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LIBELLETTER

October 1997

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LDRC ANNUAL DINNER
NOVEMBER 12
7:30 p.m.
WALDORF ASTORIA

DCS ANNUAL MEETING AND BREAKFAST
NOVEMBER 13
7:00 a.m.
CROWNE PLAZA

Stranger Than Fiction

By Henry S. Hoberman and Robert D. Lystad

Increasingly, publishers and filmmakers are having to defend against lawsuits brought by latter-day "Zeligs." Like the famous Woody Allen character, these plaintiffs seek to inject themselves into a host of settings. They even see elements of their own lives in fictional works, and they want damages for misappropriation, defamation, false light and other torts from the author.

Two recent decisions may make it easier to dispatch these kinds of

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ABC Wins Summary Judgment in Hidden Camera False Light/Libel Case

By David P. Sanders and Janice A. Hornaday

The United States District Court for the Northern District of Illinois has granted summary judgment to ABC on the plaintiff's libel and false light claims in *Russell v. ABC*, a case brought by a woman who was a subject of a Prime Time Live hidden camera undercover investigation on the fish and seafood industry. The court ruled that ABC's statements about the plaintiff in the broadcast were constitutionally protected opinion, and that ABC did not act with constitutional malice because it did not intend the alleged implication that the plaintiff was a dishonest person.

The Prime Time broadcast addressed a variety of topics relating to the fish and seafood industry, including how fish is handled at supermarkets and some methods stores use to sell fish to consumers. This portion of the report was based on an undercover investigation by Prime Time in which Prime Time helped local journalism students find jobs in fish departments of Chicago area retail food stores and fitted them with a hidden videotape camera to record their training. The plaintiff was a fish department supervisor who trained the undercover worker in the methods of selling fish.

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Stranger Than Fiction

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lawsuits.

The first involves author Steven Spruill, a popular writer of science-fiction medical thrillers. With a Ph.D. in psychology and a vivid imagination, Spruill crafted an intriguing tale about brain implants that enable blind people to see again. One of the protagonists in Spruill's book, *My Soul to Take*, is a young medical resident at the National Institutes of Health who assists in an experimental project by inserting microchips into volunteer patients. While working on the implant project, the resident is the victim of an unwanted sexual advance by her supervisor. She then becomes a target of rogue CIA agents who hope to harness the magical properties of the implant, which allows some patients to see the future.

Enter real-life doctor Maureen Polsby, who once was a medical resident at NIH and claimed she -- like the character in Spruill's book -- was the victim of sexual harassment by her supervisor. After learning of Spruill's book, Polsby sued Spruill and the publisher of a condensed version of the novel for misappropriation, libel, false light, and intentional infliction of emotional distress.

In *Polsby v. Spruill*, 25 Media L. Rep. (BNA) 2259 (D.D.C. 1997), the United States District Court for the District of Columbia granted summary judgment for the defendants. Initially, the Court noted that the defendants submitted unrebutted affidavits indicating that they had never heard of the plaintiff prior to the litigation. Judge Thomas F. Hogan then proceeded to analyze each of plaintiff's claims in turn.

As to the misappropriation and publicity claims, the Court held that even if the novel's heroine was based on the plaintiff, the defendants did not receive any commercial benefit from using the plaintiff's name or likeness, a fundamental element of a misappropriation claim. "The mere fact that the novel was published and the defendants intended to make a profit from this publication is not enough to constitute commercial benefit," the Court wrote. Despite a few factual similarities between the plaintiff's life and the life of the novel's heroine, the Court found that there were "many more differences than similarities." Finally, the Court found that -- since the plaintiff had testified before Congress about her experiences at NIH -- she had voluntarily made her life public "and the information became ripe for fair use by others, even in fictionalized form."

Judge Hogan made equally short shrift of plaintiff's libel, false light and emotional distress claims. Because the plaintiff could not show that the novel actually depicted her, she failed to meet the "of and concerning" requirement. In addition, the alleged factual predicate for the defamation-related torts -- that the heroine of the novel breaks into a house to help save a comrade and shares a few passionate kisses with a former patient -- was not "highly offensive" for false light purposes, defamatory for libel purposes, or "outrageous" for emotional distress purposes. "[I]n the context of the plot, Dr. Lord's actions are acts of heroism and serve to make Dr. Lord a more courageous and admirable protagonist," the Court wrote.

A California appellate court used a similar approach to reject the plaintiff's claims in *Polydoros v. Twentieth Century Fox Film Corp.*, 57 Cal. App. 4th 795, 67 Ca. Rep. 2d 305 (Cal. Ct. App. 1997). There, a "noncelebrity" sued the makers and distributors of a film called "The Sandlot," a comedic coming-of-age story set in the San Fernando Valley in the 1960s. Plaintiff Michael Polydoros, a schoolmate of the writer and director of the film, claimed that one of the film's characters, a boy named Michael Palledorous and nicknamed "Squints" because of his thick eyeglasses, was patterned after him. He sued for misappropriation for the use of his name and likeness, and for defamation based on "infantile epithets" hurled at the Squints character in the movie.

In affirming the trial court's grant of summary judgment, the California Court of Appeal held that the misappropriation claim failed because "the rudimentary similarities in locale and boyhood activities do not make 'The Sandlot' a film about appellant's life. This is a universal theme and a concededly fictional film. The faint outlines appellant has seized upon do not transform fiction into fact." The Court concluded that the allegedly defamatory language (such as "little pervert," "reject," "pretty crappy") was not actionable because it amounted to rhetorical hyperbole and thus was protected opinion.

In both cases, the courts made clear that works of fiction -- either in print or on the silver screen -- deserved the same constitutional protection as works of nonfiction. And the special role for summary procedures that courts have traditionally applied to "core" First Amendment cases seems to have found another home.

Henry S. Hoberman and Robert D. Lystad are with Baker & Hostetler in Washington, D.C. Along with Bruce W. Sanford, they represented defendants Steven Spruill and The Hearst Corporation in the Polsby v. Spruill case.

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ABC Wins

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Prime Time introduced this section of its news report with a voice-over: "During their week on the job, our workers get a crash course on the selling of seafood, the so-called tricks of the trade." The broadcast then featured four "lessons" ABC learned from the hidden camera tape of the training its undercover workers received in how to sell fish. Plaintiff appeared in two of these lessons. Each lesson was proceeded by an introduction that explained its purpose -- what Prime Time learned -- followed by videotape from the undercover cameras.

In Lesson 1, plaintiff was shown speaking to a customer on the telephone in the food store's fish department and then describing to the undercover worker what transpired on the telephone call.

> **Voice-over:** Lesson number one -- always tell the customers what they want to hear, especially when it comes to how old the fish is.
> **Plaintiff (Hidden Camera Footage):** Okay, we just had a customer call and she said, "do you have any tuna?" "Yeah, we have tuna." "Is it fresh?" That's another big thing. "How fresh is your fish?" I don't know if you've had that with people yet, but they always constantly ask how fresh the fish is. Just tell them it's today fresh.
>
> **Undercover worker (In subsequent group interview with reporter):** Even if we knew that fish is sitting in a container in the back, that was fresh fish. That was today's fresh fish.

Lesson 3 showed plaintiff teaching the undercover worker to take fish that plaintiff had described as "old" and previously had been intended for sale to customers as fresh (*i.e.*, uncooked), and instead to cook it for sale:

> **Voice-over:** Lesson number three -- when it comes to selling fish, better late than never. Our manager tells us that this fish is too old to sell as fresh, but instead of throwing it away, she has another idea.
>
> **Plaintiff (Hidden camera footage):** You could cook it. It's still cookable, it's just not, you know, something that people are going to really want to buy and cook, but it's something that we can salvage and still make money off of.

The plaintiff's original complaint against ABC asserted claims for intrusion upon seclusion, violation of the federal wiretapping statute, and false light invasion of privacy. In May of 1995, the district court granted ABC's Rule 12(b)(6) motion to dismiss the wiretapping and intrusion claims, but denied the motion to dismiss the false light claim on the ground that Lessons 1 and 3 were not susceptible to a reasonable innocent construction. *Russell v. ABC Inc*, 23 Med. L. Rep. 2428 (N.D. Ill. May 30, 1995) (*See LibelLetter*, July 1995, p. 7). Plaintiff subsequently filed an amended complaint, asserting libel and false light claims predicated on the theory that the Lessons falsely depicted her as unscrupulous and as someone who sold unhealthy fish.

After discovery, ABC moved for summary judgment on two grounds:

(1) that the two allegedly injurious portions of the broadcast that depicted plaintiff -- Lessons 1 and 3 -- were not actionable as a matter of law under a *Milkovich* First Amendment analysis, because they were merely ABC's subjective interpretations, based on disclosed, true facts, that could not themselves reasonably be understood as stating actual facts about plaintiff, and

(2) as to her false light claim under Illinois law and her claim for punitive damages plaintiff could not raise a triable issue of fact showing that ABC published the challenged statements or the allegedly injurious implications with constitutional actual malice. The court agreed with ABC on both issues and entered summary judgment for ABC on all of the plaintiff's claims.

ABC's Interpretation Not Actionable

As to the *Milkovich* issue, ABC emphasized that the "Lessons" contained two kinds of statements: (i) true statements of fact, presented to the viewer in the form of excerpts from the hidden camera footage of plaintiff's own statements to the undercover worker; and (ii) PrimeTime's introductions to the Lessons, which set forth its subjective interpretations of those facts in rhetorical and figurative language. ABC contended that this structure, as well as the language used in the Lessons, demonstrated that the allegedly injurious implications arose from the introductions, which were ABC's subjective interpretations and commentary concerning true facts about plaintiff's actions, which could not reasonably be understood as stating actual facts.

The district court adopted ABC's reasoning, relying on the line of cases holding that "when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the

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reader free to draw his own conclusions, those statements are generally protected by the First Amendment," *citing Partington v. Bugliosi*, 56 F.3d 1147, 1156-57 (9th Cir. 1995), and *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993). The court stated, "given the rhetorical language used to describe its conclusions regarding the aired portions of the videotape, it is clear that ABC was presenting its own interpretation of plaintiff's words and actions."

The court rejected plaintiff's argument that the broadcast as a whole conveyed the false factual assertion that she was a dishonest merchant, stating "While the context of the program as a whole – an expose of the commercial fish industry – may have put a negative spin on plaintiff's conduct, this does not negate the fact that ABC is merely presenting its own interpretation of facts it disclosed to its viewers." The court also noted that "[w]hile ABC does not disclose the entirety of plaintiff's dialogue, or other portions of the videotape . . . that may reflect more positively on (plaintiff), the substance of what it did broadcast was true," adding that "the portions of the unaired videotape do not indicate that the aired portions were inaccurate."

ABC Had To Intend Implication

On the constitutional actual malice issue, ABC had submitted the affidavit of the producer of the broadcast, as well as a detailed statement of uncontested facts which contained a painstaking analysis of evidence establishing that ABC believed every word it said about plaintiff in the broadcast (including in the introductions) to be true, and that it did not intend to communicate the implications plaintiff alleged.

The court did not undertake any analysis of the voluminous evidence offered by ABC rebutting constitutional actual malice as to what ABC actually said in the broadcast, virtually all of which plaintiff was unable to contradict. Instead, the court focused on ABC's alternative argument, based on *Newton v. NBC*, 930 F.2d 662 (9th Cir. 1990), that a plaintiff seeking to rely on an unspoken implication must prove that the defendant intended the implication. Applying *Newton*, the court noted that "the issue is not whether the segment conveyed the impression that Russell was dishonest, but whether [ABC] knew that the segment conveyed this impression or recklessly disregarded the risk that it did." While the court acknowledged that a viewer might reasonably interpret the Prime Time segment as insinuating that the plaintiff was dishonest or unscrupulous, it correctly observed that this would not suffice to show that ABC knew the segment conveyed this message or that it "subjectively entertained serious doubts" as to whether the segment gave this impression.

The court rejected plaintiff's argument that ABC knew its depiction of plaintiff was false, because its producer testified at his deposition that he did not believe that she was "unscrupulous" or dishonest. That the producer did not believe the implication did not establish his knowledge that this message was being conveyed.

And the Expert Conclusion it was Malice Rejected

The plaintiff's opposition included an affidavit and report from Gilbert Cranberg, a retired newspaper editorial page editor and a professor at the University of Iowa, which contained his opinions that the broadcast falsely depicted the plaintiff as unscrupulous; that ABC violated its own guidelines and deviated from professional journalistic standards in preparing the broadcast; and that ABC broadcast its news report knowing it was false or with reckless disregard for its truth or falsity.

ABC moved to exclude Cranberg's opinions on a variety of grounds, including that the opinions on ABC's compliance with standards of care were irrelevant to the subjective constitutional malice standard; that there was no need for expert testimony on the constitutional malice issue because the jury could decide ABC's state of mind for itself; that the opinions were inadmissible because they were based on nothing more than inferences drawn from evidence; and that Cranberg was unqualified to opine on the matters relating to the presentation of television news reports.

The court rejected the plaintiff's attempt to rely on the expert's opinions that ABC acted with constitutional actual malice, because the opinions were based solely on inferences and not any expertise. The court then considered whether the expert's opinion that ABC departed from its own guidelines or professional standards of journalism was relevant to a circumstantial constitutional malice analysis. The court held that it was, but warned that this type of evidence was of limited probative value and was insufficient, standing alone, to demonstrate a defendant's state of mind.

The plaintiff has chosen not to appeal.

David P. Sanders and Janice A. Hornaday are with Jenner & Block in Chicago, and represented ABC in this case.

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Website Posting Enough for Jurisdiction in Corporate Defamation Case

A Virginia federal district court Judge, James Cacheris, denied defendant's motion to dismiss for lack of personal jurisdiction, finding that "posting a Web site advertisement or solicitation constitutes a persistent course of conduct," and that two or three press releases posted "rise to the level of regularly doing or soliciting business," sufficient to grant jurisdiction against a non-resident under Virginia's long-arm statute. *Telco Communications Group, Inc. v. An Apple a Day, Inc., d/b/a Dial and Save, et al.,* No. 97-542-A, 1997 U.S. Dist. LEXIS 14543 (E.D.Va. September 24, 1997). Defendants did not assert a due process argument.

Posting a Web site constitutes a "persistent course of conduct" and posting a press release "rises to the level of regularly doing or soliciting business."

Telco Communications Group, a Virginia corporation, brought suit for defamation, tortious interference with contract, and conspiracy to harm business. The company alleged that An Apple a Day corporation, which is based in Missouri, and its president and her husband committed these torts by posting two or three (the number is disputed) press releases on the Internet. The facts of the case show that the husband of the owner of the defendant company wrote the allegedly defamatory press releases in Missouri, and placed them on Business-Wire for distribution into Connecticut, New York, and New Jersey. *Telco*, 1997 LEXIS 14543 at *11. At deposition, a representative for Business-Wire stated that even if a person were to order a limited distribution range [as defendant did], the company makes those it services aware that the press releases will be distributed at no extra charge to financial disclosure circuits; databases; online services and Internet sites; financial databases and services; and BW Analyst Wire. Included among the distribution outlets are "several Virginia consumer information facilities." *Id.*

Under these facts, the court found that it had personal jurisdiction pursuant to two subsections of Virginia's long-arm statute, Va. Code 8.01-328.1(A)(3) and (4). Subsection 4 permits personal jurisdiction "over a defendant who caused a tortious injury in Virginia by an act or omission outside Virginia if the defendant 'regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered' in Virginia." *Telco*, 1997 LEXIS 14543 at *4-*5 quoting *Blue Ridge Bank v. Veribanc, Inc.*, 755 F.2d 371, 373 (4th Cir. 1985).

In making its subsection 4 determination, the *Telco* court surveyed recent decisions concerning jurisdiction and the Internet. It rejected *Zippo Manuf. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), and *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (S.D.N.Y. 1996), aff'd, 1997 WL 560048 (2d Cir. Sept. 10, 1997), both of which had found that a passive Web site does little more than make information available to those who are interested in it and is thus not grounds for the exercise of personal jurisdiction. The court then embraced *Inset Systems, Inc. v. Instruction Set*, 937 F.Supp. 161, 165 (D.Conn. 1996), which held that a continuous Web site constituted the purposeful doing of business in Connecticut.

In rejecting *Bensusan*, the *Telco* court makes the point that though New York may require that a nonresident defendant be present in its state for jurisdiction to attach, Virginia has no such requirement. *Telco*, 1997 LEXIS 14543 at *7-*8. Thus, the court found that under subsection 4, jurisdiction attaches because the defendants admitted that "they were advertising their firm and soliciting investment banking assistance in posting the press releases." *Id.* at *8. In addition to finding that posting a Web site constitutes a "persistent course of conduct," the court found that the posting of the press releases rises "to the level of regularly doing or soliciting business, thus satisfying subsection 4." *Id.* at *8-*9. Although defendants contended that they did no business in Virginia, the court states that if a Virginian were to call, defendants would not refuse to answer. *Id.* at *8.

The court then went on to hold, though it need not have, that jurisdiction also exists under subsection (A)(3), which permits personal jurisdiction over a person who causes tortious injury by an act or omission in Virginia. The court

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cited the Supreme Court of Virginia's holding in *Krantz v. Air Line Pilots Assoc., Int'l*, 245 Va. 202, as standing for the proposition that a defendant need not be physically present in Virginia in order to satisfy subsection 3. The *Krantz* court held that all that subsection 3 requires is that some further act, beyond the defendant's acts out of state, be required in Virginia to complete the defendant's tortious act. The *Telco* court then applied that test, saying that "[b]ut for the Internet service providers and users present in Virginia, the alleged tort of defamation would not have occurred in Virginia. The conspiracy and tortious interference counts, to some degree, also required contacts in Virginia." *Telco*, 1997 LEXIS 14543 at *12. In addition, the court found that "because Telco is located [in Virginia], the firm absorbed the harm here, which is a necessary element to each of its claims." *Id.* at 13.

Brief Due Process Analysis: They Should Have Known

After finding that jurisdiction is permissible under Virginia's long-arm statute, the court turned very briefly to Due Process analysis, finding that "Defendants could reasonably have anticipated being 'haled into court' here." *Id.* While on one hand stating that "foreseeability" is not enough, the court went on to say that though defendants did not request distribution in Virginia, "Defendants should have reasonably known that their press releases would be disseminated [in Virginia], and they certainly knew that TELCO is based in Virginia. Their activities were sufficient to serve as an analogue for physical presence." *Id.* at *13.

Defense counsel have decided not to bring an interlocutory appeal on the jurisdictional finding, but they have preserved their right to appeal the issue following trial. Trial is scheduled to begin on January 7, 1998.

A Cautionary Tale: The Only Sure Freedom is to Own the Presses

Editor & Publisher and Printer at Odds Over Nude Photo

In reporting on the effect Arizona's new news rack law has had on *The Beat*, a 33 year-old Phoenix sex-oriented weekly, *Editor & Publisher* magazine ran into some censorship problems of its own when the magazine's printer, Cadmus Journal Services, of Richmond, VA, refused to print an advertisement taken from *The Beat* that featured bare-breasted dancers. "Bare Breasts Bare Values Gap," *Editor & Publisher*, Oct. 11, 1997 at 9.

Editor & Publisher is the weekly trade publication for the newspaper industry. It takes a rigorous free speech/free press editorial posture.

According to Cadmus' vice president/sales Jim Hillsman, printing the *Beat* ad in a 2"x4" box, which was intended to illustrate an article concerning the seizure of 15 *Beat* news racks by Phoenix vice squad police officers, would have run counter to Cadmus' corporate values. Noting that the decision came down to a "value judgment," Hillsman was quoted by *E&P* as saying, "[w]e honestly don't want to alienate our employees . . . . We don't print nudity. We don't print anything that is pornographic. Even language is something that would concern our associates. We just have an image to uphold."

E&P, after considering taking the magazine to other printers (two of which also refused to print the image), decided to run blank space and a story bringing the dispute with Cadmus to light in the space where the *Beat* ad would have appeared. *E&P* publisher, circulation/production, Christopher Phillips, noting that the image was to be presented in a news fashion, worried that printers "who owe their existence to the First Amendment" may have changed their attitude finding "that it is more important to them to placate their employees than to refuse to censor material protected by the same First Amendment that protects them."

Editor & Publisher said it was re-evaluating its relationship with the printer. We commend to you the story of *The Beat*, and its challenge to the constitutionality of the new Arizona news rack law which makes criminal the sale from news racks of material that is "harmful to minors." The defining characteristics appear broad enough to encompass the Yellow Pages if it carried listings for escort services.

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Mere Pleading Rule Rejected and Fair Report Applied in Pennsylvania

- - News Story on Complaint is Protected - -

By Malcolm J. Gross

Recently, the Pennsylvania Superior Court provided some positive news out of Pennsylvania and strong support for a liberal interpretation of the fair report privilege. The Court affirmed and essentially adopted the opinion of Judge Jack Panella of the Court of Common Pleas of Northampton County in *First Lehigh Bank v. Cowen and The Morning Call, Inc.*, 24 Media L.Rep. 2409, North.Co. (1996) and *First Lehigh Bank v. Cowen and The Morning Call*, 1997 WL 545896 (1997 Pa. Super).

First Lehigh arose when a bank, its principal shareholder and former CEO, as well as one of its other officers, sued The Call and Richard Cowen, one of its reporters. The complaint was based on *The Morning Call* story of June 9, 1995 reporting on the filing of a federal complaint against the bank and its two officers by a local dentist and his development company. Other than service of the federal complaint, no other action had occurred in the federal case and, specifically, no judicial action had occurred.

As a result, the fair report privilege was questionable, not only for the usual reason that the bank contended The Call's story was not a "fair and accurate summary" of the complaint, but also because of two obscure but potentially lethal provisions of the privilege which have sometimes found their way into both the *Restatement of Torts* and various states' common law.

The "Mere Pleading" Rule

The bank argued that because of what is sometimes called the "mere pleading" rule, the fair report privilege did not apply. The "mere pleading" rule -- which rejectes application of the Fair Report Privilege to pleadings before they have been brought before a magistrate or judge for action -- has a long and superficially impressive pedigree. It was apparently first propounded by then Chief Judge Oliver Wendell Holmes in *Cowley v. Pulsifer*, 137 Mass. 392 (1884) and had its basis in a concern that individuals would deliberately file false papers with the expectation that they would then gain publication and immunity under the fair report privilege. Subsequently, apparently based on the same concerns, the *Restatement (Second) of Torts* in Comment (e) to §611 had adopted the "mere pleading" rule and today, according to Professor David Elders in *The Fair Report Privilege*, fourteen states probably follow comment (e).

The bank argued that this is precisely what occurred in this case because the reporter had obtained a copy of the complaint from the plaintiff's attorney and the federal action had been dismissed under FRCP Rule 12(b)(6) shortly after the story was written It was unclear as to whether Pennsylvania was one of those states. In *Oweida v. Tribune-Review Publishing Co.*, 410 Pa. Super 112, 119 n.5; 599 A.2d 230 at 234 n.5 (1991), *app. den.*, 529 Pa. 670, 605 A.2d 334 (1992), Judge McEwen had noted that the Court was reserving judgment on the issue.

The "mere pleading" rule actually has a certain superficial appeal, not because of false pleadings, but because of what appears to be a fundamental unfairness about the ability to publish completely unsubstantiated charges from a complaint against an individual. Since the privilege is completely lost, however once the "mere pleading" rule applies, a newspaper is essentially defenseless in a defamation action if it publishes based on a complaint.

Rule Rejected

Fortunately, Judge Panella, and subsequently the Superior Court, rejected the rule. They did so for a number of reasons. First, they both noted that equally sound precedent exists for rejection of the rule and specifically called attention to Judge Pound and his opinion in *Campbell v. New York Evening Post*, 245 N.Y. 320, 326, 157 N.E. 153, 155 (1927) which identified the fundamental flaw in the rule. Judge Pound noted that judicial action cannot prevent the harm of a deliberate false filing simply because the judicial action usually has nothing to do with the contents of the filing. Judge Panella also noted that Professor Eldridge, an advisor to the *Restatement (Second) of Torts*, called attention to the fact that there was a "sharp conflict" about the rule among the cases. And Professor Elders has identified eighteen states which have rejected the mere pleading rule, most of them modern decisions.

In addition, although Pennsylvania had not directly spoken

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on the issue, the privilege had apparently been applied, in an old case *Mengel v. Reading Eagle Company* 241 Pa. 367, 88 A. 660 (1913), to a situation in which a summons had been put on record but a complaint not yet even filed. Therefore, the rule was, at least, implicitly rejected in the Commonwealth. Further in *Doe v. Cohn, Nast & Graf, P.C.*, 866 F.Supp. 190 (E.D. Pa. 1994) the Eastern District held that, regardless of judicial action, the privilege applied to all pleadings.

As a result, in language specifically adopted by the Superior Court, Judge Panella held that:

> Pleadings are public records, maintained in government buildings, open for review by the general populous. We find no sense in the argument that newspapers, or other media groups, cannot report on pleadings prior to judicial action without opening themselves to a libel action. It is the media's job in business to keep the public informed of pending litigation and related matters conducted in taxpayer-funded courthouses.

First Lehigh Bank, 24 Media L. Rep. at 2411.

Was It Fair and Accurate? A Side-By-Side Comparison

Next, the trial court, and now the Superior Court, found that the fair report privilege did apply to the story and did so by adopting what my partner, Michael Henry, and I found to be a very useful technique in cases of this type. *First Lehigh Bank*, 24 Media L. Rep. at 2413-15. We laid paragraphs of the federal complaint side by side with the story on a table which we presented to the court. The result was extremely effective because it defeated many of the bank's complaints about journalistic language such as "euchred" and "cozy arrangement" by placing those words literally side by side with the common legal terms of "manipulation," "promoting their self interest," "misrepresented," "conflict of interest," etc. In fact, the legal words often looked far worse than those used by journalists in this type of a comparison. Further, the comparison made the court aware of the difficult job any journalist has in reducing mountains of legal jargon to simple language easily understood by the general reading public. I recommend it, not only in this type of litigation, but for pre-publication review of difficult legal documents.

Was It Solely to Cause Harm?

Finally, the trial court rejected an additional nasty quirk in the Restatement (First) of Torts which provided that if a publication was "solely to cause harm," it was still actionable. The *Restatement (Second)* dropped this language, however, Pennsylvania case law had continued to carry forward this additional baggage by which the fair report privilege might be lost. The trial court found that the plaintiff had failed to meet his burden by coming forward with evidence in this regard. Thus, we avoided the difficult argument that the *Restatement (Second)* should be adopted on this point but rejected on the "mere pleading" rule. It is almost impossible to visualize a situation where a newspaper could be held liable in this regard given *Hustler v. Falwell*, 485 U.S. 46 (1988). However, it could present a problem, at least, at preliminary stages of defamation litigation, because the bare allegation of improper motive would probably survive a motion to dismiss.

Important Role of Summary Judgment

The trial court, in a further section of its opinion adopted by the Superior Court, then went on to strongly reaffirm the use of "summary judgment as an important function in the context of a defamation action," *id.*, citing *Mosley v. Oberver, Pub. Co.*, 427 Pa. Super. 471, 475-76, 629 A.2d 965, 967 (1993) which adopted the sometimes forgotten language of *Washington Post v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967), giving a First Amendment gloss to the summary judgment procedure in defamation cases. Since this language was also adopted by the Superior Court it is now part of Pennsylvania's precedential authority.

Limited Discovery

As a final procedural point, *The Morning Call* was able, at the commencement of this action, to persuade the trial court to limit discovery to the issues of the fair report privilege thereby saving substantial discovery costs as well as preventing the plaintiff from injecting numerous other issues into the case, such as punitive damages, which are typically used to confuse a clear-cut fair report defense.

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Fair Report Privilege Protects Party's Press Release and Letter on Lawsuit

Procter & Gamble (P&G) did not libel Quality King Distributors when it publicized its lawsuit charging that Quality King was selling a contaminated, counterfeit version of P&G's Head & Shoulders shampoo. Judge Arthur Spatt, of the Eastern District of New York, granted P&G's motion to dismiss all of the counterclaims brought against it by Quality King. *The Procter & Gamble Company v. Quality King Distributors, Inc., et al.*, No. CV 95-3113 (ADS), 1997 U.S. Dist. LEXIS 13677 (E.D.N.Y. September 3, 1997).

The libel charge was filed by the Long-Island-based Quality King Distributors as a counterclaim in the suit that P&G filed against it for selling counterfeit Head & Shoulders. Following P&G's filing of the suit, the company advertised the fact that it was suing Quality King in a press release and in a letter that it sent to many of its customers. P&G also took out an ad warning the public about counterfeit products; Quality King sued over this ad too, but the court found that since the ad did not mention Quality King by name or make mention of the pending lawsuit, the libel did not meet the "of and concerning" requirement. *Procter & Gamble* at *13.

"When determining whether an article constitutes a 'fair and true report,' the language used therein should not be dissected and analyzed with a lexicographer's precision."

Concerning the letter and the press release, the court ruled that each were privileged as fair and true reports of judicial proceedings. "'A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceedings . . . .'" *Id.* quoting N.Y. Civ. Rights L. § 74 (McKinney 1992). A party to the lawsuit is protected by the privilege as well as the press. In making its decision, the court said that "when determining whether an article constitutes a 'fair and true report,' the language used therein should not be dissected and analyzed with a lexicographer's precision." *Procter & Gamble* at *14 quoting *El Greco Leather Prods. Co, Inc. v. Shoe World, Inc.*, 623 F.Supp 1038 (E.D.N.Y. 1985). Finding that the letter and press release were substantially accurate and fair reports of the complaint, the court rejected Quality King's argument that they told an incomplete and thus misleading story.

Quality King's claim was for trade libel or disparagement. The court correctly notes, however, that the claim was for harm to its reputation, a libel not trade libel contention. In any event, in applying the fair report privilege, the court makes no distinction between these claims. Moreover, the court applied the fair report privilege in dismissing Quality King's counterclaims for prima facie tort, tortious interference with business relations, and unfair competition; each of those claims was also premised upon the statements contained in the letter, the press release, and the ad. *Id.* at *20.

The court went on to add that Quality King's prima facie tort must also be dismissed for failure to adequately plead special damages and, separately, for failure to plead that P&G's actions were motivated solely by "disinterested malevolence." *Id.* at *22-23. Quality King alleged that P&G was "motivated by, inter alia, business animus toward Quality King." *Id.* at *22. "Motives other than disinterested malevolence, 'such as profit, self-interest, or business advantage' will defeat a prima facie tort claim." *Id.* quoting *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 571 (2d Cir. 1990).

The court found too that Quality King's claim for tortious interference with business relations fails on independent grounds. Quality King failed to allege that P&G acted with the sole purpose of harming the plaintiff or by dishonest, unfair or improper means. *Procter & Gamble* at *24-25. Acting out of "business animus" does not satisfy the test. *Id.* at *25.

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Florida Appellate Court Adopts Restatement Position On Group Libel Claims; Affirms Dismissal With Prejudice of Class Action

By Carol LoCicero and David Bralow

Florida's First District Court of Appeal recently upheld a trial court order dismissing with prejudice a class action complaint filed by 436 commercial net fishermen in the Jacksonville area. *Thomas v. Jacksonville Television, Inc., et al.*, 1997 LEXIS 10745, Case No. 96-706 (Fla. 1st DCA, opinion filed Sept. 25, 1997). This opinion is the first appellate decision in Florida to declare expressly that Florida does not permit suits by large groups for libel. District courts of appeal are Florida's intermediate appellate courts.

The case is one of five class actions filed by fishermen upset over political advertisements that depicted the alleged negative consequences to sealife of net fishing. The ads were sponsored by a non-profit organization, Save Our Sealife, which supported an amendment to the Florida Constitution banning net fishing off Florida's coast. The amendment was ultimately adopted, severely affecting the livelihood of Florida's commercial net fishermen. The fishermen then sued the television stations broadcasting the ads and argued that their reputations were damaged by the ads.

The Jacksonville action was a companion case to cases filed in Tampa, Miami, Orlando and Ft. Myers, Florida. In total, the named plaintiffs sued on behalf of approximately 4,200 fishermen. All five complaints alleged that the defendant broadcasters defamed every commercial net fishermen in Florida by broadcasting the Save Our Sealife ads.

In affirming the dismissal with prejudice of the Jacksonville action, the First District Court of Appeal recognized that, as a matter of law, the ads were not "of and concerning" any particular fisherman, a necessary element to any libel claim. The Court relied heavily on section 564 of the *Restatement (Second) of Torts*. That section states the general proposition that there is no liability for one who publishes defamatory matter concerning a large group. The comments to the *Restatement* and many other courts define a large group as one that exceeds twenty-five members, the Court recognized. No individual fisherman was singled out in any of the ads. Consequently, as a matter of law, no fisherman could sue for defamation.

Although the First District Court of Appeal was the only appellate court to write an opinion, Florida's Third District Court of Appeal and Fifth District Court of Appeal had also affirmed trial court orders dismissing with prejudice similar class actions in Miami and Orlando, respectively. *See Bass v. Post-Newsweek Stations of Fla., Inc.*, 686 So. 2d 594 (Fla. 3d DCA 1996); *Adams v. WFTV, Inc.*, 691 So. 2d 557 (Fla. 5th DCA 1997). A fourth appellate court is currently reviewing the trial court's dismissal with prejudice of the Tampa class action. In the Tampa action, the fishermen attempted to save their claims by amending the complaint to eliminate the class action allegations. That case was argued before the Second District Court of Appeal on September 11, 1997, and a ruling should occur within the next few months. The fishermen themselves voluntarily dismissed the Ft. Myers case.

Carol LoCicero and David Bralow are with the firm Holland & Knight in Tampa, FL, and represented Jacksonville Television, Inc. in this matter.

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First Circuit Reverses $600,000 Libel Verdict

Assigns Error On Fact/Opinion, Public Concern, Jury Instructions

By Charles J. Glasser, Jr.

The First Circuit Court of Appeals, in a thirty-page opinion reversing a jury award of $600,000 presumed damages, explored the issues of opinion, public concern and constitutionally required standards for jury instructions in *Levinsky's, Inc. v. Wal-Mart Stores*, 1997 U.S.App.LEXIS 26873, (1st Cir. Sept. 26, 1997) (Selya, J). The court dismissed one of two sued-upon statements as protected opinion, and remanded with special instructions to review the issue of public concern and whether or not the record could support a finding of actual malice as threshold matters before a new trial could proceed.

At the center of the case were comments printed in a local business magazine's story about Levinsky's, a local mom-and-pop retailer involved in a "David versus Goliath" battle with Wal-Mart, the nation's largest retailer. While researching the story, the magazine writer telephoned a Wal-Mart manager in Maine who expressed his views about Levinsky's store. The manager described the store as "trashy" and stated that when a person called Levinsky's on the telephone "you are sometimes put on hold for twenty minutes, or the phone is never picked up at all." Levinsky's and several family members sued Wal-Mart (but not the local publication) for a wide variety of claims, including defamation, false light, deceptive trade practice and infliction of emotional distress, seeking $40 million in compensatory and punitive damages. Despite stipulations by plaintiffs that there was no evidence of actual pecuniary loss, the jury awarded $600,000 for presumed damages to the company.

The District Court: Defamatory Per Se

Over strenuous objection of trial counsel, the District Court Judge Gene Carter did not find that the word "trashy" or that the "twenty minutes on hold" comments stated opinions and instead held that they could be reasonably understood as asserting a defamatory fact. In addition, Carter concluded that because the statements were defamatory per se, presumed damages were available without a showing of negligence. Further, Judge Carter held that because the Wal-Mart manager contended that he did not realize that he was speaking to a reporter (but thought he was speaking to a university student) the comments did not relate to a matter of public concern, that *Dun & Bradstreet* would apply and actual malice need not be shown to recover presumed damages.

Independent Appellate Review and the Fact/Opinion Dichotomy

Judge Selya for the panel began his analysis by underscoring the important role of independent appellate review in First Amendment cases, and citing *Bose*, restated the first circuit's priority of constitutional speech protections over procedural rules: "Indeed when the imperative of independent appellate review conflicts with a standard procedural dictate (such as FRCP 52(a)) the constitutional mandate controls." From this starting point the appellate court reviewed the two statements ("trashy" and the "phone" statement) for their actionability. On the briefs, Plaintiffs argued that *Milkovich* should be read to strip away all protection for any statement which could conceivably be based on a fact. The court refused to go this far and noted that "the *Milkovich* Court was careful not to discard the baby with the bath water...the [*Milkovich*] Court reaffirmed the protection long afforded to imaginative expression and rhetorical hyperbole."

Varying Definition is the Indicia of Opinion

Citing *McCabe v. Rattiner*, 814 F.2d 839 (1st. Cir. 1987) and *Dilworth v. Dudley*, 75 F.3d 307 (7th Cir. 1996) among other "fact/opinion" cases, appellate counsel argued that the word "trashy" was subject to so many different interpretations and uses that it could not reasonably be construed as stating a defamatory fact within the strictures of *Milkovich*. Appellant's brief also cited dozens of newspaper and magazine headlines highlighting widely different uses of the word. Indeed, the panel noted the fact that the plaintiffs themselves used the word to mean different things at trial. Each plaintiff testified as to what the word "trashy" meant to them, and each had a different definition. The court held that the "polysemous nature of the word trashy and its susceptibility to numerous interpretations puts the word squarely in the category of protected opinion," and also stated that "those who sue for defamation are not at liberty to pick and choose among

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a word's various possible definitions and saddle the speaker with the consequences."

Innocent Construction Rejected

Thecourt, however, refused to apply a quasi-innocent construction analysis to the statement regarding Levinsky's poor telephone service. Appellate counsel had argued that the statement that "you are sometimes put on hold for twenty minutes or they don't answer the phone at all" was an obvious exaggeration, tantamount to the statement "you are sometimes put on hold forever." Rejecting this approach, Judge Selya held that "a reviewing court must evaluate a speaker's statement as it was given and must resist the temptation to replace what was actually said with some more innocuous alternative." Nor was Judge Selya convinced that the phone call statement was hyperbole, and Judge Selya held instead that that "a reasonable listener could well conclude that the service was so bad that Levinsky's did not bother to answer the telephone."

Scope of Public Concern Need Not Be Large

The court of appeals acknowledged that in an issue of public concern "the relevant community need not be very large and the relevant concern need not be of paramount importance or national scope," citing *Roe v. City of San Francisco*, 109 F.3d 578, 585 (9th Cir. 1997). The court held that the district court erred in concluding that because the Wal-Mart manager thought he was engaged in a private conversation with a college student instead of a reporter, that the public concern privilege would not apply. The court held instead that "we do not think that a speaker's belief as to who will hear his statements should be the sole determinant of the constitutional question."

While the issue had been properly raised and preserved in the court below, appellate counsel presented to the circuit court voluminous newspaper and magazine articles and excerpts of Congressional testimony about Wal-Mart's "David and Goliath" public concern issue. Appellate counsel presented articles, all of which predated the alleged libel but which were not presented to the court below, and showed the existence of public debate over Wal-Mart and its impact on mom-and-pop stores. At oral argument, Judge Selya focused on the fact that although the issue was raised, the support (via the articles) for this argument was not in the record on appeal.

The court acknowledged its authority to resolve the public concern issue ab initio (citing *Connick v. Myers*) but refused to apply that authority. The court expressed a considerable degree of uncertainty as to whether it could properly consider the content of the newly presented articles. Appellants argued that the public concern issue, being a question of law, was ripe for de novo review, and (especially given Independent Appellate Review) that the newspaper articles underscoring the existence of public concern could properly be reviewed. Instead, the court issued special instructions on the remand, requiring the parties to brief and argue anew the existence of public concern.

Jury Instructions

Finally, the court of appeals assigned error to the jury instructions which were based on the lower court's faulty reasoning that because the doctrine of defamation per se applied, a negligence instruction would be unnecessary. As pointed out at trial and on the appellate briefs, the court held that the doctrine of per se defamation applies to damages, not to liability and that under *Gertz* as well as state law, negligence at the very least must be proven. Because the first circuit requires that jury instructions "adequately illuminate the applicable law" an erroneous instruction requires a new trial if the preserved error can be said to prejudice the objecting party.

Finally, appellants argued that the general verdict (which did not delineate the non-actionable "trashy" statement from the actionable "telephone" statement) should be set aside. The appellate court remanded the case for a new trial subject to an in limine resolution of whether or not the comments implicated a matter of public concern, and if so, whether the evidence would be sufficient to show actual malice. Further, the court held that if a new trial were ordered that the jury should be instructed on the element of negligence. Despite public posturing about waging battle anew, it is not clear at this time whether or not Plaintiff/Appellees will pursue further litigation.

Charles Glasser is an associate at Preti, Flaherty, Beliveau & Pachios, and with partner Jonathan Piper, represented Walmart Stores on appeal.

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Summary Judgment Granted in Case by New York State Supreme Court Justice Over "Ten Worst Judges" Articles

By Slade R. Metcalf and Melissa Georges

The publisher of the *New York Post*, along with investigative journalist Jack Newfield and Rupert Murdoch, have won summary judgment in a libel suit brought by New York State Supreme Court Justice Herbert A. Posner over two articles published in the *New York Post* describing him as one of New York's "Ten Worst Judges." *Posner v. The New York Post Co., et al.*, No. 124641/93 (N.Y. Sup. Ct. Sept. 8, 1997)

The articles naming Justice Posner as one of the infamous ten were written by Newfield and reporter Jim Nolan and published in the April 26, 1993 issue of the *Post*. Newfield and Nolan obtained the information for the articles by interviewing lawyers, courtroom employees, and other individuals in the legal community and reviewing transcripts of court proceedings over which Justice Posner presided. Justice Posner complained that the following statements in the articles were false and defamatory of him because they conveyed to others that he was mentally unbalanced and eccentric, that his conduct as a judge was bizarre and that he was incompetent and unqualified to serve as a Justice of the Supreme Court:

- - "In *** 'The World of Poz,' rulings are arbitrary and capricious and sometimes rendered from the robing room without regard to what's happening in his courtroom."

- - "It's a totally Kafkaesque experience [to appear] before the former accountant-turned assemblyman-turned judge."

- - "Lawyers said the Judge munches peanut butter and crackers and attends to matters of personal hygiene while on the bench."

- - "[Posner] had two tissues stuffed up his nose with the ends sticking out ***. The whole thing was just nutty."

The articles also set forth portions of transcripts of two courtroom proceedings in which Justice Posner threatened to raise a defendant's bail unless the defense attorney complied with an omnibus motion procedure and in which he refused to let an attorney finish a summation.

Defendants moved for summary judgment following discovery, arguing that the newspaper's selective judgments, which were strictly based on an evaluation of judicial performance, were classic examples of opinion which were not provable by objective evidence as true or false and therefore were not actionable. Defendants also contended that Justice Posner had failed to demonstrate that the information reported about him was false. Defendants urged that Justice Posner had not only conceded the truth of much of the information reported about him in his deposition testimony, but he could not argue with the reporting of his own court proceedings, which was privileged as a "fair and true" report of judicial proceedings under § 74 of New York's Civil Rights Law. Defendants further argued that even if the court were to find a factual dispute as to the truth of the information reported, plaintiff is a public official and could not prove that defendants acted with "constitutional malice."

Justice Paula J. Omansky of the Supreme Court of the State of New York, New York County granted summary judgment to defendants and dismissed both the libel and intentional infliction of emotional distress claims. Citing *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977), the court recognized that freedom of the press to criticize a sitting justice is important and that the need for free public discourse is especially compelling in New York State where judges are elected to office. The court went on to state that "[t]he public clearly has a vital interest in the performance and integrity of its judiciary." *Id.*

Substantial Truth

The court found that Justice Posner had admitted a number of statements in the articles were substantially true, such as that he did not permit an attorney to finish a summation,

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had threatened to raise a defendant's bail to coerce cooperation from defense lawyers, had eaten food on the bench, and had suffered nose bleeds on the bench which he may have stopped by putting tissues in his nose.

Justice Posner argued that his libel claim should stand because defendants had omitted key facts which would have put his admittedly true actions into perspective and would have removed any false impression. For example, Justice Posner contended that he ate on the bench only because he was obligated to take food with his medication for Graves' and Hashimoto's disease, and that he did not permit an attorney to finish his summation because the attorney was making improper remarks. The court found that although the inclusion of the facts cited by plaintiff may have cast more doubt on the validity of the reporter's conclusions, the omitted facts did not make the statements concerning plaintiff's actions untrue. The court went on to state, citing *Rappaport v. VV Publishing Corp.*, 163 Misc. 2d 1, 618 N.Y.S.2d 746 (Sup. Ct. N.Y. Co. 1994), *aff'd*, 223 A.D.2d 515, 637 N.Y.S.2d 109 (1st Dept. 1996) that "under the First Amendment the decision of what to select must always be left to writers and editors."

Fair & True Reports

The court also found that the portions of the transcripts describing plaintiff's comments to attorneys were accurately reported and thus protected pursuant to § 74 of the New York Civil Rights Law. The court held that the "fair and true" report privilege applied even though defendants had not reviewed or published the entire transcripts of any of the proceedings described. The court further recognized, with respect to the incident where plaintiff cut off an attorney's summation, that the full facts may not have been available to the reporter since the plaintiff had testified that his prior warnings to the attorney may have occurred off the record. The privilege applied because defendants would have had no way of ascertaining the true sequence of events from the official court transcript.

And Opinion

The court also found that defendants' "selective coverage" of plaintiff constituted subjective opinion. *Santaella v. VV Publishing Corp.*, Index No. 122242/93 (Sup. Ct. N.Y. Co. Mar. 15, 1994). The court stated that use of insulting phrases such as "bench bums" did not save plaintiff's libel claim for "[t]he expression of opinion, even in the form of pejorative rhetoric, relating to fitness for judicial office or to performance while in judicial office, is safeguarded." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977); *Rappaport v. VV Publishing Corp.*, 163 Misc. 2d 1, 618 N.Y.S.2d 746 (Sup. Ct. N.Y. Co. 1994), *aff'd*, 223 A.D.2d 515, 637 N.Y.S.2d 109 (1st Dept. 1996).

No Actual Malice

Finally, with respect to defendants' conduct in publishing the articles, the Court found, citing *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Rinaldi* that judges are public officials and that plaintiff was required to prove that defendants acted with constitutional malice. The court held that despite his overall good record as a jurist, Justice Posner had not presented clear and convincing evidence of constitutional malice. The court found that defendants' purported failure to speak with persons who had a favorable opinion of plaintiff did not amount to constitutional malice because the First Amendment gives disgruntled attorneys and litigants the right to complain about judges. Likewise, the court found that plaintiff's allegation that Newfield harbored "personal animus" towards him was not actionable because malice, in the constitutional sense, means reckless disregard for the truth and is not to be equated with a base or unworthy motive. The court also dismissed plaintiff's claim for intentional infliction of emotional distress applying the same constitutional standard and echoing the lack of any probative evidence to support a finding of constitutional malice.

On October 20, 1997, plaintiff served a Notice of Appeal from the decision.

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Schmalenberg v. Tacoma News, Inc.: Washington Court Offers Discourse on "Causation" as an Element of Defamation

By Eric M. Stahl

Calling the state's leading defamation case "incomplete" and confusing, the Washington Court of Appeals, Division Two, has issued an opinion that recasts the way causation is analyzed in defamation claims. The decision, *Schmalenberg v. Tacoma News, Inc.*, 943 P.2d 350 (Wash. App. Sept. 2, 1997) does not appear to produce any substantive change in the law, but, if followed, could force practitioners to reassess how they frame their arguments in defamation claims – or, at least, to brush up on the traditional tort concepts of factual and proximate causation.

The plaintiffs, two individuals and a limited partnership, opened a 21-unit shelter for battered women in Tacoma in February, 1993. In July, 1993, the *Tacoma News Tribune* published an article reporting that the shelter, initially promoted as a model resource for battered women, was in fact dangerous and inadequate: The facility was a haven for crime, provided residents with little security from abusive mates, and failed to deliver promised services such as day care and counseling. Among those quoted as describing serious problems at the shelter were a police spokesman and a housing official, both of whom later denied making the comments attributed to them. The plaintiffs sued the *Tribune* for defamation. The trial court granted summary judgment for the newspaper, finding plaintiffs' evidence insufficient to support a defamation claim. More specifically, according to the plaintiffs' appellate brief, the trial court found "that the 'true' statements in the article were so damaging . . . that the additional untrue statements and fabricated quotations did not change the sting of the story."

On appeal, plaintiffs argued they were entitled to try their defamation claim because the story's description of conditions at the shelter was false. The appeals court affirmed, holding that the "the gist" of the story – that "sordid conditions existed at the project" – was true, and that any falsity was minor and produced no additional damage. The court also rejected the plaintiffs' contention that the article was actionable because it allegedly misquoted the two sources (who were not parties to the action). The court held that the false attribution, if any, was not damaging to the plaintiffs.

More notable than *Schmalenberg*'s holding on falsity is the path the court traveled to reach it. Rather than simply applying the well-established rule that an inaccurate published statement is not actionable if its "sting" is true, the *Schmalenberg* court engages in a lengthy discourse on the role of causation in defamation cases. The court prefaces its analysis by stating that the recitation of defamation's elements typically used by Washington courts – "falsity, an unprivileged communication, fault, and damages," *Mark v. Seattle Times*, 635 P.2d 1081, 1088 (Wash. 1981) (citing Restatement (Second) of Torts § 558 (1977)) – "seems incomplete." This list "omits concepts that have long been part of the law of defamation, including (a) that a statement is actionable only if defamatory, and (b) that a causal link must exist between the element of falsity and the element of damages," the court said. Based on these supposed omissions, the Schmalenberg court endeavors to "revert to the fundamental concepts underlying today's law of defamation." These concepts, according to the court, require asking whether the defendant made "a false statement that caused damage to the plaintiff's reputational or other compensable interest," and if so, whether the defendant should be held liable, based on the rules regarding fault and privilege. In the case before it, the court states, only the first of these questions – and more specifically, falsity and factual causation – are at issue.

The court first examines falsity, concluding that under Washington law, a statement satisfies the element of falsity if it is false in part, regardless of whether it is false in material part. Washington courts deal with materiality, the court states, as a question of factual causation.

This leads to the heart of *Schmalenberg*'s analysis, its discussion of factual causation. The court notes that in "the typical non-defamation negligence case, it is

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necessary to show factual causation," that is, that the plaintiff's damages would not occur but for the defendant's conduct. "[T]he same idea applies in a defamation case." Thus, where a news story is partly true and partly false, the plaintiff must produce evidence that the false part caused damage that the true parts would not have caused anyway; the plaintiff can only recover for damages that would not have occurred but for the false part. This reading of Washington case law, the court states, teaches that "proximate cause is an element of defamation," and "[i]f proximate cause is an element of defamation, factual cause is also, for proximate cause includes factual cause and legal cause."

It is not readily clear why the court of appeals chose this case, which could have been decided squarely within the conventional framework set out in *Mark*, as the vehicle for a detailed treatment of causation. Nor is it clear that *Schmalenberg* is any more "complete" than earlier cases in describing the elements of defamation. The analysis in *Schmalenberg* does not seem incorrect. But it does seem unnecessary, and a potential source of confusion.

Schmalenberg's approach is unnecessary because all of its detailed analysis regarding causation is and always has been accounted for in the usual formula for defamation, in several ways. Requiring a defamation plaintiff to show that a false statement was damaging in some measure beyond the true "sting" or "gist" of the story is but another way of saying that the plaintiff must prove a causal link between the false statement and the damage to his reputation. Causation is also part of the definition of "defamatory:" A statement is defamatory if it is the sort of statement that causes reputational harm. *See* Restatement (Second) of Torts § 559 (1977). Furthermore, the requirement that, to constitute defamation, a statement must be "of and concerning" the plaintiff encompasses both factual causation (in that the plaintiff must show he or she was in fact the person defamed), and proximate or legal causation (in that the law imposes certain prudential limits on liability for defamation, as where a remedy is denied when a defamatory statement refers to a large group of people). Though causation usually is not stated expressly as an "element" of defamation, the law unquestionably recognizes the need to show a causal link between a statement and the damage done.

Thus, *Schmalenberg* also stands as a potential source of confusion. By questioning *Mark* but engaging in essentially the same analysis, *Schmalenberg* could be seen as suggesting a need to change the language by which defamation arguments are framed. *Mark*'s statement of the elements of defamation – "falsity, an unprivileged communication, fault, and damages" – is shorthand, but it is correct, well established and widely understood shorthand. *Schmalenberg*, in the name of completeness, would add "causation" to the list. This does not seem to be a change worth making; indeed, it would be a change that makes no difference.

The *Schmalenberg* court acknowledges as much. Applying its discussion of causation to the facts before it, the court states the critical question as whether "a rational trier of fact [could] find that the substantively false parts of the Tribune's story were a factual cause of damage that would not have been caused anyway by the substantively true parts of the story." In a footnote, the court observes,

> This question can be phrased in at least two alternative ways. (1) Could a rational trier of fact find that the substantively false parts of the Tribune's story were a factual cause of damage that would not have occurred but for those false parts? (2) Could a rational trier find that the false parts of the story increased its "sting"?

It seems fair to ask whether courts need to be providing so many different ways to ask the same question.

Schmalenberg may be aimed at the numerous state cases that it describes as "reiterat[ing] *Mark*'s list of elements without additional analysis." It cannot be disputed that causation should be accounted for in claims of defamation. That accounting, however, has always been part of the defamation equation.

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Corporation is Public Figure

Summary Judgment Granted in DC

Finding on reconsideration of its original partial grant of summary judgment that both plaintiff corporation and its president were public figures, a United States District Court for the District of Columbia granted full summary judgment to the Bulgarian-American Enterprise Fund (BAEF) in a defamation case filed against it by Novecon corporation and its CEO, Richard Rahn. *Novecon Ltd., Novecon Management Co., L.P., and Rahn v. Bulgarian-American Enterprise Fund, et al.*, No. 96-1178-LFO, 1997 U.S. Dist. LEXIS 14267 (D. D.C. September 16, 1997).

In an earlier decision, the court found that Rahn was a public figure and dismissed his claim; but, finding Novecon a private figure, refused to dismiss its claim.

Summary judgment rulings have a "prominent role" in the "protection of the First Amendment," the court noted, citing *Washington Post Co. v. Keogh*, 125 U.S. App. C.D. 32, 365 F.2d 965, 968 (D.C. Cir. 1966). *Novecon* at 2.

The dispute arose when BAEF and Novecon were unable to consummate a business contract. After the deal fell through, Novecon's CEO, Richard Rahn, visited and wrote to different parties, including the American Ambassador to Bulgaria and members of Congress, criticizing BAEF and even charging that BAEF had abused its fiduciary responsibility with taxpayer money (BAEF is an agency of the U.S. government). BAEF fought back, sending a package to those whom it believed had received damaging information, stating in it that "Dr. Rahn, through Novecon, seeks to extort $200,000 of U.S. taxpayer money from BAEF" and that BAEF had turned the deal with Novecon down because it "turned out to be the veritable 'Brooklyn Bridge' of misrepresentation." *Id.* at *6. Novecon and Rahn sued for defamation over these statements.

In its latest decision, the court found that both Novecon and Rahn are limited-purpose public figures. *Id.* at *8-9 The court held that Rahn is a limited-purpose public figure because of both his "impressive resume" and his participation in the larger public controversy between Novecon and BAEF. *Id.* at *9. This was consistent with the court's original opinion.

On Novecon's status, however, the court originally found that Novecon was not much more than "Rahn's letterhead" in the BAEF controversy. Upon reconsideration, the court held that "[b]ecause Novecon fired the first shot and would have been the principal beneficiary if plaintiffs had prevailed, it also qualifies as a limited-purpose public figure under the standard enunciated in *Waldbaum v. Fairchild Publications, Inc.*," 201 U.S. App. D.C. 301 (D.C. Cir. 1980). *Id.* at *9. The court said that in the original pleadings none of the parties emphasized the independent role of Novecon in the BAEF public controversy, but that upon reargument it was made clear that "Novecon is a stand-alone, going concern with a corporate life of its own, including stockholders, directors, executives, and employees other than Rahn, and transacting in its own name and right." *Id.*

After making the public figure determination, the court found that "[q]uite apart from the classification of plaintiffs as limited-purpose public figures, defendants would have 'a complete defense to libel, . . . [absent] the showing of malice'" because BAEF had issued the offending statements in order to defend its reputation. *Id.* at *10 (citation omitted). The court concluded its analysis by finding that "nothing proffered by plaintiffs or apparent on the face of the challenged statements demonstrates 'with convincing clarity' that defendants made false assertions of fact knowingly or recklessly." *Id.* at 16. In fact, the court said, the offending statements were all either protected opinion, rhetorical hyperbole, or vigorous epithet. *Id.* at *19.

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New York Anti-SLAPP Counterclaim Allowed

Court Finds AIDS Fundraising Organization to be Public Applicant/Permittee

Finding a tax-exempt AIDS fundraising organization to be a public applicant or permittee under New York's Anti-SLAPP statute, C.R.L. §76-a, New York Supreme Court Judge Howard Berler has permitted a libel defendant to amend her answer with anti-SLAPP counterclaims. *The Long Island Association for AIDS Care v. Greene*, No. 15582/96 (N.Y. Sup. Ct., Sept. 30, 1997).

Charges and Countercharges

The defendant, Susan Greene, was hired by The Long Island Association for AIDS Care ("LIAAC") in February 1995 as an independent consultant for services as a fundraising/events coordinator. The relationship was short-lived, however, as soon after the contract was signed LIAAC began accusing Greene of getting drunk at LIAAC social functions and taking mood altering medication which impaired her work product and her ability to work with others.

In the Summer of 1995, Greene countered by accusing LIAAC and its executive director of financial misconduct and corruption. In addition, Greene was quoted in an article published by *Newsday* accusing LIAAC of improperly investing money raised by donations and forwarding only 3% or revenue raised by LIAAC to client services. Subsequently, LIAAC brought suit against Greene for breach of contract and defamation. While Greene originally answered the complaint with four affirmative defenses and four counterclaims, she later sought to amend her answer by adding the defenses of qualified privilege, opinion and mitigation. More importantly, however, Greene also sought to add an anti-SLAPP counterclaim.

New York's Anti-SLAPP

Designed to protect citizen activists from "lawsuits brought against them in retaliation for the public advocacy," New York's anti-SLAPP statute allows "[a] defendant in an action involving public petition and participation . . . [to] maintain an action, claim, cross-claim or counterclaim to recover damages including costs and attorneys' fees from any person who commenced or continued such action." The law defines an "action involving public petition and participation" as;

> an action, claim, cross-claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.

Further, a "public applicant or permittee" is defined as;

> any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body.

The statute permits the defendant to recover attorneys' fees and costs "upon a demonstration that the action . . . was commenced or continued without a substantial basis in fact and law." Defendants may also recover compensatory damages "upon additional showing that the action . . . was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights," and punitive damages may be recovered as well if the defendant can show that the action was commenced or continued with the sole purpose of harassing or intimidating.

Is the Non-Profit Within Reach of Anti-SLAPP?

LIAAC challenged the Greene's proposed amendment on two grounds, arguing that the anti-SLAPP statute is not a statutory cause of action and that the instant action is not one involving public petition and participation because neither party involved in the case has applied for nor obtained a permit, zoning change, lease, license, certificate or other entitlement.

Addressing these contentions, Judge Berler quickly disposed of LIAAC's first argument stating that §76-a "by its very words, clearly provides an affirmative cause of action." Slip op. at 6. In rejecting LIAAC's second argument, however, the court adopted an expansive scope of the anti-SLAPP statute, stating that LIAAC's status as a tax-exempt organization which solicits funds from the public was enough to make it a public applicant or permittee.

First, the court noted that "LIAAC is a tax-exempt organization that has obtained tax-exempt status by the Internal Revenue Service." The court then stated that "according to its Form 990's, LIAAC has solicited contributions from the pub-

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lic which cannot be done in New York without first obtaining permission from a government body [Executive Law, Art. 7-a]." In addition, the Form 990's show that "LIAAC has obtained government grants that it uses to fund some of its programs." "Thus," the court concluded, " the application for government enabling permits and receipt of entitlement for funding from the government makes LIAAC a public applicant or permittee under Civil Rights Law §76-a. LIAAC's lawsuit therefore, is an attempt to chill defendant's free speech rights to report on, comment on, challenge, or oppose LIAAC's receipt of those special permissions and entitlements." Slip op. at 6-7.

The decision marks the second time this year that a defendant's anti-SLAPP counterclaim has withstood a challenge from the plaintiff. In February, a Nassau County Supreme Court Judge denied plaintiff's motion to dismiss an anti-SLAPP counterclaim in *Adelphi University v. Committee to Save Adelphi*, (N.Y. Sup. Ct. Nassau Co.), N.Y.L.J., February 6, 1997, p. 33, col. 2, *see LDRC LibelLetter* February 1997 at 11. In that case, as well, the court applied a broad view of what made the plaintiff a public applicant or permittee holding that the plaintiff was subject to the anti-SLAPP statute because the plaintiff's operation of the university and its ability to award degrees were dependent upon a grant from the State of New York. With both of these cases moving forward under the protections of the statute, New York may soon see the first positive application of the anti-SLAPP statute since its enactment in 1992.

Rev. Al Sharpton Tries to Enjoin Giuliani Campaign's Sharp Barbs

Judge Finds Statements At Issue to be Protected

Finding that "to grant the relief sought would impermissibly amount to censorship of discussion on public issues and debate on the qualifications of candidates and would be inimical to our system of system of government and fundamental freedom of speech," New York State Supreme Court Justice Gangel-Jacob denied a motion for a preliminary injunction filed by the Reverend Al Sharpton's and dismissed the lawsuit against New York City Mayor Rudolph Giuliani upon which the motion was predicated. *Sharpton v. Giuliani*, N.Y.L.J., Oct. 16, 1997 (N.Y. Sup. Ct. Oct. 15, 1997).

Sharpton, who unsuccessfully sought the New York City Democratic Mayoral nomination this fall, sued for defamation, intentional and negligent infliction of emotional distress, and conspiracy to defame over statements made by Mayor Giuliani's campaign manager, Fran Reiter. Following a February 19, 1997 debate among several candidates seeking the Democratic Mayoral nomination Ms. Reiter stated during a news interview:

> You saw three candidates today who vowed to support Al Sharpton if he is in fact the Democratic nominee. We think that is highly questionable. Here you got Al Sharpton, who has a long record of accomplishments. He's incited riots, he has engaged in criminal conduct and now he seeks to run for Mayor.

Prior Restraint "Abhorred"

Addressing Sharpton's request for a preliminary injunction, Justice Gangel-Jacob first stated that, "[i]n the first instance plaintiff's application should not be granted as, distilled to its essence, it seeks the imposition of a prior restraint on pure speech which is abhorred under both the U.S. and the State Constitutions." *Id.* The court continued to note that U.S. Supreme Court has held that, "[i]n the realm of political expression, the broadest protection is provided to discussion of public issues and debate on the qualifications of candidates which are integral to the operation of our system of government." *Id.*

Pointing out that the plaintiff's proper remedy "'lies not in an injunction against that publication but in a damages action . . . after publication,'" Justice Gangel-Jacob turned to address Sharpton's allegations that the statements were defamatory. *Id.*, quoting, *Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986). Looking at the statements in "'the full context of the communication in which the statement appears [and] the broader social context and surrounding circumstances,'" the court found, "the objected to comments in this case and the anticipated comments for which the injunction is sought, unquestionably uttered in the political arena in the context of the New York City Mayoral campaign fall under the rubric of opinion, campaign rhetoric and political hyperbole. In circumstances such as these, the speech is protected." *Id., quoting, Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995).

Explaining the court's reasoning, Justice Gangel-Jacob wrote, "[a] reasonable listener would certainly observe such statements by a candidate's campaign manager to be no more than a partisan political opinion on the qualifications of an opposing candidate." *Id.*

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US Court Upholds Quashing FTC Subpoena of NBC *Dateline* Hidden Camera Outtakes

By Daniel M. Kummer and Bruce S. Rosen

In precedent-setting actions protecting the release of hidden camera outtakes subpoenaed from a non-party under the federal newsgathering privilege, a United States Magistrate Judge and District Judge in New Jersey have quashed a Federal Trade Commission subpoena for *Dateline* NBC outtakes sought by the government to strengthen its case against the subject of the broadcast.

On September 22, 1997, District Judge Alfred J. Lechner, Jr., before even receiving opposition briefs from NBC, denied the Justice Department's appeal of a September 4, 1997 order by Magistrate Judge Dennis M. Cavanaugh quashing the subpoena. Judge Cavanaugh ruled that "the government can acquire evidence . . . without relying on the privileged work product of NBC."

"To allow the government to subpoena news gathering material simply because that method is more convenient than securing equivalent information from non-privileged sources would impermissibly intrude upon protected investigative and editorial processes and subvert the [newsgathering] privilege," Judge Cavanaugh said. "Litigants cannot feel free to do this and journalists should not hesitate to report on an issue that may become subject to litigation."

U.S. v. NTA

The case, *United States v. National Talent Associates, Inc.*, 96-2617, involves a 1996 enforcement action brought by the government against NTA, which allegedly had been advertising itself as a service which can arrange to have children considered for modeling jobs. NTA was the subject of consent decree dating back to 1975 prohibiting it from making certain representations in marketing its services. On April 22, 1997, *Dateline* aired an investigative report on NTA's business practices, including hidden camera video and audio tape of three NTA sales representatives making presentations to NBC employees posing as prospective customers. The Broadcast showed the sales representatives making statements that could be construed as violative of the consent decrees. One month later, the government served NBC with a subpoena seeking all outtakes from the broadcast and seeking a witness to testify as to the tapes.

Privilege From *U.S. v. Criden*

NBC then moved to quash the subpoena based on the newsgathering privilege. The network argued that the government had not met its burden under the three-prong test established in *United States v. Criden*, 633 F.2d 346 (3rd Cir. 1980), under which a party seeking information must establish (1) that he has made an effort to obtain the information from other sources; (2), that the only access to the information sought is through the journalist and her sources; and (3), "the information sought is crucial to the claim." 633 F.2d at 358-9.

NBC argued that not only was the material available from other sources, but that it was supplemental to material already in the possession of the government, including alleged violations in the government's complaint filed months before the broadcast. The government countered that each statement constitutes a separate offense under the consent order, and the government sought to establish new offenses requiring the outtakes, without which it has "no independent proof."

Judge Cavanaugh pointed out that although the government alleges NTA violated the order 5,307 times, it was not practical for the government to expect to obtain evidence of every additional offense. Even so, he said, they may still augment their claims against NTA, and thus the NBC material was not crucial for the government's case as a whole. He even suggested that the government examine the hidden camera footage that was broadcast for additional violations. Finally, the judge said that NBC's status as a non-party strengthens its invocation of the privilege.

Daniel M. Kummer is the NBC litigation counsel involved in this matter and Bruce S. Rosen is outside counsel for NBC at McCusker, Anselmi, Rosen & Carvelli in Chatham, N.J.

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But *Dateline* Outtakes Ordered Produced by New York Court in Civil Rights Case

By Susan Weiner

The U.S. District Court for the Southern District of New York (Judge Harold Baer, Jr.) has directed NBC to produce out-takes from a *Dateline* investigative report in a federal civil rights suit. The NBC report was about Louisiana law enforcement officers who stop motorists without probable cause, claim the driver is violating the law and try to detain the driver or seize the car or other assets under the state's forfeiture law. The out-takes from the January 3, 1997 *Dateline* report were sought by both parties in a federal civil rights lawsuit pending in Louisiana. The plaintiffs in the Louisiana case are suing a deputy sheriff for stopping their car without probable cause and discriminating against them because they are Hispanic. *Dateline* aired videotape showing this same deputy sheriff stopping a car driven by a *Dateline* producer and claiming the driver was driving unlawfully. The correspondent reported that the hidden cameras showed that no violations had occurred because the car was set on cruise control and was not changing lanes. Not all of the supporting videotape, however, was aired.

The plaintiffs, who were stopped by the defendant deputy months before *Dateline*, have testimony from other motorists who were also wrongfully detained by the defendant. Nevertheless, plaintiffs claim that they need the out-takes because, while the deputy can dispute the plaintiffs' and other drivers' testimony that they were driving properly, the deputy cannot dispute the out-takes showing that the *Dateline* car was stopped without cause.

NBC opposed motions to compel production of the out-takes, arguing that the parties could not satisfy the tripartite test established by the Second Circuit for disclosure of non-broadcast or unpublished newsgathering material. The text requires that the information sought from the journalist be highly material to the claim, necessary and critical, and unavailable from alternative sources.

The district court, however, ruled that the plaintiffs' claims for punitive damages and injunctive relief "virtually rise or fall" upon the out-takes of the *Dateline* car stop, thereby satisfying the requirement, as defined by the Second Circuit in *In re Application to Quash Subpoena to NBC* (*Krase v. Graco*), 79 F.3d 346, 351 (2d Cir. 1996), that a journalist's non-broadcast material not be disclosed unless it is critical to the subpoenaing party's claim. The court further held that the material captured on the out-takes was otherwise unavailable. The court also found persuasive plaintiffs' assertion that the defendant deputy's superior had stated that he would terminate the deputy's employment if the *Dateline* out-takes showed that the deputy stopped the *Dateline* car without cause.

NBC is pursuing an appeal from the district court's order on the grounds that plaintiffs' claim for punitive damages and injunctive relief did not render the out-takes "critical" and that information about other allegedly unlawful stops was available from other sources. NBC believes that the district court's ruling is inconsistent with the constitutional standards enunciated by the Second Circuit.

Susan Weiner is Vice President, Litigation in the NBC Law

Criminal Defense Attorney Subpoenas Newspaper Over Web Site Coverage

In an apparent attempt to build an argument that potential jurors have been prejudiced by extensive web site coverage, criminal defense attorney James Farley has served a California newspaper with a subpoena seeking information regarding the newspaper's web site. The request has created novel First Amendment questions involving the interrelationship of the press, the internet and the criminal justice system.

The defense attorney represents Michael Dally, who is accused of conspiring with his lover to murder his wife. He is asking the *Ventura County Star* to turn over unpublished e-mail, poll results published on the newspaper's web site, and the "digital footprints" left by visitors to the site in an effort to determine whether the newspaper's electronic coverage has effected potential jurors outside the newspaper's circulation area.

The newspaper's web site (www.staronline.com) provided extensive coverage of the trial of Dally's lover and alleged co-conspirator, Diana Haun, who was convicted of murder on September 28. The online coverage included daily trial reports, several transcripts, audio clips of closing arguments, evidence, photos, a timeline, maps, and an interactive voting poll that allowed readers to enter a verdict.

While jurors from Santa Barbara County are expected to

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be bused to the Ventura courthouse for Dally's November trial, defense team investigator Len Newcomb stated in a *Ventura County Star* article that because of the extensive reach of the web coverage, jury pools in Santa Barbara County may not be any less contaminated. According to the Associated Press, defense attorney Farley said, "[w]e agreed before the trial that there was a tremendous amount of publicity about the case, so I just want to make sure that the panel that we're going to be getting out of Santa Barbara is not full of information about this."

Glenn Smith, an attorney for the newspaper has stated in a *Ventura County Star* article that he believes that the e-mails and demographic information on people who participated in the online poll are protected under the California shield law. The newspaper's editor, Timothy J. Gallagher, was quoted by the Associated Press as stating, "I don't have a problem providing information to defense attorneys that has already appeared in the newspaper, or in this case online, but beyond that there's a privileged relationship between newspapers and readers."

In addition to the subpoena served on the *Ventura County Star*, Dally's defense team has filed 56 subpoenas on news organizations from Los Angeles to San Luis Obispo requesting unpublished reader, listener and viewer responses to the coverage of the Haun trial.

Congressman Proposes to Amend Communications Act of 1934

Bill Would Outlaw Scanners That Can Be Modified for Eavesdropping

Representative Billy Tauzin of Louisiana, Chairman of the House Subcommittee on Telecommunications, Trade and Consumer Protection, has introduced a bill (H.R. 2369) that would amend the Communications Act of 1934 by outlawing the manufacture and sale of scanners which can be modified to eavesdrop on cellular telephone and personal communication services (PCS). While Congress enacted 47 U.S.C. § 302 (d) in 1992, making the sale or manufacture of any scanning device that is capable of receiving cellular telecommunication transmissions illegal, Rep. Tauzin's proposal is intended to "eliminate any debate as to the illegality of *modifying* scanners for the purpose of eavesdropping and clarify that the law applies to cellular as well as new PCS services." *Talking Points Regarding the Cellular Privacy Bill*, Office of Rep. Billy Tauzin (emphasis in original).

The bill is also intended to clarify that the Communications Act prohibits the interception *or* divulgence of wireless communications. According to a release from Rep. Tauzin's office, because the Federal Wiretap Statute, 18 U.S.C. §2511, makes it illegal to intentionally intercept any wireless conversation while the Communications Act links a prohibition on interception to divulgence of intercepted communications, eavesdroppers have "rel[ied] on the differences between these two provisions to argue that the FCC can only prohibit eavesdropping when it is coupled with the divulgence of private conversations." Rep. Tauzin's bill would make clear that interception *or* divulgence is prohibited by the Communications Act.

The bill would also bring the penalties for intercepting wireless communications into line with the penalties provided for under the Federal Wiretap Statute, which would permit the current fine of $2,000, 6 months in jail, or both for a willful violation to be increased based upon repeated violations. Finally, the bill would require the FCC to investigate and take appropriate action regarding wireless privacy violations under the Communications Act, notwithstanding any other investigative or enforcement action of any other Federal agency.

Addressing concerns over the scope of the amendment, Rep. Tauzin's *Talking Points* notes that "the bill is not intended to prohibit scanners from intercepting non-commercial mobile radio services, like those in the emergency service or public safety bands." In addition, the statement admits that Rep. Tauzin knows "that there may be problems with the bill as currently drafted and is currently working with the amateur radio community (the American Radio Relay League), the FCC, and the manufacturers of scanners to ensure that the legislation narrowly targets its prohibitions to reflect these goals."

Rep. Tauzin was joined in sponsoring the bill by Rep. Ed Markey of Massachusetts among others. Rep. Markey is the highest ranking Democratic member of the Telecommunications, Trade and Consumer Protection Subcommittee, which he chaired from 1987 to 1994.

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Media Challenges Sweeping Gag Order in Tobacco Suit

By Paul C. Watler and Rachel E. Boehm

A proposed gag order which would have prevented the parties in Texas' $8.6 billion tobacco lawsuit from commenting on the case or on any matter concerning nationwide tobacco litigation was withdrawn after the state, the tobacco industry and numerous news organizations objected to the sweeping order.

Media entities objecting to the gag order included *The New York Times*, the *Los Angeles Times*, *The Dallas Morning News* and the *Houston Chronicle*. The media entities were represented by Paul Watler and Rachel Boehm of Jenkens & Gilchrist.

Texas is among 41 states that have sued tobacco companies for reimbursement of billions of dollars the states have reportedly spent treating smoking-related illnesses. Jury selection in Texas' tobacco lawsuit was scheduled to begin in mid-October in the United States District Court for the Eastern District of Texas.

The draft gag order, issued in late September by U.S. District Judge David Folsom, would have prevented the parties to the Texas tobacco suit, their spokespersons, public relations firms, testifying experts, and retained experts from engaging in communications with the media "regarding the nationwide litigation involving the tobacco industry, including the claims and defenses of the parties, whether in federal or state court."

Under the gag order, the parties and their counsel would have been allowed to comment on the Texas case or the nationwide tobacco litigation only by providing the identity of the court in question, the judge, the lawyers, the docket number, and the time and dates of deadlines, hearings and trials.

The Dallas Morning News filed its motion for leave to intervene in the litigation for the purposes of opposing the proposed gag order on September 24, 1997. *The New York Times*, the *Los Angeles Times* and the *Houston Chronicle* filed their motion to intervene the following day, joining in the arguments asserted by *The Dallas Morning News*.

In opposing the gag order on First Amendment grounds, the media entities argued that the proposed gag order would have effectively terminated public debate and coverage of it by the news media on nationwide tobacco liability litigation. One of the subjects of the gag order was the State of Texas. Arguably, every elected and appointed official -- indeed, every employee of state government, numbering in the untold thousands -- would have been clothed in secrecy by the gag order. Thus, the proposed gag order was overly broad and unnecessarily abridged the First Amendment rights of the public and the media.

Furthermore, the media entities argued that competing constitutional interests which might have been applicable in a criminal trial -- a defendant's Sixth Amendment right to a fair trial -- were not at issue in the tobacco litigation, a civil matter.

Paul C. Watler and Rachel E. Boehm are with the firm Jenkens & Gilchrist in Dallas, TX.

The *LDRC 1997-98 50-State Survey: Media Libel Law* is currently available.

Please call LDRC at 212-889-2306 to order your copy if you have not already done so.

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International Update

Malaysia

Contempt Sentence for Canadian Reporter

Murray Hiebert, a Canadian journalist, has been sentenced by a Malaysian judge to three months in jail for contempt. Hiebert, Kuala Lumpur bureau chief for the *Far Eastern Economic Review*, was sentenced for a January 23 article that he wrote about lawsuits in Malaysia.

In the article, Hiebert mentioned a lawsuit filed by Chandra Sri Ram, the wife of appeals court judge Sri Ram Gopal, who had sued the International School for dropping her son from a debate team that traveled Taiwan. Though Chandra's case was settled before trial, Hiebert noted that the suit moved quickly through the court system and that Chandra's husband was a judge. Chandra took exception to the article and filed the contempt of judiciary charge.

The judge who tried the contempt case, Low Hop Bing, was quoted in *Editor & Publisher* as saying "[i]n my view, for far too long, there appear to be unabated, contemptuous attacks by and through the media on our judiciary." Hiebert's lawyers had argued against the contempt charge by saying that the story was carefully checked and that Judge Low Hop Bing had a potential conflict of interest because of his professional relationship with Judge Sri Ram Gopal.

On September 15, Hiebert appealed the decision to the Shah Alam High Court. He also filed a motion to reclaim his passport which he surrendered as a condition of bail. The motion to reclaim the passport was denied.

The Committee to Protect Journalists sent a letter on September 4 to Prime Minister Dato Seri Mahathir Mohamad asking for an investigation into the case. This is reportedly the first time that a Malaysian court has convicted a journalist for contempt.

Mexico

Prosecutors Won't Charge New York Times Over Drug Corruption Article

According to AP, Mexican prosecutors announced earlier this month that they would not press charges against *The New York Times* for an article that two Mexican state governors claimed falsely linked them to drug traffickers.

The complaints were filed in March by Sonora state Governor Manlio Fabio Beltrones and Morelos state Governor Jorge Carrillo Olea in response to a February 23 article which reported that both men had frequently assisted drug smugglers. While the Mexican Attorney General's Office stated that it had dropped the matter because the article was published in the United States, *The Times* called the decision a "clear vindication" of the paper pointing out that the Attorney General "declined to examine any of the witnesses and documents cited in the story and *The Times* offered to make available."

Canada

Mulroney to Receive $1.44 Million From Mounties

Former Canadian Prime Minister Brian Mulroney's libel suit against the Royal Canadian Mounted Police has reportedly been settled for $1.44 million. The settlement was reached in January, but was recently reviewed and approved by Justice Alan B. Gold. Mulroney had filed suit for $36 million over allegations that he had received kickbacks in connection with the purchase of Airbus jetliners by Air Canada 10 years ago. The accusations were contained in a letter from government investigators who were seeking access to bank records from Swiss authorities.

According to AP, Mulroney has already received an apology and $864,000 from the Mounties and will receive $576,000 more plus interest. While the government announced, in conjunction with its apology, that it had no evidence of wrongdoing by Mulroney, it also stated that the Airbus deal is still subject to investigation.

Singapore

Prime Minister Awarded Damages Then Appeals For More

According to the Associated Press, Singapore Prime Minister Goh Chok Tong is seeking to appeal the $12,903 libel verdict he won against Joshua Jeyaretnam, an opposition leader, on the grounds that the award was only one tenth of the $129,032 he had sought to recover.

Goh and ten other government officials have sued Jeyaretnam for announcing at a campaign rally that a Workers Party colleague had filed police reports against Goh "and his peo-

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ple." Despite the fact that Tang Liang Hong, a candidate in the election, had in fact filed police reports accusing the prime minister and other government leaders of defamation and conspiracy a few hours before the rally, the case proceeded to trial over the alleged innuendo of Jeyaretnam's statement and the effect it was likely to have on the crowd.

Tang, in a separate but related trial, was ordered to pay $5.2 million to Goh, Senior Minister Lee Kuan Yew and 10 others. Tang subsequently fled the country but the case is on appeal. Jeyaretnam, one of three opposition voices in the 84-member Parliament, has not stated whether he also intends to appeal the verdict.

France

Libel Suit Filed, Book Sales Halted

On October 13, a Paris judge halted sales of *The Yann Piat Affair, Assassins at the Heart of Power*, a book written by journalists Andre Rouget and Jean-Michel Verne, after Marseille Mayor, and former minister of urban affairs, Jean-Claude Gaudin filed a $1.7 million defamation suit alleging that the book falsely incriminates him in the 1994 assassination of a French Parliament member.

The book details the assassination of Yann Piat, who according to an unnamed retired general was killed to prevent her from disclosing a plan to sell military land in southern France to the Mafia, and the role in the killing allegedly played by two politicians referred to only as "the squid" and "scooter." Gaudin and former Defense Minister Francois Leotard, whose request to remove certain passages from the book was rejected by the court, claim that identifying details in the book concerning the two politicians make it clear that the allegations are directed at them.

According to AP, Gaudin's lawyer, Jose Allegrini, stated that the suit would be tried by the end of the year in a special Marseille court that specializes in media-related law and that any award would go to charity. For the present, however, the authors have been directed to bring proof of their allegations to a hearing set for October 24.

England to Permit Contingency Fees

Plans for major changes to England's civil justice system were announced this month by England's Lord Chancellor. The plan includes permitting contingency fees, termed "conditional fee agreements," in civil lawsuits. Government ministers believe that permitting contingency fees will increase access to the courts, but the plan is also seen as a big cost saver to the government's "legal aid" budget which pays some civil suit legal fees.

Mark Stephens, London media lawyer and DCS member, has expressed concern that contingency fees will lead to more libel suits. England's plaintiff-friendly libel laws presume that defamatory statements are false and require defendants to prove truth. The new contingency fee plan will make it even easier to bring suit by removing the financial burden of paying legal fees during the prosecution of a suit. In addition, the plan changes the strict English "loser pays" fee system, by permitting plaintiffs to buy an insurance policy (estimated cost $160) to pay legal fees in the event they lose.

The plan could take effect by April 1998

English Court Dismisses Libel Suit

A Russian politician's libel lawsuit against *Forbes* magazine was thrown out on forum non conveniens grounds at an October 22, 1997 hearing in a London court. Boris Beresovsky, one of Russia's richest businessmen and a controversial politician, sued *Forbes* over an article entitled *Godfather of the Kremlin?* that linked him to shady business deals and the murder of a Russian television journalist. Another Russian businessman, Nicolai Glushkov, also joined in the suit. Neither plaintiff was a UK resident and no witnesses or facts in the suit related to the UK. The suit was undoubtedly brought in England to take advantage of its plaintiff-friendly libel laws.

Despite the lack of connections to the UK, the English court had jurisdiction to hear the case. Nevertheless, in a very important ruling for the US media defending libel suits in the UK, the court held that the UK was an improper forum to bring the case. The decision was rendered at a private hearing, but a written decision should be released soon. David Hooper, of Biddle & Co. in London, commented that this decision "may turn the tide against forum shoppers."

Mr. Hooper, Geoffrey Robertson of Doughty Street Chambers and Tennyson Schad of Nowrick & Schad represented Forbes in this matter.

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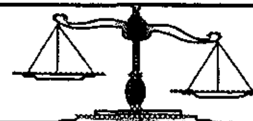
Supreme Court Update: *Certiorari Denied*



The 1997 session for the Supreme Court is underway, and the Court has already denied certiorari in a number of media-related cases.

U.S. v. McDougal, **103 F.3d 651 (8th Cir. 1996), *cert. denied sub nom., Citizens United v. U.S.*, 66 U.S.L.W. 3244 (U.S. October 7, 1997) (No. 96-1788); *see LDRC LibelLetter,* January 1997 at 15.**

The United States Supreme Court has let stand a decision of the U.S. Court of Appeals for the Eighth Circuit that refused to allow media organizations access to the videotaped testimony of President Clinton that was used at trial in the underlying criminal case. *U.S. v. McDougal*, 940 F.Supp. 224 (E.D. Ark. 1996). Media organizations claimed that denying access offended not only common law rights of public access to judicial records but also the First Amendment. On the access issue, the Eighth Circuit held that the videotape was not a judicial record to which the public had access under common law. Instead, the court analogized the playing of the videotape in court to live testimony and the videotape itself to an electronic reproduction of that testimony. Alternatively, the court found that even if the tapes were found to be judicial records, the district court's discretionary refusal to grant access deserved deference. In making this order, the Eighth Circuit refused to follow the Second, Third, Seventh, and D.C. Circuits, each of which has granted very high deference to the presumption that court records should be accessible to the public.

The Eighth Circuit also rejected the First Amendment claim, noting that the tapes had already been publicly viewed (in court), that transcripts of the tape were readily available, and thus that the free flow of information had not been stifled in such a way as to implicate the First Amendment.

KCAL-TV Channel 9 v. Los Angeles News Service, **108 F.3d 1119, 24 Media L. Rep. 1506 (9th Cir. 1997), *cert. denied,* 66 U.S.L.W. 3226 (U.S. October 7, 1997) (No. 96-2040); *see LDRC LibelLetter,* May 1997 at 15.**

The Supreme Court also let stand a decision of the U.S. Court of Appeals for the Ninth Circuit that found that rebroadcast of a Los Angeles News Service (LANS) copyrighted videotape of the beating of Reginald Denny during the 1992 Los Angeles riots, by KCAL-TV Channel 9 was not protected by fair use. In reversing a district court decision which found the broadcast protected by fair use, the Ninth Circuit found that though rebroadcast may have been in the public interest, KCAL's use was commercial and it came after LANS had refused to license the station's rebroadcast of the video clip. Further, the court found that KCAL failed to produce evidence that the footage could not be acquired from other sources. Last, although the tape had been licensed and published before KCAL's use, it is not obvious that there was no impact on the market for first publication rights as KCAL itself requested a license.

Naro v. Hamilton Township, **NJ, 147 *N.J.* 576, 688 A.2d 1051 (N.J. Super. Ct. App. Div., 1996), *cert. denied,* 66 U.S.L.W. 3233 (October 7, 1997) (No. 96-1986).**

The Supreme Court also denied review of a New Jersey Superior Court decision that held that the plaintiff, a local firefighter, was a limited-purpose public figure after he was charged and acquitted by reason of temporary insanity in a highly publicized assault and robbery case. The court subsequently dismissed the plaintiff's defamation suit for failure to meet the actual malice standard. The plaintiff sued defendant newspapers alleging that they knowingly made false statements identifying him as a suspect in an unrelated murder case and asserting that he resembled a composite sketch of one of the suspects in that case. As a limited-purpose public figure, the court required that plaintiff present substantial evidence that the newspaper knew that he was not a suspect or entertained serious doubts about whether he was a suspect.

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Second Circuit Reverses Summary Judgment On Copyright Claim for Use of Art in TV Scene

By Kim J. Landsman

The Court of Appeals for the Second Circuit reversed summary judgment in favor of defendants in a copyright claim over the use of a work of art in the background set of a television show. *Ringgold v. Black Entertainment Television*, 44 U.S.P.Q.2d 1001, 1997 WL 570161 (2d Cir. Sept. 16, 1997). Defendants had argued that such use constituted de minimis infringement or fair use when, as in this case, the artwork appeared for a short period of time, was out of focus and not shown in full, and was not a subject of attention. The decision is highly fact-specific and would not necessarily bar summary judgment in distinguishable cases; it also left room for an ultimate judgment for the defendants at trial. Nevertheless, risk-averse producers considering the use of copyrightable material in the background of a film or television show will want to be aware of the decision. Because five different district judges had granted summary judgment when a work of visual art appeared only in the background of a set,[1] it seems fair to say that the *Ringgold* decision has upset the expectations of many lawyers as to what does and does not constitute de minimis or fair use in copyright law.

At issue was an episode of the sitcom "Roc" produced by HBO Independent Productions that had first appeared on the Fox network and was subsequently syndicated on BET. In the final, five-minute scene of the 23-minute sitcom, a framed poster of a story quilt, consisting of words and images, was hung on the wall of a church social hall. "In the [final] scene, at least a portion of the poster is shown a total of nine times. In some of those instances, the poster is at the center of the screen, although nothing in the dialogue, action, or camera work particularly calls the viewer's attention to the poster. The nine sequences in which a portion of the poster is visible range in duration from 1.86 to 4.16 seconds. The aggregate duration of all nine sequences is 26.75 seconds."

The Concept of De Minimis in Copyright

The doctrine of de minimis can, according to the Court, have two types of meaning in the context of potential copyright infringement. It can mean "a technical violation of a right so trivial that the law will not impose legal consequences," or it "can mean that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying." In determining that the use of the story quilt poster was not de minimis under either definition, the Court noted that determining whether copying of visual works rose above the de minimis level involved assessing "the observability of the copied work – the length of time the copied work is observable in the allegedly infringing work and such factors as focus, lighting, camera angles, and prominence."

As to the the amount of copyrightable expression perceptible to the viewer, the Court held that "[i]n some circumstances, a visual work, though selected by production staff for thematic relevance, or at least for its decorative value, might ultimately be filmed at such a distance and so out of focus that a typical program viewer would not discern any decorative effect that the work of art contributes to the set. But that is not this case. The painting component of the poster is recognizable as a painting, and with sufficient observable detail for the 'average lay observer' . . . to discern African-Americans in Ringgold's colorful, virtually two-dimensional style."

Fair Use Discussion

In examining the fair use factors, the Court of Appeals criticized the District Court for ignoring the fact that the use of the poster did not fit into any of the functions of "criticism, comment, news reporting, teaching, scholarship, and research" set out as "'illustrative and not limitative'" examples in the statute. As to the first fair use factor (purpose of the use), the Court held that defendants' use was in no sense transformative and that they "used Ringgold's work for precisely a central purpose for which it was created -- to be decorative." The defendants had conceded that the second factor favored plaintiff, because the work was creative.

The Court of Appeals did not disturb the District Court's conclusion that the third factor, amount and substantiality of use, favored defendants, but indicated that it would have weighed it less strongly in defendants' favor and admonished

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that courts considering visual works "must be careful not to permit this factor too easily to tip the aggregate fair use assessment in favor of those whom the other three factors do not favor. Otherwise, a defendant who uses a creative work in a way that does not serve any of the purposes for which the fair use defense is normally invoked and that impairs the market for licensing the work will escape liability simply by claiming only a small infringement."

The Court of Appeals faulted the District Court's analysis of the fourth fair use factor, "effect of the use upon the potential market for or value of the copyrighted work," for focusing on likely impact on sales of the poster, rather than Ringgold's averred "'traditional, reasonable or likely to be developed' market for licensing her work as set decoration."

Kim J. Landsman is a partner at Patterson, Belknap, Webb & Tyler LLP and represented the defendants in this case.

Endnote

1 In addition to the district court opinion in *Ringgold*, those decisions include *Amsinck v. Columbia Pictures Industries, Inc.*, 862 F. Supp. 1044 (S.D.N.Y. 1994); *Frank Schaffer Publications, Inc. v. The Lyons Partnership, L.P.*, 15 Ent. L. Rep. 9 (C.D. Cal. Aug. 25, 1993; *Sandoval v. New Line Cinema Corp.*, 43 U.S.P.Q.2d 1949, 1997 WL 481749 (S.D.N.Y. Aug. 21, 1997); and *Jackson v. Warner Bros., Inc.*, 96-CV-72976 (E.D. Mich. Aug. 29, 1997). The *Sandoval* case is currently on appeal.

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