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LDRC Libel Defense Resource Center

LIBELLETTER

September 1994

2nd Circuit Refuses to Dismiss Fourth Amendment Claim in Ride-Along

A Second Circuit panel affirmed the denial of a motion to dismiss brought on behalf of a United States Treasury Agent who had invited CBS News to videotape the execution of a search warrant at Plaintiff Ayenis' home. Mrs. Ayeni and her infant son had filed a civil suit against CBS, a CBS News producer, and the Secret Service agent, James Mottola, alleging, *inter alia*, violations of the plaintiffs' Fourth Amendment rights, after Mottola and others from the Secret Service allowed the CBS crew to videotape execution of the warrant at the Ayeni home. The object of the investigation, Mr. Ayeni, was not at home at the time. The CBS crew allegedly taped Mrs. Ayeni and her son despite requests by her that they not be videotaped. The crew also taped the search of closets, desktops and drawers and other areas of the home.

Both the CBS defendants and the agent filed motions to dismiss. Federal District Court Judge Weinstein denied both motions and, subsequently, CBS settled the claim with the Ayenis. *Ayeni v. CBS INC*, 848 F. Supp 362, (EDNY 1994). The agent filed an interlocutory appeal arguing that he was protected from suit under a theory of qualified immunity: that the rights claimed to have been violated were not "clearly established" at the time of the search and/or that it was objectively reasonable for him to believe that his actions did not violate clearly established law, thus entitling him to judgment as a matter of law.

The Second Circuit panel, in *Ayeni v. Mottola*, 94-6041(L), 94-6047(2nd Cir. September 12, 1994), rejected both prongs of the argument. Noting that the government did not argue that the presence of the CBS crew was either explicitly authorized by the warrant or that it was implicitly authorized because it served a legitimate law enforcement purpose, the court concluded that the presence of the crew violated established Fourth Amendment principles. Not only was the presence of the unauthorized individuals violative of

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Moldea Files Petition for Cert against Times

Dan Moldea, author and plaintiff in *Moldea v. New York Times*, has filed a petition for certiorari asking the Supreme Court of the United States to reinstate his $10 million libel suit against the *New York Times*. LDRC reported on the decison in *Moldea* in the June edition of the *LDRC LibelLetter* in which the Court of Appeals for the District of Columbia reversed itself in an opinion having potentially far ranging implications for the issue of opinion in libel. After initially determinining, among other things, that the context of a statement -- in this case, a book review -- did not have significant impact on the analysis of whether or not a given statement was protected opinion, the panel concluded that the reverse was true: that context was, indeed, a very significant factor in the analysis.

The New York Times filed a response to the petition on September 1 and it is

Masson, Prozeralik Set For Retrial

Jury selection is set to begin on September 29 in a retrial of psychoanalyst Jeffrey Masson's much-publicized libel suit against author Janet Malcolm. Judge Eugene Lynch of Federal District Court for the Northern District of California ordered the retrial after the original jury could not reach consensus on the issue of damages. The jury did decide issues of liability, however, and having determined that the plaintiff could not support his claims against *The New Yorker* magazine, the magazine will not be party to the retrial. Opening arguments are scheduled for October 3, and it is estimated that the proceedings will last three weeks before the jury begins deliberation. The retrial will be bifurcated. Liability and non-punitive damages will be decided in the first phase, and punitive damages will be decided in the second phase. Counsel for Ms. Malcolm is Gary Bostwick. Jim Wagstaffe of Cooper, White & Cooper, has served as counsel for *The New Yorker*.

A retrial is also soon to commence in *Prozeralik v. Capital Cities*. *Prozeralik*, in which the New York Court of Appeals, New York's highest court, reversed a prior jury finding of actual malice, returning the case to the lower court, is due to start on Monday, September 26 in Buffalo, New York with Judge Jacqueline Kushian presiding.

It is estimated that the retrial will take approximately six weeks. Counsel for Capital Cities is Floyd Abrams.

Ride-Along Claim

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the Ayenis' rights, but the fact that the crew was taping the intrusion for later broadcast to the public meant that "it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect -- the right of privacy" (slip op. at 10-11)

The Second Circuit held that the law was "clearly established" and that the agent could not with objective reasonableness believe that his action was consistent with the Fourth Amendment.

The panel also found "reenforcement" for its conclusion under Federal statute, 18 U.S.C. Section 3105 (1988), which specifies who may or may not be on private premises in connection with the execution of a search warrant. Because the CBS crew was not arguably assisting the agents in conducting the search, the conduct of the agents violated the statutory provisions. Although not setting the standard of liability, the court concluded that the statute did provide some guidance with respect to the Fourth Amendment's standard of reasonableness.

While the panel allowed that there were factual issues regarding the claim of qualified immunity with respect to other of the plaintiffs' claims against the agent -- claims of excessive force and intrusiveness -- the panel held that there were no unresolved factual issues as to claims involving the presence of CBS. The agent could claim no qualified immunity as a defense to those claims and no such defense could be submitted to the jury.

This decision deals exclusively with the claims against and the defense of qualified immunity asserted by the Secret Service defendant, but it will undoubtedly have an impact on newsgathering. It can only serve to chill the interest of law enforcement in informing the media in advance of its activities and allowing the media to follow and report on those activities. It may as well encourage other subjects of "ride-along" searches, arrests, etc. to file claims against both law enforcement and the media.

If one assumes as the Second Circuit panel did that CBS was at the Ayeni home for no other reason than "[t]he quest of television reporters for on-the-scene coverage of dramatic events," then the lessening of "ride-along" coverage may not be particularly disturbing. If, however, you believe that the press performs some function as a watchdog of government activities, such as the actions of law enforcement, and as the eyes and ears of the public in learning about and reviewing those activities, then the *Ayeni* decision is of concern.

A copy of the opinion can be obtained from LDRC. A more extensive analysis of the decision and its impact will be published in the October *LDRC LibelLetter*.

DOJ Restricts Advance Warrant Info

The Department of Justice, post-Waco, has adopted a new policy on "Assisting the News Media" which prohibits Federal law enforcement personnel from providing advance iformation to the news media regarding execution of search or arrest warrants. The policy -- found as an insert to the *United States Attorneys' Manual* --also prohibits inviting or soliciting media representatives to be present at such actions.

The policy applies to operations in which Justice Department personnel are working with other agencies and with local law enforcement if the federal personnel are the "lead agency" for the operation. Exceptions o the policy may be granted "in extraordinary circumstances" by the Office of Public Affairs of the Department of Justice.

If news media personnel are found at the scene of a law enforcement action, the policy provides that DOJ personnel may request them to leave voluntarily if the media presence "puts the operation or the safety of individuals in jeopardy." If the media does not voluntarily depart, the DOJ personnel are instructed under the policy to consider cancelling the action if cancellation is practical.

Carl Stern, head of the Office of Public Affairs of the Department of Justice, pointed out that the policy does not give federal authorities the right to order the press to leave the scene. But the press that does follow the officials does so at its own peril and not at the invitation of the federal officials. Mr. Stern noted that the policy was deemed necessary after the Waco episode, in which media representatives did have prior notice of the planned raid and, it is thought, inadvertently tipped off the Davidians just prior to the commencement of the action.

Mr. Stern indicated that he is unaware of any particular problems that have arisen under the policy although he did confirm that with respect to one operation planned with local law enforcement, the federal authorities had concluded that they would not allow the operation go forward if the locals invited media. The federal officials, however, have not as yet had to abort an operation because media was present.

Mr. Stern emphasized that this policy does not apply to ride-along reporting such as a "day in the life of..." reports, in which a reporter or crew is following the general activities of a team of officials. If, by chance, an arrest was effected during the course of such coverage, the media would not be barred from learning about it by this policy. And exceptions to the policy have, in fact, been made, albeit only on two or three ocassions. The exceptions arose when the officials in charge were in operations that allowed them to strictly supervise the movement of the media representatives.

LDRC has a copy of the policy -- it is only three short paragraphs in length -- if you wish to obtain a copy.

50-State Survey Discount Still Available

The order forms for the *50-State Survey* have been mailed. You probably have one in your mailbox. Many of you have already sent them in. Please note that there is a discount for members whose orders are received on or before November 1, 1994.

This year's *Survey* features an update of the federal circuit-by-circuit outlines. In addition, each of the state outlines will include statutory citations and case materials on eavesdropping and related taping issues, with a special report on the Federal Wiretap Statute and relevant Communications Act provisions.

We want to thank all of the *50-State Survey* preparers. Their work this year is greatly appreciated. But we also wish to give a special thanks to Turner Broadcasting System, Inc. and to Stuart Pierson of Davis Wright Tremaine for providing LDRC with a compendium of eavesdropping statutory and case law materials for all 50 states and the District of Columbia to serve as a starting point for the survey preparers.

With all of the new updates and special reports, members will want to order many copies!

LDRC Annual Meeting Wednesday, Nov. 9, 4:30 Please Plan On Attending!

The LDRC Annual Meeting will be held on Wednesday, November 9, 1994 at the Waldorf-Astoria at 4:30 P.M.. We would encourage all LDRC members to attend. The LDRC Executive Committee will be reviewing the annual budget for 1995, as well as the financial picture for LDRC in 1994. The Executive Committee and LDRC staff will also present the membership with an overview of LDRC activities, both past and planned.

Because LDRC is at foremost a membership organization, it actively seeks input from its member on its programs and projects. Please come and discuss and review LDRC with the Executive Committee and staff of LDRC.

Anti-Slapp Statutes May Be Worth Examining in Media Defense

The July 1994 LibelLetter reported on a decision applying California's anti-SLAPP suit statute to a newspaper and its reporters. Henry Kaufman, who is representing a group of nonmedia amici curiae in a case of first impression involving New York's anti-SLAPP law, writes to suggest that New York's laws — and possibly others as well, may also be found to apply in media cases.

Although their goals are similar, there are significant differences in terminology between the New York and California statutes. Nonetheless, there seems to be no reason why both cannot be interpreted to apply to media defendants.

The California statute protects all potential defendants against whom a claim is asserted for acts "in furtherance of [a] person's right of petition or free speech ... in connection with a public issue." Cal. Code Civ. Proc. § 425.16(b). Such acts "in furtherance" are defined to include a variety of activities, some of which contemplate

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APME Updates Media Ethics Guidelines

After a year of vigorous debate, Associated Press Managing Editors (APME) has voted to update its one-page ethics code instead of supplanting it with controversial, detailed and more restrictive guidelines proposed last fall.

The original draft proposal, which stirred considerable protest for being too specific and lengthy, was significantly revised after the drafting committee studied results of an APME member survey and analyzed reports on town meetings held across the country at which the draft was fiercely debated.

The feedback was analyzed last May at the Freedom Forum by a group that included Ethics Committee Chair David Hawpe of The Courier-Journal**CK city-Louisville?**, Bob Ritter, editor of Gannett News Service, Marcia Bullard of USA Weekend, Larry Beaupre of The Cincinnati Enquirer and Mike Waller of The Hartford Courant. Also participating were Mark Zieman of The Kansas City Star, who conducted the survey, Ed Jones of The Fredricksburg (st?) Free Lance-Star, and Bob Bernius, an attorney with the Washington firm of Nixon Hargrave Devans & Doyle.

The group concluded that it was impossible to agree on specific guidelines of conduct; that would meet the varying facts and circumstances journalists face in their decision-making . Individual differences among publications and concerns that a code would be used against publications in libel and other legal claims were among the issues cited by the APME membership with respect to the original proposal. Indeed, the final proposal states in an initial paragraph that "[n]o statement of principles can prescribe decisions governing every situation."

That final proposal, to be submitted for approval by membership at the APME convention in October, works within the framework of the 1975 Code retaining that Code's broad strokes approach. As a result, it is far less detailed than the the earlier draft. It alters the 1975 code by addressing several new issues, including diversity, manipulation of photographs, the impact of new technology and plagiarism. It also calls for a bright line difference between news and advertising, and expands language on conflicts of interest and community involvement.

LDRC was aware that many of its members were familiar with the original proposal and had advised their clients on its terms. We thought that you would be interested in the current status of the ethical code. A copy of the new proposal can be obtained from LDRC.

Anti-SLAPP Statutes

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expression directly before an official body and therefore would presumably exclude media expression under most circumstances. However, other covered acts more broadly contemplate commentary on issues under consideration by an official body or proceeding or expression in "a public forum in connection with an issue of public interest," which may well also cover media publications. Cal. Code Civ. Proc. § 425.16(e).

In contrast, the New York statute applies to any defendant in "an action involving public petition and participation," defined as an action brought by a "public applicant" that is "materially related" to the defendant's efforts to "*report on, comment on*, rule on, challenge or oppose" the application. N.Y. Civ. Rights Law §§ 70-a(1), 76-a(1)(a) (emphasis added). It would seem apparent that, although the primary thrust of the legislation may have been to cover individuals or civic groups directly participating in the application proceeding, the plain meaning of the italicized language is more than broad enough to cover media reports or commentary on such public applications or proceedings.

Similarly, in the small number of other states with SLAPP statutes, although the definitions vary somewhat from state to state, an argument can be made for coverage of media defendants in most of these jurisdictions. The Rhode Island and Delaware SLAPP statutes mirror the language of the California and New York statutes, respectively. *See* R.I. GEN LAWS § 9-33.2; DEL. CODE. ANN. tit. 10, § 8136-8138. The Minnesota statute would appear to cover at least certain media editorials. *See* Minnesota Citizens Participation Act of 1994 (*statute immunizing nontortious* "conduct or speech that is genuinely aimed at ... procuring favorable government action"). The two remaining statutes, however, appear to restrict protection to direct communication to governmental bodies or officers, without making provision for general commentary. *See* WASH. REV. CODE §§ 4.23.500, 4.24.510, 424.520 (protecting "good faith reports to appropriate governmental bodies"); NEV. REV. STAT. §§ 41.640–41.670 (protecting "good faith" communication to government employee regarding "matter reasonably of concern to th[at] governmental entity").

Unlike the situation in California, the New York statute has not yet been construed and its application to the media is unlikely to be considered in the case now pending in New York County which although it raises important issues regarding the breadth, scope, and application of the New York statute, involves only nonmedia defendants. *See Harfenes v. Sea Gate Association*, New York Co. Index No. 103809/94.

I believe it will be important for media groups to closely monitor further developments in SLAPP legislation in order to assure that these new statutes are appropriately construed. For if the media are found to be covered they will gain important procedural and substantive benefits in their future defense of defamation and related claims. For example, under the New York legislation, a covered defendant can secure an expedited hearing on a motion for summary judgment or motion to dismiss, can invoke the actual malice and clear and convincing evidence rules even if the case involves only private figures, and can recover attorneys' fees as well compensatory and punitive damages in cases of frivolous or bad faith litigation.

While the new SLAPP statutes may have been motivated primarily by reference to the plight of the lonely citizen advocate, the tax on free expression imposed by unwarranted SLAPP suits is not limited to such persons but affects all who exercise their rights of free expression, including the media.

Settlement in Internet Case

Brock N. Meeks, who electronically publishes commentary on the Internet and became the first such libel defendant, has settled the claim of Plaintiff Suarez Industries, in a Consent Judgment filed in late August in the Court of Common Pleas in Cuyahoga County, Ohio where the case was brought. The *LDRC LibelLetter* reported on the claim against Meeks in the June edition.

Suarez drew Meeks' attention in February when Suzrez attempted to initiate a new marketing program targeted at computer enthusiasts who use the Internet. Meeks investigated Suarez, and published his allegedly defamatory results in an article in Meeks' electronic publication, *"The Cyberwire Dispatch."* Among other things, he called businessman Benjamin Suarez a "P.T.Barnum," and "infamous for his direct marketing scams," and noted that Suarez had previously been sued by the Washington State Attorney General for deceptive trade practices in violation of state consumer laws.

Meeks had filed a Motion for Summary Judgment in the case prior to the settlement. The motion, written by Bruce Sanford and David Marburger of Baker and Hostetler, argued in part that the speech at issue was protected hyperbole and opinion under Ohio precidents. Citing *Moldea v. New York Times Co.*, 15 F.3d 1137 (D.C. Cir. 1994), defendant Meeks raised the issue of "context" in determining whether speech was protected or not, indicating that the free-wheeling, free-speaking culture of the Internet had to be taken into consideration.

While the defense felt that its position was strong, Marburger noted that the *Consent Judgment allowed Meeks to* avoid incurring any further legal costs or risks that continued litigation would surely entail. The Judgment avers that Meeks, an individual without institutional publication backing, had already accumulated $25,000 in legal costs. He was not required to admit any liability for defamation or tortuous interference with trade, but did agree that he did not intend his readers to infer that Suarez or his business had committed any crime or were subject to any law enforcement investigation.

LDRC has copies of the brief filed on the Summary Judgment Motion and of the Consent Judgment available in the LDRC Brief Bank.

Special *William J. Brennan, Jr. Defense of Freedom Award* Presentation to **Dr. Jan Moor-Jankowski** *To be followed by a debate on libel law by* **Michael Kinsley & John Sununu** of *CNN's Crossfire*

The invitations to the LDRC Annual Dinner are in the mail! The Dinner will be on November 9, 1994 at the Waldorf-Astoria at 8:00.

LDRC is pleased to announce that the LDRC *William J. Brennan, Jr. Defense of Freedom Award* will be presented to **Dr. Jan Moor-Jankowski**, defendant in *Immuno v. Moor-Jankowski*, the noted New York Court of Appeals case on the issue of opinion. Dr. Moor-Jankowski, a research scientist by profession and Professor at New York University Medical School, became the a sole defender of significant free expression issues when he chose to litigate to the end a claim based upon a letter to the editor of the scholarly scientific publication that he edited. His is a memorable story and LDRC believes that he is a unique candidate for the *William J. Brennan, Jr. Defense of Freedom Award.*

Diane Zimmerman, Professor of Law at the New York University School of Law, will introduce the award with comments on the decision and its impact on the law. **Solomon B. Watson IV**, Vice President and General Counsel of The New York Times Corporation and Chair of the LDRC Award/Annual Dinner Committee, will present the award.

In addition, **Michael Kinsley** and **John Sununu** of CNN's *Crossfire* will engage one another and ultimately you in a debate on libel law. These two extraordinary commentators have agreed to share their views on libel issues in a *Crossfire* format.

Michael Kinsley, co-host of *Crossfire*, CNN's popular political debate program, and host of *Heads Up With Michael Kinsley*, a monthly interview program also on CNN, has been a journalist for over 15 years. In addition to CNN, Mr. Kinsley serves as a senior editor at The New Republic and contributes essays to Time magazine.

John Sununu, also co-host of *Crossfire*, was Chief of Staff in the President Bush White House from January 1989 until March 1992 where he also served as Counsellor to the President. He was Governor of New Hampshire for three consecutive terms prior to joining the White House staff. He recently founded JHS Associate, LTD, a consulting firm.

We believe that this will be an extraordinary evening and hope that you and all of your colleagues will join LDRC.

In addition, DCS members will find in their mail an invitation to the LDRC/Defense Counsel Section Annual Meeting and Breakfast. The breakfast is Thursday morning, November 10, at 7:15 - 9:00 at the Holiday Inn Crowne Plaza. This is an opportunity for DCS members to obtain updates on DCS activities and committee projects and to vote on a new Treasurer for the DCS. Please plan to attend.

And, before the LDRC Annual Dinner on Wednesday, November 9, 1994, , there will be a Cocktail/Reception from 6:30-8:00, at the Waldorf-Astoria, hosted by Media/Professional Insurance. All LDRC members are invited!