false as applied to the real man." Among other things, the fictional O'Neill, unlike the flesh-and-blood Muzikowski, scalps tickets, gambles, and "commits such crimes as battery, theft, criminal destruction of property, disorderly conduct, and drinking on the public way"; O'Neill represents himself as a broker, even though he has no license, while Muzikowski is "a licensed securities broker and insurance salesman"; and O'Neill "is portrayed as having no interest in children or their well-being in contrast to Muzikowski's deep commitment to young people" (the O'Neill character gets involved in Little League "only to pay off a gambling debt"). *Id.*

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Seventh Circuit Reverses Dismissal of Defamation

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District Court Dismissed Using Innocent Construction

As a threshold matter, Muzikowski's complaint was found to adequately plead statements imputing commission of a crime punishable by imprisonment (theft) or prejudicing Muzikowski in trade, profession or business (O'Neill lies about being a broker), and thus, were libelous *per se*. Yet,

> "some of Muzikowski's other allegations, such as his claim that he will be damaged because the movie asserts that his motives for coaching were pecuniary and not philanthropic, are statements of opinion which do not amount to defamation *per se*." *Id.* at *4-5.

But the district court dismissed the defamation *per se* count because it found Paramount's statements "were reasonably capable of an 'innocent construction' or of referring to somebody other than Muzikowski." Under Illinois law,

> Even if a statement falls into a recognized category, it will not be actionable *per se* if the statement "may reasonably be innocently interpreted *or reasonably be interpreted as referring to someone other than the plaintiff*." *Chapski v. Copley Press,* 442 N.E.2d 195, 199 (Ill. 1982). In Illinois courts, this determination is made by the judge and it is regarded as a question of law. *Anderson v. Vanden Dorpel,* 667 N.E.2d 1296, 1302 (Ill. 1996).

Muzikowski, at *4 (emphasis added).

Paramount advanced two reasons why it was "reasonable to construe the statements in question as referring to someone other than Muzikowski": (a) *Hardball* is a work of fiction; and (b) the differences between Muzikowski and O'Neill, which Muzikowski himself identified in his complaint.

Seventh Circuit Relied on Bryson

The Seventh Circuit, in an opinion written by Judge Diane Wood, easily dispatched the first argument, with a citation to the Illinois Supreme Court's lamentable decision in *Bryson v. News Am. Publ'ns, Inc.,* 672 N.E.2d 1207, 1214 (Ill. 1996).

> "'[S]imply because the story is labeled "fiction" and, therefore, does not purport to describe any real person' does not mean that it may not be defamatory *per se*."

Muzikowski, at *4, quoting *Bryson,* 672 N.E.2d at 1219. In *Bryson,* an article in defendant magazine's "fiction" section featured a character with the same last name as plaintiff, who was described as a 'slut." Plaintiff alleged numerous similarities she had with the character, including where she lived. Under these circumstances, the Illinois Supreme Court held, plaintiff should have the opportunity to prove that the character bore "*such a close resemblance to the plaintiff that reasonable persons would understand that the character was actually intended to portray the plaintiff*." *Id.* (emphasis added).

The district court, it reasoned, "relied not only on Illinois substantive law (which was proper), but also on Illinois pleading rules (which was not)."

Paramount attempted to distinguish *Bryson* because Muzikowski was never referenced by name in the movie. The court observed that, prior to *Bryson*, intermediate Illinois Appellate Courts were in conflict over whether a statement had to mention plaintiff by name, but that *Bryson* "clarified" matters by holding, "where a libelous article *does not name the plaintiff,* it should appear on the face of the complaint that persons other than the plaintiff and the defendant must have reasonably understood that the article was about the plaintiff and that the allegedly libelous expression related to her." *Id.* at *5, quoting *Bryson,* 672 N.E.2d at 1218 (emphasis in original).

Illinois Pleading Requirement for Innocent Construction Rejected

According to the Seventh Circuit,

> "[t]his suggests that there is no automatic ban on recovery if the plaintiff is not named"; instead, "*Illinois imposes a heightened pleading standard*

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Seventh Circuit Reverses Dismissal of Defamation

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> *for complaints basing claims on publications that do not literally name the plaintiff*." *Id.* (emphasis added). But, the court held, while "[t]hat may be the Illinois pleading rule, . . . it of course does not apply in a federal court." *Id.*

In reversing dismissal, the Seventh Circuit focused on the liberal federal standard for pleading; the district court, it reasoned, "relied not only on Illinois substantive law (which was proper), but also on Illinois pleading rules (which was not)." *Id.* at *1. Specifically, it held,

> Allocation of functions between judge and jury in federal court . . . are a matter of federal law. Moreover, facts beyond those that appear in a federal complaint may be relevant to the reasonableness inquiry [under the innocent construction rule, and *Bryson*], which requires that statements be read in their natural sense, not in the light most favorable to the defendant.
> *Id.* at *1.

The court further noted that Muzikowski's defamation *per se* claim "does not fall under the special pleading regime of Rule 9, and thus he is entitled to the usual rules for notice pleading established by Rule 8." *Id.* at *5. Thus, even if Muzikowski's complaint "would not have met Illinois's heightened pleading standard, we are satisfied that it was sufficient to put Paramount on notice of his claim" under the liberal standard of Rule 8.

While the Court cites *Mayer v. Gary Partners*, 29 F.3d 330 (7th Cir. 1994) for the proposition that Illinois pleading rules do not apply in federal court, other Seventh Circuit cases have distinguished cases, such as Mayer, that "did not involve a state procedural rule limited to a particular field of law, such as contract law, and arguably motivated by substantive rather than procedural concerns." *AM Int'l v. Graphic Management*, 44 F.3d 572, 576 (7th Cir. 1995).

Certainly, the way Illinois law treats defamation *per se* cases, by way of the innocent construction rule, is "motivated by substantive concerns." *See, e.g., Chapski v. Copley Press,* 442 N.E.2d at 198 ("the strongest reason advanced in support of the [innocent construction] rule is that it comports with the constitutional interests of free speech and free press and encouraging the robust discussion of daily affairs"); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1234 (7th Cir. 1993) ("in cases involving the rights protected by the speech and press clauses of the First Amendment the courts insist on firm judicial control of the jury").

Gives Plaintiff Chance to Prove Case

The complaint listed "in great detail many similarities between [Muzikowski] and O'Neill that could cause a reasonable person in the community to believe that O'Neill was intended to depict him and that Paramount intended *Hardball*'s mischaracterizations to refer to him." *Id.* Paramount pointed to "a number of differences between the real and the fictional man that are apparent on the face of the complaint" — essentially arguing that Muzikowski had "pleaded himself out of court" — but to no avail.

> In our view, Muzikowski might be able to produce evidence showing that there is in fact no *reason-*

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able interpretation of the movie that would support an innocent construction. He may be able to show that no one could think that anyone but him was meant, and the changes to "his" character, far from supporting an innocent construction that O'Neill is a fictional or different person, only serve to defame him in the ways already discussed. We conclude that Muzikowski's allegations, read in the light most favorable to him, entitle him to the chance to prove his claim under a defamation *per se* theory. As the case develops further, of course, it is entirely possible that Paramount will be able to produce enough facts to support its "innocent construction" argument. At this stage, however, we believe it was premature to reject Muzikowski's case.

Decision May Have Limited Impact

Illinois is a fact pleading jurisdiction. Arguably, as the court found, there might be pertinent facts bearing on the "of and concerning" issue (as defined by *Bryson*) that might not have to be brought out in a federal complaint judged by the standard of notice pleading. Application of the innocent construction rule is typically decided as a matter of law, based on the allegedly defamatory statement pleaded (*in haec verba*) in the complaint.

The *Muzikowski* holding could make Illinois cases brought in federal court more complicated than they were in the past. Notably, under Illinois practice — unlike Federal Rule 12(b)(6) — a "motion for dismissal" may be brought that relies on extrinsic material, i.e., affidavits. *See* 735 ILCS 5/2-619(a)(9). Since this option is not available to federal litigants, summary judgment may now have to be the preferred vehicle for raising certain defenses prior to trial in Illinois federal courts sitting in Illinois and applying Illinois law.

Paramount has filed a petition for rehearing, with *amicus* support from a number of media organizations, which is pending.

Circuit Judges Kenneth F. Ripple and Terence T. Evans were also on the Seventh Circuit panel. There was no dissent. Plaintiff appeared *pro se* on the appeal; defendants were represented by Jenner & Block, Chicago. Amicus are represented by Sonnenschein, Nath & Rosenthal, Chicago.

UPDATE: FCC Reverses Itself; Turns out Sarah Jones is not "Indecent" After All

Reversing its earlier decision, the Federal Communications Commission declared on February 20 that the Sarah Jones song "Your Revolution" is in fact not indecent. This action came four days before the agency had to file a response brief in federal court in Jones's suit over the original finding of indecency. The FCC had earlier ruled that the song was indecent because of its "patently offensive" lyrics. Now however, the FCC has had a change of heart and decided the song did not violate broadcast indecency standards. In its latest Memorandum Opinion and Order, the FCC stated that when taken in context, the sexually suggestive lyrics are not "sufficiently graphic to warrant sanction." The agency also took into consideration that Jones has performed the song during high school performances.

In October 1999, KBOO-FM in Portland broadcast "Your Revolution" and the FCC received complaints shortly thereafter. The FCC fined the station, and held the song was indecent in a March 2001 Notice of Apparent Liability. While the song contains several sexually suggestive lyrics, Jones contended the FCC did not examine the lyrics within the entire context of the song. Jones claimed that the work is a "statement against indecency", and quotes lyrics from other songs broadcast on the radio which have not been found indecent.

Jones filed a claim against the FCC in the Southern District of New York. However, the case was dismissed by the district court on procedural grounds. Jones subsequently filed an appeal with the Second Circuit Court of Appeals. *(For further discussion see LDRC LibelLetter, February 2002, pg. 37)*

Indiana Supreme Court Reduces Attorney's Sanction But Again Rejects First Amendment Defense

By Daniel P. Byron

On February 4, 2003, the Indiana Supreme Court ("Court"), modified on rehearing an ethics sanction it had imposed on an attorney in *In Re Wilkins,* 777 N.E.2d 714 (Ind. 2002) ("*Wilkins I*"). In *Wilkins I* the attorney received a 30-day suspension for comments suggesting that an intermediate appellate court opinion was "so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach the conclusion." In *Wilkins I* the Court determined that those comments violated Indiana's professional conduct rules by falsely or recklessly suggesting an unethical motivation behind the appellate court's decision. On rehearing, the Court reduced the sanction to a public reprimand. *In Re Wilkins*, 782 N.E.2d 985, 2003 Ind. LEXIS *112 (Ind. Feb. 4, 2003) ("*Wilkins III*").

Recusal

In an important procedural development, one justice recused himself after the Court decided *Wilkins I*. *In re Wilkins*, 780 N.E.2d 842, 848 (Ind. Jan. 3 and 9, 2003) ("*Wilkins II*"). That justice had taken part in the intermediate appellate court panel (concurring in the result but not the opinion) which opinion Wilkins had originally criticized.

In recusing himself, however, the justice questioned Wilkins' failure to raise the recusal issue until a year and a half after disciplinary proceedings began and only after the Court's adverse determination in *Wilkins I*. The justice reasoned that Wilkins either (1) was aware of the recusal issue but felt the justice would be impartial; (2) was aware of the issue but would raise it only if the Court's determination was unfavorable; or (3) was unaware of the recusal issue. *Wilkins II*, at 846. The justice was particularly troubled by the possibility that Wilkins raised the issue only after receiving an unfavorable determination in *Wilkins I*. *Id.* at 846. Nevertheless, the justice recused himself (despite being firmly convinced that he "fairly and impartially decided" *Wilkins I*) because of the possibility that "a significant minority of the lay community could reasonably question the court's impartiality" due to his participation in the intermediate court panel criticized by Wilkins. *Id*. at 847-48.

Rehearing Denied on First Amendment Issue

In *Wilkins III* the Court denied rehearing Wilkins' First Amendment contention that the statements were protected free speech. The Court reasoned that attorneys are "completely free to criticize the decisions of judges. As a licensed professional, they are not free to make recklessly false claims about a judge's integrity." *Wilkins III, at* _, *2. The Court ultimately concluded that, while advocacy must not be stifled, the attorney's remarks went beyond permissible appellate advocacy criticizing factual and legal conclusions by positively ascribing bias and favoritism to the intermediate appellate judges and thereby impugning their integrity. *Id*. at _, *5.

The Concurrence

Noting the "extremely unusual procedural posture" of the case after the above noted recusal, one of the two justices who dissented on First Amendment grounds in *Wilkins I* concurred in the result in *Wilkins III*, notwithstanding his belief that Wilkins' comments were protected free speech. The justice felt he had little choice but to concur; to do otherwise would have left the 30-day suspension in place for procedural reasons because no majority would have existed to grant rehearing on any issue (First Amendment or sanctions), despite the fact that on rehearing half of the justices now felt only a public reprimand was indicated and the other half continued to believe that no sanction was appropriate.

Daniel P. Byron is a partner in Bingham McHale LLP in Indianapolis, Indiana.

Any developments you think other MLRC members should know about?

Call us, send us an email or a note.

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Florida Appellate Court Affirms Denial of Dismissal in Internet Defamation Case

Holds Trial Court has Jurisdiction Over Out-of-State Defendant for Internet Posting

In a March 12 decision, the Florida Fourth District Court of Appeals affirmed a denial of defendant's motion to dismiss in an Internet defamation case. *Becker v. Hooshmand, M.D., 2003 WL 1041232, Fla. App. 4 Dist.)* The defendant claimed that the court could not claim jurisdiction over a non-Florida resident for comments posted in an Internet chat room. Chief Judge Polen disagreed holding that Florida's long-arm statute permitted the trial court to exercise proper jurisdiction over the defendant because defendant had committed a tort within the state of Florida.

Plaintiff is a Florida resident and physician with a medical practice in the state who brought claims of defamation, defamation per se, and tortious interference with a business relationship over comments Ms. Becker posted in an Internet chat room. Ms. Becker resides in Pennsylvania. These comments, according to the plaintiff, were targeted to Florida residents, or those "likely to seek medical care in the state of Florida", and harmed his reputation. Ms. Becker filed a motion to dismiss for lack of jurisdiction, which was denied by the trial court.

The Court of Appeals affirmed, holding that the trial court had jurisdiction through Florida's long-arm statute. Under Florida law, long-arm jurisdiction is valid when the plaintiff has "established sufficient jurisdictional facts" to justify jurisdiction, and if defendant has "sufficient minimum contacts to satisfy the constitutional due process requirements." *(Citing Venetian Salami Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989))*. Plaintiffs can satisfy their initial burden of pleading the "basis for service under the long-arm statute," by either merely "alleging" the statute without supporting facts, or "alleging specific facts that indicate that the defendant's actions" fall under the long-arm statute. Once plaintiff has satisfied their burden, the defendant has the opportunity to contest jurisdiction by submitting affidavits in support.

The court ruled that Dr. Hooshmand satisfied his initial burden by alleging sufficient facts in his complaint that Ms. Becker committed a tortious act in Florida. In determining whether a tort was committed for purposes of long-arm jurisdiction, Florida courts will focus on where the harm to the plaintiff occurred; not the residency of the defendant or where the tort was committed. In *Wendt v. Horowitz, 822 So. 2d 1252 (Fla. 2002)* the Florida Supreme Court held that a tort can be committed under long-arm jurisdiction through a "defendant's telephonic, electronic, or written communications into Florida," as long as the communication at issue is the basis for the cause of action.

Other Florida precedent have also held that a tort can be committed through the mailing of a letter into Florida, and "making a defamatory statement over the telephone constitutes the commission of a tortious act for purposes of Florida's long arm statute." *citing Achievers Unlimited, Inc. v. Nutri Herb, 710 So. 2d 716 (Fla. 4th DCA 1998).*

Comparing the present situation with cited precedent, the court concluded that the facts presented by Dr. Hooshmand were analogous to those in earlier cases which involved other forms of communication, including electronic communication. Plaintiff's burden was therefore satisfied.

Finally, the court noted that while the defense did submit an affidavit contesting jurisdiction, it was submitted after the trial court approved jurisdiction. The trial court properly then ruled on the motion to dismiss based solely on the complaint.

For Becker: Kevin S. Doty of Hatch & Doty (Vero Beach, Florida)

For Hooshmand: Janet M. Carnet and Louis B. Vocelle, Jr. of Clem, Polackwich, Vocelle & Berg (Vero Beach, Florida)

Berezovsky Withdraws Defamation Suit Against Forbes

By Lynn Oberlander

On March 6, 2003, Boris Berezovsky and Nikolai Glouchkov withdrew their libel case against Forbes and Jim Michaels, its former editor. The suit arose out of a December 30, 1996 article, entitled "Godfather of the Kremlin?", which described the rise of Boris Berezovsky, a Russian businessman and politician with significant holdings in the automobile, oil and media industries.

The article, one of the first to appear in the Western press, described the climate of violence that surrounded Russia's transition from a planned to a capitalist economy. It noted that Berezovsky had been involved in industries that were extremely violent, and that Berezovsky had been investigated in connection with the murder of Vladislav Listiev, a television executive. It also said that Glouchkov, a Berezovsky ally and an executive of the Russian airline Aeroflot, had been convicted of theft of state property in 1982. At the time that the article was published, Berezovsky was a Deputy Secretary of the Security Council of the Russian Federation.

Forum Non Conveniens Motion Denied

Berezovsky and Glouchkov sued Forbes for libel in England, despite the fact that only a small fraction of the copies sold were distributed there and that the subjects of the article were in Russia. Forbes brought a motion for forum non conveniens, arguing that the case would be better tried in either the United States or Russia. The motion was granted by the trial court (Popplewell, J.) in October 1997, but reversed by the Court of Appeal a year later. LTL 19/11/98: TLR 27/11/98: (1999) EMLR 278.

That appeal was ultimately affirmed by the House of Lords in a 3-2 decision in May 2000**.** LTL 11/5/2000: TLR 16/5/2000: ILR 18/5/2000: (2000) 1 WLR 1004: (2000) 2 All ER 986: (2000) EMLR 643.

In dissent, Lord Hoffman noted that Berezovsky was a libel tourist:

> "But the notion that Mr. Berezovsky, a man of enormous wealth, wants to sue in England in order to secure the most precise determination of the damages appropriate to compensate him for being lowered in the esteem of persons in this country who have heard of him is something which would be taken seriously only by a lawyer. . . The common sense of the matter is that he wants the verdict of an English court that he has been acquitted of the allegations in the article, for use wherever in the world his business may take him. He does not want to sue in the United States because he considers that New York Times Co. v. Sullivan 376 US 254 (1964) makes it too likely that he will lose. He does not want to sue in Russia for the unusual reason that other people might think it was too likely that he would win. He says that success in the Russian courts would not be adequate to vindicate his reputation because it might be attributed to his corrupt influence over the Russian judiciary."

Forbes sought to appeal to the European Court of Human Rights, but was informed that the issue was not yet ripe, and that they would not hear the case until after a trial had been conducted.

High Court Found It Defamatory

The English High Court (Eady, J) also ruled in November 2000 that under English libel law the article's description of the Listiev murder was tantamount to stating that Berezovsky was guilty of the murder and that he was a gangland leader running a mafia-style operation. The court, applying the notoriously restrictive British libel laws, then ruled that Forbes was obliged to prove that Berezovsky had killed Listiev – even though the article made plain that the Listiev murder "remains unsolved". The appeal of this ruling failed. (2001) EWCA Civ. 1251.

Resolved With Clarification

On March 6, 2003, the resolution of the case was announced in the High Court in London. Forbes stated in open court that

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Berezovsky Withdraws Defamation Suit Against Forbes

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1) it was not the magazine's intention to state that Berezovsky was responsible for the murder of Listiev, only that he had been included in an inconclusive police investigation of the crime;
2) there is no evidence that Berezovsky was responsible for this or any other murder;
3) that in light of the English court's ruling, it was wrong to characterize Berezovsky as a mafia boss; and
4) the magazine erred in stating that Glouchkov had been convicted for theft of state property in 1982 (the information Forbes had been given related to another person with the same name).

Berezovsky and Glouchkov withdrew their suit. No costs or damages were paid, and no apology was made. After the dismissal was announced, Berezovsky took out full page ads in a number of UK and US newspapers in a bizarre attempt to salvage his reputation by portraying the resolution as a retraction. It was not. The article remains on Forbes' website, along with an editor's note and a full copy of the Statement in Open Court (see www.forbes.com/berezovsky).

Berezovsky now lives in self-imposed exile in London and is the subject of criminal investigation by the Prosecutor General's office of the Russian Federation (Berezovsky says the investigations are politically motivated). Glouchkov languishes in jail in Russia, standing trial for fraud in the operation of Aeroflot.

Forbes was represented by Senior Vice President - General Counsel Terrence O'Connor, the late- Tennyson Schad, and Editorial Counsel Lynn Oberlander, and by solicitors David Hooper, Emily Pomeroy and Isabel Griffith of Pinsent Curtis Biddle. The Barristers on the case included Geoffrey Robertson, Q.C., Heather Rogers, and Sara Mansoori. Mr. Berezovsky and Mr. Glouchkov were represented by solicitors Andrew Stephenson and Claire Gill of Peter Carter-Ruck and Partners and barristers James Price QC and Justin Rusbrook and Desmond Browne QC and M. Nicklin.

French Court Acquits Former Yahoo! Executive for Sale of Nazi Memorabilia

On February 11, a French court acquitted Tim Koogle, the former president of Yahoo!, of charges of "justifying war crimes and crimes against humanity". The court found that Yahoo and Koogle did not post Nazi memorabilia on Yahoo's auction web sites in a "glorifying, praising" or favorable manner. The charges were brought by several French Jewish and other anti-racist groups and were the latest round in proceedings stemming from the posting of the Nazi materials on Yahoo.

The first proceedings began in 2000 when Yahoo, and its French subsidiary, were sued for permitting Nazi collectibles (including knives, swastikas, and photos of concentration camps) to be posted on its auction web sites accessible to French residents. French law makes it illegal to possess, sell or display publicly pre-World War II Nazi uniforms, emblems or insignias.

The French court ordered Yahoo, in a startling opinion, to "take any, and all measures" to ensure that the materials were not accessible to French residents. Yahoo's protests that its servers were located in the United States and that it's sites aimed at U.S. residents were dismissed by the court because French residents had access to the offending material. Yahoo subsequently removed all of the offending materials from its site (although Nazi stamps and coins are still available). *(For a further discussion, please see LDRC LibelLetter November 2001, pg. 37)*

Yahoo filed a complaint with the federal district court in San Jose in December 2000 seeking a declaratory judgment that the ruling of the French court was unenforceable in the United States. The court granted Yahoo summary judgment, holding that the French decision was contrary to the First Amendment of the Constitution and U.S. public policy. *(LDRC LibelLetter November 2001, pg. 37).* That decision is on appeal to the Ninth Circuit.

In October 2001, French Holocaust survivors, their families, and several groups including the Movement Against Racism and for Friendship Between People filed the "war crimes" charges against Mr. Koogle. The plaintiffs sought damages of one euro.

California Appellate Court Rejects Claim For Publication of Old Crime Information

Concludes Briscoe No Longer The Law

By Robert S. Gutierrez

Until recently, it was potentially risky business in California for the media to identify an individual as having a not-so-recent criminal past, even though this information was documented in public records. Under the California Supreme Court's 32-year-old decision in *Briscoe v. Reader's Digest*, *4 Cal.3d 529 (1971)*, a claim for public disclosure of information contained in public records could make it to trial. A California jury could determine that a former criminal had since become a rehabilitated member of society and that disclosure of his or her criminal past was highly offensive and warranted damages.

Relies on Cox v. Cohn

On February 21, 2003, California's Fourth District Court of Appeal concluded that *Briscoe* is no longer good law. *Gates v. Discovery Communications, Inc. 2003 WL 549347*. Relying on the Supreme Court's decision in *Cox Broadcasting Corporation v. Cohn*, *420 U.S. 469 (1975)*, and taking a cue from Justices Kennard and Mosk in their concurring opinions in the California Supreme Court's decision in *Shulman v. Group W Productions, Inc.*, *18 Cal.4th 200 (1998)*, the appellate court gave a strong pull for the First Amendment in the tug-of-war with the right to privacy.

In *Cox*, the Supreme Court held that a television broadcast which identified a 17-year-old rape-murder victim could not be the basis for a public disclosure of private facts action where the information was lawfully obtained from court records, notwithstanding a Georgia statute that made it a misdemeanor to publish or broadcast a rape victim's name or identity. Noting that the interest in privacy fades when the information involved was already in the public record, the Court stated that "[i]n preserving [our] form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official records open to public inspection."

Program on Murder-For-Hire Plot

New Dominion Pictures produced a reality-based cable television program entitled *The Prosecutors* which was broadcast on the Discovery Channel. *The Prosecutors* re-enacted past crimes, identified the perpetrators and victims, and chronicled the investigation and prosecution of the criminals through first-hand interviews with those involved.

New Dominion researched and produced an episode of *The Prosecutors* about the notorious 1988 murder of a San Diego car salesman named Salvatore Ruscitti. In an episode entitled *Deadly Commission* broadcast in 2001, the program disclosed that a former San Diego car dealer named William Nix had orchestrated Ruscitti's murder to retaliate against him for filing a class action lawsuit against a car dealership owned by Nix's mother and stepfather.

The program truthfully disclosed that Gates was arrested and charged with Ruscitti's murder, pled guilty to being an accessory after-the-fact, and received a sentence of three years in state prison.

Steve Gates was among several persons identified and portrayed in *Deadly Commission*. He was not the focus of the program which laid out the myriad pieces of the infamous Ruscitti murder-for-hire puzzle, the multi-year investigation to find and bring the perpetrators and other participants to justice, and the resulting criminal proceedings which found a hitman named "Tonto" still at large. The program truthfully disclosed that Gates was arrested and charged with Ruscitti's murder, pled guilty to being an accessory after-the-fact, and received a sentence of three years in state prison. The facts of Gates' arrest, plea and sentence are contained in court records accessible to the public.

On June 21, 2001, Gates filed a Complaint against New Dominion and Discovery, alleging causes of action for slander and invasion of privacy. The slander claim was based on *Deadly Commission*'s alleged description of Gates as a "co-conspirator" to the Ruscitti murder, rather than as an "accessory." The invasion of privacy claim was based on *Deadly Commission*'s public disclosure of the fact that Gates pled guilty to being an accessory after-the-fact to the

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murder-for-hire plot, and the airing of his mug shot in the show.

New Dominion and Discovery demurred to Gates' Complaint on the grounds that *Deadly Commission*'s portrayal of Gates was substantially true, defeating the slander claim, and its truthful disclosure of Gates' involvement in the cover-up was constitutionally protected, defeating the invasion of privacy claim.

Filed Anti-SLAPP Motion

New Dominion and Discovery also filed a special motion to strike under California's Anti-SLAPP statute (C.C.P. § 425.16). The latter motion targeted the slander claim on the grounds that Gates was a limited purpose public figure unable to meet his burden of demonstrating that the allegedly defamatory statements about his involvement in the Ruscitti murder were made with constitutional malice. The invasion of privacy claim was attacked on the grounds that no *private* facts were disclosed, and in any event the disclosure of Gates' plea was constitutionally privileged because this truthful information was newsworthy, contained in public records, and had been lawfully obtained.

In support of their special motion to strike, New Dominion and Discovery relied on the California Supreme Court's decision in *Shulman*, and the Supreme Court's decisions in *Cox Broadcasting*, *Florida Star v. B.J.F.*, *491 U.S. 524 (1989)* and *Smith v. Daily Mail*, *443 U.S. 97 (1979)*. New Dominion and Discovery also moved on the grounds that the information about Gates' plea was absolutely privileged under California Civil Code § 47(d) as a fair and true report in a public journal of a judicial proceeding and statements made in the course thereof.

Trial Court Allowed Privacy Suit

The trial court sustained the demurrer to the slander claim, without leave to amend, on the ground of substantial truth. However, relying on *Briscoe*, the trial court overruled the demurrer, and denied the special motion to strike, as to the invasion of privacy claim on the ground that New Dominion and Discovery had failed to demonstrate that disclosure of Gates' identity as an accomplice to murder was newsworthy thirteen years after the murder and years after he had completed his sentence and claimed to have resumed a life of anonymity.

At issue in *Briscoe* was a *Reader's Digest* article about the big business of truck hijackings that identified an individual, Marvin Briscoe, as having committed a truck hijacking, but that failed to mention that his particular crime had occurred eleven years earlier. Citing a concern for the integrity of the rehabilitation process, the California Supreme Court denied Reader's Digest's demurrer to Briscoe's public disclosure of private facts claim on the grounds that the magazine was required to demonstrate that disclosure of Briscoe's identity as a former hijacker was newsworthy eleven years after the hijacking.

The Fourth District Court of Appeal reversed the trial court, concluding that "insofar as Briscoe held that criminal or civil penalties could result from the publication of the public record of a judicial proceeding, it was overruled by Cox."

However, in 1998, the California Supreme Court in *Shulman* relied on post-*Briscoe* Supreme Court decisions (such as *Cox*) and held that publication of truthful, lawfully obtained material of legitimate public concern is constitutionally privileged and does not create liability under the private facts tort. While *Shulman* did not overrule *Briscoe*, Justices Kennard and Mosk both expressed doubt that *Briscoe* survived the holding of *Cox* that the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.

On Appeal, Briscoe Held Overruled By Cox

New Dominion and Discovery appealed the trial court's denial of their special motion to strike. In a decision filed on February 27, 2003, the Fourth District Court of Appeal reversed the trial court, concluding that "insofar as Briscoe held that criminal or civil penalties could result from the publication of the public record of a judicial proceeding, it was overruled by *Cox*."

Indeed, following *Cox*, the Supreme Court had also held unconstitutional other state statutes that restricted publica-

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tion of the names of crime victims. In 1979, the Supreme Court held in *Daily Mail* that a West Virginia statute that made it a crime for a newspaper to publish, without court permission, the name of a minor charged as a juvenile offender violated the First and Fourteenth Amendments. Ten years later, in *Florida Star*, the Supreme Court found unconstitutional a Florida statute that prohibited publishing a sexual assault victim's name in an instrument of mass communication. The Supreme Court held that the statute violated the First Amendment because the news article contained lawfully obtained, truthful information about a matter of public significance.

Writing for the panel in *Gates*, Justice Benke reviewed this Supreme Court precedent and reasoned that there was

> "no suggestion in *Cox* that the fact the public record of [a] criminal proceeding is one or two or ten years old affects the absolute right of the press or a documentarian or a historian to report it fully."

Justice Benke noted that Justices Kennard and Mosk expressed doubt in their concurring opinions in *Shulman* that *Briscoe* survived *Cox* and its progeny. Justice Benke wrote that

> "[t]o require journalists, historians or documentarians to make subjective judgments balancing the right of the public to know against, for example, the right of a convicted and perhaps rehabilitated felon to some degree of privacy would promote the type of self-censorship and timidity the United States Supreme Court is not willing to accept."

While the Supreme Court has yet to hold that the First Amendment always protects the publication of lawfully obtained truthful information of public significance, the media may, in light of the *Gates* decision, at least publish public record information of a person's criminal past without regard to the recency of the crime. As Justice Benke reasoned, "The core of *Cox* is that the State cannot make the record of a judicial proceeding fully public and then sanction a publication of it."

The *Gates* decision follows a similar decision by the Idaho Supreme Court holding that the First and Fourteenth Amendments precludes The Idaho Statesman from being found liable for publishing a document contained in a court record open to the public. *Uranga v. Federated Publications, Inc. 2003 WL 328431*. (*See MLRC MediaLawLetter*, February 2003, at 9.)

For Discovery Communications and New Dominion Pictures: Robert S. Gutierrez and Louis P. Petrich of Leopold, Petrich & Smith.

For Gates: Niles R. Sharif.

Robert S. Gutierrez is with Leopold Petrich & Smith in Los Angeles, which represented Discovery Communications and New Dominion Pictures in this matter.

Broadcast Of "Old" Television Show Not Actionable

By Rex S. Heinke and Jessica M. Weisel

On January 21, 2003, in an unanimous decision, Division Eight of the Second Appellate District of California decided *Ingerson v. Twentieth Century Fox Film Corp.*, 2003 WL 147771, Cases No. B152689 and B153595, in favor of media defendants Twentieth Century Fox Film Corp. and Langley Productions, Inc.

The plaintiff sued the defendants over the airing of a four-minute segment of events that occurred following the plaintiff's abortive attempt to buy drugs in 1989. The plaintiff had driven his motorcycle into a "bad area of town" and had been attacked by a prospective seller. He ran away, leaving his motorcycle behind, and called 911. The responding Sheriff's Deputies, accompanied by a *Cops* camera crew, learned the reason the plaintiff was in the area and helped him recover his motorcycle. Although the officers did not arrest the plaintiff, they pointed out that his troubles had all occurred because he had attempted to buy drugs.

The segment originally aired in 1990, but the plaintiff did not file suit until 2000, after the segment had aired several more times. In the trial court, the plaintiff raised six causes of action: (1) false light; (2) statutory misappropriation of name and likeness under Civil Code section 3344; (3) common law misappropriation of name and likeness; (4) public disclosure of private facts; (5) restitution/unjust enrichment; and (6) unfair competition in violation of Califor-

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Broadcast Of "Old" Television Show Not Actionable

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nia's Unfair Competition Law, Business & Professions Code Section 17200, *et seq.* (the "UCL"). Defendants then moved for and obtained summary judgment.

Limits Claims on Appeal

On appeal, the plaintiff abandoned all but his statutory misappropriation claim and his unfair competition claim, which he limited to alleged violations of the unlawful and fraud prongs of the UCL. He argued that the segment misappropriated his likeness, particularly his voice, without his consent in violation of Civil Code Section 3344. For the same reason, he contended that broadcasting the segment violated the unlawful prong of the UCL. The plaintiff also maintained that the broadcast violated the fraud prong of the UCL, because it was likely to mislead viewers about when the events in the segment actually took place.

Misappropriation Claims

The Court of Appeal (Judge Boland) affirmed the grant of summary judgment. Rejecting the plaintiff's statutory misappropriation and unlawful competition claims, the court held that the segment fell within the "public affairs" exception to Section 3344, which exempts from any use "in connection with any news, public affairs, or sports broadcast or account, or any political campaign . . ." Cal. Civ. Code § 3344, subd. (d). Relying on *Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536 and *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, the court held that the segment squarely fell within this exception because it "highlight[ed] dangers posed by use of illicit drugs."

In addition, the court held that the broadcast was constitutionally protected under the rule precluding the imposition of tort liability for broadcasts in the public interest. *See, e.g., Shulman v. Group W. Productions, Inc.* (1998) 18 Cal.4th 200, 228-229. In reaching this conclusion, the court explained that the First Amendment protection for speech in the public interest and Section 3344's statutory exception for uses in connection with public affairs are "closely related, if not identical, and the same reasons underlie their application to bar [the plaintiff's] appropriation claims."

UCL Fraud Claim

With respect to the plaintiff's remaining argument that the Segment was likely to mislead viewers and, thus, violated the fraud prong of the UCL, the court held that the plaintiff had failed to satisfy his evidentiary burden on summary judgment. The defendants had offered evidence that reasonable viewers were not likely to be deceived as to when the events in the segment occurred because:

(1) the segment aired only in syndicated repeats;
(2) the episode is dedicated to a deputy who died in 1988 and contains a 1989 copyright date; and
(3) during the segment, a gas station sign advertises gasoline for $0.79, a price that even the plaintiff admitted he had not see since the late 1980s. The plaintiff's sole evidence in response were declarations from his mother and brother, both of whom were aware of the original timing of the incident with the police. Their declarations, according to the court, constituted "only speculative, anecdotal evidence that anyone had been or was likely to be misled" and did not "satisfy [the plaintiff's] obligation to provide 'substantial evidentiary support' to show viewers were likely to be misled as to the timing of the segment."

Unique Cost Argument Rejected

Finally, in a separate appeal, the Court of Appeal rejected the plaintiff's argument that he should not be required to pay defendants' litigation costs. The plaintiff had argued that, because defendants had procured insurance, their insurers, not defendants, had actually paid the costs. The court rejected this as an "attempt to obtain a windfall" and refused to allow the plaintiff to avoid his obligation to pay costs simply because the defendants had the foresight to obtain insurance coverage. The decision is unpublished and the plaintiff has petitioned the California Supreme Court for review.

Mr. Heinke and Ms. Weisel are attorneys with Akin Gump Strauss Hauer & Feld, LLP. They represented the defendants and respondents in this matter. Robert Cooper, Beverly Hills for plaintiff and appellant.

Falwell Website Complaint Dismissed by Virginia Federal Court

Court Finds No Personal Jurisdiction Over Anti-Falwell Web Site Run By Illinois Resident

Reverend Jerry Falwell's second attempt to silence jerryfalwell.com, a web site devoted to anti-Falwell criticism, cartoons and parody, was dismissed by a Virginia federal judge on March 4, 2003. After losing before a World Intellectual Property Organization arbitration panel, Rev. Falwell filed a libel and trademark suit. Judge Moon, of the Western District of Virginia, dismissed Rev. Falwell's complaint for lack of personal jurisdiction. *See Falwell v. Cohn*, 2003 WL 751130 (March 4, 2003). Defendant Gary Cohn, operator of jerryfalwell.com, is an Illinois resident and Rev. Falwell is a Virginia resident.

Young & Revell Set the Standard

Relying on the recent Fourth Circuit Court of Appeals decision in *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), the Court found that jerryfalwell.com is "not aimed at a Virginia audience" nor "manifests an intent to expressly target a Virginia audience." The Court stated that jerryfalwell.com addresses a national audience, and even though Rev. Falwell's church and many of his followers are located in Virginia, Rev. Falwell is admittedly a national figure. The court concluded that Cohn could not have "reasonably anticipated being haled into court in Virginia." *Id.*

The Court found that jerryfalwell.com is "not aimed at a Virginia audience" nor "manifests an intent to expressly target a Virginia audience."

In *Young*, the Fourth Circuit held that Virginia did not have jurisdiction over two Connecticut newspapers that posted articles to their respective web sites. The defamation suit was brought by the warden of a Virginia prison that was housing Connecticut inmates. The Fourth Circuit found that neither the articles nor the web site were aimed at or intended to target a Virginia audience, even though the warden and the prison were located in Virginia. *Id. See also MediaLawLetter,* December 2002, 5-9.

Two weeks after *Young*, the Federal Court of Appeals for the Fifth Circuit in *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) also addressed jurisdiction in an Internet publication defamation case. *Revell* held that to establish specific jurisdiction, a defendant must have known plaintiff's reputation will be harmed in a particular forum and that the articles or sources must be connected with the forum. The Fifth Circuit cited *Young*, reasoning that minimum contacts sufficient for jurisdiction requires proof that the activities were expressly directed at that jurisdiction. *Revell* also adopted the sliding scale approach developed in *Zippo Manufacturing v. Zippo Dot Com*, 952 F.Supp. 1119 (W.D. Pa. 1997) to determine if a defendant has maintained minimum contacts. Passive sites that allow posting to a web site will not be sufficient for minimum contacts under *Zippo,* but web sites with repeated contacts between the site and the forum may be sufficient. *See MLRC MediaLawLetter*, Jan. 2003, 15-16.

WIPO Denied Transfer of Domain Name

Last June, a WIPO arbitration panel denied Falwell's request to transfer domain names jerryfalwell.com and jerry*fall*-well.com held by Cohn. Rev. Falwell failed to prove the three elements necessary to establish a domain name transfer:

(1) the domain name was identical or confusingly similar to a trade or service mark in which Rev. Falwell had rights;
(2) Cohn had no rights or legitimate interests in respect to jerryfalwell.com; and
(3) Cohn registered and used the domain names in bad faith.

The Panel found that Rev. Falwell did not prove his name was used in a trademark sense or for commercial purposes, something the Panel noted Rev. Falwell might have been hesitant to do considering his position as a minister and educator. The Panel also found that Cohn's web site constituted legitimate, noncommercial, fair use of Rev. Falwell's name. *See Reverend Falwell and The Liberty Alliance v. Gary Cohn*, WIPO Case No. D2002-0184 (June 3, 2002).

For Falwell: Jerry Falwell, Jr. (Lynchburg, VA); John H. Midlen, Jr. of Midlen Law Center (Chevy Chase, MD)

For Cohn: Rebecca K. Glenberg of the ACLU of Virginia (Richmond); Alexander Wayne Bell (Lynchburg, VA); Paul Alan Levy of Public Citizen Litigation Group (DC)

U P D A T E S

Texas Court of Criminal Appeals Bars Filming of Jury Deliberations

By Chip Babcock

The public will miss a rare opportunity to witness a jury deliberating life and death matters in a capital murder trial presently pending in Harris County following an opinion from the Texas Court of Criminal Appeals. District Judge Ted Poe had granted a request by the Public Broadcasting System program Frontline to film a death penalty case from the selection of the jury all the way through the verdict including the jury deliberations.

The District Attorney objected only to filming the jury deliberations even though the defendant, his mother and attorneys as well as the jurors consented to the taping and even though the judge would not have permitted access to the tape until after the verdict was announced in Court. The Texas Court of Criminal Appeals stopped the trial while it considered the District Attorney's objection. While the matter was pending, Judge Poe's ruling provoked widespread media attention and a national debate on the propriety of filming jury deliberations.

In short, the Court concluded, a camera is a "person" and "persons" other than the jurors are not allowed in the jury room.

The Court of Criminal Appeals heard argument before a packed courtroom and last week granted mandamus relief by a vote of 6-3. 2003 WL 291926. This means that there will be no filming of jury deliberations in criminal trials in Texas in the future unless the Texas legislature, which is currently considering legislation, overturns the Court's decision. One judge wrote that allowing the filming would result in a "genuine disaster in our State's criminal justice system," and called Judge Poe's order "shocking."

The majority, and even one member of the dissent, expressed extreme hostility to cameras in the jury deliberation room and strained to interpret a Texas statute to reach the desired result. In short, the Court concluded (Judge Hervey), a camera is a "person" and "persons" other than the jurors are not allowed in the jury room.

So there will be no cameras in death penalty deliberations in Texas. We argued to the contrary on all the issues.

SECRECY: The critics argue that the jury room is a secret proceeding akin to the voting booth. It is true that no person, other than the jurors, is permitted in the room and under Judge Poe's procedures there wouldn't be. What goes on in the jury room is secret only during the deliberations and not afterwards. The jurors are free to talk to the press after their decision is announced and frequently do so. The only difference here is that a more accurate reporting tool (a camera) is being used than is customary (pen and pad). Of course, the jurors don't have to speak with the press after the fact unless they consent. The jurors in this case had already consented to participate in the taping of their deliberations. Nevertheless, the Court found that the century old tradition of jury secrecy precluded the filming, missing the point that the secrecy ends when the case is over.

CHANGE OF BEHAVIOR: The critics say that having a camera present will change juror behavior. There is some empirical evidence which refutes this fact. This will not be the first criminal case where the jurors have been filmed although it is the first capital case. The cases where cameras have filmed the jurors show that they have not been influenced by the camera. There is also the experience of many trial lawyers who litigated cases with gavel-to-gavel camera coverage. Lawyers, myself among them, will say that their behavior is not changed by the camera. But what about OJ, the opponents ask? I dare say that Johnny Cochran and the other participants behaved in that case as they usually do in court. The camera just happened to catch their act this time. That is not an argument against cameras merely an observation about how a particular trial was conducted.

ENDLESS APPEALS: Some say that even though the defendant has consented to the filming, that his appellate lawyer will take advantage of what the jurors say. The defendant has waived even those rights but, if in fact, the camera catches gross and reversible jury misconduct in a death penalty case perhaps the information should be used in some fashion.

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U P D A T E S

Texas Court of Criminal Appeals Bars Filming of Jury Deliberations

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What is the public interest in this information? Application of the death penalty is a matter of international discussion and importance. Texas, which leads the nation in executions, is at the forefront of the controversy. Watching a jury deliberate this life and death decision, if it comes to that, will shed enormous light on this debate. I, for one, believe that the camera will reveal public minded citizens approaching their job with a seriousness of purpose that will demonstrate that the decision-makers on this issue are to be trusted and believed. But it might show the opposite and that will be equally illuminating.

Unfortunately, in Texas we will not know.

Mr. Babcock, a partner with Jackson Walker L.L.P., represented Judge Ted Poe, who had permitted the filming, before the Texas Court of Criminal Appeals. Frontline was represented by Jim Hemphill of George & Donaldson. William J. Delmore, III, Asst. DA, Houston, Matthew Paul, State's Atty., Austin, for State.

Supreme Court Cancels Arguments in *Dept. of Justice v. City of Chicago*; Case Remanded to Seventh Circuit

On February 26, the Supreme Court vacated its earlier grant of certiorari in *Dept. of Justice v. City of Chicago (02-322)* and remanded the case back to the Seventh Circuit with instructions to examine what effects recent federal legislation has on the issues presented to the Court. *2003 WL484146.* The case had been accepted earlier for review by the Court without comment on November 12, 2002. *123 S. Ct. 536.* The Seventh Circuit had affirmed a grant of summary judgment for Chicago in the city's attempt to obtain gun records concerning the sale and purchase of firearms in the Chicago area and nationwide from the Alcohol, Tobacco and Firearms (ATF). *City of Chicago v. United States Department of Treasury, 287 F. 3d 628 (see MLRC MediaLawLetter December 2002, 39).* In February, Congress inserted a provision into a spending bill which forbade the ATF from spending any money on releasing the data requested by Chicago.

Chicago initially requested from ATF the names/addresses of firearm manufacturers, dealers and purchasers from ATF's Trace and Multiple Sale databases to assist the city in its public nuisance suit against firearm manufacturers, dealers and distributors. ATF provided Chicago some of the requested information (including trace and multiple sales data relating to the Chicago area for certain periods of time as requested by the city, as well as limited nationwide records) but refused to divulge the names and addresses. The agency claimed it did not have to provide the information to Chicago because the records fell within three FOIA exceptions: interference with law enforcement proceedings; invasion of personal privacy relating to personnel, medical and/or "similar files"; and disclosure of information gathered for law enforcement purposes would "reasonably be expected to constitute an unwarranted invasion of personal privacy".

The district court granted Chicago summary judgment and the Seventh Circuit affirmed holding that none of the three FOIA exceptions cited by ATF were applicable in the case. Specifically, the court ruled that there is no legitimate privacy interest in the purchase of a firearm; nor can a gun purchaser or seller have a reasonable expectation of privacy in information maintained by ATF concerning a gun purchase; and that any potential privacy interest would be outweighed in this circumstance by the public's interest in the information.

Cert Denied in Philadelphia Newspapers v. New Jersey

On February 24, 2003, the Supreme Court denied certiorari without comment to *Philadelphia Newspapers v. New Jersey* (No. 02-945), refusing to review whether a New Jersey trial court could prevent a newspaper from interviewing jurors after a hung jury but before a retrial. Philadelphia Newspapers appealed a Supreme Court of New Jersey, 801 A.2d 255 (2002), decision that affirmed and modified a trial court order imposing restrictions on access to the jurors. The order was a part of the highly-publicized murder trial of Rabbi Fred. J Neulander. Five reporters were also cited for

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U P D A T E S

Philadelphia Newspapers Denied Cert

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contempt in separate proceedings for violating the orders on juror contact.

Rabbi Neulander, a leader of a large congregation in Southern New Jersey, was accused of arranging the murder of his wife. His first trial ended in a hung jury, but he was retried, convicted and sentenced to life in prison.

In anticipation of intense media scrutiny and concerns about a fair trial, Superior Court Judge Linda G. Baxter initially issued a media order that prohibited (1) disclosure of juror names or identities and (2) media representatives from contacting or interviewing any juror or potential juror. On appeal, the New Jersey Supreme Court vacated the portion of the order preventing disclosure of the jurors. The Court also modified Judge Baxter's prohibition on juror contact—extending it only until the conclusion of the retrial and verdict, but also preventing contact initiated by jurors.

The Court explained, in a July 18, 2002 opinion, that preventing disclosure of the jurors' names was unconstitutional under the First Amendment — the jurors were already named in open court. Furthermore, the court stated that no objections were made to the presence of the public or press at that point. But in upholding and extending the prevention of media-juror contact after the hung jury, the court found the defendant's Sixth Amendment rights might be impinged. The court reasoned that juror interviews would allow prosecutors a strategic advantage at retrial and make it harder to empanel an impartial and willing jury. See also *MediaLawLetter,* August 2002, at 47.

The New Jersey Supreme Court decision on disclosure of juror names was unanimous, however two justices dissented on the question of juror-media contact. The dissent saw a continuing First Amendment violation and a Due Process violation. According to the dissent, no hearing was conducted or evidence taken when the order was issued. And in light of the total media saturation circling this trial, the prior restraint was not shown to be necessary or effective.

Five reporters received contempt charges for their actions in the Neulander trial. Before the New Jersey Supreme Court ruled on the trial court orders, the *Philadelphia Inquirer* published a report about the deadlocked jurors, specifically naming the jury foreperson and suggesting she might have been a resident of Pennsylvania, and not New Jersey. During proceedings in June 2002, the four reporters listed as co-authors were ordered to pay $1,000. Three of the four reporters were also ordered to perform 5-10 days of community service, on a suspended 180-day jail sentence, for contacting the jurors after the hung jury. See *MediaLawLetter,* June 2002 at 51. Earlier in the Neulander trial, another reporter from *Philadelphia Magazine*, was fined $1,000 and given a suspended 30-day sentence for asking a juror if he believed any of the jurors would speak to the reporter after the trial. See *MediaLawLetter* Feb. 2002, at 33.

Senate Press Gallery Grants Credentials To WorldNetDaily.com

New Panel To Review Rules

Threatened legal action and a long campaign against the Standing Committee of Correspondents for the Senate Press Gallery finally ended with *WorldNetDaily.com* receiving press credentials. The Standing Committee reached a 3-2 decision on September 10, 2002 reversing an earlier decision to deny access to the online news site. Now, *Roll Call* and *WorldNetDaily.com* report that the new panel of the Standing Committee will review accreditation rules in light of *WorldNetDaily.com's* application, and overhaul its guidelines for the first time in more than 50 years.

The Senate Press Gallery originally denied press credentials to *WorldNetDaily.com* in a decision issued January 29, 2002 — almost one year after *WorldNetDaily.com* first applied. According to *WorldNetDaily.com*, the denial rested on concerns that *WorldNetDaily.com* was interested in lobbying or advocacy because a non-profit organization owned minority stock in the site, and that *WorldNetDaily.com* didn't produce a significant amount of original reporting content according to informal Committee rules. See *LDRC MediaLawLetter,* March 2002 at 22.

Richard Ackerman represented *WorldNetDaily.com* on

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Senate Press Gallery Grants Credentials To WorldNetDaily.com

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behalf of the United States Justice Foundation, a non-profit organization. Following appeals to the Standing Committee and the Senate Rules Committee, Ackerman demanded accreditation or warned that WorldNetDaily.com would bring an action alleging intentional First Amendment viewpoint discrimination, among other violations.

The Senate Press Gallery is a non-governmental organization that receives authority from the Senate Rules and Administration Committee. The Senate Press Gallery empowers a Standing Committee of Correspondents, composed of five working journalists, to evaluate and issue credentials. The credentials permit access to U.S. House and Senate office buildings and the Capitol for journalists reporting on Congress.

William L. Roberts III, outgoing chair of the Standing Committee, told *Roll Call* in January that new guidelines have been drafted and will be reviewed by an incoming panel. According to *Roll Call*, lawyers warned the Standing Committee that informal rules could cause problems if another publication that had claimed they had been unfairly denied credentials.

Three new journalists join the Standing Committee next month. Jim Drinkard of *USA Today*, Jesse Holland of *The Associated Press* and Mary Agnes Carey of *Congressional Quarterly* join remaining members Scott Sheppard of *Cox Newspapers* and Jack Torry of *The Columbus News Dispatch*.

The new Standing Committee is to vote on proposed guidelines for Internet-based publications, whether to make clear that only publications funded chiefly by advertising, subscription or sales can be accredited, and to require the Standing Committee to distribute a new handbook of rules and procedures at the beginning of each Congress, among other resolutions. See Ben Pershing, Rules Overhaul Proposed for Daily Press Galleries, *Roll Call* (Jan. 20, 2003).

First Circuit Rejects First Amendment and Common Law Right of Access to Criminal Justice Act Documents

By Elizabeth A. Ritvo and Jeffrey P. Hermes

On February 26, 2003, the United States Court of Appeals for the First Circuit issued a decision in *In re Boston Herald, Inc. (U.S. v. Connolly)*, 2003 WL 474403, – F.3d –, Docket Nos. 02-2340 and 02-2098, in which the *Boston Herald* newspaper sought access to sealed financial information filed by a criminal defendant in support of his application for appointment of counsel pursuant to the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A.

The defendant in question was John J. Connolly, Jr., the former Boston FBI agent accused of impropriety in his relationship with informants, including alleged organized crime figures such as James "Whitey" Bulger and Stephen Flemmi. As noted by the Court, "information about Connolly's relationships [with informants] was extracted from a reluctant government by a trial judge who heard the earlier criminal cases." Connolly's prosecution garnered extensive media coverage and public interest nationwide. On May 28, 2002, Connolly was convicted of racketeering and obstruction of justice in the Massachusetts federal district court.

The specific documents in question consisted of two versions of CJA Form 23 (a standard form financial affidavit), and a statement of attorneys' fees to date. A magistrate judge for the United States District Court for the District of Massachusetts had denied a motion by the *Herald* to vacate the impoundment order, finding that there was neither a First Amendment nor a common law right of access to those documents, and the district court overruled the *Herald*'s objections to the magistrate's order. On appeal, the First Circuit affirmed the decision of the district court in a rare 2-1 split decision.

The majority opinion (Judge Lynch) first addressed an outstanding issue regarding the proper method of obtaining review from orders denying access, ruling that it had jurisdiction either on an interlocutory appeal pursuant to the collateral order doctrine, or on a petition for "advisory mandamus" on an important issue of law. In an earlier access matter, *In re Providence Journal*, 293 F. 3d 1 (1st Cir. 2002), the Court had left open the question of whether the Court had jurisdiction over an interlocutory appeal under the collateral order doctrine.

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Judicial Documents?

Turning to the merits of the case, the majority first questioned whether the CJA documents at issue were "judicial documents" to which either a First Amendment or common-law right of access attached. Although the Court emphasized that the sealed documents more concerned the Court's administrative rather than judicial function, it hesitated to decide the underlying issues in the case on that basis, noting that "disentangling judges' judicial and administrative roles can be tricky." Thus, the majority declined to rest its ruling on the 'judicial documents' ground alone.

Applying Press Enterprise II

Addressing the *Herald*'s First Amendment claims, the majority suggested that the "complementary considerations" of *Press-Enterprise II* (i.e., the "experience" and "logic" test) should not be interpreted as a two-prong test, such that both prongs must be satisfied for a First Amendment right to attach. However, because the majority did not believe that the CJA documents at issue satisfied either test, it left that question open.

With regard to "experience," the majority found that the recent origin of the CJA did not alone bar the finding of a tradition of access to documents *of that type or kind* and that the Court could look to analogous traditions; it then found none close enough to the CJA documents to enable the majority to find a tradition by analogy.

With regard to "logic," the majority held that the release of CJA documents might deter criminal defendants from seeking appointment of counsel because of fears of loss of privacy, and that this outweighed any positive effect of access. The majority did state, however, that negative effects of access idiosyncratic to the particular case at bar should not be considered in determining whether the First Amendment right attaches, but rather should be considered at the next stage, when a court determines whether there is a compelling interest warranting closure.

Common Law Access Analysis

With regard to a common-law right of access, the majority again stated that it did not believe that the CJA documents were judicial documents to which the common-law presumption of access attached. However, the majority stated that it believed the district court could have appropriately determined that the loss of privacy faced by the defendant overcame the presumption of access in any event.

Dissent: Forms are Judicial Documents

In a vigorous dissent, Circuit Judge Lipez strongly rejected the contention that the CJA documents were not judicial documents, stating that the CJA forms are considered in a potentially adversarial proceeding, that the CJA mandates the participation of the judiciary in the process of reviewing applications for counsel, and that the Sixth Amendment rights at issue are "the unique province of the judiciary," even if other constitutional rights outside of the courtroom are occasionally delegated to administrative personnel.

With regard to the common law right of access, the dissent noted that "the law and the [relevant administrative] guidelines appear not to preempt, but rather to ratify, a common law presumption of access to the information at issue here." Finally, the dissent criticized the majority's treatment of the First Amendment analysis, finding that the "experience" test was of little weight in this case, and that under the "logic" test, there was no showing of the type of "procedural frustration" that courts had previously required to overcome the manifest benefits of openness in determinations such as these. The dissent concluded that there was a First Amendment right of access, requiring a remand for a determination as to whether there was a compelling interest warranting closure.

On March 12, 2003, The Boston Herald filed a Petition for Rehearing En Banc.

Elizabeth A. Ritvo is a partner and Jeffrey P. Hermes is an associate at the Boston office of Brown Rudnick Berlack Israels LLP. They are counsel to the Boston Herald in this matter.

Access to Search Warrants:

Overcoming "Privacy" and "Reputational Harm" Objections

By Mark J. Prak and C. Scott Meyers

This past fall our firm handled a somewhat unusual access case for the Worcester, Massachusetts *Telegram & Gazette*. The *Telegram & Gazette* is owned by *The New York Times Company*. The case involved a demand for access to a search warrant and related materials. Happily, we were able to secure the information desired by the newspaper. The case lasted 34 days from start to finish and required two hearings in the federal district court before the Fourth Circuit mercifully denied a stay of the order granting access. *In Re Search Warrant, The New York Times Company v. L.S. Starrett Co.,* No. 02-4862, CR-02-137.

We characterize the case as "somewhat unusual" because, notwithstanding the Fourth Circuit's reputation as conservative and tough on the news media, the law on access to search warrant materials in the Fourth Circuit is actually quite favorable for the press. In addition, the case yielded a "first" for us in terms of the shortest required turn-around time for filing a brief. Our opponents filed a petition for stay at 1:13 p.m. on a Friday afternoon, and the clerk's office called us at 2:30 p.m., before we had been served with our opponents brief, to say that our response would be due at 5:00 p.m. – a mere two and one half hours later! The speed of the briefing prompted one of our senior partners to respond, when being told the tale: "Is law a great profession or what?!"

Notwithstanding the Fourth Circuit's reputation as conservative and tough on the news media, the law on access to search warrant materials in the Fourth Circuit is actually quite favorable for the press.

Access Law Not Self Executing

Access cases, as most media lawyers know, are sticky. They serve to remind us of the fact that the law, clear as it may be, is not self-executing. Editors and in-house counsel dislike the cost associated with bringing such cases. Yet, the press' willingness to enforce open meetings and public records laws is what, ultimately, vindicates our core constitutional values. Outside counsel know that although such cases are enjoyable they generally demand the immediate attention, focus and short turn around of a TRO or preliminary injunction case. Overlay the heightened sense of government sensitivity toward national security in the wake of September 11th and these days an access case can be a pretty "tough putt," even if national security concerns are not directly implicated.

But on to our story.

Search Spurred by Qui Tam Action

The L.S. Starrett Company is a publicly traded, 122 year old firm, headquartered in Athol, Massachusetts. Starrett employs some 2,300 people at manufacturing plants throughout the world. The company produces a wide variety of precision instruments, including industrial, professional, and consumer tools. One of Starrett's plants is located in Mount Airy, North Carolina (a/k/a "Mayberry" on "The Andy Griffith Show"). Among the items manufactured at the Mount Airy plant is a piece of equipment known as a Coordinate Measuring Machine (CMM), a computer-aided measuring device which is used to measure dimensions. CMMs are extremely precise (measuring to tolerance ranges of one thousandth to five-ten-thousandths – of-an-inch). CCMs are used by the government to analyze the tolerances of and ensure that machined parts on F-15 fighter jets and the Space Shuttle meet the specifications called for on blueprints or computer-aided designs. CMMs are important quality control tools.

On September 5, 2002, agents of the Defense Criminal Investigative Service – the fraud detection arm of the U.S. Department of Defense – the U.S. Postal Inspection Service and NASA executed a search warrant at Starrett's Mount Airy plant. A week later, *The Wall Street Journal* ran an article about the search that included allegations from a confidential source (who appeared from the text to be a former Starrett subcontractor). According to *The Wall Street Journal*, the subcontractor had filed a qui tam action under the federal False Claims Act[1] against Starrett, alleging that the company knowingly manufactured and sold defective equip-

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ment to the government. The article sent Starrett's stock price plummeting 26%, prompting strident remarks by the Company's CEO and a press release denying any wrong doing by the company, among other responses.

The news report raised two troubling issues for Starrett. First, claims under the False Claims Act are sealed initially to allow the government an opportunity to investigate allegations before they become public. However, it appeared as if the source may have violated the confidentiality requirement by talking to *The Wall Street Journal*. Second, and more immediately troubling, the company itself was unaware of the complete substance of the allegations made by the source that the government used to obtain its search warrant. Hence, the company was unsure of exactly how to respond publicly to *The Wall Street Journal* article.

Government Files Redacted Papers

In the Fourth Circuit, after a search warrant is executed, the government must file a return with the issuing court, containing an inventory of what was taken by the officers conducting the search. The return also includes a copy of the affidavit presented to the judge to obtain the search warrant. Once these materials are filed with the court, they are customarily made public. However, in an on-going investigation, where a full release of the search warrant materials could compromise the investigation, the standard procedure is for the government to file a redacted version of the papers to be made public, removing sensitive material, and for the original to be sealed – if sealing is considered justified by the court. The government followed this procedure in the Starrett matter, filing a redacted search warrant affidavit along with the return.

Concerned over possible future damage to its image, reputation and stock price, Starrett sought to intervene in the proceeding to prevent *any* search warrant materials from being made public. Starrett filed a motion to seal all of the warrant materials, asserting that they likely contained highly sensitive and unproven allegations that could damage Starrett. U.S. Magistrate Judge Russell Eliason, the judge who had issued the search warrant, initially denied Starrett's motion. However, Judge Eliason kept the materials under seal and set an abbreviated briefing schedule to give Starrett, as well as other potential intervenors, an opportunity to file further motions.

At this point, the *Telegram & Gazette* entered the fray. The newspaper had been following the qui tam action and doing its own reporting on the Starrett story. The readership of the *T&G* is very interested in the goings-on at Starrett, as the company is one of the largest employers in the paper's service area, and many local residents either work for or have retired from the Company. Many retirees have Starrett stock in their retirement plans. The *T&G* covered the search of Starrett's Mount Airy plant, as well as the fallout after *The Wall Street Journal* article. The newspaper was interested in obtaining a copy of the search warrant affidavit to further detail the allegations being made by the government against Starrett. We filed a motion, on behalf of the *T&G*, seeking to intervene and oppose Starrett's motion to seal.

Fourth Circuit Law: Common Law Access

The law in the Fourth Circuit on issues concerning public access to search warrant materials is set forth in the case of *Baltimore Sun Co. v. Goetz*, 866 F.2d 60 (4th Cir. 1989). The holding of *Baltimore Sun* is that, while there is no First Amendment right to search warrant materials, they are judicial documents, and as such, the public has a common law right of access to such materials. The test announced in *Baltimore Sun* is that sealing search warrant materials is only permissible "when the sealing is essential to preserve higher values and is narrowly tailored to serve that interest." *Id*. at 65-66 (citations and internal quotations omitted). (That, of course, is more or less the constitutional test.)

Starrett argued, with much fanfare and histrionics, that protecting its reputation from unsubstantiated allegations at this early stage in the proceedings (pre-indictment) was just such a "higher value" deserving of protection. Starrett cited the loss in stock value after *The Wall Street Journal* article was published as evidence of the further harm that would result if the warrant materials were made public. Further, the company decried the position it was forced into by the odd procedural posture of the case, having to attempt to protect its interests as an intervenor when, to its knowledge, no case – criminal or civil – had been filed against it. Finally, Starrett also argued that unarticulated "privacy interests" of itself and its employees should somehow trump the newspaper's common law right of access.

The *T&G* argued that Starrett's concern for its reputation was not a higher value worthy of the protection the company

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sought. Rather, the newspaper asserted that the higher value to be protected was the open nature of the American judicial system. Starrett's reputational concerns were merely the public relations conceits of a publicly traded company and were, we argued, not sufficient to overcome the public's common law right of access.

Starrett and the newspaper were not the only two parties involved in the matter. The U.S. Attorney, for his part, did not oppose or support Starrett's motion, contending that the redacted affidavit was sufficient to protect its own ongoing investigation.

Magistrate Opens Record

At the initial hearing before Magistrate Judge Eliason, Starrett had submitted a brief with portions under seal and demanded that the courtroom be closed for the argument. We strenuously objected to the proposed closing of the courtroom and to being forced to respond to arguments we were not able to see. Starrett suggested a "for lawyers eyes only" approach. We rejected the proposal and urged the court to do so.

Judge Eliason resolved the matter sensibly by informing counsel for Starrett that the courtroom would be open, that he had read their brief, including the portions filed under seal, and that the material did not merit sealing. The court followed up in a memorable way by suggesting that only arguments made and evidence offered in open court would be considered. Judge Eliason issued a twenty page order holding that Starrett had not established that sealing the affidavit materials was necessary and narrowly tailored to protect any higher value. Judge Eliason then stayed the execution of his order to permit Starrett to appeal to the district judge.

District Judge Agrees

Starrett immediately appealed, and a hearing was set in front of United States District Judge Frank Bullock. At the hearing, Starrett again attempted to have the courtroom closed. Such efforts were rebuffed by the court. Judge Bullock indicated that, though he disagreed with a portion of the rationale of Judge Eliason's order, he nonetheless agreed with the substantive decision holding that the warrant materials should not be sealed in light of the *Baltimore Sun* standard. Judge Bullock expressed some sympathy for the argument that reputational harm could flow from the disclosure of pre-indictment allegations of criminal conduct. Nonetheless, he indicated that such harms were inherent in our open justice system.

On October 31, Judge Bullock ordered the warrant materials unsealed, giving Starrett until November 4 to seek a stay from the Fourth Circuit. The district court's decision was reviewable under an "abuse of discretion" standard, as well as the customary four factor test for a stay. Starrett filed an application for an emergency stay in the Fourth Circuit the next day, on Friday, which, much to our satisfaction, was denied without a written opinion on Monday morning, November 4.

Judge Bullock expressed some sympathy for the argument that reputational harm could flow from the disclosure of pre-indictment allegations of criminal conduct.

News Does Not Damage Company

When the materials were finally unsealed, the *T&G* ran its story. The evidentiary basis for the probable cause finding made by the court that issued the search warrant was available to the public for review. Not surprisingly, the government believed that there might have been an effort to "cover-up" the delivery of CMMs which, it suggested, were not up to Starrett's usual standards. Interestingly, Starrett's dire predictions of harm to its stock price and reputation never materialized. The company's stock price changed little after the additional details relating to the government's preliminary investigation were released.

The major lesson we took away from the case: it is possible to knock out an appellate brief from start to final filing in 2 ½ hours and still have a good relationship with your secretary!

Copies of the *Worcester Telegram & Gazette's* reporting on the Starrett matter are available at the newspaper's website, www.telegram.com.

Mark J. Prak and C. Scott Meyers of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP represented the Worcester Telegram & Gazette along with David McCraw of The New York Times Co. Brian T. O'Connor and Richard D. Batchelder of Ropes & Gray, Boston represented Starrett

Supreme Court of Mississippi Proposes Rules For Cameras in the Court Room

By John C. Henegan

For nearly two years, the public has had access to oral arguments in civil and criminal cases heard by the Supreme Court of Mississippi by watching a live broadcast of the proceedings through the appellate court's web site. Based in part on its experience with this type coverage, on December 18, 2002, the Media and the Courts Study Committee of the Supreme Court of Mississippi submitted to the State Supreme Court its report entitled, "Public Access to Mississippi Trial Courts", which includes suggested guidelines concerning the use of cameras and electronic technology by the news media in covering courtroom proceedings.

In late January of 2003, the Mississippi Supreme Court posted a draft of proposed rules governing the use of cameras in the courtroom on its web site at www.mssc.state.ms.us/news/camera_and_courts.pdf, requesting comments from the bench, the bar, and the public on the proposed rules.

The proposed rules govern the "electronic media coverage" of court room proceedings in all appellate and trial courts of Mississippi. The media is defined as any person or organization engaged in newsgathering or reporting, and electronic coverage includes any reporting, recording or broadcasting using any electronic device. R. 2.

All electronic coverage is subject to t he authority of the presiding judge who has the discretion to limit or terminate electronic coverage at any time it finds necessary and in the interest of justice to protect the rights of the parties or witnesses. R. 3. Certain types of proceedings are expressly excluded from coverage, including those involving certain domestic and criminal pre-trial proceedings; trade secrets, and in camera proceedings, unless the trial court expressly orders that coverage is permitted. R. 3.

Electronic coverage of jurors and potential jurors and the following categories of witnesses is also expressly prohibited: police informants, minors, undercover agents, relocated witnesses, victims and families of victims of sex crimes, and victims of domestic abuse. R. 3 & 4. Side bar conferences and proceedings held in chambers are also excluded. R. 4.

The proposed rules also regulate the location of equipment and permit no more than one television camera or video recorder, one audio system for radio broadcasting, and one still photographer in any proceeding. R. 4. Pooling arrangements are the "sole responsibility" of the media, and in the absence of advance media agreement regarding disputed equipment or personnel issues, the presiding judge shall exclude all contesting personnel from a proceeding. R. 4.

Media representatives who want to engage in electronic coverage of a proceeding must notify the clerk and the court administrator of the court at least 48 hours before the scheduled proceeding. R. 5. A party may object to electronic coverage of a proceeding by written motion supported by affidavit no later than 15 days before the proceeding. R. 7.

Written comments, addressed to the Clerk of the Supreme Court, Gartin Justice Building, P.O. Box 249, Jackson, MS 39205, were due for filing by March 14, 2003.

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It's No Secret: Classification Under Scrutiny

Proposed Bush Order Would Tighten Access; Declassified Evidence Used in Supreme Court Appeal

The Bush Administration has drafted an executive order on government information which would shift the classification decisions from a presumption of public disclosure to a presumption of secrecy, and would place limits on an automatic declassification program instituted by President Clinton.

But the proposal does not contain a wholesale revision of government classification policy, as some observers feared when the White House announced in August 2001 that it was working on the revisions.

The Bush order is expected to be issued before April 17, 2003, when Clinton's program of automatically declassifying most documents more that 25 years old was set to begin. The draft order would replace Executive Order 12958, which was issued by the Clinton Administration on April 17, 1995.

Removes Presumption of Access

The new order will apply to information and documents held and generated by agencies within the executive branch of the federal government, and will determine which of these materials are exempt from disclosure under the national security exemption to the Freedom of Information Act. *See* 5 U.S.C. § 552 (b)(1). It will not apply to papers of the president, which are covered by separate laws and executive orders, (*see LDRC LibelLetter*, Nov. 2001, at 13) or to information held by Congress or the federal courts.

According to a draft obtained by the Federation of American Scientists and available online at http://www.fas.org/sgp/bush/drafteo.html, the new order would remove a presumption towards imposing the lowest possible classification level, or no classification at all, to any piece of information; bar automatic declassification of information when there are leaks of identical or similar information; and increase the standard time period during which most information may initially be classified from 10 to 25 years. Previously only very sensitive information could be secret for 25 years.

The new order would also provide that all information obtained from foreign governments is automatically classified.

The new order would remove a presumption towards imposing the lowest possible classification level, or no classification at all.

The new order would continue the procedure under which classification decisions may be appealed to a Interagency Security Classification Appeals Panel, but adds a provision allowing the Director of Central Intelligence to overrule decisions of the panel for national security reasons.

It would eliminate the Information Security Policy Advisory Council, a seven-member panel established by Clinton to recommend subject areas for systematic review of material for possible declassification.

Historical Materials Program Left Mainly Intact

But the new order would largely keep intact a program of declassifying historical materials that was contained in the Clinton order. Under this program, records more than 25 years old must be reviewed by agency officials for declassification. As long as an agency head or designee determines that release of the information would not compromise national security, all such records that are determined by the National Archives to be of historical value will then automatically be declassified. (The Clinton program provided for declassification after 25 years, even though the initial classification period under the Clinton order was 10 years for most materials.)

Previously, this program was to go into effect on April 17, 2003, with the release of papers which dated from earlier than 25 years before that date – April 17, 1978 – being released on that day. Afterwards, papers created after April 17, 1978 would be released on the 25th anniversary of their creation. The draft order provides that papers will be released on Dec. 31 of the year that is the 25th anniversary of their creation, starting in 2006. Thus, under the new order, formerly classified documents from 1981 and previous years will be released on Dec. 31, 2006.

But the new order would provide for various extensions that were not in the Clinton version, such as a three-year extension for records that were inadvertently not reviewed by agency officials prior to the deadline, and a five-year extension for records contained in microforms, motion

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pictures and other media which makes review difficult.

The new provision would also allow for the reclassification of declassified information under certain circumstances.

Finally, the new order would require that training for government personnel on classification standards and procedure include a discussion of "the criminal, civil and administrative sanctions that may be brought against an individual who fails to protect classified information from unauthorized disclosures." In 2000, President Clinton vetoed legislation that would have imposed specific penalties on government officials who leak classified information. *See LDRC LibelLetter*, Nov. 2000, at 36. Attorney General John Ashcroft later concluded that such legislation was not necessary. *See LDRC MediaLawLeter*, Nov. 2002, at 41.

The draft order has been circulated to various executive agencies for comment. The administration is not required to solicit public comment on the proposed order, although a group of historians has asked officials for a mechanism for such input.

Declassified Evidence Cited to Claim Fraud in Supreme Court Case

Meanwhile, lawyers for the daughters of two civilian employees of an Air Force contractor who were killed in a 1948 crash are using unclassified documents to argue that the military improperly invoked military secrecy in convincing the U.S. Supreme Court to reverse verdicts finding the government liable for the deaths.

In 1953, the U.S. Supreme Court ruled that the courts must defer to legitimate claims of military secrecy, and reversed a lower court's default judgment entered after the government refused to provide reports on the crash. *U.S. v. Reynolds*, 345 U.S. 1 (1953). The high court's ruling led the widows to settle their case.

The reports were declassified in 2000, without any redactions. According to the daughters, they do not reveal any past or present military secrets, but do conclude that a mandated heat shield had not been installed on the plane that crashed, and that "[t]he aircraft is not considered to have been safe for flight."

On Oct. 6, 1948, Robert Reynolds, William H. Brauner and Albert H. Palya were killed when an Air Force plane in which the three civilian engineers were flying crashed in Georgia. All three were engineers employed by the Radio Corporation of America and the Franklin Institute of Technology in Philadelphia, and were helping military personnel with electronic equipment being tested during the flight.

Their widows sued under the Federal Tort Claims Act, claiming that the crash was caused by the Air Force's negligence. During discovery in this case, the government refused to produce its reports on the accident. After its argument that findings of official government investigations were privileged from disclosure was rejected, *see Brauner v. U.S.*, 10 F.R.D. 468 (E.D. Pa. 1950), the government then argued that the reports could not be disclosed because they contained military secrets. The district court judge agreed to review the documents *in camera*, but the Air Force continued to refuse. So the court found the government in default, and awarded the widows a total of $225,000.

The government appealed, but the Third Circuit Court of Appeals affirmed the trial court verdict. The appellate court held that determination of whether the reports were privileged, either as internal agency documents or because they contained government secrets, was within the judicial power of the courts. *Reynolds v. U.S.*, 192 F.2d 987, 996-97 (3rd Cir. 1951).

After granting *certiorari*, the U.S. Supreme Court reversed, in a case that established that government could assert a privilege based on the need for military secrecy. The Court, in a 6-3 decision, held that courts must balance the asserted need for a document against the requirements of military secrecy.

> "In each case," Chief Justice Fred M. Vinson wrote for the majority, "the showing of necessity which is made [by the party seeking documents] will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. ... [E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *U.S. v. Reynolds*, 345 U.S. 1, 11 (1953).

Justices Hugo Black, Felix Frankfurter and Robert H. Jackson dissented without opinion, stating that they were largely in agreement with the 3rd Circuit's opinion.

Almost 50 years later, Judith Palya Loether read the de-

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classified report about the crash in which her father died, and found no national security reason why it should not have been disclosed. Through Internet searches, she found other descendants of the men whose widows originally sued, and together they hired the Philadelphia firm of Drinker Biddle to attempt to reopen the case. Drinker Biddle founding partner Charles Biddle had represented the widows in the original litigation.

Partner Wilson M. Brown, III proceeded by filing a petition for a writ of error *coram nobis* to the U.S. Supreme Court. The somewhat obscure writ allows for re-evaluation of a judicial decision in light of the subsequent discovery of an error in matters of fact in the case. *Petition for a Writ of Error Coram Nobis to Remedy Fraud Upon This Court*, No. _____ (U.S. filed Feb. 26, 2003).

The petitioners are asking the Court to vacate the *Reynolds* result and reinstate the district court's award with interest – a total of $1.14 million – plus attorneys' fees and costs. They point out, however, that they are not challenging the

Homeland Security Act: An Effort to Amend Act to Narrow FOIA Exemption

By Kevin Goldberg

On March 12, 2003, Senators Patrick Leahy (D-VT), Carl Levin (D-MI), Robert Byrd (D-WV), Joseph Lieberman (D-CT) and Jim Jeffords (I-VT) tried to turn back time in introducing the "Restoration of Freedom of Information Act of 2003." This bill seeks to amend the Homeland Security Act of 2002 to replace onerous provisions which allow private companies virtually free reign to hide potentially damaging information from public view by sharing it with the federal government with a compromise language that had been agreed to by Senators from both parties and which would have had markedly less impact on FOIA.

The Original Compromise

The Homeland Security Act of 2002 was originally introduced last Spring. It contained a simple, one paragraph FOIA exemption that allowed any company to share certain information with the federal government in a manner that would keep that information hidden from public view. It simply said that information provided by private companies to the federal government that was related in any way to terrorism or infrastructure vulnerabilities would be exempted from public access through FOIA.

Fearing that FOIA itself would effectively be gutted, a number of FOIA advocates began working with Senators Levin, Leahy and Robert Bennett (R-UT) to minimize the damage. This "compromise bill" would still have contained an exemption from FOIA, but that exemption would have been limited to any *records* voluntarily submitted to the Department of Homeland Security by a private company which pertained to the *vulnerability of* and *threats to* the critical infrastructure.

The critical infrastructure was defined as any systems and assets, whether physical or computer-based, so vital to the United States that their incapacitation or destruction would have a debilitating impact on security, national economic security, national public health or safety. Information would be considered to have been "furnished voluntarily" — and thus protected from disclosure — if:

(1) there was no requirement that they be submitted; and
(2) the records were not submitted to satisfy any legal obligation or requirement or to obtain any grant, permit, benefit, loan, reduction or modification of agency penalty or ruling.

Records could still be used in any criminal proceeding, including agency regulatory proceedings or Congressional investigations, or as evidence in a civil lawsuit. In addition, redaction provisions existed to make access as comprehensive as possible, allowing any reasonably segregable portion of a record to be provided to any person. Finally, no penalties existed for those who released protected information.

"Lame Duck" Passed Big Exemptions

Upon return to a "lame duck" session in November, Senate Republicans, with little vocal opposition, rushed through a version of the Homeland Security Act, eventually enacted into law that once again threatened the very viability of access to government information. Instead of simply containing a FOIA exemption, the final version of this section con-

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tained three exemptions applicable when a private company provides *any* critical infrastructure information to the government, if such protection is requested when the information is voluntarily submitted to *any federal agency*:

(1) an antitrust exemption that allows private companies to share information with each other and the government;
(2) a "civil immunity" provision which prevents any information shared with the government from being used as evidence in a civil liability proceeding; though information can still be used in criminal, regulatory, and Congressional proceedings; and
(3) a FOIA exemption.

Finally, any government employee who releases critical infrastructure information described therein will be fired from his or her job, fined and potentially subject to up to one year in jail.

Information, Not Merely Records, Allowed Secrecy

Whereas the compromise bill said that only records would be protected, the final version states that a company need only provide information, whether or not in record form, to the government in order to receive this exemption. This means that if a private entity orally discloses information that is not reduced to writing and that information is later memorialized into an agency record, it becomes exempt from FOIA.

Further, the definition of "furnished voluntarily" is quite broad, covering anything that is voluntarily submitted, whether or not the agency has the authority to require its disclosure. There are no redaction provisions that would allow for release of some portions of the records.

Finally, any government employee who releases critical infrastructure information described therein will be fired from his or her job, fined and potentially subject to up to one year in jail.

The Restoration of Freedom of Information Act of 2003 would simply reinstate the compromise language in its entirety. While it is still a FOIA exemption, many access-oriented groups have begrudgingly accepted this language as the only viable method of saving the overall future of the federal Freedom of Information Act.

Kevin Goldberg is an associate with Cohn & Marks LLP in Washington, D.C.

9/11 Access Cases Continue

In the Middle East, the Pentagon has taken a approach to press access to military operations that is different from that of recent incursions, by "imbedding" reporters with American troops as they prepare for a war with Iraq – although there were questions of how well this system will work in actual battle.

At home, meanwhile, media attorneys continued to fight for access in a myriad of court cases that have resulted from the Sept. 11 attacks and the ensuing war on terrorism.

Appeals Court Holds Secret Argument

On March 5, the 11th Circuit Court of Appeals in Atlanta held a closed argument in the appeal of a civil case apparently brought by a Algerian man who was one of about 1,200 Arab and Muslim men who were detained in the wake of the Sept. 11 terrorist attacks.

In addition to the closed hearing, information about the case was removed from the court's public calendar, and visitors to the court's docket information website are told that the case is "not available" and that they should contact the court clerk's office for more information.

According to the *Miami Daily Business Review*, which first reported on the closed argument, the docket was removed from the website after the newspaper's reporter asked why the calendar had been altered but the docket remained on the web site.

Eleventh Circuit Chief Deputy Clerk Robert Phelps told the *Business Review* that the case was removed from the appellate court's calendar because "it shouldn't have been there in the first place." When asked by the *Business Review* reporter why the case was still on the court's website, Phelps

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responded, "It is? We'll have to fix that too." Later that day, the case had been removed.

The case is also missing from the docket information site for the Southern District of Florida, where it apparently originated.

The case, *Bellahouel v. Wetzel*, No. 02-11060 (11th Cir. argued March 5, 2003), appears to involve a challenge to the detention of Mohamed Kamel Bellahouel; the defendant is Monica S. Wetzel, former warden of the Federal Correctional Institution in Miami. Bellahouel has been released, and is currently living in Deerfield Beach. He would not comment to the *Daily Business Review* except to say that he was "not allowed" to speak about the case.

Government Seeks to Seal Florida Case

In another case reported by the *Miami Daily Business Review*, the government has moved to seal all documents in a habeas petition brought by a man with alleged terrorist ties who has been ordered deported for overstaying his visa.

South Florida Muslim activist Adham Amin Hassoun was arrested last June. At the time, government officials announced that he had ties to Jose Padilla, who is being held on suspicion that he was planning to detonate a "dirty bomb." The evidence regarding Hassoun's alleged terrorist ties is secret, and cannot be disclosed to anyone other than his attorney, who says that the evidence does not show any such connection. Hassoun was denied bail at a closed hearing on Aug. 6, 2002, and he was ordered deported for overstaying his visa at another closed hearing in January.

In December, Hassoun filed a habeas petition with the Southern District of Florida. *Hassoun v. U.S. Attorney General*, Civil No. 02-23576 (S.D. Fla. filed Dec. 18, 2002). The government's documents responding to this case have been sealed, and, according to the *Daily Business Review*, in its March 4 filing – which itself was among the sealed documents – the government moved to seal the entire case.

Media Seek Transcripts in New Jersey Case

Meanwhile, several newspapers have filed suit seeking transcripts of closed remand and bail hearings held in the case of an Egyptian immigrant accused of creating forged IDs. *In re Release of Sealed Transcripts in the matter of Mohammed M. El-Atriss*, No. L 917-03 (N.J. Super. Ct., Passaic County).

Louis Pashman of Pashman Stein in Hackensack, N.J. filed the suit on behalf of *The New Jersey Law Journal*, *The Record* of Hackensack, N.J., the Newark, N.J. *Star Ledger*, *The Herald News* of West Paterson, N.J., *The New York Times*, and *The Washington Post*.

The closure hearings occurred in the case of Mohammed El-Atriss, who was arrested after a raid on his home and business by the Passaic County sheriff's office.

After El-Atriss was arrested, Judge Marilyn C. Clark of the New Jersey Superior Court sent a letter to both the prosecution and defense counsel suggesting that proceedings in the case be closed and that the case record be sealed. Senior Assistant Passaic County Prosecutor Steven Brizek then formally requested closure, and El-Atriss's attorney at the time did not object. She granted the closure motion and held three closed bail hearings, from which even El-Atriss and his attorney were excluded. But her closure order was reversed and remanded after El-Atriss's new lawyer appealed. *See MLRC MediaLawLetter*, Feb. 2003, at 45.

After the appellate court remanded the case, El-Atriss pleaded guilty to third-degree sale of simulated documents, and was sentenced to five years probation.

AP Gets Some Access to 9/11 Documents

A Manhattan Surrogate's Court judge has granted the Associated Press' motion for access to some court documents used to quickly issue death certificates for victims of the Sept. 11 attack on the World Trade Center, while withholding judgment on access to others and directing that some documents should remain sealed.

The court granted access to most court rulings on issuance of death certificates, and to redacted versions of employers' affidavits regarding victims' presence at the scene of the disaster. But the judge withheld affidavits by family members of the victims and their personal items found in the debris.

The documents and materials were filed as part of a special procedure set up after the disaster. Under this procedure, relatives, employers and others submitted affidavits and evidence showing that a particular missing person was a victim of the attacks. These were reviewed by New York City's Corporation Counsel office (the city's in-house legal

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department) and the city's medical examiner, and were then submitted to the court for a determination whether the documentation was adequate for a death certificate to be issued.

More than 2,700 death certificates were issued through this process, but about 50 applications were rejected by the court for suspected fraud.

In court, this process took the form of a proceeding against the city's health commissioner, Dr. Thomas R. Frieden, brought by the city's medical examiner, Dr. Charles Hirsch. *See Hirsch v. Frieden*, No. 754000/01 (N.Y. Sup. Ct., N.Y. County filed Sept. 2001). The AP intervened in this case to obtain access to the documents.

In January, Surrogate Eve Preminger appointed NYU Law Professor and former ACLU legal director Burt Neuborne to represent the interests of the families on the issue of public access to the documents. After reviewing some of the files and speaking with representatives of the families Neuborne recommended that all affidavits filed by families remain sealed, but urged disclosure in full of any applications that were found to be fraudulent. He also recommended that personal information such as Social Security numbers and salary information not be disclosed, but that court orders granting or denying death certificates should be made public.

In her decision on the access issue, Preminger recognized the right of public access to court records. But she added that New York law requires a "balancing of 'the interests of the public as well as the parties." *Hirsch*, slip op. at 4, quoting 22 NYCRR 216.1. She then weighed these interests in considering releasing four types of material in the files: the court orders on death certificates, victims' personal items submitted to the court, employer affidavits, and family affidavits.

Preminger ordered release of all of the sealed court orders approving death certificates, which she said "contain only the name of the alleged missing person and are devoid of personal information," and thus "do not raise security or privacy concerns." But she gave the Manhattan District Attorney's Office 60 days to identify orders denying death certificates which, if released, could harm ongoing or future criminal investigations, after which she said she would rule on public disclosure of the denial orders.

On the second type of material, victims' personal items, Preminger noted that this material "could increase the risk of identity theft," and that during oral argument the AP had not objected to continued sealing of these documents. She thus ordered the material to remain sealed, saying that "while the public has a right to know the type of evidence considered by the Court in ruling in these proceedings, it has no legitimate interest in the particular information that has been documented." Slip op. at 5.

Based on these concerns, Preminger ruled that the third type of documents, affidavits from victims' employers, should be available in redacted form, with personal information such as Social Security numbers removed.

Preminger called the fourth category, affidavits by family members of the victims, "the most troublesome," since they contain "emotional accounts of a last conversation with the victim, and of the poignant efforts of family and friends to locate their loved ones...." Saying that such statements were given without the expectation that they would be made public, Preminger ruled that "the protection of the affiants' privacy in these circumstances outweighs the right of the public of access."

David Schulz and Jeff Drichta of Clifford Chance represented the Associated Press.

En Banc Eleventh Circuit Mixed On Atlanta Airport Newsrack Scheme

By Peter Canfield, Sean R. Smith and Marcia Bull Stadeker

On February 28, 2003, the Eleventh Circuit *en banc* unanimously declared that government is not "universally" precluded "from imposing profit-making or revenue-raising fees on First Amendment expression." *Atlanta Journal-Constitution, USA Today and The New York Times v. City of Atlanta*, 2003 WL 557327, ___ F.3d ___, 2003 U.S. App. LEXIS 3729 (11th Cir. 2003) (en banc) (Birch, J.) [accessible on line at http://law.emory.edu/11circuit/feb2003/00-14413.op2.html].

District Court Enjoined Regs

Before the Court was a permanent injunction barring as unconstitutional a proposed newsrack regulation scheme at the City of Atlanta's Hartsfield Airport. The scheme had been preliminarily enjoined by the trial court in 1996, *see* 1996 U.S. Dist. LEXIS 22591 (N.D. Ga. 1996) (Hunt, J.), and again in 1998, *see* 6 F.Supp. 2d 1359 (N.D. Ga. 1998) (Story, J.) (denying City's motion to dissolve injunction), and permanently enjoined in 2000, *see* 107 F. Supp. 2d 1375 (N.D. Ga. 2000) (Story, J.).

Government is not "universally" precluded "from imposing profit-making or revenue-raising fees on First Amendment expression."

By its terms, the permanent injunction prohibited the City from imposing any newsrack scheme at the airport that (1) vested officials with unfettered discretion in the granting or revoking of permits; (2) forced publishers to use newsracks bearing advertisements for other products (the original plan called for all airport newsracks to be plastered with Coca Cola advertising); or (3) required publishers to pay a fee not tied to the City's costs in administering the scheme.

The trial court held that this last provision of the injunction was mandated by *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991), in which the Eleventh Circuit had sustained a challenge to a Florida scheme to regulate newsracks in its highway rest areas, including a 5 cent per newspaper licensing fee. *Sentinel* held that "a licensing fee is permissible, but a state or municipality may charge no more than the amount needed to cover administrative costs." It reasoned that "government may not profit by imposing licensing or permit fees on the exercise of first amendment rights, and is prohibited from raising revenue under the guise of defraying its administrative costs." 936 F.2d at 1205.

11th Circuit Panel Upheld in Injunction

In early 2002, an Eleventh Circuit panel affirmed the injunction in its entirety. *See* 277 F.3d 1322 (11th Cir. 2002) (Hill, J., with Black and Stapleton, JJ.). However, the panel, like the trial court, questioned the wisdom of *Sentinel* and its prohibition of any revenue raising fee, particularly in light of the Second Circuit's decision in *Gannett Satellite Information Network, Inc. v. Metropolitan Transp. Authority*, 745 F.2d 767 (2d Cir. 1984). The trial court and the panel found that in *Gannett* the Second Circuit had ruled that government could charge a revenue-raising licensing fee, even on a protected activity, so long as it was acting in a "proprietary," as opposed to a "governmental," capacity. *See also Jacobsen v. City of Rapid City, S.D.*, 128 F.3d 660 (8th Cir. 1997).

En Banc Split Decision

Last summer, the Eleventh Circuit accepted the panel's invitation and granted reconsideration by the full court, *see* 298 F.3d 1251 (11th Cir. 2002), and, foreshadowing its eventual decision, asked counsel to focus briefs on two issues:

"1) Should we clarify the restrictive language in *Sentinel* … to acknowledge that a different analysis may be applicable where a municipality is acting in a principally proprietary, as opposed to a governmental, capacity?" and

"2) If so, should we adopt the reasoning of our sister circuits in *Gannett* … and *Jacobsen* … and permit a municipality to charge a revenue-raising fee, even on a protected activity, if it is acting in a proprietary, as opposed to a governmental, capacity?"

By its decision, the *en banc* Court, per Judge Stanley Birch, affirmed the trial court's injunction generally —

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including specifically its prohibitions of unrestrained official discretion and of forced advertising — but reversed its revenue-raising fee prohibition. The Court held

> "that when a government acts in a proprietary capacity, that is, in a role functionally indistinguishable from a private business, then commercially reasonable, profit-conscious contracts may be negotiated for distribution space in a non-public forum for First Amendment activities, subject to structural protections that reduce or eliminate the possibility of viewpoint discrimination." Slip op. at 29-30.

In reaching this conclusion, the Court noted the *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943), line of cases, in which the Supreme Court has held that a state may not impose a charge for the enjoyment of a right granted by the federal constitution where the fee is not calculated to defray the expense of administering the regulatory scheme. But the Court found that this line of cases "does not control" because, the Court reasoned, "the Plan at issue here is an outgrowth of [the City's] role as a business proprietor rather than its ordinary role as a regulator." Slip op. at 20, citing *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

In reaching its conclusion, the Court also noted but rejected as "unduly formalistic" the publishers' contention that the proposed newsrack fees were in effect a special tax on the press and thus prohibited by *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). As the Court stated, the Supreme Court in *Minneapolis Star* recognized that:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. … When the State singles out the press … the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.

Minneapolis Star , 460 U.S. at 585. *See also* 460 U.S. at 587-88 (immaterial that special tax on press approximated another generally applicable tax not imposed on press; "[i]f the real goal of this tax is to duplicate the sales tax, it is difficult to see why the State did not achieve that goal by the obvious and effective expedient of applying the sales tax").

Here, the Court reasoned, *Minneapolis Star* is inapplicable because these fees are part of the general scheme of the Airport to "tax" those vendors who are granted space in the facility. Slip op. at 25.

> "True, the contracts made by the Department with the publishers involve a different method of computing the fee due than the contracts with other Airport vendors. Moreover, the amount of the fee is not linked by some mathematical scale to the fees imposed on other vendors in the Airport. However, this is not a fee, like that involved in *Minneapolis Star*, that has no analogue in the general scheme of regulation." *Id.* at 26.

With respect to the specific amount of the fee — $20 per month per newsrack — the Court held it to be "facially reasonable; it does not appear that the Department is applying monopolistic muscle to the publishers." *Id.* at 22. The Court noted that

> "[i]t would be different if the Department set a prohibitively high fee for use of the newsracks. However, the charges imposed do not strike us as outside the reasonable bounds for this alternative distribution channel…" *Id.*

But, the Court went on to say, "though we find that the Department could impose a profit-conscious fee on publishers who wished to distribute newspapers through newsracks, we also find that the manner in which the Department is able to exercise this prerogative runs afoul of the Constitution's concern over unbridled official discretion in the First Amendment area," emphasizing the panel's concern that "the department's plan contains no explicit limits on airport personnel's power to cancel news rack licenses" and its recognition that "[s]uch unbridled discretion vests broad censorial power in government and this the Constitution does not permit." *Id.* at 28.

The Court remanded the case to the district court for further proceedings consistent with its opinion, specifically leaving open the issue of whether the City would be entitled

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to back rent for newsracks placed at the airport while the injunction was in place. *Id.* at 30-31.

This last issue prompted three concurring opinions, evidencing disagreement as to whether the City could be entitled to back rent on a newsrack plan that the Court held was otherwise properly enjoined as obviously unconstitutional.

Judge Ed Carnes, writing for himself and Judge Joel Dubina (with Judge Gerald Tjoflat separately concurring), argued that the publishers were required to pay back rent, employing strong language to make his point: "[T]he district court must force them to pay up, just as courts forced the robber barons of old to pay what they owed." *Id.* at 41.

Judge Rosemary Barkett disagreed, arguing that the City could not collect back fees "because it has never formulated a licensing scheme that would suitably constrain airport officials' discretion." *Id.* at 42.

Judge Lanier Anderson, in another separate concurring opinion, noted that he joined in the Court's overall opinion "[b]elieving as I do that the opinion for the court with respect to unbridled discretion applies not only to accepting or rejecting a potential publisher's request to rent a news rack and the cancellation thereof, but also to the determination of the amount of the rent charged." *Id.* at 33. Citing *Minneapolis Star*, he went on to note that "in determining the amount of the rent, a rental charge based on the same formula applied to the rental of space for other purposes in the airport would constitute a generally applicable rent, and virtually foreclose a First Amendment challenge based upon the amount of the rent." *Id.* Otherwise, he acknowledged "some reluctance with respect to placing undue reliance upon the distinction between a proprietorship capacity and a governmental function," citing the Supreme Court's rejection of the distinction in a number of contexts. *Id.* at 34. But he argued that the Supreme Court effectively recognized such a distinction in *Murdock* and noted the "possibility of suppression or censorship which concerned the Court in *Murdock* is significantly diluted here because the instant rental charge is considerably more indirect with respect to its impact upon speech, as compared to the fees charged in *Murdock* for the privilege of canvassing." *Id.* at 34-35.

Peter Canfield, Sean Smith and Marcia Bull Stadeker of Dow, Lohnes & Albertson have represented the Atlanta Journal-Constitution and the New York Times. USA Today has been represented by James Rawls and Eric Schroeder of Powell, Goldstein, Fraser & Murphy. The City of Atlanta has been represented by William Boice and Scott Tewes of Kilpatrick Stockton and by the office of the Atlanta City Attorney.

Federal and State Courts Enjoin Cities' Ordinances

By Roger Myers and Gregory Jung

Two courts – a federal district court and a California appellate court – have upheld newspapers' constitutional challenges to municipal ordinances that severely restricted the number of newsracks available in the cities' prime distribution areas and imposed a lottery to distribute the suddenly scarce newsrack permits. In affirming a permanent injunction after trial in the state case and issuing a preliminary injunction in the federal case, the courts found that the numerical restrictions (and, in one case, the lottery) were arbitrary and not narrowly tailored to address the cities' cited interests in health, safety and aesthetics. *Napa Valley Publishing Co. v. Calistoga*, 225 F. Supp. 2d 1176 (N.D. Cal. 2002); *San Luis Obispo Tribune v. El Paso De Robles*, 2002 WL 31812737 (Cal. Ct. App. 2002).

The Federal Case

In the federal case, the district court preliminarily enjoined a newsrack ordinance (Judge Chen) issued in 2001 by the City of Calistoga to preserve, the City said, the aesthetic appeal of the heavily touristed downtown area of this Napa Valley town. *Napa Valley Publishing*, 225 F. Supp. 2d at 1179. The evidence showed that much of the aesthetic problem had stemmed from some merchants discarding newsracks placed in front of their establishments – including by occasionally dumping newsracks in the nearby river. Rather than police local merchants, the City sought to regulate the rights of out-of-town publishers who distribute periodicals in the downtown area.

Calistoga's ordinance limited the number of newsracks available in any one block to eight (with three exceptions) and required that they all be included in a "modular" or

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"pedestal" newsrack at locations designated by the City. Publishers must apply each year for a permit for each newsrack location they desire and, if the number of applications for a given block are greater than the number of newsracks permitted, the permits are allocated by lottery. The ordinance also required applicants to obtain a permit under the City's Encroachment Ordinance, which could be denied at the discretion of the City.

No challenge was brought to the ordinance in 2001 because the publishers were able to agree on distribution of the available permits, thereby avoiding a lottery. But more publications applied for permits in 2002, and a lottery was held last April for all nine downtown locations. As a result of the lottery, Napa Valley Publishing Company, a subsidiary of Pulitzer Newspapers, Inc., lost its permit for the prime newsrack location for its paid daily newspaper, *The Napa Valley Register*, which accounted for one-third of all NVP's single sales in Calistoga, as well as four other permits (one for the *Register* and the rest for NVP's free publications, *Inside Napa Valley* and *Distinctive Properties*). After administrative appeals were denied, NVP filed suit in federal district court in San Francisco challenging the Calistoga ordinance.

Preliminary Injunction Standard Challenged

In issuing its preliminary injunction, the district court as a threshold matter rejected the City's contention that NVP would be unable to show irreparable harm if it were unable to show a likelihood of success on the merits. This is significant because, in the Ninth Circuit, the merits part of the injunction test can be met either by showing a likelihood of success *or* by showing serious questions going to the merits. While a likelihood of success in a First Amendment case establishes a sufficient threat of irreparable harm to free speech rights to warrant injunctive relief, the City argued that only raising serious questions was insufficient to establish such a threat.

Rejecting this argument, the district court held that, even if a plaintiff in a First Amendment case only shows "serious questions on the merits, it thereby establishes a distinct possibility that its constitutional rights would be violated absent the preliminary injunction." This threat is "especially significant (and irremediable) for a periodic publication whose publication loses value with each passing period," the court noted, because "lost opportunity to disseminate time sensitive speech cannot be remedied after trial." *Id.* at 1181-82.

This threshold determination became significant because, with one exception, the district court found NVP had only raised serious questions about the merits of the City's ordinance. While the court did find that NVP had shown a likelihood of success on its claim that the City had unbridled discretion to grant or deny an encroachment permit, the court found this only justified an injunction against the Encroachment Ordinance, but would not, by itself, support an injunction against the numerical restrictions and lottery.

9th Circuit Inconsistent on Proof Needed

With respect to the numerical restrictions, the court found only a serious question on the merits due to inconsistency in Ninth Circuit precedent as to the quantum of proof the City must present to justify the breadth of its regulation – *i.e.*, to show that a time, place and manner regulation is narrowly tailored.

In several cases, the Ninth Circuit has held the municipality must provide "'tangible evidence' that speech-restrictive regulations are 'necessary' to advanced the proffered interest." *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 863 (9th Cir. 2001) (quoting *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990)). If those cases controlled, the court noted, NVP would prevail because the City has presented no such evidence supporting its numerical restrictions.

But in a case decided just as NVP was filing suit, the Ninth Circuit upheld Honolulu's ordinance regulating newsracks in Waikiki in a decision that seemed not to require such tangible evidence but instead deferred if the municipality's decision appeared "reasonable." *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1043-44 (9th Cir. 2002).

Finding these authorities difficult to reconcile, the district court opined that the amount of evidence required may turn on the regulations' impact on speech and found, at the least, a serious question as to "why the number of newsracks could not be expanded to accommodate more, if not all publications, without jeopardizing the City's asserted interests." *Napa Valley Publishing*, 225 F. Supp. 2d at 1195-96.

Since the court found these questions regarding the numerical restrictions were sufficient to support an injunction, it did not address the merits of NVP's argument that the lot-

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tery was arbitrary because it conditioned the exercise of First Amendment rights on the functional equivalent of an annual roll of the dice. Two months later, however, the California Court of Appeal held that a similar lottery provision was arbitrary.

The State Case

In the *San Luis Obispo Tribune* case, two publishing companies had challenged an ordinance issued by the City of El Paso de Los Robles ("Paso Robles") – also motivated by the complaints of local merchants – that also restricted the number and location of newsracks within the City and imposed a lottery for the available permits. After a bench trial, the superior court found both the numerical restrictions and the lottery were arbitrary and not narrowly tailored to advancing the City's stated interests. The California Court of Appeal (Judge Perren) affirmed the trial court's decision.[1]

The measures used by Paso Robles were similar to those used by Calistoga to restrict newsracks within the city. The Paso Robles ordinance restricted the number of newsracks to one for every 100 linear feet of a city block, and no more than three newsracks could be placed on any block. If more than three publishers or distributors sought to place newsracks on the same block, the City allocated the newsracks by lottery.

In affirming the decision striking down the Paso Robles ordinance, the Court of Appeal noted that distribution by newsracks is an important means of distributing First Amendment-protected speech because they "are relatively inexpensive … and they provide a venue for quietly disseminating ideas day or night, even when other public forums and businesses are closed." *San Luis Obispo Tribune*, 2002 WL 31812737 *5.

The Court of Appeal found that the numerical restrictions the ordinance imposed on this mode of First Amendment expression had not been justified by the City, which offered no evidence supporting its numerical restrictions. With respect to other aspects of the ordinance at issue, the Court of Appeal was "also concerned about the pernicious effects the proposed lottery might have on publishers and citizens" because the "evidence established that the loss of prime spots downtown through a lottery would result in devastating permanent losses of circulation." *Id.* at **5-6.

The California Court of Appeal distinguished the Ninth Circuit's decision in *Honolulu Weekly* by noting, first, that the record in that case had justified the restrictions by showing that Waikiki (unlike Paso Robles and even Calistoga) was one of the most visited and congested districts in heavily-touristed Honolulu; second, that, under the First Amendment, *Honolulu Weekly* could not be read to allow cities to "restrict the number of newsracks and conduct lotteries without any attempt to show there is even a rational relationship between the restrictions and the purposes set forth in the ordinance"; and, third, that Paso Robles' ordinance also fails under California law, "which is more protective, definitive and inclusive than federal law." *Id.* at *7.

These two cases illustrate, once again, that both federal and state courts will require such restrictions to be narrowly tailored to advancing a legitimate governmental interest

No Clear Guidelines

While these two cases provide some guidance for both publishers and cities in defining when restrictions on the newsracks go too far, they give little guidance as when such restrictions would pass constitutional muster (such as the type of evidence necessary to justify the numerical restrictions or a lottery). It is likely, however, that courts in California will have further opportunities to do so, as cities in this state are enacting such ordinances with increasing frequency. At the least, these two cases illustrate, once again, that both federal and state courts will require such restrictions to be narrowly tailored to advancing a legitimate governmental interest, and the battle will typically be fought over the quantum of evidence that a local government must present to meet this test.

Mr. Myers is a partner and Mr. Jung an associate at Steinhart & Falconer LLP in San Francisco, which represented plaintiff Napa Valley Publishing Company *in the federal case. Dennis D. Law and Mary E. McAlister of Andre, Morris & Buttery represented plaintiff* San Luis Obispo Tribune *in the state case, while the law firm of McDonough, Holland & Allen represented the defendant cities in both cases.*

[1] This opinion has not been officially published. However, plaintiffs and others have requested that the Court of Appeal certify the opinion for publication.

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