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LDRC LIBELLETTER

Reporting Developments Through October 23, 1998

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A LEGAL EARTHQUAKE: SECOND CIRCUIT HOLDS THERE IS NO FEDERAL REPORTER'S PRIVILEGE FOR NON-CONFIDENTIAL MATERIAL IN CIVIL CASES

By Laura R. Handman

In a startling decision last month that contradicts what courts, litigants and the media had universally understood to be the settled law in the Circuit for 15 years, a panel of the Second Circuit in *Gonzales v. NBC*, No. 97-9454, 1998 WL 647148 (Sept. 22, 1998), held that there is no qualified privilege under federal law for non-confidential newsgathering materials in civil cases.

While a few other Circuits have reached that conclusion in the context of criminal cases, most notably the Fifth Circuit this past February, *United States v. Smith*, 135 F. 3d 963 (5th Cir. 1998), this ruling marks the first time *any* federal Court of Appeals has so held in the context of a civil case. From the Second Circuit, the home court to many national media organizations, it was particularly unexpected, all the more so since it was not necessary to make such a broad ruling in order to decide the case before the Panel. One bright spot, the Court reaffirmed a qualified privilege under federal law for confidential sources.

District Court Applied Privilege

Before the Court on appeal was the district court's ruling that

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Second Circuit on Reporter's Privilege

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NBC must comply with a third-party subpoena for non-confidential unedited and unbroadcast outtakes. The district court assumed a journalist's qualified privilege for non-confidential material existed under federal law, but held that the three-part test had been satisfied. While affirming the district court, the Second Circuit held that a journalist's qualified privilege for non-confidential material had *never* been recognized in the Second Circuit. Rather than applying the three-part test, the Court ruled that the outtakes must be produced because they were relevant to the plaintiffs' case.

In November of 1995 while driving on a Louisiana highway, the Gonzales claim they were pulled over without reasonable suspicion by Deputy Sheriff Pierce and were detained because of their Hispanic origin. They filed a federal civil rights suit against Pierce in federal court in Louisiana. In January of 1997, *Dateline NBC* broadcast a segment about the abuses of Louisiana law enforcement officers who conducted unnecessary stops of motorists. A camera affixed to a car captured Deputy Sheriff Pierce pulling over a *Dateline NBC* reporter and a portion of the tape was included in the broadcast. In the *Gonzales* litigation, both sides subpoenaed the unbroadcast outtakes from the recorded stop of NBC's reporter.

In response to NBC's objection to the subpoenas, applying the three-part test, the district court (Baer, D. J.) held that the outtakes did not meet the critical necessity requirement on the issue of liability since they did not record the Gonzales' stop. But the district court held that requirement was satisfied with respect to the claim for punitive damages, to which the court held, a pattern or practice was relevant. The district court also concluded that the information on the tape was not available from any other source, since the tape recording device on Pierce's car was activated only at the time of the stop and did not capture, as the *Dateline* tape did, the activities that preceded the stop. The reporter was not ordered to testify but, instead, an authenticating affidavit was required.

Distinguishing All Prior Precident

Rather than simply affirm the lower court's decision, the Panel (Parker, C. J.) held that a journalist's qualified privilege under federal law for non-confidential newsgathering information has *never* been recognized in the Second Circuit, distinguishing all the precedents as either *dicta*, limited to confidential sources and materials or involving application of state law. *Baker v. F&F Investment*, 470 F.2d 778 (2d Cir. 1972), which recognized a qualified privilege in the context of a civil case brought under federal law, was distinguished by the *Gonzales* Panel as limited to confidential sources. *U.S. v. Burke*, 700 F.2d 70 (2d Cir. 1988), long viewed as the source for the qualified privilege for non-confidential newsgathering material, was distinguished based on the *Gonzales* Court's speculation that confidential material was involved. In fact, the subpoena in *Burke* had sought the reporter's file, including records of interviews with the prosecution's star witness, who, far from a confidential source, was co-author of the article.

The qualified privilege under federal law for non-confidential material recognized in *Burke* in the criminal context, was extended to the civil context in *von Bulow, by Auersperg v. von Bulow*, 811 F.2d 136 (2d Cir. 1987). While stating that the privilege applied to non-confidential, unpublished material, the Second Circuit in that case ruled that von Bulow's friend was not entitled to assert the privilege because she was not a journalist engaged in the newsgathering process. The *Gonzales* Panel concluded that the *von Bulow*'s recognition of the privilege was mere *dicta*.

The *Gonzales* Panel also deemed as irrelevant the New York Shield law, notwithstanding prior decisions by the Circuit holding that New York law, while not binding, is relevant authority since federal and state policies were congruent. New York amended its Shield Law in 1990 to expressly provide a qualified privilege for non-confidential newsgathering material, which, in a recent diversity case, the Second Circuit applied, with approval, in *Krase v. Graco Children Products, Inc.*, 79 F.3d 346 (2d Cir. 1996), refusing to compel production of another set of *Dateline* outtakes.

No Empirical Evidence of Media Harm

Having concluded that prior Second Circuit precedent had not recognized the privilege, the *Gonzales* Panel dis-

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Second Circuit on Reporter's Privilege

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missed NBC's arguments as to why the First Amendment nonetheless required recognition. The *Gonzales*' Panel found that NBC had not shown any empirical evidence to prove that the absence of the privilege would interfere with editorial decisions, impede the free flow of information or cause undue burden. In fact, the Court opined that the effect would only go to the public's benefit in that scrutiny of the editorial process "is likely to enhance the reliability and truthfulness of news reporting." 1998 WL 647148 at 8.

While citing *Herbert v. Lando*, 441 U.S. 153 (1979), for the proposition that any negative impact on the editorial process was outweighed by the need for information, the Court did not note the distinction when, as here, the journalist is only a third-party, not a defendant as in *Herbert*, and the information is only relevant, not critically necessary to a key issue, such as actual malice in *Herbert*.

As to the undue burden posed by subpoenas, the *Gonzales* Panel dismissed this concern as special pleading by the press. Instead, the Court equated a news organization with any other business which is subject to third-party subpoena and rejected the contention that, because its core business is reporting on matters in court or likely to be in court, subpoenas will be far more frequent.

For its insistence on "empirical evidence," the Panel cited the plurality opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972) where the Supreme Court refused to recognize a journalist's privilege not to testify in grand jury proceedings in part because there was no empirical showing that the lack of the privilege had impeded the vitality of the press. (Of course, in this Circuit, news organizations have enjoyed the privilege for 15 years, making hard data on the effect of its withdrawal difficult to come by.) The *Gonzales* Panel believed the protections afforded by F.R. Civ. P. 26 would be sufficient protection against unduly burdensome subpoenas.

Rehearing Sought

Because the Panel decision appears to overturn the understanding of more than a dozen district courts as to the law of this Circuit, NBC has petitioned for rehearing or rehearing in banc. The broad impact of the ruling, its apparent about face from prior precedent and the Panel's emphasis on the lack of empirical support, also sparked wide ranging amicus support for NBC's rehearing petition from the national newspapers, the New York newspapers, the major broadcasters, national magazines, wire services and groups dedicated to freedom of the press. The amici hope to provide the Court with a realistic assessment of the impact of the ruling which is certain to lead to an increased number of subpoenas. The ruling would, in effect, force the production of a reporter's entire file, notes and all, and, quite likely testimony as well, not just when the reporter is a participant with first hand knowledge, but whenever a litigant believes the newsgathering material is likely to lead to admissible evidence. This, in turn, would effect the free flow of information as on-the-record sources seek off-the-record status or deny access altogether to avoid reporters being turned as witnesses against them.

From a jurisprudential point of view as well, NBC and amici have urged rehearing by the full Bench before adopting such a broad new ruling. Such relief is warranted here, because the Panel decision both departed from past precedent and altered the "proper balance" suggested by Justice Powell in his decisive fifth vote in *Branzburg*. While strongly urging rehearing, in the event the Court rejects rehearing, amici have requested that the Panel's ruling be limited to the narrow facts as found by the district court, namely where the reporter was a participant in an event in which he had observed first-hand alleged unlawful conduct deemed to be key, no source was involved, there is a recording of the event which is uniquely probative, and the reporter's testimony is not required. A decision on NBC's petition is pending.

Laura R. Handman, a partner at Davis Wright Tremaine LLP, working with Robert D. Balin and Matthew S. Schweber, represents a group of 18 amici, organized by The New York Times and Dow Jones, which have sought leave to file a friend of court brief in support of NBC's Petition for Rehearing and Suggestion for Rehearing In Banc.

State's Due Process Rights Trump Shield Law

A California court of appeal held that the People's rights to due process and to truth-in-evidence in a criminal case can trump California's shield law and ordered production of a station's outtakes in response to a prosecution subpoena. *Miller v. Superior Court*, 98 Daily Journal D.A.R. 9187 (Aug. 26, 1998).

Attorneys for KOVR-TV news director, Ellen Miller, have petitioned the California Supreme Court for review of the adjudication of contempt based on Miller's failure to surrender the subpoenaed outtakes. Amicus support is anticipated.

Miller is asking the Supreme Court to determine whether the government in a state criminal proceeding has state constitutionally-based rights sufficient to overcome press rights under the California Shield law, California Constitution as Art. I, § 2(b). The corollary issue is whether the voters and the legislature of California, who enacted the Constitutional shield law, have the power to afford absolute protection for journalists from subpoenas, only limited, if at all, by the federal constitutional right of individuals (and not of the government).

The California Shield Law provides that "a media member cannot be adjudged in contempt for refusing to disclose unpublished information, whether confidential or nonconfidential, or the source of information, whether published or unpublished." *Miller* at 9189.

Two Confessions

Miller arose out of the 1996 slaying of Timoteo Carona Silva, an inmate at a California Youth Authority facility near Stockton, California by his cellmate, Anthony Lee DeSoto. DeSoto confessed to the murder to the sheriff of San Joaquin County. When KOVR-TV learned that DeSoto had confessed, the station sent news reporter Tom Layson to the facility to conduct an interview. During that interview, DeSoto confessed once again to the murder of Silva. KOVR-TV broadcast portions of that interview on March 19 and 20, 1996.

The People of California subpoenaed the outtakes from that interview. KOVR-TV responded that it would produce the broadcast portion of the subpoenaed materials but relied on California's shield law to refuse to disclose the outtakes.

That shield law provides that newspersons cannot be held in contempt in any proceeding "for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." Cal. Const. Art. I, § 2(b).

In opposing the motion, the District Attorney stated that the People's right to relevant evidence in a criminal proceeding overrides the protections of the shield law, relying on *United States v. Nixon*, 418 U.S. 683 (1974). The trial court, however, relied upon *Delaney v. Superior Court*, 50 Cal. 3d 785, 268 Cal. Rptr. 753, 789 P.2d 934 (1990), a California Supreme Court decision which held that the state's shield law may be subordinated to a *criminal defendant's* federal due process right to a fair trial under the supremacy clause.

Indicating that the government had made the "necessary" threshold showing that the outtakes would assist in its prosecution, the court reviewed KOVR's outtakes *in camera* and kept the tapes, placing them under seal. Reasoning that the People's interest "in access to the sealed evidence outweighed the press' interest in protecting against disclosure of unpublished material it had not obtained in confidence," KOVR's motion to quash was denied on July 19, 1996. Petitioner's Petition at 7.

The appellate court sent the matter back, finding that the shield law, which only provided immunity from contempt, was not ripe for review in the absence of a contempt order.

Miller Cited for Contempt

KOVR once again moved to quash the subpoena. On July 23, 1997 the motion was denied by the San Joaquin County Superior Court and KOVR-TV's news director and custodian of records, Ellen Miller, was cited for

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contempt. The court ordered her confined in the San Joaquin County Jail "until the video tape is produced or until all proceedings in the case of the *People v. Anthony Lee DeSoto* are concluded." Id. The court also ordered Miller to pay reasonable attorney's fees and costs in connection with the contempt proceedings for counsel for People of the State of California. The contempt order was stayed as Miller sought writ of review or habeas corpus.

> ***"Under ordinary circumstances, it cannot reasonably be argued the disclosure of statements given freely to the press with no strings attached would somehow have an adverse impact on future news gathering efforts." Miller,* at 9192.**

Delaney v. Superior Court

The court of appeal determined that the People's due process rights overcame any protection KOVR-TV might have against disclosing the video tape. Specifically, as the trial court had, the court of appeal relied on *Delaney v. Superior Court*, for the proposition that the shield law, despite its "sweeping and unambigious language," "may be subordinated to conflicting rights under appropriate circumstances." *Miller v. Superior Court*, 98 Daily Journal D.A.R. 9187, 9189 (Aug. 26, 1998).

In *Delaney*, the press accompanied the police on the search and arrest of the defendant for possession of brass knuckles. Arguing that he had not consented to the search, the defendant moved to suppress the evidence and sought the testimony of the reporters. The reporters refused to testify, citing the state's shield law, and were held in contempt.

Delaney held that the shield law must yield where a defendant's federal constitutional right to a fair trial is in jeopardy and employed a balancing test for that purpose. A defendant seeking to invoke the *Delaney* balancing test must first make "a threshold showing of 'a reasonable possibility the information will materially assist his defense.'" *Miller* at 9189. Once this threshold showing is met, the court must employ the following factors in a balancing test: "(1) whether the unpublished information is confidential or sensitive, (2) the interests sought to be protected by the shield law, (3) the importance of the information to the criminal defendant, and (4) whether there are alternative sources for the unpublished information." Id. The court indicated that no one factor is any more dispositive than another. In *Delaney*, where the reporter was a first person witness to the events at issue, the court determined that disclosure was necessary.

What the *Delaney* court did *not* decide was whether the *prosecution* in a criminal proceeding might have a similar *state* constitutional right that could overcome the shield law. This is the question presented in *Miller v. Superior Court*.

People's Due Process Rights--Qualified by Shield Law?

The *Miller* court found that a due process right resides in the People of the State of California, citing article 1, section 29 of the State Constitution, which provides "In a criminal case, the people of the State of California have the right to due process of law and to a speedy and public trial." *Miller* at 9190.

Miller argued that the right set out in section 29 was qualified by section 28 of the State Constitution, which reads:

> "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . . . Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. *Nothing in this section shall affect any existing statutory or constitutional right of the press.*" (italics original).

Id. at 9190.

Miller argued that the recognition of a press/shield law exception to the truth-in-evidence provision implicitly restricted the governments due process rights under section 29.

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State's Due Process Rights Trump Shield Law

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Miller argued that her position was supported by the way the California Supreme Court handled an analogous situation involving the psychotherapist-patient privilege in *Menendez v. Superior Court*, 3 Cal. 4th 435 (1992). In *Menendez*, the People sought three audio tapes of sessions with the Menendez brothers and their psychotherapist. The court held that the tapes were protected by the psychotherapist-patient privilege.

In what may prove to be a contentious footnote, the *Menendez* court announced, "The People claim that the psychotherapist-patient privilege must yield to their interest in successful criminal prosecutions and their state constitutional right to due process of law. We are not persuaded." *Miller* at 9190.

The Supreme Court went on to state that Section 28 makes it clear that the privilege does not undermine the truth-finding function and thus does not deny due process to the government

The Appellate Court Says "No"

The *Miller* court was not persuaded that the *Menendez* decision stood for the sweeping proposition that the shield law "does not undermine the truth-finding function of criminal proceedings and, hence, does not deny due process." *Miller* at 9190. To agree with that proposition, the court states baldly, would be inconsistent with *Delaney*. Thus a decision based upon the supremacy of a criminal defendant's federal due process rights has been used to circumvent the clear language of the California Constitution and the clearly analogous reasoning of the California Supreme Court in *Menendez*.

The *Miller* court concluded that "the People have a state due process interest in the disclosure of evidence relevant to a criminal prosecution. This interest, while not 'trumping' the shield law, is sufficiently compelling to invoke the *Delaney* balancing test." *Miller* at 9190.

Media as Arm of the State

Miller did not contest the fact that there was a reasonable possibility that the outtakes from the interview would "materially assist" the People's case. Miller's principle argument was that "forced disclosure of unpublished information would cause the media to appear as an arm of the State." *Miller* at 9191. She argued that the shield law was created precisely because anticipated harm to the news gathering function would always be speculative -- that is why the voters of California voted to enact the shield law. The court countered with the notion that it is *because* of the shield law that a balancing of interests is required -- otherwise the People would have an "unfettered right to disclosure of the published information." Id.

Miller also argued that the importance of the outtakes was minimal "in light of the availability of the published information and the Sheriff's videotaped interview . . . ." *Miller* at 9192. Citing the trial court, the Miller court countered that the outtakes contained information which would refute statements in the Sheriff's videotape. There were also no eyewitnesses to the murder, said the trial court, nor was there any "direct evidence as to the mens rea of the crime other than the defendant's statements in the KOVR interview." Id.

The court concluded that "[w]here the press can show no compelling interest in withholding highly relevant, non-confidential, non-sensitive, otherwise unavailable information that would outweigh the need of a party to a criminal prosecution to the information, the balance should be struck in favor of disclosure." *Miller* at 9192. The court did not find this reasoning to be inconsistent with the purposes of the shield law. "Under ordinary circumstances, it cannot reasonably be argued the disclosure of statements given freely to the press with no strings attached would somehow have an adverse impact on future news gathering efforts." Id.

Charity Kenyon and Samuel McAdam of Diepenbrock, Wulff, Plant and Hannegan LLP in Sacramento, California, are representing Ellen Miller in this matter.

Actual Malice Held Proven When Reporter Refuses to Identify Confidential Sources

A Colorado trial judge ruled this month that a radio talk-show host, now libel defendant, would be deemed to have acted with actual malice as a sanction for his refusal to disclose his source(s) to the plaintiff. *Gordon v. Boyles*, No. 97 CV 5224 (Colo. Dist. Ct.) (Oct. 2, 1998) This follows the court's decision finding the defendant, Peter Boyles, in contempt and fining him $20,000 for refusing to reveal his sources in response to discovery requests by the plaintiff, Denver police officer Bryan Gordon. The court rejected Boyles claimed right to protect his sources under the Colorado shield law.

Boyles is seeking review of these decisions by the Colorado Supreme Court. He will have *amicus* support in that effort from various Colorado media on what will be a case of first impression for the Court.

The libel suit is based upon remarks made by Boyles and questions taken during his radio shows regarding a fight between off-duty police officers at a local supper club in January 1997. Boyles allegedly stated that the plaintiff fought with another officer over a woman, with the other cop receiving a knife wound. Plaintiff denies any involvement in the incident. The defendant-Boyles claims that his sources for the story are confidential.

Oklahoma Television Station Wins Jury Verdict

Jury Out Less Than Ten Minutes

KFOR-TV, Channel 4, in Oklahoma City won a jury verdict in September in a libel case in which summary judgment had been granted twice, and reversed twice, in a state in which summary judgment is unreasonably difficult to obtain and sustain. *Malson v. Palmer Broadcasting Group*, No. CJ-94-5284-62 (Okla. Dist. Ct. Sept. 18, 1998). Glenn Malson and his wife brought suit against Channel 4 based on a consumer report about their small business. The station's report charged that the company was discharging toxic waste into local sewers in violation of the law. While the report mentioned Mr. Malson, there was no mention of his wife. Glenn Malson died while the case was pending. His wife carried on.

The trial judge granted summary judgment first on the grounds of lack of negligence and then, after Malson died, on the issue of "of and concerning." Both times the decisions were reversed by the appellate courts. In the end, however, after a week long trial (in which the defense required but half a day to present its case), the jury came back with a defense verdict. It took them less than ten minutes to decide the matter.

In talking with the jury foreman after the trial, defense counsel found it interesting that the jurors apparently agreed that the report was not of and concerning Mrs. Malson and that the defendant had not been negligent -- concurring in the trial court's initial assessments on the summary judgement motions.

Robert Nelon of Hall, Estill, Hardwick, Gable, Golden & Nelson, represented the station in the matter.

Texas: A Great Libel State

The state to be in this past month was Texas. Apart from solid, precedential decisions on defining public officials and public figures, a consistent, important element in the Texas cases is the Texas interlocutory appeals statute. That statute, which allows media to take interlocutory appeals in cases involving constitutional issues and which stays trial of the case pending the appeal, resulted in four of the five Texas press decisions reported on the next pages in this issue. In one case, the interlocutory appeal statute itself was upheld against constitutional challenge. We hope to take an organized look at Texas and its surprising number of state court press decisions next month.

TEXAS SUPREME COURT DECIDES PUBLIC FIGURE CASE

LOCAL TV REPORTER A VORTEX PUBLIC FIGURE

By William W. Ogden

In yet another lawsuit implicating the media's role in the ill-fated 1993 raid on a Waco, Texas cult compound, the Texas Supreme Court has unanimously dismissed a libel complaint by a Waco TV reporter, holding that the reporter is a vortex public figure and that the record negates actual malice as a matter of law. *WFAA-TV, Inc. v. McLemore,* ___ S.W.2d ___, 41 Tex. S. Ct. J. 1394 (Tex. 1998).

The Ill-Fated WACO Raid

The case arose from the March 1993 raid by agents from the Bureau of Alcohol, Tobacco & Firearms (ATF) on a Branch Davidian cult compound. Four agents were killed and another 20 agents were wounded. Dramatic video footage captured the failed raid, which quickly became an international news story.

In the raid's aftermath, some agents privately blamed the press for compromising raid security. There were angry accusations that reporters had intentionally or inadvertently alerted the cult to the raid in advance. Veteran *Houston Chronicle* reporter Kathy Fair Walt noted those accusations in an interview with Ted Koppel on the ABC *Nightline* broadcast for March 2, 1993. Ms. Walt, however, mentioned no reporter by name. The next day WFAA-TV in Dallas, Texas carried a similar story, including video of John McLemore, a local TV reporter who was at the scene when the shooting started. McLemore was the only local journalist to broadcast from the compound during the firefight, and afterwards, McLemore used his truck to carry wounded agents from the field.

Summary Judgment Denied

McLemore sued for libel, claiming that the news accounts made him the scapegoat for the botched raid, naming the *Chronicle* and its reporter, Ms. Walt, together with WFAA-TV and its reporter, Valerie Williams. The news defendants all moved for summary judgment. The trial court granted summary judgments for the *Chronicle* and Walt without opinion, presumably on the issue of identification. Since Ms. Walt had not mentioned McLemore by name, and since the record established that there were 11 reporters in 6 different vehicles near the compound before the raid began, the *Nightline* broadcast did not sufficiently identify McLemore so as to impose liability.

The trial court denied summary judgment for WFAA, however, since the broadcast included both McLemore's name and likeness. WFAA invoked the Texas interlocutory appeal statute, Tex. Civ. Prac. & Rem. Code Sec. 51.014, which permits media defendants to appeal interlocutory orders denying summary judgment in libel cases which raise a constitutional defense. The interlocutory appeal has the added benefit of staying trial.

On appeal, the intermediate appeals court let stand the denial of summary judgment, holding in the process that McLemore was not a public figure and that he had raised a fact question as to negligence. The Texas Supreme Court granted discretionary review, and in a unanimous opinion issued September 24, 1998, reinstated summary judgment for all news defendants.

The Public Figure Test: Must It Be Voluntary

In only its third opinion to analyze the law of vortex public figures, the Court adopted the "generally accepted test" from the 5th and D.C. Circuits to define a limited purpose public figure: (1) there must be a public controversy--meaning one which is both discussed and which will impact people other than the immediate participants, (2) the plaintiff must have more than a trivial role in the controversy, and (3) the alleged defamation must relate to the plaintiff's participation in the controversy. *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431 (5th Cir. 1987).

Much of the colloquy at oral argument focused on whether "voluntariness" was an element of the test--that is, whether the plaintiff must have voluntarily injected himself into the controversy, or whether he could become a public figure involuntarily by being drawn into a controversy

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TV Reporter is Public Figure

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against his will. While noting that the 2d and 4th Circuits required a showing of voluntariness, the Court found it unnecessary to decide whether voluntariness was required in the abstract, because McLemore had clearly joined in this controversy. McLemore reported live from the raid and gave interviews after the raid, proudly portraying himself as a hero in assisting wounded agents "at considerable personal risk."

McLemore also argued that there was no larger controversy involving him until he was falsely accused of breaking raid security; thus, the only relevant "controversy" for purposes of public figure analysis was the issue of his personal journalistic ethics. Again, the Court disagreed. Noting the considerable media coverage surrounding the entire event, the Court concluded that the relevant issue was the broader question as to why the ATF raid failed in the first place. Regarding that question, the Court had no trouble concluding that McLemore met the test as a vortex public figure.

The Court's opinion is significant in several respects. It defines Texas law on vortex public figures, and while technically leaving the issue of "voluntariness" an open question, the Court actually adopts a test that does not require voluntary action on the plaintiff's part to achieve public figure status. The opinion also highlights the strategic value of interlocutory appeals from denials of summary judgment. Finally, in holding that WFAA negated actual malice as a matter of law, the Court reiterates its approval of summary judgments in cases where the media provides detailed (albeit interested) affidavits from the reporter, clearly identifying a story's sources and providing a persuasive basis for the reporter's subjective belief that the account is accurate.

William W. (Bill) Ogden, of Ogden, Gibson, White & Broocks, L.L.P. in Houston, Texas, represented the Houston Chronicle and Kathy Walt. Paul C. Watler, of Jenkens & Gilchrist, L.L.P. in Dallas, Texas, represented WFAA-TV, Inc. and Valerie Williams.

Texas Constitution Broader than First Amendment

Court-Appointed Psychologist Is Public Official

Reversing the judgment of the lower court, the Fourteenth Court of Appeals in Houston, Texas recently ruled that a court-appointed psychologist who was authorized by the court to determine parental visitation rights was a public official. The case marks the third time that a Texas appellate court has indicated that Article I, section 8 of the Texas constitution has greater breadth than the First Amendment. *HBO v. Harrison*, No. 14-96-01529-CV (Tex. Ct. App. Oct. 8, 1998).

Women on Trial

The appeal arose out of a defamation suit brought by Kit Harrison against HBO for alleged defamatory statements made in connection with the film, *Women on Trial*. The film was made by Lee Grant and her husband's production company, Joseph Feury Production, Inc. The film focused on women involved in child custody proceedings in the Texas courts and purported to give "voice to women who believed they were treated unfairly by the courts." *HBO v. Harrison*, No. 14-96-01529-CV, slip op. at 2 (Oct. 8, 1998).

During one of the proceedings, Kit Harrison was appointed to conduct a psychological evaluation of Sandy Hebert, her ex-husband, and the couple's children. Hebert sought a modification in custody because she believed that her ex-husband was abusing their young son.

The creators and producers of the Hebert segment conducted numerous interviews while researching the story. Among those interviewed were Hebert herself, "support groups, attorneys, child protective personnel, a reporter a police officer, the judge and [Harrison]." Slip op. at 3. Documents related to the case were also reviewed.

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Psychologist is Public Official

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After the film was aired, Harrison filed suit against HBO because he believed that the film "unfairly and falsely criticized his handling of the Hebert case." Id. HBO filed a motion for summary judgment, which was denied. HBO then brought an interlocutory appeal in the Fourteenth Court of Appeals.

Rosenblatt v. Baer

Initially the court noted that the *New York Times v. Sullivan* opinion had not addressed "how far down into the lower ranks of government employees the 'public official' designation would extend, and did not specify categories of person who would or would not be included." Id. at 5. Nor, the court noted, has the Supreme Court ever devised a specific test for determining who is a public official.

The court was, however, able to ascertain what the parameters of "public official" might be, relying on *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966). In *Rosenblatt*, the Supreme Court concluded that the public official designation does, "at the very least [apply] to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. . . ."

The court found that Harrison's primary duty as the court-appointed psychologist was to "arrive at an independent conclusion as to the mental health, stability, and status of the parents and the children." Slip op. at 6. But Judge Huckabee, who appointed Harrison, gave Harrison "more than just investigative powers. By court order, the trial court gave appellee the power to determine visitation between mother and child." Id.

Villarreal v. Harte-Hanks Communications, Inc.

The court found this scenario consistent with *Villarreal v. Harte-Hanks Communications, Inc.*, 787 S.W.2d 131, (Tex.App.--Corpus Christi 1990, writ denied) in which a Child Protective Services worker was found to be public official by virtue of the fact that the worker had "sufficient power to remove children or cause them to be removed, to place them in foster homes, and establish conditions governing the circumstances by which the parents could regain custody." Slip op. at 7. The *Villarreal* court reasoned that it would be difficult to argue that a child protective worker was not "a person occupying a post that invites public scrutiny." Id.

In a similar fashion, the HBO court noted, a Tennessee court found a junior social worker to be a public official. *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1987). There, the court indicated that "any position of employment that carries with it duties and responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family, is a public official within the meaning of the constitutional privilege." Id. at 441.

Harrison had been given comparable responsibility to that which was given in *Villerreal* and *Verran*. Harrison, the court noted, "*was* the judge, with the authority to determine Sandi Hebert's parental rights." Slip op. at 7. In this way, the court was able to attribute the exercise of sovereign power to Harrison, a power the court noted was a "fundamental attribute of public office." Id.

That Harrison Did Not Hold Government Office Was Irrelevant

The court rejected Harrison's arguments that he was not a public official because he did not hold public office, nor was he paid by the government. On the first issue, the court found that an individual could participate in government activities to such an extent that, regardless of whether the individual holds a formal position, he or she could be classified as a public official. Id. at 9. The phrase "governmental employee" was not limited to those

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occasions where a traditional "'employer-employee' relationship with a governmental entity" existed. Slip op. at 10.

The court distinguished *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). In *Gertz*, the court declined to extend public official status to an attorney who appeared at a coroner's inquest. The distinguishing factor for the *HBO* court was "the *power* bestowed on [Harrison] by the trial court -- a power that was absent in *Gertz*, and a power that is not possessed by attorneys who appear in court as representatives of clients." Slip op. at 10, n.4.

The court also distinguished *Gertz*, in that "the Supreme Court's decision in *Gertz* is based solely on the First Amendment, while this case embraces not only the First Amendment, but the protection of article 1, section 8 of the Texas Constitution. As many of our state courts have recognized, our constitution is in many aspects, is broader than the First Amendment." Id. (citing *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397 (Tex. 1988)).

The court did not find persuasive the argument that Harrison's's fees were not paid by the government. Because the parties were ordered by the court to pay Harrison's fees, the court reasoned that Harrison's argument was "rather disingenuous," holding that "where the paycheck comes from is not determinative because it has little if nothing to do with the standard set out in *Rosenblatt*." Slip op. at 11.

The Actual Malice Element

After determining that Harrison was a public official, the court addressed the summary judgment proof on the issue of actual malice. In Texas, summary judgment may be granted "on the basis of uncontroverted testimony of an interested witness as long as that evidence 'is clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies and could have been readily controverted." Id. at 11. While summary judgment is not appropriate if the credibility of the deponent is likely to be dispositive, summary judgment may be proper if the non-movant "must come forward with independent evidence to prevail" and fails to do so. Id.

HBO appellants Virginia Cotts, co-producer and principal researcher; Lee Grant, director and narrator, and officer of Joseph Feury Production, Inc.; and Sheila Nevins, vice-president of documentaries and family programming for HBO, submitted affidavits describing the research Cotts undertook and the supervisory process by which the film was researched, filmed, and edited. Cotts and Grant both swore that they believed the information presented in the film to be true, while Nevins stated that she had no doubts as to its truth.

The combination of the affidavits was sufficient, the court found, to negate the element of actual malice, and the burden shifted to Harrison. Harrison alleged a deliberate effort on HBO's part to "avoid the truth" and pointed out "obvious reasons" to doubt Sandi Hebert's veracity. He also argued that the failure to interview witnesses, who would have presented a different slant on the story, was evidence of actual malice.

Ultimately, "He Said, She Said"

Reviewing the evidence in a light most favorable to Harrison, however, the court found that the evidence showed at most: editorial choices, a difference in opinion and, at the worst, a failure to investigate.

Editorial choice is not evidence of actual malice, the court stated, citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). "The editorial choice to exclude certain information, in this case, interviews of people with a contrary view, is not specific, affirmative proof that shows appellant knew the publication was false or entertained serious doubts about its truthfulness." Slip op. at 16.

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On the issue of difference of opinion about whether Hebert's ex-husband had abused the couple's son, the court simply stated that "this does not prove that anyone involved in the production of the film subjectively believed the statements in the film were untrue." Id.

Finally, the court noted that "failure to investigate, without more, cannot establish actual malice" (citing *Gertz*). The evidence, ultimately, said the court, is nothing more than a "he said, she said" situation. Slip op. at 17. There was no evidence to show that "the allegations in the film were so improbable that including them amounted to recklessness." Id.

The Cotts Memorandum

Also at issue were statements about plaintiff in a memorandum written by Virginia Cotts. These claims were dismissed because the plaintiff failed to prove publication. The memo, once written, was kept it in the files of Joseph Feury Productions, Inc. and used solely for Cotts' reference.

Texas Constitution Gives Broader Rights Than the First Amendment

HBO v. Harrison marks the third time that a Texas appellate court has indicated that Article I, section 8 of the Texas Constitution confers broader rights to Texas citizens than those conferred by the First Amendment. *See also, HBO v. Dean Huckabee*, No. 14-96-01528 (Tex. App. Ct. Aug. 27, 1998); *Texas Monthly v. Stanley*, 1998 WL 437 417 (Tex. App.-Hous. (1 Dist.)).

> Throughout all of the versions of the Texas Constitution, the framers rejected language similar to that contained in the United States Constitution, which is written only to restrict the government's ability to abridge free speech. . . . . Instead, Texas chose a version of free speech that granted to the people an affirmative right to free speech.

Slip op. at 21.

Citing Texas' unique history of rebellion with Mexico, the court cites a desire by Texans to "ensure broad liberty of speech." Id.

Because of the breadth of Article I, section 8, nonmovants in summary judgment cases must come forward with "specific, concrete evidence of actual malice once the movant has negated that element as a matter of law." Id.

The defendants in this matter were represented by Jim George of George, Donaldson & Ford L.L.P. of Austin, TX.

Another Texas Court Rejects The Doctrine of Libel by Implication

Texas Interlocutory Appeal Statute Survives Challenge

By Laura Stapleton

Wayne Dolcefino, of recent Court TV fame from the Sylvester Turner libel litigation, wages another war. As was demonstrated during the Turner trial, (currently on appeal) the investigative reporter from Houston's KTRK, Wayne Dolcefino, can be a bit aggressive in his approach. In a recent case, another heated exchange from Dolcefino is looked at by the courts. Fortunately for media defendants, this time, the result reaffirmed narrow limits on libel by implication as a cause of action in Texas and upheld the constitutionality of the Texas interlocutory appeal statute. *KTRK v. Fowkes,* No. 01-96-01290-CV (D. Tx. Sept. 30, 1998)

Background Information

In the course of investigating a story for KTRK, reporter Wayne Dolcefino was irritated with the slow manner in which the City was forthcoming with requested documents. Dolcefino complained specifically about city employee Gordon Fowkes who worked as information manager for the city's Public Works and engineering Department. Dolcefino went to Fowkes supervisor, Hal Caton. Caton called Fowkes in to discuss the items Dolcefino and KTRK were requesting. A heated interchange ensued between Fowkes and Dolcefino in which profanities were exhanged. After this discussion, a new city employee was assigned to help Dolcefino with his requests.

Ultimately Dolcefino obtained the records he wanted and began a series of stories focusing on the propriety of city building inspectors taking free lunches from those who regularly required building permits or inspections. One portion of one of the broadcasts mentioned Fowkes as follows:

> [Dolcefino]: 13 Undercover complained often that City building officials were intentionally withholding records on Cude's consulting work during our investigation. A Channel 13 protest to City Hall led to the reassignment of the department's computer director, Gordon Fowkes. Fowkes's access to Building Department computers has now been limited.
>
> [Fowkes]: I am discouraged from being in my office and I am discouraged from doing certain kinds of actions.

As a result, Fowkes sued for defamation, intentional infliction of emotional distress, tortious interference with his employment relationship with the city, negligence and gross negligence. The trial court granted KTRK's summary judgment on the intentional infliction and negligence grounds and denied it as to the defamation and tortious interference claims.

Texas Interlocutory Appeal Statute is Constitutional

Under the Texas interlocutory appeal statute, KTRK appealed the denial of summary judgment on the defamation and tortious interference claims. Fowkes cross appealed and challenged the constitutionality of the interlocutory appeal statute. The right of the print or electronic media to make an interlocutory appeal in cases involving constitutional issues has existed in Texas since 1993. Mr. Fowkes challenged the constitutionality of the statue on the following grounds:

(1) the law was a "special law" in violation of Texas Constitution article III, section 56;

(2) the law violates the open courts guarantee of Texas Constitution, article 1, section 3; and

(3) the law violates equal protection provisions in the Texas and United States Constitutions.

The Court found that the statute was not a "special law" because there was a reasonable basis for the classification it makes, and because the law operates equally on behalf of those within the class, i.e. small newspapers are treated the same as large broadcasters. The rational basis for classifying the media differently and giving them the right to

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Texas Libel By Implication

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an interlocutory appeal was to "preserve the freedom of the press because the statute permits media defendants to appeal and obtain an immediate ruling on constitutional issues without incurring substantial expense."

The Court also found that the statute did not present an open courts violation because the Texas Civil Practices & Remedies Code provides for the recovery of attorneys' fees and costs incurred by the plaintiff in the appeal "if the order appealed from is affirmed." Thus, if the media defendant loses the interlocutory appeal, the plaintiff loses no money and is allowed to proceed to trial on his or her claims. If the media defendant wins, the plaintiff saves the cost of a trial and appeal where they will be ultimately reversed. Finally, the Court did not believe that this was a violation of the equal protection clause because it was rationally related to the legitimate state purpose of furthering the national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.

Interlocutory Appeal does not extend to Plaintiffs

The Plaintiff made a cross appeal from the granting of the defendants' motion for summary judgment on his intentional infliction claims. The Court determined that it did not have jurisdiction over the plaintiff's cross-appeal at this time. In making this ruling, the court relied on the statute itself which only confers jurisdiction on the media defendants and on a recent El Paso Court of Appeals decision which denied jurisdiction over the cross-claims of libel plaintiffs.[1] As a result, the Court declared that Texas Civil Practices & Remedies Code section 51.104(6) was not designed to benefit libel plaintiffs and declined to address the Plaintiff's cross-point of error.

Interlocutory Appeal extends to all Media Summary Judgment claims defended on First Amendment grounds

On the other hand, the Court would consider the non-libel claims on which the media defendants motion for summary judgment was denied so long as they were defended in whole or in part on free speech grounds. In this particular instance, in addition to the defamation claim being defended on free speech grounds, the tortious interference claim was challenged on the grounds of (1) it being indistinguishable from Fowkes's libel claim, (2) Dolcefino's actions being a bona fide exercise of his First Amendment rights, and (3) no damages.

Libel by Implication Rejected by Court

On appeal, the Court reversed the trial court's denial of the summary judgment on both the defamation and the tortious interference claims.[2] In ruling on the defamation claim, the Court found that the statements were substantially true.

Still, however, Fowkes complained that the statements made were libelous by implication. The Court found, relying on the Texas Supreme Court case of *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640 (Tex. 1995), that where the stated facts are substantially true, a plaintiff cannot assert a cause of action for libel by implication. Interestingly, although there was some dicta in *Randall's* to support the rejection of libel by implication in Texas, the ruling was based upon the statements having been true and qualifiedly privileged.

The Court also relied on its previous decision in *Hardwick v. HL&P*, 943 S.W.2d 183 (Tex. App.--Houston [1st Dist.] 1997, no writ) in which the Court stated "the implications of a true statement, however unfortunate, do not vitiate an affirmative defense of truth." After relying on both of these decisions, the Court stated:

> To hold otherwise would chill the reporting of factual news because one might always infer negative implications from an event that actually occurred. For example, members of the media could never report an employee was terminated for fear someone would infer the dismissed employee was dishonest or committed some heinous act. Likewise, members of the media could never report an individual was being questioned by police for fear a viewer might infer the interviewee was guilty of some reprehensible crime.

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Texas Libel By Implication

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Thus, because the Court found that the statements were substantially true, the Court found that the media defendants were entitled to summary judgment. As a result, the Court did not reach the more interesting discussion of whether the heated exchange between Dolcefino and Fowkes would support a claim of actual malice; however, this ruling is significant as another nail in the coffin of libel by implication in the state of Texas.

Laura Stapleton is with the firm Jackson Walker LLP in Austin, TX which represented Dolcefino and the station in this matter.

Endnotes

1. *TSM AM-FM TV v. Mecca Homes, Inc.*, 969 S.W.2d 448 (Tex. App.--El Paso 1998, writ denied). *See also, Rogers v. Cassidy*, 946 S.W.2d 439 (Tex. App.--Corpus Christi 1997, no writ)(court would not consider the separate appeal filed by a libel plaintiff after her summary judgment motion was denied).

2. Fowkes' tortious interference claim was also thrown out. He claimed that both the allegedly libelous broadcast and the fact that Dolcefino had gone to Fowkes's supervisors to complain about Fowkes intentionally withholding requested documents constituted tortious interference with his employment relationship. The Court dismissed the claim arising out of the libelous broadcast for the same reason that the defamation claims were dismissed -- it is well settled law that one cannot prevail on a nonlibel claim that is grounded on the same speech giving rise to a libel claim if the statements made are true or substantially true. With regard to the claims concerning interference arising out Dolcefino's discussions with Fowkes's supervisor, the Court found that there was no actual damages established by Fowkes. Although Fowkes was laterally transferred more than a year after the heated discussion with Dolcefino, his pay and his benefits remained the same at the City.

TEXAS COURT OF APPEALS REVERSES DENIAL OF "NO EVIDENCE" MOTION FOR SUMMARY JUDGMENT

By Charles A. Daughtry

A recent Court of Appeals decision in Texas held that 1) Texas' new "no evidence" summary judgment rule mandated that the Plaintiff must produce evidence of "actual malice" in order to preclude summary judgment in a public figure libel trial, and 2) that in the case of the "tag-along" tort of tortious interference with contract, the plaintiff must also raise a fact issue as to actual malice in order to avoid summary judgment.

In *Galveston Newspapers Inc. v. Norris*, No. 01-97-01381-CV, the Court of Appeals for the First District of Texas, in what is believed to be the first libel appeal decided under Texas' new "no evidence" summary judgment rule (Tex. R. Civ. Proc. 166a(i) (Vernon Supp. 1998)), unanimously held that "[Plaintiff's] concession of public figure or public official status places on him the burden of showing actual malice." Thus, in Texas, according to this decision, the libel defendant, in a public figure/public official case, is no longer obligated to negate actual malice as a matter of law in order to be entitled to summary judgment.

Additionally, and more importantly, the Court with reference to *Hustler Magazine v. Falwell*, held that Plaintiff's tortious interference with contract claim was a "tag-along" tort that required a showing of actual malice in order to preclude summary judgment in the newpaper's favor.

Finally, the Court held that Plaintiff's summary judgment affidavit alleging that one of the newpaper's reporters did not even read the loan document made the subject of the allegedly libelous articles did not rise to the level of actual malice.

Charles A. Daughtry, a partner in Houston's Mieszkuc, Daughtry & Scott, represented the media defendants in this matter.

Single Publication Rule Used to Dismiss Lawsuit in Texas

A Dallas weekly has won affirmance of summary judgement in the Second Court of Appeals of Texas, Fort Worth, on statute of limitations grounds. *Williamson v. New Times, Inc.*, No.2-97-178-CV (Aug. 6, 1998) At issue were statements made about plaintiff, a former Dallas school teacher, in the *Dallas Observer* and by the reporter on a Dallas radio station. Plaintiff had filed her claim on November 19, 1996, one year and four days after the radio broadcast and after the paper was put in the hands of its distributors. Texas has a one year statute of limitaitons for libel and slander actions.

The *Dallas Observer* is a free weekly, distributed through news racks. The paper is sent to the printer late in the week prior to its distribution. As a consequence, the issue bearing the cover date of November 16-22, 1995 was sent to the printer on November 14th and was made available for distribution on November 15th. Rejecting plaintiff's argument that the newspaper was published for the entire week that it was available in the news racks, the court held that November 15th was "the last day of mass distribution," the relevant date for this analysis under Texas law. The court also rejected plaintiff's attempt to come within the two-year statute of limitations afforded claims for "business harm," finding that the one year statute of limitations should apply "if the primary gravamen of the tort alleged is an injury to a personal reputation." Slip op. at 8.

Defendants were represented by Haynes and Boone, Thomas J. Williams, in Texas.

LARGEST LIBEL VERDICT IN VIRGINIA: Kim v. The Korea Times

In what is apparently the largest defamation award ever to be given in the state of Virginia, a Richmond Circuit Court jury awarded more than $1.5 million in damages to plaintiff, Sunny Kim, a community activist, against defendant, *The Korea Times*, a Washington D.C. based newspaper for a 1997 article that accused Kim of stealing money from a local senior citizens group. The amount includes $1 million in compensatory damages, $500,000 in punitive damages, and prejudgment interest from the date of publication of $80,000. *The Korea Times* has filed a post-trial motion seeking a new trial or at a minimum, remittitur of the award.

The dispute arose after the plaintiff, a well-respected member of the Korean-American community in the Richmond area, helped to develop a senior citizens center through a grant from the state. Subsequently, some former members of the group began to speak out against Plaintiff-Kim. This controversy led to an investigation by Defendant-*The Korea Times* which resulted in an article which accused the plaintiff of stealing money from the group in order to purchase a car and take long trips. Kim demanded a retraction and when the newspaper refused, he filed suit.

The defendant filed an answer denying the claims in the plaintiff's Complaint, but did not respond within the requisite time to the plaintiff's Requests for Admission. As such, under Virginia Supreme Court Rule 4:11, they were deemed admitted. Subsequently, the plaintiff filed a motion for summary judgment which was granted by the court. As a result of the court's ruling on the admissions, the jury considered evidence that only related to damages.

At trial, the defendant's attorney, Intak Lee, attempted to show that the plaintiff had not suffered any real damages -- Kim had no evidence of physical or reputational harm -- as a result of the article. But the plaintiff's attorney, Thomas Albro of Tremblay & Smith, LLP, told a local newspaper that character witnesses were a key part of making out the plaintiff's case and aided in establishing a case that the newspaper was publishing "clearly malicious rumors."

In its post-trial motion, *The Korea Times is* now represented by the Washington D.C. firm Wiley Rein & Fielding. According to Daniel Troy, who will argue the motion on behalf of the defendant, the defamation award far exceeded the largest Virginia defamation verdict upheld to date -- in the range of $100,000.

The motion is scheduled to be heard November 4th.

RICHARD JEWELL'S CLAIMS ALLOWED TO PROCEED AGAINST N.Y. POST

But Court Recognizes Incremental Harm Doctrine

By Charles J. Glasser, Jr.

In a hefty 127 page opinion issued in late September, Judge Loretta Preska of the United States District Court for the Southern District of New York dismissed some of Olympic Bombing Suspect Richard Jewell's libel claims against the publisher the *New York Post*, and allowed other claims to proceed to discovery. *Richard Jewell, v. NYP Holdings, Inc. d/b/a The New York Post*, 97 Civ. 5399 (LAP) (Sept. 30, 1998, S.D.N.Y). The most notable aspect of the opinion is that it is the first case in New York specifically allowing publishers to assert the "incremental harm" doctrine defense.

Judge Preska's opinion is also noteworthy for her breathtaking and detailed analysis of each and every one of the more than two dozen statements complained of. The *Post* raised defenses of lack of defamatory meaning, substantial truth, the wire-service defense, constitutionally protected opinion, and incremental harm to the more than two dozen individual statements complained of in the three articles, two photographs and editorial cartoon published by the *Post*.

Incremental Harm Doctrine Would Be Recognized By New York

The incremental harm doctrine holds that a communication which contains true, albeit derogatory, statements about the plaintiff and false defamatory statements, may not be actionable if the defamatory statements do not significantly add to the overall defamatory impact of the statement.

While recognizing that no reported New York state law opinion has explicitly addressed the doctrine, the court was guided by precedential discussion of the substantial truth and "libel-proof" plaintiff doctrines in *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F.Supp 742 (S.D.N.Y. 1981) and *Church of Scientology Int'l v. Time Warner, Inc.*, 932 F.Supp 589 (S.D.N.Y. 1996). Judge Preska predicted that New York courts would most likely adopt the doctrine based upon New York's historical "greater protection" of libel defendants under the New York State Constitution instead of the United States Constitution. Citing *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235 at 249, Judge Preska reiterated that:

> New York has chosen, in clear and unmistakable terms, to speak in terms of positive rights. . . . this considerable breadth of protection supports the view that the New York Court of Appeals would choose to adopt the incremental harm defense.

Slip op. at 99-101.

Overall Tone Contributes to Defamatory Meaning

Using the overall tone and tenor of the articles to leverage defamatory meaning into individual statements, Preska noted that:

> Many of the statements complained of are not defamatory when viewed in isolation, however when viewed in the context of the publications in question, which suggest that Jewell was responsible for a major act of terrorism and a deadly bombing, as to most of the statements, I cannot say as a matter of law that no reasonable juror would find the statements defamatory.

Slip op. at 16.

For example, when the statement that Jewell "spent most of his working days as a school crossing guard" is combined with the another statement in the Post that Jewell was "desperate to stand out as a hero," it would not be unreasonable, said the Judge, to find calling Jewell a "crossing guard" capable of a defamatory meaning:

> Although the term [school crossing guard] may have an entirely innocent meaning under some circumstances, it is reasonable to read these statements

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as aspersions on what [New York Post columnist] Andrea Peyser perceived to have been the trivial nature of Jewell's work history.

Slip op. at 20.

Similarly, *Post's* statements that Jewell was "a straight arrow who overdid everything", "over investigated everything" and was "desperate to stand out as a hero" are statements that a jury might find "portray Jewell in the negative light of contempt or aversion or induce an unsavory opinion of him in the community. " Slip op. at 22.

On the other hand, Judge Preska held that reporting that plaintiff had refused to talk to law enforcement without his lawyer present was not defamatory: "A newspaper should be able to print (even falsely) that an individual exercised a constitutional right without fearing a subsequent libel action." Slip op. at 30.

Photographic Libel Claims

Judge Preska refused to dismiss Jewell's claims related to one of the two photographs which appeared in the *Post*. The photograph portrays Jewell holding an automatic weapon wearing combat-style camouflage. The caption underneath the photograph read "DRESSING THE PART: Suspect Security Guard Richard Jewell clearly fits the profile of the bomber, say Federal Investigators."

The *Post* argued that the photograph and caption simply made the statement that Jewell looks like a person who might fit the profile of the bomber issued by the FBI. Preska rejected this argument, holding that statements suggesting that Jewell "fit the profile of the bomber" were capable of defamatory meaning. Moreover, Preska read the phrase "dressing the part" to mean that a reasonable jury would suggest that Jewell *was in fact* the bomber.

Preska dismissed Jewell's claims as to another photograph published by the Post on August 2. This photograph (which Jewell disputes is actually of him) portrays a person looking out from underneath the stairway of an Atlanta home. The rungs of the stairway, claimed Jewell, portrayed him "as an individual behind bars who was guilty of criminal involvement." Preska refused to accept this argument, holding that no reasonable reader would conclude that the *Post* was suggesting that Jewell was actually behind bars, especially because the caption of the photograph stated that Jewell was "peering from the stairway of his Atlanta home yesterday."

Wire Service Defense Needs More Facts

Judge Preska also denied the *Post's* motion to dismiss based on the "wire service defense." Although recognizing the defense, Preska found that because the reporters had no specific recollection of exactly *which* Associated Press reports they relied upon, a material question of fact precluded a motion to dismiss.

Preska had (at the invitation of defendants) converted this aspect of the motion to dismiss into one for summary judgment and granted Jewell the right to conduct limited discovery on the wire service defense issue by deposing *Post* staffers Andrea Peyser and Kyle Smith. Although they both emphasized that they had reviewed Associated Press dispatches prior to writing the articles, neither Peyser nor Smith, were able to state under oath with certainty exactly *which* of the many wire service reports they relied upon, nor did either have copies of the precise versions of those dispatches. Because the wire service defense is based on whether or not there was any reason for publishers to question the accuracy of the relied-upon report, reasoned Preska, "in the absence of a clear record on the critical issue of which reports were relied upon" Preska felt obligated to deny the motion on these grounds.

The Judge also denied the wire-service defense based on the *Post's* reliance on broadcasts made previously by CNN because the specific transcripts or other indicia of what was in the broadcasts were not in the record.

Cartoon Claim Dismissed

The Court dismissed Jewell's claim based upon an editorial cartoon published in the Post on August 1. That captionless cartoon pictured an office interviewer apparently reviewing the resumes of job applicants, each one dressed in either a black ski mask or Arab headdress, and each of

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JEWELL CLAIMS ALLOWED TO PROCEED AGAINST N.Y. POST

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which held bombs. The only words appearing in the cartoon were signs on the office wall reading "Olympic Security" and "Now Hiring." The court held that even assuming that the cartoon portrayed Jewell in a defamatory light by implying that he was in fact guilty of the bombing, the cartoon would:

> [S]till not be actionable because a reasonable reader would not view such a cartoon as a statement of fact; rather, given the inherent nature of a cartoon, a reasonable reader would view it as a statement of pure opinion not based on undisclosed facts.

Slip op. at 84.

Fact/Opinion Dichotomy

The Post also argued that several of the statements complained of by Jewell were expressions of opinion, and therefore, non-actionable protected opinion.

Acknowledging again that the New York State Constitution grants libel defendants greater protection than that offered by the U.S. Constitution, Preska, again citing *Immuno*, performed the fact/opinion analysis based strictly on New York State law.

Preska began by examining the broad context of the articles. While recognizing that they all had a "preliminary" tone with respect to the statements about Jewell being the FBI's prime suspect in the bombings, the judge refused to apply this to statements about Jewell's work history, and held that "the conclusion that Jewell was involved in the bombing was based, at least in part, upon his employment history and the fact that this history purportedly fit the profile of a bomber." Slip op. at 69. Although denying the motion to dismiss on this ground with respect to the news articles, Preska found that certain statements in the column published July 31 were non-actionable statements of opinion. Phrases like "village Rambo" and "fat, failed former sheriff's deputy," held the judge:

> [U]tilize hyperbolic language, lack a precise meaning and are incapable of being proven true or false. Words such as "Rambo", "failure" "home-grown failure" "disgraced" or "disaster" are indicative of terms which the average reader would understand to be statements of opinion.

Slip op. at 72, *citing Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976).

Continuing the fact/opinion analysis, Preska then applied New York cases analogous to *Milkovich*, wherein opinions based on undisclosed defamatory facts can be actionable. In so reviewing, the court found that other statements in the column, such as those about Jewell wrecking his squad car, or driving under the influence, are actionable even though in a context surrounded by hyperbole and heated rhetoric. Slip op. at 76.

The New York Post was represented by Squadron Ellenoff Plesent & Sheinfeld LLP Partner Slade R. Metcalf and Associate Melissa Georges. Charles Glasser, Jr. is with Squadron Ellenoff Plesent & Sheinfeld LLP.

New Claims Rejected in *Jewell v. WABC Radio*

In a decision handed down the same day as her ruling in *Jewell v. NewsAmerica*, Judge Preska of New York's Southern District refused to allow Jewell to add new defendants in his lawsuit against WABC-AM Radio and talk-show host, "Lionel" Michael Lebron. *Jewell v. WABC-AM Radio*, 97 Civ. 5617 (LAP) (S.D.N.Y. September 30, 1998). Plaintiff-Jewell sought leave to amend his original complaint after the statute of limitations had run to add sixteen new allegedly defamatory statements, nine of which were made by defendant-Lionel and the remainder of which were attributable to five individuals not previously identified in the complaint, but who participated in the radio broadcasts at issue in the suit.

Judge Preska held that the plaintiff could only amend his complaint pursuant to Fed.R.Civ.P. 15, as it related to statements made by individuals already identified in the initial complaint, in this instance Lionel alone. Statements made by other individuals were barred by the statute of

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Jewell

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limitations.

The analysis, Judge Preska stated, turned on whether the new allegations "arose out of the conduct, transaction or occurrence attempted to be set forth in the original pleading" and whether the opposing party had adequate notice.

> "An amendment will not relate back if it sets forth a new set of operational facts; it can only make more specific what has already been alleged. [cite omitted] Amendments alleging the separate publication of a libelous statement may be subject to the defense of statute of limitations because they fail to satisfy the transaction standard contained in Fed.R.Civ.P. 15(c)." Slip op. at 5.

The addition of statements by new individuals, the court holds, "introduces a new set of operational facts," and allowing their introduction into the litigation at this point would afford plaintiff an improper means of circumventing the statute of limitations. Slip op. at 6.

The defendants are represented by Gregory L. Diskant and Jeffrey Blum of Patterson, Belknap, Webb & Tyler in New York.

New Hampshire Federal Court Denies Expansion Of Libel and False Light Suit

By William Chapman

The United States District Court for the District of New Hampshire, in an order dated October 5, 1998, refused to allow Robert Gray, the former Chairman of Hill & Knowlton Worldwide, to add 20 statements to his suit against St. Martin's Press. *Gray v. St. Martin's Press*, No. 95-285-M (D. NH Oct. 5, 1998) The court held that plaintiff failed to adequately explain filing amendments more than 6 years after publication of the book at issue, and three years after filing the initial complaint. The case arises out of the July 1992 publication of *The Power House* by Susan Trento, who also is a named defendant. The book chronicles Gray's career as one of Washington's most prominent and highly visible lobbyists and influence peddlers.

Gray filed suit in June 1995, complaining about eight specific statements in the book. Early on, St. Martin's advised the court it would move for summary judgment on the grounds of lack of actual malice and opinion. The court limited the initial discovery to only those issues. In March 1998 it ruled that there were disputed issues of fact concerning actual malice and denied St. Martin's motion on that ground. But it dismissed three of the eight statements, agreeing with St. Martin's that they were protected opinion.

In July 1998, Gray sought leave to amend his complaint by adding 20 statements. St. Martin's and Ms. Trento opposed the motion on two grounds. First, they argued that it did not relate back under Fed. R. Civ. P. 15(c) and, therefore, was barred by New Hampshire's three-year statute of limitations. Second, they argued that under controlling First Circuit precedent Gray had failed to provide the court with a sufficient reason to explain his three-year delay in seeking to amend the complaint. The court agreed with the second point and thus found it unnecessary to reach the statute of limitations issue.

The court began its discussion by noting that because of Gray's "undue delay," the burden was on him to demonstrate "some valid reason for his neglect and delay." The only reason offered by Gray was that he had directed his efforts to opposing Ms. Trento's motion to dismiss for lack of jurisdiction and St. Martin's motion for summary judgment. The court was not persuaded. It presumed that both Gray and his counsel had carefully read the book prior to filing suit and would have been aware of all statements they considered to be false. The court expressed concern about the timing of the amended complaint, coming only after the court dismissed three of the original eight statements. Finally, the court stated that the proposed five-fold increase in the scope of the complaint would substantially prejudice the defendants. It noted that some of the witnesses the defendants would have called had died or could not be located, and it presumed that the memories of other witnesses "have likely faded." In conclusion, the court concluded that all the relevant factors pointed toward denying Gray's motion.

St. Martin's Press and Susan B. Trento are being represented by William L. Chapman of Orr & Reno, P.A., Concord, New Hampshire, and John C. Lankenau, of Davis Wright & Tremaine LLP, New York, New York.

California Court : First Amendment Requires Constitutional Malice in Trade Libel Claims

By Guylyn Cummins

On September 29, 1998, the Fourth District Court of Appeal, Division One, in San Diego, California, reversed a libel verdict in excess of $1,500,000 in *Melaleuca, Inc. v. Hulda Regehr Clark*, clarifying important constitutional protections in trade libel claims, including the requirement that plaintiffs prove actual malice. *Melaleuca v. Clark*, Super. Ct. No. 689466 (Ct. App. CA Sept. 29, 1998)

The Author's Unique Science

Dr. Hulda R. Clark, Ph.D., an independent research scientist, developed new technology, a syncrometer which she claims is capable of detecting the presence of carcinogenic chemicals, such as benzene, in trace amounts in certain products. Clark is the author of two books which advocate avoidance of such products for health reasons.

In her books, Clark stated that she had found benzene in Melaleuca products, a company which sells a line of personal hygiene, cosmetic, household cleaning, over-the-counter pharmaceutical, nutrition and pet care products. Melaleuca retained an independent laboratory to conduct tests of its products using conventional gas chromography and mass spectroscopy, which found no benzene. Melaleuca then sued Clark for libel, defamation, trade libel, negligence and other economic interference claims.

At trial, Melaleuca moved in limine to prevent Clark from attempting to establish the truth of her statements by relying on her synchrometer. Melaleuca's expert testified at trial that there was no accepted scientific basis for the syncrometer testing advocated by Clark in her books.

The trial court ruled that Clark's synchrometer testing was not an accepted scientific procedure in accordance with a *Kelly-Frye*[1] analysis for evaluating the admissability of scientific technique, and held she could not use it to establish the existence of benzene in Melaleuca products. The trial court did permit Clark to present evidence that she used the synchrometer in order to establish her state of mind at the time she published the books.

The jury found Clark's statements were false, and that while she did not know they were false, she nonetheless published the statements in reckless disregard of whether they were false. The jury awarded $6,000 in special damages and $178,000 in presumed damages on the defamation claims. With respect to the economic interference claims, the jury found that Melaleuca suffered an additional $366,000 in compensatory damages. The jury awarded $1,000,000 in punitive damages, finding that Clark acted with oppression, fraud and malice in making the statements.

Following the entry of judgment on the jury's verdict, the trial court granted Melaleuca a permanent injunction against Clark, preventing her from publishing the defamatory statements about Melaleuca products. Clark appealed.

The Appellate Court's Kelly-Frye Analysis

The appellate court, like the trial court, determined that Clark's statements involved matters of public concern, and that Melaleuca had the burden of establishing Clark's statements were false. While noting the sparseness of legal authority with respect to using experts in defamation actions to establish truth or falsity, the court first held that, in appropriate circumstances, a plaintiff may rely upon expert testimony to establish the falsity of statements made.

In cases where one of the underlying disputes is over the chemical or biological make-up of a particular material, the court reasoned there was no inherent impediment to the use of expert testimony to establish the falsity of factual statements. Likewise, the court found that a defamation defendant may find it helpful or necessary to present expert testimony as to the truth of the allegedly defamatory statements.

Having recognized the propriety of using expert testimony, the court turned to whether Clark's testimony passed scrutiny under a *Kelly-Frye* analysis. Under *People v. Kelly*, 17 Cal. 3d 24, 30 (1976) when an expert offers testimony which is based upon the application of a new scientific technique, the party offering the expert's testimony must demonstrate that the technique is sufficiently established to have gained general acceptance in the particular field in which it belongs.

The court found no reason that litigants in defamation

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actions should be able to avoid the constraints of the *Kelly* rule, as both have an interest in preventing the use of purely experimental techniques to persuade the trier of fact on the issue of truth or falsity. Moreover, the court reasoned that a defamation defendant has other important defenses to protect it from liability even where it has relied on unproven scientific techniques.

Because Clark offered no evidence to show her synchrometer testing had been accepted in any field of chemistry, she could not show the synchrometer testing met the requirements of *Kelly*. Accordingly, the court ruled there was no error in preventing Clark from using synchrometer testing as a means of proving the truth of her statements.

Constitutional and Common Law Analysis Both Lead to Actual Malice

With respect to constitutional malice, the appellate court first noted that the law governing defamation and injurious falsehood is essentially liberal and designed to assure the free flow of information in our society. The principal means by which the flow of information is protected is the requirement that a defamation or injurious falsehood plaintiff prove a defendant spoke with some degree of culpability.

In cases involving the reputation of a private figure, California permits private individuals to recover liability for damage to their reputation on the basis of negligence.

Importantly, the court found, where a defendant's statements do not impugn the reputation of a plaintiff -- either individual or corporate -- there is considerably less justification for permitting liability to be imposed on the basis of negligence alone. Accordingly, where the unique interest that individuals and business organizations have in their reputation is not implicated, the court reasoned that the public's interest in avoiding self-censorship requires that the highest standard of culpability be applied.

In the context of allegedly false statements about the contents or quality of a product, the court ruled a plaintiff must demonstrate the highest degree of culpability, i.e., the defendant's actual knowledge of falsity or actual serious doubts as to the truth of his or her statements.

This standard, the court found, was based on the distinction at common law that has always given the owner or marketer of a product very limited rights against the publisher of statements which disparage the product (see Restatement (2d) Torts, § 623A and § 626). The public has always had a well-recognized interest in knowing about the quality and content of consumer goods.

The common law distinction was further buttressed by the constitutional preference for the free exchange of ideas established in *New York Times v. Sullivan* (1964) 376 U.S. 254. In the *New York Times* decision, the Supreme Court borrowed the common law standard that a speaker disparaging a product must know his or her statements are false or act in reckless disregard of their truth or falsity. After the *New York Times* decision, the *Clark* court reasoned that the First Amendment will not permit liability to be imposed for injurious falsehood absent a showing of constitutional malice.

Clark's statements were made in the context of books espousing her scientific theories and advocating the adoption of what she believes are healthy nutritional practices and the avoidance of substances she believes cause serious illnesses. Because her statements reflected merely upon the quality of the products Melaleuca sold, the court found there was no disparagement of the company's reputation and thus Melaleuca's claim was simply one of trade libel. Accordingly, the judgment of Melaleuca could not be affirmed absent the jury's finding that Clark spoke with constitutional malice.

California's BAJI 7.04.1 Instruction on Constitutional Malice Invalidated

Using California Form BAJI 7.04.1 on constitutional malice, the trial court had instructed the jury that they could find Clark spoke with constitutional malice if she "must have had" serious doubts about the truth of her statements concerning Melaleuca's products. Because the jury had found Clark did not know her statements were false, Clark argued on appeal that the instruction was confusing because it suggested to the jury that so long as a reasonable person in Clark's position would have had serious doubts about the truthfulness of her statements, *Clark* acted with constitu-

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tional malice. The appellate court agreed.

As the law is clear that a finding of constitutional malice is a subjective standard, objective recklessness or doubt can not survive constitutional scrutiny, the *Clark* court held. In this regard, the court noted that the United States Supreme Court has repeatedly eschewed liability based on what a speaker "must have realized." The appellate court stated that such reasoning may be adequate when an alleged libel purports to be an eyewitness or other direct account of events that speak for themselves; however, such deductive analysis is inadequate when the libel is based on choices the defendant has made in describing what others have written or said or, as in this case, drawn conclusions from extensive or complex research.

Because the instruction allowed the jury to draw the inference as to what Clark "must have believed," the verdict could not stand. In assessing the prejudice from the erroneous instruction, the court noted the record could support a belief that Clark was as concerned and sincere about her findings as any of history's scientific iconoclast. Further, the jury had found she did not know her statements were false. In light of these circumstances, the court had little doubt that Clark would have obtained a more favorable verdict had the jury been properly instructed.

Endnotes:

[1] The *Kelly* rule, from *People v. Kelly*, 17 Cal. 3d 24,30 (1976), had as its federal counterpart the rule from *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), sometimes known as the *Kelly-Frye* rule. Frye has been replaced by *Daubert v. Merrill Down Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), which requires in lieu of general acceptance of the technology in the scientific community, that the trial judge find the proffered scientific evidence will assist the trier of fact to understand or determine a fact issue.

Guylyn Cummins is with the firm Gray Cary Ware & Freidenrich in San Diego, CA and represented Dr. Clark on the appeal of this case.

Public Figure Status Question for Judge, Not Jury

By William P. Robinson

The First Circuit recently ruled that the "question of whether a defamation plaintiff is a public figure is properly resolved by the court, not a jury, regardless of the contestability of the predicate facts." *Pendleton v. City of Haverhill* 1998 WL 537823 at *10. Consequently, the Court of Appeals affirmed the district court's ruling that an African-American candidate for a public school teaching position, who was profiled in a newspaper article about his quest for the position, and who was quoted as decrying the paucity of minority teachers, is a limited-purpose public figure with respect to a police officer's published comments that Pendleton was a "drug user in need of rehabilitation." WL 537823 at *2.

Shortly after the police officer's statements, Pendleton was terminated from his position as a school counselor. Previously, Pendleton had sought a position as a public school teacher, after having worked as a substitute teacher for several years. Pendleton announced his candidacy to become a permanent teacher through a newspaper article published in mid-1993 where he addressed his lifelong dream of teaching and his experience working with Haverhill youths. In addition to conveying Pendleton's view's, the article addressed recent racially motivated incidents at Haverhill High school where the students called for more minority teachers. Both Pendleton and his attorney had also been interviewed by a competing newspaper after the drug charges were dismissed.

In *Pendleton*, the plaintiff argued that under *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (Mass. 1975) the public figure status decision should be made by the jury. The *Stone* court applying a more particularized interpretation, held that a court may only make the public figure determination if the facts which bear on that determination are uncontroverted. In *Pendleton*, the parties disagreed as to whether

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Public Figure Status Question for Judge, Not Jury

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Pendleton injected himself into a public controversy to such an extent that he became a limited-purpose public figure. The court stated that the question of status was one of "constitutional dimension" and, therefore ruled that federal law controls. Under federal law, the status issue would be treated as a question of law. Seeking to bolster its reasoning, and quoting *Rosenblatt v. Baer,* 383 U.S. 75, 88, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966), the court also suggested that a jury "might use the cloak of a general verdict to punish unpopular ideas or speakers." 1998 WL 537823 at *9. Pendleton argued that the slanderous language used by the police officer caused him to lose his job, depriving Pendleton of a constitutionally protected liberty. However, the Supreme Court has long since determined that defamation, even from a government actor, "does not in and of itself transgress constitutionally assured rights." 1998 WL 537823 at *4. Precedent establishes that deprivation of a constitutionally protected liberty interest is actionable when, in addition to mere reputational injury, the words spoken by the government actor "adversely impact a right or status previously enjoyed under state law." 1998 WL 537823 at *4.

The court disagreed with Pendleton's argument because the alleged slanderous statement and the decision to fire Pendleton came from two separate, unrelated sources. Pendleton worked for a non-governmental employer and was terminated from a private, not a public position. Moreover, Pendleton's employer gave several other reasons for its decision to terminate him. Therefore the defamatory remarks could not be viewed as forcing a denial of a previously recognized right or status according to the court. While Pendleton conclusorily attributed loss of his job to the police officer's remarks, the court held that Pendleton did not produce evidence sufficient to permit a finding that the remarks prompted his employer to fire Pendleton.

In keeping with the spirit of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) the Pendleton court determined that Pendleton had "access to the channels of effective communication" 418 U.S. at 344, as evidenced by the article on his teaching bid, and the fact that his arrest made the front pages of both the local newspapers. However, Pendleton's article on his teaching bid left no doubt that an independent public controversy existed within Haverhill to increase minority faculty representation. The court determined that Pendleton voluntarily injected himself into this preexisting controversy.

The court bolstered this argument, citing *Rosenblatt*, 383 U.S. at 85-86, for the proposition that if a person holds or aspires to hold any public post which entails control over matters of substantial public concern, then their "qualifications for serving in that capacity are likely to engender the type of public debate and discussion that the First Amendment protects." 1998 WL 537823 at *12.

The court found that Pendleton thrust himself into the public debate after seeking to influence public opinion on the desirability of minority hires and the virtues of his own candidacy. As a result, Pendleton's criminal charges were not irrelevant to his bid for a teaching position. Having thrust himself into the realm of public opinion, the court determined that Pendleton assumed the risk that the discourse might contain factual errors. Absent a showing of actual malice, therefore, the court ruled that the defendant could not be held liable for defamation.

William R. Robinson is with the firm Edwards & Angell in Providence, RI.

"FIRED FOR INCOMPETENCE" HELD TO BE OPINION

A statement by a campaign committee member who was also its lawyer that a former campaign financial officer was "fired because of incompetence" was found to be nonactionable opinion by an Illinois appellate court, affirming a trial court's decision to dismiss plaintiff's suit. *Hopewell v. Vitullo*, No.1-97-3946 (Sept. 22, 1998).

The allegedly defamatory statement was made to the press regarding a lawsuit filed by Hopewell against the Carol Moseley Braun for U.S. Senate Committee and the Senator herself, and in response to comments made by Hopewell and his lawyer to the media, in which it was alleged, among other things, that the campaign retaliated against Hopewell because he objected to certain campaign finance irregularities. Applying the post-*Milkovich* test in Illinois -- (1) whether the language has a precise and readily understood meaning; (2) whether the general tenor of the context in which the statement appears negates the impression that it is factual; and (3) whether the statement is susceptible being objectively verified as true or false -- the court found that the statement was nonactionable.

Lastly, and seemingly in addition to the specifics of the three-part test, the court looked at the statement in its social context and setting, finding that in the current political climate, where the campaign had been served up a barrage of accusations, the response would not seem to listeners more than rhetoric without specific factual basis.

The defendant, Wildman, Harrold, Allen & Dixon, attorney-Louis Vitullo's law firm, was represented in this matter by Paul Levy, Phillip Zisook and Brian Saucier, of Deutsch, Levy & Engel in Chicago.

Criminal Libel Statute Struck Down in Nevada

By Kevin Doty

The Nevada Attorney General has stipulated to a judgment declaring Nevada's criminal libel law unconstitutional. *Nevada Press Association v. Frankie Sue Del Papa*, CV-S-98-00991-JBR (1998) The judgment includes a permanent injunction barring enforcement of the 87-year-old law. In July, the Nevada Press Association filed suit in federal court seeking to have the law declared unconstitutional on its face since the law vaguely defines libel and provides that truth is only a defense if the allegedly libelous statement was published "for good motive and for justifiable ends."

The definition of libel set forth in NRS 200.510(1) includes expressions that tend "to blacken the memory of the dead" and the publishing of "the natural defects of a living person." *Falsity is* not an element of this definition. Pursuant to NRS 200.510(3), a jury may acquit the accused upon a finding "that the matter charged as libelous is true and was published for good motive and justifiable ends."

The "good motives and justifiable ends" limitation on the truth defense in criminal libel statutes was analyzed by the United States Supreme Court in *Garrison v. State of Louisiana,* 379 U.S. 64, 70-73, 85 S.Ct. 209, 213-215 (1964). The Supreme Court declared this limitation unconstitutional, at least as it applied to a criminal libel prosecution based upon a publication that criticized "public officials and their conduct of public business." The judgment entered in Nevada declares Nevada's criminal libel law unconstitutional in all applications.

In 1916, Nevada's criminal libel law was used to prosecute Bill Booth, a newspaper editor in Tonopah, Nevada. Booth published an article in the Tonopah Daily Bonanza suggesting that then-Nye County District Attorney John Sanders had taken a bribe to favor certain brothels in an ordinance restricting prostitution in Tonopah. Sanders responded by bringing criminal libel charges against Booth. A jury found Booth guilty of a gross misdemeanor and he was sentenced to six months in the Nye County jail. The Nevada Supreme Court denied Booth's appeal. *In the Matter of Booth*, 39 Nev. 183, 154 Pac. 933 (1916) (denying Booth's request for habeas corpus relief based on the fact that the indictment charged him with a felony and not a gross misdemeanor). The Nevada Pardons Board, citing Booth's age and health, ordered Booth released after he had spent only two weeks in jail.

Although no successful convictions for criminal libel had been reported in Nevada since 1916, the threat of prosecution remained. In 1992, a Nevada district attorney cited the criminal libel statute in a letter mentioning possible legal action against a newspaper that had published an editorial criticizing her official conduct. The Nevada Press Association decided to file suit to prevent the chilling effect that results from the threat of prosecution and, as a matter of principle, to invalidate a law that allows a person to be thrown in jail for doing no more than speaking the truth.

Kevin Doty, an attorney with Lionel Sawyer & Collins in Las Vegas, Nevada, serves as General Counsel to the Nevada Press Association.

CALIFORNIA COURT STRIKES LIBEL SUIT UNDER ANTI-SLAPP LAW

Article is Fair Report

By Roger R. Myers and Joshua Koltun

A San Francisco Superior Court judge in July granted the special motion of the *San Francisco Examiner* and one of its reporters to strike a defamation lawsuit under California's anti-SLAPP legislation. The court ruled that an article reporting on allegations of gay domestic violence reflected in court records and police reports was protected not only by California's statutory "fair report" privilege but also by the First Amendment. *Sison v. San Francisco Examiner*, Case No. 992855 (S.F. Super. Ct. July 31, 1998).

Pursuant to the anti-SLAPP law, which mandates an award of fees to a prevailing defendant, the order also provides that the *Examiner* and reporter Katherine Seligman will recover their attorneys' fees and costs. The libel suit arose out of a February 1997 *Examiner* article by Seligman concerning the issue of domestic violence in gay relationships, a growing problem -- one counseling agency noted 347 cases in San Francisco during 1995 alone -- that the local gay community has been reluctant to report or speak out about because of concerns over police and public reaction.

To illustrate the potential severity of the problem, the *Examiner's* article focused on one man, Mark Ankeles, who had died two months earlier of a heart attack that family, friends and legal advocates considered a byproduct of an allegedly abusive longterm relationship. According to tape recordings and a diary that Ankeles left behind, his lover, identified in the article by the pseudonym "Jason," had assaulted, beaten, bloodied and threatened Ankeles with firearms on numerous occasions during an 18-year relationship.

Alleging that the accusations of abuse were false and had been concocted to aid Ankeles' position in a court battle to divide the couple's property, Jason sued the *Examiner*, Seligman and one of the *Examiner's* sources for the story. The *Examiner* and Seligman responded by filing a demurrer and special motion to strike under California's anti-SLAPP statute, Code of Civil Procedure § 425.16.

The anti-SLAPP statute applies to any lawsuit arising out of defendant's conduct "in furtherance of ... the constitutional right of free speech in connection with a public issue or an issue of public interest." The statute defines this clause to include, among other things, "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law."

The *Examiner* and Seligman argued that the article qualified under this definition because Ankeles had sought and obtained in family court a TRO against Jason, and later filed several police reports alleging violations of the TRO, and the allegations in the judicial and police records largely reflected the allegations in the article. In addition, the *Examiner* and Seligman argued that a report about domestic violence in the gay community met the alternative "public interest" test for invoking the statute.

The superior agreed and ruled that Jason's complaint arose out of defendants' conduct in furtherance of their free speech rights in connection with a public issue. The burden then shifted to plaintiff to establish a probability that he could prevail on his claim. The court found that plaintiff had failed to make this showing because, "[a]s a 'fair and true' report of allegations made in and concerning judicial and police proceedings, the *Examiner's* article is privileged under Civil Code § 47(d) and the First Amendment."

After granting the motion to strike, the court ruled that the demurrer was moot.

Messrs. Myers and Koltun, who are with Steinhart & Falconer LLP in San Francisco, CA, represented the media defendants San Francisco Examiner *and Katherine Seligman in this matter.*

Maine Supreme Judicial Court Affirms Jury Verdict

By Bernard J. Kubetz

A Navy employee, who also served as a town selectman in Maine, won affirmance of a $125,000 judgment against the *Bangor Daily News*. *Beal v. Bangor Publishing*, 714 A.2d 805 (Me. 1998). The suit was the result of two newspaper stories which reported on disciplinary steps taken against Melrose Beal by his Naval superior, Thomas Shea.

Plaintiff Beal was employed as civilian security guard at the local Navy base. The town selectmen put out to bid an old radar gun and Beal's boss, the head of Navy security, arranged with the town police chief to borrow the radar gun to check out if it was compatible with the Base transmitter equipment. Beal learned of the radar gun loan at his Navy job and complained to the town manager that the loan had occurred without authorization from the selectmen.

The town manager suspended the police chief and demanded that Shea immediately return the gun. Shea did so but immediately confronted Beal and accused him of breaching national security by going off Base with sensitive Navy information and said he was "going to have Beal's ass because of his interference between governmental departments." From that point until Beal's retirement 19 months later, Shea and Beal did not speak to each other.

Beal lodged a complaint with his union about his confrontation with his boss and a grievance was prepared but not filed. His union representative prepared a memoranda of his discussions with Beal, reporting that Shea admonished Beal that Shea was going to "hang my ass," that his job as selectman was interfering with his Base job, and that he breached national security by alerting the town manager of the town's loan to the Base.

Immediately after the radar gun incident, Beal and his security detail were reassigned from the public entrance at the Base to a guard shack at a more isolated gate, where there is little contact with the public. The reassignment had been planned for some time and was unrelated to the radar gun incident.

The *Bangor Daily News* reported on the police chief's suspension and that Beal had been reprimanded for breaching national security and violating conflict of interest rules. It also reported, incorrectly, that Beal was reassigned because of the radar gun incident. As a result, Shea himself was reprimanded by his superiors for speaking to the media. The newspaper published a correction but Beal sued the newspaper for defamation. At trial, all of the reporter's sources "dried up." No one, including Shea, acknowledged talking to the reporter. The jury found Beal's conduct did not constitute a breach of national security, concluded the gate transfer statement to be defamatory and determined that it had been published with actual malice.

The Maine Supreme Court affirmed, concluding there was enough evidence to support the verdict. The "sting" of the articles was the erroneous assertion that Beal had violated Navy security rules and had thus been reassigned to a remote security post on the Base. According to the Court, the logical inference of "this erroneous and defamatory statement was that the Navy considered Beal to be a security risk requiring sequestration from the general public." The Court noted that on determinations of credibility, it would defer to the fact finder who had the unique opportunity to observe the demeanor of the witnesses.

This "mouse that roared" may represent one in a continuing cycle of anti-media jury awards. Beal was a lifelong resident of the community, while the newspaper is based 75 miles away and is the only daily to serve that area of Maine. The reporter and key editor had left the paper after the articles were published, and both came from other states to testify at trial. Although instructed that Beal was a public figure, the jury evinced little understanding of "actual malice." In a post-trial interview, a juror claimed that the jury understood actual malice and that why they awarded no consortium damages to Beal's wife.

Bernard J. Kubetz is with the firm Eaton, Peabody, Bradford & Veague, P.A. in Bangor , ME and represented Bangor Publishing in this matter.

Granada Television Libel Settlement

One More Case For A "Public Defense" in England

By Amber Melville-Brown

Granada Television has settled a libel action brought by three police officers over allegations in a 1992 World in Action programme that they fabricated evidence against a prisoner accused of murdering his cell mate and perjured themselves at the accused's trial. *Peter Bleakely, Paul Giles, Emlyn Welsh v. Granada Television Limited*

While Granada apologised to the officers and withdrew the allegations, a post-settlement statement insisted that the programme had not alleged that the officers had been involved in the murder and had explicitly said they did not know who the killer was. In its statement, Granada said the programme was investigated with 'painstaking care'.

This case raises the issue of the danger faced by broadcasters -- and publishers -- reporting investigative stories in the public interest. Whereas in US it is likely that the programme makers would have been protected by the constitutional requirements and limitations on libel -- established in the case of *New York Times v Sullivan* (1964) and its progeny and adopted to some extent under the guise of qualified privilege in Canada, Australia and New Zealand -- what is commonly referred to in the U.K. as the "public figure defence" -- no such protections are available in the UK, despite much criticism of the incumbrance this places upon journalists investigating in good faith alleged wrong-doing and corruption.

The Police Federation is the only trade union to fund libel actions on behalf of its members. A plethora of 'conservatory cases' - so named because the spoils pay for a conservatory - are taken every year, usually against small local papers who cannot afford to defend themselves and are forced into early settlement.

In *Reynolds v. Times Newspapers Ltd* & Others 8 July 1998, the defendants appealed against the decision of Mr Justice French in a libel action brought by the former Taoiseach of Ireland, Albert Reynolds, over a publication relating to the political crisis in Ireland which led to his resignation. They failed - many think surprisingly - to establish a UK public figure defence through the back door of qualified privilege.

The Court of Appeal considered the qualified privilege defence in some depth and has set clearer guidelines for its availability. It specifically stated that in order to maintain the proper balance between freedom of speech and the right to reputation of an individual engaged in public life, the common law qualified privilege defence is available to a newspaper - and presumably broadcaster by analogy - provided that:

-- the false publication was made honestly;

-- in performing its task of informing the public the newspaper had a legal, social or moral duty to the general public to publish the material;

-- the general public had a corresponding interest in receiving the information;

-- the nature, status and source of the material and the circumstances of this publication were such as to warrant the protection of privilege in the absence of malice.

Although Granada attempted to plead the defence of qualified privilege, this was thrown out at an interlocutory hearing last year before the *Reynolds* decision. Ian McBride managing editor of factual programmes at Granada says the public figure defence in the UK is long overdue. 'Broadcasters have a statutory obligation under the Broadcasting Act to broadcast quality national and international current affairs. The public figure defence would be invaluable in ensuring that challenging journalism in an area as difficult as this can be honestly pursued.'

Amber Melville-Brown is a defamation specialist solicitor at Stephens Innocent in London

WASHINGTON RECOGNIZES INVASION OF PRIVACY CLAIM FOR PUBLICATION OF PRIVATE FACTS

By Gerry A. Reitsch

In a recent unanimous decision the Washington Supreme Court specifically recognized common law invasion of privacy in four non-media consolidated cases. Summary judgment for the defendant county was reversed and the cases were remanded for trial. *Reid v. Pierce County*, __ Wn.2d __, 961 P.2d 333 (1998).

Washington appellate courts have frequently referred to the tort of invasion of privacy in various settings including media cases. In none of the cases, however, has the court permitted a privacy claim to go to trial or permitted an award of damages. Most recently, the Court of Appeals, Division I, affirmed dismissal of a non-media disclosure of private facts case, holding that the tort had never been recognized in Washington. *Doe v. Group Health Cooperative of Puget Sound Inc.*, 85 Wn. App. 213, 932 P.2d 178 (1997).

In *Reid*, the families of four decedents alleged that employees of the Pierce County Medical Examiner's Office had taken or obtained photographs of their next of kin and showed them to others without consent of the families. In the most egregious case, the niece of former Washington governor Dixie Lee Ray alleged that employees of the county showed photos of the governor's corpse at cocktail parties. Plaintiffs in the other cases were relatives of a former mayor of Tacoma, a woman who died of a drug overdose, and a man who died of strangulation in an accident involving a power tool.

The plaintiffs alleged outrage (equivalent in Washington to intentional infliction of emotional distress), negligent infliction of emotional distress, common law invasion of privacy, and violation of plaintiffs' constitutional right of privacy under the state and federal constitutions. All claims were dismissed by the trial courts on motions for summary judgment.

On appeal, the Supreme Court affirmed dismissal of the outrage claims since none of the plaintiffs had been present when any photograph was displayed and had only learned of the conduct sometime later. Likewise, dismissals of the negligent infliction claims were affirmed under the same reasoning.

Dismissals of the invasion of privacy claims, however, were reversed. The court cited Restatement (Second) of Torts § 652D with approval and held that publication of private facts is actionable in Washington. The court referred to an earlier public records case, *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978), in which it had affirmed a trial court order requiring disclosure of certain information in the tax records of the county assessor, who was alleged to have granted special favors to individuals contributing to his reelection campaign. In *Hoppe*, the court said, it had adopted the Restatement definition of right to privacy in ruling on whether that right would be violated by disclosure of the tax information under Washington's public records act.

The county argued that even if a publication of private facts tort exists in Washington, damages were unavailable to the plaintiffs since the right of privacy was that of the decedent, not his or her relatives. Relying on a statute establishing the confidentiality of autopsy reports except to family members, the attending physician and law enforcement agencies having jurisdiction, the court held that immediate relatives have a privacy interest in maintaining the dignity of the deceased which could have been violated by the conduct alleged in these cases. The court held that the "county's actions in these cases are sufficiently egregious to enable the families of the deceased to maintain their own actions."

While *Reid* is a non-media case, it is likely that Washington appellate courts would countenance a claim against a media defendant in a proper case. Earlier Washington cases in which invasion of privacy claims have been asserted against media defendants have applied First Amendment analyses to the claims. See *Maloney v. Tribune Publishing Co.*, 26 Wn. App. 357, 613 P.2d 1179, 6 Media L. Rep. 1426 (1980).

Gerry A. Reitsch is with the firm Reitsch & Weston, P.L.L.C. in Longview, Washington.

Governor Wilson signs California Paparazzi Bill

"Under this bill, the so-called 'stalkerazzi' will be deterred from driving their human prey to distraction--or even death." So said Governor Pete Wilson of California when he signed California's "paparazzi" bill on September 30, 1998.

The bill, sponsored by Senator John Burton (D-San Francisco), creates a cause of action for invasion of privacy by photographers for commercial purposes. Specifically, the bill provides that "a person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any physical image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person." Cal. Penal Code s. 1709.8(a).

In addition, a person is similarly liable for constructive trespass if enhanced audio or visual devices were used to obtain an image, sound recording or physical impression that otherwise could not have been obtained without trespassing. Cal. Penal Code s. 1708.8(b).

Under the statute, a defendant is liable for up to "three times the amount of any general and specific damages that are proximately caused by the violation." Cal. Penal Code s. 1708.8(c). Defendants may also be liable for punitive damages and, if done for commercial purposes, disgorgement of profits. A person who "directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate" the statute is also liable for any "general, special, and consequential damages resulting from" a violation. Cal. Penal Code s. 1708.8(d). Actual use of the photo is not a requisite element.

The statute is similar to, but father reaching than, three bills in the House and Senate. See <www.spj.org> for the text of the Feinstein-Hatch and House bills. The bills in the House and Senate do not extend liability to an employer or one who commissions the photo or tape. The California legislation purports to protect not just celebrities, but other individuals, such as crime victims, who may become "media targets."

The bill will take effect on January 1, 1999.

UPDATE:

Pagones v. Maddox, Sharpton, Brawley and Mason

Verdict Affirmed
Brawley Ordered to Pay Damages

The Poughkeepsie, New York trial judge in the libel case brought by former prosecutor Steven Pagones against Tawana Brawley and her then-advisors, Alton Maddox, Jr., Al Sharpton, and C. Vernon Mason, has refused to overturn the jury verdict in Pagones' favor. The verdict was the result of bitter and contentious trial lasting over eight months. *See LDRC LibelLetter*, Aug. 1998 at 10.

In a separate order, the judge, Judge Hickman, assessed $5,000 in compensatory and $180,000 in punitive damages against Ms. Brawley, who defaulted in the libel suit.

The libel suit arose out of a highly publicized and racially charged episode in 1987 during which Ms. Brawley, then fifteen years old, through her family and their advisors accused Pagones of being one of six white men who kidnapped and held Ms. Brawley for four days, raping and sodomizing her. She was found in a garbage bag outside her home. A nine month grand jury probe concluded that the allegations were fiction.

While the opinion denying motions to set aside the verdict by Maddox, Mason, and Sharpton was relatively brief, the judge issued a lengthy opinion in support of his damage award against Ms. Brawley. In it the court explained the chronology of the events leading up to the defamation trial, including the Grand Jury investigation which held Brawley's accusations to be a hoax. The court expressed outrage with Brawley's refusal to testify before the Grand Jury proceedings and at the defamation trial, noting that Brawley had traveled to attend a rally in Brooklyn during the libel trial but had not appeared in Poughkeepsie to testify under oath. Although Judge Hickman in his decision notes that one might view the actions of a teenager with special consideration, for Brawley may have been subject to manipulation by her parents and advisors, he states that she is now an employed, college-educated woman responsible for needlessly wasting legal resources because of her refusal to come forward.

Magistrate Recommends Dismissal Of Wiretap Claims Against TV Station Based On First Amendment Grounds

Source Held to Violate The Law

By Tom Leatherbury and Mike Raiff

Dallas federal Magistrate Judge Kaplan described the lawsuit as "a classic conflict between the right of privacy and the right of a free press to publish truthful and newsworthy information." The free press won the first round. In his 49-page Findings and Recommendation on the parties' motions for summary judgment, Magistrate Judge Kaplan concluded that the First Amendment protects the media's use and disclosure of lawfully obtained information about matters of public significance, even though the media's source illegally obtained the information in violation of the state and federal wiretap acts. *Oliver v. WFAA-TV, Inc.* No. 3-96-CV-3436-L (N.D. Tex. Oct. 15, 1998) It is now up to two federal district courts to review Judge Kaplan's recommendations.

Overheard on a Scanner

In two related lawsuits pending in separate district courts, Dan Peavy, a former trustee of the Dallas Independent School District (DISD), his business associate Eugene Oliver, and their wives sued A.H. Belo Corporation's Dallas station WFAA-TV, WFAA reporter Robert Riggs, and the Peavys' neighbors, Charles and Wilma Harman. The disputes began when the Peavys' neighbors, the Harmans, intercepted some of Peavy's cordless telephone calls using a police radio scanner. The neighbors heard Peavy, who was then a DISD trustee, discussing DISD insurance contracts and other matters. After being told by the local district attorney's office that it was lawful to do so, Harman began taping Peavy's phone calls.

The neighbors, who were involved in ongoing disputes with Peavy, eventually called WFAA's reporter Riggs with a tip on a potential news report about Peavy. After talking to and meeting with the Harmans, WFAA started its investigation. Over the next several months, the neighbors gave WFAA 18 tapes containing 188 telephone conversations between Peavy and others, including his business associate Oliver. At that time, the Harmans and WFAA were unaware of the November 1994 amendment to the federal wiretap act making it unlawful to intercept the radio portion of cordless telephone calls.

Investigations, Indictments, Awards, Law Suits

Upon learning of the recent changes in the federal law, the Harmans stopped taping and WFAA stopped accepting tapes. WFAA continued with its intense investigation of Peavy, Oliver, and DISD insurance without using the tapes and materials relating to the tapes. After an exhaustive six-month investigation, WFAA and Riggs aired several broadcasts in 1995 reporting on Peavy, his relationship with Oliver, Oliver's criminal history, and corruption in DISD insurance programs. WFAA later won numerous awards for the broadcasts including the *George Foster Peabody Award* and the *Alfred I. Dupont Columbia University Journalism Award* for investigative reporting. After an FBI investigation, Peavy and Oliver were indicted on more than forty counts of official bribery, conspiracy, and income tax evasion. They were eventually acquitted of all criminal charges.

Peavy and Oliver then began pursuing their lawsuits against WFAA, Riggs, and the Harmans, claiming that the Harmans illegally intercepted the calls and that WFAA and Riggs procured the interceptions and unlawfully used and disclosed the contents of the interceptions in violation of the federal and Texas wiretap acts. Peavy and Oliver further asserted claims for invasion of privacy, intentional infliction of emotional distress, conspiracy, and tortious interference with contracts. Plaintiffs claimed to be seeking more than $1 billion in damages.

After a great deal of discovery, all parties, including the plaintiffs, filed motions for summary judgment. The district courts referred all motions for summary judgment to Magistrate Judge Kaplan for a recommendation. Judge Kaplan started his recommendation by explaining: "This case started with the breakdown of common civility between neighbors. It led to a public scandal that resulted in a highly

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Magistrate Recommends Dismissal Of Wiretap Claims

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publicized criminal trial and spawned at least thirteen different civil lawsuits. . . . Succinctly stated, plaintiffs got caught with their hands in the 'cookie jar' and are upset that the media exposed their misdeeds."

Wiretap Laws Violated

In addressing the wiretap claims, Judge Kaplan concluded that the Harmans unlawfully intercepted (as well as used and disclosed) the telephone conversations, and further held that WFAA and Riggs used and disclosed the contents of the illegally intercepted conversations in violation of the federal wiretap act. He rejected the argument that a specific intent to violate the law, clearly absent here, was required. Judge Kaplan also rejected Plaintiffs' claims that WFAA and Riggs procured the Harmans to intercept the calls. He explained that WFAA and Riggs did not cross the line into active participation, and further noted that "the mere fact that WFAA and Riggs may have associated with the Harmans and accepted tapes from them is not sufficient to constitute illegal procurement."

But TV Use Protecetd by Constitution

Judge Kaplan then moved to the constitutional issues. Applying the analysis set forth in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), Judge Kaplan determined that WFAA and Riggs lawfully obtained the tapes, that the tapes contained truthful information, that the information on the tapes involved matters of public significance, that imposing liability on WFAA and Riggs would not be necessary to further a state interest of the highest order, and that punishing the media for publishing truthful information would result in timidity and self-censorship. Based on this analysis, Judge Kaplan concluded that the First Amendment prohibits the imposition of liability against WFAA and Riggs under the use and disclosure prongs of the Texas and federal wiretap acts, even though the source had illegally obtained the information. Judge Kaplan stressed that the media did not seek out the Harmans or induce them to intercept the communications, but instead received the information through legitimate news-gathering techniques.

Based on First Amendment concerns and state law, Judge Kaplan further recommended the dismissal of the remaining common-law claims against WFAA and Riggs. As for the Harmans, Judge Kaplan recommended that a summary judgment be entered against them for violations of the wiretap acts and for invasion of privacy.

The parties now await the district courts' decisions on whether to adopt the magistrate's recommendations.

A.H. Belo Corporation's in-house counsel, Michael J. McCarthy, General Counsel, and Marian Spitzberg, Deputy General Counsel, represent WFAA-TV and Robert Riggs in this matter, along with Bill Sims, Tom Leatherbury, Mike Raiff, Stacy Simon, and Stacey Doré of Vinson & Elkins.

Consistent with *Boehner v. McDermott* in D.C.

The result in *Oliver v. WFAA-TV* is consistent with the federal district court opinion in the District of Columbia last July in *Boehner v. McDermott*, Civ. No. 98-594 (TFH)(D.D.C. July 28, 1998), a lawsuit brought by Congressman Boehner against fellow Congressman McDermott over McDermott's alleged disclosure to the news media of a recording of Boehner's mobile-phone conference call with Newt Gingrich and other members of the House of Representatives. McDermott received the tape from a Florida couple who were prosecuted for violating the federal wiretap statute in connection with the recording. That decision is on appeal to the D.C. Circuit. *See LDRC LibelLetter*, August 1998 at 5.

Trespass And Fraud Claims Allowed Against Hidden Camera Investigative Report By Minnesota Court of Appeals

A Minnesota Court of Appeals recently affirmed denial of summary judgment to the Minneapolis CBS station on the basis that the affirmative misrepresentation by the reporter of her employment status, her and her references' failure to identify her as a reporter, and her use of a hidden camera created sufficient factual issues for a jury on claims of trespass and fraud. *Special Force Ministries v. WCCO Television*, CX-97-2220 (October 13, 1998). The court also allowed certain allegedly defamatory statements to remain in the case, although failing to identify any evidence plaintiffs produced in response to defendant's substantial truth arguments.

On trespass, the court found that under Minnesota law, a person permitted entry on to private property may become a trespasser by exceeding the scope of consent, and that "[w]hile [plaintiffs] initially welcomed [the reporter] onto their property, if she exceeded the scope of her consent by secretly videotaping their activities, her continuing presence became unpermitted and unlawful."

On fraud, the court found that a duty to disclose is imposed when necessary to clarify information already disclosed which would otherwise be misleading. Further, the misrepresentation could be found to have caused the requisite damage attributable to the fraud if the plaintiffs would not have given the reporter the volunteer position had they known of her real employment status and damage arose from the employment.

The court reserved the question of whether plaintiffs were entitled to damages that arose solely from publication of the material obtained from the investigative reporting and hidden camera shoot.

The decision is the first applying Minnesota's anti-SLAPP statute, which the court acknowledged put the burden on the plaintiffs to prove by clear and convincing evidence the elements of their claim. Minn. Stat. Section 554.02, subd. 2(2), (3), 554.03. From the contents of this decision, however, whether the court actually held plaintiffs to that standard is questionable.

Plaintiffs' Facilities for the Mentally Disabled and Its Alleged Failings

Special Force Ministries operated residential and nonresidential care facilities for mentally disabled individuals in Hennepin and Carver counties in Minnesota. In the summer of 1995, Lora Johnson, an employee of WCCO, the CBS owned and operated station in Minneapolis (and consistently one of the most highly respected news operations in the country) applied for a volunteer position at one of the facilities located in Waconia. She completed an application and supplied the names of two individuals as references, Jacqueline Pechtel and Ann Williams, who were also employed by WCCO. Ms. Johnson told Special Force that she was unemployed at the time and that she was interested in Special Force's ministry. Neither Johnson nor her references disclosed the fact that they were employed by WCCO. Nor did they disclose the fact that Johnson intended to secretly videotape activities at the facility.

Using the footage gathered by Johnson, WCCO broadcast its report on Special Force on November 6 and 7, 1995. The footage showed staff members allegedly forgetting to feed and administer medications to patients, giving double doses of medications, and included footage of a patient falling. The reporter, Trish Van Pilsum, stated that "Special Force provided questionable care and billed the state for care [it] simply did not provide."

The Home and Its Staff Move to Missouri, but Sue in Minnesota

Special Force, along with its pastor Tom St. Angelo, brought an action against WCCO and its reporters, alleging fraud, trespass and defamation. Spe-

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cial Force and St. Angelo claimed that "as a result of appellants' tortious actions, their reputations have been harmed" and because of this, respondents subsequently moved to Missouri. The respondents sought "actual damages in the form of moving expenses, lost revenues, and decreased donations. St. Angelo also claims he has suffered ill health, loss of reputation, embarrassment and emotional distress." Id. The respondents also claimed that eight residents, several of whom also moved to Missouri, were "devastated, humiliated and felt betrayed by Johnson, whom they trusted as a caregiver and friend." Id. Many of the residents claimed that their disabilities had "been aggravated as a result of [WCCO's] actions." Id.

WCCO moved to dismiss the complaint but the motion was denied. The district court ordered Special Force to file an amended complaint, stating their claims with more particularity.

Anti-SLAPP Statute Held to Apply

WCCO then moved for summary judgment under Minn. Stat. 554.02-05, the anti-SLAPP statute, which provides for early dismissal of cases involving speech or conduct that was genuinely aimed in part at procuring favorable government action, where plaintiff does not present clear and convincing evidence that the speech or conduct constitutes a tort or a violation of the plaintiff's constitutional rights. While the district court agreed that the statute applied, the court concluded that Special Force had presented "clear and convincing evidence that appellant's conduct was tortious." *Special Force v. WCCO Television,* CX-97-2220 (October 13, 1998). The motion for summary judgment was therefore denied.

The case came before the Minnesota Court of Appeals on remand from the Minnesota Supreme Court after the Supreme Court held that defendants have a right under the Anti-SLAPP statute to directly appeal a denial of motions to dismiss or summary judgment. *Special Force Ministries v. WCCO Television*, 576 N.W.2d 746 (Minn. Apr. 23, 1998). *See LDRC LibelLetter.* May, 1998 at 9.

On remand, the appellate court affirmed the district court's denial of WCCO's motion for summary judgment on all claims, but limited "the defamation claim to the specific statements set out in the amended complaint." Special Force v. WCCO, CX-97-2220 (October 13, 1998).

Trespass Based On Consent Exceeded

For the court, the matter was straightforward: while trespass is committed through entry onto another's land without consent, a permitted entrant may become a trespasser by exceeding the scope of the consent or by virtue of wrongful conduct. The question is one for a jury. If the reporter exceeded the scope of her consent by secretly videotaping on the premises, her continued presence in the facility constituted trespass.

The panel rejected both of WCCO's contentions: that the trespass claim should fall because Johnson's entry onto the property was neither unlawful nor forcible, and that trespass could not be maintained because Special Force did not own the property at the Waconia facility. WCCO argued that the controlling authority, *Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402 (Minn. App. 1995), should be limited to its facts.

In *Copeland*, a university student, who was employed by KSTP Television, used a hidden camera to investigate a veterinarian's practice. The footage was obtained without the permission of either the veterinarian or the owner of the home where the footage was taken. The homeowner sued the television station. WCCO attempted to distinguish *Copeland* on that basis--that is, that while in *Copeland*, the plaintiff owned the property, Special Force did not own the property on which the facility was situated. The court

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Minnesota Court of Appeals on Fraud and Trespass

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determined that ownership of the property was not dispositive, finding the distinction irrelevant. "Trespass encompasses *any unlawful interference* with one's person, property, or rights and requires only two essential elements: a rightful possession in the plaintiff and unlawful entry upon such possession by the defendant." *Special Force Ministries v. WCCO*, CX-97-2220 (October 13, 1998) (emphasis added).

WCCO also argued that *Copeland* should be overruled because it violates the First Amendment. The court disagreed, citing *Dieteman v. Time*, 449 F.2d 245 (9th Cir. 1991) for the proposition that the First Amendment "does not insulate a person from liability for unlawful trespass." Id. Within this context, the court also gave passing mention to the fact that Minnesota has recently recognized three of the four basic invasion of privacy torts in *Lake v. Wal-Mart Inc.*, 582 N.W. 2d 231 (Minn. 1998). The Minnesota Supreme Court did not, however, recognize the tort of false light publicity, primarily because the court was "concerned about the increased tension between the First Amendment and the tort of false light publicity." Special Forces v. WCCO Television, CX-97-2220 (October 13, 1998). The court found no inherent tension between the First Amendment and what it considered to be trespass on the part of WCCO's reporter. On this basis, the court declined to overrule *Copeland*.

Reserves Issue of Publication Damages and Allows Fraud

WCCO also argued that Special Force should not be able to enhance their damages claim by referring to the WCCO broadcast. The court did not reach this issue, however, reasoning that "whether a defendant's conduct while on the premises proximately caused the plaintiff's injuries is a fact for the jury." *Special Force Ministries v. WCCO Television*, CX-97-2220 (October 13, 1998).

WCCO also maintained that Special Force could not prove fraud because "Johnson had no duty to disclose that she worked for WCCO." Id. Citing *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282 (Minn. 1992), the court held that a duty to disclose is "imposed when disclosure is necessary to clarify information already disclosed, which would otherwise be misleading." Johnson, the court indicated, made affirmative misrepresentations that she was unemployed and also failed to disclose her true employment status. A question of fact existed, the court stated, as to whether the claimed damages for emotional distress, humiliation and aggravated physical and mental ailments were proximately caused by Johnson's deceit. The court therefore disagreed with WCCO's claim that Special Force could show no damage "attributable to the misrepresentation." Id.

Allows Limited Defamation Claims

WCCO also challenged Special Force's defamation claims for failure to specify with particularity the exact defamatory language. The court agreed to allow five statements that the plaintiffs actually identified from the broadcast, but rejected other allegations based only upon characterizations of statements in the broadcast. The court found that plaintiffs had access to the broadcast, that they had been given additional time in which to amend their complaint, and that their failure to identify other specific statements would act to bar them from expanding their defamation claims.

WCCO argued, however, that the statements were true or substantially true. Stating little more than "appellants dispute the facts underlying these statements," the court refused to dismiss the claims.

John Borger of Faegre and Benson, Minneapolis, Minnesota is representing WCCO in this matter.

UPDATES: SUPREME COURT DENIES REVIEW

Dow Jones & Co. v. Clinton, 1998 WL 313080 (U.S.) (October 5, 1998)(No. 97-1959)

The Supreme Court of the United States denied certiorari this month on the petition of twelve media organizations who were attempting to gain access to federal court proceedings and documents relating to a grand jury's investigation of President Clinton's relationship with Monica Lewinsky. *Dow Jones & Co. v. Clinton,* 1998 WL 313080 (U.S.) (October 5, 1998) (No. 97-1959); See *LDRC LibelLetter* March 1998, at p. 24.

The organizations argued that there was a constitutional right of public access to judicial hearings that are "ancillary to grand jury proceedings" and drew a distinction between matters before a grand jury and related legal issues such as attorney-client privilege. But the justices, without comment, rejected their appeal.

The dispute arose from U.S. District Judge Norma Holloway Johnson's decision to allow closed-door hearings on such privilege claims and related matters. Last May in a unanimous ruling, the U.S. Circuit Court of Appeals upheld Holloway's decision finding that there was no First Amendment right of access to these matters, and that allowing access to these types of ancillary proceedings would create "enormous practical problems in judicial administration, and there is no strong history or tradition in favor of doing so."

Snyder v. Ringgold, 1998 WL 273373 (U.S.) (October 5, 1998)(No. 97-1865)

The Supreme Court also denied certiorari this month on the petition of WBAL-TV reporter, Terrie Snyder, in her case against Samuel Ringgold, former Baltimore police department's director of public affairs. Snyder alleged that Ringgold had violated her First Amendment rights by denying her the same access given to other journalists to governmental information. *Snyder v. Ringgold,* 1998 WL 273373 (U.S.)(October 5, 1998)(No. 97-1865); See *LDRC LibelLetter* April 1998, at p. 10.

Snyder's appeal stated that the Fourth U.S. Circuit Court of Appeals had used the wrong standard in deciding whether to grant Ringgold the legal immunity he sought. The Supreme Court gave no comment in rejecting the petition.

In the lower court proceeding, the judge ruled for Snyder, but the Fourth U.S. Circuit Court of Appeals unanimously reversed that ruling last January. Regarding the issue of equal access to information, the panel found that Ringgold was entitled to legal immunity because no such right for the press had been clearly established in the Fourth Circuit. The panel also stated that, "The press has no general First Amendment right of access to information about police investigations." The Fourth Circuit, however, chose not to publish its decision so it cannot be used as precedent in future cases.

Ride-Along Blasted by Texas Federal Court

By Thomas Leatherbury

In a sharply worded opinion, a federal district court in Houston, condemned the federal government's invitations to the media to ride along on and to videotape searches and seizures. *Swate v. Taylor*, No. H-94-727 (S.D. Tex. Aug. 28, 1998)

Plaintiff Tommy Swate, a medical doctor, operated two Houston methadone clinics until the Drug Enforcement Agency (DEA) suspended his registration that allowed him to dispense drugs. During the DEA's investigation of Dr. Swate, federal agent Teresa Hayth Pack obtained several show cause orders to search Dr. Swate's clinics and to seize records and methadone. Pack's "search for and seizure of methadone were authorized by warrants direct[ed only] to DEA's special agents and diversion investigators." Slip Op. at 2.

When Pack searched one clinic to seize its methadone, she brought a news crew from the Fox television station in Houston and allowed them to enter the clinic. "Clinic employees tried to prevent the crew from filming the search, but Pack told them the news people could stay." *Swate v. Taylor* No. H-94-727 at 2 (S.D. Aug. 28, 1998) One month later, during the DEA's search of the second clinic, Pack brought a crew from *60 Minutes*. Again, Pack let the television crew in the clinic to videotape the search. Before both searches the DEA's public relations officer "had notified the news media and given them permission to join the search teams. The DEA officers and the crew met before the raid and drove to the clinics together." *Id.*

Swate sued Pack and two state officers, but not the news media, for violating his Fourth Amendment rights. The state officers were dismissed because they acted under the authority of a state warrant and (apparently) were not involved in inviting the news media.

On cross-motions, in an opinion highly critical of both the government and the news media, Judge Lynn Hughes denied defendant Pack's motion for summary judgment and granted Dr. Swate's motion for partial summary judgment on liability.

The Court wrote, "In the hands of the [DEA], the tradition of public service in law enforcement has gone from "One riot — one Ranger" to "one search warrant — one regional press officer, six assistants, and a television news crew," characterized the searches as "a spectacle of invasion," and held that "[i]ncluding extraneous outsiders in a search unreasonably exceeds the legal scope of the warrant" in violation of Dr. Swate's Fourth Amendment rights. *Id* at 1.

An Historical Look

The Court first engaged in an historical and somewhat technical analysis of the law of warrants and writs. The Court noted that "[l]ike other grants in law, a warrant allows the officer only the specific authority described in the instrument itself." The Court traced the historical development of warrants under English law and in this country. "In response to . . . abuses of power by the government, the Founders abolished general warrants, restricted the government's ability to search without warrants, and required individual authorization of specific warrants. Today, search warrants are specific instruments that restrict government, dictate who may conduct a search, what may be searched, and when it may be searched."

The Court wrote that Swate must prove three things in order to prevail on his constitutional claim: Pack acted in a governmental capacity; her actions were not merely negligent; and her actions deprived Swate of a liberty protected by the Constitution." The Court had no trouble in finding that Swate had satisfied his burden since the news crews were not named in the search warrants.

No Qualified Immunity

The Court went on to reject Pack's defense of qualified immunity. In light of the longstanding Constitu-

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Ride-Along Blasted by Texas Federal Court

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tional prohibition against unreasonable searches, the Court held that Swate's Fourth Amendment rights were clearly established and that Pack's conduct was not objectively reasonable. "Federal law about who may accompany an officer on a search is well-established and clear; it does not include commercial news crews." Slip op. at 7.

The Court further criticized Pack for not exercising her own judgment about the news crews' participation in the search. "It is the exercise of judgment that earns immunity — not abdication to the regional press officer." Pack could not successfully defend herself by saying she was just following her superiors' orders. "An illegal order is an insufficient warrant to act. From Andersonville through Nuremberg to My Lai, excesses of superiors do not justify excesses of subordinates." Slip op. at 8.

The Court concluded, "The DEA may be free to publicize some of its actions, but its agents cannot convert the property and lives of citizens into consumable supplies for its public relations campaign. The news media should publicize the government's actions, but they may not use governmental authority to acquire locations from unwilling citizens." Id. A conference "to discuss the calculation of damages" is scheduled later this month.

Thomas Leatherbury is with Vinson & Elkins in Houston, TX.

LIBEL DEFENSE RESOURCE CENTER
ANNUAL DINNER
The Waldorf Astoria
301 Park Avenue
7:30 p.m., The Starlight Roof

A Cocktail Party sponsored by Media/Professional Insurance and Scottsdale Insurance Company will be held immediately before the Dinner at 5:30p.m. in the Hilton Room

LDRC ANNUAL MEETING
November 11 at 4:30 p.m.
in the Palm Room of the
Waldorf Astoria

LDRC ANNUAL DCS BREAKFAST MEETING
Thursday, November 12, 1998
Crowne Plaza Manhattan Hotel
1605 Broadway
Samplings Restaurant
7:00 a.m. - 9:00 a.m.

Prior Restraint in Tucson

By Philip R. Higdon

For most media law practitioners, "prior restraint" is a theoretical concept. However, the theoretical became reality for the *Arizona Daily Star* on September 16, 1998. An Arizona state trial court judge ordered the *Star* not to publish information contained in documents its reporter, Sarah Tully Tapia, had received in the mail from an anonymous source. *Tucson Unified School District 1 v. Sarah Tully and Star Publishing* No. 328850 (Super. Ct. Sept. 16, 1998) The trial court judge later changed his mind and rescinded his order, but it remained in effect in various forms for 12 days. In the meantime, other Tucson media were free to investigate and publish stories covering the same subject matter.

Investigating School District Claims

Late in 1997, Ms. Tully Tapia learned that an administrator of the local school district, Edward Arriaga, was the subject of sexual harassment allegations. She learned that the district, the Tucson Unified School District ("TUSD"), had settled the matter, and she heard reports that sexual harassment charges at TUSD were not a rarity.

Accordingly, she submitted a public records request to the district under Arizona's Public Records Law. The request called for access to TUSD's files on the investigation of the Arriaga and other sexual harassment claims within the school district over a three year period. TUSD refused the request, and the *Star* filed suit under the public records statute. In the public records case, the Pima County Superior Court decided that TUSD did not have to release the records. Judge Gilbert Veliz was concerned that public availability of sexual harassment investigation files could hamper future investigations and the willingness of victims and witnesses to come forward. The *Star* did not appeal.

An Anonymous Envelope

Late this past summer, Ms. Tully Tapia received a white envelope in her mail containing no return address or other indication of who sent it. The envelope held several TUSD documents concerning the sexual harassment claim against Mr. Arriaga (now a high school principal). Among those documents were several letters and memoranda written to TUSD officials by both in-house and outside counsel. These documents confirmed that the charges against Arriaga (as well as others) had been made, assessed the strengths and weaknesses of TUSD's case and made recommendations concerning settlement.

Of greatest interest to Ms. Tully Tapia was a letter by outside counsel Grace McIlvain. Ms. McIlvain informed TUSD that another district employee's lawyer (Paula Morris was the employee) had made "serious allegations" of sexual harassment within TUSD in earlier litigation, and that these allegations "were not investigated" by the district. Moreover, a TUSD in-house lawyer, Todd Jaeger, previously had summarized the allegations for the school board and had urged the district to investigate them. Mr. Jaeger warned, "[the fact] that we had knowledge of but failed to investigate Morris' allegations would substantially jeopardize our defense of any such future claim. A failure to investigate would have the likely effect of increasing our liability". Ms. McIlvain informed TUSD in her 1997 letter that, "[u]nfortunately, we now find ourselves in the situation which Mr. Jaeger feared. We face the possibility not only of a significant monetary liability but the possibility of damage to the District's reputation and other undesirable consequences".

Ms. Tully Tapia was concerned that TUSD had been provided with charges of sexual harassment, had failed to investigate them, and had jeopardized its position in litigation as a result. In preparing her story on these documents, Ms. Tully Tapia interviewed the TUSD board president Joel Ireland on September 15, 1998. During the interview, she showed Mr. Ireland several of the documents she had received in the white envelope and asked for his comments.

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Prior Restraint in Tucson

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TRO: First Amendment v. Attorney-Client Privilege

Immediately after the interview, TUSD's lawyers informed attorneys for the *Star* that they would be going to court to seek an order prohibiting the *Star* from disclosing or publishing any of the information contained in the "white envelope" materials. The next morning, September 16, the school district filed papers to block publication, claiming that Ms. Tully Tapia had obtained the material by "illegal and improper" means, and that publication of the information would violate both TUSD's right of privacy and the order imposed in the earlier public records case.

Pima County Superior Court Judge Kenneth Lee conducted a hearing on TUSD's request for a temporary restraining order later that day. The *Star* opposed the prior restraint on the basis of the Arizona Constitution's absolute ban of prior restraints [*Phoenix Newspapers, Inc. V. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966)] as well as the heavy presumption that any such order violates the First Amendment. TUSD argued that its right to preserve the confidentiality of its attorney-client communications outweighed any right the *Star* had to publish under the state and federal constitutions. The school district also argued that Judge Veliz' findings in the earlier public records case were a conclusive determination that the district would suffer harm if the materials were made public. At the conclusion of the hearing, Judge Lee entered an order prohibiting Ms. Tully Tapia, the *Star* or their agents from disclosing or publishing any material contained in the white envelope or within the documents Judge Veliz refused to release in the public records case. Because the *Star* did not know what records or information had been refused it in the public records case, it published virtually any story about TUSD at its peril.

A Hearing 8 Days Later

Judge Lee scheduled a hearing on TUSD's request for a preliminary injunction for Thursday, September 24, 1998.

On September 18, the *Star* sought immediate relief from the prior restraint from the Arizona Court of Appeals. The appellate court refused to act, however, until after the preliminary injunction request was decided in the lower court. As with the trial court, the Court of Appeals did not see the harm in delaying publication for a matter of days. Both courts were persuaded by TUSD that the "cat would be out of the bag" and the issue moot if publication were not restrained pending a hearing. The *Star* could only wait.

In the meantime, because TUSD had chosen to file suit, the story attracted substantial local media and public interest. Other Tucson newspapers and broadcasters were obtaining and publishing information the *Star* had earlier but now could not publish. The *Star* still had information its competitors lacked, including the McIlvain letter, but could not get it out to the public.

After the September 24 hearing, Judge Lee reversed himself and dissolved the temporary restraining order, and denied TUSD's request for a preliminary injunction. The testimony and argument he had heard at the hearing convinced him that there was little likelihood that TUSD would succeed on the merits of its case. Judge Lee made no finding on the state and federal constitutional issues.

Before the *Star* could publish, however, TUSD raced back to the Court of Appeals. TUSD dropped its claims based on the previous public records case and concentrated on the attorney-client communications. The appellate court ordered a temporary continuation of the restraining order until the court could hold a hearing on the matter. At the *Star*'s request, however, this order was limited to the TUSD lawyers' conclusions and advice. The *Star* was free to publish all the factual material it had, including that contained in the attorneys' letters and memos.

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Prior Restraint in Tucson

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Lifted 12 Days Later

Finally, on September 28, 1998, following an emergency hearing, the Arizona Court of Appeals terminated its temporary order and refused to grant any relief to TUSD. The court gave no reason for this result. As TUSD's lawyers were trying to get the attention of the Arizona Supreme Court, the *Star* published on the Internet its articles based on the "white envelope" material, making further appeals moot. TUSD subsequently agreed to dismiss the entirety of its case against the *Star* and Ms. Tully Tapia.

In a postscript, the TUSD board voted within hours after the *Star* published its articles on its web site to leave no stone unturned in finding the person responsible for leaking the documents to the *Star*. There was little discussion on the underlying problem of ignored sexual harassment charges.

Predictably, TUSD's efforts at cover-up backfired in a major way. The story achieved much local notoriety and media coverage. Not only was all the information TUSD wanted secret made public, but a one-day story stretched out over two weeks, and the bad information contained in the documents was amplified by the fact that TUSD had tried to keep it out of the public's view.

Nonetheless, the fact remains that the *Star* was restrained for nearly two weeks from publishing important information it had received in a perfectly legal way. Prior restraint remains a threat to the media, however rarely seen.

Philip R. Higdon is with Brown & Bain, P.A. in Tucson, Arizona. Mr. Higdon represented the Arizona Daily Star along with D. Douglas Metcalf and Cyndy A. Valdez of Brown & Bain's Tucson office and Daniel C. Barr of the firm's Phoenix office.

NINTH CIRCUIT UPHOLDS RULING UNSEALING PSYCHIATRIC COMPETENCY REPORT IN UNABOMBER CASE

By Roger R. Myers and Joshua Koltun

In the first federal appellate decision finding a right of access to psychiatric competency reports in criminal cases, the Ninth Circuit on August 20 affirmed a district court order granting the motion of the *San Francisco Examiner*, CBS Broadcasting and *The Sacramento Bee* to unseal the 47-page competency report in the Unabomber case. *United States v. Kaczynski*, __ F.3d. __, 1998 WL 510393 (9th Cir. Aug. 20, 1998).

Rejecting the arguments of defendant Theodore Kaczynski that competency reports historically had been filed under seal and that, therefore, no right of access attached, the Ninth Circuit affirmed an order of the district court finding a common law right of access to the report that outweighed any privacy interests asserted by Kaczynski or his family. Judge Thompson, writing for a unanimous panel, agreed with the district court that the media had shown that "disclosure of Kaczynski's psychiatric report would serve the ends of justice by informing the public about the court's competency determination and Kaczynski's motivation for committing the Unabomber crimes." *United States v. Kaczynski*, 1998 WL 510393 at *2 (9th Cir. Aug. 20, 1998).

The competency issue arose near, and played a critical role in, the culmination of Kaczynski's aborted trial for multiple murder and other crimes attributed to the Unabomber. After the jury was selected, Kaczynski sought to invoke his right of self-representation to prevent his counsel from presenting a mental illness defense. Defense counsel then declared a doubt about their client's mental competency to stand trial. Based on these developments, and Kaczynski's apparent suicide attempt, the district court ordered a competency examination and report under 18 U.S.C. §§ 4241(b) and 4247(b)-(c).

Pursuant to the district court's order, Bureau of Prisons Psychiatrist Sally C. Johnson examined Kaczynski and interviewed Kaczynski's mother and brother. Dr. Johnson submitted a 47-page, single-spaced psychiatric report that concluded,

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Unabomber Report

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in essense, that Kaczynski was schizophrenic but competent to stand trial.

Based on that report, defense counsel stipulated to Kaczynski's competency, and the government agreed, obviating the need for a court hearing on the issue in which Dr. Johnson would have testified and her report admitted into evidence. Instead, the report was filed under seal. The district court then made its own finding that Kacyznski was competent, based largely on Dr. Johnson's report, and denied Kaczynski's motion to represent himself. Two days later, Kaczynski pleaded guilty to multiple murder and the Unabomber crimes under a plea bargain that resulted in a life sentence without possibility of parole but spared Kaczynski a possible death sentence.

Motion to Unseal

The *Examiner*, CBS and *The Bee* then moved to unseal the 47-page psychiatric competency report under both the common law and First Amendment rights of access to judicial proceedings and records. Kaczynski opposed the motion, arguing that competency reports were categorically immune from disclosure because of their nature and because they had typically been kept under seal unless an actual contested hearing was held on the competency issue at which the examining psychiatrist testified and her report was admitted into evidence.

In addition, Kaczynski and his family argued that disclosure would violate their privacy rights because they claimed an expectation that what they told Dr. Johnson would remain confidential. The media responded that the rights of access are not limited to exhibits admitted into evidence, but extends to all documents filed with the court -- especially with respect to the resolution of an important issue, such as competency, in a criminal case -- and that any expectation of privacy was unreasonable since Dr. Johnson could have been required to testify in open court about anything she had been told during her evaluation.

The district court rejected Kaczynski's categorical arguments against disclosure and granted the media's motion on common law grounds. The district court found that the public could not understand the court's competency determination, the resolution of the Unabomber case, or the factors that led Kaczynski to commit the Unabomber crimes, absent access to the report, and it found that this public interest in disclosure outweighed any privacy interests asserted by Kaczynski or his family. The court thus ordered the entire 47-page report unsealed after limited redaction primarily to delete references to third parties unassociated with the Unabomber, his crimes or his case.

At Kacyznski's request, the district court stayed its order one week while Kaczynski decided whether to appeal. The stay was extended when Kaczynski filed a notice of appeal, and extended again by the Ninth Circuit pending resolution of an expedited appeal.

Ninth Circuit Affirms

In affirming the order granting access to the report on common law grounds, the Ninth Circuit agreed both that "the public and the media have a legitimate interest in disclosure of the report" and that "the district court properly balanced the public's legitimate interest in access to the report, that is, its interest in obtaining information bearing on the workings of the criminal justice system, with the countervailing privacy interests asserted by Kaczynski." *Kaczynski*, 1998 WL 510393 at *2. Because it agreed with the district court that the media had established a common law right of access, the Ninth Circuit found it unnecessary to resolve the media's alternate First Amendment claim.

In a concurring opinion, Judge Reinhardt contended that in order to protect a free press "and the critical importance to a democratic society of the public's right to be fully informed," normally a district court should grant access on constitutional rather than common law grounds because the former is more protective of the press and public's rights than the former. 1998 WL 510393 at *3 (Reinhardt, J., concurring). However, since the district court had not reached the constitutional question and had granted access to virtually the entire 47-page report on common law grounds, Judge Reinhardt agreed with the panel that the Ninth Circuit did not have to reach the issue of whether the First Amendment provided an even stronger right of access to psychiatric reports in criminal cases.

Messrs. Myers and Koltun, who are with Steinhart & Falconer LLP in San Francisco, CA, represented the media intervenors San Francisco Examiner, *CBS Broadcasting and* The Sacramento Bee *in this matter.*

NINTH CIRCUIT BOLSTERS MEDIA'S ACCESS RIGHTS

Judge Sidney Thomas Sets Out Procedures and Standards for Court Closures

Jurors Threatened and Offered a Bribe

By David J. Bodney

In a ringing endorsement of the media's First Amendment access rights, the Ninth Circuit held September 14 that a U.S. district court violated both the substantive and procedural rights of the press and public by denying timely access to transcripts of closed proceedings in the criminal prosecution of Arizona's then-Governor J. Fife Symington III. *Phoenix Newspapers, Inc. v. United States District Court*, ____ F. 3d ____, 1998 WL 658281 (9th Cir. 1998).

The recent Ninth Circuit ruling arose from an August 22, 1997 decision of U.S. District Judge Roger Strand to conduct closed hearings during jury deliberations in the Symington case. The closed hearings took place more than two weeks into the jury's deliberations, and after nearly three full months of the trial of the sitting Governor of Arizona. Phoenix Newspapers, Inc. ("PNI"), publisher of The Arizona Republic, sought access to the proceedings and an expedited hearing on the court's closure decision. At a hearing that same day, Judge Strand cited only "security" and "the fair administration of justice" in support of closure - and the sealing of all hearing transcripts.

> ***"The procedural and substantive safeguards. . . are not mere punctilios, to be observed when convenient. They provide the essential, indeed only, means by which the public's voice can be heard."***

Following the court's closure order, PNI filed a supplemental motion seeking specific findings in support of the court's closure order and requesting the unsealing of the transcript of the closed hearing. Though the district court conducted an open hearing on PNI's supplemental motion, it did not alter or elaborate on its August 22, 1997 closure order.

On September 3, 1997, the jury returned a guilty verdict against Gov. Symington on seven counts of fraud. The following day, PNI filed another supplemental motion for "constitutionally adequate findings" and for release of the August 22, 1997 transcript. On September 5, 1997, the court issued an order denying PNI's motions, reiterating the paramount importance of "security of individuals associated with this trial" and eschewing any alternatives to closure.

On September 24, 1997, PNI and the local NBC affiliate, KPNX Broadcasting Co., filed a petition for writ of mandamus in the Ninth Circuit. Between the filing of the media's petition and government's lodging of a response, the media obtained access to a Phoenix Police Department report under the Arizona Public Records Law shedding some light on the likely content of the closed proceeding. Indeed, the police report revealed that at least one juror had received a death threat and the offer of a bribe. That juror expressed a 60-70% certainty that the threatening caller was Symington's criminal defense lawyer, John Dowd.

On October 15, 1997, after being contacted by a reporter about the police report, Symington's counsel moved to unseal the August 22, 1997 transcript. Given the media's access to the police report, and Dowd's belief that access to the full transcripts would exonerate him of having made the call, the court conducted a brief, closed hearing that same day and granted Dowd's motion to unseal. Except for telephone numbers and addresses, the transcript was ordered unsealed and available for media inspection "within the hour."

The transcript revealed that two jurors had been threatened and offered bribes in the case, as had the Governor's secretary (at whose home Dowd and Symington's defense team were dining when the call

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NINTH CIRCUIT BOLSTERS MEDIA'S ACCESS RIGHTS

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came in). When the government lodged its opposition to the media's petition a week later, it argued that the petition was moot, and that the court's findings had been adequate in the circumstances.

District Court Rebuked

Writing for a unanimous, three-judge panel, Circuit Judge Sidney R. Thomas issued a comprehensive overview of the media's access rights, and rebuked the district court for its handling of the media's requests. Finding that the issue presented was indeed "capable of repetition while evading review," the Ninth Circuit made short shrift of the government's mootness defense. Focusing attention on post-trial transcript access, Judge Thomas then surveyed both prongs of the "logic and experience" test, and concluded that the transcripts were subject to the media's First Amendment access rights. As Judge Thomas observed, "It is difficult to imagine a circumstance in which maintaining public trust in the integrity of the judicial process is more crucial than in the criminal trial of a public official." Id. at *7.

Interestingly, the transcripts revealed that the district court had conducted its closed proceedings in a way designed to mislead the public about the true reason for closure. In closed session, Judge Strand had informed the two jurors who received threatening phone calls that he would ask all jurors in open court whether any of them had been contacted during deliberations. As the transcripts revealed, Judge Strand instructed the two "threatened" jurors not to respond to his question, and to give the impression that they had not been contacted during deliberations.

The Ninth Circuit left no doubt about the impropriety of the "'two-tier system' of 'open and closed' records":

> Without this transcript, the public had no way of knowing that two of the jurors had received telephone threats that might have affected - however negligibly - their assessment of the evidence against Symington. In fact, the public could well have affirmatively inferred that such threats had not occurred, because the court had asked both jurors to refrain from responding during the open-court inquiry into outside communications with the jury. This outright conflict between the record of the open hearing and the sealed transcript of the closed hearing risked creating the 'two-tier system' of 'open and closed' records that we have previously deplored.

Id. at *7.

Following the dictates of Press-Enterprise II, the Ninth Circuit reviewed the Supreme Court's requirements for closure of any criminal proceeding, and summarized the law in a press-friendly way. In particular, the Ninth Circuit announced: "[I]f a court *contemplates* sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives. If objections are made, a hearing on the objections must be held as soon as possible." Id. at *9 (emphasis added).

Reviewing the procedural requirements for closure, the Ninth Circuit criticized the district court's six-week delay in releasing the transcripts, as well as its failure to hold a prompt hearing on PNI's post-trial motion for release of the transcript. The Ninth Circuit rejected Judge Strand's "conclusory order, summarily denying the motion and rejecting the possibility of alternatives." Id. at *9. As Judge Thomas concluded, " . . . [a]t no time was the Press afforded a meaningful opportunity to address sealing the transcripts on the merits, or to discuss with the court viable alternatives." Id.

Even if the district court had followed its procedural duties under the First Amendment, its closure orders "fell short of satisfying the First Amendment's

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NINTH CIRCUIT BOLSTERS MEDIA'S ACCESS RIGHTS

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substantive requirements." Id. For example, the district court never specified how the security interest would be "thwarted" by release of the transcript, or how this "thwarting" would threaten Symington's fair trial rights. Id. at *10.

Moreover, upon a close review of the facts, the Ninth Circuit found no indication that the jurors' security constituted a compelling interest justifying the continued sealing of the hearing transcript. For example, the "relatively limited 'security measures' the court implemented suggest that jurors' security was not in actuality an urgent problem. The character of these measures shows they were aimed at shielding the jurors' identities from the media, rather than protecting them from danger . . . ." Id.

Finally, reviewing the lower court's claim that there were no reasonable alternatives to closure, the Ninth Circuit again focused on the facts, and rejected the lower court's reasoning. "Indeed, redaction of the juror's names and addresses from the transcript - as was ultimately accomplished - would have sustained the protection of the jurors' security interests . . . ." Id. at *11. Judge Thomas rounded out his opinion with strong language that should go far to deter trial courts from closing criminal proceedings from public view so lightly:

> *The procedural and substantive safeguards. . . are not mere punctilios, to be observed when convenient. They provide the essential, indeed only, means by which the public's voice can be heard.* All too often, parties to the litigation are either indifferent or antipathetic to disclosure requests. This is to be expected: it is not their charge to represent the rights of others. However, balancing interests cannot be performed in a vacuum. Thus, providing the public notice and an opportunity to be heard ensures that the trial court will have a true opportunity to weigh the legitimate concerns of all those affected by a closure decision. Similarly, entry of specific findings allows fair assessment of the trial judge's reasoning by the public and the appellate courts, enhancing trust in the judicial process and minimizing fear that justice is being administered clandestinely.

Id. (emphasis added).

As for Judge Strand's affirmatively misleading the public, Judge Thomas reserved the strongest rebuke: "This resulted in the creation of a trial record at variance with the true facts. That consequence would be a matter of grave import by any measure; it is particularly unfortunate when the salient issue is jury tampering in the criminal trial of a public official. Although that action cannot be condoned, an immediate post-trial hearing and transcript release would have ameliorated the potential for public misunderstanding and alarm. . . . Here, the failure to disclose the truth of trial proceedings unfortunately created the potential for suspension and mistrust, precisely the consequences a public trial is designed to forfend." Id. at *11-12.

David Bodney is a partner in the Phoenix Office of Steptoe & Johnson LLP and, with Peter B. Swann, represented PNI and KPNX Broadcasting Co. in this matter.