

MILRC Media Law Resource Center

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Jury Gives Goose Egg to Libel Plaintiff for Video Footage Mistake

By Charles A. Brown and Judith A. Endejan

On May 4, 2004, after a seven-day trial in the District Court of Lewiston, Idaho, a jury returned a complete defense verdict in favor of KLEW TV News, owned by Fisher Broadcasting, on defamation and related claims. *Arnzen and Bryden Pawnshop, Inc. vs. Fisher Broadcasting, Inc. et al.*, No. CV02-02832 (Dist. Ct. Idaho, County of Nez Perce).

Background

The plaintiff, Michael Arnzen, the owner of Bryden Pawn Shop sued the station over an error made in a December 2000 KLEW TV news broadcast. During the broadcast, the anchor read an accurate script describing the dismissal of criminal charges against Steve's Pawn Shop, owner Steven J. Taulbee and his two sons. However, during the 73-second story, the station aired 55 seconds of video of a different pawn shop, Bryden Pawn Shop owned by the plaintiff.

Arnzen never demanded a retraction from the station, instead he filed suit for defamation and related tag-along theories days before the two-year statute of limitations expired.

Plaintiff asked the jury to award him between \$349,000 and \$1.5 million, claiming that his pawn shop lost profits as a

result of the broadcast. He claimed that the broadcast made him look like "a crook." He furthermore claimed that he suffered significant emotional distress as a result of the broadcast. He calculated his "damages" by multiplying the number of KLEW's potential audience members by \$1 to \$5.

Pretrial Motions

The pretrial motions by the defendants primarily consisted of a motion for summary judgment on the basis that the gist and sting of the broadcast was not of and concerning the plaintiff. Rather, it was of and concerning Steven J. Taulbee and his two sons, and as such it was factually accurate.

The defendants also argued that it was not defamatory by its very nature because the thrust of the broadcast was that the criminal charges had been dismissed against Steven Taulbee and his sons, which again was factually accurate, and the mere momentary juxtaposition of pictures of the plaintiff and his shop were not by their very nature defamatory. This motion was denied.

Additionally, the motion for summary judgment was made trying to establish that the plaintiff had to prove actual malice on the basis of the fact that the defendants were reporting on a

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Jury Gives Goose Egg to Libel Plaintiff for Video Footage Mistake

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judicial proceeding, reporting on the comments of a public official (defendants were relating what the prosecutor was stating as to the dismissal of the criminal charges against the Taulbees) and that the plaintiff was a limited purpose public figure.

Again, the judge denied this motion and ruled that the plaintiff was private person and that he merely had to establish negligence.

Plaintiffs' Case

The trial started on a Monday and the plaintiffs' case went through Friday and a small portion of the following Monday morning. The plaintiffs' witnesses consisted of a CPA who testified that the Bryden Pawn Shop was enjoying a 20% growth from 1998 through the year 2000, and that as a result of the broadcast, it failed to enjoy that continued 20% growth per year for the years 2001 through 2003.

The plaintiffs also called a video expert who freeze-framed the broadcast to focus upon those snippets which included Mike Arnzen individually or signage from the Bryden Pawn Shop or inventory in his store in an attempt to imply that the entire focus was directed toward the plaintiff and/or his shop.

The plaintiffs called multiple witnesses who were friends, relatives, or friendly acquaintances of Mike Arnzen who testified about the various ways that his reputation had been hurt in the community.

Defendants' Case

KLEW TV called only three witnesses – the former news director, a financial expert and Steven Taulbee, the actual subject of the news story – all of whom were on and off the stand within three hours.

The station successfully defended itself by demonstrating that Arnzen's pawn shop actually lost no money because its business turned down when its largest competitor, Steve's Pawn Shop (the subject of the dismissed criminal charges) began operating in competition against it again. In fact, the plaintiff's tax returns showed that he actually made more money the year after the broadcast.

Expert Excluded

The plaintiffs had intended to call a media expert who would have testified that the actions of the defendants essentially constituted negligence and/or actual malice. Her testimony was presented in the form of an affidavit in support of a pretrial motion by the plaintiffs and the defendants relied upon that affidavit and made a motion in limine to exclude her testimony.

The judge granted the motion in limine essentially on the basis that her testimony would invade the province of the jury, and it was up to the jury to determine the ultimate factual issues of negligence and/or actual malice, if need be.

The jury returned a special verdict and found that there was no liability whatsoever in regard to defamation and/or false light, and as a result did not go to the next question which would have them contemplate damages.

The Jury Verdict

In closing, defense counsel argued that KLEW-TV made "an honest mistake" and inadvertently included the video footage of Arnzen, his shop, and his inventory in the broadcast for which they were genuinely sorry. But,

that was far different than having defamed Mr. Arnzen or Bryden Pawn Shop.

The jury returned a special verdict and found that there was no liability whatsoever in regard to defamation and/or false light, and as a result did not go to the next question which would have them contemplate damages.

Post-trial Discussion with Jurors

In discussing the trial with some of the jurors, it appears that their entire deliberations took less than 55 minutes, perhaps as little as 25 minutes. They did not look at one exhibit of the many exhibits that had been submitted during the trial, and simply gathered around the table and discussed the situation fairly briefly, deciding that Mr. Arnzen and Bryden Pawn Shop were not defamed (or cast in a false light) and thus Mr. Arnzen had not been damaged.

It appeared that jurors felt genuinely uncomfortable with the plaintiffs' convoluted interpretation of the broadcast and felt uncomfortable with the claim that the broadcast caused the tremendous damages to which they were laying claim.

Charles A. Brown of Lewiston, Idaho represented KLEW TV at trial, assisted by Judith A. Endejan and Michael G. Atkins of Graham & Dunn, PC, Seattle, Washington.

Pennsylvania Supreme Court Dismisses Anti-Rap Activist's Libel Lawsuit

By Amy B. Ginensky and Michael E. Baughman

On April 29, 2004, the Pennsylvania Supreme Court dismissed the libel suit of anti-gangsta rap crusader C. Delores Tucker. The suit claimed that the *Philadelphia Daily News* and *The Legal Intelligencer* defamed Mrs. Tucker and her husband by characterizing a claim for "loss of consortium" as one involving damage to their sexual relationship. *Tucker v. Philadelphia Daily News, et. al.*, 2004 WL 909704 (Pa. 2004).

Although the Court found that such a statement could be capable of defamatory meaning, it found that the plaintiffs had failed to plead sufficient facts to support a finding of actual malice. The Court granted the plaintiffs leave to replead only if they could state in their complaint that they unequivocally told the defendants that the loss of consortium claim did not include a claim for damage to their sex life.

Suit Over Gangsta-Rap Lyrics

The Supreme Court's opinion is yet another chapter in the lengthy litigation involving Mrs. Tucker. In the mid-1990s, Mrs. Tucker was a prominent leader in the movement against "gangsta rap" – a genre of rap that Tucker claimed was insulting to women and that glorified violence and drug use. Not surprisingly, her attack drew criticism from those who performed and promoted the music.

One well known gangsta rap artist, the late Tupac Shakur, wrote a song about Mrs. Tucker in which he allegedly called her, among other things, a "Mother F_____." Offended by the song, Mrs. Tucker brought a claim against Shakur's estate for defamation. Her husband joined in the lawsuit claiming a loss of consortium.

Media Focused on Consortium Claim

The Tuckers promoted their lawsuit against Shakur by issuing a press release announcing that the suit was aimed "at the heart of the gangsta rap movement." The press release also indicated that Mr. Tucker had joined the lawsuit, but did not say why. Meanwhile, the attorney for Shakur's estate, Richard Fishbein, seized on the loss of consortium claim, telling the media that "it's hard for me to conceive how these lyrics could destroy her sex life."

The *Philadelphia Daily News* ran a cover story about Mrs. Tucker's lawsuit on August 2, 1997. The cover contained a picture of Mrs. Tucker and a headline that read: "A DIRTY

RAP: Suit vs. Shakur estate says 'vile' lyrics ruined her rep — and her sex life." The text of the article pointed out that Mrs. Tucker claimed that "some of the late rapper's lyrics caused her mental anguish and diminished her sex life."

The article also quoted the Tucker's attorney at length, who explained the reasons behind Mrs. Tucker's lawsuit, including that: "This is the woman who marched with Martin Luther King to fight for integration, and now she is fighting a new battle against gangsta rap." Numerous other publications also published stories about Mrs. Tucker's lawsuit, including reporting that she had brought a claim for diminishment to her sex life.

The Tuckers lashed back with a series of lawsuits, claiming that while Mr. Tucker had brought a claim for loss of consortium, loss of consortium does not necessarily include harm to sex life and, in this case, the Tuckers did not intend to claim damages for diminishment of their sex life.

Federal Court Action

She first sued *Time* and *Newsweek*, and Fischbein in the Eastern District of Pennsylvania. Shortly before the statute of limitations ran, in July 1998, she filed two additional lawsuits. One, against the *Daily News* and Philadelphia's legal community newspaper, *The Legal Intelligencer*, in the Court of Common Pleas, Philadelphia County and another against some 100 publications in the Eastern District of Pennsylvania.

While the state court action was pending, the case against *Time* and *Newsweek* went through the discovery process and, eventually, Judge Buckwalter of the Eastern District of Pennsylvania granted summary judgment to the defendants on the basis that the articles were not defamatory and the plaintiff had failed to plead sufficient facts to support a finding of actual malice.

The Third Circuit eventually affirmed the summary judgment for *Time* and *Newsweek*. While the Third Circuit found that the statements could be defamatory because they might suggest that the Tuckers were litigious and, perhaps "unstable," it found insufficient evidence of actual malice since there was no evidence that *Time* or *Newsweek* knew or should have known that the Tuckers were not, in fact, seeking damages for diminishment to their sex life.

The Third Circuit allowed the claims to proceed against Fishbein, as it found sufficient evidence that he, in fact, knew

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Pa. Court Dismisses Anti-Rap Activist's Libel Lawsuit

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that the Tuckers did not intend to pursue a claim for harm to their sex life.

Pennsylvania Court Action

Meanwhile, the Court of Common Pleas for Philadelphia County dismissed the claims against the *Daily News* and the *Legal* on the grounds that the articles were not capable of a defamatory meaning, that they were not published with actual malice, and that the articles were protected by the fair report privilege. The Tuckers appealed and, in 2000, the Pennsylvania Superior Court reversed.

The Superior Court concluded that the articles were capable of a defamatory meaning because they might imply that the Tuckers were "overly concerned with sexual matters." It further found that the Tuckers had adequately pleaded actual malice and abuse of the fair report privilege.

The *Daily News* and the *Legal* filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court which granted the Petition in November 2001. The case was argued in October 2002, and the Supreme Court issued its decision in April 2004.

Defamatory Meaning, Albeit Barely

The majority opinion, authored by Justice Newman, first took up the question of whether a statement that the Tuckers were seeking damages for their sex life was capable of a defamatory meaning.

The Court noted, citing one of its prior decisions, that "it is not enough that the victim of the [statements] ... be embarrassed or annoyed, he must have suffered the kind of harm which has grievously fractured his standing in the community of respectable society." Despite the demanding standard announced, the Court eventually concluded that the statements at issue were capable of a defamatory meaning, "albeit barely."

The Court relied heavily on the Third Circuit's conclusion that the statements – to the extent they could be read as suggesting the Tuckers were claiming millions of dollars in damages because of song lyrics – "could make the Tuckers seem

overly interested in money or sex, and not concerned with their life work of fighting for civil rights. It is possible to conclude that such a false statement would cause people to decline to associate with the Tuckers."

The Court also emphasized that the case was at the pleadings stage, and suggested that if the evidence eventually indicated that, in fact, people did *not* stop associating with the Tuckers, the claims may eventually fail.

No Actual Malice

After a lengthy explication of *New York Times v. Sullivan*, the Court turned to the question of whether the complaint had sufficiently pleaded actual malice. The court held that, even at the pleading stage, a plaintiff was required to allege facts

that, if proven, would establish actual malice by clear and convincing evidence.

Such facts were lacking here, the Court concluded. It noted that a claim for loss of consortium, by definition, includes a claim for diminishment of sexual relationships. Thus, absent some reason to believe that the Tuckers were

not pursuing that aspect of a consortium claim, the Supreme Court opined that it was reasonable for the *Daily News* and *The Legal* to conclude that Mr. and Mrs. Tucker were, in fact, claiming harm to their sex life.

Citing the Third Circuit opinion, the Supreme Court noted that in that case, the Tucker's lawyer had stated in a deposition that he had not, in fact, told either *Time* or *Newsweek* that the claim for loss of consortium did not include a claim for diminished sex life. Noting that the articles in the *Daily News* were published *before* the *Time* and *Newsweek* articles, the Supreme Court indicated its skepticism that these defendants would have been told that the Tuckers' suit did not include damages related to sex.

The Court also squarely rejected the plaintiffs' argument that the defendants had acted with reckless disregard of the truth. For example, the Court held that the defendants acted reasonably in relying on a quotation from the lawyer for Shakur's estate to the extent that the Tuckers were claiming damage to their sex life.

Absent some reason to believe that the Tuckers were not pursuing that aspect of a consortium claim, the Supreme Court opined that it was reasonable for the Daily News and The Legal to conclude that Mr. and Mrs. Tucker were, in fact, claiming harm to their sex life.

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Right to Use Vivid Words

Moreover, to the extent that the defendants put a “sexual spin” on the Tucker’s lawsuit, the Court found this was not actionable since a newspaper has a right to use “vivid words” or a “smart alecky style” to create reader interest. The Court also emphasized that the articles *did* point out that Mrs. Tucker’s claims were not limited to sexual damages, and that the newspapers had quoted Mrs. Tucker’s lawyers.

At bottom, the Court found that, absent a clear indication from the complaint that the defendants were, in fact, informed that the Tuckers consortium claim did not include sex, the defendants could not have acted with actual malice. The Court thus dismissed the case, but granted the plaintiffs leave to replead — if and only if they could allege unequivocally that the defendants were told that the claims did not include damage to the Tuckers’ sex life.

In a concurring opinion, Justice Saylor indicated that he would not have granted plaintiffs the right to replead as there is nothing false about stating that a claim for loss of consortium includes damages to the plaintiffs’ sex life. Justice Nigro, in a concurring and dissenting opinion joined by Justice Castille, argued that the plaintiff should be permitted discovery on the issue of actual malice and that it was premature to dismiss her lawsuit.

The mere fact that a media defendant prevailed in the Pennsylvania Supreme Court on a libel claim is encouraging.

Conclusion

The Supreme Court’s opinion is significant in several respects. For one thing, the mere fact that a media defendant prevailed in the Pennsylvania Supreme Court on a libel claim is encouraging as, over the past two decades, that Court has not been a particularly friendly forum for libel defendants. The opinion may also prove very useful in attacking complaints at the pleading stage in Pennsylvania courts on the grounds of actual malice. The opinion makes clear that a lower court is entitled to parse the pleadings to ensure that sufficient facts are pleaded so that a jury could eventually find malice by clear and convincing evidence.

Finally, by emphasizing the procedural posture of the case in discussing the defamatory meaning issue — and leaving open the door to raise the issue again after discovery — the opinion could be read as requiring some evidence that the plaintiff’s reputation had actually been damaged before a case may go to the jury.

Plaintiffs were represented by Richard Angino in Harrisburg. *The Legal* was represented by James Gicking at Marshall Dennehey in Philadelphia.

Amy B. Ginensky and Michael E. Baughman of Dechert in Philadelphia represented The Daily News defendants.

Condit Slander Suit Against *Vanity Fair*’s Dominick Dunne to Proceed

Statements About the Disappearance of Chandra Levy Survive Initial Motion to Dismiss

By Laura Handman and Wendy Tannenbaum

On April 27, 2004, Judge Peter K. Leisure of the U.S. District Court for the Southern District of New York denied in part journalist Dominick Dunne’s motion to dismiss a slander action brought against him by former U.S. Congressman Gary Condit. *Condit v. Dunne*, 02-CV-9910 (S.D.N.Y. April 27, 2004).

The court held that statements concerning the disappearance of Washington intern Chandra Levy, which Dunne made on two broadcasts, in an interview for an online gossip column and at two private dinner parties, could be actionable. Two of Condit’s claims — based on statements Dunne made to the *Boston Herald* and *USA Today* — were dismissed.

The Allegations

Condit sued Dunne, a columnist for *Vanity Fair* magazine and regular television and radio commentator, in December 2002. Dunne is the sole defendant. In sum, the complaint alleges that Dunne’s statements, “imputing to Plaintiff Condit involvement as a principal and/or a co-conspirator and/or an accessory to the crime of murder and/or the crime of kidnapping,” constitute slander *per se*.

The statements at issue are alleged to have been made (1) during a December 2001 interview on *The Laura Ingraham Show*, a nationally syndicated radio talk show; (2) during a February 2002 broadcast of *Larry King Live*; and (3) to

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Condit Slander Suit Against Dominick Dunne to Proceed

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reporters for *Entertainment Tonight Online*, *The Boston Herald* and *USA Today*.

In addition, the complaint avers that statements made by Dunne on *The Laura Ingraham Show* were repeated at two dinner parties, one held in Los Angeles, attended by approximately 24 guests, and a second in New York, attended by ten guests.

Condit's claims focus on Dunne's statements concerning two hypotheses about Levy's mysterious and widely-publicized disappearance. Dunne's first theory was that Levy had been taken on a motorcycle, possibly by associates of Condit, who, Dunne said, "rides with Hell's Angels as a motorcyclist."

The other theory was one Dunne said was relayed to him over the phone by a "horse whisperer," or animal behaviorist. The source told Dunne that an Arab "procurer," who ran a prostitution ring servicing Middle Eastern men abroad and in Washington, D.C., said that Condit had made it known that he was having trouble breaking ties with a mistress. The source suggested that Levy was taken by members of the prostitution ring and was drugged and possibly dumped from an airplane into the Atlantic Ocean.

Choice of Law

In deciding Dunne's motion to dismiss, Judge Leisure was faced with a choice between application of New York or California law. The selection was significant, because New York law provides more protection in defamation lawsuits to statements in the form of opinions than does California law.

California law, the court said, "extends no greater protection to opinions than does the United States Constitution." The primary argument on the motion to dismiss – that Dunne was offering various versions or theories – relied in substantial part on the Second Circuit's decision in *Levin v. McPhee*, 119 F.3d 189 (2d Cir. 1997), interpreting New York law.

Using New York's choice of law rules, which focus in part on the location where plaintiff suffered the greatest injury, the court decided that California, Condit's home and the locale of his constituency, had the most significant interest in the litigation.

Constitutional Analysis

Applying California law, the court then undertook to determine which of Dunne's disputed statements declared or

implied a provably false statement of fact. In doing so, the court looked to the statements themselves, the context in which they were published, whether the defendant used figurative or hyperbolic language and whether the statements were capable of being proved false.

The court dismissed Condit's claims regarding articles in *The Boston Herald* and *USA Today* that were published after Levy's remains were found in Washington, D.C. Dunne had told the print reporters that he still believed Levy was the victim of foul play, possibly in connection with her affair with the congressman. He told *USA Today*, for instance: "I don't think he killed her. I think he could have known it was going to happen." The court held that those statements, not based on undisclosed information or false assertions of fact, were opinions protected under the First Amendment.

With respect to the two broadcasts and the online entertainment report, the court rejected defendant's argument that the context of the publication medium – *i.e.*, a politically charged radio show, a gossip column and a talk show featuring guest opinions, all published in the context of a media frenzy over Levy's disappearance – signaled to the audience that Dunne was offering a hypothesis as to Levy's death.

Dunne's interviews included statements such as "I can't vouch for any of this," "if indeed [Condit] is involved" and "I can't authenticate all of this." The court said that despite the nature of these particular media, Dunne's "statements can be interpreted as explicit republications of actual detailed facts," and, as opinions based on disclosed allegedly false facts, they were actionable.

Defendant also argued that his Middle East story was merely restating a theory that had been relayed to Dunne by a source and that Dunne, whose monthly diaries are published in *Vanity Fair*, was a renowned "raconteur," retelling the extraordinary events of his life without adopting or endorsing what people tell him. The court explained:

"[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment ... This principle assumes, however, that the factual basis itself is true."

Since the horse whisperer's theory was assumed to be false for purposes of the motion to dismiss, the court said, Dunne

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Condit Slander Suit Against Dominick Dunne to Proceed*(Continued from page 8)*

could be liable for republishing the source's falsities, if other requirements of defamation were met.

Although not raised by defendant, the court also declined to apply the "neutral reportage" privilege to Dunne's statements, holding that the status of that doctrine in California was unclear, and in any case, Dunne's reporting concerning Levy was not "neutral."

Dinner Parties

Despite defendant's argument that allowing Condit's claims regarding statements at two dinner parties would "put all dinner table conversation at risk of such suits, casting a pall on such social discourse," the court declined to dismiss those claims at this time. Defendant had argued that Condit failed to meet the heightened pleading standard applicable to slander claims.

The court held that since Condit's complaint alleged that the dinner party comments repeated Dunne's statements on

The Laura Ingraham Show, a transcript of which was included in the filing, Condit had succeeded in pleading a claim as to the dinner conversations.

Outlook

As a result of the district court's decision, the parties will proceed with discovery on the five claims that remain in suit. As a classic public figure, Condit faces the sizable task of proving "with convincing clarity" that Dunne acted with "actual malice" when he made the disputed statements.

Indeed, at the end of his opinion, Judge Leisure noted that his "decision softens none of the additional requirements in this case" and "merely rules that plaintiff has made out a claim for slander [for] defendant's statements on *The Laura Ingraham Show*, *ET Online* and *Larry King Live* and at dinner parties."

Gary Condit is represented by L. Lin Wood of Atlanta.

Laura Handman, Sam Leaf and Wendy Tannenbaum of Davis Wright Tremaine represent Dominick Dunne.

California Court Applies Single Publication Rule to Internet

In what appears to be the first published California decision on the subject, an appellate court held that the single publication rule applies to statements on Internet websites. *The Traditional Cat Association, Inc., v. Gilbreath*, 2004 WL 964751 (Cal. App. May 6, 2004).

Quoting at length from the recent California Supreme Court decision in *Shively v. Bozanich*, 80 P.3d 676 (Cal. 2003) which strongly reaffirmed the single publication rule in the hard copy context, and from the New York Court of Appeals decision in *Firth v. State*, 747 N.Y.S.2d 69 (2002), which applied the rule to the Internet, the California court wrote:

[T]he need to protect Web publishers from almost perpetual liability for statements they make available to the hundreds of millions of people who have access to the Internet is greater even than the need to protect the publishers of conventional hard copy newspapers, magazines and books.

The Court concluded that because of these interests it had little doubt that the California Supreme Court would apply the single publication rule to the Internet, and dismissed plaintiffs' action as time barred.

Court Grants Anti-SLAPP Motion

The libel suit arose out of dispute between cat breeders over the management of the "Traditional Cat Association." In response to litigation between the parties over the management of the association and related issues, defendants created a website containing information on the status of the litigation and criticism of plaintiff.

The trial court denied the defendants' anti-SLAPP motion under Cal. Code §425.16, holding that while the statements on the website involved matters of public concern – at least to the cat breeding community – a statute of limitations defense could not be raised on the motion.

The Court of Appeals reversed, holding that the trial court ruling as to the statute of limitations defense was "contrary to the express terms" of §425.16.

Plaintiffs were represented by Jerry D. Hemme and James W. Peterson of Goode, Hemme, Peterson, Sayler & Lund. Defendants were represented by Darren J. Quinn, Law Offices of Darren J. Quinn.

Any developments you think other MLRC members should know about?

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AP and Gannett Sue U.S. Marshals Over Scalia Tape Seizure

Justice Antonin Scalia's aversion to tape recordings of his speeches has led to litigation following an April 7, 2004 incident in Hattiesburg, Mississippi in which a U.S. Marshal seized and erased two separate recordings of his speech made by print reporters. The Justice Department has defended the action. In the words of the local U.S. Marshal, "even with hindsight, I can't think of what other steps she could have done."

On April 10, the two reporters and their news organizations filed suit against the deputy marshal who seized the tapes and the U.S. Marshal's Service. *The Hattiesburg American v. U.S. Marshalls Service*, No. 3:04 CO 344 LN (S.D. Miss.).

The reporters are Tony Konz, who works for the Hattiesburg American, a Gannett paper, and Denise Grones, who reports for the Associated Press out of its Jackson, Mississippi bureau. A copy of the complaint is available at www.lsrc.com.

The news agencies also sued "John Does 1, 2, and 3" who are alleged to have instructed or assisted the deputy who not only seized the recordings, but also erased one of them, and required the erasure of the other before she would return the tape recorder back to the reporter who owned it. Plaintiffs did not name Justice Scalia, who denied any responsibility for the incident and said he was upset by it and said his ban would not apply to "print journalists" in the future.

In their complaint, AP and Gannett contend that both constitutional and statutory rights were violated. The complaint alleges that the seizure of the recordings violated the Fourth Amendment, that it interfered with newsgathering and was a prior restraint in violation of the First Amendment, and that it deprived plaintiffs' of their property without due process of law in violation of the Fifth Amendment.

The complaint also asserts a claim under the Privacy Protection Act of 1980, 42 U.S.C.A. § 2000aa, which generally requires the use of a subpoena when the government

wants to seize the work product of a journalist. The reporters seek no less than \$1,000 each in damages for emotional distress, humiliation, and violation of their rights. Claims are also made for attorney fees and litigation costs.

Finally, the complaint also requests declaratory relief and injunctive relief designed to prevent the deputy and the marshals service from "i) seizing any tape, tape recorder, digital recorder, or similar device, from any reporter engaged in news gathering activities, and from ii) erasing the recordings of any tape or digital recorder or similar device seized from a reporter, whether the seizure

is lawful or not."

When the complaint was filed, Gary L. Watson, President of Gannett's newspaper division, said in a statement that taking legal action was necessary. "It is ironic this seizure took place

while Justice Scalia was making a speech about preserving the Constitution," Watson said. "Given the federal government's very tough stand on those who violate the law, the Marshal's Service and [the deputy] must be willing to taste their own medicine," he added. "An apology or hollow commitment to study the issue will not suffice or serve as a meaningful deterrent to prevent any repeat performances."

"It's been more than a month since this happened, and we're still angry about it," said David Tomlin, AP Assistant General Counsel. "People who enforce the law should know what the law is, and especially the basic law that says citizens can't be shaken down by their own government."

The reporters and their news organizations are jointly represented by Luther Munford and John Sneed of Phelps Dunbar LLP as well as Leonard Van Slyke and Frank Garrison of Watkins, Ludlam and Stennis, all of whom practice in Jackson, Miss. Also on the complaint for the Associated Press is David Schulz of Levine Sullivan Koch and Schulz of New York., N.Y.

"It's been more than a month since this happened, and we're still angry about it," said David Tomlin, AP Assistant General Counsel. "People who enforce the law should know what the law is, and especially the basic law that says citizens can't be shaken down by their own government."

NY Court Affirms Dismissal of Libel Claim Against Newsday – But Reinstates Trespass Claim

By Saul B. Shapiro and Sneha M. Patel

On April 19, 2004, a New York appellate court affirmed the dismissal of a libel claim against *Newsday* by Nassau County GOP Chairman Joseph Mondello. *Mondello v. Newsday, Inc.*, 774 N.Y.S.2d 794, 2004 N.Y. Slip Op. 02919 (N.Y.A.D. 2d Dept. April 19, 2004). In so doing, the Court affirmed the application of the fair index rule as grounds for dismissing a libel suit at the pleading stage.

The Court, however, reinstated a trespass claim against *Newsday* because of the availability of nominal damages, even though plaintiff's trespass damages were indistinguishable from those attributable to the libel cause of action. In so doing, the Court backtracked from one of its own recent decisions. See *Every Drop Equal Nutrition v. ABC, Inc.*, 772 N.Y.S.2d 865 (2d Dep't Mar. 15, 2004); MLRC *MediaLawLetter* April 2004 at 15.

Background

The case stemmed from the following headline, which appeared on the cover of *Newsday* on June 15, 2001:

Nassau Tax Reductions Chosen Few

This headline was accompanied by a sub-headline that stated:

Member of Little-Known Panel Resigns Amid Questions on Assessments Granted to Politically Connected

Below the sub-headline appeared pictures of two properties. One depicted the home of the head of Long Island's Independence Party, the other was identified by its caption as the "Oyster Bay Cove Property of Nassau GOP Chairman Joseph Mondello."

The article accompanying the headline correctly reported that the vice chairwoman of Nassau County's Independence Party had resigned from her part-time position as a member of the Nassau Assessment Review Commission after

"officials questioned her personal reduction of assessments for a number of homeowners, including ... Joseph Mondello, chairman of Nassau's Republican Party."

Further into the article, the paper reported that "officials sa[id] the proper process was followed when Anderson reduced the assessed valuation" of Mondello's property.

Shortly after this article was published, Mondello sued *Newsday* for libel and trespass stemming from Mondello's allegation that a *Newsday* reporter trespassed on his property to take the photograph of his house. *Newsday* moved to dismiss both claims, arguing that the libel claim could not survive because the headline was a fair index of a concededly true article, and that no damages properly attributable to the trespass were alleged. On March 13, 2003, Judge Jones dismissed Mondello's complaint in its entirety.

Headline Was Fair Index

The Second Department (Florio, A.; Townes, S.; Crane, S.; Rivera, R.) affirmed dismissal of the libel claim, recognizing that whether words are capable of a defamatory meaning is a matter of law to be determined by the Court.

The Court agreed with the lower court and *Newsday* that, "[i]n order to determine whether the headline of a concededly truthful article is actionable as libel, the court must initially determine whether the headline was a fair index of the article with which it appears; if it was, then the headline is not actionable." The Court's analysis ended there because it determined that "the front page headline in this case constituted a fair index of the concededly accurate article with which it appeared."

This decision reaffirmed the application of the fair index rule in the Second Department for determining whether the headline of a truthful article can itself be defamatory. Under this rule, the headline and the article must be considered together, and any ambiguity in the headline can be explained by the article. If the headline is a fair index of the article, then the libel claim cannot succeed.

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Under the Mondello decision a plaintiff who alleges trespass against a media defendant might always survive a motion to dismiss if he or she claims nominal damages to his property for the trespass.

NY Court Affirms Dismissal of Libel Claim Against Newsday – But Reinstates Trespass Claim

(Continued from page 11)

Trespass Claim Reinstated

On the trespass claim, however, the Court backpedaled from the standard that it set forth just one month prior in *Every Drop Equal Nutrition*. In this case, the Second Department followed the Fourth Department's 1970 decision in *Costlow v. Cusimano*, 311 N.Y.S. 2d 92, and affirmed dismissal of a trespass claim because it held that "the damages sought therein did not flow from an interference with possession of property but rather from the alleged defamation." *Id.*

Espousing this same reasoning, the lower court in *Mondello* dismissed the trespass claim on the grounds that Mondello failed to allege any damages that stemmed directly from the trespass itself.

The Second Department in *Mondello*, however, reinstated the claim because of the availability of nominal damages. The Court purported to distinguish its decision in

Every Drop on the ground that the plaintiff there, unlike Mondello, had only sought damages to reputation in its complaint.

In fact, this was not accurate: Mondello also had failed to allege any damages apart from his alleged reputational injury. As a result, the decision suggests that the sound decision in *Every Drop* may be undermined. Indeed, under the *Mondello* decision a plaintiff who alleges trespass against a media defendant might always survive a motion to dismiss if he or she claims nominal damages to his property for the trespass.

Plaintiff was represented by John E. Ryan and John M. Donnelly of Ryan, Brennan & Donnelly, LLP, Floral Park, N.Y.

Saul B. Shapiro and Sneha M. Patel, attorneys at Patterson, Belknap, Webb & Tyler LLP, represented Newsday, Inc. in this matter.

Appeal on Reporter's Privilege Issue in Sports Illustrated Libel Case

U.S. District Court Judge Lynwood Smith issued an order allowing Sports Illustrated to appeal to the 11th Circuit a decision that would have forced the magazine to reveal the identity of its confidential sources for an article on Mike Price, former head coach of the University of Alabama. *Price v. Time, Inc.*, No. CV-03-S-1868-S (D. Ala. May 5, 2004).

Price sued Time Inc. and reporter Don Yeager over a May 2003 *Sports Illustrated* article entitled "Bad Behavior: How He Met His Destiny At a Strip Club." The article reported on Price's alleged exploits in a Pensacola, Florida strip club and hotel.

In December 2003, Judge Smith issued a decision holding that magazines are not within the scope of the Alabama shield law, § 12-21-142. The Alabama statute provides in relevant part that "no person engaged in, connected with or employed on any newspaper, radio broadcasting station, or television station, while engaged in a newsgathering capacity, shall be compelled to disclose" sources. (Emphasis added.)

Judge Smith ruled that "[i]f the legislature had intended for the scope of the statutory privilege to include

magazines or other media, it could have done so clearly and unequivocally." See *MediaLawLetter*, December 2003 at 15. Judge Smith later certified this issue to the Alabama Supreme Court, but on April 1 the state high court declined to rule on the question, setting the table for compelled disclosure.

Fifteen news media organizations filed a brief to the 11th Circuit in support of Time, Inc. Among other things the media brief argues that if allowed to stand the privilege ruling would create "immense arbitrariness and uncertainty in Alabama and beyond."

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Update: Post Trial Motions Narrow Claims in *McDermott v. Biddle*

By Amy Ginensky and Michael Baughman

Twenty one years after it was filed, and fourteen years after the trial of the case, the Philadelphia Court of Common Pleas decided the post trial motions in *McDermott v. Biddle* for the third time. *McDermott v. Biddle*, (Ct. Comm. Pleas April 26, 2004).

This time, the trial court threw out much of the claims of the estate of deceased, former Pennsylvania Supreme Court Justice James T. McDermott.

The trial court concluded that any claims based on alleged implications in the articles at issue that Justice McDermott's votes on particular cases were influenced by campaign contributions or other factors were not actionable under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1992). Any such implication about the Justice's motive, said Judge Edward Biester, are not capable of being proven true or false by objectively verifiable evidence.

Background

In 1983, Justice McDermott brought suit against *The Philadelphia Inquirer* claiming that he was defamed by a series of articles about the Pennsylvania Supreme Court titled "Above the Law." The series was later republished in tabloid form, which Justice McDermott also claimed defamed him in a separate lawsuit.

The Series and Reprint -- which won many awards -- chronicled questionable practices by Justices of the Supreme Court, primarily relating to the activities of Justice Rolf Larsen (who was impeached some years later). Justice McDermott claimed that the publications defamed him by suggesting that his votes in two cases were improperly influenced by campaign contributions and certain friendships. He also claimed that the series and tabloid implied that he had engaged in nepotism by obtaining a job for his son at the Philadelphia District Attorney's Office.

The 1990 Trial

The case originally went to trial in late 1990. After a lengthy trial, the jury returned a verdict in favor of the defendants on the "Series Case" -- the case relating to the original series of articles. However, the jury also returned a verdict for the plaintiff on the "Reprint Case" -- the case

relating to the tabloid -- awarding \$3 million in compensatory damages and \$3 million in punitive damages.

The trial court, Judge John P. Lavelle, originally granted a new trial in both cases on the grounds that the verdicts were inconsistent. The Pennsylvania Superior Court affirmed in a 1994 opinion, but, two years later, the Pennsylvania Supreme Court reversed in a majority opinion of three Justices. Pennsylvania's high court remanded the case to the trial court for consideration of the "remaining post trial motions," which were undecided because the trial court granted a new trial on the grounds of inconsistent verdicts.

New Trial Granted

The case was then reassigned to Judge Flora B. Wolf in 1997. After further briefing, she issued a decision on post trial motions in July 1998. She granted a new trial to the defendants in the Reprint Case on the grounds that the articles had been improperly redacted before they were submitted to the jury. She also granted a new trial to the plaintiff in the Series Case on the grounds that certain evidence had (she thought) been excluded from the jury. She did not decide any of the other post trial issues. Both sides appealed.

In 2000, the Superior Court affirmed the grant of a new trial to defendants, but reversed the grant of a new trial to the plaintiff as Judge Wolf had been mistaken in her conclusion that certain evidence was excluded. The Superior Court also found that, contrary to the Supreme Court's mandate, Judge Wolf had not decided all of the remaining post trial motions. It therefore remanded for consideration of *all* the remaining post trial motions.

3rd Round of Post Trial Motions

After the Pennsylvania Supreme Court refused discretionary review, the case returned to Philadelphia County. After Judge Wolf was reassigned to family court, and another Judge recused himself, the case was eventually reassigned to Judge Edward Biester, sitting by designation from Bucks County, in the summer of 2003. Judge Biester decided the post trial motions for the third time April 2004.

Judge Biester's opinion narrows the suit considerably.

(Continued on page 14)

Post Trial Motions Narrow Claims in *McDermott v. Biddle*

(Continued from page 13)

First, Judge Biester denied all of plaintiff's motions for a new trial with respect to the Series Case. Thus, absent a third appeal by the plaintiff, that case is now (after 21 years) over.

With respect to the Reprint Case, the Court's decision that *Milkovich* bars the claims based on Justice McDermott's votes in two cases guts a significant portion of plaintiff's case. Most of the six weeks of the first trial were spent on these issues — only about a day of testimony related to the nepotism issue, which is now the *only* issue for retrial. The Court has not yet scheduled a new trial date.

Justice McDermott's estate is represented by James Beasley of The Beasley Firm in Philadelphia.

Amy Ginensky, Robert Heim and Michael Baughman at Dechert LLP in Philadelphia represent the The Inquirer defendants.

Supreme Court Turns Down Female Fighter Pilot's Libel Appeal

The Supreme Court declined to hear an appeal from a former female U.S. Navy combat pilot who contends that a public policy group's report labeling her unqualified to fly fighter jets was libelous and an invasion of her privacy. *Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C.Cir. 2003), *cert. denied*, 72 U.S.L.W. 3707 (No. 03-1272)(May 18, 2004).

Carey Lohrenz brought suit over the publication of a series of reports from the Center for Military Readiness and statements made by the group's president, Elaine Donnelly, that alleged Lohrenz was the beneficiary of a double standard employed by the Navy to support the ascension of pioneering female fighter pilots.

The High Court's refusal lets stand a unanimous D.C. Circuit decision that held that Lohrenz was a voluntary limited-purpose public figure by choosing to become a fighter pilot knowing of the preexisting public controversy over the appropriateness of women in combat. *See MediaLawLetter* December 2003 at 21.

Supreme Court Refuses to Review California Police Libel Case

The Supreme Court declined in March to review a decision by the California Court of Appeals upholding the constitutionality of a California statute that permits police officers to file civil libel suits against people who make false charges of police misconduct. *Kinder v. Loshonkohl*, 109 Cal.App.4th 510, 135 Cal.Rptr.2d 114, 31 Media L. Rep. 1855 (Cal. App. 2003), *cert. denied*, No. 03-1099 (U.S. March 22, 2004).

The California appellate court affirmed a \$350,000 bench verdict in favor of a San Diego police officer who sued the owner of an automobile rental business who filed several complaints against the officer. See also MLRC MediaLawLetter Oct. 2003 at 57.

The California appellate court held that Cal. Civ. Code § 47.5 was constitutional, finding it only applied to knowingly false statements made with spite, hatred, or ill will, thus "exceed[ing] the standards" of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Moreover, the court found that while the statute gives police officers a right to sue for defamation that is not given to other public officials, this does not render the statute unconstitutional because

"the underinclusiveness of a regulation restricting 'totally proscribable speech' need not be justified by reference to a neutral basis 'so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.'"

Citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

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California Court of Appeal Strikes Libel Suit Against LA Times

Last month a California Court of Appeal granted an anti-SLAPP motion dismissing libel and false light claims against the *Los Angeles Times* over an article reporting on inaccuracies in a CEO's public resume. *Page v. Los Angeles Times*, 2004 WL 847527 (Cal App. April 24, 2004) (unpublished) (Perluss, J., Johnson, J. and Woods, J).

Beginning its opinion with the observation that "There are three kinds of falsehoods: lies, damn lies and resumes," the Court found that the complained of statements – which pointed out significant overstatements – were either statements of opinion not defamatory, not of and concerning plaintiff or covered by the fair report privilege.

The Court also noted that while "resume puffing once was acknowledged with a wink and a nod," the newspaper's article had to be assessed in the current context of corporate scandals. Thus the newspaper's questions about the motivation for the inaccuracies – without adopting any conclusion – were all non-actionable.

Background

Plaintiff Dorriah Page is the former CEO of Ceryx, a developer of catalytic converters for diesel engines. The *Los Angeles Times*' article reviewed public documents produced by Page and Ceryx, including press releases, Web site postings, Page's resume and a grant application for state funding, and reported that these documents appeared to contain numerous inaccuracies, misstatements and exaggerations about Page and Ceryx.

Among other things, the article reported that Page stated she had a Ph.D in civil engineering and was an associate professor at UC Davis. School records, however, showed her degree was in ecology and she had only worked as a teaching assistant. She and the company claimed to be patent holders, but records showed no patents in their names. Page claimed to be the "founder" of another company named Turbodyne, but officials there disputed that.

After the article was published, Ceryx lost several key funders and ultimately declared bankruptcy and Page lost her position as CEO. She sued over 28 statements in the article, alleging they implied she had intentionally and unethically misrepresented herself and her company in order to secure investors.

Court of Appeals Decision

The trial court denied the newspaper's anti-SLAPP motion, holding that at least a few of the statements were actionable and that plaintiff alleged sufficient special damages.

One statement at issue on appeal was that Page had misstated the origin of her "Entrepreneur of Year" award. A press release claimed the award came from the Economic Development Collaborative of Ventura County. In fact, it came from the local Boy Scouts Council.

The Court of Appeal held this true disclosure could not reasonably imply the plaintiff "deliberately falsified the source of the award."

Another statement at issue – that "Ceryx officials said that they sought to correct and change several discrepancies. However, even after those statements were made, many discrepancies remained on the Web site" – was simply not of and concerning plaintiff.

The newspaper's statement that "at the same time Page said she was helping to found Turbodyne she was selling cars in Westlake Village" was a fair report of two law suits. The trial court had held a question of fact existed as to whether the report was a fair summary of the complaints, but the Court of Appeal significantly noted that resolution of this issue as a matter of law "is particularly appropriate in a SLAPP case because the legislative purpose [is] that unjustified SLAPP's be terminated at an early stage."

Finally, the statement "Page said potential investors, state officials and taxpayers ... shouldn't be concerned about the discrepancies" was not actionable even where Page denied making the statement. Taken in context, according to the court, the statement meant no more than "Don't sweat the small stuff, look at the big picture." And even if it did imply that Page was "irresponsible and callous," as she alleged, the statement was constitutionally protected opinion.

Plaintiff was represented by Paul L. Hoffman, Benjamin Schonbrun, and Michael D. Seplow of Schonbrun Desimone Seplow Harris & Hoffman. The *Los Angeles Times* was represented by Kelli L. Sager, Alonzo Wickers IV, and Jean-Paul Jassy of Davis Wright Tremaine.

While "resume puffing once was acknowledged with a wink and a nod," the newspaper's article had to be assessed in the current context of corporate scandals.

Update: Hearing Scheduled in Appeal of Criminal Libel Convictions in Kansas

Next month the Kansas Court of Appeals will hear the appeal of a newspaper and editor convicted of criminal defamation – the first time in more than 30 years that members of the press have been convicted of criminal defamation in the U.S. *Kansas v. Powers*, No. 90690 (Kan. Ct. App., oral arg. scheduled June 16, 2004).

In July 2002, a fringe newspaper in the Kansas City area, *The New Observer*, and its publisher and editor were convicted by a jury of multiple counts of criminal defamation for reporting that the Mayor of Kansas City and her husband, a judge, lived outside the county in violation of residency laws. *Kansas v. Carson*, No. 01-CR-301 (Kansas Dist. Ct. Wyandotte County jury verdict July 17, 2002). See also *MLRC MediaLawLetter* August 2002 at 5.

The publisher and editor were both ordered to pay \$3,500 in fines, and sentenced to one year unsupervised probation which was suspended pending appeal.

Kansas Statute

The Kansas criminal defamation statute, K.S.A. 21-4004, provides in relevant part:

(a) Criminal defamation is communicating to a person orally, in writing, or by any other means, information, knowing the information to be false and with actual malice, tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such person of the benefits of public confidence and social acceptance; or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends.

In July 1995, following a civil challenge in federal court, the statute was amended to expressly include an actual malice standard (viz. “knowing the information to be false and with actual malice”), but it otherwise substantially tracks an 1868 definition of criminal libel.

Press Amici Challenge Constitutionality

The Associated Press, Dow Jones & Company, Inc., the Kansas Broadcasters Association, the Kansas Press Association and Reuters America LLC made a motion to the Court of Appeal to file an amicus brief in the case challenging the constitutionality of the Kansas criminal defamation statute.

The Court of Appeal only accepts amicus briefs by motion. The press groups argued that criminal defamation law raises serious constitutional issues — a point inadequately briefed by defendants — and therefore the court should accept the brief. The Court of Appeal denied the motion to file without explanation. The amici will file a motion for reconsideration.

The brief argues that the statute violates the First Amendment on its face because the language that attempts to identify what speech is subject to criminal punishment is impermissibly vague and allows for arbitrary and selective enforcement.

Second, amici argue that the statute is unconstitutional under the strict scrutiny standard because Kansas has no interest to investigate and prosecute potentially libelous statements about public officials or people of any kind. Moreover, civil defamation law provides an entirely adequate remedy for complaints about alleged harm to reputation.

Finally, amici argue the statute is simply per se unconstitutional under evolved standards of decency and freedom.

The media amici brief was prepared by David Heller, MLRC; Mike Merriam, Topeka, Kansas; and James Goodale, Jeremy Feigelson and Erik Bierbaur of Debevoise & Plimpton in New York.

Florida Editor Appeals Dismissal of Suit Over Arrest

The editor of *Key West The Newspaper* has filed an appeal of a district court’s dismissal of his § 1983 action against a police chief who arrested him under a Florida law that restricts discussing reports of police misconduct. *Cooper v. Dillon*, No. 04-1150 (11th Cir. filed March 15, 2004).

In dismissing the editor’s complaint against Key West Police Chief Gordon A. Dillon, Florida Southern District Court Judge James L. King held that the statute was a content-neutral time place and manner restriction on speech, and was thus constitutional. See *Cooper v. Dillon*, Civil No. 01-10119 (S.D. Fla. order Feb. 6, 2004); see also *MLRC MediaLawLetter*, Feb. 2004 at 59.

Dillon arrested Cooper after the newspaper published stories tracking a complaint that Cooper had filed against a Key West internal affairs officer for allegedly failing to investigate whether a member of the Key West police force had lied in a traffic court proceeding.

Anti-Cybersquatting Suit Against Consumer Complaint Website Dismissed

In a matter of first impression, the federal district court in New Jersey granted summary judgment in favor of a so-called “cyber-griper” under the Anticybersquatting Consumer Protection Act (“ACPA”), 15 U.S.C. §1125(d). *Mayflower Transit, LLC v. Prince*, 2004 WL 859281 (D.N.J. March 30, 2004).

Judge Jose L. Linares held that the defendant’s decision to purchase Internet domain names similar to plaintiff’s trademark was motivated by dissatisfaction with services rendered by the plaintiff rather than a “bad faith intent to profit,” a distinction that transformed him from a cybersquatter into a “cyber-griper.”

But the court allowed libel and trade libel claims to proceed, holding that a jury could find the complaints false and defamatory.

Background

The case stems from Dr. Brett Prince’s registration of several domain names and postings on his Web sites that are highly critical of Mayflower Transit, a shipping and moving company. Mayflower filed suit on October 30, 2000 against Prince requesting injunctive relief and damages for alleged violations of the ACPA, trademark dilution in violation of Federal Dilution Act (“FDA”), 15 U.S.C. §1125(c), and claims of trade libel and libel under state law.

Prince had contacted Mayflower Transit (“Mayflower”) in September 1997 to arrange a move from West Orange, New Jersey to Freehold, New Jersey. However, because Mayflower is not licensed to engage in intrastate moves in New Jersey, the company relied on agents to conduct such moves. Prince ultimately made an agreement with Lincoln Storage Warehouses (“Lincoln”), purportedly a Mayflower affiliated entity that used boxes and a truck bearing the Mayflower trademark and logo.

During the move, thieves broke into the parked van – which was left unattended overnight – and stole a considerable amount of property.

Domain Names

Prince decided to get even with his moving company by stocking up on Internet Web sites with domain names

similar to the company’s trademark and posting critical commentary warning others against hiring the beleaguered transporter. Prince registered the Internet domain name “mayflowervanlinebeware.com” and posted a website describing his moving incident and provided a link to another page entitled “Don’t let this happen to you” and told readers “Unless you’re willing to risk a total loss of your possessions, do not do business with Lincoln Storage Warehouses or Mayflower Van Lines. What happened to me can and will happen to you!” Prince subsequently registered domain names “mayflowervanline.com” and “lincolnstoragewarehouse.com.”

ACPA Claim

To prevail on an ACPA claim, plaintiff must demonstrate that (1) it has a distinctive or famous mark; (2) defendant’s domain names are identical or confusingly similar to plaintiff’s marks; and (3) the defendant registered its domain name with the bad faith intent to profit from them. 15 U.S.C. §1125(d)(1)(a).

The court found no dispute over whether the first two prongs of ACPA had been met. Mayflower owned a distinctive trademark and Prince’s use of “mayflowervanline.com” was “confusingly similar” to Mayflower’s trademarks.

Rather, the case turned on the court’s scrutiny of the “bad faith” element by analyzing the guiding nine factors as enumerated in the ACPA. Although the majority of the factors favored the Mayflower’s case, the court found that the fourth factor – whether defendant had a bona fide noncommercial or fair use of the mark – to be dispositive. Considering the totality of the circumstances, the court found that Prince’s motivation for registering the domain names was to express his dissatisfaction with Mayflower’s services; an activity referred to in the opinion as “cyber-gripping.”

The court distinguished *Shields v. Zuccarini*, 254 F.3d 476 (3d Cir. 2001), the only previous case in the Circuit to address “protest pages” published on web sites, because the defendant’s in that case used the griping argument as “a spurious argument cooked up purely for the suit” and “did not reflect defendant’s true profit motives.”

(Continued on page 18)

Anti-Cybersquatting Suit Against Consumer Complaint Website Dismissed

(Continued from page 17)

Acknowledging that “excluding cyber-grippers from the scope of the ACPA” could “eviscerate the protections of the bill,” the court suggested that future courts will have to be vigilant in their examination of the entire record to determine whether defendant’s griping defense is merely a “pretext disguising an underlying profit motive.”

Libel and Trade Libel Claims Can Proceed

The court denied summary judgment motions made by both parties on the libel and trade libel claims. The court held that defendant’s Web postings holding plaintiff “at least partially responsible for [his] disastrous moving experience” constituted statements of fact capable of defamatory meaning. Among other things defendant warned readers that “Unless you’re willing to risk a total loss of your possessions, do not do business with Lincoln Storage Warehouses or Mayflower Van Lines. What happened to me can and will happen to you! Don’t be their next victim!”

In addition, questions of fact existed as to whether Mayflower had apparent authority over the local moving company. Therefore the court could not rule on falsity or defendant’s fault as a matter of law.

Negligence Standard Applies

As to fault, the court held, without discussion, that Mayflower was a private figure. Although New Jersey applies the actual malice standard to private plaintiffs where the defamatory statement involves a matter of important public concern, *see Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 N.J. 392, 410 (1995), the court concluded that negligence was the appropriate standard.

The court reasoned that plaintiff was accused of simple negligence in conducting a move — an “everyday service” rather “than an activity which “intrinsically involves a legitimate public interest.”

Plaintiff was represented by George Wright and Narinder Parmer of George Wright & Associates, LLC, Hackensack New Jersey; and Mark Sableman and Elizabeth Eastman of Thomas Coburn LLP, St. Louis, Missouri. Defendant was represented by John Pischeriam and Dennis A, Cipriano, in West Orange, New Jersey.

9th Cir. Grants Rehearing En Banc in *Gator.com v. L.L. Bean*

The Ninth Circuit granted a motion for rehearing en banc in *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072 (9th Cir. 2003), *motion for rehearing en banc granted*, 2004 WL 928247 (9th Cir. April 29, 2004).

In September 2003, a panel consisting of Judges Warren Ferguson, Melvin Brunetti and Wallace Tashima held that California had general jurisdiction over Maine-based clothing retailer L.L. Bean “in light of L.L. Bean’s extensive marketing and sales in California, its extensive contacts with California vendors, and the fact that ... its website is clearly and deliberately structured to operate as a sophisticated virtual store in California.” *See also MediaLawLetter* Sept. 2003 at 42.

In the underlying litigation, Gator, an Internet marketing company now known as Claria, sought a declaratory judgment that its pop-up advertisement computer program does not infringe or dilute L.L. Bean’s trademarks and does not constitute unfair competition, fraud or false advertising.

Supreme Court Refuses to Hear Copyright Damages Case

The Supreme Court declined to hear an appeal in a copyright case involving the extent of damages recoverable under U.S. copyright laws for infringements that have effects overseas. *Los Angeles News Service v. Reuters Television International, Ltd.*, 340 F.3d 926, 31 Media L. Rep. 2172 (9th Cir. 2003), *cert. denied*, 2004 WL 1085504 (No. 03-965)(May 18, 2004).

At issue was the use of news video of the beating of Reginald Denny — the white truck driver beaten on a Los Angeles street following the acquittal of police officers in the 1992 Rodney King trial. LANS filmed the incident from its helicopter during the Los Angeles riots. It sued Reuters for distributing the video to international subscribers without permission.

A divided Ninth Circuit panel held that a plaintiff can only recover additional profits earned by the infringer overseas flowing from the domestic infringement — not “actual damages” i.e., plaintiff’s losses from the extraterritorial distribution. *See MediaLawLetter* September 2003 at 41.

Cases Consider Scope of Section 230 Immunity

§ 230 Protects Adult Entertainment Website

In a robust application of Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230, a D.C. federal district court held that an adult entertainment website was immune for claims over an advertisement featured on the site. *Ramey v. Darkside Productions, Inc.*, No. 02-730 (D.D.C. April 14, 2004).

The plaintiff, a nude dancer, sued the operator of the website www.eros-guide.com for intentional infliction of emotional distress, unjust enrichment and fraud after her picture was used without consent in an online advertisement for an apparent escort service.

The website contains advertisements for escorts, dancers and massage. Advertisers supplied the website operator with photographs and accompanying text on a prepaid monthly basis. Defendant categorized the advertisements geographically and by subject matter, and added its watermark and web address to the photographs.

Judge Gladys Kessler granted summary judgment to the defendant, holding that the site receives full immunity under Section 230, citing among other cases the Ninth Circuit's decision in *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1124 (2003) ("so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process").

Judge Kessler concluded that "because Defendant did no more than select and make minor alterations ... it cannot, as a matter of law, be considered the content provider of the advertisement for purposes of § 230."

No § 230 Immunity for Complaint Website

In contrast, a Texas court held that two consumer complaint websites were not immune under § 230 for third party complaints posted on the sites. *MCW, Inc. v. Badbusinessbureau.com*, 2004 WL 833595 (N.D. Texas April 19, 2004) (Fish, Chief J.).

Plaintiff, a career counseling service, sued the operators of the websites www.ripoffreport.com and www.badbusinessbureau.com for trademark infringement, false advertising, unfair competition and disparagement.

The court held that plaintiff failed to state any federal claims because defendants' use of plaintiff's marks was

non-commercial. The court dismissed the pendent state law claims for lack of subject matter jurisdiction. But along the way it issued an extremely narrow decision on § 230.

The websites operate in part as consumer complaint forums. They organize consumer complaints geographically, by company name and service. The complaints also appear under various report titles, including "Con Artists," "Scam," and "Corrupt Companies."

In rejecting a motion to dismiss based on § 230 immunity, the court found that certain statements at issue were clearly written by the defendants. For example, defendants allegedly responded to one consumer posting about plaintiff with the comment – "we will not rest until [plaintiffs] either change their fraudulent practices or are run out of business."

But the court further explained that defendants were not entitled to § 230 immunity because the websites' category titles and headings were themselves disparaging in combination with the third party complaints. As the court explained:

The titles and headings are clearly part of the web page content. Accordingly, the defendants are information content providers with respect to the website postings and thus are not immune from [plaintiff's] claims.

Moreover, the court found that the defendants were not entitled to immunity under Section 230 where plaintiff alleged that defendants encouraged a consumer to provide photographs for use on one website. "These allegations ... suggest — at a minimum — that the defendants are responsible for the materials created and developed by the consumer."

As the court explained:

[A]ctively encouraging and instructing a consumer to gather specific detailed information is an activity that goes substantially beyond the traditional publisher's editorial role. The defendants are clearly doing more than making minor alterations to a consumer's message. They are participating in the process of developing information.

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§ 230 Protects Adult Entertainment Website

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In a footnote the court added that under Section 230 a court is required not only to determine whether a party creates or develops content, but whether it is *responsible* for the content.

Citing to § 230 (f) (3) – which defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service” the court concluded that a party may be responsible for information created by a third party “without actually creating or developing the information itself” – a distinction it said the *Carafano* court “ignored.”

Plaintiffs were represented by Thomas B. Walsh, IV, of Fish & Richardson, Dallas, TX. Defendants were represented by J. Garth Fennegan, Settle & Pou, Dallas, TX; and Maria Crimi Speth, Grant Williams, Phoenix, AZ.

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Supreme Court Denies Cert. in Missouri Limited Purpose Public Figure Doctrine Case

By Benjamin Lipman

The United States Supreme Court recently ended defamation litigation brought by Chad and Terri Sigafus against St. Louis Post-Dispatch LLC and two of its reporters. *Sigafus v. St. Louis Post-Dispatch L.L.C.*, 109 S.W.3d 174 (Mo. App. E.D. 2003), *cert. denied*, 124 S. Ct. 1413 (Feb. 23, 2004).

The U.S. Supreme Court let stand the opinion of the Missouri Court of Appeals written by Hon. Sherri B. Sullivan, and joined by Hon. William H. Crandall, P.J., and Glenn A. Norton, J., which found the Sigafuses to be public figures. Prior to that decision, the Missouri Court of Appeals for the Eastern District had not discussed the parameters of the limited purpose public figure doctrine.

Articles About The Christian Identity Movement

The case stemmed from a March 5, 2000, group of articles in the *St. Louis Post-Dispatch*. The articles discussed the Christian Identity movement and an event in southwest Missouri called the Gospel Gathering. The Gospel Gathering was an annual event that included secular and Christian music, plus preaching.

Many of the speakers and musicians had been self-proclaimed adherents of the Christian Identity philosophy. The Sigafuses attended the 2000 Gospel Gathering and played children's and Christian music at the event, plus Chad Sigafus provided the sound engineering for the gathering, all at no cost, as the Sigafuses had done similarly in previous years.

The articles discussed the event itself and discussed various beliefs ascribed to the Christian Identity philosophy, as well as some of the more extreme acts and proclamations of some Christian Identity adherents. The Sigafuses were listed as affiliates of the Christian Identity movement, a designation they maintained was false. The Sigafuses also claimed they did not adhere to the offensive teachings listed for Christian Identity, nor had they committed any of the acts attributed to other, named people.

Christian Identity Doctrine

Christian Identity is a religious doctrine that claims that the true identity of god's chosen people (the Israelites of the bible) are today's white, Anglo-Saxon, Germanic, Celtic and "kindred" peoples ("Aryans"). The philosophy holds that the Jews of today are not the descendants of the Israelites of the bible, but rather Aryans are the true chosen people and are descended from the lost tribes of Israel.

Hence the true identity of Christians (well, certain Christians) is that of the Israelites of old. Some Christian Identity adherents claim that Jews are descended from the offspring of a mating between Eve and Satan in the Garden of Eden, and non-whites are something less than Aryans and do not descend from Adam or Eve (some suggest that non-whites are the beasts of the field mentioned in the biblical book of Genesis). Most of the self-proclaimed leading preachers in the Christian Identity movement have preached white supremacy and anti-Semitism.

Plaintiffs Are Limited Public Figures

The Sigafuses were not happy when Defendants (hereinafter, "*St. Louis Post-Dispatch*") linked them to Christian Identity, and the Sigafuses sued for defamation. The trial court granted *St. Louis Post-Dispatch's* motion for summary judgment, holding that the Sigafuses were public figures and could not prove actual malice. The Missouri Court of Appeals, Eastern District, affirmed.

The Sigafuses claimed that they were not public figures because they did not have sufficient "access to the media, did not voluntarily rise to the forefront or seek to influence the outcome of the controversy, were not prominent as to the issues raised, and merely sought to promote their wholesome music by appearing at the Gospel Gathering." *Sigafus v. St. Louis Post-Dispatch L.L.C.*, 109 S.W.3d 174, 176.

However, the Sigafuses had insisted that they were nationally recognized performers of children's music. *Id.* at 177. Moreover, over the years, they sent out promotional materials to the media, they solicited and received reviews of their music from newspapers and magazines, and the Sigafuses provided interviews to radio stations and newspapers. *Id.* at 177-78.

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Supreme Court Denies Cert. in Missouri Limited Purpose Public Figure Doctrine Case

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Based on the evidence, the Court concluded that

“[the Sigafuses] were well known to a wide audience of people, interested in religious and children’s music... [T]he evidence projects a picture of people who ‘commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements.’”

Id. at 178 (quoting *Warner v. Kansas City Star Co.*, 726 S.W.2d 384, 385-86 (Mo. App. W.D. 1987)).

The Court further found that the Sigafuses’ activities inherently invited public attention because of the religious nature of their public performances, as well as the tapes and CDs they disseminated. *Id.*

The Sigafuses’ status as limited public figures does not limit the statements made about them children’s music. “Not only were [the Sigafuses] limited public figures in their own right, but they also interjected themselves into the Christian Identity Movement controversy.”

Plaintiffs Injected Themselves Into Controversy

Ultimately, the Sigafuses claimed that while they were limited purpose public figures for purposes of a discussion about their production of children’s music, the complained of statements had nothing to do with that subject. *Id.*

Importantly, the Court rejected the Sigafuses analysis and held that the Sigafuses’ status as limited public figures does not limit the statements made about them children’s music. “Not only were [the Sigafuses] limited public figures in their own right, but they also interjected themselves into the Christian Identity Movement controversy.” *Id.* The Court then explained the facts that lead to that conclusion.

The Court found that the Sigafuses had “on numerous occasions voluntarily and without a performance fee... performed music onstage at public events featuring Christian Identity Movement speakers. In 1996, Chad Sigafus acted as videographer and principal editor of a videotape, prepared for public sale, on which he also performed, entitled ‘IDENTITY, Identifying God’s Chosen’ (Identity Tape).” *Id.* at 179.

The Identity Tape espoused Christian Identity views, including that whites are god’s chosen people and including condemnation of Jews as well as whites who associate with non-whites. *Id.* The Court did not get further into the details of the Identity Tape, but did explain the tone of the tape and the relationship between the speakers on the tape and the Sigafuses. “Suffice it to say the views are clearly racist and anti-Semitic,” the Court held. “These same speakers and participants organized, promoted or spoke at events at which [the Sigafuses] later publicly performed an participated.” *Id.*

The Court then proceeded with a year-by-year recap of the various events at which the Sigafuses performed or were in attendance and at which Christian Identity speakers also

performed, together with a recitation of some of the controversial statements made by the various speakers. Finally, the Court found that the

“views presented in the Identity Tape and espoused by its creators

and participants are clearly racist and anti-Semitic, and therefore controversial. Also clear is that [the Sigafuses] interjected themselves into this controversy by their participation in the creation of the Identity Tape,... ***shown to millions*** (emphasis in the original),... and by their frequent performance, as ‘***nationally known recording artists,***’ (emphasis in the original) in their own words, at subsequent gatherings of Identity Tape speakers and creators.” *Id.* at 179-80.

The Sigafuses Could Not Prove Actual Malice

Next the Court analyzed the Sigafuses’ arguments relating to actual malice. The Sigafuses claimed that the *St. Louis Post-Dispatch* “falsely attributed the source of their information that [the Sigafuses] were affiliates of the Christian Identity Movement to the Southern Poverty Law Center.” *Id.* at 180.

However, the Court held that there was no evidence that any incorrect attribution was more than a mistake, and,

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therefore, the claim could not support an allegation of actual malice because “[n]egligence is ‘constitutionally insufficient to show the recklessness that is required for a finding of actual malice.’” *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 286-88 (1964); *Glover v. Herald Co.*, 549 S.W.2d 858, 861 (Mo. banc 1977)). The Court also mentioned that there was no evidence that the *St. Louis Post-Dispatch* knew of any inaccuracy of the source at the time of publication.

The Sigafuses also contended that the articles implied that the FBI determined that the Sigafuses were affiliates of the Christian Identity movement. However, the Court dismissed this argument because the *St. Louis Post-Dispatch* “presented evidence that they relied on sources other than the FBI to ascertain [the Sigafuses’] role in the Christian

Identity Movement... [and] honestly believed when they published the article, and still do believe that [the Sigafuses] were and are affiliates of the Christian Identity Movement.” *Id.* at 180-81.

Conclusion

The case demonstrates that public figures cannot insulate themselves from criticism for controversies of which they are integrally a part simply by not speaking out on the most controversial aspects of the controversy.

Plaintiffs were represented by Robert Chase Seibel, of Seiber & Eckenrode Law Offices, in Clayton, Missouri.

Benjamin Lipman, a member of Lewis, Rice & Fingersh L.C. in St. Louis, Missouri, represented the St. Louis Post-Dispatch LLC and its reporters in this case.

Law Firm’s Efforts to Obtain Prior Restraint Against Newspaper and Reporter Fail

By Kent Raygor

On April 20, 2004, the *Oakland Tribune* began reporting on purportedly privileged and confidential documents. The documents that the newspaper received involve international law firm Jones Day’s evaluation of the legal predicaments faced by its client, Diebold, surrounding the effectiveness and integrity of Diebold’s electronic voting machines in California and elsewhere.

Law Firm Seeks Injunction

On April 20, Jones Day arrived in a Los Angeles Superior Court with six lawyers and a complaint for conversion, unfair competition and misappropriation of trade secrets against the newspaper’s parent company, MediaNews Group, and *Oakland Tribune* reporter Ian Hoffman. *Jones Day v. MediaNews Group et al.*

At a hearing that afternoon, Jones Day, the plaintiff in the lawsuit, went before a judge demanding the return of the documents, including the reporter’s notes about the documents, and an order restricting the publication of the documents’ contents. The Jones Day team was led by former California appellate justice Elwood Lui.

Jean-Paul Jassy of Sheppard, Mullin, Richter & Hampton, on behalf of the media defendants, argued that any restriction on publication would be an unconstitutional prior restraint, invoking the Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), and the Supreme Court’s recent decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001) to remind the Court that even supposedly stolen material could be published.

Jassy also cited *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232 (2000), to explain that even the publication of supposedly privileged material does not warrant a prior restraint; and it defended the newspaper’s right to retain the documents under the First Amendment and California’s shield law.

Court Refuses to Restrain Publication

After a three-hour hearing, Superior Court Judge Dzintra Janavs refused to issue an order restraining publication of the contents of the documents, but did issue a narrow order that documents marked privileged be returned to the Court, under seal, except for those documents that already had been published on the Internet.

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Law Firm's Efforts to Obtain Prior Restraint Fail

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Two days later, on April 22, the media defendants filed a special motion to strike Jones Day's complaint under the California anti-SLAPP statute, Code of Civil Procedure § 425.16, arguing that each cause of action in Jones Day's complaint failed and that Jones Day had no constitutional remedy against the media. On April 23, the media defendants filed a notice of appeal from the April 20 order, and on April 26 the defendants complied with the April 20 order.

On April 30, the media defendants filed an emergency writ in the Court of Appeal, arguing that the April 20 order was a de facto prior restraint (because it prevented publication of the entire documents), that it interfered with the constitutional right to gather the news, and that it violated the rules regarding the sealing of court documents.

Law Firm Dismisses its Case

Jones Day never opposed the writ petition. Instead, on May 5, Jones Day unilaterally moved to voluntarily dismiss its case. On the same day, the Court of Appeal issued an alternative writ and order to show cause why the April 20 order should not be vacated in its entirety.

On May 11, the trial court dismissed Jones Day's complaint, vacated the April 20 order and directed the Clerk of

the Court to immediately return the documents to the media defendants. The media defendants still have the option of pursuing their attorneys' fees and costs against Jones Day under the anti-SLAPP statute, despite Jones Day's voluntary dismissal.

Despite repeated efforts by Jones Day to silence the *Oakland Tribune*, the law firm never succeeded in restricting the newspaper's right to report on the contents of the documents. The documents – which were all legally acquired by the newspaper – were never returned to Jones Day. And the Court of Appeal expressed its disapproval of the narrow – but still unconstitutional – order entered by the trial court. Finally, the newspaper retrieved all of its documents, and still has the option of pursuing its attorneys' fees from Jones Day.

Jones Day was represented by Elwood G. Lui, Daniel D. McMillan, Kevin Dorse, Philip E. Cook and Erich R. Luschei of Jones Day in Los Angeles, CA.

Kent Raygor is a partner at Sheppard, Mullin, Richter & Hampton LLP in Los Angeles. He represented MediaNews Group and reporter Ian Hoffman together with Gary Bostwick, Amy Johnson Harrell and Jean-Paul Jassy.

NJ Supreme Court Dismisses Libel Suit Against Newsletter Publisher

The New Jersey Supreme Court entered summary judgment dismissing a police officer's libel and related claims against a private individual who self-published a newsletter critical of the officer. *Hill v. DeAngelis*, 2004 WL 1047640 (N.J. May 11, 2004).

Background

Following a parking and traffic court dispute, the defendant created a newsletter and distributed it to every home in his town. Among other things, it stated "Woodcliff Lake Police Accused of Perjury." The newsletter complained that the officer lied in the traffic court proceeding. The defendant had also secretly recorded his encounter with the officer and the newsletter included portions of these conversations.

The trial and appellate courts both denied defendant's motion for summary judgment. The trial court held that the

statements at issue were not protected opinion; and that sufficient evidence of actual malice existed based on the defendant's motive to discredit the officer following the parking dispute.

New Jersey Supreme Court Decision

Reversing and remanding for dismissal, the New Jersey Supreme Court held that there was insufficient evidence of actual malice – indeed "the evidence clearly demonstrated that defendant believed the statements were true." Moreover, it reaffirmed that actual malice has "nothing to do with hostility or ill will," such as defendant's motive "to strike back at the police officer."

Plaintiff was represented by Kevin C. Corriston, Breslin and Breslin. Defendant was represented by John C. Connell, Archer & Greiner, in Haddonfield, New Jersey.

D.C. Circuit Limits the Scope of the Presidential Communications Privilege in *Judicial Watch, Inc. v. Dept. of Justice*

By Alia L. Smith

A divided panel of the D.C. Circuit Court of Appeals declined to expand the Presidential communications privilege, holding that it does not apply to documents generated by the Deputy Attorney General and Pardon Attorney in the course of advising the President on pardon decisions, unless the documents were ‘solicited and received’ by the President or his immediate advisers in the Office of the President.” *Judicial Watch, Inc. v. Dept. of Justice*, 2004 WL 980826 (D.C. Cir. May 7, 2004).

The Internal Justice Department documents “that never make their way to the Office of the President,” are covered, if at all, by the deliberative process privilege, the court ruled.

The FOIA Requests

In early 2001, Judicial Watch filed FOIA requests with the Department of Justice (“DOJ”) seeking documents concerning any pardons that former President Clinton granted or considered in January of 2001. One request was directed to the Office of the Pardon Attorney and the other to the Office of the Deputy Attorney General.

DOJ released thousands of pages of documents in response to these requests, but withheld 4,341 pages pursuant to 5 U.S.C. § 552(b)(5) (“Exemption 5”), which exempts from disclosure any “inter-agency or intra-agency memorandums or letters which would not be available by law to a party.” Specifically, DOJ invoked the Presidential communications privilege and the deliberative process privilege (which are encompassed within Exemption 5) to withhold various categories of documents, including internal DOJ documents never submitted to the President or his staff.

The Presidential communications privilege can be invoked when the President is “asked to produce documents or other materials that reflect Presidential decision making and deliberations and that the President believes should remain confidential.” *Id.* at *4 (citing *In Re Sealed Case*, 121 F.3d 179, 744 (D.C. Cir. 1997)). The deliberative process privilege “protects ‘confidential intra-agency advisory opinions’ and ‘materials reflecting deliberative or policy-making processes.’” *Id.*

The Presidential communications privilege is more difficult to defeat than the deliberative process privilege, and is broader, in that it covers entire documents, whether pre-deliberative or post-decisional.” *Id.*

The Lawsuit

Seeking the 4,341 documents withheld by DOJ, Judicial Watch commenced an action in the U.S. District Court for the District of Columbia. The district court granted DOJ’s motion for summary judgment, holding that the documents were properly withheld under the Presidential communications privilege pursuant to Exemption 5, despite the fact that the privilege previously had only been applied to documents involving members of the White House staff, and not to other agency employees. *Id.* at *2.

The district court found that the privilege should be extended to include documents that had been created for the “sole” purpose of advising the President on a “quintessential and nondelegable Presidential power.” *Id.*

On appeal, DOJ took the position, which had been adopted by the district court, that the Presidential communications privilege should apply to all documents “that are generated in the course of preparing pardon recommendations for the President.” *Id.* at *3. Judicial Watch, on the other hand, argued that the privilege should encompass only those documents that were “solicited and received” by the President or his advisers. Any other documents would be exempt, if at all, under the deliberative process privilege.

The Limits of the Presidential Privilege

To determine the limits of the Presidential communications privilege, the court first examined *In Re Sealed Case*, 121 F.2d 729 (D.C. Cir. 1997). *Sealed Case* extended the Presidential communications privilege to include not only documents viewed by the President himself, but also to documents viewed by his closest White House advisers.

The test established in that case asks whether the documents at issue were “solicited and received” or authored by the President or his closest advisers. As the Judicial Watch court explained:

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D.C. Circuit Limits the Scope of the Presidential Communications Privilege in *Judicial Watch, Inc.*

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The privilege extends to the President's immediate advisors because of the need to protect 'candid, objective, and even blunt or harsh opinions,' for as the Supreme Court has recognized, 'a President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.

Id. at *5 (citing *United States v. Nixon*, 418 U.S. 683, 708 (1974)). The court cautioned that "the privilege should not extend to staff outside the White House in executive branch agencies." *Id.* at *6.

Because the pardon documents at issue in this case originated in other agencies (i.e., not in the White House), and went through various stages of review at DOJ before submission to the President and his staff, the court held that the privilege did not apply. The same concerns about promoting candor in Presidential communications simply are not present where the documents at issue are so far removed from the President, the court said.

Communications which are never received by the President or his White House advisers would not likely reveal secret or confidential Presidential deliberations. Communications that are "solicited and received" by the President or his advisers remain privileged. The court reasoned that extending the privilege outside a small circle of White House advisers to the Pardon Attorney and the Deputy Attorney General and their staffs would be contrary to precedent and would "considerably undermine the purposes of FOIA to foster openness and accountability in government." *Id.* *8.

Pardon Attorney and Deputy AG Not Close Advisers

The court turned next to DOJ's argument that the Pardon Attorney was effectively a member of the immediate White House staff, and therefore documents he authored, solicited or received should be covered by the privilege.

Rejecting this argument, the Court recognized that "the organization of governmental functions is of significance for purposes of FOIA." *Id.* at *9. Because the pardon attorney works for DOJ, and submits his recommen-

dations for review and intermediate decision-making to the deputy attorney general, he cannot be considered a close White House adviser. *Id.* *10-11. He is at least "twice removed" from the President.

The court similarly rejected the argument that the attorney general or deputy attorney general were "close" Presidential advisers, because their "sole function" was not to advise the President. Rather, the attorney general's primary responsibility was to head DOJ. "Extension of the Presidential communications privilege to the Attorney General's delegatee, the Deputy Attorney General, and his staff, on down to the Pardon Attorney and his staff, with the attendant implication for expansion to other Cabinet officers and their staffs, would ... 'pose a significant risk of expanding to a large swath of the executive branch privilege that is bottomed on a recognition of the unique role of the President.'" *Id.* at *11.

The court refused to adopt the "functional approach" urged by DOJ, under which the documents at issue would have been covered because "they are produced for the sole function of assisting the Deputy Attorney General in presenting pardon recommendations for the President," opting to define the privilege not by the nature of the documents requested and the purpose for which they were created, but instead by the nature of the people viewing and relying on the documents. To hold otherwise "would have far-reaching implications for the entire executive branch that would seriously impede the operation and scope of FOIA." *Id.* *10.

Nor, in the majority's view, does the privilege apply to all documents emanating from the Office of the Pardon Attorney because his "'sole' responsibility [is] to advise the President on his pardon duty." *Id.* at *12. This approach ignores the internal workings of the Justice Department, particularly that the deputy attorney general, and not the pardon attorney, is the one who makes the final decisions on the pardon recommendations to be submitted to the President.

Adopting this approach would mean that every document having to do with pardons would be subject to the privilege because all pardon documents are created pursuant to a standing request by the President to the Attor-

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D.C. Circuit Limits the Scope of the Presidential Communications Privilege in *Judicial Watch, Inc.*

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ney General to provide pardon recommendations. The court held that this interpretation of the privilege was conceptually troubling for at least two reasons.

First, it would mean that nearly every document created, solicited, or received by the entire executive branch would come within the privilege, because, to some extent, the executive branch exists to advise the President in the performance of his Article II duties.

Second, extending the privilege would be “inconsistent with [DOJ’s] historical approach of invoking the deliberative process privilege rather than the Presidential communications privilege to protect its internal documents and deliberations from disclosure.” *Id.*

Deliberative Process Privilege May Apply

Although the Court ruled that the Presidential communications privilege does not apply, it found that the documents should be evaluated under the deliberative process privi-

lege, the privilege that DOJ historically has claimed with respect to these types of documents. *Id.* at *12. The court therefore remanded the case to the district court, with instructions that internal DOJ documents should be examined pursuant to the deliberative process privilege.

In dissent, Judge Randolph would have affirmed the reasoning of the district court. Characterizing the majority as relying on an “organizational chart” to define the privilege, he argued that there is no principled distinction between the working papers of the Pardon Attorney, for example, and the working papers of the White House staff, when both are created for the purpose of advising the President. “In short, the Pardon Attorney’s proximity to the President is not the key. It is the function the Pardon Attorney performs that should have controlled.” *Id.*

Paul J. Orfandes represented *Judicial Watch*. Mark B. Stern, Peter D. Keisler, Roscoe C. Howard, Jr., Gregory G. Katsas and Michael Raab represented the Justice Department.

Alia Smith is an associate at Levine Sullivan Koch & Schulz, L.L.P. in its New York office.

South Dakota Governor Has No Power to Seal Pardons

By Craig Pfeifle

The Supreme Court of South Dakota held this month that the governor has no statutory or constitutional right to seal so-called executive privilege pardons – pardons issued directly by the governor pursuant to the state constitution. *Doe v. Nelson*, 2004 SD 62 (May 5, 2004).

Background

For approximately 20 years, the governor’s office in South Dakota had ordered all executive privilege pardons filed under seal. In January of 2003, a reporter for the *Sioux Falls Argus Leader* requested a list from the South Dakota Secretary of State of those pardoned by the governor between 1995 and 2002. The Attorney General’s office determined that these pardons were public records under South Dakota law, and the Secretary of State announced the pardons would be made public.

Those pardoned applied for a writ of prohibition requiring the Secretary to keep the pardons under seal. After a hearing, the trial court determined that the governor’s con-

stitutional power to issue pardons included the authority to seal them. The Secretary of State and the Board of Pardons appealed to the Supreme Court of South Dakota and a number of news organizations participated as amici curiae.

Governor Sealed 279 Pardons

In reviewing the news media request for a list of those pardoned by the governor between 1995 and 2002, the Secretary of State found that the governor had issued 279 pardons under seal during that time period.

All of the pardons filed by the governor’s office cited to S.D.C.L. § 24-14-11 as authority for their sealing. That statute provides that pardons issued under S.D.C.L. Chapter 24-14, those issued under review or recommendation by the Board of Pardons and Paroles, are to be sealed.

The pardons at issue, however, were *not* subject to Board recommendation or review. They were all granted by the Governor under the S.D. Constitution, Article IV, Section, 3, which allows the governor to “grant pardons.”

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South Dakota Governor Has No Power to Seal Pardons

(Continued from page 27)

Governor's Right to Seal Pardons

The Court noted that South Dakota has a two-pronged pardons scheme: 1) pardons issued by the governor with involvement by the Board of Pardons and Paroles, which "may be sealed per SDCL §24-14-1" and 2) pardons granted solely by the governor without Board input.

The Court considered only the narrow issue of whether the governor has statutory or constitutional authority to seal the latter. It did not address whether the news media has a First Amendment right of access the former – pardons sealed with Board input per SDCL 24-14-11.

No Power to Seal Granted Pardons

The trial court, in granting the applicants' writ, held that the Governor's constitutional power to grant pardons was broad enough to vest in the governor the power to seal granted pardons. The Supreme Court disagreed, holding that nothing in the South Dakota Constitution vested in the

governor's office the right to keep those pardons private and within the governor's "private domain."

The applicants for the writ also raised privacy concerns, but the Court refused to consider the merits of that position, noting that the pardons were not part of the court's record, and the court could not act on that argument. The Court did state, however, that since the underlying conviction was a matter of public record, the applicant for a pardon would likely be better off with a pardon publicly granted than no pardon at all.

The Court dissolved the trial court's writ of prohibition, thus making the pardons at issue subject to the state's public records statute.

Thomas K. Wilka of Hagen, Wilka & Archer, P.C., Sioux Falls represented the applicants. Jon E. Arneson, Sioux Falls, South Dakota, represented the Amici Curiae.

Craig Pfeifle is a partner with Lynn, Jackson, Shultz and Lebrun, P.C. in its Rapid City, South Dakota, office. He frequently represents media interests in South Dakota.

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Update: New Jersey Appeals Court Reverses Contempt Findings Against Four Philadelphia Inquirer Reporters

By Amy Ginensky and Michael Baughman

On May 4, 2004, the Appellate Division of the Superior Court of New Jersey, in a per curiam opinion, reversed the contempt convictions of four reporters for *The Philadelphia Inquirer*. *In the Matter of Gamardello, et al*, No. A-5416-01T1 (N.J. App. May 4, 2004). See also *MediaLawLetter* May 2002 at 27; June 2002 at 51.

The lower court had found the reporters in contempt of an order which prohibited the media from interviewing discharged jurors in the highly publicized murder case of Rabbi Fred Neulander. The Appellate Division found that, in fact, there was no evidence that the reporters had violated the order since the only evidence was that the reporters had *attempted* to interview and contact the discharged jurors, and that conduct was not prohibited by the order.

Background

The underlying murder case was probably one of the most publicized trials in New Jersey's history. Fred Neulander, a popular rabbi in southern New Jersey, was charged with hiring a hit man to kill his wife.

On July 18, 2001, shortly before jury selection began in the case, the trial judge entered a "media order" governing the conduct of the case going forward. Among other things, paragraph 13 of the Order prohibited the media from publishing the names of jurors and paragraph 15 prohibited the media from any "contact or attempt to interview" jurors. Emergency appeals of that order failed to yield a ruling on the merits.

Meanwhile, the trial resulted in a hung jury. After a mistrial was declared, on November 14, 2001, the trial judge refused to modify paragraphs 13 and 15 of the Order and also prohibited media representatives from "conducting interviews with any discharged juror in this case" and identifying the "discharged jurors."

Shortly thereafter, several articles appeared in *The Philadelphia Inquirer* which identified the names of the dis-

charged jurors, and referred to contacts with them. On December 13, 2001, the trial judge issued an order to show cause why the four reporters of the articles should not be held in contempt.

Prior to the contempt hearing, the New Jersey Supreme Court ruled that prohibiting the publication of juror names was an unconstitutional prior restraint, but prohibiting interviews of discharged jurors until the completion of the retrial was constitutional because the case involved the death penalty. See *State v. Neulander*, 173 N. J. 193 (2002).

Reporters Held in Contempt

At the contempt hearing, the trial court found all the defendants guilty of violating the order by publishing the jurors' names. The court also found three of the four defendants guilty for having violated paragraph 15 of the Court's November 14, 2001 order for attempting to interview and contacting the discharged jurors. It did so even though there was no evidence that any of the defendants had, in fact, interviewed any of the discharged jurors. While several of the discharged jurors testified that some of the reporters had tried to talk to them, there was no evidence that any interviews, in fact took place.

No Evidence that Reporters Violated Order

After noting that the contempt finding for publishing the names of jurors was unconstitutional under the New Jersey Supreme Court's *Neulander* decision, the Appellate Division discussed the finding of contempt for alleged violations of paragraph 15 of the media order. The Court agreed with defendants' argument that there was no evidence that they had violated the order. The court pointed out that the July 18, 2001 Order prohibited not only interviews of jurors, but also attempts to interview

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The Appellate Division found that, in fact, there was no evidence that the reporters had violated the order since the only evidence was that the reporters had attempted to interview and contact the discharged jurors, and that conduct was not prohibited by the order.

New Jersey Appeals Court Reverses Contempt Findings Against Four Philadelphia Inquirer Reporters

(Continued from page 29)

jurors. The November 14, 2001 Order, by contrast, contained no such prohibition with respect to discharged jurors. Because the only evidence in the record related to *attempts* to contact discharged jurors, the court found that the order had not been violated. Having decided the case on these simple grounds, the court did not need to address the numerous constitutional issues raised by defendants in their briefing.

Amy Ginensky and Michael Baughman of Dechert LLP, represented the four reporters together with Thomas J. Cafferty of McGimpsey & Cafferty, Morris Pinsky, and Carl D. Poplar, of Poplar & Eastlack. Frank Muroski, Deputy Attorney General, argued for the State of New Jersey.

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Montana University “Policy Committee” Meetings Must Be Open to the Public

By Kevin Twidwell

Advisory meetings between Montana’s top higher education official and a committee of high-level university system officials – closed to the public for years – are subject to Montana’s open meeting laws and cannot be conducted behind closed doors, the Montana Supreme Court ruled recently. *Associated Press v. Crofts*, 2004 MT 120 (Mont. May 4, 2004). The opinion and the parties’ briefs are available at: www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-9866

In a 5-2 vote, the Court rejected the state’s argument that meetings between the Commissioner of Higher Education and university administrators, including presidents and chancellors of various schools, were essentially informal, staff meetings not required to be open to the public.

Background

Between June 30, 1999 and December 7, 2001, Commissioner Richard A. Crofts met fourteen times with a “Policy Committee” of administrators, including presidents and chancellors of the state’s universities and colleges. The Committee, later known as the Senior Management Group, advised Crofts on various policy and legislative issues at the meetings.

Crofts canceled a fifteenth meeting in February 2002 when a reporter from the Associated Press refused to leave. Shortly thereafter, the Associated Press and other media organizations filed an action against the Commissioner seeking a declaration that the meetings were subject to Montana’s Open Meetings Act. The lower court found for the news organizations, and the Commissioner appealed.

Public Body or Staff Meeting?

On appeal, the Commissioner argued that the Policy Committee was not a “public body” and did not conduct “meetings” as contemplated by the Montana Constitution or the Open Meetings Act because it had no definite membership, no specific charter or goals, was not created by a specific order of the Board of Regents and does not vote or take direct action on issues raised at the meetings. Instead, the Commissioner argued that the meetings were akin to staff meetings. (Appellant’s Brief at 2-4)

The Court rejected this argument, noting that the Committee discussed policy changes, tuition and fee changes, budgeting issues, contractual issues, employee salaries and legislative initiatives and advised the Commissioner on issues of public concern. 2004 MT 120, slip op. at 7-8, 11.

Noting that the “whether advisory committees are public bodies subject to the open meeting laws has been recognized as presenting special problems for courts,” the Court set out a non-exhaustive list of relevant factors, including 1) whether the committee deliberates rather than simply gathers facts and reports; 2) whether the deliberations concern matters of policy rather than merely ministerial or administrative functions; and 3) whether the committee’s members have executive authority and experience. 2004 MT 120, slip op. at 8-9.

Here the Court concluded that the Policy Committee was not merely a fact finding body, but that it “met to deliberate on matters of substance” and was thus subject to the state’s Open Meetings Act.

The Associated Press and other media companies were represented by Ronald Waterman and Laura Vachowski of Gough, Shanahan, Johnson & Waterman in Helena, Montana. The Commissioner was represented by Leroy Schramm of the Montana University System.

Kevin A. Twidwell is with the law firm of Garlington, Lohn & Robinson, PLLP, in Missoula, Montana.

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Ohio Supreme Court Rejects Newspaper's Request for Sealed Criminal Trial Record

The Ohio Supreme Court rejected a request by the Cincinnati Enquirer for access to a criminal case record that had been sealed following the defendant's acquittal. *State ex rel. Cincinnati Enquirer v. Winkler*, 805 N.E.2d 1094 (Ohio April 14, 2004).

In a unanimous decision, the Court held that an Ohio statute that permits post-acquittal sealings of criminal case records is not overbroad and does not violate the press and public's First Amendment right of access to criminal proceedings.

Background

In September 2001, Hamilton County Municipal Court Judge Ralph Winkler rendered a bench verdict in favor of Stephen Roach, a Cincinnati police officer charged with negligent homicide for shooting an unarmed African American young man. The trial received enormous attention and public disturbances followed the verdict. Approximately six weeks after the verdict the judge granted Roach's request that the case record be sealed pursuant to Ohio Revised Code 2953.52.

R.C. 2953.52 provides that a defendant found not guilty may apply for an order to seal the official records of the case. The statute requires that judges weigh the defendant's interest in sealing the records against "the legitimate needs, if any, of the government to maintain those records." (The statute also permits courts to seal records following a dismissal of charges by prosecutors or a grand jury).

One month after the file was sealed the *Cincinnati Enquirer* requested access to the case records. Judge Winkler denied the Enquirer's request and the newspaper filed a mandamus action. In 2002, the Court of Appeal reversed the trial court's decision, holding that it should have considered the public's interest in access before sealing the case record. 777 N.E.2d 320, 31 Media L. Rep. 1021 (Ohio App. 2002).

On remand, Judge Winkler ruled that the Roach's privacy interests outweighed the public's right of access. A split three-judge panel for the Court of Appeal affirmed. 782 N.E.2d 1247, 31 Media L. Rep. 2957 (Ohio App. 2002).

Ohio Supreme Court Decision

The Ohio Supreme Court first noted that criminal trial records fall under the Ohio Public Records Act – which is to be broadly construed – but then held that R.C. 2953.52 is an exception to the Act. The Court then considered, and rejected, the newspaper's arguments that R.C. 2953.52 is unconstitutional on its face and as applied.

The Court noted that although the First Amendment creates a right of access to criminal proceedings, it "is not absolute" and can be balanced against privacy interests. Citing *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 602 N.E.2d 1159 (1992).

The court held that R.C. 2953.52 "balances the public's right of access and the acquitted defendant's constitutional right of privacy" – taking "into account the public policy of providing a second chance to criminal defendants who have been acquitted."

The Court concluded that the statute was not unconstitutional on its face because it did not impinge the public's right to attend trials or the media's ability to report on trials – at least contemporaneously. And the statute was not unconstitutional as applied because the newspaper "had ample opportunity to report on and to access and copy the trial record for a substantial period of time before its sealing."

The Cincinnati Enquirer was represented by John Greiner and John Flanagan of Graydon, Head & Ritchey in Cincinnati.

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"balance's the public's right of access
and the acquitted defendant's
constitutional right of privacy" – taking
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Second Circuit Vacates Injunction Against Penguin Putnam

By Susan Stevens

On May 7, 2004, the Second Circuit reversed summary judgment against Penguin Putnam, Inc. (“Penguin”) in a copyright infringement case and vacated a permanent injunction against the publisher that had barred it from distributing a book containing the collected poems of Dorothy Parker. *Silverstein v. Penguin Putnam, Inc.*, 2004 WL 1008314 (2d Cir. 2004).

In an opinion by Judge Jacobs, joined by Judges Winter and Straub, the court held that material issues of fact existed as to whether plaintiff’s book of poems by Parker was sufficiently “original” to merit copyright protection and, if so, whether Penguin’s infringement of that copyright was more than trivial.

Moreover, the court held that the copyright interest asserted by plaintiff was simply “too slight to support an injunction against publication.”

Background

At issue in this case are two books, one published by plaintiff, Stuart Silverstein, in 1996, entitled *Not Much Fun: The Lost Poems of Dorothy Parker* (“*Not Much Fun*”) and another published by Penguin in 1999, entitled *Dorothy Parker: Complete Poems* (“*Complete Poems*”).

Both works contain so-called “uncollected” poems of renowned poet, screenwriter, critic and short-story author, Dorothy Parker, who published three volumes of her poems in her lifetime, entitled *Enough Rope* (1926), *Sunset Gun* (1928), and *Death and Taxes* (1931).

In 1994, prior to the publication of *Not Much Fun*, Silverstein approached Penguin with his manuscript for publication. Each page included the caption, “Compilation ©1994 Stuart Y. Silverstein. All rights reserved.” Silverstein owned no copyright in the underlying poems.

Penguin offered Silverstein \$2,000 dollars for the right to publish the manuscript as part of a larger work, which purported to include all of Parker’s previously published poems. Silverstein turned down the proposal and subsequently published *Not Much Fun* in 1996 which contained his subjective arrangement of Parker’s “uncollected” poems.

In 1999, Penguin published *Complete Poems*, a compilation of the three volumes previously published by Parker with an additional section entitled “Poems Uncollected by Parker.”

This section consisted of all but one of the “uncollected” poems published by Silverstein – but arranged chronologically.

Penguin admitted that the editor of this section photocopied Silverstein’s *Not Much Fun*, and rearranged the poems in the Penguin manuscript in chronological order without crediting *Not Much Fun* or Silverstein.

Silverstein sued Penguin for copyright infringement, violation of the Lanham Act, “immoral” trade practices and unfair competition.

District Court Rules for Plaintiff

The federal district court in New York granted summary judgment in favor of Silverstein on his copyright infringement claim holding that his selection of Parker’s poems evinced the requisite level of creativity to be considered an “original work of authorship.” The court found he had employed “his own taste, judgment, and informed decision-making” in selecting and characterizing Parker’s works as poetry and that Penguin had infringed on that copyright by cutting and pasting Silverstein’s work into *Complete Poems*. *Silverstein v. Penguin Putnam, Inc.*, No. 01 Civ. 309, 2003 U.S. Dist. LEXIS 5487 (S.D.N.Y. Apr. 4, 2003).

The district court also granted summary judgment on plaintiff’s Lanham Act, “immoral” trade practices and unfair competition claims finding that Penguin’s failure to credit plaintiff in *Complete Poems* amounted to “willful false designation” and that Silverstein’s state law claims for “immoral” trade practices and unfair competition were not preempted by federal law.

The district court then permanently enjoined Penguin from further distributing or selling *Complete Poems*, ordered that Penguin recall all existing copies, and denied Penguin’s motion to stay the injunction.

Copyright Infringement Ruling Reversed

On appeal, the Second Circuit vacated the permanent injunction, reversed the district court’s grant of summary judgment in favor of Silverstein on the copyright infringement claim and remanded for further proceedings, finding that material facts existed as to whether Penguin appropriated any non-trivial creative input from Silverstein.

The Court declined to rule on the district court’s grant of summary judgment as to the Lanham Act and state law claims

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Second Circuit Vacates Injunction Against Penguin Putnam

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for unfair competition and “immoral” trade practices holding that the district court’s rulings and findings on remand might bear upon or obviate the need to address these claims.

Originality of Selection

The Court noted that a compilation of various works may be entitled to copyright protection, even where the underlying works themselves do not enjoy copyright protection, so long as the compilation itself possesses “at least some minimal degree of creativity.”

The Court concluded that here “material questions of fact exist as to whether Silverstein exercised creativity in selecting the works for his compilation” and acknowledged that “[t]hose questions must be answered before the creativity, if any, in his selection can be assessed.”

Among other things, questions of fact existed as to whether differences between Silverstein’s selection of poems and that of a leading Parker scholar evidenced sufficient creativity.

The Court held that, even if the compilation is creative, to merit copyright protection the compilation must include “indicia that principles of selection (other than all-inclusiveness) have been employed” and a question of fact remains as to whether Silverstein simply published all of the uncollected poems by Parker he could find.

Injunction Not Warranted

Finally, the Court concluded that an injunction was not appropriate to bar Penguin from doing what any other publisher assembling a complete works could do.

Even if Silverstein’s creative contribution to the selection of Mrs. Parker’s previously uncollected poems is non-trivial, and even if Penguin’s appropriation of it was deliberate, enforcement of his rights by a preliminary or permanent injunction that stops publication of *Complete Poems* is an abuse of discretion.

Silverstein is represented by Mark A. Rabinowitz of Neal, Gerber & Eisenberg LLP in Chicago, IL. Penguin is represented by Richard Dannay of Cowan, Liebowitz & Latman in New York, NY.

Susan Stevens is an associate with Coudert Brothers LLP in New York.

Second Circuit Considers Impact of Bad Faith in Fair Use Test

In an interesting fair use decision, the Second Circuit was presented “with an opportunity to examine the import of the Supreme Court’s holding in *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985), that ‘the propriety of the defendant’s conduct’ is relevant to the” purpose and character inquiry of the fair use test. *NXIVM Corporation and First Principles, Inc. v. The Ross Institute, et al.*, No. 03-7952 (2d Cir. April 20, 2004) (Walker, C.J., Jacobs, J., and Straub, J.).

While the panel affirmed the trial court’s denial of a preliminary injunction in a copyright infringement case, it found that the lower court erred in “not fully and explicitly” considering the extent to which defendants knew that an unpublished manuscript from which quotations were taken and disseminated on the Internet was wrongfully acquired.

Background

Plaintiff NXIVM provides an expensive training program called “Executive Success.” Participants receive a 265-page seminar manual – and also sign a non-disclosure agreement, purporting to bar them from releasing the manual or the proprietary techniques taught in the seminar program.

Plaintiff sued a “cult de-programmer” and two writers who authored and posted on the Internet a report on plaintiff’s program using quotes from the seminar manual. The defendants obtained a copy of the manual from a former seminar participant – allegedly in violation of the non-disclosure provision of the program.

Fair Use and Bad Faith

The Second Circuit rejected the broad proposition that “to invoke the fair use exception, an individual must possess an authorized copy of a literary work.” See *Atari Games Corp. v. Nintendo*, 975 F.2d 832, 843 (Fed. Cir. 1992). Instead it found that while bad faith must be weighed, it is not dispositive. Here, even assuming bad faith on the part of defendants, the transformative and critical nature of their use was sufficient to sustain the fair use defense.

NXIVM Corporation and First Principles, Inc. was represented by Arlen L. Olsen of Olsen & Watts. The Ross Institute was represented by Thomas F. Gleason of Gleason, Dunn, Walsh & O’Shea. Stephanie Franco was represented by Harold Kofman and Anthony K. Sylvester of Riker, Danzig, Sherer, Hyland & Peretti.

Federal Court Grants Summary Judgment for Publisher

Trial on Damages for Newspaper Raid By Off-Duty Sheriff's Deputies Scheduled for December

By Ashley Kissinger

In a memorandum opinion and order issued this month, the U.S. District Court in Maryland granted summary judgment on liability for Ken Rossignol, publisher of the weekly community newspaper *St. Mary's Today*, against the former Sheriff of St. Mary's County, Maryland, six of his deputies, and the State's Attorney for the county, in a civil rights action Rossignol instituted four years ago. *Rossignol v. Voorhaar*, Civ. WMN-99-3302 (D. Md. May 5, 2004).

Background

The long-awaited vindication of Rossignol's First, Fourth and Fourteenth Amendment rights comes in the wake of a reversal and remand by the Fourth Circuit Court of Appeals last year in an opinion constituting nothing short of a rallying cry for the freedom of speech. *See Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003).

The district court had earlier held that the defendants, who were off duty, did not act "under color of law" when they bought the lion's share of the 1998 Election Day edition of the newspaper. In a ringing defense of the First Amendment right of even unpopular speakers to speak about matters of public concern, and particularly to criticize candidates for public office, the Fourth Circuit held not only that the defendants acted "under color of law" despite their off-duty status, but that their conduct constituted a First Amendment violation of the highest order.

The district court's order on remand leaves standing only the issue of damages for the violations of Rossignol's constitutional and state law rights. Particularly sweet for Rossignol in this round of the torturous litigation was the district court's mention of "its abhorrence for Defendants' actions," an observation it did not make in its initial opinion granting them summary judgment.

The Newspaper Raid

In the early morning hours of Election Day 1998, two teams of off-duty deputies from the St. Mary's County, Maryland Sheriff's Office drove around the county to

convenience stores and newsboxes and purchased virtually every copy of that day's edition of *St. Mary's Today*. The newspaper bore the front-page headline "Fritz Guilty of Rape," accurately reporting that Richard Fritz, the Republican candidate for State's Attorney, had pled guilty in 1965 to a charge of carnal knowledge of a minor.

Another article in that edition of the paper criticized the handling by incumbent Sheriff Voorhaar, who also stood for election that day, of an employee's sexual harassment claim.

The defendants, offended by the newspaper's long history of criticizing the Sheriff's Office and county officials and anticipating more of the same on Election Day, conceived of the newspaper raid as a way to "protest" Mr. Rossignol's allegedly "unsavory journalism" and prevent him from "smear[ing] Richard Fritz, and [Sheriff Voorhaar] . . . in the newspaper on Election Day."

To implement their plan, the defendants pooled their money, including \$500 contributions from Sheriff Voorhaar and Richard Fritz. Although at least two of the deputies carried their guns, which were at times during the night unconcealed, they had all agreed to wear civilian clothing and to drive their own cars, and they formally had taken leave in advance of the election.

The deputies split into teams of three to remove *St. Mary's Today* from circulation as it was delivered to newsboxes and convenience stores throughout the county. Antici-

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Federal Court Grants Summary Judgment for Publisher

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pating that Mr. Rossignol would accuse them of theft, they obtained receipts from those stores that were open for business and videotaped themselves dropping quarters into vending newsboxes.

As one defendant boasted on camera in the middle of the night: “You know what, Rossignol has never given us enough credit to have formally laid plans. He always calls us bumbling idiots. We’re gonna see who’s an idiot tonight. We have a plan, we’re working our plan. We planned our work and we’re working our plan, Rossignol.”

Rossignol fortuitously learned of the raid at approximately 2:00 in the morning on November 3, election day, while it was in progress. But when the defendants saw him frantically driving around to restock the papers, they followed him around the county and purchased the replenished stock.

The defendants’ videotape and the receipts they collected are a testament to the success of their plan: Of the approximately 2,600 newspapers sold at retail stores and 1,100 sold from vending boxes in the county, the defendants managed to purchase at least 1,379 copies of the paper by the time the polls opened on Election Day. They bundled the newspapers together and stored them in a barn on the Fritz family farm, where they remain to this day.

The Federal Bureau of Investigation and United States Attorney’s Office spent 22 months investigating the newspaper raid. Ultimately, however, the government did not indict anyone and closed its investigation.

In the meantime, Mr. Rossignol filed a civil suit in federal court in Maryland. The complaint alleged, *inter alia*, that the defendants, acting under color of law, imposed an unlawful prior restraint on the press in violation of the First Amendment, executed warrantless seizures of Rossignol’s property in violation of the Fourth Amendment, and deprived him of property without due process of law in violation of the Fourteenth Amendment. Rossignol sought damages and declaratory and injunctive relief against the individual defendants and the St. Mary’s County Board of County Commissioners.

The District Court’s First Opinion and the Fourth Circuit’s Reversal

On the parties’ cross-motions for summary judgment, which followed extensive discovery, Judge William Nickerson of the U.S. District Court for the District of Maryland denied the plaintiffs’ motion and granted the defendants’ motions on the sole ground that “the mass purchase constituted private conduct not executed under color of state law.” *Rossignol v. Voorhaar*, 199 F. Supp. 2d 279, 289 (2002).

The court acknowledged both the defendants’ retaliatory motive and their intent to remove the newspaper from circulation, but concluded that

“[t]he fact that Defendants’ conduct was related to or motivated by their state employment does not transform that conduct into state action.”

The court expressly rejected the defendants’ argument that, because they lawfully purchased the newspapers, they did not unlawfully suppress speech.

Id. at 287. Shortly after the district court announced its decision, Fritz – who was

elected to the office of State’s Attorney in the 1998 election – issued a press release praising the ruling as one that “signifies the last gasp of a dying political machine that attempted to subvert democracy through the use and control of an unprincipled tabloid editor on the eve of an election.”

Writing for the unanimous court, Chief Judge Wilkinson made clear that it was the defendants, not Rossignol, who “attempted to subvert democracy.” Before addressing the “under color of law” question, the court issued a stinging rebuke to the defendants, holding that, “there can be no question that, if defendants acted ‘under color of law,’” they “clearly contravened the most elemental tenets” of the First Amendment: “In suppressing criticism of their official conduct and fitness for office on the very day that voters were heading to the polls, defendants did more than compromise some attenuated or penumbral First Amendment right; they struck at its heart.” *Id.* at 521-22.

In that regard, the court expressly rejected the defendants’ argument that, because they lawfully purchased

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Federal Court Grants Summary Judgment for Publisher

(Continued from page 36)

the newspapers, they did not unlawfully suppress speech. “The First Amendment is about more than a publisher’s right to cover his costs,” the court explained. “Indeed, it protects *both* a speaker’s right to communicate information and ideas to a broad audience *and* the intended recipients’ right to receive that information and those ideas.” *Id.* at 522 (emphases in original).

Given this “inherently communicative purpose of First Amendment activity,” the court observed, the “fact that a small newspaper seeks to turn a meager profit does not remove it from the protections of the First Amendment.” Instead, “[w]hat matters is that defendants intentionally suppressed the dissemination of plaintiff’s political ideas on the basis of their viewpoint. And in doing so before the critical commentary ever reached the eyes of readers, their conduct met the classic definition of a prior restraint.” *Id.*

The court then concluded there was “no doubt” that the defendants acted “under color of law,” *id.*, primarily because the “link between the seizure’s purpose and defendants’ official roles” – *i.e.*, defendants’ dual desires “to retaliate against those who questioned their fitness for public office and who challenged many of them in the conduct of their official duties,” and to censor speech critical of them – “help[ed] demonstrate that defendants’ actions bore a ‘sufficiently close nexus’ with the State to be ‘fairly treated as that of the State itself.’” *Id.* at 523-35 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

Their “scheme,” the court observed, was “a classic example of the kind of suppression of political criticism which the First Amendment was intended to prohibit,” *id.* at 523, and the fact that they “acted after hours and after they had taken off their badges” could not “immunize their efforts to shield themselves from adverse comment and to stifle public scrutiny of their performance,” *id.* at 524.

Several other factors “reinforced” the court’s conclusion that the raid constituted state action, including the fact that the defendants could avoid prosecution for their activities given Sheriff Voorhaar’s position as the chief law enforcement officer in the county, and the fact that “the deputies’ identities as state officers played a role at several points during the seizure itself,” enabling them “to execute their scheme in a manner that private citizens never could have.” *Id.* at 526.

Summary Judgment Victory on Remand

The district court’s opinion on remand reflects the great extent to which the Fourth Circuit’s opinion circumscribed the issues that remained for its determination. Because the Fourth Circuit concluded from the record that “both Fritz and Voorhaar personally supported and participated in the mass purchase,” the district court held that it “need not reach either defendant’s arguments that they were not subject to suit as co-conspirators, or that Fritz, as a private individual, was not subject to suit under § 1983.”

The Fourth Circuit’s determination that the defendants violated Rossignol’s First Amendment rights had an even broader impact on their remaining defenses. First, because the court’s “analysis concerning violation of the First Amendment [was] inextricably intertwined with violations of the Fourth and Fourteenth Amendments,” the district court concluded that “violations of all three amendments resulted from Defendants’ acts,” as did violations of the analogous state constitutional provisions.

Second, because the defendants had been found to have violated these rights, the court rejected their argument that because “there is nothing unlawful in simply purchasing newspapers,” they did not tortiously interfere with Rossignol’s business relationships. In a footnote to its explanation why it was granting summary judgment to Rossignol on this claim, the court added that, “as noted by the Fourth Circuit, Defendants’ conduct was arguably in breach of the [Maryland] Newspaper Theft Act.”

Finally, the court granted summary judgment to Rossignol on his conspiracy claim because the defendants’ position that “the mass purchase was lawful” is “no longer tenable given the conclusions of the Fourth Circuit.”

Qualified Immunity

With respect to the two issues the district court evaluated independently of the Fourth Circuit’s analysis – whether the Sheriff’s Office defendants were entitled to qualified immunity and whether the St. Mary’s Board of County Commissioners, also a defendant, was liable – the result was mixed.

As the Court explained, “[q]ualified immunity is a doctrine that shields government officials performing discretionary functions from liability for civil damages when

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Federal Court Grants Summary Judgment for Publisher

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“their conduct does not violate clearly established statutory or constitutional rights.”

The Sheriff’s Office defendants wanted to have their cake and eat it too. They claimed, on the one hand, that they were off-duty, acting outside of the scope of their employment, and therefore did not act “under color of law,” but argued, on the other hand, that they were entitled to qualified immunity – a defense reserved for government officials.

The dissemblance did not escape the court: “In the face of these positions and the undisputed facts of the case, this court would be hard-pressed to find that Defendants acted within the scope of their employment in order to raise the potential of qualified immunity.” Accordingly, the court held that the individual defendants were not entitled to the defense.

The county, on the other hand, escaped liability. The court acknowledged that Sheriff Voorhaar, who both “personally supported and participated in the mass purchase,” is St. Mary’s County’s final policymaker on law enforcement issues. Upon analyzing provisions of state law and Supreme Court precedent concerning municipal

liability in Section 1983 actions, however, the court concluded that the Sheriff’s conduct could not be attributed to the county because Maryland’s sheriffs are state officials, not county officials. And because the States are immunized from damages liability for Section 1983 actions in federal court under the Eleventh Amendment, no recourse may be had against the state, either, for the Sheriff’s violations of Rossignol’s constitutional rights.

The trial on damages against the individual defendants is currently scheduled for December 2004. The defendants likely will appeal the court’s denial of their qualified immunity defense, however, and Rossignol is considering taking an appeal of the court’s determination that the county is not liable.

The defendants are represented by Daniel Karp, Kevin Karpinski, and John Breads.

Ashley Kissinger is a lawyer with Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C. She represented Mr. Rossignol together with colleagues Lee Levine, Seth Berlin and Audrey Critchley; and Alice Neff Lucan of Washington, D.C.

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Naomi Campbell Wins Media Privacy Case in UK's Highest Court

By Kevin Bays

On May 6, 2004, the five Judges in the House of Lords delivered their Judgments in the case brought by Naomi Campbell against MGN Limited, publishers of The Mirror newspaper, for breach of confidence. *Campbell v MGN Ltd* [2004] UKHL 22 (6 May 2004). Available online at: www.bailii.org/uk/cases/UKHL/2004/22.html

Naomi Campbell had been successful at the trial court level, but the decision of the Trial Judge was overturned by the Court of Appeal last year. By a split decision of three to two, the House of Lords upheld Naomi Campbell's appeal and reinstated the Trial Judge's award of damages of £3,500. In addition, the newspaper must pay the substantial costs of the case.

Background

The facts of the case are now well known. Naomi Campbell is of course a world famous fashion model whose face is instantly recognizable. Over the years in interviews with journalists and on television, Naomi Campbell has claimed, falsely, that unlike many of her colleagues in the fashion business she had not succumbed to the temptation to take illegal drugs.

However, in January 2001, The Mirror newspaper obtained information that Naomi Campbell had acknowledged her drug dependency by going regularly to meetings of Narcotics Anonymous ("NA"). In particular, the newspaper learned that she would be going to a meeting of NA at an address in the Kings Road, London as a result of which a photographer was sent to take photographs of her as she left the meeting.

The Mirror published an article on its front page under the headline "Naomi: I am a drug addict." The article was accompanied by a photograph, the caption to which read "Therapy: Naomi outside meeting." The article said that she had been attending NA meetings regularly for three months, often attending twice a day.

A second picture was published which showed Naomi Campbell in the doorway of the building where the NA meeting took place. The address was not identified but someone very familiar with that part of the Kings Road could no doubt have recognized it.

From general knowledge, the newspaper described the way group counselling works at NA meetings. There were other people in one of the photographs whose faces had been blanked out to preserve their anonymity. The information contained in the article could be broken down into five categories:

- (1) The fact that Naomi Campbell was a drug addict;
- (2) The fact that she was receiving treatment for her addiction;
- (3) The fact that the treatment was provided by NA;
- (4) Details of the treatment – for how long, how frequently and at what times of day she had been receiving it, the nature of it and extent of her commitment to the process; and
- (5) A visual portrayal by means of photographs of her when she was leaving the place where treatment had been taking place.

Naomi Campbell's legal advisers accepted that in light of her public lies about drugs, the newspaper was entitled to publish the fact that Naomi Campbell was a drug addict and was having therapy. As she had chosen to present a false image and make untrue pronouncements about her life, the press were entitled to put the record straight.

It was also entitled – perhaps obliged – to tell its readers that she was addressing the problem by having therapy. Thus, it was recognised that Naomi Campbell was precluded from claiming any protection for the information in categories (1) and (2) above.

The dispute in the case therefore centred around the question of whether The Mirror was also entitled to publish the material comprised in the third, fourth and fifth categories as the Court of Appeal had found – or whether that information went beyond the subject of legitimate comment and was still to be treated as private.

Naomi Campbell is of course a world famous fashion model whose face is instantly recognizable. Over the years in interviews with journalists and on television, Naomi Campbell has claimed, falsely, that ... she had not succumbed to the temptation to take illegal drugs.

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Naomi Campbell Wins Media Privacy Case in UK's Highest Court*(Continued from page 39)****The Law***

Although there were different opinions on the outcome of the appeal, with minor differences of language all five Law Lords were unanimous as to the principles of law to be applied to the facts.

It is clear that it is still the case that in English law there is no general all-embracing cause of action for invasion of privacy. However, the longstanding common law action for breach of confidence has now been extended to protect the unjustified publication of confidential or private information.

The action for breach of confidence, though, has been given a new strength and breadth so that it accommodates the rights of privacy and freedom of expression given by Articles 8 and 10 of the European Convention on Human Rights which was incorporated into English law by the Human Rights Act 1998.

It is also clear that an individual now has the right to control the dissemination of information about his or her private life unless there is justification for such dissemination. As Lord Nicholls said in this case, the essence of the cause of action is now better described as misuse of private information rather than breach of confidence. However named, the elements of the tort are the same:

- (a) Was the published information within the sphere of the complainant's private or family life?
- (b) If - and only if - that is the case, the intrusion into the complainant's private life will be capable of giving rise to liability unless the intrusion can be justified.

Private Information

It is necessary to answer the first question in the affirmative in order for Article 8 of the European Convention on Human Rights to be engaged at all. Article 8 of the Convention states that everyone has the right to respect for his private and family life, his home and his correspondence. The question to be asked is whether in respect

of the disclosed information, the complainant had a reasonable expectation of privacy. In order to satisfy this test, it is not necessary in every case for the disclosure to be highly offensive to a reasonable person. It is merely necessary that, viewed objectively, the complainant should have a reasonable expectation of privacy in relation to the information.

There is no doubt that information relating to health, personal relationships or finances will easily be found to be private.

The Balancing Exercise

If the disclosed information has been identified as private by satisfying the test of reasonable expectation of privacy,

a Court must then balance the individual's right to keep the information private against any competing justification for publication. In particular, the Court must consider the right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights. Article 10(1) states

It is still the case that in English law there is no general all-embracing cause of action for invasion of privacy. However, the longstanding common law action for breach of confidence has now been extended to protect the unjustified publication of confidential or private information.

that everyone has the right to freedom of expression which includes the freedom to hold opinions and to receive and impart information and ideas.

Neither of the rights under Articles 8 and 10 of the Convention take precedence over the other - they are of equal value and there is no presumption in favor of one rather than the other. As they are competing rights, the Court must determine the extent to which it is necessary to qualify the one right in order to protect the underlying value protected by the other.

The Lords' Opinions

The question for the Lords to consider on the facts of this case was whether, having regard to the fact that The Mirror was entitled in the public interest to publish the facts of Naomi Campbell's drug dependency and that she was seeking treatment, the newspaper should have confined itself to these bare facts or was it entitled to reveal more of the circumstantial detail and print the photographs.

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Naomi Campbell Wins Media Privacy Case in UK's Highest Court

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In other words, The Mirror being entitled to print the information comprised in categories (1) and (2) above, did the further information in categories (3), (4) and (5) retain its character of private information and if so, could the infringement of privacy be justified after balancing Naomi Campbell's rights with those of The Mirror under the Convention.

The Court of Appeal in overturning the Trial Judge's decision held that, given it was legitimate for the newspaper to publish the facts that Naomi Campbell was a drug addict and was receiving treatment, it was not significant to add that the treatment consisted of attendance at meetings of NA.

The Court of Appeal unanimously thought that the information in categories (3), (4) and (5) was peripheral information which faded into insignificance compared to the central fact that she was receiving treatment for drug addiction. The Court of Appeal considered that these details and the photographs were a legitimate, if not an essential, part of the journalistic package designed to demonstrate that Naomi Campbell had been deceiving the public when saying that she did not take drugs.

In the House of Lords however, opinions were divided. The majority decided that publication of the third, fourth and fifth categories of information contained in the article constituted an unjustified infringement of Naomi Campbell's right to privacy.

The Majority Decision

The three Judges who formed the majority in the House of Lords, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell, considered that the information comprised in categories (3), (4) and (5) above was private. The information related to an important aspect of Naomi Campbell's physical and mental health and the treatment she was receiving for it.

Had it not been for Naomi Campbell's false public statements, the newspaper would not have been permitted to publish any of the information about her addiction or treatment. It was information in respect of which she had a reasonable expectation of privacy.

As it was, Naomi Campbell's false public statements served to justify the publication of some of the informa-

tion. However, the publication of the details of her treatment at NA and the photographs, taken surreptitiously, of her emerging from a meeting went significantly beyond what it was necessary for the newspaper to publish in order to set the record straight.

An important consideration was the effect which the majority thought that the disclosure would have upon Naomi Campbell, a recovering drug addict, and the risk of disruption to her therapy and the distress and uneasy feelings which this would engender in such a person.

The majority also took the view that the publication of the photographs was an infringement of Naomi Campbell's right to privacy. They felt that the photographs had to be viewed in conjunction with the captions and the article as a whole.

Although it was said expressly that the mere fact of covert photography is not sufficient to make the information contained in the photograph confidential, the accompanying text transformed the photographs into more than a mere street scene, and they added greatly to the intrusion which the article as a whole made into her private life.

They showed her arriving at or leaving the NA meeting in the company of others and added to the potential harm by deterring her from going back to the same place again.

Once they had decided that the further information was private, it was necessary to carry out the balancing exercise of Naomi Campbell's right to privacy with the newspaper's right to freedom of expression.

In considering The Mirror's rights under Article 10 of the Convention, it was acknowledged that journalists should be accorded a reasonable margin of appreciation in taking decisions as to what details need to be included in an article to give it credibility. The press should be allowed a degree of latitude in the way in which it chooses to present a story.

The factors to be weighed in the balance are, on the one hand, the newspaper's duty to impart information of public interest which the public have a right to receive and, on the other hand, the degree of privacy to which Naomi Campbell was entitled as to the details of her therapy. However, the right of the public to receive information about the details of her treatment was said to be of a much lower order than the undoubted right to know that she was misleading the public.

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Naomi Campbell Wins Media Privacy Case in UK's Highest Court*(Continued from page 41)*

The majority of the Court did not believe that there was any compelling need for the public to know the name of the organization that Naomi Campbell was attending for therapy or for the other details of it to be set out. It was also thought that the publication of the photographs was more concerned with a wish to publish an interesting story rather than to maintain credibility.

Lord Hope thought that it was the publication of the photographs which tipped the balance in favor of Naomi Campbell's right to privacy. However, although stating expressly that the real issue was not the taking of the photographs in a public place but whether publicizing the content of the photographs would be offensive, the Judge then placed reliance on the fact that the photographs were taken deliberately, in secret with a view to publication in conjunction with the article.

Taking the photographs and the article as a whole, this was considered by the majority to be a gross interference with Naomi Campbell's right to respect for her private life and outweighed the newspaper's right to freedom of expression.

The three Law Lords thought that in this case there was a risk that publication of the information in categories (3), (4) and (5) would cause harm and it was unnecessary to publish this information for the newspaper to exercise its right to impart information to the public in order to set the record straight.

Publication of the details about Naomi Campbell's attendance at NA, highlighted by the photographs, constituted a considerable intrusion into her private affairs which was capable of causing substantial distress and constituted an unjustifiable infringement of her right to privacy.

The Minority

The other two Law Lords took a very different view of the three categories of information which were in dispute in the case. Lord Nicholls considered that given the extent of the information (the facts that she was a drug

addict and receiving treatment) which could properly be disclosed to put the record straight, the additional information relating to her attendance at NA meetings was so unremarkable that it would be applying too fine a tooth comb to divide it from the information which could be published. The reference to the way Naomi Campbell was treated at NA meetings was no more than common knowledge.

Lord Hoffmann made the point that Judges are not newspaper editors and he agreed with the observations of the Court of Appeal that it is harsh to criticize the editor of the Mirror for painting a somewhat fuller picture in order to show Naomi Campbell in a sympathetic light.

Lord Hoffman said that a newspaper should be allowed some latitude or "margin of choice" in the way it presents an article where the main substance of the story can legitimately be published. He felt that the additional details as to frequency of attendance were relatively anodyne and could not be said to be discreditable or embarrassing.

Even if they went further than a Judge might deem necessary to satisfy a newspaper's legitimate interests in putting the record straight, they were within the margin of judgement which the press should be allowed.

Lord Nicholls also felt that the disclosures complained of were within the latitude to be accorded to journalists. He thought that the revelation that Naomi Campbell had chosen to attend NA was no more significant than saying that a person with cancer is undergoing a course of chemotherapy.

As to the photographs, rightly no complaint had been made by Naomi Campbell about the covert taking of the photographs of her outside the building where she had attended an NA meeting. Although in general photographs can be more vivid than text – worth a thousand words – the same principles apply to photographs as any other information.

The publication of a photograph revealing someone in a situation of humiliation or severe embarrassment – even if taken in a public place – may be an infringement of privacy. Likewise, the publication of a photograph taken by

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Taking the photographs and the article as a whole, this was considered by the majority to be a gross interference with Naomi Campbell's right to respect for her private life and outweighed the newspaper's right to freedom of expression.

Naomi Campbell Wins Media Privacy Case in UK's Highest Court*(Continued from page 42)*

intrusion into a private place (for example by a long lens camera) may in itself be an infringement even if the picture does not disclose anything embarrassing.

In this case, the pictorial information in the photographs of Naomi Campbell conveyed no private information beyond that contained in the written article. There was nothing embarrassing about the pictures, nor did they involve any intrusion into private space. Again, the decision to publish the pictures was considered by the two minority Judges to be within the margin of editorial judgement.

The Future

As the House of Lords were at pains to point out, the Campbell case did not raise any new issues of principle. The differences of opinion were the result of disagreement, in the unusual circumstances of the case, as to where the law should strike the balance between the right to privacy and the right to freedom of expression. The result may have been otherwise had just one different Lord heard the appeal.

It is however the application of legal principles to the facts of a particular situation with which journalists, editors and their lawyers must deal every day. Often it is easy to state the law, but not so easy to apply it to the factual situation which has arisen so as to predict the outcome. It is for this reason that in principle the law allows the press some latitude in deciding how to exercise its right to freedom of expression.

But at the end of the day, it is the Judges who decide where the balance between privacy and freedom of expression is to be struck in any given case. It is therefore very difficult for journalists and editors to know where Judges – perhaps a long time after the event – will draw the line. If the facts in Campbell occurred again, would any editor know how much information to publish safely – would he decide not to publish the photographs?

So what of the future? We believe that as a result of this case, there will be an increase in the number of com-

plaints of misuse, or unjustified publication, of private information. There will be many more claims that information has been published in respect of which the complainant has a reasonable expectation of privacy which cannot be justified on public interest or freedom of expression grounds.

This may be particularly so in the case of photographs – whether taken in a public place or not – which contain information in respect of which the complainant considers he or she has a reasonable expectation of privacy.

Of course, if there are strong public interest reasons to publish the information – such as the exposure of a hypothetical or dishonest politician – there will be no problem.

However, it is in the grey areas where the Campbell decision may have a seriously negative impact upon the ability of the press to impart information.

The development of English law in this area, which has been confirmed by the House of Lords in this case, will have a significant effect on the publication of photographs and information which reveal the private activities of public figures. The difficulty for the press will be where to draw the line between an individual's privacy rights and freedom of expression.

The reason for the difficulty is that under the European Convention on Human Rights, both privacy and freedom of expression are of equal value and neither takes precedence over the other. In all cases therefore, once the information in question engages the right to privacy, a balancing exercise of these two equal rights must be undertaken and different people may easily come to different conclusions. This lack of certainty is bound to restrict freedom of expression.

Naomi Campbell was represented by solicitor Keith Schilling of Schillings and Andrew Caldecott QC, Antony White QC and Katrin Evans.

Kevin Bays is a partner at Davenport Lyons in London. He represented MGN Limited, publishers of The Mirror Newspaper, together with barristers Desmond Browne QC and Richard Spearman QC.

***The development of English law
in this area ... will have a
significant effect on the
publication of photographs and
information which reveal the
private activities of public figures.***

New Zealand Court of Appeal Recognizes Invasion of Privacy Tort

By William Akel

The New Zealand Court of Appeal issued a major media law decision explicitly recognizing for the first time a tort for invasion of privacy. *Hosking v Runting, Pacific Magazines NZ Limited & Ors* [2004] NZCA 34 (March 25, 2004). The decision is available online through: www.austlii.org/

The pecking order in New Zealand is as follows. The High Court deals with major cases at first instance. There is a right of appeal to the Court of Appeal. The final court of appeal was, up until very recently, the Privy Council sitting in London. The Privy Council judges were in the main the judges who make up the House of Lords judges. Appeals to the Privy Council have been abolished. New Zealand now has its own Supreme Court as the final court of appeal. It commences work in July this year.

Now down to business.

Magazine Photos Bring Privacy Claim

The Court of Appeal was called on to decide whether there is a tort of invasion of privacy in New Zealand law. Previous decisions of the High Court have held that there was such a tort. However it would be fair to say that all the issues had not been fully canvassed in any of these decisions.

Along came the *Hosking* case. The facts were simple. Mike Hosking was a well known broadcaster. He and Mrs Hosking jealously guarded the privacy of their twin girls born in June 2001. They declined all interviews about them, and didn't allow photographs to be taken. The Hoskings separated in August 2002.

Pacific Magazines commissioned Simon Runting to take photographs of the twins to supplement an article. He took photographs of the children in a well known shopping street in Auckland, the biggest city in New Zealand. They were taken without Mr and Mrs Hoskings' consent. They objected to their publication when they found out about them. The magazine said it was going to publish regardless.

Trial Court Rejects Privacy Claim

The Hoskings applied to the High Court for an injunction to stop publication of the photographs. After a very full hearing the High Court judge held there was no law of invasion of privacy in New Zealand.

The judge referred to the state of play in Australia, Canada, England, the European Court, the United States, and extensive writings on the topic. He was swayed very much by the UK approach, that no separate tort of invasion of privacy exists. If there was going to be any developments in this area of the law it had to be via law of confidence.

This of course was all pre-*Naomi Campbell* in the House of Lords.

Court of Appeal Considers Right of Privacy

Although the Hoskings lost their appeal, the five Court of Appeal judges took time to consider privacy law developments world wide and fully considered the conflict between freedom of expression rights and the encroachment of privacy values on these rights. Four powerful separate opinions were delivered. In the end, three judges supported the tort of invasion of privacy while two opposed it.

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New Zealand Court Recognizes Invasion of Privacy Tort

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A little bit of constitutional background is required. New Zealand has a bill of rights – The New Zealand Bill of Rights Act 1990 (“NZBOR”). Section 14 provides for freedom of expression:

“Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”

Thus the right is broad based. However, it is far from absolute. Section 5 of the NZBOR provides that:

“the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

There is no express right to privacy in the New Zealand Bill of Rights. However, the Court of Appeal has often said that privacy is the underlying value in other freedoms, particularly as relates to unreasonable search and seizure.

In the leading judgment in *Hosking*, Gault P and Blanchard J jointly upheld a tort of invasion of privacy. They said that there are two fundamental requirements for a successful claim for interference with privacy:

- (a) The existence of facts in respect of which there is a reasonable expectation of privacy; and
- (b) Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

These two Judges agreed that no Court can prescribe all the boundaries of a privacy cause of action in a single decision and that the claim will evolve through future decisions as courts assess the nature and impact of particular circumstances.

Invasion of Privacy Claim Recognized

They emphasized however that they are concerned only with wrongful publicity given to private lives – *not* an unreasonable intrusion into a person's solitude or seclusion. In many instances this aspect of privacy will be protected by the torts of nuisance or trespass or by laws against harassment, but this may not always be the case.

These two Judges say that private facts are those that may be known to some people, but not to the world at

large. There is no simple test for what constitutes a private fact. They further say that the right to privacy is not automatically lost when a person is a public figure, but his or her reasonable expectation of privacy in relation to many areas of life will be correspondingly reduced as public status increases.

Involuntary public figures may also experience a lessening of expectations of privacy, but not ordinarily to the extent of those who willingly put themselves in the spotlight. They say the special position of children must not be lost sight of.

The concern of these two Judges is widespread publicity of very personal and private matters. Similarly publicity, even extensive publicity of matters which, although private, are not really sensitive should not give rise to legal liability. The concern is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned.

Most important there should be available in cases of interference with privacy a defense enabling a publication to be justified by a legitimate public concern in the information.

Judge Tipping also held that a tort of invasion of privacy exists. To him the first and fundamental ingredient of the tort should be that the plaintiff must be able to show a reasonable expectation of privacy in respect of the information or material which the defendant has published or wishes to publish.

The necessary expectation can arise from the nature of the information or material or the circumstances in which the defendant came into possession of it or both. In most cases that expectation is unlikely to arise unless publication would cause a high or substantial level of offence. It should be a defence to an action for invasion of privacy that the information or material published about the plaintiff's private life is a matter of legitimate public concern.

Two Judges Reject Privacy Tort

Judges Keith and Anderson in separate judgments rejected a tort of invasion of privacy. Judge Keith based his conclusion on the central role of the right to freedom of expression; the existing protections of privacy interests under the Privacy Act, Broadcasting Act, Press Council Rules

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New Zealand Court Recognizes Invasion of Privacy Tort

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and the like; and the lack of an established need for the proposed cause of action.

He found it significant that a general provision on privacy was deliberately excluded from the Bill of Rights.

Judge Anderson emphasised the concern that the right to freedom of expression, affirmed by s14 of the New Zealand Bill of Rights Act 1990, is now to be limited because publication of truth, might be "*highly offensive to an objective reasonable person.*"

Anderson considered that cases such as *Douglas and Zeta Jones* could have been dealt with on conventional bases of contract and trespass. The photographs could only have been taken by a person who was either not invited and therefore a trespasser, or by an invitee who breached a significant stipulation of the license to be present.

Magazine's Photos Not Offensive

As stated the Hoskings lost their appeal. The majority judges said there could be no reasonable expectation of pri-

vacuity when Mrs Hosking went shopping with the girls. The publication of the photos of the two girls would not be considered highly offensive to the average New Zealander. The fact that the claimant was a celebrity did not mean that privacy did not apply. Each case had to be decided on its own facts. In this respect the law of privacy will develop on an incremental basis. Each case will be very much fact driven.

Since the decision, the House of Lords has given its split decision in *Naomi Campbell*. The *Hosking* decision is referred to by the House of Lords.

As a final point, having won the appeal the magazine has decided not to publish the photographs. It was all a matter of principle....

Plaintiffs were represented by Chen Palmer & Partners, Wellington. Defendants were represented by Bell Gully, Auckland.

William Akel is a partner at Simpson Grierson, Barristers & Solicitors, in Auckland, New Zealand.

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UK Court of Appeal Decision May Curb No Win No Fee Libel Costs

By Keith Mathieson

Claimant libel lawyers in England have received a sharp reality check from the Court of Appeal. For the last few years a small number of specialist law firms have been earning large fees out of libel cases funded by no win no fee arrangements, also known as conditional fee agreements or CFAs.

In England the loser pays the winner's legal costs. Successful cases against the media where CFAs are involved can result in the media having to pay vast sums in legal fees. The appeal court has decided this is unfair to defendants and has imposed a new regime that will involve costs being capped in advance. The implications of this new regime are explored below.

The Judgment

The Court of Appeal's judgment has been given in the case of *Adam Musa King v Telegraph Group Limited*, [2004] EWCA (Civ) 613 (CA May 18, 2004). The decision is available online at: www.bailii.org/ew/cases/EWCA/Civ/2004/613.html

At issue in the underlying libel action are two newspaper articles in the *Telegraph* reporting that UK and US law enforcement were investigating claimant for suspected terrorist links.

The well known firm of Peter Carter-Ruck & Partners is charging Mr King £375 an hour for partners, £265 for other solicitors and £150 for trainee solicitors, in all cases subject to a success fee, which would double these rates to £750, £530 and £300 plus VAT.

Except, of course, that Mr King will never have to pay these fees because his lawyers are doing the case under a CFA. If Mr King wins, the fees will be payable by the *Sunday Telegraph* newspaper. If he loses, he will pay nothing.

The Court of Appeal expressed its concern over the potentially chilling effect on the media of disproportionate claims for costs by claimants' lawyers. It said it was unjust in cases where freedom of expression is at stake to submit defendants to a costs regime where they have to pay unreasonable and disproportionate costs if they lose and have no prospect of getting their own costs back if they win.

In the *Musa King* case, the maximum compensation the claimant could expect to recover at trial was £150,000. Yet

the claimant's lawyers had estimated that their fees, excluding the success fee, would be not less than £360,000. Once the success fee was added and the defendant's own costs taken into account, the defendant, if it lost at trial, was facing a total bill of around £1 million.

The Court of Appeal noted "the gulf between the value of this action to the claimant and its value to the lawyers instructed in the case" and observed that "something seems to have gone seriously wrong".

The Court of Appeal recognised that defamation cases possess certain features that distinguish them from other kinds of litigation. First, legal costs assume particular significance in libel cases where the damages recoverable are often a fraction of the costs. Second, after the event (ATE) insurance covering the claimant's liability for the defendant's costs is

often not available in libel cases.

Since the claimant is rarely rich enough to pay the defendant's costs if he loses, this means the defendant will be left to pay its own costs even if it wins. That prospect naturally encourages the defendant to buy the claimant off even where the claimant's case is devoid of merit.

In the Court of Appeal, the *Sunday Telegraph* recognised that Mr King, like anyone else, had a right to pursue his case with the benefit of a CFA. But it argued that where it was unlikely that he would be able to pay the newspaper's costs if he did lose, and there was no insurance to cover those costs, it was especially important that the court should control the manner in which the claimant's lawyers conducted the case, particularly when its rates were so high.

Law Firm's Tactics

The newspaper referred the Court of Appeal to various instances of what they considered to be disproportionate conduct. This included a 10 page letter of claim, swiftly followed by Particulars of Claim drafted by a barrister for which 54 hours of partner's time and 48 hours of trainee solicitor's time had been charged; and 150 partner hours, 120 solicitor hours and 96 trainee hours for work on witness statements and disclosure of documents. Before the newspaper even had an opportunity to respond to the claim, it was facing an exposure of as much as £64,000.

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Claimant libel lawyers in England have received a sharp reality check from the Court of Appeal.

UK Ct. Decision May Curb No Win No Fee Libel Costs

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The Court of Appeal was not impressed by the extravagant and vituperative manner in which Carter-Rucks had handled the case. In Lord Justice Brooke's words:

"... the claimant's lawyers appear to have advanced their client's claim from time to time in a manner that is wholly incompatible with the philosophy of the Civil Procedure Rules."

The judge remarked that the letter of complaint "departed markedly" from the requirements of the Pre-Action Protocol for Defamation and said that he expected a costs judge to "take an axe to certain elements of their charges."

The New Regime

The Court of Appeal's solution is for judges to impose in advance a limit on the amount of costs that lawyers may recover when acting for libel claimants on a Conditional Fee Agreement without ATE insurance. The Court of Appeal recognised that its "novel cost-capping regime" could disadvantage libel claimants, who might no longer be able to consult QCs or "very expensive" law firms. But it thought such a disadvantage was a small price to pay compared to the potential price to be paid by allowing the present state of affairs to continue.

It will take time for the new cost capping regime to develop and while the Court of Appeal has said that the detailed operation of the regime is for others, it has provided some general guidance as to what it expects.

First, Lord Justice Brooke has recommended that a Master (a judge dealing mainly with procedural issues) should be specially assigned to defamation cases. That designated Master would handle case management applications and in time would develop specialist experience in the field.

Second, in CFA cases where there is no ATE cover, the Master *should*, according to Brooke LJ, make an order that the recoverable costs of the case should be limited to a specified amount. Such an order would be made at the allocation stage and would in most cases, presumably, limit the recoverable costs to those stated in the allocation questionnaire. However, if the Master considers it appropriate, he may refer the case to a costs judge in order that a specific cap or budget may be imposed.

Third, and this is of considerable significance, the total amount of recoverable costs prescribed should include any

success fee and insurance premium payable even though the court has no power to compel a claimant's lawyer to disclose the level of success fee or insurance premium. It appears that Brooke LJ envisages that the court should simply take a view as to what in the circumstances would represent a reasonable and proportionate amount and set that as the limit of what will be recoverable.

Fourth, the starting point for costs in most cases should be the amount of damages likely to be recovered. In these days of modest libel damages, that may, of course, not amount to very much.

Fifth, the Court of Appeal clearly envisages that once a cap on costs is imposed, it should not be easy to increase it. Brooke LJ has suggested that the Master ought to consider making the capping order subject to a condition that before either party may make an application which could significantly increase the costs of the action, it should first apply to the court for a direction varying the costs cap.

Such an application would be made on notice and would be supported by up to date costs estimates. It will then be for the court to decide whether and to what extent the costs cap needs to be varied before it allows the proposed application to proceed.

Conclusion

These are potentially major changes to the way in which libel cases are run. The Court of Appeal's decision should benefit media companies but if real gains are to be achieved it is going to be particularly important that defendants in defamation cases give careful consideration to the operation of the new regime in the early days since the early cases are likely to determine the success or otherwise of the Court of Appeal's bold initiative.

Much will also depend upon the availability of insurance to cover the costs of a successful defendant. Such insurance is becoming more readily available. While that provides security for a defendant's costs in a winning case, it represents a further significant expense for defendants wishing to settle.

The Telegraph was represented by Farrer & Co. and barristers Andrew Caldecott QC and Godwin Busuttil. Peter Carter-Ruck and Partners instructed barristers Richard Ramp-ton QC and Harvey Starte.

Keith Mathieson is a partner in Reynolds Porter Chamberlain in London.

International Media Law Round-up

By Charles J. Glasser, Jr.

France: Burying Mitigating Facts

On May 5th, a French trial court ordered *Paris Match* to pay 15,000 Euros (appx. \$18,000 USD) and publish an apology for defaming Ivory Coast President Laurent Gbagbo. In February 2002, the magazine published a story repeating allegations that the head of the African nation had stolen cars belonging to a political opposition leader.

The court found that the magazine could not prove the truth of the statements and that the statements were not covered by a rough equivalent of the “fair comment” defense. French law recognizes a defense on matters that serve the public interest and are published in “good faith.” Under French law, however, bad faith is presumed. (*article 35 bis of the Law of 29 July 1881*).

The source of the allegations was the wife of the opposition party leader who had an admitted political bias against the president and a motive to defame him. The article disclosed this, but these facts appeared at the end of the story, which the court found “particularly insidious” and evidence of bad faith.

This decision serves to remind counsel vetting publications in non-US jurisdictions that courts may not consider an article in its entirety in assessing a defamation claim. Thus a court may find bad faith where an article discloses – but does not emphasize – facts that challenge the credibility of a source who makes defamatory allegations.

Korea: Internet Anti-Libel Law Delayed

The Korean National Election Commission (NEC) has withdrawn revisions to that nation’s election laws that would have made it illegal to post anonymous messages on Internet chat rooms that slander politicians or political parties. The law was scheduled to have taken effect on April 12.

Politicians argued for the new rule because Internet anonymity makes it difficult – if not impossible – to track down the putative defendant. The Korean Civil and Criminal Codes protect statements that are true; and false statements predicated upon “an exercise of due care” (Korean Civil Code, Articles 751(1), 764; Korean Criminal Code, Articles 305(1) and (2), 309).

Enactment of the NEC rule was not challenged in court, but instead was delayed in part because the Korean Ministry of Government Administration does not yet have the technical means in place to trace the identities of Internet posters. In the meantime, the NEC has said it has sent official requests to webmasters for all political websites asking for voluntary cooperation.

Australia: Journalist's Bad Behavior Brings Breach of Confidence, Contempt Charges

A recent non-media case in Australia should remind lawyers everywhere of the old adage that “bad facts make bad law.” In a wild case, the Queensland Supreme Court ruled in early March that freelance journalist John Macgregor assisted in the theft of computer documents belonging to Elan Vital, a quasi-religious group he claimed to be investigating.

Macgregor was a former member of Elan Vital, and had sold freelance articles in the past about his disillusionment with the group. Hoping to sell investigative pieces about the group, Macgregor convinced a computer technician repairing Elan Vital computers to steal computer files belonging to the group and send them to him.

The scheme fell apart when Macgregor posted bits and pieces of the stolen files – including private financial data about the group’s individual donors – on the Internet.

The religious group obtained an ex parte “*Anton Pillar*” order. Pillar orders allow the owner of proprietary information to effectuate a seizure of a computer that may contain stolen data. Like a temporary restraining order in the U.S., a “Pillar” order is a drastic remedy that requires immediate and irreparable harm and is not outweighed by public policy.

Elan Vital traced the files back to the computer technician, who admitted the scheme, and on that basis obtained another order allowing them to seize Macgregor’s computer to prevent further distribution.

Seizures under a Pillar order are supervised by an independent court-appointed solicitor. When the order was being served, Macgregor grabbed his computer, ran out of the back door of his house, and fled service, which is considered contempt under Australian law. Macgregor

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International Media Law Round-up

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now faced two claims: the underlying breach of confidence claim, and contempt of court for fleeing service.

At a hearing on the contempt claim, Macgregor submitted affidavits denying that he had been served, and stating that the independent solicitor threatened him with rape in prison while trying to effectuate service. The trial level court rejected his affidavits as lacking credibility, and held that Macgregor was liable for contempt and indemnity costs to the group totaling more than \$100,000AU (appx. \$75,000USD).

In March, the Elan Vital filed an application for summary judgment on the underlying breach of confidence claim. Unlike U.S. law, Australian law will not allow reporters to publish proprietary documents knowing they 1) contain proprietary data; and 2) were most likely obtained illegally.

Australian common law provides a narrow exception to breach of confidence liability, when the documents stolen are of “dire and urgent” need for a matter of public health or safety.

The court examined the documents stolen by Macgregor and found that they were merely expense reports and showed no wrongdoing by the group, especially wrongdoing that would rise to the level of an “urgent” public need to know.

In a ruling from the bench, Macgregor was found liable for breach of confidence. Although Macgregor distributed the documents to several newspapers in Australia, the group did not pursue injunctions against any publishers, and the publishers did not publish the documents.

South Africa: “Reverse Immunity” Case on Appeal in South Africa

We are all familiar with the doctrine that government officers are generally immune from suit for defamation for statements made in the course of their official duties. South Africa is deciding an unusual twist on the doctrine: that a cabinet minister does not have the right to sue for libel over statements that concern his or her work as a member of parliament.

In 1997 the Pretoria *Mail & Guardian* published its annual “report card” which criticized the performance of Housing Minister Sankie Mthebu and raised questions about a housing scheme that favored a friend of the minister’s.

Although the defamatory meaning was apparent – it implied corruption or dishonesty at the least – the Rand High Court held that under the South African Constitution the right to freedom of speech outweighs a minister’s right to sue for libel.

The Appeals Court will decide whether to hear Mthebu’s appeal by the end of May.

Charles J. Glasser, Jr. is Media Counsel at Bloomberg News LLP.

Australian High Court Affirms Qualified Privilege Defense

In a recent decision, Australia’s High Court affirmed the use of the qualified privilege defense in a media libel case. *Bashford v. Information Australia (Newsletters) Pty Ltd* [2004 HCA 5 (Feb. 11, 2004)]. The decision is available online through: www.austlii.org

In a 5-2 decision, Australia’s highest court rejected the argument that the qualified privilege defense cannot be applied to inaccurate reports of judicial proceedings.

At issue was an article in an occupational safety trade journal reporting on a prior case involving a company owned by plaintiff. The article erroneously identified plaintiff personally as a party to the prior lawsuit and overstated his role in the suit.

The trial court and appellate court both held that the qualified privilege applied notwithstanding these errors. Affirming, the High Court held that the privilege applied because of the subject matter of the article and the journal – and that the errors did not eviscerate the privilege.

The MLRC MediaLawLetter will publish a fuller discussion of this case in the June issue.

ISP Liability: Canada Proposes Copyright Reforms

By Andrew Bernstein and Tyson Dyck

Canada has no similar legislation to the *Digital Millennium Copyright Act* (the "DMCA"). Faced with uncertainties about copyright infringement and ISP liability, the Canadian federal government has begun reforming the *Copyright Act*. On June 22, 2001, it released its *Consultation Paper on Digital Copyright Issues* (the "Consultation Paper"). See Canada, Industry Canada and Canadian Heritage, *A Framework for Copyright Reform* (June 22, 2001), at: [http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/\\$FILE/digital.pdf](http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/$FILE/digital.pdf).

In its section on the liability of network intermediaries, the Consultation Paper acknowledges that Canadian copyright law does not specifically deal with the role of ISPs. It therefore recommends a system similar to that set out in the DMCA.

Background

The leading case on ISP liability in the copyright context, *Tariff 22*,¹ dealt predominantly with whether ISPs can be liable for communicating copyright-infringing works to the public (by letting them "flow" through their networks), copying the works (by caching them) or authorizing infringement and indirectly infringing copyright (by permitting users to use the Internet to infringe).

In *Tariff 22*, the Federal Court of Appeal found that the person who posts the work, and not the ISP, communicates it to the public. The Court also found that to authorize an infringement, the ISP must "have enough control over the infringer to prevent the infringement and behave in a way that would lead a reasonable person to conclude that [the ISP] had approved or countenanced infringement."

According to the Court, such a circumstance would be rare; it would require the ISP not only to approve the use of its equipment and transmission service for the infringing activity but also to purport to grant customers permission to infringe copyright.

On the other hand, the Court held that ISP caching constituted copying, a finding that attracted a dissent at the

Court of Appeal. An appeal is pending to the Supreme Court of Canada, and it will be interesting to see how the Court decides comes down on this controversial issue.

Indirect Infringement Standards

The potential liability for indirect infringement remains less clear. The Canadian court in *Apple Computer, Inc. v. Mackintosh Computer Ltd.* (1986), 28 D.L.R. (4th) 178 (F.C.T.D.) at 225, suggested that once someone has actual or imputed knowledge that a particular work may be infringing copyright, he or she is obligated to ensure that it does not continue to do so.

This thinking parallels the notice and take-down provisions in the DMCA; however, its application in Canadian law is vague. The issue has not been considered in the context of ISP liability and leaves potential for liability.

The Consultation Paper proposes a complaints-driven notice and take-down procedure that recognizes both the interests of copyright holders and the infeasibility of requiring ISPs to monitor all their online content.

Copyright Reforms Proposed

The Consultation Paper proposes a complaints-driven notice and take-down procedure that recognizes both the interests of copyright holders and the infeasibility of requiring ISPs to monitor all their online content. This proposed procedure would have the following features: an ISP would not be liable for the copyright infringements of third parties who use its facilities to disseminate copyrighted information to the public. Nor would an ISP be liable for reproducing copyrighted material for caching or website hosting.

An ISP could, however, be liable if it failed to block access to the infringing material after receiving proper notice from the copyright holder. *Id.* at 37. Proper notice would be written, would identify the copyright holder and would provide a clear description and location of the infringing material.

Finally, an ISP that acted in good faith to comply with this notice and take-down procedure would not be liable for the economic harm suffered by the copyright owner or by the infringer. Like that in the DMCA, this procedure

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ISP Liability: Canada Proposes Copyright Reforms

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would recognize ISPs' role as intermediaries but encourage them to fill this role responsibly.

Debate on Proposals Continues

The Canadian debate on copyright reform continues today. ISPs have submitted their opinions to the House Standing Committee on Canadian Heritage. They agree with limiting ISP liability but propose a notice and notice, rather than a notice and take-down, process. Canadian Association of Internet Providers, *Re: 'Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act'—Review by the House of Commons Standing Committee on Canadian Heritage* (September 15, 2003), at <http://www.caip.ca/issueset.htm> (accessed April 22, 2004) at 5-6.

The Canadian Association of Internet Providers (CAIP), a collection of ISPs that provide about 80% of Internet connections in Canada, states that its ISP members will not knowingly host illegal content. If a copyright holder gives an ISP clear notice of an infringement, the ISP will then relay this notice to its customer and advise the Canadian Recording Industry Association (CRIA) that it has done so. ISPs will take down the infringing material only upon a court order if the notice and notice does not result in voluntary removal. *Id.* at 6-7.

The federal government is considering these proposals, and new legislation is likely to be introduced during 2005. Canada, Canadian Heritage and Industry Canada, "Supporting Culture and Innovation: Report on the Provisions and Operation of the *Copyright Act*" (October 2002), at <http://strategis.ic.gc.ca/pics/rp/section92eng.pdf> (accessed April 27, 2004) at 43.

In the federal government's March 24, 2004, *Status Report on Copyright Reform*, it considers two directions for this reform: first, to exempt ISPs from liability when they act as intermediaries, but to leave the possibility of civil sanctions if they do not help remove infringing material, perhaps using a notice and notice procedure; and second, to subject ISPs to liability for the infringing material on their facilities, which they could escape by meet-

ing certain conditions, such as responding to the requests of copyright holders to remove infringing material or to collect royalties.

Canada, Canadian Heritage and Industry Canada, *Status Report on Copyright Reform* (24 March 2004) at [http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/statusreport.pdf/\\$FILE/statusreport.pdf](http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/statusreport.pdf/$FILE/statusreport.pdf) (accessed April 23, 2004) at 4-8.

In practice, these approaches might function similarly; in both cases, ISPs have some duty to respond to the requests of copyright holders. The difference lies in the initial presumption of liability. Whether ISPs will be prima facie liable for hosting infringing content will most likely depend on the Supreme Court's decision in *Tariff 22*. The federal government will also consider the systems established in other jurisdictions, including the United States.

Whatever direction it chooses, the federal government is likely to follow the Federal Court of Appeal's analytical framework in *Tariff 22*, and grant ISPs some type of protection from liability. The outstanding issues concern the process by which ISPs will enjoy this protection. The Canadian federal government has reacted more slowly to the issue of ISP liability than has the U.S. government, but in doing so, it seems to have gained from the American experience. It will undoubtedly incorporate that experience into new Canadian copyright legislation that will deal with the rights of copyright holders in a new digital environment.

Andrew Bernstein is a lawyer at Torys LLP in Toronto and member of the firm's Intellectual Property and Technology Groups. Tyson Dyck is an articling student at Torys LLP.

¹ *Re: SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet)* (1999), 1 C.P.R. (4th) 417 (C.B.D.), varied by *Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers* (2002), 19 C.P.R. (4th) 289, 215 D.L.R. (5th) 188, [2002] F.C.J. No. 691 [hereinafter *Tariff 22*] and leave to appeal to S.C.C. granted in [2002] S.C.C.A. No. 289.

The federal government is considering these proposals, and new legislation is likely to be introduced during 2005.

Sex, Minors and the Internet: 4th Circuit Rules Virginia Law Unconstitutional

By Michael A. Bamberger

Most states have laws criminalizing the sale or dissemination of certain sexually explicit material to minors – so-called “harmful to minors” materials. This material is protected by the First Amendment as to adults, but at the same time is unprotected as to minors. This bifurcated status causes great problems in the Internet context.

With the rise of the Internet in the '90s and the easy availability of many sexually explicit web sites, concern arose as to how to protect minors from such materials, and various states started to extend their “harmful to minors” laws to the Internet.

However, factors inherent in the nature of the Internet – in particular the practical difficulties of limiting access to web sites, the inability to know the age of one who accesses a web site, and the inability to limit or direct Internet transmissions geographically – have caused each of the statutes to be invalidated. Some were held to violate the First Amendment; some, the dormant Commerce Clause; and some, both.

In the most recent Court of Appeals decision in this area, *PSInet v. Chapman*, 362 F.3d 227 (4th Cir. 2004), the Fourth Circuit held that a Virginia law imposed an unconstitutional burden on protected adult speech and also violated the Commerce Clause. The statute was amended in 1999 to add “electronic file or message” to a law which made it unlawful to “sell, rent or loan to a juvenile” or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse “any picture, photography, drawing, sculpture, motion picture film containing” sexually explicit material harmful to juveniles. *See* Va. Code 18.2-391.

District Court Ruling

The statute was initially challenged in federal court in the Eastern District of Virginia by ISPs, bookstores with web sites, sexual health websites, media trade associations, and People for the American Way in a suit against Virginia’s Governor and Attorney General. After the Chief Judge dismissed the case on the ground that the 11th Amendment and sovereign immunity prohibited seeking injunctive or declaratory relief against the gover-

nor and attorney general (a decision contrary to applicable precedent), no appeal was taken because of the delay that would involve. Rather, the case was re-filed in the Western District of Virginia, adding some Charlottesville plaintiffs and naming as defendants the local commonwealth’s attorneys.

On February 15, 2000, a hearing was held in the District Court on the motion for summary judgment. Shortly thereafter, before any decision, the Virginia legislature amended the challenged statute. While originally the amendment would have effectively repealed the challenged part of the statute, in conference committee it was substantially watered down.

After further briefing on the meaning of the 2000 amendment, on Aug. 8, 2000 the court granted a preliminary injunction, finding a likelihood that plaintiffs would prevail on both their First Amendment and Commerce Clause claims. In October 2001, plaintiffs were granted summary judgment, and enforcement of the amendment which applied the statute to the Internet was barred. 167 F. Supp. 2d 878 (W.D.Va. 2001)

As to the First Amendment, the Court found that, given the current state of Internet technology, enforcement of the Act would restrict access of both adults and minors, and therefore would impose an unconstitutional burden on protected adult speech.

Applying a strict scrutiny analysis, the Court found that there was a compelling state interest in the protection of minors, but the law was not narrowly tailored and did not employ the least restrictive means to achieve that interest. Finally, the court found that the global nature of the Internet meant that the Act would have little impact in achieving its end.

As to the dormant Commerce Clause challenge, the district court found that the Act imposed an unreasonable burden on out-of-state businesses since they must adhere to the strictest state regulation.

4th Circuit Decision

On appeal, in addition to arguing that the Act did not run afoul of the First Amendment and the Commerce Clause, Virginia pressed a *res adjudicata* argument. In

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Sex, Minors and the Internet

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1985 a challenge had been brought against the earlier Virginia “harmful to minors” statute by bookstores and other retailers. Obviously, that challenge did not deal with the application to the Internet; among other things, the World-Wide Web had not yet been developed.

In 1989, after the 1985 statute had been substantially narrowed, the 4th Circuit found it constitutional. *See American Booksellers v. Virginia*, 882 F.2d 125 (4th Cir.1989). Virginia argued that the 2000 amendment was merely a “clarification” of what had been in the 1985 statute all along.

After oral argument before the 4th Circuit, the Court certified two questions on the meaning of the 1999/2000 amendments to the Virginia Supreme Court (317 F.3d 413), which, after oral argument before it, rejected the questions because they would not have affected the Commerce Clause issues.

Months later, the 4th Circuit affirmed the ruling of unconstitutionality by a vote of 2-1. The majority opinion by District Court Judge John Spencer, sitting by designation, follows the approach of the district court. The statute’s ban on electronic files or messages, containing harmful words, images or sound recordings, that minors may examine and peruse, violated the First Amendment because it was not narrowly tailored. Moreover, the statute violated the Commerce Clause because it, in effect, restricted commercial electronic materials in all states, not just Virginia.

In a concurring opinion, District Court Judge Andre Davis, also sitting by designation, stated that “were I participating in this case as the doting grandfather that I am proud to be, I would eagerly embrace the result reached by the dissent,” but as a judge he was pleased to join with the majority.

The dissenter, Judge Paul Niemeyer, the only Circuit Judge on the panel, argued that the Court was bound by its 1989 decision upholding the constitutionality of the prior “bricks and mortar” version of the statute, and that

in any event, the statute is constitutional. He is the first judge out of 17 federal judges in 10 federal courts¹ to vote to uphold the constitutionality of a “harmful to minors” dissemination or display statute.

Conclusion

Virginia’s petition for reargument en banc is pending. (Since both panel members in the majority are district judges, plaintiffs start one down.)

It should be noted that the Child Online Protection Act case recently argued before the U.S. Supreme Court may,

depending on the result and the reasoning, impact the First Amendment analysis in the litigations challenging state statutes like this one. It should not, however, affect the Commerce Clause aspects. *See ACLU v.*

Ashcroft, 322 F.3d 240 (3rd Cir.), cert. granted, 124 S.Ct. 399 (2003), appeal argued March 2, 2004.

Michael A. Bamberger, a partner in the New York office of Sonnenschein Nath & Rosenthal LLP, represented plaintiffs in this case and is lead counsel or co-counsel in 7 of the 8 challenges to the application of state “harmful to minors” statutes to the Internet.

¹ The reported decisions other than the *PSInet* case include: *Am. Booksellers Found. v. Dean*, 342 F. 3d 96 (2d Cir. 2003), aff’g 202 F. Supp. 2d 300 (D.Vt. 2002); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), aff’g 4 F. Supp. 2d 1029 (D.N.M. 1998); *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932 (S.D. Ohio 2002); *American Libraries Ass’n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999), aff’d; 238 F.3d 420 (6th Cir. 2000) (unpublished), 142 F. Supp. 2d 827 (E.D. Mich. 2001).

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Prepublication Committee Report: Is Sixteen Old Enough?

By Alice Neff Lucan

Interviewing minors, or using their images, without parental consent can carry special risks, especially when the topic is sex, drugs or their parents. But how much protection do minors get and how is it measured? Is it a function of their legal age to drive, buy liquor, or enter a contract? The answer seems to be much more subjective and to depend on the sophistication of the minor and the obtrusiveness of the report.

Children Are High-risk Plaintiffs

There's no doubt the courts are ready to be offended when children are involved in intrusive news coverage. Look at the 30 year old decision of the Supreme Court in *Cantrell v. Forest City Publishing Company*, 419 U.S. 245 (1974), where the Court reinstated a false light jury verdict against a newspaper publisher and reporter. The reporter and a photographer walked into a home and spent more than an hour talking and taking pictures of plaintiff's children when their mother was not home.

The Supreme Court did not discuss any special considerations because children were involved, in fact four of the children were dismissed out of the case – yet their presence appears important in justifying the Court's conclusion that the article caused plaintiff "outrage, mental distress, shame, and humiliation."

Consider also the Second Circuit's decision in *Galella v. Onassis*, 487 F.2d 986, (2d Cir. 1983). Again, no special consideration is spelled out because Caroline and John Kennedy were 12 and 9 years old at the time, but a pesky paparazzi photographer was ordered to stay five feet further from the children than from Mrs. Onassis and was ordered not to enter the children's play areas or school yard. The children got more protection than the adult and clearly had a special impact on the outcome of the case.

Children of "Tender Years"

A television reporter approached three young children, all under twelve years old, to interview them about their playmates next door after the neighbor children had been mur-

dered by their suicidal mother. The reporter, "gratuitously assuming to perform a sensitive parental prerogative," took it on himself to tell the children that their playmates were dead, apparently not even bothering to break it to them gently.

The ages of the children, "manifestly of tender years" were key to the appeals court. "There were no adults in the home and the minors were obviously too young either to consent to an intrusion by strangers into a private residence or to exercise any control over strangers who appeared there." *KOVR-TV v. Superior Court of Sacramento County*, 31 Cal. App. 4th 1023, 1029 (Cal. App. 1995).

Was the outcome a result of the children's ages or the egregious conduct of the reporter? The case was sent to trial because the appeals court held, "a jury could find that a television reporter who attempts deliberately to manipulate the emotions of young children for some perceived journalistic advantage" has engaged in outrageous conduct, beyond the bounds of decency. *Id.*

But "minority status," as it were, does not win special protection every time. A sixteen year old girl, visibly pregnant and a voluntary participant on one of those horrid encounter-television-talk shows, sued the television producers after her step-mother read embarrassing information from the girl's police record on the show.

The sixteen year old and her sister had accused their step-mother of adultery. The step-mother responded with the police report, which, the court said, contained "pretty tame stuff by contemporary standards of adolescent decorum." *Howell v. Tribune Entertainment Co.*, 106 F.3d 215, 220 (7th Cir. 1997).

The Seventh Circuit agreed that the girl's privacy lawsuit was properly dismissed, based on an analysis that assumed that the girl "was old enough to waive rights she may have had under the tort law of privacy." While her level of maturity could not be judged from a few moments on videotape, the appeals court said, "[s]he was not so young as to be incapable of realizing that she would be in a glass house throwing stones. We need not decide at what age a child is sufficiently mature to waive her right of privacy, but 16 is old enough when no circumstances of deception or overreaching or limited competence are shown." *Id.* at 221.

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There's no doubt the courts are ready to be offended when children are involved in intrusive news coverage.

Prepublication Committee Report: Is Sixteen Old Enough?*(Continued from page 55)****Traditional Privacy Defenses Still Work, Most of the Time***

Furthermore, if the information is already public, lack of consent is generally not an issue. The federal trial court in Miami held that the publication of the photograph of a one year old child over a caption reporting that she was the illegitimate grandchild of Johnny Carson was not a private fact as a matter of law. *Health v. Playboy Enterprises, Inc.* 732 F. Supp. 1145 (S.D. Fla. 1990).

The baby's photograph was taken with her mother outside the Broward County Courthouse after an appearance in a claim for child support. The child's paternity and the support award were in public court records. And the entire story had already gotten a great deal of public attention with the voluntary participation of the mother.

The child's guardian ad litem argued that the mother couldn't give consent for her child because their interests were adverse, but the court ruled that consent could not be required before disclosure of public facts, especially when the story had gotten so much attention earlier.

"Newsworthiness" is a similar defense in the sense that a newsworthy report does not require prior consent of the subject, and that seems to work even with children. The Supreme Court of Alabama held that an interview with a 15 year old runaway was a matter of public concern, thus an interview broadcast on television was not "an improper intrusion into private activities." *J.C. v. WALA-TV, Inc.*, 675 So. 2d 360, 362 (Ala. 1996). The interview was conducted on a public street and in this circumstance the court noted that the news station's "conduct in this case falls within the bounds of the 'legitimate public interest' privilege." *Id.*

But Be Careful of Cavalier Assumptions

The California Court of Appeal, however, would not dismiss an invasion of privacy claim brought by eight members of a Little League team and two of their coaches against *Sports Illustrated* for publishing the team's picture in a story discussing another coach who had been convicted of sexual abuse. *M.G. v. Time Warner, Inc.*, 89 Cal. App. 4th 623 (Cal. App. 2001).

The caption made no distinction among the team members, but four of the boys had been molested by the coach and four had not. Neither of coaches in the picture was the bad guy.

The plaintiffs persuaded the appeals court that the team photograph had never been widely circulated and that no other news report had identified the team until the *Sports Illustrated* story. That is a little hard to understand, given that the coach's name was known, the story was widely reported and the team had been identified at least by its initials. Nonetheless, the court treated the information as a "private fact" and let a potpourri of privacy claims go forward.

It's true that the legal age of majority played no role in the discussion by any of these courts, at the same time, the age of the children involved was always a factor. Age and sophistication on the one hand were weighed against the intimacy or newsworthiness of the information published and the conduct in getting the interview.

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Alice Neff Lucan practices in Washington D.C. and is a member of the Pre-publication / Pre-Broadcast Committee.

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80 Eighth Avenue, Suite 200
New York, NY 10011

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ETHICS CORNER: Legal Paladins May “Roam,” but Not with Impunity

By Robert C. Bernius and Kevin M. Colmey

*“Have Gun, Will Travel” reads the card of a man.
A knight without armor in a savage land.
His fast gun for hire heeds the calling wind.
A soldier of Fortune is the man called Paladin.” **

Almost two years ago, Bruce Johnson enlightened the media bar about pitfalls in the peripatetic practice of law. Johnson, *Practicing Law in an Interconnected World*, LDRC *MediaLawLetter* September 2002 at 47.

Bruce’s article rightly sounded an optimistic theme, since the American Bar Association had just amended the Model Rules of Professional Conduct, in Bruce’s words, to “enable lawyers more freely to provide legal services in states where they are not admitted.” Yet it remains a potentially savage land for lawyers who saddle up and ride across a border.

The ABA’s remedial action was overdue, and was inspired by *Bierbrower, Montalbano, Condon & Frank v. Superior Court*, 70 Cal. Rptr.2d 304 (Cal. 1998), a particularly nasty decision. *Bierbrower* characterized the unauthorized practice of law in the most expansive of terms, and concluded that New York lawyers did not have a right to be paid for services rendered in connection with a California arbitration. *Bierbrower* spawned, or was at least consistent with, other decisions disfavoring legal gunslingers from out of state.

The ABA amendments would permit lawyers to “provide legal services on a temporary basis” in a foreign jurisdiction, provided the services: (1) are undertaken in association with a lawyer licensed to practice in that jurisdiction and who actively participates in the matter; (2) are rendered in connection with a proceeding before a tribunal in which the lawyer is, or reasonably expects to be, admitted *pro hac vice*; (3) are reasonably related to an alternative dispute resolution proceeding, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is licensed; or (4) arise out of, or are reasonably related to, the lawyer’s practice in a jurisdiction in which the lawyer is licensed.

The ABA Model Rules, however, are effective only if adopted by individual states. The good news is that a number of states have changed their rules and now more liberally permit activities by unadmitted lawyers. Some states have also promulgated special rules for in-house lawyers. The ABA

maintains separate charts showing the current state rules relating to multi-jurisdictional practice and to in-house counsel. Those charts can be found at http://www.abanet.org/cpr/jclr/jclr_home.html.

But it is not all okay around the corral. The media bar should continue to pay close attention to this issue before they heed the calling wind. Just because the ABA has taken a reasonable view does not mean that state bars share that approach. The locals may still try to get you – in a variety of ways.

One example of a somewhat territorial approach – distinctly reminiscent of *Bierbrower* – is contained in a recent staff opinion of the Florida Bar (Staff Op. 24894, September 3, 2003). The opinion responded to an inquiry from a Florida lawyer whose Florida real estate clients received, from non-Florida lawyers, “demand letters or other correspondence ... interpreting Florida real estate documents ... and Florida law in general.” The Florida lawyer stated that he routinely responded to such inquiries with the following language:

It is inappropriate for me to communicate with unadmitted attorneys regarding the interpretation of Florida law and Florida real estate documents. Accordingly, I respectfully demand that you cease and desist from communication with my client. Any further communication regarding this issue should be handled through a Florida-admitted attorney, addressed to my attention....

Florida Bar staff concluded such a response was entirely appropriate to alert “out of state practitioners to Florida rules regarding the unlicensed practice of law” because, as the opinion observed, “lawyers who are not licensed to practice in Florida are considered to be non-lawyers in Florida.”

The Florida Bar’s Real Property, Probate & Trust Law Section, relying on the staff opinion, has concluded that if an *out of state* attorney representing an *out of state* beneficiary of a Florida trust contacts the trust’s Florida attorney *from out of state*, the Florida lawyer “should not communicate with such out-of-state attorneys because to do so would assist such out-of-state attorneys in the unlicensed practice of law.” <http://www.flabarrppl.org/pdf/ActionLineSpring2004.pdf>.

The opinion – and its rather uncompromising progeny – may have little practical effect, however, in light of the Florida Bar’s February 2004 petition to amend that state’s rules

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to allow for multijurisdictional practice. See www.flabar.org/tfb/TFBComm.nsf/6bfd54554e7b35f185256728004f5220/d5722ba3a24231a685256b2f006ca4c3?OpenDocument.) But the opinion confirms that indigenous hostility to out of state lawyers can still be palpable. And, the risks in multi-jurisdictional activity can transcend mere antagonism.

Thus, unadmitted lawyers might face:

Sanctions against a client: the Virginia Supreme Court dismissed an appeal in a multimillion dollar case because the notice of appeal was signed only by an attorney not admitted in the Commonwealth. *Wellmore Coal Corp. v. Harman Mining Corp.*, 568 S.E.2d 671 (Va. 2002).

Disbarment: well after enactment of the ABA rules, the Maryland Court of Appeals observed that “there is a trend in this Court favoring disbarment as the appropriate sanction for the unauthorized practice of law.” *Attorney Grievance Comm. of Maryland v. Velasquez*, 2004 Md. LEXIS 180 *13 (April 9, 2004).

Or criminal prosecution: On March 15, 2004, a North Carolina grand jury indicted two Georgia lawyers for the unauthorized practice of law in violation of N.C. Gen. Stat. § 84-4, which prohibits the practice of North Carolina law by any person not licensed in the state of North Carolina, a misdemeanor. The North Carolina indictment was returned even though that state had already adopted the ABA’s model rules (albeit after the conduct at issue).

In the North Carolina case, a small North Carolina college retained the now-criminal-defendant-lawyers to investigate a scandal involving the alleged “recalculation” of a basketball player’s grade point average that reinstated the player’s academic eligibility. The lawyers interviewed school officials and issued a report to the board of trustees.

According to media accounts, the report effectively cleared the school’s president of wrongdoing, but led the board of trustees to “reassign” two other faculty members. After the reassignments, other faculty members, critical of the board’s actions, resigned in protest. One of the resigning faculty members was a North Carolina attorney, who filed a bar complaint against the Georgia lawyers alleging the unauthorized practice of law; he also sent a copy of the complaint to the local District Attorney.

The Georgia lawyers deny practicing law in North Carolina, and say the college had “separate local counsel available and present at the time of all meetings to advise it on legal issues in North Carolina law.” But the State Bar nevertheless issued a “Letter of Caution” to them, stating that their report went beyond an investigation because it “outlined and advised the Board concerning the University’s potential legal liabilities.”

It remains to be seen how the criminal prosecution will turn out. But one should keep in mind that many states have criminal provisions equivalent to those in North Carolina (e.g. N.Y. Judiciary Law §§ 484, 485). Those provisions have historically been used to stop non-lawyers from practicing law; one would hope that the North Carolina criminal case is but an aberration.

These examples of territorial protectionism should dissipate with time. Yet the risks remain tangible today, and the ABA’s amendment of the model rules should not lead to overconfidence.

In the words of our Wild West hero:

*Paladin, Paladin, where do you roam?
Paladin, Paladin, far, far from home*

Far from home, sure. But only after checking the ABA website for the latest word on state multi-jurisdictional practice rules.

* *One of the authors of this article is constrained to note (for his younger colleague and presumably many readers) that “Have Gun, Will Travel” was a TV Western aired in the early 1960’s. Its protagonist, Paladin, was a sophisticated, albeit mercenary, gunslinger who (after payment of his retainer) would leave San Francisco to do justice wherever necessary – somewhat akin to the paradigmatic media defense lawyer. His business card read, simply, “Have Gun, Will Travel; Wire Paladin - San Francisco.” The quoted verses are from the show’s theme song (available at <http://www.classicthits.com/showcards/havegunwilltravel/>).*

Robert Bernius, Chair of the MLRC Ethics Committee, is a partner in the Washington D.C. office of Nixon Peabody LLP, and serves as Chair of the firm’s Professional Standards Committee, and is a Fellow of the American College of Trial Lawyers. Mr. Colmey is an associate in the Washington D.C. office of Nixon Peabody LLP.