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Reporting Developments Through January 22, 2012

SUPREME COURT

Justices Address Broadcast Indecency 04
Four Letter Words and Bare Buttocks at the Supreme Court
FCC v. Fox Television

What the Court's GPS Ruling Could Mean for Digital Privacy 08
United States v. Jones

Supreme Court Delivers Good News to TCPA Defendants 11
Mims v. Arrow Financial

MLRC

MLRC/Southwestern Media and Entertainment Law Conference 13
Angels and Demons: Navigating Tricky Entertainment and Media Issues to Reach Legal Nirvana

LIBEL & PRIVACY

Ill. **Illinois Supreme Court Dials Back Protection Provided By State's Anti-SLAPP Statute** 16
Statute Only Covers Speech Aimed "Solely" at Petitioning Activities
Sandholm v. Kuecker

E.D. La. **Louisiana Federal Court Narrowly Interprets State Anti-SLAPP Statute** 17
Author's Anti-SLAPP Motion Denied
Louisiana Crisis Assistance Center v. Marzano-Lesnevich

Md. **Maryland High Courts Affirms Defamation Case Dismissal for City Paper** 19
Coverage of Murder Trial Protected by Fair Report, Fair Comment
Piscatelli v. Smith

N.Y. Sup. **Trial Court Dismisses Right of Publicity and Related Claims Arising Out of Use of Video in Comedy Segment of Television Program** 20
Law Strictly Limited to Commercial Appropriations
Sondik v. Kimmel

N.Y. Sup. **Judge Refuses to Put Ice Cream Plaintiffs' Claim on Ice** 22
Defamation and Disparagement Claims over "Shame, Shame, Shame" Report
Prince v. Fox Television Stations

D.C. App. **Court of Appeals Shields Anonymous Internet Informant** 25
Affirms Specificity Required for Corporate Defamation Damages
Software & Information Industry Association v. Solers, Inc.

D. Ore. **Blogger Moves for New Trial to Reverse $2.5 Million Verdict** 27
Court Applied Strict Liability Standard; No Public Concern
Obsidian Financial Group, et al. v. Cox

REPORTERS PRIVILEGE

Ill. Cir. **Illinois Judge Snubs Tech Blog – Holds Reporter's Privilege Inapplicable** 29
Website Not "News Medium"
Johns-Byrne Co. v. TechnoBuffalo LLC, et al

ACCESS

D.C. App. **Washington Post Wins Release of Jury Questionnaires in Murder Trial** 31
D.C. Court of Appeals Affirms First Amendment Right of Access to Completed Forms
In re Access to Jury Questionnaires

Kentucky **Newspapers Seek More Transparency And Public Accountability In Child Fatalities And Near Fatalities** 34
Child Welfare Agency Fights to Keep Records Secret

Cal. Sup. **Los Angeles Times Wins Access to State Employee Pension Data** 37
Boost for Pension Transparency

Tenn. Cir. **Media Wins Access to High Profile Adoption Dispute Trial** 38
Court Dismisses Motion for Closure and Sealed Record
In re Hansen

COPYRIGHT

9th Cir. **DMCA Requires Specific Knowledge of Copyright Violation for Service Provider Liability** 39
General Knowledge of Infringement Insufficient
UMG Recordings v. Shelter Capital Partners

FIRST AMENDMENT

N.H. **New Hampshire Misteps On "Bigfoot's" Free Speech** 41
First Amendment Protections Apply Even to Video Hoax
Doyle v. Commission, N.H. Depart. Resource & Economic Development

INTERNET

Ark. Cir. **Website "Flash Cookie" Invasion of Privacy Class Action Dismissed** 43
Arkansas State Court Relies On Forum Selection Clause In Terms of Use
Roller, et al. v. TV Guide Online Holdings, LLC, et al.

INTERNATIONAL

Canada **"Intrusion Upon Seclusion": New Privacy Tort Recognized in Canada** 45
Decision Will Likely Lead to Claims Against Media
Jones v. Tsige

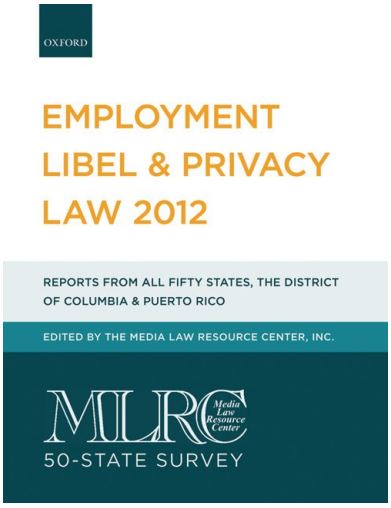
Canada **Heavy Evidentiary Burden Imposed On Litigants Seeking Publication Bans and Sealing Orders** 47
Media Intervenors Entitled to Report on Divorce Case
E.H. v. Russell Williams

Netherlands **Dutch Movie Producer Wins Second Case Over Heineken Kidnapping Movie** 50
Kidnappers' Reputation Claims Denied

ETHICS

Virginia Circuit Court Sanctions Party and Counsel $722,000 for Spoliation of Facebook Evidence 52
Instruction to Clean Up Facebook Page Results in Sanction
Lester v. Allied Concrete Co.

RETURN TO TABLE OF CONTENTS



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RETURN TO TABLE OF CONTENTS

Justices Address Broadcast Indecency:

Four Letter Words and Bare Buttocks at the Supreme Court

By Jerianne Timmerman

It's a rare case when a former Solicitor General arguing before the Supreme Court directs the Justices' attention to bare buttocks. But that is what occurred on January 10 when Seth Waxman pointed out the unclothed figures on the frieze along the high walls of the Court during oral argument in *Federal Communications Commission, et al. v. Fox Television Stations, Inc., et al.* and *FCC and United States of America v. ABC, Inc., et al.*, No. 10-1293.

The lively oral argument in these two cases – one involving fleeting expletives in live television programming and the other a brief look at bare buttocks in a scripted program – revealed sharp differences between the Justices as to the constitutionality of restricting "indecent" programming aired on broadcast stations. Whatever the outcome, the Court's decision likely will be narrow and divided. Indeed, it appears that the ultimate question of the broadcast medium's level of protection under the First Amendment may remain unresolved.

The lively oral argument in these two cases – one involving fleeting expletives in live television programming and the other a brief look at bare buttocks in a scripted program – revealed sharp differences between the Justices as to the constitutionality of restricting "indecent" programming aired on broadcast stations.

The FCC's Reversal on Indecency Enforcement

Federal law prohibits the broadcast of "obscene, indecent, or profane language by means of radio communication." 18 U.S.C. § 1464. Nearly 35 years ago, the Supreme Court, by a slim 5-4 majority and stressing the narrowness of its decision, upheld the differential treatment of indecency in the broadcast media in comparison to all other electronic and print media. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court based its decision on the supposed unique pervasiveness and accessibility, particularly to children, of the broadcast media.

Following *Pacifica*, the FCC for decades adhered to the position that fleeting expletives were not actionable under its indecency rules. In 2004, however, the FCC reversed course, concluding that even the fleeting use of certain expletives was actionably indecent and profane. In two cases applying this stricter indecency standard, the FCC found that the fleeting use of "fuck" and "shit" in live broadcast programming (two *Billboard Music Awards* shows on the Fox network) was indecent and profane. Fox appealed this order to the Second Circuit Court of Appeals.

Appeals Court Reversals of the FCC

The Second Circuit overturned the FCC's new indecency policy on the airing of fleeting expletives. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007). In a 2-1 decision, the appeals court found that the FCC had failed to provide a reasoned analysis for its about-face on the treatment of fleeting expletives, and, thus, the agency's new policy was arbitrary and capricious under federal administrative law.

The court refrained from deciding the constitutional questions raised by broadcasters, but, in dicta, strongly indicated its skepticism about the constitutionality of the FCC's indecency regulatory regime.

In 2009, the Supreme Court reversed the Second Circuit, finding that the agency's altered indecency policy was not arbitrary and capricious under the Administrative Procedure Act. *FCC, et al. v. Fox Television Stations, Inc., et al.*, 129

(Continued on page 5)

(Continued from page 4)

S.Ct. 1800 (2009). Because the lower court had not ruled on the constitutionality of the FCC's order, the high court declined to address the constitutional challenges made by broadcasters. The case was then remanded to the Second Circuit.

On remand, the Second Circuit addressed the constitutional questions raised by the FCC's more restrictive indecency policy. In July 2010, the appeals court unanimously held that the current "policy violates the First Amendment because it is unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives" directly at issue. *Fox Television Stations, Inc., et al. v. FCC*, 613 F.3d 317, 319 (2d Cir. 2010). Accordingly, the court vacated the FCC's order and the indecency policy underlying it. The appeals court, however, noted that it did "not suggest that the FCC could not create a constitutional policy," but determined "only that the FCC's current policy fails constitutional scrutiny." *Id*. at 335.

During this same time period, another case – this one involving brief partial nudity in scripted programming – also had reached the Second Circuit. In 2008, the FCC imposed a forfeiture on 45 ABC owned and affiliated stations for airing in 2003 one episode of *NYPD Blue* containing a brief view of a woman's bare buttocks. ABC paid the nearly $1.24 million fine and sought review in the Second Circuit.

While this appeal was pending, another panel of the court found the FCC's indecency policy unconstitutional in the *Fox* fleeting expletives case. Subsequently, the court issued a summary decision in the *ABC* case vacating the FCC's order, concluding that there was no significant distinction between the *ABC* and *Fox* cases because both turned on application of the same impermissibly vague indecency test.

The government sought Supreme Court review in the two cases. On June 27, 2011, the high court granted certiorari on the limited question of whether the FCC's "current indecency -enforcement regime violates the First or Fifth Amendment" to the Constitution.

The Parties' Arguments, Both Broad and Narrow

In its brief, the government presented an interesting combination of both narrow and broad arguments. It argued that the Second Circuit erred in focusing on the FCC's indecency policy as a whole, based on the policy's perceived inconsistent application to broadcasts not directly before the court. According to the government, any as-applied vagueness challenge focused on the particular broadcasts at issue would fail; but, in any event, the FCC's indecency enforcement regime is not unconstitutionally vague, as the agency employs a definition of indecency and a contextual approach to applying it that the Supreme Court upheld in *Pacifica*.

Stressing the government's interest in protecting children and providing parents with a "relatively safe medium" for their children, the government asserted that there is no basis for overruling *Pacifica.* The government's brief dismissed both the development of the V-chip and the emergence of alternative communications media as grounds for change in broadcast indecency regulation.

Perhaps most interestingly, the government stressed the scarcity of broadcast frequencies (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) and earlier cases), even though, as ABC and Fox observed in their briefs, neither the Supreme Court nor the FCC has ever relied on spectrum scarcity to justify indecency restrictions. Here, the government relied on the scarcity rationale to argue that, because broadcasters have substantially benefitted from federal allocation of scarce spectrum, licensees' acceptance of those benefits carries with it enforceable obligations to operate in the public interest. And, according to the government, one of these enforceable obligations that broadcasters accept in return for their use of spectrum is a restriction on the airing of indecent material.

In response, Fox Television Stations, Inc. (along with NBCUniversal Media, CBS Broadcasting and the Fox Television Affiliates Association, collectively "Fox, *et al*.") argued that the FCC's indecency enforcement policy violates the First Amendment. Fox, *et al*. asserted that the Supreme Court should overrule *Pacifica*, given that broadcasting is neither "uniquely pervasive" nor "uniquely accessible to children," in light of the growth of myriad other media and technological tools for parents to control or block their children's access to objectionable material.

But, even under *Pacifica*, Fox, *et al*. argued that the FCC's altered indecency regime is unconstitutional, given the narrow nature of that decision and the FCC's failure to narrowly tailor its revised policy. In any event, the FCC's current indecency policy is unconstitutionally vague, as the Second Circuit correctly held.

Finally, Fox, *et al*. argued the government cannot

(Continued on page 6)

(Continued from page 5)

now fall back on *Red Lion*'s scarcity doctrine to justify the FCC's indecency enforcement policy. Scarcity has never been the basis for restricting indecency, and decades of technological advancements have now undermined the assumptions on which the scarcity doctrine rests.

The brief of ABC, Inc., KTRK Television, Inc. and WLS Television, Inc. made many of these same arguments, but with different emphases. ABC, *et al*. stressed that the FCC's indecency policy is unconstitutionally vague, such that broadcasters do not have constitutionally adequate notice as to what material may be regarded as indecent. Vaguely-defined indecency standards and inconsistent application of those standards have led to arbitrary enforcement (apparently driven by the agency's own artistic judgments) and a chill on protected speech.

ABC, *et al*. also argued that the FCC's indecency enforcement regime violates the First Amendment, as it goes beyond *Pacifica* and fails to take account of less restrictive alternatives (such as the V-chip and other blocking technologies). Thus, not only is the forfeiture order against ABC infirm even under existing Supreme Court precedent, ABC *et al*. argued that there is no basis today for reduced First Amendment scrutiny of broadcast indecency regulations. Given technological developments, relying on spectrum scarcity (as set forth decades ago in *Red Lion*) to justify indecency restrictions for the first time now would be particularly unwarranted. And neither predicate of *Pacifica* (broadcasting's unique pervasiveness and accessibility to children) remains true today.

The Court's decision likely will be split with multiple opinions and perhaps no single opinion garnering the support of a majority. Thus, it is entirely possible that these cases will not resolve the ultimate question of the broadcast medium's level of protection under the First Amendment.

Additional merits briefs were submitted by stations affiliated with ABC, CBS and NBC and by artists' groups. Numerous other parties – ranging from parent and family groups to PBS to First Amendment advocates – filed amicus briefs that made a range of arguments in support of both the government and broadcasters.

Oral Argument Reveals Splintered Court

The January 10th oral argument revealed little agreement among the Justices as to their approaches toward broadcast indecency and limited interest in resolving these cases by overturning long-standing precedent. In particular, attorneys for broadcasters took considerable time explaining how the FCC's indecency policy could be found unconstitutional even without overturning *Pacifica*, and the scarcity doctrine and *Red Lion* were notable in this oral argument only by their absence.

The government continued to stress its major theme that, because broadcasters benefit from their use of spectrum, the government, in return, can enforce certain obligations, including that stations refrain from broadcasting indecent material, thereby creating a safe haven for parents and their children. Justice Scalia embraced this approach most strongly, agreeing that the "government is entitled to insist upon a certain modicum of decency" on the "public airwaves," even as a "symbolic matter." Transcript at 21-22. Chief Justice Roberts also appeared to support the government's interest in ensuring that, in a world with "800 channels," there are "a few" where viewers "are not going hear the S word, the F word" and "are not going to see nudity." *Id*. at 37.

While Justice Kennedy expressed concern that the "inevitable" consequence of finding the FCC's indecency policy unconstitutional would be an increase in use of four-letter words, he also appeared more skeptical than other Justices of the government's argument for a higher and different standard for broadcast media. Justice Kennedy noted the fact that many viewers could not even differentiate between broadcast channels and cable channels when watching television and asked specifically about the operation of the V-chip. *Id*. at 18-20; 33.

Justices Ginsburg and Kagan seemed most skeptical of the government's position and most receptive to the broadcasters' arguments about the First Amendment problems with the FCC's indecency policy. Justice Ginsburg was the first to ask the Solicitor General about the "arbitrariness" and inconsistency of the FCC's indecency enforcement. *Id*. at 7-8.

For her part, Justice Kagan almost immediately questioned the government's "contract notion." She seemed

(Continued on page 7)

(Continued from page 6)

to reject the idea that, just because the government gave broadcasters something, "now they have to do whatever we say," and asked the Solicitor General why the indecency condition is "appropriate when many other conditions would not be appropriate." *Id*. at 4.

Justice Kagan further expressed concern about the lack of standards in the FCC's policy and the degree of discretion it allowed the agency. *Id*. at 51-52. In fact, near the end of oral argument, she observed that "it's like nobody can use dirty words or nudity except for Steven Spielberg." *Id*. at 52. (As explained in the record, the FCC found two Spielberg movies, "Saving Private Ryan" and "Schindler's List," not to be indecent, despite their frequent use of multiple four letter words and full frontal nudity, respectively. ABC's attorney particularly stressed these and other inconsistencies in the FCC's enforcement.)

In contrast, Justice Alito challenged the broadcasters' position, inquiring whether, if the Court ruled in the broadcasters' favor on First Amendment grounds, viewers would be "seeing a lot of people parading around in the nude and [hearing] a stream of expletives." *Id.* at 28. He appeared reluctant to "intervene by overruling a prior precedent," given the limited number of people who still receive television programs via the airwaves. *Id*. at 21, 33. Justice Alito also inquired what had changed with regard to radio specifically since the *Pacifica* decision, thereby leading to a discussion as to whether the Court could hold the FCC's policy invalid on First Amendment grounds as to TV but not as to radio. *Id*. at 26-27.

Justice Breyer made inquiries about the procedural posture of the cases and, specifically, whether the ABC case had gone through all of the procedures below that the Fox case had undergone. *Id*. at 10-13. He seemed very interested in how both cases could be decided on narrow grounds, asking both Carter Phillips (representing Fox, *et al*.) and Seth Waxman (representing ABC, *et al*.) if it were necessary to overrule *Pacifica* or make an "earthshaking decision" to resolve the two cases. *Id*. at 29-31; 42-43.

As is often the case, Justice Thomas asked no questions during the oral argument, and Justice Sotomayor, who previously sat on the Second Circuit, recused herself. Interestingly, the absence of Justice Sotomayor and the vote of Justice Thomas both may play significant roles in the outcome of these cases.

Predictions Anyone?

Commenters on the oral argument have agreed that the Court's decision in these cases likely will be both splintered and narrow. *See, e.g*., Mike Sacks, "Supreme Court Frets Over TV's Devolving Standards of Decency," huffingtonpost.com (updated Jan. 11, 2012); Lyle Denniston, "Many Options on TV Rules," scotusblog.com (Jan. 10, 2012); "FCC v. Fox: The Swami Tells It Like It Was, and Like It Will Be," CommLawBlog.com (Jan. 16, 2012). The Justices were not in agreement on the merits of the cases, and there was clear searching, especially by Justice Breyer, for a way to decide the cases without overturning existing precedent.

The Justice perhaps most inclined to rule broadly in this case – Justice Thomas – did not speak during argument. But, in the 2009 *Fox* case decided on administrative law grounds, he filed a separate concurring opinion showing his willingness to reconsider both *Pacifica* and *Red Lion*. In the earlier case, Justice Thomas wrote that "*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity." *Fox*, 129 S.Ct. at 1820. He found no basis for making distinctions among types of media in the text of the First Amendment, observed the "doctrinal incoherence" of *Red Lion* and *Pacifica*, and noted their "deep intrusion into the First Amendment rights of broadcasters." *Id*. at 1820-21. Based on the oral argument, the other Justices appear unlikely to rule this broadly.

And although Justice Sotomayor did not participate, her absence is significant. It would take the votes of five of the eight Justices hearing the case to reverse the Second Circuit's decision finding the FCC's current indecency policy unconstitutional, as a four-four tie would affirm the lower court.

In light of this (and Justice Thomas' assumed opinion, given his earlier strongly-worded concurrence), some commenters have predicted a decision narrowly upholding the Second Circuit, *see, e.g*., "FCC v. Fox," CommLawBlog.com, although a split decision reversing the lower court also seems possible. If the Supreme Court affirms the Second Circuit's opinion without overturning prior precedent, then the FCC's more restrictive indecency policy adopted in 2004 would not stand, but, in all likelihood, such a decision would not prevent the agency from attempting to

(Continued on page 8)

(Continued from page 7)

adopt and enforce a less restrictive policy.

Whatever the outcome, the Court's decision likely will be split with multiple opinions and perhaps no single opinion garnering the support of a majority.

Thus, it is entirely possible that these cases will not resolve the ultimate question of the broadcast medium's level of protection under the First Amendment. That question, again, could be left for another day.

How long that day will be in coming is anyone's guess. Certainly there is no shortage of possible cases. The Janet Jackson "wardrobe malfunction" decision is waiting in the wings, as the Third Circuit in November 2011 reaffirmed its decision vacating the FCC's forfeiture order against broadcasters for that incident.

In addition, last December, a number of media groups filed cert petitions asking the Supreme Court to review FCC restrictions on the ownership of broadcast outlets, with many of these companies arguing that the scarcity doctrine of *Red Lion* (which the courts have relied upon to uphold strict broadcast ownership rules) should be overruled. Thus, as is often the case in TV, a sequel is not out of the question.

Jerianne Timmerman is Senior Vice President and Senior Deputy General Counsel of the National Association of Broadcasters, which filed an amicus brief supporting respondent broadcasters in these cases. Solicitor General Donald Verrilli argued the case for the government. Carter Phillips, Sidley & Austin LLP, argued on behalf of Fox Television Stations, Inc. Seth Waxman, Wilmer Hale LLP, argued on behalf of ABC, Inc.

United States v. Jones: What the Court's GPS Ruling Could Mean for Digital Privacy

By Bryan Clark

If you do not work for a government agency, it might be easy to skip over this article. After all, how could a Fourth Amendment search and seizure case have any impact on your media company or your media defense practice? But if your company or your clients have tapped into the benefits of geo-tracking software, behavioral advertising, and other mobile technologies that have become targets for digital privacy class actions over the last several years, the Supreme Court's decision in *United States v. Jones,* 2012 WL 171117 (U.S. January 23, 2012), could provide valuable insights into how the Court is applying traditional notions of privacy to new digital technologies like geo-tracking.

Factual and Procedural Background

In *Jones*, the FBI and local police (the "Government") installed a Global-Positioning-System ("GPS") on the vehicle of a suspected drug dealer without a valid search warrant. *Id.* at *2. (The Government obtained a search warrant that authorized installation in the District of Columbia and within 10 days, but the agents installed the device on the 11th day and in Maryland. *Id.* at *2.).

Based on the data collected by the GPS, the Government subsequently secured an indictment on drug trafficking conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at the defendant's residence, but held the remaining data admissible because the defendant had no reasonable expectation of privacy when the vehicle was on public streets. *Id.* The defendant was convicted, based in part on the GPS data. The D.C. Circuit reversed the conviction, holding that admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment.

The Court's Ruling

The Supreme Court upheld the D.C. Circuit's decision in three separate opinions (a majority opinion by Justice Scalia, joined by Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Justice Sotomayor, a concurring opinion by Justice Sotomayor, and a separate concurring opinion by Justice Alito, joined by Justice Ginsburg, Justice Breyer, and Justice Kagan). All the Justices agreed that the D.C. Circuit's ruling should be upheld, but for different reasons. Five

(Continued on page 9)

(Continued from page 8)

Justices held that the Government's mere attachment and monitoring of a GPS device constituted a "search" for the purposes of the Fourth Amendment, but the Justices in the Alito concurrence rejected that view. Additionally, five Justices (those in the Alito concurrence plus Justice Sotomayor) agreed with the portion of the Alito opinion concluding that long-term monitoring of a GPS device violates a reasonable expectation of privacy. The other four Justices left this question open.

The majority opinion was based largely on traditional concepts of property law. The Court held that by installing the GPS device, "[t]he Government physically occupied private property for the purpose of obtaining information." *Id.* The Court held that the defendant had a reasonable expectation of privacy because the Government's action constituted a trespass on his property. *Id.* at *4. The Court defined a reasonable expectation as one that "has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id.*

In this case, the expectation of privacy was based on historical notions of property and trespass. Because the defendant possessed the vehicle at the time the Government attached the GPS device, the Court distinguished this from a case in which a defendant accepted a container that came to him with a tracking device and therefore was not entitled to object to the device's presence. *Id.* at *5.

The Alito concurrence, on the other hand, focused on the Government's long-term monitoring of the GPS data. *Id.* at *11 (Alito, J., concurring). Justice Alito held that warrantless, long-term monitoring of the movements of the vehicle driven by the defendant violated the defendant's reasonable expectations of privacy — regardless of whether this was accomplished by physically placing a monitoring device on his vehicle. *Id.*

Justice Alito noted that relatively short-term monitoring of a person's movements on public streets "accords with expectations of privacy our society has recognized as reasonable," but "use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy" because "society's expectation has been that law enforcement agents and others would not — and indeed, in the main, simply could not — secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.* at *17. Thus, Justice Alito upheld the D.C. Circuit's decision because he believed the Government's long-term surveillance without a valid warrant violated the defendant's reasonable expectation of privacy. *Id.* at *18.

Possible Implications for Mobile and Digital Privacy

So what can digital advertising companies, mobile application developers, and other media entities learn from *Jones*? After all, non-governmental entities do not necessarily need to worry about running afoul of the Fourth Amendment's prohibition on illegal search and seizure. But the Court's majority opinion — and perhaps more so, the concurring opinions of Justices Sotomayor and Alito — offers insights into how the Court may interpret privacy in the digital and mobile context.

Over the last several years, plaintiffs' attorneys have brought a steady stream of putative class action lawsuits against various entities in the digital and mobile marketplace, alleging various invasions of privacy in the context of mobile marketing, behavioral advertising and data mining — including geo-tracking on GPS-enabled devices.

In defense, mobile companies have argued, *inter alia*, that there was no invasion of privacy in this context because the defendants did not engage in the tort of trespass by physically occupying the plaintiffs' property, that the defendants in fact caused no damage to the plaintiffs at all, and that the plaintiffs purchased the mobile device or application with full knowledge of the geo-tracking and data mining features. Although the Court's majority in *Jones* was not directly addressing any of these arguments, its discussion of the traditional notions of property and trespass could be helpful to attorneys raising these defenses.

However, the Court's majority opinion is careful to note that it turns on the issue of trespass, ***not*** the expectation of privacy that may arise in the context of GPS tracking. "It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question." *Id.* at *7.

Even more insightful for potential media defendants is Justice Sotomayor's concurrence, which acknowledges the merits of the Court's trespass analysis in this particular case, but notes that it likely would be inadequate in analyzing the privacy interests of an individual who is tracked using a factory- or owner-installed GPS-enabled smart phone.

Justice Sotomayor takes a more detailed look at the attributes of GPS monitoring, noting that "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her

(Continued on page 10)

(Continued from page 9)

familial, political, professional, religious, and sexual associations" and that "[a]wareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." *Id.* at *9 (Sotomayor, J., concurring).

Justice Sotomayor goes on to question "whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on." *Id.* Although Justice Sotomayor addressed these issues in the context of a Fourth Amendment search and seizure, it is not hard to imagine these same privacy concerns being raised by plaintiffs in putative class actions related to alleged surreptitious tracking by mobile advertising companies or application developers.

Justice Sotomayor also notes that the "digital age" may require the courts to "reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." *Id.* at *10. She observes that in today's digital society, "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers." *Id.*

But she does not believe that such disclosures should strip an individual of his or her expectations of privacy. Again, it seems likely that this language could be used by class action plaintiffs' attorneys to combat the usual battery of defenses in digital privacy cases.

The Alito concurrence also squarely addresses the role that GPS-enabled smart phones have on an individual's expectation of privacy, although it is not clear whether Justice Alito believes the prevalence of GPS tacking will increase or decrease a reasonable expectation of privacy.

> Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States. For older phones, the accuracy of the location information depends on the density of the tower network, but new 'smart phones,' which are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ("crowdsourcing") the speed of all such phones on any particular road. Similarly, phone-location-tracking services are offered as "social" tools, allowing consumers to find (or to avoid) others who enroll in these services. ***The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements***.

Id. at *17 (Alito, J., concurring) (emphasis added, internal citation omitted).

One could argue that this description of the role of GPS-enabled smart phones supports the position that consumers who knowingly utilized GPS-enabled devices have a limited expectation of privacy in the context of geo-tracking and behavioral advertising class actions.

Conclusion

The *Jones* opinions do not contain any silver bullets that will doom mobile media companies or guarantee victory for defendants in digital privacy class actions. But the case shows how the Court is wrestling with the overlap of new technology and traditional notions of privacy — and it provides clues as to how certain Justices might react if a digital privacy class action ever reaches the Supreme Court. It is therefore important for any individual involved in the defense of digital privacy claims — particularly those related to geo-tracking and behavioral advertising on GPS-enabled devices — to understand the various positions taken in *Jones* and determine whether any of those arguments may be helpful or harmful in their particular cases.

Bryan Clark is an associate in the Chicago office of Lathrop & Gage LLP and a member of the firm's Digital Privacy and Data Protection practice group.

Supreme Court Delivers Good News to TCPA Defendants

Resolves Circuit Split on Jurisdiction Issue

By Jeff Davis

The United States Supreme Court, resolving a split among the U.S. Circuit Courts of Appeal, has unanimously ruled that federal question jurisdiction exists for private actions under the Telephone Consumer Protection Act of 1991 ("TCPA") 47 U.S.C. § 227. The TCPA generally prohibits use of automatic telephone dialing systems, artificial or pre-recorded voice messages, and unsolicited facsimile advertisements. The Supreme Court, in *Mims v. Arrow Financial Services, LLC*, No. 10-1195 (Jan. 18, 2012), held that because the TCPA is a federal statute, private TCPA claims arise under United States law for federal question jurisdiction under 28 U.S.C. § 1331. The decision fully opens the doors to federal courts nationwide, and is a positive development for TCPA defendants and their counsel.

The TCPA contains specific jurisdictional provisions. It provides that federal district courts have exclusive jurisdiction over claims brought by state attorneys general. 47 U.S.C. § 227(g)(2). And it contains a permissive grant of jurisdiction to state courts for private TCPA actions; the statute provides that a person or entity may bring an action in "an appropriate court of that state…." 47 U.S.C. § 227(b)(3). The question in *Mims* was whether this language meant that state courts had *exclusive* jurisdiction over private TCPA claims.

The Supreme Court concluded that state courts do not have exclusive jurisdiction over private TCPA claims, because the TCPA contains no statement expressly divesting federal district courts of federal-question jurisdiction.

The Supreme Court concluded that state courts *do not have* exclusive jurisdiction over private TCPA claims, because the TCPA contains no statement expressly divesting federal district courts of federal-question jurisdiction. The Court reasoned: "Nothing in the text, structure, purpose, or legislative history of the TCPA calls for displacement of the federal-question jurisdiction U.S. district courts ordinarily have under 28 U.S.C. § 1331." The Court sided with the Seventh and Sixth Circuit Courts of Appeal, which had previously ruled that U.S. district courts have federal-question jurisdiction over private TCPA actions. (The Ninth, Third, Second, Fifth, Fourth and Eleventh—which was reversed by *Mims*—had reached the opposite conclusion).

But even before this ruling, private TCPA suits had already been making their way to federal courts for some time. As the *Mims* Court observed, all courts of appeal to have considered the question have held that the TCPA does not bar district courts from exercising diversity jurisdiction under 28 U.S.C. § 1332. And TCPA cases can be removed to federal court under the provisions of the Class Action Fairness Act of 2005.

Justice Ginsburg dismissed the argument that a ruling conferring section 1331 jurisdiction would open the floodgates to federal court for TCPA claims. She wrote that given the current federal district court filing fee of $350, it would make little sense for a plaintiff to bring an individual TCPA lawsuit in federal court, because the anticipated recovery is only $500 per violation. But private TCPA lawsuits are often pursued as class actions by plaintiffs' counsel specializing in such claims. These lawsuits will certainly be of more concern to businesses than individual TCPA claims. TCPA violations incur statutory damages of $500 per violation, which can be trebled if the defendant acted "willfully or knowingly." *See* 47 U.S.C. § 227(b)(3). This can escalate quickly in putative class actions. For example, a TCPA class action brought on behalf of just 500 unsolicited fax recipients exposes the fax sender to a potential judgment of $750,000, at the maximum of $1,500 per facsimile.

The *Mims* decision likely will lead to more private TCPA class action claims being filed in federal district courts. Where a TCPA plaintiffs' counsel might once have begun a class action in state court, they will now likely just file in federal court in the first instance because removal will be practically inevitable. For TCPA defendants (who can now

(Continued on page 12)

(Continued from page 11)

remove any TCPA litigation to federal court nationwide), there are perceived advantages to being in federal court, with its heightened familiarity with federal law and a well-developed body of class action case law.

And there is evidence of skepticism of TCPA litigation at high levels in the federal judiciary. Judge Posner in the Seventh Circuit Court of Appeals recently described the TCPA as "an obscure statute" with "draconian penalties." *Creative Montessori Learning Centers v. Ashford Gear, LLC,* 662 F.3d 913, 915-16 (7th Cir. 2011). Federal judges will likely bemoan the added burden these cases add to their dockets, and will continue to push for early resolution of these cases. But there the TCPA is not going away anytime soon, and companies must remain mindful of its restrictions. As Judge Posner said in *Ashford Gear*: "the statute, with its draconian penalties for multiple faxes, is what it is."

Jeff Davis is an attorney with Lathrop and Gage LLP in Chicago. He specializes in defense of TCPA class actions and media entities, and is a member of the firm's Digital Privacy and Data Protection Group.

2012 MLRC – Southwestern Media and Entertainment Law Conference

Angels and Demons: Navigating Tricky Entertainment and Media Issues to Reach Legal Nirvana

On January 19, 2012, over 160 MLRC members and friends gathered in Hollywood, California at the Renaissance Hollywood Hotel for the ninth annual MLRC – Southwestern Law School Biederman Institute conference on media and entertainment law issues. The conference included sessions on Releases in Reality Programming, Social Media and Music Clearance.

Exorcising Rights: Releasing the Demons in Reality Programming
(l. to r.) Jean-Paul Jassy (Bostwick & Jassy LLP), Glen Kulik (Kulik, Gottesman, Mouton & Siegel, LLP), John Farrell (Endemol USA) and Louis P. Petrich (Leopold, Petrich & Smith)

Social Media - Savior or Satan?
(l. to r.) Dan Cooper (Paramount Pictures), Jennifer Mardosz (Fox Entertainment Group), Karlene Goller (Los Angeles Times) and Paul Koenig (Paramount Pictures)

RETURN TO TABLE OF CONTENTS

Sympathy for the Devil in Music
(l. to r.) Jeffrey Schneider (NBCUniversal), Keith Zajic (Attorney at Law), Chip McLean (Hollywood Records) and Doug Frank

2012 MLRC – Southwestern Media and Entertainment Law Conference

RETURN TO TABLE OF CONTENTS

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Illinois Supreme Court Dials Back Protection Provided By State's Anti-SLAPP Statute

The Illinois Supreme Court has significantly scaled back the protection provided by Illinois's anti-SLAPP statute, known as the Citizens Participation Act. In its opinion in *Sandholm v. Kuecker*, Docket No. 111443, released on January 20, 2012, the court retreats from the much more liberal construction it gave to the Act just over a year ago in *Wright Dev. Group v. Walsh*, 939 N.E. 2d 389 (Ill. Sup. Ct. 2010).

Background

In *Sandholm*, a high school basketball coach filed a suit for defamation against local residents who had petitioned the school board to remove him from his position based on his allegedly abusive coaching tactics. He also sued a local newspaper and radio station that had published articles and aired residents' grievances about him.

The Illinois intermediate appellate court affirmed the dismissal of all claims, finding that the CPA created a new statutory immunity for any claim that is "based on, relates to or is in response to any act or acts of the [defendant] in furtherance of [his] rights of petition, speech, association, or to otherwise participate in government." *Sandholm v. Kuecker*, 942 N.E. 2d 544, 570 (1st Dist. 2010).

On its face, the CPA is arguably one of the most protective anti-SLAPP statutes in the country. The Act was passed in response to what the Illinois legislature termed "the disturbing increase in SLAPPS." It provides that any acts in furtherance of constitutional rights are immune from liability "regardless of intent or purpose," with the only exception to its application being the so-called "sham" exception under the Noerr-Pennington doctrine.

Illinois Supreme Court Decision

In reversing the intermediate appellate court, Illinois' highest court abandoned the liberal construction it had applied to the statute in *Walsh*. Relying on the Massachusetts Supreme Court's construction of the Massachusetts anti-SLAPP statute in *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E. 2d 935 (Mass. 1998), the *Sandholm* court construed the phrase "based on, relates to or is in response to" to mean "*solely* based on" and imposed on any defendant seeking protection under the Act a threshold burden of showing that the plaintiff's claims are meritless and have no substantial basis other than to chill a defendant's exercise of his constitutional rights.

Looking at the legislative history the Court concluded:

> We believe that, had the legislature intended to radically alter the common law by imposing a qualified privilege on defamation within the process of petitioning the government, it would have explicitly stated its intent to do so. See *In re D.F.*, 208 Ill. 2d 223, 235 (2003). The legislative history of the Act further supports our conclusion that the legislature intended to target only meritless, retaliatory SLAPPs and did not intend to establish a new absolute or qualified privilege for defamation.

The court noted that its latest interpretation "serves to ameliorate the particular danger inherent in anti-SLAPP statutes . . . that when constructed or construed too broadly in protecting the rights of defendants, they may impose a counteractive chilling effect on prospective plaintiffs' own rights to seek redress from the courts for injuries suffered."

The court gave little guidance on how a defendant could ever meet this threshold burden but concluded that "[i]f a plaintiff's complaint genuinely seeks redress for damages from defamation or other intentional torts . . . it is irrelevant whether the defendants' actions were genuinely aimed at procuring favorable government action, result or outcome."

Plaintiff was represented by Stephen T. Fieweger, Katz, Huntoon & Fieweger, P.C., Moline, Ill. NRG Media, LLC was represented by McGuireWoods LLP, Chicago, IL.

RETURN TO TABLE OF CONTENTS

Louisiana Federal Court Narrowly Interprets State Anti-SLAPP Statute

Author's Anti-SLAPP Motion Denied

By Mary Ellen Roy and Dan Zimmerman

A federal district court in Louisiana recently issued a decision that applied Louisiana's anti-SLAPP statute in federal court, but construed the statute narrowly, ignoring state-court decisions allowing the statute to be applied to dismiss discrete claims or causes of actions in a lawsuit. *Louisiana Crisis Assistance Center v. Marzano-Lesnevich*, No. 11-2102 (E.D. La. Nov. 23, 2011) (Barbier, J.). Holding that the statute could be used only to dismiss a lawsuit in its entirety, the Court denied the defendant's anti-SLAPP motion and awarded attorneys' fees to the plaintiff.

Background

Plaintiff, the Louisiana Capital Assistance Center ("LCAC"), provides representation to individuals facing the death penalty. Defendant, Alexandria Marzano-Lesnevich, was an LCAC summer intern. After graduating from Harvard Law School, Ms. Marzano-Lesnevich published two essays based on her experiences at LCAC. *In the Fade* was a nonfiction description of the criminal prosecution of an LCAC client, Rickey Langley, for the murder of a six-year old boy. *Longtermer's Day* is an account of Ms. Marzano-Lesnevich's experiences visiting prisoners at Louisiana's Angola Prison.

(Reported decisions from Mr. Langley's lengthy journey through the Louisiana criminal justice system can be found at 620 So.2d 1203 (La.App. 1993); 635 So.2d 784 (La.App. 1994); 639 So.2d 211 (La. 1994); 711 So.2d 651 (La. 1998); 813 So.2d 356 (La. 2002); 896 So.2d 200 (La.App. 2004); 958 So.2d 1160 (La. 2007); and 61 So.3d 747 (La.App. 2011)).

Believing the essays to contain confidential client information, LCAC sued in state court, alleging breach of fiduciary duty and breach of contract, and seeking injunctive relief prohibiting Ms. Marzano-Lesnevich from future disclosure of confidential information obtained during her LCAC internship.

Defendant has filed a motion for reconsideration pursuant to Rule 59 that is pending, alleging that it was a manifest error of law for the Court to rule that the anti-SLAPP statute could be used only to dismiss an entire lawsuit.

Ms. Marzano-Lesnevich removed the case to the Eastern District of Louisiana and filed a special motion to strike pursuant to article 971 of the Louisiana Code of Civil Procedure, Louisiana's anti-SLAPP statute. The motion was "directed exclusively at LCAC's claims for injunctive relief," which, Defendant asserted, would be an impermissible prior restraint.

Under Louisiana's anti-SLAPP statute, a defendant must make a *prima facie* showing that the claims asserted by the plaintiff arise "from any act of [the defendant] in furtherance of the [defendant's] right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue." The burden then shifts to the plaintiff to establish "a probability of success on the claim." The prevailing party, plaintiff or defendant, is entitled to attorneys' fees and costs.

Anti-SLAPP Law in Federal Court

The first issue addressed by the Court was an *Erie* question – whether the Louisiana anti-SLAPP statute applied in federal court. LCAC argued, in less than one page of briefing, that the statute was procedural and incompatible with the federal rules of civil procedure. The District Court disagreed, holding that, like federal Rules 12 and 56, article 971 is designed to bring meritless litigation to an early end, but the anti-SLAPP statute "is intended to provide an additional layer of protection to individuals who have been targeted for the exercise of their constitutionally protected free speech activities." The Court concluded that the anti-SLAPP statute does impose a heavier burden on a plaintiff than does Rule 12 or Rule 56.

Deciding an issue not briefed by the parties, the Court held that the "probability of success" standard required by the anti-SLAPP statute "is functionally equivalent to the burden imposed on the nonmovant in a motion for summary judgment." Thus, the anti-SLAPP statute did not "directly

(Continued on page 18)

(Continued from page 17)

collide" with the Federal Rules of Civil Procedure. (A Fifth Circuit case, *Henry v. Lake Charles American Press*, 566 F.3d 164 (5th Cir. 2009), had allowed the application of article 971 in federal court but had not considered whether the article was compatible with the federal rules.)

Turing to the second part of the *Erie* analysis, the Court concluded that failure to apply Louisiana's anti-SLAPP statute would "inequitably deprive Louisiana defendants targeted by meritless SLAPP lawsuits of an important procedural weapon to which they would otherwise be entitled to use in state court." Applying the anti-SLAPP statute would eliminate the "threat of forum shopping." Therefore, Louisiana's anti-SLAPP statute was applicable in federal court.

Thus, Defendant first had to show that she was exercising her right of free speech in connection with a public issue. LCAC asserted that "no person has a First Amendment right to disclose confidential information in breach of a confidentiality agreement." The Court concluded that the anti -SLAPP statute does not require a defendant to "establish as a matter of law that her speech was actually protected by the First Amendment." Instead, a movant must show only that the acts forming the basis of the lawsuit fall within the scope of the anti-SLAPP statute, even when the speech is alleged to be unprotected by the First Amendment. Defendant's essays, which addressed the death penalty and sexual abuse, met this burden because they clearly addressed matters of public concern.

Plaintiff's Probability of Success

Because Defendant met her *prima facie* burden, Plaintiff had to demonstrate a probability of success on its claims. The Court's ruling here, however, was based on an issue the parties never raised or briefed – whether the anti-SLAPP statute could be used to dismiss individual claims from a lawsuit. Ignoring decisions by Louisiana courts applying the anti-SLAPP statute to discrete claims, the Court held that the statute could be used only to dismiss a lawsuit in its entirety. This meant that, even if Defendant was correct that Plaintiff's request for an injunction against her would be an impermissible prior restraint, the special motion to strike would nonetheless be denied if the LCAC demonstrated a probability of success on any of its claims.

The Court then considered only the breach of contract claim for damages. The Court held that LCAC sufficiently alleged an oral agreement with Defendant that she would abide by the Louisiana Rules of Professional Responsibility and that passages in Defendant's essays contained information that was not a matter of public record. LCAC adequately alleged that it had been damaged because – especially in the context of death penalty litigation, with its separate penalty phase and "mitigation defense" that often requires testimony of mental retardation and severe physical or sexual abuse of the criminal defendant – the disclosure of confidential information may make clients reluctant to share information with their attorneys, thereby compromising the ability of LCAC to effectively represent clients.

The Court stated that, although "this injury is somewhat less concrete than the typical injury alleged in a breach of contract claim, it is certainly no less real." Because LCAC sufficiently alleged all three elements of a breach of contract claim – an agreement, a breach, and damages – it had demonstrated a probability of success on the merits of the breach of contract claim. The Court denied Defendant's anti-SLAPP motion and awarded attorneys' fees to LCAC.

The irony in the decision is striking. The Defendant's motion attacked only the request for injunctive relief, but the Court never ruled on the well-supported argument that an injunction against Defendant's future speech would be an impermissible prior restraint.

Instead, the Court denied the motion because the plaintiff had demonstrated a probability of success on a claim that Defendant had never argued did not have a probability of success.

Defendant has filed a motion for reconsideration pursuant to Rule 59 that is pending, alleging that it was a manifest error of law for the Court to rule that the anti-SLAPP statute could be used only to dismiss an entire lawsuit. The motion correctly points out that the statute refers to "a cause of action" and a "claim," not a "complaint" or a "lawsuit," as being subject to a special motion to strike and cites Louisiana cases applying the anti-SLAPP statute to the individual claims in a lawsuit.

Mary Ellen Roy and Dan Zimmerman are partners in the New Orleans office of Phelps Dunbar LLP. LCAC is represented by Harry Hardin III, Christopher Cazenave and Mark Cunningham of Jones Walker. Alexandria Marzano-Lesnevich is represented by Loretta Mince and Alysson L. Mills of Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P.

Maryland High Court Affirms Defamation Case Dismissal for City Paper

By Charles D. Tobin

The Maryland Court of Appeals has affirmed summary judgment awarded to *City Paper* in its coverage of a murder prosecution that included the newspaper's speculation on whether the libel plaintiff, who was never charged, had been involved in the killings. *Piscatelli v. Smith*, Slip. Op., No. 18 (Md. January 23, 2012).

The court's decision bolsters the state's already strong fair reporting and fair comment privileges, and it reinforces the right of journalists to report, outside of the courtroom, on their own interviews with witnesses in criminal cases.

The lawsuit, filed by Baltimore nightclub owner Nick Piscatelli, arose out of the coverage of the prosecution of Anthony Miller, who had been convicted for the murder of two of Piscatelli's employees at the Redwood Trust nightclub.

Before the trial, *City Paper* reporter Van Smith in 2006 reported that prosecutors had given defense lawyers a memo containing an interview with the mother of one of the victims. She had told police that a man approached her at a benefit for her son and "advised her that Nick Piscatelli was behind her son's murder, he covered his tracks and hired someone to kill him." The memo became part of the public court file. The newspaper also reported quotes from its direct interview the victim's mother.

Smith and *City Paper* also reported in 2007 that at the trial, Piscatelli was called as a witness, denied complicity in the murders, but testified that he had suspected one of the murdered employees of embezzlement. The newspaper also reported that Piscatelli testified he suspected that victim planned to quit, go to work for a rival nightclub, and take with him a booking for the appearance of entertainer P. Diddy.

The Baltimore City Circuit Court had granted summary judgment for the defense with little explanation, and Maryland's intermediate appellate court, the Court of Special Appeals, affirmed.

State High Court Decision

In its January 23 decision, the Maryland Court of Appeals acknowledged up front that, "Both articles more than hinted that Piscatelli may have been involved in the murders, despite that he was not criminally charged." The court distilled the articles into three themes: "the double murder remains 'mysterious,' despite Miller's conviction; Piscatelli may have had motive to kill (the victims), and, (one victim's mother) believed Piscatelli may be involved in her son's murder."

After a thorough distillation of the facts, the court's unanimous opinion essentially makes short work of the legal issues. First, the court held that under Maryland's fair reporting privilege, journalists cannot be held liable for repeating defamatory allegations contained in official proceedings and records. Recognizing that this privilege is conditional, the court held that the burden rests with the plaintiff to defeat the privilege by showing that the coverage was inaccurate or unfair. Applying the privilege, the court held that as to the mother's statement from the prosecution memo, and Piscatelli's testimony at trial, Piscatelli had failed to show the articles were "unfair or inaccurate reporting."

With respect to the mother's direct interview with *City Paper*, which would not ordinarily fall within the protections of the fair reporting privilege, the court held her statements were not separately actionable, because: "Her recollection is consistent with the contents of the memorandum and does not add additional details or allegations."

Finally, as to the suggestions in the coverage that Miller's conviction may not have closed the book entirely on the murders, and that questions about Piscatelli's involvement remain, the court held City *Paper* was protected under the fair comment privilege. The privilege protects a publisher from liability for derogatory opinions on matters of public concern, so long as the facts on which it bases the opinions are disclosed to readers and are true or protected by privilege. As *City Paper*'s opinions were based entirely on legally privileged information disclosed to readers, the fair comment privilege precluded liability.

Charles D. Tobin is a partner at Holland & Knight LLP in Washington, D.C. Peter A. Prevas, of Prevas & Prevas, Baltimore, MD, represented the plaintiff. Peter F. Axelrad and Michael S. Steadman, Jr., of Council, Baradel, Kosmerl & Nolan, PA, Annapolis, MD, represented the defendants.

RETURN TO TABLE OF CONTENTS

New York Court Dismisses Right of Publicity and Related Claims Arising Out of Use of Video in Comedy Segment of Television Program

By Robert Penchina

A Brooklyn, New York trial court recently dismissed an action against Jimmy Kimmel and ABC, Inc. arising out of the use of a video of plaintiff during a segment of the *Jimmy Kimmel Live!* show. *Sondik v. Kimmel*, No. 30176/10 (Kings Cnty. Sup. Ct. December 14, 2010) (Schmidt, J.). Deciding defendants' motion to dismiss, the court found that California law was inapplicable and plaintiff could not state a claim under New York law for the unauthorized use of his likeness as the use of his image in a comedy segment qualified for the "newsworthy exception" to liability under Sections 50 and 51 of New York's Civil Rights Law.

Plaintiff Daniel Sondik, the "Flying Rabbi"

Background

Plaintiff Daniel Sondik is a resident of Brooklyn who refers to himself as the "Flying Rabbi," and who has become a minor Internet sensation through numerous videos on YouTube depicting plaintiff antically singing, chanting and proselytizing to people on the streets of Brooklyn. Among the videos of plaintiff on YouTube is one showing him looking into the camera through the window of a car while he animatedly sings, chants and gesticulates alongside the car.

In August 2010, it was widely reported that professional basketball star LeBron James had hired a rabbi who spoke only in Hebrew, Yishayahu Yosef Pinto, to provide business advice to Mr. James. On August 11, 2010, *Jimmy Kimmel Live!* featured a spoof of this news item. During his monologue, Mr. Kimmel showed a picture of the actual meeting between Mr. James and Rabbi Pinto, told some jokes about Mr. James and his meeting, and then set up a video by saying facetiously that, "at one time, I actually consulted with the rabbi myself." What followed was a 31-second video portraying a supposed meeting at which Mr. Kimmel, sitting in a car, drolly received business advice from a rabbi he could not understand. This video was made by editing Mr. Kimmel's image into the clip showing plaintiff singing and chanting alongside a car, resulting in a scene where Mr. Kimmel appeared to be listening to and interacting with plaintiff by making such comments as "yeah, I think you're right. Thanks man."

The plaintiff brought suit, contending that defendants' video made use of his image without permission and made him "look foolish." His complaint alleged causes of action for unauthorized use of his likeness in violation of Section 51 of the New York Civil Rights Law, California Civil Code Section 3344, and under California common law, and claims for unjust enrichment and breach of the YouTube terms of use. Defendants moved to dismiss all claims, contending that plaintiff had failed to state a valid claim because his likeness had not been used for advertising or purposes of trade within the meaning of Section 51, California law was inapplicable (and defendants did not in any event violate California law), the unjust enrichment claim was preempted by Section 51, and plaintiff lacked standing to assert a violation of YouTube's terms of use. The trial court granted the motion and dismissed the action.

(Continued on page 21)

(Continued from page 20)

Decision

Choice of Law: Both sides agreed that, for purposes of choice of law analysis, the right of publicity is considered personal property and, as such, claims for misappropriation of that right generally are governed by the law of the domicile of the person claiming the right—in this case, New York. Plaintiff argued, however, that because he did not earn his living by licensing his image, he was not enforcing a publicity right and his claim should be considered to be for misappropriation of his right of privacy. Therefore, plaintiff contended, the choice of law rules applicable to tort claims (*i.e.*, the jurisdiction with the most significant interest) should apply. Plaintiff alleged that California law was applicable because that is where the defendants allegedly downloaded the YouTube video of plaintiff and created and broadcasted the offending segment.

The court disagreed. The court concluded that plaintiff was seeking to vindicate a right of publicity and thus the property choice of law rule applied, but that New York law would apply even under the tort choice of law rules. Citing sections 152 and 153 of the Restatement (Second) of Conflicts of Laws, and a string of cases from New York and California, the court found that plaintiff's injury occurred in New York where he resided and New York's interest in seeing the rights of its citizens vindicated outweighed any interest California may have.

Right of Publicity Claim: In support of his claim for violation of Section 51 of the Civil Rights Law, plaintiff alleged that defendants used his image and "took words that [he] had spoken in one context, and turned them into the butt of a joke in another context," and did this without consent. Plaintiff also bemoaned that Mr. Kimmel's lead-in to the video wrongly identified him as Rabbi Pinto.

Rejecting the plaintiff's claims, the court reiterated that Sections 50 and 51 are narrowly construed and recovery is "strictly limited" to "commercial appropriations." The court observed that the sections do not apply to reports of newsworthy events or matters of public interest, and this "newsworthy exception" is broadly applied and "extends to comedic or satiric performances 'even if the performance is not related to a legitimate news broadcast or event.'" According to the court, the challenged use of plaintiff's image was newsworthy and thus not actionable. Perhaps not fully appreciating the humor of the piece, the court nevertheless recognized that it fit the newsworthy exception because the use was "part of a comedic (or at least attempted comedic) or satiric parody of LeBron James' meeting with Rabbi Pinto, itself an event that was newsworthy or of public interest." Significantly, the court concluded that even if the "newsworthy exception" did not apply, defendants' use of the clip in an entertainment context "raises serious First Amendment concerns that would likewise require dismissal of the section 50 and 51 claims."

Rejecting the plaintiff's claims, the court reiterated that Sections 50 and 51 are narrowly construed and recovery is "strictly limited" to "commercial appropriations."

Although rejecting application of California law to plaintiff's claims, the court indicated that the same result would obtain under California law.

Specifically, although plaintiff alleged that defendants profited from advertising they sold during the show, there were no allegations suggesting that the commercial value of *Jimmy Kimmel Live!* was based on or enhanced by plaintiff's identity and thus plaintiff could not state a claim under California statutory or common law. Moreover, citing a string of California cases, the court indicated that because it is an "expressive work" the challenged video is entitled to First Amendment protection.

Other Claims: The court gave short shrift to plaintiff's remaining claims. Because Sections 50 and 51 displace any common-law privacy right or other non-statutory claims relating to the unauthorized use of a person's likeness, plaintiff had no cause of action for unjust enrichment. Plaintiff's breach of contract claim likewise was dismissed because plaintiff could not establish that he was a third-party beneficiary of the YouTube terms of service.

Jimmy Kimmel, American Broadcasting Companies, Inc. and ABC, Inc. were represented by Robert Penchina of the New York office of Levine Sullivan Koch & Schulz, LLP, and plaintiff was represented by Daniel Shimko of The Berkman Law Office, Brooklyn, NY.

Judge Refuses To Put Ice Cream Plaintiffs' Claim On Ice

By Collin J. Peng-Sue and Katherine M. Bolger

Talk about a case that just won't melt away! In a decision issued on November 23, 2011 in *Prince v. Fox Television Stations*, Index No. 107129/11 (N.Y. Sup. Ct.), Justice Carol Edmead of the Supreme Court of the State of New York, New York County, denied a motion to dismiss a claim for defamation and product disparagement, even though the report at issue did not name either of the plaintiffs, and plaintiffs did not own the ice cream product that was the subject of the report.

Background

Fox Television Stations, Inc. ("FTS") owns and operates the television station with the call letters WNYW, also known as Fox 5, which broadcasts to the greater New York City metropolitan area on Channel 5. Arnold Diaz is employed by FTS as a consumer reporter for WNYW.

Investigative Journalist Arnold Diaz, left, reporting on alleged nutritional misinformation for Fox 5.

On May 12, 2011, as part of its 10:00 p.m. news program, FTS broadcast on WNYW a report in Diaz's regular investigative segment "Shame, Shame, Shame" (the "Report"). This particular Report discussed the manner in which D'Lites ice cream was being served at two stores in Woodbury, New York, and West Caldwell, New Jersey. The formula for D'Lites ice cream is owned by D'Lites Emporium, Inc. ("DEI"), a Florida-based corporation, and described as a "diet friendly ice cream that is just as creamy and tasty as traditional ice cream products."

The Report features an interview with Magda Abt, the owner of the D'Lites store in Woodbury, New York. The Report compares the nutritional information concerning D'Lites ice cream made on the D'Lites website and in the stores in West Caldwell and Woodbury with the results from independent lab tests of ice cream purchased at the stores in West Caldwell and Woodbury. In the Report, Diaz notes that the independent lab tests showed that the supposedly "small" servings sold at the West Caldwell and Woodbury stores contained far more calories, fat, and carbohydrates than what was stated on the nutrition facts advertised on the D'Lites website and at those two stores, as provided by DEI, the owner of the ice cream.

As the Report explained, the problem apparently was caused by employees at the two stores in West Caldwell and Woodbury selling "small" servings that contained the supposedly low calorie, fat, sugar, and carbohydrate count, but in fact the servings were much larger and contained more calories, fat, sugar, and carbohydrates than advertised. The Report points out that although Jerry Corsover, owner of DEI, claims that the appropriate weight of a serving of D'Lites ice cream is 39 or 40 grams, the servings obtained from the Woodbury and West Caldwell stores weighed between 160 and 170 grams each.

The Report further notes that "[t]he fact that customers are being served much more is apparently not an accident or mistake. The Woodbury D'Lites owner [Magda Abt] says her employees are trained how much to serve," and includes part of an interview with Abt in which she states "It's all caloried and portioned out. That's why I don't do self-serve."

The Plaintiffs in this case are *not* the owners of the stores in Woodbury and West Caldwell. Rather, Matthew Prince ("Prince") recently became interested in the D'Lites ice cream product and "established" the corporation D'Lites

(Continued on page 23)

(Continued from page 22)

L.A.M.D. B.H. Inc. ("LAMD") for the purpose of opening stores to sell the ice cream. According to the Complaint, on February 14, 2011, LAMD "entered into a sub-licensing agreement" with the D'Lites license holder "to open three stores located in Long Island, New York"—in Bayside, Commack, and Babylon.

The Report makes no mention of Prince or LAMD, and no mention of the serving sizes of ice cream sold in Prince's and LAMD's yet-to-be opened stores in Babylon, Bayside, and Commack. The Report is explicit that those stores, plus one in Greenvale, New York, are not yet open.

Instead, the Report makes only a passing reference to D'Lites stores other than those in West Caldwell and Woodbury, saying "[t]here are 22 stores, including one in West Caldwell New Jersey, another in Woodbury, and four more New York locations about to open." That is the only statement in the Report that could even remotely be said to refer to the yet-to-be opened stores owned by Prince and LAMD.

The Complaint and Motion to Dismiss

On June 20, 2011, Plaintiffs commenced this action by filing a summons and the initial complaint in the Supreme Court for the State of New York, County of New York. Plaintiffs filed the Amended Complaint on August 10, 2011. That Amended Complaint purported to assert seven causes of action against the Defendants based on the Report: defamation, disparagement of goods, tortious interference with business relations, tortious interference with contract, violation of N.Y. Gen. Bus. L. § 349, fraud, and negligent misrepresentation.

On August 31, 2011, Defendants moved to dismiss all seven of Plaintiffs' claims. In their motion, Defendants argued that the Report was not "of and concerning" the Plaintiffs on its face and that Plaintiffs' defamation claim should therefore be dismissed.

As for the product disparagement claim, Defendants argued that the Report was not about *Plaintiffs'* "product or property," and that Plaintiffs had also failed to plead special damages. The motion to dismiss was fully submitted to the court below on October 28, 2011, without oral argument.

The Order

By order dated November 28, 2011 (the "Order"), Justice Carol Edmead granted Defendants' motion as to Plaintiffs' claims for tortious interference with business relations, tortious interference with contract, violation of N.Y. Gen. Bus. L. § 349, fraud, and negligent misrepresentation. Justice Edmead also dismissed Prince's defamation claim on "of and concerning" grounds. The court also dismissed the product disparagement claim as to Plaintiffs' unopened stores in Bayside and Commack, New York, on the grounds that Plaintiffs had failed to satisfy the special damages element of the claim because those stores had not yet opened.

The court below denied the motion to dismiss LAMD's claim for defamation. The court held that the Report could be "of and concerning" LAMD because "*it is possible that the public might have understood* the name 'D'Lites' to refer to 'D'Lites Emporium' and 'D'Lites LAMD' stores, and therefore, inferred that D'Lites LAMD's advertising of the nutritional value of the 'D'Lites ice cream' was false as well." (emphasis added). Notably, there was no allegation in the Complaint that LAMD advertised at all.

As for Plaintiffs' product disparagement claim, the court below rejected Defendants' contention that Plaintiffs had failed to state a cause of action because the Report was not about Plaintiffs' product, but instead about a product owned by DEI and about the manner in which that product was served at two competitors' stores in West Caldwell and Woodbury. Instead, the court held that no New York case supported "such a narrow interpretation of this element of the claim as to require plaintiff to be an actual owner of the goods claimed to be disparaged."

Turning to Defendants' argument that Plaintiffs had failed to properly allege special damages, the court below first held incorrectly that Defendants "no longer dispute[d] the sufficiency of plaintiffs' special damages allegations with respect to the Babylon store." The court then went on to hold that Plaintiffs' allegations of "losses of approximately $1 million in investments in the D'Lites brand representing months of work, resources, expenditures, and investments to expand D'Lites in the New York region; acquiring license rights, property and location rights, renovations, and supplies for the D'Lites store locations" were sufficient to satisfy New York's special damages pleading requirement, "to the extent that the plaintiffs' store in Babylon was opened for operation at the time when the subsequent broadcast of the Report was aired on May 15, 2011." The court below further held that, despite clear Court of Appeals precedent to the contrary,

(Continued on page 24)

(Continued from page 23)

there was no need for Plaintiffs to specifically name the customers they claimed they had lost because of the Report.

On December 19, 2011, Defendants filed a Notice of Appeal from the Order and a Civil Appeal Pre-Argument Statement, appealing from the Order insofar as it denied Defendants' motion to dismiss (1) the defamation claim of LAMD; and (2) the product disparagement claim of LAMD and Prince to the store in Babylon, New York, and perfected their appeal on January 3, 2012, in time for the March 2012 Term of the Appellate Division, First Department.

Issues for Appeal

In their appeal, Defendants argued that the court below erred in concluding that the Report was "of and concerning" Plaintiff LAMD because the language of the Report itself specifically precludes the possibility that the Report is "of and concerning" LAMD or its stores. First, the name LAMD is never mentioned at any time in the Report. Second, to the extent the Report mentions the towns in which LAMD intended to open D'Lites stores, the Report specifically states that those stores are *not yet open*. Thus, the reasonable viewer could not have understood the Report to say that the LAMD's stores were serving overly large servings of ice cream.

Defendants further argued that the court below also erred in holding that Plaintiffs could bring a product disparagement claim, in light of the case law which states "[a] long line of cases holds that First Amendment considerations preclude a plaintiff from recovering based on losses sustained by virtue of the defamation of another. The same First Amendment considerations preclude such vicarious liability by anyone other than the manufacturer in a product disparagement suit." *Simmons Ford, Inc. v. Consumers Union of U.S.*, 516 F. Supp. 742, 751 (S.D.N.Y. 1981) (footnote omitted), *abrogation on other grounds recognized*, *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998).

Finally, Defendants argued that the lower court's holding that "plaintiffs' estimates for the loss in customers and attempted itemization of investment costs are sufficient" was incorrect in light of the clear holding from the New York State Court of Appeals that "special damage must be fully and accurately stated; if the special damage was a loss of customers, the persons who ceased to be customers, or who refused to purchase, must be named. If they are not named, no cause of action is stated" and that allegations of financial loss must be specifically pled; "round figures, with no attempt at itemization, must be deemed to be a representation of general damages." *Drug Research Corp. v. Curtis Publ'g Co.*, 7 N.Y.2d 435, 440-41, 199 N.Y.S.2d 33, 37 (1960) (internal marks omitted).

Plaintiffs' opposition papers are due February 1, 2012.

Defendants Fox Television Stations, Inc. and Arnold Diaz are represented by Slade R. Metcalf, Katherine M. Bolger, and Collin J. Peng-Sue of Hogan Lovells US LLP, New York City. Plaintiffs Matthew Prince and D'Lites L.A.M.D. B.H. Inc. are represented by Adam J. Gana of Napoli Bern Ripka Shkolnik, LLP, New York City.

D.C. Court of Appeals Shields Anonymous Internet Informant

Affirms Specificity Required for Corporate Defamation Damages

By Charles D. Tobin and Drew E. Shenkman

The District of Columbia's highest court, in its second review in the same case, has strengthened the heightened First Amendment protection for anonymous internet whistleblowers and, at the same time, reinforced the need for corporate defamation plaintiffs to show actual lost business. *Software & Information Industry Association v. Solers, Inc.*, Slip. Op., No. 10-CV-1523 (D.C. January 12, 2012).

In its latest, and hopefully last, ruling in this seven-year-old case, the D.C. Court of Appeals held that the trial judge should not have enforced a subpoena issued by Solers, Inc. an Arlington, VA-based defense contractor. The subpoena sought the identity of an informant who sent an online report to a trade association that Solers was pirating software. Applying the multi-part test the court had established in the initial appeal, *Solers, Inc. v. John Doe*, 977 A.2d 941 (D.C. 2009), the appeals court this time held that Solers had failed proffer any evidence to support its claim of damages. The court specifically rejected Solers contention that time spent by its executives and fees paid to its attorney, all to investigate the informant's allegations, would support a damages claim.

The court made clear that, in the absence of lost business, a corporation cannot "bootstrap" itself into a defamation claim.

Background

The dispute began in May 2005, when the Software & Information Industry Association (SIIA) told Solers that an informant had accused it of pirating software. On behalf of its members, 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.

The informant reported, via SIIA's anti-piracy web site, allegedly unlicensed use of software by Solers. When SIIA's counsel contacted Solers, the company denied the report, and after further discussion, SIIA decided that it would not pursue the matter. However, Solers, alleging harm to its business and reputation, quickly sued the "John Doe" information for defamation and tortious interference, and the next day, subpoenaed SIIA seeking his identity.

SIIA moved to quash on grounds that because the information was transmitted anonymously via the Internet, Solers could not overcome the First Amendment protection for the informant's identity. SIIA initially prevailed when the trial court quashed the subpoena. In the 2009 decision, while the Court of Appeals agreed that a First Amendment test applied, it remanded with the instruction that Solers must provide "*evidence* supporting its defamation claim." *Solers, Inc. v. John Doe*, 977 A.2d at 959 (emphasis is the court's).

On remand, Solers filed a proffer containing a single affidavit from its CEO. The affidavit attested to the dollar value of the time company executives devoted, and the legal fees expended, in investigating the informant's allegations after SIIA contacted the company and before the lawsuit was filed. In all, Solers alleged $7,144.00 in damages, and asserted that it would need discovery to determine any actual lost business. A new trial judge sided with Solers and orderd SIIA to disclose the informant, on pain of sanctions (stayed pending appeal) if it refused. The trial judge, however, in a portion of her decision she labeled "Coda," questioned why Solers' had pursued the matter as Doe's "report has seemingly caused no damage to Solers' reputation." She wrote that "if the parties are not wise enough to end this case, perhaps the Court of Appeals will do it for them."

SIIA appealed the decision to force it to disclose the informant.

(Continued on page 26)

(Continued from page 25)

Court of Appeals Decision

In its *per curiam* decision, the Court of Appeals resoundingly reversed the trial court. Specifically, the appellate court found that Solers' affidavit of executive and legal fees did not reflect "damages suffered as a direct consequence of the alleged defamation--for example, lost profits or customers deterred from dealing with the company." The court made clear that, in the absence of lost business, a corporation cannot "bootstrap" itself into a defamation claim.

> [T]o accept Solers' argument (that these costs constitute special damages) would mean that a corporate plaintiff may overcome a speaker's First Amendment right to anonymity with little more than an allegation of defamation and its own decision to expend money in response.

Software & Information Industry Association v. Solers, Inc., Slip. Op. at 3.

Moreover, the Court of Appeals outright rejected Solers' argument that it should presume damages because Doe's statements tended to harm its reputation. This argument "presented nothing more than the same unsupported allegations we found insufficient" in the previous appeal, and "will not suffice to overcome John Doe's right to speak anonymously." *Id*. at 4.

Charles D. Tobin, Leo G. Rydzewski, and Drew E. Shenkman of Holland & Knight LLP, Washington, D.C., represented the Software & Information Industry Association. Daniel J. Tobin of Ballard Spahr LLP, Bethesda, MD, represented Solers, Inc. Andrew G. McBride and Claire J. Evans of Wiley Rein LLP, Washington D.C., represented amicus curiae Business Software Alliance. Kevin T. Baine of Williams & Connolly LLP, Washington D.C., represented amici curiae The Washington Post and the Maryland-Delaware -District of Columbia Press Association.

Oregon Blogger Moves for New Trial to Reverse $2.5 Million Verdict

By Duane Bosworth

In late November, an unusual Oregon libel case captured the attention of the blogosphere and mainstream press. Blogger Crystal Cox was hit with a $2.5 million verdict for defaming Obsidian Finance Group and its principal. *Obsidian Finance Group v. Cox*, (D. Ore. Nov. 30, 2011) (Hernandez, J.). More notable than the size of the judgment against the pro se defendant, was the court's controversial discussion of who is to be considered a journalist in the online sphere.

In January, Cox filed a Motion for New Trial and in the alternative, for Remittitur. The motion, authored by leading First Amendment scholar Professor Eugene Volokh of UCLA Law School, argues that the jury should have been instructed, consistent with *New York Times Co. vs. Sullivan*, that it could find defendant liable only if she acted with "actual malice." Alternatively, even if the *Sullivan* standard did not apply, the motion argues the jury should have been instructed, consistent with *Gertz v. Robert Welch, Inc.*, that it could hold defendant liable for proven compensatory damages only if it found that defendant acted negligently, and that it could hold defendant liable for presumed damages only if it found that defendant acted with "actual malice". The motion also argues that the evidence presented to the jury did not support $2.5 million in damages, whether proven or presumed, arising from the single Internet post considered at trial.

More notable than the size of the judgment against the pro se defendant was the court's controversial discussion of who is to be considered a journalist in the online sphere.

The motion is supported and supplemented by an amicus curiae brief filed by the Electronic Frontier Foundation. That brief additionally challenges the court's ruling that Oregon's retraction statute does not apply to the Internet, and that because defendant Cox was not a member of the "media," Oregon's shield law does not apply.

Background

The Obsidian Finance saga began in earnest last summer with U.S. District Court Judge Marco Hernandez's denial of plaintiff's motion for partial summary judgment on liability. Despite the fact that Cox was unrepresented and filed little relevant opposition, the court on its own held that plaintiffs failed to address "the obvious First Amendment issues raised by defendant's statements" and that "defendant's statements are expressions of opinion protected by the First Amendment." The court added that although Cox had not moved for summary judgment, it would *sua sponte* grant summary judgment for her, pursuant to F.R.Civ.P.56(f), unless plaintiffs successfully opposed that conclusion.

In response, plaintiffs newly submitted 16 different blog entries. The court again found that all but one of them was "protected by the First Amendment" because "no reasonable juror could conclude that the statements contained provable assertions of fact." With regard to one newly submitted post, however, the court concluded that "reasonable readers could reach differing conclusions about whether the statements contain or imply an assertion of objective facts". While nearly all of the posts were made on a single website, the post in question appeared on a different website. The court noted that it was one of only two postings submitted by plaintiff from that site, and therefore "a full assessment of the flavor or tenor of the website is not possible."

While the court noted that the post in question contained "several none-provable, figurative or subjective-type words which tend to negate the impression that defendant asserts provable statements of fact", because so little material from the website was presented by plaintiffs, the court found that it could not "collectively examine the surrounding posts to determine the frequency with which defendant uses these words." The court added that "while the post is somewhat confusing and uses some unclear terms such as 'liquidating trust,' it reads more like a factual narrative" than the other 25 posts plaintiffs provided.

The court held that the context of the post in question

(Continued on page 28)

(Continued from page 27)

"does not necessarily negate the impression that the statements are incapable of being proved true or false. On the one hand, a reasonable reader may view the title of the website [bankruptcycorruption.com], the fact that the statements appear on a blog, and the use of loose, figurative language, as dispelling such impression. However, … a different reader could reasonably understand the statements to imply provable assertions of fact." The case proceeded to trial on this single post.

Just before trial, the court ruled on a number of legal issues. First, defendant argued that plaintiffs were precluded from general damages because plaintiffs had failed to seek a retraction in accordance with the requirement of Oregon's retraction statute. The court held that "because the statements at issue in this case were posted on an Internet blog, they do not fall under Oregon's retraction statutes." The statute, enacted in 1955, applies to "a defamatory statement published or broadcast in a newspaper, magazine, other printed periodical, or by radio, television, or motion pictures". While there are no appellate decisions, Oregon's state trial courts have frequently applied the retraction statute to Internet statements made by traditional newspapers and broadcasters.

The court also held that Oregon's shield law did not apply to defendant in the first instance because "the record fails to show that she is affiliated with any newspaper, magazine, periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system." The Oregon shield applies to any "medium of communication", which includes, but is not limited to, the litany of particular media the court listed. The brief submitted by Electronic Frontier Foundation challenges the court holding that Cox's status as an Internet publisher precluded her from shield law protection.

Most significantly, the court held that because the individual plaintiff, a bankruptcy trustee, was not a public figure "actual malice" did not apply and, because the defendant was not "media" even the negligence standard of *Gertz* was not triggered. The court found that defendant failed to bring forth any evidence "suggestive of her status as a journalist," citing "no evidence of (1) any education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting 'the other side' to get both sides of a story."

The court also rejected the argument that the blog "referred to a matter or issue of public concern, further implicating First Amendment protections." The court held that "similarly to the plaintiff's status as a lawyer in *Gertz* [plaintiff's] status as a bankruptcy trustee does not make statements about his actions in that role a matter of public concern." The jury instructions therefore allowed them to find for plaintiffs simply if the defendant published a defamatory communication which damaged them.

Duane Bosworth is a partner with Davis Wright Tremaine LLP in Portland, Oregon.

Illinois Judge Snubs Tech Blog
Holds Reporter's Privilege Inapplicable

By Esther J. Seitz

An Illinois trial court this month declined to apply the state's reporter's privilege law to a technology blog which published a sneak peak of a forthcoming smart phone. *Johns-Byrne Co. v. TechnoBuffalo LLC, et al.*, No. 2011 L 9161 (Ill. Cir. Jan. 13, 2012). Although the website has had over a million viewers, the trial court held it was not part of the "news medium" for purposes of protecting its source.

Background

Johns-Byrne Co. filed a petition for pre-suit discovery against TechnoBuffalo—a website dedicated to technology news and reviews. Johns-Byrne had been handling the packaging of a not-yet-released Motorola Droid smartphone. In August 2011, TechnoBuffalo publicized information about that device before it hit the market. TechnoBuffalo claimed "an anonymous tipster" had provided the information.

Johns-Byrne's suit against TechnoBuffalo seeks one thing only—the tipster's identity. Johns-Byrne claims it needs to know who leaked the information in order to proceed against that individual on a trade secrets claim. TechnoBuffalo sought to protect its tipster by asserting Illinois' reporter's privilege.

The Illinois reporter's privilege is a qualified privilege of confidentiality for "the source of any information obtained by a reporter." 735 ILCS 5/8-901. "Reporter" is defined as "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis." 735 ILCS 5/8-902. "News medium" means "any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a news service whether in print or electronic format; a radio station; a television station; a television network; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing." *Id.*

Illinois courts have stated that the objectives underlying the privilege are two-fold: Preserving the press' autonomy and allowing the public to receive complete, unfettered information. *E.g. In re Arya*, 226 Ill. App. 3d 848, 852 (4th Dist. 1992).

Trial Court Decision

Cook County Associate Judge Michael Panter granted Johns-Byrne's petition to ascertain the tipster's identity, rejecting TechnoBuffalo's claim of privilege. The court's terse analysis suggests that it found the blog's tech focus too narrow to merit statutory protection:

> While TechnoBuffalo's website may have over a million viewers, it fails to show how it qualifies as a "news medium" under the Illinois Act .... The contents on TechnoBuffalo's website may inform viewers how to use certain devices or offer sneak peaks of upcoming technology, but that does not qualify the website as a "news medium" or its bloggers as "reporters." The article at issue is an editorial posting that is part of a technology blog on TechnoBuffalo's site. It does not "encourage a

(Continued on page 30)

(Continued from page 29)

well-informed citizenry" to protect the source and type of confidential information disseminated by TechnoBuffalo in its blog positing about JBC's client's not-yet-released smartphone.

Judge Panter's ruling will likely be appealed. And TechnoBuffalo should stand a chance of winning. The Illinois reporter's privilege statute defines both "reporter" and "news medium" broadly. A glimpse of TechnoBuffalo's website reveals that its contributors, or bloggers, must regularly collect, write and edit news for publication so as to meet the definition of "reporter"; the website hosts a long list of well-written content and multiple articles are posted daily. The website seems to qualify as a "news medium" under the statute's definition, because it is a regularly issued, electronic periodical, having a general online circulation.

The site's focus on technology should be of no consequence, as an Illinois appeals court held that an equally narrowly-focused medical journal and its staff were covered by the reporter's privilege. *Cukier v. American Med. Ass'n*, 259 Ill.App. 3d 159 (1st Dist. 1994). Significantly, TechnoBuffalo's content should qualify as news, because at least some of its postings appear sufficiently based on facts—and not random musings or opinion. While Judge Panter dismissed the article as an "editorial posting," the mere fact that *some* content of a news site is editorial in nature is irrelevant for purposes of the statute. Traditional newspapers run both fact-based articles and editorial commentary.

Moreover, both statutory objectives are implicated if TechnoBuffalo enjoys the privilege: The website's autonomy will be protected so as to allow the public maximum access to information. To be clear, a determination that the privilege applies does not end the matter. Johns-Byrne may well be able to put forth the necessary proof to divest the website of any protection. But TechnoBuffalo appears to be a sufficiently responsible, continuous and well-prepared publication to avail itself of the qualified privilege.

Esther J. Seitz is a lawyer at Donald M. Craven, P.C., Springfield, Illinois. TechnoBuffalo is represented by Elizabeth Bradshaw, Dewey & LeBoeuf LLP in Chicago. Johns-Byrne Co. is represented by David Eisenberg, Much Shelist Denenberg Ament and Rubenstein, P.C., Chicago.

Washington Post Wins Release of Jury Questionnaires from Levy Murder Trial

First Amendment Right of Access to Completed Forms

By Bruce D. Brown and Laurie A. Babinski

In an appeal brought by The Washington Post, the District of Columbia Court of Appeals unanimously held that the First Amendment guarantees a presumptive right of access to completed juror questionnaires. *In re Access to Jury Questionnaires,* (Jan. 19, 2012). The Court ruled that this presumption can only be overcome with specific, on-the-record findings that jurors have an overriding privacy interest at stake and that any closure would be narrowly tailored to protect that interest. In its decision, which arose out of the Chandra Levy murder trial, the Court also found that a trial judge's promise to jurors that their questionnaires would remain confidential does not trump the press and the public's constitutional right to the materials.

The Trial Court Seals the Questionnaires

On October 18, 2010, jury selection began in D.C. Superior Court for the trial of Ingmar Guandique, an illegal immigrant from El Salvador who was charged with the murder of Ms. Levy almost a decade after the intern vanished while out for a jog in a Washington park. Presiding judge Gerald Fisher and the parties agreed to have prospective jurors complete an 11-page questionnaire to help expedite oral questioning during voir dire.

A blank copy of the questionnaire, which was made available to the press and the public, showed that jurors would be identified by number only. It did not ask for names, addresses, social security numbers, or other personally-identifiable details. The questionnaire sought standard demographic information about the jurors as well as information about their attitudes on issues specifically relevant to Mr. Guandique, who had not only entered the United States illegally from El Salvador and but was also a member of the MS-13 gang. Prospective jurors were also asked about their familiarity with the crime scene and their exposure to pre-trial publicity about Ms. Levy's disappearance and Mr. Guandique's arrest.

On October 25, 2010, a 16-member jury (12 jurors and four alternates) was empanelled and the government opened its case. On November 3, 2010, The Post, The Associated Press, Gannett Co. and the Reporters Committee for Freedom of the Press sought leave to intervene to obtain access to the completed questionnaires. The trial court did not respond until November 12, 2010, when it offered counsel for the intervenors a brief, impromptu opportunity to be heard on the record. At the hearing, Judge Fisher advised counsel that he would release only the jurors' ages, genders, education levels, and occupations, and even then only after he consulted with the jury.

On November 15, 2010, after meeting with the jurors off the record in the jury room, the court released the basic demographic information it had promised but nothing more. The next day, the media organizations filed a request for formal, on-the-record findings. On November 22, 2010, the jurors returned with a guilty verdict. The trial court did not hold a full hearing on the intervenors' motion until November 24, 2010, two days after the verdict was rendered and at least six members of the jury appeared on television to speak about the case.

At the November 24 hearing, Judge Fisher ruled from the bench that he would not publicly disclose the completed jury questionnaires. His principal justification was that, in the off-the-record discussions with jurors 10 days earlier, they were – "to a person" – concerned about their privacy and that "people were going to try to talk to them and intrude upon their private or their working lives." Judge Fisher also said that having told prospective jurors that their answers would be used only for voir dire and remain confidential, "I intend to live up to that promise unless the [Court of Appeals] tells me I have to do otherwise."

(Continued on page 32)

(Continued from page 31)

The Post Appeals

On December 23, 2010, The Post filed an appeal with D.C.'s highest court seeking an order requiring the trial court to release the completed questionnaires or, in the alternative, requiring the trial court to undertake the procedures outlined in the Supreme Court's decision in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*) to justify withholding the documents.

The Post argued that it had a presumptive right of access to the completed questionnaires, that the trial court was incorrect in failing to conduct the appropriate analysis under *Press-Enterprise I* before sealing the questionnaires, and that the trial court's promise of confidentiality to the jurors was unconstitutional.

The U.S. Attorneys' Office, which had not objected to the media intervenors' motion in the trial court, opposed the appeal on grounds that The Post had waived its constitutional right of access to the questionnaires by failing to formally object before the jury was selected. Mr. Guandique took no position in the trial court or on the appeal.

On September 20, 2011, Court of Appeals Judges Kathryn A. Oberly, Stephen H. Glickman, and Warren R. King heard oral argument on the appeal.

The Court of Appeals Reverses

On January 19, the D.C. Court of Appeals handed The Post a victory with a unanimous decision recognizing a First Amendment right of access to completed jury questionnaires as part of voir dire and ordering the trial judge to review the documents and disclose them to The Post and the public absent a finding that there were significant privacy concerns that could not otherwise be remedied. *See In re Access to Jury Questionnaires; The Washington Post*, No. 10-SP-1612 (D.C. Jan. 19, 2012).

In the opinion written by Judge Oberly, the Court recognized a "broad constitutional right of access" to public trials, and by extension, jury selection. It found "no principled reason to distinguish written questions from oral question for purposes of the First Amendment right of public access." As such, the Court held that there was "a presumption … that the completed questionnaires, as part of voir dire, should be available to the press."

The Court cited *Press-Enterprise I* in holding that while the right of access is "not absolute," the presumption of openness could only be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Under *Press-Enterprise I*, the Court continued, the trial court "must first articulate … with the requisite specificity the protectable privacy interests at stake and then consider whether alternatives to complete closure are available to protect those privacy interests."

The Court of Appeals then held that the trial court had erred in failing to conduct the analysis required under *Press-Enterprise I* before sealing the questionnaires. It further determined that the trial court "cited no specific privacy interests raised by any particular juror" prior to sealing and "considered no alternatives to blanket closure." Though the trial record did reflect that jurors were opposed to disclosure "to a person," the Court found that the actions of the six jurors who had voluntarily appeared on television proved otherwise.

The Court dismissed as "unconvincing" the government's "peculiar" argument that The Post's request was untimely and that, as a result, it had waived its right to the completed questionnaires. "The right of public access is a right that any member of the public can assert, whether it is for the purpose of reporting on a trial as it unfolds or researching jury selection 10 years later," Judge Oberly wrote. The Court also rejected the government's argument that the trial judge's pledge of confidentiality could not be remedied. "Promises of confidentiality in this context are not merely inappropriate; they are constitutionally unsound," the Court held. "Such a promise does not trump the First Amendment right of access."

The remaining question was whether the Court could "unscramble the egg" and order the trial court to undertake the *Press-Enterprise I* procedure even though the trial had concluded. The Court determined that at any time the trial judge "could [] explain[] to the jurors that the guarantee of confidentiality was made in error" and embark upon a *Press-Enterprise I* analysis by informing the jurors that their questionnaires "were subject to a constitutional presumption of disclosure unless they had particular privacy concerns, in which case they could request an in camera, on-the-record

(Continued on page 33)

(Continued from page 32)

proceeding to discuss those concerns and whether they outweighed the presumption of access."

The Court then remanded the case to the trial court to conduct the *Press-Enterprise I* analysis, noting that it saw "no reason why the trial court may not, if it so chooses, recall the jurors." However, it also cautioned that it was "unlikely that the answers to the questions w[ould] raise serious privacy concerns of the magnitude needed to override the public's interest in a completely open voir dire process."

On Remand Questionnaires Promptly Released

On January 25, six days later, the trial court released the questionnaires completed by the 16 members of the jury. The questionnaires revealed that all of the jurors had heard about Ms. Levy's murder before they were selected to serve on the jury, and that about half had knowledge of the MS-13 gang. They also showed that one juror admitted to having "negative" feelings about illegal immigrants like Mr. Guandique.

Before release, the trial judge redacted the answer to only a single question which sought information about whether the juror or any family member of close friend had been a victim of or accused of sexual assault.

Mr. Guandique's conviction is on appeal.

Bruce D. Brown and Laurie A. Babinski of Baker & Hostetler LLP in Washington D.C. and Eric N. Lieberman, James A. McLaughlin and Kalea S. Clark of The Washington Post represented the newspaper on appeal. Patrick J. Carome of Wilmer Hale in Washington, D.C. represented the intervenors in the trial court. Bruce Gottlieb of the Atlantic Media Company represented a group of 16 amici that filed a brief in support of The Post.

Kentucky Newspapers Seek More Transparency, Accountability in Child Fatalities

By Jon L. Fleischaker and Jeremy S. Rogers

In recent years, Kentucky has ranked among the states with the highest rates of child abuse deaths. Also in recent years, Kentucky has been among the states with the least transparency in its state child protection services. Although Kentucky has a very strong state freedom of information law, the Open Records Act, for years the state agency in charge of child protection services has essentially exempted itself from the law and has operated within a culture of complete secrecy. We have represented The Courier-Journal in a fight to change that in a series of lawsuits pitting the Cabinet for Health and Family Services (Kentucky's largest state agency) against Kentucky's two largest newspapers, the Louisville Courier-Journal and the Lexington Herald-Leader.

Although Kentucky has a very strong state freedom of information law, the Open Records Act, for years the state agency in charge of child protection services has essentially exempted itself from the law and has operated within a culture of complete secrecy.

Legal Background

In Kentucky, the Cabinet for Health and Family Services is the state agency responsible for child protection services. When a report of suspected child abuse or neglect is made, the Cabinet and its social workers are required to investigate and intervene.

The Commonwealth receives federal funding for child protection services via the federal Child Abuse Prevention and Treatment Act ("CAPTA"). In 1996, Congress amended CAPTA in order to increase transparency and public scrutiny over state child protection agencies in cases where the agency has been involved with the child, but despite that involvement, child abuse and neglect results in a fatality or near fatality. (Under the law, a "near fatality" is defined as an injury placing the child in critical condition.) Under the amended version of CAPTA, to be eligible for funding, a state is required to give assurances that it has in place, and that it actually enforces, a state law that includes "provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality." 42 U.S.C. § 5106a(b)(2)(A)(x).

To maintain Kentucky's eligibility for CAPTA funding, in 1998 Kentucky's General Assembly passed a statute providing that "[i]nformation may be publicly disclosed by the cabinet in a case where child abuse or neglect has resulted in a child fatality or near fatality." KRS 620.050(12)(a). However, that turned out to be a change of law only on paper because the Cabinet instituted its own contrary policy. The Cabinet maintained that it would never under any circumstances publicly disclose any information about any case where child abuse or neglect resulted in a fatality or near fatality. According to the Cabinet, this was to protect the "privacy" of those involved.

As this culture of complete secrecy pervaded Kentucky's child protection services, the rates of child abuse fatalities and near fatalities rose.

The First Lawsuit

In 2009 and 2010, some transparency began to emerge. Unfortunately, it took the tragic death of Kayden Branham to make it happen. In 2009, 20-month-old Kayden was living in Wayne County, Kentucky with his 14-year-old mother, both of whom had been placed under the Cabinet's supervision. Although the Cabinet had intervened in Kayden's situation and had placed the child and his 14-year-old mother in the home of a relative, the Cabinet failed to ascertain that the two had actually moved in with Kayden's 19-year-old father in a trailer that was being used as a meth lab. Kayden died after drinking a toxic drain-cleaning chemical used in the production of meth. The father was charged with murder and drug offenses in connection with Kayden's death and the mother was reportedly charged in juvenile court.

Consistent with its policy of absolute secrecy, the Cabinet refused to provide any information relating to Kayden's death to the newspapers. The newspapers filed suit against the

(Continued on page 35)

(Continued from page 34)

Cabinet under the state's Open Records Act.

In prior decisions, Kentucky's Attorney General (who can issue binding administrative decisions under the Open Records Act) had held that the Cabinet was not prohibited from publicly disclosing information about child abuse or negelct deaths because the state law provides that "[i] nformation may be publicly disclosed by the cabinet in a case where child abuse or neglect has resulted in a child fatality or near fatality." The Attorney General reasoned that the use of the word "may" gave the Cabinet "reasonable discretion" to release or not release information.

In court, the newspapers asserted that, when the state law changed to allow for release of these records, the Open Records Act mandated the release of the records when a request was made. The Cabinet continued to say it had the discretion to withhold these records and also asserted a variety of other legal theories to support its non-disclosure of the requested records, including the confidentiality provisions of the Health Insurance Portability and Accountability Act ("HIPAA"), the Open Records Act's personal privacy exception (KRS 61.878(1)(a)), and other state statutes that generally provide for the confidentiality of the Cabinet's child abuse investigation records.

Franklin Circuit Court Judge Phillip J. Shepherd issued an Opinion and Order on May 3, 2010, rejecting each of the Cabinet's arguments. Judge Shepherd held that, because the state law specifically allows the Cabinet to publicly disclose information in cases of child abuse and neglect fatalities, such information is not exempt from disclosure under the Open Records Act. In turn, because the Open Records Act is mandatory – not discretionary – the Cabinet is required to disclose the records. He observed that "the Cabinet has ignored the explicit authorization for public disclosure of these records set forth in KRS 620.050(12)(a)."

When the ruling became final in December 2010, the Cabinet did not appeal the ruling, and the court compelled it to provide records relating to Kayden's death and the Cabinet's involvement with the family.

The Second Lawsuit

Shortly after the court's decision in the first lawsuit became final, The Courier-Journal and Herald-Leader made requests to the Cabinet under the Open Records Act for multiple records relating to child fatalities and near fatalities in 2009 and 2010. The Cabinet delayed responding to the requests, and during the delay promulgated an "emergency regulation" which significantly limited the amount of information that it would provide from a child fatality or near fatality case. According to the Cabinet, the emergency justifying the regulation was the potential loss of federal CAPTA funds. However, there was no communication from the federal government to suggest that Kentucky's CAPTA funds were in any jeopardy.

When the Cabinet finally responded to the records requests, it refused to provide any of the records and, instead, attempted to invoke the exact same exceptions to disclosure that Judge Shepherd rejected in the final and binding decision in the first lawsuit.

The Courier-Journal and Herald-Leader filed suit, again in Judge Shepherd's court, seeking to hold the Cabinet to the prior ruling and seeking to strike down the emergency regulation. The Cabinet attempted to remove the lawsuit to federal court, claiming that the lawsuit presented a federal question because of the involvement of CAPTA. After several months, the federal court remanded the case to state court, holding that there was no federal question presented.

On November 3, 2011, Judge Shepherd granted summary judgment to the newspapers, holding that the Cabinet was bound by the prior decision in the case involving Kayden Branham. The court also struck down the emergency regulation, which by that time had automatically expired due to the Cabinet's failure to present the regulation through the legislative process. In his decision, Judge Shepherd wrote, "[a]fter reviewing the briefs filed in this case, the Court must conclude that the Cabinet is so immersed in the culture of secrecy regarding these issues that it is institutionally incapable of recognizing and implementing the clear requirement of the law that the general rule of confidentiality is subject to a specific exception in cases that have resulted in child fatality or near fatality."

On December 1, 2011, the court entered a judgment compelling the Cabinet to provide the records. However, since that time, the Cabinet has continued to fight with the newspapers over what information may be redacted from the records. Despite the court's decisions, the Cabinet has insisted on redacting a wide variety of information from the records, including the identities of witnesses who report

(Continued on page 36)

(Continued from page 35)

susptected abuse or neglect, witnesses who were interviewed by social workers, medical information, information about past allegations of abuse or neglect, and even the identities of some of the fatality or near fatality victims and their family members, including those who may have been an active party to the abuse or neglect which led to the fatality or near fatality. The parties continue to litigate this dispute, and it is possible that the Cabinet will pursue an appeal.

The Third Lawsuit: the Amy Dye case

At the age of four, Amy Dye was adopted by relatives in Todd County, Kentucky in 2006. Beginning in 2007, the Cabinet received multiple reports of suspected abuse and neglect concerning Amy from teachers and administrators at Amy's elementary school. The allegations primarily focused on Amy being physically and sexually assaulted by her two adopted brothers who were eight and ten years older than Amy. The family denied the allegations, and the Cabinet took no action. In February 2011, nine-year-old Amy died after one of her brothers beat her in the head with a jack handle.

The local newspaper, the Todd County Standard, made an open records request to the Cabinet for any records relating to Amy Dye. At first, the Cabinet failed to respond to the Standard's open records request, but when the Standard appealed to the Attorney General, the Cabinet claimed that it had no records concerning Amy. When the Attorney General inquired further, the Cabinet insisted that it was not required to offer an explanation for the *nonexistence* of records. The Attorney General issued a decision that the Cabinet violated the Open Records Act by failing to establish the nonexistence of the requested records. However, the Cabinet declined to appeal or to provide any of the records, apparently still maintaining that it had no records.

The Standard filed suit in Franklin Circuit Court to enforce the Attorney General's decision. Once the case landed in Judge Shepherd's courtroom, the Cabinet finally admitted that it had records relating to Amy. However, the Cabinet claimed that all of its records were exempt from disclosure because Amy's death was not the result of child abuse or neglect insofar as she was killed by a sibling and not by a parent or guardian. In a November 7, 2011 ruling, Judge Shepherd soundly rejected the argument, observing that "[t]his case presents a tragic example of the potentially deadly consequences of a child welfare system that has completely insulated itself from meaningful public scrutiny." He wrote that "the Cabinet's records document an alarming history of misfeasance, at best, or malfeasance, at worst, on the part of the Cabinet in addressing allegations of abuse and neglect toward [Amy]." Contrary to the Cabinet's determination, Judge Shepherd ruled that Amy's death was the result of child neglect by her adoptive parent, even though the fatal blow was administered by her brother.

Judge Shepherd released the Cabinet's files on Amy Dye. The records show that on February 16, 2011 -- the day after the Standard's open records request -- Cabinet employees made the deliberate decision not to label the investigation of Amy's death a "fatality investigation" so that it could try to evade the Standard's open records request. This highlights another continuing problem with transparency in the Cabinet. In order to provide oversight and accountability of the Cabinet, information is public in cases where fatality or near fatality results from child abuse or neglect. Yet, the Cabinet has unilaterally narrowed the definition of "abuse or neglect" and says it is the sole arbiter of whether a death was the result of abuse or neglect. The Cabinet has also continued to use the "privacy" argument, not to protect these children, but to protect itself and the adults in the system.

The litigation, especially the public disclosure of the facts involved in the deaths of Kayden Branham and Amy Dye, has resulted in a serious effort by the Kentucky General Assembly to revise and strengthen the laws to allow for more transparency and public accountability of the actions, or inactions, of the Cabinet. The fight for transparency continues both in the courts and in the legislature, but it seems that there may be substantial, favorable changes in the public's right to know and understand what happened to allow these children to die or be seriously harmed. It is more than coincidence that Kentucky's high child abuse death rates correlate to the Cabinet's high rate of secrecy. Disturbing cases like Kayden Branham's and Amy Dye's demonstrate the critical need for more public accountability within the Cabinet. Hopefully, increasing transparency will decrease child abuse deaths.

Jon L. Fleischaker and Jeremy S. Rogers represented The Courier-Journal and Todd County Standard in the matters referred to in this article.

Los Angeles Times Wins Access to State Employee Pension Data

Boost for Pension Transparency

By Karl Olson

A Los Angeles judge has fired what may be the final shot in a years-long battle for pension transparency in California.

Ruling in a case brought by the Los Angeles Times, Superior Court Judge James Chalfant held on November 15 that the Times is entitled to know not just the names and pensions of retired Los Angeles County employees but also their start date, their years of service at retirement, service years they "purchased," benefit payment options, the formula used to calculate the benefits, and their gross medical benefits. Judge Chalfant's ruling became final on December 13.

The Los Angeles County Employees Retirement Association ("LACERA") had, for two years, resisted turning over even the names of pension recipients. Finally, after three separate 2011 Court of Appeal decisions held that names and pension amounts had to be disclosed, LACERA agreed to disclose names but still maintained that the other information like years of service, pension formula and medical benefits received was off limits to the public.

Superior Court Decision

Judge Chalfant's 14-page, single-spaced decision interpreted the three Court of Appeal decisions and found that the public had a right – and a need – to know not only how much a public employee's pension is, but also how it is calculated. He agreed with newspaper reporters and taxpayer advocates who testified that without knowing how a pension is calculated, the public is unable to determine whether a pension has been "spiked" by adding perks to a last year's salary or "purchasing" service time.

"A retiree member's election of retirement options is a necessary component in the calculation of his or her retirement benefits in which the public has a legitimate interest," Judge Chalfant ruled. "A retiree's years of service at retirement, service years purchased, benefit payment options, and the formula used to calculate the benefit all must be disclosed...LACERA's calculation of retirement benefits cannot be evaluated without this information."

LACERA has indicated it will not appeal Judge Chalfant's ruling and that it will turn over the records by February 15. Thousands of Los Angeles County retirees receive six-figure pensions, and California Governor Jerry Brown has called for raising the retirement age and trimming pension formulas at the state level to help the cash-strapped state balance its budget and avoid even deeper cuts to education and other services.

Judge Chalfant also ruled in a companion case brought by law enforcement unions that only two of the roughly 7,000 sheriff's deputies represented by the unions were entitled to have their names redacted because of safety concerns. Relying on language from a California Supreme Court case that undercover peace officers might in some cases have a special safety interest allowing their names to be withheld from salary disclosure, the unions brought their own lawsuit against LACERA and the Times.

Judge Chalfant gave it short shrift, issuing a tentative ruling denying all claims of redaction, and allowing one of the 7,000 names to be withheld after a hearing. The Times agreed to redact another officer's name after the officer filed a declaration saying he is now in jail and other inmates might harm him if they saw his name in the Times.

In the last two and a half years, eight different California Superior Courts – in heavily-populated Los Angeles, Orange, San Diego, Sacramento and Contra Costa counties, and in Stanislaus, Sonoma and Ventura counties as well – have ruled in favor of pension transparency. Courts of Appeal in San Diego, Sacramento and San Francisco upheld the San Diego, Sacramento and Sonoma rulings. With Judge Chalfant's ruling, it appears the transparency battle is over – and the advocates of openness have defeated the forces of secrecy.

Karl Olson and Karlene Goller represented the Times in the LACERA case. They were also involved in the Contra Costa and San Diego cases. Olson represented the Sacramento Bee in the Sacramento case in which the Times joined a friend-of-the-court brief.

RETURN TO TABLE OF CONTENTS

Tennessee Media Wins Access to High Profile Adoption Dispute Trial

Court Dismisses Motion for Closure and Sealed Record

By Robb Harvey and Keith Randall

In a high profile case with international dimensions, a group of media and open government organizations recently intervened and succeeded in persuading the trial court that the proceedings and records should be opened. *In re Hansen*, No. 12062 (Tenn. Cir. Ct. Nov. 22, 2011) (denying motion for closure and to seal judicial record).

Background

What sort of case is "a riddle, wrapped in a mystery, inside an enigma…"? [Winston Churchill, radio broadcast of October 1939, referring to future Russian actions.] One involving a child adopted out of Russia and sent back to Moscow on a one-way ticket by an adoptive mother who says she was unable to deal with him, months of court proceedings conducted under a cloak of invisibility, and an effort by the adoptive parent to keep all court proceedings and records closed to the media and public.

The Tennessean (a regional daily newspaper owned by Gannett), *Shelbyville Times-Gazette* (owned by Rust Communications), Tennessee Press Association, Tennessee Coalition for Open Government, Middle Tennessee Professional Chapter of the Society of Journalists, The Associated Press, WKRN Channel Two (owned by Young Broadcasting), and WSMV Channel Four (owned by Meredith Corporation) intervened to open the proceedings and record. The Intervenors' motion can be viewed here, and the supporting brief may be found here.

Tennessee courts have a long-standing commitment to openness of judicial proceedings and records, founded in the United States and Tennessee Constitutions and Tennessee Public Records Act. That commitment was tested in this high profile case. The adoptive mother's action had caused an international incident, with Russia threatening to suspend adoptions to the United States.

The pending case involves the claims asserted by the adoption agency and others against the adoptive mother for, among other things, breach of contract and neglect. Among the agency's requests is a monetary award for support of the young boy in Russia. The case followed a circuitous route—from circuit court to juvenile court back to circuit court. The trappings of privacy inherent to juvenile court proceedings kept the status of the case out of the public eye and, even after its return to circuit court, obfuscated the procedural history of the case.

Motion for Closure and the Motion to Intervene

The adoptive mother sought to preserve the protections afforded juvenile court proceeding and moved to close all courtroom proceedings and maintain a blanket seal on all judicial records. The trial judge, the Hon. Franklin Lee Russell of the Bedford County (Tenn.) Circuit Court, in response to the adoptive mother's closure motion, allowed interested parties to intervene and fast-tracked the proceeding.

The trial court recognized that the multi-step procedures articulated by the Tennessee Supreme Court in *State v. Drake,* 701 S.W.2d 604, 608 (Tenn. 1985), applied to motions to close judicial proceedings and to requests for other "restrictive orders." The required steps are:

The motion for closure must be in writing, stating a compelling interest sufficient to justify closure and the extent of the restrictions desired

The judge must then order an expedited hearing, but the hearing may not take place until the motion for closure is on file for at least three days. The public and media may intervene.

At the hearing, the court must determine intervenors, and then may order a portion of the hearing closed only as necessary to avoid disclosure of prejudicial material.

The transcript of any closed proceedings shall be made available to the public at the earliest time possible, consistent with the interests compelling closure and also consistent with facilitating appeal.

If the trial court determines closed proceedings are appropriate, the trial court must state specific facts

(Continued on page 39)

(Continued from page 38)

demonstrating why closure is essential to preserve the movant's interest and make specific findings that no alternative to closure will adequately protect that interest.

Finally, "orders of closure must be served upon intervening parties at least seven days prior to any proceedings" conducted under the order so that prompt appellate review is available pursuant Tenn. R. App. Proc. 10. Id. at 608.

The Court found that the defendants' motion for closure had failed at the initial step; the defendants' motion could not state a "compelling interest" sufficient to justify closure. While the best interests of the juvenile are paramount, the court must balance requests to impose restrictions with the right of the public and media to have access to judicial proceedings. Here, the juvenile wasn't seeking closure, but rather the defendants sought to cloak their own misdeeds in the juvenile's right to privacy.

The Court held that the privacy protections afforded to juveniles in juvenile court are intended to protect the children involved and not to protect the adult parties to a contract dispute. The parties did, however, agree to work together to determine which records to make public so certain records about the boy's family and his adoption history will remain under seal.

Robb Harvey and Keith Randall of Waller Lansden Dortch & Davis, LLP represented The Tennessean, *the* Shelbyville Times-Gazette, *the Tennessee Press Association, the Tennessee Coalition for Open Government, the Middle Tennessee Professional Chapter of the Society of Journalists, The Associated Press, WKRN Channel Two*, *and WSMV Channel Four. Defendants Torry and Nancy Hansen were represented by Sandra L. Smith. Plaintiffs Justin Hansen, Jennifer Terhune, the World Association for Children and Parents, and the National Council for Adoption were represented by Larry Crain, of the Crain Law Center.*

Ninth Circuit Holds That DMCA Requires Specific Knowledge of Copyright Violation for Service Provider Liability

By David M. Silverman

In an important decision on the issue of website operators' copyright liability for user-generated content, the U.S. Court of Appeals for the Ninth Circuit has refused to hold a site operator liable for copyright infringement based solely on its general knowledge that some of the third party content on its site may be infringing.

The Ninth Circuit's opinion in the case of *UMG Recordings v. Shelter Capital Partners*, (Dec. 20, 2011) (Pregerson, Fisher, Berzon, JJ.), concerned the potential liability of video-sharing website operator, Veoh Networks, under one of the so-called "safe harbors" of the Digital Millennium Copyright Act (DMCA). Veoh operates a publicly accessible website that enables users to share videos with other users. The particular safe harbor Veoh invoked protects website operators and other "service providers" from liability for the copyright infringement of others who provide content on their sites when the provider "expeditiously" takes down the allegedly infringing content residing on its servers in response to a notice from a copyright owner that the content is infringing.

In this case, UMG argued that Veoh's general knowledge that infringing content resided on its servers was sufficient to deprive Veoh of the protections of the DMCA's safe harbor for infringing content. The Ninth Circuit disagreed and affirmed the district court in upholding summary judgment for Veoh.

There was no question that Veoh acted expeditiously to remove allegedly infringing content from its servers upon receipt of a DMCA notice alleging that specific content on its site was infringing. However, UMG claimed that Veoh's actions were "too little, too late" due to Veoh's late adoption of filtering technology to detect infringing material and Veoh's takedown of only the specific videos identified in DMCA takedown notices.

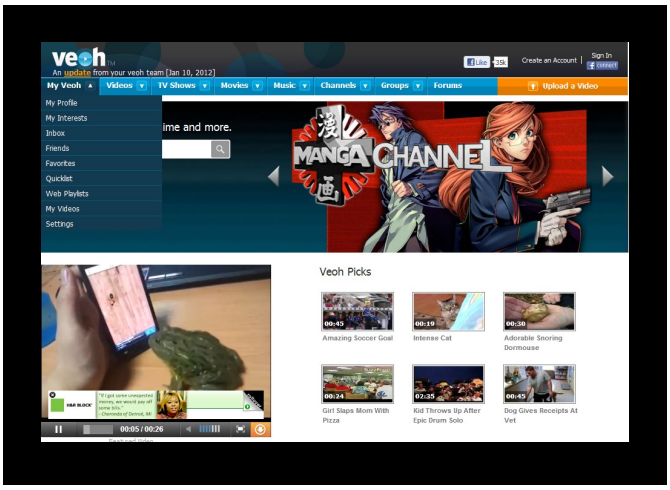
In finding that Veoh was entitled to the DMCA safe harbor, the Court first found that Veoh's functions in

(Continued on page 40)

(Continued from page 39)

connection with video uploads by users fell within the safe harbor requirement that the uploaded content was on Veoh's website was "by reason of the storage at the direction of the user." In so holding, the Court found that Veoh's automatic processes of creating Flash files and/or "chunks" of videos to facilitate streaming and downloading did not deprive Veoh of the safe harbor for "storage at the direction of the user."

The Court reasoned that such a narrow interpretation of that language would render the safe harbor meaningless. The Court also noted that, by contrast, the DMCA safe harbor for providing transient (peer-to-peer or P2P) communications in Section 512(a) requires that the third party material not be modified in any way. That restriction does not apply to DMCA Section 512(c) (Information Residing on Systems or Networks at Direction of Users) at issue here.



The Court then addressed UMG's claim that Veoh had "actual knowledge" of the infringing activity, which would deprive Veoh of the DMCA safe harbor, if true. UMG raised numerous factors that could have tipped off Veoh to the presence of infringing content on its servers, such as the presence of music videos without any license from a rights holder. As the Court pointed out, however, many music videos do not require licenses, such as originally created music or music provided with permission of the rights holder. On this point, the Court followed the Supreme Court's 1984 Sony decision, holding that a product "capable of substantial noninfringing uses" (like a VCR in that case) does not violate copyright law just because it is capable of being used for copyright infringement. As the Court noted, the safe harbor provisions of the DMCA presume that websites such as Veoh's may be used for infringing purposes. Accordingly, "the general knowledge that one's services could be used to share infringing material [ ] is insufficient to meet the actual knowledge requirement . . . ."

The Court reached the same conclusion regarding the safe harbor condition that, "in the absence of [actual] knowledge, [the service provider] is not aware of facts or circumstances from which infringing activity is apparent." Ultimately, the Court refused to shift the safe harbor burden from the copyright owner to the service provider. The Court noted that shifting the burden could violate other DMCA provisions that specifically exempt service providers from having to monitor or investigate content and could result in the removal of noninfringing content.

Finally, the Court addressed UMG's claim that Veoh violated the safe harbor condition that it not "receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity." The Court followed its reasoning in the knowledge provisions discussed above, i.e., a service provider "must be aware of specific infringing material to have the ability to control that infringing activity within the meaning of" the safe harbor provision of the DMCA.

This is one of the first cases decided by a U.S. Court of Appeals on the obligations of a service provider claiming protection under the DMCA safe harbor where the service provider has general knowledge that there may be infringing material on its website. So long as the service provider acts expeditiously to remove allegedly infringing materials when statutorily compliant and specific takedown notices are received, the safe harbor will not be lost. It will be interesting to see whether other appellate courts—including the Second Circuit, where the issue is on appeal in the Viacom v. YouTube case with a decision expected soon—follow the Ninth Circuit or whether a split in the circuits arises that could merit Supreme Court review.

David Silverman is a partner in the D.C. office of Davis Wright Tremaine LLP.

New Hampshire Missteps On "Bigfoot's" Free Speech

By William L. Chapman

In *Doyle v. Commission, New Hampshire Department of Resource & Economic Development* (Jan. 13, 2012), the New Hampshire Supreme Court held that a rule governing access and use of state property managed by the Department of Resources and Economic Development (DRED) violates the state constitutional guarantee of free speech. The case arose out of the filming of "Bigfoot" on Mt. Monadnock, a national natural landmark within Monadnock State Park.

Background

The legend of Bigfoot dates back centuries. Also known as "Sasquatch," Bigfoot is "'a large, hair human-like creature believed by some persons to exist in the northwestern United States and western Canada.'"

In September 2010, Jonathan Doyle ("Doyle") and his girl friend climbed Mt. Monadnock. At the top, he put on a Bigfoot (apelike) costume and filmed conversations with other hikers for about 20 minutes. While descending he reported the Bigfoot sighting to two Park staff members and upon leaving the Park made further reports to the local and state police.

Two weeks later, Doyle and five others returned to Mt. Monadnock for a second Bigfoot filming. Before doing so, Doyle had a friend interview him about the first filming, and he wrote a press release and made a posting on his website. The local paper, the *Keene Sentinel*, ran an article that Doyle would again climb Mt. Monadnock dressed as Big Foot. The article came to the attention of the Park Manager.

Doyle and his party hiked part-way up the mountain where three members dressed up as "Bigfoot, Yoda and a pirate." Doyle filmed them talking with hikers. The Park Manager stopped Doyle and asked whether he had a special-use permit. Doyle replied he did not and was told to leave, and did leave, the mountain.

An administrative rule that applied to Mt. Monadnock required a special-use permit "for [h]olding organized or special events which go beyond routine recreational activities." To obtain a permit, a person had to apply "at least 30 days prior to the event, pay a $100 fee and obtain a $2 million insurance policy that covers the State of New Hampshire." If the requirements were met, DRED had to issue a permit.

Doyle brought a declaratory judgment action challenging the rule as a violation of free speech under the New Hampshire Constitution and First Amendment. The trial court granted DRED's motion for summary judgment, concluding that the rule was not unconstitutional, either facially or as applied.

> **"Even though Doyle's activities may have been nothing more than a playful hoax, '[w]holly neutral futilities…come under the protection of free speech as fully as do Keats' poems or Donne's sermons' … Only narrow categories of speech, such as defamation, incitement … fall outside the ambit of the right to free speech."**

N.H. Supreme Court Decision

On appeal, the New Hampshire Supreme Court decided Doyle's claim under the state constitution and cited federal opinions "for guidance only." It began its analysis by stating that the filmings were "unquestionably protected" by the state constitution: "[e]ven though Doyle's activities may have been nothing more than a playful hoax, '[w]holly neutral futilities…come under the protection of free speech as fully as do Keats' poems or Donne's sermons' … Only narrow categories of speech, such as defamation, incitement … fall outside the ambit of the right to free speech."

Doyle challenged the rule as being overbroad, meaning, according to the Court, that "'a substantial number of its applications are unconstitutional, judged in relation to the [regulation's] plainly legitimate sweep.'" Citing *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court stated that the governing standard depends on the "character of the property involved."

In the trial court, DRED argued that Mt. Monadnock was a "traditional public forum." Neither party addressed that on appeal and the Court requested supplemental briefing. DRED

(Continued on page 42)

(Continued from page 41)

changed its position and argued that Mt. Monadnock is either a "limited public forum or a non-public forum." But because Doyle had relied on DRED's assertion to the trial court, the Court analyzed the constitutionality of the rule on the basis that Mt. Monadnock is a traditional public forum.

The Court first considered whether the rule was "narrowly tailored:" the rule "may not burden substantially more speech than is necessary to further the government's interest, but it 'need not be the least restrictive intrusive means' of doing so" (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). DRED stated that the purpose of the rule was to further the state's interest in managing "varied and competing uses of park resources and to mitigate the impacts of commercial events." The Court agreed that those interests were significant. DRED also claimed that "it has a significant interest in protecting visitors from unwelcome or unwarranted interference, annoyance, or danger." While the Court questioned whether that was a significant governmental interest, it assumed, without deciding, that it was.

DRED's position was that the rule's application to an "organized event" did not turn on the number of people who participated in the event. Given that interpretation, the Court stated that the rule "applies equally to large groups, small groups and even one person," giving as an example "a lone protestor holding a sign at the top of the mountain." The Court ruled that application would not "further DRED's interests" because a "one-person event will not require the allocation of competing park resources, nor is one person likely to cause any unwarranted or unwelcome annoyance."

The Court next stated that the rule applies to "a wide range of speech that has no relation to DRED's significant interests, such as, a six people holding "a short, private prayer service at the summit" or "three people … walk[ing] around the summit with campaign signs" in support of a political candidate. The Court also noted that the 30-day notice requirement "raises additional constitutional concerns." It cited a number of federal cases for the proposition that "advance notice requirements for traditional public forums typically survive constitutional attack only when they require no more than several days' notice. Short notice requirements, the Court stated, reflect the fact that "state officials are often deployed on short notice[and] there is no reason to require longer notice periods." Finally, the Court found problematic the rule's failure to include an exception for spontaneous expression: "'[a] spontaneous [event] expressing a viewpoint on a topical issue will almost inevitably attract more participants and more press attention, and generate more emotion, than the 'same' [event] [3]0 days later.'"

Summing up, the Court held that the rule "is unconstitutional in a substantial number of its applications and is thereby overbroad ... [and] violates the right to free speech guaranteed by" the state constitution.

In a concluding paragraph, the Court observed that its "holding is a narrow one" because it is based on the assumption the Mt. Monadnock is a traditional public forum. Thus, it remains to be seen whether "Big Foot, Yoda and a pirate" will climb again!

William L. Chapman is a partner with Orr & Reno, P.A. in Concord, NH. Jonathan Doyle was represented by Barbara R. Keshen of the New Hampshire Civil Liberties Union and Jon Meyer of Backus, Meyer and Branch, LLP. The State of New Hampshire was represented by Michael A. Delaney, Attorney General.

Website "Flash Cookie" Invasion of Privacy Class Action Dismissed

Arkansas State Court Relies On Forum Selection Clause In Terms of Use

By Natalie J. Spears and Gregory R. Naron

Invasion of privacy claims arising out of website usage, social media, and cloud storage are a real threat to any company with a significant internet presence -- which is to say, virtually all businesses, media-related or otherwise. The recent dismissal of a class action lawsuit asserting such claims against TV Guide based on its alleged use of "Flash cookies" is instructive both legally and strategically. See *Roller, et al. v. TV Guide Online Holdings, LLC, et al.* Case No. CV 11-52-4 (Ark. Cir.).

A "Flash cookie" is a general term used for locally stored objects and data associated with Adobe's Flash technologies. Flash cookies are unlike traditional HTTP cookies in several important respects; principally, Flash cookies cannot be rejected through browser settings and cannot be located or deleted through one's browser. Certain Flash cookies have the ability to "re-spawn" cookies deleted by the user, thereby continuing to track the user. Flash cookies were necessary to run Adobe's Flash software and were designed to be more persistent than HTTP cookies. In late 2010, Flash Cookies caught the attention of the Federal Trade Commission, the academy, the press, and shortly thereafter, the plaintiffs' bar. See generally, Tanzina Vega, "Code That Tracks Users' Browsing Prompts Lawsuits," *New York Times*, p. B3 (Sept. 20, 2010).

In the fall of 2010, several lawsuits were filed (primarily in California) concerning the improper use of Flash cookies. The suits alleged that Flash cookies were being used to invade the privacy of web users by tracking internet usage, and that the information collected was aggregated and sold to research and marketing companies. In January 2011, several Arkansas and Texas plaintiffs' firms collectively filed a putative class action -- the *Roller* action -- in state court in Fayetteville, Arkansas, against approximately 20 companies with successful websites -- including Pandora, Metacafe, Mattel, Nordstrom, and TV Guide. Plaintiffs' complaint cribbed information from earlier suits, the Federal Trade Commission, and various articles to inform their allegations.

With respect to TV Guide, the plaintiffs alleged that TV Guide's website had secretly deployed Flash Cookies to invade the privacy of users, collect their information, and use that information for business purposes and/or for sale to information brokerages. Plaintiffs asserted violation of two Arkansas criminal statutes, several common law tort claims, and a claim for unjust enrichment; they sought to certify a huge class encompassing every person in the State of Arkansas who had accessed TV Guide's website over a 3-year period.

TV Guide was the first defendant to file a motion to dismiss the suit, which became the template for the other defendants. Dismissing plaintiffs' amended complaint "with prejudice to re-filing in Arkansas circuit court," on January 3, 2012, the Court ruled that TV Guide's Terms of Use, specifically its forum selection clause, were effective and valid, and that plaintiffs were required to bring these types of claims in California. (*Roller, et al. v. TV Guide et al.,* Jan. 3, 2012 Judgment and Order.)

The strategy adopted in the *Roller* case afforded TV Guide an early exit from potentially costly class litigation in an unfavorable forum, without having to respond to discovery. Other putative class actions complaining of the use of Flash cookies have been dismissed (with leave to amend) on Article III standing grounds, see, e.g., *LaCourt v. Specific Media, Inc.*, 2011 WL 1661532, *6 (C.D. Cal., April 28, 2011) ("It is not obvious that Plaintiffs cannot articulate some actual or imminent injury in fact. It is just that at this point they haven't offered a coherent and factually supported theory of what that injury might be"); *Del Vecchio v. Amazon.com Inc.*, 2011 WL 6325910 (W.D. Wash., Dec. 1, 2011), while other courts have sustained at least some causes of action in class complaints complaining of Flash cookie use, see, e.g., *Bose v. Interclick, Inc.*, 2011 WL 4343517 (S.D.N.Y., Aug. 17, 2011) (dismissing Computer Fraud and Abuse Act, implied contract and tortious interference claims with prejudice, but denying motion to dismiss claims

(Continued on page 44)

(Continued from page 43)

asserting violation of N.Y. Gen. Busin. Law § 349 and trespass to chattels).

It appears that the use of Flash cookies and other tracking devices will continue to be a source of dispute and legal action for the foreseeable future. Late last year, the Federal Trade Commission announced a settlement with an online advertiser that the commission had charged with deceiving customers by using Flash cookies (the company, ScanScout, allegedly instructed consumers on its privacy policy page that they could opt out of receiving targeted ads by "changing your browser settings to prevent the receipt of cookies," which was untrue).

Like the *Roller* class action, the ScanScout matter is reflective of the larger battle "between companies that rely on browser data to create customized web advertising and a collection of consumer advocacy groups, governmental agencies and some politicians who are attempting to rein in a fast-growing industry of online tracking. Last year FTC members called for the creation of a do-not-track system. A half-dozen privacy bills have been introduced on Capitol Hill this year." Tom Loftus, "FTC Settles with Online Advertiser over Flash Cookie Use," *Wall Street Journal* Tech. News & Insights Blog (Nov. 8, 2011) (http://blogs.wsj.com/digits/2011/11/08/ftc-settles-with-online-advertiser-over-flash-cookie-use/).

Whether or not the plaintiffs' bar will be able to sustain a viable class action based on Flash cookie usage, the specter of federal legislation and an active FTC counsels vigilant focus on this fast-moving area of the law.

Natalie J. Spears is a partner at SNR Denton in Chicago and a co-chair of SNR Denton's global Technology, Media and Telecommunications Sector. Gregory R. Naron is of counsel at SNR Denton. The litigation team at SNR Denton's Kansas City office represented TV Guide in the Roller lawsuit, led by partner Jason Scheiderer.

"Intrusion Upon Seclusion": New Privacy Tort Recognized in Canada

By Paul Schabas and Iris Fischer

The Ontario Court of Appeal has recognized the existence of a tort of "intrusion upon seclusion," in granting summary judgment in favour of a plaintiff whose privacy had been invaded by the actions of the defendant. *Jones v. Tsige*, 2012 ONCA 32 (Jan. 18, 2012).

This decision) will likely lead to claims of invasion of privacy against the media. However, if developed along the lines suggested by the Court of Appeal, its impact on how the media investigates and publishes stories that are in the public interest may be limited.

Facts and Judicial History

Both parties in this case were employees at a bank. Although they had never met, the defendant was involved in a relationship with the plaintiff's ex-husband. The defendant had accessed the plaintiff's personal banking records at least 174 times over a period of four years, contrary to bank policy. The plaintiff commenced an action against the defendant, alleging (among other things) invasion of privacy. The defendant asserted that she was involved in a financial dispute with the plaintiff's former husband and accessed the accounts to confirm whether he was paying child support to the plaintiff, but she did not publish or record the plaintiff's banking information.

The parties brought competing motions seeking summary judgment. The motion judge granted the defendant's motion for summary judgment and dismissed the plaintiff's claim, on the basis that Ontario law did not recognize a tort of breach of privacy. The plaintiff appealed to the Court of Appeal.

New Tort of Intrusion upon Seclusion

The Court of Appeal noted that causes of action relating to privacy have been recognized in other jurisdictions (including the United States, the United Kingdom, Australia, and New Zealand), and that four Canadian provinces have already enacted legislation creating statutory causes of action for invasion of privacy. Justice Sharpe, who wrote the decision, reviewed case law in Ontario and concluded that the courts have remained open to the possibility of a common law tort of invasion of privacy, although it had never previously been recognized by an appellate court.

In addition to these trends, the Court of Appeal recognized that a right to privacy underlies certain rights under the *Canadian Charter of Rights and Freedoms* (such as the right to be free from unreasonable searches), and that the common law should be developed in a manner consistent with the *Charter*. The Court also noted that technological advancements have led to the routine collection and electronic storage of vast amounts of highly personal information, posing a novel threat to the privacy of individuals.

> The Court of Appeal recognized that a right to privacy underlies certain rights under the Canadian Charter of Rights and Freedoms (such as the right to be free from unreasonable searches), and that the common law should be developed in a manner consistent with the Charter.

Against this background, the Court of Appeal confirmed the existence of a cause of action for intrusion upon seclusion. This new tort has three elements: first, that the defendant's conduct be intentional or reckless; second, that the defendant have invaded the plaintiff's private affairs or concerns without lawful justification; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation, or anguish. It is not necessary for the plaintiff to prove any harm to his or her economic interests. It is also not necessary that the plaintiff's personal information have been published or disseminated by the defendant; the tort focuses on the act of intrusion upon the plaintiff's private affairs, not on any subsequent use of the information.

The Court was careful to emphasize, however, that only "deliberate and significant invasions of personal privacy," which would be viewed as offensive on an objective standard, will ground a cause of action. Accordingly, the Court suggested that only intrusion into highly personal matters will meet the standard, and gave as examples a person's financial

(Continued on page 46)

(Continued from page 45)

or health records, sexual practices and orientation, employment, diary, or private correspondence. Future cases will likely provide clarity as to the types of conduct that will meet this threshold.

Damages for Intrusion upon Seclusion

Since claims for invasion of privacy will usually involve intangible interests such as humiliation or emotional distress as opposed to pecuniary losses, damages for intrusion upon seclusion will generally be modest – the Court of Appeal imposed a cap of $20,000 where the plaintiff has suffered no pecuniary loss. While not precluding punitive or aggravated damages awards on top of this amount in "truly exceptional" cases, the Court was clear that it would not encourage them.

The factors identified for determining the quantum of damages are: 1) the nature, incidence, and occasion of the defendant's wrongful act; 2) the effect of the wrong on the plaintiff's health, welfare, social, business, or financial position; 3) any relationship, whether domestic or otherwise, between the parties; 4) any distress, annoyance, or embarrassment suffered by the plaintiff arising from the wrong; and 5) the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.

Result in *Jones v. Tsige*

On the facts of this case, the Court of Appeal found that the defendant had committed the tort of intrusion upon seclusion, and granted summary judgment in favour of the plaintiff. Damages were fixed at $10,000, having regard to the factors set out above. The court noted the deliberate and repeated nature of the defendant's actions, the background of domestic relationships, and the plaintiff's distress at the invasion of her privacy. On the other hand, the plaintiff had not suffered any public embarrassment or harm to her health, welfare, social, business, or financial position, and the defendant had apologized for her conduct and attempted to make amends. Despite the deliberate nature of the defendant's conduct, the Court found that aggravated or punitive damages were not warranted.

Implications for the Media

While it did not consider the issue in detail, the Court of Appeal recognized that in the future, it may be necessary to reconcile the new common law right to privacy with other competing rights, including the *Charter* rights of freedom of expression and freedom of the press. In particular, the Court noted that no right to privacy is absolute, and that "many claims for the protection of privacy will have to be reconciled with, and even yield to, competing claims." Referring to the Supreme Court of Canada's decision in *Grant v. Torstar*, establishing the defence of responsible communication in the public interest, the Court suggested that the balance may tip in favour of the press where it is reporting on matters that are in the public interest. Nevertheless, it can be expected that media outlets will see an increased incidence of plaintiffs relying on this new cause of action. And the media will have to be careful that it only intrudes upon the kinds of personal matters identified in this decision when there is a clear public interest in doing so.

The Court suggested that the balance may tip in favour of the press where it is reporting on matters that are in the public interest. Nevertheless, it can be expected that media outlets will see an increased incidence of plaintiffs relying on this new cause of action.

Further, the Court signalled that other torts relating to breach of privacy may be recognized in the future. Justice Sharpe noted that most American jurisdictions have accepted the following classification of torts relating to invasion of privacy: 1) intrusion upon seclusion; 2) public disclosure of embarrassing private facts about the plaintiff; 3) publicity which places the plaintiff in a false light in the public eye; and 4) appropriation of the plaintiff's name or likeness.

In this case, the court was clear that it was recognizing only the first as a new cause of action, though it considered that the fourth, appropriation of personality, already exists in Ontario. In accepting that the general right to privacy "embraces four distinct torts," the Court has opened the door to litigation to establish torts number 2 and 3 in Ontario as well. These two potential torts, on their face, encompass public disclosure of private information, and would therefore have relevance to the media as well.

Paul Schabas is a partner, and Iris Fischer an associate, at Blake, Cassels & Graydon LLP in Toronto, Canada.

Heavy Evidentiary Burden Imposed On Litigants Seeking Publication Bans and Sealing Orders

By Richard G. Dearden

The Court of Appeal for Ontario, in a strong endorsement of freedom of the press and the open court principle, has imposed a heavy evidentiary burden on litigants who seek non-publication and sealing orders. *E.H. v. Russell Williams*, 2012 ONCA 35 (Doherty, Armstrong, Hoy, JJA).

The Court of Appeal's unanimous decision in *M.E.H. v. Russell Williams* set aside numerous non-publication and sealing orders issued in a high profile divorce case involving a former Air Force Colonel who has been convicted of first degree murders and sexual assaults. The wife of the former Colonel served notice on the media that she intended to seek a divorce from him but only if the court file was entirely sealed or, alternatively, that a non-publication order was imposed on the divorce proceedings.

The Motion Judge issued a number of non-publication Orders (such as the name of the former Colonel's wife and her employer) as well as sealing Orders on financial information to be filed to obtain the divorce. The Court of Appeal set aside all of those Orders.

The Court of Appeal for Ontario has affirmed that family law proceedings are not different from any other type of civil proceeding. Openness is the rule.

Embarrassment, Personal Distress Insufficient To Deny Openness

Purely personal interests cannot justify the issuance of non-publication or sealing orders. The personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test for obtaining non-publication and sealing orders in Canada. *Williams* at para. 25.

The Court of Appeal held:

> "The distinction between personal emotional distress and embarrassment, which cannot justify limiting publication of or access to court proceedings and records, and serious debilitating physical or emotional harm that goes to the ability of a litigant to access the court is one of degree. Expert medical opinion firmly planted in reliable evidence of the specific circumstances and the condition of the litigant will usually be crucial in drawing that distinction." *Id.* para. 30.

Test to Obtain a Publication Ban

In what is referred to as the *Dagenais/Mentuck* test for obtaining non-publication Orders, the Supreme Court of Canada requires an Applicant to prove both necessity and proportionality. *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 at para. 32.

A publication ban of court proceedings should only be ordered when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

The Significant Evidentiary Burden

The serious risk to the proper administration of justice must be "real and substantial" and be a risk the reality of which is well-grounded in the evidence. *Mentuck,* at para. 34. There must be a convincing evidentiary basis for issuing a ban. *Id.* at para. 39.

The Court of Appeal described the significant legal and evidentiary burden on an Applicant for a non-publication or

(Continued on page 48)

(Continued from page 47)

sealing order as follows:

> "Limits on freedom of expression, including limits that restrict media access to and publication of court proceedings, can be justified. However, the centrality of freedom of expression and the open court principle to both Canadian democracy and individual freedoms in Canada demands that a party seeking to limit freedom of expression and the openness of the courts carry a significant legal and evidentiary burden. Evidence said to justify non-publication and sealing orders must be "convincing" and "subject to close scrutiny and meet rigorous standards".

M.E.H. v. Russell Williams, supra, at para. 34.

The non-publication and sealing orders were set aside because the Motion Judge's finding that the orders were necessary to prevent a serious risk to the proper administration of justice was unreasonable on the evidence proffered by the former Colonel's wife. *Id.* at para. 37.

The Public Interest At Stake - Denial Of Access To The Courts

An individual's access to the courts is an essential component of the proper administration of justice. *Id.* at para. 26. If the openness of court proceedings would result in a denial of access to the courts, the necessity branch of the *Dagenais/Mentuck* test is fulfilled if proven with convincing evidence. The Court of Appeal held:

> "There can be no doubt that an individual's right to seek and obtain appropriate relief in a court proceeding is a matter of significant public interest impacting on the proper administration of justice. The public interest in access to the courts for legal relief is particularly important where that access is required to give legal effect to a decision as integral to personal autonomy as the decision to seek a divorce. If insisting on the openness usually demanded of court proceedings will effectively close the courtroom door to a litigant because of the physical and/or emotional consequences to that litigant of maintaining the openness of the courts, I am satisfied that the first component of the *Dagenais/Mentuck* test would be made out assuming that there was no reasonable alternative to some limit on the openness of the courts. The court would then have to go on and address the competing interests under the second component of that test before deciding what limit, if any, would be placed on the openness of the courts." *Id.* at para. 27.
>
> … It is not necessary that a litigant establish that he or she would not go to court absent the privacy protections requested. Access to the courts should not come at the cost of a substantial risk of serious debilitating emotional or physical harm to the party seeking access. Access to the courts at that cost would be more illusory than real." *Id.* at para. 29.

However, the Court of Appeal recognized that there was a constitutional imperative to ask the proper question in determining whether to ban publication or seal a court record, notwithstanding that the wife was another one of her husband's victims. The proper question the court must ask is as follows:

> "A court faced with a case like this one where decency suggests some kind of protection for the [wife of a serial killer] must avoid the temptation to begin by asking: where is the harm in allowing the [wife] to proceed with some degree of anonymity and without her personal information being available to the media? Rather, the court must ask: has the [wife] shown that without the protective orders she seeks there is a serious risk to the proper administration of justice?" *Id.* at para. 32.

(Continued on page 49)

(Continued from page 48)

No Weight to Hearsay Opinion of Psychiatrist

The only evidence filed to support the non-publication and sealing orders was an affidavit of the wife's treating psychiatrist, Dr. Quan. The former Colonel's wife did not file her own public or confidential affidavit notwithstanding that she filed a public affidavit in an action commenced against her and her husband by Jane Doe, one of her husband's victims.

Dr. Quan did not offer any opinion as to whether the former Colonel's wife would seek a divorce if she was not guaranteed the kind of anonymity and privacy she sought through the non-publication and sealing orders. Nor did he have any first-hand knowledge of the media coverage as it related to his patient. Dr. Quan's hearsay opinion was given no weight by the Court of Appeal because:

> "There is, however, force to the [former Colonel's wife] submission that the absence of any affidavit from the respondent significantly undermines the weight that can be given to Dr. Quan's opinion. Without evidence from the respondent, much of what Dr. Quan said in his letters and reports is properly characterized as speculation and assumption.

It is clear that Dr. Quan's opinion as to the need for the non-publication and sealing orders was premised on his belief that the media had engaged in an unrelenting and very intrusive invasion of the respondent's privacy beginning when Williams was charged and continuing through to the proposed divorce proceedings. Dr. Quan's letters to counsel and his report are replete with phrases like "the media onslaught", the "media harassment regarding her private life", "the constant invasions of her privacy", "the media feeding frenzy", "the unwanted, undeserved and unproductive efforts of media to meddle in her private life" and the "persistent, insistent and incessant efforts of the media to gain entry into her private life.

There is quite simply no evidence to support any of these characterizations. The respondent was clearly the person who could have spoken most directly to her experiences with the media and the nature and degree to which her privacy had been invaded by the media. She chose not to do so. *Id.* at para. 53-55.

The Court of Appeal concluded that Dr. Quan's opinion rested entirely on his assumption that his patient would be subject to media harassment and incessant efforts to invade her privacy. Those assumptions had no foundation in the evidence and Dr. Quan's opinion did not provide the kind of convincing evidence needed to meet the rigorous standard demanded by the necessity branch of the *Dagenais/Mentuck* test. *Id.* at para. 57. Accordingly, all of the Motion Judge's non-publication and sealing orders were set aside.

Conclusion

Freedom of the press and the open court principle in family law proceedings were at stake in this appeal. Family law litigants cannot simply file hearsay evidence from their psychiatrist or psychologist who accuse the media of feeding frenzies and invasions of privacy. The convincing evidentiary standard is a significant burden to overcome and is not met even in cases of real emotional distress and embarrassment.

The Court of Appeal for Ontario has affirmed that family law proceedings are not different from any other type of civil proceeding. Openness is the rule. Secrecy is the exception. Litigants have an extremely high evidentiary threshold to overcome to obtain any secrecy regarding Court proceedings and records filed in Court files.

Richard G. Dearden, a partner with Gowling Lafleur Henderson LLP in Ottawa, Canada, represented The Ottawa Citizen, CTV Inc., The Canadian Broadcasting Corporation, Global Television and The Ottawa Sun in this case.

Dutch Movie Producer Wins Second Case Over Heineken Kidnapping Movie

Kidnappers' Reputation Claims Denied

By Tessel Peijnenburg & Jens van den Brink

On December 1, 2011 the Amsterdam Court rendered its judgment in the second summary proceeding over the Dutch movie 'De Heineken Ontvoering' (The Heineken Kidnapping), starring Rutger Hauer. This proceeding was instituted against producer IDTV by Frans Meijer and Jan Boellaard who were involved in the kidnapping of beer mogul Alfred Heineken. We reported in the October 2011 MediaLawLetter on the first summary proceeding, which was instituted by Willem Holleeder (also one of the kidnappers) against the producer. In that case, Holleeder's claims were denied by the court. This did not stop Meijer and Boellaard from starting a separate legal proceeding targeting the movie.

Background

The movie tells the story of the 1983 kidnapping of Alfred Heineken and his driver Ab Doderer. It does not claim to be a documentary: it is based on facts, but also contains fictitious elements, including fictitious characters and storylines. The two kidnappers complained that their roles are played by actors who look like them and dress like them, and their real names are used. (In the previous case, the character who resembled Holleeder was given a different name). As a result, they are fully identifiable and – according to the kidnappers – it will not be clear to the viewer which elements of the movie are fact, and which fiction. The movie is preceded by a general disclaimer:

> This movie is a cinematographic interpretation of the 1983 kidnapping of Alfred Heineken and does not aim to document what actually happened. Facts are mixed with fiction. The characters that appear in this movie are also to a large extent based on fiction.

However, Meijer and Boellaard were not satisfied with this disclaimer, as it does not indicate exactly which scenes are factually and which are fictitious. Their complaints were especially aimed at three scenes in which violence and weapons are used. In these scenes, respectively, one of the kidnappers shoots at a taxi, in other scenes weapons are used, and in a third scene the suggestion is raised that Meijer hit his girlfriend and gave her a black eye.

Meijer and Boellaard wanted a more extensive and more specific disclaimer stating that these scenes are fabrications. They also wanted this disclaimer published over the width and length of a full page in a number of newspapers.

Dutch Court Judgment

The Court began its judgment by setting out the legal framework.

> Allowance of the claim would entail a restriction of the right of freedom of expression to which IDTV is entitled, as set out in Article 10 of the ECHR.... In this case a lot of weight has to be attached to the fact that a maker of a film about a historical event is free – in view of the freedom of artistic expression – to use fictitious elements.... However, the freedom of the filmmaker may be limited if there are compelling interests of those involved in

(Continued on page 51)

(Continued from page 50)

> this historical event, especially the interest that they do not wish to be wrongly associated with fictitious elements that may constitute damage or damage to their reputation. Therefore, the question that has to be answered is whether Boellaard and Meijer have such interests, and whether in this case these interests outweigh the freedom of expression of IDTV.

The Court then pointed out the chilling effect if people could exercise control over the movie version of a historical event.

> [I]n this case there is no question of one single truth. The film is about an event which happened almost 30 years ago, in which various people were involved at various moments. Therefore, there is no clear-cut separation between fact and fiction, as Meijer and Boellaard claim.... Moreover, this [the detailed disclaimer] could lead to a "chilling effect," in the sense that various persons involved will claim their "own" disclaimer. This way the persons involved in a historical event could get too much grip on the making and composing of motion pictures."

Next, the Court discussed the three movie scenes which Meijer and Boellaard specifically pointed out as being fictitious and harmful. With respect to all three scenes, the Court in summary proceedings concluded that the fictitious elements did not justify granting the claims.

> Again, here it can be said, in the light of all facts and circumstances, that the fictitious elements are not so far removed from reality that the interests of Boellaard and Meijer are being affected in a serious manner.

With regard to the black eye scene, the Court found this fictitious element, while very serious, was not damaging to Meijer's reputation:

> [G]iven the other violence in the film for which the kidnappers are held responsible and against which Meijer has not objected, [the element is] not so extraordinary that it sheds a completely different light on the person of Frans. The fictitious element does not further affect his reputation."

The Court noted that the movie's disclaimer was on the screen for a fairly short time, which may mean that the average viewer did not immediately get the message. This is, however, in itself no reason to allow the claims. The public is, after all, aware that it is watching a motion picture and not a documentary. Furthermore, it is of importance that there has been extensive discussion in Dutch media about the mix of fact and fiction in the movie. IDTV also promised that the disclaimer on the DVD will be on the screen for a longer period, so that for the future it is sufficiently clear that the public will take cognizance of it. An order to also show the disclaimer in the cinema version for a longer time would be disproportionate in view of the costs and the difficult practical feasibility thereof. All claims of the kidnappers were denied.

Tessel Peijnenburg and Jens van den Brink of Kennedy Van der Laan in Amsterdam represented the movie producer IDTV in this litigation.

Ethics Corner: Court Sanctions Party and Counsel $722,000 for Spoliation of Facebook Evidence

By Travis Wimberly

A Virginia trial court recently granted monetary sanctions against a plaintiff and his attorney for spoliation of evidence from the plaintiff's personal Facebook page. Lester v. Allied Concrete Co., Nos. CL08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011) (unpublished order).

The lawsuit arose when plaintiff Isaiah Lester, individually and as administrator of his deceased wife's estate, sued Allied Concrete Company and one of its cement-truck drivers for negligently causing a car accident that killed his wife. During discovery, the defendants served Lester's attorney, Matthew B. Murray, with a request for production of documents.

Discovery of Facebook Postings

Among other things, the discovery request sought "screen print copies on the day this request is signed of all pages from Isaiah Lester's Facebook page, including but not limited to pictures, his profile, his message board, status updates and [all] messages sent or received." Id.

Attached to the request was a photo of Lester holding a beer can and wearing a t-shirt that said "I ♥ hot moms," which may have been taken shortly after his wife's accident. Id.

A paralegal at Murray's firm discovered that the photo had come from Lester's Facebook page. Murray instructed the paralegal to tell Lester to "clean up" his Facebook because "we don't want blowups of this stuff at trial." Following these directions, the paralegal emailed Lester twice. In the first email, she informed Lester about the "I ♥ hot moms" photo and stated that there were "some other pics that should be deleted." Id. at 11. In the second email, she echoed Murray's comments: "we do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace!" Id.

The same day his paralegal sent these emails, Murray began developing a response to the Facebook discovery request. However, the trial court found that instead of accurately responding to this request, Murray "created a scheme to take down or deactivate Lester's Facebook page." Id. After Murray communicated this plan to Lester, Lester complied and deactivated his Facebook page. Id. at 12. The next day, Murray signed and served a response to the discovery request stating that Lester "[did] not have a Facebook page on the date this is signed." Id.

Defense counsel promptly complained to Murray about his response and threatened to file a motion to compel. After conferring with another attorney at his law firm about Virginia's rules governing e-discovery, Murray decided to produce the Facebook screenshots and asked his paralegal to obtain them. The paralegal instructed Lester to reactive the account and then obtained the screenshots.

Shortly before the paralegal created the screenshots, however, Lester deleted 16 photos from his Facebook page. The trial court characterized this act as "consistent with the earlier directive from Murray to 'clean up' his Facebook account." Id.

The paralegal maintained that she did not know Murray had deleted the photos at the time she created the screenshots. Id. at 14. Similarly, Murray claimed that, at the time he delivered the Facebook screenshots to opposing counsel, he did not know that Lester had deleted the 16 photos.

During a deposition and on the witness stand at trial, Lester testified that he never deactivated his Facebook page. Id. at 15. The trial court found that Lester's "emails and later testimony appear to show that he knew this statement was false." Id. at 15. At another deposition, Lester admitted he deleted the 16 photos but claimed he made that decision without input from anyone else. Id. at 16.

After trial, the jury awarded Lester and the parents of his deceased wife approximately $8.6 million in total damages. Id. at 5. In post-trial motions, the defendants argued this verdict was excessive and that Murray and Lester should be sanctioned for spoliation of the Facebook evidence. Id. at 2,6.

Spoliation Claim & E-Discovery

The trial court agreed on both issues. In addition to reducing the jury award by approximately $4.13 million, id. at 29, the court found that Murray "chose to obstruct production of the requested screen-prints by drafting a

(Continued on page 53)

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deceptive response to [the discovery request] and then instructing his client to take down his Facebook page," a clear violation of Virginia's e-discovery rules. Id. at 24.

The court further concluded that Lester "did what Murray told him to do, deliberately delete Facebook photos that were responsive to a pending discovery request." Id. at 25. The court required that Murray pay the reasonable expenses—including attorney's fees—incurred by defense counsel as a result of his violation. Id. The court also noted that it would refer Murray's ethical violations to the Virginia bar. Id. at 25 nn.5-7.

The court then found that Lester had: (1) deactivated his Facebook account and claimed he did not have one in a "misleading" response to the defendants' discovery request; (2) deleted the 16 Facebook photos prior to their production; (3) misrepresented that he had never deactivated or deleted his Facebook page; and (4) claimed on the witness stand at trial that he had never deleted the 16 photos despite having previously admitted otherwise. Id. at 26. The court imposed monetary sanctions and stated that it would refer Lester's conduct to the Commonwealth Attorney to review allegations of possible perjury. Id. at 26-27.

The court required Murray to pay $542,000 and Lester to pay $180,000, with both sums going to the defense's law firm. Lester v. Allied Concrete Co., Nos. CL08-150, CL09-223 (Va. Cir. Ct. Oct. 1, 2011) (unpublished order).

Travis Wimberly is an appellate and litigation attorney at Vinson & Elkins LLP.