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Surfer Magazine and Author Win Libel Trial in Hawaii

Jury Finds No Falsity

By Elijah Yip

A surfing magazine and the authors of two pieces published in the magazine prevailed in a defamation trial in the federal district court of Hawaii this month. *Craig Elmer ("Owl") v. Journal Concepts, Inc., et al.*, No. 07-00002 JMS/LEK (D. Haw. March 5, 2009).

The jury trial lasted eight trial days. U.S. District Judge J. Michael Seabright presided. This was one of the few defamation cases in Hawaii to be tried before a federal jury in the past three decades.

Background

The plaintiff, Craig Elmer "Owl" Chapman ("Chapman") is a surfer and shaper of surfboards living on the North Shore of Oahu, Hawaii, which is reputed as the "mecca" of surfing. Chapman is known as an icon of the "soul surfing" era in the 1970's. In the summer of 2007, *The Surfer's Journal* ("TSJ"), a magazine whose readership consisted predominantly of surfers, published an article about Chapman.

The author wrote about his adventures in ordering a custom surfboard from Chapman to capture the legend behind Chapman. The article was accompanied with photographs of Chapman in and around the North Shore and his shaping room. The issue of TSJ in which the article appeared also contained liner notes in which the publisher of TSJ shared his impressions of Chapman and reprinted anecdotes and commentary on Chapman from people who knew him.

Chapman sued TSJ, its publishers, various editors, the author of the subject article, and the photographer who took the pictures appearing in the article. The complaint sought damages for defamation, invasion of privacy, misappropriation of identity, disparagement of trade, false light, and emotional distress. Chapman decided to pursue only his defamation claim at trial.

Pretrial Decisions

Prior to trial, the court had entered two summary judgment orders. The first order determined that Chapman is a general purpose public figure who must satisfy the "actual malice" standard established in *New York Times v. Sullivan*, 376 U.S. 254 (1964). Chapman and the defendants then filed cross-motions for summary judgment. The court held that most of the statements in the article and



liner notes were not actionable defamation because they did not imply objective facts or were not reasonably susceptible to defamatory meaning.

Examples included statements like "Owl is a survivor on his own planet," "Owl was always a soul-monster," and the

article's literary references to counterculture icon William Burroughs, which Chapman interpreted to mean that he shared certain deviant traits of Burroughs. The court also held that the non-author defendants did not act with actual malice, rejecting Chapman's argument that they failed to conduct an adequate investigation of the facts in the article and liner notes.

However, the court found triable issues with respect to statements concerning (1) the author's experience in ordering a surfboard from Chapman; (2) a quote referring to his altercation with another surfer; (3) a quote attributed to him that referred to another well-known surfer in derogatory terms; (4) references to him "dropping" in front of other surfers; and (5) a quote implying that until recently, he had not been sober. These statements were the subject of the trial.

Libel Trial

Defendants did not engage in any pre-selection jury research. In selecting jurors, defendants preferred jurors with a high level of education, low media bias, and familiarity with the sport of surfing. The composition of the jury was very "multi-ethnic." There was one juror who was a surfer.

Chapman called five witnesses at trial, including himself and the defendants as adverse witnesses. Defendants called no witnesses. Plaintiff's case was that the events in the article were entirely fabricated, and that the publisher failed to investigate the facts stated in the article and editorial commentary. Defendants trial theme was that the events in the article happened, that the factual assertions in the publications were substantially true, and that plaintiff's reputation prior to the publications was already questionable.

After Chapman rested his case, on motion by the defendants, the court granted judgment as a matter of law in

favor of the defendants on the claim regarding references to Chapman "dropping in" on other surfers. Those references had survived summary judgment because the court previously found factual questions as to Chapman's allegation that the statements were completely fabricated.

Chapman based his allegation on an audio recording of an interview between the publisher and one of Chapman's acquaintances. The "dropping in references" were gleaned from the interview. Chapman claimed that the publisher actually staged the interview staged the liner notes were published. After hearing all of the evidence presented by Chapman at trial, the court held that no reasonable juror could agree with Chapman's argument.

The other statements in the case went to the jury. After approximately one and a half hours of deliberation, the jury returned a verdict in favor of defendants, finding the no false statements.

Through juror interviews, defense counsel learned that the jury initially felt some sympathy for the plaintiff, but when they read the publications, they could not find anything false about them. Thus, following the court instructions, they could not award him any damages.

Jeffrey S. Portnoy and Elijah Yip of Cades Schutte LLP in Honolulu, Hawaii represented defendants Journal Concepts, Inc., dba The Surfer's Journal, Steve Pezman, Debbie Pezman, Jeff Johnson, Dan Milnor, Scott Hulet, and Jeff Divine. Plaintiff was represented by Arnold T. Phillips, II of Honolulu.

ANY DEVELOPMENTS YOU THINK OTHER MLRC MEMBERS SHOULD KNOW ABOUT?

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MEDIA LAW RESOURCE CENTER, INC.
520 EIGHTH AVE., NORTH TOWER 20TH FLOOR
NEW YORK, NY 10018

PH: 212.337.0200,
MEDIALAW@MEDIALAW.ORG

Update: First Circuit Rejects Rehearing in Noonan v. Staples Staples Waived Constitutional Objections to Qualified Truth Defense

The First Circuit this month rejected a petition for rehearing in *Noonan v. Staples* – the employment libel case in which a three judge panel unanimously – and surprisingly – held that truth is not an absolute defense to libel claims under Massachusetts law. [Noonan v. Staples](#), No. 07-2159, 2009 WL 723024 (1st Cir. March 18, 2009) (Lynch, Torruella, Boudin, Wallace, Lipez and Howard, JJ.).

Although the constitutional issues were extensively briefed by Staples, and in a media amicus brief joined by over 50 organizations, the court held that Staples had waived the issue by not expressly raising the issue in its initial briefing to the First Circuit. Moreover, the First Circuit denied the media motion to file its amicus brief because of an undisclosed conflict of interest that might have required recusal by one or more of the judges. The media coalition had planned to reapply for leave with only associational entities as amici when the court denied Staples motion on March 18th.

The Court's ruling denying rehearing, however, suggests that the Court might not have been persuaded by the constitutional objections. Staples, the court stated:

does not cite a case for the proposition that the First Amendment does not permit liability for true statements concerning matters of private concern. The Massachusetts Supreme Judicial Court (“SJC”) case relied upon by Staples did not hold that truth is an absolute defense in private concern cases, but rather that a private figure may recover for a negligently made defamatory falsehood in a case of *public concern*. *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161, 164 (Mass.1975). And the Supreme Court has stated that as to matters of private concern, the First Amendment does “not necessarily force any change in at least some of the features of the common-law landscape.” *Phila. Newspapers v. Hepps*, 475 U.S. 767, 775, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); *see also Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (“In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive

damages-even absent a showing of ‘actual malice.’ ”). invalidation of § 92 to matters of public concern. *Shaari v. Harvard Student Agencies*, 427 Mass. 129, 691 Thus, whether § 92 is a “feature[] of the common-law landscape” left unchanged for matters of private concern is an issue on which we now take no position.

As reported last month, a unanimous three-judge panel reinstated an employment libel case holding that under an obscure Massachusetts state statute truth is not an absolute defense in private figure / private concern cases. *See Noonan v. Staples, Inc.*, No. 07-2159, 2009 WL 350895 (1st Cir. Feb. 13, 2009).

The plaintiff in the case, a former Staples salesman, was fired for padding his expense reports. A Staples manager sent an e-mail to approximately 1,500 employees stating “It is with sincere regret that I must inform you of the termination of Alan Noonan’s employment with Staples. A thorough investigation determined that Alan was not in compliance with our [travel and expenses] policies.”

The First Circuit found that even if true the e-mail could be actionable if published with intent to harm the plaintiff under an obscure Massachusetts state statute last amended in 1902 entitled “Truth as justification for libel.” Massachusetts General Laws ch. 231, § 92 provides that:

The defendant in an action for writing or for publishing a libel may introduce in evidence the truth of the matter contained in the publication charged as libellous; and the *truth shall be a justification unless actual malice is proved*

The three-judge panel considered at some length the construction of the statute, concluding that given its age the phrase “actual malice” must refer to “malevolent intent or ill will.”

Plaintiff is represented by Wendy Sibbison, Greenfield, MA. Staples is represented by Seyfarth Shaw LLP. Robert Bertsche, Prince, Lobel, Glovsky & Tye LLP Boston coordinated the media amicus brief.

First Circuit Affirms Summary Judgment Dismissal of Libel and Privacy Claims Against Fox News

No Constitutional Malice

By Theresa M. House

Issued on the heels of its already infamous *Noonan* decision, the United States Court of Appeals for the First Circuit affirmed the summary judgment dismissal of libel and false light claims against Fox News Network, LLC and co-hosts of the *Fox & Friends* morning television program, while limiting *Noonan* to its specific facts. *Levesque v. Doocy*, No. 08-1814, 2009 WL 709430 (1st Cir. March 19, 2009).

In *Levesque*, the Court held that the public-official plaintiff did not present a triable issue as to whether the defendants acted recklessly in their newsgathering or expressed serious doubts about the truth of what they reported.

Factual Background

Leon Levesque, the superintendent of schools in Lewiston, Maine, alleged that the defendants defamed him and portrayed him in a false light in their reporting of an incident that occurred in April 2007 at the Lewiston Middle School. There, a middle-school student was suspended for ten days and investigated by police and prosecutors for potential hate crime charges after he placed a piece of ham on a school cafeteria table where Somali-Muslim students were sitting. The Somali students complained that the incident was intended to belittle their religious beliefs.

The *Lewiston Sun Journal* newspaper reported on the incident and quoted Levesque extensively. “The school incident is being treated seriously as ‘a hate incident,’” Levesque was quoted as saying, adding “We’ve got some work to do to turn this around and bring the school community back together again.” The *Sun Journal* also reported that Levesque had described the incident as “a possible hate crime” and stated that the school was working with a group called “the Center for the Prevention of Hate Violence” to create “a response plan.”

Almost immediately, the *Sun Journal* article was republished on a variety of internet blogs and news websites, many of which criticized Levesque and the school for their decision to suspend the student. On April 23, 2007, college student *cum* amateur news reporter Nicholas Plagman published an article with

his own take on the *Sun Journal*’s account of incident for Associated Content, a website that pays “citizen journalists” for writing and publishing articles on topics of their choice.

The Plagman article (which represented itself as a news report describing the facts of the incident, attributed itself to the *Associated Press*, and was retrievable on *Google News*) mischaracterized some of the details of the incident – reporting that the ham was a ham sandwich rather than a ham steak, and distorting, apparently for satirical effect, some of the facts and quotations in the *Sun Journal* article. For example, the Plagman article quoted Levesque as saying, “We’ve got some work to do to turn this around and bring the school community back together again... These children have got to learn that ham is not a toy,” and reported that the school was working with “the Center for the Prevention of Hate Violence... to create an anti-ham ‘response plan.’” It also quoted another individual described in the *Sun Journal* article as stating, “It’s extraordinarily hurtful and degrading. They probably felt like they were back in Mogadishu starving and being shot at.”

A line producer for *Fox & Friends* discovered the Plagman Article online in the early morning hours of April 24, 2007 and then referred it to the Fox research department for additional investigation. There, an information specialist corroborated the Plagman article by fact-checking the people and places it described, comparing its account of the incident to other previously published reports of the same (including an article published in the *Boston Globe* and the original *Sun Journal* article that inspired Plagman’s piece), and confirming that the *Sun Journal* was a legitimate newspaper.

Fox & Friends co-host Steve Doocy then conducted his own research of the incident on *Google News*, where he discovered the Plagman article and reviewed other news reports that corroborated the incident. None of the other articles, however, contained quotations identical to those Plagman had falsely attributed to Levesque. The producers decided to report and discuss the incident on that morning’s show.

During the three-hour morning cablecast, the co-hosts repeated some of the facts and quotations that were later discovered to have been fabricated by Plagman, including: (1) that the ham was

a “ham sandwich”; (2) that Levesque said, “These children have got to learn that ham is not a toy”; and (3) that Levesque said that the act was “akin to making these kids feel like they’re being shot at back in Mogadishu and being starved to death.”

After Levesque complained about these erroneous quotations, Fox issued an on-air apology and correction.

The District Court Proceedings

On June 22, 2007, Levesque filed suit for libel, libel per se, false light invasion of privacy, and punitive damages. He alleged Fox defamed him through five statements repeated on the cable program: (1) “... the superintendent and the school board [are] looking into perhaps other charges against the kid because it’s a hate crime”; (2) that the school was developing an “anti-ham ‘response plan’”; (3) “the superintendent... says, ‘[T]hese children have got to learn that ham is not a toy’”; (4) that it was “crazy” to suspend a student for a “ham sandwich”; and (5) “the superintendent... says it’s akin to making these kids feel like they’re being shot at back in Mogadishu and being starved to death.”

After discovery, defendants moved for summary judgment, arguing that the report was (a) not defamatory; (b) constitutionally protected as substantially true and opinion/rhetorical hyperbole; and (c) published without constitutional malice.

The District Court held that three of the five challenged statements were actionably false and defamatory (or “highly offensive” for the purposes of the false light claim). The District Court found that two statements – that the school and Levesque called the incident a hate crime and that the school was now working to develop an “anti-ham” response plan – were constitutionally protected as substantially true or statements of rhetorical hyperbole or opinion. It agreed with Levesque, however, that the false quotations and the reporting that the ham was a ham sandwich were defamatory in that they would tend to cause viewers to ridicule plaintiff.

The District Court nevertheless dismissed all claims because it found Levesque had failed to meet his burden to show clear and convincing proof of constitutional malice.

The Appeal

Levesque appealed the District Court’s finding on the nonactionable statements and its conclusion on the issue of actual malice. Levesque argued that the District Court had erred in: (1) crediting “self-interested” declarations, without the benefit of cross examination in trial, from the defendants stating that they believed

their report of the incident was accurate and true; (2) giving insufficient weight to plaintiff’s purported evidence of actual malice, including the defendants’ allegedly cursory research of the incident before reporting erroneous facts, on-air statements such as “I hope we’re not being duped” and “I thought this was almost from *The Onion*. I didn’t think this was actually true,” and the allegedly apparent unreliability of the Plagman article; and (3) ruling that some statements were substantially true and/or rhetorical hyperbole.

The defendants countered that: (1) the District Court correctly found no evidence of actual malice, not based on the declarations of the defendants, but rather on the basis that plaintiff failed to set forth affirmative evidence of constitutional malice; (2) plaintiff had not met his burden because failure to investigate is insufficient to show actual malice, even where the story is not “hot news,” and because the defendants did in fact conduct additional research, none of which contradicted the Plagman article; (3) the defendants had reason to believe the Plagman article was reliable because it tracked the *Sun Journal* and other clearly reliable reports of the incident, attributed itself to the *Associated Press*, and was republished on *Google News*; (4) the defendants’ on-air statements did not show they harbored doubts about the truth of what they were reporting, but rather in context they were meant and understood as colorful devices for attracting the audience’s attention to their report.

First Circuit Affirms Dismissal

On March 19, 2009, the Court of Appeals affirmed the District Court’s dismissal of all claims against the defendants. Before addressing the merits, the Court took pains to distinguish this case from *Noonan v. Staples*, even though *Noonan* addressed Massachusetts state law and Maine law applied to this case. In *Noonan*, the Court stated, the issue was *not* constitutional malice or even the constitutional protections afforded to free speech; to the contrary, the opinion rested on Massachusetts state law regarding common-law malice, defined as “malicious intention,” in the context of private-figure defamation.

Accordingly, the Court emphasized, *Noonan*’s analysis and holding was “inapplicable” to cases involving public officials, public figures, or matters of public concern. Further, the Court explicitly noted that the defendant in *Noonan* did not timely argue that constitutional protections applied to its speech, thus apparently leaving open the question of whether the rule in *Noonan* would stand where constitutional protections were at issue.

Turning to the matter before it, the Court first summarily affirmed the District Court’s findings on the non-actionable

statements, concluding that the description of the incident as a hate crime was substantially true and the characterization of the “anti-ham” response plan was also constitutionally protected rhetorical hyperbole inasmuch as it was a “succinct, perhaps distasteful, jingle” that could not “reasonably be interpreted as stating actual facts about [Levesque].”

For the remaining statements, the “ham sandwich” and the fictitious quotes, the Court likewise affirmed the District Court’s findings. The Court emphasized, however, that it was a “close question whether the references to a ham sandwich would have a different effect on the mind of a listener than an accurate report about a leftover ham steak,” and stated that it did not disturb the District Court’s finding largely because of the Court’s ultimate resolution of the constitutional malice question. Likewise, for the fictitious quotations, the Court expanded upon the District Court’s finding that they were actionably defamatory.

Rather than merely concluding that the quotations were defamatory because they would subject Levesque to ridicule, the Court found that because “the manner of expression or even the fact that the statement was made [can] indicat[e] a negative personal trait or an attitude the speaker does not hold,” the fictitious quotes were actionable in that they “encouraged viewers to form negative conclusions about Levesque, thus tending to harm his reputation.”

In the end, however, the First Circuit’s opinion turned on the issue of actual malice – and was as notable for defining the legal boundaries between actual malice and negligence in general as for its ultimate resolution of the issues of law presented by the facts of this case. The Court began by reaffirming that constitutional malice is *not* demonstrated by either reasonably prudent conduct nor by an industry’s professional standards; rather, it is “wholly subjective.”

The Court also took time to define what circumstantial evidence could, in appropriate factual circumstances, be sufficient to demonstrate constitutional malice: “where a publisher fabricates an account, makes inherently improbable allegations, relies on a source where there is an obvious reason to doubt its veracity, or deliberately ignores evidence that calls into question his published statements.”

Turning to the facts of this case, the Court rejected Levesque’s arguments that the defendants’ failure to corroborate the fabricated quotes coupled with their incredulous statements during the cablecast (e.g., “I thought this was a joke”) were sufficient to establish a jury question on the issue of constitutional malice. The Court found that although “[i]t is true that a more deliberate consideration of the Plagman article should have caused reasonable skepticism about the source and that the defendants were careless in relying on it,” this was, at most, evidence of “negligence, not actual

malice.” Here, the record showed that the defendants did not act with constitutional malice because they authenticated the Plagman report of the Lewiston incident by comparing it to other reputable news sources. Further, the Plagman article itself appeared reliable because (1) it cited the *Associated Press*; (2) it presented the “absurd” quotes attributed to Levesque “within larger, accurate comments that could be corroborated with the [*Sun Journal*] article”; and (3) it was corroborated by other sources. Moreover, Levesque “offered no evidence that the defendants deliberately limited their investigatory inquiry.” In so finding, the Court noted that reliance on Internet sources, even those that are not subjected to the same vetting process as traditional printed reports, does not in itself alter the actual malice equation.

The defendants’ on-air statements also did not disturb this conclusion, the Court found, because in the “context of a consistently irreverent (and to many, insensitive) morning television show... such statements frequently are used as devices to magnify the presentation and grab viewers’ attention.” For this reason, and because the Court found that many of these statements referred to the true portions of the report rather than the alleged errors, the Court concluded that these statements “do nothing to undermine the defendants’ sworn testimony regarding their belief in the veracity of the Plagman article.”

In sum, the Court distinguished the legal contours of the constitutional malice rule, conscientiously differentiating the proof necessary to show clear and convincing evidence of subjective doubt from that sufficient to show negligence. Here, the defendants’ investigation, however brief, was sufficient. Plaintiff could point to no area of inquiry that the defendants “purposefully avoided”; their investigation failed to produce any information that contradicted the facts as they believed them to be.

In this context, the Court found that even though their sympathies may go to the Plaintiff, the “substantial truth of the story which [the defendants] reported obviates a finding of actual malice.” In so doing, the Court upheld the high burden of proof required for public officials to present a jury issue on constitutional malice with convincing clarity, and issued an opinion that could serve as a benchmark in the Circuit on the legal boundary between negligence and reckless disregard for the truth.

Dori Ann Hanswirth and Theresa M. House of Hogan & Hartson LLP, New York City, and David Soley and John M. R. Paterson of Bernstein, Shur, Portland, Maine represented Fox News Network, LLC, Steve Doocy, and Brian Kilmeade. Plaintiff was represented by Bernard J. Kubetz and Mark D. Beaumont of Eaton Peabody, Bangor, Maine.

Maryland Court of Appeals Adopts Rigorous Test For Unmasking Anonymous Internet Posters

By Mark I. Bailen and Laurie A. Babinski

In a case of first impression in Maryland that pitted a libel plaintiff's ability to unmask unnamed defendants against First Amendment rights to anonymous speech, the Maryland Court of Appeals last month quashed a subpoena issued to Independent Newspapers, Inc. for the identity of posters who allegedly made defamatory comments on the newspaper company's "www.Newszip.com" message board forum for Centreville, Maryland. *Independent Newspapers, Inc. v. Brodie*, No. 63 (Md. Feb. 27, 2009).

The Court – one of only two state high court decisions so far on this subject – adopted a five-prong test based on New Jersey's "*Dendrite*" standard that must be satisfied before forcing a publisher to comply with a subpoena for the identities of anonymous posters.

Background

Zebulon Brodie, the owner of a Dunkin Donuts franchise, among other businesses in Queen Anne's County, Maryland, filed a two-count complaint for defamation and conspiracy to defame on May 26, 2006 against Independent Newspapers, Inc. and three John Doe defendants – anonymous message board posters who used the screen names "CorsicaRiver," "Born & Raised Here" and "chatdusoliel." Brodie alleged that postings on the message board by the John Doe defendants falsely accused him of "maintaining 'dirty and unsanitary-looking food-service places' and allowing trash from those establishments to 'waft' into the nearby waterway." Brodie further alleged that he was defamed by postings purportedly accusing him of burning down an historic home and having no "sense of decency."

Independent Newspapers filed a motion to dismiss arguing immunity under Section 230 of the Communications Decency Act, non-actionable opinion, and that the statements regarding the historic home were not "of and concerning" Brodie because they actually referenced a developer who bought the house from Brodie, as was evident from the posted comments. The circuit court dismissed Independent Newspapers from the case on Section 230 grounds on November 21, 2006.

Brodie also subpoenaed Independent Newspapers for any identifying information for "CorsicaRiver," "Born & Raised Here" and "chatdusoliel." Independent Newspapers moved for a protective order to prevent disclosure, but the trial court denied the motion in its November 21, 2006 order. On reconsideration, the circuit court granted the motion in part on March 12, 2007, holding that "the piety of the First Amendment requires ensuring that Plaintiff has stated a valid claim for defamation." The circuit court dismissed the cause of action premised on the statements regarding the burning of Brodie's former home, but ordered Independent Newspapers to comply with the subpoena relating to the commentary on the Dunkin Donuts.

Thereafter, Brodie served a second subpoena purportedly seeking identifying information for the posters making the comments regarding the Dunkin Donuts but it included the three John Does named in the complaint as well as two additional posters, "RockyRacoonMD" and "Suze," neither of whom were named in the complaint. Independent Newspapers filed another motion to quash the subpoena and for a protective order, arguing that the identities of "CorsicaRiver," "Born & Raised Here" and "chatdusoliel" were no longer relevant to the case because the claim based on statements they allegedly made had been dismissed, and that Brodie had not named and could not name, based on Maryland's one-year statute of limitations, "RockyRacoonMD" and "Suze" as defendants. On February 19, 2008, the circuit court denied Independent Newspapers' motion and ordered disclosure of the identifying information for all five posters.

Independent Newspapers appealed the circuit court's order to the Court of Special Appeals, Maryland's intermediate appellate court. After Independent Newspapers and two groups of *amici curiae* supporting the newspaper company submitted opening briefs, the Maryland Court of Appeals – the state's highest court – granted *certiorari* on its own initiative.

Maryland Court of Appeals Decision

In a 44-page opinion issued on February 27, 2009, the Court of Appeals held that the circuit court abused its discretion when it denied Independent Newspapers' motion for a protective order because Brodie had not pleaded a valid defamation claim

against any of the posters whose identities he sought. The circuit court already determined that “CorsicaRiver,” “Born & Raised Here” and “chatdusoliel” made comments that were not actionable because they were not concerning Brodie. The two posters who made statements that were allegedly defamatory, “RockyRacoonMD” and “Suze,” according to plaintiff’s counsel, were not initially named as defendants in the action and could not be added because of Maryland’s one-year statute of limitations on defamation claims. With no viable cause of action against any defendant, the Court of Appeals held that the identities of the posters could not be compelled.

The Court of Appeals noted, however, that it “did not take this issue just to sort out the record but to give guidance to trial courts addressing similar matters.” Recognizing that it was “presented with a confrontation between defamation law and the use of the World Wide Web,” the Court reviewed the various methods of communication on the Internet, including email (both “email client” and “web-based email”), instant messaging, blogs, chatrooms, and discussion forums. It also reviewed the First Amendment protection of anonymous Internet speech, noting that since the early 1990s, “anonymity and pseudonymity has been a part of the Internet culture” and that both the United States Supreme Court and the Maryland Court of Appeals have acknowledged the “magnitude of the protection of anonymous speech under the First Amendment.”

Against this backdrop, the Court laid out the standard that trial courts in Maryland should employ when “balancing an individual’s First Amendment right to speak anonymously on the Internet against a plaintiff’s right to seek judicial redress for defamation.” As the Court noted, “[o]n the one hand, posters have a First Amendment right to retain their anonymity and not be subject to frivolous suits for defamation brought solely to unmask their identity. ...On the other, viable causes for defamation should not be barred in the Internet context.”

After thorough discussion of the line of the cases that have adopted similar standards, including *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) and *Dendrite Int’l v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), the Court held that “a test requiring notice and an opportunity to be heard, coupled with a showing of a prima facie case and the application of a balancing test – such as the standard set forth in *Dendrite*, 775 A.2d at 760-61 – most appropriately balances a speaker’s constitutional right to anonymous Internet speech with a plaintiff’s right to seek judicial redress from defamatory remarks.” Specifically, the decision requires a trial

court confronted with a defamation action in which the plaintiff seeks the identity of an anonymous speaker to:

- “(1) require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, including posting a message of notification of the identity discovery request on the message board;
- (2) withhold action to afford the anonymous posters a reasonable opportunity to file and serve opposition to the application;
- (3) require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster, alleged to constitute actionable speech;
- (4) determine whether the complaint has set forth a prima facie defamation per se or per quod action against the anonymous posters; and
- (5), if all else is satisfied, balance the anonymous poster’s First Amendment right of free speech against the *strength* of the *prima facie* case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant’s identity, prior to ordering disclosure.”

While the decision to quash the subpoena was unanimous, three of the seven judges filed a concurrence that questioned the requisite evidence to establish a *prima facie* case, arguing that the majority opinion was not clear on whether a complaint alone, as opposed to affidavits and other evidence, would be sufficient. The concurrence also rejected the balancing test out of “fear that the majority decision invites the lower courts to apply, on an *ad hoc* basis, a ‘superlaw’ of Internet defamation that can trump the well-established defamation law” and “become an obstacle to pursuit of legitimate causes of action.”

Mark Bailen and Laurie Babinski, of Baker & Hostetler LLP in Washington, D.C. represented Independent Newspapers, Inc. in this matter along with their partner Bruce W. Sanford. Paul Levy and Adina Rosenbaum of Public Citizen Litigation Group joined as co-counsel to Independent Newspapers, Inc. on the appeal. E. Sean Poltrack of Foster, Braden, & Thompson LLP of Stevensville, Maryland, represented plaintiff Zebulon Brodie

Arkansas Supreme Court Holds That Fair Report Privilege Applies to Information Inadvertently Released by Police

By Andrew King

This month the Arkansas Supreme Court reaffirmed its broad interpretation of the fair report privilege and rejected arguments that a newspaper must investigate whether or not it should have access to information voluntarily released by the police department. *Whiteside v. Russellville Newspapers, Inc.*, No. 08-313 (Ark. Mar. 12, 2009).

Through its routine access to a dedicated terminal at the police department, the newspaper obtained witness statements that the department had intended to restrict from public access. Because the newspaper committed no wrongdoing in obtaining the information, it cannot be held liable for publishing a substantially correct account of the accusations in the report.

Background

The Whiteside case arose from a newspaper's coverage of local beauty queen Nona Dirksmeyer's gruesome murder. In 2005, Ryan Whiteside, Kevin Jones, and Jones's mother found Dirksmeyer's body naked and beaten to death in her Russellville, Arkansas apartment.

Jones was Dirksmeyer's ex-boyfriend; he was charged with her murder and later acquitted. While Jones was free on bond, a woman reported to the Russellville Police Department that Jones and Whiteside were involved in an alleged rape during a party at Whiteside's home. After hearing a radio report of the alleged rape, the *Russellville Courier* obtained copies of the incident report through the police department's computer system. The department maintained a dedicated terminal through which it allowed the media to access documents and records that it determined were available for public inspection.

Normally the system disclosed everything from an incident report except for the portion that included witness statements. When the *Courier* used the dedicated terminal

on January 10, 2007, however, it obtained a detailed report including witness statements. *The Courier's* editor asked the police department about the detailed report and was not told there were any restrictions on the release of the information.

The next day, the *Courier* published an article stating that the Arkansas State Police were investigating an alleged rape at Whiteside's home. The article referred to the incident report and repeated the accuser's allegation that Whiteside had sexual contact with the rape victim.

Whiteside sued the newspaper, alleging that the article was incomplete and misleading. He also asserted that a follow-up article on January 14, 2007, omitted reference to a letter by the prosecuting attorney stating there was no evidence that Whiteside had sexual contact with the victim. The trial court granted the newspaper's motion for summary judgment based on the fair-report privilege.

On appeal to the Arkansas Supreme Court, Whiteside argued that the witness statements in the police report should not have been considered part of the official document subject to the fair report privilege, the witness statements were not voluntarily and legally released, and the newspaper's publication was not a substantially fair and correct account of the police report and prosecutor's letter.

The Supreme Court's Decision

Relying on Restatement (Second) Torts Sec. 611, the Arkansas Supreme Court held that "a report of an official action or proceeding" encompasses witness statements and investigations by local and state police. It rejected Whiteside's contention that witness statements as to facts not yet part of a judicial proceeding or arrest are not privileged under comment h to section 611.

The Court cited case law from several jurisdictions to support its holding that "information released by the police, including reports and records, is considered to be a

report of an official action subject to the fair report privilege.”

The Court found no merit in Whiteside’s argument that the witness statements were not voluntarily and legally released. Its review of the record showed that, at best, the department’s release of the information was inadvertent. The Court held that newspapers have no duty to investigate whether they are supposed to have access to information provided by the police. To hold otherwise, wrote the Court, would result in “timidity and self-censorship” contrary to the First Amendment and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

As to Whiteside’s argument that the *Courier* articles were unfair and inaccurate, the Court reiterated its holding from *Butler v. Hearst-Argyle Television, Inc.*, 49 S.W.3d 116 (Ark. 2001), that the substantial-truth doctrine is applied in testing the accuracy of a report. As long as the gist or sting of the publication is essentially true, some minor conflicts between the article and the public proceeding will not eliminate the privilege.

Therefore, the confusing arrangement of certain statements in the *Courier* articles was not sufficient to destroy the fair-report privilege. The Court further held that malice and excessive publication are not part of the analysis.

The *Whiteside* decision protects media outlets that rely on police records and other official documents to report news, even when the government inadvertently released the records. It also confirms the broad scope of the fair-report privilege in Arkansas, which extends to any substantially true report of an official proceeding.

Andrew King is an associate with Williams & Anderson, PLC, Little Rock, AR. E.B. Chiles, IV, of Quattlebaum, Grooms, Tull & Burrow, PLLC, Little Rock, argued the case for Russellville Newspapers, Inc. John E. Tull, III, and Kristine G. Baker were with him on the brief. Plaintiff was represented by Henry Clay Moore of Houston, Texas.

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Court Tosses Golfer's Defamation Action

Truth, Opinion and Lack of Malice Protect Newspaper

By Timothy J. Conner

A Florida Court has thrown out a lawsuit brought by professional golfer, John P. Daly ("Daly"), over an unflattering sports column published in March 2005. [*John P. Daly v. Morris Publishing Group, LLC d/b/a The Florida Times-Union, et al.*](#), Circuit Court, Duval County, Florida.

On March 17, 2009, the Court entered an order granting final summary judgment (the "Order") in favor of the newspaper and the author, Mike Freeman, who now writes sports related columns for [cbssportsline.com](#). The Court based its ruling on findings that the facts stated in the column were true, that comparisons made to other sports figures were non-actionable expressions of opinion, and secondarily that there was no evidence of actual malice.

Other claims that were included in Daly's complaint, e.g., false light invasion of privacy, intentional infliction of emotional distress, and negligent hiring and supervision, were thrown out as well.

The Column

Daly is a well known professional golfer and public sports figure who promotes his image as the bad-boy of his sport. Daly was participating in the Players' Championship golf tournament put on by the PGA Tour in Ponte Vedra Beach, Florida (just outside Jacksonville) in 2005. Mike Freeman, at the time a sports columnist for *The Florida Times-Union*, wrote an opinion piece entitled "Daly, Duval Star in Golf's Surreal Life." Duval is David Duval, former British Open and Players' Championship winner. In the column, Freeman expressed opinions about the long-standing public controversy surrounding Daly's notorious career and personal life.

In relevant part the column stated (the underlined portions show the specific statements about which Daly complained):

A question. When will normally smart and skeptical sports fans stop making excuses for Daly and Duval and apply that same critical fan eye and sarcastic tongue they normally do to other pro athletes to these two men?

Particularly in terms of Daly. How does Daly not fail the scoundrel sniff test with fans despite possessing definite Thug Life qualifications? Look at the Daly blog. Domestic violence accusations? Yup. Substance abuse issues? Unfortunately. Three different kids from three different moms, making him the Shawn Kemp of golf? Yes. A former wife indicted for laundering illegal drug profits? Roger that.

He still received endorsement deals from TrimSpa and Dunkin Donuts despite a rap sheet that would make R.J. Soward look like a Backstreet Boy.

It is always interesting to observe what behavior fans and the media will tolerate from athletes. A hard-working Jaguars safety asks for more money and a trade and it's Armageddon. Daly hasn't played but one or two decent rounds of golf lately, abuses his body, is accused of smacking women around and fans are lined up five rows deep outside the ropes to get his autograph. Remarkable.

The Claims

Daly filed suit in 2005 alleging a series of defamation claims which can be grouped under the general headings of (1) the "Domestic Abuse" Counts, (2) the "Three Children/Three Moms" Counts and (3) the "Thug Life" Counts.

He advanced several arguments regarding the domestic abuse counts, including that he had never been accused of domestic abuse, and had in fact never hit a

woman, that the use of the word “is” in the column meant that he was currently accused as opposed to having been accused at one time in the distant past, and that the use of the word “women” indicated that there were multiple victims.

With respect to the three children/three moms counts, Daly alleged that the comparison made to Shawn Kemp, a one time star in the NBA who was reportedly notorious for having illegitimate children, meant that Daly’s children were illegitimate when in fact they were all born in wedlock.

As to the thug life counts, Daly complained that the comparison to R.J. Soward, a Jacksonville Jaguar football player who had been suspended by the NFL for substance abuse, implied that Daly had used illegal drugs such as cocaine, which, Daly contended, everyone knew had been the basis for R.J. Soward’s suspension from the NFL. Daly also complained that he did not have a “rap sheet” that would make R.J. Soward look like a Backstreet Boy.

In addition, as noted above, Daly also included claims for false light invasion of privacy, intentional infliction of emotional distress, and negligent hiring and supervision.

The Court’s Ruling

In the early stages of the case defendants filed a motion for summary judgment based on a number of publicly available documents about Daly, including court and police records, other columns and publications, books, and even Daly’s autobiography which he published shortly after the suit was filed. The Court denied the motion in 2006 in a one page order that did not discuss or analyze the merits of the case. Accordingly, the suit proceeded through extensive discovery, including numerous depositions of the parties.

Following that discovery, a renewed motion for summary judgment was filed in early 2009. This time, the Court found that the motion should be granted, determining that the facts stated in the column were true; domestic violence accusations, substance abuse, and three different kids by three different moms. The Court further ruled that

the comparisons were protected opinion, whether one agreed with the opinions or not.

First, the Court found that there was no genuine dispute that Daly is someone “accused” of domestic abuse. Daly had even admitted under oath at his deposition that he had been accused stemming from an incident in Castle Rock, Colorado by his then wife.

Q: You were accused of domestic abuse? ...

A: ... [Y]es, I was accused of it. ...

Daly also admitted that thereafter the words “John Daly” and “domestic abuse” were “locked together.” As a consequence of that incident, Daly had pled guilty to harassment under Colorado law which meant he was convicted of having “struck, shoved, kicked, or otherwise subjected [his wife] to an unlawful physical contact.” As part of his sentence, Daly was required to participate in domestic violence evaluation and treatment.

Daly attempted to argue that his wife had publicly recanted her accusation. The Court found this to be irrelevant because it did not change the fact that she had accused Daly, that the State of Colorado repeated the accusation in a criminal proceeding, and that Daly pleaded guilty to a crime based upon it.

Daly further attempted to argue that the use of the word “women” necessarily implied that he had been accused of domestic violence by multiple women, and that use of the word “is” suggested that the accusations were of more recent vintage. The Court rejected these efforts to so closely parse the language, and held:

Given the context of the Column, a sports-related opinion piece, Daly is incorrect that the phrase “smacking women around” should be read in such a literal fashion. ... Moreover, even if a reader interpreted the phrase as referring to more than one woman, it would not make a difference because the “sting” of the Column would be the same - that Daly has been accused of committing domestic abuse.

In addition, the Court found that even if Daly's interpretation were accepted, the evidence established that the statement was substantially true. The Court noted that it need not decide if in fact domestic abuse had actually occurred; the analysis stopped with a finding that Daly had been "accused."

Secondly, the Court addressed the three kids/three moms counts. With respect to these claims the Court found that the comparison to Shawn Kemp was pure opinion and therefore not actionable. In addressing the issue that the implication of the comparison was to suggest that Daly's children were illegitimate, the Court stated that

... interpersonal comparisons based upon stated facts are not actionable, even when a plaintiff contends they are poorly considered or otherwise offensive.

[t]he problem with this argument is that Daly could come up with any number of reasons why the analogy to Kemp is invalid and it would not matter. Under established First Amendment law, the question of whether an opinion is well thought out or not is legally irrelevant. ... In short, interpersonal comparisons based upon stated facts are not actionable, even when a plaintiff contends they are poorly considered or otherwise offensive.

(emphasis supplied).

The Court then turned to the Thug Life counts. Again, the Court concluded that the comparison to R.J. Soward, and the reference to "Thug Life", were protected opinion. The Court stated:

Conclusions are the opinions of the author. ... The key, however, is that Freeman does not make the factual bases for his conclusion a secret. ... Because the supporting facts are identified, the Column's conclusions (that he has thug-life qualifications and makes R.J. Soward look like a Backstreet Boy) are afforded complete immunity

under the First Amendment and cannot be the subject of a defamation action.

The Court further found that there was no evidence of actual malice, much less the required "clear and convincing" level of such evidence. The Court stated that it would dismiss Daly's claims on this basis as well.

With respect to false light invasion of privacy the Court found that no such cause of action exist under Florida law in light of a decision made by the Florida Supreme Court last year in *Jews for Jesus, Inc., v. Rapp*, a decision reported on in these pages previously. The other counts were all dismissed under the single publication/single action rule as they were all based on the Column.

Conclusion

As this is being written, Daly's time for filing a notice of appeal is still open. Nevertheless, the Court's opinion in this matter is precedent for opinion columnists, particularly sports columnists. It reinforces the hard fought for right of Americans to express their opinion about public figures, and what public figures get talked about more than professional athletes? Perhaps the next time a sports figure files a defamation action the suit can be dismissed earlier, rather than later, with this helpful precedent.

Defendants were represented in the case by George D. Gabel, Jr., and Timothy J. Conner, partners, and Zachary Potter and Erin Allen, associates, Holland & Knight LLP, in Jacksonville, FL. Plaintiff was represented by Steven Brust, Smith Gambrell & Russell, LLP, in Jacksonville, FL; and Lydia A. Jones, Rogers & Theobald, LLP, Phoenix, AZ.

Report On Consumer Affairs Investigation Is Privileged

By Laura M. Leitner

On February 26, 2009, the U.S. District Court for the Southern District of New York dismissed a libel suit brought by Test Masters Educational Services, Inc., a Texas corporation that offers test preparation services. Test Masters sued the publisher of the *New York Post* and Heidi Singer, one of its reporters, based on an article in the *Post* that reported on a state investigation of Test Masters. In *Test Masters Educational Services, Inc. v. NYP Holdings, Inc.*, No. 06-CV-11407 (BSJ), --- F. Supp. 2d ---, 2009 WL 497378, Judge Barbara Jones held that the article was privileged under N.Y. Civ. Rights Law § 74 as a fair and true report of an official proceeding.

Background

On October 26, 2005, a four-paragraph article in the *Post* reported that a number of students taking the New York State Law Admission Test (“LSAT”) had been confused between Test Masters and the more well-established California corporation, Robin Singh’s TestMasters, leading the New York Consumer Protection Board (“NYCPB”) to demand that fees be refunded to seventeen students who mistakenly enrolled in the wrong course. The article was based on a warning issued by the NYCPB about Test Masters. The NYCPB had issued a press release on October 25, 2008, entitled, “Pre-law students caught in web of confusion; Texas firm has the Internet name, but not the reputation, of a law school preparatory course sought by students.”

The press release noted that the NYCPB had “issued a warning that a Texas company [Test Masters] is using the same name as a California test-preparation course [TestMasters].” The press release explained that “Seventeen students have filed complaints with the CPB after they enrolled in what they thought was the original ‘TestMasters’ offered by Robin Singh’s California company” and stated that the NYCPB was “seeking refunds [from Plaintiff] for these students as well as new contract language” to clarify the confusion. The press release also stated that although Test Masters required students to sign a refund-waiver agreement that included language about other companies with similar names and Robin Singh Educational Services, but did not mention TestMasters. The press release quoted a student as saying that she

interpreted this agreement to mean that Test Masters was “fully aware that they are defrauding customers.”

In addition to the press release itself, in her reporting for the article, Singer had communicated with Jon Sorensen, Director of Marketing and Public Relations for the NYCPB (who sent Singer a copy of the press release). She also spoke to Roger Israni (president of Test Masters) and Robin Singh.

In its complaint, Test Masters claimed that this article was false, defamatory, and malicious. The defendants, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moved to dismiss under Section 74, arguing that the article was a fair and true report of an official proceeding. Because the defendants’ motion included declarations and exhibits outside of the pleadings (including a NYCPB press release upon which Singer relied in writing the article), they also requested that the motion be converted to one for summary judgment under Fed. R. Civ. P. 56. The plaintiff opposed the motion and cross-moved for discovery. In opposing the motion, the plaintiff argued that Texas law should apply, and therefore, the defendants could be held liable because the Texas fair and true report privilege was only qualified, not absolute like the New York privilege.

The plaintiff further argued that even if Section 74 applied under New York law, a reasonable jury could conclude that the article was not a fair and true report of the press release, and requested discovery regarding where it had suffered the greatest harm and whether the defendants were entitled to Texas’ qualified privilege. The plaintiff did not dispute at that time, however, that the article was based on an official proceeding.

On September 19, 2007, Judge Jones issued an order, 2007 WL 4820968, 36 Media L. Rep. 1084, wherein she declined to convert the motion to one for summary judgment because the NYCPB press release was integral to the complaint. Judge Jones further found that New York law applied in spite of the plaintiff’s Texas domicile because the article emanated from New York, the Consumer Protection Board was established by New York State law to protect New York consumers, and the LSAT preparation incident was based on a New York course. Judge Jones further found, however, that since there was a dispute between the parties as to which party had submitted the correct press release, discovery was needed.

The parties then engaged in limited discovery, and ultimately agreed that Singer had relied on a particular version of

the press release in draft format. Plaintiff then argued that because the NYCPB press release was a draft, it was not actually an “official proceeding” for Section 74 purposes, and in the alternative, if the press release was an official proceeding, the article was not a fair and true report of the press release. The defendants argued, by contrast, that even though the press release was a draft (and not the official version later issued by the NYCPB), the article was not merely a report on the press release – but rather, the article was a report on the underlying *investigation* by the NYCPB.

The Decision

In the February 2009 decision, Judge Jones found that the article was protected by Section 74. As an initial matter, the Court looked at how New York courts have broadly construed Section 74 to include administrative agencies and other officials. As such, the Court agreed with the defendants that the official proceeding was not the draft press release itself, but rather the underlying investigation. As such, regardless of how the *Post* and its reporter learned of the investigation – whether through an official press release, a draft press release, or some other means – they were privileged to publish a fair and accurate report of it.

The Court then turned to whether the article was a fair and true report of the NYCPB investigation. The Court found that the article was, in fact, “substantially accurate” when compared to both the draft and the official press release – in other words, it was a fair and true report of the investigation. Even the headline, “LSAT CRAM ‘SCAM’ BARRED”, which the plaintiff had taken particular exception to, was considered to be a fair index of the information in the article and substantially accurate with respect to the NYCPB investigation. Thus, the Court dismissed the complaint in its entirety. On March 24, 2009, Plaintiff filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit.

Laura M. Leitner is an associate at Hogan & Hartson LLP in New York City. Defendants NYP Holdings, Inc. and Heidi Singer were represented by Slade R. Metcalf and Jason P. Conti of Hogan & Hartson LLP, New York City. Test Masters Educational Services, Inc. was represented by Jeffrey M. Eilender, Esq. of Schlam Stone & Dolan LLP, New York City.

UPCOMING EVENTS

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
31	1	Legal Frontiers in Digital Media <i>@ Stanford University, Stanford, California</i> May 14 & 15, 2009				6
7	8	9	10	11	12	13
14	MLRC London Conference <i>International Developments in Libel, Privacy</i> <i>Newsgathering and New Media Law</i> October 1-2, 2009				26	27
21	22	23	24	25	26	27
28	29	30	MLRC Annual Dinner November 11, 2009			
First Amendment Speakers Bureau <i>Upcoming MLRC Institute Events</i>						
notes:						

**Feel free to e-mail us with any questions regarding
MLRC's upcoming events @ MediaLaw@MediaLaw.org**

Pennsylvania Federal Court Dismisses Privacy Claims Over Google “Street View” Map

Plaintiffs Failed to State Any Claims

A Pennsylvania federal court dismissed for failure to state a claim privacy, trespass and related claims brought by a suburban Pittsburgh couple who sued because pictures of their home were available on Google’s “Street View” map. *Boring v. Google, Inc.*, 2009 WL 383484 (W.D. Pa. Feb. 17, 2009) (Hay, J.).

Google’s “Street View” map allows users to see photographic street level images of a number of cities, including Pittsburgh. The images are created by Google employees who drive around city streets with continuously filming digital panoramic cameras. According to Google, Street View is limited to public roads and includes an opt out option to remove images.

The plaintiffs alleged that Google trespassed on their private road to take photos of their residence and sued Google for 1) invasion of privacy; 2) trespass; 3) negligence; 4) unjust enrichment; and 5) injunctive relief.

Plaintiffs had alleged general invasion of privacy. The court found that their allegations could not support a claim for intrusion or disclosure of private facts. “While it is easy to imagine that many whose property appears on Google’s virtual maps resent the privacy implications, it is hard to believe that any-other than the most exquisitely sensitive-would suffer shame or humiliation.” Moreover, the court noted that plaintiffs by bringing suit and failing to opt out of Street View, appeared to invite additional public attention to their alleged private information.

In a lengthy footnote, the court also noted that the information disclosed was likely available in other public records and Internet search maps, but even if disclosed for the first time by Google the disclosure did not constitute the “morbid and sensational prying into private lives for its own sake” required to support a claim. *Citing Restatement (Second) of Torts § 652D cmt. h.*

The negligence claim failed because there was no legally recognized duty of care between the parties. Similarly, the unjust enrichment claim failed because there was no real or quasi-contractual relationship between the parties.

Finally the trespass claim failed because plaintiffs did not allege any damage to their possessory rights – and had failed to plead a claim for nominal damages over the alleged unauthorized entry onto their property.

Plaintiffs were represented by Dennis M. Moskal, Technology & Entrepreneurial Ventures Law Group, Pittsburgh, PA. Google was represented by Elise Miller, Jason Gordon, Joshua Plaut and Tonia Ouellette Klausner, Wilson Sonsini Goodrich & Rosati P.C.; and Brian Fagan, Weiss Bauerle & Hirsch, Pittsburgh, PA.

Judge Grants Dr. Phil's Motion To Strike Under California Anti-SLAPP Statute

By Chip Babcock

California Superior Court Judge Malcolm Mackey granted a special motion to strike under the California Anti-SLAPP statute filed by Dr. Phil McGraw thereby disposing of claims of defamation, false light and intentional infliction of emotion distress brought by Thomas Riccio, the memorabilia dealer and chief witness in the OJ Simpson criminal trial in Nevada. The judge also awarded attorneys fees to the Defendants. *Riccio v. McGraw*. (Cal Sup. Ct. March 10, 2009)

Riccio claimed that defendants had improperly edited his comments on the Dr. Phil Show in promos and during the episode which centered on OJ's conviction. The California Anti-SLAPP statute applies to "any act of a person in furtherance on the person's right of petition or free speech under the United States or California Constitution in connection with a public issue or a matter of interest to the public." If the statute, which is to be construed broadly, applies the burden shifts to the Plaintiff to demonstrate by admissible evidence that he has a "probability" of success on the merits.

Riccio argued that the statute did not apply because the law was limited to situations where powerful, monied interests attempted to chill the speech of underfunded defendants such as "neighborhood associations and environmental activists". The Plaintiff also claimed that the statute was inapplicable because the Dr. Phil Show was attempting to misuse the protections of the statute. Judge

Mackey gave little weight to Plaintiff's position noting that "the law has left these arguments behind."

Riccio appeared on many media programs and published a book about his connection to the OJ episode and did not contest that he was a public figure. He argued that actual malice was shown because "statements that plaintiff made on the show were not published in the same context or with the same meaning as Plaintiff made them." Riccio contended that "Defendants took the tape of the show, spliced pieces of plaintiff's comments, then placed them next to comments that had been made at a different time in the taping and in different context during the taping."

The Defendants countered that whatever editing had been done did not result in the publication of any false fact. Indeed, Dr. Phil argued, if the show had been edited as Plaintiff wanted the program would have published a falsity.

The court agreed and dismissed the claims. He allowed one claim to remain. Plaintiff says he was fraudulently induced into appearing on the show despite having signed a release. The court suggested a motion for summary judgment on that claim would be appropriate.

Chip Babcock, Nancy Hamilton and Amanda Bush of Jackson Walker LLP represented the defendants together with local counsel Bill Haggerty. Plaintiff was represented by Stanley Lieber

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[Invasion of the Blogs](#)

An Introductory Survival Guide for Assessing, Addressing and Managing Employee Blogs and Other Alien Publication Life Forms

“Communist” Still Capable of Defamatory Meaning ***Appeals Court Affirms Denial of Anti-SLAPP Motion***

In an interesting non-media case, a California appeals court affirmed denial of an anti-SLAPP motion to strike libel and tortious interference claims brought by a Vietnamese-American public school administrator against a community activist who called her a communist. *Nguyen-Lam v. Cao*, 90 Cal.Rptr.3d 205 (Cal.App. 4 Dist. Feb. 26, 2009) (Aronson, Sills, O’Leary, JJ.).

The plaintiff was selected to be the superintendent of public schools in Westminster, California. Local television stations and major newspapers picked up the story because plaintiff would have been the first Vietnamese-American hired as a superintendent of a public school system. After her appointment, the defendant contacted school board officials and accused plaintiff of “being a Communist, inexperienced, and unqualified for the position.” Shortly after the call, the Board reversed its decision and terminated plaintiff’s appointment.

The trial court denied the motion to strike the complaint, finding sufficient evidence that under the circumstances the accusation that plaintiff was a communist could be defamatory; and sufficient evidence of knowing or reckless falsity on the part of defendant.

The court of appeals affirmed and accepted plaintiff’s evidence that calling someone a “Communist” in Westminster’s “Little Saigon” Vietnamese community was “extremely harmful to [her] reputation.” Notably the statements were not made to Vietnamese members of the

community, but to school board officials. Nevertheless, the court accepted plaintiff’s argument that the Board members were “necessarily attuned by demographics to the concerns of Vietnamese-American voters.”

The court also rejected defendant’s argument that his statements were matters of opinion.

Plaintiff’s evidence suggested defendant held himself out as having inside knowledge about plaintiff, i.e., ... he “ ‘knows all about Dr. Nguyen-Lam.’ ” But defendant admitted in his first declaration he had never met plaintiff and knew of her only through media reports. Nothing in those reports hinted she was a Communist. Consequently, the trial court could reasonably conclude that because defendant had no basis for his claim plaintiff was a Communist, a jury could reasonably determine he lied in leveling the charge against her and, moreover, infer malice from the lie.

The defendant was represented by John L. Dodd & Associates and Bucher & Palmer. Plaintiff was represented by Donna Bader, Laguna Beach, CA; and Lents & Foley, Newport Beach, CA.

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Court Affirms Summary Judgment Dismissing Contract, Fraud and Privacy Claims Against Reality Show

Release Bars Orphans' Privacy Claims

In an unpublished decision a California appeals court affirmed dismissal of fraud, breach of contract and related privacy claims against ABC and the producers of the reality television series “Extreme Makeover: Home Edition.” [*Higgins v. Disney/ABC International Television, Inc.*](#), No. B200885, 2009 WL 692701 (Cal.App. 2 Dist. March 18, 2009) (Rubin, Bigelow, O’Neill, JJ.).

Plaintiffs had sought to hold the media defendants responsible for the consequences of a nasty dispute over possession of a house constructed as part of the show. The court held that the plaintiffs’ fraud claims were not supported by the facts and their privacy related claims were barred by the releases plaintiffs signed before the show was filmed.

“Extreme Makeover: Home Edition” is a reality show produced by Lock and Key Productions, which airs on ABC. The show renovates or rebuilds the homes of deserving families. The plaintiffs, five orphaned siblings, participated in an episode of the show in 2005. Plaintiffs, then ranging in age from 14 to 21, had been taken in by family friends and the two families were living together. The producers of the show arranged for the house to be rebuilt, but according to the lawsuit shortly after the show aired their former friends “began a campaign of harassment, humiliation, and intimidation” that drove them out of the house.

The plaintiffs sued ABC and the producers for a variety of claims, including breach of contract to provide them with a permanent home; fraudulent misrepresentation over the ownership rights of the constructed home; false light for rebroadcasting the episode after the dispute erupted thereby

falsely portraying them as happy and secure; and violation of their right of publicity based on releases obtained by fraud.

In 2006, the trial court ordered that the claims be arbitrated in accordance with provisions of the release contracts. The Court of Appeal reversed, holding that the arbitration provision of the releases were one-sided and unenforceable. In 2007, the trial court granted summary judgment to the media defendants.



On appeal, the court affirmed. Reviewing the evidence, the court of appeal found no specific promise to convey any interest in the house to plaintiffs and, further, that the relevant portions of the releases were valid and enforceable. With respect to the release the court stated:

“We begin our analysis with the primary purpose of the agreement. As the trial court noted, that was to determine whether appellants would become show participants and to have them waive their publicity rights if selected. Such a purpose is clearly legal. “

The media defendants were represented by Patricia Glaser, Mark Block and Amy Duncan of Christensen, Glaser, Fink, Jacobs, Weil & Shapiro, Los Angeles. Plaintiffs were represented by Dennis P. Riley and Rena E. Kreitenberg, Mesisca, Riley & Kreitenberg, Los Angeles.

Another Sign of Apocalypse?

Journalism School Dean Seeks Federal Court Order to Compel Georgia Journalist to Identify Confidential Source

By Tom Clyde

With friends like these, who needs enemies? John Soloski is currently a faculty member at the University of Georgia's Grady College of Journalism and Mass Communication, a school named after one of *The Atlanta Journal-Constitution's* most famous journalists. Until he resigned in June 2005, he was Grady College's dean.

Today, however, he is plaintiff in a lawsuit pending in the U.S. District Court for the Northern District of Georgia claiming that the University violated his constitutional rights when it found that he had breached the University's sexual harassment policy. [*Soloski v. Board of Regents of Univ. System of Ga., Case*](#) No. 06-cv-3043 (N.D. Ga.). As part of his suit, he is asking that former Journal-Constitution reporter Kelly Simmons be compelled to reveal the confidential source or sources who alerted her that an investigation was underway.

This subpoena matter is being litigated under Georgia's statutory reporter's privilege, O.C.G.A. § 24-9-30 – a privilege that has never been overcome in connection with a confidential source since its passage in 1992. However, on January 30, 2009, U.S. Magistrate Judge Christopher Hagy issued an order denying the Journal-Constitution's motion to quash Simmons' deposition. The Journal-Constitution's objections to the Magistrate Court's Order are now pending before U.S. Senior District Court Judge Marvin Shoob.

The Privacy Claim: Is the Investigation of a University Dean a Matter of Public Interest?

Soloski's lawsuit has taken a serpentine route through the Georgia courts. It was originally filed in a state court as a mandamus action seeking to overturn the University of Georgia's determination that Soloski violated its sexual harassment policy. The case was removed to federal court when Soloski added claims that he had been

discriminated against in connection with the investigation. Finally, while the case was pending in federal court, Soloski amended his complaint to add an additional state law claim: a count for invasion of privacy alleging that the University's investigation of him was a "private fact" that should not have been disclosed to the public until the investigation was complete.

In connection with his invasion of privacy claim, Soloski issued a subpoena to Simmons for the admitted purpose of trying to discover the source of the tip that enabled Simmons to write a June 17, 2005 article that revealed that the University had launched an investigation of Soloski. On its face, the short article is unremarkable. In it, the University confirmed the investigation was underway, but otherwise declined to comment. Then-dean Soloski himself commented at length in the article, stating that "I don't engage in harassment" and informing the reporter that his accuser had been disciplined just before lodging the sexual harassment complaint. There was no further reporting on the issue until Dean Soloski resigned his deanship approximately two weeks later and the University released the results of the investigation, including a letter formally finding him in breach of its sexual harassment policy.

Notwithstanding the fact that he himself commented on the investigation, in his lawsuit Soloski now claims that any disclosure of the investigation prior to its conclusion breached his right to privacy. He claims that the University's sexual harassment policy suggests that the privacy rights of the accused and the accuser will be respected, so any disclosure by the University supports a "disclosure private facts" invasion of privacy claim.

Among other legal problems, Soloski's "private facts" claim runs counter to a well-established legal principle in Georgia (and elsewhere) that an invasion of privacy claim cannot be premised on a matter of public interest. Thus, Soloski's legal position in the case is effectively that allegations of sexual harassment against a

top University administrator are *not* a matter of public interest.

The Magistrate Court's Order: A Temporary Right of Privacy.

In ruling on the parties' cross motions for summary judgment, the Magistrate Court made no bones of the fact that he believed Dean Soloski was wrongly found guilty of violating the University's sexual harassment policy. Magistrate Judge Hagy made headlines in Georgia when he found that even if Soloski's conduct was unbecoming for a dean (Soloski admits to commenting that a co-worker's dress showed off "her assets" and subsequently commenting on her eyes), it did not amount to sexual harassment under the rigorous standard adopted by the University. As Judge Hagy put it, the University failed "spectacularly" to meet its own standard.

It was in this context that the Magistrate Court ruled on the Journal-Constitution's motion to quash. In order to skirt Georgia's well-established law precluding privacy claims based on matters of "public interest," the Magistrate Court held that the investigation of Dean Soloski was not a "legitimate" matter of public interest until the investigation became final, and that public policy is best served by keeping information about sexual harassment investigations "private until the truth can be ascertained." The Magistrate Court admitted that in the context of this case, where Dean Soloski was eventually found guilty of violating the sexual harassment policy, "Plaintiff will have difficulty in establishing any damages that arose from the early disclosure that were different from those that followed the conclusion of the investigation and disclosure of its results." Nonetheless, the Magistrate Court concluded there was a sufficient interest to deny the motion to quash Ms. Simmons deposition and overcome Georgia's long-established statutory reporter's privilege.

The Pending Objections in the District Court.

The Journal-Constitution filed its objections to the Magistrate Court's order this month asserting that the order is "contrary to law" in numerous respects.

Specifically, the Journal-Constitution contends that the order effectively rewrites Georgia law regarding what constitutes a matter of public interest. The Journal-Constitution also asserts that Soloski's claim that the investigation was a "private fact" is fatally undermined by the record which demonstrates that more than a dozen journalism school faculty and employees were interviewed as part of the investigation and were free, even under University rules, to discuss it as they saw fit. In the alternative, the Journal-Constitution asks that Soloski's privacy claim, and the subpoena issue connected with it, be remanded to the state court system for resolution in that forum.

The District Court has not yet ruled on the Journal-Constitution's objection, but it has addressed several other issues in the case. The District Court affirmed the Magistrate Court's finding that a mandamus should issue ordering the University to clear Soloski's record, but it dismissed Soloski's other claims, including the discrimination claims that brought the case to federal court in the first place. The only claim that the District Court reserved ruling on was Soloski's privacy claim, which the District Court left pending until the subpoena issue is resolved.

A ruling on the Journal-Constitution's objections and the merits of Soloski's privacy claim is expected this summer.

Peter Canfield, Tom Clyde and Lesli Gaither of Dow Lohnes PLLC in Atlanta represent The Atlanta Journal-Constitution and reporter Kelly Simmons.

Plaintiff John Soloski is represented by Brandon Hornsby and Austin Perry of Atlanta, Georgia. The University of Georgia is represented by Bryan K. Webb of Athens, Georgia, and Annette Marie Cowart of the Office of the State Attorney General.

International Criminal Tribunal Backs Reporter's Privilege

Special Court for Sierra Leone Rules Journalist Cannot Be Compelled to Identify Military Personnel Who Facilitated His Reporting

By Erik Bierbauer and Rebecca Jenkin

On March 6, 2009, a trial chamber of the Special Court for Sierra Leone ("the SCSL") issued a decision that recognizes a privilege for a journalist to refuse to testify as to the identity of a person who facilitated the journalist's reporting under a promise of confidentiality. [*Prosecutor v. Taylor*](#), Decision on the Defence Motion for the Disclosure of the Identity of a Confidential 'Source' Raised During Cross-Examination of TF1-355, SCSL-03-1-T (Mar. 6, 2009).

The decision is noteworthy for its holding that the journalist was privileged not to reveal a facilitator's identity even though the person was not a "source" in the traditional sense of someone who provides information, and for its reasoning that the reporter's privilege is especially crucial for journalists working in conflict zones.

Factual Background

The SCSL was established pursuant to an agreement in 2002 between the Government of Sierra Leone and the United Nations to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since November 30, 1996. The SCSL was created as a result of the civil war in Sierra Leone from 1991 to 2002 that is estimated to have caused tens of thousands of civilian deaths and the displacement of more than two million people. The SCSL sits in Freetown, Sierra Leone and in The Hague, the Netherlands and includes both judges appointed by the government of Sierra Leone and by the Secretary-General of the United Nations.

In a trial that has garnered extensive international media attention, the SCSL is trying Charles Taylor, the former President of Liberia, on charges of crimes against humanity, war crimes and other serious violations of international humanitarian law. The charges arise out of Taylor's alleged backing of rebels who committed atrocities during the Sierra Leonean civil war.

In January of this year, the prosecution called Liberian journalist Hassan Bility to testify about a trip he took in 1997, while he was the managing editor of a Liberian newspaper, from Liberia to Sierra Leone to investigate ties between Taylor and Sierra Leonean rebels, the Revolutionary United Front. On cross-examination, Bility testified that members of a multilateral West African military force, who, Bility believed, are currently serving in the military of Nigeria, had "facilitated" his trip by helping him to enter Sierra Leone. Taylor's defense counsel asked Bility the names of those who helped him. Bility declined to provide them, testifying that he had made a promise as a journalist to those who assisted him that he would keep their confidences. *Prosecutor v. Taylor*, SCSL-03-1-T, Transcript, 22504-5 (Jan. 14, 2009).

Taylor's defense counsel moved for an order compelling Bility to disclose the names of his facilitators and the prosecution opposed the motion. The trial chamber instructed both sides (Bility did not have his own representation) to submit written arguments on the issue of whether a testimonial reporter's privilege protected Bility from being ordered to disclose the names.

Legal Background

In 2002, the Appeals Chamber of International Criminal Tribunal for the Former Yugoslavia ("the ICTY") handed down the watershed *Brdjanin* decision. This was the first decision of an international criminal tribunal holding that war correspondents could not be compelled to testify unless certain conditions were met. *Prosecutor v. Brdjanin*, Decision on Interlocutory Appeal, IT-99-36-AR73.9 (Dec. 11, 2002).

At issue in *Brdjanin* were statements attributed to defendant Radoslav Brdjanin in an interview with a *Washington Post* correspondent, Jonathan Randal, about the expulsion of non-Serbs from regions of Bosnia Herzegovina. Brdjanin was accused, among other things, of crimes against humanity relating to deportation and forcible transfer. The

prosecution subpoenaed Randal to testify as to the accuracy of the statements.

The Appeals Chamber in *Brdjanin* held that a war correspondent could be subpoenaed only if a two-prong test was satisfied. First, the evidence sought must be of “direct and important value in determining a core issue in the case”. *Id.* at ¶ 50. Second, the evidence sought must not be reasonably obtainable elsewhere. *Id.*

In Bility’s case, the central issue was whether this qualified privilege extended not just to persons who provide information to journalists, but also to those who facilitate their investigations.

The SCSL Decision

The SCSL held that a facilitator is a source and therefore comes within the scope of what it described as the “journalistic privilege.” *Prosecutor v. Taylor* at ¶ 27. The court’s reasoning exhibited a strong concern that journalists’ ability to do their job in conflict zones not be undermined.

Taylor’s defense counsel had argued that “a fundamental distinction must be drawn between *information* given to a journalist by a ‘source’ and an *act* by a person facilitating the movement of another in and out of a country.” *Id.* at ¶ 4. The SCSL rejected the defense’s argument, concluding that no principled distinction could be drawn between a “source” and a “facilitator.” Both, it held, “assist journalists in producing information which might otherwise remain uncovered”. *Id.* at ¶ 25. The court recognized that both facilitators and traditional sources might risk harm by assisting journalists, particularly in conflict situations. Likewise, if journalists in conflict zones are forced to testify about those that assist them, they may be put at risk. *Id.*

After finding that information about the identity of “facilitators” fell within the privilege, the court determined that the defense had not satisfied the two-pronged *Brdjanin* test for compulsion. The court held that the information sought was not of direct and important value to a core issue in the case. *Id.* at ¶¶ 30-32. It noted that “obliging the Witness to divulge his sources without a compelling reason to do so would set an uncomfortable precedent and could threaten the ability of

journalists, especially those working in conflict zones, to carry out their newsgathering role.” *Id.* at ¶ 33. Because the SCSL held that the first *Brdjanin* prong was not satisfied, it did not need to address the second prong of whether the information sought could not reasonably be obtained elsewhere.

The SCSL also rejected the defense’s alternative request that it elicit Bility’s testimony on the identity of his facilitators in closed session. *Id.* at ¶ 35. It held that it did not matter that these measures might ameliorate the potential danger posed to the facilitators by Bility naming them in open court:

“the underlying rationale behind the journalistic privilege is to ensure freedom of expression and the public interest in the free flow of information ... [and] the anonymity of the Witness’s sources is essential to ensure that the newsgathering function of journalists, especially in situations of conflict, is not threatened.” *Id.*

Conclusion

The SCSL’s decision represents an important extension of the qualified privilege of journalists before international criminal tribunals. While not binding upon other international tribunals and courts, the decision will carry persuasive weight before those bodies. In addition, the reasoning of the court, in particular its holding that a “facilitator” should be protected by the reporter’s privilege and its recognition of the need to protect the important role journalists play in reporting from conflict zones, will likely be drawn upon in future cases testing the scope and application of the privilege.

Erik Bierbauer is counsel and Rebecca Jenkin is an associate at Debevoise & Plimpton LLP in New York City. The prosecution in the Taylor case is represented by Brenda J. Hollis and Nicholas Koumjian, among others. The Defense is represented by Courtenay Griffiths, Q.C., Terry Munyard, Andrew Cayley and Morris Anyah.

... the central issue was whether this qualified privilege extended not just to persons who provide information to journalists, but also to those who facilitate their investigations.

European Court of Human Rights Declines to Apply Single Publication Rule to Newspaper's Online Archive

No Prejudice Under Facts of Case

In a disappointing decision, the European Court of Human Rights declined the opportunity to apply the single publication rule to a newspaper's online archive. [*Times Newspapers Ltd. \(Nos. 1 and 2\) v. United Kingdom*](#), Nos. 3002/03, 23676/03 (March 10, 2009).

Although the history and application of the single publication was fully briefed to the Court, it issued a narrow decision focusing on the particular facts of the case. The Court found that the suit over the newspaper's archived articles had not prejudiced its defense and thus under the circumstances there was no violation of Article 10, the free expression provision of the European Convention on Human Rights.

In something of a consolation, the Court noted that it might have decided differently if the libel suit had been brought long after original publication. The Court also acknowledged that online news archives are a valuable public resource. The UK government had argued that online archives were "stale news" and therefore not of "central or weighty importance" as contributions to free expression.

Background

At issue in the appeal to the ECHR were two UK libel actions brought against *The Times* newspaper by Grigor Loutchansky. In September and October 1999, *The Times* published articles discussing Loutchansky's suspected ties to money laundering and weapons smuggling, describing him as a "suspected mafia boss." Loutchansky sued over the hard copy publication of both articles in December 1999. Then in October 2000 he filed a second libel suit over the archived online versions of the same articles.

The trial court refused to apply the single publication rule to the second suit, instead holding that the archived articles were separately actionable under the

common law rule set out in *Duke of Brunswick v. Harmer* [1849] 14 QB 201. The trial court also struck out the newspaper's qualified privilege defense, holding that there was "no duty" to publish the articles online when suit had already been brought against the hard copy versions.

The Court of Appeal affirmed, reasoning that the *Duke of Brunswick* rule did not impose a disproportionate restriction on freedom of expression. Moreover, the court was dismissive of online archives, calling them "a comparatively insignificant aspect of freedom of expression" since they consist of "stale news." The court suggested that the paper should have attached "an appropriate notice warning against treating [the articles] as truth." See also *MLRC MediaLawLetter* June 2001 at 45; December 2001 at 40; January 2002 at 15 and January 2003 at 23.

The House of Lords declined an appeal and *The Times* ultimately settled both libel cases.

ECHR Appeal

In its application to the ECHR, *The Times* argued that Article 10 requires the adoption of the single publication rule. It also asked the Court to recognize the importance of online archives as historical records. The UK government argued that under the facts the newspaper was not prejudiced since both the libel suits were brought within one year, and thus the paper was not facing "ceaseless liability." The UK government also argued that since archives are "stale news" they are not of "central importance."

The Decision

The Court began by agreeing with *The Times'* submission on the value of online archives, however, it went on to find that "the margin of appreciation afforded to

States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned.” *Times v. UK* at para. 45.

Moreover, the Court noted that the press bears a higher duty to ensure the accuracy of historical information because of “the absence of any urgency in publishing the material.” *Id.*

As to the single publication rule, the Court confined its analysis to the facts of the case. It agreed with the Court of Appeals that publishing an appropriate qualification that the article was in dispute was not an undue burden on the newspaper.

The Court therefore found it unnecessary to consider in detail the broader chilling effect created by the absence of the single publication rule. The Court found it significant that here the two libel actions were brought with 14 or 15 months after the initial publication of the articles and thus under the facts there was “no suggestion that the applicant was prejudiced in mounting its defense to the libel proceedings in respect of the Internet publication due to the passage of time. In these circumstances, the problems linked to ceaseless liability for libel do not arise.”

In conclusion, the Court suggested that some greater length of time between first publication and suit would create an Article 10 issue stating: “while an aggrieved applicant must be afforded a real opportunity to vindicate his right to reputation, libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10.” *Id.* para. 48.

The Times was represented by Reynolds Porter Chamberlain in London.

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Supreme Court: Privately Funded Monuments On Government Property Not Subject To Free Speech Analysis

On February 25, 2009, the U.S. Supreme Court unanimously ruled that the display of a permanent monument in a public park qualifies as a form of government speech and would not be subject to scrutiny under a First Amendment free-speech clause analysis.

[*Pleasant Grove City, Utah v. Summum*](#).

In the majority opinion, Justice Samuel A. Alito wrote that government entities may exercise selectivity in their acceptance of privately funded or donated monuments, as monuments displayed on government land “are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.” Justice John Paul Stevens filed a concurrence, joined by Justice Ruth Bader Ginsburg. Justice Antonin Scalia filed a concurrence, joined by Justice Clarence Thomas. Justice Stephen G. Breyer, too, filed a concurrence.

Background

Summum is a Salt Lake City-based religious organization founded in 1975. On two separate occasions in 2003, the president of Summum requested permission of Pleasant Grove City, Utah’s mayor to donate a stone monument featuring the Seven Aphorisms of the religion for display in the city’s Pioneer Park. The park features 15 permanent monuments, at least 11 of which were privately funded or donated and including a stone display of the Ten Commandments. The mayor denied the request, citing city policy that monuments displayed must “either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community.” The mayor denied a third request by respondent in 2005.

Following the third denial, Summum filed suit in the U.S. District Court for the District of Utah in 2005, claiming violation of the free-speech clause of the First Amendment. The district court rejected the respondent’s request for a preliminary injunction.

On appeal, the Tenth Circuit held that the district court erred by applying the standard associated with a nonpublic forum. A city park, however, is a traditional public forum and content based restrictions on speech there are subject to strict scrutiny. Here the city’s interest in promoting its history was not a compelling justification for the policy, according to the Tenth Circuit.

The city appealed and the Supreme Court granted certiorari on the following questions.

- (1) Did the Tenth Circuit err by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by a municipality is not government speech but rather remains private speech of the monument’s donor?
- (2) Did the Tenth Circuit err by ruling, in conflict with the Second, Sixth, and Seventh Circuits, that a municipal park is a public forum under the First Amendment for erection and permanent display of monuments proposed by private parties?
- (3) Did Tenth Circuit err by ruling that city must immediately erect and display respondent’s “Seven Aphorisms” monument in city’s park?

Analysis

Citing *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217, 229 (2000), Justice Alito wrote that government entities are free to say what they wish and choose which views they want to express. The Court found that this right applies even when the government receives private assistance in the delivering of a government-controlled message. “[B]ecause property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely – and reasonably – interpret them as conveying some message

on the property owner's behalf," and this equally applies when the property owner is a government entity.

While not constrained by the free speech clause, because the First Amendment restricts government regulation of private speech and not government speech, the Court wrote that government speech is still subject to the Establishment Clause.

The Court acknowledged that, while government entities may fully control the messages they choose to convey, the government may not regulate private free speech in traditional public fora. Justice Alito cited the longstanding recognition of the court that – subject to reasonable time, place and manner restrictions – public property “has immemorially been held in trust for the use of the public and... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Perry Ed. Assn. v. Perry Local Educators' Assn.* 460 U.S. 37, 45 (1983) (quoting *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939)). The Court differentiated the display of monuments in a public park from private speech in a public park by giving the example that, while a park can accommodate many speakers or demonstrators who come and go over a certain period of time, the bounds of the park can only accommodate a limited number of permanent monuments.

Because the Court found that the monument respondent wished to donate for display in the park would be a method of government speech and not private expression in a public forum, the city's decision to accept or reject privately donated monuments is government speech and overruled the Court of Appeals' decision.

Justice Stevens' concurrence

While joining in the Court's majority opinion, Justice Stevens wrote in his concurrence that, even if the city's refusal to accept the monument were not characterized as government speech, the city would still

have been able to validly reject the monument on the basis that accepting and displaying such would be “an implicit endorsement of the donor's message.” Justice Ginsburg joined Justice Stevens in his concurrence.

Justice Scalia's concurrence

In his concurrence, Justice Scalia addressed the majority opinion's Establishment Clause analysis. While Summum argued that the display of the Ten Commandments in the park violated the Establishment Clause, Scalia – citing *Van Orden v. Perry*, 545 U.S. 677 (2005) – wrote that the Establishment Clause would not apply because the “Ten Commandments ‘have an undeniable historical meaning’ in addition to their ‘religious significance.’” Justice Thomas joined Justice Scalia in his concurrence.

Justice Souter's concurrence

In his concurrence, Justice Souter wrote that he believes that “government speech” should not be applied across the board to “the selection of permanent monuments on ground unrelated to the display's theme, say solely on political grounds.” He wrote that he believes the city's rejection of the Summum monument would be lawful either

The Court acknowledged that, while government entities may fully control the messages they choose to convey, the government may not regulate private free speech in traditional public fora.

analyzed as government speech or “as a proportionate restriction on Summum's expression.”

Jay Alan Sekulow of the American Center for Law and Justice in Washington argued the case on behalf of Pleasant Grove. Daryl Joseffer, Deputy Solicitor General, Department of Justice, argued the case for the United States, as amicus curiae, supporting Pleasant Grove. Pamela Harris of O'Melveny & Myers LLP in Washington argued the case for Summum.

Sheppard Fairey Challenges AP AP Fights Back To Protect Photojournalism

By Nancy Wolf

The Audacity of Hope... Poster

Once Sheppard Fairey admitted that the source of his famed HOPE poster of Obama was a photograph found using Google images, New York gallery owner James Danziger's curiosity led him to discover Mannie Garcia's photograph. Garcia took the photograph of Obama in April 2006 at the National Press Club event headlined by George Clooney after his visit to Darfur. Garcia, then a staff photographer for the Associated Press capturing Obama looking off into the distance, with his head slightly angled to the left and his chin lifted against the backdrop of an American flag. This photograph, along with Fairey's poster based on that photograph can be still viewed on Danziger's online exhibit "Can & Did-Graphics, Art and Photography from the Obama Campaign" together with other Obama campaign art at http://www.danzigerprojects.com/exhibitions/2009_1_can-and-did/. By the time Danziger began searching for the photographer, the Fairey poster and its various versions was ubiquitous and well associated with the Obama campaign, Los Angeles street artist Fairey was a household name and his posters were selling for thousands on eBay.

The story did not end there. In late January, the Associated Press (AP) contacted Fairey, to negotiate a license fee based on the derivative use Fairey made of the AP photograph. Fairey then contacted Stanford law professor Anthony Falzone, a fair use advocate from Stanford Law School's Center for Internet and Society. While discussions between AP and Falzone were underway, Fairey fired the first shot and on February 9, 2009, he and his corporation Obey Giant Art, Inc. filed a Complaint for a Declaratory Judgment in the Southern District of New York that his famed Obama "HOPE" poster was not infringing of the AP photograph and that his use was protected by the Fair Use Doctrine. The complaint seeks an injunction enjoining AP from asserting its copyrights against Fairey or his company.

Fairey admits using a Garcia photograph as reference for his poster, but contends it is not the one discovered by Danziger

but another one in which Obama is photographed with George Clooney and his head is at a slightly different angle. In his complaint, Fairey asserts that he transformed a portion of the Garcia photograph into an abstracted and idealized visual image that conveys a different message than the AP photograph and that he did not use the various Obama artworks for commercial gain. He further alleges that the Garcia Photograph was a factual and not a creative work, and his use of the Garcia photograph imposed no significant harm to the value of it or any derivatives, but rather enhanced the value of the Garcia photograph. Based on those alleged facts, Fairey and Obey Giant assert that they are entitled to a declaratory judgment that the use of the photograph in the creation of the various Obama posters is protected by the Fair Use Doctrine.

On March 11, 2009, AP, through its attorneys, Kirkland and Ellis, led by Dale Cendali, filed an Answer and Counterclaim asserting that Fairey and his various companies have done nothing but deliberately copy the AP photograph, relying on the underlying photograph's unique expression as the basis of the poster series and on other related merchandise. As a result of the copying, AP claims that Fairey and his entities have illegally profited off of merchandise that bears the image. Furthermore, AP asserts in the counterclaim that they made efforts to enter into a licensing agreement where proceeds received from Fairey's past use would be contributed by AP to the Associated Press' Emergency Relief Fund, a charitable fund which distributes grants to staff and their families who are victims of natural disasters and conflicts.



The AP's 61 page (with exhibits) answer and counterclaim is replete with examples of Fairey's commercialization of the Obama poster series though his company's website store at www.obeygiant.com/store as well as his other acts of creating posters and merchandise based on artwork that was created by third parties, which AP believes to be without attribution or compensation. AP's counterclaim against Fairey describes his history of arrests for graffiti and vandalism and ironically his protection of his own intellectual property rights

in the form of trademark applications, his copyright notice and copyright restrictions on the Obama poster series and his use of cease and desist letters to prevent another artist from adapting his Obey image.

AP asserts that Fairey purposely chose the AP photograph out of the vast number of photographs taken of Obama because of the qualities of the photograph and that Fairey's changes were minimal and amounted to nothing more than a computerized "paint by numbers" retaining the defining expression contained in the AP photograph. The AP counterclaim defends news photography as an art form and describes the photographer's creative choices in making the Obama photograph including capturing the moment, the type of lens and the light and careful composition. The AP counterclaim asserts that AP licenses its photographs for both commercial and non-commercial uses and that Fairey's unauthorized use has caused substantial impairment to the potential market for the original.

The AP pits its long history as a not-for profit news agency against the tactics of a street artist who misappropriated the Obama photograph from Google Images without permission, in conflict with Google's copyright policy. In downloading the image Fairey allegedly stripped out AP's copyright management information from the IPTC fields that identified AP as the source of the photograph and Mannie Garcia as the photographer in contravention of 17 USC §1202 (c) –the Digital Millennium Copyright Act's provision that provides damages for the removal of copyright management information with the intent to facilitate infringement. Further, AP's counterclaim alleges that Fairey defrauded the Copyright Office in failing to state in his copyright registrations for the Obama poster series that the works were derivative works of the AP Obama photograph. Lastly, the AP counterclaim accuses Fairey of purposely misrepresenting the source of the Obama poster photograph as the one with both Clooney and Obama when the photograph discovered by Danziger is reportedly an exact match using image recognition technology. In countering Fairey's assertion that he created the Poster to support the Obama campaign and only sold them to create more posters in order to give them away, AP sites Fairey's merchandising and marketing enterprises

and his commercial exploitation of the Obama poster series. AP seeks damages, including statutory for direct willful infringement; and damages for contributory infringement and damages for violation of the DMCA removal of copyright management information.

What started out as a search for merely the source of a now infamous poster is now framed as a legal battle with an artist on one side supported by a law school institute looking for a noteworthy fair use battle and the other side a not for profit news organization defending the value of photo journalism in an effort to preserve licensing income and acknowledge the creativity of that is involved in the art of photo journalism.

The Poster clearly meets the definition of a derivative work under 17 USC § 101 as it is "based upon one or more preexisting works" and is "recast, transformed, or adapted". The issue will turn on the sufficient amount of change or commentary on the original work required to constitute transformation under the fair use doctrine.

Judge Hellerstein, who has been assigned to this case, may finally have an opportunity to define the line between a work of visual artwork that is transformed in the creation of a derivative work and requires permission from the copyright owner, and the "transformation" that is necessary for purposes of the first fair use factor and does not require permission. Judge Pierre Leval's seminal Harvard Law Review Article "Toward a Fair Use Standard," 103 Harv. L. Rev. 1111 (1990) was the first to describe "transformation" in connection with the first fair use factor

in that the use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. As the fair use defense favors works that are not commercial, with the exception of parodies, the parties will likely focus on whether Fairey's poster series was commercial in nature or not as the poster is clearly not a parody of the original. Both the [Declaratory Judgment](#) and the Answer and [Counterclaim](#) can be found online

Nancy Wolf us a partner at Cowan, Debaets, Abrahams & Sheppard LLP in New York.



This image was excerpted from Paragraph 54 of the AP's Answer and Countersuit. Please review this image in conjunction with the AP's filing. This image is for viewing purposes only.

FTC Rescinds Mirror Image Doctrine

By Jonathan Bloom

On February 20, 2009, the Federal Trade Commission announced it was rescinding its longstanding “Advertising in Books” enforcement policy, known as the Mirror Image Doctrine (MID). The MID was a guideline pursuant to which the Commission “ordinarily” would not challenge advertising claims made in connection with books and other publications when the claims merely purported to convey the content of the publication and did not promote a product. A statement announcing and explaining the decision to rescind the policy was published in the Federal Register on February 25, 2009. Advertising of Books: Enforcement Policy, 74 Fed. Reg. 8542 (Federal Trade Comm’n Feb. 25, 2009).

The MID, published on July 21, 1971, provided as follows:

The Commission, as a matter of policy, ordinarily will not proceed against advertising claims which promote the sale of books and other publications: Provided, The advertising only purports to express the opinion of the author or to quote the contents of the publication; the advertising discloses the source of statements quoted or derived from the contents of the publication; and the advertising discloses the author to be the source of opinions expressed about the publication. Whether the advice being offered by the publication will achieve, in fact, the results claimed for it in the advertising will not be controlling if appropriate disclosures have been made. This policy does not apply, however, if the publication, or its advertising, is used to promote the sale of some other product as part of a commercial scheme.

Advertising in Books: Enforcement Policy, 36 Fed. Reg. 13,414 (Federal Trade Comm’n July 21, 1971). The purpose of the MID was to reconcile the Commission’s false-advertising enforcement policy with the First Amendment, which protects the expression of even false ideas in noncommercial works. Thus, for example, the publisher of a bogus diet or other advice book would not be liable for deceptive advertising so long as the ads made clear that the claims conveyed in the ad were the view of the author as

expressed in the book and were not promoting a related product such as a dietary supplement.

In rescinding the MID, the Commission stated that it had determined that Supreme Court’s post-MID commercial speech rulings, beginning with *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), had rendered the MID “unnecessary” by according First Amendment protection (albeit less than the highest level) to commercial speech. “The Court’s commercial speech cases,” the Commission explained, “not the MID, delimit the constitutional constraints on challenges to deceptive advertising claims for book and other publications that are commercially marketed.” 74 Fed. Reg. at 8543.

The commission did not expressly indicate, however, that it believed the MID was inconsistent with the Supreme Court’s commercial speech jurisprudence, nor did it explain what had prompted its decision to abandon the MID. Accordingly, it is not clear what effect, if any, the removal of this regulatory “safe harbor” will have on book advertising.

Although the FTC’s rescinding of the MID does not purport to reflect any change in the Commission’s actual enforcement practices, it does give rise to concern that the Commission may be seeking greater latitude to pursue “hucksters.” It is worth remembering, in this regard, that courts applying state consumer protection laws have not been entirely consistent in protecting marketing materials for constitutionally protected books. For instance, in separate class-action false advertising suits brought in California and New York against the publisher of the Beardstown Ladies investment advice books prompted by an independent audit which found that the 23.4 percent annual investment returns touted in the books and on their covers and flyleaves was inaccurate, the New York trial court dismissed the action on First Amendment grounds, *see Lacoff v. Buena Vista Publishing, Inc.*, 183 Misc. 2d 600, 705 N.Y.S.2d 183 (2000), but the California appellate court held that the statements were actionable commercial speech under the California consumer protection statute. *Keimer v. Buena Vista Books, Inc.*, 75 Cal. App. 4th, 89 Cal. Rptr. 2d 781 (1999).

Were the Commission to follow *Keimer*, it would have significant repercussions for book publishers, who would face greater pressure to verify the accuracy of any statements featured in

marketing materials and on book covers. Notably, the FTC's ongoing enforcement activity against Kevin Trudeau, *see Federal Trade Comm'n v. Trudeau*, No. 08-4249 (7th Cir., appeal pending)), dating to 1998, for marketing a variety of "miracle cure" products and self-help books, has purported to hew to the MID's principle that advertisements for books and other materials are proper so long as they do not misrepresent the content of the book and the book is not sold in conjunction with a related product or

service. But if the new policy statement reflects an intention by the Commission to take a more aggressive approach, it will present very serious First Amendment concerns.

Jonathan Bloom, of Weil, Gotshal & Manges LLP, represents the Association of American Publishers, Inc.

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For information contact Dave Heller at dheller@medialaw.org

APIAC CASE UPDATE:**4th Circuit Upholds Classified Info Procedure for Pending Trial, But Trial Court Refuses to Defer to Government on Classification**

The criminal espionage prosecution of two former lobbyists for the American Israel Public Affairs Committee (AIPAC) continues, with the long-delayed trial now scheduled to begin June 2. *U.S. v. Rosen*, Crim. No. 1:05CR225 (E.D. Va.).

The pre-trial proceedings in the case, have led to some significant rulings on use of national defense information in public trials, including recent decisions by the 4th Circuit Court of Appeals and the trial judge presiding over the case.

Background on the Case

The indictment of former AIPAC lobbyists Steve J. Rosen and Keith Weissman in 2005 under the Espionage Act, 18 U.S.C. ' 793, drew the immediate attention of First Amendment advocates because of the nature of the alleged offense. According to the government, Rosen and Weissman violated the law by receiving information “relating to the national defense” and “connected to the national defense” (the terms used in the Espionage Act, generally referred to as “national defense information, or NDI) from a former Defense Department official, and sharing it with fellow AIPAC staffers, reporters and foreign government officials. (The Pentagon official, Lawrence Franklin, pled guilty in the case and was sentenced to 12 years in prison.)

The media defense bar became concerned because the allegedly illegal actions that Rosen and Weissman took are not that different from what many reporters do every day in Washington, D.C.

The defendants initially argued for dismissal on the grounds that the statute was unconstitutionally vague as applied to oral communications, since there is no notice that the information is categorized as classified. See *MLRC MediaLawLetter*, March 2006, at 9. Trial judge T.S. Ellis rejected this argument, holding that the Act constitutionally prohibits intentional, oral dissemination of classified information as long as the speaker intended to harm

national security. *U.S. v. Rosen*, 445 F.Supp.2d 602 (E.D.Va. Aug. 9, 2006); see *MLRC MediaLawLetter*, Aug. 2006, at 3.

The case then proceeded to discovery. After the court agreed to allow the defendants to depose three Israeli government officials, 240 F.R.D. 204 (E.D.Va. Feb. 14, 2007); see *MLRC MediaLawLetter*, March 2007, at 49, the court proceeded on the prickly issues of the need to introduce evidence that the government said was classified. Such trials are governed by the Classified Information Procedure Act (CIPA), Pub. L. 96-456, 94 Stat. 2025 (1980), codified at 18 U.S.C. App. 3, which provides for a court to oversee a process in which classified material is redacted or summarized for presentation at trial.

In March 2007, it appeared from docket entries that the government had filed a motion to totally close the trial to the public. In reaction, a coalition of media entities and organizations filed a motion to intervene and to argue against any such closure. Judge Ellis denied the motion to intervene, but also ordered that any briefs on the issue of closure submitted by either the prosecution or defense in the case be filed publicly.

It turned out that while the government had not proposed a total closure, it had proposed a highly restrictive, blanket process in which classified material would be available to trial participants, including jurors, but not public observers. Names of certain individuals and places would be referred to by code words, with only participants having the key. And all courtroom testimony would be heard by trial observers on a audio system, with classified testimony masked by “white noise” (the so-called “silent witness rule”). Judge Ellis largely rejected this proposal, holding that such a procedure would “virtually guarantee” juror confusion, and did not meet the closure requirements of *Press-Enterprise v. Superior Court*, 464 U.S. 501. 487 F.Supp.2d 703 (E.D.Va. Apr. 19, 2007); see *MLRC MediaLawLetter*, March 2007, at 41, and *MLRC MediaLawLetter*, April 2007, at 3.

The court and the parties then proceeded with the CIPA procedure to evaluate each item of classified evidence and whether, and how, it could be redacted or summarized for presentation at trial. Eventually, Judge Ellis approved the use of the “silent witness rule” for a relatively small portion of evidence (four minutes and six seconds of a total of four hours, 13 minutes and 51 seconds of recorded conversations between Franklin, the Defense Department official, and the defendants). 520 F.Supp.2d 802 (E.D. Va. Nov. 2, 2007).

Fourth Circuit Opinion

The government appealed the trial court’s ruling on use of substitutions in lieu of “classified” evidence during trial for two specific documents. The defendants responded with a motion to dismiss the appeal for lack of jurisdiction, arguing that the summaries do not contain classified information, must again be subjected to the CIPA process, and the relevant agency heads must affirmatively assert that the information is properly classified, before they can be subject to an interlocutory appeal.

The court rejected the defendant’s jurisdictional arguments, and upheld the CIPA order. *U.S. v. Rosen*, 557 F.3d 192 (4th Cir. Feb. 24, 2009). This means that the trial can proceed under the evidentiary rules contained in that order, with substitutions and summaries of classified material, and use of the “silent witness rule” when some recordings are played at trial.

But the Fourth Circuit’s opinion contains statements that cause some concern to First Amendment advocates.

The court rejected an argument challenging the trial court’s Aug. 9, 2006 order limiting the application of the Espionage Act to oral communications, which the government argued was the basis of the subsequent CIPA rulings. “Although we possess jurisdiction to review the district court’s evidentiary rulings under CIPA,” the court stated, “the government’s attempt to piggyback a pretrial review of the courts interpretation of § 793 is improper at this juncture.”

Nevertheless, in a footnote the appellate court expressed some concern about the trial court’s application of the Espionage Act.

Although we do not possess jurisdiction to review the § 793 Order at this juncture, it is apparent that the district court worked tirelessly to balance the competing forces inherent in a prosecution involving classified information, and that its efforts to protect the fair trial rights of the defendants were not inappropriate. We are nevertheless concerned by the potential that the § 793 Order imposes an additional burden on the prosecution not mandated by the governing statute. Section 793 must be applied according to its provisions, as any other course could result in erroneous evidentiary rulings or jury instructions.

It is unclear what effect, if any, this *dicta* will have either on the AIPAC prosecution or on Espionage Act prosecutions generally.

Court Rejects Deference on Classification

While the 4th Circuit was about to release its affirmance of the trial court’s CIPA order, Judge Ellis continued to consider various discovery requests prior to trial. One of these was the defense’s desire to present J. William Leonard, a retired United States government official with substantial experience and expertise in the field of information classification, as an expert witness, apparently in support of its contention that the material that Rosen and Weissman allegedly discussed was not properly categorized as “national defense information” (NDI), which is protected by the Espionage Act.

As stated by the court in its opinion allowing Leonard’s testimony, “NDI, it is worth noting, is not synonymous with ‘classified’ ... NDI in a § 793 prosecution is that information, which at the time of an alleged unauthorized disclosure, is found by the jury beyond a reasonable doubt (i) to have been closely held by the government and (ii) to be potentially damaging to the United States or useful to an enemy of the United States if disclosed without authorization.” *U.S. v. Rosen*, ---

F.Supp.2d ----, No. 1:05CR225, 2009 WL 453410 (E.D. Va. Feb. 17, 2009) (available [here](#)), slip op. at 5.

Judge Ellis went further, stating that the government must show more than that particular information was classified for a successful prosecution under the Espionage Act:

In such a prosecution, evidence that information is classified does not, by itself, establish that the information is NDI; evidence that information is classified is, at most, evidence that the government intended that the designated information be closely held. Yet, evidence that information is classified is not conclusive on this point; it is open to a defendant to show that the government in fact failed in the attempt to hold the information closely because, for example, the information was leaked or was otherwise in the public domain. Further, the government's classification decision is inadmissible hearsay on the second prong of the NDI definition, namely whether unauthorized disclosure might potentially damage the United States or aid an enemy of the United States.

U.S. v. Rosen, --- F.Supp.2d ----, No. 1:05CR225, 2009 WL 453410 (E.D. Va. Feb. 17, 2009), slip op. at 6.

Groups Seek Dismissal

In late March, the American Jewish Committee and the Anti-Defamation League made separate public statements asking the Justice Department to drop the prosecution against Rosen and Weissman.

The Anti-Defamation League released a letter it had sent to the Justice Department in September, which stated that the "prosecution of this case endangers core First Amendment protections not just for AIPAC, but for the media and anyone who, in the course of their work, discusses with government officials something that a prosecutor later decides was protected national defense information."

Rosen's Libel Suit

While the criminal trial against the AIPAC defendants is pending, Rosen has filed his own, \$21 million defamation suit against AIPAC in D.C. Superior Court. The suit claims that statements issued by AIPAC and an outside spokesman the organization hired to respond to inquiries in the wake of his indictment were defamatory to him. The case is currently set for a scheduling conference on June 5. *Rosen v. American Israel Public Affairs Committee*, No.2009 CA 001256 (D.C. Super. filed March 2, 2009).

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First Amendment Challenge to Restaurant Chain Calorie Disclosure Law Rejected

Health Code Permissible Restriction of Commercial Speech

By Jennifer A. Klear

The New York State Restaurant Association (“NYSRA”), a not-for-profit business association consisting of over 7,000 restaurants, challenged the constitutionality of New York City Health Code §81.50, which requires “roughly ten percent of restaurants in New York City, including chains such as McDonald’s, Burger King and Kentucky Fried Chicken, to post calorie content information on their menus and menu boards.” Specifically, the NYSRA argued that the Regulation was unconstitutional because it was “(1) preempted by federal laws, specifically the Nutrition Labeling and Education Act of 1990, and (2) infringes on its member restaurants’ First Amendment rights.”

This past month, the Second Circuit, affirming a decision by the Southern District of New York, held that “although restaurants are protected by the Constitution when they engage in commercial speech, the First Amendment is not violated, where as here, the law in question mandates a simple factual disclosure of caloric information and is reasonably related to New York City’s goals of combating obesity.” [*New York State Restaurant Association v. New York City Board of Health*](#), No. 08-1892 (2d Cir. Feb. 17, 2009) (Pooler, Sotomayor, Restani, JJ.).

In so ruling, the Second Circuit upheld the application of the rational basis test in reviewing the constitutionality of purely factual and uncontroversial commercial speech regulations.

Background

In December 2006, the New York City Board of Health adopted regulations to combat the rising rates of obesity and associated health care problems. “The 2006 regulation, which was to become effective on July 1, 2007, mandated that any food service establishment voluntarily publishing caloric information post such information on its menus and menu boards.” The NYSRA, on behalf of restaurants, challenged the

regulation on preemption and First Amendment grounds by suing the New York City Board of Health, the New York City Department of Health and Mental Hygiene, and Thomas R. Frieden, the Commissioner of the New York City Department of Health and Mental Hygiene in the Southern District of New York. On September 11, 2007, the Southern District issued a decision in which it held that the regulation was preempted, but did not reach the NYSRA’s First Amendment claim.

As a result, on January 22, 2008, the New York City Board of Health repealed and modified the 2006 regulation. Regulation 81.50 now “requires all chain restaurants with fifteen or more establishments nationally to make statements showing calorie content in the precise manner prescribed by the regulation. For those restaurants covered by the regulation, the calorie information must be presented clearly and conspicuously, adjacent or in close proximity to the menu item, and the font and format of calorie information must be as prominent in size and appearance as the name or price of the menu item.”

District Court Ruling

The NYSRA, still unhappy with the latest revisions to the Regulation, filed the instant action in the Southern District of New York seeking an injunction and a declaratory judgment on the grounds that the regulation is preempted by federal law and unconstitutional. New York City cross-moved for summary judgment. The district court rejected the preemption challenge and granted the City summary judgment on its claim. With regard to the NYSRA’s First Amendment claim, the district court found that “the required disclosure of caloric information is reasonably related to the government’s interest in providing consumers with accurate nutritional information and therefore does not unduly infringe on the First Amendment rights of NYSRA members.”

Second Circuit Ruling

The NYSRA appealed. With respect to its First Amendment claims, the NYSRA argued on appeal that “Regulation 81.50 should be subjected to heightened scrutiny, and not, as the district court concluded, ‘rationality.’” The Second Circuit, relying on *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-51 (1985) and its progeny, noted that “there are ‘material differences between [purely factual and uncontroversial] disclosure requirements and outright prohibitions in speech’ and that regulations that compel ‘purely factual and uncontroversial’ commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech.”

The Court further relied on the Second Circuit’s interpretation of *Zauderer* in *National Electrical Manufacturers Association v. Sorrell*, 272 F.3d 104, 114-15 (2d Cir. 2001) where the Circuit held that “rules ‘mandating that commercial actors disclose commercial information’ are subject to the rational basis test.” The *Sorrell* case held that “[c]ommercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.”

By relying on the *Sorrell* case, the Second Circuit simultaneously rejected several arguments asserted by the NYSRA — one of which advocated the application of intermediate scrutiny as the Second Circuit had done in *International Dairy Foods Association v. Amestoy (IDFA)*, 92 F.3d 67 (2d Cir. 1996). The Second Circuit, however, explained that *IDFA* “was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of ‘consumer curiosity,’” which the Court found New York’s interest in preventing obesity was not.

The Second Circuit next examined “whether Regulation 81.50’s labeling . . . requirements are compelled speech in violation of the Constitution or simply requirements of purely factual disclosures.” Because the NYSRA did not deny that the calorie information is not “factual,” the Second

Circuit, in a rather cursory fashion concluded that “the First Amendment does not bar the City from compelling such ‘under-inclusive’ factual disclosures ... where ... the City’s decision to focus its attention on calorie amounts is rational.”

Having decided to apply the rational basis test, the Second Circuit noted that NYSRA conceded that if the Court applied rational basis, its arguments would not prevail. Nevertheless, the Second Circuit continued to explain how New York City “plainly demonstrated a reasonable relationship between the purpose of Regulation 81.50’s disclosure requirements and the means employed to achieve that purpose.” According to the City, the Regulation had been enacted to “(1) reduce consumer confusion and deception; and (2) to promote informed consumer decision-making so as to reduce obesity and the diseases associated with it.”

The City cited numerous studies declaring obesity to be a “public health crisis of epidemic proportions” and “a serious and increasing cause of disease.” It further demonstrated that obesity is linked to dining out and “the consumption of high-calorie meals at fast-food restaurants.”

One study even concluded that “calorie information is most relevant to obesity prevention [and] restaurants should provide consumers with calorie information in a standard format that is easily accessible and easy to use.” Keystone Ctr., *The Keystone Forum on Away-from-Home Foods’ Opportunities for Preventing Weight Gain and Obesity* 74 (2006) (the “Keystone Report”).

In digesting this information, the Court was particularly intrigued by one study’s finding that “a smoked turkey sandwich at Chili’s contains 930 calories, more than a sirloin steak, which contains 540, or that 2 jelly-filled doughnuts at Dunkin’ Donuts have fewer calories than a sesame bagel with cream cheese.” Upon reviewing these findings, the Second Circuit concluded that Regulation 81.50’s calorie disclosure rules are reasonably related to its goal of reducing obesity.

Jennifer A. Klear is an associate at Gibbons, PC in New York. Kent A. Yalowitz and Peter L. Zimroth of Arnold & Porter LLP, New York, represented the New York State Restaurant Association.

ETHICS CORNER:
Return to Sender?
The Dilemma of Inadvertent Disclosure

By Andrew Shute and Khory McCormick

This article examines some recent developments in Australian courts in relation to inadvertent disclosure of documents in the course of discovery in legal proceedings.

Parties to complex litigation are increasingly having to review significant volumes of material in electronic form. Accordingly, the risk of inadvertently disclosing privileged material has increased. This risk is likely to be higher when, as is becoming increasingly common in Australian legal proceedings, lists of documents are exchanged at the same time as copies of documents are provided.

This issue is coming up in courts in many jurisdictions.

On 29 January 2009, the Federal Court of Australia issued Practice Note No 17: The use of technology in the management of discovery and the conduct of litigation¹.

Under the Practice Note, parties are encouraged to meet and confer, with a view to agreeing on matters such as the scope of discovery, reasonable search strategies, and strategies for the preservation of electronic information. In addition, parties are encouraged to agree on strategies relating to privilege. The issue of inadvertent disclosure is not specifically referred to, however the Practice Note is sufficiently flexible for parties to be able to agree, prior to the process of discovery commencing, how they will deal with the issue of inadvertent discovery.

Unlike in the United States, which has Fed R Evid 502, Australian courts must consider the issue on primary principles.

The decision of Hollingworth J of the Supreme Court of Victoria (an Australian State court) in *GT Corporation Pty Ltd v Amare Safety Pty Ltd* [2007] VCS 123 is a timely reminder of how readily inadvertent disclosure can occur, the ethical dilemmas that are faced by lawyers receiving such material, and the measures

courts can take to prevent the use of inadvertently disclosed material.

In light of this decision, it is submitted that parties in Australian proceedings - particularly in electronic discovery - should endeavour to agree on how they will deal with any inadvertent disclosure of privileged documents in the discovery process.

The Facts

In these proceedings, discovery of documents had been ongoing for some time². The defendant, Amare, was ordered to provide discovery of computers used by certain employees. It engaged experts to obtain forensic images of the computers.

In their list of documents, Amare listed the forensic images of computers used by one of the named employees. It did not make any specific claim of privilege in its list in respect of any part of those images.

Amare did not copy images for the other employees because they were duplicated on servers used by Amare.

Amare's lawyers advised the lawyers for the plaintiff (GT) of this fact. They also advised that a preliminary keyword search indicated that some 900,000 files were potentially subject to legal privilege.

GT's lawyers requested a list of the privileged files.

The party's IT consultants dealt directly with each other in relation to electronic discovery. Amare's consultants delivered a substantial number of electronic files and emails to GT's consultants, unaccompanied by a list. Without the knowledge of Amare's lawyers, the consultant had not removed all of the documents in respect of which privilege was to be claimed.

The judge noted that there was 'no doubt that the manner in which Amare's electronic discovery was provided, together with the complete lack of any index, has contributed significantly to the problems which have subsequently arisen.'

¹ Some State courts have also introduced Practice Notes that relate to the use of technology, although none of them prescribe any steps for dealing with inadvertent disclosure. However the Supreme Court of New South Wales has a General Practice Note, and a Practice Note for the Commercial List and the Technology and Construction List in the Equity Division, which require the parties to meet and agree on whether electronically stored information is to be discovered on an agreed 'without prejudice' basis.

² In Australia, court rules generally require parties making discovery of documents to provide the other party with a list or affidavit of documents.

The lawyer for GT who commenced reviewing the discovery had assumed that all privileged documents had been removed. This was held to have been a reasonable initial assumption. However he began to notice some sensitive lawyer-client communications. He stopped reading the documents when he realised they were potentially privileged.

Thinking that the documents had been provided inadvertently, and unsure about what to do, he sought advice from the barrister³ who had been retained in the matter. Subsequently GT's lawyers wrote to Amare's lawyers, but did not specifically bring the inadvertent disclosure to their attention. They repeated the request for a list of privileged documents.

Amare's lawyers advised that a list of documents was being prepared. The list subsequently turned out to have some inaccuracies.

In the meantime, GT's lawyers arranged for copies of certain documents which referred to previous lawyers of Amare to be provided to counsel. These documents were obtained by searches and were not reviewed by GT's lawyers. The barrister read the documents, and formed the view that some of the documents undermined Amare's defence. However he also formed the view that Amare should be entitled to 'revive' a privilege claim for the remaining documents.

It was at this time that GT's lawyers wrote to Amare's lawyers and enclosed documents that they presumed were inadvertently disclosed. In respect of other documents they asserted that privilege had been waived by the manner in which they were disclosed.

Amare's lawyers responded that all the documents referred to in the letter had been inadvertently disclosed and that privilege was maintained.

GT sought a list of all the privileged documents that Amare said had been inadvertently disclosed, together with an explanation of how they had been disclosed inadvertently.

Amare eventually provided a list (identifying 379 specific documents in respect of which privilege was claimed). One of the lawyers for GT 'skim read' the emails that had been sent to the barrister to compare them with this list. He identified that nobody on behalf of GT had viewed around 150 of the listed documents, and that the barristers had been briefed with 34 documents that were not listed. GT's lawyers responded stating that they regarded

privilege as having been waived in respect of any documents not in the list.

The Orders Sought

GT sought an order that Amare swear a further affidavit listing each and every document in respect of which privilege was claimed.

Amare sought orders that GT's current lawyers and barristers be restrained (ie disqualified) from acting or continuing to act for GT in the proceedings, and that all copies of privileged documents be returned.

The Orders Made

The judge ordered that Amare swear a further affidavit listing each and every document, including attachments, contained in the electronic discovery in respect of which it wished to claim privilege. The affidavit also needed to specify the precise basis on which privilege was claimed and, if the claim could not be established merely from the document description, sufficient facts to establish the claim.

In respect of certain documents, the judge found that disclosure of privileged material was inadvertent.

He ordered that GT's barristers be restrained from acting for GT, however he declined to make such an order for GT's lawyers.

Waiver

In making his decision that there had not been a waiver in respect of inadvertently disclosed documents, the judge noted that implied waiver can occur when there is an inadvertent disclosure of privileged material.

His Honour referred to the decision of the Court of Appeal in the United Kingdom in *Guinness Peat Pty Ltd v Fitzroy Robinson* [1987] 2 All ER 716 in which it was held that '[p]rivilege may be lost by inadvertence'. In that case the court stressed the need for parties to take great care in preparing their lists of documents and providing inspection because, ordinarily, a party who sees a document which has been listed or produced without a claim for privilege 'is fully entitled to assume that any privilege which might otherwise have been claimed has been waived'. However that court held that it did have power to intervene under its equitable jurisdiction if either the inspection had been procured by fraud, or the inspecting party realised, on inspection, that he had been

³ In the State of Victoria, there is a split profession along English lines of solicitors and barristers.

permitted to see a confidential document only because of an obvious mistake.

His Honour noted that these principles had been applied in a number of Australian decisions and that, in determining what fairness requires in each case, the courts have had regard to matters such as:

- how the recipient obtained the information;
- how quickly the party claiming the privilege acted once it learned of the mistake;
- what, if any, use had been made of the information;
- what prejudice may flow to either side from the waiver or non-waiver of privilege; and
- whether the inspecting party would have difficulty conducting the case whilst trying to ignore the contents of the documents.

Applying these principles, the judge held that there had been no waiver of privilege and that the documents had been disclosed through inadvertence.

The judge held that Amare had acted reasonably promptly in seeking the return of the privileged documents once it became aware of the disclosure. He took into account the fact that GT accepted that it would be able to conduct the trial without recourse to the privileged material. The judge held that the prejudice which might flow to Amare from the loss of privilege outweighed any forensic advantage which GT might obtain from retaining the material.

Restraining Lawyers from Acting

The judge then reviewed the position in relation to the ability to restrain from acting a lawyer who has inspected privileged documents disclosed inadvertently.

He noted the position summarised in the decision in *Kallinicos v Hunt* (2005) 64 NSWLR 561, being as follows:

The test to be applied is whether a fair-minded, reasonably-informed member of the public would conclude that the proper administration of justice requires that a lawyer be prevented from acting, in the interest of the protection of the integrity of the judicial process and

the due administration of justice, including the appearance of justice.

The jurisdiction is exceptional and is to be exercised with caution.

Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause.

The timing of the application may be relevant, in that the cost, inconvenience and impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief. Although there had been discovery and inspection of hundreds of potentially privileged documents, the judge took different views in respect of the position of GT's lawyers and barristers.

In light of the fact that the barristers must have had extensive regard to the contents of the documents provided to them, which they had requested, His Honour held that 'a fair-minded, reasonably-informed member of the public would conclude that those counsel should be prevented from acting, in the interest of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice'.

In relation to the lawyers he was satisfied that they had far more limited knowledge of the contents of the documents. He took into account the cost, inconvenience and impracticality of requiring them to cease acting at a relatively late stage of the proceeding. He was satisfied that they could continue to act in the trial without disclosing the contents of any privileged documents to new counsel. Rather than restrain the lawyers from acting, he indicated that an appropriately drafted injunction or undertaking would be the most appropriate remedy in respect of the lawyers to prohibit any further use of the privileged material.

Ethical Guidelines

The judge made reference to the 'Inadvertent Disclosure Guidelines' published by the Law Institute of Victoria in 1993. Those guidelines stated that if privileged information inadvertently comes to the lawyer's knowledge, the lawyer was entitled and may have a duty to use the information for a client's benefit. However the guidelines went on to provide that if it is obvious that confidential documents have been inadvertently disclosed, the lawyer should consider whether to obtain instructions from the client to read or continue to read the material and should advise the client that the court may enjoin any overt use of the information. In seeking those instructions, the lawyer should point out to the

client the risk that the court may grant an injunction prohibiting the lawyer from continuing to act, and the possible costs of retaining new lawyers.

Subsequent Decisions

A number of cases since the *GT Corporation* decision have considered, in the context of discovery, whether privilege has been waived.⁴ Drawing from those cases, as a general statement of principle, the position seems to be⁵ that:

'where solicitors for a party have mistakenly included a document in respect of which privilege could properly have been claimed, the court will ordinarily permit the solicitors to amend the list of documents at any time before inspection; but once inspection has taken place, the general rule is that it is too late to correct the mistake: unless inspection has been procured by fraud, or the inspecting solicitor realises on inspection that the document has been produced only by reason of an obvious mistake'⁶

If privileged documents are listed in the non-privileged section of an affidavit or list of documents, and they are inspected by the other side, it is likely that privilege will be found to have been waived. This is particularly so if it is not immediately apparent from reading the document that it may be privileged.

However electronic disclosure often occurs in a less traditional manner. Parties are more likely, perhaps through the use of consultants, to simply exchange documents electronically. There is a risk that, whether through inadequate practices in the review process or otherwise, privileged documents may be disclosed – as occurred in *GT Corporation*. Accordingly the recipient practitioner is placed in a difficult position. Are they entitled to assume that the disclosing party has displayed 'a high standard of probity and care in the conduct of litigation and be[en] mindful of legal professional privilege'?⁷ Or should they assume that a mistake has occurred?

⁴ *ACTEW Corporation Ltd v Mihaljevic* [2007] ACTSC 39; *Willett v Belconnen Soccer Club Ltd* [2007], ACTSC 41; *Unsworth v Tristar Steering and Suspension Australia Ltd* [2007] FCA 1081

⁵ But some doubts were expressed in relation to the position under *Uniform Evidence Act* provisions in *Unsworth v Tristar Steering and Suspension Australia Ltd* [2007] FCA 1081 at [9]

⁶ *Willett v Belconnen Soccer Club Ltd* [2007] at [31]

⁷ This was recognised in the previous version of the Inadvertent Disclosure Guidelines of the Law Institute of Victoria

New Ethical Guidelines

Interestingly, the Inadvertent Disclosure Guidelines were amended on 20 November 2008. They now specifically deal with information that has been 'accidentally' obtained. They provide that where it is immediately obvious that confidential documents have been mistakenly disclosed, the practitioner should not read the documents, should inform the other side of the disclosure, and should make arrangements to return the documents. However, if the mistake is only identified while reading the document, the practitioner should cease reading the document until satisfied of the propriety of continuing, and should notify the other side of the disclosure. The practitioner must then inform the client that injunctions may be granted to prevent the use of information and to prohibit the practitioner from acting. The Guidelines express a preference, in appropriate circumstances, for a lawyer to obtain a court order permitting use of the documents. They go on to provide that client instructions to use the information do not override the practitioner's legal and ethical obligations.

Conclusion

Often it is a difficult task for a recipient to form the view as to whether disclosure was inadvertent. The ramifications for coming to an incorrect view can be serious for the lawyer and for the client.

Accordingly, particularly in dealing with electronic discovery, parties would be well-advised to consider agreeing up-front how issues of inadvertent discovery of privileged material will be dealt with. Having said that, it is clearly also in the interests of clients, that lawyers should take a high level of care in undertaking discovery.

Andrew Shute is a senior associate and Khory McCormick a partner at Minter Ellison in Australia.