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LDRC Libel Defense Resource Center

MEDIALAWLETTER

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California Supreme Court Creates A Major Threat to Newsgathering

By Steven G. Brody and Jeanette M. Viggiano

On May 2, 2002, the Supreme Court of California, in a 4-3 decision authored by Justice Kennard, treated a corporation's responses to attacks on its labor practices as commercial speech, thereby exposing that corporation to liability for its communications with the press. The decision will chill corporate speech on important public issues, and, consequently, impede newsgathering with respect to those issues. The case is *Kasky v. Nike, Inc.*, No. S087859, 2002 Cal. LEXIS 2591 (Cal. May 2, 2002). Justice Chin, with Justice Baxter concurring, wrote a dissent, as did Justice Brown.

Nike Responds to News Reports

Like many major marketers of sports apparel, Nike contracts for the manufacture of its products in countries with low labor costs. Most of Nike's products are manufactured in China, Vietnam, and Indonesia.

Beginning in 1996, with a report on the television news program *48 Hours*, and continuing with stories in several major media outlets, including CBS News, *The New York Times* and *The San Francisco Chronicle*, various individuals and organizations alleged that workers in factories that manufacture Nike's products are paid less than the applicable local minimum wage, forced to work overtime, subjected

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Penthouse Apologizes for Topless Photo Gaffe, Reaches Settlement with Soltesz-Benetton

Magazine claimed to have pictures of tennis star Anna Kournikova

Penthouse magazine has reached a settlement with Judith Soltesz-Benetton, the daughter-in-law of the famous fashion designer Luciano Benetton, over publication by Penthouse magazine in its June 2002 issue of topless photos of Soltesz-Benetton which illustrated an article that identified them as photos of tennis star Anna Kournikova.

On May 6th, one month after Penthouse began distribution of its June 2002 issue, Soltesz-Benetton sued the magazine and its publisher General Media Communications in federal district court in New York for misappropriation of her likeness for trade purposes under New York Civil Rights Law §§ 50 and 51. She sought and received from Federal District Court Judge Denny Chin a temporary restraining order enjoining further distribution of the magazine. Expedited discovery, however, was conducted with a hearing on the preliminary and permanent injunction, with consideration as well of an order mandating a recall of all unsold copies of the magazine, held on May 14 and 15.

While the case seemed to fall outside the parameters of New York's misappropriation statute, as recently articulated by New York's highest court in *Messenger v. Gruner & Jahr Printing & Publishing*, 94 N.Y.2d 436 (2000), plaintiff argued that the fact that this was a false account – and, she argued, knowingly false in attributing old images of her to Kournikova – was sufficient to afford her a remedy. At the hearing, the central factual issue was whether or not Penthouse was acting deliberately or in a reckless manner in publishing these photos – which Penthouse now agrees are of Soltesz-Benetton and not of Kournikova – as ones of Kournikova .

The settlement was reached before Judge Chin issued a ruling on either the factual or the legal validity of plaintiff's claims. The pertinent parts of the settlement required Penthouse to destroy all copies within its control, a letter of apology, and the magazine promised no further distribution of the images. The settlement did not require a recall of unsold magazines from the retailers.

Anna Kournikova also filed a lawsuit against General Media, but in the Central District of California. Kournikova claimed, among other things, that the magazine defamed her and misappropriated her identity.

Victor A. Kovner and Laura R. Handman, of Davis Wright Tremaine in New York, represent General Media Communications, the publisher of Penthouse before Judge Chin. Judd Burstein, of New York, represented Soltesz-Benetton. William E. Wegner, Ethan D. Dettmer, of Gibson, Dunn & Crutcher in Los Angeles, and Randy M. Mastro, of Gibson, Dunn & Crutcher in New York, represent Kournikova. Steve Contopulos of Sidley Austin Brown & Wood, Los Angeles, represents General Media Communications in the California litigation.

There will be a more detailed look at this litigation in the next MediaLawLetter.

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to physical, verbal and sexual abuse, and exposed to dangerous levels of dust and toxic fumes. Those reports placed Nike's labor practices under public scrutiny and made Nike the poster child for the perceived social evils of economic globalization.

In response, Nike turned to the same media that had carried the attacks on its labor practices. Nike wrote letters to newspapers, issued press releases, and bought full page advertisements in major newspapers. Nike's responses discussed its code of conduct, addressed women's issues, answered sweatshop allegations, and denied exploitation of underage workers. Those responses, including a letter to the editor that was published in *The New York Times*, are the subject of plaintiff Kasky's complaint.

Is It Commercial Speech?

Plaintiff alleges that Nike, in the course of responding to the attacks, made a number of misrepresentations regarding its labor practices. According to plaintiff, those misrepresentations give rise to claims under California's Unfair Competition Law ("UCL") (Bus. & Prof. Code § 17200 *et seq.*) and false advertising law (Bus. & Prof. Code § 17500 *et seq.*). The remedies available to a private plaintiff in a UCL suit include injunctive relief and restitution. Injunctive relief could take the form of an order directing that the unfair business practice be stopped, as well as an order designed to undo the harm caused to the public by that practice, such as a corrective advertising campaign. Restitution could include an order compelling a UCL defendant to return money obtained through an unfair business practice.

The key issue addressed in the California Supreme Court's decision is whether Nike's allegedly false statements should be categorized as commercial speech or noncommercial speech. Only commercial speech can give rise to claims under the UCL and false advertising law. The intermediate appellate court dismissed Kasky's complaint concluding that Nike's statements were noncommercial speech and, consequently, fully protected by the state and federal constitutions. The California Supreme Court reversed, introducing a new and extraordinarily broad definition of commercial speech.

A Three Part Test

The Court formulated a three-part test for determining whether statements constitute commercial speech. The test applies "when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception...." Under the test, the courts must consider three elements: the speaker, the intended audience, and the content of the message. All three elements are described so broadly that a huge range of corporate communications could become the subject of UCL claims.

Under the test, the courts must consider three elements: the speaker, the intended audience, and the content of the message. All three elements are described so broadly that a huge range of corporate communications could become the subject of UCL claims.

First, the "speaker" element of the test will be met whenever the speaker is "someone engaged in commerce" — that is, generally, the production, distribution or sale of goods or services — or "someone acting on behalf of a person so engaged." Obviously, statements by any commercial enterprise will satisfy the "speaker" element of the test. Even statements made by nonprofit organizations engaged in the sale of services, such as public broadcasters and Planned Parenthood, could be included.

The second element -- the "intended audience" for the speech -- is similarly broad and explicitly focuses on statements made to members of the press. This element is satisfied if the intended audience is "likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as *reporters* or *reviewers*) likely to repeat the message to or otherwise influence actual or po-

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tential buyers or customers." (Emphasis supplied.)

The third element — the "content" of the speech — is satisfied if the "speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." A creative plaintiff's lawyer would argue that virtually all statements made by a corporation are for the ultimate purpose of promoting sales. Kasky's counsel did just that by alleging that Nike's letters to the editor and press releases concerning its labor practices, "although addressed to the public generally, were also intended to reach and influence actual and potential purchasers of Nike's products." Indeed, the court itself acknowledged and attempted to justify the broad sweep of its "content" element, stating it "is necessary, we think, to adequately categorize statements made in the context of a modern, sophisticated public relations campaign intended to increase sales and profits by enhancing the image of a product or of its manufacturer or seller."

Dissenting Opinions

Justice Brown's dissenting opinion criticized the majority's creation of an overly broad test for commercial speech that when "taken to its logical conclusion, renders all corporate speech commercial speech." According to Justice Brown, the majority's test "contravenes longstanding principles of First Amendment law" in three ways.

First, despite the fact that commercial speech is to be distinguished by its content, the test relies on two criteria wholly unrelated to the speech's content: the identity of the speaker and the intended audience.

Second, "the test violates a fundamental tenet of First Amendment jurisprudence by making the identity of the speaker potentially dispositive."

Third, the test stifles "the ability of speakers engaged in commerce, such as corporations, to participate in public debates over public issues."

Frustrated by the majority's poorly crafted test, Justice Brown urged the United States Supreme Court to step in and reconsider the commercial speech doctrine.

Along the same lines, Justice Brown, as well as Justice Chin in his separate dissent, reasoned that the majority's test unfairly, and unconstitutionally, handicaps one side of the public debate. Justice Brown stated that "[u]nder the majority's test, only speakers engaged in commerce are strictly liable for their false or misleading representations . . . . Meanwhile, other speakers who make the same representations may face no such liability, regardless of the context of their statements." Justice Chin added:

> [w]hile Nike's critics have taken full advantage of their right to "uninhibited, robust, and wide-open" debate, the same cannot be said of Nike, the object

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Media Amicus Must Be Considered

Nike is planning to petition for cert. News organizations may want to consider the chilling effect on newsgathering of the holding that corporate press releases, comments to reporters and letters to editors may subject a corporation to a claim of false advertising under state law.

Such a claim can be used to avoid any First Amendment protection for speech on an issue of public interest. The standard for holding such speech illegal and subject to injunction and damages is whether the words spoken have the capacity to deceive the ignorant, unthinking and credulous. Literally true statements made to a reporter may be the basis for an injunction and liability.

In addition, if the strict liability standard of false advertising laws is applicable to any corporate speech that may impact how consumers view a corporation's products, all media and entertainment companies have an interest in asking the Supremem Court to impose some level of First Amendment protection for corporate speech.

LDRC will provide additional information on media amicus efforts in this case as we learn of it.

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> of their ire. When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike's critics enjoy . . . .

The majority expressly disagreed with its dissenting colleagues, stating that the argument was "misdirected because the regulations in question do not suppress points of view but instead suppress false and misleading statements of fact."

Further, both dissenting opinions pointed out that this case typifies the circumstances where commercial speech and noncommercial speech are "inextricably intertwined." Justice Brown explained that "[i]n such cases, courts must apply the 'test for fully protected expression' rather than the test for commercial speech."

Justice Chin agreed, stating that "[c]ontrary to the majority's suggestion, Nike realistically could not discuss its general policy on employee rights and working conditions and its views on economic globalization *without* reference to the labor practices of its overseas manufacturers, Nike products, and how they are made . . . . Attempting to parse out the commercial speech from the noncommercial speech in this context 'would be both artificial and impractical.'" The dissenting justices concluded that Nike's speech deserved the full protection of the First Amendment.

Definition Could Include Almost Everything, Including Comments to a Reporter

Practically speaking, the court's three-part test for defining commercial speech will include virtually any statement made by a commercial enterprise concerning itself, or its products or services, that likely will be heard by, or repeated to, potential customers. Several illustrations readily come to mind: a response to a reporter writing a story about the environmental or health impact of a company's products; a statement to the press about a pending lawsuit; and a response to media inquiries about labor disputes.

From the media's perspective, the *Nike* decision is especially troubling because of the impact it will have on newsgathering. Commercial entities will be far more wary of speaking to the press now that their statements can become the subject of lawsuits commenced in California by plaintiff's lawyers. Even though companies technically can be held liable only for false or misleading statements, they likely will conclude that it is better not to talk to the press than take the risk that their statements will give rise to litigation.

Indeed, the nature of the UCL will make it easy for plaintiff's lawyers, emboldened by the *Nike* decision, to file copycat actions. A UCL claim can be brought by a private citizen suing on behalf of the general public of the State of California, as Kasky did in suing Nike. Moreover, the named plaintiff need not have been deceived by the allegedly false statements or harmed in any way by the statements.

This chilling of corporate speech could have been avoided if the California Supreme Court had adhered to the established, and much narrower, definition of commercial speech as "speech that does no more than propose a commercial transaction." The "no more than" definition is broad enough to serve the underlying purpose of the commercial speech exception to the First Amendment. According to the United States Supreme Court, commercial speech receives less than full constitutional protection because it is inextricably tied to commercial transactions, an area traditionally subject to the police power. Further, the "no more than" definition is narrow enough so as to not lead to inadvertent suppression of speech deserving of full First Amendment protection.

No part of Nike's challenged statements satisfies the "no more than" definition of commercial speech. Rather, those statements were part of a public discussion concerning Nike's labor practices and, more generally, the responsibilities of American corporations that manufacture their products in developing nations. Such speech deserves full constitutional protection and should not be the subject of lawsuits under state law. Unless the United States Supreme Court steps in and reverses the *Nike* decision, public debate concerning important issues, as well as press coverage of those issues, will be impoverished.

Steven G. Brody and Jeannette M. Viggiano are with King & Spalding in New York City.

Texas Appeals Court Says Satire Could Be Taken Seriously, So Trial Necessary

By Jim Hemphill

A state court of appeals in Fort Worth has affirmed the denial of a defense summary judgment in a unique libel case involving criticism of public officials in the form of a satire. The court held that reasonable readers could have misinterpreted the article as literally true, and that a fact issue existed as to actual malice.

The opinion in the case, *Isaacks v. New Times*, was handed down on May 2 and is currently available online at http://www.2ndcoa.courts.state.tx.us/ops2002/201023&216CV.pdf. The court has designated it for publication.

The facts of the case are set forth in detail in the June 2001 LibelLetter (reporting on the trial court's denial of summary judgment). In sum, the article in the *Dallas Observer*, an alternative newsweekly, criticized the actions of several persons, including two elected officials, in the handling of an incident in which a 13-year-old student in Denton County (north of Dallas) was jailed for five days for writing a Halloween essay in which he discussing shooting two students and a teacher. Public officials' actions were critiqued through a fictional, satirical account of the jailing of a fictional six-year-old girl for writing a book report on the child's classic *Where the Wild Things Are*.

The two officials, District Attorney Bruce Isaacks and Judge Darlene Whitten, sued the *Observer*, New Times (its parent company), the author, and two editors after some members of the public expressed concern over the jailing of such a young child, apparently under the mistaken belief that the article was a straight news story rather than a fictional satire. It is not clear whether any of these people actually read the entire story as presented in the *Observer*.

At summary judgment, the trial court held that there was a fact issue as to whether a reasonable person would interpret the article as true. The judge further ruled that there was a fact issue on actual malice, but adopted a fairly strict standard: to show actual malice, the plaintiffs must prove that the defendants *intended* readers to think the article stated actual facts. Under Texas law, the defendants were entitled to take an interlocutory appeal.

Appeals Court Agrees That Fact Issues Exist

The Court of Appeals for the Second District, headquartered in Fort Worth, said that the case presented "two issues of first impression in Texas": whether a fictional satire or parody was mere "rhetorical hyperbole" and thus entitled to First Amendment protection, and how the actual malice standard should be applied in such a case.

On the first issue, the court held that if reasonable readers would misinterpret the satire, the defendants could be held liable. The court further held that this was a question of fact in this particular case because "a reasonable reader could find this story to be believable" and the newspaper "provided no obvious clues to the average reader that the article was not conveying statements of actual fact." This holding was despite passages in the article such as the following:

> "Any implication of violence in a school situation, even if it was just contained in a first-grader's book report, is reason enough for panic and overreaction," Whitten said from the bench. "It's time for you to grow up, young lady, and it's time for us to stop treating kids like children."
>
> "We've considered having her certified to stand trial as an adult, but even in Texas there are some limits," Isaacks said.
>
> Cindy [the fictional six-year-old] scoffed at the suggestion that *Where the Wild Things Are* can corrupt young minds. "Like, I'm sure," she said. "It's bad enough people think like Salinger and Twain are dangerous, but Sendak? Give me a break, for Christ's sake. Excuse my French."

With regard to actual malice, the appeals court rejected the standard adopted by the trial court and advocated by the defendants. Instead, the plaintiffs could prevail by proving that the defendants either knew or strongly suspected "that the article was misleading or presented a substantially false impression." The exact nature of this inquiry appears unclear, however, as the

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Mistrial Declared in Surfer Suit

A federal district court judge has declared a mistrial in a lawsuit over a retailer's use of a photograph of a 1965 surfing tournament after one of the surfers in the photograph, who was among the plaintiffs in the suit, spoke to a reporter for the *Los Angeles Times*. *Downing v. Abercrombie & Fitch*, No. 99-CV-4612 (C.D. Cal. mistrial declared May 17, 2002).

The photo, which showed the plaintiffs when they competed in the 1965 Makaha International Surf Championship in Hawaii, appeared in the spring 1999 edition of the Abercrombie Quarterly, a magazine published by clothing retailer Abercrombie & Fitch which includes both original editorial content and information regarding clothing which may be ordered.

The lawsuit, alleging commercial misappropriation, Lanham Act violations, defamation and negligence, was brought in 1999 by seven of the 12 surfers shown in the photo. District Judge Manuel Real granted summary judgment for the defendant on Feb. 14, 2000, but was overruled on all but the defamation claim by the 9th Circuit Court of Appeals. *See Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. Sept. 13, 2001), *reh'g denied* (9th Cir. Oct. 31, 2001); *see also LDRC LibelLetter*, October 2001, at 15.

Two additional surfers in the photo filed a separate suit, which was dismissed by Real. An appeal of the dismissal is pending before the 9th Circuit. *See Spangler v. Abercrombie & Fitch*, No. 01-55472 (9th Cir. stay issued July 13, 2001) (staying appeal while awaiting court's decision in *Downing*).

As the trial after remand proceeded in the *Downing* case, Judge Real ordered the parties not to "try their cases in the press."

Despite this order, on May 16 plaintiff George Downing returned a call made to him by a reporter for the *Los Angeles Times* "City of Angles" column. The column, which appeared in the paper the next day, reported that Mr. Downing, calling from the U.S. Courthouse in downtown Los Angeles, said that the surfers were seeking $9 million in damages, which the column said they alleged was Abercrombie & Fitch's profits from selling clothing modeled on the outfits they are shown wearing in the photo.

During the trial, an Abercrombie & Fitch executive had testified that the retailer made a profit of $2,531 from the clothing.

After seeing the article, Judge Real questioned eight jurors about whether they had seen media coverage of the case. One had heard coverage of the case on National Public Radio, and another had seen a television news report on the case on the day the trail began. Although none had seen the *Times* column, Real declared a mistrial, citing the damages figure in the column as proof that the article is "so provocative and it misstates the facts."

Abercrombie & Fitch is represented by Joel McCabe Smith of Leopold Petrich & Smith in Los Angeles. The plaintiffs are represented by Brent Herbert Blakely of Carlsmith Ball in Los Angeles.

Texas Appeals Court Says Satire Could Be Taken Seriously, So Trial Necessary

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court stated that the speaker's "subjective belief about how the reader will perceive the article" is *not* to be examined.

A fact question on malice exists, the court said, because the defendants' deposition testimony indicated, for example, that the defendants intended to hold the plaintiffs up to ridicule and admitted the satire was fictional.

At press time, the defendants had not determined whether to seek a rehearing in the Court of Appeals or petition for review by the Texas Supreme Court. Further appellate proceedings of some form are likely.

Jim Hemphill is a partner in Austin's George & Donaldson, L.L.P. He represents the defendants in Isaacks v. New Times *along with his co-counsel, Steve Suskin of Phoenix, Arizona.*

Georgia Supreme Court Grants Cert in Non-media, Internet Libel Case

Public figure analysis is a key issue

By Peter Canfield

The Georgia Supreme Court has granted certiorari in a non-media Internet libel case to consider whether the Georgia Court of Appeals erred in affirming the trial court's grant of summary judgment to the plaintiff. (*Bruce Mathis a/k/a "duelly41" v. Thomas C. Cannon*, 252 Ga.App. 282, 30 Media L. Rep. 1026 (Nov. 2, 2001) (Blackburn, C.J., with Pope and Mikell, JJ.), *cert granted*, 2002 Ga. Lexis 325 (Ga., April 17, 2002)). A key issue is the court's public figure analysis and its conclusion that plaintiff was a private figure.

Chat Board Messages

The case stems from three Internet chat room messages posted late one night by Crisp County, Georgia resident Mathis about the plaintiff, the president of a waste management company under a controversial contract with the county to haul waste products to a disposal site.

The first message stated: "what u doingXXX by: *duelly 41* does [Waste Industries] think they can take our county — stop the trash flow cannon we love u for it—our county not a dumping ground and sorry u and lt governor are mad about it — but that is not going to float in Crisp County — so get out now u thief." The second message, posted less than 15 minutes later, stated: "cannon a crookXXXX by: *duelly41* explain to us why you got fired from the calton company please XXXX want hear your side of the story cannon!!!!!!!!" The third message, posted less than 20 minutes later, stated: "cannon a crook by: *duelly41* hey cannon why u got fired from calton companyXXXX why does cannon and lt governor mark taylor think that crisp county needs to be dumping ground of the southXXX u be busted man crawl under a rock and hide cannot and poole!!! if u deal with cannon u a crook too!!!!!!! so stay out of crisp county and we thank u for it."

Appellate Court Says Its Not Opinion

In affirming summary judgment for the plaintiff on liability and entitlement to punitive damages, the Georgia Court of Appeals rejected the defendant's contention that the messages were protected statements of opinion and concluded instead that the messages constituted libel per se: "There is no question that Mathis' postings state and imply defamatory facts about Cannon, namely that he was a thief and that he was fired from a former job for wrongdoing." 30 Media L. Rep. at 1028.

And Plaintiff Isn't Public Figure

The Court of Appeals also rejected the defendant's claim that plaintiff was a limited purpose public figure. Although the waste disposal issue had been the subject of considerable news coverage, the Court of Appeals echoed the trial court's findings that plaintiff's involvement

> had been limited to his role as an employee and representative for a company doing business with [a public authority] involved in public controversy. Plaintiff's attendance at Authority meetings and assistance given the Authority was simply to further his company's business interests and was not meant to thrust him to the forefront of public controversy. Further, there is no evidence to suggest that the Plaintiff relished the attention he received and sought to join the controversy or influence public opinion one way or the other.

See 30 Media L. Rep. at 1028 ("it appears that Cannon was involuntarily drawn into the controversy in his position as an officer of [companies contracting with Crisp County]").

Ironically, in seeking certiorari from a different Georgia Court of Appeals panel's decision last year labeling him a limited purpose public figure in his libel case against *The Atlanta Journal-Constitution*, Richard Jewell filed a supplemental brief citing *Mathis* in support. *The Journal-Constitution* argued in response that the appropriate remedy was not to grant cert in *Jewell* but to grant cert in *Mathis*. The Georgia Supreme Court denied cert in *Jewell* in February.

Oral argument in *Mathis* will be scheduled for July.

The plaintiff has been represented by Robert C. Norman, Jr. and Hubert C. Lovein, Jr. of Jones, Cork & Miller, LLP, Macon, Georgia. The defendant has been represented by James W. Hurt and T. Harry Hurt of Hurt & Associates, Cordele, Georgia.

Peter Canfield is a partner at Dow, Lohnes & Albertson, Atlanta, GA.

Web Site Operators Lose Libel Trials

A California attorney who describes himself as the "dean of DUI attorneys" and a University of North Dakota physics professor both won libel verdicts in April against defendants who posted statements about them on personal web sites.

DUI Attorney Wins $1 Million

The California case stemmed from a rivalry between attorneys Edward Kuwatch and Lawrence Taylor. Both Kuwatch and Taylor exclusively represent drunken driving defendants, and have written books on the subject. They also both maintain web sites which offer a variety of resources on drunken driving law (Kuwatch's is www.dui-law.com; Taylor's is www.duicenter.com).

Kuwatch is currently the Libertarian Party candidate for Calfornia Attorney General.

Taylor sued Kuwatch in June 2001 over statements on Kuwatch's site regarding the level of experience of Taylor and his associates, and their willingness to take cases to trial. The statements were contained in list of "15 tips" for drunk driving defendants written by Kuwatch.

After an eight-day trial, the jury awarded Taylor $1 million, consisting of $500,000 for loss of reputation and $500,000 for lost income resulting from the comments on the site. *Taylor v. Kuwatch*, No. BC 252859 (Cal. Super. Ct., L.A. County, jury verdict April 22, 2002).

After the verdict, the plaintiff asked Los Angeles Superior Court Judge David A. Workman to enjoin future postings by the defendant; the decision was pending at press time.

Kuwatch was represented by Douglass H. Mori of Parker Stanbury LLP in Los Angeles; Gerald P. Schneeweis of Morris, Polich & Purdy LLP's San Diego's office represented Taylor.

Professor Wins $3 Million From Former Student

In North Dakota, professor John L. Wagner won a $3 million jury verdict after a former student, Glenda Miskin, who posted an article titled "Kinky, Torrid Romance by Randy Physics Professor" on a web site she operates, undnews.com. *Wagner v. Miskin*, No. 00-C-672 (N.D. Dist. Ct., Grand Forks County jury verdict April 2, 2002).

The site describes itself as being "brought to you by people who are appalled by what goes on at UND [the University of North Dakota], a fourth-rate institution that is desperately pretending to be half way respectable." It includes commentary and links to various articles — both from legitimate news sites and written by Miskin and other disgruntled students — focusing on actual and alleged misdeeds by University of North Dakota administrators.

Miskin was suspended from the university in 1999, after the university's disciplinary committee – made up of five faculty members and five students – found that she had stalked Professor Wagner.

The article at issue in the lawsuit alleged that Wagner had harassed Miskin with sexually provocative phone calls, and also accused Wagner of being a pedophile.

At trial on the Professor Wagner's claims of slander, libel and interference with business relationships, Miskin alleged that Wagner had sent her e-mails and left phone messages containing sexual banter, although she was unable to produce any these at trial. At the university disciplinary hearing, however, Wagner did admit that he often had lengthy phone conversations with Miskin.

The jury reached its verdict after a five-day trial and almost seven hours of deliberation. The award consisted of $2 million for libel, $500,000 for slander, and $500,000 with interference with Wagner's business relationships.

Miskin said that she would appeal; Wagner's attorney said that he would now pursue claims against a woman in Florida – dismissed from the university in 1990 – who operates another site which posted the article, und-fraud.com, *see Wagner v. Nelson*, Civil No. C-1055 (N.D. Dist. Ct., Grand Forks County) (filed Sept. __, 2000) and against the Internet company that hosts the und-fraud.com site.

Wagner is represented by William E. McKechnie of Grand Forks; Miskin represented herself.

Pennsylvania Court Holds Web Site Insufficient for Personal Jurisdiction

Court follows increasingly common 'sliding scale' analysis

In April, a Pennsylvania appeals court held that a website that permits Pennsylvania citizens to register thoroughbred horses on-line does not establish general jurisdiction over the website operator, The Jockey Club, a non-profit association with offices in New York and Kentucky. *See Efford, et. al. v. The Jockey Club*, 2002 WL 509553, 2002 Pa. Super. 100 (Pa. Super. April 5, 2002).

Robert and Lauren Efford own Goldhope Farm in Pennsylvania, where they raise and breed horses. As is common practice, the Effords register their horses with The Jockey Club, which publishes the written rules that govern registration and eligibility for registration of horses in *The American Stud Book*.

In March 2001, The Jockey Club revoked the registration of four of the Effords' horses. The Effords sued in a Pennsylvania state court, seeking to restrain The Jockey Club from taking further action until a hearing could be scheduled. The Jockey Club subsequently moved to have the case dismissed for lack of personal jurisdiction.

The Effords claimed a Pennsylvania court could exercise jurisdiction over The Jockey Club because the club used a website, and the mail, for the purposes of registering horses.

The trial court found there was no basis for personal jurisdiction and dismissed the complaint. On appeal the Pennsylvania Superior Court considered only whether there was a proper basis for general jurisdiction because the Effords failed to develop a legal argument for asserting specific jurisdiction.

The crux of the Effords argument was that The Jockey Club subjected itself to general jurisdiction by maintaining a website that could be used for the purposes of registering horses with the club. In an opinion by Judge Popovich, and joined by Judges Johnson and Tamilia, the court found that the "question of whether the Internet web site of a foreign company permits a Pennsylvania tribunal to exercise personal jurisdiction

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Pennsylvania Court Holds Website Insufficient for Personal Jurisdiction

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via Pennsylvania's long arm statute is a matter of first impression before this Court."

The Sliding Scale Approach

To answer this question, the court turned to the "growing case law in the Third Circuit's district courts addressing the relationship between personal jurisdiction and the foreign Internet web sites," which has "established a 'sliding scale' of jurisdiction based largely on the degree and type of interactivity on the web site."

The "sliding scale" analysis used by the Pennsylvania Superior Court, citing *Zippo Mfg. Co. v. Zippo DotCom, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997), is the same analysis that was used recently by the District Court of Utah in *iAccess, Inc. v. WEBcard Techs.*, 182 F.Supp.2d 1183 (D.Utah Jan. 24, 2002). *See also LDRC LibelLetter*, Feb. 2002 at 23.

The "sliding scale" analysis used by the Pennsylvania Superior Court is the same analysis that was used recently by the District Court of Utah.

Under this analysis, websites are placed along a spectrum. At one end of the spectrum are the websites that are most likely to allow for personal jurisdiction. These websites are "interactive" websites – websites used in a way that clearly shows the company does business over the Internet. These interactive websites, for example, would allow the company to enter into contracts over the Internet and involve the "knowing and repeated transmission of computer files over the Internet."

At the other end of the spectrum are the websites that do not establish personal jurisdiction. These websites are "passive" websites, used only to post information that is accessible to users in foreign jurisdictions.

The middle ground is "occupied by interactive web sites where a user can exchange information with the host computer." Where jurisdiction is sought over a website in this "middle ground," courts examine the "level of interactivity and commercial nature of the exchange of information that occurs on the website" to determine whether jurisdiction is appropriate.

The Pennsylvania Superior Court acknowledged that the "sliding scale" was "consistent with our well-established concepts of general jurisdiction." In other words, a defendant must have "purposefully directed its activities to the forum and conducted itself in a manner indicating that it has availed itself to the forum's privileges and benefits such that it should also be subjected to the forum state's laws and regulations."

No Jurisdiction Based on the Facts

Applying the facts of this case, the Pennsylvania Superior Court found that jurisdiction was not appropriate.

First, the court determined that The Jockey Club's website fell into the "middle ground." While the website mostly provided information, the website also allowed horse breeders to register their foals via the Internet. This added element pushed the website from the "passive" category and into the middle ground.

Still, the website did not provide sufficient contacts with Pennsylvania to warrant personal jurisdiction. The Effords offered evidence that in 1999, 953 foals were born in Pennsylvania and were registered with The Jockey Club. In 2000, 112 stallions from Pennsylvania were registered in The Jockey Club's stallion registry. The Effords, however, did not show how many of those registrations took place exclusively via the Internet. The court thought it was worth noting that none of the four horses that gave rise to this case were registered via the Internet.

The court also found that there was no evidence that the website targeted towards residents of Pennsylvania.

Finally, the court said the website appeared to be "general advertising with the added convenience of an online registry and was not directed toward any particular state." Thus, under the sliding scale approach, the court found that jurisdiction based solely on the website would be inappropriate.

Robert A. Hoffa, of Newton, Pa., represented the Effords. Thomas A. Riley, Jr., of Riley, Riper, Hollin & Colagreco in Paoli, Pa., represented The Jockey Club.

Minnesota Court of Appeals Affirms ABC's Summary Judgment

Hotel owner sued over story on alleged rapes at hotel

By Nathan Siegel and Thomas Tinkham

The Minnesota Court of Appeals, in a decision by Judges Anderson, Schumacher and Harten, affirmed summary judgment in favor of ABC and one of its sources in *Chafoulias v. American Broadcasting Cos., Inc.*, 2002 Minn. App. LEXIS 460 (April 30, 2002), a libel action originally filed in Rochester, Minnesota. The case arose from an August 1997 report on the ABC newsmagazine program *PrimeTime Live*, reported by ABC correspondent Brian Ross.

The story was about a sexual harassment lawsuit in Rochester. Five former female employees of a local Radisson Hotel, and one former guest, charged they were systematically sexually harassed, assaulted, or raped by Arab male hotel guests who stayed at the hotel while receiving medical care at the Mayo Clinic. The suit also alleged that the hotel owner, Gus Chafoulias, a prominent local developer, knew about the harassment and failed to stop it. Most of the plaintiffs and their lawyer, Minneapolis attorney Lori Peterson, granted interviews to ABC.

In ABC's case, the plaintiff argued that PrimeTime Live was an "infotainment" program that aired sensationalized entertainment pieces, rather than news.

After the sexual harassment suit settled, Chafoulias sued ABC and Peterson. The suit focused on Peterson's on-air comment that "Chafoulias knew, Chafoulias has known for years that these women were harassed, assaulted, raped." The trial court found that Chafoulias was a limited-purpose public figure and did not produce any clear and convincing evidence of actual malice by either ABC or Peterson.

The Appeal

On appeal, the plaintiff argued that Chafoulias was not a public figure because his only involvement with the story was as a defendant in a lawsuit. He pointed to case law holding that being the target of a lawsuit is not in itself sufficient to make someone a limited public figure. ABC argued that the lawsuit was merely the continuation of a bona-fide public controversy that preceded it. Moreover, the plaintiff was a very active, prominent person locally whose business-related activities invited scrutiny, as evidenced by hundreds of local press reports over the prior decade.

Public Figure Analysis

The court applied the three-part test for limited public figure status derived from *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980) that it recently adopted, tailored to the facts of this case.

First, it determined that there was a pre-existing public controversy before the lawsuit was filed. Articles about harassment by Arab guests at the Mayo Clinic appeared in the local press several months before the lawsuit was filed, including the charges against Chafoulias' hotel. The court also noted that Chafoulias hired a public relations firm months before the stories began, suggesting his awareness of an impending controversy.

Second, the Court concluded that Chafoulias played a "purposeful and prominent role in the controversy." It noted that he hired a PR firm, wrote a letter to a local television station that was quoted on the air, talked to ABC off-camera, and granted a two-part interview to another local station after the lawsuit was settled. It also concluded that Chafoulias' general access to the media should be taken into account in evaluating the second part of the *Waldbaum* test, even where it was not exercised. Therefore, the extensive record of general press interest in his activities was relevant to his prominence in this particular controversy.

Finally, the court found Peterson's statement was obviously relevant to the subject of the controversy, satisfying the final prong of the *Waldbaum* test.

No Evidence of Actual Malice

Next, the court concluded that there was no clear and convincing evidence of actual malice as to either ABC or Peterson. It noted that "summary judgment on the issue of actual malice has historically been the preferred disposition in defamation cases brought by public figures." The court found that both ABC and Peterson had independently investigated the charges, and both found evidence which arguably supported them. In fact, the court noted that even today there is still evidence that arguably supports Peterson's statement.

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Summary Judgment Affirmed in Magazine Product Review Case

Product Manufacturer Held to be a Public Figure

In March, a Florida appellate court, in a decision by Judge Polen, with Judges Hazouri and May concurring, affirmed summary judgment in favor of Petersen Publishing (Petersen) in a defamation claim over a negative product review. Petersen's magazine, *4-Wheel & Off Road*, unfavorably compared plaintiff Mile Marker's hydraulic winch with a competitor's electric winch. The court affirmed that Mile Marker was a public figure and that it failed to offer any proof that Petersen published the article with actual malice. *Mile Marker, Inc. v. Petersen Publ'g Co.*, 811 So. 2d 841, 843 (Fla. Dist. Ct. App. 2002).

The court's decision turned upon its determination that Mile Marker qualified as a "limited purpose public figure." *Id*. at 845. Applying the two-prong limited public figure test set forth in *Gertz v. Robert Welch, Inc*. 418 U.S. 323 (1974), the court assessed whether a public controversy existed at the time of the alleged defamation and whether Mile Marker played a sufficiently central role in the controversy to determine Mile Marker's public figure status.

Existence of Public Controversy

To find the existence of a public controversy, the court inquired whether "a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution." *Mile Marker*, 811 So. 2d at 845. The court reasoned that while winch performance was not necessarily headline news, resolution of the dispute would likely impact the defined segment of the population comprising off-road enthusiasts, current and prospective winch purchasers, and *4-Wheel & Off-Road* readers. The court concluded that a pre-existing public controversy existed regarding the quality of hydraulic versus electric winches.

Corporate Role in the Controversy

Having found the existence of a public controversy, the court then analyzed the significance of Mile Marker's role in the controversy. The court examined two factors, the nature and extent of the company's advertising and publicity campaign and the company's level of media access. The court found that Mile Marker had pursued a marketing strategy that emphasized the controversy since the company had consistently and vocally asserted the hydraulic winch's superiority, and had repeatedly sought and obtained independent comparison tests, including the very test which resulted in the article at dispute. Finally, the court concluded that Mile Marker enjoyed greater media access given that two separate publications immediately published Mile Marker's claims against Petersen with respect to the lawsuit.

Having concluded that Mile Marker was a public figure with regard to the winch controversy, the court affirmed summary judgement in favor of Petersen since Mile Marker offered no evidence of actual malice.

Mile Marker was represented by Jane Kreusler-Walsh and Rebecca J. Mercier of Jane-Kreusler -Walsh, P.A., West Palm Beach, and John B. Dichiara of John B. Dichiara-P.A., Fort Lauderdale. John H. Pelzer of Ruden McClosky Smith Schuster & Russell, Fort Lauderdale and David Jacobs of Epstein Becker & Green, Los Angeles represented Petersen Publishing, Co., L.L.C.

Minnesota Court of Appeals Affirms ABC's Summary Judgment

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Interestingly, the primary theme of Chafoulias' case was an attack on the integrity of both Peterson and ABC. In Peterson's case, he argued that she was an unethical attorney who used inflammatory media tactics to leverage settlements for her clients. In ABC's case, he argued that *Prime-Time Live* was an "infotainment" program that aired sensationalized entertainment pieces, rather than news. In the trial court, in response to a fair report privilege defense raised by ABC and rejected below, he had even argued that newsmagazine programs cannot qualify for the fair report privilege as a matter of law because they are not bona fide news reports.

Though at times the court was critical of both Peterson and ABC, it noted that none of the plaintiff's critiques of journalistic style were germane to the issue of actual malice. In this respect, the opinion is a useful precedent for cases in which plaintiffs seek to prove actual malice through broad attacks on journalistic style and presentation.

Thomas Tinkham of Dorsey & Whitney LLP, Minneapolis, MN, and Nathan Siegel of ABC, Inc. represented ABC in the appeal.

Does Voluntary Participation In A Statewide Political Advertising Campaign Lead To "Limited Purpose Public Figure" Status?

By Bobby R. Burchfield and Jason A. Levine

Judge Joseph R. Goodwin, a federal judge sitting in Charleston, West Virginia, ruled recently that a defamation plaintiff was not a "limited purpose public figure" even though he had voluntarily appeared in a statewide political advertisement, and allowed the very photograph of himself that was the subject of his lawsuit to be used in a candidate's political pamphlets and on the candidate's World Wide Web site. *Bell v. NRCC*, 187 F.Supp. 2d 605, (S.D.W.Va. Jan. 17, 2002). This decision, which could have significant implications for defamation law in West Virginia, reaches a result at odds with prevailing authority.

Ad Photo Used by Opponents

Harry F. Bell, Sr., a retired engineer, had a speaking role in a television advertisement aired many times throughout the state of West Virginia by the 2000 congressional campaign of James Humphreys. Mr. Bell also posed for photographs with Mr. Humphreys, and placed no restrictions on the use of those photographs. One photograph appeared in several Humphreys campaign pamphlets mailed throughout the state, and also was published on the Humphreys campaign World Wide Web site, with an express invitation for viewers to "download" the photograph.

The National Republican Congressional Committee availed itself of this invitation, and used the photograph of Messrs. Humphreys and Bell, without naming Mr. Bell, in a political pamphlet. The NRCC's pamphlet accurately reported that Mr. Humphreys had previously represented sex offenders, and as a state legislator had voted against legislation restricting the sale of x-rated videos and drug paraphernalia to children.

Mr. Bell brought a defamation lawsuit against the NRCC alleging that the pamphlet's text implicitly suggested that he was a sex offender, a purveyor of obscene material and drug paraphernalia, and otherwise "morally bereft." Simultaneously, and thereafter, Mr. Bell and his lawyers issued a press release, gave several newspaper interviews, and appeared in a television interview setting forth Mr. Bell's side of the dispute.

Defendants Move for Summary Judgment

After discovery, the NRCC moved for summary judgment on numerous grounds, including Mr. Bell's failure, as a limited purpose public figure, to come forward with any evidence of "actual malice." *See New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974).

The Southern District of West Virginia denied the motion, holding that plaintiff's voluntary appearances in Mr. Humphreys' television advertisement, brochures, and web site were insufficient to make him a "limited purpose public figure." Accordingly, the court ruled, a negligence standard rather than the actual malice standard of *New York Times* and *Gertz*, governed plaintiff's claims.

Plaintiff's voluntary appearances in Mr. Humphreys' television advertisement, brochures, and web site were insufficient to make him a "limited purpose public figure."

In concluding as a matter of law that Mr. Bell was not a limited purpose public figure, the court emphasized the importance of voluntary campaign activities by private individuals. Although recognizing that the political campaign was a "matter of public concern," the court stated that Mr. Bell's activities did not place him "at the forefront of the campaign," and that Mr. Bell did not "seek or achieve any position of great importance" in the campaign. 187 F.Supp. 2d at 613. The court also relied upon decisions such as *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979), which rejected limited purpose public figure status.

The Opinion, Examined

The court's decision on the limited purpose public figure issue can be criticized in several ways. First, Mr. Bell voluntarily appeared in a campaign television advertisement repeatedly aired statewide, as well as in several Humphreys campaign pamphlets mailed extensively

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Does Voluntary Participation In A Statewide Political Advertising Campaign Lead To "Limited Purpose Public Figure" Status?

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to the public and published on the campaign's World Wide Web site. These activities distinguished Mr. Bell's case from the cases relied upon by the court, in which the plaintiff *involuntarily* received publicity. Thus, Mr. Bell is in a much different position, for example, than the plaintiff in *Hutchinson*, who had "published writings [that reached] a relatively small category of professionals concerned with research in human behavior," and received government grants for his work.

Further, although emphasizing the relatively small amount of effort expended by Mr. Bell, the court minimized the notoriety that the very photograph at issue had achieved throughout the state of West Virginia. Mr. Bell chose to identify himself visually with Mr. Humphreys, and he allowed the campaign to use his photograph in a variety of contexts. That Mr. Bell was not at the "forefront" of the campaign, and achieved no position of "great importance" in the campaign, did not prevent him from becoming a limited purpose public figure in the context of commentary about Mr. Humphreys.

Finally, the court emphasized its desire for increased citizen participation in the political process, observing that "[t]he campaign volunteer is not in the spotlight illuminating public figures." 187 F. Supp.2d at 613. But few citizens participate in political campaigns to the extent of appearing in television advertisements or allowing their photographs to appear in campaign pamphlets and on campaign web sites.

Moreover, it is hazardous to use this concern about citizen participation in political campaigns as a counterbalance to voluntarily achieved public standing; while it is clearly desirable to encourage "good people" to seek elective office, it has long been clear that entry into elective politics bestows public figure status under the *New York Times* standard. The balance prescribed by the First Amendment weighs in favor of robust and uninhibited public discussion by political advertisers, news media, and the public at large. This is the essential purpose of allowing liability for defamation of public figures only upon a showing of falseness and actual malice.

Because the case was settled before trial, with no payment to Mr. Bell, the Fourth Circuit had no opportunity to review the district court's summary judgment rulings. Nevertheless, the decision will likely be cited by defamation plaintiffs seeking to avoid public figure status. Courts and practitioners should be wary of accepting the court's reasoning because of the unfortunate implications it might have.

The authors represented the National Republican Congressional Committee in the Bell case. Mr. Burchfield is a partner in Covington & Burling, Washington, DC, and Mr. Levine is a senior associate in that office.

Virginia Supreme Court Affirms Dismissal of 'Small Group Theory'

Police officer could not satisfy 'of and concerning' requirement using the theory

In April, the Virginia Supreme Court affirmed a trial court's dismissal of a police officer's defamation claim where the police officer sought to satisfy the "of and concerning" requirement by utilizing the "small group theory." *See Dean v. Dearing*, 561 S.E.2d 686 (Va. April 19, 2002).

In 1999, officer Donald A. Dean, Jr., sued M. Lee Dearing, the mayor of Elkton, Va., over a series of comments the mayor had made about alleged corruption in the Elkton police department. Following an encounter and his subsequent arrest by the Elkton police, Dearing made a series of comments, which appeared in local newspapers. The comments accused the police department of "intimidating witnesses, stealing property, harassment, misappropriation of money, and improperly disposing of drug and gun evidence." Most Dearing's comments, however, were directed at the "Elkton police" generally. Dearing named Dean directly in only one comment relating to the destruction of confiscated weapons.

Lower Court: Not Of and Concerning

When Dean brought a defamation action based on all of Dearing's statements, Dearing argued that Dean could not show that all of the comments were "of and concerning" Dean. In response, Dean relied upon a 1924 Virginia Supreme Court case which adopted the theory that a member of a small group can sue for defamation when the allegedly defamatory language is directed towards the small, restricted group of persons. Dean relied on this "small group theory" because the Elkton police department employed between five and eight people when the comments were made.

The circuit court of Rockingham County dismissed Dean's claim, holding that under *New York Times v. Sullivan*, the "small group theory" could not be used to satisfy the "of and concerning" requirement when a government body – no matter its size -- was the subject of defamatory statements. *See LDRC LibelLetter*, January 2002 at 11. The circuit court also concluded that the lone statement that did name Dean directly was not defamatory as a matter of law.

When Dean appealed the trial court's ruling, he appealed only the decision denying his use of the "small group theory." On appeal, the Virginia Supreme Court came to the same conclusion as the trial court, using the same rationale to deny Dean's use of the "small group theory."

Supreme Court Looks to Sullivan and Rosenblatt

The Virginia Supreme Court first considered *New York Times v. Sullivan*. The court noted that the United States Supreme Court decision did not directly address the "small group theory," the decision did "establish that a reference to a governmental group cannot be treated as an implicit reference to a specific individual even if that individual is understood generally to be responsible for the actions of the identified governmental group."

> ***[T]he Virginia Supreme Court held that there was "little question that the use of the 'small group theory' alone as the basis for satisfying the 'of and concerning' element of a common law defamation action against a governmental actor does not survive constitutional scrutiny."***

Next, the Virginia Supreme Court turned to *Rosenblatt v. Baer*, 383 U.S. 75 (1966), a later United States Supreme Court decision that did expressly limit the use of the "small group theory."

In *Rosenblatt*, the Supreme Court struck down a New Hampshire law that allowed a member of a park management group to successfully sue for defamation if the jury found that the defamatory publication "cast suspicion indiscriminately on the small number of persons who composed the former management group, whether or not it found that the imputation of misconduct was specifically made of and concerning [the plaintiff]." The Supreme Court struck down the law because it was "tantamount to a demand for recovery based on libel of government, and therefore is constitutionally insufficient."

Relying on these decisions, the Virginia Supreme Court held that there was "little question that the use of the 'small group theory' alone as the basis for satisfying the 'of and concerning' element of a common law defamation action

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Beware of Stories on Heroic Guards

National Enquirer Wins Summary Judgment in Libel by Photograph Case

By Kenneth A. Zirm

A district court judge in the Northern District of Ohio has dismissed libel and other claims brought by a security services company against *The National Enquirer* based upon an article which did not identify or even mention the security company. In *Mid-American Security Services, Inc. v. National Enquirer, Inc.*, case no. 5:01 CV 248 (N.D. Ohio, Feb. 27, 2002), district court judge Dan Aaron Polster held that the article was, at most, libelous *per quod* but was not actionable because of plaintiff's failure to prove special damages, and because Ohio's innocent construction doctrine.

Hero Guard Loses Job

The case arose from an article in the Sept. 11, 2001 edition of *The National Enquirer* about a security guard who had been fired from his job for what some people deemed to be heroic conduct. The headline of the article was "What A Way to Treat A Hero! He Loses His Job For Bagging A Bank Robber." The article described how the security guard had wrestled a bank robber to the ground to prevent a robbery, and how the guard had been congratulated by members of the FBI and the local police for his heroic efforts.

The bank where he worked, however, was unhappy with this conduct, which put people's lives in jeopardy and violated the bank's policy which dictates that the guard was to serve only as a visual deterrent. The article explained that, after this incident, the bank terminated its contract with the security company which had been providing the bank with security services, causing the guard to lose his job.

A Mid-American customer claimed the article misled her into believing that Mid-American had fired the guard.

No security company was identified by name in the text of the article; however, the photograph of the security guard which accompanied the story showed him wearing a uniform with a "Mid-American Security" patch on his shoulder.

Mid-American Security, however, was not the security company that employed the guard at the time of the incident but, in fact, was the company which hired the guard after learning of his plight. Mid-American Security filed a three count complaint alleging defamation, false light invasion of privacy and injurious falsehood, claiming that readers of the article would wrongly conclude from the photograph that Mid-American Security was the company that terminated the heroic bank guard and that such allegation was false and defamatory.

The National Enquirer filed a Rule 12(b)(6) motion to dismiss all counts of the complaint arguing that, as a matter of law, the article was not "of and concerning" the plaintiff, and that it was not capable of the defamatory interpretation placed on it by the plaintiff. In opposition, Mid-American submitted three affidavits, including the affidavit of a Mid-American customer who claimed the article misled her into believing that Mid-American had fired the guard, but acknowledged that

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Virginia Supreme Court Affirms Dismissal of 'Small Group Theory'

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against a governmental actor does not survive constitutional scrutiny." The court went on to say that when a governmental group is the object of potentially defamatory statements, a member of that governmental group can sustain an action for defamation "only if that member can show the statement specifically implicated that member or each member of the group."

Finding that Dean's pleadings contained "no allegations, factual or otherwise, addressing how the articles reference Dean specifically or could be understood to do so," the court concluded that the trial court had properly dismissed the claim.

William W. Helsley, of Helsley & Clough in Harrisonburg, Va., represented Dean. David P. Corrigan, of Harman, Claytor, Corrigan & Wellman in Richmond, Va., represented Dearing.

Beware of Stories on Heroic Guards

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Mid-American quickly provided an explanation. Plaintiff also submitted the affidavit of its president who claimed that the company received ten negative e-mails after the article was published. *The National Enquirer* moved to strike these affidavits as matters outside of the pleadings, but the district court denied the motion to strike and, instead, converted the motion to dismiss to a Rule 56 motion for summary judgment, giving the parties additional time to submit additional relevant documents.

No Libel Per Se, No Special Damages, No Claim

The district court then granted summary judgment in *The National Enquirer*'s favor on all three counts. The court first held that the article was not defamatory *per se* because it made no reference to the plaintiff and, even if it did, the implication that the plaintiff terminated its employee did not rise to the level of defamation *per se*. Thus, the article was, at most, libelous *per quod* and required the pleading and proof of special damages. Neither the affidavit of plaintiff's customer nor the evidence of unfavorable e-mails received by the company, however, established any actual loss of business as a result of the article. The court further found that, even with evidence of special damages, Ohio's innocent construction doctrine would have barred plaintiff's libel claim because the article could reasonably have been interpreted in a non-defamatory manner.

Plaintiff's false light claim was dismissed because Ohio does not recognize such a claim, and plaintiff's injurious falsehood claim also failed because of a lack of evidence of pecuniary harm.

Mr. Zirm a partner at Walter & Haverfield LLP in Cleveland, Ohio represented the National Enquirer, along with Barbara Tarlow, Assistant General Counsel for The National Enquirer's parent company, American Media, Inc. Plaintiff was represented by Jeffrey Witschey of Akron, Ohio's Witschey & Witshcey

Mississippi's Troubled Past Sets the Scene as Court Upholds Dismissal of Defamation Suit

By Luther Munford

Mississippi author William Faulkner noted that "the past is never dead. It's not even past."[1] That was particularly true in the Mississippi Supreme Court's recent dismissal of a defamation suit brought by a Mississippi private investigator against Mississippi's most celebrated journalist, *Armistead v. Minor*, __So.2d __, 2002 WL 938138 (Miss. May 9, 2002). In upholding summary judgment, the court held that Bill Minor's published statements about Rex Armistead's alleged role in civil rights violations and political intrigue: (1) were not defamatory, (2) were substantially true, and (3) were not shown to have been made with actual malice. While the court also held that the "libel-proof plaintiff doctrine" is not an appropriate issue for summary judgment, it seemed to rely at least partially on the concept in upholding the lower court.

Bill Minor has covered Mississippi for almost 60 years. A.J. Leibling praised him in *The Press*, for uncovering a secret state police unit in the 1940s. He currently comments on politics and other issues in his syndicated "Eyes on Mississippi" column. Rex Armistead is currently a private investigator, who over the years as a Mississippi law enforcement officer was often at the center of racially charged incidents and political intrigue.

In April 1998, Minor devoted a column to Armistead's involvement in "The Arkansas Project" to discredit former President Bill Clinton. Minor's column reiterated specific incidents involving Armistead dating back to the early 1960's, summarizing them with the statement "Armistead's odoriferous background in Mississippi, ranging all the way from head-bashing of civil rights workers to concocting a bizarre homosexual scandal in an attempt to defeat a gubernatorial candidate."

Armistead filed a defamation lawsuit against Minor and a number of newspapers that ran the column. Armistead later voluntarily dropped the newspapers from the case. The Circuit Court granted Minor's motion for summary judgment.

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Mississippi's Troubled past Sets the Scene as Court Upholds Dismissal of Defamation Suit

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On appeal, Armistead claimed the statements made by Minor were false, and as such, there were genuine issues of material fact that precluded summary judgment. He also claimed the Circuit Court improperly made findings of fact and abused its discretion.

In affirming the lower court, the Mississippi Supreme Court held that the statements contained in Minor's column were not defamatory because, even accounting for minor accuracies, they were substantially true. The court reviewed accounts in the column of Armistead firing a shotgun into student dorms during a 1970 protest at historically black Jackson State University and of his role in Mississippi's 1983 gubernatorial race, during which a scandal was concocted linking transvestite prostitutes to the ultimately victorious Democratic candidate. The court noted that while Armistead disputed the truth of the claims, Minor's statements all had "the ring of substantial truth."

The court also held that Armistead failed to meet his burden of showing actual malice, or a high degree of awareness on the part of Minor that the statements were false or were made with reckless disregard as to whether they were false or not. The court noted that "[w]hile it may be evident that Minor does not hold Armistead in high regard, such feelings do not amount to actual malice." The court also cited to numerous other unflattering publications concerning Armistead to show the lack of actual malice.

While affirming summary judgment on the basis of substantial truth and lack of actual malice, the Mississippi Supreme Court found error in the summary judgment use of the libel-proof doctrine. The court said the doctrine required a fact decision by the jury. However, the court recognized the doctrine and appeared to endorse it by relying heavily on the many other publications concerning Armistead's reputation on matters of law enforcement, race and politics.

Minor was represented by Luther T. Munford, John P. Sneed, and Mark Fijman of Phelps Dunbar. L.L.P. and Armistead was represented by William E. Spell.

[1] WILLIAM FAULKNER, *Requiem for a Nun* (1951).

More on Prior Restraints:

New York Court Enjoins Painting at the Center of Libel Suit

Federal Magistrate in Maine Finds City Illegally Censored Public Access Television Show

In recent months, stories of prior restraints have become more prevalent – even when the speech in question has nothing to do with national security or any other topic related to September 11. In April alone, the LDRC reported on four prior restraint stories, *see LDRC MediaLawLetter*, April 2002 at 16, 37, 42 and 55. Now a particularly astonishing prior restraint story is developing in a small town northwest of New York City.

Altbach v. Kulon

Franciszek C. Kulon, a painter living in Parksville, NY, was unhappy with a local judge. Kulon later exercised that displeasure by producing a painting that is now the basis of a defamation claim. The painting depicts Liberty, NY, Justice Jeffrey Altbach as a devil, leaning on a stack of books. One of the books is entitled "Law of J S Altbach."

The painting came to Altbach's attention in 2000 when Kulon reproduced it and began using it to advertise the opening of his art gallery. Kulon used the painting on fliers and in a Yellow Pages ad. Altbach filed a $1.5 million libel lawsuit in New York state court, claiming the painting depicted him as "worthy of ridicule and contempt."

Shortly thereafter, a preliminary injunction was issued by barring Kulon from "displaying, distributing, disseminating, copying, printing, recreating, and/or reproducing any photographs, designs or creations depicting (Altbach) in any manner." The injunction was later upheld by Sullivan County Supreme Court Judge Anthony Kane until the libel suit was resolved.

More recently, contempt proceedings were initiated after Kulon posted the painting for sale on eBay and, according to Altbach, began using the painting again on fliers for an art show. On May 7, Judge Kane ordered Kulon to turn the painting over to the court and to take down the offer of sale on eBay.

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New York Court Enjoins Use or Distribution of a Painting at the Center of Libel Suit

(Continued from page 20)

Kulon's new lawyers asked for a 10-day extension to answer to the contempt papers. Judge Kane gave them a two-day extension. In addition, Judge Kane told Kulon's lawyers that if the painting was not taken off eBay, Judge Kane would direct action against Kulon.

On May 10, Kulon's lawyers filed a motion for summary judgment on First Amendment grounds. As of May 22, Judge Kane had not ruled on the civil contempt motion.

Helen Ullrich and Stephen Bergstein of Chester, NY, represent Kulon. Gerald Orseck of Liberty, NY, represents Altbach.

Maine Court Prior Restraint

For the second time in as many months, restrictions on the use of public access television have been found to be impermissable prior restraints. *See LDRC MediaLawLetter*, April 2002 at 53.

In Maine, a federal magistrate David M. Cohen held that the city of Biddeford, Maine, imposed an impermissable prior restraint on the users of a public access channel when the city required broadcasters to obtain a written release from anyone, other than a public official, who is merely *mentioned* on a show to be aired on the public access channel. *See Lafortune v. City of Biddeford*, No. 01-250-P-H (D. Me. April 30, 2002).

The case was brought by Dorothy Lafortune, the producer and host of "The Maine Forum," a call-in program that was typically broadcast live. The show was also rebroadcast as many times as possible. On July 4, 2001, "The Maine Forum" featured local resident Philip Castora. During his one-hour appearance on "The Maine Forum," Castora made numerous accusations about state and local government officials, as well as private business entities.

When the public access station began rebroadcasting the July 4 episode, Biddeford Mayor Donna Dion requested that the rebroadcasts cease. Lafortune was notified that she could no longer broadcast live and must submit tapes of her program for prior review by Dion. The prior review of Lafortune's show continued for the rest of July 2001.

In October 2001, Dion and the city counsel announced that the Access User's Agreement would require all users of the city's public access channel to obtain a written release from all persons mentioned in a public access broadcast, unless that person was a public official.

Lafortune argued that these actions amounted to a prior restraint and thus violated the First Amendment. U.S. Magistrate David M. Cohen agreed with Lafortune. In an opinion issued April 30, Cohen held that the prior review and the release requirement were impermissable prior restraints.

As to the requirement that Lafortune submit her tapes to Dion, the court said that the "only possible purpose of such a review would be to allow defendant Dion to edit the content of the program or to order that it not be broadcast." However, the court held that Lafortune was not entitled to summary judgment on this claim because the policy had been discontinued after a month. The court said "there is no evidence to support an argument that the defendants are likely to impose the policy again in the near future.

The court found that Lafortune was, however, entitled to summary judgment as to the release requirement. In addition to noting that the release requirement would prevent live programming as a practical matter, the court also found that the release requirement would give the general public a veto power over some of the content of public access programming. The requirement was therefore an unconstitutional prior restraint.

David A. Lourie, of the Law Office of David Lourie in Cape Elizabeth, Me., represented Lafortune. Harry B. Center, II, of Smith, Elliott, Smith & Garmey in Saco, Me., represented the City of Biddeford.

Any developments you think other LDRC members should know about?

Call us, send us an email or a note.

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Music in Miami: Judge Refuses to Enjoin PARTY From Counting — and Recounting — POWER's Commercials

On Wednesday, May 8, Dade County Circuit Judge Margarita Esquiroz denied an emergency motion by Beasley-Broadcasting's WPOW POWER 96 to enjoin Cox Radio's WPYM PARTY 93.1 from allegedly exaggerating in station promotions the number of POWER's commercials. *Beasley-Reed Acquisition, LLC v. Cox Radio, Inc.*, Case No. 02-9517 CA 10 (Eleventh Judicial Circuit, Dade County, Florida, April 16, 2002).

Since signing on in late December, dance-intensive PARTY has wooed Miami listeners from contemporary-hit POWER with new music and the promise of fewer commercials. PARTY's repeated promotions have compared PARTY's 6 commercials per hour to hours in which POWER's commercial count has reached 28.

According to POWER's complaint, which seeks in excess of $5 million in compensatory damages, PARTY's promotions constitute "a fraudulent scheme to steal listeners and advertisers of POWER by falsely calculating, inflating and, thereafter, publishing false results regarding the amount of commercials played by POWER," and are actionable both as common law slander and intentional interference with business relationships. In an answer, PARTY denied the allegations and asserted a right to costs and attorney's fees.

In seeking emergency injunctive relief POWER asserted that PARTY aired "statements, including, but not limited to, that 'we [PARTY] just caught them [POWER] playing twenty (20) commercials in a row,' that POWER does not play eighteen songs in a row as POWER claims it does, and POWER is 'more likely to play eighteen commercials in a row,' that POWER says they play fewer commercials, but that is an old radio trick by 'the old tricksters at POWER,' and that with regard to commercials on 'POWER, who knows, they play 10, 12, 18 or 20' an hour." According to the motion, these "intentional, defamatory" and "knowingly false" statements entitled POWER to an order requiring "PARTY to cease and desist making and airing defamatory and slanderous statements about POWER."

In response, PARTY submitted an affidavit of its program director attesting that since January 1, 2002, POWER has not always played 18 songs in a row as it has claimed it does and that he had heard and had recordings of POWER playing as many as 22, 24, 25 and 28 commercials in a one-hour period, including as recently as April 27, 2002, two weeks after the filing of POWER's complaint. PARTY also argued, *inter alia*, that, even assuming arguendo that the PARTY promotions were false, the prior restraint sought by POWER would plainly violate the First Amendment and the Florida Constitution,.

During an hour long hearing May 8, Judge Esquiroz heard evidence from POWER, specifically, its program director Kid Curry, who testified as to POWER's basis for asserting that four PARTY promotions were false. He also discussed POWER's alleged damages, testifying on direct that POWER had lost approximately 3.5 rating shares during the first quarter, worth $1.7 million per share. But he also testified on cross that he would not know if this loss was related to the alleged falsities in PARTY's promotions.

At the conclusion of this evidence and without requiring or allowing an evidentiary response from PARTY, Judge Esquiroz ruled that POWER had not demonstrated a likelihood of success on the merits, irreparable injury or the absence of an adequate remedy at law and thus was not entitled to an injunction. In doing so, she questioned, among other things, whether the alleged false statements were defamatory and whether POWER had established causation.

Rudolph F. Aragon of Miami, Florida's Aragon, Burlington, Weil & Crockett, P.A. represented PARTY at the hearing, together with Peter Canfield of Dow, Lohnes & Albertson, Atlanta, Georgia. POWER is represented by Alan K. Fertel of Miami, Florida's Ferrell, Schultz Carter Zumpano & Fertel, P.A.

Rough Seas for Plaintiffs in "The Perfect Storm" Case

Federal Judge Grants Summary Judgment on All Counts of Complaint Against Warner Bros.

By Gregg D. Thomas

A federal court in Florida has granted summary judgment in favor of Warner Bros. and other defendants in a case arising out of the motion picture "The Perfect Storm." *Tyne, et al. v. Time Warner Entertainment Co., L.P. d/b/a Warner Bros. Pictures, et al.*, Case No. 6:00CV-1115-ORL-22-C (M.D. Fla. May 9, 2002). Trial in the case was set to begin in June.

In 1997, Sebastian Junger authored the best-selling book "The Perfect Storm." The book detailed the tragic events that took place off the coast of New England in October 1991 when a tremendous and unprecedented combination of meteorological forces combined to create the "storm of the century." A sword-fishing boat known as the *Andrea Gail* was caught in the storm and lost at sea, resulting in the deaths of the boat's captain and five crewmembers. The storm was the subject of countless news articles, and Junger's book remained on the best-seller list for over a year. Warner Bros. purchased the rights to the book, and in June 2000 released the movie by the same name.

[T]he court held that use of a person's name or likeness in a motion picture, such as "The Perfect Storm," as well as in any advertising or promotion of the motion picture, is not a commercial, trade, or advertising purpose within the meaning of the statute.

Surviving Family Sues

The plaintiffs in the case were the surviving children and the ex-wives of two fishermen, Billy Tyne and Dale Murphy, who were aboard the *Andrea Gail* and lost at sea in the October 1991 storm. A former crewmember of the *Andrea Gail* also was a plaintiff. The six plaintiffs sued Warner Bros. because they were displeased with the their own depictions in the movie as well as the depictions of decedents Tyne and Murphy, and because the movie, while based on a true story, contained some fictional elements, including characters, dialogue, and events. The plaintiffs claimed the movie commercially misappropriated their names and invaded their privacy by depicting them without their permission and without compensating them. They filed their original complaint in August 2000, shortly after the film's release, and sought in excess of $10 million in damages, plus punitive damages.

The plaintiffs based their claims on three theories: (1) Florida's commercial misappropriation statute; (2) common law false light invasion of privacy; and (3) common law public disclosure of private facts invasion of privacy. In January, 2002, after extensive document and deposition discovery, Warner Bros. filed a summary judgment motion, arguing that the plaintiffs' claims were legally insufficient and threatened important constitutional principles of free expression. Judge Anne C. Conway of the Middle District of Florida agreed and, on May 9, granted summary judgment on all counts in Warner Bros.'s favor and awarded Warner Bros. its costs in defending the action.

The Court's Decision

Florida's commercial misappropriation statute prohibits the use of a person's name or likeness "for purposes of trade or for any commercial or advertising purpose" without the person's consent. *See* Fla. Stat. § 540.08 (2000). An exception exists if the use is part of a "news report or presentation having a current and legitimate public interest." Fla. Stat. § 540.08(3).

In granting summary judgment, the court held that use of a person's name or likeness in a motion picture, such as "The Perfect Storm," as well as in any advertising or promotion of the motion picture, is not a commercial, trade, or advertising purpose within the meaning of the statute. The court also held that the motion picture was entitled to First Amendment protection and would be exempted from liability under the statute's "current and legitimate public interest" exception.

Fictionalization Not Relevant

Responding to plaintiffs' argument that fictionalization in "The Perfect Storm" changed the analysis, the court stated: "the truth or falsity of the events depicted in the Picture is of no import to the issue of whether there was unauthorized publication of the plaintiffs' and decedents' likenesses."

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Rough Seas for Plaintiffs in "The Perfect Storm" Case

(Continued from page 23)

All six plaintiffs had brought claims under the statute. The plaintiffs also pursued two types of common law claims against Warner Bros. First, the surviving daughters of the boat's captain, Billy Tyne, brought claims for false light invasion of privacy. Tyne's daughters argued that the motion picture invaded their privacy by falsely portraying their father in a manner that was highly offensive to a reasonable person. The court disagreed, holding that the girls lacked standing to bring a false light claim on their father's behalf because they could not establish an independent violation of their own personal privacy rights.

Second, the ex-wife and surviving son of crewman Dale Murphy brought common law public disclosure of private facts claims, alleging that the movie disclosed intimate information about them. They also alleged that the information disclosed was fictional. The court held that the movie revealed no private facts about Murphy's ex-wife and son because "an essential element of the tort of public disclosure of private facts is that the facts at issue be true." Because the ex-wife and son had argued that the entire depiction of them in the movie was fictional, the plaintiffs had no cause of action for public disclosure of private facts.

In granting summary judgment in favor of Warner Bros., the court recognized the long-standing constitutional principle that motion pictures, though produced for profit and heavily advertised, are treated no differently under the First Amendment than any other medium of expression. Quoting the United States Supreme Court, the court stated: "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. *We fail to see why operation for profit should have any different effect in the case of motion pictures.*" (Quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952)) (emphasis added).

The plaintiffs are considering an appeal to the Eleventh Circuit.

Gregg D. Thomas is a partner in the Tampa office of Holland & Knight LLP. Along with partner James J. McGuire and associate Deanna K. Shullman, Holland & Knight LLP represented all three defendants, Time Warner Entertainment Co., L.P., d/b/a Warner Bros. Pictures, Baltimore/ Spring Creek Pictures, L.L.C., and Radiant Productions, Inc.

Google Removes Links After Church of Scientology Claims Copyright Infringement

But Finds Way to Inform Public of the Information and Sites

In April, the popular Internet search engine Google began removing links to websites that the Church of Scientology claimed contained copyright-infringing material. By removing the links, Google can claim protection under the Digital Millennium Copyright Act's safe harbor provisions.

The Church of Scientology complained of the use of its copyrighted material by a Norwegian-based website that was critical of the church. The website, Operation Clambake (www.xenu.net), describes the church as a greedy cult and a fraud, among other things.

Despite removing the links, Google as a means of satisfying the demands of those who expect it to be the full and honest broker of search information, is providing copies of the complaints to a website run by the Electronic Frontier Foundation and several law schools, www.chillingeffects.org.

An example of how Google has handled this situation can be seen by running a Google search for "helatrobus." As of May 17, the following message can be found at the bottom of the search-result page:

> In response to a complaint we received under the Digital Millennium Copyright Act, we have removed 1 result(s) from this page. If you wish, you may read the DMCA complaint for these removed results.

The text of the message contains a link to a copy of the DMCA and a link to chillingeffects.org, where the user can read the complaint. Section 512 of the Digital Millennium Copyright Act provides a safe harbor for online service providers if they remove or disable links to information that is allegedly infringing on another's copyright. Once an online service provider is notified by the copyright holder of the infringing information, there are three requirements the online service provider has to meet in order to get protection under § 512.

First, the online service provider must have no knowledge of, or benefit financially from the infringing activity. Second, the online service provider must provide proper notification of its policies to its subscribers. Finally, the online service provider must set up an agent to deal with such complaints.

Charges Dismissed Against Reporter Who Reported on Fuel Spill Without Calling 911

Prosecutor determined dismissal was in the interests of justice

On May 13, *Deseret News* reporter Jerry Spangler was scheduled to be arraigned on charges of violating a Salt Lake City "unauthorized discharges" law by not calling 911 to notify authorities of a fuel spill in the basement of the newspaper's building. The Salt Lake City prosecutor's office, however, dismissed all charges after a "further investigation" revealed dismissal would be "in the interests of justice." Spangler's only involvement with the accident was his reporting on the January 3 spill in the January 4 edition of the newspaper.

The fuel spill was caused by a mistake in delivery of the diesel fuel. A fuel supplier delivered 400 gallons of diesel fuel to the Deseret News building in Salt Lake City. The delivery, however, was intended for a neighboring building. The spill resulted when the supplier attempted to pump fuel into a full fuel tank. Fumes from the fuel spill filled the nine-story buildings.

After the spill, officials with the Deseret News and Zions Securities, the company that manages the building, brought in a private company to clean up the spill. No evacuation of the building was ordered, and workers were assured that the fumes were not hazardous. City public works crews were also called to flush out the storm drains.

Spangler, who had no other involvement, reported on the spill for the following day's paper. As part of his reporting process, Spangler contacted Richard Gee, the hazardous materials trainer for the Utah Division of Comprehensive Emergency Management. Gee expressed his concern that no one had called the fire department to report the spill.

Spangler, in turn, contacted Bruce Clayton, who works for Zions Security. Clayton confirmed that the environmental cleanup company was called in lieu of the fire department. Spangler's story quoted both Gee and Clayton.

As a result of his story, Salt Lake City prosecutor Simarjit Gill brought charges against Spangler for failing to call 911. Spangler was the only one charged with violating the "unauthorized discharge" law despite the fact that numerous parties were more directly involved in the spill and subsequent clean-up and the fact that Spangler informed his bosses about the need to report the incident to the fire department. According to reports, building manager Fred Keller was cited in connection with the incident, but that charge was later dropped.

After bringing the charges against Spangler, Gill told reporters that Spangler was "told in no uncertain terms to contact the fire department immediately and he failed to do so." Under Salt Lake City Code § 2703.3.1, Spangler could have been convicted of a Class B misdemeanor and sentenced to up to 30 days in jail and a $1,000 fine.

After the May 13 hearing, at which charges were dismissed, Gill told reporters that "[t]echnically, there was a basis for the charge, but I didn't think [the charge] served the interest of justice."

Jeff Hunt, of Parr, Waddoups, Brown, Gee & Loveless in Salt Lake City, represented Spangler.

Porn Publisher Sentenced, Released Pending Appeal

Screw magazine publisher Alvin Goldstein was released on $25,000 bail after serving six days of a 60-day jail sentence for his conviction on six counts of harassment stemming from his treatment of his former secretary. Several of the harassment counts involved content of Goldstein's magazine and cable show. *People v. Goldstein*, No. 2001-KN-052112 (N.Y. Crim. Ct., Kings County bail granted May 13, 2002).

Goldstein was released while he appeals his conviction.

During a three-day trial in March, Goldstein admitted making vulgar and threatening comments in phone calls to the secretary, Jennifer Lozinski. He also mailed to Lozinski's home a videotape of his public access cable program and a *Screw* editorial, both of which insulted her by name and gave her home address. *See MediaLawLetter*, March 2002, at 29.

Throughout the trial, Goldstein claimed that his comments were protected by the First Amendment. He came to court for his sentencing wearing a striped prison outfit, although he removed the costume before appearing before Judge Danny Chun for sentencing. Goldstein could have faced up to a year of imprisonment.

Herald Price Fahringer of Lipsitz Green Fahringer, Roll, Salisbury & Cambria, LLP in Manhattan is representing Goldstein in the appeal. The case was prosecuted by Assistant District Attorney David Cetron.

Eleven Courts Sign On For Remote Criminal Access

Two-Year Trial Allowing Access to All Criminal Case Documents Begins

The 8th Circuit Court of Appeals and 10 district courts are participating in a two-year pilot program to provide web access to all criminal case records that was adopted by the Judicial Conference of the United States in March.

The criminal case documents are available through the federal courts' PACER service, which charges a per page fee. Most federal courts offer access to civil and bankruptcy case documents through PACER.

The participating district courts are those for the Southern District of California, the District of Columbia, the Southern District of Florida, the Southern District of Georgia, Idaho, the Northern District of Illinois, Massachusetts, the Northen District of Oklahoma, Utah, and the Southern District of West Virginia.

Most of the courts in the program had offered access to criminal case documents until last September, when the Judicial Conference decided to severely limited Internet access to such documents. *See LDRC LibelLetter*, Sept. 2001, at 32. The Conference then partially reversed itself, creating the pilot program and allowing all federal district and appeals courts to provide such access in highly-publicized cases.

The changes came in the face of a large volume of media and public requests for documents in the criminal prosecution of Zacarias Moussaoui, who is accused of being a conspirator in the terrorist attacks of Sept. 11.

The Conference is to revisit the issue of access of criminal case documents in fall 2003.

The policy changes have applied only to Internet access to documents filed in a case; criminal, civil and bankruptcy dockets continue to be available through the PACER service.

Four Journalists Face Contempt in NJ Over Ban on Access to Jurors

By David A. Schulz

Four reporters for the *Philadelphia Inquirer* will face contempt charges at a hearing scheduled to begin in a New Jersey Superior Court on May 23. The reporters each face sanctions of up to six months in jail and a $1,000 fine for publishing the name of the jury foreperson and attempting to contact discharged jurors after the murder trial of Rabbi Fred Neulander ended in a hung jury last fall.

The contempt proceedings arise from the reporters' efforts to cover the a highly publicized murder trial of a prominent Philadelphia-area rabbi accused of hiring a hit man to murder his wife. During pretrial proceedings Superior Court Judge Linda G. Baxter entered an order that, among other things, prohibited the identification of any juror in any publication and barred all reporters from contacting or attempting to interview any juror. Efforts by the press to seek interlocutory review were unsuccessful, and after the trial ended with a hung jury the trial court rejected an application by the press seeking to relax the order. The court concluded instead that the restrictions needed to remain in place to protect juror privacy and to ensure a fair retrial.

[T]he order seems to embrace the novel suggestion that it would violate a defendant's right to a fair trial to allow a prosecutor indirectly to gain the benefit of any insights that a discharged juror might provide to a reporter.

The *Inquirer* subsequently published a report describing the deadlock among the jurors. The article also disclosed the name of the jury foreperson and presented facts suggesting that she may not even have been a citizen of New Jersey. Contempt proceedings were promptly initiated against the four reporters whose names were attached to the article.

Last month the New Jersey Supreme Court entered an order upholding most of the restrictions imposed by the trial court. The Supreme Court vacated the injunction only to the extent that it prohibited the reporting of juror identification information that is in the public record of the trial, and required the prohibitions to be lifted entirely upon the return of a verdict at the retrial. The Supreme Court also broadened the injunction until it is lifted, so that it now encompass not only attempts by the media to contact jurors, but covers all communications with the media including those initiated by jurors themselves.

In a highly unusual move, the New Jersey Supreme Court issued its order in advance of an opinion explaining the basis for the order. However, the order seems to embrace the novel suggestion that it would violate a defendant's right to a fair trial to allow a prosecutor indirectly to gain the benefit of any insights that a discharged juror might provide to a reporter. Apparently a holding of the first impression, this rationale raises many thorny questions about the extent to which news gathering can be restricted to prevent information from ending up in the hands of a prosecutor.

Two of the seven justices, Justice Virginia Long and Chief Justice Deborah T. Poritz, dissented. They found the restriction on juror interviews to be a prior restraint, and noted that other alternatives existed to protect the fairness of the retrial.

A petition for reconsideration of the Supreme Court's order is pending. The petition questions the "prosecution roadmap" theory for affirming the order, noting that the Court itself had handed down a decision only weeks earlier in another murder case (*State v. Cruz*), discussing at length specific juror votes and other matters concerning the deliberations, even though that case, too, faces a retrial.

Meanwhile, at the contempt hearing the reporters are expected to argue that sanctions are inappropriate for the publication of the juror's name given that the Supreme Court struck down the injunction against the use of identifying information in the trial record, and to urge the court not to apply the collateral bar rule on the facts presented. They will also stress the novelty of the order in restricting what had previously been typical newsgathering techniques. The contempt hearings are expected to last two days.

The Philadelphia Inquirer was represented in its appeal to the New Jersey Supreme Court by Warren Faulk of Brown & Connery in Camden, New Jersey.

David A. Schulz is a partner at Clifford Chance Rogers & Wells, New York, NY.

Massachusetts High Court Upholds Subpoena of Journalist/Judge's Husband

Commission on Judicial Conduct looking into allegations of "whispering campaign"

By Elizabeth A. Ritvo

In *In the Matter of the Enforcement of a Subpoena*, SJC-08633 (Mass. May 10, 2002), the Massachusetts Supreme Judicial Court, in a decision by Justice Sosman, upheld a single justice's order both enforcing a subpoena issued by the Commission on Judicial Conduct, which required the husband/journalist of the judge under investigation to produce documents, and impounding all pleadings filed with the Supreme Judicial Court in connection with the Commission's enforcement action.

The commission undertook an investigation into a particular judge's conduct at a sentencing hearing where she had sentenced a defendant to probation with house arrest and no jail time after the defendant had admitted to charges of kidnapping and molesting an 11-year-old boy and threatening him with a screwdriver. When the prosecutor asked permission to further address the sentencing issue, the judge berated the prosecutor and indicated her disagreement with the prosecutor's assessment of the severity of the crime.

The courtroom exchange between the judge and the prosecutor was captured on camera, broadcast on local television news programs and subsequently became the subject of significant public discussion concerning the appropriateness of the judge's sentence and her conduct.

Shortly thereafter, allegations concerning the child victim began to circulate. As described by the court, the commission's investigation came to include whether the judge had conducted a "whispering campaign" to discredit the child victim and thereby justify her behavior and her ruling.

In connection with its investigation, the commission served a subpoena duces tecum on the judge's husband, a journalist and owner of a local newspaper, seeking production of all non-privileged documents in his possession concerning the case under investigation. The husband objected to producing the responsive documents on various grounds.

The commission then filed a petition to enforce the subpoena and, relying on the statutory confidentiality of commission proceedings, moved to impound all papers filed in court in connection with its enforcement action. A single justice of the Supreme Judicial Court ordered the husband to comply with the subpoena and impounded all papers filed with the court in connection with the enforcement action.

In affirming the order of the single justice, the court found no infringement of the husband's constitutional rights. That the husband under subpoena was himself a journalist did not "transform the subpoena into a violation of free speech rights."

The court continued that, even if any constitutional right were implicated, the commission had demonstrated that there were compelling state interests in enforcing the subpoena. As compelling interests, the court identified the state's interest in a through investigation and fair resolution of allegations of judicial misconduct, the state's need to discipline an offending judge and the state's need to dispel any unwarranted accusation against a judge. In this context, the court found that production of documents relevant to an allegation of misconduct served a compelling interest, whether the documents corroborated or refuted the allegations under investigation.

The court also upheld the blanket impoundment of all papers filed or to be filed with the court in the enforcement action. It found the single justice did not abuse his discretion where there was good cause to impound the record based on the statutory provision that the proceedings of the commission are confidential until formal charges are filed against a judge under investigation.

Stating that the pleadings filed in the enforcement action were replete with identifying information concerning the judge under investigation, the court found impoundment necessary to protect the judge's statutory right of confidentiality. It rejected the argument that statutory confidentiality applied only to the commission itself and not to all papers filed in the judicial proceeding, and even if some portion of the record required confidential treatment, the blanket impoundment order was not narrowly tailored to protect any compelling interest.

Elizabeth A. Ritvo is a senior partner at Brown Rudnick Berlack Israels LLP in Boston. Her firm filed an amicus brief on behalf of The Boston Herald.

Ninth Circuit Holds Common Law Right of Access Does Not Apply to Sealed Documents

Information may be released only if a court finds no good cause for protective order

The Ninth Circuit Court of Appeals, on May 13, the Ninth Circuit vacated that decision in an opinion by Judge Rudi M. Brewster, joined by Judges Arthur L. Alarcon and Barry G. Silverman, vacated a district court's decision to release General Motors' settlement information to the *Los Angeles Times*. The Ninth Circuit also remanded the case so that the district court could conduct a "good cause" as analysis to whether the underlying protective order was appropriate, leaving open the possibility that the information would be released to the *Times*. The Ninth Circuit, however, held that the federal common law presumption of access does not apply to documents properly filed under seal. *Phillips v. General Motors Corp.*, 2002 WL 972125 (9th Cir. May 13, 2002).

The *Los Angeles Times* was seeking access to settlement information that General Motors had given to the underlying plaintiffs in August 2000. Darrell and Angela Byrd and their two minor sons had sued GM in November 1998 for damages "allegedly caused by a defect in the gas tank of a GM C/K pickup truck."

The Settlement Information

During discovery, the plaintiffs learned of previous settlements involving the C/K pickup trucks. A magistrate ordered GM to produce the "total number and aggregate dollar amount of all settlements involving C/K pickup truck fuel-fed fires." GM produced the information, as well as data on the average settlement award. GM, however, requested that the settlement information be subject to a "share protective order" the parties had previously agreed to, under which information could be shared between parties in similar cases, but not the public. The magistrate agreed. After the plaintiffs obtained the information from GM, they filed a discovery-sanctions motion against GM and attached to their motion the sealed settlement information. The underlying case was itself settled before the court ruled on the discovery-sanctions motion. However, the sealed settlement information gave rise to the current case.

On January 5, 2001, district court Judge Molloy, for the District of Montana, ordered the release of the settlement information, holding that the settlement information "was not covered under the share protective order stipulated by the parties," the settlement information "independently did not deserve a protective order," and the *Times* had a common law right of access to the information.

Vacating Release

In vacating the decision, the Ninth Circuit focused on the propriety of the protective order. Citing *San Jose Mercury News, Inc. v. United States District Ct.*, 187 F.3d 1096 (9th Cir. 1999), the court recognized the public's presumptive right of access to "the fruits of pre-trail discovery." The court said that presumption, however, is overridden when a court finds there is "good cause" to issue a protective order.

Turning to the district court's analysis, the Ninth Circuit found that the district court "never engaged in a 'good cause' analysis, but held that, based on [Federal Rule of Civil Procedure] 26(c)(7), *only* trade secrets or other confidential research, development, or commercial information could be protected from disclosure under Rule 26(c)."

With the requisite "good cause" analysis missing, the court remanded the case to the district court for further analysis. The court also noted that district courts have "broad latitude to grant protective orders," and that courts have "consistently granted protective orders to prevent disclosure of many types of information," including settlement agreements. To back up this proposition, the court cited *Hasbrouck v. BankAmerica Housing Serv.*, 187 F.R.D. 453 (N.D.N.Y. 1999), and *Kalinauskas v. Wong*, 151 F.R.D. 363 (D. Nev. 1993).

The Ninth Circuit instructed the district court to determine whether good cause existed to issue a protective order for the GM's settlement information, and if not, to identify and discuss the factors the district court considered in the "good cause" examination.

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Ninth Circuit Holds Common Law Right of Access Does Not Apply to Sealed Documents

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Common Law Right of Access vs. Sealed Documents

Turning to the *Times* request for access to the information, the court said that if there is no good cause to issue a protective order, the settlement information could be distributed to the *Times*. If the district court did find good cause, however, the Ninth Circuit instructed the district court to "determine whether the *Los Angeles Times* has a right to [the settlement information] under the common law right of access, a separate and independent basis for obtaining this information."

Quoting from *San Jose Mercury News, Inc. v. United States Dist. Ct.*, the Ninth Circuit noted that the common law right of access "creates a strong presumption in favor of access" that can be overcome only with a showing of "sufficiently important and countervailing interests." This analysis would force the district court to consider the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets."

Later in the opinion, however, the Ninth Circuit narrowed the possibility of using the federal common law right of access to gain documents previously filed under seal.

The court first found that the Ninth Circuit had not yet addressed the issue of whether the federal common law right of access applied to documents submitted under seal. In providing the first answer for the Ninth Circuit, the court turned to two circuit court opinions and two district court opinions that previously held that the federal common law right of access was inapplicable when a court has determined good cause existed for the issuance of a protective order.

Citing *United States v. Corbitt*, 879 F.2d 224 (7th Cir. 1989), *Lawmaster v. United States*, 993 F.2d 773 (10th Cir. 1993), *United States v. Certain Real Property Located in Romulus, Wayne County, Michigan*, 997 F.Supp. 833 (E.D. Mich. 1997), and *Grundberg v. Upjohn Co.*, 140 F.R.D. 459 (D. Utah 1991), the court said:

> When a court grants a protective order for information produced during discover, it already has determined that "good cause" exists to protect this information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality.

The court also said that it "makes little sense to render a protective order useless simply because a party filed a document with the court like the underlying plaintiffs did in this case."

When a judicial document is properly filed under seal pursuant to a protective order, the presumption of access shifts, so that the party seeking disclosure must present sufficiently compelling reasons why the document should be released."

Finally, the court concluded that "when a judicial document is properly filed under seal pursuant to a protective order, the presumption of access shifts, so that the party seeking disclosure must present sufficiently compelling reasons why the document should be released."

The case will now return to the district court for consideration of the protective order.

Kelli L. Sager, of Davis, Wright Tremaine in Los Angeles, and Jennifer S. Hendricks, of Meloy Law Firm in Helena, Mont., represented the *Los Angeles Times*. Eric R. Clays, of Kirkland & Ellis in Washington, D.C., and William R. Jentes, of Kirkland & Ellis in Chicago, represented General Motors. James H. Goetz, of Goetz, Gallik, Baldwin & Dolan in Bozeman, Mont., represented Alvin Phillips, representative of the estates of Darrell, Angela, and Timothy Byrd.

Former Washington Post Reporter Subpoenaed in the Hague

Claim of Privilege Not to Testify is One of First Impression

By Fiona Campbell

In 1993, when the conflict of ethnic cleansing in the former Yugoslavia was at its height, Jonathan Randal, a war correspondent with the *Washington Post*, was in Bosnia covering the conflict. He interviewed Radoslav Brdjanin, the then Minister for Housing, about his involvement in the expulsion policy of non-Serbs from the region. He wrote an article on this encounter which was subsequently published by the *Post*.

Nearly eight years later, after his retirement from the dangerous field or war reporting, Randal, who now lives in Paris, was contacted by the Office of the Prosecutor (OTP) at the International Criminal Tribunal for the former Yugoslavia (ICTY). Brdjanin was in The Hague charged with genocide, crimes against humanity and war crimes; having seen his article the prosecution wanted Randal to write a statement and testify as a witness before the Tribunal. Randal was reluctant. As a journalist he questioned the appropriateness of testifying before the Tribunal. His refusal caused him to be summonsed by the ICTY to give evidence.

On May 10, 2002 the Tribunal heard argument as to why the subpoena should be set aside. In short, it was submitted that, as a journalist who reported from a conflict zone, Randal should be able to claim a qualified privilege of testimony before the court. The case raises issues of fundamental importance to the international criminal justice system as it is the first time that a journalist has ever sought to claim a privilege in the public interest and challenge a subpoena issued by the Tribunal.

The case comes at an appropriate time. According to the International Press Institute, already this year 17 journalists have been killed worldwide, in 2001 the figure was 55. In the early stages of the conflict in Afghanistan, more journalists were killed than allied soldiers. The extreme dangers that journalists face in conflict zones was acknowledged by the international community with the adoption of Article 79 of Protocol I to the Geneva Conventions. The International Committee of the Red Cross Commentary to the Article states:

> The circumstances of armed conflict expose journalists exercising their profession in such a situation to dangers which often exceed the level of danger normally encountered by civilians. In some cases the risks are even similar to the dangers encountered by members of the armed forces.

Compelling conflict zone reporters to testify in subsequent war crimes trials exposes them to an even greater and enhanced risk. They will become obvious targets and it follows that their ability to gather and transmit vital news stories to the international community will be greatly hampered.

Compelling conflict zone reporters to testify in subsequent war crimes trials exposes them to an even greater and enhanced risk.

There is some irony in this. After all it was the heroic and brave efforts of journalists like Jon Randal back in the early 1990s that brought to the world's attention the horrors of what was going on in the former Yugoslavia. It was the effect of the now famous images and stories that, in part, moved the international community to respond by setting up the ICTY. Yet now the OTP seeks to compel journalists to testify, with the possible effect that in future conflicts journalists will be restricted from playing the vital role that they have done thus far. The decision will likely have an effect on the permanent International Criminal Court, which will have jurisdiction over genocide, crimes against humanity and war crimes committed after July 1 2002.

The stance taken by the OTP is not shared by Judge Richard Goldstone a former ICTY Chief Prosecutor: ["Like aid workers and Red Cross delegates, if reporters become identified as would-be witnesses, their safety and future ability to be present at a field of battle will be compromised ….. I would therefore support a rule of law to protect journalists from becoming unwilling wit-

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Former Washington Post Reporter Subpoenaed in the Hague

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nesses in situations that would place them or their colleagues in future jeopardy….. They should not be compelled to testify lest they give up their ability to work in the field".]

The Trial Chamber constituted by Judge Agius, Presiding (Malta), Judge Janu (Czech Republic) and Judge Taya (Japan) will be urged to establish the much needed and clear criteria as to how and when journalists will be compelled to testify at the ICTY. We submitted that only where the evidence of a journalist will be of crucial importance in determining a defendant's guilt or innocence and where that evidence cannot be obtained by any other means should the journalist be compelled to testify. Furthermore, where the giving of evidence will require the journalist to breach any obligation of confidence and where it could put the journalist or his family in reasonably apprehended danger, journalists should not be compelled to testify in war crimes trials.

Such a development would not be without precedent. The ICTY has already granted immunity from testifying to Red Cross Officials, state officials acting in their official capacity, and employees and functionaries of the ICTY itself. Journalists and their work product are by no means less, and in some cases are more, deserving of the same guarantees and protections. Failure to afford them such protection could result in exposing them to greater danger and limit their ability to inform the world of those issues that are of the utmost concern to us all.

Finers Stephens Innocent solicitors in London instructing Geoffrey Robertson QC and Steven Powles, barristers at Doughty Street Chambers appeared at the ICTY on behalf of Mr Randal. Eric Lieberman, Associate Counsel for the Washington Post, generously assisted in the preparation of written submissions in this case.

The Tribunal's decision is expected shortly.

Fiona Campbell is a senior solicitor at Finers Stephens Innocent in London.

American Reporter Arrested in Zimbabwe

Journalists Challenge New Media Law

On May 1, police in Zimbabwe arrested Andrew Meldrum, an American-born freelance reporter for the *Guardian* newspaper, charging him with abuse of journalistic privilege for publishing falsehoods, a crime under the country's recently enacted Access to Information and Privacy Act. Abuse of journalistic privilege carries a penalty of up to two years in jail. Meldrum was arrested after reporting that a women was killed allegedly by government supporters. Two local journalists who reported the same story, Lloyd Mudiwa and Collin Chiwanza of the *Daily News*, were also arrested. The three reporters were all released on bail.

Eight local and foreign reporters have been charged with abuse of journalistic privilege since March 2002 when Zimbabwe's new media law was adopted. The new media law has been widely condemned as an effort to crush political opposition to the increasingly autocratic government in Zimbabwe.

Lawyers for the Foreign Correspondents Association of Zimbabwe have filed a petition with the Supreme Court of Zimbabwe on behalf of reporters from Zimbabwe, South Africa and Germany, seeking a declaration that the Access to Information and Privacy Act is unconstitutional. In addition to challenging abuse of journalistic privilege provision, the reporters are also challenging portions of the law that bar foreign reporters for working in Zimbabwe and that require reporters to be accredited by a government media commission. *See* J. Day, "Guardian reporter challenges Zimbabwe press law," May 8, 2002, available through www.mediaguardian.co.uk

UK Newspaper Fined for Contempt for Publishing "Prejudicial" Interview During Trial

The *Sunday Mirror* newspaper was fined a near-record £75,000, and ordered to pay an additional £54,000 in costs, for contempt of court for publishing a "prejudicial" interview last year during a high profile criminal trial. *AG. v. Mirror Group Newspapers* (April 18, 2002). In April 2001, the judge presiding over a high-profile criminal assault trial of two Leeds United soccer players and two other men declared a mistrial after the *Sunday Mirror* published an interview with the victim's father. The interview was published while the jury was deliberating and several jurors saw the newspaper article. Mr. Justice Poole recommended that the newspaper be prosecuted for contempt and referred the matter to the Attorney General who initiated proceedings against the newspaper.

At a hearing in April 2002, before Lord Justice Kennedy and Mrs Justice Rafferty, Mirror Group Newspapers ("MGN"), publisher of *The Sunday Mirror*, admitted fault and conceded that the interview should not have been published during jury deliberations. According to a news report, MGN said the decision to publish the interview was the "result of bad legal advice." *See* J. Hodgson "Sunday Mirror admits it was wrong,"*The Guardian*, April 18, 2002 (available online at <mediaguardian.co.uk>). The government described the newspaper's interview as "prominent" and "emotive" with a fundamental capacity to prejudice the defendants' free trial rights. In the interview, the victim's father suggested that the attack on his son was racially motivated – a theory that had been excluded by the trial judge for lack of evidence. Moreover, the *Sunday Mirror* allegedly broke its agreement with the source to publish the interview only after the trial was over. Last year the editor of the *Sunday Mirror*, Colin Myler, resigned in the wake of the controversy. The decision is not yet available online. Archived news reports are available at <mediaguardian.co.uk> and <http://news.bbc.co.uk/>.

As a practical matter, news articles or headlines about "active" cases that suggest a suspect is guilty or report past convictions or other bad conduct may be considered prejudicial and risk contempt proceedings.

Contempt of Court Act

The stiff fine highlights the unusual and complicated UK restrictions on press coverage of court proceedings in order to protect fair trial interests. In contrast to US law, under UK law there is no voir dire of prospective jurors, jurors are rarely sequestered and venue changes are extremely rare. Instead, the focus is on prohibiting the press from publishing information about a case that may influence jurors. This approach is often defended for preventing sensational US-style trials, such as the O.J. Simpson trial.

Under the Contempt of Court Act 1981 (the "Act") the press faces strict liability for any publication "addressed to the public at large ... [which] creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced." The Act applies in criminal cases once a case is "active" – that is once an arrest warrant is issued, an arrest is made or charges are brought. The Act applies in civil cases once a case is scheduled for trial. Violations are punishable by unlimited fines and prison sentences of up to two years. A court can also enjoin publication of a potentially prejudicial article. Another provision of the Act makes it an offense for the press to report details of a jury's deliberations . Section 8 makes it an offense "to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings."

In determining whether a publication creates a substantial risk of prejudice, a court will consider the timing of the publication, the likelihood of its coming to the attention of jurors or potential jurors, the likely impact on the jury and ability of the jury to abide by any judicial directions which seek to neutralize any prejudice. As a practical matter, news articles or headlines about "active" cases that suggest a suspect is guilty or report past convictions or other bad conduct may be considered prejudicial and risk contempt proceedings. As for actual trial proceedings, while the press can report on the details of open court proceedings before a jury, reports on evidentiary and other arguments made out-

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UK Newspaper Fined for Contempt

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side of the jury's presence may also risk contempt proceedings. For a comprehensive review of media liability for contempt of court see G. Robertson QC & A. Nicol QC, MEDIA LAW (3rd ed. 1992).

Other Recent Contempt Cases

Contempt prosecutions of the UK media occur fairly regularly. In 1994, the *Sun* tabloid was fined a record £80,000 for contempt of court for publishing the photograph of a man accused of murder just days prior to his line up identification. In 1992, the *Evening Standard* newspaper was fined £40,000 for contempt of court for publishing an article that several defendants on trial for escaping from prison were convicted IRA terrorists. In 1988, the *Sun* was fined £75,000 for deliberately seeking to influence a criminal trial after it published articles suggesting a criminal suspect was guilty of child rape, accused him of uncharged crimes, and was funding a private prosecution of the suspect in exchange for exclusive story rights from the alleged victim's mother. *AG v. News Group Newspapers* [1988] 2 All ER 906; see also MEDIA LAW at 286-87.

In a notorious case, the *Times* was found to be in contempt of court for editorializing that Thalidomide victims get a larger settlement than was offered by the manufacturer in ongoing litigation. *AG v. Times Newspapers Ltd.* [1974] AC 273. The House of Lords held it was a contempt of court for the newspaper to put moral pressure on one side in a case. On appeal, the European Court of Human Rights found that under the particular facts the contempt finding was contrary to the freedom of expression guarantee of Article 10 of the European Convention. *Sunday Times v. United Kingdom* [1979] 2 EHHR 245. More recently, however, the European Court upheld an Austrian court's conviction of a journalist for publishing an article capable of influencing a criminal proceeding, upholding in principle restrictions on the press designed to protect free trial rights as an acceptable restriction of free expression rights. *Worm v. Austria*, 25 Eur. H.R. Rep. (Eur. Ct. H.R. 1997)

Contempt of Court Law Faces Web Collision

The development of the Internet – and other new communications technology such as satellite television – will likely challenge the application of contempt rules to the media. For one thing, these new forms of communication make the foreign media more accessible to jurors and potential jurors, creating at least some risk of an eventual contempt prosecution against an American newspaper or broadcaster reporting on UK trial proceedings.

Another challenge to contempt law is its application to online news archives. In a recent case, a defense lawyer in a Scottish murder trial asked for a mistrial on the grounds that juror's could be exposed to prejudicial news articles available in online archives. The lawyer cited articles from British newspaper sites and an American publication called *Gay Today* that referred to the defendant's previous conviction for murder, which had been reversed on appeal, and that compared the defendant to a serial killer.

> ***[W]hile the law of contempt was written with newspapers, magazines and books in mind, in some cases it might apply to Internet publications which might influence jurors and not otherwise be curable by a cautionary instruction***

In an apparent ruling of first impression, the Scottish trial judge, Lord Osborne, denied the request for a mistrial, finding that the online archives were more akin to back copies of newspapers which could be found in a public library. But the judge went on to note that while the law of contempt was written with newspapers, magazines and books in mind, in some cases it might apply to Internet publications which might influence jurors and not otherwise be curable by a cautionary instruction. *See* Judge details Beggs 'internet ruling,' BBC News Oct. 30, 2001 (available through <http://news.bbc.co.uk/>.)

Thus the potential risk of contempt liability still lurks for foreign media publishing on the Internet. A UK criminal trial with a high profile on both sides of the Atlantic may test how far UK law will extend in the New Media Age.

Jonathan Caplan QC of 5 Paper Buildings represented The Sunday Mirror in the contempt hearing. Andrew Caldecott QC of 1 Brick Court represented the Attorney General.

Canadian Court Allows 'Flexible Judicial Discretion on Confidentiality'

Displaces a Bedrock Constitutional Rule

By Roger D. McConchie

In this unanimous (7-0) judgment released April 26, 2002 the Supreme Court of Canada held that judges have a flexible discretion to make a confidentiality order in civil proceedings to protect a commercial interest. *Sierra Club of Canada v. Canada* (Minister of Finance) 2002 SCC 41.

Exercising that flexible discretion in this case, Canada's highest court over-ruled the Federal Court of Appeal and the Federal Court Trial Division which had honoured the "open court" principle and refused such an Order. The confidentiality order made by Canada's highest Court will prevent the Canadian taxpayer from learning the contents of Chinese government environmental impact reports or a Chinese safety analysis concerning the construction in China of two CANDU nuclear reactors sold and built by Atomic Energy of Canada Ltd. ('AECL'), a taxpayer-owned corporation. The contents of certain affidavits summarizing those reports were also banned from dissemination. The Sierra Club of Canada, as the petitioning litigant, will be permitted to see the reports and the affidavits subject to the confidentiality order but may not disclose that information to others.

Suit to Review Reactor Sale to China

The question of denying public access to part of the Court record arose when the Sierra Club sued Ottawa in the Federal Court Trial Division seeking a judicial review of the Canadian government's decision to provide a $1.5 billion (Cdn) loan guarantee to facilitate the reactor sale to Beijing. The Sierra Club's challenge revolved around an argument that the Canadian Environmental Assessment Act, S.C. 1992, c. 37, requires an environmental assessment before a project is eligible for Canadian taxpayer assistance.

In defence of the financial arrangements concerning the Chinese purchase, the Canadian government and AECL decided to demonstrate to the Court that, among other things, Canadian environmental assessments were unnecessary because an adequate environmental assessment had been carried out by the Chinese. The government and AECL told the Court, however, that because of confidentiality obligations owed by AECL to the Chinese, the foreign environmental studies could not be filed with the Canadian courts unless the Court made a confidentiality order restricting access to the litigants and their counsel and prohibiting the litigants from disclosing the contents of the reports to the public.

The Supreme Court of Canada concluded that the case involved factors of substantial public interest, a confidentiality order was warranted in this case by the following factors:

Canadian courts have long recognized an exemption to the 'open court' principle where the litigation involves a secret process and the effect of publicity would be to destroy the subject matter of the litigation.

a) The information to be protected is the property of the Chinese authorities;

b) If AECL publicized the Chinese information, it would breach its contractual obligation of confidentiality to the Chinese and in consequence suffer a risk of harm to AECL's competitive position;

c) If the Court denied the confidentiality order, AECL could not file the documents with the Court thereby compromising AECL's ability to make full answer and defence to the Sierra Club allegations, with the result that AECL's right to a fair civil trial would be infringed.

Turn Around on Canadian Precedent

Canadian courts have long recognized an exemption to the "open court" principle where the litigation involves a secret process and the effect of publicity would be to destroy the subject matter of the litigation. However, *Sierra Club* does not fit into this category. If it

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Canadian Court Bans 'Flexible Judicial Discretion Displaces a Bedrock Constitutional Rule'

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had, a confidentiality order would have been unexceptional.

A hundred years of Canadian jurisprudence about the importance of preserving full public access to civil court proceedings stood in the way of the Supreme Court's recognition of a broad discretion to limit public access to commercial civil litigation.

The Supreme Court of Canada therefore found it necessary to look to the recent jurisprudence of the Court in criminal matters for precedent to validate the recognition of a judicial discretion to infringe the 'open court' principle. The Court found such authority in the post-Charter decisions in *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Canadian Broadcasting Corp. v New Brunswick* (Attorney General), [1996] 3 S.C.R. 480; and *R. v Mentuck*, 2001 SCC 76. Those criminal law cases recognized and laid down guidelines for the exercise of a common law discretion to order a publication ban or to direct that court proceedings occur in camera where the fair trial interest of an accused is at stake (*Dagenais*), where an individual privacy interest is at risk (*New Brunswick*), or where the proper administration of justice was at stake (*Mentuck*).

The Supreme Court of Canada found it necessary to look to the recent jurisprudence of the Court in criminal matters for precedent to validate the recognition of a judicial discretion to infringe the 'open court' principle.

Test for Confidentiality

Modifying the so-called *Dagenais* test, the Court in *Sierra* described and purported to apply the following test:

> A confidentiality order should only be granted when:
>
> (1) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of the litigation because reasonably alternative measures will not prevent the risk; and
>
> (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

The judgment of the Supreme Court of Canada expresses unstinting praise for the theoretical virtues of open courts, but reserves its real applause for the "flexibility" of the so-called *Dagenais* principle which authorizes a judge to balance all factors in a particular case in deciding whether or not to limit public access to all or part of the proceeding. Further, *Sierra Club* signals that neither the common law principle of transparent judicial acts nor the guarantee of freedom of expression in § 2 (b) of the Canadian Charter of Rights and Freedoms necessarily trump other "rights" weighing in favour of limiting public access.

Media Not Represented

Although the news media were the primary "open court" proponents in *Dagenais*, *New Brunswick* and *Mentuck*, they played no role in argument in the Supreme Court of Canada in *Sierra Club*. Nor was the news media represented when the AECL application for a confidentiality order was argued in the Federal Court Trial Division or in the Federal Court of Appeal. The judgment of the Supreme Court of Canada displays no concern, however, that media interests were not represented although the case raised important issues of when, and under what circumstances, a confidentiality order should be granted.

The Supreme Court of Canada only mentions the news media to point out that media interest in a lawsuit should not be regarded by the courts as a barometer of

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Canadian Court Bans 'Flexible Judicial Discretion Displaces a Bedrock Constitutional Rule'

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the public interest, and to caution that a media desire to probe the facts of a specific case is of no assistance in determining whether public dissemination of the information is in the public interest.

Uses Charter to Support Confidentiality

Another perplexing aspect of *Sierra Club* is its treatment of the right of free speech, which is normally a basis for refusing a limitation on public access to the courts.

In this judgment, the Supreme Court of Canada appears to suggest that a commercial litigant may base its application for a confidentiality order (or a publication ban) on s. 2(b) of the Canadian Charter of Rights and Freedoms, which provides that "Everyone has the 'fundamental freedoms ..of thought, belief, opinion and expression.'"

The Court holds that a confidentiality order may "assist in the search for truth, a core value underlying freedom of expression." The Court also makes the express finding that a confidentiality order would have "substantial salutary effects on the [AECL's] right to a fair trial and freedom of expression." The reasonable inference to be drawn from this discussion in *Sierra Club* is that a litigant can legitimately argue that in order to exercise its right to freedom of expression in the courtroom, it needs the protection of a confidentiality order or publication ban.

It is difficult to predict what Canadian trial judges will make of *Sierra Club's* pronouncement that court confidentiality may promote the "core freedom of expression values of seeking the truth and promoting an open political process" particularly in light of the Supreme Court's other statement that the confidentiality order granted to AECL is only a "fairly minimal intrusion on the open court rule."

The surprising proposition that a confidentiality order can be regarded as a 'minimal intrusion' will offer a powerful argument to civil litigants seeking secrecy. Opponents of such confidentiality orders will have to look for ways to argue that the Supreme Court of Canada's decision in *Sierra Club* must be limited to its particular facts. Although the Court did not actually inspect the Chinese documents, the judgment does state that the documents were few in number (although apparently not in pages) and highly technical and that the general public would be unlikely to understand their contents. Further, the Court noted that the documents might eventually be held by the Federal Court Trial Division to be irrelevant to the proceedings in any event.

Sierra Club is certain to inspire many applications by commercial litigants for court confidentiality orders, publication bans, file or exhibit sealing orders, and for in camera hearings.

Dagenais, New Brunswick, Mentuck and Sierra Club collectively signal the death of transparency of judicial acts as a bedrock constitutional principle that may only be violated in extraordinary circumstances.

Dagenais, New Brunswick, Mentuck and *Sierra Club* collectively signal the death of transparency of judicial acts as a bedrock constitutional principle that may only be violated in extraordinary circumstances. Judges will now decide whether or not public access to judicial proceedings should be restricted by weighing the factors militating for and against transparency on a case by case basis.

In view of the experience in criminal proceedings since *Dagenais*, the Canadian public should expect civil court judges to exercise the *Sierra Club* discretion liberally. This will unquestionably lead to less transparency in civil proceedings and may also accelerate the trend to increasing closure in criminal proceedings.

Roger D. McConchie Barrister & Solicitor, Borden Ladner Gervais LLP, Vancouver, British Columbia, Canada

Save the Date!

LDRC ANNUAL DINNER

Wednesday
November 13, 2002

In honor of war reporting…
moderated by Ted Koppel, ABC News

DCS BREAKFAST MEETING

Friday
November 15, 2002

Sheraton Hotel and Towers
New York City