COMMITTEE REPORT

PREVAILING ON SUMMARY JUDGMENT UNDER A NEGLIGENCE STANDARD

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Media lawyers defending defamation claims brought by private-figure plaintiffs need not resign themselves to seeing the cases proceed to trial. Summary judgment is not an impossible goal.

Courts frequently regard questions of ordinary negligence as jury issues ill-suited for consideration on a motion for summary judgment. However, in the particular context of defamation or other content-based claims against the media, courts have granted summary judgment even under a negligence standard. As the following examples reflect, the likelihood of prevailing increases if the applicable state standard requires clear and convincing evidence, or even expert testimony, to support allegations of negligence, or if the news sources carry an extra measure of reliability (such as under the special "wire service" defense).

To assist and encourage MLRC members in the presentation of summary judgment motions in negligence situations, the Pretrial Committee has assembled potentially useful cases in this article. We present them in numerical order of federal circuit courts of appeals, followed by federal district court decisions and state court decisions in alphabetical order, for ease in locating the cases most pertinent to members' own cases. At the end, we present a few cases that discuss the negligence standard in helpful dicta. The cases are:

- Middleton v. Sutton, 24 Media L. Rep. 1639 (1st Cir. 1996) (unpublished) (affirming summary judgment for defendant in libel action against television program that "exercised reasonable care in [its] investigation" for report that portrayed plaintiff as one who had sexually abused and exploited his own children; the court noted: "The television program itself, despite a shallow pretence at serious reporting, was, as to the plaintiff, a highly colored

and inflammatory version of the events. But there seems to have been at least some evidence for, and some investigation of, various key charges.");

- Brown v. Hearst Corp., 54 F.3d 21 (1st Cir. 1995) (affirming summary judgment that television station was not negligent in broadcasting news report accurately reporting underlying facts of wife's disappearance and official suspicion that pilot/husband killed her, and holding no reasonable juror could infer defamatory meaning in alleged innuendo of murder by leading news report with reprise of recent pilot/husband murder in same small town, the "woodchipper murderer"); id. at 26 ("So far as the murder goes, [plaintiff] points to nothing to suggest that Channel 5 was negligent in its mustering of the available evidence. Some might think the broadcast gaudy journalism; certainly the interpolation of the woodchipper murder is largely gratuitous. But so far as guilt or innocence is concerned, [plaintiff] directs us to no significant inaccuracies in Channel 5's depiction of evidence. Nor does he point to any counterbalancing exculpatory evidence that Channel 5 wrongly withheld or that it would have discovered by diligent research.");

- Wiley v. Ohio/Oklahoma Hearst-Argyle Television, Inc., 33 F. App'x. 434, 437, 30 Media L. Rep. 1821 (10th Cir. 2002) (unpublished) (Appellate court affirmed summary judgment for television reporter who relied on police statements. Under controlling Oklahoma law, media negligence is determined under a professional negligence standard that ordinarily should be proven by an expert, and in this case, in "the face of defendant's affidavit evidence [from a journalism professor] that it complied with the standard of care, plaintiff could not simply rest on her argument that the broadcast of incorrect information inherently demonstrates

negligence." The court rejected plaintiff's argument that an ordinary layperson could determine negligence if a news station broadcast falsehoods that were not based on information actually gathered.);

- Walker v. The City of Oklahoma City, 2000 U.S. App. LEXIS 1677, 2000 Colo. J.C.A.R. 712 (10th Cir. 2000) (unpublished) (holding that, although fair report privilege did not apply to news report based on reporter's private discussion with police department public information officers, summary judgment in favor of television reporter was proper because broadcasts reflected the available conflicting information and plaintiff had failed to offer any evidence that reporter's reliance on the public information officers' statements constituted negligence; controlling Oklahoma law required that evidence of customs and practices within the news profession will normally come from an expert);

- Dresbach v. Doubleday & Co., 518 F. Supp. 1285, 7 Media L. Rep. 2105, 2110 (D. Colo. 1981) (summary judgment proper for book publisher that relied upon efforts of author, independently substantiated all potentially libelous matters, completely reviewed the author's sources, conducted interviews, had extensive discussions with author, and completely verified all matters from public records);

- Pierce v. The Clarion Ledger, 433 F. Supp.2d 754, 761-62 (S.D. Miss. 2006) (holding that editor who had no substantive involvement in publication of article could not be held accountable for its publication);

- Garza v. Hearst Corp., 23 Media L. Rep. 1733 (W.D. Tex. 1995) (granting summary judgment to newspaper that relied on photographic identification of plaintiff as provided by sheriff's office);

- Turner v. Harcourt, Brace, Jovanovich, 5 Media L. Rep. 1437, 1438 (W.D. Ky. 1979) (granting summary judgment for defendant magazine that described defamation plaintiff as "a crazed stablehand [who] kidnapped and assaulted" a woman; plaintiff failed to present evidence that magazine acted negligently, and magazine had a right to rely upon the accuracy of the statements of the victim of crime for a description of that event, inasmuch as she was the witness against plaintiff in the case which led to his conviction and her version of the incident was accepted by the jury);

- Kendrick v. Fox Television, 659 A.2d 814 (D.C. Ct. App. 1995) (affirming summary judgment that television station was not negligent in failing to obtain a school administrator/landlord plaintiff's side of the story before reporting on the air challenged statements about his possible involvement in tipping off drug dealers to police raid, or in reasonably relying on police statements which were not inherently suspicious);

- Karp v. Miami Herald Publ. Co., 359 So.2d 580 (Fla. Dist. Ct. App. 3d Dist.) (granting summary judgment; no negligence where reporter made reasonable efforts to contact plaintiffs for their version of circumstances prior to publication), appeal dismissed, 365 So.2d 712 (Fla. 1978);

- Phillips v. Washington Post Co., 8 Media L. Rep. 1835 (D.C. Superior Ct. 1982) (granting motion for summary judgment, despite plaintiff's claim that reporter acted negligently in failing to talk with homicide detectives prior to writing article; reporter based article on written police "hot line" report which had been established to eliminate need for personal interviews with police and which reporter previously had found to be accurate);

- Karp v. Miami Herald Publishing Co., 359 So.2d 580, 582 (Fla. Dist. Ct. App.), dismissed mem., 365 So.2d 712 (Fla. 1978) ("there was no genuine issue of material fact concerning the absence of negligence" where reporter got information about deportation charges from INS official and made reasonable efforts to contact plaintiffs prior to publication);

- Bates v. Times Picayune Publishing Corp., 527 So.2d 407, 411 (La. App.), writ denied, 532 So.2d 136 (La. 1988) (plaintiff's photograph was published with caption incorrectly naming him as a different person arrested in connection with a disturbance at a housing project; photographer had obtained identification of the photograph from police department; court affirmed summary judgment for newspaper, stating that defendant was without fault because it relied on a police source and had no reason to doubt the reliability of the information);

- Lovett v. Caddo Citizen, 584 So.2d 1197 (La. App. 1991) (newspaper did not act negligently in publishing article based upon information obtained from police chief, erroneously stating that plaintiff had been arrested in connection with a theft; appellate court reversed trial court judgment in plaintiff's favor and ordered the case dismissed);

- Appleby v. Daily Hampshire Gazette, 478 N.E.2d 721 (Mass. 1985) (affirming summary judgment and holding that newspaper is generally not negligent when it accurately restates, or publishes verbatim, information obtained from a reputable source, such as a wire service);

- Jones v. Taibbi, 512 N.E.2d 260, 269 (Mass. 1987) (affirming summary judgment as to certain statements, court stated "there is nothing in the record to indicate that the sources of these statements were unreliable, and, as to these statements, we perceive no evidence of conduct on the part of the defendants which could be considered negligent");

- Reilly v. Associated Press, 797 N.E.2d 1204, 1217 (Mass. App. Ct. 2003) (applying a "reverse wire service defense" to affirm summary judgment for the Associated Press, whose article was based on an article in the *Boston Herald*, the appeals court held that no jury could reasonably find that the AP acted negligently when the newspaper was recognized as a reputable news source, nothing on the face of the article appeared "inherently improbable or inconsistent," and the "article at least appears accurate and adequately researched." However, the court reversed summary judgment as to the newspaper, because of disputed issues of material fact as to whether the newspaper negligently published the story without first calling a willing source to clarify certain statements or alerting readers that there were disputed facts.);

- Divendra v. Tompkins, 26 Media L. Rep. 1528 (Mass. Super. Ct. 1997) (granting summary judgment in libel action based on several news reports about a drug raid on plaintiff's store); id. at 1531 ("While the question of negligence is generally for the jury to decide, this court

may decide the issue, as a matter of law, when no rational view of the evidence permits a finding of negligence."); id. at 1532 ("AP exercised due care in republishing articles, from an AP member newspaper, that were not inherently improbable. This court finds [plaintiff] cannot establish negligence, an essential element of her defamation claim. This conclusion is buttressed by the wire service defense.") id. ("By relying on the affidavit and search warrant executed by Hull Police, and the surveillance reports of the police officers, along with the accurate description of the arrests, WBZ exercised due care in its reporting of the drug raid. … WBZ accurately described [plaintiff] as the owner of the store and the report indicated that the police had no evidence that she participated in the illegal activity.");

- Greer v. Newark Morning Ledger, 26 Media L. Rep. 1959, 1960 (Mich. Ct. App. 1998) (unpublished) ("Absent evidence that the newspapers harbored a belief that the statements were false, or that they lacked reasonable grounds to believe in the truth of such statements, summary disposition for lack of proof of negligence was properly granted.");

- Howe v. Detroit Free Press, Inc., 219 Mich. App. 150, 555 N.W.2d 738, 741, 25 Media L. Rep. 1602 (Mich. Ct. App. 1996) (local news organization has no duty to independently verify wire service releases and as a matter of law cannot be negligent for failing to do so);

- Cole v. Star Tribune, 26 Media L. Rep. 1158, 1160 (Minn. Dist. Ct., Ramsey County 1997) ("Where a newspaper relies on the accuracy of a story from a reliable wire service, no reasonable jury could find negligence."), aff'd, 581 N.W.2d 364 (Minn. Ct. App. 1998);

- McKinney v. Avery Journal Inc., 393 S.E.2d 295, 297 (N.C. App.), rev. denied, 399 S.E.2d 123 (N.C. 1990) (newspaper was not negligent in relying on sheriff for information about plaintiff);

- Fuchs v. Scripps Howard Broadcasting Co., 868 N.E.2d 1024, 1039-40 (Ohio App. Ct. 2006) (affirming summary judgment in favor of broadcaster, applying state standard that private-figure defamation plaintiffs must show by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication; reporter contacted multiple unconnected knowledgeable sources for her investigative report on dental practices, and plaintiff refused to provide information to the reporter; court stated that it was "not sure what more [the reporter] could have done, given the intransigence she encountered");

- Benson v. Griffin Television, Inc., 593 P.2d 511, 514 (Okla. App. 1978), cert. denied (Okla. 1979) (reporter reasonably relied on police statements in making report, though erroneous, that plaintiff was suspect in local bank robbery);

- Torres-Silva v. El Mundo, Inc., 3 Media L. Rep. 1508 (P.R. 1977) (wire service, which erroneously reported that arrested individual was the son of the plaintiff, did not act negligently in relying on statements of police officers who identified family relationship; affirming summary judgment for defendants);

- Lewis v. News Channel 5 Network, L.P., 33 Media L. Rep. 1505, 1511 (Tenn. Cir. Ct. 2005) (in addition to granting summary judgment based on the fair report privilege, the court granted summary judgment because plaintiff "cannot establish that defendants were negligent in the reporting of the facts" of internal investigations within a police department, where the reporter received information from police officers, confirmed that information with the police officer most directly involved in the incident and further confirmed essential elements of that account with the Police Department's Office of Professional Accountability, listened to police radio transmission tapes that provided further confirmation, broadcast the report only after the police department had issued a press release that confirmed other parts of the story, and before the broadcast contacted the plaintiff who cursed the reporter but did not deny the allegations of misconduct);

- Holly v. Cannady, 669 S.W.2d 381, 384-385 (Tex. App. 1984) (there was "simply no evidence indicating the existence of circumstances which would have prompted a reasonable person to question the statements made and conclusions drawn by the city manager" concerning city investments);

- LaMon v. Butler, 770 P.2d 1027, 1030-1031 (Wash.), cert. denied, 493 U.S. 814 (1989) (affirming summary judgment for newspaper; reporter did not act negligently in relying upon city attorney's interpretation of court order);

- Dunlap v. Wayne, 716 P.2d 842, 849-850 (Wash. 1986) (affirming summary judgment in defamation action where plaintiff had not provided evidence necessary to create an issue of fact about any claim of negligence);

- Havalunch, Inc. v. Mazza, 294 S.E.2d 70, 76 (W.Va. 1982) (reversing judgment for plaintiff; "We find no . . . element of negligence present in this case. . . . Where there are facts which would lead a reasonably prudent person to formulate a harsh conclusion, the facts need not be disclosed and the statement of opinion becomes actionable only when nonexistent facts are implied.");

- Van Straten v. Milwaukee Journal, 447 N.W.2d 105, 111-112 (Wis. App. 1989), cert. denied, 496 U.S. 929 (1990) (holding that newspaper, which published article concerning suicide attempt by prisoner who had tested positive for HIV and who sprayed two jailers with his blood, did not act negligently in relying on statements made by jail personnel directly involved in incident, even though personnel mistakenly described prisoner as having AIDS rather than being HTLV-3-positive; summary judgment for newspaper affirmed);

- Cf. Baumback v. American Broadcasting Companies, Inc., 161 F.3d 1 (table), 1998 WL 536358 at **6, 1998 U.S. App. LEXIS 18770 at *18, 26 Media L. Rep. 2138, 2143 (4th Cir. 1998) (unpublished) ("we can see nothing negligent, let alone reckless, in ABC's choice of [plaintiff] to be the focus of its criticism");

- Cf. Littlefield v. Fort Dodge Messenger, 614 F.2d 581, 584 n.4 (8th Cir.) (dicta; "Even assuming that Iowa would adopt the negligence standard, it appears that Littlefield failed to make even that showing. The record indicates that the defendant reporter, who checked his story, in general terms, with a variety of sources including Littlefield, exercised due care in writing the piece."), cert. denied, 445 U.S. 945 (1980);

- Cf. Britton v. Koep, 470 N.W.2d 518, 524 (Minn. 1991) (affirming summary judgment for defendant and noting it was "difficult to find even a question of ordinary negligence, let alone malice, to submit to a jury").

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