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LDRC Libel Defense Resource Center

LIBELLETTER

Reporting Developments Through May 18, 1999

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1999 NAA/NAB/LDRC Libel Conference
September 22-24, 1999
Hyatt Regency Crystal City Hotel
Arlington, Virginia

Registration materials will be mailed next week.

Former CNN *Tailwind* Producer Sues CNN and Source

April Oliver, a former CNN producer who co-produced the controversial report (and companion *Time* magazine story) on Operation Tailwind, has filed a counterclaim in the defamation suit brought against her, and against CNN, *Time*, Time Warner and Peter Arnett, by one of her confidential sources for the story. John K. Singlaub, retired Major General and commander of a elite unit in Vietnam that was the subject of Oliver's report, was an outspoken critic of the report and of Oliver after the story appeared both on CNN's Newstand program and in *Time* magazine. He took his criticism one step further, however, when he sued CNN, Oliver and the others for libel based upon the report. He also, according to Oliver, was a confidential source.

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Tailwind Producer Sues CNN and Source

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Oliver v. Singlaub

Oliver's May 7 filing asserts claims of breach of contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, defamation, intentional interference with business relations and contractual relations, fraud and negligent misrepresentation. In essence, Oliver contends that she and Singlaub agreed that she would guarantee his confidentiality as a source in return for his commitment to provide accurate information to Oliver. She performed. He breached by embarking, in bad faith, on a media campaign "intended to ensure that she would not enjoy the benefits of their contract," and "designed to discredit Oliver, and thereby distance himself from the Tailwind report."

Oliver further asserts that Singlaub breached the contract by filing suit claiming that she had defamed him by reporting the information that she states he confirmed for her. The result of his actions, she contends, was that she was fired by CNN and her reputation damaged.

Oliver was quoted in the May 7 issue of *Editor & Publisher*: "I promised to go to jail to protect him. Then he sued me."

Cross-Claim Against CNN

Oliver also filed a cross-claim against CNN for defamation, wrongful termination, intentional interference with advantageous business relations, breach of contract and breach of implied covenant of good faith and fair dealing. In a lengthy pleading, Oliver tries to lay out her reporting methodology and the extent to which CNN senior editors, producers, and executives were involved in the production of the news report — including specific additions and deletions from the script. She notes that while she and co-producer Jack Smith were fired, neither the correspondent Peter Arnett nor any of the supervisory executives or editors who were involved with the story were let go. Peter Arnett has recently stated publicly that he intends to leave CNN.

Oliver asserts that CNN's decision to retract and apologize for the Tailwind report, and to fire her and Smith was based largely on CNN's efforts to mollify the military with which CNN has built exceptional access. CNN, she asserts, was unwilling to jeopardize what it saw as the competitive advantage it derived from its unique access to military sources and operations.

Oliver alleges that she gave CNN higher-ups total access on an on-going basis to her research on what she and they knew would be a controversial story. She purports to have incredibly detailed notes of her interviews with sources — some of which are quoted in her pleadings — which bolster the contentions in the Tailwind report. The complaint identifies the numerous sources she and Smith spoke to during the course of their lengthy investigation.

Oliver had an employment contract and she alleges that while CNN said that it was terminating her for cause, CNN failed to specify what that "cause" really was. She again asserts that she provided the many superiors who were involved in the decision to broadcast the report with "all pertinent information" so as to allow them to make an informed decision about whether or not to broadcast the story. She cites two statements by Tom Johnson, President and CEO of CNN — one discussing how "mind boggling" it was that such a "fiasco" resulted from so much talent and effort, and one in which he ostensibly stated that "April Oliver was the 'beginning, middle and end' of this story" — as the basis of her defamation claims.

She asserts that CNN acted in bad faith by conducting a hurried and flawed investigation in the Tailwind report, publicly releasing the results of that flawed report, terminating Oliver without justification, and making false and injurious statements about her to the public.

Why the Truth Matters: The Reporter-Source Relationship, the Attempted Application of Contract Law, and First Amendment Protection for Publication of Truthful Information in *Steele v. Isikoff*

By Stuart W. Gold and Jeffrey L. Nagel

On June 21, 1999, the United States District Court for the District of Columbia is scheduled to hear arguments for dismissal of *Steele v. Isikoff, et. al*, No. 1:98CV01471 (D.D.C., filed July 2, 1998), a case raising the questions of whether a source who admittedly and intentionally lied to a reporter can nevertheless sue that reporter for breaching an alleged agreement that her statements were "off the record" and recover money for reputational damages based on the publication of truthful information.

A Visit From Michael Isikoff

Kathleen Willey has publicly claimed that in November 1993, she met with President Clinton in the Oval Office and that the President made an inappropriate sexual advance to her. Pursuing the details of that encounter, *Newsweek* magazine reporter Michael Isikoff met with Julie Hiatt Steele — a former friend of Ms. Willey — in March 1997. Ms. Steele at first corroborated Ms. Willey's story to Isikoff, but months later, in July 1997, told Mr. Isikoff that Ms. Willey had asked Ms. Steele to lie at this first meeting, and that she did in fact lie at that time. Ms. Steele also claims that she was promised by Mr. Isikoff that her statements in both March and July 1997 would be "off the record."

The Newsweek Story

In August 1997, *Newsweek* published an article relating the story of Kathleen Willey's encounter with President Clinton and reporting that Ms. Willey had been subpoenaed by the lawyers representing Paula Jones to give a deposition in Jones's civil sexual harassment case against President Clinton. As part of that story, Mr. Isikoff printed Ms. Steele's name and the substance of her statements to him — namely, that when they first met in March 1997 Steele supported Willey's story, but later said that she was asked by Ms. Willey to lie.

Isikoff Sued for Breach of Contract, Promissory Estoppel, and Multiple Torts

In June 1998, almost a year after the *Newsweek* article appeared, Ms. Steele was called to testify before a federal grand jury investigating possible wrongdoing by President Clinton (this testimony was later used by federal prosecutors to indict Ms. Steele on charges of obstruction of justice and making false statements, the trial of which resulted in a hung jury). Upon emerging from the grand jury, Ms. Steele made a brief press statement and proceeded to sue Mr. Isikoff for breach of contract, promissory estoppel, fraud, unjust enrichment, breach of fiduciary duty, and intentional infliction of emotional distress. *Newsweek* and The Washington Post Company (as a parent company) were also sued on theories of respondent superior and negligent hiring.

Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

A Lie By Any Other Name Is Still A Lie

In support of dismissal, defendants deny that Mr. Isikoff had any agreement with Ms. Steele, but even if there was an "off the record" understanding, defendants argue (among other things) that in situations where the source admittedly and intentionally has lied to the reporter, any alleged agreement of confidentiality between the reporter and source has no legal force. This is because the *source* has breached an implicit underpinning of any reporter-source confidential arrangement: namely, that *truthful* information will be conveyed by the source to the reporter.

This intuitively obvious result is supported by basic principles of contract and tort law. In the contract context, intentional lies by a source would appear to

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constitute either deceit in the very formation of the confidentiality agreement or, alternatively, conduct that itself violates the duty of good faith and fair dealing present in every contract.

In the tort context, such deceit constitutes unclean hands, barring enforcement of the alleged agreement through the doctrine of estoppel or "unjust enrichment." Such conduct should also prohibit sources from claiming any reasonable reliance on a reporter's alleged promise of confidentiality, because at the time such a promise was extracted, the source knew that false information would be conveyed.

In responding to these arguments, Ms. Steele has asserted that Mr. Isikoff was free to bargain for only truthful information, but did not do so. Of course, one is left wondering exactly what the point of Mr. Isikoff talking to Ms. Steele was, if not to obtain facts rather than fiction. The D.C. District Court may have to decide whether truthful information must be separately bargained for, or if the reporter-source relationship presupposes, at a minimum, that intentionally false information conveyed by a source prevents legal enforcement of any alleged understanding of confidentiality.

First Amendment Protection For Publishing Truthful Information

As an alternative ground for dismissal of Ms. Steele's entire complaint, defendants point out that Ms. Steele seeks damages for reputational and state of mind injuries. In *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46 (1988), a unanimous Supreme Court held that any recovery for the tort of intentional infliction of emotional distress based on a published statement was impermissible absent a showing that the statement met the requisite First Amendment standards for libel as set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. *Hustler* demonstrates that, without proving falsity and the requisite scienter, publications and reporters cannot be liable for reputational or state of mind injuries simply because they are sued under a tort of a different name.

Three years later, however, the Supreme Court in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), a 5-4 decision, allowed a suit based on promissory estoppel to proceed against a newspaper that admittedly breached a promise of confidentiality to a source. Yet in *Cohen*, the damages sought were not reputational in nature, but rather stemmed from the loss of Mr. Cohen's job that he alleged was proximately caused by the publication of his name. The point is subtle (and perhaps in practice often elusive), but the Supreme Court made the distinction both critical and explicit when distinguishing *Hustler*, noting that Mr. Cohen "is *not* seeking damages for injury to his reputation or his state of mind." *Cohen*, 501 U.S. at 671. Indeed, the four dissenting justices would have subjected Mr. Cohen's promissory estoppel claim to First Amendment scrutiny *regardless* of the nature of his alleged damages. *Cohen*, 501 U.S. at 677-78.

Steele's damage claims against Mr. Isikoff more closely track those sought in *Hustler* than those sought in *Cohen*. Ms. Steele's amended complaint clearly seeks damages for injury to her reputation, embarrassment, humiliation, and any pecuniary effects stemming from those injuries. She also alleges, as did the plaintiff in *Hustler*, intentional infliction of emotional distress. Therefore, *Hustler* should bar recovery absent pleading and proving the requisite First Amendment libel standards. But Ms. Steele neither pleads libel nor alleges that Mr. Isikoff recklessly printed false material told to him in confidence. Defendants' motion to dismiss thus provides the D.C. District Court with the opportunity to interpret and apply *Hustler* in view of *Cohen*, and to uphold the principle that reputational and state of mind damages cannot be recovered for the publication of truthful, newsworthy information through causes of action sounding in contract or tort that seek to evade First Amendment scrutiny.

Conclusion

Journalists of all types, whether from the world of talk shows, undercover investigative reporting, or national news magazines, seem increasingly at risk to be

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Why the Truth Matters

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sued *not* for inaccurate reporting, but for zealously reporting and exposing *the truth*. That trend is not encouraging for journalists or the public whom they serve. Cases like Ms. Steele's represent a chance for federal courts to establish that the reporter-source relationship does not lend itself to being governed by contract principles — and if they are, that basic principles of good faith and fair dealing apply to journalists *and* their sources, and that recovering money for injury to one's reputation based on the publication of truthful, newsworthy information — even if embarrassing or unflattering — is not permitted by the First Amendment. In short, Ms. Steele's case represents an opportunity to demonstrate that the truth matters.

Stuart W. Gold and Jeffrey L. Nagel of Cravath, Swaine & Moore represent defendants Michael Isikoff, Newsweek Magazine and The Washington Post Company against plaintiff Julie Hiatt Steele.

Update: Chiquita Litigation Spurs Creative Attempts To Use Ohio Law

By Jill Meyer Vollman

The criminal litigation that has stemmed from the *Cincinnati Enquirer*'s report on Chiquita's business practices, subsequent apology and settlement, has spurred some interesting attempts at new uses of existing Ohio law. George Ventura — former in-house attorney for Chiquita who served as a confidential source for *Enquirer* reporter Michael Gallagher — attempted to assert Ohio's Shield Law in his own criminal defense to prevent Gallagher and the other reporter, Cameron McWhirter, from identifying him as the confidential source. The court rejected that novel argument. In addition, in the criminal action pending against Gallagher, a local "victim" of Gallagher's crime has petitioned the court to order Gallagher to disclose more information. Most recently, the judge presiding over Gallagher's sentencing has asked for purposes of sentencing, whether Gallagher was in a "position of trust" when he wrote the Chiquita expose.

Source Attempts To Invoke Ohio Shield Law

Indicted on ten felony counts for his participation in the interception of Chiquita officials' voice mail, George Ventura filed a motion with the Common Pleas Court in Hamilton County, Ohio seeking to exclude evidence that identifies him as Gallagher's source of the information. Ventura asserted that he, the confidential source, was entitled to claim the protections of Ohio's Shield Law. He asked Judge Ann Marie Tracey to exclude all evidence stemming from Gallagher and McWhirter that either identifies Ventura as a source of information, or implicates him in allowing others' access to information possessed, owned, or controlled by Chiquita.

As part of his plea agreement, Gallagher identified Ventura as a source and pleaded guilty to two felony charges for accessing Chiquita's voice mail system, to which Ventura had given him the access codes. Gallagher awaits sentencing on the criminal charges. Gallagher has also been named in a civil suit filed by Chiquita in federal court. Cameron McWhirter, who allegedly was given the voice mail access codes but never used them, was granted immunity in exchange for his testimony against Ventura.

Ventura's motion to exclude was based on a novel interpretation of Ohio's Shield Law, which states: "no person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court." Ventura argued that the law applied to him because he was "connected

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with" the gathering of information for the purpose of publishing a news story.

Like most other jurisdictions, Ohio courts have extended the shield privilege only to the reporter, rather than the source. Even so, Ventura argued that public policy weighed in favor of extending the privilege to allow confidential sources to protect their own identities. Ventura argued that a democratic society has an interest in the free flow of information, that investigative journalism played a central role in that process, and that for that process to continue, sources must have a guarantee of confidentiality. Ventura further argued that the court had the power to extend the privilege to cover sources. That power, Ventura argued, is supported by case law that enforces promises of confidentiality as legally binding.

Court Rejects Proposed Expansion of Privilege

Judge Tracey did not agree with Ventura's creative argument. She ruled against him, and instead framed the issue as whether she should expand the scope of the Shield Law to allow Mr. Ventura to silence the reporters. The court reasoned that privileges are carefully consid-ered and crafted by the legislature and designed to protect certain relationships society deems worthy of protecting. The law also clearly establishes who has the power to assert a privilege: for example, only the client can waive the attorney-client privilege, only the patient can relinquish information protected by the doctor-pat-ient privilege.

Accordingly, the judge ruled that Ohio's shield law does not protect the source from being identified if the reporter voluntarily discloses the source's identity. The application of the privilege depends upon whether rep-orters choose to assert it. Gallagher, in this case, did not. Further, the judge reasoned that the legislature clearly delineated the bounds of the privilege which, although broad, has not been extended to cover sources. Moreover, Judge Tracey stated that there is no relation-ship left to protect between Ventura and the reporters. Mr. Gallagher already identified Mr. Ventura to prosecutors and in testimony given in open court.

Judge Tracey also took note of the fact that, in this case, Ventura is an attorney. He was, therefore, well acquainted with the concepts of privilege and ethics. He knew, or should have known, that the reporters might disclose his identity.

Last, extending a privilege in this case could potentially shield the commission of crimes, namely, the unlawful interception of communications and unauthor-ized access to a computer system. Therefore, the judge concluded that there was no statutory, common law, policy, or common sense reason to grant Ventura's motion to suppress.

Requested Discovery of Chiquita-Enquirer Negotiations Not Permitted

The court also rejected another motion by Ventura for permission to depose "all individuals necessarily and immediately involved in negotiations between Chiquita and the *Enquirer* as well as the decision(s) to prosecute Mr. Ventura and not others . . . ." This discovery, Ventura claimed, was necessary to establish that Ventura is being selectively prosecuted and to support his motion to dismiss his indictment on that basis. Ventura claimed that other members of the *Enquirer* staff and another inside source at Chiquita should have been prosecuted, as should have the *Enquirer*'s editors and attorneys because they "instructed Gallagher to destroy papers and tapes evidencing the interception of and access to Chiquita's voice mail." Gallagher testified that he did so, and therefore, argued Ventura, the editors and lawyers were "aiders and abettors to Gallagher's activity, or responsible for obstruction of justice, or both." Based on that evidence, along with the *Enquirer*'s settlement with Chiquita, Ventura argued that others were not prosecuted "because they or the *Enquirer* made arrangements that spared them criminal prosecution in exchange for other considerations ($10,000,00 withdrawal of the Chiquita story, and the purging of

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editorial staff)."

Finding no support for his claim of selective prosecution, the court denied both the motion to conduct that discovery and to dismiss the indictment. Ventura's jury trial is set to begin on July 6.

"Victim" Seeks Disclosure

Although the *Enquirer*-Chiquita debacle has already generated its share of interesting legal issues in its own right, perhaps the most novel issue in the saga recently surfaced in late April in Gallagher's criminal case. A Cincinnati attorney, who does not represent any of the parties in any of the related litigation, sent a letter to Judge Richard Niehaus, who will preside over Gallagher's sentencing. The letter, sent under an Ohio law that allows victims of a crimes to send letters to the judge about the case, claims that he is victim of Gallagher's crimes:

> As one of many thousands of Greater Cincinnatians who bought those editions of the *Enquirer* and read the article, I was left not knowing which of the allegations were true, and which were not . . . . Quite simply, Mr. Gallagher effectively has stolen the time and money we put into obtaining and reading those articles. I propose that Mr. Gallagher be ordered to make us whole.

What the "victim" proposes for making the *Enquirer* readers "whole" is that the court order Gallagher to issue a written report explaining the accuracy of "each fact alleged in the articles." His suggestion is that Gallagher's report detail whether each fact is accurate, based upon legal sources; "believed to be true based on illegally obtained information, the accuracy of which Mr. Gallagher has no reason to doubt;" unknown whether true; or known to Gallagher to be inaccurate. Gallagher's def-ense lawyer has stated that the accuracy of the story is irrelevant.

Gallagher's sentencing, originally scheduled for May 13, was postponed by Judge Niehaus, pending the resolution of Ventura's trial. A new sentencing date has not been set.

Judge Asks If Reporter Held A "Position of Trust"

In the latest, and yet another twist in the Chiquita-*Enquirer* related litigation, on May 12, Judge Niehaus wrote a letter to the attorneys involved in Gallagher's case instructing them to brief the issue of whether Gallagher held a "position of trust" in his role as a reporter. The judge also wants to know the facts underlying Gallagher's case, as well as when the *Enquirer* editors learned that Gallagher was accessing Chiquita's voicemail system and whether they instructed him to stop.

The significance of the judge's decision on this "position of trust" issue could affect Gallagher's criminal sentence. Gallagher, who pleaded guilty to two felony charges of illegally accessing Chiquita's voicemail, was expected to receive probation — the presumed sentence under Ohio law for low-level, non-violent felonies. The court's request, however, stems from an exception to that presumption, which allows the judge to impose jail time if the crime is committed by a person in a "position of public trust." If Gallagher is determined to be such a person, he could receive up to 2 ½ years in prison.

Gallagher's attorney has stated that in "no way" was Gallagher in such a position when he reported the Chiquita story. The special prosecutor, at least initially, appears to agree based upon his understanding that a position of trust usually refers to the relationship between the defendant and the victim. Contrary to the letter from the "victim" asserting that members of the *Enquirer*-reading public are victims of Gallagher's reporting, the special prosecutor stated that Chiquita was the victim of his crime and Gallagher does not appear to have been in special relationship with that company.

Jill Meyer Vollman is an associate at Frost & Jacobs LLP in Cincinnati.

Accusations of Bigotry Held to Be Opinion

A recent non-media case from Massachusetts contains an interesting analysis of whether accusations of bigotry are statements of fact or opinion. *Tech. Plus, Inc. v. Ansel*, No. 96-01668-B (Superior Ct. Mass. March 1999) (*inter alia* granting summary judgment on defamation claims). The court concluded that such accusations are essentially characterizations of another's state of mind, and therefore are not verifiable statements of fact.

The case itself involved a business deal gone sour. Included with the business-related torts was a defamation claim based on statements that plaintiff was "anti-Semitic;" that plaintiff "persecuted" defendant because he was Jewish; and that plaintiff was "prejudiced against gays." (Another alleged defamatory statement, that plaintiff was "mentally unstable, crazy, and a lunatic," was dismissed as mere rhetorical hyperbole.)

The court noted with surprise that no Massachusetts case had previously decided whether an accusation of anti-Semitism, or racism, is a statement of fact or opinion. Citing and concurring with decisions from outside the jurisdiction, the court held the accusations of anti-Semitism and gay bias were non-actionable opinion.

> A person calling someone anti-Semitic may mean many things but the term is generally best understood as a characterization of another person's state of mind towards Jews. As such, it can perhaps be shown to be justified or unwarranted as a characterization, but it cannot be proven false and an assertion that cannot be proved false cannot be held libelous.

Slip op. at 18-19.

The accusation that plaintiff "persecuted" defendant because he was Jewish presented a slightly closer question. The court noted that the essence of such a statement — discriminatory treatment — is a charge which is litigated as a fact question in employment discrimination cases. Nevertheless, the court deemed the allegation an expression of opinion. According to the court, the claim of discrimination also involves a characterization of another's state of mind. But perhaps more important was the court's concern that permitting a defamation claim based on an allegation of discrimination would unduly chill free expression. "Individuals should be able to express their views about the prejudices of others without the chilling effect of a possible lawsuit . . . ." Slip op. at 21 (quoting from *Rybas v. Wapner*, 457 A.2d 108, 110 (1983)).

An Involuntary Public Figure
He Owned the Hide-Out

By Malcolm J. Gross

What, until recently, was believed to be the almost extinct species of an involuntary public figure plaintiff has been identified and tagged in, of all places, Pennsylvania. In *Wagstaff v. The Morning Call, Inc. and Kristin Casler*, No. 94-C-2104 (Common Pleas, Lehigh County, PA.), Judge Edward D. Reibman determined that the plaintiff was an involuntary public figure and granted summary judgment because of the inability of Mr. Wagstaff to prove actual malice against either of the Defendants.

The *Wagstaff* case arose out of the January 8, 1994 article by *Allentown Morning Call* reporter Kristin Casler which detailed a search of a "garage" by Allentown Police. The article, after a lengthy description of an armed bank robbery in Warren County, New Jersey, involving a "career criminal" quoted the police as stating the robbers had used "Wagstaff's Auto Repair" in Allentown as their "base of operations." It later developed that the "garage" was part of a building principally occupied by Wagstaff's Auto Repair of which William Wagstaff was the owner. However, Wagstaff contended that the "garage" was not part of the business portion of the building.

The reporter's information was based on quotes from several Allentown Police Officers who participated in the search who described the building as "Wagstaff's" and a search warrant which described the premises as owned by "William Wagstaff" but did not actually mention "Wagstaff's Auto Repair."

Because of these fine distinctions, an earlier motion to dismiss based on the fair report privilege and substantial truth had been denied by another judge of Lehigh County Court. As a result, the case was scheduled for trial in August of this year. However, Judge Reibman dismissed the entire action on April 12, 1999 based on a finding that the plaintiff was an involuntary public figure.

In a carefully written opinion, Judge Reibman traced the development of the public figure doctrine from *Gertz v. Welch*, 418 U.S. 323 (1974) in which Justice Powell had identified several types of public figures. Interestingly, the trial court did not divide those categories into all-purpose, voluntary and involuntary. Instead, Judge Reibman viewed public figures as being either all-purpose or limited-purpose and then moved to a discussion of whether a controversy existed and the nature of a plaintiff's involvement in that controversy.

The court found a major local controversy given the bank robbery which had occurred before the search of the Wagstaff building and the fact that the robbers had made their base of operations in that building. The court carefully analyzed the nature of the controversy as being community safety, integrity of banks, availability of guns and ammunition being supplied to former convicts and similar items. The court found this controversy sufficient to qualify the situation as a public controversy under *Gertz*.

The court then analyzed plaintiff's own conduct in leasing the space which became the robbers' base of operations and the confusion caused by plaintiff's use of the same building for his auto repair business, which it held was sufficient to place the plaintiff "in the path of legitimate inquiry" for purposes of *The Call*'s news story.

Finally, the court determined that the participation of the plaintiff, to the extent of his building being used by the robbers subsequently searched by the police, was germane to the controversy. As have other courts which recently resurrected the doctrine of an involuntary public figure, Lehigh County Court relied heavily on *Walbaum v. Fairchild Publications, Inc.*, 627 F.2d 1289 (D.C. Cir. 1980) in this regard. The court also noted factual similarity in *Wells v. Liddy*, 1 F. Supp. 2d 532 (D.Md. 1998) and *Dameron v. Washington*

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Magazine, Inc., 779 F.2d 736 (D.C. Cir. 1985).

The analysis, using only two categories of public figures and then determining the issue of a public controversy and relevance of the plaintiff's activities to that controversy, presents an interesting way of avoiding the previously difficult defense burden of proving that a plaintiff had voluntarily injected himself into the controversy. Instead, the court focused on the controversy and the conduct of the plaintiff as it related to the controversy itself. This permitted the court to find plaintiff a public figure without being drawn into the difficulties of the involuntary nature of his action.

Having determined the plaintiff was a public figure, the court rejected a claim by the plaintiff that defendants were nevertheless guilty of actual malice. The court found plaintiff's argument that the reporter had failed to review, edit the article and otherwise failed to follow accepted journalistic procedures was not relevant to an analysis of actual malice. The court also noted that the reporter had gone to the trouble of interviewing a deputy chief of police and examining the search warrant at the District Justice's office before writing her piece. The court noted a reporter was not required to check deed references in the county courthouse to determine who owned the specific property the police searched. As a result, Judge Reibman found actual malice was not found to be present.

Plaintiff has announced he intends to appeal to Pennsylvania Superior Court.

Malcolm J. Gross is with Gross, McGinley, LaBarre & Eaton, LLP, Allentown, Pennslylvania, and represented the defendants in this matter.

Cert Denied: Supreme Court Lets Stand $1.17 Million Verdict Against *The Globe*

On May 18, 1999 the United States Supreme Court denied cert. in *Globe International Inc. v. Khawar*, 965 P.2d 696 (Cal. 1998), *cert. denied*, 67 U.S.L.W. 3699 (U.S. May 18, 1999) (No. 98-1491). By doing so, the Supreme Court let stand the $1.17 million jury verdict affirmed by the California Supreme Court last year. *See LDRC LibelLetter* November 1998 at 1.

Khawar sued the *Globe* over a 1989 article headlined "Former CIA agent claims: IRANIANS KILLED BOBBY KENNEDY FOR THE MAFIA." The *Globe* reported that this allegation was made by author Robert Morrow in his 1988 book *The Senator Must Die: The Murder of Robert Kennedy.*

In his book, Morrow, a former CIA agent and author of a best-selling book on the assassination of President Kennedy, theorized that the Iranian secret police together with the Mafia killed Robert Kennedy. The real killer, according to Morrow, was not Sirhan Sirhan, but a man named "Ali Ahmand," a young Pakistani present at the scene of the killing, carrying a gun disguised as a camera. The book contained four photographs of "Ahmand" standing in a group of people around Kennedy shortly before the assassination. In fact, the photographs were of Khawar, a naturalized American citizen.

The California Supreme Court held that Khawar was a private figure, that California does not recognize the neutral reportage privilege, and that there was sufficient evidence of actual malice on *Globe's* part to support an award of punitive damages. The court's analysis of actual malice was based on *Globe*'s failure to independently verify the allegations in Morrow's book, allegations that the court characterized as inherently improbable.

Fringe Party Candidate's Suit Dismissed
Group Libel Doctrine Applied

By Adam Liptak

A New York appellate court, taking an expansive view of the group libel doctrine, has dismissed a libel lawsuit brought by a fringe politician who was said by *The New York Times* to be affiliated with a group "that has been accused by former members of acting like a cult." *Fulani v. The New York Times Co.*, 1999 N.Y. App. Div. LEXIS 3949 (N.Y. App. Div. Apr. 13, 1999).

The case, like so much recent New York libel litigation, arose out of a report on Abe Hirschfeld, the eccentric parking lot magnate, former *New York Post* publisher, Paula Jones lawsuit meddler and, according to the *New York Daily News*, wacky indicted wannabe politician. (*The News*'s characterization was recently ruled to be a nonactionable combination of truth and hyperbole. *Hirschfeld v. Daily News*, L.P., No. 122147 (N.Y. Sup. Ct. Jan. 22, 1999)).

Associated With a Cult

The disputed statement by *The Times* was in a profile of Mr. Hirschfeld, who was then running for Manhattan Borough President. The paper reported that Mr. Hirschfeld had opened an office in Harlem. It went on: "That office, he said, is run by his Harlem coordinator, Lenora B. Fulani, of the New Alliance Party, a political group that has been accused by former members of acting like a cult."

Ms. Fulani sued on two theories. First, while conceding that she had twice run for President of the United States on the New Alliance Party ticket and had served as its chair, she said that the article's failure to note its dissolution several years earlier amounted to defamation. Second, she said that associating her with a cult defamed her.

The first point is easy. Even flatly false statements about political party affiliation are not defamatory (putting aside some McCarthy-era cases about Communist party membership). It follows that a merely outdated reference to party affiliation cannot be defamatory. The trial court so held, and the appellate court affirmed.

The cult characterization is harder. The trial court dismissed this claim on a motion to dismiss directed to the pleadings on the absence of actual malice, a ground not argued to it. That ruling would have been perfectly sensible in response to a post-discovery summary judgment motion. It was problematic on a motion to dismiss.

A Group Libel

On appeal, *The Times*, to be sure, defended the trial court's atual malice ruling, relying on a series of mostly employment libel cases that do reject the conclusory pleading of actual malice without further factual allegations. It more seriously urged, and the appellate court accepted, that only the New Alliance Party could sue for having been called a cult under the group libel doctrine.

The appellate court relied on *Provisional Government of the Republic of New Afrika v. American Broadcasting Cos.*, 609 F. Supp. 104, 108 (D.D.C. 1985), which contains the seemingly authoritative statement that "a defamatory statement directed against a group does not give rise to a cause of action on behalf of its individual members." But that case did not involve a named individual member, much less a named individual member who also led the group. The New York appellate court concluded that "[w]hile plaintiff was described as 'of the NAP,' the words 'acting like a cult' referred to the NAP, not to plaintiff, who is not in any manner distinguished from any member of that group."

The New York Times Company was represented by Adam Liptak of its Legal Department.

NRA Loses False Light Suit to Former Members: Charlton Heston Not Credible

The Legal Intelligencer reported that on May 13, a federal jury returned a verdict of more than $4.45 million in a suit brought by an Iowa couple against the National Rifle Association. The plaintiffs, Sally and Kenneth Brodbeck, were both former members of the NRA. Mrs. Brodbeck had even been on the board of the organization.

According to the news report, they ran into trouble with plain clothes and unidentified NRA security guards at an NRA board meeting when Mr. Brodbeck began to videotape a presentation by his wife. They told Brodbeck to stop, but the net result was that the guards apparently knocked Brodbeck briefly unconscious. Charlton Heston, President of the NRA, contributed to the mayhem by telling the press at a later meeting with reporters that Brodbeck had staged the incident to "stir up trouble."

At trial, Heston testified that he saw the incident and could tell, from his extensive experience, that Brodbeck had faked the fall.

According to post-trial interviews with the jurors, they did not believe Heston. The jury found that defendants committed battery, and that the plaintiffs were portrayed in a false light. The jury awarded Kenneth Brodbeck $150,000 in compensatory damages for the battery and $1.6 million in punitives against the NRA, as well as $6,000 in punitives against one of the guards. Brodbeck received $1 in compensatory and $200,000 in punitive damages on the false light claim. Sally Brodbeck received $2.5 million in compensatory damages on the false light claim and $1 in punitive damages.

Does this verdict have any relevance to the media bar? We will avoid comparisons of the views the American public holds today about the media and about the NRA. Instead, we will note with some interest that celebrities as witnesses are not always the key to success in libel and/or privacy litigation. As defendants, they sometimes end up with the most disappointing results. A topic for discussion at the Conference in September, perhaps.

New Insurance Policy for Freelance Writers

As of April 1, 1999 The National Writers Union (NWU) provides group error and omissions insurance to freelance writers who are members of NWU. NWU's Media Special Perils Insurance Policy provides international coverage to print, television, radio, film, CD-ROM and internet writers. So far, 500 union members have signed up for the $195 annual policy which, after a $5,000 deductible, provides individual writers with up to $1 million per lawsuit, including legal fees, settlements and judgments. The total group plan payout is limited annually to $10 million, allowing ten members to obtain $1 million per year or any other combination not exceeding $10 million.

The new policy, underwritten by Lloyd's of London through Detroit insurance broker Bosquett & Company, covers libel claims as well as claims of slander, invasion of privacy, emotional distress, product disparagement, violation of publicity, copyright infringement, errors and omissions and piracy. However, the plan does not provide coverage for claims of trademark or patent infringement, false advertising, employer-employee relations, any fraudulent or criminal action, or property damage.

For many freelance writers, this insurance is necessitated by the inclusion of "indemnification clauses" in contracts between writers and publishers. NWU does not review the work of writers who apply for the policy and only denies coverage to those with a history of being sued for libel or related claims.

Anderson v. Liberty Lobby Ignored
Summary Judgment Denied in S.D.N.Y.

In a decision remarkable for the absence of any burdens of proof on the plaintiff or meaningful balancing of the evidence consistent with *Anderson v. Liberty Lobby*, a United States District Court in New York denied summary judgment to Univision Communications, Inc., parent to the country's largest Spanish-language television network, on three of four allegedly defamatory statements contained in a news report about a well-known Hispanic doctor. *Lopez v. Univision Communications, Inc.*, Slip op., 98 Civ. 2487 (LAK) (S.D.N.Y. April 30 1997).

The decision is a case study in what happens when a court, clearly failing to appreciate any First Amendment values in summary judgment motions in libel cases, goes so far as to reject evidence that he recognizes is uncontested on the issue of public figure status and fault because he wants evidentiary "I" dotting and fails to properly evaluate the sufficiency of what he has before him. Indeed, the court no where cites or suggests that he is applying *Anderson v. Liberty Lobby*. (or *Celotex Corp. v. Cotrett*, 477 U.S. 242 (1986)).

Judge Lewis A. Kaplan directed the parties to complete discovery by mid-September and file any further case dispositive motions by mid-October.

"One of the Most Renowned Specialists"

The libel lawsuit arose out of a three-part report broadcast last year over Univision's Channel 41 in New York that questioned the credentials of Dr. Jose Lopez. Dr. Lopez is a prominent physician who owns and operates cosmetic surgery clinics in New York, New Jersey, Italy and his native Columbia. The doctor had been a frequent guest on Spanish-language radio call-in shows in New York and New Jersey, and shortly before the news report had been elected a member of the Senate in Columbia. During his Senate campaign, Dr. Lopez was featured on at least one Channel 41 news report campaigning in New York for the votes of the Colombian citizens living in the New York area. The doctor is also the founder of the Jose A. Lopez Foundation, which promotes Dr. Lopez as "one of the great men of the 20th Century" and "one of the most renowned specialists in the United States in the field of aesthetic dermatological surgeon and laser micro-surgery."

The Channel 41 report disclosed several apparent discrepancies or misrepresentations in the doctor's resume that had first been reported by a national "news magazine" on Colombian television. The discrepancies included claims that Dr. Lopez held a Ph.D. from N.Y.U. and that he had served as Director of the Department of Health in Hillside, New Jersey, neither of which was true.

Dr. Lopez filed his complaint against Channel 41 seeking $50 million in damages based on the allegedly false statements that: (1) his New York medical license had "expired" in December 1997, (2) officials at Massachusetts General Hospital and Harvard Medical School could find no record that Dr. Lopez had studied microsurgery at that hospital for two years as claimed, and (3) officials at "New York Medical Hospital of the University of the same name" could find no records that Dr. Lopez had studied cosmetic surgery at "that institution" as he claimed.

While not alleged in his complaint, Dr. Lopez also claimed in opposing summary judgment that a fourth statement in the report was false: that Dr. Lopez had completed only "two semesters" at Kean College despite his claim to have completed his pre-medical education there.

Limited Discovery

Univision moved for summary judgment at the outset, on the grounds that the challenged statements were substantially true and in any event not broadcast with any level of fault required for plaintiff to state a claim. In support of the motion Univision submitted

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affidavits from the reporter, producer and research assistant who worked on the story. These affidavits disclosed the extensive work done over several days to confirm the various aspects of Dr. Lopez's background that were discussed in the news report. These efforts included hiring an outside investigator to assist in confirming the facts about Dr. Lopez's claimed training and experience.

After reviewing the initial papers supporting and opposing summary judgment, Judge Kaplan allowed the parties one month to take "limited discovery" with respect to certain specific statements contained in the affidavits of the Univision producer and the Univision researcher concerning the steps they had taken in preparing the report. Plaintiff used this opportunity to take 12 depositions, including depositions of a number of third-party witnesses at Kean College and the New York Division of Medical Licensing.

Upon considering the further briefs discussing the results of this discovery, Judge Kaplan denied summary judgment as to three of the four statements at issue.

Substantial Truth

On Univision's claim that the report was substantially true, the Court found questions of fact or a failure of proof on each of the four statements. The first issue concerned the doctor's license. Dr. Lopez's New York registration to practice medicine expired in December 1977 and was not renewed until April 1, 1998, after the news report concerning the doctor's credentials first appeared in Colombia.

The specific statement about Dr. Lopez's New York license, made on the first day of the three-day report, was that "Lopez's license expired in December 1977." At the beginning of the third installment, on April 3, Univision updated this report to note that the doctor's license "which had expired in December 1977, was renewed on April 1, 1998."

Addressing the truth of these statements, the Court noted that under New York law a medical license itself never "expires," only its registration does. A license can only be "revoked" for professional misconduct. Univision argued that its report was substantially true, because a doctor is required by law to have both a license and a registration in order to practice medicine in the state of New York. Seemingly reaching out to find an issue, however, Judge Kaplan concluded that a trier of fact "reasonably could find a material difference between the expiration of a registration for non-payment of fees and the revocation of a license to practice medicine."

The Court did not address Univision's argument that no reasonable juror could have understood its report about a license that had "expired" and was then "renewed" to mean that Dr. Lopez's license had been "revoked."

Affidavits on Phone Calls Inadmissible

On each of the other statements at issue, the court rejected as hearsay the affidavits submitted by the reporter and the investigator of conversations that they had with staff at Massachusetts General, Harvard Medical School, N.Y.U. and Kean College. While submitted on fault issues, Judge Kaplan took the opportunity to state that none of the conversations were admissible for the truth of what was disclosed. Nowhere was it suggested, however, that the plaintiff bears the burden of proof on the issue of falsity nor did the court analyze plaintiff's opposing papers to determine the weight or sufficiency (if any) of evidence of falsity submitted. Nor did the court mention other evidence, much of it documentary, submitted by defendants.

While as will be seen below with respect to the issue of fault, the plaintiff submitted some evidence to prove he had attended Kean College, he did not, it would seem, submit evidence that would have supported the truth of his resume with respect to his alleged two year attendance at Harvard or Mass

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General, nor a residency in cosmetic surgery at a hospital affiliated with N.Y.U.

Plaintiff's Status: Even Without Dispute Court Rejects Evidence

Turning to the second ground for summary judgment advanced by Univision, absence of fault, Judge Kaplan first assessed whether the plaintiff should be considered a public official, a public figure or a private figure. Recognizing that there was "an abundance of material before the Court suggesting that Dr. Lopez indeed is a public figure" and that "it appears quite likely" that Dr. Lopez will be found to be a public figure, the court rejected otherwise uncontested facts and documents, engaged in no other analysis of why the admissible evidence before him was insufficient, imposed no burden on plaintiff, but ultimately found that defendant failed to carry its burden on this issue.

While Dr. Lopez is a member of the Senate in Colombia, Judge Kaplan concluded that this status did not render him a "public official" for purposes of invoking *Times v. Sullivan*, because the Univision report did not directly identify him as a public official and there was no proof that he is recognized in the community as a public official. Rather, the Court found his public official status to be relevant to the analysis of whether he should be considered a "public figure."

Evidence on the public figure issue, however, included not only plaintiff's status as a legislator, but also his position as a physician with an extensive practice in the area, his solicitation of votes from Colombian citizens in New York, his self-promotion of his own political, civic and charitable activities and his appearances on local broadcast media. Judge Kaplan noted that evidence upon which Univision sought to characterize Dr. Lopez as a public figure was in many respects undisputed, including his admitted radio and television appearances and his prior appearances on Univision news reports.

Not disputed, but rejected as insufficiently authenticated, were documents distributed by Dr. Lopez' foundation identifying him as "a leader of Colombian causes" and "one of the most internationally important physicians to perform laser endoscopic surgery." The materials were submitted by Univision's producer, who identified them on information and belief as having been prepared and distributed by the plaintiff. Dr. Lopez did not deny or dispute this statement, but Judge Kaplan concluded that the information could not be considered properly authenticated for purposes of the motion.

Furthermore, deposition testimony by the Univision producer and researcher that Dr. Lopez had appeared on a radio call-in show following the second installment of the three-part series in order to deny the Univision report was held to be inadmissible as well. The Univision employees had not heard the radio broadcast themselves, but rather had received phone calls from irate individuals calling to complain after they heard the doctor on radio.

Again, Dr. Lopez did not dispute the claim that he had appeared on the call-in show, but Judge Kaplan concluded there was an insufficient basis to consider the fact.

Gross Irresponsibility

The Court then turned to an analysis of each of the four statements to determine whether the defendants "had reason to doubt the truthfulness" of the statements, a standard he found consistent with the "gross irresponsibility" standard for private figures under New York law.

On this issue, the court admitted the affidavits regarding the numerous calls to the hospitals and medical schools. On the basis of calls in which no one at Mass General Hospital or at Harvard had any record of Dr. Lopez, and in the absence of any argument by Dr. Lopez that he was actually enrolled

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in these two institutions during the times listed on his resume, the court dismissed the claims on that point.

He similarly allowed in the affidavits which recited the defendants' research, including a number of telephone calls to N.Y.U., from which the Channel 41 staff was unable to confirm that the hospital at which Dr. Lopez claimed to have studied was ever affiliated with N.Y.U., but did learn that N.Y.U. had no record of his attendance nor could N.Y.U. staff find any record of the doctors he had told defendants would verify his work.

Yet Judge Kaplan concluded that the statement in the broadcast is ambiguous. It is unclear, he found, whether the reporter is telling the viewer that the station was unable to confirm Dr. Lopez's residency at the specific hospital (which Dr. Lopez had given evidence of to the reporter) or at N.Y.U. Clearly the evidence established that the defendants had tried to confirm the important fact in Dr. Lopez's resume: did he or did he not do a residency in cosmetic surgery with a hospital affiliated with the prestigious medical school at New York University. The ambiguity, however, that Judge Kaplan discerns in the report, he says, was arguably apparent to Channel 41 at the time of the report, although he cites no evidence on this point, and precluded granting a summary disposition at this time.

Summary judgment on the statements regarding Dr. Lopez's resume claim to have completed his pre-medical training at Kean, while the station reported that he completed only two semesters, falls to the possibility that a jury might disbelieve the Channel 41 researchers as to what they say they learned from calls to Kean. The producer and researcher on the reports had separately spoken to two different individuals at the college, each of whom they believed had confirmed the two-semester statement which was first reported in the original Colombian news story about the doctor.

Neither of the two individuals from Kean College recalled at their depositions any specifics of any phone conversations with the Univision reporters. And while Dr. Lopez submitted a transcript that apparently showed more time spent at the College, the Court noted "it is entirely possible that Kean College confirmed" the information broadcast by Univision. Despite that, however, and the absence of contrary evidence, the Court refused, again, to grant summary judgment, concluding: "the Court is obliged to review the evidence in a light most favorable to the non-moving party. Defendant's evidence fails to preclude the possibility that a trier of fact could find that Kean's employees did not say what defendants allege."

Returning to the statement concerning the expiration of Dr. Lopez's license, the Court reviewed the deposition testimony surrounding this fact. Both the Univision producer and researcher had testified that they were not aware of any distinction between a license expiring and a registration expiring, and that each had verified through calls to the licensing authorities that the doctor's license had expired. However, the outside investigator retained by Univision, testified that she did understand the difference between a "license" and a "registration," and initially thought she may have conveyed the distinction to the producer or to an in-house lawyer. Notwithstanding that the investigator's own written report to Univision also stated that Dr. Lopez's "*license* had expired," (emphasis added) the Court found there to be a question of fact as to whether the distinction between registration and license had been conveyed to Univision. The Court found that a trier of fact could conclude "that proceeding with the broadcast in the face of that confusion was grossly irresponsible."

Motion for Temporary Restraining Order Against CBS Denied in Charlotte

By Jay Ward Brown

A federal judge in North Carolina refused last month to issue a temporary restraining order against CBS sought by the nation's largest chain of psychiatric hospitals, Charter Behavioral Health Systems, LLC. Charter tried to block CBS's broadcast of an hour-long *60 Minutes II* report based on its year-long investigation into questionable practices and procedures at the hospitals. *Charter Behavioral Health Systems, LLC v. CBS Inc. d/b/a CBS News and 60 Minutes II*, No. 3:99-CV-150-MU (W.D.N.C. Apr. 21, 1999). Rejecting Charter's claim that the privacy of mental health patients justified a prior restraint, Judge Graham Mullen of the United States District Court for the Western District of North Carolina held that the First Amendment barred Charter's attempt to enjoin the broadcast.

Hidden Camera Investigation

After receiving a tip from a third party alleging abuses at Charter, CBS undertook a year-long investigation of more than 20 Charter hospitals. Terrance Johnson, a licensed clinical social worker, obtained a job as a mental health technician at Charter Pines, a facility in Charlotte, North Carolina. Over the course of several weeks, Johnson documented troubling events at the hospital, including, according to CBS's pleadings, the apparent falsification of patient records, diagnoses being made by staff who had limited or no contact with their patients, and what experts consulted by CBS said was the improper use of physical restraint procedures. Some of Johnson's observations were documented on videotape.

Charter learned of the impending broadcast of the CBS report and, the day before the broadcast, filed a complaint and application for a temporary restraining order in federal district court in Charlotte.

Invasion of Privacy and Federal Wiretap Act Violations Alleged

In its complaint, Charter alleged that CBS's acquisition and intended broadcast of the footage recorded inside its facility constituted an invasion of the privacy rights of patients residing and receiving treatment at Charter Pines. Charter also alleged that Johnson had violated the Federal Wiretap Act, 18 U.S.C. § 2510, *et seq.*, when he videotaped events at Charter, and that CBS's planned broadcast of the footage would constitute an additional wiretap violation. Finally, although Charter did not name Johnson as a defendant, it alleged that Johnson's conduct violated an agreement he had signed when he began working at Charter Pines in which he acknowledged that he would regard all patient information as "confidential and available only to authorized users."

In support of its application for a temporary restraining order to enjoin CBS's broadcast, Charter argued that the report contained "profoundly personal details about the lives of minor patients" and their treatment, including the identities of patients and footage of patient records and patients receiving treatment. In this regard, Charter asserted that airing the report would violate a North Carolina criminal law prohibiting the dissemination of certain patient information and would "fundamentally compromise the therapeutic process." Charter also insisted that it would suffer tremendous harm to its corporate goodwill if the report were broadcast.

Requirements for Prior Restraint Not Met

In its brief in opposition to Charter's application for a TRO filed the next morning, CBS argued that Charter had failed to make the extraordinary showing required to obtain a prior restraint on the press. Charter had argued that the heavy presumption against prior restraints did not apply in this case because CBS allegedly came into possession of the "confidential" information unlawfully and the broadcast of that information would constitute a criminal offense under state law (N.C. Gen. Stat. § 122C-52). CBS pointed

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out the longstanding line of cases holding that, even where information has been obtained illegally, a prior restraint is not appropriate.

Moreover, CBS argued, it had not committed a criminal act under the state statute. The statute was designed for the protection of patients, not the institutions in which they are treated, CBS observed, noting the irony that the "confidential information" that Charter sought to restrain from dissemination was information revealing apparent violations by Charter of this very statute. Furthermore, CBS noted, the statute provides an exception for disclosure of confidential information when there is "an imminent danger to the health or safety of the client or another individual or there is a likelihood of the commission of a felony or violent misdemeanor."

In any event, the "crime" that Charter alleged would be committed by airing the report was, CBS pointed out, a Class 3 misdemeanor punishable by a fine less than that for driving without a current registration or driving above the speed limit — hardly an injury to the public interest sufficient to justify a prior restraint on publication under the First Amendment.

Requirements for a TRO Not Met

In addition to raising the constitutional defense, CBS argued that Charter had not met the arduous requirements for obtaining a temporary restraining order in the Fourth Circuit even in an ordinary case. First, CBS told the court, the balance of harms weighed against the requested injunction. The fundamental First Amendment interest in the timely and full dissemination of newsworthy information to the public outweighed any legitimate interest Charter could assert in preventing the broadcast.

Protection from prejudicial publicity and harm to corporate goodwill are not interests that justify a prior restraint. Furthermore, CBS argued, any interest that Charter sought to assert on behalf of its patients was wholly speculative.

In a declaration that accompanied CBS's responsive brief, one of its officers told the court that the report had been designed to protect the privacy of patients: CBS did not identify any current patients by name, it obscured the faces of patients entirely, and it altered patients' voices beyond recognition. Those patients identified in the broadcast were former patients who had given their express consent to CBS.

Moreover, CBS argued, it was highly unlikely that Charter would ultimately prevail on the merits of either of the two claims it had asserted in its complaint. North Carolina, known for its hostility to the invasion of privacy torts, does not recognize the tort of publication of private facts. As for intrusion upon seclusion, while the North Carolina Court of Appeals has recognized it in egregious circumstances involving the invasion of the plaintiff's bedroom by private persons, no North Carolina court has addressed its viability in circumstances involving a media defendant and the workplace. Moreover, CBS noted, the North Carolina Supreme Court has never ruled on the viability of the intrusion tort in any context. More importantly, CBS observed, the tort of intrusion only protects against the act of intrusion itself; it does not protect against the dissemination of information after it is acquired.

Charter's federal wiretap claim was equally defective, CBS argued. Johnson, the person who intercepted the communications, was a party to them, and his conduct was therefore outside the ambit of the statute, CBS noted. Citing *In re King World Produ-ctions, Inc.*, 898 F.2d 56, 57-58 (6th Cir. 1990), CBS also argued that Charter's federal wiretap claim, like its invasion of privacy claim, could not justify a prior restraint on the press.

As for the North Carolina criminal statute protecting patients' privacy, CBS noted that the

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statute affirmatively *supports* disclosure where the safety and health of the patient may be at risk. That, CBS observed, was precisely the point of its broadcast. Furthermore, as demonstrated by the declaration offered in support of CBS's position, the broadcast did not impinge on the patients' privacy and, in any event, the statute affords no civil cause of action to private parties. Thus, CBS explained, Charter was unable to demonstrate that Johnson recorded the conversations at Charter "for the purpose of committing a criminal or tortious act" as would be necessary to avoid the single party consent rule applicable to federal wiretap claims.

Victory for CBS: Judge Refuses to Close Courtroon

The broadcast was scheduled to air on *60 Minutes II* at 9:00 p.m. EST on Wednesday, April 21, 1999. The court heard argument on Charter's application for a temporary restraining order beginning at 1:30 that same afternoon. At the outset, Judge Mullen denied Charter's motion to close the courtroom during the hearing on its application for a TRO.

"As I understand my obligations in determining whether hearings should be closed or not, it requires greater notice than this," Judge Mullen said, "and it requires that we in fact notify press elements and, indeed, have a hearing on whether we can close a hearing or not. That simply is not available." In addition, Judge Mullen noted, the privacy interests Charter claimed to want to protect could be adequately protected if any witness it planned to call simply did not name patients or make other identifying disclosures.

Discomfort With the Newsgathering?

After hearing argument on the merits of Charter's application for a TRO for over an hour, Judge Mullen ruled from the bench that Charter had failed to satisfy the extraordinary burden imposed on a party seeking a prior restraint. In an unfortunate aside, however, the court suggested that if Johnson had ever received a paycheck from Charter in the mail, he might be guilty of mail fraud. At bottom, the court held, the First Amendment affords almost complete protection to publication or broadcast of material on matters of public concern:

> It appears to this court that the Supreme Court has elevated press powers to a point that prior restraint is all but impossible even where, as in this case, it appears that the press may well have set out to and committed a federal crime in order to obtain the information. I nevertheless do not believe that under these circumstances that this court is empowered to issue an injunction . . . . Certainly the press is not free to commit crime nor to send people out on its behalf to commit crime. It's just that as I read the cases, just because they do doesn't give me the opportunity to shut them down in this.

Charter did not appeal the decision, and the report aired on *60 Minutes II* as scheduled that evening. Hailed by several critics as an outstanding piece of journalism, the report was itself the subject of considerable press coverage. On May 3, 1999, Charter voluntarily dismissed all of its claims against CBS without prejudice.

CBS was represented in this matter by Susanna Lowy and Anthony Bongiorno of CBS in New York, Lee Levine, Jay Ward Brown and Ashley I. Kissinger of Levine Sullivan & Koch, L.L.P. in Washington, D.C., and James P. Cooney III of Kennedy Covington Lobdell & Hickman, L.L.P. in Charlotte.

Jenny Jones: A Case of Duty

No media lawyer — or anyone else for that matter — could have missed the fact that a jury in Michigan this month found that the *Jenny Jones* show was negligent in the death of one of its guests at the hands of another of its guests. The jury awarded the estate of the deceased, Scott Amedure, over $25 million — less than the $71 million that plaintiffs were asking — but substantial enough to get attention. Amedure was killed three days after he and his murderer, Jonathan Schmitz, appeared on the *Jenny Jones* show in which Amedure, a homosexual male, revealed that he had a crush on Schmitz and a private sexual fantasy about himself and Schmitz. The show was aptly titled "Same Sex Secret Crush, was taped on March 6, 1995, but was never aired.

The Shooter and His Victim

Amedure, a then-32 year old, unemployed bartender, who traveled from Chicago home to Michigan with Schmitz and a mutual friend, Donna Riley; who was bought drinks by Schmitz at the airport bar before leaving Chicago, went at Schmitz's suggestion out drinking when they returned home and to Riley's apartment for more drinking, dancing and good times; who may have had sexual contact with Schmitz between the program and his death; who may have been seen with Schmitz in a gay bar in the days before or after the taping; and who Schmitz expected the following weekend was going to install a ceiling fan in Schmitz's home; was killed at his home in Michigan when Schmitz shot him twice in the chest with a shotgun Schmitz purchased just minutes before.

Schmitz had come to Amedure's house the day of the murder apparently to confirm that a blinking yellow construction light and a sexually suggestive but unsigned note left at his home was the work of Amedure. After speaking with Amedure, Schmitz went back out to his car, retrieved the shotgun, returned to Amedure's front door and shot him.

Schmitz, a 24-year old waiter at the time of the taping, was found guilty of second degree murder in 1996, but his conviction was set aside on appeal on technical grounds. The criminal case is to be retried in August.

Amedure's family, represented by a very flamboyant and aggressive attorney, Geoffrey Fieger (who is probably best known for his representation of Jack Kevorkian), contended that Schmitz was mentally ill, was extremely vulnerable, and was lured on to the program believing that he was going to meet a woman who had a secret crush on him. He was humiliated by the revelation that the secret admirer was a man.

The defendants, Warner Bros. (distributor), Telepictures (producer), and the *Jenny Jones* show, presented evidence that Schmitz was told that, assuming that he wanted to appear on the program, he was going to appear with a secret admirer who might be either male or female. Indeed, not only did detailed pre-interview notes contain a discussion of that possibility, but Schmitz told police in a videotaped and audiotaped interview that the show would not tell him whether the admirer was male or female. Evidence showed that Schmitz, after the pre-interview said that he wanted to think about whether or not he wished to appear on the program, but called back later to state that he did want to participate. There was evidence that Schmitz had no exhibited symptoms of mental illness in the months prior to the show and that the show producers would have had no obvious way of knowing that he had mental illness in his background and could not have predicted violence.

Each side produced psychiatric experts.

What Duty Is Owed

The jury awarded $5 million for Amedure's conscious pain and suffering from his injury before his death, $10 million for plaintiffs' loss of gifts, services, society and companionship from Amedure from his death to the date of the verdict and another $10 million for such future losses, and $6500 for funeral and burial expenses.

The verdict, not unreasonably, was interpreted by some commentators as evidence of the current distaste

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Jenny Jones

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the public has for the media (and certain day time talk formats in particular) and the desire to send the media a clear message.

Perhaps a not insignificant key to the verdict, however, can also be found in some of the jury instructions. There is a lengthy instruction on the "duties owed by the Defendant to the Plaintiff." The entire instruction on "duty" is reproduced in the box accompanying this article. The parties agreed that the jury would be instructed that the only defendant was Warner Bros.

Those duties included the relatively reasonable duty to protect people from foreseeable and unreasonable risks of harm while they are on your premises. Defendants had argued in their summary disposition motion that this was the limit of their duty to their guests, that they owed no duty to them once they left the premises. The judge, in denying that motion, rejected this argument and put forward a position that analogized defendants to bar owners under the dram shop laws. *See LDRC LibelLetter* March 1996 at 4.

But the court went far beyond this basic premises provision (or even the existing statutory dram shop law liability), creating jury instructions that defendants argue are not based upon Michigan law or, indeed, any existing precedent designed to meet the causes of action set out in this lawsuit. The court instructed the jury that defendant had a duty "to take reasonable measures to protect a Plaintiff from criminal acts by a third person ***on or off*** the premises, so long as the acts were foreseeable." (emphasis added) That is a sweeping statement of responsibility to which defendants objected.

In addition, the court instructed, defendant "has a duty to act in a manner such that it does not intentionally and unreasonably subject another to emotional distress which it should recognize as likely to result in illness or other bodily harm, even though it had no intention of inflicting such harm and irrespective of whether the act was directed against another or a third person." That too, is an amazingly broad statement of responsibility to which defendants also, correctly, objected. Moreover, the plaintiff never plead intentional infliction of emotional distress.

And he instructed the jury that defendant would be liable for misrepresentations if physical harm resulted from an act done in reliance upon the truth of the representation made by defendant. While stating that the defendant must intend its statement to induce, or should realize that it is likely to result in, an unreasonable risk of physical harm to another, and that defendant must know that the statement is false, the court further instructed the jury that the defendant must disclose any fact that it knows is necessary to prevent partial or ambiguous statements of fact from being misleading. That latter instruction virtually nullifies the knowing falsity requirement. It undoubtedly also allowed the jury to find liability under plaintiff's argument that Schmitz would not have come on the program had he known that his admirer was male.

Negligence and By Whom

"Negligence" is defined as the "failure to do something that a reasonable careful television production company would do, or the doing of something that a reasonably careful television production company would not do, under the circumstances that you find existed in this case."

As to proximate cause, in addition to noting that there may be more than one proximate cause, the court instructs the jury that if they found that the defendant's negligence was a proximate cause of Amedure's death "it is not a defense that the conduct of Jonathan Schmitz, who is not a party to this suit, also may have been a cause of this occurrence, nor can his mental problems, if any, affect his own legal responsibility for any act that he committed." Only if they found that Schmitz's conduct was the only proximate cause could they find for defendant.

Interestingly, the court instructed the jury that the parties had stipulated that Amedure was not negligent and that none of his actions may be considered a

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Jenny Jones

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proximate cause of his own death. Apart from the facts that he, unlike the television producers, knew Schmitz and that he appeared nonetheless on the television program (which one could see as further evidence that Schmitz did not appear to be dangerous even to those who knew him), early news reports on the trial suggested that the defendants were going to put in evidence that Amedure was a drug abuser, was sexually aggressive who may have plotted to embarrass Schmitz. As a result of various pre-trial motions that evidence was not admitted at the trial.

The defendants have said that they will appeal the verdict. Post-trial motions seeking judgment notwith-standing the verdict, a new trial and remittitur will be filed within the requisite 21 days after the entry of judgment. To date, judgment has not been entered.

Gay Groups Protest

Interestingly, gay groups have noted that the plaintiff's case is based on the contention that it is a predictable reaction to being told that one is admired by a homosexual to kill the admirer. The homophobia that underlies such a proposition is breathtaking. A Michigan columnist, picking up on this theme, suggested that the case would not have made it to trial if the secret admirer had been African-American who Schmitz then murdered because of racism unknown to the producers. Brian Dickerson of the *Detroit Free Press* argued: "How far do you suppose Fieger would get if he tried to argue that the Jones' producers had sentenced a black woman to death by inviting her to reveal her affections for a white man on the air?" Thought provoking spin to the case.

Counsel for defendants are James P. Feeney and Greg Schuetz of Feeney Kellett Wienner & Bush in Bloomfield Hills, Michigan, and Jim George of George & Donaldson, Austin, Texas.

Taken From the Jury Instructions in Jenny Jones:

I now want to discuss with you duties owed by the Defendant to the Plaintiff.

A special relationship between partners may create a duty.

A Defendant, under circumstances of this case, has a duty to exercise ordinary care to protect those persons from foreseeable and unreasonable risks of harm while they are on those premises. These risks could have either been known, or should have been known, to the Defendant by exercising ordinary care.

A defendant has a duty to take reasonable measures to protect Plaintiff from criminal acts by a third person on or off the premises, so long as the acts were foreseeable.

The Defendant under these circumstances, may be liable if it makes a misrepresentation to another and physical harm results from an act done by the other or a third person in reliance upon the truth of representation. There are two elements. If the Defendant: (1) intended its statement to induce, or should realize that it is likely to induce action by another or third person which involves an unreasonable risk of physical harm to the other, and (2) knows that the statement is false.

A Defendant has a duty under these circumstances to disclose to another a fact that it knows may justifiably induce the other to act or refrain from acting and has further duty to exercise reasonable care to disclose to the other party matters known to it the it knows to be necessary to prevent its partial or ambiguous statement of facts from being misleading.

The Defendant has a duty to not act in a manner that either intends to affect or realizes or should realize that it is likely to affect the conduct of another or a third person in such a manner as to create an unreasonable risk of harm.

Defendant has a duty to act in a manner such that it does not intentionally and unreasonably subject another to emotional distress which it should recognize as likely to result in illness or other bodily harm, even though it had no intention of inflicting such harm and irrespective of whether the act was directed against another or third person.

Fourth Circuit Grants Emergency Mandamus Petition to Unseal Judicial Records in Julie Hiatt Steele Prosecution

By Theodore J. Boutrous

On May 6, 1999, the United States Court of Appeals for the Fourth Circuit granted a Petition for a Writ of Mandamus on behalf of Time Inc., Dow Jones & Company, Inc., the New York Times Company, the *Los Angeles Times*, and the Associated Press, ruling that the public has a First Amendment right of access to discovery materials filed in connection with pre-trial motions in criminal cases, and ordering the district judge overseeing the Independent Counsel's prosecution of Julie Hiatt Steele to apply First Amendment principles in evaluating the continued sealing of certain documents relating to Kathleen Willey, the Independent Counsel's main witness in the case. *See In re: Time Inc., et al.*, Case No. 99-1489 (Order dated May 6, 1999). On May 11, 1999, in response to the Fourth Circuit's Order, Judge Claude M. Hilton unsealed most of the documents in question.

Sealed Polygraph Results

The documents — which included the results of polygraphs taken by Kathleen Willey, Ms. Willey's grand jury testimony, her immunity agreement with the Independent Counsel, and an affidavit she filed in the *Jones v. Clinton* case — were filed as exhibits to pretrial motions and placed under seal pursuant to the terms of a broad protective order, which permitted the Independent Counsel to designate discovery materials provided to the defense as "confidential" and mandated that these materials be filed under seal, without any prior review or approval by the court.

On March 10, 1999, the media petitioners moved for access to the documents, arguing that their sealing had infringed the public's right of access guaranteed by the First Amendment and the common law. Specifically, the media petitioners contended that under the Supreme Court's decisions in *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press Enterprise I*") and *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press Enterprise II*"), and the Fourth Circuit's decisions in *In re State-Record Co.*, 917 F.2d 124 (4th Cir. 1990), *In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989), *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988), and *In re Washington Post*, 807 F.2d 383 (4th Cir. 1986), among others, the district court's sealing of the documents — without any prior review, approval, or findings — violated the right of access. On March 30, 1999, however, the district court denied the media petitioners' motion.

Fourth Circuit Grants Emergency Relief

Thus, on April 16, 1999, the media petitioners filed their mandamus petition, seeking emergency relief, in light of the impending criminal trial of Ms. Steele, which was scheduled to begin on May 3. Over the vigorous opposition of the Independent Counsel, the Fourth Circuit ordered expedited briefing.

On May 6, the Fourth Circuit granted the petition, ruling unequivocally that the documents in question were "part of the proceedings to which the traditional First Amendment right of access applies." Order at 2. Because of this, the Fourth Circuit emphasized that such documents could only be sealed if such an order was "'necessitated by a compelling government interest, and . . . narrowly tailored to serve that interest.'" Id. (quoting *Press-Enterprise I*, 464 U.S. at 510 and *In re Washington Post*, 807 F.2d at 390).

In addition, the Fourth Circuit stated that, in sealing documents, a district court must follow the procedures established in *In re Charlotte Observer*, 882 F.2d at 853. Specifically, a court "must (1) provide public notice that the sealing of documents may be ordered, (2) provide interested persons an opportunity to object before sealing is ordered, (3) state the reasons, supported with specific findings, for its decision if it decides to seal documents, and (4)

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Fourth Circuit Grants Emergency Mandamus Petition

state why it rejected alternatives to sealing." Order at 2.

District Court Unseals Documents On Remand

Because the district court followed none of these procedures, the Fourth Circuit granted the mandamus petition. Indeed, as noted by the Fourth Circuit, the district court denied the motion for access without even reviewing any of the documents in question — let alone following the First Amendment procedures established in *Press-Enterprise I* and *In re Charlotte Observer*. Order at 3. In its May 6, 1999 Order, the Fourth Circuit directed the district court to "undertake that process" and to proceed expeditiously.

On May 11, following the Fourth Circuit's directives, the district court unsealed most of the documents in question, including the polygraph results of Ms. Willey.

Theodore J. Boutrous, Jr., Jonathan K. Tycko, and Seth M.M. Stodder of Gibson, Dunn & Crutcher LLP represented the media in this matter.

Author and Wife Convicted Over Wreckage Theft

James Sanders, author of a book alleging that a missile brought down TWA Flight 800, and his wife, Elizabeth, a TWA flight training supervisor, were convicted on April 13, 1999 of conspiring to steal a piece of the plane's wreckage and aiding and abetting in the theft of wreckage. *U.S. v. Sanders*, No. 98-CR-013 (E.D.N.Y. April 13, 1999).

The Sanders were accused of persuading senior TWA Captain Terrell Stacey, who was assisting federal investigators probing the crash, to provide investigation documents and to remove red residue which stained pieces of wreckage from the hangar where the jet's remnants were being reassembled. Sanders later charged in his book, *The Downing of Flight 800*, that laboratory analysis showed that the residue was similar to missile fuel. Government investigators have stated that the residue was a glue used to hold the plane's seats together and that the jet most likely exploded due to a mechanical malfunction.

Despite the fact that Captain Stacey stated that "under [his] own volition, [he] took two small pieces [of seat fabric] and gave it to [Sanders]," the Sanders were charged under 49 U.S.C. § 1155 (b) which provides:

> A person who knowingly and without authority removes, conceals, or withholds a part of a civil aircraft involved in an accident, or property on the aircraft at the time of the accident, shall be fined under title 18, imprisoned for not more than 10 years or both.

According to FBI documents, Elizabeth Sanders and Stacey knew each other from working at TWA, and she had asked Stacey to help her husband with his independent investigation of the crash. Stacey and James Sanders subsequently met at a hotel where Stacey provided Sanders with documents from the National Transportation Safety Board investigation. Although he was reportedly reluctant to provide samples of the red residue, Stacey eventually agreed to take the stained fabric shreds from the hangar after receiving a call from Elizabeth Sanders. In December 1997, Captain Stacey plead guilty to one misdemeanor count of theft and agreed to cooperate with prosecutors in the case against the Sanders.

In August 1997, U.S. District Court Judge Seybert rejected the Sanders' contention that their conduct in obtaining the fabric was protected by a First Amendment newsgathering privilege. *U.S. v. Sanders*, 17 F. Supp. 2d 141 (E.D.N.Y. 1998). At trial, defense counsel argued that the Sanders were "acting as concerned citizens who were seeking to unmask a government coverup."

Riding-Along in Denver: Media Presence Violates Fourth Amendment

Not waiting for the United States Supreme Court's ruling in *Wilson v. Layne* and *Hanlon v. Berger*, the United States District Court for the District of Colorado ruled in February on the question of government immunity in a ride-along case. The court in *Robinson v. The City and County of Denver*, 1999 WL 164041 (D. Colo. 1999), ruled that the media's presence in plaintiff's home on the execution of an arrest warrant violated plaintiff's Fourth Amendment rights and that the right to be free from unauthorized government intrusion into a private home was clearly established, denied Denver officials' motion to dismiss and motion for summary judgment.

While six print and broadcast organizations were named defendants in the lawsuit, the Memorandum and Order addresses only plaintiff's claims against the law enforcement officials.

Cops Wanted Crime Exposed

The plaintiff, Mark Robinson, was arrested in his home for the alleged sexual exploitation and sexual assault of children. The media videotaped Robinson's arrest, and, at the same time, chatted with him and asked him questions. When Robinson eventually asked the media representatives to leave, they did so.

The Denver defendants maintained that they asked the media to accompany the officers on the execution of the warrant in the hope that "unidentified victims would come forward upon seeing plaintiff's picture on television and newspapers." *Robinson* at 2. *[Editor's note: We understand that, in fact, other victims did come forward as a result of the publicity.]*

The law enforcement officials were comprised of two groups: the Jefferson County Defendants (including the Board of County Commissioners of Jefferson County, the Jefferson County Sheriff and unknown Jefferson County deputy sheriffs) and the Denver Defendants (including the city and county of Denver and a number of Denver police officers). The Jefferson County Defendants brought a motion to dismiss, while the Denver Defendants brought a motion for summary judgment.

The Jefferson County Defendants' Motion to Dismiss

The Jefferson County Defendants sought dismissal of the claims on six grounds: (1) that the state law tort claims of trespass, invasion of privacy and outrageous conduct were barred by the Colorado Governmental Immunity Act ("GIA"); (2) that the trespass claim failed by virtue of the arrest warrant; (3) that the due process clause does not protect life, liberty or property interests; (4) that the Fourth Amendment claim must fail because there is no recognized right to be free from media presence during an arrest; (5) that the defendants that were sued in their individual capacities are entitled to qualified immunity; and (6) that plaintiff alleged no facts that the Board of County Commissioners had a policy or custom which led to the constitutional violations.

The Denver Defendants' Motion for Summary Judgment

The Denver defendants sought summary judgment on five grounds: (1) that officers sued in their individual capacities were entitled to qualified immunity under 42 U.S.C. § 1983; (2) that plaintiff had not shown that the press presence at the execution of the warrant violated the Fourth Amendment or that the police had a custom or policy with regard to press presence; (3) that plaintiff's substantive due process claim must fail; (4) that the individual officers were entitled to qualified immunity from the tort law claims under the GIA; and (5) that Denver has absolute immunity from the tort law claims under the GIA.

State Law Tort Claims

For both sets of defendants, the district court divided its analysis of this claim into two categories:

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Riding-Along in Denver

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public entity immunity and public employee immunity. The public entity category applied to the Board of County Commissioners (the "Board") and to the city and county of Denver. Plaintiff conceded that, under the GIA, neither the Board nor the city or the county could be held liable for the tort claims. Robinson asserted, however, that his allegation of outrageous conduct against the Board and the city and the county was not subject to immunity. The court disagreed, held that the claim was barred and granted the defendants' motion to dismiss and the motion for summary judgment on this claim.

With respect to the immunity of the individual officers, under another section of the GIA, officers would be entitled to immunity unless "the act or omission causing . . . injury was willful or wanton." *Robinson* at 3. For both sets of defendants, the "willful" prong was met by virtue of the officers *intentionally* inviting the press into Robinson's home. With respect to the "wanton" prong — "wantonness" being defined under Colorado law as conduct "'wholly disregardful' of others' rights" — the allegations in plaintiff's complaint sufficed to support the contention that Jefferson County officers were not entitled to immunity. A genuine issue of fact was found to exist on the "wanton" prong with respect to the Denver officers.

Trespass Claim Does Not Fail Because of Warrant

The Jefferson County defendants alleged that their entry into Robinson's home could not be the basis for a trespass claim because of the existence of an arrest warrant. As support for this notion, the defendants offered *East Coast Novelty Co. v. City of New York*, 809 F.Supp. 285 (S.D.N.Y. 1992). The court countered, however, with Colorado authority to the contrary, which held that "law enforcement officials who exceed the scope of their warrant are subject to civil liability as trespassers." *Robinson* at 4 (citing *Walker v. City of Denver*, 720 P.2d 619 (Colo. App. 1986)). Under *Walker*, the court concluded that the existence of a warrant was not an automatic bar to a trespass claim.

Substantive Due Process Claim

Robinson had initially alleged that his Fifth and Fourteenth Amendment rights to substantive due process were violated when the media were brought into his home. He later conceded, in the Denver defendants' motion for summary judgment, that his claim for deprivation of life, liberty or property was more properly brought under the Fourth Amendment. He did not, however, relinquish his Fifth Amendment claim against the Denver defendants nor did he abandon any aspect of his substantive due process claim against the Jefferson County defendants. Relying on *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed 2d 114 (1994), which stands for the proposition that claims for deprivation of life, liberty and property interests in criminal prosecutions are properly brought under the Fourth Amendment, the district court granted the defendants' motion to dismiss and motion for summary judgment on this claim.

Liability of Individual Officers Under 42 U.S.C. § 1983

The court tied its analysis of Robinson's Fourth Amendment claim to the proffered qualified immunity defense. The crux of defendants' argument here was that "there is no recognized right to be free from media presence during an arrest." *Robinson* at 5. Working its way through the two-pronged qualified immunity analysis — whether a constitutional right was violated and whether that constitutional right was clearly established at the time of the arrest — the court concluded that Robinson had a right to be free from the presence of the media at the time of his arrest. Noting that a reasonable officer would have been aware that inviting the media along on an arrest warrant where the warrant made no mention of the media was unlawful, the court held that the

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defendants were not entitled to qualified immunity under 42 U.S.C. 1983. Both the motion to dismiss and the motion for summary judgment were denied on this issue.

Liability of Denver and the Board Under 42 U.S.C. § 1983

The liability of the Board and the city and county of Denver turned on whether either entity maintained a policy that would have resulted in the violation of Robinson's Fourth Amendment rights.

Section 110.04(4)(f) of the Denver Police Department Operations Manual provides in pertinent part: "Authorized agents of the media shall be permitted access on private property . . . upon consent of the owner or agent of the property, *or without such consent, where agents are willing to assume responsibility for such acts*, so long as access does not hinder police operations." *Robinson* at 14 (emphasis added). The Denver defendants maintained that this section did not apply where the media was serving a legitimate law enforcement objective, but the court found that a reasonable juror could infer that section 110.04(4)(f) applies to all instances where the media was invited to enter onto private property by law enforcement officials without the owner's consent. Thus, the court found a genuine issue of fact existed as to whether the police department's policy resulted in the violation of Robinson's Fourth Amendment rights. The motion for summary judgment was therefore denied on the 42 U.S.C. § 1983 claim.

With respect to the Board, the court found Robinson's claim that the Board "knew of, supported, adopted, approved, and ratified" the defendants' custom of inviting the media along on the execution of warrants sufficient under Federal Rules of Civil Procedure 8(a)(2) to deny the motion to dismiss.

Second Circuit Seeks Advice on New York's Misappropriation Law

Stating that "this question is simply too important for New York, with the state's long history as the hub of the publishing industry, for us merely to make an educated guess about the state of the law," the U.S. Court of Appeals for the Second Circuit has asked the New York Court of Appeals to resolve questions surrounding the newsworthiness exception to the state's commercial misappropriation statute. *Messenger v. Gruner + Jahr USA Publ'g*, N.Y.L.J., May 5, 1999 at 25 (2d Cir. Apr. 28, 1999). *See LDRC LibelLetter*, March 1998 at 12, April 1998 at 19.

Fictionalization Defeats Newsworthiness?

At center are allegations that *YM: Young and Modern* magazine, a Gruner + Jahr publication, misappropriated the image of Jamie Messenger in its June/July 1995 issue. Photos of Messenger were used to illustrate a *YM* Love Crisis column, whose headline was "I got trashed and had sex with three guys." While Messenger, a professional model, was booked through a modeling agency, *YM* apparently did not receive adequate consent for the photos because Messenger was only fourteen-years-old at the time and *YM* did not obtain written consent from Messenger's parents.

Messenger's mother subsequently brought suit on her daughter's behalf against Gruner + Jahr alleging defamation, negligence, negligent and intentional infliction of emotional distress, and violation of Messenger's statutory right of privacy under New York law. On Gruner + Jahr's motion for summary judgment, U.S. District Court Judge Lewis Kaplan dismissed all but the statutory misappropriation claim arising under N.Y. Civil Rights Law §§ 50 and 51. *[Editors Note: Judge Kaplan was also the judge in Lopez v. Univision Communications, see p. 13, infra.]*

As to the misappropriation claim, Gruner + Jahr had contended that the use of Messenger's photographs

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Second Circuit Seeks Advice

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fit within New York's broad exception to § 51 liability for newsworthy material or material in the public interest. While the district court found that the topic of the column was sufficiently newsworthy to satisfy the exception, the court ultimately concluded that the newsworthiness exception was not applicable in cases where the use "is 'infected with material and substantial falsity'" or fictionalization. *Messenger v. Gruner + Jahr USA Publ'g*, 994 F. Supp. 525, 529 (S.D.N.Y. 1998), quoting *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 132-33 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985). Thus, the district court held that because a reasonable jury might find that "the publication created the impression that Messenger had had the experiences that were the subject of the column," the fictionalization limitation on the newsworthiness privilege applied and prevented the entry of summary judgment. The misappropriation claim was tried in March 1998 resulting in a $100,000 award.

An "Important, Unsettled, and Dispositive" Issue

Gruner + Jahr argued on appeal, as it did in the district court, that there is no "fictionalization" exception under §§ 50 and 51. It based its argument on a line of New York Court of Appeals' cases culminating in *Finger v. Omni Publications Int'l*, 77 N.Y.2d 138, 566 N.E.2d 141, 564 N.Y.S.2d 1014 (1990), which held that there can be no claim under §§ 50 and 51 for use of a photograph in a newsworthy article unless the photograph bears no real relationship to the subject matter of the articles or the article is an advertisement in disguise.

While recognizing that there is persuasive evidence that the New York Court of Appeals decision in *Finger* precludes a "fictionalization" exception, the Second Circuit noted that the Court of Appeals in *Finger* failed to mention that "at least some New York cases appear to have recognized a third limitation to the application of the newsworthiness exception where the use at issue is 'infected with material and substantial falsification.'" *Messenger v. Gruner + Jahr USA Publ'g*, N.Y.L.J. at 29, quoting *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 127 (1967). *See also Davis v. High Soc'y Magazine*, 90 A.D.2d 374, 457 N.Y.S.2d 308, 315 (App. Div. 2d Dep't 1982); *Fils-Aime v. Enlightenment Press, Inc.*, 133 Misc. 2d 559, 561, 507 N.Y.S.2d 947, 948 (App. Term, 1st Dep't 1986); *Quezada v. De Lamota*, 130 Misc. 2d 842, 846, 501 N.Y.S.2d 971, 975 (App. Term, 1st Dep't 1986); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 132 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

Thus, the Second Circuit stated that while *Finger* "suggests that the fictionalization limitation may no longer exist," the New York Court of Appeals' failure to explicitly reject fictionalization entirely leaves open the possibility that it still exists. Accordingly, the Second Circuit certified the following questions to the New York Court of Appeals:

1. May a plaintiff recover under New York Civil Rights Law §§ 50 and 51 where the defendant used the plaintiff's likeness in a substantially fictionalized way without the plaintiff's consent, even if the defendant's use of the image was in conjunction with a newsworthy column?

2. If so, are there any additional limitations on such a cause of action that might preclude the instant case?

Shield Law Protects Foreign Author and Libel Defendant from Discovery of Editorial Process, Says D.C. Superior Court in Northern Irish Dispute

By Russell Smith

In a decision which could affect any journalist or book author whose work is published in the District of Columbia, the D.C. Superior Court has ruled that the plaintiffs in the $100 million libel case against the author and publishers of *The Committee: Political Assassination in Northern Ireland* cannot be allowed to use the discovery process to gain access to the author's journalistic notes, memoranda and other documents, even where such information "is clearly relevant to significant legal issues in this case." In an 18-page opinion issued by the Hon. Geoffrey M. Alprin, the parameters of the D.C.'s Free Flow of Information Act (the "Shield Law") were interpreted for the first time since the law's enactment in 1992. *Prentice v. McPhilemy*, Case No. 98CA0004309, (D.C. May 5, 1999).

This ruling essentially holds that in the nation's capitol, because of the 1992 passage of the Shield Law, journalists no longer are burdened by the decision in Herbert v. Lando.

The *Prentice* suit is an unusual twist from the all-too-frequent scenario of U.S. citizens bringing libel claims in the United Kingdom. The plaintiffs here are U.K. citizens suing in the District of Columbia. David and Albert Prentice, two of Northern Ireland's most prominent businessmen, allege that in *The Committee*, they falsely have been accused of collusion with British security forces and loyalist paramilitaries in dozens of "unsolved" political murders of Irish Catholics. Although the book has been a number one bestseller in Britain, ironically it never was published there, and has been sold there only by U.S. retailers on the internet.

At issue were broad, sweeping document requests and interrogatories that in effect sought all notes, memoranda, recordings — anything with information — related to the subject matter of the book (and a related documentary), including the identity of all sources. Defendant McPhilemy, citing the journalist shield law, objected to disclosures of confidential sources and previously unpublished documents and information that defendant did not intend to rely upon at trial, but which included internal memoranda between members of the production staff about sources, including their evaluation of the sources and the information received from them.

The D.C. shield law provides absolute protection against disclosure of sources. The law provides for a limited exception to the protection against disclosure "of news or information." In a significant victory for author Sean McPhilemy and publisher Roberts Rinehart, the D.C. Court held that the exception to the Shield Law which allows for discovery of journalistic files "where there is an overriding public interest in the disclosure" does not apply in a case such as this one, where the plaintiffs assert that the "public interest" is in favor of an alleged "right of civil litigants to discover information genuinely relevant to their lawsuit," and "an individual's interest in protecting and defending his or her reputation."

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Shield Law Protects Foreign Author

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While not conceding that those were the plaintiffs' motives, the court ruled that such motives are superceded by "the public's interest in the receipt of news and information." The court noted in particular that "although plaintiffs argue that the statute was not designed to insulate defendant journalists from liability in libel suits, there is no evidence in the language or legislative history of the Shield Law that suggests that the City Council intended to carve out an exception to the Act's coverage for libel defendants."

This ruling essentially holds that in the nation's capitol, because of the 1992 passage of the Shield Law, journalists no longer are burdened by the decision in *Herbert v. Lando*, 441 U.S. 153, 169, 180 (1979), the libel case against the producers of *60 Minutes*, in which the Supreme Court decided that the First Amendment does not protect libel defendants against compelled disclosure of information in their possession regarding the editorial process. In declining to apply the holding in *Lando*, the D.C. Court held that "[a]lthough *Lando* may have limited the protection conferred on journalists under the First Amendment, it did not in any way prohibit state legislatures from enacting laws conferring greater protections on journalists." In the current case, for example, the plaintiffs are barred from discovery on the subject of "research corroborating the accuracy of a source's account of events to be reported."

Judge Alprin also rejected the plaintiffs' arguments that the Shield Law should not apply to non-resident journalists, or to information gathered outside the District of Columbia or gathered before the effective date of the statute, or to information concerning events overseas. The court noted that "none of the restrictions stated above is articulated in the language of the Act," and that "to impose such limitations would not further the primary purpose of the Act, namely, to encourage the free flow of information to residents of the District."

In support of their position, McPhilemy and Roberts Rinehart submitted affidavits from U.S. Representative Peter King, Co-Chairman of the Congressional Ad Hoc Committee on Irish Affairs, McPhilemy's U.K. solicitor Geoffrey Bindman, as well as a statement in the Congressional Record by Senator Daniel Patrick Moynihan, who praised McPhilemy and linked the assassination of prominent Northern Irish human rights lawyer Rosemary Nelson, a McPhilemy witness and supporter, to the allegations made in *The Committee*. The decision and briefs, as well as further information concerning the book at issue, are available on the internet at www.robertsrinehart.com/truthinireland.htm

Russell Smith is a litigator based in New York who represents the defendant's in this matter, along with local counsel Elizabeth C. Kock from Levine, Sullivan & Koch in Washington D.C.

Update: Texas "Veggie Libel" Law Repeal Rejected

The Texas House, by a vote of 80-57, rejected a bill that would have repealed the state's "veggie libel" law. The law, adopted in 1995, allows agricultural producers to sue for damages resulting from false, disparaging statements made about their products if those who made the statements knew of their falsity. Rep. Ruth Jones McClendon (D-San Antonio) introduced the measure to repeal the law, contending that it unduly restricts free speech. Those opposing the repeal argue the law provides necessary protection for the state's agricultural industries. This law was the basis for the Texas cattle industry's unsuccessful million dollar lawsuit against Oprah Winfrey in 1996.

Subpoenas in Wonderland: Michigan News Organizations' Motion to Quash Denied

In a ruling that might have come from Lewis Carroll himself, East Lansing District Court Judge David Jordan, in response to Michigan media organizations' plea that investigative subpoenas cannot be used against them because the media was not the subject of the investigation, replied, "You received the subpoenas, you must be the subject of the investigation."

The motion to quash was thus denied on May 19 on this *second* set of subpoenas for outtakes and unpublished photographs of a March 27 riot that broke out after Michigan State University lost in the NCAA basketball tournament.

The 1995 law that authorizes the use of investigative subpoenas states that the media may be subjected to such a subpoena in two instances: where the subpoena is for published or broadcast material and where the media itself is the subject of the investigation. Defense counsel argued that the statute was clearly meant to apply where the media is the subject of the *criminal* investigation.

The news organizations had won an 11th hour victory April 30, 1999 when the Michigan Supreme Court overturned three lower court rulings requiring the news organizations to turn over outtakes and unpublished photographs. The Supreme Court, acting in less than 48 hours on an emergency appeal, held that the prosecutor could not obtain the material utilizing general procedures under the state's court rules. The Supreme Court remanded the case to the state district court, indicating that the prosecutor might ask for an investigative subpoena — similar to a search warrant — but gave no guarantee that such a request would be endorsed by any court. And in fact, Circuit Court Judge Lawrence Glazer had already ruled in the case that investigative subpoenas cannot be used in this case because of the 1995 law. Judge Glazer's ruling was, however, vacated — not overruled — when the Supreme Court remanded the case. The investigative subpoenas were authorized in the first week in May.

The prosecutor in the case, Stuart Dunnings III, sought the outtakes and unpublished photographs, seeking to identify individuals that were involved in the riot. There was a sense of urgency in his appeal, as he hoped to identify and charge as many individuals as possible before the school adjourned for summer vacation on May 7. Dunnings had the support of two lower court judges who ruled that the unpublished material was not protected because the riot was filmed in a public place. The lower courts also rejected claims that the unpublished material was shielded by common law and the First Amendment. The Supreme Court expressed no opinion on that issue.

Because the University of Michigan is on summer vacation, Judge Jordan conceded that the sense of urgency had abated (most of the rioters were students). Media organizations have three weeks in which to appeal to the Circuit Court for a stay.

Ohio Reporter Sentenced to Jail for Refusing to Answer Questions About Confidential Source

A reporter for the *Akron Beacon Journal* was found guilty of contempt of court on April 7 for refusing to reveal to a grand jury when confidential Ohio State Department of Human Services documents were given to him. The reporter, Jon Craig, believed that disclosing *when* the documents were given to him would narrow the pool of "suspects" and would be tantamount to disclosing *who* gave him the documents. The subject of the grand jury hearing was the improper disclosure of Department of Human Services documents. Craig was writing a story on alleged Medicaid fraud. While Craig did disclose the documents in question at the grand jury hearing, with regard to when he received the documents, Craig would only say that he received the documents sometime before the publication of his November 1, 1998 article.

The jail sentence has been suspended pending appeal. Craig's brief is not due until May 24.

N.Y. Cable News Seeks Camera Access to Diallo Murder Trial

Asserts State Constitutional Right of Access

WRNN-TV/Regional News Network in New York has asked a New York trial court to allow it to intervene for the purpose of arguing that it has a constitutional right under the New York State Constitution to provide audio-visual coverage of the trial in *People of the State of New York v. Kenneth Boss, et al.*, currently scheduled for January 2000. The defendants in that criminal case are four police officers charged with murdering Amadou Diallo, a 22-year old West African immigrant, with a barrage of 41 bullets while he stood, unarmed, in the doorway of his apartment building in the Bronx. Public interest in the case, and issues of police training and police activities in minority neighborhoods, are running very high in New York.

The court has asked the parties to respond by May 20, with WRNN given 8 days after that to respond, and has set June 7 as the return date.

New York had various statutes that authorized experiments with cameras in state courtrooms for a ten year period beginning in 1987. The last of those statutes was allowed to expire on June 30, 1999. While there is discussion again this legislative term of the introduction of a new bill on the matter, the New York State Legislature, which in recent years cannot seem to work its way through the critical budgetary process, its primary function, with any efficacy or dispatch, may not reach the issue. Currently on the books, New York Civil Rights Law § 52 bars audio-visual coverage of proceedings at which witnesses are appearing under subpoena or other compulsory process.

NY Recognizes a Right of Access

WRNN-TV argues that New York law, even prior to the Supreme Court decision in *Richmond Newspapers*, recognized a constitutional right of public access to criminal trials that could only be denied under compelling circumstances where a defendant's right to a fair trial was in jeopardy. Moreover, the experience in New York (documented in the reports filed at the closure of each of the four experimental periods that New York experienced in which cameras were permitted in courtrooms) and in other states supports the conclusion that coverage aids in public understanding, confidence and respect of the judicial process.

WRNN-TV asserts that it is appropriate for New York courts to look to the New York Constitutional provisions on free speech and press, Article 1, Section 8, which, as the New York Court of Appeals has held in other contexts, is more expansive in its protection than the First Amendment. Thus while federal First Amendment decisions are mixed on the issue (at best), the New York Courts have their own Constitution to interpret and apply. WRNN-TV argues that the denial of public access to this trial, one of unquestioned concern to the public, by denying the ability of the press to bring the audio-visual images to those who cannot themselves attend the trial, is not narrowly tailored and fails to meet any articulated and supportable government interest.

An Equal Protection Argument

WRNN-TV also asserts that § 52 of the Civil Rights Law denies television press equal protection under the New York Constitution vis-a-vis print journalists preventing the former (in all circumstances) from using the basic tools of their trade in covering trial proceedings. WRNN-TV proposes that the coverage be generally governed by the basic technical and court administration rules developed during and for the various experiments with cameras in courtrooms in New York. Those have been blessed by New York's Chief Administrative Judge as meeting all legitimate concerns of fairness and decorous judicial administration. With those regulations in place, the complete prohibition of what otherwise would be a significant category of protected speech is constitutionally impermissible.

Eleventh Circuit Affirms Reduction of "Illegal" Punitive Damage Award Without Offering Plaintiffs Option of New Trial

Splits with Holdings of Second and Tenth Circuits

On April 1, 1999, a three-judge panel of the Eleventh Circuit Court of Appeals unanimously affirmed the reduction of a $15 million punitive damage award to $4.35 million without offering plaintiffs the alternative of a new trial. *Johansen v. Combustion Engineering*, No. 97-8726 (11th Cir. 1999). In affirming the ruling by the United States District Court for the Southern District of Georgia, the appellate panel distinguished between a court's reduction of a jury's award it believes unreasonable on the facts and a *constitutional* reduction, which the panel ruled "is a determination that the law does not permit the award." The latter, the panel ruled, was a question of law for the court and not for the jury.

The decision creates a split in the circuit courts, with the Second and Tenth Circuits ruling recently that plaintiffs should continue to have the option of accepting either a reduced amount or a new trial. *See Continental Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996); *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996).

Both the appellate panel and the district court in *Combustion Engineering* relied on *BMW of North America v. Gore*, 517 U.S. 559 (1996), in which the Supreme Court held that "the Constitution provides an upper limit on punitive damage awards so that a person has 'fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.'" *Id.* at 574.

A Nuisance and Trespass — Acidic Water

Combustion Engineering ("Combustion") was the successor to a kyanite mining site in Lincoln County, Georgia. Combustion purchased the site in the mid-1960s and mined the property until 1984. Although the site was sold in 1984, the purchasers defaulted on their obligations and all environmental responsibilities reverted back to Combustion in 1986.

The process of mining kyanite involved crushing and processing rock and removing the kyanite. Once the kyanite was removed, the remaining rock, or tailings, was deposited into tailings ponds. Also present in the tailings was a mineral that, when exposed to water, rendered the water more acidic. The acidic water would from time to time seep into the streams that flowed through Combustion's property. Several individuals who owned property downstream from Combustion sued Combustion, claiming damages for trespass and nuisance. The essence of the claims was that the streams "looked and smelled bad, that the streams no longer contained fish, and that cows would not drink from the streams." *Johansen v. Combustion*, No. 97-8726, slip op. at 2 (11th Cir. 1999).

The trial was bifurcated, with issues of liability and compensatory damages given separate consideration from issues relating to punitive damages. An aggregate verdict of $47,000 in compensatory damages was rendered in the first phase of the trial, with the jury also awarding the various property owners a total of $227,000 in litigation costs.

Clear and Convincing Evidence Required

On the issue of punitive damages, the property owners were required to "prove by clear and convincing evidence that [Combustion's] actions 'showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.'" Slip op. at 2. Moreover, to recover more than $250,000 each, the property owners had to show by clear and convincing evidence that Combustion had acted "with the specific intent to harm." *Id.* The owners were then awarded $3 million each for a total of $45 million.

Finding such an award "shocking" and one that would, if allowed to stand, "give the system a black eye", the district court granted Combustion's motion

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Eleventh Circuit Affirms Reduction of "Illegal" Punitive Damage Award

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for a new trial unless the property owners agreed to remit all damages over $15 million. The property owners agreed and judgment was entered for $15 million.

United States Supreme Court Remands in Light of BMW

Combustion appealed the entry of judgment in the amount of $15 million. While the appeal was pending, Combustion settled with three of the property owners, leaving a total of $43,500 in compensatory and $12 million in punitive damages at issue in the appeal. Those judgments were affirmed. Combustion then petitioned the Supreme Court, contending that the judgment was still excessive. A ruling on the petition was deferred pending resolution of *BMW of North America v. Gore*, 517 U.S. 559 (1996).

Post-*BMW*, the Supreme Court granted Combustion's petition, vacated the award and remanded the case for further consideration in light of *BMW*. The Eleventh Circuit remanded the case to the district court. Ruling that the $15 million punitive damage award against Combustion approached the 500:1 ratio that the Supreme Court found "breathtaking" in *BMW* — $15 million was almost 320 times the compensatory damages — the district court reduced the award to $4.35 million, which represented a ratio of 100:1. The district court did not offer the property owners the alternative of a new trial.

Combustion appealed the $4.35 million award, claiming that it was still excessive. The property owners cross-appealed, seeing to reinstate the original $15 million award. The owners claimed the district court's reduction of the award was a constitutional error.

A Jurisdictional Quandary

The panel faced the following alternatives: either to dismiss the case for lack of jurisdiction — because the right to a jury trial prescribed in the Seventh Amendment prohibits a court from rendering a judgment for a sum other than that awarded by the jury — or to accept the district court's judgment. Because the district court relied on *BMW* for its authority, the appellate panel looked to the interplay of *BMW* and the Seventh Amendment. Under the Seventh Amendment, the "reexamination of a jury's determination of the facts, including its assessment of plaintiff's injury," is prohibited. *Slip op. at 3.* A court may, however, order a new trial. The power to order a remittitur is derived from this power.

Remittitur or Constitutional Reduction?

The appellate panel resolved the jurisdictional issue by ruling that a "constitutionally reduced verdict . . . is not a remittitur at all." Slip op. at 5. The court reached this conclusion by reasoning that a court has jurisdiction to modify a verdict that "is not permitted by law." *Slip op. at 4.* A constitutionally required reductions — on based on questions of law and not of fact — would not come within the strictures of *Hertzel v. Prince William County*, 523 U.S. 208 (1998).

In that case, the Supreme Court reversed the Fourth Circuit's writ of mandamus directing the district court to enter judgment for remittitur without giving the plaintiff the option of a new trial. The Eleventh Circuit panel distinguished *Hertzel*, noting that there was no claim in that case that the Constitution required a reduction of the award. Noting that the Second and Tenth Circuits might have disagreed, the panel nonetheless agreed with the district court's conclusion that the $15 million award was, in effect, illegal under *BMW*. The district court, therefore, merely amended the verdict "to conform to the law." Slip op. at 5.

The Upper Limit — De Novo Review

Although the question of the standard of review to employ under *BMW* was one of first impression, the court easily reached the conclusion that, because the question of whether an award is constitutionally excessive is a question of law, a *de novo* review would be appropriate.

Court Grants ABC's Motion to Dismiss Copyright Claim, Holding That Depiction of Magazine Photo in News Broadcast Was Fair Use

By Roger R. Myers, Joshua Koltun, and Jeff Frost

A federal district court judge in San Francisco has granted a motion by American Broadcasting Companies, Inc. ("ABC") to dismiss a copyright claim arising out of news reporting. The court ruled that ABC's brief depiction, in a one-hour special report, of a portion of a magazine article containing a photograph taken by plaintiff was fair use. In an important ruling, the court held that the determination of fair use could be made at the pleadings stage, after taking judicial notice of the videotape of the ABC news program and the magazine article containing plaintiff's photograph. *Morgenstein v. ABC Inc.*, 27 Media L. Rep. 1350 (N.D. Cal. 1998).

The genesis of the lawsuit was the media coverage of California's Proposition 215, which, when it passed in November 1996, legalized the medicinal use of marijuana by anyone with a doctor's recommendation. After the November 1996 election, *Newsweek* magazine published a cover report entitled "The Battle over Marijuana: Is it Medicine? The Risks of Legalization." One photograph illustrating the lead article was taken by the plaintiff, Richard Morgenstein. The photograph was of Hazel Rodgers, a woman in her seventies, smoking marijuana. It appeared across from text in the article discussing Rodger's use of marijuana for medicinal purposes.

In 1997, ABC aired a report "entitled "Pot of Gold," which reported on the increasing role that marijuana plays in the economy, and the ramifications that shifting perceptions of such use and cultivation have for electoral and initiative politics both locally and nationally. One segment of the program showed Dennis Peron, leader of the campaign to pass Proposition 215, as he described his strategy for the legalization of marijuana. Peron explained that "[w]hat you have to do is build a coalition of senior citizens, of housewives, and professionals and doctors and lawyers and nurses," by using the media to "change the face [of marijuana] from a longhair hippie to Hazel Rodgers."

The camera then panned from Peron to Rodgers,who was sitting nearby. The narrator, Peter Jennings, explained to the audience that "Hazel Rodgers is a 77-year old Californian who uses marijuana to treat her glaucoma." Jennings then reported that "[h]er picture has appeared in numerous magazines and newspapers as a symbol of marijuana's newfound medicinal value." As Jennings spoke these words, the screen showed first the cover of the *Newsweek* article, then two pages inside the magazine, one of which contained Morgenstein's photograph of Rodgers. The program showed this page from *Newsweek* for only a few seconds out of the hour-long program.

Morgenstein sued ABC for copyright infringement. ABC moved to dismiss, arguing that its news reporting use of the photograph was quintessential fair use. The relevant segment of the broadcast had informed viewers of Peron's successful campaign to transform the image of marijuana users. The brief depiction of the *Newsweek* photograph had been necessary to make sense of his reference to Hazel Rodgers, and to corroborate Peron's claims of having influenced media coverage of his movement. Plaintiff responded that ABC's news presentation was a mere pretext for misappropriating an aesthetically pleasing image that he had created.

At the initial hearing on the motion, Judge Legge heard argument on whether the fair use issue, normally a mixed question of law and fact, could be decided on a motion to dismiss. ABC argued that the only facts needed to resolve the issue — a videotape of ABC's news report and a copy of the *Newsweek* article — were properly before the court on ABC's request for judicial notice and thus the issue was ripe for adjudication. Judge Legge agreed and set a date for argument on the merits.

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Court Grants ABC's Motion to Dismiss Copyright Claim

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At the second hearing, the court granted ABC's motion to dismiss, finding that three of the four fair use factors favored ABC and that the other was a wash. In considering the "purpose and character" of ABC's use, the court ruled that the most important factor in the case was that ABC was involved in news reporting, one of the specific illustrative fair uses listed in § 107 of the Copyright Act. The court ruled that where the alleged infringement occurs in the context of a news report, that creates a strong presumption in favor of a finding of fair use.

The court also rested on the fact that ABC had shown the photograph as it had been published in *Newsweek*, rather than passing it off as its own photograph. The court reasoned that such use was "transformative," a factor that also favored a finding of fair use.

On the second factor, the "nature of the copyrighted work," the court ruled it also favored ABC, for two reasons. First, the work was previously published. Second, although the work was not without aesthetic and cultural value, it was more factual/informative than imaginative/creative, having been created for and published in the context of a news article. The court ruled that the third factor, the amount of copyrighted work used, did not readily apply to photographs and was primarily of concern when considering written works.

As for the fourth factor, the market for the work, the court conceded this was not a factor that could always be determined on a motion to dismiss. On the facts of the case, however, the court concluded that, as a matter of common sense, a display on television of a magazine publication containing a photograph would have no tendency to supplant plaintiff's market for his original photographs.

Although the court granted the motion to dismiss with leave to amend, Judge Legge cautioned plaintiff's counsel that he did not necessarily believe plaintiff could plead around the fair use defense. Plaintiff then decided not to amend his complaint or appeal the ruling.

Roger R. Myers and Joshua Koltun, with Steinhart & Falconer LLP in San Francisco, CA, represented ABC in this matter. Jeff Frost is General Attorney to ABC in Los Angeles.

Tape Recording of Conversations by Maine Attorneys Not *Per Se* Unethical

By Jonathan S. Piper, Esq.

In an opinion declaring the opposing majority view "not persuasive" and "highly conclusory," Maine's Professional Ethics Commission of the Board of Overseers of the Bar has opined that it is not *per se* unethical for attorneys in Maine to record phone conversations to which they are a party (Opinion No. 168, Issued March 9, 1999).

In the advisory opinion sought by Bar Counsel, the Commission focused on an ethical rule, found in most jurisdictions, providing that "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." (Noting that both Maine and Federal law permit recording of conversations with the consent of either party to the conversation, Maine's Commission did not consider another common rule that prohibits a lawyer from engaging in "illegal" conduct.)

Acknowledging the considerable number of ethics commissions and courts that have concluded otherwise, Maine's Commission observed that "without exception, the opinions are highly conclusory, contain little if any analysis of any kind and fail to rely on provisions in the applicable ethical rules of the jurisdiction" and that "such lack of analysis is the equivalent of stating that 'recording is deceitful under the Rules because it is deceitful.'"

Observing that the fundamental rationale for the majority opinions seems to be that "secret recordings of conversations offends the sense of honor and fair play of most people," Maine's Commission added the further insight, however, that "while we wholeheartedly agree with the sentiment expressed in these opinions, we are unable to find any support for it in the text of the Maine Bar Rules." It added, "We do not believe that the language of the rule can be read so broadly as to proscribe conduct sim-ply because we are of the view that it is 'unfair' or 'not nice,' or is 'dishonorable.' . . . We do not have a charter authorizing us to declare conduct to be unethical simply because we believe that it 'offends our sense of honor and fair play.'"

"We do not have a charter authorizing us to declare conduct to be unethical simply because we believe that it offends our sense of honor and fair play."

The Commission's opinion did include a *caveat*, however, by reminding its readers that findings of unethical conduct are generally "situation specific," meaning that while secret recordings may generally be permissible, they would not be considered ethical if, for example, the attorney lied in res-ponse to a specific inquiry about recordation or prom-ised confidentiality to the other speaker and then proceeded to disseminate a transcription to a third party.

"The fact that the act of recordation is not *per se* unethical still requires that the recording attorney's conduct must otherwise not be dishonest, fraudulent, deceitful or involve misrepresentation."

Mr. Piper is Managing Partner of Preti, Flaherty, Beliveau, Pachios & Haley, LLC, a 65 lawyer firm in Portland, Maine.

UPDATES

Puerto Rican Paper Settles With Governor

On May 11, 1999, U.S. District Judge José A. Fusté entered an order approving a settlement agreement between *El Nueva Día*, Puerto Rico's largest newspaper, and Commonwealth Governor Pedro Rosselló. The agreement puts an end to the federal civil rights lawsuit filed against the Governor and six of his top aides on grounds that they violated the First Amendment by withdrawing government advertising from *El Nueva Día* and harassing its corporate partners in response to unfavorable news coverage.

In the settlement agreement, Governor Rosselló and his aides acknowledged that the use of government advertising to coerce the media into favorable news coverage of the government violates the First Amendment. The Commonwealth has now committed itself to using objective, non-retaliatory criteria, such as audited circulation, in deciding where to place official notices and announcements. The settlement agreement also provides for the resumption of several projects of the Puerto Rican Cement Company, Inc., *El Nueva Día*'s corporate affiliate and co-plaintiff, that the lawsuit alleged were halted in order to punish the newspaper.

Judge Fusté, who sits in San Juan, ordered that he found it necessary to retain jurisdiction over the case to make sure that all provisions of the settlement agreement are implemented. *El Nueva Día* and the Puerto Rican Cement Company were represented by Bruce W. Sanford and his colleagues at Baker & Hostetler LLP. Trial had been scheduled to begin May 10.

Mirage Resorts Chairman Drops Libel Lawsuit

Steve Wynn, chairman of Mirage Resorts, has dropped a libel lawsuit against the author and publisher of an unauthorized biography entitled, *Running Scared: The Life and Treacherous Times of Las Vegas Casino King Steve Wynn*. In August, 1997 Wynn won a $3.1 million lawsuit against the publisher of the biography, Lyle Stuart, for a statement that was printed in a catalogue advertising the biography. The statement in the catalogue said that the book "details why a confidential Scotland Yard report called Wynn a front man for the Genovese family." The judgment is currently on appeal in the Nevada Supreme Court.

When Wynn failed to show up for a scheduled deposition in a second libel lawsuit against the author and publisher based on the book itself, the defendants' attorney, Don Cox, filed what were most likely motions to dismiss based on noncooperation. Wynn then offered to dismiss the case. Wynn's attorney, Barry Langberg, scoffed at the notion that Wynn was not anxious to litigate the merits of his case, indicating that Wynn had already won $3.1 million on the same issues and that it would be unproductive to spend resources on a second trial.

Any developments you think other LDRC members should know about? Call us, or send us an email or a note.

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Back on Course — *Berezovsky* Explained and Contained

By Mark Stephens and Marietta Cauchi

In a unanimous judgment the UK Court of Appeal affirmed a High Court ruling that London is the inappropriate forum for a libel suit brought by a US company and its CEO against Dow Jones. *Chadha & Osicom Technologies v. Dow Jones & Co., Inc.* (Court of Appeal May 14, 1999). *See also LDRC LibelLetter* July 1998 at 27. The case will be reported at www.courtservice.gov.uk.

Forum Principle Reaffirmed

The judgment restates the fundamental common law principle of forum non conveniens propounded by the House of Lords in *Spiliada Maritime Corporation v. Consulex Ltd.* [1987] 1 AC 460, that the appropriate forum in any individual case is the jurisdiction in which that particular case "may be tried most suitably for the interests of all parties and for the ends of justice." There was concern that this fundamental principle had been eclipsed by the Court of Appeal's decision last November in *Berezovsky v. Forbes*. In that case, Russian plaintiffs succeeded in reversing the trial court decision and were allowed to continue their defamation claim against *Forbes* magazine in London.

California Company Sued Dow Jones in London

Here the plaintiffs, Osicom Technologies, Inc., an electronics company based in California, and its CEO, Parvinder Chada, who is also domiciled and resident in California, issued and served defamation proceedings against Dow Jones & Co. arising out of an article published in *Barron's* magazine. It was alleged that the article concerned corporate fraud involving quantities of unregistered stock sold to buyers outside the US using regulation 5 of the Securities Act 1933. The share dealings have been the subject of litigation in America. Approximately 1,200 of total sales of 294,346 of the edition of the magazine were sold within the UK.

Relying on the Court of Appeal judgment in *Berezovsky* the plaintiffs argued that once publication of an alleged libel within the UK is established, there is (now) a presumption that the case would most appropriately be tried in England. The Court of Appeal rejected this narrow interpretation of *Berezovsky*. The court accepted that significant publications of a libel in more than one country could be separately actionable in different countries, but this did not displace the *Spiliada* test nor did it extend the principle in *Shevill v. Presse Alliance SA* (1995) (which circumscribed national torts in Europe by virtue of article 5(3) of the Brussels Convention)[1] to include the US, as contended by Osicom and Chadha.

Once it is established that there is publication in the UK, English courts have jurisdiction, but the plaintiff must then still jump the *Spiliada* hurdle to justify service on a foreign defendant and hauling him before UK courts. The *Spiliada* test will involve a substantial complaint with regard to the plaintiff's injury in the UK and this is done by reference to the scale of publication within the UK and the extent of the plaintiff's connections and his reputation to be protected within the UK.

Berezovsky: Evidence of UK Reputation

On the facts before the Court of Appeal in *Berezovsky* — but not at first instance — there was substantial new evidence of the plaintiffs' (particularly Berezovsky's) connection with and reputation within the UK. No such evidence was put by Osicom and Chadha before the Court of Appeal in this case. Further, the defendant in *Berezovsky* having accepted that the plaintiffs would not obtain a fair trial in Russia left the court with the alternative jurisdictions of the US and the UK. In this regard, it was significant that whereas plaintiffs had some connections to the UK they had minimal and unsubstantial connections to the US as an alternate forum. By contrast, here both plaintiffs and the defendants are located and conduct business in the US — the appropriate forum for the case.

The review of *Berezovsky* in this recent judgment is

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Berezovsky Explained and Contained

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a sensible and unforced interpretation in line with the fundamental principle laid down in *Spiliada*. It will hopefully quiet tourist libel plaintiffs and commentators who viewed the *Berezovsky* judgment as leading to a presumption of jurisdiction in the UK.

House of Lords to Hear Berezovsky Appeal

Whether or not there is a conflict between these two Court of Appeal decisions and, if so, whether the House of Lords will feel bound to resolve that conflict by ruling on the *Berezovsky* appeal to the House are interesting questions that remain. English courts have a less proactive, more reactive attitude in the development of common law and the Lords may confine the *Berezovsky* appeal to a point of law on "global tort" — that is the defendant's argument that in multi-jurisdiction cases there is only a single cause of action and the court must identify the real focus of the dispute.

[1] *Article 5(3) of the Brussels Convention provides for a person domiciled in a contracting state to be sued in tort in another contracting state in the courts for the place where the harmful event occurred. This means that the victim of a libel by a newspaper article distributed in several contracting states may bring an action for damages against the publisher either before the courts of the contracting state of the place where the publisher is established, which have jurisdiction to award damages for all the harm caused by the defamation or before the courts of each contracting state in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in that particular state.*

Mark Stephens and Marietta Cauchi are with Stephens Innocent in London. They represented Dow Jones & Co. in this case together with Stuart Karle of Dow Jones & Co and barristers Geoffrey Robertson QC and Gavin Millar.

Update on UK Bill Restricting Access to Criminal Proceedings

By Marietta Cauchi

The Youth Justice and Criminal Evidence Bill, which contains a number of provisions that would severely restrict the media's ability to report on criminal proceedings, has completed its readings in both Houses of Parliament and will now go through a committee and report stage to be completed before Parliament's term finishes in mid-October. *See LDRC LibelLetter* March 1999 at 46. During the reading stage, a number of amendments were made which address some of the media's concerns, as reported in my earlier article.

The Bill provides that a court can make a "special measures direction" ejecting the press and public from a courtroom so that evidence can be heard in private (clause 43). This was amended to allow one journalist to remain in the courtroom. This means that the hearing remains public and can be reported on by the media who will retain the relevant statutory and common law defenses. Further, under clause 20(5), the court must state its reasons in open court for giving, varying or discharging a special measures direction.

The other significant amendment relates to the absolute ban on identification of anyone under 18 involved in a criminal incident whether victim, witness or suspect. The ban on identification was clarified to apply from the beginning of the criminal investigation — the Bill previously referred just to the allegation. There is now a right to appeal orders granting or denying a ban and clause 49 provides three defenses to the publication of material identifying a victim or witness (not alleged offender) in breach of a ban. These are innocent publication, public interest (except for sexual offences) and waiver.

Under the Bill, courts have the power to ban news reports of criminal proceedings until after trial.

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Update on UK Bill

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However, the courts will now have an increased facility to relax or dispense with such a restriction if the effect is otherwise to impose a substantial and unreasonable reporting restriction. However, there is still an absolute ban on the reporting of any ban until the conclusion of proceedings (clause 46).

The Bill may be amended further during its final stages but in its current form, even as amended, worrying elements remain. It is obviously difficult to balance the competing interests of an individual's right to privacy and the public's right to information, especially in the investigation and prosecution of crimes and the prevention of future crimes. Under this legislation the courts have been empowered, and in some circumstances are required, to prevent the public from access to information. The courts are already entitled under their inherent jurisdiction to hold proceedings in camera when issues such as national security or protection of vulnerable individuals are concerned — but this Bill gives the court express powers which do not seem either necessary or within the spirit of the European Convention on Human Rights, now enacted into UK law through the Human Rights Act.

Marietta Cauchi is with Stephens Innocent in London.

Committee to Protect Journalists Releases Enemies of the Press List

In connection with World Press Freedom Day on May 3rd, the Committee to Protect Journalists ("CPJ") released a report on the top ten enemies of the press. Topping the list is Yugoslav President Slobodan Milosovic, who, according to the report, has used "intimidation, assault, crippling fines, and license denials" to mute his country's independent media. Also on the list: Jiang Zemin of China, Fidel Castro of Cuba, Laurent Kabila of the Congo, Meles Zenawi of Ethiopia, Zine Abdine Ben Ali of Tunisia, Mahathir Mohamed of Malaysia, Alberto Fujimoro of Peru, Leonid Kuchma of Ukraine and Hosni Mubarak of Egypt.

All are cited for leading regimes that have "knowingly suppressed the press through censorship, imprisonment, physical attack and even murder." The full text of this report is available at CPJ's web site at www.cpj.org. Also accessible at that web address is a summary of CPJ's annual worldwide study of press freedom issues in 118 countries.

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