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LDRC LIBELLETTER

Reporting Developments Through November 25,1998

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California Supreme Court Affirms $1.17 Million Verdict Against The Globe

In a unanimous decision, the California Supreme Court affirmed a $1.17 million jury verdict against the *Globe* based on its publication of an article that recounted allegations made in a book about the assassination of Robert Kennedy. *Khawar v. Globe International, Inc.*, __ Cal. App. 4th __ (Cal. Sup. Ct. Nov. 2, 1998). *See* LDRC *Libelletter* June 1996 at 1. In so doing, the court offered up a fairly lengthy analysis of three issues: public figure status, neutral reportage and actual malice -- all of which were raised by the *Globe* as grounds to reverse the jury award. Specifically, the court held that the plaintiff was properly deemed a private figure, that California does not recognize a neutral reportage privilege -- at least in private figure cases -- and that there was sufficient evidence of actual malice to support an award of punitive damages, primarily because the *Globe* did not independently verify the allegations of a book that the court characterized as inherently improbable.

With respect to each of these issues, the Court engages in the kind of broad, sweeping statements that almost never stand up to rigorous analysis, but invariably offer ugly fodder for future plaintiffs. Nowhere, perhaps, is that more so than the Court's conclusion that the investigation and conviction of Sirhan Sirhan

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for the murder, and the appellate review upholding that conviction, rendered subsequent theories of the murder so inherently improbable as to support a claim for actual malice.

Factual Background

Khalid Khawar sued the *Globe* over a 1989 article headlined "Former CIA agent claims: IRANIANS KILLED BOBBY KENNEDY FOR THE MAFIA." The *Globe* reported that this allegation was made by author Robert Morrow in his 1988 book *The Senator Must Die: The Murder of Robert Kennedy*. In his book, Morrow, a former CIA agent and author of a best selling book on the assassination of President Kennedy, theorized that the Iranian secret police together with the Mafia killed Robert Kennedy. The real killer, according to Morrow, was not Sirhan Sirhan, who was convicted of the crime, but a man named "Ali Ahmand" -- a young Pakistani present at the scene of the killing, carrying a gun disguised as a camera. The book contained four photographs of "Ahmand" standing in a group of people around Kennedy shortly before the assassination. The book also reported that, at the time of its writing, Ahmand was living in Iran.

In fact, these photographs were of Khawar, now a naturalized American citizen, living in Bakersfield, California. In 1968, Khawar was a Pakistani citizen working as a freelance photojournalist. On the night of Kennedy's assassination, Khawar was covering Kennedy's campaign press conference at the Ambassador Hotel in Los Angeles for a Pakistani periodical. Khawar stood near Kennedy to take his picture and also so that a friend could photograph Khawar together with Kennedy -- a fact that the *Globe* cited to show that Khawar had knowingly engaged in a highly publicized political event. By standing close to Kennedy, Khawar was aware that he would be in photographs taken of Kennedy and that these photos would be publicized. In fact, even prior to the Morrow book, Khawar's photograph from this night appeared in numerous articles.

Khawar was questioned by the FBI and Los Angeles police about the assassination of Kennedy, but he was never regarded as a suspect.

Public Figure Status

The *Globe* argued on appeal that Khawar was drawn into the public controversy surrounding the assassination of Robert Kennedy, albeit involuntarily. In rejecting this argument, and affirming Khawar's private figure status, the court engaged in a lengthy analysis of *Gertz*, especially the statement that it is possible for a person "to become a public figure through no purposeful action of his own." Slip op. at 6 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345). Narrowly construing this language, the court concluded that for a person to become a public figure through no purposeful action, i.e., be an involuntary public figure, the person must have substantial media access in relation to the controversy at issue.

> Thus, assuming a person may ever be accurately characterized as an involuntary public figure, this characterization is proper only when that person, although not having voluntarily engaged the public's attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements.

Slip op. at 6.

The court's standard appears to effectively eliminate the category of *involuntary* public figure by requiring *voluntary* media access to such an extent that the person would be considered a limited public purpose figure. In fact, the court says as much by stating that it reads *Gertz* and its progeny "as precluding courts from affixing the public figure label" unless "they have media access enabling them to effectively defend their reputations in the public arena; and by injecting themselves into public

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controversies . . . invit[e] comment and criticism." *Id.*

Not a Public Figure

Looking at the record, the court found no substantial evidence that Khawar had access to the media in relation to the assassination of Robert Kennedy. Before publication of the Morrow book, Khawar was not interviewed by the media about the event, although the court alluded to a 1970 book, *RFK Must Die* by Robert Blair Kaiser, that also raised questions about Khawar's role in the assassination. But, according to the court, neither Kaiser's nor Morrow's book "enjoyed substantial sales or was reviewed in widely circulated publications." Slip op. at 7. Only 500 copies of Morrow's book were sold from a print run of 25,000; and of the 150 copies sent out to the media, only the Globe published a report on the book.

The court noted that after publication of *The Senator Must Die*, no reporter contacted Khawar about the book. He was interviewed by a local television station, but this, according to the court, was solely in response to the *Globe* article. Although this demonstrated that Khawar enjoyed some media access, "it is only the media access that would likely be available to any private individual who found himself the subject of sensational and defamatory accusations in a publication with a substantial nationwide circulation." *Id.* To hold otherwise, the court said, would allow the media to confer public figure status simply by publishing accusations against a private figure.

The court also dismissed the notion that Khawar's proximity to Kennedy on the night of the assassination constituted voluntary participation in the public controversy surrounding that event. By standing near Kennedy and being photographed with him, Khawar "voluntarily associated" himself with the public issue of Kennedy's presidential candidacy -- albeit on what the court describes as a trivial level. But Khawar's conduct was not a voluntary association with the controversy surrounding the assassination. "Khawar did not know, nor should he have known, that Kennedy would be assassinated moments later, much less that a book would be published 20 years thereafter containing the theory proposed in the Morrow book." Slip op. at 7.

Essentially, the court held that recognizing the privilege in private figure cases would "emasculate" Gertz.

Neutral Reportage Rejected

The Globe also argued on appeal that California should apply the neutral reportage privilege to its article since it accurately reported the allegations made in Morrow's book. Surveying both the history and legal commentary on the privilege, the court held that the privilege does not apply in private figure cases, although it left undecided whether the privilege exists in public figure cases.

The starting point of analysis was the Second Circuit's decision in *Edwards v. National Audubon Society, Inc.* 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002. There the Second Circuit articulated the privilege to apply "when a responsible, prominent organization . . . makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity." Id. at 120. The rationale for the privilege is that reporting of defamatory accusations relating to a public controversy is of informational value to the public, shedding light on the accused and the accuser. But the decision notes, "that some state and federal courts have rejected the privilege entirely" and thus, "the existence of the privi-

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lege as a matter of constitutional law is uncertain." Slip op. at 9-10.

Having affirmed Khawar's status as a private figure plaintiff, the court considered the narrower issue of whether the neutral reportage privilege applied in such cases. Essentially, the court held that recognizing the privilege in private figure cases would "emasculate" *Gertz*. As the court explained, although the public has a legitimate interest in knowing that prominent individuals have made charges, perhaps unfounded, against a private figure, recognition of an absolute privilege for the republication of those charges would upset the balance struck in *Gertz* for protecting the reputation of private figures. Slip op. at 11. Moreover, in a conclusion for which it provides no adequate predicate, the court added:

> Only rarely will the report of false and defamatory accusations against a person who is neither a public official nor a public figure provide information of value in the resolution of a controversy over a matter public concern. On the other hand, the report . . . can have a devastating effect on the reputation of the accused individual . . . .

Id.

Actual Malice To Support Punitive Damages

The California Supreme Court also affirmed the jury's punitive damage award of $500,000, finding that there was clear and convincing evidence of actual malice. In reviewing the award, the court focused on two factors -- the improbability of Morrow's book and that *Globe* did not attempt to verify the allegations of the book, which, the court found, amounted to a purposeful avoidance of the truth.

As to the first, the court stated that there were obvious reasons to doubt the truth of Morrow's accusation that Khawar killed Kennedy, namely that the accusation is contrary to the official investigation, the criminal trial of Sirhan Sirhan and the California Supreme Court's own decision on Sirhan's appeal of his conviction.

> The assassination . . . had been painstakingly and exhaustively investigated by both the FBI and state prosecutorial agencies. During this massive investigation, these agencies accumulated a vast quantity of evidence pointing to the guilt of Sirhan as the lone assassin. . . . At Sirhan's trial, 'it was undisputed that [Sirhan] fired the shot that killed Senator Kennedy.' (quoting *People v. Sirhan,* 7 Cal. 3d 710, 717 (Cal. Sup. Ct. 19--)).

Finding Morrow's book to be "inherently incredible" and its claims "highly improbable," the court next found that the evidence supported the jury's implied finding that the Globe did not use readily available means to verify the accuracy of the book, such as interviewing witnesses, reviewing documents and other evidence -- in effect, conducting its own investigation into the Kennedy murder and the theory of Morrow's book. In this connection, the decision noted that because of the length of time between the assassination and the *Globe's* article (21 years) there was no time pressure that made it impractical to investigate the truth of the underlying charge that Khawar killed Kennedy. Slip op. at 15. Moreover, the court determined that the *Globe* did not have a prior source relationship with Morrow, nor had it established sufficient evidence that Morrow was a credible commentator, journalist or academic to justify *Globe's* decision not to investigate.

The Court's handling of Morrow's reputation, e.g., its failure to mention (and thus credit) Morrow's status as a best-selling author on the assasination of President Kennedy, its handling of the testimony of plaintiff's assasination expert - - apparently a 19-year old high school student -- is not terribly satisfying, but may leave open the means to distinguish this from all future cases.

The *Globe* filed a petition for reconsideration with the California Supreme Court on November 18th.

Vocal Inflection Not Enough for Defamation

In the first decision of its kind in Illinois, the District Court on reconsideration granted Defendant-WFLD Fox Television's motion to dismiss after the Court decided that a reporter's vocal inflection during a news piece is not sufficient to support a defamation claim against a report that otherwise states accurate facts. *Hanash v. WFLD Fox Television*, 1998 U.S. Dist. Lexis 17738 (N.D. ILL Nov. 3, 1998). When the claim is based upon defamation per quod, the intonation of the reporter (here, allegedly skeptical in tone) will not constitute the extrinsic fact(s) needed to maintain the claim. Indeed, after calling upon the parties to research not only Illinois law, but case law nationwide, the court concluded that extrinsic evidence is required in these cases in order to protect the press that reports otherwise accurate facts from frivolous claims based upon no more than allegations of an incredulous or sarcastic tone of voice.

Was Plaintiff Delivering Alcohol to a Minor?

The facts of the case are set out in an earlier opinion of the court, *Hanash v. WFLD Fox Television*, 1998 U.S. Dist. Lexis 14471 (N.D. Ill. Sept. 11, 1998). The Plaintiff-Hanash was the subject of a news report by the defendant which exposed liquor businesses that delivered alcohol to minors. In the segment, the plaintiff was captured on tape in the process of delivering alcohol to a home at which the individual answering the door and receiving the delivery was a teenage girl. While he was videotaped as he left the beverages in the vestibule of the minor's home, and received a cash payment, he claimed that he left the home only to move his car from its double-parked position and await an adult with proper identification to accept delivery of the beverages. Defendant reported Hanash's actions and his statements, but Hanash claimed that the overall impression left by the reporter was that Hanash was attempting to complete an illegal transaction and lied to the reporter when he was caught leaving the scene. The defendant filed a motion to dismiss.

Initial Motion to Dismiss Denied

The District Court initially denied WFLD's motion to dismiss. The Court stated that defamation per quod involved statements that are not defamatory on their face, but that have a defamatory meaning under Illinois law when considered with extrinsic facts ***and*** innuendo. Innuendo, the drawing of a defamatory meaning from the published statements, was insufficient standing alone. In deciphering what "extrinsic facts" and "innuendo" meant in this context, the Court, using the definitions as set out by Prosser and Keeton, found that the extrinsic fact alleged in the case was the WFLD reporter's allegedly skeptical tone in reporting plaintiff's explanation for his actions. The innuendo was that Hanash was lying when he stated that he was planning to wait for a qualified adult despite the appearance of having made a delivery of alcoholic beverages to an underage female at her home.

The Court was not clear, however, whether Illinois law would allow a defamation per quod claim when the extrinsic evidence was only found in the tone of voice of the reporter. The Court asked that more research be conducted on this question of law.

The Reconsideration

In the defendant's motion for reconsideration, WFLD presented case law from other jurisdictions which supported the notion that a reporter's inflection was not sufficient to constitute inducement and a defamation per quod claim, including the Tennessee case of *Hunt v. Tangel*, 1997 Ten. App. LEXIS 914, *7 and *White v. Fraternal Order of Police, et al.*, 909 F.2d 512, 520 (D.C. Cir. 1990). Finding that the concern expressed in these cases was the same as that expressed by the Illinois requirement that the plaintiff in a defamation per quod case prove extrinsic facts and not merely innuendo, the court held that allowing tone of voice to somehow fill the shoes of extrinsic evidence would make it all too easy for plaintiffs to complain about reports of true facts.

Steven P. Mandell and Catherine Van Horn of Davidson, Mandell & Menkes, and Muriel Henle Reis of Fox Television, represented the defendants in this lawsuit.

New York Times Reporter's Repeated Misreadings of Documents Held Sufficient Evidence of Actual Malice to Defeat Summary Judgment

By Adam Liptak

In a sarcastic decision harshly critical of a *New York Times* reporter's "ability to understand written matter," a New York state court denied the newspaper's motion for summary judgment in a libel case, holding that the reporter's repeated misreadings of documents coupled with a failure to follow up on the plaintiff's request that he be called for comment prior to publication of subsequent articles presented a jury question on actual malice. *Khan v. The New York Times*, Index No. 107928/94 (Sup. Ct. N.Y. County, Oct. 16, 1998).

The case arose from two articles separated by four months concerning Rafi M. Khan, a controversial stock promoter. Each contained a mistake arising from the same reporter's misreading of two different complex news articles. The mistakes were promptly corrected.

The first article, published in October 1993, reported that Mr. Khan had been sued by the Securities and Exchange Commission for manipulating the stock of a company called Future Communications. In fact, as the *Wall Street Journal* article upon which the reporter relied said, Mr. Khan had been sued for this conduct, but only by private investors and not the SEC.

Mr. Khan complained and asked for both a correction and that he be contacted in connection with future articles. The Times promptly corrected the mistake.

In a nice twist, reality caught up with the mistake a few months ago, when Mr. Khan was sued by the SEC for the very conduct at issue, thus transforming the error into a scoop published five years too soon. The court was unimpressed by this development.

The second article, published in January 1994, reported that Mr. Khan had been fined for securities fraud in Canada. In fact, as the Bloomberg Business News item upon which the reporter relied said, a former partner of Mr. Khan's had been so convicted. The Canadian authorities have to date not followed the SEC's lead in attempting to conform reality to the Times's reporting.

Mr. Khan was not contacted in connection with the second article. *The Times* again corrected. Mr. Khan sued.

The court held that all of this presents a jury question on actual malice. Although there is little more here than a lack of care in reading resource materials and a failure further to investigate what was understood to be historical fact, the court seemed persuaded that the repeated errors and the disregard of the request for comment by themselves could amount to actual malice.

The court also assigned some weight to an affidavit of former *Newsday* journalist Robert Greene, who opined that *The Times* had violated "the two basic tenets of journalism, accuracy and fairness."

The court was unimpressed by *The Times's* prompt corrections of the errors, noting more than once that they had appeared on page A2 and "not in the business section."

Under New York procedure, *The Times* is entitled to and will appeal the decision on an interlocutory basis.

The Times was represented by its senior counsel Adam Liptak and by John Kiernan and Jeremy Feigelson of Debevoise & Plimpton.

Appellate Decision For Stunt Pilot Reversed

Narrow Public Figure Analysis Not Reached

By Eric L. Dahlin

In a recent decision involving a claim for defamation and invasion of privacy by false light, the Oregon Supreme Court reversed a decision by the Oregon Court of Appeals that had generated a fair amount of controversy by articulating a narrow conception of "public figure" status. *Reesman v. Highfill*, 327 Or. 597, 965 P.2d 1030, 1998 WL 761477 (1998) (*Reesman II*). The Supreme Court's decision, however, did not address the court of appeals' public figure analysis, rather the court simply reversed on the grounds that the statements at issue were not capable of having a defamatory meaning.

From Plane Crash to Flyer

Reesman involved the efforts of a community group, People Against Aurora Airport Expansion (PAAAX), to fight the proposed expansion of a local airport. PAAAX's efforts included distributing a fund-raising flyer which discussed potential problems with the airport expansion. In the flyer, PAAAX republished a photograph and headline from a local newspaper that had reported that plaintiff had recently crashed an airplane at the Aurora airport.

Plaintiff, the owner and chief pilot of a business engaged in air show performances, had previously received local media attention because of his performances and had also actively sought publicity for his air shows. The flyer discussed the crash and the practices of pilots in general at the airport and treated the crash as a sign of things to come if the airport was expanded and air traffic increased. Plaintiff sued PAAAX and some of its members for defamation and false light on the grounds that the statements in the flyer *implied* that he was an unsafe pilot who was flying in violation of FAA regulations when his crash occurred.

The trial court granted summary judgment in favor of the defendants, finding that the statements at issue were not capable of a defamatory meaning. The trial court also ruled that plaintiff was a public figure and that plaintiff had failed to prove that the defendants acted with actual malice.

Appellate Court: Not a Public Figure

The court of appeals reversed. *Reesman v. Highfill*, 149 Or.App. 374, 942 P.2d 891 (1997), *rev'd* 327 Or. 597, 965 P.2d 1030 (1998) (*Reesman I*). (See *LDRC LibelLetter* Aug. 1997, at 10.) The court of appeals first determined that although the flyer never stated that plaintiff was an unsafe pilot, the statements at issue "are capable of defamatory meaning" because the flyer made references to unsafe flying practices "in the context of describing plaintiff's mishap." *Id.* at 381. The court of appeals then determined that plaintiff did not become a limited public figure due to his crash at the Aurora airport and the resulting publicity, thus he was not required to prove that the defendants acted with actual malice in defaming him.

The court reasoned that the crash certainly was newsworthy but that plaintiff's involvement was involuntary, thus plaintiff was the "quintessential involuntary participant in a newsworthy event" and did not become a public figure on that basis. *Id.* at 385. The court also rejected the defendants' argument that by promoting his air shows and seeking publicity plaintiff became a public figure who invited comment on his performances and related matters, such as the crash of one of his stunt planes. Though this argument seemed to merit a substantial discussion, the court of appeals only gave it a perfunctory look before summarily rejecting it. In reaching its conclusion that plaintiff was not a public figure, the court of appeals narrowly interpreted two prior Oregon Supreme Court decisions which involved a public figure analysis. *See Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 91979); *Bank of Oregon v. Independent News*, 298 Or. 434, 693 P.2d 35 (1985).

False Light Requires Malice

The court of appeals next addressed plaintiff's claim for invasion of privacy by false light in which plaintiff alleged that the statements at issue in his defamation claim also placed his skills as a pilot in a false light, and that this was highly offensive to a reasonable person. *Id.* at 387. The

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court required the actual malice standard and stated that to prevail in a false light claim the plaintiff must prove that the defendants had "knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which [the plaintiff] would be placed." *Id.* Despite applying this strict standard, the court of appeals determined that there were disputed issues of material fact as to whether the defendants acted with actual malice, and thus reversed the district court's grant of summary judgment.

Oregon Supreme Court Reverses

The Oregon Supreme Court agreed to review this decision and subsequently reversed the court of appeals and affirmed the trial court's grant of summary judgment in favor of the defendants. *Reesman II* at *1. The supreme court first addressed the question of whether the statements at issue were capable of defamatory meaning. The court noted that the question of whether a statement is capable of defamatory meaning is a question of law for the court and held that the statements at issue were not defamatory on their face.

However, the court acknowledged that a communication that is not defamatory on its face "may be defamatory if a reasonable person could draw a defamatory *inference* from the communication," *Id.* at *4 (emphasis added) — what is commonly labelled "defamation by implication." The court noted that when defamation by implication is alleged, the link between the communication and the defamatory inference must not be "too tenuous," or in other words, "the inference that the plaintiff seeks to draw from the facially nondefamatory communication must be reasonable." *Id.*

The supreme court then engaged in a fact-specific analysis of the allegedly defamatory statements and determined that the statements were not capable of a defamatory meaning. Specifically, the court stated that plaintiff's first allegation, that the flyer implied that at the time of the crash the plaintiff was conducting a maneuver that was prohibited by FAA regulations, was simply unsupportable because the flyer stated that the FAA permitted, not prohibited, aerial acrobatic maneuvers over the area where the accident occurred. With respect to the remaining allegations, the court determined that the statements at issue were either opinions that could not be reasonably interpreted as stating actual facts or that there was simply no support for the implication that the plaintiff was among those pilots who routinely violated airport rules.

Because the Court concluded that the defendants could not be liable for defamation because the statements were not capable of defamatory meaning, the court declined to "address defendants' argument that plaintiff is a public figure because he actively seeks publicity for his air shows." *Reesman II* at *6 n 2. The supreme court did not discuss the court of appeals' discussion of this matter – in fact this important issue was only mentioned in a footnote – and gave no indication of whether the court of appeals correctly interpreted prior public figure cases.

The supreme court did address plaintiff's false light claim, first noting that it had never before recognized the tort of invasion of privacy by false light, although this tort has been recognized by the Oregon Court of Appeals for over a decade. *Id.* at *6 and n3. The court found it was not necessary to decide whether to recognize this tort because even if such a tort was available, there was no reasonable link between the statements in the flyer and the implied statements that plaintiff argued placed him in a false light. Because plaintiff failed to present an adequate claim for invasion of privacy, it was not necessary to address the question of whether the court of appeals correctly determined that there were questions of material fact as to whether the defendants acted with actual malice.

The *Reesman II* decision is certainly a positive decision for First Amendment advocates because it abrogates an appellate decision that imposed a narrow construction of public figures. However, because the Oregon Supreme Court did not address the court of appeals' discussion of the public figure issue and did not specifically repudiate the court of appeals analysis, the court of appeals' opinion as to the public figure analysis may still be cited as dictum.

Eric L. Dahlin is with the firm Davis Wright Tremaine in Portland, Oregon.

IOWA SUPREME COURT: SUBSTANTIAL EVIDENCE OF REPUTATIONAL HARM IS NECESSARY FOR DEFAMATION CLAIM

By Kasey Kincaid

In holding the trial court should have sustained the *Ottumwa Courier*'s motion for JNOV after a jury returned a verdict of $230,000 in compensatory damages for a defamation plaintiff, the Iowa Supreme Court clarified that Iowa law requires proof of reputational harm to recover in a defamation action. In *Schlegel v. The Ottumwa Courier*, 585 N.W.2d 217 (Iowa 1998), the Court found that because the plaintiff failed to establish substantial evidence of harm to his reputation, the proper remedy was dismissal of his claim, rather than a new trial.

The Court also held that the trial court correctly sustained the *Courier*'s motion for JNOV on the jury's $2 million dollar punitive damage award, which was not supported by the evidence. Further, the Court held that because there was no reputational harm, the jury's award of $150,000 to the plaintiff's wife for loss of consortium should be similarly reversed.

Plaintiff Mistaken for His Client

The suit was brought by Richard Schlegel, a lawyer and former county attorney, against the *Courier* after it erroneously reported that Schlegel had filed for bankruptcy, when he had actually represented the debtor. The report, which was published on page five of the paper in the "courthouse records" section, mistakenly transposed Schlegel's name with that of his client. After discovering the error and consulting with Schlegel's attorney, the *Courier* published the next morning a prominent front page correction, stating that Schlegel's name had been incorrectly listed due to a clerical error and explaining that Schlegel had not filed for bankruptcy, but instead was acting as the debtor's lawyer. The correction also stated that the *Courier* regretted the error.

Schlegel subsequently brought an action for defamation against the *Courier* and its editor-in-chief, alleging he had suffered humiliation and damage to his reputation, that his wife had suffered loss of consortium, and that the *Courier*'s act of publishing the erroneous report was willful and wanton misconduct, entitling them to punitive damages.

The trial court denied the *Courier*'s post-trial motion for JNOV on the compensatory damage award, but found the award to be excessive and, presumably, a result of jury passion or prejudice. The trial court observed that although Schlegel's evidence indicated that the erroneous report "made him very upset and mad," there was no evidence that he suffered any loss of business or reputation. As a result, the trial court set aside the compensatory damage award and granted the *Courier*'s alternative motion for new trial. As noted, the trial court sustained the *Courier*'s motion for JNOV on the punitive damage award, finding there was insufficient evidence to support the award.

Supreme Court Requires Reputational Harm

On the *Courier*'s cross-appeal, the Iowa Supreme Court determined that Schlegel's failure to produce damage of reputational harm necessitated the dismissal of all claims. In considering whether Schlegel established substantial evidence that he had suffered reputational harm, the Iowa Supreme Court assumed Schlegel was a private figure.

The Court assessed the trial record and noted that Schlegel did not contend he suffered loss of business. Further, Schlegel failed to present evidence that he had a good reputation in the community prior to the erroneous report, as Schlegel testified merely that he was well known in the community, be it "good or bad." The Court also noted that none of Schlegel's witnesses testified that Schlegel "had any particular reputation before the false report or that they thought ill of him because of it." The Court ultimately determined this

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evidence was insufficient to send the case to the jury.

The Court concluded that although the trial court properly found there was insufficient evidence to support a jury finding of reputational harm, it erroneously determined that evidence of "hurt feelings and physical manifestations of those injuries were enough to submit the issue to the jury." The Court reversed the trial court's order granting a new trial and held the *Courier*'s motion for JNOV should have been granted, concluding that "[u]nder our rule requiring reputational harm, [hurt feelings] are not enough." In rejecting application of United States Supreme Court cases that suggest recovery may be permitted in a defamation action without showing reputational harm, the Court stated:

> Given our case recognition that defamation is based upon damage to reputation, we agree with those courts that have continued to impose a reputational harm prerequisite in defamation actions. We agree . . . that to do otherwise would set the law of defamation on end.

585 N.W. 2d 217, 223 (Iowa 1998).

The Court also expressly disavowed any implication that its prior holdings in this area permitted a defamation plaintiff to recover "parasitic damages such as emotional distress and humiliation" without proving reputational harm.

Kasey Kincaid is a partner in the Des Moines office of Faegre & Benson LLP and represented the Ottumwa Courier at trial and on appeal of this case.

Defamation Action Dismissed on Collateral Estoppel Grounds

In an interesting application of the collateral estoppel doctrine, the First Circuit affirmed dismissal of a nonmedia defamation suit. *Hoult v. Hoult*, 1998 WL 689947 (1st Cir. Oct. 9, 1998). The unusual facts here involve litigations between a father and daughter based on the daughter's recovered memories of sexual abuse and rape by her father. In 1993, the daughter obtained a general verdict civil judgment against her father for assault and battery, intentional infliction of emotional distress, and breach of fiduciary duty. She thereafter sent letters to professional organizations stating that her father had raped her -- providing the basis for the defamation suit.

In response to the motion to dismiss on collateral estoppel grounds, plaintiff argued that the jury's general verdict of liability did not necessarily determine the specific allegation of rape, and the general verdict may have been based on acts of violence and abuse. In affirming dismissal, the court stated that when reviewing a general verdict to see if an issue was actually decided for collateral estoppel purposes the court should consider not only what was logically a necessary component of the decision but also what was practically a necessary component of the decision. *Id.* at *3. Examining the full record of the prior proceeding, the court found that the rape charges were the "centerpiece" and "pivotal" issue of the prior case, that the jury necessarily decided that they had occurred, and, finally, that the defamation suit was merely a guise to retry the central issue of the prior proceeding. *Id.* *3-*4.

South Carolina Supreme Court Remands $1 Million Verdict . . . Again
Suit Over 1986 Article Sent Back for Third Trial

Noting the confusion caused by their 1991 opinion remanding the case, the South Carolina Supreme Court has once again remanded a trial result in *Holtzscheiter v. Thomson Newspapers, Inc.* — a case arising out of a 1986 article discussing the murder of the plaintiff's 17-year-old daughter. The decision marks the second time that the case has been reversed by the South Carolina Supreme Court and sent back for retrial. In 1991, the Supreme Court reversed a directed verdict for the defendant. This time, after a period of over three and a half years between argument and decision, the court reversed a $1 million award for the plaintiff. *Holtzscheiter v. Thomson Newspapers, Inc.*, No. 24842 (S.C. Sup. Ct. September 22, 1998) ("*Holtzscheiter II*").

"No Family Support"

On July 26, 1986, the Florence Morning News reported the murder of Shannon Holtzscheiter, a 17-year-old girl who the article characterized as a high school dropout, a "drifter" and the "product of a broken home." The article also quoted Shannon's doctor as saying " . . . there simply was no family support to encourage [Shannon] to continue her education." The story allegedly ran with no one other than the reporter reading it before publication — a transgression of the paper's ordinary procedures.

The girl's mother, Sandra Prosser Holtzscheiter, sued the paper alleging the statement concerning a lack of family support for Shannon was defamatory. Holtzscheiter claimed — and later introduced evidence at trial — that she had, in fact, encouraged Shannon to pursue her G.E.D. in the future. In addition, the doctor who provided the quote testified she told the newspaper's reporter that Shannon lacked *financial* (not family) support to continue her education.

Holtzscheiter I

At the end of the first trial in the case, the court granted the defendant's motion for directed verdict holding that the plaintiff failed to prove special damages as required under South Carolina law in cases of libel per quod. Reversing the directed verdict, the South Carolina Supreme Court held that the newspaper article "could be read, on its face, to charge Holtzscheiter with failing to support her daughter by not encouraging her to continue her education." *Holtzscheiter v. Thomson Newspapers*, 19 Media L. Rep. 1717, 1718 (S.C. Dec. 16, 1991) ("*Holtzscheiter I*"). The majority opinion left the impression that the statement would constitute libel per se for which special damage was not required, but the opinion apparently left confusion on the point.

Upon retrial, a jury awarded the plaintiff $500,000 in actual damages and $1.5 million in punitive damages. The trial judge remitted the punitive damage award to $500,000.

Defamatory Per Quod But Actionable Per Se

Delving into the archaic rules governing per se and per quod distinctions, the South Carolina Supreme Court noted that a statement whose "defamatory meaning is not clear unless the hearer knows facts or circumstances not contained in the statement itself" is defamatory per quod. The court cleared up any confusion surrounding the "family support" quotation by holding that the statement was defamatory per quod. "Hence," the court continued, "extrinsic evidence is necessary to prove the defamatory meaning." *Holtzscheiter II*, slip op. at 17.

The court went on to note that statements may also be actionable per se or not. According to the court, in circumstances involving statements which are actionable per se the common law "*presumes* that the defendant acted with common law malice and that the plaintiff suffered general damages." *Id.* [emphasis in original]. Conversely, if a statement is not actionable per se, the plaintiff must plead and prove common law malice and special damages.

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Essentially all libel — because it is written and presumably more damaging — is actionable per se, the court stated, with the seeming gentle limitation that the statements must be of the kind which the judge can legally presume would harm plaintiff's reputation. Also actionable per se are the five traditional categories of *slander* which are actionable per se — (1) crimes of moral turpitude; (2) loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in business or profession. Fearing that its opinion in *Holtzscheiter I* had confused this issue as well, the court overruled any contrary limitations that might otherwise have been drawn from its earlier opinion.

Thus, the court ultimately found the statement to be defamatory per quod and actionable per se, and accordingly the plaintiff was not required to plead or prove special damages.

Punitives Reversed and Case Remanded

The court refused to review the newspaper's assertion of appellate issues of opinion, falsity (or substantial truth), and reputational harm, finding they were not adequately preserved below for appeal. The court rejected the newspaper's assertion that the statement was not "of and concerning" the plaintiff. Rather, the court found that recovery was not precluded in cases involving small groups and that a jury could have found that the statement in the article was "of and about" the plaintiff.

The court also rejected the newspaper's argument that the plaintiff failed to show negligence. The court found that from the evidence at trial a jury could have found "professional standards were breached in that no one other than the reporter actually read the story before it was published." According to the court, this evidence of negligence was sufficient to deny the defendant's motion for a directed verdict.

Finally, the court held that the trial court should have granted a directed verdict on the issue of punitive damages. The court found "absolutely no evidence the newspaper either knew the statement was false or had serious reservations about its truthfulness when the article was prepared and published." Slip op. at 23.

The court then ordered that the case be sent back to the trial court for a "new trial absolute" — "not simply because the issue of punitive damages should never have been submitted to the jury, nor solely because of the size of the award, but also because the parties were denied a fair trial as the result of the confusion generated by our decision in *Holtzscheiter I*." *Id.*

A Concurrence in Result

In a strongly worded concurrence written by Justice Toal, she stated that only by completely rejecting the concept of libel per quod "and by rejoining the mainstream of defamation law can any clarity be brought to the law in our state." *Id.* at 33. In her concurrence, Justice Toal bemoaned the state of South Carolina libel law:

> It has been written that "there is a great deal of the law of defamation which makes no sense." This statement is particularly applicable to certain areas of South Carolina defamation law, which are mind-numbingly incoherent. Case law in this state presents no clear analytical system for resolving defamation questions. Because a clear framework is lacking, the resolution of disputes often turns on chance, on whatever aspect of defamation law happens to arrest the parties' or court's attention in that case. As a result, the law lacks consistency and predictability, and confounds the bench, the bar, members of the general public, and media personnel who have to make important decisions based on court precedent.

Id. at 24.

Justice Toal continued by outlining the elements of defamation law and recommending that the concept of libel per quod — referred to by one South Carolina court as among the "rusted relics of ancient asininity" — be rejected in favor of adopting § 569 of the Restatement (Second) of Torts which provides that all libel is actionable and does not require proof of special damages.

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Under her system, Justice Toal would also have sent the case back for retrial. Notably, however, Justice Toal disagreed with the majority that the statement was a matter of public concern. Rather, she states that because the statement "solely relates to a matter of private concern: family support for an individual," she cannot conceive how the statement is a matter of public concern. *Id.* at 39. Consequently, Justice Toal would hold that *Hepps* does not apply and that the newspaper would have to raise the issue of truth solely as an affirmative defense.

And A Dissent in Part

Finally, in a dissent in part, Justice Chandler stated that while he agreed that no punitive damages should have been awarded, he did not believe that the entire case should be remanded for a new trial. Rather, Justice Chandler stated that the compensatory award should have been affirmed because it was not "so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other considerations not founded on the evidence." *Id.* at 42.

LDRC would like to thank fall interns, Lara Schneider and Lisa Smith for their contributions to this month's newsletter and other LDRC projects.

They are both second year students at Benjamin N. Cardozo School of Law.

Former Cincinnati Enquirer Reporter Pleads Guilty to Violations In Reporting Chiquita Story

Civil Discovery in *Chiquita v. Gallagher* May Resume

With the reporter in *The Cincinnati Enquirer* story on Chiquita Brands International pleading guilty to two felony counts arising out of his reporting, the civil suit against the reporter may be allowed to fully proceed. Discovery may resume after Thanksgiving in the civil trial brought by Chiquita Brands International against Michael Gallagher, now a *former* reporter for *The Cincinnati Enquirer*, and author of the infamous investigative report on Chiquita for which the *Enquirer* apologized earlier this year. *Chiquita Brands International, Inc. v. Michael Gallagher,* C-1-98-467 (S.D. Ohio July 2, 1998). The case was brought against Gallagher for defamation, trespass, conversion and other toritious acts stemming from violations of state and federal wiretapping laws. The criminal investigation began several weeks after the newspaper article appeared. The civil action was subsequently filed on July 2, 1998. *See LDRC LibelLetter* July 1998, at p. 16.

Gallagher Pleads Guilty to Criminal Conduct

On September 24, 1998, Michael Gallagher pled guilty in criminal court to a felony four and a felony five under the Ohio statute. Ohio's system is a one to five felony system, with felonies at the four and five level characterized as nonviolent, primarily business-related crimes, generally with a presumption of probation for first time offenders. O.R.C. s.2933.52-(a)(1), the felony four provision, provides liability for the unlawful interception of communications. O.R.C. 2913.04(b), the felony five provision, provides liability for the unauthorized access to computer systems.

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Former Cincinnati Enquirer Reporter Pleads Guilty

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On August 27, Judge Dlott of the United States District Court for the Southern District of Ohio, Western Division, denied Gallagher's motion for a protective order to stay the civil proceedings. Patrick Hanley, attorney for Michael Gallagher, stated that he had asked for a complete stay in the civil action until the criminal investigation was completed. While a complete stay was denied, Judge Dlott did approve Chiquita's proposal for a 90-day stay. The order granting that stay was filed on August 27, 1998. During the period of the stay, Gallagher was not required to respond to Chiquita's complaint, and no discovery was to be taken from Gallagher. Nor was Gallagher allowed discovery of Chiquita. Chiquita was otherwise allowed to proceed with discovery. Gallagher was not.

Although sentencing in the criminal action has not been decided, Judge Niehaus has indicated that Gallagher will probably get probation. But while the 90-day stay is up on November 27, it is not likely that the sentence will have been handed down by the time civil discovery is set to be reconsidered. Gallagher's counsel told LDRC that the criminal investigation is really concluded at this point and, because Judge Dlott was reluctant to order a stay in the first place, counsel expects that an answer to Chiquita's complaint will be due next week or shortly thereafter.

Patrick Hanley of Covington, Kentucky is Mr. Gallagher's attorney. Attorneys for Chiquita Brands, International are James Burke and Daniel Donnellon of Keating, Muething and Klekamp in Cincinnati, Ohio and Thomas Yannucci, James Basile, and Thomas Clare of Kirkland & Ellis in Washington, DC.

N.Y. Court Uses Anti-SLAPP Law to Dismiss Defamation Suit

A New York trial court dismissed a defamation suit on the grounds that it was a strategic lawsuit against public petition and participation or "SLAPP" suit under CPLR 3211(g) and New York Civil Rights Law sections 70-a and 76-a. *Rubin v. Gitlitz*, No. 44912/97 (N.Y. Kings Cty. Jul. 28, 1998). This appears to be the first time a New York court has used the state anti-SLAPP law to dismiss a defamation claim.

The defamation claim arose out of an investigation by defendant, employee of a non-profit social services organization, into plaintiff's administration of a retirement home. Defendant's investigative report alleged that plaintiff improperly handled residents' funds in violation of state and federal law. The report led several residents to file suit against plaintiff alleging various breaches of fiduciary duty and misuse of funds. Two weeks after the residents' suit was filed, plaintiff sued for defamation alleging that defendant told residents that he was "embezzling funds."

In dismissing the suit, the court ruled that defendant, both as a citizen and as an employee of an organization entitled to have access to retirement homes, was within the scope of New York's anti-SLAPP law protection. Moreover, there was no separate basis for the defamation suit, since it materially related to the residents' suit and prior investigation into plaintiff's administration of the home.

Defendants were represented by Patterson, Belknap, Webb & Tyler New York, NY.

Texas Libel Law Developments Favor News Media

By William W. Ogden

Texas journalists are benefitting from several developments in that state's libel law which enhance the defense of libel claims. The most significant developments are new cases construing the 1993 statute permitting media defendants an interlocutory appeal from summary judgment denials in libel cases. Other favorable developments include a new rule permitting "no evidence" summary judgment motions, a strengthening of speech and press rights under the Texas constitution, and a series of favorable court rulings on public figures, libel by implication, and substantial truth.

These developments are so strong that they might prompt some out-of-state news organizations to re-think the issue of diversity removal jurisdiction when sued in Texas state courts. While some publishers and broadcasters historically have viewed federal courts as a preferred forum, that consideration must now be weighed against the realization that removal forfeits the right to exercise the interlocutory appeal, and may arguably land a litigant in a forum less receptive to state constitutional claims.

The Interlocutory Appeal Law

In 1993, the Texas Legislature amended the Texas Civil Practice and Remedies Code, permitting media defendants to file interlocutory appeals from denials of summary judgments in libel cases. Tex. Civ. Prac. & Rem. Code § 51.014(6).

Until recently, few courts had construed or applied this provision. In 1998, however, Texas appellate courts to date have decided at least seven interlocutory libel appeals on the merits. The results are impressive: in six of the seven cases, the appeals court reversed the trial court's denial of summary judgment, and rendered judgment in favor of the media defendants.

* ***WFAA-TV, Inc. v. McLemore,*** 41 Tex. S. Ct. J. 1394 (Tex. 1998), reversing denial of summary judgment for a broadcaster on a news report arising from the 1993 ATF cult raid in Waco, Texas. The plaintiff was a local televison reporter who claimed he was libeled when federal agents blamed unnamed "local reporters" for compromising raid security. WFAA repeated these allegations in a newscast that identified Mr. McLemore. WFAA appealed the denial of summary judgment on actual malice grounds, but the intermediate appellate court affirmed, holding that the journalist-plaintiff was not a public figure. The Texas Supreme Court reversed, finding McLemore a vortex public figure, and holding that the record negated actual malice as a matter of law.

* ***Galveston Newspapers, Inc. v. Norris***, 1998 Tex. App. Lexis 6416 (Tex. App.--Houston [1st Dist.] 1998, no writ), reversing denial of summary judgment in a libel suit against a newspaper by the executive director of a municipal housing authority. A series of articles raised allegations of mismanagement and improper financial procedures. The director claimed the articles accused him of fraud and "implied he was guilty of theft." On the newspaper's "no evidence" summary judgment motion denying actual malice, the appeals court found that the plaintiff's controverting affidavit failed to raise "specific affirmative proof" of a fact issue on actual malice, and rendered judgment for the newspaper.

* ***HBO v. Huckabee***, 1998 Tex. App. Lexis 5399 (Tex. App.--Houston [14th Dist.] 1998, no writ), reversing denial of summary judgment in a libel suit brought by a state district judge regarding the 1992 HBO film "Women on Trial." The broadcast dealt with claims of judicial bias and unfair treatment by four women who lost custody battles in Texas family courts. The court's opinion details the extensive research undertaken by the reporter and producer, noting dozens of interviews and comprehensive reviews of trial transcripts. The court concluded that the reporter's and producer's affidavits negated actual malice as a matter of law.

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* ***HBO v. Harrison***, 1998 Tex. App. Lexis 6410 (Tex. App.--Houston [14th Dist.] 1998, no writ), reversing denial of summary judgment in a companion libel suit brought by a court-appointed psychologist concerning the same "Women on Trial" broadcast as in *Huckabee, supra*. The appeals court concluded that the psychologist was a public official because his order of appointment granted him authority to rule on visitation matters, thus vesting him with effective judicial power. Relying on the *Huckabee* defense affidavits detailing thorough pre-broadcast research, the appeals court found actual malice negated as a matter of law and rendered judgment for HBO.

* ***KTRK Television, Inc. v. Fowkes***, 1998 Tex. App. Lexis 6399 (Tex. App.--Houston [1st Dist.] 1998, no writ), rendering judgment for the broadcaster on interlocutory appeal from a trial court order which partially denied summary judgment. This suit clustered claims of libel, negligence, emotional distress and tortious interference, brought by a public works information manager and arising from a news broadcast that questioned the propriety of building inspectors taking free lunches from contractors. After holding the interlocutory appeal law valid in the face of several challenges under both the state and federal constitution, the appeals court found the summary judgment evidence sufficient to establish substantial truth as a matter of law and rejected the plaintiff's claim of libel by implication.

* ***Texas Monthly, Inc. v. Stanley***, 1998 Tex. App. LEXIS 4685 (Tex. App.--Houston [1st Dist.] 1998, no writ), reversing partial denial of summary judgment in a libel claim based on a magazine article entitled "The King of Bankruptcy." The article deals with claims of bankruptcy fraud against a natural gas company and its president, detailing testimony and allegations raised in a separate lawsuit that resulted in an $8 million verdict against the company. The summary judgment evidence included substantial portions of the trial record on which the verdict was based, and which the reporter had relied upon in writing the article. The appeals court found that Texas Monthly had established a defense under the statutory fair report privilege as a matter of law. Tex. Civ. Prac. & Rem. Code § 73.002.

* ***TSM AM-FM TV v. Meca Homes***, 969 S.W.2d 448 (Tex. App.--El Paso 1998, pet. denied), affirming denial of summary judgment in a libel claim brought by a homebuilder. The suit concerned a local news broadcast alleging that the builder had erected an illegal retaining wall in excess of his building permit, a possible criminal offense. The appeals court found that a jury question was presented on issues of truth and defamatory meaning, and held that the homebuilder was not a vortex public figure since the controversy did not affect anyone other than the participants.

Statute Held Constitutional

The interlocutory appeal statute was held constitutional against a series of challenges in *KTRK Television, Inc. v. Fowkes, supra.*

The court held that the interlocutory appeal statute was not a "local or special law" prohibited by the state constitution, because there was a reasonable basis for the classification made by the statute, and the law operated equally within that classification. Claims against the media raise special policy concerns because they threaten both the media's constitutional rights and the public's ability to receive information. Thus, the preferential right of interlocutory appeal is founded on a sufficient policy basis.

The court also held that the interlocutory appeal law did not violate the state constitution's open courts provision. The law did not impose unreasonable financial barriers to libel plaintiffs, and moreover, the law was reasonable when balanced against the legislature's intent to protect the exercise of constitutional rights.

Finally, the court sustained the state law against an equal protection challenge under both state and federal constitutions, since the law does not abridge a fundamental

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right, does not distinguish between persons on a suspect basis, and is rationally related to the legitimate purpose of insuring "uninhibited, robust, and wide-open" public discussion.

The *Fowkes* opinion also illustrates some interesting jurisdictional parameters of the interlocutory appeal law. Often a libel claim is linked with tort claims such as tortious interference or emotional distress--sometimes referred to as "tag-along" torts. *See Galveston Newspapers, Inc. v. Norris, supra. Fowkes* and *Galveston Newspapers* hold that the appellate court's jurisdiction on an interlocutory libel appeal also extends to the tag-along tort claims. However, the interlocutory appeal law only grants appeal rights to libel *defendants*, not plaintiffs. Thus, if the trial court partially or wholly denies a libel plaintiff's motion for summary judgment, the appeals court lacks jurisdiction to make an interlocutory determination of the plaintiff's points, either by direct appeal or by cross-appeal. *TSM AM-FM TV v. Meca Homes, Inc., supra; Rogers v. Cassidy*, 946 S.W.2d 439 (Tex. App.--Corpus Christi 1997, no writ).

"No Evidence" Summary Judgment Motions

1998 Amendments to the Texas Rules of Civil Procedure give libel defendants yet another weapon: the "no evidence" motion for summary judgment under Tex. R. Civ. P. 166a.

Under the new rule, a defendant may file a "no evidence" summary judgment motion based on the claim that the record is devoid of evidence on any essential element of the plaintiff's case. In a public official libel case, one Texas appellate court entertained a defense "no evidence" summary judgment motion, holding that the plaintiff could not raise a fact issue on actual malice. *Galveston Newspapers, Inc. v. Norris*, supra. When the trial court failed to grant the "no evidence" motion, the newspaper then resorted to the new interlocutory appeal, and the result was a defense judgment rendered as a matter of law.

The Texas Constitution

A series of earlier Texas cases stand for the proposition that the state constitution has "independent vitality" in the area of free speech and may afford greater protection for speech than that provided under the federal constitution. *O'Quinn v. State Bar*, 763 S.W.2d 397 (Tex. 1988); *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992); *Cain v. Hearst Corporation*, 878 S.W.2d 577, 584 (Tex. 1994). *But see Operation Rescue v. Planned Parenthood*, 41 Tex. S. Ct. J. 1071, 1079 (Tex. 1998).

The argument for greater speech protection under the Texas Constitution stems in part from the fact that it contains an affirmative guarantee of the right to free speech, as contrasted with the federal constitution, which restricts the government's ability to abridge free speech. This distinction was noted again with approval in two of the 1998 interlocutory libel appeals. *HBO v. Harrison, supra.*; *HBO v. Huckabee, supra.*

The state constitution figured in another 1998 Texas case: *Falk & Mayfield L.L.P. v. Molzan,* 974 S.W.2d 821 (Tex. App.--Houston [14th Dist.] 1998, no writ). Molzan was a chef who felt victimized by frivolous liability suits filed against his restaurant. In retaliation, he placed a portable sign in front of his restaurant inviting patrons to "ask me about lawsuit abuse," and naming the law firm of Falk & Mayfield. Unamused, the lawyers sued for libel, but when they non-suited the case several months later, Chef Molzan immediately filed a motion to reopen the case to award sanctions for frivolous litigation.

The trial court agreed that the libel suit based on the portable sign was frivolous, and awarded Chef Molzan treble attorneys's fees as sanctions, totaling $42,360. The court of appeals affirmed, calling the libel complaint "nakedly frivolous," since the term "lawsuit abuse" is an expression of opinion which is "absolutely protected" by the federal and state constitutions. The opinion relies on a pre-*Milkovich* Texas Supreme Court opinion, which held that the state constitution protects "all assertions of opinion." *Carr v. Brasher*, 776 S.W.2d 567 (Tex. 1989).

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Thus, in Texas state courts, libel defendants arguably not only have stronger free speech rights under their state constitution, but also (1) sanctions available for "nakedly frivolous" claims, (2) "no evidence" summary judgment motions for public figure cases in the absence of actual malice, and (3) the right to an interlocutory appeal if their motions for summary judgment are denied.

Libel By Implication

Building on a 1995 Texas Supreme Court decision, several intermediate appellate courts have reinforced and strengthened the prohibition against claims for libel by implication.

The 1995 Texas Supreme Court decision was an employment slander case. *Randall's Food Markets Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex.1995). In *Randall's*, an employee admitted leaving the store absentmindedly without paying for merchandise, but contested her termination and alleged if falsely implied she was a thief. The court flatly rejected a theory of "libel by implication" where the facts stated were substantially true.

The Texas First Court of Appeals reaffirmed that position in *KTRK Television, Inc. v. Fowkes*, *supra*, holding that any claim for libel by implication "otherwise would chill the reporting of factual news, because one might always infer negative implications from an event that actually occurred." Thus a news report claiming that the reporter's investigation "led to the reassignment of the department's computer director" was substantially true, even though the director was not permanently reassigned, but temporarily replaced following a profanity-laced confrontation with the reporter. Similarly, a housing authority director lost a libel claim on a summary judgment appeal where articles about mismanagement "implied that he was guilty of theft." *Galveston Newspapers, Inc. v. Norris, supra.* "The implication of a true statement, however unfortunate, does not vitiate the defense of truth." *Texas Monthly, Inc. v. Stanley*, supra, Slip Op. at 19.

A related opinion came in *Ortiz v. Federal Credit Union*, 974 S.W.2d 833 (Tex. App.--San Antonio 1998, no writ). In *Ortiz*, the credit union "flagged" accounts suspected of involvement in a check kiting scam, and published the flagged accounts to alert its members. Mr. Ortiz was a victim of the fraud, but since some of the suspect checks were deposited in his account, his name and account were included in the alert. Ortiz admitted that the statement in the alert was true, but alleged it implied his involvement in theft. The appeals court affirmed summary judgment for the credit union, holding that the literal truth of the alert defeated any claim on a defamatory implication.

Yet another case giving short shrift to claims of libel by implication is *Saucedo v. Rheem Mfg. Co.*, 974 S.W.2d 117 (Tex. App.--San Antonio 1998, no writ). *Rheem* is an employment reference case, in which the plaintiff claimed he was defamed by supervisors who either hesitated or refused to talk when asked for a reference about him. Plaintiff offered the affidavit of an employment recruiter, who said that such reactions are universally understood to be a bad reference. The court actually denied all relief on the defense of consent -- an absolute defense in Texas--since the plaintiff had asked that the referral calls be made. Yet the opinion also concludes that hesitant or refused references are not grounds for libel, regardless of the inference drawn by the listener.

Public Figures and Public Officials

As reported in last month's *LDRC LibelLetter*, the Texas Supreme Court adopted the Fifth Circuit/D.C. Circuit test for vortex public figures, holding that there must be proof of (a) a public controversy, (b) in which the plaintiff has more than a trivial role, and (c) the alleged libel must relate to the plaintiff's participation. *WFAA-TV, Inc. v. McLemore*, 41 Tex. S. Ct. J. 1394 (Tex. 1998). Because the plaintiff in *McLemore* clearly had injected himself voluntarily into that controversy, the court did not decide whether "voluntariness" is a requirement for the Texas limited purpose public figure test.

Another intermediate Texas appellate court, however, has held expressly that voluntariness is not part of the

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vortex public figure test. In *Swate v. Schiffers*, 975 S.W.2d 70 (Tex. App.--San Antonio, 1998, no writ), the plaintiff was a doctor who complained he was libeled by a newspaper article describing several disciplinary orders and other controversies concerning his practice. In affirming summary judgment for the newspaper, the court of appeals noted that the reporter's affidavit incorporated 24 prior news articles concerning Dr. Swate, which "describe a medical practice that can only be characterized as atrocious." The court concluded: "Although Swate may not have voluntarily injected himself into controversy, he has certainly been drawn into controversy," which was sufficient to satisfy the public figure test.

The *Swate* opinion is also interesting because the court found that the reporter's affidavit, listing 24 prior news articles concerning charges against Dr. Swate, not only proved the requisite "public controversy" for public figure analysis, but also negated actual malice. 975 S.W.2d at 78. Thus, while the court does not use the term "wire service defense," the effect of summary judgment in *Swate* closely approximates judicial recognition of a modified wire service doctrine. No prior Texas case has explicitly endorsed the wire service defense.

Perhaps the more remarkable Texas case law development on public figure/public official analysis is *HBO v. Harrison*, *supra*, in which the court held a court-appointed psychiatrist to be a public official for libel analysis. The court acknowledged that Dr. Harrison was not a public employee, had never sought nor held public office, and was not paid from public funds. Nonetheless, Dr. Harrison was a public official as a matter of law, since his order of appointment conferred more than investigative powers, but actually gave the psychiatrist the power to determine visitation: "Appellee [Dr. Harrison], for all intents and purposes, was the judge, with the authority to determine Sandy Hebert's parental rights." Slip Op. at 8.

Privilege and Substantial Truth

Finally, there are a number of favorable recent court rulings on issues of privilege and substantial truth. One Texas Court of Appeals notes that "considerable latitude has been given" in the test of substantial truth. *Texas Monthly, Inc. v. Stanley*, *supra*. Thus the charge that company executives "wiretapped" opponents and "cooked the books" to cover accounting improprieties was privileged as a fair and accurate account of testimony and claims made in related proceedings. Id. Likewise, a statement that a federal judge ordered the company to settle, "although not 100% accurate in every detail," was held substantially true. *Id.*

In an actual malice case, another Texas Court of Appeals affirmed summary judgment for defendants on a broadcast that accused a school superintendent of "bid-rigging and racketeering," despite the source's statement that he denied the term "racketeering" and could not recall the term "bid-rigging." *Beck v. Lone Star Broadcasting Co.*, 970 S.W.2d 610 (Tex. App.--Tyler 1998, no writ). Since the same source went on to say that he felt there had been some "collusion" in revealing bid data to competitors, and since he also had concerns that the plaintiff's secretary had destroyed documents, the court concluded the broadcast was sufficiently close to the source's allegations to negate actual malice.

In *Swate v. Schiffers*, supra, the court concluded that a statement accusing Swate of "assault" was substantially true, even though Swate had received a "not guilty" judgment on the assault charge. 975 S.W.2d at 75. When Dr. Swate complained that three statements in the article were libel per se since they falsely accused him of crimes, the court looked to the reporter's affidavit attaching 24 other news articles describing a ten-year "atrocious" medical practice, and concluded that Swate was libel-proof. Thus, even though a libel per se plaintiff can presume injury, the newspaper rebutted the presumption of injury by establishing the libel-proof doctrine.

William W. (Bill) Ogden is a partner with Ogden, Gibson, White & Broocks, L.L.P. in Houston, Texas.

Fort Worth Court Dismisses ABC 20/20 Libel Claims

By Laura Stapleton

Finding that the statements in an ABC News ***20/20*** report were either opinion, privileged or simply not defamatory, a Fort Worth Court of Appeals affirmed summary judgment for defendants with respect to their report on the quality of care in nursing homes in Texas. Brewer v. CapitalCities/ABC, Inc., No. 2-97-189-CV (Ct. App. 2d Dist.Oct. 15, 1998). Among the findings: stating in the news report that the plaintiff declined to be interviewed was not defamatory.

Victims of Greed

The report entitled "Victims of Greed" aired in October 25, 1991 and concerned abuse, neglect and improper or inadequate care in Texas nursing homes. The report began with hidden camera footage showing patient abuse and neglect inside two different nursing homes. Don Leonard Brewer, an owner of several nursing homes in Texas, who also happened to be a member of the Texas Board of Health at the time the story was investigated, sued ABC and several others for libel and conspiracy to commit libel, after the ***20/20*** commentator mentioned that Brewer faced possible criminal liability for buying and selling nursing homes while on the Board of Health, that three of his homes had appeared on the TDH "worse case" list, and that he had recently resigned from the Board of health and left the state.

The plaintiff specifically complained of the statements alleging (1) he was responsible for patient abuse, (2) he engaged in "profiteering," (3) he fled the state of Texas to avoid fines and criminal liability, and (4) he declined to be interviewed. The trial court granted summary judgment in favor of the defendants, and Brewer appealed.

The appellate court affirmed the summary judgment and explained first that the profiteering statement was merely ABC's presentation of its opinion and was not a statement of fact. Based on the facts given in the report, the Court determined viewers could easily decide for themselves the validity of ABC's opinion that "the most likely reason" for the deficient care was profiteering.

Next, the Court determined that the statement concerning Brewer declining to be interviewed was not defamatory. The Court relied on *Chapin v. Greve*, 787 F. Supp. 557 (E.D. Va. 1992, aff'd sub. nom. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993) where the court dismissed the libel suit for failure to state a claim and stated:

> "Refusing to answer reporters questions is commonplace and certainly cannot reasonably be said to tarnish one's reputation. People in the public eye do it all the time. There is nothing odious or disgraceful about it."

The Court then addressed the issue concerning privilege and concluded that the report was factually consistent with the underlying documents ABC relied upon from the Texas Department of Health, including reports of abuse, neglect and other violations. The court found that evidence concerning such occurrences clearly demonstrated that the report was a reasonable and fair comment on the official proceedings of the Texas Department of Health and of matters that were of a public concern and, as such, were privileged under Texas Civil Practice & Remedies Code s.73.002(b)
(2)

Laura Stapleton is with Jackson Walker, L.L.P. in Austin, the firm that represented defendants in this matter.

Texas Interlocutory Appeal Statute: First Amendment Protection in a Procedural Package

By Paul C. Watler

Two "mega verdicts" against Texas broadcasters in the early 1990s spawned libel reform in the state. Rather than seeking a politically impractical overhaul of the substantive Texas libel statute, this effort focused on summary judgment procedure.

The result was a unique statute that affords Texas journalists the right to interlocutory appeal of a trial court's denial of a motion for summary judgment. The statute has served its purpose of eliminating jury trials of media libel cases that should be decided in favor of defendants on First Amendment grounds.

In 1990, KENS-TV of San Antonio was hit with a $28 million libel judgment for a series of investigative reports questioning the competency of a local heart surgeon. The Bexar County district court jury's award was the largest ever in a libel case in Texas. The record proved short-lived.

In the spring of 1991, a jury in Waco slapped WFAA-TV of Dallas with a $57 million verdict for a series reporting influence peddling allegations involving the McLennan County district attorney.

Seemingly meritorious summary judgment motions by the media defendants were denied before trial in both cases. The frequently observed phenomenon of juror hostility toward the media--expressed with dollar signs and lots of zeroes--followed at trial. Both cases were eventually settled with appeals pending.

Summary judgment has been historically disfavored in Texas jurisprudence. For decades, trial judges followed the Texas Supreme Court admonition that only "patently unmeritorious" cases were to be eliminated by summary judgment. In 1985, the Texas Supreme Court made it virtually impossible for a media libel defendant to obtain summary judgment in an actual malice case. A libel defendant who negated actual malice by his own affidavit attesting to his state of mind was not entitled to summary judgment because such evidence could not be easily controverted as required by Texas civil procedure rules.

In 1989, the Texas Supreme Court eliminated this road-block, holding that a libel defendant's own affidavit could suffice to negate actual malice. But as the KENS and WFAA cases illustrated, Texas district courts continued their historic antipathy to summary judgment. A trial judge knew he could never be reversed on appeal for denying a summary judgment.

LDRC studies at the time suggested that libel defendants were often wrongly subjected to substantial jury verdicts since libel defendants prevailed in about three-fourths of appeals but lost two-thirds of cases tried to juries. Substantial defense and settlement costs could be avoided if summary judgment had been properly granted.

Texas broadcasters and publishers began looking for a solution. A revision to the general rule that interlocutory orders--such as the denial of summary judgment motions--are not appealable was the answer. Permitting libel defendants to directly appeal the denial of a motion for summary judgment would help eliminate the frivolous or marginal cases while preserving the right to jury trial for libel plaintiffs with truly meritorious cases.

Under the leadership of A. H. Belo Corporation--owner of WFAA-TV--the Appellate Fairness Coalition came together with broad-based support of the reform proposal in the 1993 session of the Texas Legislature. The Texas Trial Lawyers Association--the plaintiff's bar--supported the measure as well as the state newspaper and broadcast associations. Dean Mark Yudof of the University of Texas School of Law, well known and esteemed, offered a respected scholarly view in favor of the reform bill in testimony before House and Senate committee hearings.

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Texas Interlocutory Appeal Statute

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Two amendments were added in the House and eventually passed. One made the measure inapplicable to pending cases. At the time, Rep. Sylvester Turner of Houston had a pending defamation case against KTRK-TV, the ABC owned affiliate in Houston. (Turner later obtained a jury verdict of more than $5 million. Summary judgment was denied before trial.) The other amendment provided that an appellant pay costs and attorney fees if the trial court's order is affirmed. The statute - - Texas Civil Practices & Remedies Code § 51.014(6) - - became law effective September 1, 1993.

The statute has succeeded remarkably in eliminating mega-verdicts against Texas libel defendants in state court. In the substantial majority of reported cases under the statute, media defendants were granted summary judgment by Texas appellate courts that had been denied in trial courts. Each of these cases would have gone to trial or been settled without the right of interlocutory appeal. Many media defense practitioners in Texas now prefer state to federal court, in no small part because of the interlocutory appeals statute.

Paul C. Watler originated the proposal for the Texas interlocutory libel appeals statute. He heads the Media Law Practice Group of the Dallas-based firm of Jenkens & Gilchrist, a Professional Corporation.

California Supreme Court Dismisses Claims Based on Movie Character

In an important ruling endorsing the right to create fictional characters based on real life experiences, the California Supreme Court effectively affirmed summary judgment against a plaintiff who claimed that a fictional 1993 movie, *The Sandlot*, appropriated his likeness, invaded his privacy, was negligent and defamed him. *Polydoros v. Twentieth Century Fox Film*, 57 Cal. App. 4th 795, 25 Media L. Rep. 2363 (1997), *rev. dismissed*, (Cal. Sup. Ct. Oct. 14, 1998). The California Supreme Court had accepted *Polydoros* for review last year, but on October 14, 1998 it granted a motion by the defendants to dismiss review, and directed that the 1997 Court of Appeals opinion, affirming summary judgment, be published in the Official Appellate Reports.

Factual Background

The movie *The Sandlot* is a comedic coming-of-age story set in the 1960's, featuring a motley group of boys over the course of one summer. One of the characters is named "Michael Palledorous," a boisterous, nerdy boy who wears glasses and is nicknamed "Squints." The plaintiff, Michael Polydoros, was a childhood classmate of the writer and director of the movie. In fact, the fictional character bears a close resemblance to a childhood photograph of Polydoros. Polydoros grew up in a setting similar to that described in the film, was somewhat obstreperous like the character, and engaged in similar activities, such as sandlot baseball.

These basic similarities, however, were of no significance to plaintiff's legal claims. According to the court of appeals, the film was an obvious work of fiction that is constitutionally protected.

Appropriation of Identity & Invasion of Privacy

First, the court rejected Polydoros' appropriation claim under Cal. Civ. Code §3344 because the movie was not for a "commercial purpose" within the meaning of the law. "[T]o succeed in his claims the plaintiff must establish a direct connection between the use of his name or likeness and a *commercial* purpose." 25 Media L. Rep. at 2365 (citing *Fleet v. CBS, Inc.*, 50 Cal. App.4th 1911, 1918 (1996)). This law, the court noted, does not apply to works of fiction. As such, mere similarity between life and fiction is, as a matter of law, "insufficient to establish a work of fiction is of and concerning a real person." *Id.* (citing *Aguilar v. Universal City Studios, Inc.*, 174 Cal. App.3d 384, 388 (1985)).

The court found compelling the reasoning of *People ex. rel. Maggio v. Charles Scribner's Sons*, 130 N.Y.S.2d 514 (1954), involving New York's commercial appropriation of likeness statute and a suit by a plaintiff alleging his likeness was used in the novel *From Here to Eternity*. Like *Polydoros*, the plaintiff in *Maggio* had a connection to the author, having served in the army with the book's author James Jones. But as the New York court observed, it is generally understood that novels are written out of experience, and fiction characters grow out of real persons. Despite a basis in life, fiction takes over and "the details of the character's life and deeds usually have, beyond possible faint outlines, no resemblance to the life and deeds of the actual person known to the author." *Id.* at 517- 518.

Constitutional Protection

The court of appeals decision also added that *The Sandlot* is constitutionally protected, noting that popular entertainment is as protected as political ideas and news stories. In this connection, the court cited the case of *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860 (1979), which rejected an appropriation claim based on the use of silent screen star Valentino's name and likeness in a fictional movie and in its advertising. Even where a right of publicity may exist, a fictional work of art, even if created *for* financial gain,

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Polydoros v. Twentieth Century Fox Film

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is protected by the First Amendment. Thus, in the instant case there was no claim stated against the defendants for using the "Squints" character in its advertising, since the underlying use in the movie was not actionable.

Negligence

The same reasoning applied to bar plaintiff's negligence claim. The claim was based on the fact that defendants did not follow industry custom and obtain a clearance from plaintiff to use his likeness in the film. As to this claim the court observed:

> The industry custom of obtaining "clearance" establishes nothing, other than the unfortunate reality that many filmmakers may deem it wise to pay a small sum up front for a written consent to avoid later having to spend a small fortune to defend unmeritorious lawsuits such as this one.

25 Media L. Rep. at 2367.

Defamation

The court also made short work of plaintiff's defamation claim based on the fictional character's nickname of "Squints" and the epithets hurled at the character, such as "little pervert," "pretty crappy," "dead fish," "reject," and "an insult to the game." These statements in a movie were not "of and concerning" plaintiff, and, moreover, were mere rhetorical hyperbole.

Florida Appellate Court Affirms Dismissal of Suit Against AOL

A Florida appellate court applied §230 of the Communications Decency Act ("CDA") to dismiss a claim against AOL that alleged its chat rooms were used to market and transmit child pornography. *Doe v. America Online, Inc.*, 97-2587 (4th Dist. Ct. App. Oct. 14, 1998). The suit, alleging negligence and violations of Florida's anti-child pornography laws, was brought by the mother of a child abuse victim who claimed that photographs and videotapes of her son engaged in sexual activity were marketed through AOL chat rooms. In dismissing, the court relied on the Fourth Circuit's decision in *Zeran v. American Online*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998). Citing extensively to *Zeran*, the court quoted, inter alia, that "by its plain language, §230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." Slip op. at 4 (quoting *Zeran* at 330).

UPDATES

To Ride or Not to Ride?

U.S. Supreme Court Grants Cert in Media Ride-Along Cases

The Supreme Court has granted certiorari in two cases that may ultimately determine the scope of the media's ability to accompany law enforcement on the execution of search warrants and to report on police activity more generally. The cases are *Hanlon v. Berger*, 129 F.3d 505, 25 Med. L. Rep. 2505 (9th Cir. 1997), *cert. granted*, 67 U.S.L.W. 3315 (No.97-1927) and *Wilson v. Layne*, 26 Med. L. Rep. 1545 (4th Cir. 1998) (en banc), *cert. granted*, 67 U.S.L.W. 3315 (No. 98-83).

The cases have been consolidated and one hour has been allotted for oral argument. The Supreme Court has limited the issues to the following questions:

- Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

- Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to defense of qualified immunity?

Wilson and *Hanlon* involve illegal search claims against law enforcement officials for permitting the media to attend the executions of search warrants on private property. The Fourth Circuit and the Ninth Circuit are split on whether the attending officers are entitled to qualified immunity. The *Wilson* court expressed general support for media ride-alongs and extended qualified immunity to the officers, holding that there was no clearly established right to be free from searches where the media were present. The *Berger* court did not extend qualified immunity to the officers, holding that a residential search that was videotaped by commercial television cameras was unreasonable under the strictures of the Fourth Amendment. The *Wilson* court expressly refused to address the reasonableness of the search of the Wilson's home. In neither instance was the magistrate judge, who signed the warrants, informed of the media's prospective involvement.

CNN has a petition before the court as well, *CNN v. Berger*, (No.97-1914). The justices conferenced this petition on August 12 and October 14 and reconferenced it again on November 6, 1998. No decision has been made, however, on the petition. The court may be waiting until after oral argument is heard on *Hanlon* and *Wilson* before reaching a decision on the *CNN* petition.

Oral argument on *Hanlon* and *Wilson* will take place sometime during the February term. The Supreme Court orders list, which comes out every Monday, will most likely have the February calendar up within the next couple of weeks. The orders list can be found at <supct.law.cornell.edu/supct>.

Michigan Supreme Court to Review *Sally Jessy* Eavesdrop Decision

A Michigan Supreme Court has decided to review a Court of Appeals decision in a case in which the Court held that a television talk show violated Michigan's eavesdropping statutes. *Dickerson v. Sally Jessy Raphael*, 222 Mich. App. 185 (1997); *See LDRC LibelLetter* April 1997 at 15. At a guest's request, the show's producers aided in taping a conversation the guest had with her mother and siblings about her mother's involvement in Scientology. The television show then broadcast a portion of the recording to illustrate the effects of Scientology on the family. The Court of Appeals drew a distinction between an individual taping a conversation on her own, which was allowable, and one who is wired with a microphone and simultaneously allows a third party to have access to the conversation via the recording.

Cert Denied: *Metropolitan Transportation Authority v. New York Magazine*

On October 5, the Supreme Court denied certiorari on the Metropolitan Transportation Authority's petition seeking a reversal of the Second Circuit's determination that the advertising space on the outside of the Metropolitan Transportation Authority's buses was a designated public forum. *Metropolitan Transportation Authority v. New York Magazine,* 136 F.3d 123 (2d Cir. 1998), *cert. denied*, 67 USLW 3202 (U.S. Oct. 5, 1998) (No. 97-2020). The case arose out of a series of ads planned by *New York Magazine* that were to be displayed on the sides of seventy-five buses that belonged to the MTA. The initial ad featured the *New York Magazine* logo and read, "Possibly the only good thing in New York Rudy hasn't taken credit for." 26 Med.L.Rep.1301, 1302 (2d Cir. 1998).

The advertisement first ran around November 24, 1997. The following week, Mayor Giulani called the MTA and asked that the advertisement be removed, claiming that his name had been used for advertising or trade purposes in violation of N.Y. Civil Rights Law s. 50. The MTA subsequently removed the advertisement from the sides of the buses. *New York Magazine* brought suit, requesting preliminary and injunctive relief against the MTA and the City of New York under 42 U.S.C.S. 1983, claiming that the city and its agency had violated the magazine's rights under the First and Fourteenth Amendments.

The Supreme Court denied certiorari without comment.

Library Internet Filtering Ruled Unconstitutional

Finding that the Loudoun County Library's Internet filtering system did not serve a compelling government interest, U.S. District Court Judge Leonie Brinkema has ruled that the library could not use filters on library computers to prevent access to sexually explicit material on the Internet. In a 46-page opinion, Judge Brinkema found that the library policy "offends the guarantee of free speech in the First Amendment." The judge, herself a former librarian, also noted that by buying commercial software to filter Internet sites, the library board was "abdicat[ing]" its constitutional responsibilities to set clear standards itself. *Mainstream Loundoun, et al v. Loundoun County Board of Trustees*, No. CA 97-2049-A (E.D. Va. November 23, 1998). For background *see LDRC LibelLetter*, March 1998 at 33.

According to the *Washington Post*, civil liberties advocates hailed the decision. The *Post* quoted Kent Willis, executive director of the ACLU of Virginia as saying, "[t]he judge is giving full First Amendment protection to the Internet. She is also reminding us of the importance of libraries and why they have to be protected." Library board members were less enthusiastic. Library board member, Chris Howlett was quoted as saying, "[i]t seems so foolish if she says we have to accept everything or nothing online . . . . You do not do that with books or magazines. You pick through it, and someone uses good judgment." An attorney for the library board has said he plans to ask the court allow the filtering system to stay in place while the board decides whether to appeal the decision or modify its policy.

Prior Restraints Imposed By Courts Asserting that Right to Fair Trial Trumps First Amendment

Tennessee Court Relies on South Carolina Supreme Court Precedent

By David Smallman

A state trial court in Tennessee recently enjoined further publication of news stories based upon ostensibly privileged attorney time records. *State of Tennessee v. Huskey*, No. 51903 (Knox Cty Tenn. Crim. Ct. November 4, 1998). The billing records, leaked to the press by a confidential source, raised questions about expenditures of public funds by court-appointed counsel for an accused serial killer. Following entry of a TRO prior to a hearing, the court subsequently imposed a preliminary injunction. It cited a recent decision in which the South Carolina Supreme Court affirmed a lower court's restraining order to prevent further dissemination of a secretly videotaped consultation between a murder defendant and his lawyer. *State Record Co. v. State*, 504 S.E.2d 592 (S.C. 1998). Opinions issued in both cases justified imposition of prior restraints by asserting that the First Amendment right of the press to publish lawfully obtained, but privileged information is outweighed by a defendant's Sixth Amendment right to a fair trial.

State of Tennessee v. Huskey

In early 1998, *The Knoxville News-Sentinel* intervened in the murder trial of a notorious, indigent defendant to gain access to information about the handling of the case. The newspaper successfully obtained summary financial information about the costs of the four-year old case, but was denied access to witness names not yet known to the state and other information considered to encompass defense strategy or preparation for trial. Eventually, however, a reporter received leaked copies of detailed time records that had been filed with the court under seal.

Immediately upon learning that the paper had the records and was preparing to publish a story based upon their contents, defendant's counsel sought a TRO. Because the judge was out-of-town over the weekend when the controversy arose, he requested that the paper "voluntarily withhold publication of the article until a full hearing could be had on Monday." The court explained that "it was impossible to hold a full and fair hearing on . . . the matter over the telephone with no resources available to make a decision."

Counsel for the paper declined to voluntarily withhold publication on the grounds that the paper had the right to print the story, which was scheduled to occur in a matter of hours. Later that Saturday afternoon, the court entered a TRO prohibiting publication or dissemination of information from the detailed time records until a hearing could be held on the following Wednesday. *The Knoxville News-Sentinel*, apparently disregarding what was believed to be a transparently invalid order, published its story in the Sunday edition of the paper. Following a hearing on October 28, 1998, the court entered a temporary injunction and ordered the paper to turn over all copies of the sealed records to its counsel to be maintained in a confidential file until the conclusion of the case.

The trial court based its decision upon the three-part test established by the U.S. Supreme Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), and considered the following factors: (1) the nature and extent of pretrial publicity; (2) whether alternative measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and (3) how effectively a restraining order would operate to prevent the threatened danger.

Reviewing prior case law in which courts had balanced the heavy presumption against prior restraint of the press against competing Sixth Amendment interests, the court closely followed the analysis of the South Carolina Supreme Court in *State Record Co.*,

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State of Tennessee v. Huskey

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Inc. v. State. Agreeing with the South Carolina Court that Sixth Amendment rights are superior to those protected under the First Amendment, the court held that (1) pretrial publication of the billing information could impair the defendants right to a fair trial, (2) alternate measures would be less effective than a narrowly tailored restraint prohibiting disclosure of the details from the time sheets, and (3) potential harm to the accused's defense could result if a prior restraint did not issue. Acknowledging that "[t]he balancing of two such fundamental constitutional rights is not an easy task," the court determined that "the prior restraint was warranted to ensure the defendant's constitutional right to a fair trial." *The Knoxville News-Sentinel* is seeking discretionary review of the decision by the Tennessee Supreme Court, and expects to be joined by a number of *amici curiae*, including the Tennessee Press Association.

State-Record Co., Inc. v. State

This case involved appeal of a TRO prohibiting the media from disseminating the contents of a videotape containing a privileged communication between an imprisoned murder suspect and his attorney. In a 4-1 decision, the South Carolina Supreme Court held, among other things, that a limited prior restraint was necessary to avoid "potential prejudice" to the defendant and preserve his right to "effective assistance of counsel." The court reasoned that were it hold otherwise,

> the contents of the videotape in question could have been disclosed and the substance of the privileged communication with his attorney divulged. Once disclosed, although other measures might have alleviated the prejudice to [the defendant], his right to a fair trial could not have been guaranteed.

504 S.E. 2d 592, 597 (S.C. 1998).

The court went on to observe that, in its view, "the United States Supreme Court did not intend such a result in establishing the *Nebraska Press* test." Referring to confusion surrounding similar issues raised by three related opinions in *United States v. Noriega*, the court speculated that the *Nebraska Press* standard may be open to revision because "it is uncertain precisely how the Supreme Court would rule if faced directly with the issue of a prior restraint in the context of the media's threatened disclosure of confidential conversations obtained in violation of the attorney client privilege."

Finding that *Nebraska Press* did not "foreclose" imposition of a prior restraint, the court affirmed the temporary restraining order entered by the court below, and expressly invited the U.S. Supreme Court to resolve the matter: "Should that Court wish to establish an alternative standard from that set forth in *Nebraska Press*, or to adopt an absolute ban on prior restraints, it is free to do so."

Justice Toal strongly dissented from the majority opinion with respect to the validity of the prior restraint. Applying the second prong of the *Nebraska Press* test, Justice Toal stated that there was "little doubt that other measures might mitigate the effects of the pretrial publicity," and found that under binding U.S. Supreme Court precedent, such alternatives would sufficiently mitigate those effects. Accordingly, Justice Toal concluded that the prior restraint must be stuck down.

Petition for certiorari is under active consideration by counsel for appellants.

David Smallman is with the firm Simpson Thacher and Bartlett in New York City.

Florida Supreme Court Holds Reporters' Privilege Protects Non-Confidential Information

By David Bralow and Jim Lake

A qualified common-law privilege generally protects journalists' non-confidential information, the Florida Supreme Court has ruled. In three opinions handed down October 22, Florida's highest court reversed a series of lower-court opinions limiting the privilege to confidential information. The decisions left intact prior Florida Supreme Court rulings that the common-law privilege does not apply when a reporter witnesses or photographs a crime or an arrest or has physical evidence of a crime.

The Florida Supreme Court's decisions come just five months after the Florida Legislature gave journalists similar statutory protection (Florida Statutes §90.5015). Like the new statute, the court's ruling shields most information unless a judge finds a compelling need exists for information that is relevant to a pending case and that the journalist alone possesses. This test applies whether or not a confidential source is involved.

The principal opinion announcing the standard, *State v. Davis*, concerned the assertion of the privilege in response to a subpoena from a criminal defendant. 1998 WL 732918 (Fla. Sup. Ct. Oct. 22, 1998). On an appeal by the government, the Supreme Court reinstated a criminal conviction even though the defendant was not allowed to depose a reporter who interviewed the crime victim, holding that a qualified reporters' privilege exists extending to confidential and non-confidential information. In *Morris Communications Corp. v. Frangie*, 1998 WL 732883 (Fla. Sup. Ct. Oct. 22, 1998), the court found the qualified privilege is available in civil cases. Finally, in *Kidwell v. State*, 1998 WL 732927 (Fla. Sup. Ct. Oct. 22, 1998), the court said that the privilege is available in response to subpoenas from prosecutors in criminal cases.

Because the privilege is qualified, there still will be some cases when reporters are forced to testify. For example, in *Davis*, the Court states that a criminal defendant's constitutional rights to compulsory and due process are factors trial courts must consider in applying the qualified privilege, although any failure to do so was in this case harmless error.

In *Kidwell v. State*, the court considered application of the qualified privilege in the context of a jailhouse interview by *Miami Herald* reporter David Kidwell. When Kidwell refused to testify for the state against his source, the trial court held Kidwell in contempt and sentenced him to 70 days in jail. A mid-level appellate court affirmed the contempt conviction and held that the qualified privilege did not apply, because the interview and Kidwell's source were not confidential. The Florida Supreme Court overturned the appellate court's reasoning but did not explicitly address whether the contempt conviction should be reversed. A motion by Kidwell asking the Supreme Court to resolve that issue is pending.

Finally, in *Morris Communications Corp. v. Frangie*, the court found the qualified privilege applied to a *Florida Times Union* reporter's interview with the plaintiff in a civil case. The trial court had ordered the reporter, Mike Bianchi, to testify about the interview, finding that no qualified privilege applied. The Florida Supreme Court reversed that ruling and remanded the case for reconsideration. In the meantime, however, the underlying case had settled, so further proceedings are not expected.

David Bralow and Jim Lake are with the firm Holland & Knight in Orlando and Tampa, FL respectively. Holland & Knight represented David Kidwell, Morris Communications, and several amici curiae in State v. Davis.

FOURTH CIRCUIT HEARS ARGUMENT ON APPEAL OF WILMINGTON CONTEMPT CASE

STAYS JAIL SENTENCE FOR REPORTER

By George Freeman

On October 27 and 28, 1998, the U.S. Court of Appeals for the Fourth Circuit took action on both phases of the civil and criminal contempt judgments against the *Wilmington Morning Star*, a subsidiary of The New York Times Company, and two of its reporters. As was reported in the *LDRC LibelLetter* in February and March, the two contempt cases arise from the *Morning Star*'s publication of the amount of a confidential settlement in an environmental tort case brought by 178 trailer park residents against Conoco, Inc. The newspaper obtained the information in two ways: from documents provided by a court clerk and from confidential sources. Each of the two set of transactions has given rise to separate contempt judgments.

Receipt of Court Documents

Oral argument was held on October 27 on the appeal of the first judgment, arising from the documents provided by the court clerk, *Ashcraft v. Conoco*, 26 Media L. Rep. 1620 (4th Cir. Jan. 21, 1998). Federal District Judge Earl Britt had entered a $600,000 contempt judgment against reporter Kirsten Mitchell and the *Morning Star* for disseminating the sealed information even though he acknowledged that she had obtained it from documents inadvertently given to the reporter by a court clerk. Ms. Mitchell, and vicariously the *Morning Star*, were said to have violated a court order by opening the envelope in which the settlement agreement was contained, disseminating the amount internally, and ultimately publishing it in the newspaper. Judging from the questions they asked, the Fourth Circuit panel appeared sympathetic to the newspaper (see discussion of the argument below), though, of course, trying to predict the result in an appeal from the questions asked at argument is a dangerous business.

Confidential Sources Demanded

In the meantime, shortly before the appellate argument, Judge Britt held in contempt the second *Morning Star* reporter on the same story, Cory Reiss, who had obtained the same information from confidential sources. Judge Britt ordered Reiss to divulge the names of his sources so as to enable the judge to see whether they had violated a confidentiality provision in the settlement agreement. Reiss, standing on the First Amendment reporter's privilege, declined to disclose the names of his sources, and consequently the judge found him in contempt and ordered him to jail.

The Times Company asked the Fourth Circuit to stay any incarceration pending an appeal of this second contempt judgment. On October 28, the same panel that heard Ms. Mitchell's appeal found that Mr. Reiss's stay application was "well taken" and stayed any sentence until an appeal could be heard in February or March 1999.

The appeal of the contempt finding against Mr. Reiss will raise some interesting and novel issues. Judge Britt in January 1998 had denied a motion by Conoco for Reiss' sources on the grounds that alternative sources had not been sought.

At this juncture, Judge Britt is the prime mover in trying to force Mr. Reiss to reveal his confidential sources. Even though the underlying case has been settled, the judge has apparently retained jurisdiction, and some of the settlement funds have apparently been held back with an eye towards seeing if any of the plaintiffs had violated any confidentiality terms of the settlement agreement. (The *Star News* and its counsel have still not seen that agreement, as it has remained under seal.)

Therefore, one question raised is whether an interest of the court in its institutional integrity, in the proper dissemination of settlement funds, and in its ability to pursue possible perjury charges against parties on issues raised post-settlement, constitute a "compelling interest" sufficient to

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overcome the three-part qualified privilege, even though these interests have been principally asserted by the court and not by a party to the case.

The possible perjury charges arise from the fact that all parties connected with the case and court personnel have answered interrogatories -- and five have sat for depositions -- which the court required in its search to discover the sources for Mr. Reiss' article. Although none of these individuals have apparently admitted to divulging any confidential information, the judge ruled that this sequence of events has estopped the *Morning Star* from arguing that alternative sources for the information had not been exhausted. (These proceedings, too, were held under seal, and the *Morning Star* has not been privy to the court's (and Conoco's) attempts to discovery the identity of the courses.)

In a similar vein, the *Morning Star* has argued that the settlement agreement should never have been sealed in the first place, and that the judge did not comply with Fourth Circuit precedent in sealing that document without notice to the press and public.

Finally, the appeal raises another interesting question with respect to whether Conoco has met the "compelling interest" prong of the test. The underlying case, after all, dealt with an environmental leak. Therefore, it is unclear whether Conoco can successfully argue that the question involving disbursement of a portion of the settlement funds goes to the heart of the matter.

Oral Argument: Could Disclosure of Court Document Be Contemptuous?

At the Fourth Circuit oral argument on the dissemination of information from the court documents -- Kirsten Mitchell's contempt -- the most active questioner was Judge Michael Luttig, known to many media practitioners as the author of the very critical *Hit Man* decision. However, in this case, Judge Luttig appeared to be supportive of the *Morning Star*'s position.

The *Morning Star* argued that the sealing order in the case, which Ms. Mitchell was held to have violated when she opened an envelope and viewed the confidential settlement agreement, could not bind her since she was a non-party to the case. The *Morning Star* argued that to hold otherwise would violate F.R.C.P. 65(d). Additionally, the *Morning Star* made a separation of powers argument, contending that since, pursuant to the Attorney General's guidelines regarding prosecution or interrogation of the press, Attorney General Reno declined to authorize prosecution of the *Morning Star* in this matter, Judge Britt violated separation of powers principles by appointing his own special prosecutor to handle the criminal contempt case for him. In so doing, the *Morning Star* argued the judge took on an Executive Branch function.

No Notice to the Reporter

At the oral argument, the *Morning Star* also argued that the substantive elements of civil and criminal contempt could not have been met in the factual scenario at issue. Thus, when Ms. Mitchell went to the courthouse to search for documents *after* the settlement agreement, she was given a pile of documents by the court clerk. The court clerk -- subsequently fired -- pulled one document aside and said Ms. Mitchell could not see that document since it was sealed. Ms. Mitchell readily agreed, and began reviewing the documents she had been given, which included the confidential settlement agreement in an envelope. That envelope itself had a flap which said "opened," thereby also adding to Ms. Mitchell's belief that the document was not currently sealed.

When one of the judges questioned how a federal district judge was supposed to keep orderly control of his cases without the power asserted by Judge Britt here, Judge Luttig appeared to agree with the *Morning Star* that the facts at issue hardly gave Ms. Mitchell clear and unqualified notice that the document was currently sealed and that she should not have reviewed it. Of course, a series of U.S. Supreme Court cases also hold that even under a worst case scenario, as long as she did not illegally obtain the document -- and there is no evidence that she did so -- she would be allowed to

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Wilmington Morning Star

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read and the newspaper would be allowed to publish the truthful newsworthy information it had so gathered.

A decision is expected in about three months.

The Wilmington Morning Star and its reporters were represented by George Freeman, assistant general counsel of The New York Times Company, by Floyd Abrams and Landis C. Best of Cahill Gordon & Reindel, by Mark J. Prak and Harold C. Chen of Brooks, Pierce, McLendon, Humphrey & Leonard and by Stephen T. Smith of McMillan, Smith & Plyler. Professor Rodney A. Smolla filed an amicus brief on behalf of a number of news organizations supporting the appellants.

TWO BOSTON COURTS REACH DIFFERENT RESULTS ON PROTECTIONS FOR CONFIDENTIAL SOURCES AND UNPUBLISHED INFORMATION

By Jonathan M. Albano

Two trial court judges sitting in Boston, Massachusetts have reached dramatically different decisions about the extent to which the First Amendment protects confidential sources and unpublished information. In one case, a Massachusetts Superior Court has held *The Boston Globe* and one of its reporters in contempt for refusing to disclose confidential sources to a libel plaintiff. As a sanction for non-disclosure, the Court imposed a series of escalating fines that, but for a stay pending appeal, could have exceeded $5 million by the time the case is reached for trial. *Ayash v. Dana-Farber Cancer Institute, et al.*, Suffolk Superior Court No. 96-0565-E.

Approximately two miles away, a federal judge sitting in Boston refused to compel two university professors to disclose confidential interview tapes and notes used in the preparation of a book concerning the epic Microsoft/Netscape browser wars, despite Microsoft's argument that the information was critical to its defense against antitrust claims brought by the United States. *In re Subpoenas of Michael A. Cusumano and David B. Yoffie*, D. Mass. No. 98-10404-MBD. Expedited appeals of both cases currently are pending in the First Circuit Court of Appeals and the Massachusetts Appeals Court.

Ayash v. Dana-Farber Cancer Institute, et al.

In the Spring of 1995, the Boston medical and journalistic community was rocked by the news that Betsy Lehman, a popular *Boston Globe* health columnist, had died after receiving a four-fold chemotherapy overdose while undergoing an experimental breast cancer treatment at the Dana-Farber Cancer Institute. Another patient received an identical overdose, but managed to survive after a period in intensive care. The hospital did not discover the overdoses until two months after Lehman's death, raising serious questions about the quality of care and research efforts at one of the nation's leading cancer centers.

Lois Ayash was the Study Chairperson of the experimental protocol in which Lehman was enrolled. In its initial story on the overdoses, the Globe reported that Ayash had countersigned the overdose orders and was the "leader of the team" treating Lehman. No confidential sources were used for either statement. As the Globe subsequently reported, Ayash did not, in fact, countersign the overdoses. During the course of 1995, the Globe published over 20 additional articles on the overdoses, the ensuing investigations, and the reforms instituted at Dana-Farber and elsewhere as a result of the tragedy. Those articles accurately reported that the hospital and a state health agency investigated Ayash for her role in the overdose incidents (information obtained from confidential sources) and the hospital's conclusion that Ayash bore partial responsibility for the accidents.

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TWO BOSTON COURTS REACH DIFFERENT RESULTS

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Ayash sued the Globe for libel and invasion of privacy. Her libel claims alleged that she was defamed by the false report that she countersigned the overdoses and by the description of her as the "leader of the team," a description that Ayash claims overstated her responsibility for the overdoses. Ayash also alleged that her privacy was violated by the Globe's reports that she was facing confidential hospital and regulatory investigations for her role in the overdoses.

In separate decisions, the Superior Court first granted partial summary judgment dismissing Ayash's privacy claims against the Globe on the ground that the reports about the investigations of Ayash (obtained from confidential sources) were newsworthy as a matter of law. In a subsequent opinion, the same Superior Court judge nevertheless granted Ayash's motion to compel the disclosure of the Globe's confidential sources. The Court ruled that neither federal nor state law provided any protection for confidential sources and that the sources' identities were central to Ayash's libel claims.

The Court first concluded that disclosure of the sources' identities would cause only "speculative or theoretical" injury to the free flow of information, for three reasons: (1) it had been 2 ½ years since the sources had provided the information to the Globe; (2) the investigation of the overdoses was now over; and (3) the information concerned only an "isolated incident" involving the overdose of two cancer patients. Alternatively, even if a balancing of interests was required, the Court held that the sources' identities were central to Ayash's claims, citing Massachusetts case law requiring the disclosure of confidential sources relied on by a newspaper in publishing allegedly libelous statements. *Dow Jones & Co. v. Superior Court*, 303 N.E.2d 847 (Mass. 1973). The decision did not address the Globe's argument that because the sources were not relied on for the allegedly defamatory statements sued upon by the plaintiff, their identity was neither central nor relevant to the libel case.

When the Globe and the reporter refused to comply with the disclosure order, the Court found them in contempt and imposed a series of escalating fines. The Globe was fined $1,000 per day, to increase by $1,000 with each passing week until disclosure was made. The reporter was separately fined $100 per day, increasing by $100 each week thereafter. Had the fines not been stayed pending appeal, by the end of 1998 they would have totaled over $1 million against the Globe and over $100,000 against the reporter (more than his annual salary).

On appeal, the Globe argued, among other things, that the Superior Court erred as a matter of law in holding that sources were central to the libel case. Indeed, there appear to be no reported decisions in which a libel defendant was required to disclose confidential sources that were not relied on in publishing allegedly defamatory statements. *Compare Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 599, 6 Media L. Rep.. 2507 (First Cir. 1980); *Dowd v. Calabrese*, 577 F. Supp. 238, 242-43, 10 Media L. Rep. 1208 (D.D.C. 1983); *Sierra Life v. Magic Valley Newspapers*, 623 P.2d 103, 108-110, 6 Media R. Rep.. 1769 (Idaho 1980); *Mitchell v. Superior Court*, 690 P.2d 625, 634, 11 Media L. Rep.. 1076 (Cal. 1984).

The Globe also argued that the fines imposed are primarily punitive rather than coercive, particularly given the alternative sanctions employed by most trial courts in analogous situations, such as shifting burdens of proof or evidentiary standards. *See Downing v. Monitor Publishing*, 415 A.2d 683, 686, 6 Media L. Rep. (N.H. 1980); *Oak Beach Inn Corp. v. Babylon Beacons*, Inc., 464 N.E.2d 967, 971, 10 Media L. Rep. 1761 (N.Y. App. 1984), *cert. denied*, 469 U.S. 1158 (1985); Sierra Life, 623 P.2d at 108-110, 6 Media L. Rep. 1769; *DeRoburt v. Gannett Co.*, 507 F. Supp. 880, 887, 6 Media L. Rep. 2473 (D. Hawaii 1981). The appeal was argued on October 15, 1998.

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TWO BOSTON COURTS REACH DIFFERENT RESULTS

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In re Subpoenas of Michael Cusumano and David Yoffie

In July of 1997, Harvard Professor David Yoffie and M.I.T. professor Michael Cusumano began work on a book concerning the battle between Netscape and Microsoft for control of the Internet browser market. In order to prepare the book, the professors tape recorded interviews with 44 Netscape employees. The professors promised each of their sources that they would keep their interviews confidential subject to a prepublication review that would give the sources the right to object to the inclusion of any quotes attributed to them. The ultimate result was a book published in October 1998 entitled *Competing on Internet Time: Lessons from Netscape and Its Battle with Microsoft.*

In May of 1998, the United States, joined by 20 States, brought an antitrust action against Microsoft in the United States District Court for the District of Columbia alleging, among other things, that Microsoft had unlawfully monopolized the market for browsers, including those made by Netscape and others. In September 1998, approximately one month before the trial was to begin, Microsoft obtained from Netscape a copy of the professors' manuscript. According to Microsoft, the manuscript contained candid admissions by Netscape employees that Netscape's market problems were caused by its own strategic errors rather than by any unlawful conduct by Microsoft. Microsoft then subpoenaed the professors' research materials. Motions to compel and to quash the subpoenas followed.

In support of its motion to compel, Microsoft argued that the journalists' privilege did not extend to academics and that because the identities of all 44 Netscape sources were disclosed in the manuscript, there were no confidentiality interests worthy of protection. Microsoft also contended that the tapes could provide critical impeachment evidence in the event any Netscape witnesses denied the statements attributed to them in the book and that the tapes also might be admissible as substantive evidence under the residuary hearsay exception of Fed. R. Evid. 807.

The professors countered that, as authors of a book, their work product was entitled to the same First Amendment protections as journalists. They argued that because only one Netscape witness was then scheduled to testify at trial, Microsoft had failed to demonstrate a compelling need for the tapes for impeachment purposes and, in any event, could have obtained the substantive evidence it sought by deposing Netscape employees.

The District Court denied Microsoft's motion to compel and provisionally granted the professors' motion to quash. The Court applied the principles enunciated by the First Circuit Court of Appeals in *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583 (First Cir. 1980), a case involving confidential news sources. The Court found that Microsoft failed to demonstrate that it could not obtain essentially the same information it sought from the professors by deposing Netscape personnel and that Microsoft had failed to demonstrate that the materials were central to its defense. Nevertheless, the Court retained jurisdiction over the case and ruled that it would conduct an *in camera* review of the tapes in the event Microsoft made a showing that any witness had repudiated statements attributed to him or her in the manuscript.

On November 5, 1998, the First Circuit heard oral argument on an expedited appeal taken by Microsoft of the District Court's order. A decision remains pending.

Jonathan M. Albano is a partner in the Boston law firm of Bingham Dana LLP. He is counsel to the Boston Globe in Ayash v. Dana-Farber Cancer Institute, et al., and is counsel to Professor David B. Yoffie and Harvard University in In re Subpoenas of Michael A. Cusumano and David B. Yoffie.

UK Appeals Court Applies Qualified Privilege Defense

Relying on the recent breakthrough decision of *Reynolds v. Times Newspapers Ltd.* on qualified privilege, a UK appeals court reinstated a qualified privilege defense in a lawsuit brought by a son of Libyan leader Colonel Gaddafi against the *Daily Telegraph* newspaper. *Gaddafi v. Telegraph Group Ltd.*, (Court of Appeal Oct. 28, 1998). *See also* LDRC *LibelLetter* August 1998 at 11 discussing *Reynolds*.

Although *Gaddafi* is on one level a decision on the technical pleading requirements of English libel law, it is evidence of the substantive impact of the *Reynolds* decision. There the Court of Appeal endorsed something of a fault standard under the doctrine of "qualified privilege." It held that the press has a duty to report on matters of public interest, that the public has a right to receive information on matters of public interest (the "duty and interest" tests) and therefore that defamatory statements may be privileged based on "the nature, source and status of the defendants' information and all the circumstances of its publication"(the "circumstantial test"). Under this standard, a report containing honest mistakes may be protected absent proof of express malice -- a departure from the harsh strict liability standard.

At issue in *Gaddafi* were two news articles published by the *Daily Telegraph* linking Saif Gaddafi to a scheme to flood Iran with fake currency. The first article, written by an investigative reporter, set out the scheme. A subsequent article by an opinion columnist responded to a Libyan request that the investigative reporter fly to Libya to correct the first article by wryly asking, "What kind of correction did the Libyans have in mind? Did they merely desire to challenge the article's factual accuracy? Or was there a much more sinister plan, such as stringing up the hapless hack from the nearest Tripoli lamp-post?"

Gaddafi's complaint alleged that both articles meant that he "participated in an outrageous international criminal conspiracy" and "had thereby shown himself to be a thoroughly dishonest unscrupulous and untrustworthy maverick against whom the international banking community had been warned to be on its guard." In its answer, the Telegraph pled as to the first article, both justification -- that is, truth; and qualified privilege. The trial court "struck out" (dismissed) the qualified privilege defense based solely on the initial pleadings, meaning that the *Telegraph's* only defense would be to prove truth, a task undoubtedly complicated because the investigative article relied on confidential international security sources.

Citing the recent *Reynolds* decision as "radically affect[ing]" the law of qualified privilege, the Court of Appeal reinstated the defense. First, the investigative article, reporting on matters of public interest, met the duty and interest tests of qualified privilege. Second, the *Telegraph's* pleadings detailing the basis of the article, including the background and reputation of the investigative reporter and the sources relied on, adequately demonstrated that the circumstances of publication could warrant application of the qualified privilege defense. In this connection, the court also rejected the plaintiff's request that the newspaper provide more information about the confidential sources relied upon. Citing both UK and ECHR decisions, the court reiterated the media's right to protect the identity of confidential sources, including not revealing their nationality.

By reinstating the qualified privilege defense, the *Daily Telegraph* may defend on grounds that its investigative article was journalistically sound, without having to meet the extreme burden of proving truth.

Geoffrey Robertson QC, of Doughty Street Chambers, and G. Busuttil represented the Telegraph before the Court of Appeal.

UK Printer "Pulps" Print Run of Potentially Libelous Magazine

By Amber Melville-Brown

One of the more draconian features of English libel law was that printers were liable for any defamatory material they duplicated. This harsh rule was tempered by the Defamation Act of 1996 which created an innocent dissemination defense which applies when a printer exercises reasonable care and has no reason to believe it is printing defamatory matter. The law, however, does not give clear guidance as to what constitutes "reasonable care." A recent incident demonstrates that the innocent dissemination defense may not provide effective security to printers with harsh consequences to the media.

The English printing company Penwells had for 30 years printed the magazine *The Ecologist*. In August 1998, *The Ecologist* sent to print a special issue containing controversial articles about the Monsanto company. Penwells claimed that it was informed by an editor at *The Ecologist* that the magazine expected the issue to result in a libel complaint from Monsanto. This is disputed by *The Ecologist*, but an editor acknowledged the issue was contentious.

Either because Penwells received notice of potentially libelous content, or was generally aware of its content, it became concerned that it would no longer be able to rely on the innocent dissemination defense. Penwells consulted with a barrister who advised that there were potential areas of concern in the magazine and that Penwells would be at risk if it published it. Penwells therefore decided not to print the issue and it destroyed, or "pulped," copies that had already been printed. It returned the camera ready copy to *The Ecologist* which engaged another printer to put out the magazine despite the risk of a libel suit.

This case illustrates that the lack of guidance in the innocent dissemination defense still leaves a printer at risk. A Penwells official said, "We knew that if we printed we could expose ourselves to an action for libel from Monsanto and if we did not print to an action from [*The Ecologist*]. In the end we took the lesser of two evils." The issue may not be clarified through case law because of the high cost of defending suit. Instead, the result may be what the Defamation Act of 1996 presumably sought to avoid -- printers will settle any libel claims and seek indemnity from publishers who will bear the cost regardless of the ultimate outcome against them.

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Bloomberg Gets Prior Restraint Lifted in UK Breach of Confidence Action

By Richard L. Klein

Bloomberg L.P. successfully overturned a prior restraint recently imposed upon it by an English court. On an ex parte application from Salomon Brothers International Limited, the court had enjoined publication of a story originating from Bloomberg News' London bureau based upon information contained in a letter inadvertently sent to a Bloomberg reporter by Salomon, the author of the letter. One week after the issuance of the order forbidding Bloomberg to report upon the contents of the letter -- the subject of which was of significant interest to the European financial community -- the court vacated, or "discharged," the injunction. *Salomon Brothers International v. Benjamin Wootliff, Bloomberg LLP*, No. 1998-S-1218 (Q.B. Oct. 7, 1998.)

The focus of the injunction was a letter from Salomon, dated September 21, 1998, to PLIVA, Pharmaceutical Chemical, Food and Cosmetic Industries, Inc. ("PLIVA"), a Croatian company. The letter set out proposals and recommendations from Salomon regarding potential strategies for the financing of PLIVA's industrial activities. Salomon intended the letter to serve as a preliminary to a planned meeting between Salomon and PLIVA.

On that same date, Bloomberg's London bureau received a lengthy fax from Salomon. The first page of the fax, after the cover sheet addressed to Bloomberg and other news organizations, was a press release on an unrelated matter. The latter portion of the fax was the Salomon letter to PLIVA, apparently sent in error to Bloomberg and to the other media recipients. The letter to PLIVA, forty-four pages long, was marked "Strictly Private and Confidential."

Once Salomon discovered that the letter had been faxed to media entities, it requested its return. Salomon additionally sought reassurances that the media would neither report on the contents of the letter nor use its contents to gather information for an article concerning the subject matter of the letter. Salomon maintained that the information in the letter was the property of Salomon and that the contents were private and confidential as between Salomon and PLIVA. Apparently only Bloomberg refused to either five back, destroy and/or not make use of the document.

Broad Ex Parte Injunction

When those reassurances from Bloomberg were not forthcoming, Salomon applied for injunctive relief in the High Court of Justice, Queen's Bench Division, against defendants Bloomberg L.P., Bloomberg UK Limited, and the Bloomberg News reporter who first received the Salomon fax. On September 29, 1998, Salomon sought and obtained an order enjoining the defendants from "publish[ing] or disclos[ing] or . . . mak[ing] any use of the Document or the contents thereof or any information derived directly or indirectly therefrom."

Salomon's legal theory was based upon a cause of action for "breach of confidence." Under English law, a party seeking to restrain a news organization from publishing or reporting upon allegedly confidential materials must set forth strong evidence that (1) the information the party seeks to protect is confidential; (2) that there is a threat of immediate misuse or disclosure of that information by the defendants; and (3) and that the resulting loss to the party seeking the injunction could not be adequately compensated by the payment of monetary damages.

On October 7, 1998, counsel for Bloomberg appeared before the court to apply for the discharge or variation of the injunction. At that hearing the judge vacated the injunction on the grounds that it was unduly broad. He permitted Salomon to make a new application for a narrower injunction and instructed Salomon to outline with specificity the exact conduct sought to be enjoined. Salomon responded with a proposed order which provided for the destruction of any copies of the document in Bloomberg's possession as well as any notes or extracts from the letter and an injunction against the publication or reproduction of the letter. Salomon further sought to prevent any disclosure of specific contents of the letter, namely the strategy and timetable prepared by Salomon and discussed in the docu-

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ment, the investors identified by Salomon for targeting by PLIVA, and Salomon's proposed fees for its work.

Significantly, Salomon did not press for an injunction enjoining the publication of an article a draft of which had been disclosed to Salomon by Bloomberg in the papers filed in the court proceeding, publication or other use of the information obtained from an interview between a Bloomberg reporter and the chief financial officer of PLIVA, who by the time of the hearing had confirmed much of the substance of the Salomon proposals, or publication or other use of any information in or derived from the letter to the extent that such information had already come into the public domain from sources other than Bloomberg.

The Hearing

The hearing centered upon the narrower order proposed by Salomon. The judge first considered whether the letter and its contents constituted confidential material worthy of protection from disclosure. The court noted that Salomon's proposal to PLIVA was still very much viable and that in theory, the information that Salomon sought to protect -- the result of Salomon's "particular skill and ingenuity" -- was capable of being confidential.

The court ultimately concluded, however, that Salomon had not met its burden of demonstrating that the letter was confidential in fact. The most significant factor in deciding whether the information in the letter was confidential was the relationship between Salomon and PLIVA. The judge noted the likelihood that PLIVA, in deciding among comparable services offered by rival financial institutions and negotiating with those competitors of Salomon, would disclose the information contained in the Salomon letter to obtain a greater bargaining advantage. The court further noted, and Salomon's counsel conceded, that once the letter was in PLIVA's hands, Salomon could not realistically control, through legal or other means, the disclosure or dissemination of the information in the letter by PLIVA. In that regard, the court found it significant that Salomon neither requested nor obtained an agreement on confidentiality with PLIVA concerning the contents of proposals and recommendations submitted to PLIVA by Salomon. Lastly, the court rejected Salomon's argument that its notation of "Strictly Private and Confidential" on the fax letter rendered the contents of the letter confidential.

The court then considered the second factor -- the threat of immediate misuse or disclosure of the "confidential" information by the defendants. Although the judge felt that at that stage in the proceeding, without a full record, the hearing was an inappropriate forum for a finding of whether Bloomberg had actually misused the letter, he noted that the Bloomberg reporter had used the letter to initiate a contact with PLIVA's CFO and discussed the contents of the letter with the CFO. The judge observed that the discussion of the document with PLIVA's CFO, the party to whom the letter was addressed, could not seriously be characterized a misuse or breach of confidentiality, as the CFO was well aware of the contents of the letter.

Thus, the inquiry had to focus upon the threat of future misuse or disclosure. There was no evidence before the court that Bloomberg intended to publish anything other than the information contained in the draft article shown to Salomon. The court declined to infer such a threat by what Salomon characterized as Bloomberg's "ungentlemanly behavior" in not returning the document, noting that although Bloomberg had demonstrated its intention to use the material it erroneously received, it had exercised restraint in its use of that material.

The court examined the third factor -- potential loss to Salomon that could not be adequately compensated in monetary damages. The court found that if any harm at all was to be sustained by disclosure of the letter, such harm would be felt by PLIVA and its commercial interests and not to Salomon. Any loss to Salomon would a "consequential commercial loss" of an opportunity to provide financial services to PLIVA, but such loss would not be directly tied to disclosure of the actual contents of the document.

Ultimately, the court weighed on one side the arguments for confidential treatment of the letter and the case for harm to Salomon against the "public interest in the freedom of expression" and concluded that injunctive relief, even on a narrower basis, was inappropriate. In do-

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ing so, the court made specific reference to Article 10 of the European Convention on Human Rights, which upholds the "right to freedom of expression," but subjects such right under certain conditions to "such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society." Ultimately, the judge was not satisfied that there was the sufficient degree or quality of confidence in the document or that he had been presented with sufficient evidence of the threat of misuse of the allegedly confidential materials to justify the injunction on Bloomberg's news reporting activities.

Bloomberg was represented in this matter by London solicitors firm, Olswang, and at the hearing by London barrister Michael Tugendhat, Q.C.

Richard L. Klein is a partner with the firm Willkie Farr & Gallagher in New York City, Bloomberg's outside general counsel.

UK Court of Appeal Reverses Pro-Media Forum Decision

A UK Court of Appeal reversed a media favorable forum decision in a libel suit filed against *Forbes* magazine by Boris Berezovsky, a Russian government official and one of that country's most powerful businessmen, over a 1996 article entitled "Is he the Godfather of the Kremlin? Power, Politics, Murder. Boris Berezovsky could teach the guys in Sicily a thing or two." *Berezovsky v. Forbes* (Court of Appeal Nov. 19, 1998) (also reinstating claim of Berezovsky associate Nikolai Glouchkov who sued separately over the same article). *See* LDRC *LibelLetter* 12/97 at 1.

The decision by Mr. Justice Popplewell at the trial court level stayed the Russians' actions on the grounds that their cases could more appropriately be heard in Russia or the U.S. The court noted that plaintiffs' connection to England were tenuous and that almost all the relevant witnesses and documents were in Russia. The decision turned on the fact that plaintiffs served their libel complaints on *Forbes* in the U.S. Significantly, in this context the burden was on plaintiffs to show that England was the appropriate forum to hear the case -- an advantage in combating forum shopping plaintiffs.

The Court of Appeal, considering both the record below and new affidavits, held in contrast that Berezovsky and his associate, Glouchkov, have a substantial relationship with England and that both have important business reputations there to protect. Regarding Berezovsky, the court cited, among other things, 31 trips to England from 1994-1997, that his wife and children reside in London, and that he frequently visited Prince Michael of Kent (a minor member of the Royal family) -- facts that were considered below but ruled insufficient to justify hauling a foreign defendant into a London court to defend against libel suits brought by foreign plaintiffs. The Court of Appeal also considered and credited new affidavits from business associates of plaintiffs submitted to show that the *Forbes* article hurt their reputation in England.

Having found that plaintiffs have substantial connections and reputations in England, the Court of Appeal disposed of all other objections to trying the case in London, giving no consideration to overarching concerns raised by *Forbes* that American publishers may abstain from publishing certain material in the U.K. for fear of having to defend libel suits there. In fact, *Forbes* argued that publications in the U.S. and elsewhere will be chilled because in the age of the Internet and globalization any material may make its way into the U.K. and be subject to suit.

Forbes will seek to appeal the decision to the House of Lords.

Landmark Libel Ruling in South Africa: Court Rejects Strict Liability

In what is considered a landmark ruling, the South African Supreme Court of Appeals rejected the common law strict liability standard for libel actions and held that the media can defend on grounds that its reporting was reasonable and careful. *National Media v. Bogoshi*, (Sept. 29, 1998). The decision was based on an analysis of South African common law and foreign law, particularly English and Dutch decisions, and it acknowledges for the first time in South African law that the media has a duty to the public to report on matters of public interest. The decision effectively adopts a negligence standard, although the common law burden of proof will remain on the libel defendant who will have to prove lack of negligence. The libel suit was brought by an attorney against a weekly newspaper *City Press* that reported alleged improprieties in the attorney's handling of an insurance case.

On a related, but more pessimistic, note, *The New York Times* reported on a development that sent a "shiver through many of South Africa's newsrooms." The country's Human Rights Commission announced it would open an investigation into racism in the press, including using its subpoena and arrest powers to gather information. "South African Rights Panel Will Study Press Racism," *The New York Times*, Nov. 17, 1998 at A_. The article reports that some news editors and journalists believe the investigation is, in fact, aimed at repressing criticism of the government leading up to next year's national elections.

U.S. Celebs Get Mixed Results in U.K. Libel Cases

At the end of October, actors Tom Cruise and wife, Nicole Kidman, settled in the midst of trial their libel case against Express Newspapers for a reported £350,000 in damages and costs. A 1997 Sunday Express Magazine article entitled, "Cruising for a Bruising . . . What's the inside story on Hollywood's Golden Couple?" alleged that the couples' marriage was a hypocritical sham entered into as a business arrangement, or on the orders of the Church of Scientology, or as a cover for their homosexuality. The article also reported that Cruise was impotent and sterile and that the Hollywood actors adopted two children as part of a Los Angeles fashion trend. In addition to paying damages, Express Newspapers withdrew all the allegations and apologized to the couple.

Internationally acclaimed American soprano Jessye Norman was less successful. In November, the Court of Appeal affirmed the dismissal of her claim for lack of defamatory meaning. Ms. Norman sued the magazine *Classic CD* over a 1994 article that reported she had some difficulty passing through a doorway. Upon being advised to try passing through sideways, the article allegedly falsely quoted Ms. Norman as responding, "Honey, I ain't got no sideways." She alleged the quote made her appear "vulgar and undignified," that the false quote was a "degrading racist stereotype of a person of African-American heritage" or alternatively a "patronising mockery of speech attributed to certain black Americans." Lord Justice Gibson described the words as "gentle fun." Interestingly, Ms. Norman first sued the U.K. based magazine in New York. Her complaint was dismissed as outside the statute of limitations.

LDRC ANNUAL DINNER: NOVEMBER 11, 1998
THANK YOU ALL FOR ATTENDING

Thank you all for attending the LDRC Annual Dinner. It was, we believe it fair to conclude, a very successful event in many ways. For one, there was a record number of you there. And it looked as if you were all having a grand time meeting and greeting one another. That, of course, is a very substantial reason for the Dinner. Indeed, this is an appropriate place to thank Media/Professional Insurance and Scottsdale Insurance Company for sponsoring the cocktail party that preceded the Dinner.

Second, LDRC was honored to be able to celebrate the role of journalists and publications from all media who took the risks and understood the rewards of reporting on the Civil Rights Movement. Clearly it was an American Revolution -- one that most of us were alive to experience -- and one that Americans were able to understand and participate in as a result of the information received from the mass media.

We were particularly honored to have had as our keynote speaker **Congressman John Lewis** of Atlanta, Georgia. Very much a civil rights leader in the late 1950's and 1960's, a Freedom Rider, chairman of Student Non-Violent Coordinating Committee, an organizer and speaker at the March on Washington in 1963, and a leader of the march in Selma, Alabama that led to the enactment of the Voting Rights Act of 1965, Congressman Lewis has always been a leader of conscience and commitment. He came to extol the role of journalists who were willing to take the risks necessary to cover what he characterized as a war in the South.

> "I have often said that without the media -- without your dedication to exposing the truth -- the Civil Rights Movement would have been like a bird without wings -- a choir without a song. Your stories brought the Civil Rights Movement into American living rooms, into the barber shops and the beauty shops and, most importantly into the hearts and minds of those who believed in a better nation...
>
> "I have often said that journalists during those years were not just passive bystanders. Many put their bodies and their lives on the line -- they stood with us against violent acts by police authorities in the South. If you had a pen and pad or a camera and a microphone, you were in the line of fire."

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LDRC ANNUAL DINNER: NOVEMBER 11, 1998

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He came to extol the First Amendment, as a shepherd to the Civil Rights Movement -- "it guided us and led the way."

> "Whenever people are fighting the good fight -- whenever ordinary people have the courage to say 'no,' to take a stand against injustice -- the First Amendment of our precious Constitution is there to protect and guarantee that right to fight."

And he came to exhort us to stay in the American House and help to keep it upright and strong. Reminding all of us that journalists have "always stood firm in our house" reporting without fail on those people and events that would tear down the society or wreck havoc with basic Constitutional freedoms.

LDRC Will Publish a Transcript Next Month

LDRC will publish a transcript of Congressman Lewis' speech and the panel discussion that followed, which featured truly noted and distinguished journalists **Karl Fleming** (former *Newsweek* civil rights correspondent), **Reuven Frank** (former executive producer of NBC's Huntley/Brinkley Report and twice-president of NBC News), Vernon Jarrett (former reporter *Chicago Daily Defender*, as well as reporter, columnist and commentator for the *Chicago Tribune, Chicago Sun*, ABC/7 Chicago, among other newspapers, magazines and broadcast outlets), and **Jack Nelson** (*Los Angeles Times*). Moderated by **Terry Adamson** and joined by **Congressman Lewis**, this panel offered all of us a window into the concerns, logistical and journalistic, and profound pride of those of who covered the Civil Rights Movement. They told of the rational fear of covering hostile actions, the memories of watching and hearing men, women and children bloodied, of the Jim Crow justice, and the ultimate break-through of the civil rights story into mainstream journalistic consciousness -- and front pages.

Jack Nelson perhaps said it best when he noted that among his colleagues who covered the Civil Rights Movement it was felt that they had never covered so profound and important a news story before or after.

Minutes of the Annual Meeting of the Media Membership of LDRC November 11, 1998

Chairman's Report

The meeting was called to order by the Chair, Robert Hawley. Robert Hawley noted that 1998 was his final year as Chair of the Executive Committee of LDRC. He reflected on the success of LDRC during a transitional period, focusing on the transition from a General Counsel model, under Henry Kaufman's guidance, to an Executive Director model, under the direction of Sandra Baron. He stated that the ability of LDRC to take on the many new projects it has in recent years -- including two new **LDRC 50-State Surveys**, conferences in London and in Moscow, and the many committee activities -- and to remain solvent and even prosper while doing so, was the result of LDRC having its own staff.

Election of Executive Committee Members

Bob Hawley reported that Ken Vittor, The McGraw-Hill Companies, Inc., was nominated to serve a second two-year term, and that the Executive Committee has stated its intention to elect Ken as the new Chair of the Executive Committee commencing January 1, 1999. Also nominated for a second two-year term was Susanna Lowy, CBS Inc., and for an initial two-year term, Harold Fuson, Jr., The Copley Press, Inc. The nominations were moved, seconded and adopted by unanimous vote. Robin Bierstedt, Time Inc., and Mary Ann Werner, The Washington Post Company, are entering the second year of their two-year terms.

Executive Director's Report

Next on the agenda was the Executive Director's Report. Sandra Baron noted that 1998 had been a difficult year for the media, citing instances of fictionalized reporting, the Lewinsky and Chiquita cases. Public opinion polls indicated that the media was not particularly credible with its readers and viewers. While the general perception of the media may seem somewhat outside LDRC's core mandate, she stated that LDRC reports on these polls and materials to the membership because the perception of the press is ultimately important to the media counsel in evaluating how libel, privacy and related claims will be received by judges, juries and even legislators. She stated that she felt it was important for LDRC to continue to report to the membership any developments and trends in media law, policy and perception. She indicated that the state of media law will be the focus of the 1999 NAA/NAB/LDRC Conference in Arlington, Virginia, September 22-24, 1999.

Reminding the membership that LDRC is, at core, a cooperative venture by and between the membership, Sandy appealed to the membership for litigation materials, including briefs, for opinions of note, for information about legislative proposals, and for any suggestions about projects that LDRC should entertain. She indicated that last year, LDRC responded to a very substantial number of inquiries (well into the hundreds) for information, briefs and other materials, both from the membership and the press. She noted that LDRC regularly sends out its Jury Manual and Model Trial Brief to the members for their use in their litigation.

LDRC 50-State Surveys And LDRC Bulletin

The **LDRC 50-State Surveys** have been updated, with the **LDRC 50-State Survey of Media Libel Law** having just been shipped to subscribers. The new **LDRC 50-State Survey: Employment Libel & Privacy Law** is in the process of being edited and should be available by the end of 1998. Sandy reported that LDRC published four issues of the **LDRC Bulletin**, with the first **Bulletin** reporting on the LDRC survey of damage awards in media libel and privacy cases. The second **Bulletin** this past year focused on Agricultural

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Disparagement. In conjunction with that BULLETIN, a new LDRC/DCS Committee was formed in 1998, focusing on agricultural disparagement laws.

The Committee, in addition to assisting in the research and writing of the BULLETIN, will be monitoring the introduction of such laws, the progress in those jurisdictions where there may be efforts to modify or repeal such laws, and any litigation pursuant to the laws. The BULLETIN on agricultural disparagment has had wide distribution and was widely praised for having brought together so much useful information on these laws in one publication.

The third BULLETIN reported the LDRC Appellate Review Survey which reviewed how media libel and privacy verdicts fared at the appellate level. Also in the third issue, the annual review of activity of the Supreme Court for the past term. The fourth issue, Part I, reported new developments in libel, privacy and related law drawn, primarily, from prior LDRC publications.

Part II of the fourth quarter BULLETIN is still being drafted and focuses on the paparazzi bills adopted in California and proposed in the House and Senate. The California bill became law on September 30, 1998 and will take effect on January 1, 1999. It remains to be seen whether the House and Senate will reintroduce the bills that were pending in both chambers before the recess. LDRC had done research in support of those who were scheduled to testify before Congress on the bills and had provided substantial amounts of information to, among others, the Society of Professional Journalists which was endeavoring to inform its membership about these matters.

Indeed, Sandy reported, LDRC can perform useful service to the media community by offering research where needed to those who are working within the legislative arena. LDRC was involved in that manner in the efforts in Congress to adopt a bill that would limit punitive damages. While the bill ultimately was not enacted, Senator Hatch's office has indicated that he is willing to reintroduce a similar measure next term. And LDRC has been able to offer research support to the ASNE which has set the adoption of the Uniform Correction and Clarification Act as a top priority in 1998 and years to come. Sandy asked the members to review the memo received from ASNE on this matter and to offer their support if and when the UCCA is proposed in their jurisdiction.

To help LDRC identify where it can be useful and to help it coordinate its efforts regarding proposed legislation, a new committee is being formed -- the Legislative Developments Committee. This committee will absorb the Tort Reform Committee and, as part of its mandate, continue to monitor and act on tort reform efforts. It will be chaired by Lee Levine, with Dick Schmidt and Bob Lystad agreeing to co-chair the federal legislative sub-committee and Roger Myers agreeing to chair the state legislative subcommittee.

The London Conference

The London conference was discussed briefly. Sandra Baron stated that the conference was designed to use the break-out format that has proven so successful in the biennial Virginia conference and noted that the London effort worked better than LDRC anticipated. She also noted that there are recent changes in English libel law, notably in the area of privilege, that are favorable to the press. Less attractive, she said, are the trends in privacy law. Consideration will be given to having a follow-up conference in London in 2000. Laura Handman stated that this past year she appeared, by written communication, as an expert witness before Justice Poppelwell, one of the two English court libel judges. It was noteworthy that the Justice remembered Laura from the London Conference.

New Business

Sandra Baron stated that LDRC is not incorporated and pointed out that in an unincorporated association, liability may be found to drop down into the member-

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ship. Research on the matter has been taken up this past year. This research shows that there are costs associated with incorporation and that LDRC would have to reapply for an IRS exemption. Assuming that reapplication goes smoothly, LDRC will be incorporated some time next year. This will require a new set of by-laws, but similar to the current by-laws. Under incorporation, the Executive Committee of LDRC would become the Board of Directors and the by-laws provide that the Board could have up to nine members.

The LDRC **50-State Survey: Employment Libel & Privacy Law** was also discussed. It was noted that Blair Soyster, Project Chair, could not attend the Annual Meeting. Bob Hawley stated his view that undertaking the Survey was essential, as a great deal of defamation law is now arising in the employment context. He noted that offering this service not only benefited the membership, all of whom were employers and had to manage libel and privacy issues in that context, but also to the community-at-large where LDRC would be performing a service by compiling the law in a manner that the organization does so well. Bob stated that it was hoped that the Survey would pay for itself and also serve to introduce LDRC to those who do not know about LDRC.

Bob Raskopf, Chair of the Jury Instruction Committee, reported that the Jury Committee and the Trial Techniques Committee were proposing to undertake a joint **Jury Debriefing Project**. He wished to discuss with the membership what might be the best way(s) to attain the goals of the project. It was anticipated that the Committees would develop an appropriate questionnaire that would then be used to debrief jurors at the close of media libel and privacy trials in an effort to better understand how jurors approach these cases, the issues, and the media. He emphasized that it is best to speak with the jurors individually, as opposed to the group as a whole, in order to get more honest answers.

Bob noted that in some jurisdictions the local rules prohibit contact with jurors. Also discussed were concerns about jurors complaints and judicial disapproval of contacts with jurors. The results, however, would be a database of juror reactions to presentations at trial. Bob anticipated that the results of such a polling would be very useful at the voir dire stage.

There followed a discussion of what such a project might entail. Generally discussed were concerns about juror complaints, whether the fact that a given defendant was a member of LDRC would require disclosure, and possible disclosure of whatever information is collected to plaintiffs' counsel.

Also mentioned: whether there were models in other areas, i.e., trade groups, quasi-trade groups, that might be useful, whether jury consultants might be useful and whether it might not be appropriate to approach a judge's association for cooperation.

Defense Counsel Section

Laura Handman, President of the Defense Counsel Section for 1998, reported on the activities of the Section. She noted that the officers of the DCS serve one year terms in each of the four officer positions, moving first from Treasurer and ending with President. Tom Leatherbury will begin his term as President on January 1, 1999. Laura will take on the post of President-emeritus and David Schulz of Rogers & Wells has been nominated to the position of Treasurer.

Laura indicated that the Defense Counsel Section is growing, currently encompassing fifteen active committees. She appealed for input and participation, however, from the Media Members.

There being no further business, the meeting was adjourned.

1998 Defense Counsel Section Annual Breakfast Meeting Minutes

DCS President Laura Handman (Davis Wright Tremaine) called the meeting to order, thanking members for attending and acknowleding the moving tribute to civil rights journalism presented at the annual dinner. Reviewing activities over the past year, Ms. Handman reported on LDRC's London Conference, thanking the American and English planners for making it a success and acknowledged that it provided a unique opportunity to discuss important issues to US and UK media lawyers. She reported that a new 50-State Survey on Employment Libel and Privacy Law will be published in January 1999, complimenting LDRC's Libel and Privacy volumes, as well as LDRC's monthly *LibelLetter* and quarterly Bulletin.

New DCS Officers and Election of Treasurer

Laura Handman noted that each officer serves in a post for one year and then moves up the ranks. The President rotates off the Executive Committee to the post of President Emeritus and the DCS elects a new Treasurer. The Executive Committee has tried to maintain geographic diversity on the Executive Committee.

In 1999, Tom Leatherbury (Vinson & Elkins) will become the new DCS President, Tom Kelley (Faegre & Benson), Vice President, Susan Grogan Faller (Frost & Jacobs), Secretary. Dave Schulz (Rogers & Wells) has been nominated for Treasurer. Having called for a vote, Laura Handman reported that David Schulz was unanimously elected. Laura Handman thanked outgoing Chair of the LDRC Executive Committee Bob Hawley for his many years of contributions. She noted that Kenneth Vittor (The McGraw-Hill Companies) will be taking over as Chair of the Executive Committee.

Executive Director's Report

Laura Handman called on Sandy Baron to deliver the Executive Director's Report. Sandy thanked LDRC's staff and DCS members for their many contributions. She reflected that the media has taken some knocks this past year because of its coverage of Clinton/Lewinsky, and incidents such as the Chiquita case. Recent polls show the press' credibility declining. She noted that the *LibelLetter* has reported on these matters, that such issues will be on the agenda for the 1999 Libel Conference, and that LDRC will continue to report on these and all other issues of interest to members. She observed that the LDRC is a cooperative, that it depends on contributions from its members. She thanked members for their support and contributions and urged them to continue sending in briefs, jury instructions and other information. She reported that over the past year LDRC handled many queries from lawyers and journalists; that it serves as a serious resource of information on the law and legal trends. She reviewed the subjects of LDRC's quarterly Bulletin and concluded by urging the memberships continued participation in all projects.

Committee Reports

Laura Handman noted that DCS has invited media members to join committees, and that media member attorneys already serve on many committees. She encouraged DCS members to reach out to media members to join committees. She also noted that a rotational system for committee chairs and vice-chairs has been instituted. She then called on committee chairs to give their reports.

Reports from Committee Chairs

Advertising & Commercial Speech

Chair Cam DeVore (Davis Wright Tremaine) reported that his committee has been vigilant all year. For example, it has monitored the chances for a federal right of publicity law. There has not been much action but the committee will continue to monitor developments. Felix Kent (Hall Dickler Kent Friedman & Wood) will serve as new Vice-Chair of the committee.

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New Legal Developments

Chair Lee Levine (Levine, Sullivan & Koch) reported that the committee monitors and reports on big developments, such as the recent anti-paparazzi bills on the federal level and in California. This coming year, Lee will chair the new Legislative Developments Committee. Jack Weiss (Gibson, Dunn & Crutcher) will take over as Chair of the New Legal Developments Committee.

Tort Reform

Chair Dick Rassel (Butzel Long) reported that it was generally a quiet year. LDRC offered assistance to those who were supporting federal legislation to limit punitive damages in certain actions.

Conference & Education

Co-Chair Dan Waggoner (Davis Wright Tremaine) reported on the planning for the 1999 Libel Conference. It will be held in a new location: The Crystal Palace Hotel in Arlingon, Virginia. An overarching question to develop at the conference is "Where is media law going?" The conference will continue to use the well received interactive breakout sessions and Tom Kelley's trial session. Outgoing co-chair Terry Adamson (National Geographic) was thanked. Peter Canfield (Dow Lohnes & Albertson) will serve as new Co-Chair of the committee.

Employment Law

Chair Blair Soyster (Rogers & Wells) reported on the development and status of LDRC's new **50-State Employment Law Survey**. Two years ago the committee solicited volunteers, outlines were prepared and circulated at last year's meeting and practitioners were recruited to complete surveys for all states. Increasing libel and privacy claims in the employment context bear out the need for the book, and it will be of use to practitioners outside the media law field. She asked LDRC members to recommend the book to colleagues and clients. Sandy Bohrer (Holland & Knight) will serve as new Vice -Chair of the committee.

Agricultural Disparagement

Chair Bruce Johnson described veggie libel laws as "a specter stalking America" and cited the committee's work on LDRC's Agricultural Disparagement Bulletin. He appealed to members to report any percolating state bills to the committee. The committee can then contact local press associations and assist in opposing new bills. The committee worked with lawyers in the Buckeye egg case. He awarded the committee's new "Golden Broccoli Award" (for the best contribution in this area of law) to Chip Babcock for his efforts defending Oprah Winfrey in the suit brought by Texas cattlemen. Seth Berlin (Levine, Sullivan & Koch) will serve as new Vice-Chair of the committee.

Cyberspace

Chair Steve Lieberman (Rothwell, Figg, Ernst & Kurz) reported that the committee is tracking the legal decisions that are starting to arise in this area. They are working on a brief bank and bibliography of law in the area that would be available both in hard copy and online. The committee is thinking of starting an amicus subcommittee that would offer assistance to counsel who may be new to First Amendment litigation. In addition, it is planning another set of articles, including addressing European Data Protection law. Kurt Wimmer (Covington & Burling) will serve as new Vice-Chair of the committee.

International

Co-chair Richard Winfield (Rogers & Wells) reported on the successful London Conference. He thanked the American and English planners. The committee's goal is to repeat the conference in the years ahead. It will also continue to gather names of foreign counsel that can be of use to LDRC members. Co-chair Kevin Goering (Coudert Brothers) noted that the committee may pester members to contribute to foreign counsel list and that the committee will explore developing international libel surveys of coun-

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tries such as England, France and Mexico to add to the 50-State Surveys. Bob Hawley will continue to co-chair the committee.

Prepublication

Chair Robert Nelon (Hall, Estill, Hardwick, Gable, Golden & Nelson) reviewed that this committee split off from the Pretrial Committee. It's is developing two projects: 1) Ride along cases; and 2) Use of lawfully obtained secret or confidential information. The committee will collect decisions and anecdotal reports to distill what advice is being given and also for use at the 1999 Libel Conference. David Korzenik (Miller & Korzenik) will serve as the new Vice-Chair of the committee.

Pretrial

Vice-Chair Richard Goehler (Frost & Jacobs) reviewed the handout the committee prepared on proposed amendments to Federal Rules of Civil Procedure Rules 26 and 30. The proposed amendment to Rule 26 will stop local jurisdictions from opting out. The amendment to Rule 30 will presumptively limit to one day (seven hours) any deposition. The deadline to submit comments is February 1999.

Laura Handman added that ASNE will be pushing for the Uniform Clarification and Correction Act and cited the memo Tonda Rush prepared as a handout.

Expert Witness

Chair Guylin Cummins (Gray Cary Ware & Freidenrich) reviewed the handout her committee prepared on proposed changes to the Federal Rules of Evidence and asked members to give the committee their comments. The committee is also continuing its work gathering information on expert witnesses. In particular, the committee is looking to find recent retirees from the media who may serve as experts. James Stewart (Butzel Long) is the new Chair of the committee.

Jury Instruction

Chair Bob Raskopf (White & Case) reported on the committee's new project to survey libel jurors in order to develop more effective presentation of cases. Dan Barr (Brown & Bain) will take over as Chair of the committee. Holly Barnard (Johnston, Barton, Proctor & Powell) and David Klaber (Kirkpatrick & Lockhart) will serve as Vice-Chairs of the committee.

Trial Techniques

Chair David Bodney (Steptoe & Johnson) noted that his committee will also be working on the juror survey project. The project depends on DCS members going to trial notifying LDRC and the willingness of jurors to be debriefed. The committee will also supplement the Model Trial Brief it previously prepared and members should give the committee their comments. Guylin Cummins (Gray Cary Ware & Freidenrich) will serve as new Vice-Chair of the committee.

LibelLetter

Outgoing Chair Peter Canfield (Dow Lohnes & Albertson) thanked members for their contributions to the *LibelLetter* and stressed the publication depends on their contributions. He also thanked Sandy Baron and observed that the committee serves as a "kitchen cabinet" for her. Incoming Chair Adam Liptak (New York Times) noted that he considers the *LibelLetter* to be the best publication in the field.

Membership

Chair Dick Goehler (Frost & Jacobs) thanked all members for their support. He noted that he may call on members to help make contacts and predicted that the membership will continue to grow.

Conclusion

Incoming DCS President Tom Leatherbury (Vinson & Elkins) thanked Laura Handman for her expert leadership and contributions.