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LDRC Libel Defense Resource Center

LIBELLETTER

Reporting Developments Through September 18, 1998

In This Issue. . .

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LIBEL DEFENSE RESOURCE CENTER

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NAA/NAB/LDRC Conference Scheduled for Sept. 22-24, 1999 in Arlington, Virginia

Investment Advice: Financial Press Wins On Opinion

Fourth Circuit Revises Opinion Analysis

By Douglas Connah, Jr.

In a decision useful to the financial press in giving skeptical investment advice, the Court of Appeals for the Fourth Circuit held August 11 that statements published in *Forbes* telling investors to "short" a public company's stock because it was overvalued were constitutionally protected opinion. *Biospherics, Inc. v. Forbes Inc.*, ___ F. 3d ____, 1998 WL 466681, 26 Med. L. Rep. 2114.

The *Forbes* piece, headed "Sweet-talkin' guys," predicted that investors would "sour" on the company, Biospherics, Inc., when they realized that its main product-in-development, a natural sugar substitute, "isn't up to the company's claims." While the Fourth Circuit declined to "propose a 'doctrinal exception' for stock tip articles," it emphasized that "rarely would a stock tip article of this tenor and in this context prove actionable."

In judging the *Forbes* item according to its tenor, language, and context, the Fourth Circuit expressly relied on *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). It said that "any reasonable person reading 'Sweet-talkin' guys' would recognize . . . that the challenged statements constitute a subjective view, not a factual statement," and pointed out

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LDRC Complaint Study Released

You should have each received a copy of the newest edition of the **LDRC Complaint Study.** Released last month as an ***LDRC Special Report***, the Study looks at a sample of complaints filed against media defendants in 1997. LDRC analyzes the complaints with respect to the status of the plaintiffs, the kinds of claims brought, the status of the defendants, and the jurisdictions.

Among the key findings:

* The overwhelming number of lawsuits arose out of published material and not from newsgathering issues. Only 9 out of the 332 complaints analyzed were based on claims based on newsgathering activities.

* Libel, as in the 1996 Study, was the most frequently alleged cause of action, alleged four times as often as the next most frequent publication-based claim: intentional infliction of emotional distress. Libel was alleged more than twice as often as all of the invasion of privacy claims put together.

* Businessmen and corporations are the most frequent plaintiff category against every major media defendant category except Books, against which Artists/Entertainers bring the most lawsuits.

* Local newspapers took more lawsuits than did local television stations, but those who produce television and cable programs and movies (the Production defendant-category in our Study) saw a rise in lawsuits as compared to 1996.

LDRC wants to thank Employers Reinsurance and Media/Professional Insurance for their assistance in preparing the Study. If you did not receive a copy of the ***LDRC Complaint Study***, please contact LDRC at 212.889.2306, 212.689.3315 (facsimile) or ldrc.com.

MARK YOUR CALENDARS!

What: **The NAA/NAB/LDRC 1999 Libel Conference**

When: **Wednesday, Sept. 22 through Friday Sept. 24, 1999**

Where: **Regency Crystal City Hotel**
Arlington, VA

If you wish to volunteer for the Conference Planning Committee, or if you have any ideas for topics or panelists, please contact LDRC at (212) 889-2306.

There will be a Planning Committee Meeting on Thursday, November 12, 1998 at 12 noon.

Financial Press Wins On Opinion

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that *Forbes* had clearly disclosed the "factual basis for the entire article" in three sentences the accuracy of which Biospherics had not challenged.

However, despite its reliance on the publication's "tenor, language, and context," the opinion casts doubt on continued analytical use of the specific multi-factor test -- verifiability/choice of words/context of statement/broad social context -- by which the Court's pre-*Milkovich* decision, *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F. 2d 1280 (4th Cir. 1987), distinguished opinion from fact. The opinion asserts that *Milkovich* "specifically refused the newspaper's suggestion that it adopt the multi-factored tests" developed by the lower courts in cases like *Potomac Valve* and *Ollman v. Evans* and "quite clearly did not adopt *Potomac Valve's* precise test or lengthy discussion."

The district court had expressly relied on *Potomac Valve* in dismissing Biospherics' $15 million libel suit against *Forbes* Inc. and reporter Carolyn Waxter under Rule 12(b)(6). *See LDRC LibelLetter* January 1998 at 7.

In a press release issued after the decision, Biospherics said *Forbes* had spread harmful misinformation in violation of common journalistic practice and accused the courts of aiding and abetting "such harmful behavior, which abuses, rather than protects, the First Amendment."

Douglas Connah, Jr., of Venable, Baetjer and Howard, L.L.P., Baltimore, argued the appeal for Forbes and Ms. Waxler, who were also represented by Tennyson Schad of Norwick & Schad, New York, and Maria Rodriguez of Venable.

ILLINOIS APPELLATE COURT'S INNOCENT CONSTRUCTION RULINGS GIVE WITH ONE HAND, TAKE WITH THE OTHER

By Samuel Fifer and Gregory R. Naron

Recently, the same panel of the Illinois Appellate Court (First District) issued two opinions in media libel cases, *Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc.*, 696 N.E.2d 761 (Ill. App. 1998), and *Chicago City Day School v. Wade*, 697 N.E.2d 389 (Ill. App. 1998). Both cases addressed the venerable Illinois innocent construction rule; but while *Chicago City Day* affirmed the vitality of the State's "minority rule," the *Snitowsky* decision - issued days earlier - read troubling new limitations into that doctrine, as well as the official report privilege.

The court observed regarding the innocent construction rule:

> Illinois adopts the minority rule of the innocent construction rule. Under the majority rule, the judge decides whether the language is reasonably susceptible of a defamatory interpretation; and if it is, the case goes to the jury despite any conceivable innocent interpretation, to determine whether in fact the publication was understood to be defamatory or to refer to the plaintiff. In contrast, the Illinois rule, or the minority rule, prevents a case from getting to the jury if there is any possible reasonable innocent interpretation of the language.

Chicago City Day, 697 N.E.2d at 394.

Under the innocent construction rule, "if the statement is reasonably capable of a nondefamatory

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interpretation, given its context, it should be so construed, and there is no balancing of reasonable constructions." *Id.* (citations omitted). The innocent construction rule also applies where the alleged defamation could "reasonably be interpreted as referring to someone *other than* the plaintiff," *Chapski v. Copley Press*, 442 N.E.2d 195, 199 (Ill. 1982) (emphasis added); indeed, this "of and concerning" branch of the innocent construction rule was at issue in the seminal Illinois Supreme Court case that adopted the rule, *John v. Tribune Co.*, 181 N.E.2d 105 (Ill. 1962).

Chicago City Day

In *Chicago City Day*, a Chicago radio personality, Roma Wade, criticized plaintiff school's demolition of an historic structure in the city. The alleged defamation principally involved Wade's on-air statement that "they're just plain lying . . . there were shenanigans going on over there." In a straightforward and unremarkable application of the innocent construction/of and concerning rule, the Court held that, while "shenanigans" could mean "questionable conduct," the comment could reasonably be read as referring to someone other than the plaintiff:

> Upon examination of the record, we find that plaintiff failed to plead extrinsic facts to demonstrate how third persons could believe that Roma's defamatory statements referred to plaintiff. Although it is reasonable to assume that Roma was referring to the School when she commented on how the city officials allegedly took a bribe, it is just as reasonable to believe that someone other than the School, perhaps the parents of the students at the School, attempted to influence city officials. ... Roma stated throughout her broadcast that the kids who go to this school get dropped off in Jaguars and Mercedes, in essence alluding to the wealth of the students and their families. Furthermore, it may seem that Roma was referring to the parents, when she remarks "they only did that because there is money at work, because there's a string of Jaguars," and then "you can't even go down the street with the cars, because they are all double parked there waiting to take their little angels home." Clearly, Roma was referring to the parents of the children, alluding to their wealth, and implicitly drawing a conclusion that they could have been the ones exerting influence over city officials.

Chicago City Day, 697 N.E.2d at 396.

The Court further held that the "they're just plain lying" comment was not defamatory per se; "we fail to find how this statement falls under a per se category, specifically the one which imputes an inability to perform or want of integrity in the discharge of office or employment duties." In so holding, the Court interpreted this comment as possibly referring to "the persons in the city government or at city hall responsible for issuing the demolition permit against the mayor's orders. After Roma states that 'they' are lying, she opines that shenanigans were going on 'over there.' Given the context of these comments, we believe 'over there' means over at city hall, not at the School." *Chicago City Day*, 697 N.E.2d at 397.

Snitowsky

In *Snitowsky*, the plaintiff, a special education teacher at the Nettelhorst School in Chicago, was the subject of a police report filed by her school's principal with the Chicago Police Department in connection with an incident that allegedly occurred in her classroom on December 19, 1996. The police report recorded claims by two school officials, the principal and the assistant principal, that plaintiff had restrained an unruly student and encouraged other students to hit him. WMAQ-TV broadcast several news reports about the allegations in

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the police report, including the Police Department's ultimate conclusion that the charges were unfounded.

Plaintiff sued WMAQ for defamation. WMAQ raised, among other defenses, the innocent construction rule (*i.e.*, the broadcasts could be innocently construed as reports of allegations in an ongoing investigation rather than statements of fact as to plaintiff's conduct in the classroom); and the fair report privilege. In addition, WMAQ argued that Snitowsky — formerly an elected official of her Local School Council — was a "public official" for purposes of the litigation, so that her failure to adequately allege actual malice doomed her defamation claim.

The Circuit Court dismissed Snitowsky's complaint. Reversing, the Appellate Court engrafted limitations on both the innocent construction and fair report libel defenses arguably new to Illinois law.

Specifically, the Appellate Court refused to apply these defenses principally because the Broadcasts contained a statement -- that a security guard stopped the incident -- which was not in the police report. The court also held the innocent construction rule did not apply because WMAQ purportedly "omitted" the alleged "grounds for doubting [the principal's] motives" for making the initial allegations as well as "any account of the prior disagreements between" the principal and Snitowsky. 696 N.E.2d at 767.

Previously settled Illinois authority holds that statements speaking in terms of allegations, claims or ongoing investigations are susceptible of an innocent construction because "[t]he claims are not presented as statements of indisputable fact." *Owen v. Carr*, 478 N.E.2d 658, 663 (Ill. App. 1985), *aff'd*, 497 N.E.2d 1145 (Ill. 1986); *see also Cartwright v. Garrison*, 447 N.E.2d 446, 449-50 (Ill. App. 1983). The standard for application of the official or fair report privilege — whether the "gist or sting" of the challenged statements was greater than that of the official report — has been equally well-established. *Dolatowski v. Life Printing and Publishing Co., Inc.*, 554 N.E.2d 692, 694 (Ill. App. 1990); *O'Donnell v. Field Enterprises, Inc.*, 491 N.E.2d 1212, 1216 (Ill. App. 1986).

Here, the Appellate Court's suggestion that, for the innocent construction rule to apply, the news organization would have to give "enough background to doubt the charges against [plaintiff] on the basis of the ulterior motives of the person making the charges" (696 N.E.2d at 766), is unprecedented. Such a requirement would require a news organization to research, investigate, analyze and report every fact or dispute that might have some bearing on the credibility of allegations to the police or other law enforcement units. Illinois law does not condition the innocent construction rule's benefit on the news media having conducted such an exhaustive search. Nor has any case denied fair report protection because the report also included "non-official" facts that did not alter the gist or sting of the underlying official document.

By holding that the official report privilege may be lost by the inclusion of any material that was not in the official source or document, the court also created a new and more stringent fair report standard. It is fair to say that the Appellate Court's decision is fundamentally at odds with the *raison d'etre* of the fair report rule and its long-standing protection of reporting about official allegations. "The right to speak and print about such actions of government is well established; denial of this right would be a serious infringement of both State and Federal constitutional guarantees of free speech and press." *Lulay v. Peoria Journal-Star, Inc.*, 214 N.E.2d 746 (Ill. 1966) (citations omitted).

Petitions for Leave to Appeal to the Illinois Supreme Court have been filed in both the *Snitowsky* and *Chicago City Day* cases and are pending.

Samuel Fifer and Gregory R. Naron are is with the firm Sonnenschein, Nath and Rosenthal in Chicago, IL.

Scientology Suit Against Time Dismissed Again

Efforts to Re-Analyze Sullivan Rejected

By Robin Bierstedt

The libel suit brought by the Church of Scientology against TIME magazine has once again been dismissed. In this round, Federal District Court Judge Peter Leisure rejected plaintiff's efforts to amend its complaint to add a libel claim solely for nominal damages, a claim that plaintiff's new counsel, New York University Law Professor Burt Neuborne, argued should be sustainable on proof of falsity alone. (*Church of Scientology v. Time Warner, Inc.*, No. 92 Civ. 3024, Slip Op. at (S.D.N.Y. Sept. 8, 1998).

The case, which was brought in April 1992, arises from TIME's May 1991 cover story "Scientology: The Cult of Greed." In November 1992 the Court granted TIME's motion to dismiss Scientology's claims with respect to several statements in the article. *Church of Scientology Int'l v. Time Warner, Inc.*, 806 F.Supp. 1157 (S.D.N.Y. 1992). Three years later, the Court granted summary judgment to TIME concerning all but one of the remaining statements -- holding that Scientology could not establish that any of these statements were published with "actual malice." (The parties had agreed to limit discovery to the issue of "actual malice," but this limited discovery was nonetheless lengthy -- the deposition of TIME writer Richard Behar lasted 27 non-consecutive days.) *Church of Scientology Int'l v. Time Warner, Inc.*, 903 F.Supp. 637 (S.D.N.Y. 1995).

TIME moved for reconsideration concerning the one remaining statement at issue. In July 1996 Judge Leisure granted the motion, finding that this one statement was "subsidiary" in meaning to the non-actionable statements. *Church of Scientology Int'l v. Time Warner, Inc.* 932 F.Supp. (S.D.N.Y. 1996). Scientology then moved to modify the Court's order, arguing that it should be permitted to pursue a claim for nominal damages, whether or not it could meet the actual malice standard. The Court denied that motion but included in its opinion a footnote stating that "To the extent that plaintiff may attempt to amend its complaint in the future, the Court expresses no opinion on the merits of such a motion." *Church of Scientology Int'l v. Time Warner, Inc.*, 1997 WL 53891, *4n.8 (S.D.N.Y. Aug. 27, 1997).

Accepting the Court's invitation, Scientology moved to amend its complaint to add a claim for nominal damages -- to be awarded if Scientology were able to prove falsity (regardless of actual malice). Scientology put forward the admittedly "novel" assertion that the *New York Times* actual malice standard applied only to libel claims by public figures seeking actual damages.

The Court on September 8, 1998 rejected Scientology's attempt to amend its complaint. The Court ruled that the motion to amend, made over five years after the complaint was filed, would unfairly prejudice TIME, which had spent enormous resources in dealing with Scientology's discovery demands and motion practice relating to actual malice. In addition, the Court denied the motion because the proposed amendment would be "futile" in two ways. The Court lacked subject matter jurisdiction over the claim because nominal damages, if awarded, would not meet the amount in controversy required in federal diversity cases. And on the merits, the proposed claim would fail to satisfy the *New York Times v. Sullivan* standard.

Robin Bierstedt is Vice President and Deputy General Counsel for Time Inc. Floyd Abrams and Dean Ringel of Cahill Gordon & Reindel represented Time Inc. in this matter.

JURORS FIND THAT A REPORTING MISTAKE DOES NOT AMOUNT TO NEGLIGENCE

By Tom Tinkham & Aaron Mysliwiec

A Minnesota jury recently rendered a defense verdict for Gannett Minnesota Broadcasting, Inc., d/b/a KARE-11 TV ("KARE") finding that KARE did not negligently defame a television repairman and his store when the station erroneously reported that the repairman had been indicted for involvement in a major drug ring. (*Peter Vitale, Individually and Vitale T.V. & Stereo Co. v. Gannett Minnesota Broadcasting, Inc., d/b/a KARE-11 TV*).

While a juror told the judge that the jurors felt sorry for Plaintiff Peter Vitale — named in broadcasts instead of his son by the same name who was actually the person indicted — the panel rendered a defense verdict on grounds of no negligence.

The Story

The claims arose out of an October 3, 1996 press conference at which the Minnesota U.S. Attorney and various suburban police chiefs announced the indictment of ten individuals for illegal drug smuggling and sales in St. Paul and Minneapolis. Police had seized more than $2 million of illicit drugs. One of the people indicted was Peter Francis Vitale, whom authorities described as a 37 year old man owning a television repair shop in St. Paul. While there were available photographs of several of the indicted men, officials provided no photograph of Peter Vitale.

The bust was of note both because of the amount of drugs involved and because the people arrested did not fit the drug-dealer stereotype. This was a major cocaine ring that was operated by men aged 37-61, through their city and suburban businesses. KARE, which had a reporter cover the press conference, pursued a story angle that focused on the connection to seemingly legitimate businesses. Shortly after the press conference, KARE's reporter and other employees back at the station began tracking down leads to find the specific businesses owned by the men.

A different KARE reporter went to an arraignment where the ten men were indicted but could not remember whether she saw Peter Vitale. Several other information sources led KARE to conclude that Vitale T.V. & Stereo Co. was the television repair shop referred to at the press conference and that the Peter Vitale who worked there had been indicted. A KARE employee looked in the St. Paul business pages and the television repair store was the only one of its kind listed under the name Vitale. The employee also called the store and was told that a Peter Vitale worked there. The reporter and cameraman then went to the store.

Disputed Encounter With Plaintiff

KARE's reporter and cameraman were the third team of people to arrive at Vitale T.V. & Stereo Co. that day. Two other television stations had used similar or identical techniques as those used by KARE and had also sent people there. The people from these other stations were told that they were at the wrong store and that the Plaintiff Peter Vitale was not the Peter Vitale named in the indictment. The two other stations did not run a story connecting the Plaintiffs to the indictment.

When KARE's reporter and cameraman arrived at Vitale T.V. & Stereo Co. they identified themselves. The reporter asked a woman, who turned out to be Plaintiff's wife, if Peter Vitale was there. The woman called to the Plaintiff, then age 60, and asked him if he wanted to talk to the reporter. There were different versions at trial about what happened next. According to the Plaintiff, he told the reporter "you have the wrong guy and the wrong store." The Plaintiff's wife testified that she did not hear the Plaintiff say this. The reporter and cameraman testified that they were asked to leave the store and that there was no statement about having the wrong guy or store.

After this disputed encounter, the KARE reporter and cameraman left the store and with the store in the background did a report tying the Plaintiffs to the drug indictment. Plaintiff Peter Vitale saw his store pictured on the three broadcasts but did not call KARE and inform them that his son was actually the Peter Vitale indicted. After the 10:00 p.m. broadcast, KARE received some anonymous phone calls informing

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JURORS FIND THAT A REPORTING MISTAKE DOES NOT AMOUNT TO NEGLIGENCE

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it that the story referenced the wrong person and the wrong store. KARE news management took steps to prevent the news department from running the story again. The news management forgot, however, that KARE's engineering department tapes each night's 10:00 p.m. news broadcast and replays it at 1:30 a.m. As a result, the 10:00 p.m. broadcast relating to the Plaintiffs was televised again at 1:30 a.m.

Two weeks after the broadcasts, KARE received a letter from Plaintiffs' attorney indicating that a lawsuit might be afoot. Subsequently, KARE made three offers to run a retraction of the story. The Plaintiffs refused these offers.

Issues at Trial

There were three issues at trial: (1) whether KARE had negligently defamed the Plaintiffs in news broadcasts on October 3, 1996 at 6:00 p.m. and 10:00 p.m. and on October 4 at 1:30 a.m.; (2) whether any of the broadcasts caused damages to either Plaintiff; and, (3) whether KARE should be found liable for punitive damages.

On the issue of negligence, Plaintiffs argued that KARE acted negligently because it was wrong about the Plaintiffs' connection to the indictment and it had information which indicated that it might be wrong. Plaintiffs cited the information that the indicted Peter Vitale was 37, the failure to check the telephone white pages which showed two Peter Vitales, the presence of KARE's reporter at an arraignment where the indicted Peter Vitale appeared, and KARE's failure to stop the 1:30 a.m. broadcast as evidence of KARE's negligence.

KARE's employees stated during the trial that they made an honest factual mistake in the broadcasts and they apologized for it. KARE contended, however, that the mistake was a reasonable one. KARE emphasized that its employees followed normal procedures by reporting information from a credible source, law enforcement personnel, and then checking that information against other sources, a telephone book and calling the store to determine whether a Peter Vitale worked there. That two other television stations followed similar or identical procedures and also went to Vitale T.V. & Stereo Co. demonstrated the reasonableness of KARE's actions. KARE argued that if Plaintiff had in fact told the KARE reporter that he was not the indicted Peter Vitale, as he told the other two stations, then KARE would never have done the story. With respect to the 1:30 a.m. rebroadcast, KARE contended that it was understandable human error for KARE's news management to forget that KARE's engineering department automatically replayed each night's 10:00 p.m. news telecast.

The jury found that KARE did not negligently make any defamatory statements about either of the Plaintiffs. They also found that Plaintiffs had suffered no damage as a result of KARE's broadcasts. Due to its findings on these two issues, the jury did not reach the issue of punitive damages.

Issues of Plaintiff Status and Prior Convictions

In addition to the jury's findings, the trial also involved some interesting rulings in defamation law. None of these rulings were issued as published opinions but they may be informative to an attorney trying a similar case. Specifically, the Court considered: (1) whether Vitale T.V. & Stereo Co., by virtue of being a corporation, was a "public figure;" and (2) whether KARE could introduce evidence of Plaintiff Peter Vitale's federal conviction for copyright infringement and state misdemeanor theft conviction as evidence that Plaintiff had a poor reputation.

The Court ruled against the "media defendant" position on these issues. The Court held that because Vitale T.V. & Stereo Co. was a small corporation and owned entirely by Peter Vitale, that Minnesota case law allowing corporations to be treated as "public figures" did not apply. The Court also found that the principles underlying Minnesota Rule of Evidence 609, which is analogous to Fed. R. Civ. Proc. 609, supported excluding Plaintiff's 8 year old misdemeanor conviction and prohibiting KARE's counsel from questioning Plaintiffs' reputation witnesses about either conviction.

Tom Tinkham, a partner, and Aaron Mysliwiec, an associate, are trial lawyers in the Minneapolis office of Dorsey & Whitney, L.L.P., an international firm based in Minneapolis. They represented Gannett Minnesota Broadcasting, Inc., d/b/a KARE 11 TV in this case.

Judge Finds Reputational Harm Damages for Corporation Limited to Lost Profits

Finding that the issue of a corporation's reputational damages should not have been sent to the jury, Kentucky Circuit Court Judge F. Kenneth Conliffe reversed $1 million of what had been a $3.975 million award. The suit, which was tried to a jury in March 1998, was brought by Kentucky Kingdom, Inc., owner of a Kentucky amusement park, against WHAS-TV for allegedly defaming the park, in a series of reports concerning a 1994 accident on one of Kentucky Kingdom's rides. *Kentucky Kingdom, Inc. v. WHAS-TV*, No. 94CI05547 (Jefferson Cir. Ct., August 4, 1998). The accident occurred when two cars on the ride collided. The state shut down the ride temporarily after the accident and ordered changes.

Plaintiff contended that WHAS-TV's reports as a whole falsely implied that Kentucky Kingdom's rides were not properly maintained and managed. Plaintiff specifically argued that contrary to WHAS-TV's reports that the state ride inspectors shut down the ride because they believed it was "too dangerous," no one had testified to telling the station that the ride was too dangerous and, in fact, two state inspectors testified that they had not done so and did not know anyone who had. Plaintiff also contended that WHAS-TV's referring to the ride as having "malfunctioned" and reporting that Kentucky Kingdom had "removed a key component" were false and defamatory statements because operator error had caused the accident and Kentucky Kingdom had disabled, not removed the component, a brake.

The jury found the statements were false and awarded a total of $3.975 million -- $475,000 in lost profits, $1 million in reputational damages, and $2.5 million in punitive damages.

On post-trial motion, Judge Conliffe denied WHAS-TV's motion with respect to liability finding that "[w]hile segments of the testimony as isolated by the Defendant in its argument are impressive, the nature of the case required the jury to consider the evidence as a whole." Continuing, the court stated, "[t]he jury heard evidence of 'truths' that were allegedly inserted out of context in newscasts where the conclusion to be drawn would be different than if the statements were left in context. If the jury believed these allegations then the statements as a whole by the Defendant would not be substantially true."

Finding the jury's verdict with respect to lost profits "within the proof presented," the court turned to address the issue of whether a corporation can suffer reputational damages. Pointing out that the court struggled with the issue before ultimately submitting it to the jury, Judge Conliffe stated that he was now convinced that "even if the corporation could suffer loss of reputation, the jury had to speculate on anything other than the loss of profits." Accordingly, the judge granted judgment notwithstanding the verdict on the issue.

Finally, the court denied WHAS-TV's motion with regard to punitive damages holding that Kentucky's broadcast retraction statute, KRS 411.061, allowed for exemplary damages if there was a failure to comply with the statute, and the jury had sufficient evidence to so find. In addition, the court found that the size of the punitive award was not inconsistent with the compensatory award even after removing the award for lost reputation.

The case is currently on appeal to the Kentucky Court of Appeals.

WHAS was represented on appeal by Stites & Harbison in Louisville, KY.

CALIFORNIA COURT AWARDS ANTI-SLAPP DISMISSAL, FEES

By Charles D. Tobin

A California judge has dismissed a libel lawsuit under the state's "anti-SLAPP" statute, entitling *The San Bernardino County Sun* to its attorney's fees.

Plaintiff Matthew J. Lopez sued the newspaper after a March 7, 1998 article reporting on his conviction of a misdemeanor in a sexual encounter with a 13-year-old girl. Prosecutors had charged Lopez, 17, with felony lewd and lascivious conduct on a minor after the girl accused him of dragging her from a school playground into the bushes and sexually assaulting her. A judge had ordered Lopez, who boasted of gang affiliations, tried as an adult.

At his trial, which *The Sun* covered daily, Lopez's lawyer argued that the girl was a willing participant in the encounter. The jury acquitted Lopez of the felony charges but convicted him on three counts of the lesser-included offense of contributing to the delinquency of a minor, a misdemeanor. He later was sentenced time served in jail and 36 months probation.

On the day after the verdict, *The Sun* published an article under the headline, "Teen convicted of attack." The subheadline read: "A jury convicts Matthew Lopez of misdemeanors, saying the evidence did not convince them of more serious charges." The article's text reported on Lopez's acquittal of felony charges and convictions of misdemeanors, concluding, "Jurors said the evidence did not convince them that Lopez intended to carry out a sexual attack."

Lopez, in the libel lawsuit, said jurors only convicted him "of a low-grade misdemeanor" and found that he had done "nothing more than . . . himself engaging in sexual activity with another minor." Thus, his Complaint alleged, the newspaper's use of "attack" in the headline was "false, malicious and misleading" because the jury had acquitted him of "all allegations of sexual assault." (Lopez's Complaint also alleged the newspaper's recitation of the girl's testimony about the incident was false and defamatory, but he later abandoned that allegation and solely focused on the word "attack" in the headline.)

The newspaper responded to the lawsuit with a demurrer and a special motion to strike under Cal. Code Civ. Proc. §425.16, known as the "anti-SLAPP" law ("SLAPP" stands for "Strategic Lawsuits Against Public Participation.") The newspaper argued:

- under California case law interpreting the fair report privilege, codified in the state's Cal. Civ. Code §47(d), the "attack" headline must be read in context with the subheadline and the article's text, the accuracy of which could not be disputed;

- read in its entirety, the newspaper's report accurately captured the "gist" or "sting" of the criminal trial and verdict and, thus, was legally privileged as a fair report;

- additionally, by virtue of the coverage of the entire criminal proceeding, which began with Lopez's arrest more than six months before the trial, Lopez was "libel proof" in connection with press reports of his crime;

- in light of the privilege — which is absolute in California and, thus, cannot be defeated by allegations of "malice" — and Lopez's dismal reputation, he could not demonstrate a "probability that the plaintiff will prevail on the claim[,]" as was his burden under the anti-SLAPP statute (Code Civ. Proc.§425.16 (b)(1));

- the statute — enacted by the California legislature in 1993 to protect against lawsuits that challenge "any act of [the defendant] in furtherance of the person's right of petition or free speech . . . in connection with a public issue" (Code Civ. Proc. §425.16 (b)(1)) — protects the press from unmerited libel lawsuits like this one, since, according to a recent anti-SLAPP appellate decision, "news reporting activity *is* free speech" *(Braun v. Chronicle Pub. Co.*, 52 Cal.App.4th 1036, 1046 (1997)) (emphasis original).

Lopez's lawyer, in opposing the motion to strike and demurrer, told the court that *The Sun* had run a "correction" that said its earlier headline had "incorrectly reported what 17-year-old Matthew Lopez was convicted

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CALIFORNIA COURT AWARDS ANTI-SLAPP DISMISSAL, FEES

of" and reiterated that Lopez was convicted of misdemeanors, not felonies. With the correction, the lawyer argued, the newspaper had admitted falsity and should be foreclosed from arguing the gist of the challenged coverage was accurate. The lawyer also argued that the anti-SLAPP statute was enacted to protect "common citizens" not a "powerful corporate defendant's exercise of its First Amendment rights." Thus, plaintiff's opposition papers maintained, the statute did not apply, since libel lawsuits such as Lopez's are brought to vindicate individual reputation, not to "chill" or "punish" newspapers for reporting the news in the future.

At an August 3 hearing, Superior Court Judge Martin A. Hildreth agreed with the newspaper's argument. In an oral pronouncement granting the anti-SLAPP motion, and denying the demurrer as moot, he ruled that: the motion to strike statute protects publications by newspapers; "a libelous statement must be considered within the context in which it is presented, and the statement should not be divided into separate units"; notwithstanding the headline with the word "attack," "the overall 'gist' of the account" of Lopez's conviction "is substantially accurate"; and, plaintiff's allegations of "malice" "are not particularly relevant to the motion." (*Lopez v. The Sun*, case no. SCV 47042, *transcript of proceedings*, August 3, 1998).

Judge Hildreth also rejected declarations Lopez attached to his opposition brief, attesting that, in the words of the court, "plaintiff's friends and family were confused" about the outcome of the criminal trial. The judge said the declarations did not make clear "whether they were confused by the article, or by the consequences of a misdemeanor conviction" and, in any event, were inadmissable hearsay. *Id.*

The newspaper's counsel is preparing an application to recover its fees under the anti-SLAPP statute.

Charles D. Tobin is in-house counsel at Gannett Co., Inc. in Arlington, VA, who with James J. Manning, Jr., of Reid & Hellyer, Riverside, CA, defended The San Bernardino County Sun.

Strong Support For Summary Judgment By Texas Appellate Court

Legal Advice Not Evidence of Malice

On August 27, 1998, in a rousing affirmation of the First Amendment and free speech, a Texas Appellate Court granted summary judgment for appellant, HBO, in a defamation case brought by former Texas judge, Dean Huckabee. The Court found that the plaintiff failed to come forward with the requisite concrete evidence to support his claim of defamation. *HBO v. Dean Huckabee*, No. 14-96-01528-CV (Tex. App. Ct. Aug. 27, 1998).

The case revolved around the HBO film *Women on Trial*, produced by actress Lee Grant and her husband, which detailed the custody battles of four Texas women who believed they had been treated unfairly by the Texas courts. Two of the women's cases were heard in the appellee's courtroom and in both instances, the women lost custody of their children. The creators and producers of the film relied on a variety of sources including interviews with those involved with the trial and documents relating to each case. After the film aired, the appellee alleged that the film was defamatory and unfairly and falsely criticized his decisions in the case. HBO's summary judgment motion was denied by the trial court without opinion.

The appellant-HBO raised several points of error as to why summary judgment should have been granted in the trial court. These included issues contending that the challenged statements in the film and promotional spots were either true or protected opinion under the First Amendment; the appellee was a public figure and there was no evidence of actual malice; and that the film was a privileged fair comment on a public official and a matter of public concern.

In light of the fact that the trial court did not offer reasoning as to why they denied the appellant summary judgment, the Appellate Court was able to choose one of the appellant's points and reverse the trial court's

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judgment based on the merits of that one issue. The Appellate Court chose to review the merits of the appellee's sixth point which was the public official and actual malice claim.

"Interested Witness" Affidavits Sufficient

In its decision, the Appellate Court stated that before 1989 the law in Texas was very clear cut on this issue. Even if the affidavit of an interested witness, usually the party alleged to have committed the defamatory act, was uncontroverted it was not enough to negate actual malice and support a summary judgment motion. In 1989, the Texas Supreme Court overturned its own prior decisions and permitted the grant of summary judgment motions on the basis of an interested witness' affidavit as long as the evidence is "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies and could have been readily controverted." *See Casso v. Brand,* 776 S.W.2d 558 (Tex. 1989). The Appellate Court continued by stating that it is not enough for a jury to disbelieve the defendant's testimony. The plaintiff must be able to prove by clear and convincing evidence that the defendant acted with actual malice. A defendant's credibility, therefore, is not the overriding factor and summary judgment may still be proper even without controverting proof.

To negate this claim of actual malice, the appellant came forward with affidavits of several key people involved with *Women on Trial* including the coproducer and principle researcher, director, and HBO programming executive. The researcher gave a detailed account in her affidavit as to how she compiled the facts for the film including how she confirmed the story of the two women. The Appellate Court believed her affidavit to be sufficient in that the statements she used in the film were true and that she did not have a high degree of awareness as to their falsity.

The other two affidavits concurred with that of the researcher and affirmed that they relied on each other to insure the accuracy of the account. Both had no reason to believe that any of the statements were false or inaccurate. The Appellate Court found that the combination of these three affidavits was enough for the appellant to negate any claim of actual malice and to show that there was not a high degree of awareness of the falsity of the information. By negating the actual malice claim, the appellant established its right to judgment as a matter of law.

Intense and Continuing Legal Review Not Proof of Malice

The burden now shifted to the appellee to raise a genuine issue of fact regarding the question of actual malice. Among the evidence the appellee brought forward was the continuous review by the legal department of the film, the constant rewrites based on substantive concerns, and the absence of the men's side of the story in the film.

The Appellate Court rejected all of these arguments and found no sufficient affirmative proof. The Court stated that the continuous review by the legal department of the film does not prove that there were concerns about the falsity of the document. And as for the constant rewrites and absence of the fathers' side of the story, the Court opined that there are certain editorial decisions and choices that must be made as well as differences of opinion as to what to include and what to omit in a film. All of these decisions are protected by the First Amendment and none of these are dispositive of actual malice. Again, there was no evidence of affirmative proof.

The Appellate Court concluded by sustaining the appellant's sixth point and stating that the appellant presented enough evidence to disprove actual malice as a matter of law. The Court reversed the trial court's judgment and rendered a summary judgment motion for the appellant.

Who's Afraid of Justice Greenfield?

A Mixed Up Libel Analysis in New York Trial Court

Reporter's Selective Omission of Facts Constitutes Malice

Wielding a knife rather than a paint brush, New York Supreme Court Justice Edward J. Greenfield recently declared in *Goldreyer Ltd. v. Dow Jones & Company, Inc.* that a reporter's selective reporting of facts may constitute malice. N.Y.L.J. July 28, 1998 at 22 (N.Y. Sup. Ct. July 28, 1998).

"Who's Afraid of Red, Yellow and Blue III"

Goldreyer revolved around the restoration of "Who's Afraid of Red, Yellow and Blue III", an expressionist painting by the American artist Barnett Newman. The painting was slashed by a vandal while it was hanging in the Stedelijk Museum in Amsterdam. Daniel Goldreyer, who had worked with Mr. Newman for more than 25 years, seemed a natural choice to restore the painting, valued at more than $3.1 million. While the director of the Stedelijk Museum and Mr. Newman's widow approved of Goldreyer's restoration job, Goldreyer was subjected to harsh criticism, both for allegedly ruining the painting and for having the audacity to charge $270,000 for his work. The detractors claimed that "plaintiff had merely 'slapped on ordinary housepaint with a roller brush' and had destroyed the vitality of the painting." N.Y. L.J. July 28, 1998 at 22 (N.Y. Sup. Ct. July 28, 1998). Because of the criticism, the Dutch Ministry of Justice's Forensic Laboratory became involved, taking samples of paint from the work and testing them. The Laboratory made technical findings regarding the composition of the paint but was not conclusive on the issue of the quality of Goldreyer's work.

In the December 24, 1991 edition of the Wall Street Journal, reporter Bob Hagerty published a story on the controversy entitled "For That Price, Why Not Have the Whole Museum Repainted?" The article, which was whimsically written and somewhat dismissive of the issue, suggested that Goldreyer had used the inappropriate type of paint and reported claims that Goldreyer's restoration bordered on criminal fraud. The following week Time magazine's international edition also published a story on the controversy entitled "Was a Masterpiece Murdered?"

Goldreyer filed suit against Dow Jones and Time, alleging damage to his reputation as a master in the field of art restoration. The suit against Time was thrown out by the Appellate Division, First Department, thereby reversing Judge Greenfield's denial of Time's motion to dismiss. Dow Jones initially moved to dismiss on the grounds that the article constituted pure opinion, that it was a fair report of an official proceeding, that it was not libel per se and that standard journalistic practices were followed. N.Y. L.J. July 28, 1998 at 22 (N.Y. Sup. Ct. July 28, 1998). The lower court denied the motion to dismiss and the Appellate Division affirmed. *Goldreyer v. Van de Wetering*, 217 A.D.2d 434 (1st Dept. 1995) The court indicated that after further discovery, a summary judgment motion might be warranted, stressing that the issue would be whether proper journalistic practices were followed.

In July 1998, Dow Jones did make a second motion to dismiss after Bob Hagerty gave a deposition in which he indicated that he had conformed with standard journalistic practice when he conferred with a number of sources. Hagerty also stated in his deposition that the story amounted to fair opinion. Dow Jones also argued that Goldreyer was a vortex public figure and that Goldreyer would have to argue common law malice as well as constitutional malice to be entitled to punitive damages. But Justice Greenfield disagreed.

Goldreyer's Detractors Pushed Him

Working from the vortex public figure standard set out in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980) -- "[T]here must be a public controversy, the outcome of which affects at least some segment of the community in an appreciable way." -- Justice Greenfield determined that Goldreyer had not sought the controversy but rather that his detractors had pushed him to the fore of the

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Goldreyer Ltd. v. Dow Jones & Company, Inc.

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debate. That debate, according to the decision, focused on the liberties a restorer should take in painting over a noted work.

Justice Greenfield acknowledged that there had been a "storm of controversy" over the restoration. N.Y.L.J. July 28, 1998 at 22 (N.Y. Sup. Ct. July 28, 1998). But he rejected the notion that Goldreyer's role had "take[n] on the characteristic of holding up one side of a debate over the issue whether art restoration should ever include painting over much or all of a work of art." N.Y.L.J. July 28, 1998 at 22 (N.Y. Sup. Ct. July 28, 1998). Justice Greenfield found instead that Goldreyer had denied engaging in the controversial practice, rendering the dispute much narrower than it actually was--did Goldreyer paint over Newman's masterpiece or not. That, he concluded, is a controversy only about one painting and not, as *Walbaum* would require, a controversy that affects the broader community. That Goldreyer denied wrongdoing, Justice Greenfield says, citing a New York case on the point, does not thrust him into the larger controversy. Goldreyer was not a public figure.

The court then went on to apply the "gross irresponsibility" standard set out in *Chapadeau,* the standard applied in New York to private figures when the matter at issue is arguably of legitimate public concern. *Chapadeau v. Utica-Observer Dispatch, Inc.*, 38 N.Y.2d 196 (1975). The triable issue of fact was therefore whether the Journal "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." N.Y. L.J. July 28, 1998 at 22 (N.Y. Sup. Ct. July 28, 1998). (citing *Chapadeau v. Utica-Observer Dispatch, Inc.*, 38 N.Y.2d 196 (1975)). On this basis, the summary judgment motion was denied.

Publisher or Republisher?

The Court briefly addressed the issue of whether the Wall Street Journal was a publisher or republisher of the story. As the court noted, if the Wall Street Journal were found to be a republisher rather than a publisher, this would entitle the Journal to rely on Hagerty's and the Wall Street Journal Europe's reputations for reliability. Citing the fact that the European and Asian Wall Street Journals were subsidiaries of Dow Jones, however, coupled with the fact that the article appeared in a slightly longer version in the European edition and was edited for the American publication, the court determined that the Journal was a publisher rather than a republisher and that Hagerty was in fact an employee of Dow Jones.

Signal Failing: Decision to Treat Story Lightly

While Bob Hagerty spoke to nine different sources for the article, including other journalists in the Netherlands, a critic of the restoration, and a Stedelijk Museum official, Justice Greenfield determined that Hagerty's "signal failing was his decision to treat the story lightly, and with derision." N.Y.L.J. July 28, 1998 at 22 (N.Y. Sup. Ct. July 28, 1998). As evidence of "treating the story lightly," Justice Greenfield pointed to, among other things, the fact that Hagerty never looked at the report that the Dutch Ministry of Justice's Forensic Laboratory had published. The Justice also pointed to the fact that Hagerty never indicated in the article that the artist's widow and the director of the Stedelijk Museum had approved Goldreyer as the restorer. Citing "starkly different views of the conclusions to be drawn from the facts," the court was reluctant to substitute its opinion for that of a jury at a trial.

The court held that "the selective reporting of facts, and the deliberate omission of exculpatory or non-defamatory facts to make a 'story' at the expense of the subject may indeed be probative on the issues of irresponsibility and malice. N.Y.L.J. July 28, 1998 at 22 (N.Y. Sup. Ct. July 28, 1998). Moreover, Justice Greenfield indicated that the "deliberate presentation of selected facts to put the subject in the worst possible light certainly can create an inference of malice and a reckless disregard for the truth." N.Y.L.J. July 28, 1998 at 22 (N.Y. Sup. Ct. July 28, 1998). (citing *Rebozo v. The Washington Post Company*, 637 F.2d 375 (5th Cir. 1981)).

Finally, the court finds that the standard for constitutional and common law malice, both of which must be proven in New York in order to obtain punitive damages, are effectively the same.

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Reliance on Tailwind Report

The opinion was published three weeks after Floyd Abrams' report on CNN's reported use by the U.S. military of nerve gas on defectors. The opinion cites an edited paragraph from that report in which Floyd Abrams takes the CNN story to task for its lack of fairness; that the CNN report showed "not fabrication or illegality, but a more subtle process of distortion..." From that, the court concludes (one should suggest erroneously) that a jury in Goldreyer's case could similarly find departures from journalistic standards that presumably would constitute gross irresponsibility.

Dow Jones is appealing both this decision and the Judge's denial of its motion for a stay of discovery pending the appeal.

Anti-Rap Activist Tucker and Spouse Sue Over 135 News Organizations In Pennsylvania

By Hillary Lane

In litigation distinguished by the sheer number of press entities plaintiffs seek to hold accountable, anti-rap activist C. Delores Tucker and her husband William have launched a series of libel actions against dozens of news organizations claiming that they were defamed by news reports about a lawsuit the couple brought against the estate of rapper Tupac Shakur and eleven other defendants in July of 1997. The Tuckers allege that the media defendants falsely reported that Mrs. Tucker claimed in that lawsuit that Shakur's lewd lyrics about her had affected her sex life.

The Tuckers contend that they made no such claim and that the challenged reports mischaracterized Mr. Tucker's claim in the Shakur complaint that he had "suffered a loss of advice, companionship and consortium". According to the Tuckers, a claim of loss of consortium cannot be construed to mean that their sex life was affected, but rather "was limited to advice, society, companionship."

The Tuckers also complain that the news reports mischaracterized the Shakur complaint as being solely about the effect Shakur's lyrics had on the Tuckers' sex life when, in fact, according to the Tuckers, the lewd lyrics reference was a small part of the claims in the action. The Tuckers claim that the challenged reports defamed them by holding them up to ridicule and portraying them as individuals "bringing a frivolous lawsuit contending that lewd lyrics destroyed their sex lives."

First Suit Against Time/Newsweek Set for November Trial

The first libel action was filed in September 1997 in the U.S. District Court for the Eastern District of Pennsylvania against *Time* and *Newsweek* and the reporters who wrote the *Time* and *Newsweek* pieces about the Shakur lawsuit. In December 1997 *Time* and *Newsweek* moved to dismiss the action on the grounds that the reports about the action against Shakur were not defamatory and were privileged under Pennsylvania law as fair and accurate accounts of a judicial proceeding.

In February of this year, the Court denied those motions. With respect to the defendants' argument that the articles were not defamatory, the Court held that a ruling that the articles "did not grievously fracture plaintiffs' standing in the community. . . would be premature." *C. Delores Tucker and William Tucker v. Richard Fischbein, Time Warner Inc., Belinda Luscombe, Newsweek Magazine and Johnnie L. Roberts*, 1998 U.S. Dist. LEXIS 1753. The Court also held that *Time* and *Newsweek* "may not hide behind the fair reporting privilege." *Id.* Accepting as true plaintiffs' allegations that the defendants were informed that plaintiffs' consortium claim specifically excluded a claim for loss of sex life, the Court ruled that the challenged statements were "neither fair nor accurate and carr[ied] the requisite sting to preclude use of the fair reporting privilege." *Id.*

Following the denial of the motions to dismiss, the parties have engaged in discovery on the Tuckers' claims.

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Anti-Rap Activist Tucker and Spouse Sue

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Time and *Newsweek* expect to file motions for summary judgment. The trial of the action is scheduled to begin in November of this year.

Suits Filed In July Against Over 135 News Organizations

At the end of July of this year, the Tuckers filed an action in the Court of Common Pleas of Philadelphia County against ten Pennsylvania news organizations claiming that reports published by those organizations defamed them by stating that plaintiffs claimed Tupac Shakur's lewd lyrics had affected or destroyed their sex life.

Also in late July of this year, the Tucker's commenced another action in the U.S. District Court for the Eastern District of Pennsylvania against more than 125 news organizations, claiming that their reports about the Shakur complaint defamed them and placed them in a false light. Defendants include news organizations as far flung from Pennsylvania as the Los Angeles Times, Seattle Post-Intelligencer, The Palm Beach Post, The Fort-Worth Star-Telegram, and the Calgary Herald -- a virtual "Who's Who" of American and Canadian publications.

Wire Service and Jurisdiction Defenses, to Start

The defendants in the two new actions have not yet responded to the complaints. Many of the defendants picked up the story from the Associated Press or other reputable news sources. These defendants have a strong wire service defense to the Tuckers' claims. Additionally, those defendants that have little or no circulation in Pennsylvania can be expected to assert a jurisdictional defense to the Tuckers' claims.

Hillary Lane is with the firm Rogers & Wells in New York City which represents Associated Press in this matter.

No Error in Showing "Natural Born Killers" and "Menace II Society" to Criminal Juries in Georgia

The Georgia Supreme Court has ruled that violent movies that a criminal defendant(s) claims to have watched prior to commission of the alleged crimes may be shown to a jury as evidence of a defendant's "bent of mind." *Beasley v. State*, No. S98A0265 (July 13, 1998); *Rushin v. State*, No. S98A0259 (July 13, 1998).

Beasley is better known as the "Natural Born Killers" case and *Rushin* as the "Menace II Society" case. The defendants in both cases allegedly mimicked the ultraviolent characters depicted in both films. In both opinions, by a 4-3 vote, the Georgia Supreme Court upheld the trial court's decision to allow the juries to view the films. While in *Rushin* only a portion of "Menace II Society" was shown to the jury, in *Beasley*, "Natural Born Killers" was shown to the jury in its entirety. The Georgia Supreme Court indicated in both opinions that the films were probative of the defendant's "bent of mind" and their modus operandi.

Presiding Justice Norman S. Fletcher authored the dissent in both opinions, joined by the Chief Justice Robert Benham and Justice Leah J. Sears. Justice Fletcher concluded that the probative value of the films was outweighed by the prejudicial effect and that the films only served to prejudice and mislead the juries, with the film in each case acting as an "extra witness" that was used by the State to prove the State's theory of the case--that the defendants committed crimes similar to the crimes depicted in the films. In *Beasley*, Justice Fletcher stated that the testimony at trial was "adequate to describe the movie's connection to Beasley and his crimes."

Both defendants had seen the respective films a number of times before the crimes were committed, with Beasley watching "Natural Born Killers" twenty times and Rushin watching "Menace II Society" five times.

New York Court Cautions Press to "Trespass" at its Peril:

Dr. Felix Shiffman v. CBS, et al.

By Anthony M. Bongiorno

On May 6, 1998, the Supreme Court of the State of New York, New York County, issued rulings in a "trespass by deceit" action against CBS News that raise troubling issues about the reach of New York trespass law.

A Videotaped Doctor Visit

This action arises from a June 20, 1996 report by 48 HOURS, which exposed questionable insurance billing practices by Dr. Felix Shiffman, who is a plastic surgeon in Manhattan. To assist CBS News in its investigation, Empire Blue Cross provided CBS News correspondent Roberta Baskin with an insurance card in the name of Michelle Wielosynski. (Michelle is Ms. Baskin's actual middle name; Wielosynski is the surname of her former husband.) Ms. Baskin then telephoned Dr. Shiffman's office and made an appointment through his receptionist.

She later went to Dr. Shiffman's medical office with hidden cameras and consulted with him about cosmetic nasal surgery. CBS News' undercover footage reveals that, although Ms. Baskin never complained of any breathing problems, and without even examining her nose, Dr. Shiffman made a diagnosis of a deviated septum and concluded that he would expect insurance to cover the estimated $4,000 cost of a nose job.

Shortly after the undercover visit, a CBS News producer called Dr. Shiffman to request an on-camera interview about cosmetic surgery. Dr. Shiffman readily agreed to an on-camera interview about his practice, portions of which were shown in the 48 HOURS broadcast. In that second visit, Ms. Baskin inquired whether he could diagnose a deviated septum by "looking at [a] nose." Dr. Shiffman responded that "you can't tell" without using a headlight and a speculum. Ms. Baskin informed him that she had consulted with him as "Michelle Wielosynski," and then showed him her undercover footage of that consultation -- in which he made a diagnosis of a deviated septum without properly examining her nose or taking a medical history.

CBS News' report noted that Dr. Shiffman had agreed to pay back Empire Blue Cross and Blue Shield an undisclosed amount for nose jobs going back over a six-year period.

Trespass is Sole Claim But Only Reputation is Damaged

In 1997, Dr. Shiffman filed an action in the Supreme Court of the State of New York, New York County, against CBS, Roberta Baskin (collectively the "CBS Defendants"), Empire Blue Cross Blue Shield, and one of its fraud investigators. Dr. Shiffman did not contest the accuracy of CBS News' report, but, instead, raised a single cause of action for trespass, arguing that if he had known of Ms. Baskin's "true" identity he would have denied her entry to his medical office. This trespass allegedly caused him serious reputational injury, which was the only damage he alleged in this action. Dr. Shiffman did not allege that Ms. Baskin's consultation at his medical office was disruptive or caused harm to his property.

Shortly after the CBS Defendants served their Answer, and prior to any discovery, Dr. Shiffman filed a motion to strike each and every defense raised, including the affirmative defense of consent -- consent that was either express, implied, constructive, given by operation of law, or in accordance with custom and usage. The CBS Defendants cross-moved to dismiss the Complaint, arguing, on the strength of cases such as *Costlow v. Cusimano*, 34 A.D.2d 196, 201, 311 N.Y.S.2d 92, 97 (4th Dep't 1970); *J.H. Desnick v. American Broadcast-*

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ing Cos., 44 F.3d 1345, 1355 (7th Cir. 1995) and *Food Lion v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956 (M.D.N.C. 1997), that reputational damages cannot properly be recovered under the guise of a trespass theory.

CBS: Trespass Circumscribed

In particular, CBS argued that Dr. Shiffman's apparent personal affront at being "caught" by undercover newsgathering methods has nothing to do with a claim for trespass, which must be analyzed in accordance with the kind of interest the tort of trespass is intended to vindicate. The tort of trespass is intended to protect an interest in the possession of property. Damages recoverable in trespass are "limited to consequences flowing from the interference with the possession [of property]." *Costlow*, 34 A.D.2d at 201, 311 N.Y.S.2d at 97.

Costlow illustrates the way in which the remedy is circumscribed by the interests the specific tort is intended to vindicate. In *Costlow*, plaintiffs pursued an action against a reporter who entered their *home* and then photographed and published pictures of their small children after tragically they had trapped themselves in the family's refrigerator and died of suffocation. Plaintiffs raised four causes of action, including trespass, for which they sought both emotional and reputational damages allegedly caused by the publication of the photographs. The Fourth Department reversed the lower court and directed dismissal of the complaint, as plaintiffs had not pled damages proper to a trespass action, reasoning that:

> the tort of trespass is designed to protect interests in possession of property, *damages for trespass are limited to consequences flowing from the interference with possession* [of the property].

Costlow, 34 A.D.2d at 201, 311 N.Y.S.2d at 97 (emphasis supplied). Accordingly, as the Fourth Department explained, a trespasser may be liable for "physical harm done while on the land, irrespective of whether his conduct would be subject to liability were he not a trespasser," but damages for injury to reputation and for emotional disturbance are not a "natural consequence of the trespass" and are "more properly allocated under other categories of liability." *Id.*

The CBS Defendants also argued that as a matter of policy endorsing a rule that would allow Dr. Shiffman to pursue a trespass claim to a jury for even nominal -- and, presumably, punitive -- damages would unreasonably expand the reach of New York trespass law. In such a tort world, for example, as Judge Posner wisely noted in *J.H. Desnick*:

> Without [the ability to conceal the true motives from a property owner] a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in the dealer's showroom.

J.H. Desnick, 44 F.3d at 1351.

Intent is Not the Test

The CBS Defendants also reminded the court that, as a practical matter, CBS News' investigation of insurance fraud was premised on communications *that undoubtedly would only have been known or primarily known to the patient and Dr. Shiffman*. Indeed, Ms. Baskin did what *any other patient* who entered Dr. Shiffman's office during normal business hours for normal business purposes

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would have been able to do -- tell third parties about the medical visit. CBS posited a hypothetical scenario, which it believed exposed the flaw in Dr. Shiffman's theory. A hypothetical patient who coincidentally is employed as an insurance fraud investigator consults with Dr. Shiffman about liposuction or other cosmetic procedure. At the time of her entry onto his premises, she had no intent to share the details of that visit with any third party. Once inside, she inquiries about the cost of liposuction or other cosmetic surgery and is appalled to learn that the hypothetical Dr. Shiffman assures her that he will "find a way to bill her insurance company"; in this hypothetical scenario, she alerts her insurance carrier to possible fraud. Under Dr. Shiffman's theory, which focuses on the intent of the putative trespasser at the time of the entry, it would appear that this hypothetical insurance investigator would *not* be subject to a trespass claim -- despite the fact that she shared with third parties information similar to what Ms. Baskin did and, presumably, despite the fact that the "injury" to Dr. Shiffman would be the same as in the case of Ms. Baskin's entry.

Accordingly, the CBS Defendants argued that an approach that makes controlling the issue of the person's intent at the time of the entry is not the proper inquiry. Rather, as the *Costlow* court noted, the focus should be on the "consequences flowing from the interference with the possession" of the property. *Costlow*, 34 A.D.2d at 201, 311 N.Y.S.2d at 97. No allegations are made by Dr. Shiffman that Ms. Baskin's consultation interfered with his possession or caused injury to the property at issue. Accordingly, we urged the court to rule that a cause of action for trespass arising from entry by the press into a public or quasi-public place cannot be stated unless the trespass itself is disruptive or causes actual harm to the property.

One-Paragraph Opinion Allows Suit and Dismisses Defenses

In a one-paragraph opinion dated May 6, 1998, Justice DeGrasse appeared to implicitly conclude that the reputational injury pleaded by Dr. Shiffman could not be redressed on a trespass theory, but refused to dismiss the Complaint, reasoning that "actual damages are not an element of the tort [of trespass], and nominal damages are recoverable as a means of protecting the plaintiff's possessory rights," *citing Kronos, Inc. v. AVX Corp.* 81 N.Y.2d 90, 95, 595 N.Y.S.2d 931, 934 (1993).

Turning to the motion to dismiss affirmative defenses, Justice DeGrasse, in one sentence, dismissed the defense of consent to the supposed trespass. Although no discovery had been conducted to probe issues such as the circumstances of Baskin's visit or the public nature of Dr. Schiffman's medical office, Justice DeGrasse struck those defenses, ruling as a matter of law that a "license or privilege to enter premises cannot be obtained by misrepresentation." The sole case cited in support of his conclusion was a criminal case which involved the reach of New York's penal law provisions on burglary, *People v. Thompson*, 116 A.D.2d 377, 381, 501 N.Y.S.2d 381 (2d Dep't 1986). Justice DeGrasse did not specifically address the constitutional defenses raised in Affirmative Defense Three, noting simply that those defenses were "unavailing" because the "claim of trespass does not implicate any right to free speech."

The CBS Defendants have filed an appeal to the New York Appellate Division, First Department. We expect the court to hear in October, 1998.

Anthony M. Bongiorno is the Assistant General Counsel of Litigation for CBS Broadcasting Inc. and is the lead attorney in Shiffman.

ACCESS

D.C. Court of Appeals Stays Order Allowing Press/Public to Attend Depositions in Microsoft Antitrust Case

Depositions Proceed in Secret

On August 19th, the Federal Court of Appeals for the District of Columbia stayed a district court order permitting members of the public to attend the depositions, including that of Bill Gates, scheduled in *U.S. v. Microsoft*, the antitrust suit being litigated in the District of Columbia. See, ***LDRC LibelLetter***, August 1998 at 20. The Court of Appeals offered as the basis of its decision no more than:

> "The balance of harms favors appellant; if appellant prevails, the disclosure could not be undisclosed, whereas if appellees prevail, the text and videotape of a private deposition can then be disclosed."

A coalition of press organizations had petitioned the district court to allow for access to the depositions under a relatively unknown provision entitled "The Publicity in Taking Evidence Act" (15 U.S.C. Section 30). This provision was raised in the 1970's in the United States antitrust suit against IBM and resulted in orders authorizing public access to depositions in that lawsuit. The plain language of the Act specifically authorizes access to depositions of witnesses in Sherman Act suits brought by the government, stating that the proceedings shall be open to the public as freely as are trials in open court" and that "no order excluding the public from attendance on any such proceedings shall be valid or enforceable."

Despite this clear and unequivocal language, and despite the obvious First Amendment implications of denying access, the Court of Appeals addressed neither point. The briefing schedule offered up by the Court for a full hearing of the issues, while expedited, will conclude after the trial in the case is scheduled to begin. The press organizations have asked for a more expedited briefing schedule.

The panel included Circuit Judges Williams, Ginsburg, and Sentelle. They have asked the intervenor organizations to address the question of whether the Federal Rules of Civil Procedure Enabling Act (28 U.S.C. § 2071) somehow superseded this statutory provision on access to depositions.

Intervenors Bloomberg News, *The New York Times*, Reuters America, *The Seattle Times*, ZDNET, ZDTV, L.L.P. were represented by Levine Pierson Sullivan & Koch, L.L.P., in Washington, D.C.

LDRC wishes to acknowledge our fall interns Lara Schneider and Lisa Smith, both students at Benjamin N. Cardozo School of Law, for their contributions to this month's newsletter.

INTERNET

AOL Wins Stay of Discovery Pending Motion for Summary Judgment

Finding that the immunity from liability afforded interactive computer service providers under Section 230 of the Communications Decency Act (47 U.S.C. SEC. 230) also provides a general immunity from the burdens of litigation, a federal district court magistrate judge granted AOL's motion to stay discovery pending disposition of its motion for summary judgment on a defamation claim under Section 230. *Ben Ezra, Weinstein and Company v. America Online Incorporated*, CIV 97-485 LH/LFG (D.N.Mex. July 1998)

Plaintiff sued AOL based upon allegedly false information available through AOL but provided by a third party. The information at issue allegedly caused plaintiff's stock to fall dramatically, resulting in financial harm. AOL moved to dismiss the action under the protection afforded it by Section 230. While that motion was pending, AOL also moved for protection from discovery in the case and from case management deadlines.

Immunity Analogized to That Afforded Government Officials

In several recent decisions, the Communications Decency Act provision has been held to "effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others." *Blumenthal v. Drudge*, 992 F.Supp. 44,49 (D.D.C. 1998) as quoted in *Ben Ezra, Weinstein and Company*, Slip op at 2. [See also: *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert.denied*, ___S.Ct.___ (June 22, 1998); *Doe v. America Online Inc.*, No. Civ CL 97-631 AE, 1997 WL 374223 (Fla. Cir. Ct. June 26, 1997) AOL argued that this immunity is similar in kind to the qualified immunity provided governmental officials performing discretionary functions, an immunity which protects them not only from liability but from other burdens of litigation such as those imposed by broad discovery.

Although recognizing that his was the first court to squarely decide this issue, Magistrate Judge Lorenzo F. Garcia agreed. He noted as well that in the recent cases under Section 230, discovery had, in fact, either been stayed pending disposition of the motions to dismiss or simply not commenced at the time the Section 230 motion was decided. Further, a stay of discovery, he said, was consistent with the cost-saving provisions of the Civil Justice Reform Act. 28 U.S.C. SEC. 471 *et seq.*

The discovery bar is not absolute, the court stated. Plaintiff may request specific discovery needed to respond to AOL's motion to dismiss for the court's review

Yahoo! Finance Postings Lead to Defamation Suit Against "John Does"

On September 2, 1998, ITEX filed suit in the Oregon circuit court against one-hundred "John Does" for alleged defamatory statements published on Yahoo! Finance's Message Board. ITEX Corporation v. John Does 1-100, Civ. No. 98-09-06393.

ITEX operates a retail barter exchange in Portland, Oregon. The corporation acts as a record keeper for transactions between members who barter for goods and services with other members. ITEX alleges that, since December 1997, the defendants have maliciously posted messages on the Yahoo! Finance Message Board with the purpose of undermining confidence in ITEX stock. ITEX's complaint, which was also filed on behalf of the corporation's

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Yahoo! Finance Postings Lead to Defamation Suit Against "John Does"

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Chief Executive Officer, Graham Norris, sets forth four specific messages that the corporation considers defamatory: that the corporation overvalued goods, that the corporation would be sued for wrongful termination by a "fired, former 'top executive'", that plaintiff Norris is a "pimp", and that the corporation's businesses are a scam. The complaint alleges that the defendants published the statements knowing that they were false and that the John Does acted maliciously in doing so.

ITEX's complaint sets forth five claims for relief: interference with economic relationships, unlawful trade practices, civil conspiracy, injunctive relief, and defamation. The user names, who allegedly posted the messages, are "colojopa", "Investor727", "Orangemuscat", and "ibc96".

It should be noted that as recently as July 1998 a Canadian court ordered twelve internet service providers to provide the identities of users who posted allegedly derogatory statements about the Philip Services Corporation. Yahoo! was one of the service providers in that case and at the time, a company spokesman indicated that "We do comply with all valid court-ordered subpoenas and did so in this case." Wall Street Journal, July 13, 1998. Not only did Yahoo! comply with the subpoena, the on-line service provider removed the offensive messages from its bulletin board. Yahoo!'s terms and conditions of usage state that "you, and not Yahoo, are entirely responsible for all information and material that you post." Id. *See also* LibelLetter, July 1998, at 25.

It is expected that ITEX will subpoena Yahoo! to obtain the identities of the users who published the statements.

New LDRC 50-State Survey: 1999 Employment Libel and Privacy Law

LDRC has just mailed out a brochure on its newest Survey Book on Employment Law. The book is due to be published in January of 1999.

Like LDRC's other Surveys, The **Employment Survey** is prepared by lawyers in each state's jurisdiction and is presented in an outline format with coverage ranging from basic employment libel and privacy law to the emerging e-mail monitoring and employee drug testing.

Look for the brochure in the mail and be sure that all order forms are returned, with payment, no later than December 1, 1998.

Please call 212.889.2306 with any questions or to order the book.

Federal District Court Dismisses Privacy Suit Against America Online For Disclosing Subscriber Identity

By Patrick J. Carome and Matthew A. Brill

In one of the first cases ever to explore the obligations of an online service provider under the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §§ 2701 *et seq.*, a federal district court in Detroit ruled in July that America Online, Inc. ("AOL") may not be held liable for disclosing, in response to a civil subpoena, the identity of a former subscriber who had posted a harassing message on the Internet. *See Jessup-Morgan v. America Online, Inc.*, Civ. No. 98-70676 (E.D. Mich. 1998). Judge John Feikens held that AOL's disclosure of such information to a private party did not violate ECPA, because the statute restricts disclosure of such identity information only when the recipient is a "governmental entity." *Id.*, slip op. at 6.

Plaintiff Posts Hoax

The facts from which the suit arose, which the court set out in detail in its opinion, were unusual. In early 1996, Terry Jessup-Morgan ("Jessup") used her AOL account to post an offensive and harassing message in an Internet newsgroup. *Id.* at 1. (Newsgroups are electronic bulletin boards that are generally available to anyone with Internet access.) The target of the harassment was Barbara Smith, who was then the party to a Michigan state divorce proceeding initiated by her husband, Phillip Morgan. *See id.* Jessup was engaged in a relationship with Morgan at that time, and later married him. *Id.*

The harassing message did not disclose the true identity of its author. Posted under the screen name "Barbeeedol" to a newsgroup denominated "alt.amazon-women.admirers," the message included the following text:

> My name is Barbara and I'm a single white female looking for just about any kind of sex I can have with someone other than myself. . . If you can help, call me at (810) 977-9476.

Id. at 2. According to the court, the listed telephone number was the number of Barbara Smith's parents, with whom Barbara Smith and her children were residing pending resolution of the divorce case. *Id.* The Internet newsgroup to which Jessup posted the message was available to any of the approximately 40 million people who then had Internet access. *Id.*

The message had its apparently intended effect of generating unwanted calls to Barbara Smith, and she quickly gathered that she was the victim of a cruel hoax. *Id.* Her brother, who was himself an AOL member, located the message Jessup had posted by conducting an Internet search and deduced from the screen name on the message ("Barbeeedol@aol.com") that its author was an AOL member. *Id.* Smith's brother then contacted AOL, reported the problem, and asked AOL for the name of the member responsible for the posting. *Id.*

AOL internally identified Jessup-Morgan as the perpetrator, and immediately closed her AOL account based on its determination that she had breached the then-applicable AOL Member Agreement, which prohibited using the AOL service to post messages that harass or impersonate others. *Id.* at 3. But AOL declined to disclose Jessup's name to Smith's brother, explaining to him that, under its privacy policy, it would release a member's name and account information only in response to a subpoena. *Id.*

AOL Subpoenaed

In February 1996, Barbara Smith's divorce lawyer served AOL with a Michigan state court subpoena seeking information that would identify the AOL member who had posted the offensive message. *Id.* The subpoena was issued under the auspices of the ongoing divorce proceeding between Smith and her husband. AOL complied with the subpoena by sending the attorney a two-page member record containing

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Federal District Court Dismisses Privacy Suit Against America Online

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basic identity information on the AOL account from which the message originated. That information revealed Jessup-Morgan to be the account holder. *Id.*

Plaintiff: Compliance With Subpoena Violates Law

In her suit against AOL, Jessup-Morgan alleged that AOL's disclosure of her identity in compliance with the subpoena violated ECPA and two Michigan consumer protection statutes, constituted a breach of contract, and was tortious. She requested damages in excess of $47 million. AOL quickly moved for judgment on the pleadings, summary judgment, and dismissal with respect to Jessup-Morgan's various claims. In a July 23, 1998 opinion and order, the court granted dismissal or summary judgment with respect to each of Jessup-Morgan's claims.

Jessup-Morgan's principal allegation was that AOL's disclosure of her identity violated ECPA. ECPA limits the circumstances in which a provider of electronic communication services such as AOL may disclose the *contents* of an electronic communication to any person or entity, 18 U.S.C. §§ 2702 & 2703(a)-(b); it further limits the circumstances in which other records or information pertaining to a subscriber or customer (including subscriber identity information) may be disclosed to a governmental entity, *id.* § 2703(c).

The court held that, because AOL disclosed to a private person only information that identified Jessup-Morgan, and not the "contents" of any communication, Jessup-Morgan failed to state a claim under the statute. *Jessup-Morgan*, slip. op. at 6. Indeed, the court noted, ECPA affirmatively authorized the disclosure: Section 2703(c)(1)(A) makes clear that an interactive service provider such as AOL *may* disclose a record or other information pertaining to a subscriber to any person *other than a governmental entity*. *Id.*

The court, applying Virginia law, next held that AOL did not breach its contract with Jessup-Morgan. *Id.* at 7. The then-applicable AOL Member Agreement prohibited messages that "harass, threaten, embarrass, or cause distress, unwanted attention or discomfort," as well as those that "impersonate any person." *Id.* at 5. The court found that Jessup-Morgan's message inviting third persons to seek sexual liaisons with Barbara Smith undoubtedly was a "substantial and material breach" of those terms. *Id.* at 7. The court further found that the Member Agreement expressly authorized AOL both to terminate Jessup-Morgan's membership as a result of her conduct and to comply with the subpoena served by Barbara Smith's lawyer. *Id.* Finally, the court held that even if the disclosure had been contrary to the contract, Jessup-Morgan's own breach of the Member Agreement barred her from suing on the contract. *Id.*

The court made quick work of Jessup-Morgan's remaining claims. It held that Jessup-Morgan could not state a claim for negligence because she failed to allege that AOL breached any duty independent of its contractual obligations; failed to plead fraud and misrepresentation with particularity, as required by Fed. R. Civ. P. 9(b); failed to state a claim for invasion of privacy and disclosure of private facts, because Virginia law does not recognize such torts; and failed to state a claim under the two Michigan consumer protection statutes, because the Member Agreement dictated that the parties' relationship be governed by Virginia law. *Id.* at 8-9.

Patrick Carome is a partner and Matthew Brill is an associate in the Washington, DC firm of Wilmer, Cutler & Pickering. They represented AOL in the Jessup-Morgan case, along with their colleague Samir Jain and AOL attorneys Randall J. Boe and Charles D. Curran.

Public Opinion and the Press

Undoubtedly in the wake of the release of the Starr Report and the events that will unfold this Fall, public opinion about the press will be tested and probed. But several interesting polls that were released in recent months.

Newsweek

One was published in *Newsweek* magazine in the July 20, 1998 issue. In that poll, a majority of those responding said they got most of their news from television, 61%, versus only 24% from newspapers, 1% from magazines, and 2% from the Internet. 42% only believed some of what they saw, heard or read in the news media. And the same percentage, 11%, believed a very little of what they saw, heard or read as believed almost all of it, — 11%.

Equally disturbing, *Newsweek's* poll found that 53% of their sample felt that news organizations were "often inaccurate" versus only 39% who thought the news media got its facts straight.

AJR and Gallup

American Journalism Review ("AJR") in its July/August, 1998 issue published a poll from Gallup on the public's use and view of the media. The poll itself was conducted in March. An interesting finding was that the all-around winner appeared to be local television news, which was second only to nightly network news as the most frequent sources of news and it was third in the "who do you trust" category. That is generally consistent with the results of a poll done last November commissioned by the National Press Foundation and conducted by Princeton Survey Research Associates and polls published by Pew Research Center, although in their November poll, local newspapers fared almost as well as local television.

On trust, in the Gallup poll, CNN and Headline News were first (59%), public television was second (54%), television newsmagazines were fourth (51%), and discussions with family and friends was fifth (46%). After that came local radio news, nightly network news, local newspapers, NPR, Sunday morning tv news programs, national newspapers (with only 37%) and on down to the Internet (-5%), which fell into a "cannot trust" category, to TV talk shows, the most untrusted source in the poll (-38%).

Gallup pointed out an interesting conclusion to be drawn from its data: the most direct, unfiltered media, the Internet and C-SPAN, are neither heavily used for news (11% of those polled used the Internet at least several times per week/month and 7% similarly used C-SPAN) nor are they highly rated for trustworthiness, with C-SPAN being ranked as a media one can trust by 36% of those sampled who had an opinion and the Internet falling into the "cannot trust" category, with a -5% rating.

Like the *Newsweek* poll, the two top ranked media on the question of use were television media, with 75% of the respondents indicating that they watched nightly network news daily (56%) or several times per week/month (19%) and 73% of respondents stating the same for local television news. Local newspapers were read daily/weekly by 50% and several times per week/month by 62%. CNN, while highly rated on the trust scale, was a regular source of news for only 38% of those polled and public television by only 29%.

Political Bias and the Media

The Gallup poll reported in AJR found that many of the respondents felt that the media was biased and that, with respect to virtually each media category, more felt that the bias was a liberal bias than a conservative one. Local television news was an exception. It was the only media where a majority (51%) of those polled found it to be fair and impartial and those who felt it was biased were evenly split between the view that the bias was liberal (24%) or conservative (25%).

All other media category were found to be "fair and

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Public Opinion and the Press

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impartial" by a minority of the respondents, ranging from 47% for national cable TV news to 39% for national newspapers. And in each other category -- except local newspapers where the respondents were evenly split -- those responding that the bias of the media was a liberal one exceeded those who felt it was a conservative bias by a hefty margin.

These perceptions by the public are in contrast to the results of a survey commissioned by FAIR (Fairness & Accuracy In Reporting) from David Croteau of the Virginia Commonwealth University and published June 1998. Titled "Examining the 'Liberal Media' Claim: Journalists' Views on Politics, Economic Policy and Media Coverage," the survey was sent to 444 Washington-based journalists all of whom worked for national or metropolitan US news organizations that potentially reach the general public, with 141 responding. Of those responding, 6% were bureau chiefs, 19% were editors or producers, and 75% were reporters or correspondents. The respondents by job classification represented approximately the same percentages as the population as a whole in the Washington press corps, according to the surveyors.

What the pollsters found was that the Washington press was more conservative than the public at large (drawn from a number of contemporaneous surveys) on a groups of issues: including (1) protecting Medicare and Social Security; (2) NAFTA; (3) requiring employers to provide health insurance to employees; (4) concern over concentrated corporate power; (5) taxing the wealthy; (6) "fast track" authority; (7) government guaranteed medical care. Indeed, the only issue queried in which the journalists were to the left of the public at large dealt with concern over environmental issues.

On social issues generally, 30% of the journalists polled characterized themselves as left of center, 57% as in the center, 9% as right of center, and 5% as "other." On economic issues, however, these same journalists characterized themselves as left of center 11% of the time, centrist as 64% of the time, right 19%, and "other" 5%. The respondents, according to the poll, had very high incomes as compared to the public as a whole, with over half in households with $100,000 per year income, and one-third in households with $150,000 or more income. The poll notes that median income in 1996 nationwide was $35,492, with 80% of US households having an annual income of less than $68,015 and 95% with less than $119,540.

Among the other interesting bits of information in this FAIR Report were the results of questions about the sources these Washington journalists used in their reporting on economic policy issues. Government officials and business representatives were consulted substantially more often than labor representatives or consumer advocates. Indeed, on a list that included government officials, business representatives, think-tank analysts, university-based academics, Wall Street analysts, labor representatives and consumer advocates, the ranking was as listed here -- with labor and consumer representatives falling dead last on the "nearly always" consulted query. On the "often" consulted, the rankings were slightly different, with labor representatives scoring somewhat above Wall Street analysts.

You can obtain a copy of the FAIR Report from FAIR, 130 West 25th Street, New York, NY 10001, 212.633.6700 or by fax, 212.727.7668.

California Legislature Passes "Paparazzi Bill"

The California Legislature has passed a "paparazzi bill," which allows celebrities or crime victims to sue if their privacy is invaded by photographers. The bill was approved by the California Assembly 49-15. The final Senate vote was 21-9. The bill has been sent to Governor Pete Wilson for his signature.

Under SB 262, sponsored by California Senate President Pro-Tem John Burton, an individual would be liable for the physical invasion of privacy if the individual "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 type of visual 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."

Liability extends to constructive trespass as well, which implicates the use of high-power lenses and auditory devices. The bill further provides that "a person who commits physical invasion of privacy or constructive invasion of privacy, or both, is liable for up to three times the amount of any general and special damages that are proximately caused by the violation of this section. This person may also be liable for punitive damages, subject to proof according to Section 3294." The bill allows an individual to recover damages from the photographers and, unlike a similar bill introduced in the U.S. Senate (Feinstein-Hatch), from any "person who directs, solicits, actually induces, actually causes another person, regardless of whether there is an employer-employee relationship, to violate [Section 1708.8 (a) or (b)]." *(See* <www.spj.org> for the text of the Feinstein-Hatch and House bills.)

The bill's proponents purport to uphold the First Amendment press protections through the use of the "personal or familial activity" language in the bill, thereby limiting its reach. They argue that legitimate investigative reporting is not restricted by virtue of this language. Supporters of the bill include the Screen Actors Guild, the Directors Guild of America and a number of celebrities, including Billy Crystal and Richard Dreyfus. The California Broadcasters Association and the California Newspaper Publishers Association oppose the bill, as do the major television networks and the American Civil Liberties Union.

The Governor has until September 30th to sign, not sign, or veto the legislation.

UPDATE: California Supreme Court to Rule on Sub-tort of Invasion of Privacy by Photography

Sanders v. ABC Post-*Shulman*

In the aftermath of *Shulman v. Group W Productions*, *Shulman* 18 Cal. 4th 200 (Sup. Ct. 1998), the California Supreme Court is about to rule on a judicially created sub-tort of invasion of privacy by photography. The case before the Supreme Court is *Sanders v. American Broadcasting Cos.*, 25 Media L. Rep. 1343 (Cal. App. 1997), and review of it had been deferred by the California Supreme Court pending disposition of *Shulman*.

The Supreme Court has limited the issues to be briefed and argued to the following three questions:

> "(1)whether a person who lacks a reasonable expectation of complete privacy in a conversation because it could be seen and overheard by coworkers (but not the general public) may nevertheless have a claim for invasion of privacy by intrusion based on a television reporter's covert videotaping of that conversation;
>
> (2)whether the jury's finding in the first phase of trial, on liability under Penal Code section 632, legally precluded maintenance of a common law intrusion claim; and
>
> (3)whether the jury instructions in the second phase of trial, on liability for intrusion, were prejudicially erroneous."

Sanders arose out of a 1993 ABC *PrimeTime Live* investigation of the telepsychic industry. The report was obtained

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Sanders v. ABC Post-*Shulman*

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through the use of a hidden camera by an ABC reporter who obtained employment with the telepsychic operation. Sanders, a telepsychic operator, was recorded on two occasions by the reporter, who had also been hired as a telepsychic operator. The *PrimeTime* broadcast included a six second portion of the conversations with Sanders and nine seconds of a conversation with another telepsychic, Naras Kersis. Sanders and Kersis filed suit against ABC alleging unlawful eavesdropping, intrusion, public disclosure of private facts, false light, intentional and negligent infliction of emotional distress, and violation of the California consitutional right to privacy. The false light and private facts claims were thrown out before trial.

Despite the fact that the jury found that neither Sanders nor Kersis had a reasonable expectation of privacy in the conversations with the reporter, the trial court instructed the jury *sua sponte* that it could find ABC liable for a "sub-tort" of "the right to be free of photographic invasion." The jury did just that, assessing ABC over $1 million in compensatory and punitive damages.

On appeal, ABC argued that the "sub-tort" of photographic invasion did not exist. Rather, ABC contended that because the jury had found that Sanders did not have a reasonable expectation of privacy in the recorded conversations, he was barred from recovering on any theory alleging invasion of privacy. Sanders argued that a claim for invasion by surreptitious photography exists "if the person photographed does not subjectively intend that his communication be photographed, even if the communication occurs without an objectively reasonable expectation of privacy."

The Appellate Court concluded that Sanders had no reasonable expectation of privacy in the conversations. Judge Spencer dissented, finding that while the trial court's theory of the "sub-tort" was not strictly accurate, it was "under the facts and circumstances of this case, accurate enough in presenting the jury with a theory of autonomy privacy." Judge Spencer likened the case to *Shulman v. Group W Productions, Inc.*, where the California Court of Appeals reversed a grant of summary judgment on an invasion of privacy claim for portions of a broadcast shot inside a rescue helicopter. On appeal, the California Supreme Court held that a reasonable jury could find the use of a wireless microphone to record Mrs. Shulman's conversations with medical personnel "highly offensive."

Sanders filed a petition for review, which the California Supreme Court granted on May 21, 1997, although briefing was ordered deferred pending disposition of the appeal in *Shulman*.

By order dated August 12, 1998, Mark Sanders was directed to serve and file a Brief on the Merits on or before September 11, 1998, which he has done. ABC has until October 9 to respond to Sanders' brief.

UPDATE: The Cattlemen v. Oprah

As previously reported, the cattlemen who lost at trial in February in federal court in Amarillo to Oprah Winfrey, her production company and her outspoken guest, Howard Lyman, in the plaintiffs' efforts to bring the first successful lawsuit under the new Texas agricultural disparagement law, the Defamation of Perishable Food Products act, has sought an appeal from the Fifth Circuit. While they have now received two extensions for filing their appellate brief, originally due in July, they are now expected to file on October 2.

In the meantime, a new lawsuit, also under the Texas agricultural disparagement law, and asserting (as did the original suit) negligence and common law business disparagement claims, was filed by a group of plaintiffs that looks substantially like the plaintiffs in the initial lawsuit. These plaintiffs, led again by Cactus Feeders, Inc., brought the new suit in *state* court, presumably thinking that this would obtain for them a different perspective on the issues. Oprah Winfrey and the other defendants have removed to federal court, however, and the case is currently pending before the same judge as tried the first lawsuit. The defendants have filed a motion to dismiss on grounds, among others, of res judicata. The plaintiffs are trying to show that buried within their ranks is an Illinois resident who defeats diversity.