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LDRC Libel Defense Resource Center

LIBELLETTER

May 1995

AD PHOTO FOR ON-LINE FORUM PRIVILEGED
Incidental to Newsworthy Use

By Slade R. Metcalf

Would you find it just a little incongruous for Howard Stern, one of the foremost radio personalities in the country, to be suing someone for the invasion of his privacy? Well, basically, that's what he did recently when he charged an on-line computer company with violating his rights under the New York invasion of privacy statute.

He lost, with the court holding that the company's advertisement for its Stern for Governor forum, which included a photograph of Stern, did not violate New York law.

It all began when Stern announced in March 1994 that he would be a candidate for the Governorship of New York in the November 1994 general election. Delphi Internet Services, Inc., one of the major on-line services, treated Stern's announcement as a serious news story and created a forum in its News and Opinion area that solicited comments from its subscribers on the suitability of Howard Stern to be New York's Governor. As you might expect, that forum generated numerous, vitriolic responses (both critical and supportive of Stern). Some of the more interesting (and repeatable) ones read:

"Who are we kidding here? We had a bad movie and television actor as president, so why not a deejay as guv. Keep the free airwaves free!!!!!"

"KEEP THIS JERK ON THE RADIO! AT LEAST WE CAN TURN HIM OFF!"

"Sure, New York. Elect Mr. Potty Humor as your governor. Show us how enlightened the human species can be at this point in our evolution."

"Howard is smarter than Bill Clinton

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NJ SUPREME: PROTECTION FOR REPORTING ON CONSUMER FRAUD

by Peter G. Banta

The New Jersey Supreme Court has broadened its prior rulings on what kind of activities will subject a business to the *New York Times* actual malice rule, but retreated from a broader Appellate Division holding in the same case. In *Turf Lawnmower Repair, Inc. v. Bergen Record Corporation*, 655 A.2. 417 (N.J. 1995), the New Jersey Supreme Court, by 6-0, held that all reporting which alleged deceptive conduct which, if true, would violate New Jersey's Consumer Fraud Statute, would be subject to the actual malice standard as a matter of state law, even though the business was not a "public figure" under the First Amendment. The Appellate Division in more broadly that

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IMPLICATION ANALYSIS

Libel lawyers regularly struggle with libel by implication claims. Joyce Meyers, from the firm of Miller Dunham Doering & Munson in Philadelphia, Pennsylvania, has written an analysis of three implication cases: *Chapin* v. *Knight-Ridder*, Sassone v. Elder, and *Locricchio v. Evening News Association.* She argues that the results, while all positive for the defendants in the cases, illustrate the difficulties that courts have in developing reasoned approaches to implication claims. Her note on these opinions is attached to this edition of the LDRC LibelLetter.

If you are currently litigating a libel by implication case, or have received a recent opinion in one, please let LDRC know. This is an important area of the law and we want to keep all of the membership current.

RICO CLAIMS DISMISSED

By Richard M. Goehler

Recently, plaintiffs have asserted RICO claims on the basis of alleged misrepresentations made by journalists during the course of undercover investigations. Without challenging the truth of the subsequent publications or claiming they had been defamed, these plaintiffs have asserted that since the information was obtained wrongfully, RICO damages may be awarded. But what they actually sought by means of their RICO claims was recovery for damage caused by the publication of the information. In two recent cases, *Food Lion, Inc. v. Capital Cities/ABC, Inc.* No. 92 CV 00592 (M.D. N.C. March 21, 1995) and *W.D.I.A. Corporation v. McGraw-Hill, Inc., et al.* C-1-93-0048 (S.D. Ohio April 4, 1995), plaintiffs' RICO claims have not been successful. [The April, 1995 edition of the LDRC LibelLetter reported on the dismissal of a televangelist's RICO claims in *Word of Faith World Outreach Center Church v. Diane Sawyer*, 3:93-C-2310-T (N.D. Tex. Feb. 6, 1995); church of televangelist Robert Tilton.]

First Amendment Implications

Before turning to the specific discussion of the insufficiencies of plaintiffs' RICO claims in these cases, a word about the overriding First Amendment implications is in order. In both *Food Lion* and *W.D.I.A.*, defendants raised the question whether a plaintiff, which has asserted no claim for libel, may recover damages flowing from a publication under some other theory or theories. In *Food Lion*, the court ruled that it may not, specifically distinguishing *Cohen v. Cowles Media Co.* (a case also heavily relied upon by W.D.I.A. in opposing McGraw-Hill's

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HOWARD STERN'S RIGHT TO PRIVACY

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and more discreet than Hillary. He is also one person. If we elect him there ... will be only one person in there. Today Governor of NY and tomorrow President Howard."

Delphi realized that this particular forum would be a prime example of the exciting and controversial topics which are regularly debated on its chat line. To promote this interesting feature, Delphi placed an advertisement in certain print publications, including the *New York Post and New York* magazine. The ad featured a photograph of Howard Stern with his bare tush (although Delphi covered his posterior with a solid bar). Above the photograph was the caption: "Should this man be the next governor of New York?" The copy for the ad read in part: "You've heard him. You've seen him. You've been exposed to his Private Parts. Now he's stumping to be governor. Maybe it's time to tell the world exactly what you think. .... So whether you think Howard-the-Aspiring-Governor should be crowned King of the Empire State, or just greased up and sent face-first down a water slide, don't put a cork in it. Sit down, jack in, and be heard."

Stern sued for violation of Section 51 of the New York Civil Rights Law which provides a civil cause of action if a living person's name, portrait, or picture is used for advertising or trade purposes without that person's written consent. Delphi moved to dismiss the complaint, before any discovery had taken place, on the ground that the use of Stern's name and likeness was privileged because it fell within the "incidental use exception" to Section 51. That exception, given validity by cases involving celebrities Shirley Booth and Joe Namath, provides that if a person's name or likeness is initially used in an obvious newsworthy context (such as being included in a newspaper or magazine article), then an advertisement for that particular newspaper or magazine, that used the name or likeness, would not be violative of Section 51 since the use in the advertisement was only incidental to the protected, newsworthy use.

Delphi's motion to dismiss presented, at that time, two novel issues in interpreting Section 51: (1) whether the fact that the photograph of the plaintiff had not appeared in the newsworthy context (but the plaintiff's name had) precluded the application of the incidental use exception; and (2) whether an on-line service should be accorded the same protection for newsworthy publications as newspapers and magazines were.

After the law suit was commenced but before the motion here was determined, on August 22, 1994, Judge John Martin of the United States District Court for the Southern District granted a motion for summary judgment in the case of *Groden v. Random House, Inc.* There, book publisher Random House had used the photograph of one Robert Groden in a print advertisement for the book *Case Closed* which criticized many of the conspiracy theories surrounding the assassination of President John F. Kennedy. Several parts of the book referred to plaintiff's research and conclusions, although his photograph was never actually used in the book. Judge Martin found that the absence of the photo in the book did not bar reliance on the incidental use exception. He wrote: "[I]t is clear that what drives the exception is a First Amendment interest in protecting the ability of the media to publicize its own communications." Although this ruling was comforting to Delphi's interests, federal courts in New York have been known to take decidedly differing views from New York state court judges in interpreting the meaning and scope of Civil Rights Law Section 51.

"Affording protection to on-line computer services when they are engaged in traditional news dissemination, such as in this case, is the desirable and required result."

The motion to dismiss was argued on December 8, 1994 and in an opinion dated April 20, 1995, Justice Emily Jane Goodman of the Supreme Court of the State of New York granted the motion finding that Delphi was a news disseminator entitled to the same protection from the impact of Section 51 as newspapers and magazines. Indeed, the court found that the specific service at issue here was "a newsworthy service similar to a letter-to-the-editor column in a news publication." The court also found that the photo of Howard Stern, which did not appear on the Delphi on-line service, could be used by Delphi in its advertisement because the inclusion of it was privileged under the incidental use exception. The court stated: "Affording protection to on-line computer services when they are engaged in traditional news dissemination, such as in this case, is the desirable and required result."

The court analogized Delphi's service to a television network which carries both news and entertainment programming. Here, the forum about Stern's candidacy was clearly newsworthy, and the subsequent use of his photo was likewise protected. Relying on the *Groden* case, Justice Goodman ruled that the inclusion of the Stern photo in the advertisement was privileged: "Delphi used Stern's photograph to communicate to the public the nature and style of its service which in this case was the promotion of a news event in which plaintiff was a principal. To restrict Delphi from informing the public of the nature and subject of its services would constitute an impermissible restriction." The court noted: "Indeed, it is ironic that Stern, a radio talk show host (as well as author and would-be politician) seeks to silence the electronic equivalent of a talk show, an on-line computer bulletin board service." The plaintiff has not yet indicated whether he will appeal.

Mr. Metcalf is a partner with the New York City law firm of Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin, LLP., and represented Delphi Internet Services, Inc. in the Stern case.

NEWSPAPER ENTITLED TO SELL REPRODUCTIONS OF ITS PAGES WITH CELEBRITY PHOTOS

By Judy Alexander

The California Court of Appeal has held that a newspaper has a First Amendment right to sell reproductions of its pages in poster form--even if those pages include photographs or images of a well-known sports superstar. *Joseph C. Montana, Jr. v. San Jose Mercury News, Inc.*, No. H012004 (decided May 3, 1995).

Quarterback Joe Montana led the San Francisco 49'ers to Super Bowl victories in both 1989 and 1990. The day after each of these victories, the San Jose Mercury News ("Mercury News") ran a major front page story about the game. The 1989 story ran with a photograph of four players, including Montana, celebrating on the field. The 1990 story was accompanied by a photograph showing Joe Montana and Guy McIntyre celebrating after a touchdown. Following the 1990 victory, the Mercury News also published a special souvenir section devoted exclusively to the 49'ers, who had won four championships in the 1980-1990 decade; the section had an artist's rendition of Montana on the front page.

Each of these three newspaper pages was reproduced in poster form within two weeks of its publication and was made available for sale to the public. About 30% of the posters were sold for $5 each; most of the remaining posters were given away by the Mercury News at charity and promotional events.

In 1992 Montana sued the Mercury News for common law and statutory commercial misappropriation of his name, photograph and likeness. The trial court granted the Mercury News' summary judgment motion on First Amendment grounds, and Montana appealed.

The Court of Appeal found the Mercury News posters to be protected by the First Amendment on two grounds. First, the Court held that the posters were themselves publications reporting on newsworthy events. The Court began by comparing the Mercury News posters to those at issue in *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501 (1968). In *Paulsen* it was held that selling posters of comedian Pat Paulsen with "FOR PRESIDENT" written at the bottom did not violate Paulsen's right of publicity because the posters depicted a newsworthy event--Paulsen's mock presidential candidacy. Similarly, Joe Montana leading his team to four Super Bowl victories in a decade was newsworthy, and thus "[p]osters portraying the 49'ers victories are, like the poster in *Paulsen*, 'forms of public interest presentation to which protection must be extended.'"

The Court found support for its conclusion in *Jackson v. MPI Home Video*, 694 F.Supp. 483 (N.D.Ill. 1988), in which the court noted that Jesse Jackson's right of publicity was not violated by the unauthorized distribution of videocassettes of a speech he gave at the 1988 Democratic National Convention because the cassettes used Jackson's name and likeness in the "news media." Similar support was found in *Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536 (1993), where the court found that a video documentary on surfing that depicted plaintiff did not commercially misappropriate plaintiff's name and likeness.

The Court also held that the Mercury News had a First Amendment right to promote itself by reproducing its originally protected articles or photographs. Citing *Booth v. Curtis Publishing Company*, 223 N.Y.S.2d 737 (1962), *Cher v. Forum Intern. Ltd.*, 692 F.2d 634 (1982), and *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10 (1975), the Court found that "[w]here, as here, a newspaper page covering newsworthy events is reproduced for the purpose of showing the quality and content of the newspaper, the subsequent reproduction is exempt from the statutory and common law prohibitions."

The Court noted that the Mercury News submitted undisputed evidence that the posters were sold to advertise the quality and content of the newspaper; moreover, the posters were exact reproductions of the newspapers' pages and did not state or imply endorsement by Montana. Finally, the Court found that the fact that the posters were sold is without significance, citing *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 868 (1979) ("Whether the activity involves newspaper publication or motion picture production, it does not lose its constitutional protection because it is undertaken for profit"); and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment").

Judy Alexander is a partner with the firm Pillsbury, Madison & Sutro in San Jose, CA.

PERSONAL JURISDICTION OVER REPORTERS DENIED

A Federal District Court in Tennessee has held that the court lacked personal jurisdiction over two reporters from Sports Illustrated in connection with a libel suit brought by a Tennessee resident. *Cobb v. Time, Inc.*, No. 3:94-0836 (M.D.Tenn. 1994). Plaintiff, Randall "Tex" Cobb, a nationally known boxer and actor, brought suit against Time, Inc, publisher of Sports Illustrated, and the two reporters claiming that an article researched and prepared by the two defendant-reporters suggested that he used cocaine and was involved in a "fixed" boxing match held in Florida. The defendant-reporters filed Motions to Dismiss for lack of personal jurisdiction.

Neither reporter was a resident of Tennessee, neither maintained a business office in the state and other than calls to Tennessee in an effort to contact plaintiff, neither did any research for the story in Tennessee. All sources and the incidents reported upon were outside the jurisdiction.

The Tennessee long-arm statute affords the state jurisdiction to the extent allowed under the Due Process Clause of the U.S. Constitution. Thus, plaintiff argued that the case was controlled by the Supreme Court decision in *Calder v. Jones*, 465 U.S. 783 (1984), in which actress and California resident Shirley Jones successfully obtained personal jurisdiction over two Florida-based reporters for the National Enquirer.

The reporters in *Calder* placed a number of calls into California during the research for the story, and, more importantly, the Court held that plaintiff-Jones' primary occupation and reputation was in California and that the brunt of the story and its harm was centered in California. (Also relevant to the Court in *Calder*, but not mentioned by the Tennessee court in this decision was the fact that the reporters were aware that the publication received extensive circulation in the state. The court here makes no mention of circulation of Sports Illustrated as a factor.)

Defendant-reporters argued that a recent Sixth Circuit decision, *Reynolds v. Int'l Amateur Athletic Federation*, 23 F.3d 1110 (1994), should control instead. The district court agreed. In *Reynolds* the plaintiff was a world-class sprinter. Defendant was the international organization which governed competitions throughout the world. Defendant reported what turned out to be an invalid positive drug test result, and suspended plaintiff from competition. The report was issued by defendant in Monaco after a track meet in that country. Plaintiff sued Defendant in plaintiff's home state of Ohio.

As in *Reynolds* the Tennessee court found that the plaintiff's reputation and careers are national, not localized in his home state; plaintiff's damages are not primarily centered in Tennessee. The topic of the article was not in Tennessee; the research was not conducted in Tennessee. While defendants could foresee that the article would be published in the state, the state was not "the focal point" of the article or its impact. The defendants did not "purposefully avail themselves of the privilege of acting in Tennessee" and they overall lacked the minimal contacts required to meet due process minimums. Like *Reynolds* the case was distinguishable from *Calder v. Jones*.

D.C. COURT GRANTS SUMMARY JUDGMENT TO CBS, CONNIE CHUNG

On Friday, April 7, in *Foretich v. CBS*, Civ: 91-0123 HHG/PJA (D.D.C. 1995) United States District Judge Harold H. Greene entered final judgment in favor of CBS Inc., Connie Chung and former CBS news producer Peter Michaelis in a defamation action brought against them by Dr. Eric Foretich. Significantly, summary judgment was granted for defendants on grounds that included the neutral reportage privilege, and without affording plaintiff an opportunity to discover confidential non-broadcast CBS newsgathering materials.

The broadcast at issue, which was aired by CBS in 1990 on "Face to Face with Connie Chung," examined the widely publicized custody dispute between Dr. Foretich and his former wife, Dr. Elizabeth Morgan, who accused him of sexually abusing their daughter, Hilary. When ordered to produce Hilary for visitation over her objections, Dr. Morgan sent the child into hiding with her maternal grandparents. As a result, Dr. Morgan was held in civil contempt and incarcerated for twenty-five months before Congress passed and President Bush signed legislation releasing her.

On the broadcast, Ms. Chung interviewed both Dr. Foretich and Dr. Morgan, as well as experts on both sides concerning the conflicting medical and psychological evidence of abuse. In his complaint, Dr. Foretich contended that twenty four specific statements in the broadcast were defamatory and that the broadcast, taken as a whole, communicated the false and defamatory meaning that he had sexually abused his daughter.

During discovery, the defendants produced all nonprivileged source material they had gathered in preparation of the broadcast, including voluminous records of judicial proceedings involving Drs. Foretich and Morgan, and copies of the extensive news coverage of those proceedings. The defendants declined, however, to produce any previously unpublished material, including interview notes, scripts, and outtakes pending the adjudication of a summary judgment motion testing the threshold efficacy of Dr. Foretich's complaint.

Indeed, after their initial document production, defendants filed a motion for summary judgment asserting, *inter alia*, that (1) the broadcast, taken as a whole, was not reasonably capable of conveying a defamatory meaning; (2) Dr. Foretich could

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ALASKA EMBRACES ACTUAL MALICE STANDARD FOR PRIVATE FIGURE LIBEL PLAINTIFFS

In its most significant libel decision in nearly 30 years, a unanimous Alaska Supreme Court has clarified that Alaska law "protects the free exchange of ideas by applying the actual malice standard to publications on issues of public interest or concern, even if the defamation plaintiff is not a public figure." *Mount Juneau Enterprises, Inc. v. Juneau Empire*, Alaska Supreme Court Op. No. 4180, March 17, 1995. This is the first time Alaska's highest court has squarely addressed the applicable standard since *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) left states free to adopt any standard requiring at least some degree of fault in suits filed by "private figures" seeking actual damages.

The suit was based on two allegedly defamatory articles. As to the first, concerning bankruptcy court proceedings relating to the plaintiff's highly publicized plans and efforts to build a tramway to the top of Mount Juneau from the downtown district of the state's capital, the plaintiff was found to be a public figure. The second article discussed a goose that allegedly flew into an abandoned oil tank on the developer's property and landed in sticky fuel residue. The court expressly assumed for purposes of its ruling that the plaintiff was not a public figure with respect to this second article.

A previous Alaska Supreme Court decision on this subject also required a showing of actual malice by a private individual involved in a matter of public interest or concern, *West v. Northern Publishing Co.*, 487 P. 2d 1304, 1305-06 (Alaska 1971) (affirming summary judgment in favor of the *Anchorage Daily News*, dismissing claims by a taxicab company owner arising from a story about social problems in rural Alaska, that Nome taxicab companies "owned by liquor interests" regularly furnished liquor to minors). However, *West* was decided on Supremacy Clause grounds, and applied the standard required by a plurality of the U.S. Supreme Court earlier that same year in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971). *Rosenbloom* was the high water mark for expanded applications of the *New York Times* "actual malice" test, and since *Gertz* said the higher standard is not constitutionally required, all but a handful of states have declined to require it as a matter of state law.

There have been several indications that Alaska would finally adopt the more favorable actual malice standard, and only one to the contrary. Despite this, several courts and commentators, somewhat suprisingly, have focused only on the prediction by a single federal judge in a diversity action that Alaska would reject it and apply a negligence standard instead. See e.g., *Chang v. Michiana Telecasting Corp.*, 900 F. 2d 1085, 1087 (7th Cir. 1990); *Brown v. Kelly Broadcasting Co.*, 771 P. 2d 406, 424 (Cal. 1989); all citing *Sisemore v. U.S. News & World Report, Inc.*, 662 F. Supp. 1529 (D. Alaska 1987).

Given the numbers of states adopting a negligence standard post-*Gertz*, it may have seemed a safe prediction, but as it turns out, rumors of *West's* demise were greatly exaggerated. These courts had ignored or overlooked the fact *Sisemore* was an aberration in a line of Alaska cases that were generally favorable to the press, and that suggested continued vitality of the *West/Rosenbloom* standard. These included the only other federal diversity case applying Alaska law after *Gertz*, *Gay v. Williams*, 486 F. Supp. 12 (D. Alaska 1979), and other cases the court in *Sisemore* had rejected as *dicta*.

Briefing by both parties in the *Juneau Empire* case cited *Sisemore*; the libel plaintiff/appellant clearly urged the Supreme Court to take the position the federal judge in that case had predicted it would. In adopting the actual malice standard, the court in *Juneau Empire* makes no mention of the *Sisemore* decision, but it does cite as precedent for its ruling *Gay v. Williams* and each of the previous Alaska Supreme Court opinions rejected or distinguished by the court in *Sisemore*.

Nor can *Juneau Empire's* adoption of the actual malice standard in private figure cases be dismissed as merely *dicta*. The court expressly assumed for purposes of this ruling that the plaintiff was not a public figure for purposes of this article, and declined to remand the case despite the fact the superior court had made no determination of the plaintiff's public figure status with respect to the second, "gooey goose" article.

The court found that the article sufficiently concerned matters of public interest because the oil tank into which the protected migratory bird flew was originally purchased for the purposes of the tramway project, and because, "in addition, cleanup of the hazardous materials on the site poses an additional issue of public interest."

The remainder of the opinion, including discussions about determination of public figure status and application of the actual malice test, is useful but not groundbreaking. The court rejected the developer's arguments that *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) was applicable because neither participation in bankruptcy proceedings nor efforts to obtain required building permits should make the developer a pubic figure. Citing Professor Laurence H. Tribe, the court said *Firestone* did not create a bright-line rule erasing an individual's public figure status merely because of required participation in government proceedings, but rather was based on the reasoning that gossip about the rich and famous is not a matter of legitimate public interest. Tribe, Laurence, American Constitutional Law, § 12-13, at 881 (2d ed. 1988). The court also ruled that failure to publish a retraction is insufficient to create a factual question precluding summary judgment.

The substantial cost of the Juneau Empire's victory was ameliorated by an Alaska rule allowing the prevailing party to recover a portion of its reasonable attorney fees and costs.

Anchorage attorney D. John McKay represents news media in Alaska.

SUMMARY JUDGMENT

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not, as a matter of law, carry his constitutional burden of proving that the defamatory meaning he attributed to the broadcast -- i.e., that he had sexually molested his daughter -- was false; (3) the broadcast constituted a privileged fair report of judicial proceedings; and (4) the broadcast was absolutely privileged pursuant to the First Amendment-based doctrine of neutral reportage.

For his part, Dr. Foretich argued that he was entitled to complete all discovery before responding to the summary judgment motion and, accordingly, filed a motion to compel production of the unpublished material described above.

The defendants resisted on the ground that, pursuant to the newly enacted D.C. Shield Law, D.C. Code §§ 16-4701 through 16-4704, Dr. Foretich was not entitled to such discovery until and unless he could overcome the qualified privileged embodied in the Shield Law by stating a *prima facie* case that survived defendants' pending summary judgment motion. In that regard, defendants contended that none of the materials sought by Dr. Foretich were relevant to adjudication of the pending motion.

Magistrate Judge Patrick Attridge agreed and, by Memorandum and Order dated October 3, 1994, see 22 Media L. Rep. (BNA) 2473 (D.D.C. 1994), denied Dr. Foretich's motion to compel and ordered him to respond promptly to defendants' summary judgment motion. Specifically, Judge Attridge recognized that "[i]t simply makes no sense to waste the Court's limited resources, as well as those of the litigants, by continuing discovery, unless it can be shown that discovery might bear fruit relevant to deciding a summary judgment motion." Id. at 2474. Moreover, he determined that none of the unpublished material requested by Dr. Foretich was relevant to the issues raised on summary judgment, holding, *inter alia*, that the "plaintiff erroneously assumes that the defendants' intent is relevant to determining whether the broadcast segment was defamatory." Id. at 2475 (citing *White v. Fraternal Order of Police*, 909 F.2d 512, 519 (D.C. Cir. 1990)). "[E]ven if the defendants intended to defame the plaintiff," the Court held, "if their broadcast cannot reasonably be interpreted as being defamatory, there is no viable defamation claim." Id. (emphasis in original). Dr. Foretich appealed to the district court and, by Order dated December 5, 1994, see 23 Media L. Rep. (BNA) 1191 (D.D.C. 1994), Judge Greene affirmed the Magistrate's decision.

Then, by Memorandum Order dated January 25, 1995, Judge Greene granted defendants' motion for summary judgment on all of the grounds asserted. See 23 Media L. Rep. (BNA) 1414 (D.D.C. 1995). First, he concluded that "the specific statements identified in the amended complaint either are not false, are not capable of defamatory meaning, or are privileged as a matter of law." Id. at 1415. Second, he found "entirely persuasive" defendants' contention that "the broadcast, taken as a whole, cannot reasonably be held to convey the message that plaintiff alleges it conveys; that is, the broadcast does not state or imply that plaintiff molested" his daughter. Id. at 1415-16. In that regard, the Court emphasized that Dr. Foretich's reliance on "the opinion of a purported expert to prove that the broadcast was defamatory" was insufficient "to refute any of defendants' legal arguments" demonstrating that the broadcast did not, overtly or by reasonable implication, endorse the view that Dr. Foretich had "sexually molest[ed]" his daughter. Id.

Third, the Court held that, "even if the broadcast were to convey such a message, plaintiff cannot meet his burden of proving that that message was false," since (1) other courts, in the context of the child custody dispute, had previously declared the voluminous evidence on the issue of abuse to be "in equipoise," and (2) Dr. Foretich had failed to carry his burden of proof on the issue in a previous case in which he had asserted claims for defamation against Dr. Morgan. Id. In so holding, the Court added to a small but growing body of precedent declaring that defamation plaintiffs are not entitled to seek a "resolution" of hotly disputed issues of public concern through the courts. See *Auvil v. CBS "60 Minutes"*, 21 Media L. Rep. (BNA) 2059, 2061 (E.D. Wash. 1993)(even where plaintiffs came forward with "much evidence" to support their allegation of falsity, "at most plaintiffs have been able to show that there is a dispute over whether daminozide is harmful to children").

Fourth, the Court held that the broadcast, comprised largely of information gleaned from the records of judicial proceedings as well as Ms. Chung's interview with the protagonists, constituted both a "privileged report of judicial proceedings" at common law and a constitutionally protected "neutral report of an important public controversy, even if some of the statements quoted in the broadcast, such as those of Dr. Morgan, were themselves defamatory." 23 Media L. Rep. (BNA) at 1415. In so doing, Judge Greene became the second federal judge in the District of Columbia expressly to embrace the neutral reportage privilege. See *In re United Press International*, 106 B.R. 323 (D.D.C. 1989) (Richey, J.).

Finally, with respect to all of the foregoing, Judge Greene emphasized that "the issues of whether a reasonable person could view the broadcast as having a defamatory meaning, whether the broadcast is a neutral reportage of a public controversy, and whether the broadcast is a privileged report of a judicial proceeding are questions of law for the Court to decide." Id. at 1416 (emphasis added). This pronouncement, especially coupled with the Court's previous orders limiting discovery prior to the adjudication of defendants' summary judgment motion, makes an important contribution to the case law supporting a defamation defendant's right to secure a threshold adjudication of the *prima facie* validity of a plaintiff's claims before he is entitled to subject a defendant to costly, burdensome, and ultimately unnecessary discovery.

This article was contributed by counsel for defendants in Foretich v. Chung, Susanna M. Lowy, General Attorney for CBS Inc. and Lee Levine, Seth D. Berlin and Stacey L. McGraw of Ross, Dixon & Masback, Wash., D.C.

NJ SUPREME: PROTECTION FOR REPORTING ON CONSUMER FRAUD

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more broadly that "the sale of and repair of lawn mowers was a subject of legitimate public interest", which would invoke the actual malice standard.

In its decision, the Supreme Court upheld grant of Summary Judgment to defendants in a suit arising out of an investigative news article entitled "A Clip Joint for Mowers" about a lawnmower repair shop which allegedly ripped off its customers.

The lower courts had relied on two earlier New Jersey Supreme Court decisions, *Dairy Stores v. Sentinel Publishing Co.*, 104 N.J. 125, 516, A.2d 220 (1986) and *Sisler v. Gannet*, 104 N.J. 256, 516 .2d 1083 (1986). In these cases the court had accepted the invitation extended to state courts by *Gertz* to frame whatever standard of care they chose in non-public figure cases, so long as they did not impose liability without fault. *Dairy Stores* involved a consumer report about bottled water, which implied that the presence of chlorine in lab tests suggested the water was really tap water. The court held that the extensive government regulation of bottled water and its importance to health made application of the actual malice standard appropriate. In *Sisler*, the article reported a loan transaction between a former bank officer and his bank. The court ruled that extensive governmental regulation of banks and public interest in bank soundness made the application of the actual malice standard appropriate. The opinions had dicta with broader statements of public interest in reporting on the activities of businesses, but each opinion limited its holding to the facts of the particular case.

In *Turf* the Supreme Court said:

"We first address whether actual malice is the appropriate standard of proof in damage actions involving any business whose activities are the subject of a newspaper article."

It held the answer to that broad question is No. It reviewed the history of non-public figure standards and noted that 42 jurisdictions had only a negligence standard. The court felt that this showed that the absence of the actual malice standard would not have a chilling effect. To that extent the Court rejected the Appellate Division's broad ruling, stating:

"However, a close reading of *Dairy Stores* and *Sisler* discloses that we never intended to extend the heightened standard of actual malice to all consumer reporting activity."

Actual malice would be applied when any business is charged with "criminal fraud, a substantial regulatory violation, or consumer fraud that raises matter of legitimate public concern."

While the Court said no hard-and-fast rules existed to determine when allegations of consumer fraud in a newspaper article raises a matter of public concern sufficient to trigger the actual-malice standard, it did conclude that actions that constitute a cause of action under New Jersey's Consumer Fraud Act would require application of actual malice.

This Act prohibited various deceptive practices in transactions between business and consumers, and provided for enforcement by the Attorney General and by consumer lawsuits, including class actions. The Supreme Court had recently decided a case under the Consumer Fraud Act and heard argument in another, so the statute and its purposes were much in its consciousness.

Justice Garibaldi, for the majority, reviewed the types of activities which constitute consumer fraud, because if a media report defames a business owner's reputation on grounds short of conduct which violates the Act, the negligence standard generally would be held to apply. Consumer fraud, to the court,

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TURF LAWNMOWER REPAIR, INC. v. BERGEN RECORD CORPORATION
A Close Call?

By Peter G. Banta

As the media attorney who handled the *Turf* case from beginning to end (with significant help from my colleagues at my firm) some observations come to mind. I feel like the soldier who, celebrating his bravery and skill in achieving a victory over the enemy, takes off his helmet and finds an bullet hole in it, just missing his skull. With skill is usually found some luck, and pride is best tempered with humility.

When the motion for summary judgment was made, and on appeal, we argued at length that the actual malice standard should apply to all consumer reporting on businesses dealing with the general public. We had broad dictum language in the prior New Jersey Supreme Court cases. The plaintiff's opposition on this point was so pro forma that the trial judge ruled that plaintiff had conceded the actual malice standard. Plaintiff put enormous energy into arguing that sufficient evidence existed to go to the jury, but the summary judgment was granted. On appeal to the Appellate Division one of the three judges said the actual malice issue had been conceded below, but the other two heard it anew (plaintiff had new counsel on appeal) and adopted our broad argument applying the actual malice standard to consumer reporting, indicating that the sale and servicing of lawnmowers was sufficiently in the public interest to justify the actual malice standard. This opinion was published 269 N.J. Super. 370, 635 A.2d 575 (App. Div. 1994) and we would have been delighted for the case to end right there, with a very broad ruling, not the last word, but binding on all trial courts.

New Jersey Supreme Court review, which is purely discretionary, was welcomed for the opportunity to make definitive a

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NJ SUPREME: PROTECTION FOR REPORTING ON CONSUMER FRAUD

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involved repetitive conduct and did not comprise minor disagreements between consumer and owner on quality of customer service, timing of service or increased prices. The court felt a sign of a consumer fraud violation were acts which would "victimize the average consumer".

The Court then considered the various allegations in the Record article and concluded that some just attributed rudeness or sloppy business practices or poor business judgment to Turf. The former employee and the competitor interviews about such practices as charging for work not performed furnished some evidence of practices constituting consumer fraud, and the "tests" run by Record reporters of intentionally disabled or perfectly functioning mowers revealed other evidence of consumer fraud. The Court held that enough allegations of consumer fraud were set forth to call for application of the actual malice rule to all the allegations of libel.

The Court would not have considered statements of a disgruntled former employee or a sole competitor to be sufficient. The Court, in fact, discounted statements by four former employees because the story failed to state that they had been fired.

The Court then considered whether the evidence of actual malice submitted was enough to withstand a motion for summary judgment. Plaintiff's expert report, from a journalism professor, was highly critical of the journalistic technique. The Court's opinion stated that many of the criticisms appeared to be justified and agreed with the trial court that the reporter's methods "may have been negligent or even grossly negligent".

True to the principle that the actual malice test is a subjective test, dealing with the reporter's and paper's state of mind, the Court ultimately held that "plaintiffs have failed to prove that Locklin ever doubted that Turf's conduct constituted serious consumer fraud practices". No mention was made by the Court of the conventional summary judgment test of the plaintiff's presenting sufficient evidence from which a jury could find, by clear and convincing evidence, that the reporter acted with knowledge of falsity or reckless disregard of the truth.

In summary, the Court stated that the test remained as negligence for comment or criticism of "... businesses involved with an everyday product or service whose practices do not constitute consumer fraud, impinge on the health and safety of New Jersey's citizenry, or comprise activity with a highly regulated industry."

The concurring opinion by two of the six justices challenged the majority's narrow consumer fraud analysis, and would hold that more kinds of conduct constituted consumer fraud. Justice Pollock, the author of the majority opinion in 1986 in *Dairy Stores*, was skeptical of the majority's concern for repair people especially the local "mom & pop" retailer. Pollock said "unlike the majority, I would characterize as in the public interest articles about businesses that exploit vulnerable consumers."

Responding in the majority opinion to these comments, Justice Garibaldi suggested that the door was not closed to additional press protection, stating that there may be occasions when practices which do not violate the consumer fraud act are so damaging to the public as to call for the protection of the press through an actual malice standard.

Conclusion

By applying the actual malice standard to reporting about practices which violate the Consumer Fraud Act, the court gave media which engage in consumer investigative reporting a valuable defensive shield to plaintiffs claims. By limiting the scope of its opinion and retreating from the Appellate Division's broad ruling, the majority has failed to give guidance to trial and intermediate appellate judges that the broad dictum language in *Dairy Stores* and *Sisler* could fearlessly be applied by these judges to facts outside the narrower holdings of the Court.

The goal of media defendants is, if sued, to win a motion to dismiss or for summary judgment, if possible. All the 10 judges who considered the case agreed that plaintiff had not presented evidence to overcome the actual malice standard and force a trial, despite asserted deficiencies in the reporting, flaws in the tests, and bias in the sources. This high threshold is of value in arguing to courts on motion that plaintiff has not met the standard for overcoming the privilege. The limited scope of the majority opinion, notwithstanding Justice Garibaldi's grudging concession that there may be other occasions for applying the actual malice standard to consumer reporting, does not send an encouraging message to lower courts who will be asked to apply the actual malice standard outside the areas of health, highly regulated activities and allegations of consumer fraud. The New Jersey Supreme Court's opinion in *Turf* represents a useful extension of the Supreme Court's prior rulings. The Court passed an opportunity presented by the Appellate Division opinion to extend the actual malice rule to reporting about all businesses that do business with the public.

Peter G. Banta is a partner with the firm Winne, Banta, Rizzi, Hetherington, & Basralian, P.C. in Hackensack, N.J.

STATE TORT REFORM IMPACTS PUNITIVE DAMAGES

INDIANA

By Jay Lewis

Indiana passed a tort reform bill (H.B. 1741) on April 27, 1995, when the General Assembly voted with a narrow margin (51-49 in the House) to override Governor Evan Bayh's veto. The new law becomes effective July 1, although representatives of the State's powerful plaintiffs bar have vowed to initiate court proceedings to challenge the constitutionality of key provisions in the bill.

Of particular interest are the amendments to Indiana's Comparative Fault Act. Prior to amendment, the Act was expressly inapplicable to intentional torts. Now, however, the provisions of the Act apply to any action based upon "any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others." This broad scope would appear to include actions for libel, slander or invasion of privacy. Once applicable, the Act not only requires reduction of recovery based upon the plaintiff's percentage of fault, it now provides a cap on punitive damages at three times compensatory damages or $50,000, whichever is less, with seventy-five percent (75%) of the punitive damages award given to a state fund for victims of violent crime, rather than the plaintiff and his attorney. Trial judges will not be permitted to inform jurors of the punitive damage cap or of the percent paid to the victim compensation fund. Finally, the Act includes a "loser pays" provision, which was watered down by amendment. If the loser had rejected a qualified settlement offer, he must pay the winner $1,000 toward the winner's attorney's fees.

Indianapolis plaintiff attorney Scott Montross has called the Act a "very black day for the consumer," and stated that plaintiffs' lawyers "will have to be a lot more selective in handling cases."

Jay Lewis is a partner with the firm Barnes & Thornburg in South Bend, IN.

TEXAS

By Thomas S. Leatherbury

Texas Senate Bill 25, as passed and signed by Governor Bush, has the potential to limit dramatically the recovery of punitive damages in libel and privacy cases. While it is uncertain whether the new law, which applies to causes of action accruing on or after September 1,1995, heightens a libel plaintiff's burden of proof on the issue of liability for punitive damages, the new law caps the amount of punitive damages at the greater of (a) $200,000 or (b) two times the amount of economic damages, plus an amount equal to any non-economic damages found by the jury up to $750,000. Additionally, the law codifies the requirements of bifurcated trials at the option of the defendant, specific jury instructions about the factors the jury should consider in fixing any amount of punitive damages, and specific appellate review of the sufficiency of the evidence supporting all punitive damage awards.

Thomas S. Leatherbury is a partner with the firm Vinson & Elkins in Dallas.

NEW MASSACHUSETTS LAW TAKES AIM AT "SLAPP" SUITS

The letters to the editor sections of Massachusetts newspapers may become livelier in 1995 following the enactment of a new law in that state which backers say will help discourage frivolous lawsuits aimed at curbing public participation in debates over new development proposals and similar matters.

The new law, titled "An Act Protecting the Public's Right to Petition Government" (H. 1520), was enacted in the closing days of the 1994 legislative session when both houses of the state Legislature voted to override Republican Governor William F. Weld's veto of the measure.

The statute targets so-called "strategic litigation against public participation," or "SLAPP suits." According to sponsors of the new law, SLAPP suits typically arise in the form of defamation actions against environmentalists and neighborhood activists whose opposition to large development proposals takes the form of testimony at public hearings, letters to local newspapers, or comments to news reporters.

The Massachusetts statute adds a measure of protection to each of these activities, as it makes it more difficult to sustain legal action against would-be defendants based on (1) oral or written statements to government bodies or proceedings, (2) oral or written statements made "in connection with an issue under consideration or review" by a government body or proceeding, (3) statements which are "reasonably likely to encourage consideration or review of an issue" by a government body or proceeding, or to enlist public participation in an effort to effect such consideration, or (4) "any other statement falling within constitutional protection of the right to petition government."

The new law provides for speedier court rulings on defendants' petitions to dismiss SLAPP suits, allows the state attorney general to intervene in support of such dismissal motions, and gives courts the authority to order plaintiffs to pay a defendant's legal fees if the suit is dismissed.

The statute authorizes a "special motion to dismiss" which is to be granted unless the responding party can show that: (1) the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and (2)

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NEW MASSACHUSETTS LAW TAKES AIM AT "SLAPP" SUITS

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the moving party's acts caused actual injury to the responding party.

Observers note that the new law is likely to make life measurably easier for newspaper editors and publishers in Massachusetts. While SLAPP suits are typically aimed at individual citizens rather than newspapers or journalists, plaintiffs have occasionally named newspapers as co-defendants in their defamation actions where the suit is based on a letter to the editor or quoted material in a newspaper story. Furthermore, to the extent that frivolous SLAPP suits have helped to chill public debate, newspapers have suffered by losing access to potential stories and sources.

Similar legislation was filed in at least two earlier sessions of the Massachusetts Legislature, but failed in each instance. The Legislature passed an anti-SLAPP suit bill in the final days of its 1993 session, but the measure died when Weld refused to sign it.

Joseph D. Steinfield, of Hill & Barlow in Boston, has told LDRC that impetus for the ultimate passage of the legislation may have come, in part, from the opinion of the Suffolk Superior Court in *Home Depot U.S.A., Inc. v. Rosencranz*, 22 Med. L. Rptr. 1631 (1994). Steinfield represented the defendant-lawyer in that case, after the lawyer was sued for writing a letter to the editor protesting the issuance of a building permit to Home Depot. The libel suit against lawyer Rosencranz was dismissed on the grounds that the letter constituted protected opinion, and the court thus declined to rule on the question of whether the right to petition the government offered an independent defense.

In vetoing the bill that was ultimately enacted, Weld argued that SLAPP suits are relatively rare and that the legislation was far broader in scope than was necessary. "This is using a bludgeon when a scalpel would do," he told the Boston *Globe*. "[T]he courts [already had] the tools to deal with the relatively few instances in which such frivolous lawsuits are brought."

Supporters of the law, however, such as state Rep. David Cohen (D-Newton), say enactment of the statute was necessary to stop developers from using the legal process to blunt public opposition to their projects.

ARIZONA PRODUCE: A NEW SUSPECT CLASS?

By David Bodney

Nothing -- not law, policy or gallons of printers' ink -- could stop it. Arizona's "Agricultural Protection Act" blasted its way through the state legislature, and landed without resistance on the desk of Governor J. Fife Symington III, who signed the bill into law on April 19.

Under the Act, producers, shippers or their trade associations may sue for compensatory and punitive damages, and any other "appropriate relief," upon proof of "malicious public dissemination of false information that . . . [a perishable agricultural] food product is not safe for human consumption." A.R.S. § 3-113.A.

While the legislature removed a treble damages provision form House Bill 2257 before sending it to the Governor, the new law retains language that would permit the award of "costs and reasonable attorney fees" to the successful party. A.R.S. § 3-113.C. The Act also includes its original language requiring commencement of the action "within two years after the false information is disseminated." A.R.S. § 3-113.D. With its two-year limitations period, the Act reflects Arizona's more generous statute of limitations for privacy claims than for libel actions (which must be commenced within one year after the cause accrues).

The Act contains at least two provisions of dubious constitutionality. First, it defines "false information" as "information that it not based on reliable scientific facts and reliable scientific data and the disseminator knows or should have known to be false." A.R.S. § 3-113.E.1. One is hard-pressed to imagine any court of competent jurisdiction that would not strike down such language as unduly vague and practically meaningless. Second, the Act defines a "perishable agricultural food product" as a perishable agricultural or aquacultural food product or commodity that is grown or produced in Arizona. A.R.S. § 3-113.E.2. In other words, Arizona now discriminates against interstate commerce, and only Arizona producers and shippers can avail themselves of this Act's special privileges, not similarly situated persons in other states.

During Arizona's last legislative session, this Act, met with considerable editorial opposition. Some papers referred to the bill as the "Veggie Hate Crimes" act. Others ran cartoons and columns focusing on the silliness of the proposed law.

But this new law -- which becomes effective on July 13 -- is anything but cute. For Arizona's media, reporting on farm labor issues, or on matters affecting consumer health, suddenly becomes less free and easy. In this jurisdiction, the playing field now tilts in favor of agricultural and pesticide industry interests.

At least until the Act finds its way into the courtroom.

Mr. Bodney is a partner with Steptoe & Johnson in Phoenix, Arizona, and a member of LDRC's Defense Counsel Section.

SUING THE SOURCE — A GROWING TACTIC

By Peter G. Banta

In a recently decided case, *Turf Lawnmower Repair, Inc. v. Bergen Record Corporation*, 655 A.2.d 417 (N.J. 1995), (reported at page 1, "NJ Supreme: Protection for Reporting on Consumer Fraud") the New Jersey Supreme Court extended the actual malice standard to reporting about business practices which, if true, would violate the Consumer Fraud Act. Apart from that ruling, the case illustrated a plaintiff's tactic which has happened before and, I'm sure, will happen again - suing the sources.

In the *Turf* case, three former employees of a lawnmower repair shop were named sources in the article. Each had furnished our reporter valuable information on deceptive practices, and were identified in the article. They were named as defendants. These men had never earned more than $5-10 per hour and had no means to defend themselves. As soon as our client learned they were named, our client offered to provide them a legal defense. They accepted. Initially, our office represented both them and the newspaper defendants, but separate counsel was obtained later in the case.

Another source, a competitive lawnmower retailer who was quoted in the article, was sued. Also a person of modest means, he was provided with separate counsel.

Two of the three former employees, protected by their counsel, gave testimony at depositions, confirming both what they told our reporter, and the truth of the deceptive practices at the lawnmower shop. Our reporter's detailed notes of his interviews made it easier for them to confirm what they told him. (The third former employee disappeared on his motorcycle and was dismissed from the case.)

Another source, a fourth former employee, not referred to in the article and not sued, despite his then being "represented" by plaintiff's counsel, gave substantial corroboration at his deposition primarily because of the careful notes our reporter took of the original interview. He later repudiated what he told our reporter, and much of his deposition, in an affidavit filed in opposition to summary judgment. Happily the courts gave no appreciable weight to this affidavit.

This was the first experience I had had in 20+ years of defending libel cases of such an attack on sources. My discussions with media colleagues make it clear that others have had similar experiences, though they are rare still. In our case, after plaintiff found that the source-defendants adhered at deposition to the accounts they had originally given the reporter, he agreed to dismiss them from the case, but still attempted to extract favorable affidavits from them as a condition of dismissal. The competitor who was sued had to move for summary judgment to get out of the case, but no appeal was taken from his favorable judgment.

In the *Turf* case, the "source" defendants had either no assets or at best modest assets. Based on the facts here, a reason for suing them appeared to be to isolate them, since they could not afford counsel, and to encourage them into backing away from their prior statements to reduce their liability exposure. Plaintiff and his counsel disclaim such a motive. I think their conduct suggests otherwise.

Libel defense lawyers need to be aware of this phenomenon. The best defense starts with good reporting - careful notes, corroboration, tape recordings, items that don't let a timid source wriggle out from what he/she said before. Providing counsel to these sources was critical. It was also very expensive to the client. The cost of this counsel was not covered by the newspaper's libel insurance. Other strategies and defenses need to be considered. The sources had little to lose financially compared to sources in other cases, but the danger to the newspaper of losing their support in defending the case was quite real. Different considerations may be involved with defendant sources who have substantial financial assets which are placed at risk. I doubt if we have seen the last of this tactic. Anticipation of the problem at the time of news gathering and at pre-publication review can minimize adverse consequences.

UPDATES

1. PARTIAL SUMMARY JUDGMENT MOTION PENDING AGAINST PRODIGY

The issue of whether Prodigy Services Company ("Prodigy") should be treated as a "publisher" for purposes of defamation liability under New York law is the subject of a motion for partial summary judgment pending before Justice Ain in New York Supreme Court, Nassau County. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 94-031063. *See LibelLetter*, November 1994.

On February 1, 1995, following a period of expedited discovery during which the usual deposition priority accorded to defendants was reversed, plaintiffs moved for partial summary judgment arguing that: (a) Prodigy was the "publisher" of certain allegedly defamatory statements uploaded by an unknown user onto Prodigy's "Money Talk" bulletin board, and therefore is subject to the same standards of responsibility and liability, as a newspaper; and (b) the "board editor" or "board leader" (depending upon which parties' definition you choose) of "Money Talk" acted as Prodigy's agent with respect to the statements at issue.

In support of the motion on the publisher issue, plaintiffs offered a wide variety of public statements by Prodigy personnel characterizing Prodigy as a "publisher" and describing Prodigy's role in "editing" out certain types of speech that Prodigy deemed offensive or otherwise inappropriate. Plaintiffs also cited several law review articles which pointed out that by taking on the additional responsibility of editing for content, Prodigy was also inviting additional liability thereby creating a "Prodigy" exception to the holding of *Cubby v. Compuserve*, 776 F.Supp. 135 (S.D.N.Y. 1991). In addition, Plaintiffs offered deposition testimony concerning the extent to which Prodigy uses both screening software and live "editors" to block the publication of certain messages.

In opposition, Prodigy did not dispute earlier admissions that the service was a "publisher," but rather, argued that it had changed its editorial control policy since the admissions were made because it is no longer feasible for the service to use human editors to edit for content. On the issue of agency, Prodigy argued that the "board leader" should be treated as an independent contractor and that liability for his acts or omissions should not fall upon the service.

The motion has been fully briefed and is *sub judice*.

Steven Lieberman

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2. SPRAGUE v. WALTER

In January we reported that the panel of the Superior Court of Pennsylvania, which in November reduced by $10 million in punitives the $34 million verdict against Philadelphia Newspapers, had granted the defendant's application for reargument/reconsideration. That panel has now denied reconsideration. Defendant is planning to seek hearing in the Pennsylvania Supreme Court.

REGISTRATION FORMS HAVE GONE OUT FOR THE NAA/NAB/LDRC BIENNIAL LIBEL/PRIVACY CONFERENCE

THE CONFERENCE WILL BE HELD SEPTEMBER 20-22, 1995 AT THE RITZ CARLTON HOTEL IN TYSONS CORNER, VIRGINIA

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FOR FURTHER INFORMATION CONTACT RENE MILAM OF THE NEWSPAPER ASSOCIATION OF AMERICA AT (703) 648-1065

TURF LAWNMOWER REPAIR, INC. v. BERGEN RECORD CORPORATION

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broader rule for consumer reporting for the first time in nine years; it also raised concern that the wins below could be overturned or significantly narrowed. Except for the plaintiff's petition for certiorari and our reply in the Supreme Court on whether review should be granted, the Court considered only the briefs and appendices filed below, and oral argument. Concerned that the Supreme Court, or a majority thereof, just might not be willing to adopt the broad actual malice standard for all consumer reporting which had been the basis of our argument below, we looked for a "fallback" position which could preserve our victories to date.

The idea of using Consumer Fraud Act violations as the basis for the incremental actual malice standard extension was the result of late night brainstorming in preparation for the argument. New Jersey has a tough consumer fraud statute, but enforcement by public agencies and private litigants is spotty due to financial burdens on plaintiffs. The Supreme Court had recently issued a major opinion in that area and heard argument in another, so the field was fresh in the justices mind. In a suburban state like New Jersey, nothing is so quintessentially "consumer" as a lawn mower repair. In our view, the legislature had declared in this statute that there was a public interest in, and public need to fight deceptive consumer practices. Newspaper reporting, we were prepared to argue, was needed to supplement the shortcoming of government enforcement and private litigation, especially where, as here, any particular customer's loss was too small to make suing a viable option. Then came the problems: we had not cited any Consumer Fraud Act cases in our briefs, nor did we believe we cited the statute until we found a reference to it in a footnote to our Opposition to Certiorari. I could then argue the issue to the court and contend with a straight face that it was not a new argument not contained in the papers.

At oral argument, it quickly became clear that the members of the court were troubled about the breadth of the Appellate Division opinion. One justice was concerned about the small merchant, the "mom and pop store", without resources to litigate in the face of the higher standard. Others were concerned about the holding's blanket application to all commentary about all businesses doing business with the consumer. There seemed at argument, no majority willing to adopt the broad Appellate Division holding. In response to a question from the Court asking if there was a narrower ground on which the Court could decide the actual malice issue, while still asserting the court below was correct in its ruling, I advanced the consumer fraud allegations as a basis for the Court to expand on the prior rulings, uphold my client's dismissal and provide a new standard tied to legislative declarations and case law. As they say, the rest is history.

Two of the six justices remained sympathetic to a broader ruling in the concurrence, but the majority latched onto the consumer fraud allegations as a new but limited basis for applying the actual malice standard. I have no idea how the court would have ruled if I had insisted that its only doctrinal basis for extending the standard was to cover all consumer reporting. I might have been successful, but I doubt it.

My client is pleased with the victory, but a bit disappointed with the narrowness of the ruling. I choose to feel, like the soldier with the helmet with the bullet hole, that my client and I are still victorious, despite our close call, and free to fight again another day.

RICO CLAIMS DISMISSED

(Continued from page 1)

motion to dismiss). As the *Food Lion* court explained,

[I]n determining that the First Amendment does not prohibit a plaintiff from recovery for a [media] defendant's violation of a generally applicable law, the *Cohen* Court was mindful of the type of damages that the plaintiff sought to recover. Where a plaintiff sought recovery for non-reputational or nonstate of mind injuries, the *Cohen* Court indicated that such a plaintiff could recover these damages without offending the First Amendment. Where, however, a plaintiff seeks to use a generally applicable law to recover for injury to reputation or state of mind while avoiding the requirements of a defamation claim (requiring proof of falsity and actual malice), the Cohen holding does not appear applicable. To the extent that Food Lion is attempting to recover reputational damages without establishing the requirements of a defamation claim, this case more closely resembles *Hustler* [*Magazine v. Falwell*, 485 U.S. 46 (1988), where] . . . the Supreme Court determined that the First Amendment barred the plaintiff from recovering damages under the generally applicable law of intentional infliction of emotional distress.

Food Lion, supra, slip op. at 28-29 (emphasis added).

Thus, when the gravamen of plaintiff's claim is damage to its reputation caused by the publication of information, the truth of which is not challenged, under the First Amendment, such damages cannot be recovered through a civil RICO suit or any other suit premised on the publication of such information.

Food Lion v. ABC - Judge Affirms Magistrate's Recommendation To Dismiss

In the *Food Lion* case, a grocery store chain brought an action against, among others, Capital Cities/ABC, Inc. ("ABC") for injuries allegedly suffered as a result of ABC's undercover investigation of Food Lion's food handling and labor practices, and a story based on the investigation that was subsequently broadcast on *Prime Time Live* ("PTL"), an ABC News program.

The Complaint characterized PTL as not a "straight news" program; but rather a presenter of "'undercover,' 'investigative' and 'inside' stories of a sensational nature designed to attract large audiences and Nielsen ratings with the commensurate financial rewards and status within the television industry." *Food Lion*, supra, slip op. at 3-4. Claiming that *Prime Time Live* has undertaken as many as thirty-six undercover operations involving the use of hidden cameras, Plaintiff alleged that "[t]he use of hidden cameras requires the use of falsehoods, misrepresentations and deceit in order to position recording equipment and to entice persons into actions or statements which can be recorded." *Food Lion*, supra, slip op. at 4.

In this case, ABC employees obtained employment with Food Lion using some false credentials. ABC obtained many hours of hidden camera footage taken at Food Lion stores, eventually airing five or six minutes of such footage. That footage corroborated allegations made by several current and former Food Lion employees. Food Lion claimed it suffered a drop in retail sales immediately following the broadcast. In its forty-seven page amended complaint, Food Lion alleged a number of claims, including violations of RICO. ABC moved to dismiss all claims.

The elements of a federal civil RICO claim are (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Ultimately, the court dismissed Food Lion's RICO claim for failure to sufficiently plead a cognizable pattern of racketeering activity. This dismissal affirmed a previous recommendation of the magistrate to dismiss the civil RICO claims, which explored other bases as well.

In reaching its decision, the *Food Lion* court first determined that plaintiff could not lengthen the "continuity" element of the RICO pattern requirement through an allegation that the "scheme to defraud" necessarily extended to the date of the broadcast for which the information was gathered. Said the court, "any subsequent use of the information does not constitute mail or wire fraud, and as such cannot be used to establish continuity. The [alleged] scheme to defraud concluded when its purpose, to collect information, was realized." *Food Lion*, supra, slip op. at 17.

Second, the *Food Lion* court rejected plaintiff's effort to establish the requisite continuity through vague contentions that defendants had engaged in similar fraudulent acts with respect to other persons at other times, holding that the allegations did not survive the pleading requirements of Rule 9(B) of the Federal Rules of Civil Procedure. *Food Lion*, supra, slip op. at 17-18.

Third, the alleged predicate acts in *Food Lion* were determined by the court to have extended over a period of six months. "A series of predicate acts occurring over a six-month span and directed at one victim," the court held, "cannot be said to possess closed continuity." *Food Lion*, supra, slip op. at 20.

Since Food Lion failed to meet and sufficiently plead the pattern element, its RICO claims failed.

In addition to ruling on the RICO claims, the court reviewed the Magistrate Judge's recommendations on the motion to dismiss the other claims in the case. The court adopted the Magistrate Judge's recommendation that Plaintiff's claims of violation of the federal eavesdropping statute be dismissed. He adopted the Magistrate Judge's recommendation that the motion to dismiss be denied, however, with respect to claims of trespass and common law fraud. The motion to dismiss as to claims of negligent supervision, respondeat superior, breach of fiduciary duty and constructive fraud, and unfair and deceptive trade practices

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RICO CLAIMS DISMISSED

(Continued from page 14)

are to be deferred. The case is now in discovery.

***W.D.I.A. v. McGraw-Hill* - Ohio RICO claim dismissed**

In *W.D.I.A.*, plaintiff alleged that defendants McGraw-Hill, Jeffery Rothfeder, a former editor for *Business Week*, and Simon & Schuster wrongfully obtained consumer credit information from it in violation of Ohio's Pattern Of Corrupt Activities Law (the Ohio RICO statute), Section 2923.31-.36 of the Ohio Revised Code, breach of contract, and fraud.

Plaintiff contended that in the spring of 1989, Rothfeder proposed to his superiors that he prepare an article concerning the ease of accessing confidential computer information. Plaintiff further maintained and alleged that Rothfeder used fraudulent and deceitful misrepresentations inducing plaintiff to sell Rothfeder confidential credit information in July of 1989. It was further asserted that Rothfeder and McGraw-Hill were allowed access to the credit reports only because of this deception. On September 4, 1989, McGraw-Hill published Rothfeder's article in *Business Week*.

The article, entitled "Is Nothing Private?," described the proliferation of computerized information concerning the private lives of American consumers, reporting that three nationwide credit bureaus had accumulated over 400 million records on 160 million individuals detailing their payments and purchases, addresses, social security numbers, bank and credit card balances, mortgages, income, employment history, driving records and family makeup. The article further reported that this information was often repackaged by the credit bureaus and sold to "super bureaus" and other credit agencies for a variety of uses. The article concluded that consumer credit information was disturbingly easy to obtain, and without naming plaintiff, described how Rothfeder was able to obtain such information from it.

Defendant Simon & Schuster subsequently agreed to publish a book by Rothfeder after he had left employment at *Business Week*. W.D.I.A. contended that Rothfeder, as a result of Simon & Schuster's encouragement, again improperly gained access to confidential credit information while doing research for the book. In 1992, Simon & Schuster published Rothfeder's book, *Privacy For Sale*, which contained some information that was also contained in the *Business Week* article.

Defendants' moved to dismiss only the Ohio RICO claim. In order to survive defendants' motion to dismiss, W.D.I.A. had to allege all of the elements required for a violation of the Ohio RICO statute: (1) conduct of the defendant involving violations of two or more specifically prohibited state or federal criminal offenses; (2) the conduct occurred while the defendant was participating in an enterprise; and (3) the defendant's conduct constitutes a pattern of corrupt activity. The statute also requires that the civil RICO plaintiff show that it suffered harm proximately caused by the alleged activity.

In its pleadings, W.D.I.A. alleged that defendants committed numerous offenses in violation of Ohio and federal law constituting "corrupt activity" under the Ohio RICO statute. For example, it contended that defendants Rothfeder and McGraw-Hill used deception to access plaintiff's computer in order to obtain confidential credit reports and that this activity qualified as the predicate act of "theft" under Ohio law. The court found, however, that plaintiff was not deprived of any property without proper consideration since, as W.D.I.A. admitted, it had been paid for the credit information.

Plaintiff further contended that Rothfeder and McGraw-Hill had committed wire or mail fraud since they "deliberately tricked and deceived plaintiff into believing that they had permissible" purposes under the Fair Credit Reporting Act. Again, the court found that this conduct could not be classified as wire or mail fraud since it only deprived plaintiff of its right to accurate information in releasing its services, an intangible right which falls outside of the protection of the federal mail and wire fraud statutes. *W.D.I.A.*, supra, slip. op. at 6. The court found, however, that plaintiff had alleged sufficiently the predicate act of "tampering with records" in violation of Ohio law.

With respect to Simon & Schuster, the court found that all plaintiff had ultimately alleged was the publishing and promoting of the book and that Plaintiff had simply failed to allege or explain how this conduct could possibly constitute "corrupt activity." *W.D.I.A.*, supra, slip. op. at 7.

The court next determined that even if plaintiff's arguments concerning "corrupt activity" were accepted, plaintiff had failed to make any cognizable claim that defendants acted as a RICO "enterprise" because it could not even allege an "association in fact" between McGraw-Hill and Simon & Schuster and because, as a matter of law, there could be no RICO "enterprise" involving only McGraw-Hill and its own employee, Rothfeder. *W.D.I.A.*, supra, slip. op. at 8.

Moreover, the court concluded, there had been no "pattern" of corrupt activity under the Ohio RICO statute since the alleged activity took place only during the summer of 1989. Acts over such a short period, it held, cannot constitute a "pattern" under RICO because they do not pose a "continuing threat of criminal activity." *W.D.I.A.*, supra, slip. op. at 8-9.

Finally, the court held that the plaintiff failed to allege adequately that it had been injured or threatened with injury by the purported conduct of McGraw-Hill and Rothfeder. The court noted, significantly, that "Plaintiff summarily alleges that defendants' conduct resulted in economic injury and "other severe injury to [p]laintiff's business reputation and net asset valuation." Even given the relaxed standard at the pleading stage, the Court is unable to determine how plaintiff could have been injured through

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RICO CLAIMS DISMISSED

(Continued from page 15)

defendants' alleged conduct . . . . Plaintiff does not contend that any information printed in the Article or Book was false or that plaintiff was even mentioned in the Article or Book. Therefore, plaintiff could not have suffered injury sufficient to support a claim under the Ohio RICO statute." *W.D.I.A.*, supra, slip op. at 9 (citation omitted).

The case will proceed on the breach of contract and fraud claims.

Despite all of the allegations and efforts by the plaintiffs in *Food Lion* and *W.D.I.A.* to attempt to transform media defendants' actions into something punishable by RICO statutes, they were simply unable to adequately plead the multiple elements necessary for such claims. On a practical level, these decisions, together with that in *Word of Faith*, supra, are useful in supporting arguments that newsgathering and reporting, however characterized, are simply not violations of RICO.

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TRUTH AND CONSEQUENCES: AN UPDATE ON IMPLIED LIBEL

By

Joyce S. Meyers

The cause of action for libel by implication, long recognized by the courts of most jurisdictions, is one of the easiest to assert and hardest to defend. The very ambiguity of language and the multiplicity of inferences often inherent in even the simplest direct statements make virtually any publication containing arguably unflattering facts about anyone a potential target for a defamation claim based on implied libel. No publisher, however conscientious, careful or thorough in investigation and editing, is immune from such claims which, once asserted, subject the defendant to all the burdensome consequences of protracted litigation.

Defense of such claims is further complicated by the amorphous nature of the cause of action and the lack of consistency, uniformity and logic that has characterized the approaches of courts to these troublesome cases.

Although the Supreme Court of the United States has never directly addressed libel by implication or subjected it to careful analysis under First Amendment jurisprudence, the opinion in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), suggests approval of such a cause of action, at least in theory. By defining the question at issue in Milkovich in terms of whether "a reasonable factfinder could conclude" that published statements "imply an assertion" that is defamatory, the Supreme Court not only appears to approve claims based on implied libel but also to invite a search for inferences and implications in any publication that is challenged in a libel suit. Whether this apparent approval reflects the Court's actual position or is merely the result of imprecise language is unclear.

In the absence of guidance from the Supreme Court, courts and litigants alike must continue to struggle to make sense out of this cause of action in light of constitutional principles and

established principles of common law. Various solutions have been suggested and tried. This writer, in a previous article, endorsed the view that claims for libel by implication should not be permitted at all when the stated facts are true if the plaintiff is a public figure.[1] State courts in several jurisdictions have adopted this rule.[2] Some commentators have rejected this approach, however, as "Draconian,"[3] and it is still very much a minority point of view. Thus, in most jurisdictions, implied libel continues as a viable cause of action, and media defendants must continue to confront it.

The purpose of this article is to explore several cases in which courts, while permitting claims for implied libel, attempt to reign in their potential damage to First Amendment values by defining this amorphous cause of action and imposing some limits on its reach. The analysis used by courts in these cases and the rationales underlying their conclusions may be useful to media defendants in persuading courts in other jurisdictions to take a more rational approach to implied libel cases. Nevertheless, as will be seen in the discussions below, these approaches do not completely resolve the problems inherent in implied libel cases.

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[1] See Joyce S. Meyers, "Implied Libel: A Chill Wind on First Amendment Freedoms," 13 Communications and the Law, 21 (September 1991).

[2] See Schaefer v. Lynch, 406 So.2d 185 (La. 1981); Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 477 A.2d 1005 (1984); Diesen v. Hessburg, 455 N.W.2d 446 (Minn. 1990), cert. denied, 498 U.S. 1119 (1991); Pietrafeso v. D.P.I., Inc., 757 P.2d 1113 (Col. App. 1988).

[3] See C. Thomas Dienes and Lee Levine, "Implied Libel, Defamatory Meaning, and State of Mind: The Promise of *New York Times Company v. Sullivan*," 78 Iowa L. Rev., 237, 308 (January, 1993); Nicole Alexandra LaBarbera, "The Art of Insinuation: Defamation by Implication," 58 Fordham L. Rev. 677, 697, n. 131 (March 1990).

Chapin v. Knight-Ridder, Inc.: Public Figure, Public Concern and Truth

In Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993), the court considers claims for libel by implication in the context of a public figure plaintiff, a media defendant and a matter of public concern. The public figure plaintiffs were a non-profit charity and its president, which had sponsored a program to send "Gift Pacs" to American soldiers in Saudi Arabia during the Persian Gulf War. The challenged article questioned the finances of the program and the apparent "hefty markup" between the wholesale cost of the contents of the Gift Pacs and the price charged to the public. The article presents a classic case of alleged libel by implication from true facts accurately reported.

Plaintiffs complained of several statements in the article that accurately reported on the wholesale value of the content of the Gift Pac, the price charged to the public, and the percent of the markup, characterized as "hefty," followed by the comment, "It is not clear where the rest of the money goes." Plaintiffs also challenged a question in the article, which inquired whether the recipients of the Gift Pacs or the charity itself would benefit more from the program. Plaintiffs contended that these statements implied that they were lining their pockets with large profits. Plaintiffs also complained of the description of Chapin, the president of the organization, as an "entrepreneur" and a report on the financial troubles of one of his previous ventures. Although the statements about his previous failed venture were true, Chapin claimed that they implied that he is dishonest or incompetent. Chapin also claimed that the truthful statement in the article that he had declined to be interviewed implied "fraudulent concealment."

The district court granted a motion to dismiss, finding that the statements challenged by plaintiffs were either admitted to

be true or were subjective value judgments that could not be true or false and that the article could not reasonably be read to express the defamatory implications alleged by plaintiffs. In affirming the judgment of the district court, the Fourth Circuit focused primarily on the implied libel claims.

As a framework for its analysis, the court characterized the article at issue as a communication by the press about a public figure on a matter of public concern and acknowledged that "the constitutional protection of the press reaches its apogee" when all of these considerations are present. 993 F.2d at 1092. The court articulated several limitations on libel by implication in an attempt to give effect to these constitutional protections.

First, the court held that, to be actionable, an alleged defamatory implication "must be present in the plain and natural meaning of the words used." 993 F.2d at 1092. Second, the court noted that, "Because the constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true." 993 F.2d at 1092-1093. The court defined this "especially rigorous showing" as follows: "The language must not only be reasonably read to impart a false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference." 993 F.2d at 1093. By requiring a plaintiff to show both the reasonableness of the claimed implication and the author's intent to communicate it, the court eliminates the specter of liability for strained interpretations of language that the author neither intends nor anticipates. The court's attempt to apply these principles to the statements at issue in Chapin is instructive.

The court rejected all of plaintiffs' arguments that the various statements and questions about the markup on the Gift Pac reasonably implied that plaintiffs were lining their pockets. The court conceded that the reporter's question whether the recipients of the Gift Pacs or the charity itself would benefit more from the program was "pointed" and "could certainly arouse a

reader's suspicion." The court held, however, that a question can be defamatory only if it can be reasonably read as an "assertion of a false fact; inquiry itself, however embarrassing or unpleasant to its subject, is not accusation." 993 F.2d at 1094. (emphasis in original). Using this analysis, the court reasoned that the reporter's question framed the issue by presenting a choice between two conclusions, rather than a statement affirmatively adopting one of them and thus did no more than provoke public scrutiny of the plaintiffs' activities, which public figures must tolerate. The court took a similar approach to the other challenged statements, concluding that each failed to assert statements of fact that could be proven false.

In addition to considering separate statements, the court considered the article as a whole, thereby implying that an article consisting entirely of non-actionable statements could nevertheless be actionable. Fortunately, the court concluded that the article as a whole did no more than raise questions and that the mere raising of questions is insufficient to sustain a defamation suit.

Chapin is an important case for several reasons. First, the court's opinion in Chapin is founded on substantial respect for First Amendment values, which the court clearly articulates throughout the opinion. The court also reaches the right result in denying liability for truthful, albeit unflattering, reporting about the plaintiffs' activities and the raising of questions for the consideration of the public. Finally, the opinion articulates certain limitations on claims for libel by implication that, if adopted by other courts, could limit the ability of plaintiffs to succeed in such cases.

Sassone v. Elder: Private Figure, Public Issue and Defamatory Meaning

In Sassone v. Elder, 626 So.2d 345, 22 Media L. Rep. 1049 (La. 1993), the Supreme Court of Louisiana considered defamation

claims brought against a television reporter by two attorneys, who were found by the court to be private figures. The subject of the reports, however, was undisputedly a matter of public concern. Plaintiffs' claims relied in part on alleged implications from true statements.

The plaintiff attorneys, Martha Sassone and Joey Montgomery, represented a woman who claimed to have documents that would give her and hundreds of other heirs of a common ancestor rights to certain mineral-rich lands and an escrow account allegedly held by the state, which she claimed contained billions of dollars in mineral royalties. The state declared that the account did not exist. The alleged heir, with the help of her attorneys, induced hundreds of other heirs to sign a contract and turn over money as a prerequisite to share in the use of key documents.

The defendant television reporter, at the request of some heirs who became concerned that they had been misled, conducted an investigation and reported what he found in a series of newscasts. The relevant portions of the broadcasts for purposes of this article were as follows:

> 1. The question, following a report that a grand jury was investigating possible fraud in efforts to sign the alleged heirs to contracts, "Was it wrong for Marie and her attorneys, Martha Sassone and Joey Montgomery, to try and rush nearly a thousand people into signing a binding legal contract during that meeting at the V.F.W. hall in Gretna late in April?"
>
> 2. A question on camera addressed to one of the attorneys: "You're not taking these people to the cleaners, are you?"
>
> 3. An on camera interview with two alleged heirs, in which the heirs complained

> that they and others did not know the last names of the attorneys and that a relative trying to call their office found that they did not have "a working number."

The case reached the Supreme Court of Louisiana after the trial court granted defendants' motion for summary judgment and the Court of Appeal reversed, holding that the televised reports contained statements that could reasonably be understood to imply actual facts about plaintiffs which were capable of defamatory meaning when interpreted by a reasonable juror. The Supreme Court of Louisiana reversed again, holding that the communications at issue were not capable of defamatory meaning.

As in Chapin, two of the statements were actually questions, which the plaintiffs claimed implied defamatory answers. Also as in Chapin, the court acknowledged that defamation can occur by means of a question. Nevertheless, the court held that a reasonable listener would not have understood these communications as defamatory because they were merely rhetorical questions that expressed suspicion about certain activities. The court explained, "The unusual circumstances surrounding the heirs' signing of contracts presented a situation about which [the reporter] was entitled to investigate and to raise questions for public consideration." 656 So.2d at 353.

The court's analysis of the third communication at issue, concerning the attorneys' last names and telephone number, confronted the issue of implied libel more directly by specifically defining the claim based on this communication as a claim for defamation by implication or innuendo. Noting that the statements were not defamatory unless the implications were considered, the court implicitly recognized that these statements carried implications that could be understood as defamatory. One clear implication of the statements, in context, is that the attorneys were hiding something or did not have a legitimate office. Of course, a listener could draw the equally plausible

inference that the attorneys had not clearly communicated their full names or persons present at the meeting had not listened carefully, that the telephone had been out of order at the relevant time, or that the caller had misdialed. Thus, while a defamatory implication was possible, non-defamatory implications were also possible.

In contrast to other courts that have found liability based on a defamatory implication despite the existence of equally plausible non-defamatory implications,[4] the court in Sassone recognized the potential chilling effect of this outcome on freedom of the press. Noting that "a media publication can give rise to an infinite number of impressions," 626 So.2d at 354, the court implicitly recognized the intolerable burden on a media defendant if it is required to anticipate, investigate and verify every possible impression that might be created by a factually truthful statement. This is precisely the problem that had led this same court, in Schaefer v. Lynch, 406 So.2d 185 (La. 1981), to adopt the rule that there can be no defamation by implication when a public figure and matter of public concern are involved.

The court chose not to use Sassone as an opportunity to extend this principle to private figure plaintiffs when the subject matter is of public concern, although no logical distinction appears to exist. The court did hold, however, that even in a suit by private plaintiffs against media defendants, "adequate protection of freedom of the press at least requires that the plaintiffs prove that the alleged implication is the principal inference a reasonable reader or viewer would draw from the publication as having been intended by the publisher." 626 So.2d at 354.

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[4] See, e.g., Hallmark Builders v. Gaylord Broadcasting, 733 F.2d 1461, 1463 (11th Cir. 1984); Berkos v. National Broadcasting Co., 515 N.E.2d 668, 673 (Ill. Ct. App. 1987), appeal denied, 522 N.E.2d 1241 (Ill. 1988).

This approach, similar to that in Chapin, provides some protection by appearing to limit liability for mere ambiguities of language or the mere raising of provocative questions that could have multiple equally plausible answers. It is not, however, lacking in potential traps. For example, the court does not clearly define what is meant by "principal inference" and the relationship between the primacy of the inference and the actual intent of the publisher. Is the principal inference the most obvious one, without regard to the publisher's actual intent? Or is the principal inference the one that is the most reasonable from a careful analysis of the context, even if a superficial reader might miss it? And suppose the principal inference drawn by a reasonable reader is not what the publisher in fact intended?[5]

In Sassone, the court avoided these analytical problems by concluding that the defamatory implications plaintiffs alleged either did not exist or were not the principal inferences to be reasonably drawn from the statements. Thus, the court rejected plaintiffs' contention that the reporter's statements to the effect that the lawyers' clients did not know the lawyers' last names and the lawyers did not have a working telephone number

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[5]In a public figure case, allowing liability based on a reasonable reader's perception of meaning where it differs from the publisher's intent runs afoul of the actual malice standard. Indeed, the obliviousness of some courts to this problem, which arises when implications are treated the same as actual statements for purposes of analysis, is one of the best arguments for adopting the general rule that public figures cannot sue for alleged defamatory implications arising from statements that are substantially true. When unanticipated and unintended implications are the basis for liability, the actual malice standard is reduced to a negligence standard. See Newton v. NBC, 677 F. Supp. 1066 (D. Nev. 1987), rev'd., 914 F.2d 652 (9th Cir. 1991) (en banc), cert. denied, 502 U.S. 866 (1991). Many jurisdictions, however, permit a negligence standard in a private plaintiff case. Since the Supreme Court has countenanced this reduced standard under the First Amendment, there appears to be no obstacle to determining defamatory meaning based on a reader's perception of the publisher's intent without regard to the actual intent in a private figure case.

carried the implication that the lawyers operated in a clandestine or unethical manner and lacked integrity. The court held that, because other equally plausible inferences could be drawn from these statements, a reasonable listener could not draw the principal inference that plaintiffs lacked integrity or understand the communication in a manner that would lower plaintiffs' reputation and community esteem. Thus, despite the plausibility of the inferences plaintiffs sought to draw from the questions and statements at issue, the court refused to impose liability merely for raising suspicion. As in Chapin, this outcome appears to derive as much from the Court's expressed appreciation and respect for First Amendment values as from the application of articulated legal principles.

Locricchio v. Evening News Association: Private Figure, Public Concern and Burden of Proof

In Locricchio v. Evening News Association, 438 Mich. 84, 476 N.W.2d 112 (1991), cert. denied, 112 S. Ct. 1267 (1992), the Supreme Court of Michigan confronted the problem of imposing liability for defamatory implications arising from accurately reported facts in the context of private figure plaintiffs and a matter of public concern.

The history of the case illustrates well the problems inherent in allowing implied libel claims at all in this context. The articles at issue were published in 1979; the case was finally disposed of in 1991. In the intervening twelve years, there were two motions for summary judgment, a "jury trial of prodigious length," 476 N.W.2d at 114, multiple appeals at different stages of the case, and untold burden and expense imposed on the defendants and the judicial system. All of this arose from published statements that the plaintiffs conceded were true.

The articles at issue, which explore the financing of an entertainment complex built by plaintiffs, arose from an

investigation of rumors of organized crime involvement. The series of articles reported on the results of the investigation, which revealed that plaintiffs had associations with members of organized crime, that organized crime was involved in financing the entertainment complex, that the plaintiffs were aware of widespread rumors linking them with organized crime, and that their names appeared on government computer lists as organized crime figures. The plaintiffs did not allege that any of these and other statements in the articles were false or inaccurate. They claimed only that the "tenor" of the series as a whole falsely implied that they were members or associates of organized crime.

After a $3 million jury verdict for plaintiffs, the trial court entered a directed verdict for defendants, which was reversed on appeal. The Supreme Court of Michigan reversed again, reinstating the directed verdict and holding that plaintiffs had failed to meet their burden of proving the falsity of any factual statement or implication. In deciding the case on this basis, the court avoided the question whether a private figure plaintiff can recover damages against a media defendant for a publication on a matter of public interest on the basis of the "tenor" or impression created by the publication if the stated facts are true and accurate.

Although the plaintiffs' failure to prove falsity relieved the court of the need to articulate a theoretical approach to implied libel claims by private figure plaintiffs on matters of public concern, the opinion is of interest because it affirms some guiding constitutional principles that sometimes get lost in the tangled web of analysis in implied libel cases.

Noting the line of Supreme Court cases emphasizing that "speech on matters of public concern lies at the heart of the First Amendment," 476 N.W.2d at 128 and that, accordingly, "true speech about matters of public concern may not subject a speaker to libel sanctions," id., the court concluded that, "Claims of defamation by implication, which by nature present ambiguous

evidence with respect to falsity, face a severe constitutional hurdle." 476 N.W.2d at 129. While not disagreeing in theory with the Court of Appeals' conclusion that a cause of action for libel by implication might succeed without a direct showing of false statements, the court insisted that courts are required to conduct an independent review of the sufficiency of evidence of falsity under the standards of Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). Thus, the court held that whether plaintiffs alleging defamation by implication carry their burden of proving falsity is a question of constitutional import. 476 N.W.2d at 131. The court emphasized that "The questions whether a statement is capable of rendering a defamatory implication and whether, in fact, a plaintiff has proved falsity in an implication are separate inquiries. Plaintiffs alleging defamation by implication must still prove material falsity." 476 N.W.2d at 132.

Although the outcome of this case and the underlying analysis do not establish any new legal principles applicable to claims for defamation, the case introduces some measure of clarity into the analysis by separating the inquiries of defamatory implication and falsity and placing the burden of proof squarely on the plaintiff, where it belongs. Thus, without denying the existence of plausible defamatory implications, the court required the plaintiff to prove their falsity. In light of the admitted truth of the published statements, the plaintiff was unable to meet this burden. The court, therefore, did not need to address the knottier problem of liability for false implications allegedly arising from true statements.

This happy ending, however, should not obscure the twelve years of protracted and expensive litigation required to vindicate a publication in which there was no dispute as to the truth of the reported facts. Clearly, on a practical level, the Locricchio approach does not provide adequate protection for truthful speech on matters of public concern.

Discussion

The cases discussed above illustrate the difficulties courts have encountered in seeking reasoned approaches to the problems inherent in implied libel cases. Although, each court articulated a set of rules to limit potential liability for true statements, analysis of these rules demonstrates their limitations as a solution to the problem of implied libel claims. As noted above, requiring a plaintiff to prove that the alleged defamatory interference is the principal one conveyed by the communication, as suggested in Sassone, may weed out some claims based on obviously strained and farfetched interpretations but does not obviate the need for subjective judgments nor the possibility of liability for the reporting of accurate information about matters of public concern.

A similar problem is inherent in the rule adopted in both Chapin and Sassone to allow liability for defamatory implications only if they appear to be intended by the author. Taken literally, this test would permit liability if a jury finds that language affirmatively suggests an author's intent, even if the jury's interpretation is contrary to the author's actual intent. This test would also permit liability based on intent if an author admits believing and intending to communicate the logical implications of truthful facts accurately reported.

This result is troubling. If an inference, even a defamatory one, naturally arises from truthful facts, and there is no material distortion or omission in the facts reported, a media defendant should not be held liable merely for drawing, and implicitly communicating, the logical conclusion from those facts, even if further investigation or other information unknown to the author might have undermined his or her belief in the inference. The analytical framework articulated in Chapin and Sassone, however, does not provide this protection for truthful

reporting. In order to avoid liability under this approach, the court must deny the existence of the implication or the reporter must deny believing and intending to communicate it.

The approach in Locricchio does not require the court to deny the existence of defamatory implications that arise from true statements. By requiring plaintiffs to prove the implications false, the court avoided the imposition of liability for truthful reporting in this case. The protracted nature of the litigation required to reach this result, however, may do as much to discourage a robust free press as an adverse verdict. If the court had adopted the rule that there can be no recovery for implications from accurately reported facts on a matter of public concern, this case would have been disposed of at the summary judgment stage, based on plaintiffs' admission in discovery that the stated facts were true.

It is interesting to note that the courts in Chapin, Sassone and Locricchio all found a way to protect truthful statements from liability, although none was willing to adopt a general rule that would guarantee this result. Instead, the courts adopted more limited guidelines that left the door open to liability for defamatory implications from true facts.

Unfortunately, most courts shrink from adopting the rule that there can be no liability for defamatory implications from true statements in the absence of deliberate material omissions or distortions. Thus, it is clear that the media will continue to confront implied libel claims and media lawyers will continue struggling to make sense out of them. In this context, Chapin, Sassone and Locricchio are useful weapons despite their limitations.

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