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MEDIALAWLETTER

Reporting Developments Through September 28, 2006

Ninth Circuit Affirms Contempt Order Against Freelance Videographer

No Constitutional or Common Law Privilege in Grand Jury Context

By Theodore J. Boutrous, Jr. and Michael H. Dore

On September 8, 2006, the Court of Appeals for the Ninth Circuit filed an unpublished memorandum opinion that affirmed an order by the Northern District of California finding freelance videographer Joshua Wolf to be in civil contempt. *Wolf v. U.S.*, No. 06-16403, 2006 WL 2631398 (9th Cir. Sept. 8, 2006) (O'Scannlain, Graber, Clifton, JJ.).

Wolf had refused to abide by a grand jury subpoena ordering him to produce unaired video footage he shot during a 2005 demonstration in San Francisco, California. Wolf, who had been released on bail pursuant to an earlier Ninth Circuit order, reported back to prison on September 22, 2006, where he could remain until the grand jury's term expires in July 2007.

Ninth Circuit's Orders

In conjunction with his appeal of the district court's contempt order, Wolf filed a motion in the Ninth Circuit for bail pending his appeal. On August 31, 2006, the Ninth Circuit issued an order granting Wolf's bail motion and Wolf was released from prison. The court's order stated that the bail motion was decided by Chief Judge Schroeder and Judge Reinhardt, who were sitting on the court's motions panel in August 2006. The order noted, however, that "[t]his appeal and all other pending motions will be decided by the next motions panel."

The Ninth Circuit's motions panel in September 2006 was comprised of Judges O'Scannlain, Graber, and Clifton. On September 8, 2006, that panel issued an unpublished opinion that rejected Wolf's appeal and affirmed the District Court's order. The Court of Appeals stated that Ninth Circuit cases interpreting *Branzburg v. Hayes*, 408 U.S. 665 (1972) required a limited balancing of First Amendment interests only in certain circumstances, none of which it felt existed in Wolf's case.

According to the court, for example, there was no showing that the grand jury was being conducted in "bad faith." In any event, the court stated that "[e]ven if we applied a balancing test, we would still affirm."

The Ninth Circuit panel also noted the argument presented by Wolf and *amici* that the court should recognize a federal common-law reporter's privilege. Citing *Branzburg* and *Scarce v. United States*, 5 F.3d 397, 401 (9th Cir. 1993) the court stated only that "[t]his argument has been squarely rejected." The court did not address the arguments raised in the briefing that *Branzburg* and *Scarce* did not preclude recognition of the privilege under Federal Rule of Evidence 501.

Specifically, the court did not address the contention that *Branzburg* pre-dated Rule 501 and dealt exclusively with analytically distinct First Amendment issues, and that the district court's interpretation of *Scarce* conflicted with the Supreme Court's subsequent decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996).

Following the Ninth Circuit order affirming the district court, the United States Attorney's Office for the Northern District of California filed a motion to revoke Wolf's bail. Shortly thereafter, the court of appeals issued an order stating that Wolf had to produce the materials sought by the grand jury subpoena or report back to prison. Wolf chose to report back to prison, where he remains pending efforts by his attorneys to seek rehearing of the court of appeals decision affirming the district court's contempt order.

Conclusion

The Ninth Circuit's unpublished decision affirming the district court is not considered binding precedent and under local rules it may not be cited to or by the courts of the Ninth Circuit. Nevertheless, the seven-page decision, issued without oral argument, unfortunately provides only limited analysis of issues of significant importance to all journalists.

Theodore J. Boutrous, Jr., is a partner in the Los Angeles office of Gibson, Dunn & Crutcher LLP and Co-Chair of the firm's Media Law Practice Group; Michael H. Dore is an associate in the firm's Los Angeles office and member of the group. The authors, along with Gibson Dunn associates William E. Thomson and Amanda M. Rose filed the brief of amici curiae Reporters Committee for Freedom of the Press, WIW Freedom to Write Fund, Society of Professional Journalists, and California First Amendment Coalition in support of Joshua Wolf in his Ninth Circuit appeal seeking reversal of the civil contempt order issued against him by the District Court for the Northern District of California.

BALCO Journalists Sentenced to 18 Months for Contempt

Punishment Stayed Pending Outcome of Appeal

On September 25, Judge Jeffrey White sentenced *San Francisco Chronicle* reporters Lance Williams and Mark Fainaru-Wada to 18 months in jail for contempt of court for their refusal to testify about the identity of their confidential sources. *In re Grand Jury Subpoenas*, No. CR 06-90225 (N.D. Cal. Sept. 25, 2006).

Last month, Judge White denied the reporters' motion to quash grand jury subpoenas in the ongoing criminal investigation into the leak of BALCO grand jury transcripts to the reporters. *See In re Grand Jury Subpoenas*, No. CR 06-90225, 2006 WL 2354402 (N.D. Cal. Aug. 15, 2006). Although Judge White stated he was mindful of the "important policy considerations" at stake, he concluded he was bound by *Branzburg*, and the facts of the case, and he systematically denied all claims of a qualified or common law privilege.

Following the court's ruling, the reporters advised the government that they would not comply with the order to appear before the grand jury for the reasons raised on the motion to quash and also because of Fifth Amendment concerns over self-incrimination. In response to the latter, on August 30, Judge White granted the government's ex parte application to grant the reporters testimonial immunity.

On September 1, the reporters and the government stipulated to a finding that the reporters be held in civil contempt to expedite their appeal. The government requested that the reporters be jailed; the reporters requested a nominal $1 per day fine and suggested that the question of alternative lesser sanctions be revisited after appeal. Judge White rejected their request, saying "the Court will not engage in piecemeal litigation of that issue."

Judge White went on to hold that nominal fines would not be sufficiently coercive to win compliance with the court's orders. Instead, he ruled that based on their statements in court and to the public a "term of incarceration is the least coercive sanction that would reasonably win compliance." He sentenced the reporters to be jailed for up to 18 months.

The reporters are represented by Eve Burton, Jonathan R. Donnellan and Kristina E. Findikyan, The Hearst Corp., Floyd Abrams and Susan Buckley, Cahill Gordon & Reindel, New York, NY, and Gregory Lindstrom, Latham & Watkins, San Francisco.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ORDER HOLDING MARK FAINARU-WADA AND LANCE WILLIAMS IN CIVIL CONTEMPT

.... Fainaru-Wada and Williams spoke of the fact that they were doing their jobs as investigative reporters and were attempting to bring a truth to light. The grand jury too is attempting to do its job and is on its own search for truth, *i.e.* to determine whether *or not* a crime has been committed or an order of the court violated. In ruling on their motions to quash and for clarification and in finding them in contempt and imposing a remedial sanction, this Court is doing its job, which is to interpret and apply the law to the facts before it. Fainaru-Wada and Williams also spoke of their respect for the law and the sanctity of the grand jury process, and stated that they do not believe themselves to be above the law. Yet this Court has ruled that the law requires them to comply with the subpoenas.

.... The Court does not fault Fainaru-Wada and Williams for their convictions. *Nor is it acting to punish them for maintaining those convictions.* ... However, both in their public statements and in their statements to the Court, Fainaru-Wada and Williams make clear that they will not reveal their confidential sources as required by this Court's Orders. The Court finds based on the record before it that a term of incarceration is the least coercive sanction that would reasonably win compliance with its orders.

Judiciary Committee Holds Hearing on Federal Shield Law

By Laura Rychak

The Senate Judiciary Committee held a hearing on the Free Flow of Information Act of 2006 (FFIA) on September 20, making it the Committee's third hearing on a federal shield law. *See MLRC MediaLawLetter* May 2006 for a discussion and copy of the bill, S. 2831.

Hearing Testimony

Paul J. McNulty, Deputy Attorney General with the Department of Justice, reiterated the DOJ's previous concerns over a federal shield law and acknowledged the department's continued opposition to FFIA despite Sen. Arlen Specter's repeated attempts to address their concerns. Sen. Specter (R-PA), Chairman of the Committee, emphasized his intention to proceed with the legislation despite the DOJ's opposition. He said he would continue to try to work with the DOJ on the FFIA.

The DOJ characterized the FFIA as a solution in search of a problem after noting the department's restrained use of media subpoenas – once again, the DOJ reiterated that they issued media subpoenas in less than 20 cases in the last 15 years. (However, this number does not include subpoenas issued by special prosecutors or civil litigants.)

FFIA separately treats subpoenas from federal prosecutors in criminal cases, from criminal defendants and from civil litigants, with distinct balancing tests for each to overcome to compel disclosure. It also addresses application of the privilege in circumstances where a journalist is an eyewitness; where disclosure is necessary to prevent death or substantial bodily harm, or to prevent an act of terrorism or significant harm to national security; and the unauthorized disclosure of properly classified information by government employees.

The DOJ observed that the judiciary is ill-equipped to properly weigh national security concerns and that any balancing of national security interests with the First Amendment should remain in the Executive Branch.

Sen. Jon Kyl (R-AZ) embraced the DOJ's message and appeared to remain entrenched in his opposition to the bill. He registered his concerns over use of "properly classified information" in Section 9 and asked whether courts would be making judgments on "classified" information beyond an assessment on whether the process was followed correctly. He also asked what tests the court would use to determine "significant harm" to national security.

McNulty responded to this inquiry by noting that the courts would have to make highly subjective decisions on what seriously harmed national security. Kyl also observed that – while Section 9 applies to acts of terrorism against the U.S. – he asked what would happen under the FFIA if the specific act of terror is against another country such as Canada or the U.K. He also speculated on whether the definition of an "attorney for the U.S." in Section 3 would apply to JAG attorneys and whether the FFIA might jeopardize military tribunals.

While Sen. Sam Brownback (R-KS) made a late appearance at the hearing, his remarks and questions were similarly critical of a federal reporter's privilege. Sen. Chuck Schumer (D-NY), a supporter of the bill, was the only democrat in attendance.

Joining McNulty in opposing the bill were Steven D. Clymer, professor at Cornell Law School, and Victor E. Schwartz of Shook, Hardy & Bacon, who appeared on behalf of the National Association of Manufacturers (NAM) and its interest in protecting trade secrets.

Professor Clymer, a former district attorney, cited the recent high profile NSA wiretapping and CIA black site stories shortly after Judith Miller's jail time as evidence that leakers and whistleblowers will continue to leak even without a federal shield law.

Clymer also contended that the FFIA's balancing tests are entirely unpredictable and that the reporters could not give assurances of confidential source protection even if enacted.

Schwartz claimed that the FFIA would have inadvertent consequences in civil litigation and maintained that a party could hamper the discovery process by handing information over to a reporter. A letter by the Chamber of Commerce, NAM and a few associations cautioned the impact of the FFIA on the ability of businesses to protect trade secrets.

Supporters' Testimony

Former Solicitor General Theodore B. Olson of Gibson, Dunn & Crutcher and Former Assistant U.S. Attorney Bruce

(Continued on page 6)

Judiciary Committee Holds Hearing on Federal Shield Law

(Continued from page 5)

A. Baird of Covington & Burling testified in support of the bill. They responded to DOJ concerns by recounting their own experiences inside and out of government.

Olson emphasized that while people may disagree on the scope of the privilege, everyone should agree uniform standards are needed in light of splits in the circuit courts. He also noted the DOJ's reluctance to have their judgment second guessed by judges. In response to Senator Brownback's concern that the FFIA would immunize leakers, Baird emphasized the language of the bill does not immunize leakers and reiterated there are other tools at the prosecution's disposal to ferret out leakers.

Chairman Specter's staff reports that the Chairman remains interested in moving the legislation this session. But, it is unlikely that the bill will come up before the Senate recesses for the November 2006 elections.

Laura Rychak is Legislative Counsel with the Newspaper Association of America.

Financial Newsletter Covered By Maryland Reporters Privilege

In September, the Maryland Court of Special Appeals held that a newsletter focusing on publicly traded companies was entitled to the protection of the "news media" privilege under the Maryland state shield law. *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc*., No. 2621, 2006 WL 2670955 (Sept. 19, 2006 Md. Ct. Spec. App.) (Murphy, C.J., Eyler, Meredith, JJ.)

Forensic Advisors publishes a subscription, internet-based newsletter, entitled The Eyeshade Report. The newsletter published a lengthy report about Matrixx Initiatives, a Delaware corporation that produces Zicam cold medicines.

Matrixx had filed a defamation suit in Arizona over anonymous comments posted about it on financial bulletin boards. The company sought to take discovery in Maryland from Forensic Advisors and depose its principal Timothy Mulligan, arguing that material published in the Eyeshade report about the company was the same as that published in the bulletin boards. It argued that discovery from Eyeshade would assist it in identifying the "John Doe" defendants in the Arizona action and was otherwise relevant to is claims.

Mulligan sought the protection of Maryland's reporter's privilege, but the Circuit Court for Montgomery County in Maryland ordered that the deposition take place.

After noting that state courts had not considered whether a financial newsletter was covered by the state shield law, Md.Code Ann., Cts. & Jud. Proc. § 9-112, the court ruled that

The Eyeshade Report satisfied the definition of "news media," as that term is defined in the statute. The Maryland statute defines news media as: (1) Newspapers; (2) Magazines; (3) Journals; (4) Press associations; (5) News agencies; (6) Wire services; (7) Radio; (8) Television; and (9) Any printed, photographic, mechanical, or electronic means of disseminating news and information to the public.

Finally the court ruled that Mulligan should sit for the deposition and could assert the privilege as necessary during the course of the deposition.

First Circuit Reverses $950,000 Libel Verdict Against *Boston Phoenix*

Remands for Full Retrial to Determine Plaintiff's Status

In July the First Circuit reversed a $950,000 jury verdict against the *Boston Phoenix* over an article that described plaintiff, a former assistant district attorney, as a "child molester" in discussing his custody dispute with his ex-wife. *Mandel v. The Boston Phoenix, Inc.*, 456 F.3d 198 (1st Cir. 2006) (Selya, Cyr, Lipez, JJ.).

In a decision written by Judge Bruce Selya, the court held that plaintiff was erroneously determined to be a private figure on an inadequate record at the summary judgment stage. The court remanded the case for a full retrial of all issues in the case, including plaintiff's status. On August 2, the court panel denied a motion for rehearing.

On August 23, District Court Judge Edward F. Harrington, who made the summary judgment ruling and tried the case, issued a short decision stating that it is "the law of the case" that plaintiff's status be determined at the close of evidence after a full retrial. But in a footnote he noted the obvious practical concerns with this procedure:

> The disadvantage of this procedure is that evidence relating to plaintiff's status, although a question of law for the Court, will be presented before the jury and might tend to distract its focus from the elements of defamation which it will be called upon to decide and might tend to confuse it as to what are the relevant issues. This procedure will surely lengthen the duration of the trial. It is the judgment of the District Court that a preferable procedure would be to decide the question of plaintiff's status by summary judgment after an extensive discovery process in order to reduce the risk of jury confusion and of the additional expenditure of resources.

Mandel v. The Boston Phoenix, Inc, No. 03-10687, 2006 WL 2474980 (D. Mass. Aug. 23, 2006).

Background

At issue in the libel suit was a January 2003 article entitled "Children at Risk," written by reporter Kristen Lombardi. The article focused on a alleged trend in family courts: that when a mother accuses a father of child abuse in a child custody dispute, those courts, ill-equipped to handle such charges, often award full custody to the father.

The article recounted the experiences of women and families in four custody litigations. One of the cases discussed was the bitter custody battle between plaintiff and his ex-wife which appeared under the subheading, "Losing custody to a child molester." The article described Marc Mandel as "a man who Baltimore, Maryland, child-protection workers believe is a child molester," and stated that the Baltimore Court Department of Social Services had determined that plaintiff had assaulted his daughter from a previous marriage.

It also stated that plaintiff's ex-wife "had accumulated a battery of documentation and witnesses to back up her sex-abuse claims, including the Baltimore DSS findings that Mandel had assaulted his oldest daughter."

Mandel sued the newspaper, reporter and the editor of the article for libel in April 2003, alleging, among other things, that he lost his job as a county prosecutor in Baltimore, Maryland because of the article.

Summary Judgment & Trial

In June 2004, Judge Harrington denied defendants' motion for summary judgment, ruling that plaintiff was a private figure. *See* 322 F. Supp. 2d 39 (D. Mass. 2004). The court distinguished plaintiff's position from police officers who are generally deemed to be public officials. Plaintiff "was the lowest level prosecutor in the Maryland court system;" "did ordinary legal work;" did not exercise significant judgment without oversight from his superiors or interact with the public; and had no access to the press.

Following a 10 day trial in December 2004, an eight person jury (four men and four women) returned a verdict for plaintiff. *See* Civ. No. 03-10687 (D. Mass. jury verdict Dec. 17, 2004). Answering a special verdict form, the jury found that two statements were false and published negligently: 1) the subhead implying that plaintiff was a child molester; and 2) the comment that a child services report determined that plaintiff had assaulted his 10-year-old daughter from an earlier marriage.

The jury awarded $950,000 in compensatory damages.

First Circuit Ruling

On appeal, the First Circuit held that the pretrial private figure ruling was in error because of the insufficient record de-

(Continued on page 8)

First Circuit Reverses $950,000 Libel Verdict Against *Boston Phoenix*

(Continued from page 7)

veloped at the summary judgment stage. The court acknowledged that a showing of inadequate factual support for a claim or defense can be enough to warrant summary judgment, but found that doctrine inapplicable here. The evidence about plaintiff's status was "inherently imprecise" and "tended to support conflicting inferences."

Plaintiff, through his own deposition and that of his former supervisor, emphasized that he prosecuted only minor crimes, had little supervisory authority, did not direct any government policies and directed all press inquiries to supervisors.

Defendants emphasized plaintiff's job responsibilities as reflected in his employment file. Namely that he represented the State of Maryland in criminal prosecutions, handled trials, interviewed victims of crimes, discussed cases with other attorneys, and had access to the media.

This evidence, the Court found, "cried out for a special sort of judgment call.

This evidence, the court found, "cried out for a special sort of judgment call: which job characterizations – Mandel's, given in anticipation of litigation, or those contained in his employment file – more accurately depicted the inherent attributes of the position."

This was a matter of credibility that could not be made under the constraints of a summary judgment motion, but could have been made at trial. *Citing Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986) (explaining that "[c] redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" are not functions to be performed by a judge on summary judgment).

The court also found it significant that neither the First Circuit nor Massachusetts appellate courts had addressed the question of whether an assistant state's attorney is a public official for First Amendment purposes. "What little case law there is suggests that such a person might be a public official ... but in any event, the inquiry is too fact-dependent to rely exclusively on labels. Further factual development would have allowed for a more precise, more nuanced application of the law."

The court declined to rule on the public official issue based on the trial court record because after the summary judgment ruling the parties had no incentive to offer additional evidence at trial on the status issue.

Sufficiency of Evidence

Finally, the court found more than sufficient evidence to support the jury's findings on falsity and negligence and thus denied the newspaper's motion to set aside the verdict on the merits. Plaintiff's testimony, medical evidence and a ruling from family court in Maryland rejecting the molestation claims constituted "strong evidence" of falsity. And the reporter's failure to read pertinent available documents, her mischaracterization of other documents and her failure to contact several individuals who might have provided opposing views was sufficient evidence of malice.

None of the findings about the sufficiency of the evidence, though, would be binding at the retrial.

The Boston Phoenix was represented at trial and on appeal by Daniel J. Gleason and Rebecca L. Shuffain of Nutter, McClennen & Fish in Boston. Robert Bertsche, Prince, Lobel, Glovsky & Tye LLP, represented reporter Kristen Lombardi on appeal. Plaintiff was represented by Jennifer J. Coyne and Stephen J. Cullen of Miles & Stockbridge in Towson, Md. and Mary Alys Azzarito of Salem, Mass.

False Light Tort Can't Handle the Truth

Florida Jury Rejects Policeman's Claim Over Broadcast of Truthful Information

By Gregg D. Thomas & Deanna K. Shullman

A panel of six Florida jurors this month returned a verdict in favor of WFTS-TV, Tampa Bay Television, Inc.'s ABC affiliated station, and reporter Mike Mason, finding they did not portray a Tampa police officer in a false light. *Lusczynski v. Tampa Bay Television*, No. 03-11424 (Hillsborough County Cir. Ct. jury verdict Sept. 11, 2006)

Background

At issue in the case was a series of broadcasts discussing complaints by some police officers about the Tampa Police Department's promotions process, including allegations of favoritism, a good ol' boy system, corruption, and the promotion of officers who had engaged in misconduct.

WFTS first broadcast a report about the complaints in May 2003. The station later followed up with additional stories in June 2003 and in January 2004. The plaintiff, Paul Lusczynski, was named in the broadcasts as an example of an officer who had engaged in misconduct, been disciplined, and was later promoted. The broadcasts included the following statements about Lusczynski:

> Mason: Example. Off-duty officer Paul Lusczynski head-butted another officer during an argument at a bar in Ybor City. He was only given a written warning. Lusczynski has since been promoted to corporal.
>
> Lusczynski: I think I've earned my promotion, my assignment. Uh, obviously the Chief of Police and the staff did.

Lusczynski, and two other police officers named in the broadcasts who had also been disciplined for misconduct and later promoted separately sued WFTS and Mason in December 2003 for false light invasion of privacy.

After the station broadcast a follow-up story in January 2004, Lusczynski amended his complaint to include the January broadcast. A year later, he amended again, this time also alleging defamation claims in counts that paralleled his false light claims and were based upon exactly the same statements.

The allegations supporting the false light claims were near verbatim as that which Lusczynski alleged to support his defamation claims, including allegations that all of the statements supporting both types of claims were false and defamatory. The three cases were consolidated for discovery purposes only, and Lusczynski's was the first to go to trial.

The gist of Lusczynski's claims was not that the statements about him were false. In fact, he admitted that the statements about him in the broadcasts were true. Instead, Lusczynski claimed the story was structured to imply that he was a corrupt cop, who was promoted to corporal because of favoritism and the spoils of a good ol' boy system at the police department. In essence, he alleged both his false light and defamation claims by implication.

False Light Law

While the Restatement (Second) of Torts § 652E and the majority approach in jurisdictions recognizing the false light tort clearly require falsity as an element, the Florida Supreme Court has never explicitly addressed the contours of the tort. In 2001, however, an appellate court in Florida held in *Heekin v. CBS Broad., Inc.*, 789 So. 2d 359 (Fla. 2d DCA 2001) that a cause of action for false light invasion of privacy could exist "when the facts published are completely true."

Thus, at least in one of Florida's five appellate districts, truthful, non-defamatory communications can support a false light claim. Lusczynski's claims were brought in Hillsborough County, a circuit bound by the *Heekin* decision.

The defendants in *Heekin* ultimately obtained a judgment on the pleadings in their favor because the trial court, on remand, found that the false light "cause of action [alleged was] actually one for defamation, notwithstanding [plaintiff's] naming it as one for false light invasion of privacy." *Heekin v. CBS Broad., Inc.*, Case No. 99-5478-CA, *Amended Order Granting Judgment on the Pleadings and Dismissing Amended Complaint with Prejudice* (Fla. 12th Cir. Ct. July 23, 2004). The Second District Court of Ap-

(Continued on page 10)

False Light Tort Can't Handle the Truth

(Continued from page 9)

peal affirmed without opinion, *see* 892 So. 2d 1027 (Fla. 2d DCA 2004), but the 2001 opinion allowing false light claims to be based upon publication of truthful information remains the appellate court's only published opinion to substantively address the merits of the claims.

Heekin has proved problematic for the media in Florida and has spawned a rash of false light lawsuits based upon publication of truthful information, including *Gannett Co., Inc. v. Anderson*, No. 1D05-2179 (Fla. 1st DCA), which is currently pending in the First District Court of Appeal after a jury entered a verdict against Gannett and its co-defendants and awarded the plaintiff $18 million in damages.

Several other cases are currently in the pre-trial phase throughout the state. The false light tort has become an attractive alternative to defamation post-*Heekin* because of its four-year statute of limitations and the uncertainty about which constitutional privileges and defenses apply to the privacy tort. Legislation proposed in the Florida legislature earlier this year to correct some of the anomalies of *Heekin* was rejected at the end of the session after intense lobbying by plaintiffs and law firms pursuing these claims based upon truthful information. The *Lusczynski* case is the first known case to reach a jury in the post-*Heekin* era and result in a win for the media.

Summary Judgment Motion

In the spring, WFTS and Mason sought summary judgment based, in part, on Florida's long-established single cause of action rule, which dictates that when an action is based upon the same operative facts as a defamation claim, the defamation claim takes precedence and all other causes of action fail.

The rule had been applied in Florida to several cases involving the false light tort. In response to the motion, Lusczynski backed off the prior allegations in his complaint, his deposition testimony, and his sworn answers to interrogatories to assert for the first time in the case that the false light claims were not based upon false and defamatory communications.

Trial court Judge Gregory P. Holder agreed, allowing Lusczynski to pursue solely his false light claims. A motion for rehearing and reconsideration was denied.

The case was thereafter transferred to a new judge as a result of a reassignment of Judge Holder. Judge James D. Arnold denied a second summary judgment motion, which sought judgment in WFTS's and Mason's favor based upon a legitimate public interest defense to the false light tort that had been recognized by the Florida Supreme Court in *Jacova v. S. Radio & Tel. Co.*, 83 So. 2d 34 (Fla. 1955).

Trial

The case went to trial on Tuesday, September 6, 2006, and included three counts for false light invasion of privacy based on a total of five alleged false impressions in the broadcasts. The four women, two men jury heard four days of testimony from station employees and police officers, including officers whose statements were contained in the broadcasts as well as those who were background sources for the reporter.

During the presentation of his case in chief, Lusczynski called three officers who appeared as on-air sources in the broadcast. Retired Deputy Chief John Bushell, who stated in the broadcast that there was too much friendship at the Police Department and a good ol' boy system testified that his statements did not refer specifically to Lusczynski. Officer Steve Thurman, who stated in the broadcast that the Police Department needed officers that were corrupt out and officers with integrity and smarts promoted and that the Department was not promoting the best and the brightest, also testified that his statements did not refer to Lusczynski.

Finally, Chief of Police Stephen Hogue testified that his statements – that he would promote officers based on performance rather than friendship – were not a reference to Lusczynski. Lusczynski's attorney attempted to show that their statements had been structured in the broadcasts to imply that these individuals were referring to Lusczynski.

Each of the three officers testified that they were never asked by the station about Lusczynski and that their comments were about the promotions process generally. Plaintiff's attorney argued in closing that the station's failure to ask the sources about Lusczynski demonstrated actual malice. Lusczynski asked the jury to award him emotional and mental distress damages.

WFTS and Mason presented evidence that the broadcasts were never intended or structured to be about Lusc-

(Continued on page 11)

False Light Tort Can't Handle the Truth

(Continued from page 10)

zynski and that the only statements about Lusczynski were the truthful statements concerning his misconduct, discipline and promotion.

Defendants also presented evidence of the thoroughness of the newsgathering process, including the diligence and exhaustiveness of Mason's research and investigation, the careful scrutiny of the wording used to tell the stories, and the conscientious choice of video footage to pair with those words.

In closing, defense counsel argued that the broadcasts did not create any false impressions about Lusczynski, that the station's failure to ask each of the sources in the story about Lusczynski directly did not amount to actual malice, and that any damages Lusczynski suffered was the result of the truthful information about his misconduct.

The jury took about two hours to reach its verdict, returning to the courtroom once during deliberations to ask to see two of the four broadcasts at issue in the case. The verdict form asked four questions: 1) whether the plaintiff was cast in false light as to each of the alleged false impressions; 2) whether the false light was highly offensive to a reasonable person in Lusczynski's position; 3) whether WFTS and Mason acted with knowledge or reckless disregard; and 4) the amount of damages to be awarded to Lusczynski.

The jury answered "no" to the first question, finding Lusczynski had not been cast in a false light as to any of the alleged false impressions. Proceeding no further with the verdict form, the jury returned to the courtroom with a verdict in favor of WFTS and Mason.

There is no word on whether Lusczynski will appeal the jury's verdict. In the meantime, summary judgment is pending in both of the remaining two plaintiffs' cases, one of which is set for trial in January 2007.

Gregg D. Thomas is a partner at Thomas & LoCicero PL in Tampa, Florida, and Deanna K. Shullman is an associate with the firm. They, along with partner Rachel E. Fugate, represented Defendants Tampa Bay Television, Inc. and Mike Mason in this matter. Plaintiff was represented by Mark Herdman, a Clearwater attorney with the law firm Herdman & Sakellarides

Connecticut Court Grants Summary Judgment to Libel Plaintiff

$150,000 Damage Award Against Self-Published Local Newspaper

A Connecticut trial court this month granted summary judgment to an assistant fire chief on his libel claim against a self-published – and now closed – local newspaper, awarding the plaintiff $150,000 in damages. *Burgess v. Marino*, No. AAN-CV-04-4001823-S (Conn. Super. Ct. Ansonia/Milford Sept. 13, 2006).

Last year, in an unusual pretrial ruling, the court granted plaintiff's motion for a prejudgment attachment order freezing $150,000 of the defendant's assets pending resolution of the libel case. The defendant did not contest the claim after the attachment order.

Background

The plaintiff, Ronald Burgess, is the Assistant Fire Chief of Ansonia, Connecticut. The defendant, Richard Marino, self-published a weekly local newspaper called the *Star News* out of his home in nearby Beacon Falls. The paper with a weekly circulation of 2,000 focused on local issues, gossip and criticism of local officials.

At issue in the lawsuit was a report in the newspaper that an "assistant chief" in the fire department with the initials "R.B." had an affair with a 17-year-old female firefighter. The newspaper also characterized plaintiff as a "lying, oversexed, non-thinking pervert."

Burgess sued Marino for $150,000, alleging that the report was "of and concerning" him because he is the only chief in the department with the initials R.B., and that the allegation was false and published with actual malice.

Prejudgment Remedy

Last year, plaintiff moved for prejudgment attachment under Conn. Gen. Stat. § 52-278 which applies to "actions in law and equity." Under the statute, a plaintiff must show "probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff." Conn. Gen. Stat.§ 52-278d. *Statute available at*: www.cga.ct.gov/2005/pub/Chap903a.htm

At the evidentiary hearing on the application, the defendant called three firefighters as witnesses who he said would corroborate the information he published. But all of them testified that they had no knowledge of any affair between plaintiff and a minor.

Ruling in favor of plaintiff, Superior Court Judge Patrick L. Carroll III wrote that "there was not even a scintilla of evidence presented at the hearing that would suggest the defendant conducted even the most cursory of investigations to confirm the veracity of the allegations he made against Ronald Burgess." The judge also found probable cause that plaintiff's reputation was damaged by the publication.

This summer the court granted a summary judgment motion and held a separate hearing on damages, leading to this month's damage award. The defendant did not appear at these hearings.

Plaintiff was represented by Roger L. Crossland of Shepro & Brown, LLC in Stratford, Conn. Defendant had appeared pro se.

Directed Verdict Granted to Missouri Newspaper

By Jean Maneke

Midway through trial last month, a Missouri judge granted a directed verdict in favor of *The Lake Sun Leader* newspaper in a libel case over the paper's report about the closure of a motel. *Continental Inn, et al. v. Lake Sun Leader*, No. 26V050400241 (Mo. 26th Cir. Ct. judgment entered 8/18/06).

The trial judge ultimately accepted that the newspaper was reporting on a matter for which the newspaper had a social duty to report to the public and that in such circumstances, if there is no evidence of actual malice, that the newspaper is entitled to summary judgment.

Background

In 2002, *The Lake Sun Leader*, a daily paper located in the Lake of the Ozarks area of Missouri, published a story about the decision by city officials in a nearby community to shut down a local motel for building code violations, in particular for electrical wiring issues that the city felt created a safety hazard. The motel filed a libel suit in 2003, but then five months later voluntarily dismissed the case.

Each of plaintiff's witnesses was specifically asked if they knew anything that would support that the paper or the reporter knew the statements made by the city officials in the story were false.

But it was not over. In 2004 the suit was refiled and lengthy litigation commenced. The owners of the motel sued for libel in a two-count petition, citing two stories which mentioned the closure of the motel. Eventually, the court dismissed one of the two counts, leaving only the original story about the closure of the facility by the city still pending.

Part of the reason for the long delay in the process of the litigation is that both judges assigned to the case in Miller County died during the course of the matter, a rare event for this attorney.

Eventually the case was assigned to Senior Judge Byron Kinder, out of Jefferson City. Judge Kinder has never been a strong supporter of the media and he had no qualms of saying that to the jury members that eventually were empaneled to hear the libel case. During the voir dire of the jury panel, Judge Kinder said to the jury that even he understood how bad the newspapers can be when they wrongly report on something he had ruled upon in court, a comment that did not go unnoticed by defense counsel already beginning to think about appeal opportunities, after knowing of this judge's reputation on media matters.

Two motions for summary judgment filed previously in the case were denied by Judge Kinder. Judge Kindler ruled that plaintiff was a private figure. The newspaper nevertheless argued that the actual malice standard applied under Missouri law because Missouri recognizes a qualified privilege where an entity has a moral or social obligation to report on a matter.

In fact, the Missouri Supreme Court has previously set out in *Henry v. Halliburton*, 690 S.W.2d 775, 780-1 (1985):

> "[A]ll statements made bona fide in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the person making them, or the interest of the person to whom they are made. A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter, which, without this privilege, would be slanderous and actionable. But in this definition of a privileged communication, the word 'duty' cannot be confined to legal duties, which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation."

Trial

The case began trial on August 2 before a 12 person jury. The jury panel, in fact, knew a number of the potential defense witnesses and a significant number of potential jurors asked to be disqualified because they were well acquainted with a primary defense witness, the city building inspector, and they believed they would be influenced by that personal relationship.

The plaintiff presented a number of witnesses who told the jury about how terrible the newspaper story was to the

(Continued on page 14)

Directed Verdict Granted to Missouri Newspaper

(Continued from page 13)

reputation of the motel – once closed down, it never re-opened and the reputation of the motel was ruined, the witnesses said.

Of course, they never explained to the jury exactly why the plaintiff didn't do the repairs required and simply re-open the motel for business. One of plaintiff's witnesses who testified that he could no longer send his friends to stay at the motel, admitted that the reason he couldn't refer business was because the motel was closed, not because its reputation was besmirched.

But the most important thing was that each of plaintiff's witnesses was specifically asked if they knew anything that would support that the paper or the reporter knew the statements made by the city officials in the story were false. No, they each responded. Did they know anything that would support that the paper or the reporter acted in reckless disregard as to whether the statements by city officials were false? Again, each responded that they did not. Indeed, no evidence was offered that the newspaper was in any way negligent, except that one of the motel's owners claimed the newspaper did not return calls when the owners sought to comment, a claim that was disputed by the reporter of the story.

The paper moved for a directed verdict at the end of the plaintiff's case on the ground that there was no evidence of actual malice and that on that basis, the case should not be submitted to the jury, *citing Deckard v. O'Reilly Automotive, Inc.*, 31 S.W.3d 6, 16 (Mo.App. W.D. 2000) ("Whether the defendant acted with malice in making the defamatory statement or whether the statement made exceeded the exigencies of the situation are questions of fact for the jury, unless no substantial evidence of actual malice is presented, in which case the court should direct a verdict.").

At that point, the judge denied the motion. The defendant then began putting on evidence, including the reporter who wrote the story and the city's building inspector, who did an excellent job telling the jury about all the defects in the wiring that he found.

At some point during a break in that evidence, apparently the judge finally took time to read the legal argument that went with the motion, explaining again the argument of qualified privilege and especially how sending a case without evidence of actual malice to the jury would be reversible error.

And in a dramatic moment after the building inspector's testimony, he ordered the defendant to rest its case (which was far from over) and announced to the plaintiffs that he was granting the directed verdict after all, dismissing the jury and thus ending the trial.

Jean Maneke, The Maneke Law Group, L.C., in Kansas City, MO., represented The Lake Sun Leader in this case. Plaintiffs were represented by Michael P. O'Neill, Florissant, MO.

Illinois Appellate Court Reinstates Defamation and Disparagement Claims Over Newspaper Ad

Criticism of Competitor Capable of Verification

By Damon Dunn

An Illinois appellate court reinstated libel and commercial disparagement claims over a clothing store advertisement published in the *Chicago Sun-Times*. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, No. 1-05-2744, 2006 WL 2129448 (Ill. App. Ct. 1st Dist. July 31, 2006) (Hoffman, Karnezis, Erickson, JJ.).

The trial court had granted a motion to dismiss, holding that the advertisement was non-actionable opinion. Reversing, the appellate court held that one portion of the advertisement was not protected opinion and was potentially defamatory. The court also held that plaintiff pled a claim for commercial disparagement, creating an appellate split on whether Illinois recognizes that cause of action.

Background

Defendant Cosmo's competes with Imperial in the discount men's clothing business. Cosmo's regularly advertised a "3 for 1" sale, that is, three items for the price of one. To compete, Imperial adopted and advertised a similar 3 for 1 pitch. Rather than accept Imperial's imitation as a form of flattery, Cosmo's retaliated with a full-page advertisement.

The Cosmo's ad included a large graphic announcing an "8 DAY BLOWOUT SALE" at the "'Home of the Original 3 for 1'." The offending copy appeared under the banner "WARNING! Beware of Cheap Imitators Up North" and continued:

> We all know, there is only one 'America' in the world and only one '3 for 1' in the Midwest, and in both cases it was the original thinking of an Italian that made them famous."

The Cosmo's ad then proceeded to mock an entity by the name of "Empire" for attempting to "covet" Cosmo's original 3 for 1 sales concept and threatened a "hail storm of frozen matzo balls," among other hyperbole.

According to the complaint, Cosmo's plea that Empire should "start being kosher" coupled with metaphorical allusions to "matzo balls," and "dried cream cheese" were intended to denigrate Imperial as Jewish, rather than Italian-American, owned business. The third paragraph of the ad stated:

> It is laughable how with all the integrity of the 'Iraq Information Minister', they brazenly attempt pulling polyester over your eyes by conjuring up a low rent 3 for imitation that has the transparency of a hookers come on...but no matter how they inflate prices and compromise quality, much to their dismay, Cy and his son Paul the plagiarist still remain light years away from delivering anything close to our *'3 for 1'* values.

Imperial and two of its owners, Cyril and Paul Rosengarten, sued Cosmo's and the Chicago Sun-Times for defamation per se and per quod and commercial disparagement, with additional claims against Cosmo's for false light and violation of the Illinois consumer fraud act.

Both the newspaper and Cosmo's filed motions to dismiss and, after hearing extensive argument, the trial court dismissed the entire complaint because the advertisement did not convey verifiably false facts. In particular, the circuit court ruled:

> I am unable to find that [the ad] constitutes a precise of verifiable statement of fact which, if untrue, could form the basis for a defamation action. Moreover, I think that considering it's an ad, and it [is] clearly the context of one ... in which two commercial rivals are – or at least one commercial rival is very unhappy with the other. There is no expectation of fact as opposed to hyperbole. *See* No. 05 L 677 (Cir. Ct. Cook Ct. Ill. July 29, 2005).

Plaintiffs appealed from the judgment.

Appellate Opinion

On June 28, 2006, the appellate court affirmed in part and reversed in part. The court agreed that most of the ad

(Continued on page 16)

Illinois Appellate Court Reinstates Defamation and Disparagement Claims Over Newspaper Ad

(Continued from page 15)

was opinion except for a single phrase in the third paragraph: "no matter how they inflate prices and compromise quality, much to their dismay, Cy and his son Paul the plagiarist still remain light years away from delivering anything close to our *'3 for 1'* values."

With respect to this phrase, the court opined:

> Although the statements were made in the context of a competitor's advertisement, certainly not a setting which would lead a reader to infer that the statements are factual in nature, we nevertheless believe that a reasonable reader could very well interpret Cosmo's ad as stating actual facts about the plaintiffs and the originality and quality of Imperial's goods.

The court did not find the phrase in question was verifiable, however. Instead, it opined that the statement "appear[s] to be based on facts concerning the quality of Imperial's goods which have not been stated."

From this premise, the court reasoned that "[w]hether Imperial was selling imitation goods of inferior quality is certainly capable of objective verification." The appellate court further ruled that the ad was not subject to an innocent construction even though it could be construed on its face as referring to "Empire" rather than Imperial.

The court affirmed dismissal of both individual plaintiff's defamation *per quod* claim for lack of special damages. With respect to Imperial, however, the court held, "[a]s for the complaint's failure to allege with particularity which potential customers were deterred from purchasing. Imperial's merchandise as a result of Cosmo's ad, we do not believe that such specificity is required." This belief represented a departure from prior holdings such as *Taradash v. Adelet/Scott-Fetzer Co.*, 628 N.E.2d 884, 888 (Ill. App. Ct. 1st Dist. 1993) and *Barry Harlem Corp. v. Kraff*, 652 N.E.2d 1077, 1082-03 (Ill. App. Ct. 1st Dist. 1995).

The appellate court also broke with previous precedents in deciding that commercial disparagement is a viable cause of action in Illinois. The court expressly declined to follow a holding to the contrary in *Becker v. Zellner*, 684 N.E.2d 1378 (Ill. App. Ct. 3d Dist.1997) and characterized it as based on dicta from *American Pet Motels, Inc. v. Chicago Veterinary Med. Ass'n*, 435 N.E.2d 1297 (Ill. App. Ct. 3d Dist. 1982).

The *Sun-Times* also argued that the complaint should be dismissed because it failed to plead actual malice. The appellate court held that the pleadings had not yet triggered an actual malice standard because the "fact that Imperial advertised its merchandise does not, without more, establish it as a limited purpose public figure."

Finally, the court reinstated claims against Cosmo's for false light and violation of section 2 of the Uniform Deceptive Trade Practices Act, which prohibits "disparag [ing] the goods, services, or business of another by false or misleading representation of fact." The court rejected Cosmo's argument that the Act requires that a competitor-plaintiff be deceived in this context and held that causation necessary under the Act in such circumstances is established by proving that the false representation was addressed to the market and caused injury to the competitor-plaintiff.

Modified Opinion

Both defendants moved for rehearing. Among other things, defendants argued that, under the Illinois Supreme Court's recent decision in *Solaia Tech. v. Specialty Publ'g Co.*, 2006 Ill. LEXIS 1088, No. 100555 (Ill. June 22, 2006), there must be a concrete basis to infer a verifiable defamatory fact from the actual text of the ad. Defendants also argued that the court's express finding that the ad "on its face" was subject to a reasonable innocent construction required dismissal of the defamation *per se* claims.

The court responded by vacating its opinion. On July 31, 2006, it denied the defendants' motions for rehearing but issued a modified opinion. The modified opinion affirmed dismissal of the *per se* defamation count under the innocent construction rule. The modified opinion applied *Solaia* to hold that:

> Because the statements in Cosmo's ad do not refer to Imperial by name or give the last names of the individual plaintiffs, they could reasonably be interpreted as referring to someone other than the plaintiffs. For this reason, the statements are not action-

(Continued on page 17)

Illinois Appellate Court Reinstates Defamation and Disparagement Claims Over Newspaper Ad

(Continued from page 16)

able per se, and we affirm the dismissal of Count I of the plaintiffs' complaint.

With respect to the remaining claims, the modified opinion was materially unchanged from the vacated opinion. Notably, the court failed to address the effect that dismissal of the defamation *per se* claim would have on the plaintiffs' remaining counts. In other contexts where the innocent construction rule has been found to apply, Illinois courts required plaintiffs to allege and prove special damages in order to prosecute other defamation related claims.

In response to the modified opinion, Imperial filed its own motion for a rehearing. That motion was denied. Cosmo's then immediately filed a petition to seek leave to appeal to the Illinois Supreme Court. At the time of this writing, the deadline for filing such a petition by the other parties had not passed and their position with respect to further review is undetermined.

Damon E. Dunn and Eric D. Bolander, Funkhouser Vegosen Liebman & Dunn, Ltd., Chicago, represented the Chicago Sun-Times, Inc. James M. Wolf, Wolf & Tennant, Chicago, represented defendant Cosmo's Designer Direct, Inc. Edward W. Feldman and Jennifer E. Smiley, Miller Shakman & Hamilton, LLP, Chicago, represented plaintiffs

MLRC Calendar

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November 8, 2006

A Forum for MLRC members on the Espionage Act and Related Statutes

Wednesday, November 8
2:30-4:30 p.m.
Sheraton New York Hotel & Towers

November 8, 2006

MLRC Annual Dinner

Cocktail Reception 6:00 p.m.
Dinner 7:30 p.m.
Sheraton New York Hotel & Towers

November 10, 2006

Defense Counsel Breakfast

7:00-9:00 a.m.
Proskauer Rose Conference Room

January 25, 2007

Los Angeles, California

Southwestern Law School

Fourth Annual Conference Presented by Southwestern Law School's Donald Biederman Entertainment and Media Law Institute and the Media Law Resource Center

September 17-18, 2007

London, England

MLRC London Conference

International Developments in Libel, Privacy, Newsgathering & New Media

D.C. Appeals Court Affirms That "FBI Informer" Is Not Defamatory

By Joseph E. Martineau

Is it libelous to falsely publish that one is an informer? In an opinion issued August 31, 2006, the District of Columbia Court of Appeals followed unanimous precedent from other jurisdictions, holding that it is not. *Clawson v. St. Louis Post-Dispatch, LLC*, No. CA-7959-03, 2006 WL 2504309 (D.C. Ct. App. Aug. 31, 2006) (Reid, Nebeker, Terry, JJ.).

The court affirmed a trial court judgment holding that the terms "informer" and "FBI informer" are not defamatory as a matter of law, nor are they reasonably capable of a defamatory meaning.

Background

The case was brought by Patrick Clawson, a former CNN reporter, who had acted as a spokesman for Dr. Steven Hatfill. Hatfill had been identified as a "person of interest" in the well-publicized 2001 anthrax murders investigation. Karen Branch-Brioso, a reporter for the St. Louis Post-Dispatch in its Washington bureau covering the anthrax investigation, noted that Clawson had an attention-grabbing connection to the Post-Dispatch's home base – St. Louis.

In the 70s and early 80s, he had worked there as a television journalist and later as a private investigator. While working as a private investigator, Clawson approached the FBI concerning wrongdoing at a private investigative firm at which he worked. He claimed that the investigative firm was paying corrupt cops for confidential criminal history information, which the investigative firm was then sharing with its corporate clients. Several law enforcement officials were later convicted, and Clawson, himself, was summoned to appear before a grand jury on a claimed extortion, but no indictment resulted.

Branch-Brioso decided that her St. Louis readers would be interested in Clawson's St. Louis connection. She wrote a sidebar article on Clawson, for inclusion with a feature news story about the Hatfill investigation The sidebar bore the headline: ""Hatfill turns to an old pro to get his message out. Radio executive has history of dealing with the FBI – as an informer."

The body of the sidebar discussed Clawson's activities on behalf of Hatfill and his criticism of the FBI. The sidebar then noted the interesting irony that "the man who once gave a hand to the FBI has become its most public critic in the case of his friend Hatfield."

After the sidebar was published, Clawson took vehement issue with the characterization that he was an FBI informer, and he filed suit against the newspaper, its reporter, and two editors. Clawson claimed that he had acted as a "whistleblower" in making his report to the FBI and that he was not an "informer."

He claimed that numerous clients and sources inferred from the sidebar that he was a regular informant to the FBI, that he routinely breached his obligations of confidentiality both as a reporter and as a private investigator by providing the FBI with confidential information about his clients, and that he was paid for doing so. Some, he said, even believed he was informing on Hatfill.

Finally, Clawson alleged that referring to him as an "FBI informer" instead of "whistleblower" was libelous, because "whistleblowers" are "courageous, law-abiding citizens" who report on wrongdoing without expectation of reward, whereas "informers" are typically criminals who provide information as a means to avoid their own culpability or for remuneration.

In moving to dismiss the case, the St. Louis Post-Dispatch, without conceding any falsity in the "informer" characterization, relied on precedent from other jurisdictions that even a false characterization of a person as an informer is not libelous as a matter of law. *See, e.g., Agnant v. Shakur*, 30 F. Supp. 2d 420 (S.D.N.Y. 1998); *Waring v. William Morrow & Co.*, 821 F.Supp. 1188 (S.D. Tex. 1993).

The Post-Dispatch also argued that the sinister innuendo drawn by Clawson from the article was an unreasonable one, given that the article clearly explained the context in which the word "informer" was used, and considered in context, reasonable readers would not infer that Clawson informed on his employer to avoid his own criminal culpability or that he was informing on his existing client, Hatfill.

Finally, the Post-Dispatch appended to its motion a 41-page appendix consisting of various newspaper and magazine articles that showed that the terms "whistleblower" (which plaintiff admitted he was), and "informer" (which plaintiff claimed he was not) "mean the same thing and are used interchangeably."

(Continued on page 20)

D.C. Appeals Court Affirms That "FBI Informer" Is Not Defamatory

(Continued from page 19)

Based on the motion and a review of the sidebar that was affixed to the complaint, the trial court dismissed the complaint and entered judgment for the Post-Dispatch and its reporter.

Appeals Court Decision

On appeal, Clawson argued essentially the same thing as he had in the trial court, but also argued that the "informer" reference was particularly harmful to him in light of his profession as a journalist and a private investigator. On that basis, Clawson argued, the case should be distinguished from those existing elsewhere holding as a matter of law that a false accusation that one is an informant is not defamatory. As had the trial court, the appellate court, too, rejected the libel claim.

First, the appellate court noted that to be actionable and to survive a motion to dismiss a statement must be "reasonably capable of a defamatory meaning." The court then "stressed the importance of context to an analysis concerning whether a statement is reasonably capable of a defamatory meaning."

In analyzing the sidebar, the court agreed with the trial court that considered in context the words "informer" and "FBI informer" could not be construed in the sinister vain urged by Clawson and that no reasonable reader would so infer. "Read in context the words 'informer' and 'FBI informer' are not 'reasonably susceptible of a defamatory meaning.'"

The court went on, "[n]ot only does the contextual examination of the article negate the existence of any defamatory content which could injure Mr. Clawson and his reputation, such as a direct or indirect reference to him as a felon or a criminal, but, contrary to his argument, courts, as a matter of law, have not found the word 'informer' to be either defamatory or 'reasonably capable of a defamatory meaning.'"

The court reviewed cases from across the country rejecting similar claims, quoting one that stated: "it is evident to this Court, as a matter of law, that a communication is not libelous if it merely accuses one of being a criminal informant." *Id*. at *6 (quoting *Burrascano v. U.S. Attorney Gen. Levi*, 452 F.Supp. 1066, 1072 (D. Md. 1978)).

The court concluded quoting a Delaware case: "[o]ur society has not ... reached a point where false rumors of a lawful attempt to assist law enforcement agents constitute slander per se."

Finally, the court resorted to Black's Law Dictionary to reject the claim that there is a distinction between being an "informer" and being a "whistleblower." According to the court, nothing in any of those definitions "remotely suggests that an informer or a citizen informant is perceived as 'odious, infamous and ridiculous.'"

As of the date of submitting this article, Clawson's time for submitting a petition for rehearing had expired; however, his counsel has indicated that he will petition the court to filing such out of time.

Joseph E. Martineau of Lewis, Rice & Fingersh, LC, St. Louis, Missouri, and Kurt Wimmer and Brent Powell of Covington & Burling in Washington, D.C. represented the St. Louis Post-Dispatch. Plaintiff was represented by William Farley of Washington, D.C.

Libel Plaintiff Strikes Out

Articles About Former Baseball Star Are Opinion / Hyperbole

By Len Niehoff

In July, the Michigan Court of Appeals dismissed a defamation suit brought by baseball player Cecil Fielder regarding articles published in *The Detroit News*. In an unpublished, per curiam opinion, the court ruled that some of the statements made in the article were rhetorical hyperbole and that others were expressions of subjective opinion. *Fielder v. Greater Media, Inc.*, No. 267495, 2006 WL 2060404 (Mich. Ct. App. July 25, 2006) (Fitzgerald, Saad, Cooper, JJ.).

When Cecil Fielder played baseball for the Tigers his Detroit fans loved his broad smile, affable manner, and home-run hitting. Fielder left professional baseball with a solid record, a close-knit family, and millions of dollars. Then his fortunes plummeted. He lost vast sums of money gambling, made a series of regrettable business decisions, fell deeply into debt, lost his glamorous mansion, struggled through a bitter divorce from his wife, and became estranged from his children. It was a remarkable story, and *The Detroit News* decided it needed telling.

So, in October of 2004 *The News* printed two articles written by veteran reporter Fred Girard that described Fielder's problems. The articles relied heavily on public record sources that documented Fielder's gambling losses, business difficulties, financial woes, and divorce. The articles also quoted a Florida realtor who had business dealings with Fielder. Fielder filed suit against *The News*, Girard, and the realtor in Michigan's Wayne County Circuit Court, alleging defamation, false light, and tortious interference with business relations.

The News filed a motion for summary judgment before discovery commenced. The motion raised a variety of arguments, including that the articles were true, that they were based on public records and were therefore privileged, and that Fielder had not adequately alleged (and could not possibly prove) actual malice.

The News also argued that the challenged statements were not factual in nature but were subjective conclusions, expressions of opinion, and rhetorical hyperbole. The realtor filed a motion raising many of the same arguments. Fielder aggressively opposed these motions, even contending that he did not qualify as a limited purpose public figure.

The circuit court judge granted the motions and dismissed the case. The judge recognized that Fielder was a public figure who had to plead specific facts supporting his claim of actual malice. The judge ruled that Fielder did not do so and therefore had failed to state a claim for defamation. The court dismissed Fielder's other counts for failure to state a claim as well. Fielder asked the court to reconsider its decision and to allow him to amend his complaint. The judge rejected these requests and Fielder appealed.

Court of Appeals Decision

The Michigan Court of Appeals affirmed the decision below but on different grounds.

The court resisted the temptation to review the statements in splendid isolation from their meaning.

The court ruled that some of the statements in question were rhetorical hyperbole. These included the title of one of the articles – "Gambling Shatters Ex-Tiger's Dream Life"– and the statements that Fielder was "in hiding," that he was "not in contact with his family," and that his wife and daughter "receive no money from [him]."

The court reasoned that these statements, read in their full context, "would not be understood by the ordinary reader as statements of actual facts about plaintiff."

The court ruled that the other four challenged statements were expressions of subjective opinion and therefore not provable as false or actionable in defamation. These included the statements that "Gambling caused Cecil Fielder's empire to collapse," that "this isn't a story of a hero who went bad but a hero who got sick," that gambling was "like a cancer of some sort that ate away at his wealth," and that Fielder's wife was "hard up financially." The court held these statements to be constitutionally protected. The court affirmed the dismissal of Fielder's other claims on the same grounds of opinion and rhetorical hyperbole.

The court of appeals opinion is important in at least two respects. First, it applied the rhetorical hyperbole and opinion doctrines thoughtfully, with close attention to context.

(Continued on page 22)

Libel Plaintiff Strikes Out

(Continued from page 21)

The court resisted the temptation to review the statements in splendid isolation from their meaning. Second, the court of appeals applied those doctrines to an article rather than an editorial. The court recognized, even if implicitly, that some kinds of stories will necessarily entail elements of objective fact and of subjective opinion. In this case, the court of appeals was willing to do the hard work of parsing those very different types of expression and affording the protection the First Amendment requires.

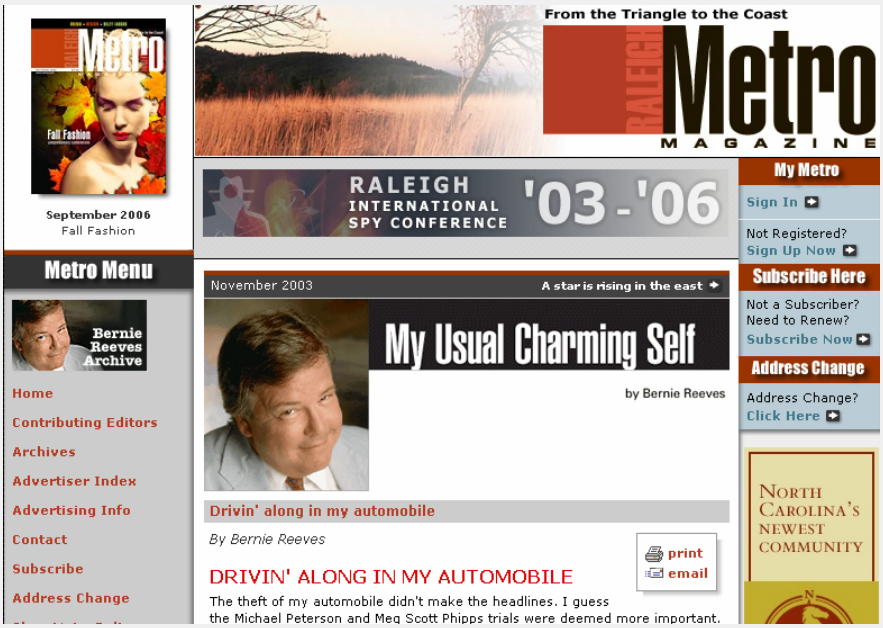
Len Niehoff with Butzel Long, Ann Arbor, Michigan, represented The Detroit News. Gerald Cavellier represented Cecil Fielder.

North Carolina Appeals Court Affirms Dismissal of Insurance Adjuster's Libel Suit

Likening Plaintiff to "Gestapo" and "Soviets" Is Hyperbole

The North Carolina Court of Appeals affirmed dismissal of a car insurance adjuster's libel suit against a local magazine and its publisher/columnist, holding that the columnist's rant about the handling of his stolen car claim was protected opinion and/or hyperbole. *Daniels v. Metro Magazine Holding Co.*, No. COA05-1336, 2006 WL 2669971 (N.C. Ct. App. Sept. 19, 2006) (Martin, Wynn, Steelman, JJ.).

In a column published in November 2003, the magazine publisher recounted at length his problems after his car was stolen. Among other things, he wrote that plaintiff, an adjuster for Progressive Insurance, insinuated that he stole his own car, and went on to compare her to the "former Soviet security police," said she spoke to him in a "Gestapo" voice and that she and the insurance company were "fascists."



Plaintiff sued for libel, intentional infliction of emotional distress, and deceptive trade practices, alleging the column "gave the impression that [she was] unethical, unprofessional, unscrupulous, an extremist and a communist." The trial court granted defendants' motion to dismiss for failure to state a claim. Affirming, the appeals court agreed that all the complained of statements were either opinions or hyperbole.

Quoting the article in its entirety, the court held that "read as a whole, it is clear that Reeves' depiction of the processing of his claim is a highly individualized, personal interpretation tainted by his own emotions, rather than a journalistic, factual recounting of events." *Citing, e.g., Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184 (4th Cir. 1998).

Reasonable readers would therefore recognize defendant's statements about plaintiff as expressions or rhetorical hyperbole, which no reasonable reader would believe.

William H. Moss, Smith Anderson LLP., Raleigh, North Carolina, represented defendants. Harold L. Kennedy, III, represented plaintiff.

Fifth Circuit Affirms No Jurisdiction Over North Carolina Newspaper

The Fifth Circuit this month affirmed dismissal of a Texas libel action against a North Carolina newspaper for lack of personal jurisdiction. *Ouazzani-Chahdi v. Greensboro News & Record, Inc.*, No. 4:05-CV-1898, 2006 WL 2612659 (5th Cir. Sept. 12, 2006) (Smith, Weiner, Owen, JJ.).

Relying on last year's decision in *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005), and the circuit's earlier decision in *Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir.2002), the court reaffirmed that a "plaintiff's mere residence in the forum state is not sufficient to show that the defendant had knowledge that effects would be felt there; a more direct aim is required."

Background

The libel complaint concerned an April 25, 2004, article entitled "Fake-Marriage Schemes Commonplace," published in the *Greensboro News & Record*, a daily newspaper based in Greensboro, North Carolina. The article focused on a North Carolina lawyer under investigation for arranging sham marriages used by immigrants to obtain United States citizenship illegally.

Plaintiff was involved in one of those marriages. Relying on information from his ex-wife, the article stated:

> In 1998, Myriah I. Ouazzani-Chahdi filed for an annulment of her marriage to Anwar Ouazzani-Chahdi, who was not a U.S. citizen. In her complaint, the wife called her marriage a "sham, as a means for obtaining permanent legal resident status" for Anwar Ouazzani-Chahdi.

The article also quoted the ex-wife's lawyer who similarly stated that the marriage was a sham.

Plaintiff sued the newspaper for libel in federal court in the Southern District of Texas. The trial court dismissed for lack of personal jurisdiction. *See* 2005 WL 2372178 (S.D. Texas Sept. 27, 2005) (Ellison, J.).

The district court notably rejected plaintiff's claim that the newspaper's availability on the web could subject it to jurisdiction in Texas.

No Personal Jurisdiction

Affirming dismissal, the court noted that the *News & Record* circulated only three copies in Texas, that it covered North Carolina people and issues, and that the complained of story involved no Texas sources. Thus it did not target the state.

On appeal, plaintiff based his argument in large part on the availability of his biographical information, including his Texas residency, on the Internet. He claimed that if the newspaper had Googled his name, it would have discovered that he was employed by a Houston law firm.

But, the court reasoned, even if the newspaper knew, or could have determined through an internet search, that plaintiff was a Texas resident, mere residence in the forum state does not mean that the newspaper targeted the jurisdiction.

Bill Ogden and Keith Lorenze of Ogden, Gibson, White, Broocks & Longoria, L.L.P. in Houston, Texas represented *The Greensboro News & Record, Inc.* The plaintiff acted pro se.

Texas Federal Court Dismisses Pro Se Defamation Claims and Awards Rule 11 Sanctions

By Michael Berry

A federal court in Texas dismissed a *pro se* plaintiff's claims against several scholars and the State of Texas, and issued Rule 11 sanctions against the plaintiff in a case arising from publications referencing the plaintiff and an organization he runs. *Hamad v. Ctr. for the Study of Popular Culture*, No. A-06-CA-285-SS (W.D. Tex. Sept. 7, 2006).

Judge Sam Sparks of the Western District of Texas ruled that the plaintiff had failed to state a viable claim against any of the defendants and sanctioned the plaintiff for filing "wholly frivolous" pleadings that "have no support in the law."

Procedural History

In April 2006, Riad Elsolh Hamad filed a complaint naming the Center for the Study of Popular Culture and its founder, David Horowitz, as defendants. According to the complaint, Hamad is affiliated with the Palestine Children's Welfare Fund and owns and operates the pcwf.org website.

The suit alleged that Hamad had been defamed in an article posted on Front Page Magazine's website on June 16, 2003. After the Center and Horowitz filed an answer and moved to dismiss the claims against them on statute of limitations grounds, Hamad filed the first of several amended complaints.

In his amended complaints, Hamad added an array of new parties and claims. Among other things, he asked the court to force the Texas Legislature to "reconsider" the statute of limitations and sued Daniel Pipes and the Middle East Forum for defaming him by republishing a Front Page Magazine article "as late as July 2004."

With the new complaints pending, Judge Sparks dismissed the claims against the Center and Horowitz, ruling that the claims were barred by the single publication rule. *See MLRC MediaLawLetter* July 2006 at 9.

That same day, the State of Texas moved to dismiss Hamad's claims, contending it was immune from suit under the Eleventh Amendment. Soon after, Pipes and the Forum moved to dismiss as well, arguing that (1) the court lacked personal jurisdiction over them; (2) Hamad's claims were time-barred; and (3) the articles at issue were not defamatory and were not even "of and concerning" Hamad.

As these motions were pending, Hamad filed additional amended complaints and named additional defendants, including Jim Robinson and FreeRepublic LLC, who also moved to dismiss the claims against them.

The Rule 11 Order

On July 25, 2006, Judge Sparks issued a *sua sponte* Rule 11 order noting that the plaintiff "has a history in this Court of filing lawsuits without merit for the purpose of harassment and making outrageous allegations." The court chastised Hamad for using "the Court simply as a tool to make serious and irresponsible contentions against parties for his own purposes." Ultimately, Judge Sparks concluded that Hamad had violated Rule 11 and ordered him to withdraw his complaints against all defendants within 21 days or risk being sanctioned.

Hamad did not withdraw his claims. Instead, he filed an opposition to Robinson and FreeRepublic's motion to dismiss, moved for a default judgment against two other defendants, and filed an interlocutory appeal of the court's Rule 11 order. (He previously had filed an interlocutory appeal of the decision dismissing his claims against the two original defendants.)

(Continued on page 26)

Texas Federal Court Dismisses Pro Se Defamation Claims and Awards Rule 11 Sanctions

(Continued from page 25)

The Court's September 6, 2006 Order

On September 6, 2006, Judge Sparks issued another order. This time, he granted the pending motions to dismiss, ruling that (1) the Eleventh Amendment barred Hamad's claims against the State of Texas; (2) the court lacked personal jurisdiction over Pipes, the Forum, Robinson, and FreeRepublic; (3) Hamad's claims were time-barred; and (4) Pipes and the Forum did not make any defamatory statements about Hamad.

The court also imposed Rule 11 sanctions totaling $3,000. Judge Sparks found that Hamad's complaints "espouse[d] no legal theory for which recovery can be made against any of the multitude of defendants sued in this case" and that the pleadings were "not filed for any purpose and simply harass and cause unnecessary delay or needless increase in the cost of litigation."

Michael Berry is an associate with Levine Sullivan Koch & Schultz, LLP in Washington, D.C. Ashley I. Kissinger of Levine Sullivan Koch & Schulz, LLP represented Daniel Pipes and the Middle East Forum. Peter Kennedy of Graves, Dougherty, Hearon, & Moody, PC and Manuel S. Klausner of the Law Offices of Manuel S. Klausner PC represented David Horowitz and the Center for the Study of Popular Culture. Aaron B. Huffman of the Texas Attorney General's Office represented the State of Texas. Julie Anne Ford of George & Brothers LLP and Charles L. Doerksen represented Jim Robinson and FreeRepublic LLC.

SAVE THE DATE

A Forum for MLRC members on the Espionage Act and Related Statutes

Wednesday, November 8
2:30-4:30 p.m.
Sheraton New York Hotel & Towers, Empire West Ballroom

A very practical look at the questions these statutes raise for media lawyers (and their clients), what resources exist for finding the answers, procedures to be considered for newsrooms and precautions media counsel may wish to consider to protect their clients. The Forum will be led by a panel of lawyers whose work has brought them into close contact with these statutes, including

Susan Buckley, Cahill Gordon & Reindel, Partner
Karlene Goller, The Los Angeles Times, Vice President & Deputy General Counsel
Eric Lieberman, The Washington Post, Deputy Counsel & Director of Government Affairs
Jeffrey Smith, Arnold & Porter, Partner & former General Counsel of the CIA (May 1995 to September 1996)

Please contact Kelly Chew (kchew@medialaw.org) if you plan to attend.

Appellate Court Affirms Dismissal of Libel Action Against Newspapers

By John J. Kerr

The South Carolina Court of Appeals affirmed the dismissal of a libel lawsuit against two weekly newspapers filed by the deputy county supervisor, who accused the newspapers of falsely reporting a story that county workers were performing landscaping work at his private residence. By finding for the newspapers, the court saw no need to address the issues involving a contempt order for the newspapers' refusal to produce financial records. *Metts v. Mims*, No. 3-CP-08-2177, 2006 WL 2345989 (S.C. Ct. App. Aug. 14, 2006) (Hearn, Goolsby, Anderson, JJ.).

Background

In July 2003, newspapers published an article entitled "It was helpful, but was it legal?" The story was about a controversial work policy that allowed Berkeley County, S.C. employees to perform work on private property for a fee. The article contained a quote from Judy Mims, then a County Council member, that, "[A] constituent called [her] ... about seeing county trucks in Robbie Metts' driveway in Pinopolis, and employees cutting limbs from trees in his yard."

The newspapers believed they had no option but to ask the trial court to hold them in contempt so they could challenge the discovery order.

The reporter learned of a list of people who had contracted for work to be performed on their private property. The reporter called the county offices and asked for the list. The list arrived at approximately 4:30 in the afternoon, a short time before the deadline to send the newspaper to press.

The reporter admitted that she did not see Metts's name on the list and neither contacted him for comment, nor did she revise the article with the statement about the deputy supervisor because of multiple duties for the newspapers and the approaching deadline. Metts was extremely upset by the implication that he was using county workers without paying a fee.

Contempt

In his libel action, Metts sued for actual and punitive damages. During the early stages of discovery and before any depositions were taken, Metts asked the newspapers to produce their financial records. The newspapers refused on the ground that their financial records were relevant only on the issue of punitive damages, which the newspapers thought would never get to a jury.

On Metts's motion to compel, a lower court judge ordered newspapers to produce the financial records without requiring Metts to show any evidentiary support that he was entitled to them. When the newspapers continued to refuse to turn over the records, Metts moved to hold them in contempt. Before the contempt hearing was scheduled, the newspapers moved for summary judgment on the grounds that Metts was a public official and there was no clear and convincing evidence of actual malice.

The contempt hearing was held before another trial judge. The newspapers pointed out their dilemma. If they complied with the discovery order, they would waive their right to challenge it on appeal. The newspapers believed they had no option but to ask the trial court to hold them in contempt so they could challenge the discovery order.

The judge agreed to hold the newspapers in contempt so they could appeal the discovery order, but imposed no sanctions. Initially, the judge held the newspapers' summary judgment motion in abeyance until the contempt matter was resolved, but then changed his mind and filed a formal written order allowing the newspapers' motion to proceed.

Thereafter, a third judge heard the newspapers' motion for summary judgment. At the hearing, Metts contended that when the reporter saw that Metts' name was not on the list of people for whom work had been performed, the reporter should have been on notice to investigate, and her failure to do so constituted actual malice.

Taken in the light most favorable to Metts, the trial judge found no evidence to suggest the reporter purposely refused to investigate why Metts's name was not on the list. The judge found that Metts failed to show any convincing evidence that would allow a jury to find that newspapers were aware the contested quote was false, or that newspapers acted with reckless disregard as to the truth of Mims' allegations. Accordingly, the lower court granted the newspapers' motion for summary judgment.

(Continued on page 28)

Appellate Court Affirms Dismissal of Libel Action Against Newspapers

(Continued from page 27)

Both Metts and the newspapers appealed. The newspapers argued that the trial court erred when it ordered them to produce financial information without requiring plaintiff to produce evidentiary support that he was entitled to it. Metts appealed the court's failure to impose sanctions against the newspaper for disobeying the discovery order. Metts also claimed that the lower court erred by allowing the newspapers' motion for summary judgment to proceed after initially holding it in abeyance pending the appeal of the contempt order. Finally, Metts appealed the order granting the newspapers' motion for summary judgment on his libel action.

Appeals Court Decision

The appellate court viewed the evidence in a light most favorable to Metts and found the reporter's testimony revealed the following about her subjective belief of the truth of Mims's statement: (1) Mims made the statement directly to the reporter at 11:30 a.m. on the day the newspapers were scheduled for a press run; (2) the reporter knew that Mims and Metts's boss, the county supervisor, did not get along and were often at odds with each other; (3) when Mims made the statement, the reporter had no reason to doubt a member of County Council who was speaking about a county policy.

The court also pointed out that the reporter did not receive the list until 4:30 p.m., and that the newspapers had held up the press run until the list arrived so it could be published with the article. The court concluded that the reporter subjectively believed the truth of Mims' statement.

The court further concluded that the reporter's knowledge of political hostilities between Mims and Metts's supervisor did not mean the reporter had obvious reasons to doubt Mims's credibility as a source.

In summary, the court held that Metts claim of actual malice hinged on the reporter's failure to investigate Mims's story after receiving the list which appeared to contradict Mims's statement. However, the court pointed out that the newspapers were small weeklies. The evidence revealed that the reporter received the list a few hours before the deadline.

Accordingly, the appellate court agreed with the lower court that any failure to investigate was due to time constraints and a number of other editing and administrative tasks given to the reporter, and not due to an ill motive. Although the reporter's actions may have been negligent, the court held that they did not constitute an extreme departure from the standards of investigation normally employed.

Conclusion

By affirming summary judgment in favor of the newspapers on the issue of fault, the court said there was no need to address the contempt order. This was a disappointment to the newspapers. Basically, the plaintiff in this case had said, "we filed a lawsuit and alleged punitive damages, so give us your financial records."

Case law in other states holds that a litigant requesting confidential records has to provide evidentiary support by way of deposition testimony, affidavits, etc. to obtain discovery. The trial judge's ruling that the newspapers had to produce financial records solely because of allegations in the complaint defied common sense and is capable of repetition. Future litigants may not be so inclined to ask to be held in contempt in order to challenge such an illogical order.

John J. Kerr of the Charleston, South Carolina law firm of Buist Moore Smythe McGee PA represented the newspapers. E. Paul Gibson of the Riesen Law Firm in North Charleston, South Carolina and Steve F. DeAntonio of DeAntonio Law Firm of Charleston, South Carolina represented the Defendant.

Any developments you think other MLRC members should know about?

Call us, or send us a note.

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D.C. Court Protects Identity of Anonymous Internet Informant

By Charles D. Tobin

With the recent ruling of a Washington, D.C. court, the nation's capitol has joined a growing number of jurisdictions that protect the anonymity of people who send allegedly defamatory information over the Internet.

In *Solers, Inc. v. John Doe*, No. 05-3779 (D.C. Super. Ct. Aug. 16, 2006), District of Columbia Superior Court Judge Anna Blackburne-Rigsby held that a trade association may continue to shield the person who reported a company for alleged software piracy. The court agreed that the company, which filed a lawsuit against the anonymous informant, had not demonstrated a legal right to discover the person's identity.

Background

The dispute began last year when the informant contacted the Software & Information Industry Association ("SIIA"), the trade association for software and digital content businesses. Among its other services, SIIA runs an anti-piracy program that encourages people to report incidents of suspected software piracy. SIIA investigates the reports and decides whether to pursue an action against a company it determines to have engaged in piracy.

The informant reported, via SIIA's anti-piracy web site, allegedly unlicensed use of software by Solers, Inc., an Arlington, Virginia-based defense contractor. Solers denied the report when contacted by SIIA counsel. After further discussion, SIIA notified Solers that it would not pursue a claim.

A month later, Solers filed a defamation lawsuit in Washington, D.C. against "John Doe" – the pseudonym Solers gave to SIIA's informant. Solers claimed that John Doe's report to SIIA was false and harmed Solers's reputation and business. Solers immediately subpoenaed SIIA, seeking all documents that would reveal the identity of the informant.

SIIA moved to quash on grounds that because the information was transmitted anonymously via the Internet, SIIA enjoyed a First Amendment privilege to withhold John Doe's identity. Courts in a number of jurisdictions outside of Washington, D.C. have faced similar issues.

Typically, those cases have involved allegedly defamatory statements posted on Internet bulletin boards or chatrooms. In the cases, the subject of the statement has sued the John Doe defendant, then subpoenaed the online service provider or other Internet host seeking the identity of the person who posted the materials.

In most of those cases, the courts, recognizing the First Amendment protections for both anonymous speech and Internet communication, have held that the party seeking the source's identity must demonstrate various combinations of factors, including an elevated need for the information, the actionability of the underlying statement, damages, and no other means for identifying the source.

In the *Solers v. Doe* litigation, SIIA argued the District of Columbia court should follow the rulings of the judges in those other cases. SIIA argued that Solers had demonstrated no actionable harm, such as loss of business, from the allegedly defamatory statement.

SIIA bolstered the argument with an affidavit reflecting that it is not in competition with Solers and has not disseminated the source's information. SIIA also argued that Solers had not demonstrated pursuit of other alternatives.

Solers argued that because it is a software provider, the informant's statement that it pirated software had the clear potential to damage the company's reputation, and that this was a sufficient ground to require SIIA to reveal the source's identity. Solers also argued that the representation that it unsuccessfully searched the company's email server for clues on John Doe's identity satisfied any requirement regarding alternative sources.

D.C. Court Decision

In her August 16, 2006 decision, Judge Blackburne-Rigsby sided with SIIA. The judge adopted the test urged by SIIA, finding that Solers had shown no actionable harm:

> Even if Solers only had to demonstrate harm to its reputation regardless of lost profit, it has not done so. Although there are some classes of statements which alone constitute harm, the mere allegation by Doe of copyright infringement in and of itself does not establish harm to Solers reputation. Additionally, even if threatened harm were sufficient for a defamation claim, Solers has not demonstrated any risk of harm.... There is no indication that any entity other than [SIIA] had knowledge of Does' alleged defamatory statements.

(Continued on page 30)

D.C. Court Protects Identity of Anonymous Internet Informant

(Continued from page 29)

In granting SIIA's motion to quash the subpoena, the judge also agreed that Solers had a duty to exhaust alternative sources, and that the search of its email server was insufficient:

> Solers attempted a single alternative in gaining Doe's identity This cannot be said to be an exhaustion of *every* reasonable alternative source. For instance, as argued by [SIIA], Solers could have searched other computer records besides the email server or it could have interviewed current and former employees.

This case – which involved a point-to-point communication over the Internet – is somewhat different than the usual context for this type of motion to quash, which typically involves a public posting. Nonetheless, the court's recognition of both a privilege protecting the recipient and a First Amendment protection for the anonymous communication should help in other permutations of subpoenas for Internet communications.

Charles D. Tobin, Leo G. Rydzewski, and William M. Stevens, of Holland & Knight's Washington, D.C. and Chicago offices, represented the Software & Information Industry Association in this litigation. Daniel J. Tobin, of Linowes and Blocker, LLP, Bethesda, MD, represented Solers, Inc.

Arizona Federal Court Adopts Summary Judgment Standard For Discovery of Anonymous Web Posters

The Arizona federal district court ruled in July that a libel plaintiff seeking to discover the identities of the authors of anonymous web postings must satisfy a heightened summary judgment standard. Best Western International, Inc. V. Doe, No. 06-1537, 2006 WL 2091695 (D. Ariz. July 25, 2006) (Campbell J.).

Adopting the decision of the Delaware Supreme Court in Doe v. Cahill, 884 A.2d 451, 460 (Del. 2005), the Arizona court agreed that anonymous speech is protected by the First Amendment and therefore a libel plaintiff must do more that state a claim to be entitled to discovery.

Plaintiff, Best Western, is a membership corporation for the owners and operators of Best Western hotels. The corporation filed a lawsuit in Arizona over anonymous statements posted on a Best Western members website devoted to discussing management and operations.

The complaint did not set forth the content of the postings, but claimed they defamed the corporation, violated its trademarks, revealed confidential information and constituted unfair competition. Plaintiff moved for expedited discovery, proposing to have out of state courts issue subpoenas to a host of internet service providers.

The court first held that it had jurisdiction to rule on the motion for discovery, rejecting plaintiff's argument that motions to quash should be individually brought and decided by the courts issuing the subpoenas. Indeed, the court noted that because of the First Amendment interest at stake "it made little sense to leave such a central issue to district by district determination."

Then recognizing the constitutional protection afforded anonymous speech, the court held that the summary judgment standard must be satisfied to obtain the identify of anonymous libel defendants. Plaintiff "must support his defamation claim with facts sufficient to defeat a summary judgment motion. This standard does not require a plaintiff to prove its case as a matter of undisputed fact, but instead to produce evidence sufficient to establish the plaintiff's prima facie case." Quoting Doe v. Cahill, 884 A.2d at 460.

Plaintiff's bare bones complaint, the court said, "provides an example of why the standard is appropriate" since nothing in the complaint provided a factual basis to limit defendants First Amendment rights.

Plaintiff is represented by Cynthia Ricketts, Squire Sanders & Dempsey LLP, Phoenix. Defendant is represented by Daniel McAuliffe, Snell & Wilmer LLP, Phoenix.

Florida Appellate Court Awards Sanctions Against Libel Plaintiff's Lawyers

By George D. Gabel, Jr., Jennifer A. Mansfield and Charles D. Tobin

A Florida appellate court, in a rare *sua sponte* decision, has awarded a Jacksonville, FL broadcaster its legal fees in a libel claim, finding that plaintiffs' lawyers "offered no good reason" why they used inappropriate language in their briefs and launched a meritless appeal. *Eliza Thomas v. Pamela Patton, et al.,* Case No. 1D05-5501 (Fla. 1st DCA Sept. 13, 2006).

In a seven-page opinion, the Florida First District Court of Appeal also affirmed summary judgment in favor of First Coast News, Gannett's news operation in Northeast Florida.

Background

Shortly after the deeply divisive Terri Schiavo controversy in Florida, First Coast News reported on a local issue concerning Scott Thomas, who had suffered a serious brain injury and then became the subject of a bitter guardianship.

The reporting was spurred by a May 2005 press release from the Terri Schindler-Schiavo Foundation, a nonprofit advocacy group formed by Schiavo's parents, that stated Scott Thomas' wife Eliza "inten[ded] to move her husband" to a hospice setting "and seek the authority to direct the removal of his gastric feeding tube, causing his death by dehydration and starvation." First Coast News learned that Pamela Patton, Scott's mother, had won temporary guardianship of her son. In those proceedings Patton had alleged Eliza was under investigation by the prosecutor's office in connection with her husband's disabling injury.

First Coast News broadcast and webcast reports on the controversy. The reports included the information on the guardianship proceeding, the allegation about Eliza Thomas, and an interview with Patton. Eliza Thomas declined the broadcaster's invitation for an interview when approached at her home.

Eliza Thomas sued Pamela Patton, Robert S. Schindler, Sr., the reporter and the broadcaster for defamation, false light invasion of privacy and conspiracy to defame. The trial court in Jacksonville in October 2005 rendered summary judgment for First Coast News, finding that – based on pre-existing publicity on the internet about the controversy – Thomas was a limited purpose public figure and had failed to establish that the broadcaster had acted with actual malice. *See MLRC MediaLawLetter* Nov. 2005 at 31.

The court also held the fair reporting privilege protected the article, as it was a fair and accurate report on a legal proceeding. Finally, the trial court held that the report about Eliza Thomas's intention to move her husband to hospice and remove the feeding tube was not defamatory as a matter of law, because she had a legal right under Florida law to proceed with a court action to seek authority to do that.

The appeals court took Thomas' lawyers to task for inappropriate rhetoric in its appeal briefing.

Appeals Court Decision

In its September 13, 2006, opinion issued in the name of all three appellate judges, the First District Court of Appeal affirmed the trial court's grant of summary judgment. The court said it only wrote an opinion because it had decided to award First Coast News's attorneys' fees — against Thomas's lawyers personally — under Section 57.105(1)(b), Florida Statutes (2005). The statute provides for fees upon a finding that a claim is by any application of law to the facts of the case.

The appellate court, adopting the language in an earlier order to show cause issued to Thomas's attorneys, found her appeal raised "no serious challenge to undisputed material facts found by the trial court," and her legal points completely lacked merit. The appeals court held that as a matter of law the broadcaster's and reporter's publication of statements in the broadcast were not capable of defamatory meaning.

The appeals court, in particular, took Thomas's lawyers to task for inappropriate rhetoric in its appeal briefing. The appeals court pointed to Thomas's lawyers' criticisms of the trial court's findings as "Baloney" and the Scott Thomas' guardianship contest as a "Star Cham-

(Continued on page 32)

Florida Appellate Court Awards Sanctions Against Libel Plaintiff's Lawyers

(Continued from page 31)

ber," as well as her lawyers' accusations that First Coast News's arguments had constituted a "fraud on the Trial Court."

The appeals court expressed particular dismay that, rather than respond to the order to show cause by apologizing for their rhetoric, Thomas's lawyers had "merely reargue[d] their case, insisting that the descriptions used in their briefs . . . are appropriate."

The appellate panel remanded the case to the trial court to assess the amount of fees to be awarded to First Coast News against Thomas's lawyers personally.

George D. Gabel, Jr., Suzanne M. Judas, Jennifer A. Mansfield, and Charles D. Tobin, of Holland & Knight LLP's Jacksonville, FL, and Washington, D.C. offices, represented defendant/appellee First Coast News. Thomas C. Powell and Roy E. Dezern, Jacksonville, FL, represented plaintiff/appellant Eliza Thomas.

Eleventh Circuit Affirms Summary Judgment for Amazon on Right of Publicity Claim

Republication of Book Cover Not a Commercial Use

In July the Eleventh Circuit affirmed summary judgment in favor of Amazon.com on right of publicity and related claims over the republication of a book cover featuring plaintiff's photograph. *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316 (11th Cir. 2006) (Tjoflat, Hull, Restani JJ.).

The district court had held that plaintiff's claims were barred by § 230 of the Communications Decency Act. The Eleventh Circuit affirmed on narrower grounds, ruling that Amazon was acting like a traditional bookseller and could not be held liable for the incidental use of the photograph related to book sales. "Amazon's use of book cover images," the court wrote, "is not an endorsement or promotion of any product or service, but is merely incidental to, and customary for, the business of internet book sales."

Background

At issue was Amazon's webpage for a book entitled "Anjos Proibidos" by photographer Fabio Cabral. The book contains photographs of partially nude girls under the age of 18. Plaintiff had been photographed in 1991 when she was 10 years old and living in Brazil. Plaintiff's mother signed a release allowing the photographs to be used in an art exhibit, a related photo book and promotional materials. The book was seized by Brazil prosecutors and the publisher and photographer were charged in 1993 with child pornography. Both were acquitted.

The book was reissued in 2000 by a fringe publisher in the United States, this time featuring plaintiff's photograph on the cover. Plaintiff discovered that the book was available for sale on Amazon in 2002 and complained that the book was published without her authorization. Amazon voluntarily removed the book from its websites.

Plaintiff nevertheless sued Amazon for violating her right of publicity, Fla. Stat. §540.08, for common law invasion of privacy and civil theft under Fla. Stat. § 772.11.

The district court dismissed the claims under § 230, holding that under the CDA, so long as the photographer and new publisher willingly provided the essential published content, Amazon.com receives full immunity. *See* No. 04-20004, WL 4910036 (S.D. Fla. Jul 30, 2004) (Cooke, J.).

Eleventh Circuit Decision

On appeal, plaintiff argued that her right of publicity claim was outside the scope of § 230. *See* 47 U.S.C. § 230(e)(2) (providing that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property"). The Eleventh Circuit began by noting that whether the CDA immunizes an interactive service provider from a state law right of publicity claim is an issue of first impression.

"It is apparent," the court noted, "that the right of publicity does not fit neatly into the category of tort-based lawsuits from which Congress sought to immunize interactive service providers, i.e., dissemination of damaging information via the internet." But the court found it was unnecessary to determine whether the CDA preempts a state law right of publicity claim.

Instead, the court held that plaintiff's right of publicity claim failed because Amazon did not use plaintiff's image for the purpose of directly promoting a product or service. The court analogized defendant to a traditional bookseller, stating:

> Amazon's use of book cover images closely simulates a customer's experience browsing book covers in a traditional book store. Thus, it is clear that Amazon's use of book cover images is not an endorsement or promotion of any product or service, but is merely incidental to, and customary for, the business of internet book sales.

Finally, the court affirmed dismissal of plaintiff's civil theft claim against Amazon, finding it lacked substantial factual or legal support. The court also affirmed an award of $3,500 in attorney fees to Amazon for having to defend this claim.

Amazon was represented by Vanessa Soriano Power, of Stoel Rie, LLP in Seattle, and John H. Pelzer of Ruden, McClosky, Smith, Schuster & Russell, P.A., in Ft. Lauderdale. Plaintiff was represented by Craig P. Kalil, Hendrik G. Milne, Carlos F. Osorio of Aballi, Milne, Kalil & Escagedo, P.A. in Miami.

New York Court Lowers Curtain on Stage Manager's Libel Claim

Broad Scope Given to Labor Preemption

In an interesting employment libel case, a New York appellate court granted summary judgment in favor of an actors' union representative who was sued by a television stage manager. *Hoesten v Best*, No. 114919/99, 2006 NY Slip Op 06373 (NY App. Div. 1st Dept. Sept. 7, 2006) (Andrias, Sullivan, Williams, Gonzalez, Catterson, JJ.).

Plaintiff was a long-time stage manager on the ABC soap opera "One Life to Live." Defendant is an official with the American Federation of Television and Radio Artists (AFTRA), the union that represents the actors employed by ABC on the show. Actors on the show made numerous complaints to defendant about plaintiff's conduct, accusing him of making insulting, humiliating and vulgar comments.

Defendant reported these complaints to ABC's in-house labor relations attorney, stating in letters and meetings that plaintiff engaged in "serious verbal and physical abuse of background performers," "repeatedly tugs, pushes, and pulls actors into position, instead of using verbal cues or hand gestures" and "follows a pattern of intimidation and humiliation."

Granting summary judgment, the appeals court held that the libel complaint "arose out of a labor dispute" and was therefore preempted by federal labor law to the extent it was not supported by a showing of actual malice. *See Linn v United Plant Guard Workers*, 383 U.S. 53 (1966).

The trial court had found no labor dispute because defendant's remarks did not arise in a traditional labor controversy, such as a union election, contract negotiation or strike, and because the complaints were not presented as a formal grievance. This was error, the appellate court held. For purposes of labor preemption "labor dispute" should be broadly defined. *Citing, e.g., Beverly Hills Foodland v United Food & Commercial Workers Union*, 39 F3d 191, 195 (8th Cir 1994) (where a union engages in acts for some arguably job-related reason, a labor dispute exists).

Thus, while the dispute over the treatment of the AFTRA members did not fall within the classic format of a labor controversy, it nevertheless was a dispute over working conditions between union members and management (ABC), and thus, constituted a "labor dispute" under the National Labor Relations Act.

Finally the court held that there no triable issue of actual malice, since defendant had no reason to doubt the complaints about plaintiff that were made by actors on the television show.

Plaintiff was represented by Michael K. O'Donnell, Greenwich, CT. Defendant was represented by Peter D. DeChiara, Cohen, Weiss & Simon LLP, New York.

Media And Canadian Civil Liberties Association Challenge Searches Of Ottawa Newspaper And Reporter

By Stuart Svonkin

Lawyers for the *Ottawa Citizen*, reporter Juliet O'Neill, the Canadian Civil Liberties Association (CCLA), and the Canadian Broadcasting Corporation (CBC) spent two weeks in August challenging search warrants that had been executed against the newspaper's offices and the reporter's home as part of a leak investigation pursuant to Canada's *Security of Information Act*. The Ontario Superior Court in Ottawa has taken the matter under reserve.

Background

The searches were conducted by the Royal Canadian Mounted Police (RCMP) in January 2004. They stemmed from a November 8, 2003, *Citizen* article, written by O'Neill, entitled "Canada's Dossier on Maher Arar." The article focused on the RCMP's investigation of Arar, a Canadian citizen who was deported to Syria by U.S. authorities after being detained on a layover at New York City's JFK airport.

The article referred to information leaked by Canadian security officials, including a leaked document that purported to reflect what Arar told interrogators affiliated with Syrian military intelligence.

The two warrants were based on section 4 of Canada's *Security of Information Act*, which makes it a crime punishable by up to 14 years in prison to communicate, receive, or retain official information covered by the Act. The *Security of Information Act* is part of Canada's *Anti-Terrorism Act*, a broad-ranging set of measures passed in the wake of the September 11 attacks. However, section 4 of the Act – which is sometimes referred to as the "anti-leakage" provision – traces its origins back to versions of the *Official Secrets Act* enacted in Great Britain in the late nineteenth and early twentieth centuries.

Application to Quash

Shortly after the searches, O'Neill and the *Citizen* applied to the Ontario Superior Court in Ottawa seeking to have the warrants quashed on a number of grounds. The application was based in part on the contention that section 4 of the *Security of Information Act* violates the *Canadian Charter of Rights and Freedoms*. The Canadian Civil Liberties Association and the CBC intervened in the proceeding to join in the constitutional challenge. (A number of other media entities also intervened, but withdrew prior to the hearing of the application.)

The case was argued during the weeks of August 21 and 28. As part of the constitutional challenge, the applicants and interveners argued that section 4 of the *Security of Information Act* unjustifiably breaches both section 2(b) of the *Charter* – which protects freedom of expression – and section 7 of the *Charter* – which ensures that any deprivation of the right to life, liberty, and security of the person must be in accordance with the principles of fundamental justice (comparable to the right of due process under the U.S. Constitution).

The primary attacks on the statute were based on overbreadth and vagueness. Both the applicants and the interveners argued that the provision imbued law enforcement with unbridled discretion and had a marked chilling effect on constitutionally protected speech.

The Canadian Civil Liberties Association's submissions focused on the degree to which section 4 criminalizes expression that poses no threat to national security or public safety. The Canadian Civil Liberties Association maintained that the receipt offence included in section 4 was one example of the provision's overbreadth, and that a properly tailored anti-leakage measure would not outlaw the mere receipt of information. In addition, the Canadian Civil Liberties Association argued that the other two offences under section 4 at issue in the proceeding (the communications offence and the retention offence) are inconsistent with the requirements of fundamental justice because they lack any *mens rea* requirement.

The Canadian Civil Liberties Association contrasted section 4 with the anti-leakage provision of the current British *Official Secrets Act*, which was amended in 1989 so that it applies only to specific categories of information, requires (with one narrow exception) that a disclosure must be damaging to constitute an offence, includes a *mens rea* requirement, and decriminalizes the receipt of information where there is no further disclosure by the recipient.

The applicants also sought to have the search warrants quashed on the basis that they constituted an abuse of discre-

(Continued on page 36)

Media And Canadian Civil Liberties Association Challenge Searches Of Ottawa Newspaper And Reporter

(Continued from page 35)

tion and that they had been issued without the necessary consideration for the effects that the searches would have on protected free expression.

The court has taken the matter under reserve.

Stuart Svonkin is a lawyer with Torys LLP in Toronto and is counsel to the Canadian Civil Liberties in the O'Neill case. The warrants were defended by lawyers for the Attorney General of Canada.

Eighth Circuit Unseals Judge's Bankruptcy Records

First Appeals Court to Address Sealing Creditor Names to Protect Reputation

By Jon Haden

The Eighth Circuit affirmed the public's right of access to the bankruptcy filings of a former judge who accepted loans from attorneys during her tenure on the bench. *In re Deborah Alice Neal*, No. 06-1878, 2006 WL 2472751 (8th Cir. Aug. 29, 2006) (Smith, Heaney, Gruender, JJ.). This is the first time a federal appeals court has ruled on the question of whether the names of bankruptcy creditors may be sealed in order to protect their reputations.

Background

Deborah Neal was a Kansas City municipal judge from 1966 through 2004, when she resigned after admitting to a gambling addiction. In May 2005, she pleaded guilty to federal charges of accepting loans from lawyers and not disclosing them as required by ethical rules; she was sentenced to 28 months in prison.

This is the first time a federal appeals court has ruled on the question of whether the names of bankruptcy creditors may be sealed in order to protect their reputations.

At about the same time, she filed for bankruptcy and asked United States Bankruptcy Judge Jerry Venters (Western District of Missouri) to seal the names of her lawyer-creditors. Judge Venters granted the request under § 107(b)(2) of the Bankruptcy Code, which allows the court to seal "scandalous" or "defamatory" matter.

The *Kansas City Star* unsuccessfully petitioned the Bankruptcy Court to unseal the list of creditors. The *Star* appealed to the United States District Court, Hon. Scott O. Wright, which reversed, but ordered the names to remain sealed pending an appeal to the Eighth Circuit.

Eighth Circuit's Holding

Before the court of appeals, the creditors and the former judge pressed two principal arguments. First, because the public would infer ethical misconduct by the lawyers who loaned money to a sitting judge, the mere names of the creditors should be sealed as "scandalous matter" within the meaning of § 107(b)(2).

Second, because the State of Missouri's Office of Chief Disciplinary Counsel was conducting an independent investigation of these lawyers, the bankruptcy court had the discretion to seal their names under Bankruptcy Rule 9018(3), which permits the court to make any order required "to protect governmental matters that are made confidential by statute or regulation."

In rejecting these arguments, the Eighth Circuit emphasized that both United States Supreme Court decisions and Bankruptcy Code § 107 establish a strong presumption in favor of the openness of bankruptcy records, subject only to limited, express exceptions.

The court held that the list of creditors was not "scandalous" because it contained truthful information that the former judge was required to disclose in her bankruptcy filings. The court stated that "[t]he unintended, potential secondary consequence of negative publicity to attorney creditors is regrettable but not a basis for sealing the filing," based on the well-established principle that "injury or potential injury to reputation is not enough to deny public access to court documents."

The Eighth Circuit recognized that the creditors list is just that – a list of persons or entities to whom the debtor owes money. The court dismissed the creditors' argument that *The Star* was seeking the court record for an "improper purpose" (to promote public scandal and sell newspapers), holding that only the intent of the filer, and not the intent of a third party seeking access to a court filing, is material to the inquiry. Here, the former judge's purpose in filing her list of creditors was to comply with the bankruptcy rules in order to facilitate her discharge.

The court also held that the list of creditors was not "made confidential" by Missouri state rules that ensure the privacy of attorney disciplinary proceedings, which were entirely separate and distinct from the bankruptcy action.

Jon Haden is a member of Lathrop & Gage LC in Kansas City, Missouri. Along with his colleagues Alok Ahuja and Ryan Shaw, he represented The Kansas City Star in this matter.

D.C. Circuit Finds FBI's FOIA Response Inadequate

FBI Could Have Used Google

The D.C. Circuit reinstated a FOIA denial lawsuit last month, holding that the FBI had not made a reasonable attempt to determine whether two unnamed speakers depicted in the requested material were deceased. *Davis v. Dep't of Justice*, No. 04-5406, 2006 WL 2411393 (D.C. Cir. Aug. 22, 2006) (Randolph and Garland, C.J, Williams, Sr. C.J.).

The court found that the inadequate attempt rendered it unable to determine whether the agency had reasonably refused to grant the FOIA request based on the privacy interests of the unnamed individuals. The D.C. Circuit noted that the FBI could have taken the minimal step of "Googling" the names of the speakers.

Background

Plaintiff, author John Davis, requested four 25 year old audiotapes made in Louisiana during an FBI investigation. The tapes captured conversations between the investigation's subject, "a prominent individual," and an FBI informant. The FBI would not release the tapes, citing Freedom of Information Act privacy exemption 5 U.S.C. § 552(b)(7)(C), which enables the agency to refuse to release law enforcement records that "could reasonably be expected to constitute an 'unwarranted' invasion of privacy."

The issue, the Court stated, was "whether the FBI has undertaken reasonable steps to determine whether the speakers are now dead, in which event the privacy interests weighing against release would be diminished."

The FBI took three steps: 1) relying upon its "institutional knowledge of the death of certain individuals" as well as the book *Who Was Who*, 2) deducting from birth dates whether a person would be more than 100 years old, and therefore, presumably dead, and 3) checking the Social Security Death Index.

However, the FBI would only instigate these steps if the "responsive records" – here, the audiotapes – contained the identifying information necessary for the search. In this case, the tape recordings did not reveal the birth dates or social security numbers of the speakers.

Even a quick Google search could have turned up an obituary.

Decision

The Court held that not only were the FBI's three cited steps "plainly fated to reach a dead end (in a manner of speaking). . . " but there were "reasonable alternatives that the government failed to consider . . . ." In fact, even a quick Google search could have turned up an obituary.

The Court remanded, directing the FBI to "evaluate alternative methods for determining whether the speakers ... are dead" and for the district court to judge whether the new search methods are reasonable.

Plaintiff was represented by James H. Lesar. The government was represented by U.S Attorneys Heather Graham-Oliver, Kenneth L. Wainstein, Michael J. Ryan and Craig Lawrence.

Press Access Granted In High Profile Guardianship Proceeding

Media Interveners Gain Access to Filings in Astor Family Litigation

By Katherine M. Bolger

A New York State Court judge has unsealed portions of an high-profile guardianship proceeding involving one of New York's most celebrated philanthropists in a family battle that has captured the attention of the local press. *Matter of Astor*, No. 500095/2006, 2006 NY Slip Op 51677 (Aug. 29, 2006).

Background

At issue in the guardianship proceeding is the care being given to Brooke Astor who is now 104 years old. On July 26, 2006, the New York *Daily News* broke the news that Mrs. Astor's grandson, Philip Marshall, had filed an adult guardianship proceeding to have his father, Anthony Marshall, removed as Mrs. Astor's guardian.

As reported in the *Daily News*, Philip Marshall's petition included bomb-shell allegations that Anthony Marshall had mistreated Mrs. Astor, a doyenne of New York society, beloved by the public for having donated nearly $200 million to charities in the New York area.

In the guardianship petition, Philip Marshall alleged that Anthony Marshall refused to have the heating fixed in Mrs. Astor's bedroom, neglected to attend to Mrs. Astor's physical needs and forced his mother to sleep on a soiled couch. Philip Marshall's petition in the guardianship proceeding was supported by affidavits from renowned public figures, including former Secretary of State Henry Kissinger, former Chase Manhattan Bank CEO David Rockefeller and Annette de la Renta, wife of fashion designer Oscar de la Renta.

As soon as the *Daily News* broke the story, on July 26, 2006, Justice John E. H. Stackhouse of the New York State Supreme Court, entered an order sealing the files of the guardianship proceeding. Specifically, Justice Stackhouse ordered that "pursuant to a letter of application by the attorney for the petitioner the court modifies its previous Order to Show Cause and directs the County Clerk to seal the file in this matter."

The next day, the publishers of the *New York Post*, the *New York Times*, and the *Daily News*, as well as the Associated Press sought access to the files of the guardianship proceeding. In response to inquiries from the media, Justice Stackhouse held a hearing on July 28, 2006 at which he made a statement that he had not "sealed" the file, but had, instead made it "temporarily unavailable." Justice Stackhouse did not hear oral argument at that time.

After the media entities filed a motion to unseal the file and appeared for a hearing on August 2, 2006, Justice Stackhouse adjourned the hearing until August 28, 2006 to allow counsel for the parties to submit opposition papers, all the while maintaining the sealing order.

Hearing to Unseal File

On August 28, 2006, Justice Stackhouse finally heard oral argument on the media's application to unseal the file. The media intervenors argued that Mrs. Astor was a beloved public figure in New York City and that the public interest in her care and treatment outweighed any privacy rights she might have in the records of the guardianship proceeding.

In particular, the media intervenors emphasized that Mrs. Astor's private life was just as much a matter of public interest as her career in philanthropy had been, and called attention to the fact that Mrs. Astor had not only written several books of memoirs but also donated her private papers to the New York Public Library.

In opposition, counsel for Philip Marshall and Anthony Marshall argued that the Court should not only keep the file under seal, but should also close the courtroom to the public because Mrs. Astor's privacy rights outweighed the public interest. In addition, the court –appointed evaluator argued that an open proceeding would preclude him from obtaining evidence because individuals might be unwilling to speak with him if those individuals believed their statements would become public.

Media Motion Granted in Part

On August 29, 2006, Justice Stackhouse entered an order granting in part and denying in part the media intervenors motion to unseal the file and granting in part and

(Continued on page 40)

Press Access Granted In High Profile Guardianship Proceeding

(Continued from page 39)

denying in part the motions of Philip Marshall, Anthony Marshall and the Court Evaluator to close the courtroom to the public.

In a clear victory for the media, Justice Stackhouse ordered all of the files to be unsealed except for Mrs. Astor's medical, mental health and nursing records and the court evaluator's report. This meant that Philip Marshall's petition, along with all of the other documents related to Mrs. Astor's treatment of her staff and the relationship between Mrs. Astor and her son are now available for public inspection. Likewise, Justice Stackhouse ordered that the courtroom will be open for all testimony, except those witnesses or arguments referring to Mrs. Astor's medical condition and her state of mind.

Slade R. Metcalf, Katherine M. Bolger and Jason P. Conti of Hogan & Hartson LLP in New York represented NYP Holdings, Inc. (publisher of the New York Post), the New York Times Company, (publisher of The New York Times), and Daily News, LP (the publisher of the Daily News), and the Associated Press in this matter.

ETHICS CORNER

Imputed Conflicts – In a "State" of Conflict

By Marcy G. Glenn and Jonathon P. Martin

You are the hiring partner in your state's premier media law firm (Hiring Firm), and you've just snared a talented mid-level associate, Lucy Lateral, from another top-flight firm (Former Firm). However, your firm's Ethics Guru just sent you a troubling email. He says that Lucy has two conflicts of interest that could be imputed to Hiring Firm pursuant to State Rule of Professional Conduct 1.10, and the imputed conflicts will likely cause Hiring Firm to lose one or two major clients.

You can't believe this so you look into it further. Lucy had an active and diverse practice at Former Firm. In response to your inquiry, she has disclosed to you the following past client relationships, among many others:

- Last year, she represented Come and Get It Enterprises, the nation's largest soft-porn producer and vendor, in a high-profile libel case against Mega Media, Inc. She took and defended several depositions and reviewed internal Come and Get It documents before releasing many – but not all – of those documents to opposing counsel.
- Two years ago, Lucy helped defend Persons Magazine in a copyright case brought by its chief competitor Them Weekly. She drafted two research memoranda dealing with subject matter jurisdiction and punitive damages. The Former Firm partner supervising Lucy eventually incorporated her memos directly into motions. However, Lucy was privy to no strategic discussions, reviewed no client documents, and relied for her research solely on the allegations of the complaint.

Hiring Firm currently represents Mega Media in the libel case brought by Come and Get It. Hiring Firm also represents Them Weekly in the copyright action against Persons Magazine. You quickly realize, without assistance from the Ethics Guru, that Lucy will be personally disqualified from representing Mega Media and Them Weekly pursuant to State Rule 1.9 (a) (Duties to Former Clients).

That's not a problem. However, there *will* be a problem if Lucy's individual conflicts will be imputed to all Hiring Firm attorneys pursuant to State Rule 1.10 (Imputation of Conflicts of Interest), in which case – absent the consent of Lucy's former clients – Hiring Firm will be unable to continue representing Mega Media in the libel case and Them Weekly in the copyright litigation.

If Lucy joins Hiring Firm – and assuming that neither of her former clients would consent to her conflicts – may Hiring Firm continue to represent Mega Media and Them Weekly? The answer, unsurprisingly, is it depends.

Primarily, it depends on (a) whether Hiring Firm is in what we shall call for purposes of this article a "screening state" or a "non-screening state," and (b) if in a screening state, the circumstances under which screening without client consent is effective.

There will be a problem if Lucy's individual conflicts will be imputed to all Hiring Firm attorneys pursuant to State Rule 1.10.

Generally, screening states allow a hiring law firm to avoid an imputed conflict by screening the personally disqualified lateral hire from any involvement with the current client in the implicated matter, without requiring the consent of the personally disqualified lawyer's former client.

However, even in screening states, the answer is still "it depends" because virtually each screening state has adopted its own unique rules and the differences among those states' screening provisions are often critical. On the other hand, non-screening states reject unilateral screening as a vaccine against imputed conflicts, and instead require the hiring firm to obtain the informed consent of the lateral hire's former clients in order to avoid imputation. Do you know the "state" of imputation in your state(s) of practice?

A Little Bit of Background

When the ABA approved the Model Rules of Profession Conduct in 1983, it distinguished between lawyers moving from government employment to private positions, and those moving within the private sector.

Original Model Rule 1.11(a) precluded a lawyer from working on any matter in which the attorney participated "personally and substantially" while a public officer or employee, absent the government agency's consent, but al-

(Continued on page 42)

ETHICS CORNER

(Continued from page 41)

lowed the lawyer's new firm to work on such a matter as long as (1) the individually disqualified lawyer was screened from and received no fee from the work, and (2) the firm gave the agency written notice of the steps it had taken to comply with the rule.

By contrast, original Model Rule 1.10(a) imputed to all lawyers in a hiring firm all conflicts under Rules 1.7 and 1.9, including the lateral hire's individual conflicts under Model Rule 1.9; because the original Model Rules included no screening-without-consent provisions for private-to-private sector moves, they arguably resulted in vicarious conflicts – and required former client consent – in all cases.[1]

The ABA Ethics 2000 Commission recommended amending Model Rule 1.10 to render it parallel to Model Rule 1.11, so that attorneys moving from government and private positions would be treated equally: so long as the hiring firm promptly screened the lateral hire and gave notice to the former agency, firm, and client, the moving lawyer's conflict would not be imputed to the new firm. However, in 2001, the ABA's House of Delegates rejected the Commission's recommendation, and currently Model Rules 1.10(a) and 1.11(a) disparately treat private and governmental attorneys moving to new private positions.

As individual states have reviewed the ABA's 2002 and 2003 amendments to the Model Rules, many have departed from the ABA's continued rejection of lateral attorney screening to address conflicts resulting from purely private sector moves. As of the submittal deadline for this article, to the best of the authors' knowledge,[2] twenty states have approved rules allowing some form of screening to avoid imputed conflicts of interest when an attorney switches from one firm to another,[3] and lateral screening provisions have been proposed in four additional states.[4] In contrast, fifteen states, like the ABA, have declined to adopt a screening provision,[5] and rules committees in five other states have recommended that their respective supreme courts reject lateral screening.[6] The seven remaining states have not yet announced a clear position regarding screening.[7]

The result is a hodge-podge of approaches to lateral hire conflicts, complicated further by state and federal case law that is often inconsistent with the text of the governing rules.[8] To add to the confusion, inconsistent rules from multiple states may apply where the mobile attorney is admitted in State A but moving to State B, or the hiring firm maintains offices in multiple jurisdictions.

Lateral Moves In a Non-Screening State

The drill is fairly straightforward in a state that does not allow unilateral screening in any circumstance to avoid imputed conflicts in purely private sector moves. If the new hire has a conflict under the state version of Rule 1.9 (b), then so does the entire hiring firm, pursuant to Rule 1.10(a), unless each affected client gives informed consent, confirmed in writing.

Therefore, if Hiring Firm is in a non-screening state, Lucy's conflicts based on her work for Former Firm clients will be imputed to the entire firm. Lucy's substantial work for Come and Get It clearly creates a conflict for her under Rule 1.9(b); because all lawyers in Hiring Firm will be tainted by that conflict, Hiring Firm must obtain Come and Get It's consent to the firm's continuing representation of Mega Media – or think about rescinding Lucy's offer.

Less clear is whether Lucy's more limited work for Persons Magazine in the copyright case brought by Them Weekly will pose a conflict for Hiring Firm. Recall that Lucy merely researched two discrete legal issues, she did not review client documents or share in any strategic communications, and she relied exclusively on the allegations of the publicly-filed complaint for her factual information.

Under these circumstances, Hiring Firm has a strong argument that hiring Lucy would not create a conflict in its ongoing representation of Them Weekly – not because Lucy's conflict should not be extended to the firm as a whole, but because Lucy herself does not have a conflict. Both original and current Model Rule 1.9(b) provide there is no conflict unless the migrating lawyer, while at the former firm, "acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter . . . ."

Where the lateral hire's work was confined in scope and did not require access to material client information, the rule is arguably not triggered at all. However, in a non-screening state, if Lucy *does* have a conflict by virtue of her limited work for Persons Magazine, then Hiring Firm will be tainted too.

(Continued on page 43)

ETHICS CORNER

(Continued from page 42)

In a Screening State

The analysis is more complex in screening states. *First*, Hiring Firm would need to determine the extent of Lucy's involvement in the prior representations because if Lucy's roles were too significant, then in some states Hiring Firm would not be allowed to screen her to avoid the vicarious conflict.

Different states have established different thresholds of participation above which unilateral screening will not contain an individual's conflict. For example, in Arizona, if the personally disqualified lateral attorney had a "substantial role" in a prior "proceeding before a tribunal [,]" then the conflict will be imputed to the entire firm.

In Indiana, if the lateral attorney had "primary responsibility" for the prior representation, then unilateral screening will not be effective. Under Wisconsin's proposed rule, unilateral screening will protect the new firm only if the personally disqualified attorney "performed no more than minor and isolated services."

There is great disparity in the states' treatment of imputed conflicts caused by lateral moves.

Other screening states have no such limitation and screening will avoid imputation regardless of whether the personally disqualified lateral attorney was the former client's lead counsel or a junior associate with scant involvement and responsibility for the former client.

Lucy's level of involvement in the representation of Come and Get It falls in a gray area, subject to unilateral screening in some screening states but not in others. Although Lucy likely did not have "primary responsibility" (the test in Indiana and New Jersey) for Come and Get It, her involvement in depositions and document review suggests she may have played a substantial role (the standard in Arizona, Massachusetts, Nevada, and Ohio) in the company's representation.

Her role in the representation of Persons Magazine was probably limited enough to permit screening under the triggers quoted above, but it is debatable where her discrete research tasks constituted more than "minor and isolated services" (the proposed test in Wisconsin).

Second, assuming Lucy's individual conflicts can be managed through screening, Hiring Firm would likely have to give formal notice of its screening steps to Come and Get It and Persons Magazine because almost all screening states require the new firm to give some form of notice to the affected former clients.

The New Jersey rule is typical, requiring "written notice [to be] promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule." Some states omit the "written" requirement (Minnesota and Washington) or drop the "prompt" requirement (Kentucky, Tennessee, and Washington). In lieu of giving notice to the affected former clients, some states require notice to the hiring firm (New York), the former firm (Oregon), or the "appropriate tribunal" (Michigan).

Massachusetts has an expanded notice provision that requires, among other things, an affidavit from the personally disqualified attorney. Two screening states (Illinois and Maryland) do not require any notice.

Third, Hiring Firm likely would have to ensure that Lucy does not share in fees paid by clients as to which Lucy has conflicts. Rules in most screening states provide that Lucy may be "apportioned no part of the fee" from Hiring Firm's work on the Mega Media and Them Weekly matters involving Lucy's former clients. However, six states (Illinois, Minnesota, New York, North Carolina, Oregon, and Tennessee) have not adopted this prohibition.

Fourth, many screening states have added a variety of miscellaneous clauses to their screening provisions, which could affect Hiring Firm's analysis. For example, North Dakota allows screening only if, among other requirements, the personally disqualified attorney's confidential knowledge of the former client is "unlikely to be significant" in the current matter, and there is "no reasonably apparent risk" that such information will have a materially adverse effect on the current client.

New Jersey requires the hiring firm to "establish appropriate written procedures" to insure compliance with screening procedures. In Massachusetts, the personally disqualified attorney and the new firm must "reasonably believe" that the screening procedures "are likely to be effective." Washington requires that the hiring firm be

(Continued on page 44)

ETHICS CORNER

(Continued from page 43)

"able to demonstrate by convincing evidence" that the personally disqualified attorney did not disclose any confidences or secrets to anyone in the hiring firm.

Whether Hiring Firm could satisfy these sundry tests will be highly fact-specific, turning on, among other factors, the size and office/practice configuration of the firm, and the quantity and quality of information to which Lucy had access at Former Firm.

Conclusion

Attorney mobility is a fact of life, and increasingly on the rise. However, there is great disparity in the states' treatment of imputed conflicts caused by lateral moves. All attorneys – those involved in recruiting and those considering a move – would be well-served to review their respective state(s)' versions of Model Rules 1.9(b) and 1.10(a). Knowing the "state" of imputed conflicts in *your* state will enable you to hire lateral attorneys (or contemplate a move yourself) with the confidence that prior work will not poison existing client relationships.

Marcy G. Glenn is a partner in Holland & Hart, LLP, resident in the firm's Denver office, and is the Chair of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct. Jonathon Martin was a summer clerk at Holland & Hart and will be joining the firm as an associate upon his graduation from the University of Colorado School of Law.

[1] Under both the original and current versions of Model Rule 1.10(a), conflicts are imputed to all lawyers "associated in a *firm*" (emphasis added), but a "firm" is broadly defined as including lawyers in "the legal department of a corporation or organization" and "a legal services organization," as well as a traditional law firm.

[2] For all fifty states' current ethics rules, *see* http://www.abanet.org/cpr/links.html#States, which is maintained by the ABA's Center for Professional Responsibility. Less easily accessed is information concerning proposed state ethics rules. We recommend that the reader confirm the status and content of the relevant rules in his or her own state(s) of admission and practice.

[3] Arizona, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah, and Washington. Seven of these states (Illinois, Kentucky, Maryland, Michigan, Oregon, Pennsylvania, and Washington) allowed unilateral screening even before the Ethics 2000 Commission recommendations were made.

[4] Colorado, New York, Rhode Island, and Wisconsin.

[5] Arkansas, Connecticut, District of Columbia, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, South Dakota, Virginia, and Wyoming.

[6] California, Maine, New Hampshire, Oklahoma, and Vermont.

[7] Alabama, Alaska, Hawaii, Missouri, New Mexico, Texas, and West Virginia.

[8] The next issue of the *Media Law Letter* will discuss case law concerning imputed disqualification when attorneys change firms.

Speakers Bureau on the Reporter's Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter's privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a "turn-key" set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

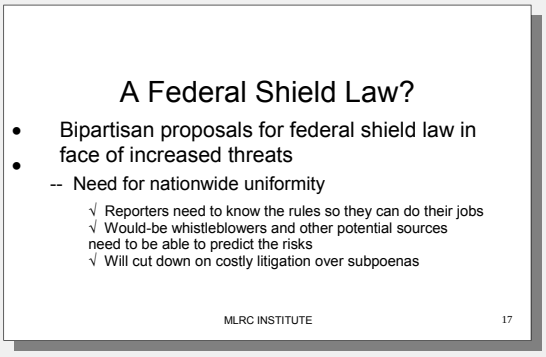
We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

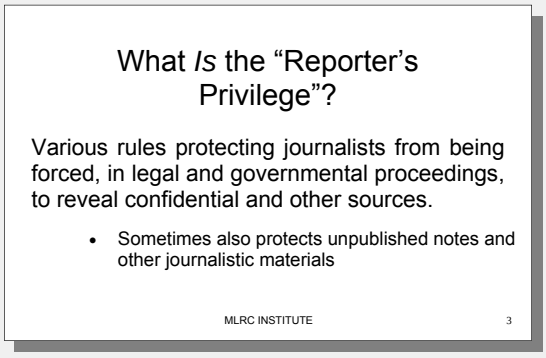
If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

Maherin Gangat
Staff Attorney
Media Law Resource Center
(212) 337-0200, ext. 214
mgangat@medialaw.org

Suggestion for background reading: Custodians of Conscience by James S. Ettema and Theodore Glasser. Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.

Presentation note: During the weeks leading up to your presentation, consider pulling articles from local papers quoting anonymous sources -- circle the references to these sources as an illustration for the audience of how valuable they are for reporters.





MLRC Calendar

PLEASE VISIT WWW.MEDIALAW.ORG FOR MORE INFORMATION

November 8, 2006

A Forum for MLRC members on the Espionage Act and Related Statutes

Wednesday, November 8
2:30-4:30 p.m.
Sheraton New York Hotel & Towers

November 8, 2006

MLRC Annual Dinner

Cocktail Reception 6:00 p.m.
Dinner 7:30 p.m.
Sheraton New York Hotel & Towers

November 10, 2006

Defense Counsel Breakfast

7:00-9:00 a.m.
Proskauer Rose Conference Room

January 25, 2007

Los Angeles, California

Southwestern Law School

Fourth Annual Conference Presented by Southwestern Law School's Donald Biederman Entertainment and Media Law Institute and the Media Law Resource Center

September 17-18, 2007

London, England

MLRC London Conference

International Developments in Libel, Privacy, Newsgathering & New Media