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2001 SUMMARY JUDGMENT STUDY
AND
SUPREME COURT REPORT - 2000 TERM

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PART B: SUPREME COURT REPORT - 2000 TERM

PREFACE

In this BULLETIN, LDRC combines its sixth study of reported summary judgment decisions in media cases with its annual end-of-term review of the Supreme Court's decisions in matters affecting the media.

There is a lot to report. First, on the summary judgment front, the detailed study reveals that summary judgment continues as a very effective tool for media defendants in libel and privacy cases. Over the 20 years surveyed, reported decisions show that more than three-quarters of summary judgment motions are granted by state and federal trial in media cases and the appellate courts affirm those grants at equally high rates. Indeed, in the last study period, 1997-2000, federal appellate courts affirmed grants of summary judgment at an impressive 84.8 percent rate.

The tables and text that follow break these figures down through the last study period, the decades of the 1980s and the 1990s and the entire 20-year study period. LDRC also continues to offer the historical perspective of the pre- and post-*Andersen* periods. The methodology of the study is described in Appendix A of the Study, and the cases reviewed are listed in Appendix B.

Next, the Supreme Court. This term was an unusually active one from a media perspective. The decision in *Bartinicki v. Vopper* was a significant victory for the media, reaffirming the holding of *Smith v. Daily Mail* – absent a governmental interest of the highest order a prohibition on the publication of truthful information cannot satisfy constitutional standards – and specifically holding that the media must not be punished for the publication of illegally intercepted, newsworthy wiretap materials when the media does not participate in the illegal interception.

In *Tasini v. New York Times*, the result placed a decade of publishers' electronic archives into precarious condition. The Court deemed the inclusion in the archives of individual freelancers' articles impermissible reproductions of the articles, rather than permissible revisions of the collective works containing the articles. Without the freelance authors' express consent to reproduce their articles in that fashion, the publishers did not hold that right and were thus in violation of the copyright law. The Court remanded the case for consideration of a remedy.

As always, the Supreme Court review also surveys, through text and tables, the petitions for certiorari ruled upon and those awaiting resolution in the next term.

PART A. 2001 SUMMARY JUDGMENT STUDY

I. EXECUTIVE SUMMARY

What's included: This Study of summary judgment in media defamation cases from 1997 through 2000 is the sixth that the LDRC has conducted since 1980. For this Study, we examined a total of 296 cases (115 federal, 181 state) in which reported decisions were rendered on defense motions for summary judgment between Jan. 1, 1997 and Dec. 31, 2000. By combining these new cases with our existing database of 1,084 cases from 1980 through 1996, this Study offers a significant analysis of summary judgment in media libel and privacy cases over the past two decades.

What's excluded: The full methodology of this Study is described in Appendix A. But it is important to note that this Study, like its predecessors, includes only cases in which courts made reported rulings on defense motions for summary judgment. Although cases without any reported decisions are excluded, the Study nevertheless represents a valuable examination of court determinations of summary judgment motions in the context of libel, privacy and related causes of action against the media.

Ultimate disposition: As in previous studies, the media continue to enjoy a high rate of ultimate success in summary judgment motions. From 1980 to 2000, the media won 77.0 percent of summary judgment motions, and won partial summary judgment in an additional 8.7 percent of cases (Table 1). In the most recent period studied (1997-2000), 76.4 percent of cases ended in summary judgments for media defendants, while an additional 12.8 percent ended in partial summary judgment. Media defendants have obtained more ultimate success in state court than in federal court (Table 3), and those facing public plaintiffs[1] have had more success than defendants facing private plaintiffs[2] (Table 4).

Trial court decisions: At trial, the media won summary judgment in 80.3 percent of cases from 1980 to 2000, and won partial judgments in an additional 7.8 percent (Table 5). In 1997-2000, media defendants won summary judgment from trial courts in 76.6 percent of cases, and partial summary judgment in 10.8 percent. Again, defendants fared better in state court than federal court (Table 6). Defendants also won summary judgment more often in cases brought by public plaintiffs than in case brought by private plaintiffs, but in the 1990s the difference was slight (81.5 percent in public plaintiff cases, 75.6 percent in private plaintiff cases) (Table 7).

Appellate decisions: Appellate courts either affirmed trial court grants of summary judgment or reversed denials in 73.3 percent of cases before them from 1980-2000, and defense appeals were partially granted in 6.1 percent (Table 10A). In the most recent period (1997-2000), defendants prevailed on appeal in 76.1 percent of the appeals, and won a partially victory in 8.0 percent. While the defense victory rate on appeal was similar in both state and federal appeals courts for most of the Study period, the rate of successful defense appeals in federal courts has increased significantly in recent years and now exceeds the state rate (Table 10B). Defendants have consistently seen more appellate success in cases involving public plaintiffs, although the success rates for private plaintiff cases virtually doubled in the 1990s as compared to the 1980s (Table 10C).

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1. "Public plaintiffs" include public officials, public figures, and limited purpose public figures.

2. In this Study, "private plaintiffs" refers to private figures.

Libel Issues: In libel suits, actual malice is the single most-often litigated issue in summary judgment motions, and it has been successful 76.1 percent of the time in cases from 1980-June 1986, and in 82.6 percent of cases since July 1986 (Table 11). In the latter 14½ years, the issues with which defendants have been most successful have been hyperbole, actual malice, not provably false, opinion, parody and the statute of limitations.

Non-Libel Claims: The most common claims litigated in non-libel summary judgment cases were false light privacy, intentional infliction of emotional distress, "private facts" privacy, and misappropriation (Table 12). Defendants were highly successful in winning summary judgment on most privacy-based claims, with success rates ranging from 86.8 to 88.1 percent, although defense success rates were somewhat lower on eavesdropping (62.5 percent) and trespassing (66.7 percent) claims. Also highly successful were summary judgment motions on claims of injurious falsehood (one case, in which summary judgment was granted), tortious interference, intentional infliction of emotional distress, and negligent infliction of emotional distress, with success rates ranging from 88.0 to 91.7 percent.

Tables: This examination is presented in the tables below, broken down by a variety of criteria. In tables 1 through 4, only the ultimate disposition of the summary judgment motion – the "end result" – of each case is considered. Tables 5 through 7 include reported and unreported [3] trial court decisions, while tables 8A through 10C consider only appellate rulings.[4] Finally, Tables 11 and 12 examine the various issues and claims litigated by media defendants in summary judgment motions, and their relative success rates.

3. When an appellate decision was reported in a case for which there was no reported trial court decision, the result and reasoning at the trial level was imputed from the reported decision on appeal.

4. Because a case may go through multiple levels of appeal, the number of rulings – trial and appellate decisions – in the Study is greater than the number of cases. All together, the 296 new cases in the Study represent a total of 469 rulings.

II. FINDINGS OF THE LDRC SUMMARY JUDGMENT STUDY

A. ULTIMATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS

Tables 1 through 4 analyze the ultimate disposition of the summary judgment motion in each case in our Study – in other words, the result of the highest reported decision on the motion. A defendant was considered to have prevailed if a trial court grant of a defense motion for summary judgment was either not appealed or was finally affirmed, if a trial court denial was reversed and dismissed, or if a trial court denial was reversed and remanded and no further information is available.

TABLE 1: ULTIMATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS: BY DECADE AND PRE- AND POST-ANDERSON

	Total	Defendant Prevails		Plaintiff Prevails		Partial SJ	
		No.	%	No.	%	No.	%
NEW DATA							
1997-00	296	226	76.4	32	10.8	38	12.8
DECADES							
1990-99	646	507	78.5	75	11.6	64	9.9
1980-89	656	492	75.0	116	17.7	48	7.3
1980-00	1380	1062	77.0	198	14.3	120	8.7
ANDERSON ANALYSIS[5]							
July 1986-2000	992	772	77.8	123	12.4	97	9.8
1980-June 1986	388	290	74.7	75	19.3	23	5.9

The media continue their robust record of ultimate success in summary judgment motions in the Study data. Over the 21 years of data, the media have won 77.0 percent of summary judgment motions, and have won partial summary judgment in an additional 8.7 percent of cases.

By decade, the rate of total summary judgment victories increased from 74.9 percent in the 1980s to 78.5 percent in the 1990s. The frequency at which partial summary judgments were granted also increased, from 7.3 percent in the 80s to 9.9 percent in the 90s.

The new data added to the Study, covering 1997 through 2000, shows that in recent years summary judgment motions have been totally successful 76.4 percent of the time, and partially successful 12.8 percent of the time.

Our Study shows that the *Anderson* was followed by a slight boost in the rate at which summary judgments by media defendants were granted, either in whole or in part, in both state and federal courts. For the five and a half years of data we have prior to the *Anderson* decision, from

1980 to June 1986,[5] summary judgment motions were fully granted 74.6 percent of the time, and partially granted in 5.9 percent of cases.[6] In the 14½ years since *Anderson*, full summary judgments were granted 77.8 of the time, and partially granted 9.8 of the time. Looked at from the other perspective, defense summary judgments motions were totally rejected 19.0 percent of the time before *Anderson*, while they were rejected 12.4 percent of the time after that decision.

TABLE 2: ULTIMATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS YEAR-BY YEAR ANALYSIS

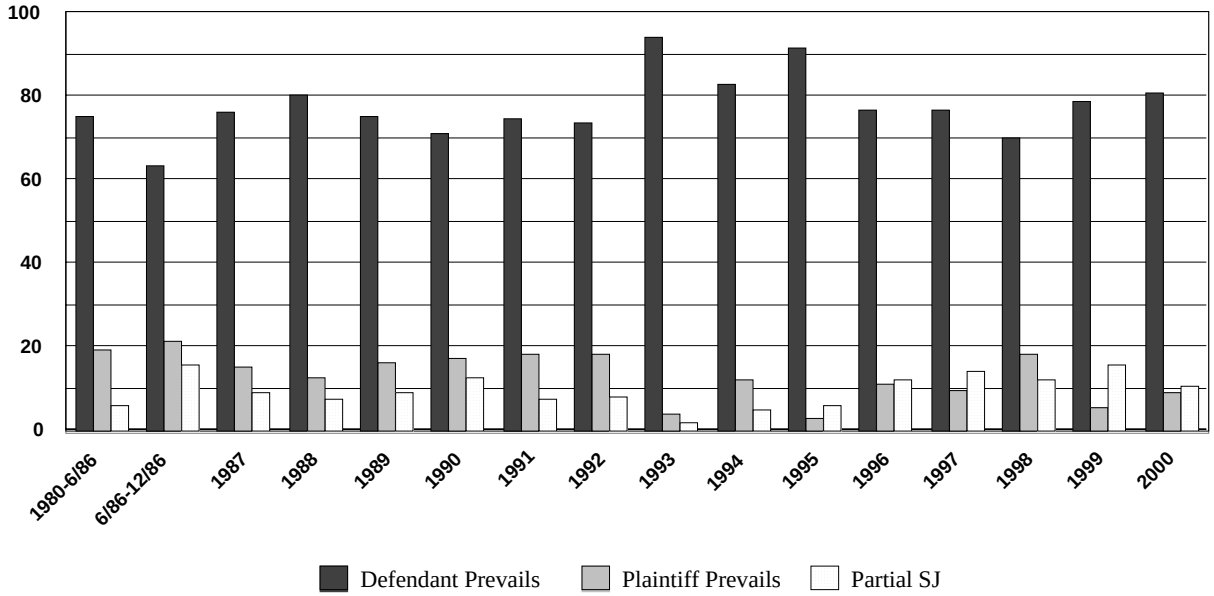
	Total	Defendant Prevails		Plaintiff Prevails		Partial SJ	
		No.	%	No.	%	No	%
2000	78	63	80.8	7	9.0	8	10.3
1999	71	56	78.9	4	5.6	11	15.5
1998	83	58	69.9	15	18.1	10	12.0
1997	64	49	76.6	6	9.4	9	14.1
1996	82	63	76.8	9	11.0	10	12.2
1995	69	63	91.3	2	2.9	4	5.8
1994	59	49	83.1	7	11.9	3	5.1
1993	49	46	93.9	2	4.1	1	2.0
1992	49	36	73.5	9	18.4	4	8.2
1991	55	41	74.5	10	18.2	4	7.3
1990	65	46	70.8	11	16.9	8	12.3
1989	68	51	75.0	11	16.2	6	8.8
1988	95	76	80.0	12	12.6	7	7.4
1987	67	51	76.1	10	14.9	6	9.0
July 1986-December 1986	38	24	63.2	8	21.1	6	15.8
1980-June 1986	387	290	74.9	74	19.1	23	5.9

FIGURE 1: ULTIMATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS: YEAR-BY-YEAR ANALYSIS

5. The U.S. Supreme Court ruling in *Anderson* was announced on June 25, 1986.

6. In prior LDRC studies, data for cases from 1980 to 1986 were originally presented with partial grants of summary judgement included within the figure for plaintiffs' victories. For Tables 1 through 8 of this Study, however, we have examined the results of these cases in order to remove the partial grants from the plaintiffs' victories figure.

While the rate at which summary judgment was granted to defendants slightly increased from the 1980s to the 1990s, a year-to-year analysis shows that the annual rate has fluctuated more than the decade-long figures would suggest.



Media defendants enjoyed their best rates of total victory in summary judgment motions in 1993 through 1995. In 1993, the media won full summary judgment in 93.9 percent of the reported cases. In 1994 this rate dipped to 83.1 percent, still one of the highest in our Study. But in 1995 the rate rebounded to 91.3 percent.

In all other years in the Study, the rate at which full summary judgment was granted remained at lower levels, ranging from a low of 69.9 percent in 1998 to a high of 80.8 percent in 2000.

While the total summary judgment rates in recent years have not been as robust as they were during the early to mid-1990s, the rate at which courts have granted partial summary judgment has grown considerably. Since 1997, the rate of partial summary judgment has remained in the double digits ranging from a low of 10.3 percent in 2000 to a high of 15.5 percent the previous year, 1999. This is in contrast to most of the years prior to 1997, when the rate at which defendants won partial summary judgment lurked in the single digits, and was generally declining.

TABLE 3: ULTIMATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS STATE VERSUS FEDERAL COURT

	Total	Defendant Prevails		Plaintiff Prevails		Partial SJ	
		No.	%	No.	%	No.	%
STATE							
NEW DATA							
1997-00	181	141	77.9	26	14.4	14	7.7
DECADES							
1990-99	421	337	80.0	57	13.5	27	6.4
1980-89	428	326	76.2	75	17.5	27	6.3
1980-00	889	695	78.2	139	15.6	55	6.2
ANDERSON ANALYSIS							
July 1986-2000	642	507	79.0	91	14.2	44	6.9
1980-June 1986	247	188	76.1	48	19.4	11	4.5
FEDERAL							
NEW DATA							
1997-00	115	85	73.9	6	5.2	24	20.9
DECADES							
1990-99	225	170	75.6	18	8.0	37	16.4
1980-89	226	165	73.0	40	17.7	21	9.3
1980-00	489	366	74.8	58	11.9	65	13.3
ANDERSON ANALYSIS							
July 1986-2000	350	265	75.7	32	9.1	53	15.1
1980-June 1986	139	101	72.7	26	18.7	12	8.6

Defendants have been slightly more successful in winning total grants of summary judgment in state court[7] than they have been in federal court. During the entire 21 years of data in our Study, defense motions for summary judgment were the ultimate result in 78.2 percent of state cases, while such total grants were the end result in 74.8 percent of federal cases in which such a motion was made.

The rate of complete summary judgment increased in both state and federal court from the 1980s to the 1990s. In state court, the figure for the 1980s was 76.2 percent of cases; in the 1990s, this increased to 80.0 percent. The rate during the 1980s in federal court,73.0 percent, rose to 75.6 percent during the 1990s.

7. In this Study, "state courts" include the local, non-federal courts of the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands.

A few states with a significant number of cases saw notable increases in the rates at which their courts granted full summary judgments.[8] New York's rate in 1986-1990, 72.2 percent (26 grants in 36 cases), increased to 87.9 percent (29 of 33) in 1991-1995, then fell back a bit to 81.6 percent (31 of 38) in 1996-2000. Michigan's 1986-1990 rate of 75.0 percent (12 of 16) rose to 83.3 percent (7 of 9) in 1991-1995, then leaped to 100.0 percent (8 of 8) in 1996-2000. Ohio saw an increase from 81.8 percent (18 of 22) to 100.0 percent (6 of 6), then a pullback to 90.0 percent (18 of 20).

The rate in federal courts in most circuits remained consistent. The rate in courts of the Second Circuit, however, first rose from 80.0 percent in 1986-1990 to 83.3 percent in 1991-1995, then dropped considerably, to 64.7 percent in 1996-2000.

But while defendants have been slightly more likely to receive entire grants of summary judgment in state court as opposed to federal court, they were also less likely to receive a partial summary judgment in state court. Thus a defendant's chance of receiving *some* relief – either a complete grant of summary judgment, or a partial grant – was actually higher in federal court than in state court.

In state courts during the 1980s, partial summary judgment was granted in 6.3 percent of cases; in the 1990s, this rate grew ever so slightly, to 6.4 percent. The increase in federal court was more significant: the partial summary judgment rate rose from 9.3 percent in the 1980s to 16.4 percent during the 1990s.

With the increases in full and partial summary judgment grants to media defendants, there was a corresponding decline in the percentage of cases in which defendants were refused any form of summary relief. In state court, these denials represented 17.5 percent of cases in the '80s (with a 19.4 percent rate in the pre-*Anderson* period), and 13.5 percent of cases in the '90s. The federal rate of defense losses, meanwhile dropped by half, from 17.7 percent in the '80s (18.7 percent pre-*Anderson*) to 8.0 percent in the 1990s. And in the year 2000, with 38 cases reported, media defendants received at least partial summary judgment in every reported case where they made such a motion in federal court; plaintiffs won none of these motions.

8. Since many individual states and circuits had too few reported cases for their figures to be deemed significant, we have not included the tables with these values in this report.

TABLE 4: ULTIMATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS
PUBLIC VERSUS PRIVATE PLAINTIFF

		Total	Defendant Prevails		Plaintiff Prevails		Partial SJ	
			N	%	N	%	No.	%
NEW DATA								
1997-00:	Public plaintiff	103	83	80.6	7	6.8	13	12.6
	Private plaintiff	41	24	58.5	8	19.5	9	22.0
DECADES								
1990-99:	Public plaintiff	234	198	84.6	16	6.8	20	8.5
	Private plaintiff	116	76	65.5	23	19.8	17	14.7
1980-89:	Public plaintiff	156	124	79.5	15	9.6	17	10.9
	Private plaintiff	66	37	56.1	12	18.2	17	25.8
1980-00:	Public plaintiff	419	345	82.3	32	7.6	42	10.0
	Private plaintiff	193	121	62.7	37	19.2	35	18.1
ANDERSON ANALYSIS								
July 1986-2000:	Public plaintiff	348	289	83.0	28	8.0	31	8.9
	Private plaintiff	160	102	63.8	34	21.3	24	15.0
1980-June 1986:	Public plaintiff	71	56	78.9	4	5.6	11	15.5
	Private plaintiff	33	19	57.6	3	9.1	11	33.3

In order to win a libel or privacy case against the media, plaintiffs who are public officials, public figures, or limited purpose public figures – referred to collectively as "public plaintiffs" in this Study – must show that the media acted with "actual malice."[9] Meanwhile, in most jurisdictions private figures – referred to here as "private plaintiffs" – must show a lower level of fault.[10]

In its infamous *Hutchinson* footnote, the U.S. Supreme Court stated that "[t]he proof of 'actual malice' calls a defendant's state of mind into question, and does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979). Later, in *Anderson*,

9. "In the context of a libel suit 'actual malice' simply does not mean ill-will or spite. Rather, 'malice' must be taken to mean fraudulent, knowing, publication of a falsehood, or reckless disregard of falsity. And we also note that reckless does not mean grossly negligent, its common use, but rather intentional disregard. When the Supreme Court uses a word, it means what the Court wants it to mean. 'Actual malice' is now a term of art having nothing to do with actual malice." *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 3 Media L. Rep. 1033 (S.D.N.Y. 1977).

10. Of the 54 U.S. states and territories, 45 jurisdictions apply the negligence standard to private plaintiff defamation cases, as permitted under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); one (New York) applies a gross irresponsibility standard in matters of pubic concern; four jurisdictions (Alaska, Colorado, Indiana and New Jersey) require actual malice in matters of public concern; and one jurisdiction (Louisiana) requires actual malice in some circumstances. The issue is unresolved in three states (Nebraska, North Dakota and South Dakota). *See LDRC 2000 Report on Significant Developments*, 2000 LDRC Bulletin Issue 4, at 16; *and* LDRC 50 STATE SURVEY 2000-2001: MEDIA LIBEL LAW, pp. 1108-1125 (Issue Status Tables).

the court wrote that this statement "was simply an acknowledgment of our general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 , 256 n.7 (1986) (citation omitted).

As a ruling of federal procedure, *Anderson*'s requirement that a defamation plaintiff show "clear and convincing evidence" of actual malice in order to survive a summary judgment motion is applicable only to federal courts. The states, many of which have a summary judgment rule which mirrors the federal provision, have taken various approaches to the issue:

- Ten states have explicitly adopted Anderson and its "clear and convincing" standard at the summary judgment stage.[11]
- 17 jurisdictions have adopted the "clear and convincing evidence" standard without explicitly adopting *Anderson*.[12]
- A dozen jurisdictions have generally favored granting summary judgment in media cases, without adopting *Anderson.*[13]
- Three states have adopted a "sufficient evidence" standard.[14]
- Two states have adopted their own, unique standards.[15]

11. Indiana, Iowa, Kansas, Michigan, Minnesota, Mississippi, Pennsylvania, Washington, West Virginia and Wisconsin.

12. Alabama, Arizona, Colorado, District of Columbia, Georgia (*Anderson* cited, but court stated that summary judgment is disfavored), Idaho, Illinois, Maine, Massachusetts, Montana, North Carolina, Ohio, Oklahoma, Puerto Rico, South Dakota (for public plaintiffs only; burden of proof for private figure plaintiffs remains a preponderance of evidence), Tennessee, Virgin Islands (*Anderson* cited, but court stated that summary judgment is disfavored) and Wyoming ("United States Supreme Court decisions" mentioned, but summary judgment disfavored).

13. Arkansas, California, Connecticut, Hawaii, Kentucky, South Carolina, Nebraska, Nevada, New York, North Dakota, Utah and Vermont.

14. Louisiana, ~~Massachusetts~~ and Missouri.

15. New Jersey has rejected *Anderson v. Liberty Lobby, Inc.*, in favor of standard which considers whether a genuine issue of material fact has been demonstrated on the question of publication with actual malice, noting, however, that there may be little practical difference between the two standards. In New Mexico, the standard is whether defendant had "belief or reasonable ground for belief in the truth of statement."

- Four states have not established any special standard for summary judgment in media cases, so normal standards for summary judgment apply.[16]

- Summary judgment is disfavored in media cases in three states.[17]

- The issue is unresolved in three states.[18]

Despite the different standards which must be met for summary judgment in media cases, it is of interest to examine how media defendants facing these different types of plaintiffs generally fare in making motions for summary judgment.

Not surprisingly, over the entire 21 years of Study data defendants have been more successful when facing a public plaintiff.[19] Defendants have received entire summary judgments in 82.3 percent of the cases involving public plaintiffs, while they have won such judgments in 62.7 percent of cases brought by private plaintiffs.

In the pre-*Anderson* period, defendants in cases brought by public plaintiffs won total summary judgment in 78.9 percent of cases, and partial summary judgment in 15.5 percent.[20] In rulings after *Anderson*, the defense victory rate increased to 83.0 percent for full summary judgment, while partial victories declined to 8.9 percent.

For media defendants seeking summary judgment in cases against private plaintiffs, the rate at which courts granted full summary judgment increased moderately, from 57.6 percent before *Anderson* to 63.8 percent afterwards. But more significant differences are seen in partial summary judgments and total denials: the partial summary judgment rate dropped from 33.3 percent to 15.0 percent, while the percentage of cases in which summary judgment motions were totally denied leaped from 9.1 percent before *Anderson* to 19.8 percent afterwards.

These differences are less obvious in a decade-by-decade analysis, since *Anderson* was decided roughly halfway through the 1980s. For that decade as a whole, defendants won total summary judgments 79.5 percent of the time and partial summary judgments 10.9 percent of the time when facing public plaintiffs. In the 1990s, the full summary judgment rate improved to 84.6 percent, while the partial rate dropped to 8.5 percent.

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16. Delaware, Oregon, Rhode Island and Texas.

17. Alaska, New Hampshire and Virginia.

18. The District Courts of Appeal in Florida differ on the issue. *Compare Cronley v. Pensacola News-Journal, Inc.*, 561 So.2d 402 (Fla. 1st DCA 1990); *with Lampkin-Asam v. Miami Daily News, Inc.*, 408 So.2d 666, 7 Media L. Rep. 2487 (Fla. 3d DCA 1981), *rev. denied*, 417 So.2d 329 (Fla.), *cert. denied*, 459 U.S. 806 (1982) *and Stewart v. Sun Sentinel Company*, 695 So. 2d 360, 25 Media L. Rep. 1763 (Fla. 4th DCA 1997), *rev. denied*, 697 So. 2d 512 (Fla. 1997).There have been no cases on the issue in Guam and Maryland (*but see National Life Ins. Co. v. Phillips Publ., Inc.*, 793 F. Supp. 627, 20 Media L. Rep. 1393 (D. Md. 1992) (applying *Anderson* in diversity action)).

19. The analysis of Study data based on plaintiff status only includes cases in which the court's ruling on this status can be determined.

20. *See* note 6, *supra*.

When facing private plaintiffs, the rate of total defense summary judgment victories rose from 56.1 percent in the '80s to 65.5 percent in the '90s. The rate at which defendants won partial summary judgment dropped from 25.8 percent of cases in the 1980s to 14.7 percent in the 1990s. The rate at which defense summary judgment motions were entirely denied rose from 18.2 percent in the 1980s to 21.4 percent in the 1990s.

SUMMARY JUDGMENT BEYOND THE MEDIA

As shown in Table 1, the media generally enjoy a high success rate when making summary judgment motions in libel, privacy and similar cases against them. Over the 21 years of LDRC data, the media have won a healthy 77.0 percent of the reported defense summary judgment motions, and have won partial summary judgment in an additional 8.7 percent of cases

Based on available statistics, it appears that the summary judgment victory rate in media cases stands in sharp contrast to the rate for civil cases as a whole. A study by the National Center for State Courts analyzing civil cases in state court in 45 of the 75 most populous counties in fiscal year 1992 found that only 3.5 percent were disposed of by summary judgment. Brian Ostrom and Neal Kauder, *Examining the Work of State Courts, 1995: A National Perspective from the Court Statistics Project*, at 23 (1995).[1]

The Florida jurisdictions in this study had exceptionally high summary judgment disposition rates: 14 percent of cases were disposed of by summary judgment in Dade County (now Miami-Dade County); 15.2 percent in Orange County (which includes Orlando); and 9.7 in Palm Beach County. New York County (Manhattan) also had a high rate, with 8.6 percent of cases being disposed of by summary judgment.[2]

The lowest rates of summary judgment disposition were in Allegheny County, Pa. (.2 percent),[3] and four California counties: Fresno (.4 percent), Orange (.4 percent), San Bernardino (.5 percent) and Los Angeles (.6 percent).[4] The two Connecticut counties in the study, Fairfield and Hartford, also had low rates (.7 and .8 percent, respectively), as did Middlesex County, New Jersey (.9 percent).[5]

1. Note that 1995 was the publication date of this report; the cases studied were from Fiscal Year 1992. Special thanks to NCSC Analyst Madelynn Herman for her assistance in accessing this information.

2. No other New York counties were included in the study.

3. The other Pennsylvania county in the study, Philadelphia, had a rate of 1.0 percent.

4. Rates in other California jurisdictions were slightly higher. The rate in San Francisco County was 1.2 percent, and it was 1.4 percent in Alameda County, 1.8 in Santa Clara County, and 2.1 in Contra Costa County.

5. The rates in the two other New Jersey counties were significantly higher: 2.3 percent in Essex County (including Newark) and 4.5 in Bergen County.

B. TRIAL COURT DISPOSITIONS

While the tables above are based on ultimate dispositions of summary judgment cases, tables 5 through 7 examine results at only the trial-level courts.[21]

21. Like the tables above, for the first time in this Study Table 5 thorough 7 offer separate data for partial grants of summary judgment in cases from 1980 to June 1986. *See* note 6, *supra*.

TABLE 5: TRIAL COURT DISPOSITION OF SUMMARY JUDGMENT MOTIONS AGGREGATE RESULTS

	Total	Defendants Prevails		Plaintiff Prevails		Partial SJ	
		No.	%	No.	%	No.	%
NEW DATA							
1997-00	286	219	76.6	36	12.6	31	10.8
DECADES							
1990-99	627	505	80.5	70	11.2	52	8.3
1980-89	487	389	79.9	65	13.3	33	6.8
1980-00	1190	955	80.3	142	11.9	93	7.8
ANDERSON ANALYSIS							
July 1986-2000	997	801	80.3	122	12.2	74	7.4
1980-June 1986	193	154	79.8	20	10.4	19	9.8

In the 21 years of reported cases in our database, defendants won total summary judgments from trial courts in 80.3 percent of cases, and won partial judgments in an additional 7.8 percent. Summary judgment motions were completely rejected in 11.9 percent of cases.

The results by decade are similar. In the 1980s, 79.9 percent of cases resulted in total summary judgment at the trial level, while 6.8 percent were partially granted. In the 1990s, these figures were 80.3 percent and 8.3 percent, respectively.

There were only slight changes in trial court results before and after *Anderson*. Prior to the decision, 79.8 of motions were granted, 9.8 percent were partially granted, and 10.4 percent were denied. After the Supreme Court's ruling, 80.3 percent of motions led to a total grant of summary judgment, 7.4 percent were granted in part, and 12.2 percent were denied.

TABLE 6: TRIAL COURT DISPOSITION OF SUMMARY JUDGMENT MOTIONS STATE VERSUS FEDERAL COURT

	Total	Defendant Prevails		Plaintiff Prevails		Partial SJ	
		No.	%	No.	%	No.	%
STATE							
NEW DATA							
1997-00	175	137	78.5	30	17.1	8	4.6
DECADES							
1990-99	403	333	82.6	53	13.2	17	4.2
1980-89	444	338	76.1	92	20.7	14	3.2
1980-00	886	702	79.2	152	17.2	32	3.6
ANDERSON ANALYSIS							
July 1986-2000	636	515	81.0	96	15.1	25	3.9
1980-June 1986	250	187	74.8	56	22.4	7	2.8
FEDERAL							
NEW DATA							
1997-00	111	82	73.9	6	5.4	23	20.7
DECADES							
1990-99	224	172	76.8	17	7.6	35	15.6
1980-89	238	186	78.2	33	13.9	19	8.0
1980-00	499	388	77.8	50	10.0	61	12.2
ANDERSON ANALYSIS							
July 1986-2000	361	286	79.2	26	7.2	49	13.6
1980-June 1986	138	102	73.9	24	17.4	12	8.7

Defendants were roughly equally successful in winning total summary judgment in state and federal trial courts. In state courts, 79.2 percent of cases between 1980 and 2000 ended with full dismissals, as did 77.8 percent of cases during this period in federal court.

The differences between federal and state court were more pronounced when it came to partial grants of summary judgment, and to denials. Trial courts granted partial summary judgment in 12.2 percent of federal cases, but only 3.6 percent of state cases. There was also a comparable and notable difference in the rates at which state and federal trial courts totally denied these motions: state courts denied them in 17.2 percent of cases, while federal courts denied them in 10.0 percent.

A comparison of the 1980s and 1990s shows a similar pattern of relatively minor changes in the rate of total grant levels between state and federal courts, but significant differences in the rates for partial grants and total denials.

In state trial-level courts, the percentage of motions granted in the 1990s was modestly higher than in the 1980s. In state trial courts during the ‘80s, 76.1 percent of motions were granted entirely, 3.2 percent were granted in part, and 20.7 percent were entirely denied. For the ‘90s, the corresponding state court figures were 82.6 percent total grants (a rise of 6.6 percent), 4.2 percent partial grants, and 13.2 percent total denials.

In federal trial courts, the grant rate was virtually the same in each decade, while the rate of partial grants rose. The figures were 78.2 percent totally granted, 8.0 percent partially granted, and 13.9 percent denied in the 1980s, and 76.8 percent granted, 15.6 percent partial and 7.6 percent denied in the 1990s.

The results in both state and federal trial courts were that plaintiffs defeated summary judgment motions at a lower rate in the 1990s in both state and federal trial courts.

TABLE 7: TRIAL COURT DISPOSITION OF SUMMARY JUDGMENT MOTIONS
PUBLIC VERSUS PRIVATE PLAINTIFF

		Total	Defendant Prevails		Plaintiff Prevails		Partial SJ	
			No.	%	No.	%	No.	%
NEW DATA								
1997-00:	Public plaintiff	47	34	72.3	2	4.3	11	23.4
	Private plaintiff	14	8	57.1	2	14.3	4	28.6
DECADES								
1990-99:	Public plaintiff	189	154	81.5	18	9.5	17	9.0
	Private plaintiff	93	75	80.6	9	9.7	9	9.7
1980-89:	Public plaintiff	158	135	85.4	14	8.9	9	5.7
	Private plaintiff	68	47	69.1	11	16.2	10	14.7
1980-00:	Public plaintiff	365	297	81.4	38	10.4	30	8.2
	Private plaintiff	164	124	75.6	20	12.2	20	12.2
ANDERSON ANALYSIS								
July 1986-2000:	Public plaintiff	287	234	81.5	31	10.8	22	7.7
	Private plaintiff	131	103	78.6	18	13.7	10	7.6
1980-June 1986:	Public plaintiff	72	63	87.5	1	1.4	8	11.1
	Private plaintiff	33	22	66.7	2	6.1	9	27.3

During the past two decades, media defendants have fared better in trial court rulings on summary judgement motions when facing a public plaintiff than they have against a private plaintiff. Trial courts have granted, in whole or in part, 89.6 percent of such motions in public plaintiff cases (81.4 granted totally, 8.2 percent granted in part). In private plaintiff cases, the media won whole or partial summary judgment in 88.2 percent of cases, but with a greater share of these (12.2 percent) were partial victories, leaving a 75.9 percent total victory rate.

In the 1980s, media defendants won a higher percentage of cases outright than in the 1990's (85.4% v. 81.6%) from trial courts in public plaintiff cases. In the 1990's media did somewhat better than in the 1980's in obtaining partial grants. The result is that public plaintiffs' ability to defeat media defendants' motions was basically the same between the two decades: 8.9 percent in the 1980's versus 9.5 percent in the 1990's.

The differences between the decades are more dramatic in private plaintiff cases. In the 1980s, summary judgment was granted in full by trial courts in 69.1 of private plaintiff cases, partially granted in 14.7 percent, and denied in 16.2 percent. In the '90s, the rate at which trial courts granted full summary judgment leaped to 80.6 percent and the rate of partial grants dropped to 9.7 percent. The rate of total media losses, meanwhile, dropped to 9.7 percent.

C. APPELLATE COURT DISPOSITIONS

The general success that defendants enjoy with their motions for summary judgment in trial

court continues on appeal, as shown in Tables 8A through 10C, which examine only appellate decisions. In a majority of these decisions, appellate courts affirmed trial court grants of summary judgment when plaintiffs appealed and reversed them when defendants appealed a denial.[22]

TABLE 8A: APPELLATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS PLAINTIFFS' APPEALS FROM TRIAL COURT GRANT

	Total	Grant Affirmed		Grant Reversed		Grant Partially Affirmed	
		No.	%	No.	%	No.	%
NEW DATA							
1997-00	134	101	75.4	20	14.9	13	9.7
DECADES							
1990-99	332	245	73.8	58	17.5	29	8.7
1980-89	313	236	75.4	64	20.4	13	4.2
1980-00	686	514	74.9	128	18.7	44	6.4
ANDERSON ANALYSIS							
July 1986-2000	529	395	74.7	91	17.2	43	8.1
1980-June 1986	157	119	75.8	37	23.6	1	0.6

There were 955 summary judgment motions which were fully granted in our database,[23] and 686 appellate decisions regarding these motions. In these appellate decisions, trial court grants were affirmed in three out of four decisions (74.9 percent), and the grant was partially affirmed in 6.4 percent. The trial court was reversed in 18.7 percent of decisions overall.

22. The numbers in Tables 8A through 10C represent all reported appellate decisions. For a case in which there has been more than one appellate decision (e.g, when a trial court decision is appealed first to an intermediate appellate court, then the jurisdiction's supreme court), there will be two appellate decisions included within these figures. Because of this, the numbers in these tables may not be used to calculate the rate at which plaintiffs appeal such grants. Also, *see* notes 31-38, *infra*, and accompanying text regarding the availability of interlocutory appeals.

23. *See* Table 5, *supra*.

The 75 percent figure for affirmance of trial court grants has remained consistent throughout the Study. There was a slight uptick, to 75.4 percent, in the latest data added to the Study, covering the years 1997 through 2000. In 2000 by itself, the affirmance rate was 80.5 percent. Meanwhile, the reversal rate for the 1997-2000 period is 14.9 percent, several percentage points lower than in prior periods; in 2000, it was 14.6 percent..

It is impossible to tell at this point whether this rise in affirmances and decline in reversals of summary judgment grants constitutes a trend, but the appellate treatment of summary judgment motions is certainly worth watching in future studies.

While the affirmance rate has remained generally consistent until recently, as noted above the rate at which appellate courts reversed trial court grants of summary judgment motions has been declining over a longer period of time. In the five and a half years of data before *Anderson*, the appellate reversal rate was 23.6 percent. Since *Anderson*, the rate has been 17.0 percent.

Correlated to the gradual decline of the reversal rate, the change in partial affirmances pre- and post-*Anderson* was much more dramatic. Form 1980 to 1986, there was only one decision in which a grant of summary judgment was partially affirmed – a rate of 0.6 percent. After *Anderson*, the rate rose more than 13-fold, to 8.1 percent.

TABLE 8B: APPELLATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS
PLAINTIFFS' APPEALS FROM TRIAL COURT GRANT – STATE VERSUS FEDERAL

	Total	Grant Affirmed		Grant Reversed		Grant Partially Affirmed	
		No.	%	No.	%	No.	%
STATE							
NEW DATA							
1997-00	101	73	72.3	18	17.8	10	9.9
DECADES (FROM 1986)							
1990-99	262	192	73.3	50	19.1	20	7.6
July 1986-89	122	92	75.4	21	17.2	9	7.4
July 1986-00	408	301	73.8	77	18.9	30	7.4
FEDERAL							
NEW DATA							
1997-00	33	28	84.8	2	6.1	3	9.1
DECADES (FROM 1986)							
1990-99	70	53	75.7	8	11.4	9	12.9
July 1986-89	34	25	73.5	6	17.6	3	8.8
July 1986-00	121	94	77.7	14	11.6	13	10.7

At the trial court level, media defendants were roughly equally successful in winning summary judgment in state and federal trial courts.[24].

On appeal, defendants have done better in federal court. Since *Anderson*,[25] state appeals courts have affirmed grants of summary judgment by trial courts in 73.8 percent of decisions, and partially affirmed these grants in 7.4 percent. Federal appeals courts, meanwhile, have affirmed summary judgment grants in 78.3 percent of decisions, and partially affirmed in 10.8 percent.

The difference between federal and state appellate results has been especially pronounced in recent years. From 1997 through 2000, the full affirmance rate in state court was 72.3 percent; the rate of partial affirmances was 9.9 percent. For the same period in federal court, the portion of fully affirmed summary judgment grants was 84.8 percent, and the partial affirmations constituted another 9.1 percent, for a whopping total of 93.9 percent of federal appeals decisions in which summary judgment grants were affirmed either in whole or in part.[26] In the year 2000, 16 of the 17 federal district court grants that were appealed were affirmed (94.1 percent); the other was partially affirmed.

TABLE 8C: APPELLATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS
PLAINTIFF'S APPEALS FROM TRIAL COURT GRANT – PUBLIC VERSUS PRIVATE PLAINTIFF

24. *See* Table 6, *supra*.

25. Because of the way in which LDRC studies prior to *Anderson* were reported, we are unable to provide data in Tables 9 and 10 for the pre-*Anderson* period. *Also see* note 6, *supra*.

26. It should be noted that these figures are based on 33 federal appellate decisions, while the state figures are based on 101 decisions.

		Total	Grant Affirmed		Grant Reversed		Grant Partially Affirmed	
			No.	%	No.	%	No.	%
NEW DATA								
1997-00:	Public plaintiff	42	37	88.1	4	9.5	1	2.4
	Private plaintiff	18	10	55.6	4	22.2	4	22.2
DECADES (FROM 1986)								
1990-99:	Public plaintiff	126	103	81.7	15	11.9	8	6.3
	Private plaintiff	57	34	59.6	14	24.6	9	15.8
July 1986-89:	Public plaintiff	56	46	82.1	6	10.7	4	7.1
	Private plaintiff	21	10	47.6	7	33.3	4	19.0
July 1986-00:	Public plaintiff	196	161	82.1	22	11.2	13	6.6
	Private plaintiff	84	48	57.1	23	27.4	13	15.5

Defendants have had more success in sustaining a grant of summary judgment on appeal involving a public plaintiff. In the post-*Anderson* period, summary judgment grants have been affirmed on appeal in 82.1 percent of decisions involving a public plaintiff, with an additional 7.1 percent affirmed in part. In decisions involving private plaintiffs, 57.1 percent of the summary judgment grants were affirmed, and 15.5 percent were affirmed in part.

The affirmance rate in public plaintiff decisions has risen slightly over the years: from July 1986 through 1989, the rate was 82.1 percent, while by the 1997-2000 period it had risen to 88.1 percent. In private plaintiff decisions, the rate rose from 47.6 percent in 1986-1989 to 55.6 percent in 1997-2000.

TABLE 9A: APPELLATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS
DEFENDANTS' APPEALS FROM TRIAL COURT DENIAL

	Total	Denial Affirmed		Rev'd/Dismissed		Rev'd/Remanded		Denial Partially	
		No.	%	No.	%	No.	%	No.	%
NEW DATA									
1997-00	31	7	22.6	23	74.2	1	3.2	0	0.0
DECADES									
1990-99	67	13	19.4	49	73.1	4	6.0	1	1.5
1980-89	70	27	38.6	30	42.9	11	15.7	2	2.9
1980-00	144	41	28.5	85	59.0	15	10.4	3	2.1
ANDERSON ANALYSIS									
July 1986-2000	110	25	22.7	68	61.8	14	12.7	3	2.7
1980-June 1986	34	16	47.1	17	50.0	1	2.9	0	0.0

The limited availability of interlocutory appeals is reflected in the small number of defendants' appeals from trial court summary judgment denials reflected in our Study. Our data include 144 decisions in appeals brought by defendants after trial courts denied summary judgment, while during the same period there were 684 decisions in plaintiff's appeals.[27]

In the federal courts, interlocutory appeals of summary judgment denials are virtually impossible. While a statute allows for such appeals,[28] federal courts are extremely reluctant to certify denials of summary judgment for interlocutory appeal.[29] In fact, there is only once case in our database in which a federal district court allowed a defendant to appeal a summary judgment denial – *Bartniki v. Vopper*.[30] (Because there is only one federal case, this Study does not contain a separate table comparing state and federal courts handle defendants' appeals from trial court denials – the figures would be virtually indistinguishable from those in Table 9A.) For a discussion of *Bartniki*, *see* Part B. SUPREME COURT REPORT - 2000 TERM, *infra*.

27. *See* Table 8A, *supra*. The figures in Table 9A represent all reported appellate decisions; each appellate decision in a single case is counted separately. *See* note 22, *supra*.

28. *See* 28 U.S.C. § 1292 (2001).

29. *See Johnson v. Jones*, 515 U.S. 304 (1995). *See also* John F. Wagner Jr., *Supreme Court's Views as to Immediate Appealability of Federal District Court's Denial of Motion for Summary Judgment in Civil Case*, 132 L. Ed. 2d 925 (1999).

30. 200 F.3d 109, 28 Media L. Rep. 1933 (3d Cir. 1999) (*rev'g and remanding*, 1996 U.S. Dist. LEXIS 22517 (M.D. Pa. June 14, 1996)). The final disposition of this case, in which the U.S. Supreme Court affirmed the appeals court reversal, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (U.S. 2001), falls outside the scope of this Study because the decision was rendered in 2001.

Four states – Arkansas[31], New York,[32] Puerto Rico[33] and Texas[34] – allow interlocutory appeals as of right.[35] An additional 43 jurisdictions allow such appeals in limited circumstances, although they are often so restricted as to be all but unavailable..[36] Three states have explicitly barred interlocutory appeals,[37] and the issue is unresolved in four jurisdictions.[38]

In the majority of the 144 decisions stemming from defense appeals of summary judgment denials – 59.0 percent – trial court denials were reversed and the cases dismissed. The denials were reversed and the case remanded in an additional 10.4 percent of decisions. Appeals courts affirmed summary judgment denials in 28.5 percent of decisions, and partially affirmed in 2.1 percent.

But breaking down these numbers shows that media defendants have fared better in recent years than they have in the past.

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31. *See* Ark. R.A.P. Civ. Rule 2(a)(2), (4) (2001).

32. *See* N.Y.C.P.L.R. 5701(a) (2001).

33. *See Garcia Cruz v. El Mundo, Inc.*, 108 D.P.R. 174 (P.R. 1978)

34. The Texas right of interlocutory appeal is limited to media defendants in cases involving the right to free speech. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(6) (2001). For an analysis of this statute and its impact, *see The Texas Interlocutory Appeal Statute*, 1999 LDRC BULLETIN NO. 2, 1-27.

35. Since 1999, California has allowed interlocutory appeals of denials of motions made under the state's anti-SLAPP statute. *See* Cal. Code Civ. Pro. §425.16(j) (2001); for discussion of the enactment of this law, *see* "Denials of Anti-SLAPP Motions Now Appealable in California," *LDRC LibelLetter*, Oct. 1999, at 42. While motions under California's anti-SLAPP statute are of the nature of summary judgment motions and have been used effectively to stop libel cases, *see, e.g., Sipple v. Foundation for Nat'l Progress*, 71 Cal. App. 4th 226, 83 Cal. Rptr. 2d 677 (1999), *rev. denied*, No. S078979, 1999 Cal. LEXIS 5229 (Cal. July 28, 1999), these motions are not included in the statistics in this Study. A bill currently pending in the California State Legislature would impose criteria to limit the ability of trial courts to grant and appellate courts to affirm summary judgment, although a section of the bill specifically provides an exception for media and other speech cases, stating that "[i]n cases involving issues of free speech or freedom of the press , summary judgment or summary adjudication is a favored remedy to avoid unnecessarily protracted litigation which might have a chilling effect on protected speech. In any case alleging false speech about a public official or figure, the plaintiff shall produce clear and convincing evidence from which a jury could find the publication was made with actual malice." S.B. 476, Cal. Legis. (amended May 10, 2001). The bill passed the State Senate on June 24, 2001, and was pending in the Assembly Judiciary Committee as this report was written.

36. "The Federal Rules and rule in most other states make such [interlocutory] appeals largely unattainable." Richard Winfield, "Interlocutory Appeals as of Right: The Time Has Come," 17 Communications Lawyer 18, 19 (Spring 1999).

37. The states barring interlocutory appeals are Connecticut, Kentucky and West Virginia.

38. These are Guam, Maryland, North Dakota and the U.S. Virgin Islands.

Prior to *Anderson*, a media defendant had a roughly even chance of getting a summary judgment denial reversed – appellate courts reversed and dismissed in exactly half the decisions in this period, and reversed and remanded in 2.9 percent (one decision); 47.1 percent were affirmed.[39] After *Anderson*, appeals courts reversed and dismissed in 61.8 percent of decisions, and reversed and remanded 12.7 percent of decisions. Only 22.7 percent of the appellate decisions affirmed trial court denials of summary judgment.

In the 1980s, the rate at which appeals courts affirmed denials was 38.6 percent; in the 1990s, this rate dropped to 19.4 percent. The reversal rates rose correspondingly – 69.2 percent were reversed and either dismissed or remanded in the '80s, while 79.7 percent of decisions in the '90s reversed and either dismissed or remanded trial decisions denying summary judgment

39. The pre-*Anderson* figures are of limited usefulness because of the limited number of decisions during this period – 34.

TABLE 9B: APPELLATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS
DEFENDANTS' APPEALS FROM TRIAL COURT DENIAL – PUBLIC VERSUS PRIVATE PLAINTIFF

		Total	Denial Affirmed		Rev'd/Dismissed		Rev'd/Remanded		Denial Partially Aff'd	
			No.	%	No.	%	No.	%	No.	%
NEW DATA										
1997-00:	Public plaintiff	10	1	10.0	8	80.0	1	10.0	0	0.0
	Private plaintiff	6	2	33.3	4	66.7	0	0.0	0	0.0
DECADES (FROM 1986)										
1990-99:	Public plaintiff	26	3	11.5	20	76.9	3	11.5	0	0.0
	Private plaintiff	17	7	41.2	9	52.9	0	0.0	1	5.9
July 1986-89:	Public plaintiff	11	3	27.3	3	27.3	5	45.5	0	0.0
	Private plaintiff	5	4	80.0	0	0.0	1	20.0	0	0.0
July 1986-00:	Public plaintiff	39	6	15.4	25	64.1	8	20.5	0	0.0
	Private plaintiff	22	11	50.0	9	40.9	1	4.5	1	4.5

While the number of decisions is small, defendants appealing the denial of summary judgment in public plaintiff cases are winning reversals and dismissals at a higher rate in the 1990's than they were previously. In 1986-1989, appeals courts reversed and remanded 45.5 percent of these cases, reversed and dismissed 27.3 percent, and affirmed the remaining 27.3 percent. In 1997-2000, however, appellate courts reversed and dismissed 80 percent of appeals involving public plaintiffs, while remanding only 10 percent.

While, again, the number of cases in the Study is rather small, the difference in the treatment of private plaintiff cases by appellate courts has apparently changed from the 1980s to the 1990s. In the data from 1986-1989, appellate courts affirmed denials in 80 percent (four decisions) of the private plaintiff appeals brought by defendants which led to appellate decisions. During the 1990s, however, courts affirmed only 41.2 percent (seven decisions), and reversed and dismissed 52.9 percent (nine decisions).

For the entire post-*Anderson* period, the rates of affirmance and reversal were not that far apart: in private plaintiff decisions the affirmance rate was 50 percent, while 40.9 percent of decisions reversed and dismissed, and an additional 4.5 percent (one decision) reversed and remanded.

TABLE 10A: APPELLATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS
ALL APPELLATE DECISIONS OF PLAINTIFFS' AND DEFENDANTS' APPEALS

	Total	Defendant Prevails		Plaintiff Prevails		Appeals Partially Granted	
		No.	%	No.	%	No.	%
NEW DATA							
1997-00	163	124	76.1	26	16.0	13	8.0
DECADES							
1990-99	394	294	74.6	70	17.8	30	7.6
1980-89	375	266	70.9	91	24.3	18	4.8
1980-00	817	599	73.3	168	20.6	50	6.1
ANDERSON ANALYSIS							
July 1986-2000	624	463	74.2	115	18.4	46	7.4
1980-June 1986	193	136	70.5	53	27.5	4	2.1

The net results of all summary judgement appeals – plaintiffs appealing grants and defendants appealing denials – were favorable to defendants in about three out of four (73.3 percent) decisions. Plaintiffs were the ultimate victors in 20.6 percent of decisions, and partial results – in which both parties achieve some of their goals in terms of summary judgment – accounted for 6.1 of all appellate decisions.

The rate of defense victories on appeal has been increasing. In the 1980s, defendants totally prevailed at the end of 70.9 percent of appeals; in the 1990s, this rate of appellate defense victories increased to 74.6 percent. In the most recent period studied, from 1997 through 2000, the ultimate defense victory rate on appeal increased to three-quarters (76.1 percent) of all appeals.

While defendants have always done well in these appeals, their appeals victory rate improved after *Anderson*, from 70.5 percent before the decision to 74.2 percent afterwards. At the same time, plaintiff victories dropped from 27.5 percent to 18.4 percent. Partial results jumped from 2.1 percent before *Anderson* to 7.4 percent afterwards.

TABLE 10B: APPELLATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS
ALL APPELLATE DECISIONS – STATE VERSUS FEDERAL COURT

	Total	Defendant Prevails		Plaintiff Prevails		Appeals Partially Granted	
		No.	%	No.	%	No.	%
STATE							
NEW DATA							
1997-00	124	96	77.4	25	20.2	3	2.4
DECADES (FROM 1986)							
1990-99	325	241	74.2	63	19.4	21	6.5
July 1986-89	148	105	70.9	32	21.6	11	7.4
July 1986-00	504	369	73.2	102	20.2	33	6.5
FEDERAL							
NEW DATA							
1997-00	32	28	87.5	1	3.1	3	9.4
DECADES (FROM 1986)							
1990-99	69	53	76.8	7	10.1	9	13.0
July 1986-89	34	25	73.5	6	17.6	3	8.8
July 1986-00	120	94	78.3	13	10.8	13	10.8

The high defense victory rate after appeal by either side is consistent between state and federal courts, although defendants fared slightly better in federal court. After *Anderson* until 2000,[40] defendants were the end winners in 73.2 percent of decisions by state appeals courts, and in 78.3 percent of federal appeals decisions.

Federal courts decisions have been especially favorable to defendants in recent years. From 1997 to 2000, the defendant was the end winner on summary judgment in 87.5 of appellate decisions, and they won partial verdicts in an additional 9.4 percent. In the year 2000, defendants prevailed in 94.1 percent of decisions, and won partial victory in 5.9 percent.

In state court, the 1997-2000 victory rate for defendants was 77.4 percent, with an additional 2.4 percent of decisions ending in partial defense victory. In 2000, defendants won 74.2 percent of the summary judgment appeals in state court, and won partial victory in 3.2 percent (one decision).

TABLE 10C: APPELLATE DISPOSITION OF SUMMARY JUDGMENT MOTIONS
ALL APPELLATE DECISIONS – PUBLIC VERSUS PRIVATE PLAINTIFF

40. *See* note 25, *supra*.

		Total	Defendant Prevails		Plaintiff Prevails		Partially Affirmed	
			No.	%	No.	%	No.	%
NEW DATA								
1997-00:	Public plaintiff:	52	45	86.5	5	9.6	2	3.8
	Private plaintiff:	25	14	56.0	6	24.0	5	20.0
DECADES (FROM 1986)								
1990-99:	Public plaintiff:	150	123	82.0	18	12.0	9	6.0
	Private plaintiff:	74	43	58.1	21	28.4	10	13.5
July 1986-89:	Public plaintiff:	64	49	76.6	9	14.1	6	9.4
	Private plaintiff:	27	10	37.0	11	40.7	6	22.2
July 1986-00:	Public plaintiff:	231	186	80.5	28	12.1	17	7.4
	Private plaintiff:	108	57	52.8	34	31.5	17	15.7

In appeals as a whole – brought by either party – defendants fare better with a public plaintiff than when a private plaintiff is involved. In all the post-*Anderson* decisions, defendants prevailed in appeals 80.5 percent of the time when a public plaintiff was involved, and 56.0 percent of the time with a private plaintiff.

In public plaintiff decisions, the rate of defense victories on appeal has increased from 76.6 percent in 1986-1989, to 86.5 percent in 1997-2000.

In private plaintiff decisions, the situation has shifted from one in which plaintiffs and defendants prevailed in appeals in roughly equal measure to one in which defendants now win more often. From July 1986 - 1989, defendants prevailed in 37.0 percent of these appeals; plaintiffs won 40.7 percent of appeals, and courts issued partial decisions in 22.2 percent. By 1997-2000, however, defendants won 56.0 percent of appeals; plaintiffs won 24.0 percent, and 20 percent of appeals resulted in partial victories for each side.

D. ISSUES AND CLAIMS CONSIDERED

Depending on the specific facts of a case, defendants may argue a number of issues to achieve summary judgment. Tables 11 and 12 analyze all of the decisions in our Study from this perspective, by analyzing courts' acceptance of these various arguments to determine which are the most successful.[41] Table 11 examines success rates of various libel issues in these decisions, while Table 12 looks privacy and other claims.[42]

1. Pre-Anderson Period (1980 - June 1986)

In the years of Study data prior to *Anderson*,[43] whether the plaintiff had shown a probability of proving actual malice was the libel issue most often argued by defendants in making summary judgment motions. Of the 377 libel issues raised in all defense summary judgment motions during this period, the actual malice issue was the basis of 163 (43.2 percent).[44] Other frequently raised issues were: (1) that the allegedly defamatory item was a statement of opinion (constituting 11.1 percent); (2) that the plaintiff was a public plaintiff (10.6 percent); (3) lack of defamatory meaning (8.2 percent); and (4) substantial truth of the statement alleged to be libelous (7.4 percent).

While actual malice was the most-often used argument by defendants in the pre-*Anderson* period, it was not the argument, as a matter of percentages, which brought them the most success -- although courts sided with the defense on this issue 76.1 percent of the time. The two issues that were most successful were the statute of limitations and the principle of "neutral reportage," which were both successful every time they were raised during this period, albeit they were not common arguments. They were followed by the substantial truth doctrine, which gave defendants a 96.4 percent success rate, and the fair report privilege, which led to defense-favorable rulings in 95 percent of cases.

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41. It is important to note that defendants' success on a particular issue does not mean that the summary judgment sought by the defendant was ultimately granted. Tables 11 and 12 chart only which arguments are ruled on by the court in favor of the defendant, not the ultimate result.

42. Both tables record every instance when an issue was raised and decided as part of a court ruling, at every level of court. Thus an issue which is raised in a single case at various levels of appeal will be counted multiple times in these tables.

43. LDRC tracked less issues during this period than in the post-*Anderson* period. Also, during this period partial defense victories were included within plaintiffs' victories.

44. Since each motion includes a number of arguments, the number of issues raised in Table 11 may exceed the number of motions in Table 2 (387 motions pre-*Anderson*; 992 post-*Anderson*). This is the case during the post-*Anderson* period, when 2,349 issues were raised in 992 motions. During the pre-*Anderson* period, the number of issues recorded in our Study (377), is actually lower than the number of motions (387). This is likely because of the limited number of issues tracked during this period. *See* note 43, *supra*.

The least successful libel issue for defendants in the pre-*Anderson* period was the argument that the defendant had not been negligent (successful only 26.3 percent of the time). Republication was only slightly more successful (33.3 percent). The defense argument that the plaintiff was actually a public plaintiff succeeded only half of the time it was raised.

Comparing the rates at which these arguments were raised by defendants and at which courts accepted them leads to some interesting conclusions. Substantial truth, which was only the fifth most-commonly raised issue and constituted 7.4 percent of arguments, was successful a remarkable 96.4 percent of the time. The third-most argued issue, the public figure status of the plaintiff, was successful only 50.0 percent of the time.[45]

2. Post-Anderson Period (July 1986 - 2000)

In the years since *Anderson*, the most-argued libel issues generally remained the same. Actual malice was still the most-often raised issue in defense summary judgement motions, constituting 14.6 percent[46] of arguments during this period. The second-most often raised libel issue[47] was again opinion (7.8 percent). Substantial truth became the third most commonly raised issue (7.4 percent), followed by defamatory meaning (rounded to 7.4 percent) and public figure status (6.6 percent).

The most successful argument post-*Anderson* was hyperbole (95.3 percent success rate), followed by the actual malice issue (82.6 percent), the argument that the alleged libel was not provably false (84.6 percent), opinion (81.0 percent) and parody and the statute of limitations (both 80.0 percent).

The least successful libel issue for defendants arguing summary judgment motions after *Anderson* was fair comment, which was won by defendants 60.0 percent of the times that it was raised. Slightly more successful were arguments of privilege (60.8 percent defense victory rate) and negligence (70.5 percent). Neutral reportage, the "of and concerning" requirement, and republication tied for the status of fourth least effective, each ending in defense victories 75.0 percent of the time.

Despite the differences in which libel issues were most useful to defendants arguing summary judgment motions in the pre- and post-*Anderson* periods, the similarity was that defendants were rather successful. Before *Anderson*, defendants received favorable rulings on 74.3 percent of the libel issues they raised; in the post-*Anderson* period, the rate of rulings favorable to the defense rose to 80.1 percent.

TABLE 11: LIBEL ISSUES CONSIDERED IN DEFENDANTS' SUMMARY JUDGMENT MOTIONS: ANDERSON ANALYSIS

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45. Of course, the determination of the issues raised by the defense in any particular case is highly fact-specific.

46. While the lower percentages for these leading issues in the post-*Anderson* period may imply that these issues are less important than they were in the pre-*Anderson* period, the likelihood is that the lower percentages are the result of the larger number of issues tracked in the post-*Anderson* period.

47. Other issues (those not specifically tracked), when grouped a whole, actually made up the second largest group.

	POST-ANDERSON 1986-2000							PRE-ANDERSON 1980-86				
	Total	Defendant Prevails		Plaintiff Prevails		Partial SJ		Total	Defendant Prevails (in whole only)		Plaintiff Prevails (in whole or part)	
		No.	%	No.	%	No.	%		No.	%	No.	%
Actual malice	391	323	82.6	56	14.3	12	3.1	163	124	76.1	39	23.9
Defamatory meaning	197	150	76.1	38	19.3	9	4.6	31	24	77.4	7	22.6
Fair Comment	20	12	60.0	8	40.0	0	0.0	–	–	–	–	–
Fair report	153	114	74.5	33	21.6	6	3.9	20	19	95.0	1	5.0
Falsity	120	93	77.5	23	19.2	4	3.3	–	–	–	–	–
Gross irresponsibility	48	35	72.9	11	22.9	2	4.2	11	7	63.6	4	36.4
Hyperbole	43	41	95.3	2	4.7	0	0.0	–	–	–	–	–
Negligence	61	43	70.5	17	27.9	1	1.6	19	5	26.3	14	73.7
Neutral Reportage	16	12	75.0	4	25.0	0	0.0	2	2	100.0	0	0.0
Of and concerning	40	30	75.0	10	25.0	0	0.0		–	–	–	–
Opinion	210	170	81.0	34	16.2	6	2.9	42	35	83.3	7	16.7
Not provably false	26	22	84.6	4	15.4	0	0.0	–	–	–	–	–
Parody	5	4	80.0	1	20.0	0	0.0	–	–	–	–	–
Privilege	51	31	60.8	19	37.3	1	2.0	6	5	83.3	1	16.7
Public figure	178	141	79.2	37	20.8	0	0.0	40	20	50.0	20	50.0
Republication	24	18	75.0	6	25.0	0	0.0	3	1	33.3	2	66.7
Statute of limitations	50	40	80.0	9	18.0	1	2.0	9	9	100.0	0	0.0
Substantial truth	199	159	79.9	32	16.1	8	4.0	28	27	96.4	1	3.6
Other Libel Issues	139	109	78.4	30	21.6	0	0.0	3	2	66.7	1	33.3
Total	1971	1547	78.5	374	19.0	50	2.5	377	280	74.3	97	25.7

TABLE 12: NON-LIBEL CLAIMS CONSIDERED ON DEFENDANTS' SUMMARY JUDGMENT MOTIONS

	POST-ANDERSON 1986-2000						
	Defendant's Motions						
	Total	Granted		Denied		Partially Denied	
		No.	%	No.	%	No.	%
PRIVACY CLAIMS							
Eavesdropping	8	5	62.5	2	25.0	1	12.5
False light	155	135	87.1	19	12.3	1	0.6
Intrusion	50	44	88.0	3	6.0	3	6.0
Misappropriation	76	66	86.8	9	11.8	1	1.3
Private facts	101	89	88.1	10	9.9	2	2.0
Trespass	15	10	66.7	5	33.3	0	0.0
Subtotal	405	349	86.2	48	11.9	8	2.0
OTHER CLAIMS							
Conspiracy	18	15	83.3	2	11.1	1	5.6
Fraud	19	14	73.7	4	21.1	1	5.3
Injurious Falsehood	1	1	100.0	0	0.0	0	0.0
Intentional Infliction of Emotional Distress	135	121	89.6	12	8.9	2	1.5
Negligent Infliction of Emotional Distress	25	22	88.0	3	12.0	0	0.0
Tortious Interference	36	33	91.7	3	8.3	0	0.0
Other	192	146	76.0	36	18.8	10	5.2
Subtotal	408	307	82.6	58	14.2	13	3.2
TOTAL	831	701	84.4	108	13.0	22	2.6

In addition to libel issues, the LDRC data since 1986 include the rates at which defendants successfully use arguments based on non-libel claims to obtain summary judgment.

The claims addressed were split almost equally between privacy and other non-libel claims. Of the privacy claims, the most frequently argued was false light, which constituted 38.7 percent of the privacy claims argued. It was followed by "private facts" (25.5 percent) and misappropriation (18.8 percent). The most frequently argued of the other claims[48] was intentional infliction of emotional distress (33.1 percent of the non-privacy claims), followed far behind by tortious interference (8.8 percent) and negligent infliction of emotional distress (6.1 percent).

Of the privacy claims, defendants saw the most success in summary judgment motions based on arguments regarding private facts (88.1 percent success rate), closely followed by intrusion (88.0 percent), false light (87.1 percent) and misappropriation (86.8 percent).

Defendants are least successful at summary judgment in privacy claims based on physical acts during newsgathering – eavesdropping and trespass.[49] In cases involving trespass claims, the media won summary judgment in 66.7 percent of cases; in alleged eavesdropping cases, summary judgment was granted to defendants 62.5 percent of the time.

Injurious falsehood had the highest victory rate for defendants among the non-privacy claims, since it was successful in the one decision in which it was discussed. Of the non-privacy claims decided in significant numbers of court decisions, the most successful were tortious interference (defense victory on the issue in 91.7 percent of the decisions which discussed it), intentional infliction on emotional distress (89.6 percent) and negligent infliction of emotional distress (88.0 percent).

48. An assortment of other non-privacy claims, grouped together as "Other" in Table 12, together constitute 47.1 percent of all the non-privacy claims argued. But no single claim in this group exceeds the figures for the top claims noted in this section.

49. The small number of cases in which these claims were raised may make these figures less significant than for claims which arose in more cases.

II. BACKGROUND AND HISTORY OF THE SUMMARY JUDGMENT STUDY

As this and LDRC's prior studies on summary judgment show, media defendants have generally enjoyed a high rate of successfully obtaining summary judgment in libel, privacy and similar cases. There was a time, however, when the viability of summary judgment motions in cases against the media was in doubt.

The questions surrounding summary judgment in media libel and privacy cases have mostly dissipated in light of U.S. Supreme Court and lower court decisions, and are now mainly of historical interest. But this history provides a background for the LDRC Study and underscores that the media and the legal defenders should not take the likelihood of summary judgment for granted.

A. AFTER *NEW YORK TIMES V. SULLIVAN*: SUMMARY JUDGMENT FAVORED

Summary judgment emerged from 19th century English law, and a few federal and state statutes from this era provided for summary judgment in limited circumstances.[50] The concept gained prominence through a seminal 1929 article by Professors Charles E. Clark and Charles U. Samenow. *See* Clark and Samenow, *The Summary Judgment*, 38 Yale L.J. 423 (1929).

Later, as the principal author of the Federal Rules of Civil Procedure adopted in 1938, Clark enshrined the procedure in Rule 56. In general, however, courts were reluctant to use their new power to grant summary judgment under this rule. *See* Schwarzer, Hirsch and Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 447 (1992).

In the libel context, this changed – in federal court, at least – after *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). After this decision, lower federal courts considering defendants' motions for summary judgment in defamation actions increasingly came to afford procedural protection to defendants, grounded in the substantive protections applicable to such actions under *Sullivan* and its progeny. The Fifth Circuit, for example, held that "where a publication is protected by the *New York Times* immunity rule, summary judgment, rather than trial on the merits, is the proper vehicle for affording constitutional protection . . ." *Bon Air Hotel v. Time*, 426 F.2d 858, 864-65 (5th Cir. 1980). And in the Second Circuit it was noted that "the courts in libel actions have recognized the need for affording summary relief to defendants in order to avoid the 'chilling effect' on freedom of speech and press." *Meeropol v. Nizer*, 381 F. Supp. 29, 32 (S.D.N.Y. 1974, *aff'd*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

In general, after *Sullivan* a consensus appeared to be forming amongst federal courts that summary judgment was "favored" in defamation cases in which the *Sullivan* "actual malice" standard applied. At the apogee of this approach favoring early pretrial dismissal, one court went as far as to observe that "because of the importance of free speech, summary judgment is the 'rule,' and not the exception, in defamation cases." *See Guitar v. Westinghouse Electric Corp.*, 396 F. Supp. 1042 (S.D.N.Y. 1975), *aff'd without opinion*, 538 F.2d 309 (2d Cir. 1976).

B. *HUTCHINSON*'S FOOTNOTE 9: "SO-CALLED RULE" QUESTIONED

But the Supreme Court seemed to question the appropriateness of summary judgment — at least in defamation cases governed by *Sullivan*'s "actual malice" standard — in *Hutchinson v.*

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50. The earliest recorded summary process in American courts was established in Virginia by 1732. Clark and Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 463 (1929).

Proxmire, 443 U.S. 111 (1979). In footnote 9 of the majority opinion, Chief Justice Burger questioned the notion that summary judgment in constitutional defamation cases "might well be the rule rather than the exception." *Id.* at 120.

> [W]e are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, and does not readily lend itself to summary disposition.

Id., at 120 n.9.

Justice Rehnquist also noted this position with approval in a footnote to his majority decision in another decision announced on the same day. *See Wolston v. Reader's Digest Association*, 443 U.S. 157, 161 n.3 (1979).[51]

While alarming to First Amendment practitioners, the declaration was consistent with the general hesitancy of both the Supreme Court and lower courts to grant summary judgment, at least in legally or factually complicated cases. For example, in *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), the Supreme Court stated that "summary procedures should be used sparingly in complex antitrust litigation." Six years later, the Court backtracked a bit, writing, "To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it." *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 289-290 (1968).

After *Hutchinson* and *Wolston*, some feared that footnote 9 might make summary judgment more difficult, if not impossible, for media defendants to obtain.

This concern led Stanford University Professor Marc A. Franklin to conduct a comprehensive study of reported decisions in libel cases against the media between January 1977 and October 1980.[52] While the number of cases in his sample that were decided after *Proxmire* and *Wolston* was limited, Franklin compared results on appeal from summary judgments before and after these decisions, and found there had not been much change. *See* Marc A. Franklin, Suing Media for Libel: A Litigation Study, 1981 A.B.F. RES. J. 795, 802.[53]

Some lower courts responded to footnote 9 by taking a more "neutral" stance towards

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51. Because *Hutchinson* was not a media case – the alleged libel involved a statement by a United States Senator – Franklin's study, discussed *infra*, and other sources cite *Wolston* as the first case in which the propriety of preferring summary judgment in defamation cases was questioned.

52. This study was derived from an earlier study Franklin had done of all libel trials, against all types of defendants (media and non-media), during this period. *See* Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 A.B.F. RES. J. 455.

53. Despite the stability of summary judgment rates before and after *Hutchinson*, Franklin later called for the creation of a legislative remedy which would allow courts to issue declaratory judgments that particular statements are false and defamatory, without awarding damages. *See* Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (May 1986) (refining proposal made in Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1 (1983)). Congressman Charles Schumer introduced a bill to create such a remedy in 1985, with some differences from Professor Franklin's proposal. *See* H.R. 2846, 99th Cong. (1985).

summary judgment motions in libel cases. The rates at which summary judgment motions were granted remained relatively high, but were no lower than they had been previously.[54]

> Until more directly advised, we think that this neutral approach correctly states the rule as it is presently in force: neither grant nor denial of a motion for summary judgment is to be preferred. Defamation actions are, for procedural purposes, such as discovery, or for summary judgment, to be treated no differently from other actions; any "chilling effect" caused by the defense of a lawsuit itself, is simply to be disregarded, to have no force and effect.

Yiamouyiannis v. Consumers Union of United States, 619 F.2d 932, 940, 6 Media L. Rep. 1065, 10 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980) (citations omitted).

It was at around this time that media groups established the Libel Defense Resource Center. One of the early studies performed by the new organization was an assessment of whether footnote 9 of *Hutchinson* had, in fact, adversely affected the availability of summary judgment in defamation actions.

In that Study, covering the two-year period immediately following *Hutchinson* (Oct. 1, 1980 - Aug. 24, 1982), LDRC documented that — while *Hutchinson* may have influenced some courts to move toward a more "neutral" rhetoric on the issue of summary judgment — the practical impact of footnote 9 had been minimal. The Study found that 75 percent of media defendants' summary judgment motions in reported defamation cases[55] were successful, and concluded that "despite *Hutchinson*, summary judgment [was] still being granted in the great majority of cases raising the issue of actual malice . . . "[56] LDRC BULLETIN No. 4 (Part 2) (1982), at 4.

D. *CALDER V. JONES*: THE ATTACK CONTINUES

In 1983, Supreme Court signaled that it might continue to mount an assault on special procedural protections in actual malice defamation cases. In *Calder v. Jones*, 465 U.S. 783 (1983), Justice Rehnquist cited and apparently reaffirmed footnote 9 when he observed for the Court that:

> [T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. . . . To reintroduce those concerns [as to procedural matters] would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws [citing, *inter alia*, *Hutchinson* footnote 9].

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54. In Franklin's study, defendants won summary judgment in 80 percent of the appellate decisions reported in Media Law Reporter which were decided between Jan. 1, 1977and June 26, 1979 (the day on which the *Hutchinson and Wolston* decisions were announced). After *Hutchinson* – between June 27, 1979 and the study's conclusion on Sept. 30, 1980 – appellate courts ruled for defendants in 74 percent of their reported decisions. The Franklin study does not divide trial court decisions into pre- and post-*Hutchinson/Wolston* eras.

55. This study, and all LDRC summary judgment studies through 1995, included mainly cases reported in the Media Law Reporter, plus a small number of other reported cases of which LDRC was aware. *See* notes 58 and 59, *infra*.

56. This rate has generally remained consistent through each of the LDRC summary judgment studies, including the latest one.

Id. at 790 (1983).

Thus concern was rekindled that the Supreme Court's view would impact negatively on the availability of summary judgment in media libel actions. In 1984 LDRC did a follow-up Study to again assess the impact of footnote 9, and once again documented that, in practice, summary judgment continued to be granted to media defendants in almost three out of every four reported defamation decisions (74 percent). *See* LDRC BULLETIN No. 12, at 2-35 (Sept. 15, 1984). A third Study that analyzed cases from mid-1984 to mid-1986 (prior to *Anderson v. Liberty Lobby*, discussed *infra*) found a similar result, with summary judgment granted in 76 percent of reported decisions. *See* LDRC BULLETIN No. 19, at 1-45 (May 31, 1987).

E. *LIBERTY LOBBY V. ANDERSON*: "CLEAR AND CONVINCING" STANDARD

Yet cause for concern remained. In a 1985 case, the 3rd Circuit flatly rejected the notion that summary judgment was favored in defamation cases against the media.

> In this case, the bench opinion of the district judge can reasonably be interpreted as expressing the view that, because of First Amendment concerns, summary judgment is more easily obtainable by a media defendant in a defamation case than by defendants in other cases. We reject that approach. A substantial dispute of material fact does not disappear merely because a media defendant is being sued, or because a public official is the plaintiff; and plaintiff's right to a jury trial is entitled to no less respect.

Lavin v. New York News, Inc., 757 F.2d 1416, 1419, 11 Media L. Rep. 1873, 1875 (3d Cir. 1985) (footnote quoting district court language omitted).

Three months later, the Supreme Court granted *certiorari* in *Liberty Lobby v. Anderson*, a defamation case hovering somewhere on the borderline between the categories outlined by Justice Rehnquist in *Calder* — between appropriately recognized "constitutional limitations on the substantive law governing such suits," and the "special procedural protections to defendants in libel and defamation actions" which the Supreme Court had disparaged in *Calder*.

In *Liberty Lobby*, the District Court had granted summary judgment, finding as to each of numerous allegedly defamatory statements a complete absence of any meaningful proof of actual malice in light of the reporter's "thorough . . . journalistic research underlying each statement." 562 F. Supp. 201, 209, 9 Media L. Rep. 1526, 1530 (D.D.C. 1983).

In the Court of Appeals, then-Judge Scalia's opinion affirmed the grant of summary judgment as to 21 of the 30 allegedly libelous statements. But he also found, with respect to the nine remaining alleged libels, that defendant's motion could only have been granted if *Sullivan*'s "clear and convincing" proof standard were incorporated into the analysis at the summary judgment stage. Despite substantial precedent supporting this approach, the D.C. Circuit held such a procedure to be inappropriate. Scalia's opinion held that:

> Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts as well . . . . It would effectively force the plaintiff to try his entire case in pretrial affidavits and depositions . . . . Finally, if summary judgment were supposed to be based on a "clear and convincing" standard, it is hard to explain the Supreme Court's

> questioning the asserted principle that in public figure libel cases "summary judgment might well be the rule rather than the exception," and affirming to the contrary that "[t]he proof of 'actual malice' . . . does not readily lend itself to summary disposition." [Citation to *Hutchinson* footnote 9 omitted.] There is slim basis for such a statement if, in order to survive a motion for summary judgment, the plaintiff must establish an arguably "clear and convincing" case.

Liberty Lobby v. Anderson, 746 F.2d 1563, 1570, 11 Media L. Rptr. 1001, 1005-06 (D.C. Cir. 1994).

The Supreme Court's grant of *certiorari* in *Liberty Lobby*, 471 U.S. 1134 (1985), offered the possibility that the D.C. Circuit's troubling ruling would be reversed. But this was the same Court that — as Judge Scalia observed — had so recently questioned the availability of summary judgment, and other "special procedural protections," in defamation actions.

It was consequently a great relief to media defendants when the Supreme Court rejected the grudging Scalia approach and ruled in *Liberty Lobby* that under the Federal Rules of Civil Procedure the heightened evidentiary standard which applies to proof of constitutional actual malice in such cases must be taken into consideration at the summary judgment stage.

Speaking for six members of the Court, Justice White held that "where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986).

Justice White also alleviated some of the confusion and concern that had been created by *Hutchinson* when, in the context of adopting a notably liberal summary judgment rule, he seemed to minimize the significance of footnote 9:

> Our statement in *Hutchinson* . . . that proof of actual malice "does not readily lend itself to summary disposition" was simply an acknowledgment of our general reluctance "to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws."

Id. at 256 n.7.

In other words, *Hutchinson* was not to be read as stating a rule intended generally to negate the availability of summary judgment in defamation actions — including on the issue of actual malice — or even as opposing the placement of a heavy burden on the public defamation plaintiff at the summary judgment stage. Instead, it merely reflected a general predisposition not to "double count" by adding procedural protections not already incorporated into the substantive constitutional law of defamation.

Anderson was just one of a trio of cases decided by the Supreme Court in 1986 which indicated a shift towards greater acceptance of summary judgment in federal court.[57] This trilogy

57. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Court rejected its earlier holding in *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), that summary judgment was inappropriate in antitrust suits. In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Court re-instated the trial court's

"changed the tone of the Court's perspective on summary judgment motions, signaling to lower courts that they should not be unduly cautious in granting these motions." Michael J. Davidson, *A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials*, 147 MIL. L. REV. 145 (1995).

For media practitioners, *Anderson* established that it was, indeed, possible to successfully dispose of cases through summary judgment motions.

> Since Anderson, it is virtually a 'given' that a libel defendant will move for summary judgment, whether on actual malice, substantial truth, opinion, qualified privilege or other grounds. A quick review of published district court opinions post-*Anderson* shows that summary judgment proceedings are the norm.

Samuel Fifer and Gregory Naron. *Summary Judgment and the First Amendment: A Decade After* Anderson v. Liberty Libby, LDRC BULLETIN 1997 No. 3, at 4 (July 31, 1997).

F. SUMMARY JUDGMENT AFTER *ANDERSON*

LDRC's next study on the issue reported on summary judgment motions in media libel cases during the eight and a half years immediately following the *Anderson* decision. *See* LDRC BULLETIN 1995 No. 3 (July 31, 1995). Again, more than three in four reported defamation cases (77 percent) ended with summary judgments for defendants. A later study covering reported summary judgment decisions in media defamation and privacy cases[58] from 1995 and 1996 found that summary judgment was granted in 82 percent of the cases – more than four out of five. *See* LDRC BULLETIN 1997 No. 3, at 25-67 (July 31, 1997).

The present Study, which updates the previous information through the year 2000, has similar results. The most recent data, which includes reported media cases between 1997 and 2000,[59] shows that 76.4 percent of cases during these years ultimately resulted in summary judgment for defendants.

Now that it has been 20 years since *Hutchinson*, it is apparent that fears that media defendants would have a difficult time winning summary judgment motions were unfounded. While the rate at which summary judgement motions were granted declined in the immediate aftermath of the decision, the media defendants continued to win summary judgment motions in about three-quarters of all cases. And in the 15 years since *Anderson v. Liberty Lobby* resolved questions of their validity, the summary judgment rate has increased.

The upshot is that the controversy regarding the appropriateness of summary judgment in media defamation cases has passed, and summary judgment motions are routinely made and, as the LDRC studies have consistently shown, routinely granted. Thus the periodic LDRC Reports on

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summary judgment for the defendant in a wrongful death action.

58. This was the first time that privacy cases were included in the study. Such cases constituted 20 of the 164 cases (12 percent) in the study. This study also marked the first time that an electronic database (Westlaw) was used to locate cases not reported in Media Law Reporter.

59. The current study data consists of libel, privacy and related cases against the media reported in Media Law Reporter or on Lexis.

Summary Judgment, like our reports on trial damages, complaints, and appellate results, offer a snapshot of how the media are faring in courts across the country.

IV. APPENDICES

APPENDIX A. METHODOLOGY

This is the sixth study of summary judgment motions that the LDRC has conducted since its founding in 1980. The methodologies of these various studies have evolved in light of new practice trends, and as new technology and information resources have become available.[60] The goal, however, has remained consistent: to chronicle and analyze cases against the media in which defense motions for summary judgment are made and then either granted or denied, by a trial or appellate court.

The cases included in this Study were found using two sources: the Media Law Reporter and the LEXIS legal database.

LDRC searched LEXIS and the Media Law Reporter for all opinions, both officially published and officially unpublished, issued by trial and appellate courts during the years from 1997 through 2000 in defamation and privacy cases against the media in which the court ruled on a motion for summary judgment. In addition, we also used LEXIS to Shepardize the two most prominent cases on the issue of summary judgment in media suits: *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The resulting list of cases found by these means are listed in section IV.

Information about these cases was determined by reading the decisions in each case. When an appellate decision was reported in a case for which there was no reported trial court decision, the result and reasoning at the trial level was imputed from the reported decision on appeal. This information was then coded and entered into a database which was used to create the tables in Section I.

Limiting the search to decisions reported in the Media Law Reporter and LEXIS, necessarily excludes cases without any decisions reported in these sources.[61] The Study nevertheless represents a valuable examination of court determinations of summary judgment motions in the context of libel, privacy and related causes of action against the media.

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60. Our last two studies, released in 1997 and 1995, used WESTLAW and the Media Law Reporter as its primary search tools. Our prior reports in 1987, 1984 and 1982 were based almost entirely on manual searches of the Media Law Reporter. The 1984 and 1982 studies also included some additional cases from LDRC's case files. The methodologies of these earlier studies were similar to the original 1981 study of media libel cases by Professor Marc Franklin, which used Media Law Reporter and 25 additional cases found in the West reporting system.

61. It is important to distinguish between "reported" and "unreported" decisions, by which we mean those that are available or not available to the public, and "published" and "unpublished" decisions, which is a judicial determination of whether a particular decision is worthy of being citable in future cases. This Study includes both published and unpublished decisions, but does not include unreported decisions.

APPENDIX B. LIST OF INCLUDED CASES

On the following pages is a list of the 296 cases (115 federal, 181 state) in which reported decisions were rendered on defense motions for summary judgment between Jan. 1, 1997 and Dec. 31, 2000. These cases were combined with our existing database of 1,084 cases from 1980 through 1996 to serve as the basis for the data in the tables and charts in this Study.

The cases are listed by jurisdiction (by federal circuit courts, then by state). Within each jurisdiction, cases are listed alphabetically within each level of court, starting with highest level court in the jurisdiction.

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
1st Circuit			
Emerito Estrada Rivera-Isuzu de P.R., Inc. v. Consumers Union of the U.S., Inc., 233 F.3d 24, 29 Media L. Rep. 1113 (1st Cir. 2000)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Of and Concerning, Other *Privacy Claims*: None *Other Claims:* Tortious Interference with Business
Faigin v. Kelly, 184 F.3d 67, 28 Media L. Rep. 1193 (1st Cir. 1999)	Partial Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice, Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Gray v. St. Martin's Press, Inc., 221 F.3d 243, 28 Media L. Rep. 2313 (1st Cir. 2000)	Partial Grant Affirmed	Public Plaintiff	*Libel Issues:* Not Provably False, Opinion, Privilege, Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Veilleux v. NBC, et al., 206 F.3d 92 (1st Cir. 2000)	PartialGrant Partially Affirmed	Private Plaintiff	*Libel Issues:* Falsity, Opinion *Privacy Claims*: False Light, Intrusion *Other Claims:* Negligent Infliction of Emotional Distress, Other
Howard v. Antilla, 1999 U.S. Dist. LEXIS 19772 (D.N.H. 1999)	Motion Granted in Part	Public Plaintiff	*Libel Issues:* Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Nat'l Ass'n of Gov't Employees v. BUCI Television, Inc., et al., 118 F. Supp. 2d 126 (D. Mass. 2000)	Motion Granted in Part	Public Plaintiff	*Libel Issues:* Actual Malice, Not Provably False *Privacy Claims*: False Light *Other Claims:* Other
Norris v. Bangor Publishing Co., 53 F. Supp. 2d 495 (D. Me. 1999)	Motion Granted in Part	Public Plaintiff	*Libel Issues:* Actual Malice, Defamatory Meaning, Other *Privacy Claims*: None *Other Claims:* Negligent Infliction of Emotional Distress, Tortious Interference with Business, Other
Riley v. Harr, 2000 U.S. Dist. LEXIS 8596 (D.N.H. 2000)	Motion Granted in Part	Public Plaintiff	*Libel Issues:* Defamatory Meaning, Hyperbole, Opinion, Substantial Truth *Privacy Claims*: False Light, Private Facts *Other Claims:* Intentional Infliction of Emotional Distress, Other
Robinson v. The Globe Newspaper Co., 26 F. Supp. 2d 195, 27 Media L. Rep. 1756 (D. Me. 1998)	Motion Granted	Private Plaintiff	*Libel Issues:* Falsity *Privacy Claims*: None *Other Claims:* None
The San Juan Star v. Casiano Communications, Inc., 85 F. Supp. 2d 89 (D.P.R. 2000)	Motion Granted in Part	Public Plaintiff	*Libel Issues:* Falsity *Privacy Claims*: None *Other Claims:* Other

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
2nd Circuit			
Chaiken v. VV Publishing Corp., 119 F.3d 1018, 25 Media L. Rep. 2025 (2d Cir. 1997)	Grant Affirmed	Private Plaintiff	*Libel Issues:* Gross Irresponsibility**,** Other *Privacy Claims*: None *Other Claims:* Intentional Infliction of Emotional Distress
Abbott v. Harris Public Relations, Inc., 28 Media L. Rep. 2642 (S.D.N.Y. 2000)	Motion Granted	Private Plaintiff	*Libel Issues:* Gross Irresponsibility *Privacy Claims*: None *Other Claims:* Other
Agnant v. Shakur, 30 F. Supp. 2d 420 (S.D.N.Y. 1998)	Motion Granted		*Libel Issues:* Defamatory Meaning**,** Other *Privacy Claims*: None *Other Claims:* None
Aequitron Medical, Inc. v. CBS, Inc., 964 F. Supp. 704, 25 Media L. Rep. 1897 (S.D.N.Y. 1997)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice**,** Falsity *Privacy Claims*: None *Other Claims:* Tortious Interference with Business, Other
Coliniatis v. Dimas, 965 F. Supp. 511 (S.D.N.Y. 1997)	Motion Granted	Public Plaintiff	*Libel Issues:* Defamatory Meaning**,** Neutral Reportage *Privacy Claims*: None *Other Claims:* None
Corporate Training Unlimited v. Nat'l Broadcasting Co., 981 F. Supp. 112, 26 Media L. Rep. 1417 (E.D. N.Y. 1997)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice**,** Hyperbole *Privacy Claims*: None *Other Claims:* None
Cowras v. Hard Copy et al. I, 1997 U.S. Dist. LEXIS 23514 (D. Conn. 1997)	Motion Granted in Part	Private Plaintiff	*Libel Issues:* Negligence**,** Republication**,** Substantial Truth *Privacy Claims*: Appropriation, False Light, Private Facts *Other Claims:* Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress
Cowras v. Hard Copy et al. II, 56 F. Supp. 2d 207 (D. Conn. 1999)	Motion Granted in Part	Private Plaintiff	*Libel Issues:* None *Privacy Claims*: None *Other Claims:* Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Other
Cox v. Abrams, 1997 U.S. Dist. LEXIS 6687 (S.D.N.Y. 1997)	Motion Granted		*Libel Issues:* None *Privacy Claims*: Private Facts *Other Claims:* Other
Jewell v. NYP Holdings, Inc., 23 F. Supp. 2d 348 (S.D.N.Y. 1998)	Motion Granted	Public Plaintiff	*Libel Issues:* Republication *Privacy Claims*: None *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Lopez v. Univision Communications Inc., 45 F. Supp. 2d 348 (S.D.N.Y. 1999)	Motion Granted in Part		*Libel Issues:* Gross Irresponsibility, Public Plaintiff, Substantial Truth *Privacy Claims*: None *Other Claims:* None
Shaw v. Rizzoli International Publications, 1999 U.S. Dist. LEXIS 3233 (S.D.N.Y. 1999)	Motion Granted in Part		*Libel Issues:* None *Privacy Claims*: Intrusion *Other Claims:* Other
Ty v. Celle, 1997 U.S. Dist. LEXIS 4456 (S.D.N.Y. 1997)	Motion Granted	Private Plaintiff	*Libel Issues:* Falsity, Of and Concerning, Opinion, Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Weber v. Multimedia Entertainment, Inc., 2000 U.S. Dist. LEXIS 5688 (S.D.N.Y. 2000)	Motion Granted		*Libel Issues:* Gross Irresponsibility, Negligence, Substantial Truth *Privacy Claims*: None *Other Claims:* Fraud, Other
Zupnick v. The Associated Press, Inc., 31 F. Supp. 2d 70, 26 Media L. Rep. 2084 (D. Conn. 1998)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice, Public Plaintiff *Privacy Claims*: None *Other Claims:* None
3rd Circuit			
Bartnicki v. Vopper, 200 F.3d 109, 28 Media L. Rep. 1933 (3d Cir. 1999)	Denial Reversed and Remanded		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* Other
Tucker v. MTS Inc., 28 Media L. Rep. 2276 (3d Cir. 2000)	Grant Affirmed		*Libel Issues:* Defamatory Meaning, Opinion *Privacy Claims*: False Light *Other Claims:* Intentional Infliction of Emotional Distress
Barrett v. The Catacombs Press, 64 F. Supp. 2d 440 (E.D. Pa. 1999)	Motion Granted		*Libel Issues:* Statute of Limitations *Privacy Claims*: None *Other Claims:* None
Byrne v. Journal Register Co., 1998 U.S. Dist. LEXIS 14808 (E.D. Pa. 1998)	Motion Granted		*Libel Issues:* Fair Report *Privacy Claims*: None *Other Claims:* None
Medure v. The New York Times Co., 60 F. Supp. 2d 477 (W.D. Pa. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice, Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Osby v. A&E Television Networks, 1997 U.S. Dist. LEXIS 8656 (E.D. Pa. 1997)	Motion Granted		*Libel Issues:* Defamatory Meaning *Privacy Claims*: False Light *Other Claims:* Other

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Tucker v. Fishbein, 27 Media L. Rep. 1663 (E.D. Pa. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Wilson v. Slatalla, et al., 970 F. Supp. 405, 25 Media L. Rep. 2281 (E.D. Pa. 1997)	Motion Granted in Part	Public Plaintiff	*Libel Issues:* Defamatory Meaning**,** Fair Report**,** Negligence**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
4th Circuit			
Barmoy v. The Times and Alleganian Co., 194 F.3d 1303 (4th Cir. 1999)	Grant Affirmed	Public Plaintiff	*Libel Issues:* None *Privacy Claims*: None *Other Claims:* None
Baumback v. American Broadcasting Companies, Inc., 26 Media L. Rep. 2138 (4th Cir. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Ditton v. Legal Times, 1997 U.S. App. LEXIS 29869 (4th Cir. 1997)	Grant Affirmed		*Libel Issues:* Fair Report *Privacy Claims*: None *Other Claims:* None
Faltas v. The State Newspaper, 1998 U.S. App. LEXIS 16316 (4th Cir. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Defamatory Meaning**,** Hyperbole**,** Republication *Privacy Claims*: None *Other Claims:* Conspiracy, Intentional Infliction of Emotional Distress, Tortious Interference with Business
Hopkins v. Lapchick, et al., 25 Media L. Rep. 2567 (4th Cir. 1997)	Grant Affirmed		*Libel Issues:* Defamatory Meaning**,** Opinion**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
The New Life Center, Inc. v. Fessio, et al., 28 Media L. Rep. 2249 (4th Cir. 2000)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* Other
Ogunde v. Alexandria Journal, 194 F.3d 1305 (4th Cir. 1999)	Grant Affirmed		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* None
Boyd v. University of Maryland Medical System, et al., 26 Med. L. Rep. 1401 (D. Md. 1998)	Motion Granted	Public Plaintiff	*Libel Issues:* Fair Report**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Carr v. Forbes, Inc., 121 F. Supp. 2d 485 (D.S.C. 2000)	Motion Granted	Public Plaintiff	*Libel Issues:* Public Plaintiff *Privacy Claims*: None *Other Claims:* Other
Hickey v. St. Martin's Press, Inc., 978 F. Supp. 230, 26 Media L. Rep. 1065 (D. Md. 1997)	Motion Granted		*Libel Issues:* Statute of Limitations**,** Other *Privacy Claims*: None *Other Claims:* None
Merrill v. McClatchy Newspapers, Inc., 1998 U.S. Dist. LEXIS 20972 (W.D.N.C. 1998)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
5th Circuit			
Peavy v. WFAA-TV, Inc., 221 F.3d 158, 28 Media L. Rep. 2601 (5th Cir. 2000)	Denial Affirmed in Part		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* Conspiracy, Other
Texas Beef Group v. Winfrey, 28 Media L. Rep. 1481 (5th Cir. 2000)	Grant Affirmed		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* Other
Davidson v. Time Warner, Inc., et al., 25 Media L. Rep. 1705 (S.D. Tex. 1997)	Motion Granted		*Libel Issues:* Defamatory Meaning**,** Negligence**,** Of and Concerning *Privacy Claims*: None *Other Claims:* Other
Green v. CBS Broadcasting, Inc., 29 Media L. Rep. 1321 (N.D. Tex. 2000)	Motion Granted	Public Plaintiff	*Libel Issues:* Falsity *Privacy Claims*: Private Facts *Other Claims:* Other
Martens v. Thomas, 27 Media L. Rep. 1913 (E.D. La. 1999)	Motion Granted		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* None
Martens v. Davis, 26 Media L. Rep. 1920 (E.D. La. 1998)	Motion Granted		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* None
Mayes v. Lin Television of Texas, Inc., 27 Media L. Rep. 1214 (N.D. Tex. 1998)	Motion Granted		*Libel Issues:* None *Privacy Claims:* Intrusion *Other Claims:* Intentional Infliction of Emotional Distress, Other

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Oliver v. WFAA-TV, Inc., et al., 37 F. Supp. 2d 495 (N.D. Tex. 1998)	Motion Granted		*Libel Issues:* None *Privacy Claims*: Intrusion, Private Facts *Other Claims:* Conspiracy, Intentional Infliction of Emotional Distress, Tortious Interference with Business, Other
Peavy v. New Times, Inc., 976 F. Supp. 532, 26 Media L. Rep. 1435 (N.D. Tex. 1997)	Motion Granted		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* Other
Sokolosky v. Dow Jones & Co. Inc., 29 Media L. Rep. 1026 (S.D. Tex. 2000)	Motion Granted	Private Plaintiff	*Libel Issues:* Substantial Truth *Privacy Claims*: None *Other Claims:* None
6th Circuit			
Adams v. Thomas Nelson Publishers, Inc., 2000 U.S. App. LEXIS 33147 (6th Cir. 2000)	Grant Affirmed	Private Plaintiff	*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* Intentional Infliction of Emotional Distress, Tortious Interference with Business
Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 28 Media L. Rep. 2328 (6th Cir. 2000)	Grant Affirmed		*Libel Issues:* None *Privacy Claims*: Appropriation *Other Claims:* Other
New Olde Village Jewelers, Inc. v. Outlett Communications, Inc., 2000 U.S. App. LEXIS 785 (6th Cir. 2000)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Negligence**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
Waterman v. Calt, 1997 U.S. App. LEXIS 34818 (6th Cir. 1997)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Barrett, et al. v. Outlet Broadcasting, Inc., 22 F. Supp. 2d 726 (S.D. Ohio 1997)	Motion Granted in Part		*Libel Issues:* None *Privacy Claims*: Trespassing *Other Claims:* Intentional Infliction of Emotional Distress, Other
ETW Corp. v. Jireh Publishing, Inc., 99 F. Supp. 2d 829 (N.D. Ohio 2000)	Motion Granted		*Libel Issues:* None *Privacy Claims*: Appropriation *Other Claims:* Fraud
Ferrara v. Detroit Free-Press, Inc., 26 Media L. Rep. 2355 (E.D. Mich. 1998)	Motion Granted		*Libel Issues:* None *Privacy Claims*: Eavesdropping, Intrusion *Other Claims:* Conspiracy, Tortious Interference with Business, Other

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Johnson v. The McGraw-Hill Co., Inc., 27 Media L. Rep. 1153 (E.D. Mich. 1998)	Motion Granted	Private Plaintiff	*Libel Issues:* Falsity**,** Opinion *Privacy Claims*: False Light *Other Claims:* Intentional Infliction of Emotional Distress
Mineer v. Williams, 82 F. Supp. 2d 702, 28 Media L. Rep. 1577 (E.D. Ky. 2000)	Motion Granted		*Libel Issues:* None *Privacy Claims*: False Light *Other Claims:* Intentional Infliction of Emotional Distress
Parks v.LaFace Records, 76 F. Supp. 2d 775 (E.D. Mich. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: False Light *Other Claims:* Conspiracy, Intentional Infliction of Emotional Distress, Tortious Interference with Business, Other
Reeves v. Fox Television Network, et al., 983 F. Supp. 703, 25 Media L. Rep. 2104 (N.D. Ohio 1997)	Motion Granted		*Libel Issues:* None *Privacy Claims*: Appropriation, False Light, Private Facts *Other Claims:* Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Other
Ruffin-Steinback v. de Passe, 28 Media L. Rep. 1417 (E.D. Mich. 2000)	Motion Granted in Part		*Libel Issues:* Fair Comment**,** Negligence**,** Other *Privacy Claims*: False Light, Private Facts *Other Claims:* Intentional Infliction of Emotional Distress, Other
7th Circuit			
Desnick v. ABC, Inc. II, 233 F.3d 514, 29 Media L. Rep. 1053 (7th Cir. 2000)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Ahn v. Midway Mfg. Co., 965 F. Supp. 1134 (N.D. Ill. 1997)	Motion Granted		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* Other
Desnick, et al. v. ABC, Inc. I, 27 Media L. Rep. 1673 (N.D. Ill. 1999)	Motion Granted in Part	Public Plaintiff/priv	*Libel Issues:* Actual Malice**,** Of and Concerning**,** Privilege**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
Russell v. American Broadcasting Co., Inc., 26 Media L. Rep. 1012 (N.D. Ill. 1997)	Motion Granted	Private Plaintiff	*Libel Issues:* Actual Malice**,** Other *Privacy Claims*: False Light *Other Claims:* None
Thompson v. Nat'l Catholic Reporter Pub'g Co., 4 F. Supp. 2d 833, 26 Media L. Rep. 2039 (E.D. Wisc. 1998)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff *Privacy Claims*: Private Facts *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
8th Circuit			
CMS Communications v. Siemens Rolm Communications, Inc., 187 F.3d 641 (8th Cir. 1999)	Grant Affirmed		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* Tortious Interference with Business
Michaelis v. CBS, Inc., 119 F.3d 697, 25 Media L. Rep. 1953 (8th Cir. 1997)	Grant Affirmed in Part	Private Plaintiff	*Libel Issues:* Defamatory Meaning**,** Fair Report**,** Of and Concerning**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Tuchschmidt v. Outdoor Writer's Association of America, 2000 U.S. App. LEXIS 25418 (8th Cir. 2000)	Grant Affirmed		*Libel Issues:* Falsity *Privacy Claims*: None *Other Claims:* None
Ashby v. Haney, 29 Media L. Rep. 1475 (W.D. Mo. 2000)	Motion Granted		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* None
Johnson v. Columbia Broadcasting System, Inc., 10 F. Supp. 2d 1071, 27 Media L. Rep. 1148 (D. Minn. 1998)	Motion Granted in Part	Private Plaintiff	*Libel Issues:* Hyperbole**,** Not Provably False**,** Opinion *Privacy Claims*: None *Other Claims:* None
Kenney v. Scripps Howard Broadcasting Co., 28 Media L. Rep. 2512 (W.D. Mo. 2000)	Motion Granted		*Libel Issues:* Defamatory Meaning**,** Fair Report *Privacy Claims*: None *Other Claims:* None
Stokes v. CBS Inc. , 25 F. Supp. 2d 992, 27 Media L. Rep. 1385 (D. Minn. 1998)	Motion Granted	Private Plaintiff	*Libel Issues:* Actual Malice**,** Defamatory Meaning**,** Fair Report**,** Falsity**,** Other *Privacy Claims*: None *Other Claims:* None
9th Circuit			
Berger v. Hanlon, 28 Media L. Rep. 1094 (9th Cir. 1999)	Grant Affirmed in Part		*Libel Issues:* None *Privacy Claims*: Trespassing *Other Claims:* Intentional Infliction of Emotional Distress, Other
Berlinger v. Corel Corp., 2000 U.S. App. LEXIS 8061 (9th Cir. 2000)	Grant Affirmed	Private Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Deteresa v. ABC Inc., 25 Media L. Rep. 2038 (9th Cir. 1997)	Grant Affirmed		*Libel Issues:* None *Privacy Claims*: Eavesdropping, Intrusion *Other Claims:* Fraud, Other

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Dodds v. American Broadcasting Co., Inc., 145 F.3d 1053 (9th Cir. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Finkelstein v. Kolbe, 2000 U.S. App. LEXIS 24056 (9th Cir. 2000)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Fontaine v. Blockbuster Entertainment, Inc., 2000 U.S. App. LEXIS 7094 (9th Cir. 2000)	Grant Affirmed		*Libel Issues:* None *Privacy Claims*: Appropriation *Other Claims:* None
Kaelin v. Globe Communications Corp., 162 F.3d 1036, 27 Media L. Rep. 1142 (9th Cir. 1998)	Grant Reversed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Defamatory Meaning *Privacy Claims*: None *Other Claims:* None
Smith v. Airborne Freight Corporation, 1997 U.S. App. LEXIS 21085 (9th Cir. 1997)	Grant Affirmed		*Libel Issues:* Privilege *Privacy Claims*: None *Other Claims:* None
Sussman v. ABC, 27 Media L. Rep. 2337 (9th Cir. 1999)	Motion Granted		*Libel Issues:* None *Privacy Claims*: Intrusion *Other Claims:* None
Wendt v. Host, 25 Med. L. Rep. 2345 (9th Cir. 1997)	Denial Reversed and Remanded	Public Plaintiff	*Libel Issues:* None *Privacy Claims*: Appropriation *Other Claims:* Other
Clark v. America Online, Inc., 2000 U.S. Dist. LEXIS 17368 (C.D. Cal. 2000)	Motion Granted in Part	Public Plaintiff	*Libel Issues:* None *Privacy Claims*: None *Other Claims:* Other
D.A.R.E. America v. Rolling Stone Magazine, 101 F. Supp. 2d 1270 (C.D. Cal. 2000)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice**,** Of and Concerning**,** Substantial Truth**,** Other *Privacy Claims*: None *Other Claims:* None
Hoffman v. Capital Cities/ABC, Inc., 27 Media L. Rep. 1534 (C.D. Cal. 1998)	Motion Granted		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* Other
Isuzu Motors Ltd. v. Consumers Union of the United States, Inc., 66 F. Supp. 2d 1117 (C.D. Cal. 1999)	Motion Granted in Part	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* Other

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Lee v. Penthouse Internat'l, Ltd., 25 Media L. Rep. 1651 (C.D. Cal. 1997)	Motion Granted	Public Plaintiff	*Libel Issues:* None *Privacy Claims*: Appropriation, Intrusion, Private Facts *Other Claims:* None
Medical Laboratory Management Consultants v. ABC Inc. II, 30 F. Supp. 2d 1182, 27 Media L. Rep. 1545 (D. Ariz. 1998)	Motion Granted in Part	Private Plaintiff	*Libel Issues:* Falsity *Privacy Claims*: Intrusion *Other Claims:* Fraud, Tortious Interference with Business, Other
Michaels v. Internet Entertainment Group, Inc., 27 Media L. Rep. 1097 (C.D. Cal. 1998)	Motion Granted		*Libel Issues:* None *Privacy Claims*: Appropriation, Private Facts *Other Claims:* Other
Silva v. The Hearst Corp., 26 Media L. Rep. 2421 (C.D. Cal. 1998)	Motion Granted	Public Plaintiff	*Libel Issues:* Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Suzuki Motor Corp. v. Consumers Union of the U.S., Inc., 2000 U.S. Dist. LEXIS 19608 (C.D. Cal. 2000)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Worrell-Payne v. Gannett Co. Inc., 29 Media L. Rep. 1205 (D. Idaho 2000)	Motion Granted	Public Plaintiff	*Libel Issues:* Defamatory Meaning**,** Fair Report**,** Not Provably False *Privacy Claims*: False Light *Other Claims:* Intentional Infliction of Emotional Distress, Tortious Interference with Business
10th Circuit			
Ben Ezra, Weinstein and Co., Inc. v. America Online Incorporated, 28 Media L. Rep. 2185 (10th Cir. 2000)	Grant Affirmed		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* None
Schwartz v. American College of Emergency Physicians, 215 F.3d 1140, 28 Media L. Rep. 1929 (10th Cir. 2000)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Falsity**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Walker v. City of Oklahoma City, et al., 2000 U.S. App. LEXIS 1677 (10th Cir. 2000)	Grant Affirmed	Private Plaintiff	*Libel Issues:* Negligence *Privacy Claims*: None *Other Claims:* None
Zeran v. Diamond Broadcasting, Inc., 203 F.3d 714, 28 Media L. Rep. 1401 (10th Cir. 2000)	Grant Affirmed		*Libel Issues:* Other *Privacy Claims*: False Light *Other Claims:* Intentional Infliction of Emotional Distress, Other

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Bosley v. Home Box Office, Inc., 59 F. Supp. 2d 1147 (D. Kan. 1999)	Motion Granted		*Libel Issues:* Actual Malice**,** Other *Privacy Claims*: None *Other Claims:* None
Miles v. National Enquirer, Inc. I, 31 F. Supp. 2d 869 (D. Colo. 1998)	Motion Granted in Part	Public Plaintiff	*Libel Issues:* Substantial Truth *Privacy Claims*: None *Other Claims:* Intentional Infliction of Emotional Distress, Other
Miles v. National Enquirer, Inc. II, 38 F. Supp. 2d 1226, 27 Media L. Rep. 1886 (D. Colo. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Peterson v. New York Times, 106 F. Supp. 2d 1227, 28 Media L. Rep. 2498 (D. Utah 2000)	Motion Granted	Public Plaintiff	*Libel Issues:* Public Plaintiff**,** *Privacy Claims*: None *Other Claims:* None
Printron, Inc. v. McGraw-Hill, Inc., 35 F. Supp. 2d 1325, 27 Media L. Rep. 1093 (D.N.M. 1998)	Motion Granted		*Libel Issues:* Statute of Limitations *Privacy Claims*: None *Other Claims:* None
11th Circuit			
Airtran Airlines Inc. v. Plain Dealer Publishing Co., 66 F. Supp. 2d 1355 (N.D. Ga. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Fair Report *Privacy Claims*: None *Other Claims:* None
Jaisinghani v. Capital Cities/ABC, Inc., et al., 973 F. Supp. 1450, 25 Media L. Rep. 1888 (S.D. Fla. 1997)	Motion Granted		*Libel Issues:* Statute of Limitations *Privacy Claims*: None *Other Claims:* None
Miller v. Twentieth Century Fox Internat'l Corp., 29 Media L. Rep. 1087 (M.D. Fla. 2000)	Motion Granted	Private Plaintiff	*Libel Issues:* Fair Report**,** Negligence**,** Of and Concerning *Privacy Claims*: Appropriation, Intrusion *Other Claims:* None
DC Circuit			
Blumenthal v. Drudge, 992 F. Supp. 44, 26 Media L. Rep. 1717 (D.D.C. 1998)	Motion Granted		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* None
Cline-Watkins v. Johnson Publishing Co., 26 Media L. Rep. 1986 (D.D.C. 1998)	Motion Granted		*Libel Issues:* Defamatory Meaning *Privacy Claims*: False Light *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Ellis v. Time Inc., 26 Media L. Rep. 1225 (D.D.C. 1997)	Motion Granted in Part	Public Plaintiff	*Libel Issues:* Actual Malice**,** Falsity**,** Opinion**,** Other *Privacy Claims*: None *Other Claims:* Tortious Interference with Business
Foretich v. ABC Inc., 26 Media L. Rep. 1171 (D.D.C. 1997)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice**,** Negligence *Privacy Claims*: Appropriation *Other Claims:* None
Metastorm, Inc. v. Gartner Group, Inc., 28 F. Supp. 2d 665, 27 Media L. Rep. 1433 (D.D.C. 1998)	Motion Granted in Part	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff**,** Other *Privacy Claims*: None *Other Claims:* None
Polsby v. Spruill, 25 Media L. Rep. 2259 (D.D.C. 1997)	Motion Granted	Public Plaintiff	*Libel Issues:* Defamatory Meaning**,** Of and Concerning *Privacy Claims*: False Light *Other Claims:* Intentional Infliction of Emotional Distress, Other
Q International Courier Inc. v. Seagraves, 27 Media L. Rep. 1982 (D.D.C. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice**,** Other *Privacy Claims*: False Light *Other Claims:* Fraud
Arkansas			
Little Rock Newspapers v. Fitzhugh, 330 Ark. 561, 26 Media L. Rep. 1801 (Ark. 1997)	Denial Affirmed		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* None
Southall v. Little Rock Newspapers, 332 Ark. 123, 26 Media L. Rep. 1815 (Ark. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Alabama			
Forrester v. WVTM TV, Inc. , 709 So.2d 23 (Ala. 1997)	Grant Affirmed	Private Plaintiff	*Libel Issues:* Actual Malice**,** Substantial Truth**,** Other *Privacy Claims*: None *Other Claims:* None
Blevins v. WF Barnes Corp., 768 So. 2d 386 (Ala. Civ. App. 1999)	Grant Affirmed in Part		*Libel Issues:* Defamatory Meaning**,** Hyperbole *Privacy Claims*: None *Other Claims:* None
White v. Anniston Star, 28 Media L. Rep. 2302 (Ala. Cir. Ct. 2000)	Motion Granted		*Libel Issues:* None *Privacy Claims*: Appropriation, Intrusion *Other Claims:* Other

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Arizona			
Church of Immortal Consciousness v. Ross, 27 Media L. Rep. 1955 (Ariz. Super. Ct. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: False Light *Other Claims:* None
Simon v. Arizona Bd of Regents, 28 Media L. Rep. 1240 (Ariz. Super. Ct. 1999)	Motion Granted		*Libel Issues:* Negligence**,** Statute of Limitations *Privacy Claims*: None *Other Claims:* Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress
California			
Shulman v. Group W Productions, Inc., 18 Cal. 4th 200, 26 Media L. Rep. 1737 (Cal. 1998)	Grant Affirmed in Part	Private Plaintiff	*Libel Issues:* None *Privacy Claims*: Intrusion, Private Facts *Other Claims:* None
Alsezh v. Home Box Office, 67 Cal. App. 4th 1456 (Cal. Ct. App. 1998)	Grant Affirmed		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* Other
Braun v. Chronicle Publishing Co., 52 Cal. App. 4th 1036 (Cal. Ct. App. 1997)	Grant Affirmed		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* None
Jackson v. Paramount Pictures Corporation, 68 Cal. App. 4th 10 (Cal. Ct. App. 1998)	Grant Affirmed		*Libel Issues:* Actual Malice**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
KNB Enterprises v. Matthews, 28 Media L. Rep. 1435 (Cal. Ct. App. 2000)	Grant Reversed		*Libel Issues:* None *Privacy Claims*: Appropriation *Other Claims:* Other
Polydoros v. Twentieth Century Fox Film Corp., et al., 67 Cal. App. 4th 318, 25 Media L. Rep. 2363 (Cal. Ct. App. 1997)	Grant Affirmed		*Libel Issues:* Defamatory Meaning**,** Negligence**,** Of and Concerning *Privacy Claims*: Appropriation *Other Claims:* None
Simtel Communications v. National Broadcasting Co., Inc., 27 Media L. Rep. 1865 (Cal. Ct. App. 1999)	Grant Affirmed		*Libel Issues:* None *Privacy Claims*: Intrusion, Private Facts *Other Claims:* Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Fraud

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Colorado			
Bueno v. Denver Publishing Co., 28 Media L. Rep. 2455 (Colo. Ct. App. 2000)	Partial Grant Affirmed	Private Plaintiff	*Libel Issues:* Negligence *Privacy Claims*: False Light, Private Facts *Other Claims:* None
Tonnessen v. The Denver Publishing Co., 28 Media L. Rep. 2039 (Colo. Ct. App. 2000)	Grant Affirmed		*Libel Issues:* Defamatory Meaning**,** Fair Report *Privacy Claims*: Private Facts *Other Claims:* None
Formby v. Chancellor Broadcasting Co., 26 Media L. Rep. 2468 (Colo. Dist. Ct. 1998)	Motion Granted		*Libel Issues:* Not Provably False *Privacy Claims: None* *Other Claims:* None
Stone v. New York Times, 27 Media L. Rep. 2206 (Colo. Dist. Ct. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: False Light *Other Claims:* None
United Food & Commercial Workers Union v. Ute City Tea Party, Ltd., 28 Media L. Rep. 2075 (Colo. Dist. Ct. 2000)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice**,** Falsity**,** Other *Privacy Claims*: False Light *Other Claims:* None
Connecticut			
Izzo v. Deafenbaugh, 1998 Conn. Super. LEXIS 2683 (Conn. Super. Ct. 2000)	Motion Granted		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* None
Perugini v. Journal Publishing Co., Inc., 1999 Conn. Super. LEXIS 419 (Conn. Super. Ct. 1999)	Grant Affirmed		*Libel Issues:* Defamatory Meaning *Privacy Claims*: None *Other Claims:* Intentional Infliction of Emotional Distress
Sweet v. The Utter Co., 1998 Conn. Super. LEXIS 2346 Conn. Super. Ct. 1998)	Motion Granted		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* None
William B. Jones v. New Haven Register, Inc., et al, 46 Conn. Supp. 634 (Conn. Super. Ct. 2000)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* None
District of Columbia			
Guilford Transportation Industries, Inc. v. Wilner, 760 A.2d 580 (D.C. 2000)	Grant Affirmed		*Libel Issues:* Falsity**,** Other *Privacy Claims*: None *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Kitt v. Capital Concerts, Inc., 28 Media L. Rep. 1538 (D.C. 1999)	Grant Affirmed		*Libel Issues:* Of and Concerning *Privacy Claims*: False Light *Other Claims:* Intentional Infliction of Emotional Distress, Fraud
Marcus Garvey Charter School v. Washington Times Corp, 27 Media L. Rep. 1225 (D.C. Super. Ct. 1998)	Motion Granted		*Libel Issues:* None *Privacy Claims*: False Light, Intrusion, Trespassing *Other Claims:* Intentional Infliction of Emotional Distress, Other
Florida			
Doe v. Univision Television Group, Inc., 26 Media L. Rep. 2342 (Fla. Dist. Ct. Appp. 1998)	Grant Affirmed in Part	Private Plaintiff	*Libel Issues:* None *Privacy Claims*: Private Facts *Other Claims:* Negligent Infliction of Emotional Distress, Other
Magnum Towing Inc. v. Sunbeam Television Corp., 27 Media L. Rep. 1730 Fla. Dist. Ct. App. 1998)	Grant Affirmed		*Libel Issues:* Hyperbole**,** Opinion**,** Privilege**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
Ovadia v. Bloom, 28 Media L. Rep. 2054 (Fla. Dist. Ct. App. 2000)	Grant Affirmed		*Libel Issues:* Statute of Limitations *Privacy Claims*: None *Other Claims:* None
Pep Boys v. New World Communications of Tampa, Inc., 27 Media L. Rep. 1286 (Fla. Dist. Ct. App. 1998)	Grant Reversed		*Libel Issues:* Falsity *Privacy Claims*: None *Other Claims:* None
The Putnam Berkley Group v. Dinin, 27 Media L. Rep. 2466 (Fla. Dist. Ct. App. 1999)	Denial Reversed and Dismissed		*Libel Issues:* Statute of Limitations**,** *Privacy Claims*: Appropriation, Intrusion *Other Claims:* None
Stewart v. The Sun Sentinal Co., 695 So. 2d 360 (Fla. Dist. Ct. App. 1997)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Bermuda Triangle Coffeehouse Co. v. Florida Media Affiliates Inc., 27 Media L. Rep. 1205 (Fla. Cir. Ct. 1998)	Motion Granted		*Libel Issues:* Defamatory Meaning**,** Fair Comment**,** Falsity**,** Negligence**,** Opinion**,** Other *Privacy Claims*: None *Other Claims:* None
Conidaris v. News-Press Publishing Co., 29 Media L. Rep. 1030 (Fla. Cir. Ct. 2000)	Motion Granted		*Libel Issues:* Hyperbole**,** Opinion**,** Substantial Truth**,** Other *Privacy Claims*: None *Other Claims:* None
Metlis v. Rhodes, 26 Media L. Rep. 1697 (Fla. Cir. Ct. 1998)	Motion Granted	Public Plaintiff	*Libel Issues:* Public Plaintiff *Privacy Claims*: None *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Steele v. Orlando Sentinel, 27 Media L. Rep. 1188 (Fla. Cir. Ct. 1998)	Motion Granted		*Libel Issues:* Fair Report**,** Falsity**,** Other *Privacy Claims*: None *Other Claims:* None
Georgia			
Bakhtiarnejad v. Cox Enterprises, Inc., 28 Media L. Rep. 2494 (Ga. Ct. App. 2000)	Grant Reversed		*Libel Issues:* Actual Malice**,** Other *Privacy Claims*: None *Other Claims:* Intentional Infliction of Emotional Distress
Blomberg v. Cox Enterprises, Inc., 25 Media L. Rep. 2342 (Ga. Ct. App. 1997)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Fair Report**,** Falsity**,** Neutral Reportage *Privacy Claims*: None *Other Claims:* None
Davis v. Emme Publishing Corp., 536 S.E.2d 809 (Ga. Ct. App. 2000)	Grant Affirmed		*Libel Issues:* Statute of Limitations *Privacy Claims*: False Light, Intrusion *Other Claims:* None
Jaillett v. Georgia Television Company, 520 S.E.2d 721 (Ga. Ct. App. 1999)	Grant Affirmed		*Libel Issues:* Defamatory Meaning**,** Opinion**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
Munoz v. American Lawyer Media, 27 Media L. Rep. 1764 (Ga. Ct. App. 1999)	Grant Affirmed in Part		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* Intentional Infliction of Emotional Distress, Other
Nix v. Cox Enterprises Inc., 28 Media L. Rep. 2085 (Ga. Ct. App. 2000)	Grant Reversed		*Libel Issues:* Substantial Truth *Privacy Claims*: None *Other Claims:* Other
Kennedy v. Southeastern Newspapers Corp., 28 Media L. Rep. 2519 (Ga. St. Ct. 2000)	Motion Granted		*Libel Issues:* Defamatory Meaning *Privacy Claims*: None *Other Claims:* None
Weaver v. Jensen, 27 Media L. Rep. 2146 (Ga. Super. Ct. 1999)	Motion Granted		*Libel Issues:* Substantial Truth *Privacy Claims*: None *Other Claims:* None
Weaver v. North Georgia News, 27 Media L. Rep. 1989 (Ga. Super. Ct. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Substantial Truth *Privacy Claims*: None *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Hawaii			
Gold v. Harrison, 26 Media L. Rep. 2313 (Haw. 1999)	Grant Affirmed		*Libel Issues:* Hyperbole**,** Other *Privacy Claims*: False Light *Other Claims:* Intentional Infliction of Emotional Distress
Jenkins v. Liberty Newspapers Limited Partnership, 27 Media L. Rep. 1513 (Haw. 1999)	Grant Affirmed		*Libel Issues:* Actual Malice**,** Negligence**,** Other *Privacy Claims*: None *Other Claims:* None
Idaho			
Uranga v. Federated Public Plaintiffations, Inc., 28 Media L. Rep. 2265 (Idaho Ct. App. 2000)	Grant Affirmed		*Libel Issues:* None *Privacy Claims*: False Light, Intrusion, Private Facts *Other Claims:* Intentional Infliction of Emotional Distress
Illinois			
McCrery v. Moffitt, 26 Media L. Rep. 1443 (Ill. App. Ct. 1997)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
Indiana			
Kitco, Inc. v. Corporation for General Trade (d/b/a WKJG, TV), 706 N.E.2d 581 Ind. Ct. App. 1999)	Grant Affirmed	Private Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Kentucky			
Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724 (Ky. 1999)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: False Light *Other Claims:* None
Deasy v. Cosmos Broadcasting Corp., 29 Media L. Rep. 1264 (Ky. Ct. App. 2000)	Grant Affirmed		*Libel Issues:* Falsity**,** Substantial Truth *Privacy Claims*: False Light *Other Claims:* None
Louisiana			
Keller v. Aymond, 722 So. 2d 1224 (La. Ct. App. 1998)	Grant Reversed		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* Other

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Massachusetts			
Shaari v. Harvard Student Agencies, Inc., 26 Media L. Rep. 1730 (Mass. 1998)	Denial Reversed and Dismissed		*Libel Issues:* Falsity *Privacy Claims*: None *Other Claims:* None
Peckham v. Boston Herald Inc., 28 Media L. Rep. 1179 (Mass. App. Ct. 1999)	Grant Affirmed	Public Plaintiff	*Libel Issues:* None *Privacy Claims*: Private Facts *Other Claims:* None
Ayash v. Dana Farber Cancer Inst., 1997 Mass. Super. LEXIS 354 (Mass. Super. Ct. 1997)	Motion Granted		*Libel Issues:* None *Privacy Claims*: Private Facts *Other Claims:* None
Cook v. WHDH-TV Inc., 27 Media L. Rep. 1242 (Mass. Super. Ct. 1998)	Motion Granted in Part		*Libel Issues:* Opinion *Privacy Claims*: Intrusion *Other Claims:* Other
Divendra v. Tompkins, et al., 26 Media L. Rep. 1528 (Mass. Super. Ct. 1997)	Motion Granted		*Libel Issues:* Defamatory Meaning**,** Negligence**,** Republication *Privacy Claims*: None *Other Claims:* None
Epstein v. Lanza, 1997 Mass. Super. LEXIS 413 (Mass. Super. Ct. 1997)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice**,** Opinion *Privacy Claims*: None *Other Claims:* Other
Lane v. Memorial Press, Inc., 28 Media L. Rep. 2335 (Mass. Super. Ct. 2000)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Nelson v. Community Newspaper Co. , 2000 Mass. Super. LEXIS 322 (Mass. Super. Ct. 2000)	Motion Granted		*Libel Issues:* Actual Malice**,** Fair Report *Privacy Claims*: None *Other Claims:* Negligent Infliction of Emotional Distress
Peckham v. Levy, 26 Med. L. Rep. 1222 (Mass. Super. Ct. 1997)	Motion Granted		*Libel Issues:* None *Privacy Claims*: Private Facts *Other Claims:* None
Trotter v. Community Newspaper Co., et al., 1998 Mass. Super. LEXIS 99 (Mass. Dist. Ct. 1998)	Motion Granted		*Libel Issues:* Of and Concerning**,** Other *Privacy Claims*: None *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Valdez v. Domeniconi, 1997 Mass. Super. LEXIS 571 (Mass. Super. Ct. 1997)	Motion Granted in Part		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* Intentional Infliction of Emotional Distress, Tortious Interference with Business, Other
Michigan			
A.O.A. Inc. v. New World Communications of Detroit, Inc., 27 Media L. Rep. 1573 (Mich. Ct. App. 1998)	Grant Affirmed	Private Plaintiff	*Libel Issues:* Defamatory Meaning**,** Other *Privacy Claims*: None *Other Claims:* None
American Transmission Inc. v. Channel 7 of Detroit Inc, 28 Media L. Rep. 1823 (Mich. Ct. App. 2000)	Grant Affirmed	Private Plaintiff	*Libel Issues:* Falsity *Privacy Claims*: Trespassing *Other Claims:* Fraud, Tortious Interference with Business, Other
Greer v. Newark Morning Ledger, 26 Media L. Rep. 1959 (Mich. Ct. App. 1998)	Grant Affirmed		*Libel Issues:* Negligence *Privacy Claims*: None *Other Claims:* None
Jersevic v. WTCF/FOX, 28 Media L. Rep. 2305 (Mich. Ct. App. 2000)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims:* Private Facts *Other Claims:* Conspiracy, Other
Minnesota			
Moreno v. Crookston Times Printing Co., 28 Media L. Rep. 2473 (Minn. 2000)	Grant Reversed	Public Plaintiff	*Libel Issues:* Fair Report *Privacy Claims*: None *Other Claims:* None
Brills v. WCCO Television, 1997 Minn. App. LEXIS 220 (Minn. Ct. App. 1997)	Grant Affirmed		*Libel Issues:* Of and Concerning**,** Opinion**,** Other *Privacy Claims*: None *Other Claims:* Negligent Infliction of Emotional Distress
Burgoon v. Delahunt, 29 Media L. Rep. 1148 (Minn. Ct. App. 2000)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Falsity**,** Hyperbole**,** Opinion**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
Cole v. The Star Tribune, et al., 581 N.W.2d 364, 26 Media L. Rep. 2415 (Minn. Ct. App. 1998)	Grant Affirmed		*Libel Issues:* Republication *Privacy Claims*: None *Other Claims:* None
Copeland v. Hubbard Broadcasting, Inc., 1997 Minn. App. LEXIS 1276 (Minn. Ct. App. 1997)	Grant Affirmed		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* Intentional Infliction of Emotional Distress, Other

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Knaeble v. Cowles Media Co., et al., 25 Media L. Rep. 1860 (Minn. Ct. App. 1997)	Grant Affirmed		*Libel Issues:* Opinion**,** Substantial Truth *Privacy Claims*: None *Other Claims:* Negligent Infliction of Emotional Distress
Special Force Ministries v. WCCO Television (CBS), 26 Media L. Rep. 2490 (Minn. Ct. App. 1998)	Partial Grant Affirmed		*Libel Issues:* Substantial Truth *Privacy Claims:* Trespassing *Other Claims:* Fraud
Vaadeland v. Independent School District No. 309, 1999 Minn. App. LEXIS 903 (Minn. Ct. App. 1999)	Motion Granted		*Libel Issues:* Substantial Truth**,** *Privacy Claims*: None *Other Claims:* None
Missouri			
Murphy v Shur, 28 Media L. Rep. 1287 (Mo. Ct. App. 1999)	Motion Granted		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* None
Myrick v. Eastern Broadcasting, Inc., 970 S.W.2d 885 (Mo. Ct. App. 1998)	Grant Affirmed		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* Other
Parker v. Multimedia KSDK Inc., 27 Media L. Rep. 2305 (Mo. Cir. Ct. 1999)	Motion Granted		*Libel Issues:* Statute of Limitations *Privacy Claims*: False Light, Intrusion *Other Claims:* None
Montana			
Hale v. City of Billings, Montana, Police Department, 28 Media L. Rep. 1321 (Mont. 1999)	Grant Reversed		*Libel Issues:* Opinion**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
New Hampshire			
Hayes v. Newspapers of New Hampshire Inc., 25 Media L. Rep. 1831 (N.H. Super. Ct. 1997)	Motion Granted		*Libel Issues:* Fair Report *Privacy Claims*: None *Other Claims:* None
New Jersey			
Fortenbaugh v. New Jersey Press, 27 Media L. Rep. 1975 (N.J. Super. Ct. App. Div. 1999)	Grant Reversed		*Libel Issues:* Fair Report**,** Negligence**,** Substantial Truth *Privacy Claims*: None *Other Claims:* Intentional Infliction of Emotional Distress

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Hill v. Evening News Co., 715 A.2d 999 (N.J. Super. Ct. App. Div. 1998)	Grant Reversed		*Libel Issues:* Falsity**,** Neutral Reportage**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Molin v. The Trentonian, 687 A.2d 1022 (N.J. Super. Ct. App. Div. 1997)	Grant Affirmed		*Libel Issues:* Defamatory Meaning**,** Fair Comment**,** Falsity *Privacy Claims*: None *Other Claims:* None
Sedore v. The Recorder Publishing Co., 716 A.2d 1196 (N.J. Super. Ct. App. Div. 1998)	Denial Reversed and Dismissed	Private Plaintiff	*Libel Issues:* Fair Report *Privacy Claims*: None *Other Claims:* None
New York			
Armstrong v. Simon & Schuster Inc., 27 Media L. Rep. 2289 (N.Y. App. Div. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
Catterson v. North Suffolk Publishing Corp., et al., 249 A.D.2d 498 (N.Y. App. Div. 1998)	Grant Affirmed		*Libel Issues:* Substantial Truth *Privacy Claims*: None *Other Claims:* None
Crucey v. Jackall, 713 N.Y.S.2d 20 (N.Y. App. Div. 2000)	Denial Reversed and Dismissed		*Libel Issues:* Gross Irresponsibility *Privacy Claims*: None *Other Claims:* None
Dancer v. Bergman, 668 N.Y.S.2d 213 (N.Y. App. Div. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Opinion *Privacy Claims*: None *Other Claims:* None
Fraser v. Park Newspapers of St. Lawrence, Inc., 246 A.D.2d 894 (N.Y. App. Div. 1998)	Denial Affirmed		*Libel Issues:* Fair Report**,** Gross Irresponsibility**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
Fulani v. New York Times, 27 Media L. Rep. 1959 (N.Y. App. Div. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Of and Concerning**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
Goldreyer v. Dow Jones & Co., Inc., 687 N.Y.S.2d 64 (N.Y. App. Div. 1999)	Denial Reversed and Dismissed	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Gorman v. Random House, Inc., et al., 237 A.D.2d 564 (N.Y. App. Div. 1997)	Denial Reversed and Dismissed	Private Plaintiff	*Libel Issues:* Gross Irresponsibility *Privacy Claims*: None *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Hahn v. Konstanty, 27 Media L. Rep. 1511 (N.Y. App. Div. 1999)	Grant Affirmed		*Libel Issues:* Substantial Truth**,** Other *Privacy Claims*: None *Other Claims:* None
Khan v. New York Times Co., 29 Media L. Rep. 1627 (N.Y. App. Div. 2000)	Denial Reversed and Dismissed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Other *Privacy Claims*: None *Other Claims:* None
Lewis v. Newsday, Inc., 26 Media L. Rep. 2278 (N.Y. App. Div. 1998)	Grant Reversed		*Libel Issues:* Actual Malice**,** Defamatory Meaning**,** Gross Irresponsibility**,** Other *Privacy Claims*: None *Other Claims:* None
Lunney v. Prodigy Services Co., 27 Media L. Rep. 1373 (N.Y. App. Div. 1998)	Denial Reversed and Dismissed	Private Plaintiff	*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* None
Miss American Petite, Inc. v. Fox Broadcasting Co., 690 N.Y.S.2d 592 (N.Y. App. Div. 1999)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Gross Irresponsibility**,** Hyperbole**,** Opinion *Privacy Claims*: None *Other Claims:* None
Morsette v. The Final Call, et al., 29 Media L. Rep. 1191 (N.Y. App. Div. 2000)	Denial Affirmed		*Libel Issues:* Defamatory Meaning**,** Gross Irresponsibility *Privacy Claims*: None *Other Claims:* None
Robare v. Plattsburgh Publishing Co., 27 Media L. Rep. 1509 (N.Y. App. Div. 1999)	Denial Reversed and Dismissed		*Libel Issues:* Gross Irresponsibility *Privacy Claims*: None *Other Claims:* None
Sands v. News America Publishing, Inc., 655 N.Y.S.2d 18 (N.Y. App. Div. 1997)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Grodin v. Liberty Cable, et al., 244 A.D.2d 153 (N.Y. App. Div. 1997)	Denial Affirmed		*Libel Issues:* None Privacy Claims: Appropriation *Other Claims:* Other
Krauss v. Globe International, Inc., 26 Media L. Rep. 2118 (N.Y. App. Div. 1998)	Grant Reversed	Private Plaintiff	*Libel Issues:* Negligence**,** Public Plaintiff**,** Other *Privacy Claims*: None *Other Claims:* None
Hirschfeld v. Daily News, 28 Media L. Rep. 2119 (N.Y. App. Div. 2000)	Grant Affirmed		*Libel Issues:* Falsity**,** Substantial Truth *Privacy Claims*: None *Other Claims:* Other

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Jee v. New York Post Co., Inc., 27 Media L. Rep. 2024 (N.Y. App. Div. 1999)	Grant Affirmed		*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Pellegrino v. Buffalo News, Inc., 696 N.Y.S.2d 740 (N.Y. App. Div. 1999)	Denial Reversed and Dismissed	Private Plaintiff	*Libel Issues:* Gross Irresponsibility *Privacy Claims*: None *Other Claims:* None
Golub v. Enquirer/Star Group, Inc., 681 N.E.2d 1282, 25 Media L. Rep. 1863 (N.Y. Ct. App. 1997)	Denial Reversed and Dismissed		*Libel Issues:* Defamatory Meaning**,** Other *Privacy Claims*: None *Other Claims:* None
Huggins v. Moore, 28 Media L. Rep. 1491 (N.Y. Ct. App. 1999)	Grant Affirmed in Part	Private Plaintiff	*Libel Issues:* Gross Irresponsibility *Privacy Claims*: None *Other Claims:* None
Bolonkin v. Pogrebnoy, 27 Media L. Rep. 2486 (N.Y. Sup. Ct. 1999)	Motion Granted	Private Plaintiff	*Libel Issues:* Defamatory Meaning**,** Gross Irresponsibility**,** Opinion**,** Other *Privacy Claims*: None *Other Claims:* None
Gross v. New York Times Co., 28 Media L. Rep. 1378 (N.Y. Sup. Ct. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* None
Lee v. Rochester, 174 Misc. 2d 763 (N.Y. Sup. Ct. 1997)	Motion Granted	Private Plaintiff	*Libel Issues:* Gross Irresponsibility**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Moyal v. New York Magazine, 27 Media L. Rep. 2019 (N.Y. Sup. Ct. 1999)	Motion Granted		*Libel Issues:* Statute of Limitations**,** Other *Privacy Claims*: None *Other Claims:* None
Posner v. New York Post, 26 Media L. Rep. 1634 (N.Y. Sup. Ct. 1997)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims*: None *Other Claims:* Negligent Infliction of Emotional Distress
Yellon v. Lambert, 29 Media L. Rep. 1308 (N.Y. Sup. Ct. 2000)	Motion Granted		*Libel Issues:* Actual Malice**,** Gross Irresponsibility *Privacy Claims*: None *Other Claims:* None
Ohio			
Conese v. Nichols, 26 Media L. Rep. 1907 (Ohio Ct. App. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Privilege *Privacy Claims*: None *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Early v. The Toledo Blade, 26 Media L. Rep. 2569 (Ohio Ct. App. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Defamatory Meaning**,** Fair Report**,** Of and Concerning**,** Substantial Truth**,** Other *Privacy Claims*: Private Facts *Other Claims:* None
Faour v. C.M. Media, Inc., 1999 Ohio App. LEXIS 5372 (Ohio Ct. App. 1999)	Motion Granted		*Libel Issues:* None *Privacy Claims*: None *Other Claims:* None
Gupta v. The Lima News, 744 N.E.2d 1207 (Ohio Ct. App. 2000)	Grant Reversed	Private Plaintiff	*Libel Issues:* Falsity**,** Substantial Truth**,** Other *Privacy Claims*: None *Other Claims:* None
Hauck v. Gannett Corp., 1998 Ohio App. LEXIS 1029 (Ohio Ct. App. 1998)	Grant Affirmed		*Libel Issues:* Falsity**,** Substantial Truth *Privacy Claims*: None *Other Claims:* None
Musa v. Gillett Communications, et al., 696 N.E.2d 227 (Ohio Ct. App. 1997)	Grant Affirmed		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* None
Pollock v. Jones, 2000 Ohio App. LEXIS 2799 (Ohio Ct. App. 2000)	Grant Affirmed		*Libel Issues:* Other *Privacy Claims*: None *Other Claims:* None
Rountree v. WBNS TV, Inc., 1999 Ohio App. LEXIS 5533 (Ohio Ct. App. 1999)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Negligence *Privacy Claims*: None *Other Claims:* None
Schwab v. Reflector-Herald, Inc., 26 Media L. Rep. 1063 (Ohio Ct. App. 1997)	Motion Granted	Private Plaintiff	*Libel Issues:* Defamatory Meaning**,** Of and Concerning *Privacy Claims*: None *Other Claims:* None
Saferin v. Malrite, 2000 Ohio App. LEXIS 1160 (Ohio Ct. App. 2000)	Grant Affirmed		*Libel Issues:* Substantial Truth *Privacy Claims*: None *Other Claims:* None
Sethi v. WFMJ TV, Inc., 732 N.E.2d 451 (Ohio Ct. App. 1999)	Grant Affirmed		*Libel Issues:* Actual Malice**,** Fair Report**,** Substantial Truth**,** Other *Privacy Claims*: None *Other Claims:* None
Sweitzer v. Outlet Communications, Inc., 726 N.E.2d 1084 (Ohio Ct. App. 1999)	Grant Affirmed		*Libel Issues:* Defamatory Meaning**,** Opinion *Privacy Claims*: None *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Talley v. WHIO TV-7 and WDTN TV-2, 27 Media L. Rep. 1470 (Ohio Ct. App. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Negligence**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Young v. The Morning Journal, 717 N.E.2d 356 (Ohio Ct. App. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Bacon v. Kirk, 27 Media L. Rep. 1780 (Ohio Ct. Common Pleas 1999)	Motion Granted		*Libel Issues:* Actual Malice**,** Other *Privacy Claims*: None *Other Claims:* None
Oklahoma			
Malson v. Palmer Broadcasting Group, 25 Media L. Rep. 1957 (Okla. 1997)	Grant Reversed	Private Plaintiff	*Libel Issues:* Negligence *Privacy Claims:* None *Other Claims:* None
Johnson v. The Black Chronicle, 964 P.2d 924 (Okla. Civ. App. Ct. 1998)	Grant Reversed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff *Privacy Claims*: None *Other Claims:* None
Pennsylvania			
First Lehigh Bank v. Cowen, 26 Media L. Rep. 1075 (Pa. Super. Ct. 1997)	Grant Affirmed		*Libel Issues:* Fair Report *Privacy Claims:* None *Other Claims:* None
Rush v. Philadelphia Newspapers, Inc., 732 A.2d 648 (Pa. Super. Ct. 1999)	Grant Affirmed	Private Plaintiff	*Libel Issues:* Defamatory Meaning**,** Negligence *Privacy Claims:* False Light *Other Claims:* None
Wagstaff v. Morning Call Inc., 28 Media L. Rep. 1605 (Pa. Super. Ct. 2000)	Grant Affirmed		*Libel Issues:* Substantial Truth**,** *Privacy Claims:* None *Other Claims:* None
Wecht v. PG Pub'g., 27 Media L. Rep. 2211 (Pa. Super. Ct. 1998)	Grant Affirmed in Part		*Libel Issues:* None *Privacy Claims:* False Light *Other Claims:* Other
Rhode Island			
Clements v. WHDH-TV, Inc., 1998 R.I. Super. LEXIS 25 (R.I. Super. Ct. 1998)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims:* False Light *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Dewitt v. Outlet Broadcasting, Inc., 1999 R.I. Super. LEXIS 39 (R.I. Super. Ct. 1999)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice**,** Falsity *Privacy Claims:* None *Other Claims:* None
South Carolina			
White v. Wilkerson, 26 Media L. Rep. 2051 (S.C. 1997)	Grant Affirmed in Part		*Libel Issues:* Defamatory Meaning**,** Fair Report *Privacy Claims:* None *Other Claims:* None
Richardson v. The State-Record Co., Inc., S.E.2d 822, 26 Media L. Rep. 1859 (S.C. Ct. App. 1998)	Grant Reversed		*Libel Issues:* Defamatory Meaning**,** Fair Report**,** Falsity *Privacy Claims:* None *Other Claims:* None
Tennessee			
Ali v. Moore, 984 S.W.2d 224 (Tenn. Ct. App. 1998)	Grant Affirmed in Part		*Libel Issues:* Defamatory Meaning**,** Statute of Limitations *Privacy Claims:* None *Other Claims:* Other
Beavers v. Lebanon Democrat Newspapers, 29 Media L. Rep. 1058 (Tenn. Ct. App. 2000)	Grant Affirmed in Part	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims:* None *Other Claims:* None
Moman v. M.M. Corporation, 1997 Tenn. App. LEXIS 233 (Tenn. Ct. App. 1997)	Grant Reversed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Defamatory Meaning**,** Parody**,** *Privacy Claims:* None *Other Claims:* None
Texas			
Huckabee v. Time Warner Entertainment Co., 28 Media L. Rep. 2158 (Tex. 2000)	Denial Reversed and Dismissed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Other *Privacy Claims:* False Light *Other Claims:* None
ABC, Inc. v. Shanks, 1 S.W.3d 230 (Tex. Ct. App. 1999)	Denial Reversed and Dismissed		*Libel Issues:* Defamatory Meaning**,** Substantial Truth *Privacy Claims:* None *Other Claims:* None
Allied Marketing Group v. Paramount Pictures Corporation, 28 Media L. Rep. 1637 (Tex. Ct. App. 2000)	Grant Reversed	Private Plaintiff	*Libel Issues:* Public Plaintiff *Privacy Claims:* None *Other Claims:* None
American Broadcasting Companies, Inc. v. Gill, 27 Media L. Rep. 2569 (Tex. Ct. App. 1999)	Denial Reversed and Dismissed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Opinion**,** Public Plaintiff**,** Substantial Truth *Privacy Claims:* Intrusion, Trespassing *Other Claims:* Other

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
The Associated Press v. Cook, 28 Media L. Rep. 2065 (Tex. Ct. App. 2000)	Denial Reversed and Dismissed		*Libel Issues:* Actual Malice**,** Opinion**,** Substantial Truth *Privacy Claims:* None *Other Claims:* Intentional Infliction of Emotional Distress, Tortious Interference with Business
Beck v. Lone Star Broadcasting, Co., 970 S.W.2d 610 (Tex. Ct. App. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims:* None *Other Claims:* Intentional Infliction of Emotional Distress
Brewer v. Capital Cities/ABC, Inc., 27 Media L. Rep. 1234 (Tex. Ct. App. 1998)	Grant Affirmed		*Libel Issues:* Defamatory Meaning**,** Opinion *Privacy Claims:* None *Other Claims:* None
Carabajal v. UTV of San Antonio, Inc., 961 S.W.2d 628 (Tex. Ct. App. 1998)	Grant Reversed		*Libel Issues:* Negligence**,** Other *Privacy Claims:* None *Other Claims:* None
Davis v. Star-Telegram Operating, Ltd., 29 Media L. Rep. 1755 (Tex. Ct. App. 2000)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Defamatory Meaning *Privacy Claims:* None *Other Claims:* Intentional Infliction of Emotional Distress, Other
Dolcefino v. Randolph, 28 Media L. Rep. 2189 (Tex. Ct. App. 2000)	Denial Reversed and Dismissed		*Libel Issues:* Defamatory Meaning**,** Substantial Truth *Privacy Claims:* None *Other Claims:* None
Dudrick v. Dolcefino, 1998 Tex. App. LEXIS 7682 (Tex. Ct. App. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff *Privacy Claims:* False Light *Other Claims:* Intentional Infliction of Emotional Distress, Tortious Interference with Business
Evans v. Dolcefino, 986 S.W.2d 69 (Tex. Ct. App. 1999)	Denial Reversed and Dismissed	Public Plaintiff	*Libel Issues:* Negligence**,** Of and Concerning**,** Substantial Truth *Privacy Claims:* None *Other Claims:* Intentional Infliction of Emotional Distress, Tortious Interference with Business
Galveston Papers, Inc. v. Norris, 981 S.W.2d 797 (Tex. Ct. App. 1998)	Denial Reversed and Dismissed	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims:* None *Other Claims:* Tortious Interference with Business
Gaylord Broadcasting v. Francis, 28 Media L. Rep. 1085 (Tex. Ct. App. 1999)	Denial Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Defamatory Meaning**,** Fair Comment**,** Opinion**,** Substantial Truth *Privacy Claims:* None *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Granada Biosciences, Inc. v. Barrett, 958 S.W.2d 215 (Tex. Ct. App. 1997)	Grant Affirmed in Part		*Libel Issues:* Other *Privacy Claims:* None *Other Claims:* Intentional Infliction of Emotional Distress, Other
Hearst Corp. v. Tucker, 27 Media L. Rep. 2131 (Tex. Ct. App. 1999)	Denial Reversed and Dismissed	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims:* None *Other Claims:* None
HBO v. Harrison, 983 S.W.2d 31 (Tex. Ct. App. 1998)	Denial Reversed and Dismissed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff**,** Other *Privacy Claims:* None *Other Claims:* None
Hogan v. Hearst Corp., 25 Media L. Rep. 2134 (Tex. Ct. App. 1997)	Grant Affirmed		*Libel Issues:* None *Privacy Claims:* Private Facts *Other Claims:* Intentional Infliction of Emotional Distress, Other
Homsy v. King World Entertainment, Inc., 1997 Tex. App. LEXIS 761 (Tex. Ct. App. 1997)	Grant Affirmed		*Libel Issues:* Substantial Truth *Privacy Claims:* None *Other Claims:* Fraud
Howell v. The American Publishing Company, 983 S.W.2d 79 (Tex. Ct. App. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Opinion *Privacy Claims:* None *Other Claims:* None
KTRK Television v. Felder, 25 Media L. Rep. 2418 (Tex. Ct. App. 1997)	Denial Reversed and Dismissed		*Libel Issues:* Negligence**,** Substantial Truth *Privacy Claims:* False Light *Other Claims:* Intentional Infliction of Emotional Distress
KTRK Television, Inc. v. Fowkes, 981 S.W.2d 779 (Tex. Ct. App. 1998)	Partial Grant Affirmed		*Libel Issues:* Substantial Truth *Privacy Claims:* None *Other Claims:* Intentional Infliction of Emotional Distress
LaCombe v. San Antonio Express News, 2000 Tex. App. LEXIS 556 (Tex. Ct. App. 2000)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Defamatory Meaning**,** Public Plaintiff *Privacy Claims:* None *Other Claims:* None
NW Communications of TX, Inc. v. Power, 28 Media L. Rep. 2483 (Tex. Ct. App. 2000)	Denial Reversed and Dismissed		*Libel Issues:* Substantial Truth *Privacy Claims:* None *Other Claims:* None
New Times v. Wheeler, 1998 Tex. App. LEXIS 2494 (Tex. Ct. App. 1998)	Motion Granted in Part		*Libel Issues:* Other *Privacy Claims:* None *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Swate v. Schiffers, 26 Media L. Rep. 2258 (Tex. Ct. App. 1998)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice**,** Fair Report**,** Public Plaintiff**,** Substantial Truth *Privacy Claims:* None *Other Claims:* None
TSM AM-FM TV v. Meca Homes, Inc., 969 S.W.2d 448 (Tex. Ct. App. 1998)	Denial Affirmed	Private Plaintiff	*Libel Issues:* Public Plaintiff**,** Substantial Truth *Privacy Claims:* None *Other Claims:* None
Texas Monthly, Inc. v. Transamerican Natural Gas Corp., 7 S.W.3d 801 (Tex. App. Ct. 1999)	Denial Reversed and Dismissed		*Libel Issues:* Defamatory Meaning**,** Fair Report**,** Substantial Truth *Privacy Claims:* None *Other Claims:* None
WFAA-TV v. McLemore, 979 S.W.2d 337 (Tex. Ct. App. 1997)	Denial Affirmed	Private Plaintiff	*Libel Issues:* Negligence**,** Public Plaintiff *Privacy Claims:* None *Other Claims:* None
Williamson v. New Times, Inc., 27 Media L. Rep. 1408 (Tex. Ct. App. 1998)	Grant Affirmed		*Libel Issues:* Other *Privacy Claims:* None *Other Claims:* None
Young v. Griffin, 27 Media L. Rep. 1123 (Tex. Ct. App. 1998)	Grant Affirmed		*Libel Issues:* Defamatory Meaning *Privacy Claims:* None *Other Claims:* None
Washington			
Schmalenberg v. Tacoma News, Inc., 26 Media L. Rep. 1001 (Wash. Ct. App. 1997)	Grant Affirmed		*Libel Issues:* Substantial Truth *Privacy Claims:* None *Other Claims:* None
Whiton v. Oregon Labor Press Publishing Co., 1998 Wash. App. LEXIS 880 (Wash. Ct. App. 1998)	Grant Affirmed	Private Plaintiff	*Libel Issues:* Actual Malice**,** Privilege**,** Other *Privacy Claims:* None *Other Claims:* Other
Wilson v. Cowles Publishing Co., 2000 Wash. App. LEXIS 1487 (Wash. Ct. App. 2000)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice *Privacy Claims:* None *Other Claims:* None
Walls v. Quickfish Media Inc., 26 Media L. Rep. 2438 (Wash. Super Ct. 1998)	Motion Granted	Public Plaintiff	*Libel Issues:* Actual Malice**,** Public Plaintiff *Privacy Claims:* None *Other Claims:* None

CASE	SUMMARY JUDGMENT RESULT	PLAINTIFF STATUS	ISSUES AND CLAIMS DISCUSSED IN DECISION
Wisconsin			
Torgerson v. Journal/Sentinel Inc., 25 Media L. Rep. 2249 (Wis. 1997)	Motion Granted in Part	Public Plaintiff	*Libel Issues:* Actual Malice, Falsity *Privacy Claims:* None *Other Claims:* None
Erdmann v. SF Broadcasting of Green Bay, 27 Media L. Rep. 2274 (Wisc. Ct. App. 1999)	Grant Affirmed	Public Plaintiff	*Libel Issues:* Actual Malice, Fair Report, Public Plaintiff *Privacy Claims:* None *Other Claims:* None

PART B. SUPREME COURT REPORT — 2000 TERM
A REPORT ON PETITIONS FOR CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

I. INTRODUCTION

It is an unusual Term, indeed, when the media has two major cases argued before the Supreme Court of the United States. While the success of the First Amendment arguments in *Bartnicki v. Vopper* [62] led to a nationwide sense of relief in the journalistic community, *Tasini v. The New York Times*[63] has led to self-censored archives and continued disputes between publishers and their freelance contributors.

In *Bartnicki,* the Court had before it a substantive newsgathering and publishing matter that posed the fundamental and recurring question of whether the press could be punished for publishing information obtained unlawfully, albeit not through the efforts or encouragement of the publisher. In *Tasini,* the Court heard a challenge to the application of copyright practices and law to the new genre of electronic archives.

In each of these two pivotal cases, technology on some level drove the matters to court – in *Bartnicki*, the technology to intercept private phone communications; in *Tasini*, the capacity to store the rich historical archives of periodicals in easily searchable databases. Technology did not ultimately determine the decision in *Bartnicki* that only a government interest of the highest order can justify punishing the publication of true and newsworthy information. Indeed, developing technology to protect electronic privacy weighed against any finding of media liability.

On the other hand, technology did drive the decision when it came to applying copyright law to electronic archives. According to the Court, such archives are simply not "revisions" of the original periodicals within the meaning of the Copyright Act. While the Court made clear that these electronic archives infringe the copyrights of freelancers whose contributions were republished without consent, the exact remedy, and ultimately the viability of other electronic archival projects, remains to be worked out.

These decisions alone would have made the Term an important one for the media and their First Amendment counsel, but additionally there was a potentially important decision in a non-media, non-First Amendment context requiring appellate courts to apply *de novo* review to punitive damage awards. *Cooper Industries, Inc. v. Leatherman Tool Group.*[64]

Bartnicki: The Court's long awaited decision in *Bartnicki* came on May 21st near the end of the term. It was the Court's first substantive opinion in a media privacy case since *Florida Star v. B.J.F*[65] was decided twelve years ago. Indeed, the Court returned to the same question posed there: whether, and in what circumstances, the media can be punished for publishing true and lawfully acquired information. And, significantly, the Court returned to the principle of *Florida Star* to

62. 121 S. Ct. 1753 (2001).

63. 121 S. Ct. 2381 (2001).

64. 121 S. Ct. 1678 (2001).

65. 491 U.S. 524 (1989).

answer the question.

The specific question before the Court in *Bartnicki* was whether the civil damages provision of the Wiretap Act (and its Pennsylvania analogue) could be applied to several media defendants and a source who disclosed the contents of a cell phone conversation. The defendants were not directly involved in the illegal interception, but they knew, or should have known, of its suspect origin. In a decision written by Justice Stevens, joined by Kennedy, Souter, and Ginsburg, with Breyer and O'Connor concurring, the Court ruled that applying the wiretap statutes to the defendants would violate the First Amendment. Without answering the broad question left open in *Florida Star*, all six Justices agreed that there could be no liability where the defendants were not involved in the illegal interception and where the information they disclosed involved a matter of public concern.

The heart of the decision was the straightforward principle from *Florida Star* and *Smith v. Daily Mail Publishing*[66] – absent a governmental interest of the highest order a prohibition on the publication of truthful information cannot satisfy constitutional standards. The fact that the wiretap statutes are content neutral laws of general applicability was of no constitutional significance in the Court's analysis, although it was an issue (along with the strict/intermediate scrutiny framework) that preoccupied lower courts in this and the other wiretap cases that are pending in the Fifth and D.C. Circuit Courts of Appeals.

The government had offered two defenses for the Wiretap Act's application: deterring illegal interceptions and protecting the privacy of electronic communications. While the Court treated both, particularly the latter, with great seriousness, in the end neither could justify liability under the facts of *Bartnicki*.

It remains to be seen whether the Court's invocation of the *Florida Star / Daily Mail* principle heralds a reinvigoration of the First Amendment defense in newsgathering cases following a decade in which lower courts routinely invoked *Cohen v. Cowles Media*[67] to preclude media defendants from invoking the First Amendment as a defense in claims involving "generally applicable laws" — from trespass to intrusion to fraudulent misrepresentation.

Other Wiretap Cases: A week after deciding *Bartnicki*, the Court granted certiorari in *McDermott v. Boehner*,[68] another wiretap case, and vacated and remanded. In 1999, a divided panel of the Court of Appeals for the District of Columbia had ruled that Congressman McDermott could be liable for disclosing the contents of a cell phone conversation between fellow Congressman Boehner, former House Speaker Newt Gingrich and other House Republicans, concerning the House Ethics Committee's investigation of Gingrich. McDermott was given the tape by a Florida couple who intentionally intercepted and recorded the call. The Court of Appeals found that McDermott indirectly participated in their illegal conduct and had "no firm First Amendment right to disclose information simply because the information was . . . legally acquired [by him]."

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66. 443 U.S. 97 (1979)

67. 501 U.S. 663, 669 (1991) ("Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.").

68. 191 F.3d 463, 27 Media L. Rep. 2345 (D.C. Cir. 1999), *cert. granted and vacated*, 121 S. Ct. 2190 (May 29, 2001).

On remand, it would seem that *Bartnicki* now requires the case be dismissed. Congressman McDermott was not involved, nor did he encourage, the illegal interception, placing him in the identical position as the source in *Bartnicki*. And the contents disclosed were certainly newsworthy. But Justice Breyer's concurrence in *Bartnicki* provides at least a thin reed of hope for the survival of the claim. Although the politicians' strategy discussion captured on the recording is certainly newsworthy, it remains to be argued, at least, that their private call was not, in Breyer's words, an "unusual matter of public concern" involving public safety as presented in *Bartnicki*. The Court left standing another wiretap case, *Peavy v. WFFA-TV, Inc.*[69] where the Fifth Circuit, applying the intermediate scrutiny standard, found that the Wiretap Act was constitutional as applied to a media defendant who may have encouraged a source to illegally intercept phone conversations.

Other Petitions for Certiorari: The Court considered 11 other petitions in libel and media privacy cases. Notable among these cases, the Court left standing *Paramount Pictures Corp. v. Wendt*, [70] the Ninth Circuit's decision that the actors who played the characters "Norm" and "Cliff" on the television program "Cheers" could proceed with a Lanham Act and right of publicity claim over robotic figures reminiscent of their television characters. Although the robotic bar flies were created by the copyright owners and their licensees, the court found that the actors held rights in their identities severable from the copyright holder's rights in their characters. The case was later settled. *See LDRC LibelLetter* June 2001 at 15.

The Court also rejected a petition seeking to reinstate a jury award in a misappropriation case under New York law. *Messenger v. Gruner + Jahr Printing and Publishing.*[71] The Second Circuit had reversed a $100,000 jury award holding that there can be no claim under New York's misappropriation statute for the use of a photograph that illustrates a newsworthy article so long as the photograph bears a relationship to the subject matter of the article and is not an advertisement in disguise. The Court also declined to disturb a jury verdict in favor of a media defendant in *Gray v. St. Martin's Press Inc.*[72] and the determination that Dr. Jack Kevorkian is a libel-proof plaintiff.[73]

A petition filed but not acted upon raises the interesting and somewhat obscure doctrine of subsidiary meaning. In *Church of Scientology Int'l. v. Time Warner, Inc.*,[74] the Second Circuit held that under the doctrine when a published view of a plaintiff is not actionable as libel, other statements made in the same publication are not actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held that there can be no recovery.

Also pending for next Term is a petition for certiorari from the Fifth Circuit's decision in

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69. 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3318, 3383 (U.S. May 29, 2001) (Nos. 00-691, 00-849).

70. 125 F. 3d 806 (9th Cir. 1997), *cert. denied*, 69 U.S.L.W. 3224 (U.S. Oct. 2, 2000).

71. 208 F.3d 122 (2d Cir. 2000), *cert. denied*, 69 U.S.L.W. 3224(U.S. Oct. 2000).

72. 221 F.3d 243 (1st Cir. 2000), *cert. denied*, 69 U.S.L.W. 3456 (U.S. Jan. 8, 2001).

73. *Kevorkian v. American Medical Association*, 602 N.W.2d 233, 28 Media L. Rep. 1582 (Mich. App. 1999), *cert. denied*, 69 U.S.L.W. 3685 (U.S. April 23, 2001).

74. *Church of Scientology Int'l. v. Time Warner, Inc.*, 238 F.2d 168 (2d Cir. 2001) (affirming summary judgment in favor of *Time*), *pet. for cert. filed*, 70 U.S.L.W. 3051 (U.S. May 8, 2001).

Procter & Gamble Co. v. Amway Corp.,[75] a disparagement case based on the repetition of the false rumor that Proctor & Gamble is involved in Satanism. Although the court accepted that Proctor & Gamble is a public figure and the rumor a matter of public concern, it held that if the defendants' motivation in spreading the rumor was substantially economic their speech would be commercial speech entitled to no protection under the First Amendment. The question in the first instance of what defines commercial speech is so fundamental and yet so murky at this juncture under prior Supreme Court precedent that it cries out for a firm and, First Amendment advocates hope, narrowly drawn set of specifications. For what follows it is the application, all too often, of lesser protection under the First Amendment, an issue also addressed by the case. Compounding the concern, the Fifth Circuit's decision has already been cited in New York and California.[76]

Summaries of these cases and petitions and other First Amendment cases of interest follow, including summaries of the Supreme Court's decisions in two commercial speech cases *Lorillard Tobacco Co. v. Reilly*[77] and *United States, et al. v. United Foods, Inc.*,[78] and the Court's decision in *Federal Election Comm'n v. Colorado Republican Fed. Campaign Commission* upholding campaign spending limits.[79]

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75. 242 F.3d 539 (5th Cir. 2001), *pet. for cert. filed*, 70 U.S.L.W. 3074 (July 5, 2001).

76. *See WWFE v.Bozell*, 142 F. Supp. 2d 514 (S.D.N.Y. 2001) (non-profit media watch dog group deemed to be commercial speaker subject to reduced First Amendment protection in libel suit) and in dicta in *Hoffman v. Capital Cities/ABC, Inc*., 2001 U.S. App. LEXIS 15085, *8 (9th Cir. July 6, 2001) ("When speech is properly classified as commercial, a public figure plaintiff does not have to show that the speaker acted with actual malice.").

77. 121 S. Ct. 2404 (2001).

78. 121 S. Ct. 2334 (2001).

79. 121 S. Ct. 2351 (2001).

II. STATISTICAL ANALYSIS OF CERTIORARI PETITIONS FOR THE 1985-2000 TERMS

A. KEY FINDINGS

The key findings of our study of certiorari petitions in the area of libel and privacy law during the 2000 Term:

1. ***One Privacy Petition Granted and Decided this Term***. The Court granted defendant's petition for certiorari in *McDermott v. Boehner*, 121 S. Ct. 2190 (2001) vacating and remanding the case to the Court of Appeals for the District of Columbia for further consideration in light of the Court's decision this Term in *Bartnicki v. Vopper*. Over the 16 Terms studied by LDRC, the Court has granted certiorari in only 16 of the 340 privacy and libel petitions filed (4.7%). Thirteen petitions in total in libel and media privacy cases were ruled on this Term. The highest number of petitions was 37 in the 1988 Term.

2. ***Media vs. Non-Media***. Of the total of 340 petitions in the 16 Terms studied, 197 (58%) were media cases; 143 (42%) were nonmedia cases. Over the 16 Terms studied, the Court has granted petitions in 12 of 197 media cases (6%) versus only 4 of 143 nonmedia cases (2.8%), suggesting that the Court is modestly more willing to hear libel and privacy cases involving the media than in such cases without a media party.

3. ***Federal vs. State***. In the 2000 Term, 10 of the 13 libel and privacy petitions (77%) were appeals from federal court decisions. Cumulatively from 1985 – 2000, 41.8% (143 of 340) of the libel and privacy petitions were from federal courts. Including the wiretap case for which certiorari was granted this term, over the 16 Terms studied, the Court has granted 10 of 143 petitions (7%) from federal courts versus 6 of 191 (3 %) from state courts.

4. ***Final vs. Nonfinal Judgments***. The majority of libel and privacy petitions this Term, as is normally the case, arose from final judgments. "Final judgment" as used in this study includes dismissal of a complaint, grant of summary judgment, denial of a motion for a new trial and other rulings by the appellate courts that dispose of all issues on a claim. *See, e.g.*, 28 U.S. § 1291 and Fed. R. Civ. P. 54 (b). Of the 13 libel and privacy petitions disposed of in the 2000 Term, 9 arose from final judgments. Over the 16 Terms studied only 11.5% (39 of 340) of petitions filed were from nonfinal judgments. Over the entire study period, the Court granted 13 of 301 (4.5%) libel and privacy petitions from final judgments and 3 of 39 (7.6%) from nonfinal judgments.

5. ***The Issues***. The most frequently raised issue in petitions this Term was whether alleged defamatory statements were properly held to be protected opinion, raised in four petitions. Actual malice, misappropriation, plaintiff's status and wiretap laws were each raised twice. Other issues raised included privilege, the single publication rule, standards for independent appellate review, right of publicity, the Communications Decency Act, government immunity, and diversity jurisdiction.

Over the past 16 Terms, the most frequently petitioned issues are actual malice (72 cases), opinion and hyperbole (55 cases), plaintiff status (48 cases) and privileges (39 cases).

B. STATISTICAL TABLES

TABLE 1: CERTIORARI GRANTS AND DENIALS IN LIBEL/PRIVACY CASES: 1985–2000 TERMS

TERM	MEDIA CASES			NONMEDIA CASES			ALL CASES		
	Grants	Denials	% Granted	Grants	Denials	% Granted	Grants	Denials	% Granted
2000	0	7	0.0	1[1]	5	20.0	1	12	7.7
1999	1[2]	9	11.1	0	14	0.0	1	23	4.2
1998	0	11	0.0	2[3]	5	28.5	2	16	11.1
1997	0	7	0.0	0	6	0.0	0	13	0.0
1996	0	14	0.0	0	14	0.0	0	28	0.0
1995	0	10	0.0	0	12	0.0	0	22	0.0
1994	0	7	0.0	0	14	0.0	0	21	0.0
1993	0	7	0.0	0	11	0.0	0	18	0.0
1992	0	11	0.0	0	6	0.0	0	17	0.0
1991	0	11	0.0	0	11	0.0	0	22	0.0
1990	3[4]	11	21.4	1[5]	5	16.7	4	16	20.0
1989	2[6]	10	16.7	0	9	0.0	2	19	9.5
1988	2[7]	22	8.3	0	13	0.0	2	35	5.4
1987	1[8]	11	8.3	0	11	0.0	1	22	4.3
1986	0	21	0.0	0	3	0.0	0	24	0.0
1985	3[9]	16	15.8	0	0	—	3	16	15.8
TOTAL	12	185	6.0	4	139	2.8	16	324	4.7

[1] *McDermott v. Boehner*, 121 S. Ct. 2190 (2001) (vacated and remanded).

[2] *Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001).

[3] *Wilson v. Layne*, 526 U.S. 603 (1999); *Hanlon v. Berger*, 526 U.S. 808 (1999) (vacated and remanded).

[4] *Cohen v. Cowles Media*, 501 U.S. 663 (1991); *Jones v. American Broadcasting Companies, Inc.*, 111 S. Ct. 239 (1990) (vacated and remanded); *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

[5] *International Society for Krishna Consciousness v. George*,499 U.S. 914 (1991) (vacated and remanded).

[6] *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Immuno A.G. v. Moor-Jankowski*, 497 U.S. 1021 (1990) (vacated and remanded).

[7] *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

[8] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

[9] *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986); *Schiavone Construction Co. v. Time Inc.*, 477 U.S. 21 (1986).

TABLE 2A: CERTIORARI PETITIONS IN LIBEL/PRIVACY CASES BY PETITIONER: 1985–2000 TERMS

PETITIONS FILED BY DEFENDANTS

TERM	MEDIA ACTION			NONMEDIA ACTION			TOTAL		
	Grants	Denials	% Granted	Grants	Denials	% Granted	Grants	Denials	% Granted
2000	0	3	0.0	1[1]	1	50.0	1	4	20.0
1999	0	2	0.0	0	3	0.0	0	5	0.0
1998	0	2	0.0	1[2]	2	33.3	1	4	20.0
1997	0	1	0.0	0	1	0.0	0	2	0.0
1996	0	3	0.0	0	3	0.0	0	6	0.0
1995	0	2	0.0	0	5	0.0	0	7	0.0
1994	0	0	—	0	3	0.0	0	3	0.0
1993	0	2	0.0	0	1	0.0	0	3	0.0
1992	0	2	0.0	0	2	0.0	0	4	0.0
1991	0	2	0.0	0	5	0.0	0	7	0.0
1990	0	2	0.0	1[3]	2	33.3	1	4	20.0
1989	0	2	0.0	0	3	0.0	0	5	0.0
1988	2[4]	8	20.0	0	4	0.0	2	12	14.3
1987	1[5]	6	14.3	0	6	0.0	1	12	7.7
1986	0	6	0.0	0	2	0.0	0	8	0.0
1985	2[6]	4	33.3	0	0	—	2	4	33.3
TOTAL	5	47	9.6	3	43	6.5	8	90	8.2

[1] *McDermott v. Boehner*, 121 S. Ct. 2190 (2001) (vacated and remanded).

[2] *Hanlon v. Berger*, 526 U.S. 808 (1999) (vacated and remanded).

[3] *International Society for Krishna Consciousness v. George*,499 U.S. 914 (1991) (vacated and remanded).

[4] *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

[5] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

[6] *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

TABLE 2B: CERTIORARI PETITIONS IN LIBEL/PRIVACY CASES BY PETITIONER: 1985–2000 TERMS

PETITIONS FILED BY PLAINTIFFS

TERM	MEDIA ACTION			NONMEDIA ACTION			TOTAL		
	Grants	Denials	% Granted	Grants	Denials	% Granted	Grants	Denials	% Granted
2000	0	4	0.0	0	4	0.0	0	8	0.0
1999	1[1]	7	14.3	0	11	0.0	1	18	5.3
1998	0	9	0.0	1[2]	3	25.0	1	12	7.6
1997	0	6	0.0	0	5	0.0	0	11	0.0
1996	0	11	0.0	0	11	0.0	0	22	0.0
1995	0	8	0.0	0	7	0.0	0	15	0.0
1994	0	7	0.0	0	11	0.0	0	18	0.0
1993	0	5	0.0	0	10	0.0	0	15	0.0
1992	0	9	0.0	0	4	0.0	0	13	0.0
1991	0	9	0.0	0	6	0.0	0	15	0.0
1990	3[3]	9	25.0	0	3	0.0	3	12	20.0
1989	2[4]	8	20.0	0	6	0.0	2	14	12.5
1988	0	14	0.0	0	9	0.0	0	23	0.0
1987	0	5	0.0	0	5	0.0	0	10	0.0
1986	0	15	0.0	0	1	0.0	0	16	0.0
1985	1[5]	12	7.7	0	0	—	1	12	7.7
TOTAL	7	138	4.8	1	96	1.0	8	234	3.4

[1] *Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001).

[2] *Wilson v. Layne*, 526 U.S. 603 (1999).

[3] *Cohen v. Cowles Media*, 501 U.S. 663 (1991); *Jones v. American Broadcasting Companies, Inc.*, *Jones v. American Broadcasting Companies, Inc.*, 111 S. Ct. 239 (1990) (vacated and remanded); *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

[4] *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Immuno A.G. v. Moor-Jankowski*, 497 U.S. 1021 (1990) (vacated and remanded).

[5] *Schiavone Construction Co. v. Time Inc.*, 477 U.S. 21 (1986).

TABLE 3A: CERTIORARI GRANTS IN LIBEL/PRIVACY CASES BY COURT SYSTEM AND FINALITY OF JUDGMENT: 1985–2000 TERMS

FINAL JUDGMENTS

TERM	FEDERAL COURTS			STATE COURTS			ALL CASES		
	Grants	Denials	% Granted	Grants	Denials	% Granted	Grants	Denials	% Granted
2000	0	7	0.0	0	2	0.0	0	9	0.0
1999	1[1]	11	8.3	0	8	0.0	1	19	5.0
1998	1[2]	6	12.5	0	7	0.0	1	13	7.1
1997	0	5	0.0	0	7	0.0	0	12	0.0
1996	0	10	0.0	0	15	0.0	0	25	0.0
1995	0	6	0.0	0	14	0.0	0	20	0.0
1994	0	8	0.0	0	10	0.0	0	18	0.0
1993	0	6	0.0	0	12	0.0	0	18	0.0
1992	0	4	0.0	0	12	0.0	0	16	0.0
1991	0	6	0.0	0	10	0.0	0	16	0.0
1990	2[3]	4	33.3	2[4]	10	16.7	4	14	22.2
1989	0	7	0.0	2[5]	12	14.3	2	19	9.5
1988	1[6]	15	6.3	1[7]	18	5.3	2	33	5.7
1987	1[8]	9	10.0	0	11	0.0	1	20	4.8
1986	0	8	0.0	0	15	0.0	0	23	0.0
1985	1[9]	9	10.0	1[10]	4	20.0	2	13	13.3
TOTAL	7	121	5.5	6	167	3.5	13	288	4.3

[1] *Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001).

[2] *Wilson v. Layne*, 526 U.S. 603 (1999).

[3] *Jones v. American Broadcasting Companies, Inc.*, *Jones v. American Broadcasting Companies, Inc.*, 111 S. Ct. 239 (1990) (vacated and remanded); *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

[4] *Cohen v. Cowles Media*, 501 U.S. 663 (1991); *International Society for Krishna Consciousness v. George*,499 U.S. 914 (1991) (vacated and remanded).

[5] *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Immuno A.G. v. Moor-Jankowski*, 497 U.S. 1021 (1990) (vacated and remanded).

[6] *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

[7] *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

[8] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

[9] *Schiavone Construction Co. v. Time Inc.*, 477 U.S. 21 (1986).

[10] *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

TABLE 3B: CERTIORARI GRANTS IN LIBEL/PRIVACY CASES BY COURT SYSTEM AND FINALITY OF JUDGMENT: 1985–2000 TERMS

NONFINAL JUDGMENTS

TERM	FEDERAL COURTS			STATE COURTS			ALL COURTS		
	Grants	Denials	% Granted	Grants	Denials	% Granted	Grants	Denials	% Granted
2000	1[1]	2	33.3	0	1	0.0	1	3	25.0
1999	0	1	0.0	0	3	0.0	0	4	0.0
1998	1[2]	2	33.3	0	1	0.0	1	3	25.0
1997	0	1	0.0	0	0	0.0	0	1	0.0
1996	0	1	0.0	0	2	0.0	0	3	0.0
1995	0	0	—	0	2	0.0	0	2	0.0
1994	0	1	0.0	0	2	0.0	0	3	0.0
1993	0	0	—	0	0	—	0	0	—
1992	0	0	—	0	1	0.0	0	1	0.0
1991	0	2	0.0	0	4	0.0	0	6	0.0
1990	0	0	—	0	2	0.0	0	2	0.0
1989	0	0	—	0	0	—	0	0	—
1988	0	0	—	0	2	0.0	0	2	0.0
1987	0	0	—	0	2	0.0	0	2	0.0
1986	0	1	0.0	0	0	—	0	1	0.0
1985	1[3]	0	100.0	0	3	0.0	1	3	25.0
TOTAL	3	11	21.4	0	25	0.0	3	36	7.7

[1] *McDermott v. Boehner*,, 121 S. Ct. 2190 (2001) (vacated and remanded).

[2] *Hanlon v. Berger*, 526 U.S. 808 (1999) (vacated and remanded).

[3] *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

TABLE 3C: CERTIORARI GRANTS IN LIBEL/PRIVACY CASES BY COURT SYSTEM: 1985–2000 TERMS

ALL JUDGMENTS

TERM	FEDERAL COURTS			STATE COURTS			ALL CASES		
	Grants	Denials	% Granted	Grants	Denials	% Granted	Grants	Denials	% Granted
2000	1	9	11.1	0	3	0.0	1	12	7.7
1999	1	12	7.7	0	11	0.0	1	23	4.2
1998	2	9	22.0	0	7	0.0	2	16	11.1
1997	0	6	0.0	0	7	0.0	0	13	0.0
1996	0	11	0.0	0	17	0.0	0	28	0.0
1995	0	6	0.0	0	16	0.0	0	22	0.0
1994	0	9	0.0	0	12	0.0	0	21	0.0
1993	0	6	0.0	0	12	0.0	0	18	0.0
1992	0	4	0.0	0	13	0.0	0	17	0.0
1991	0	8	0.0	0	14	0.0	0	22	0.0
1990	2	4	33.3	2	12	14.3	4	16	20.0
1989	0	7	0.0	2	12	14.3	2	19	9.5
1988	1	15	6.3	1	20	4.8	2	35	5.4
1987	1	9	10.0	0	13	0.0	1	22	4.3
1986	0	9	0.0	0	15	0.0	0	24	0.0
1985	2	9	18.2	1	7	12.5	3	16	15.8
TOTAL	10	135	6.9	6	191	3.0	16	324	4.7

TABLE 4: CERTIORARI GRANTS AND DENIALS IN LIBEL/PRIVACY CASES BY ISSUE: 1985-2000 TERMS

ISSUE	GRANTS	DENIALS	% GRANTED
Actual malice	4[1]	66	6.1
Attorneys' fees	0	3	0.0
Breach of contract	1[2]	0	100.0
Collateral estoppel	0	1	0.0
Commercial speech	0	3	0.0
Communications Decency Act	0	1	0.0
Damages	1[3]	19	5.0
Defamatory meaning	0	4	0.0
Discovery	0	3	0.0
Due process/equal protection	0	9	0.0
Employment	0	6	0.0
Emotional distress/outrage	1[4]	2	33.3
Evidence	0	1	0.0
Falsity (Burden of Proof)	1[5]	12	7.7
Fraud	0	1	0.0
Government immunity	0	7	0.0
Gross irresponsibility	0	4	0.0
Hyperbole	0	7	0.0
Implication/innuendo	0	4	0.0
Independent appellate review	1[6]	15	6.7
Intentional interference	0	1	0.0
Incremental harm	1[7]	0	100.0
Jurisdiction	0	7	0.0
Jury instructions	0	4	0.0
Labor/preemption	0	9	0.0
Misappropriation	0	3	0.0
Of and concerning	0	5	0.0
Opinion	3[8]	41	7.1
Plaintiff status	0	47	0.0
Privacy	3[9]	28	1.1

TABLE 4: CERTIORARI GRANTS AND DENIALS IN LIBEL/PRIVACY CASES BY ISSUE: 1985-2000 TERMS

ISSUE	GRANTS	DENIALS	% GRANTED
Privilege (common law and statutory)	0	38	0.0
Procedure	1[10]	8	11.1
Public interest	0	12	0.0
Publication/republication	0	3	0.0
RICO	0	1	0.0
Section 1983	0	6	0.0
Shield law	0	2	0.0
Slander of title	0	1	0.0
SLAPP statutes	0	1	0.0
Statutory immunity	0	3	0.0
Substantial truth (gist or sting)	1[11]	8	11.1
Summary judgment	1[12]	10	8.3
Wiretap	2[13]	4	25.0
TOTAL	21[13]	410[13]	4.7

[1]*Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

[2]*Cohen v. Cowles Media*, 501 U.S. 663 (1991).

[3] *International Society for Krishna Consciousness v. George*,499 U.S. 914 (1991) (vacated and remanded), but note that the sole purpose for the "grant" was for remand in reconsideration of damages in light of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991).

[4]*Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

[5]*Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

[6]*Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

[7] *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

[8]*Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Immuno A.G. v. Moor-Jankowski*, 497 U.S. 1021 (1990) (vacated and remanded).; *Jones v. American Broadcasting Companies, Inc.*, 111 S. Ct. 239 (1990) (vacated and remanded); but note that two of these "grants" were for the sole purpose of remand for reconsideration in light of *Milkovich*.

[9]*Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Wilson v. Layne*, 526 U.S. 603 (1999).;*Hanlon v. Berger*, 526 U.S. 808 (1999) (vacated and remanded).

[10]*Schiavone Construction Co. v. Time Inc.*, 477 U.S. 21 (1986).

[11] *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

[12]*Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

[13] *Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001) and *McDermott v. Boehner*,, 121 S. Ct. 2190 (2001) (vacated and remanded in light of *Bartnicki)*.

[14] Because many petitions presented more than one issue, grants and denials of issues is higher than total petitions filed.

II. SUMMARY OF ACTIONS ON CERTIORARI PETITIONS IN LIBEL, PRIVACY, AND RELATED CASES DURING THE 2000-2001 TERM

A. LIBEL AND PRIVACY CASES

1. Media Defendants

a. U.S. Supreme Court Judgments (1)

Bartnicki v. Vopper, 200 F. 3d 109 (3d Cir. 1999), *cert. granted*, 68 U.S.L.W. 3789 (June 26, 2000) (U.S. Nos. 99-1687 and 99-1728), *judg. aff'd*, 121 S. Ct. 1753, 69 U.S.L.W. 4323 (May 21, 2001). *See LDRC LibelLetter* Jan. 1999 at 17, Jan. 2000 at 7, Apr. 2000 at 34, May 2000 at 11, June 2000 at 22, Dec. 2000 at 1, June 2001 at 5.

Third Circuit Decision: In a 2-1 decision , the Third Circuit dismissed on First Amendment grounds federal and state civil wiretap complaints filed against a radio show host and two radio stations that broadcast portions of an illegally intercepted cell phone conversation and the individual who provided the tape to the broadcasters. None of the defendants had participated in the actual interception of the conversation between two teachers' union officials; rather, a tape was left anonymously in the non-media defendant's mailbox, and he provided it to the radio show host. The district court denied defendants' motion for summary judgment, holding that the statutes were content neutral laws of general applicability that did not unduly restrict free speech. The court granted a discretionary interlocutory appeal. In reversing, the Third Circuit agreed that the statutes were content neutral and subject to the intermediate scrutiny standard, but the court found that statutes would prohibit more speech than necessary to protect the privacy interests at stake, finding it "likely that in many instances these provisions will deter the media from publishing even material that may lawfully be disclosed under the Wiretapping Acts."

Questions Presented: (1) Do the federal and Pennsylvania wiretapping statutes violate the First Amendment insofar as they prohibit the disclosure or other use of unlawfully intercepted electronic communications by persons who were not involved in the interception itself, but who know or have reason to know that the communication was unlawfully intercepted? (2) Does the imposition of civil liability under 18 U.S.C. §2511(1)(c) and (d) for using or disclosing the contents of illegally intercepted communications, when the defendant knows or has reason to know that the interception was unlawful but is not alleged to have participated in or encouraged it, violate the First Amendment?

Supreme Court Holding: In a 6-3 opinion, written by Justice Stevens, and joined by Justices Breyer, Ginsburg, Kennedy, O'Connor, and Souter, the Court affirmed that it would violate the First Amendment to apply the civil damages provision of the federal and Pennsylvania wiretap laws to the defendants' publication of the contents of an intercepted phone conversation where they were not involved in the illegal interception and the published contents involved a matter of public concern. While the Court agreed with the government that both the federal and the Pennsylvania wiretapping statutes are "content neutral laws of general applicability," it declined to use the intermediate scrutiny framework that lower courts considering the issue had applied. Instead,

Justice Stevens wrote that any prohibition on the publication of the truth "seldom can satisfy constitutional standards," citing *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102-03 (1979) and *Florida Star v. B.J.F*, 491 U.S. 524 (1989).

The case, according to the Court, presented the narrow question of whether the government can constitutionally punish the publication of true and lawfully acquired information because of a defect in the chain, namely that the source obtained the information illegally. The "clear" answer is "that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern" unless the government can sustain the heavy burden of demonstrating a "need . . . of the highest order." The interests advanced by the government in favor of the applying the statute to defendants did not rise to this level. The government argued 1) that the wiretap provisions deter illegal interceptions of private communications; and 2) that they protect the privacy of communications. As to the former, the Court found the justification "plainly insufficient" since "the normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." The interest in protecting the privacy of communications was, however, "considerably stronger," since "privacy of communications is essential if citizens are to think and act creatively and constructively."

Without categorically answering the broader question of whether truthful publications may ever be punished under the First Amendment, under the facts of this case the privacy concerns give way when balanced against the interest in publishing matters of public importance.

In a separate opinion, Justice Breyer, joined by Justice O'Connor, concurred in what he described as the Court's "narrow" holding that the First Amendment barred punishment for disclosure under the special facts of the case, namely that defendants obtained the information lawfully and the information involved "a matter of unusual public concern." According to Breyer, the Court's holding "does not imply a significantly broader constitutional immunity for the media." Indeed, in his analysis, the case involved a conflict between media freedom and personal, speech-related privacy. The strict scrutiny standard is therefore inappropriate since there can be no presumption of unconstitutionality between competing First Amendment related rights. Instead the question was "whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences." Applied to the circumstances of this case, the wiretap laws impose "disproportionately" on the First Amendment rights of the press.

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented, on the grounds that the wiretap statutes place no more of a burden on the media than is necessary to protect the privacy of personal conversations by dissuading potential interceptors. According to the dissent, the wiretap statutes are content neutral laws of general applicability that should have been subject to the intermediate scrutiny standard – not a "tacit" strict scrutiny analysis. Rehnquist distinguished *Daily Mail* and *Florida Star* as cases involving content-based restrictions.

b. Review Granted (1)

McDermott v. Boehner, 191 F.3d 463, 27 Media L. Rep. 2345 (D.C. Cir. 1999), *cert. granted and vacated*, 68 U.S.L.W. 3686 (May 29, 2001) (No. 99-1709). *See LDRC LibelLetter* Apr. 1998 at 23, Aug. 1998 at 3, Jan. 1999 at 17, Oct. 1999 at 7, Nov. 1999 at 35, May 2000 at 11.

D.C. Circuit Decision: The Court of Appeals for the District of Columbia reinstated a federal wiretap claim brought by Republican Congressman John Boehner against Democratic Congressman Jim McDermott. McDermott disseminated to the media transcripts of a cellular phone conversation in which Boehner and other Republican leaders discussed the House Ethics Committee's investigation of former House Speaker Newt Gingrich (Boehner was then co-chair of the Ethics Committee). The phone conversation was recorded by a Florida couple, who were later fined under federal wiretap law. They provided the recording to Congressman McDermott, who allegedly distributed transcripts to several newspapers. The district court held that the First Amendment protected McDermott's disclosure to the media. In reversing, the Court of Appeals found that the distribution of the recording was conduct and not speech, and therefore the provision of the statute outlawing disclosure of illegally intercepted communications could constitutionally apply to him.

Question Presented: Did the court of appeals err and give rise to a circuit conflict by holding that the First Amendment allows a person to be punished for disclosing truthful information on a matter of public concern merely because someone else previously obtained that information unlawfully?

Supreme Court Action: Vacated and remanded in light of the decision in *Bartnicki*.

c. Favorable Media Libel/Privacy Decisions Left Standing (4)

Ben Ezra, Weinstein & Co. v. America Online, Inc., 206 F. 3d 980 (10th Cir. 2000),*cert. denied,* 69 U.S.L.W. 3225 (U.S. Oct. 20, 2000) (No. 99-2020); *see LDRC LibelLetter*, Sept. 1998 at 21, Mar. 1999 at 36, Apr. 2000 at 18, June 2000 at 15.

Tenth Circuit Decision: The Tenth Circuit affirmed a grant of summary judgment to America OnLine in a libel and negligence suit based on financial information available on AOL. The plaintiff alleged that AOL published incorrect information on its stock price and share volume. The court held that Communications and Decency Act, 47 U.S.C. § 230, barred the action as the information was not created by AOL but by third parties.

Question Presented: Did the Court of Appeals misconstrue and misapply the immunity provision of the 1996 Communications Decency Act in holding a commercial internet service provider which was heavily involved with a content provider in the process of preparing commercial data for transmission to customers immune from a suit for damages for the erroneous publication of the petitioner's stock price and share volume on the commercial site of a service provider?

Messenger v. Gruner + Jahr Printing and Publishing, 208 F.3d 122 (2d Cir. 2000), *cert. denied*, 69 U.S.L.W. 3224 (U.S. Oct. 2, 2000) (No. 99-1915); *see LDRC LibelLetter* Mar. 1998 at 12, Apr. 1998 at 19, May 1999 at 27, Mar. 2000 at 17.

Second Circuit Decision: The Second Circuit reversed a $100,000 jury award for misappropriation under New York law (N.Y. Civil Rights Law §§ 50-51) after certifying a question to the New York Court of Appeals, New York's highest court, on whether the statute is violated where a person's image is used in a substantially fictionalized manner to illustrate a newsworthy article. The claim was based on *YM* magazine's publication of photographs of a teenage model, to illustrate a "Love Crisis" column in *YM* magazine, whose headline was "I got trashed and had sex with three guys."

In a pretrial decision, the district court held that although the subject matter was sufficiently newsworthy to satisfy an exception to the statute for newsworthiness, the exception was not applicable in cases infected with material and substantial falsity or fictionalization. Thus, a jury could find that the publication created the impression that [plaintiff] had the experiences that were the subject of the column. The New York Court of Appeals disagreed, holding that there can be no claim under the statute for the use of a photograph that illustrates a newsworthy article so long as the photograph bears a relationship to the subject matter of the article and is not an advertisement in disguise. This is so even where the plaintiff's photograph could reasonably be viewed as falsifying or fictionalizing plaintiff's relation to the article.

Questions Presented: (1) When trial judge and jury determine that media defendant published article falsely reporting upon professional model's life with knowledge of falsity or in reckless disregard of truth, can Second Circuit and New York Court of Appeals hold that First Amendment privilege of newsworthiness prohibits liability without contravening express mandates of New York *Times v. Sullivan*, *Time v. Hill* and their progeny? (2) Have Second Circuit and New York Court of Appeals violated First Amendment jurisprudence, and law of New York and other states, by creating absolute immunity for media defendant to interweave photographs with article that knowingly identifies plaintiff as subject of fictional account? (3) Have Second Circuit and New York Court of Appeals traversed accepted constitutional boundaries by rendering New York safe haven for media's knowing publication of photographs interwoven with text in a manner that falsely presents person's autobiography causing her mental distress? (4) Can New York courts preclude plaintiff from proffering evidence of, and obtaining punitive damages for, grossly irresponsible fabrication of article interwoven with her images in manner that creates false impression in ordinary reader's mind that she is subject of article?

Gray v. St. Martin's Press Inc., 221 F.3d 243 (1st Cir. 2000), *cert. denied*, 69 U.S.L.W. 3456 (U.S. Jan. 8, 2001) (No. 00-700). *see LDRC LibelLetter*, Oct. 1998 at 20, May 1999 at 7, July 1999 at 15, Aug. 2000 at 18, Sept. 2000 at 7, Jan. 2001 at 4.

First Circuit Decision: Plaintiff Robert Gray sued St. Martin's Press and author Susan Trento for libel alleging eight defamatory statements in their critical book about the lobbying industry *The Power House: Robert Keith Gray and the Selling of Access and Influence in Washington.* The district court granted summary judgment as to four statements and refused Gray leave to amend his complaint to allege additional defamatory statements and to order disclosure of a source. The libel claims based on the remaining statements were tried to a jury which found in favor of the defendants.

Gray appealed the pretrial grants of summary judgment. The First Circuit affirmed. Gray was properly deemed a public figure because he was a central figure in the controversy over the influence of lobbyists in Washington. The court affirmed that Gray failed to establish actual malice with regard to statements that he exhibited "venality," "lack of integrity," and "very little real basic principle," and engaged in "an awful lot . . . of overcharging." Other statements at issue that Gray "often faked" his "closeness" to President Reagan and that his business "ultimately failed" and that he "spied on clients" were subjective characterizations and, thus, non-actionable expressions of opinion. As to procedural and discovery issues, the First Circuit held there was no abuse of discretion in denying Gray's attempt to amend or in protecting from discovery the identity of a source.

Questions Presented: (1) Should the court adopt a new liability standard in cases in which the plaintiff is a limited purpose public figure ? (2) Should the court include a temporal component in limited purpose public figure analysis under which a person may lose limited purpose public figure status by passage of time? (3) In this libel action in which petitioner claims respondents defamed him by publishing in their non-fiction book *The Power House* that petitioner faked his closeness with President Reagan and other senior Reagan administration officials, have district court and court of appeals reached decisions that conflict with this court's decision in *Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990),* when these lower courts focused on only isolated words, ignored tenor and context of statement and failed to perform any multi-factored analysis in determining that statement was non-actionable opinion?

Tucker v. MTS, 229 F.3d 1139 (3rd Cir. 2000) (affirming without opinion 1998 U.S. Dist. LEXIS 1752 (E.D. Pa. Feb. 18, 1998) and 1999 U.S. Dist. LEXIS 774 (E.D. Pa. Jan. 29, 1999)), *cert. denied*, 69 U.S.L.W. 3456 (Jan. 8, 2001) (U.S. No. 00-807).

Third Circuit Decision: The Third Circuit affirmed without opinion two district court decisions, the first granting twelve motions to dismiss in favor of record companies, the second granting summary judgment to the estate of late rapper Tupac Shakur on claims brought by anti-rap

advocates C. Delores Tucker and husband William Tucker that alleged that certain lyrics from Shakur's 1996 album *All Eyez on Me* slandered them, invaded their privacy and caused them emotional distress. In the first ruling, the district court held that the defamation, privacy and emotional distress claims against the record companies were time barred under Pennsylvania's one year statute of limitations. In the second ruling, the court granted summary judgment to the estate, holding that the complained of song lyrics – "Dear Ms. Delores Tucker, you keep stressin' me, fuckin with a motherfuckin' mind" and "Delores Tucker, yous a muthafucka, instead of trying to help a nigga you destroy a brotha" – were not defamatory. The court noted that the phrase "muthafucka" was "an epithet which is unpleasant at best and vulgar at worst," and that because the plaintiffs had conceded that Shakur was voicing his opinion that Tucker was a "bad person who was out to hurt rather than help fellow African-Americans," the statements were protected.

Questions Presented: (1) Is it reversible error to summarily dismiss a defamation case that involved statements disseminated to millions and intended to harm plaintiff's reputation for morality and integrity, and adversely affect her hard earned status as a known and respected public figure within the community? (2) Is it reversible error to apply a single publication rule in a case in which the gravamen is not clearly defamation? (3) Does the single publication rule apply to compact discs?

d. Unfavorable Media Libel/Privacy Decisions Left Standing (3)

Brown v. Ames, 201 F.3d 654 (5th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3257 (U.S. Oct. 10, 2000) (No. 99-2068).

Fifth Circuit Decision: The Fifth Circuit affirmed a jury damage award for copyright infringement and misappropriation under Texas law. The misappropriation claim was based on defendant record producer's unauthorized use of plaintiff musicians' names and likenesses to market CD's and cassettes of plaintiffs' music for which plaintiff also lacked copyrights. Defendant argued on appeal that the misappropriation claims were preempted by the Copyright Act. The Fifth Circuit held that the tort of misappropriation is not preempted by the Copyright Act because a person's name and likeness in themselves are not copyrightable. Therefore the tort does not fall into the subject matter of the Copyright Act and does not conflict with the purposes and objectives of the Act.

Question Presented: Does the Copyright Act preempt a state law claim for misappropriation of name and likeness brought by the author of a tangible work within the subject matter of copyright for use of the author's name and likeness in the reproduction and distribution of that work?

Paramount Pictures Corp. v. Wendt (*Wendt v. Host International Inc.*), 125 F.3d 806 (9th Cir. 1997), *cert. denied*, 69 U.S.L.W. 3224 (U.S. Oct. 2, 2000) (No. 99-1567); *see LDRC LibelLetter*, Nov. 1997 at 29; Jan. 2000 at 31; June 2001 at 15.

Ninth Circuit Decision: The Ninth Circuit reversed a grant of summary judgment for the defendants in a right of publicity/Lanham Act case brought by television actors against a company which displayed robotic figures reminiscent of the plaintiffs' characters, Norm and Cliff, on the television program *Cheers.* The defendant had purchased a license to open airport bars bearing the name *Cheers* from the production studio holding the copyright in the series (and the characters), which was also a defendant in the suit. The actors who played the roles of Cliff and Norm in the series claimed that the robots infringed their interests in their own identities, which they asserted were evoked by the robotic references to characters they had played for many years. Finding triable issues as to whether the robots sufficiently evoked the actors' identities, the court held that copyright law did not preempt the claims because the actors held rights in their identities severable from the copyright holder's rights in their characters.

Questions Presented: (1) Does the 1976 Copyright Act preempt a state law right of publicity claim commenced against the copyright holder of a fictional television program and its licensee by actors who portrayed fictional characters in the program and who claim that a depiction of those characters evokes the actors' identities? (2) May a state, consistently with the First Amendment, permit actors who have portrayed fictional characters to assert right of publicity claims against the copyright owners of those characters and their licensees on the ground that their later fictional depiction of the characters reminds the public of the actors in their portrayal of the characters?

Peavy v. WFFA-TV, Inc., 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3318 (U.S. May 29, 2001) (Nos. 00-691, 00-849), *see LDRC LibelLetter*, Oct. 1999 at 10, Aug. 2000 at 9.

Fifth Circuit Decision: The Fifth Circuit reversed summary judgment and reinstated Texas and federal wiretap claims against a television station and reporter where it was alleged that they indirectly encouraged the interception of plaintiff's cordless phone conversations. The conversations were directly intercepted by plaintiff's neighbor using a police scanner. Claiming the conversations revealed threats and proof of public corruption relating to plaintiff's position as a school district trustee, the neighbor contacted WFFA-TV and provided recordings of theses conversations to an investigative reporter. The source also made and supplied the reporter with additional recordings and WFFA-TV broadcast three reports on plaintiff's alleged corruption. The district court granted summary judgment to defendants on First Amendment grounds, applying a strict scrutiny standard to the wiretap statutes and finding them unconstitutional as applied to the media defendants. The Fifth Circuit reversed. Distinguishing the Third Circuit's decision in *Bartnicki*, the Fifth Circuit found that issues of fact existed as to whether the reporter was indirectly involved in the interceptions and therefore procured the interception in violation of the statutes. The court noted that the reporter took tapes from the source, inquired about the content of the recordings,

advised the source not to edit the tapes so as to compromise their authenticity, and promised to investigate the contents of the tapes. Issues of fact also existed as to whether the news broadcasts disclosed the contents of the phone communications or whether the broadcasts were based on independent sources.

Questions Presented: (1) Does imposition of civil liability on a media defendant under 18 U.S.C. § 2511(1)(c) and (d), and parallel Texas state wiretap statute, for using or disclosing contents of illegally intercepted communications violate the First Amendment? (2) Does imposition of liability under 18 U.S.C. § 2511(1)(c) and (d) require showing that defendant "know[s] or ha[s] reason to know that information was obtained . . . in violation of this subsection"? (3) Does a cause of action exist under civil remedy provision of federal wiretap statute against persons who violate 18 USC § 2511(1)(a) by "intentionally . . . procur[ing] any other person to intercept . . . any wire, oral, or electronic communication"? (4) Does statutory suppression rule of 18 USC § 2515 prohibit the defendant in a civil lawsuit from introducing contents of illegally intercepted communications into evidence to defend against state law claims or to support affirmative defenses to liability under federal wiretap statute?

e. Petitions Filed In Media Cases But Not Acted Upon (3)

Church of Scientology Int'l. v. Time Warner, Inc., 238 F.3d 168 (2d Cir. 2001), *pet. for cert. filed*, 70 U.S.L.W. 3035 (U.S. May 8, 2001) (No. 00-1683). *See LDRC LibelLetter* Nov. 1995 at 5; July 1996 at 2; Sept. 1998 at 6; Jan. 2001 at 2.

Second Circuit Decision: The Second Circuit affirmed summary judgment in favor of *Time* magazine, an individual reporter and *Time's* corporate parent in an action by the Church of Scientology over a 1991 magazine article entitled "Scientology: The Cult of Greed," a highly critical report on Scientology which described it as "posing as a religion" but being "really a ruthless global scam," citing various instances of wrongdoing. The court affirmed that several statements complained of were not of and concerning plaintiff. As to others, the plaintiff failed to establish that the reporter entertained serious doubts or purposefully avoided the truth. Moreover, absent such proof, reporter's alleged bias towards plaintiff was not probative of actual malice. The court also affirmed that remaining statements at issue were barred by the "subsidiary meaning" doctrine recognized in *Herbert v. Lando*, 781 F.2d 298, 312 (2d Cir. 1986) where the Second Circuit held "that when a "published view" of a plaintiff is not actionable as libel, other statements made in the same publication are not "actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held that there can be no recovery." Distinguishing the subsidiary meaning doctrine from incremental harm, the court explained that the former bears upon whether a view was published with actual malice and thus is a question of federal constitutional law.

Questions Presented: (1) Does the court of appeals' decision creating the "subsidiary meaning doctrine," pursuant to which a knowingly false and defamatory statement is protected by the First Amendment if the court concludes that it is "subsidiary in meaning" to a false defamatory "overall view" expressed without actual malice, conflict with the holding in *Masson v. New Yorker*

Magazine, that incremental harm doctrine is not mandated by the First Amendment? (2) Does the court of appeals' unprecedented holding that a libel defendant's ill will or bias is to be treated not as circumstantial evidence of actual malice, but as strong evidence of lack of actual malice sufficient to compel granting summary judgment to defendant unless plaintiff can demonstrate countervailing "extreme departure from standard investigative techniques," conflict with decisions in *Anderson v. Liberty Lobby* and *Harte Hanks Communications v. Connaughton*, as well as decisions of other federal circuits and state supreme courts? (3) Must a public figure libel plaintiff establish actual malice even when he seeks only to vindicate his reputation by an award of nominal damages, despite the fact that the rule established in *New York Times v. Sullivan* was intended to protect defendants against ruinous damage awards and chilling effects of danger of such awards, and despite the fact that common law permits individuals to defend their reputations by seeking nominal damages premised on a finding of falsity?

Cota v. Simonton, Case No. B138922 (2d App. Dist.) (unpublished decision), *rev. denied*, 2001 Cal. LEXIS 1657 (Cal. S. Ct. Mar. 14, 2001) (decision without published opinion), *pet. for cert filed*, 70 U.S.L.W. 3037 (U.S. June 12, 2001) (No. 00-1858).

California Appellate Court Decision: The California appellate court affirmed dismissal of a libel action against a university newspaper under the state's anti-SLAPP statute, Cal. Civ. Code § 425.16. Based on a phone conversation initiated by plaintiff, a former law student, the newspaper reported his claim that in the 1950's the law school retaliated against him because of his opposition to McCarthyism at the school. The appeals court affirmed that plaintiff was properly deemed a limited purpose public figure, having voluntarily thrust himself into a public controversy. Further, the complained of statements were either opinion, true, not harmful to reputation or not shown to have been published with actual malice. Plaintiffs claims on appeal that the anti-SLAPP law violates the First Amendment and California Constitution were not raised at trial and were therefore waived.

Questions Presented: (1) Was petitioner, a former university student, improperly deemed to be a limited purposed public figure? (2) Does the California's SLAPP statute unduly burden petitioner's First Amendment right to petition government for redress of grievances by summarily striking libel claim without benefit of requested discovery (and by imposition of attorney's fees) thereby also effectively violating petitioner's right to due process? (3) Is an article about petitioner, which was on its face calculated to subject him to mockery and ridicule and is replete with factual conclusions disguised as opinions, libelous when read in its entirety and its audience and context are taken into consideration?

Tucker v. Fischbein *(Tucker III)*, 237 F.3d 275 (3rd Cir. 2001), *pet. for cert. filed*, 69 U.S.L.W. 3750 (May 15, 2001) (Nos. 00-1723, 00-1724). *See LDRC LibelLetter* Sept. 1998 at 15, Feb. 1999 at 4, Aug. 2000 at 19, Jan. 2001 at 9.

Third Circuit Decision: Plaintiffs, anti-rap advocate C. Delores Tucker and her husband William Tucker, sued *Time* and *Newsweek* magazines, individual reporters, and a source, alleging that defendants defamed them by characterizing their loss of consortium claim in *Tucker v. MTS* (*see supra*) as one for loss of sexual relations. The district court granted summary judgment in favor of defendants, holding that the statements in question were not capable of a defamatory meaning or, alternatively, that plaintiffs could not prove actual malice. 27 Media L. Rep. 1663 (E.D. Pa. Feb. 9,1999). The Third Circuit affirmed summary judgment in favor of *Time*, *Newsweek* and their reporters, but reversed as to the source, Richard Fishbein, a lawyer for the estate of Tupac Shakur. The court found that the defendants' statements to the effect that plaintiffs had sued Shakur because his lyrics damaged their sex life carried numerous defamatory implications, such as making the Tuckers look insincere, excessively litigious, avaricious, and perhaps unstable. Nevertheless, summary judgment was affirmed as to the media defendants because plaintiffs could not show with clear and convincing evidence that they acted with actual malice. The court reversed summary judgment for Fischbein for certain statements he made to the media defendants because a jury could find knowing falsity based on the fact that he would likely have read plaintiffs' amended complaint disclaiming recovery for harmed sexual relations.

Questions Presented in Plaintiffs' Petition: (1) Did the trial and Third Circuit courts give due deference to holdings in *Masson v. New Yorker*, 501 U.S. 496 (1991), *Harte-Hanks v. Connaughton*, 491 U.S. 657 (1989), *Schiavone Const. Co. v. Time*, 847 F.2d 1069 (3rd Cir. 1988), *Ertel v. The Patriot-News Co*, 674 A.2d 1038 (Pa. 1996), *Curran v. Philadelphia Newspapers*; 439 A.2d 652 (Pa. 1981), *Tucker v. Philadelphia Daily News*, 757 A.2d 938 (Pa. Super. 2000), *Merriweather v. Philadelphia Newspapers*, 684 A.2d 137 (1996) and *Savitsky v. Shenandoah Valley*, 566 A.2d 901, 903 (1989); (2) In the framework of a summary judgment motion, does the evidence suffice to show that *Time* and/or *Newsweek* acted with the requisite knowledge of falsity or reckless disregard as to the truth of falsity of the defamatory publication? (3) Is it proper for a trial judge or an appellate court at the summary judgment stage in a libel case, to disregard the usual summary judgment standard of review and instead pick and choose, weigh and balance the alternative versions of the facts and to conclude from one sentence in a 447-page deposition that Plaintiffs will be unable at trial to sustain their clear and convincing burden of proving malice? (4) What does a public figure have to do in the new millennium to withstand a summary judgment libel malice motion by the media? (5) Has Your Court and should Your Court address the inherent conflict between the First and Seventh Amendment in public figure libel cases? (6) In light of the burden of proof that is so harsh that 70% of libel cases brought against the press (where *Sullivan* rules apply) end with Defendants' Motion for Summary Judgment and of those that go to judgment only an estimated 5-10% are upheld? Is it time to revisit New York Times v. Sullivan and its progeny in the context of the current status of public persons and the media?

Questions Presented in Defendant Fischbein's Petition: (1) Was the alleged speech of petitioner protected by the First Amendment as an opinion based upon disclosed facts? (2) Was the

alleged speech of petitioner qualifiedly privileged as fair comment upon pleadings filed in a judicial proceeding? (3) Did the respondents, after full discovery, adduce any evidence from which a reasonable juror could have concluded by clear and convincing evidence that the alleged speech of petitioner was made with actual malice?

2. Non-Media Defendants (5)

a. Favorable Non-Media Libel/Privacy Decisions Left Standing (4)

Brundage v. U. S. Information Agency, 2000 U.S. App. LEXIS 34055 (7th Cir. Dec. 9, 2000) (unpublished), *cert. denied*, 69 U.S.L.W. 3728, U.S. May 14, 2001 (No. 00-1490).

Seventh Circuit Decision: The Seventh Circuit affirmed the dismissal of a pro se defamation complaint under the Federal Tort Claims Act ("FTCA") against the U.S.I.A., the CIA, the State Department and President Clinton. Plaintiff had resided in Malaysia. He alleged that defendants conspired in the publication of a defamatory news article there that quoted plaintiff saying he was "unhappy with life" in Malaysia due to his difficulties finding employment and that, as a result, he had become "psychologically broken and mentally unstable" and that this led to his expulsion from the country. The Seventh Circuit held that the district court properly granted a motion to dismiss. Plaintiffs claims were untimely and substantively barred by the FTCA.

Question Presented: When decisions by federal courts are adopted wholesale from pleadings of defense attorneys, including FTCA claims that appellant did not plead but that are attributed to him, does this indicate that decisions at issue were not independent decisions based upon facts or law?

Jordan v. Zorc, 765 So. 2d 768 (Fla. App. 2000), *cert. denied*, 69 U.S.L.W. (U.S. June 25, 2001) (No. 00-1652).

Florida Appeals Court Decision: A Florida appellate court reversed a $3.7 million jury verdict in favor of plaintiff William Jordan, then Mayor of Vero Beach, Florida against a member of a taxpayer's watchdog group and directed a verdict in favor of defendant. At meetings and in written materials, defendant accused the Mayor of unethical and possibly illegal conduct in profiting from an eminent domain proceeding. Reviewing the evidence de novo, the appellate court held that the allegedly defamatory statements were either true or matters of opinion.

Questions Presented: (1) In a defamation case, do the Seventh Amendment, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), and *Bose v. Consumers Union of the United States Inc.*, 466 U.S. 485 (1984), allow appellate court to retry a jury's factual determinations when undertaking its independent review to determine actual malice? (2) Was Florida Court of Appeal in error under the First Amendment and *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990), in

categorizing respondent's statements as expressions of opinions that are shielded from petitioner's claim of defamation? (3) Was the Florida Court of Appeal's determination of no actual malice erroneous under the First Amendment and doctrine of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)?

Kevorkian v. American Medical Association, 602 N.W.2d 233, 28 Media L. Rep. 1582 (Mich. App. 1999), *cert. denied*, 69 U.S.L.W. 3685 (U.S. Apr. 23, 2001) (00-1361). *See LDRC LibelLetter* June 1997 at 6, Aug. 1999 at 6.

Michigan Appellate Court Decision: The Court of Appeals of Michigan reversed a denial of summary judgment and remanded for entry of judgment in favor of defendants. The court held that the defendants' statements that the plaintiff, notorious "suicide doctor" Jack Kevorkian, is "a killer," "perverts the idea of the caring and committed physician," "serves merely as a reckless instrument of death, poses a great threat to the public and engages in criminal practices, continued killings and criminal activities" could not support an action for defamation. The court emphasized that the plaintiff is a controversial public figure who injected himself into the debate about assisted suicide, which is a matter of great public concern, and found that the defendants' speech should be accorded maximum protection. Accordingly, the statements, taken in or out of context, did not, by implication or otherwise, harm the plaintiff's reputation since his reputation is such that the effect of more people calling him either a murderer or a saint is de minimis. Alternatively, even if the statements were to be considered defamatory, they would still be either non-actionable rhetorical hyperbole or protected opinion.

Question Presented: Did the Michigan Court of Appeals correctly find respondents immune from potential defamation liability under the First Amendment because petitioner is libel-proof, or alternatively because statements that accuse him of being "a killer" are protected opinion?

Sanford v. Gardenour, 2000 U.S. App. LEXIS 17566 (6th Cir. July 17, 2000) (Kentucky law) (unpublished), *cert. denied*, 69 U.S.L.W. 3456 (U.S. Jan. 8, 2001) (00-885).

Sixth Circuit Decision: Plaintiff, the sole operator of a drug testing company, sued a state probation official over his reports and letters that questioned the reliability of plaintiff's drug testing procedures. The Sixth Circuit affirmed summary judgment in favor of defendant since he was entitled to sovereign immunity and/or his statements were absolutely privileged. On a procedural issue, the Sixth Circuit affirmed that removal to federal court on basis of diversity was proper and plaintiff was estopped from claiming amount in controversy was less than $75,000.

Questions Presented: (1) May diversity jurisdiction ever be created in or conferred upon federal district court by operation of estoppel? (2) If there is such thing as diversity jurisdiction by estoppel, does it apply to plaintiff whose only inequitable act is to seek more than jurisdictional amount in federal court but only if he loses motion to remand his case to state court upon basis that

jurisdictional amount has not been met?

b. Unfavorable Non-Media Libel/Privacy Decisions Left Standing (1)

Alsaeed v. Thorpe, 2000 WL 567617 (Tex.App.-Hous.[1st. Dist.]), *cert. denied*, 69 U.S.L.W. 3479 (2001) (U.S. Aug. 10, 2000) (No.00-747).

Texas Appeals Court Decision: The Texas Court of Appeals reversed the trial court's grant of summary judgment for the defendant in a defamation case concerning his statements questioning the qualifications of a rival for a university teaching post and her relationship with members of the hiring committee. The court found that the defendant did not meet his burden of showing that his statements were qualifiedly privileged and found that genuine issues of fact existed as to whether defendant's statements were negligent.

Question Presented: Did the Texas Court of Appeals correctly apply the federal doctrine of qualified immunity in a defamation case when the petitioner had exercised right to petition guaranteed by First Amendment?

c. Petition Filed But Not Acted Upon (1)

Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 29 Media L. Rep. (5th Cir. 2001), *pet. for cert. filed*, 70 U.S.L.W. 3074 (July 5, 2001) (No. 01-29). *See LDRC LibelLetter* June 1999 at 41, Mar. 2001 at 17, July 2001 at 6. Note: This petition was filed just after the close of the 2000-2001 Term and is included because of the important issues raised.

Fifth Circuit Decision: Proctor & Gamble ("P&G") sued Amway and several distributors for disparagement under Section 43(a) of the Lanham Act and TEX. BUS. & COMM. CODE § 16.29, and related claims, alleging that they injured P&G's reputation by repeating long standing and false rumors that P&G is involved with Satanism. Following a trial, the district court granted judgment as a matter of law to the defendants on the disparagement claims. Noting that P&G was a public figure and that the Satanism rumor was a matter of public concern, the court found that P&G presented no evidence that the defendants repeated the rumor with actual malice. The Fifth Circuit reversed judgment on the disparagement claims. Although P&G is a limited purpose public figure with regard to the Satanism rumor and the speech at issue "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society," the court held that if the defendants' motivation in spreading the rumor was substantially economic their speech would be commercial and entitled to no protection under the First Amendment.

Questions Presented: (1) Whether speech at the core of the First Amendment can be deemed

"commercial speech" based on the motivation of the speaker? (2) Whether the "commercial" nature of defamatory speech deprives it of all First Amendment protection, even when the plaintiff is a public figure suing for injury to reputation?

B. CERTIORARI PETITIONS IN OTHER AREAS OF INTEREST (18)

1. Commercial Speech

a. U.S. Supreme Court Judgments (2)

Lorillard Tobacco Co. v. Reilly, 218 F.3d 30 (1st Cir. 2000), *cert. granted*, 69 U.S.L.W. 3455 (U.S. Jan. 8, 2001) (No. 00-596), *judg. rev'd*, 121 S. Ct. 2404 (June 28, 2001). *See LDRC LibelLetter* May 2001 at 13, July 2001 at 11.

First Circuit Decision: The First Circuit held that a Massachusetts regulatory scheme restricting the advertising, promotion and labeling of cigarettes and other tobacco products in order to reduce the use of such products by minors did not violate the First Amendment or the Commerce Clause and was not preempted by federal law. Among other things the regulations, promulgated by the state Attorney General, restricted billboard advertisements within a 1000-foot radius of any public playground, elementary or secondary school, as well as creating other display and promotion restrictions. The First Circuit held that the Federal Cigarette Labeling and Advertising Act 15 U.S.C. § 1334(b) ("FCLAA") did not preempt the state regulations. Applying *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980) – commercial speech concerning lawful activity and not misleading; can be regulated only if the interest the government asserts is substantial, the regulation directly advances that interest, and the regulation is no more restrictive than necessary – the court concluded that the regulations directly advanced the state's interest in protecting the health of minors and that the restrictions on the tobacco companies' speech were proportionate to the aim pursued.

Questions Presented: (1) Did the court of appeals err in holding that Massachusetts regulations that sharply limit public display of cigarette advertisements do not impose prohibitions with respect to advertising or promotion of cigarettes within meaning of preemption provision of Federal Cigarette Labeling and Advertising Act? (2) Does the Massachusetts' prohibition on virtually any public display of truthful and nonmisleading tobacco advertisements violate the First Amendment, either under the strict scrutiny standard that petitioners contend is applicable or under the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)?

Supreme Court Holding: In an opinion written by Justice O'Connor, and joined by at least five justices throughout the opinion, the Court held that FCLAA preempted the advertising restrictions on cigarettes. Restrictions on cigars and other tobacco products failed the fourth prong of the *Central Hudson* test since they were not narrowly tailored. Other regulations that required five-foot high displays did not directly advance the governmental interest and were not narrowly tailored,

thereby failing the third and fourth prongs of the *Central Hudson* test. Sales regulations which barred the use of self-service displays and required tobacco products to be placed out of the reach of customers did not raise First Amendment problems and survived.

Five justices (O'Connor, Rehnquist, Scalia, Thomas, and Kennedy) agreed that the state regulations on outdoor and point-of-sale advertising of cigarettes were preempted by FCLAA which preempts all state law restrictions. Justices Stevens, joined by Ginsburg, Breyer and Souter (in part), dissented, arguing that the state regulations were restrictions on location and not on advertising content and therefore were not preempted the federal legislation.

Six justices (O'Connor, Kennedy, Rehnquist, Scalia,, Souter, and Thomas) agreed that the state regulations on cigar and other tobacco product advertisements violated the First Amendment. Applying *Central Hudson* to these regulations, O'Connor found that while there was a sufficient governmental interest in curbing the use of such products by minors, the regulations were not narrowly tailored and, in some instances, the 1,000 foot signage restriction would totally ban the communication of truthful information about the products to adults.

United States, et al. v. United Foods, Inc., 197 F.3d 221 (6th Cir. 1999), *cert. granted*, 121 S. Ct. 562 (Nov. 27, 2000)(No. 00-276), *judg. aff'd*, 121 S. Ct. 2334 (2001); *see LDRC LibelLetter* July 2001 at 14.

Sixth Circuit Decision: The Sixth Circuit held that the provisions of the Mushroom Promotion, Research and Consumer Information Act of 1990 (7 U.S.C. § 6101 *et seq*.) that authorize the Secretary of Agriculture to order mushroom producers to contribute funds for generic advertising programs violate the First Amendment. In reversing the district court's judgment, the court distinguished the statute at issue from, which had upheld a compelled advertising program for California tree fruit businesses, reasoning that the latter was justified as a deterrence against free riders who could take advantage of the monopoly power resulting from the heavy regulation of the California fruit industry without paying for those benefits. In contrast, the mushroom industry is not heavily regulated. Although the compelled advertising was non-ideological and non-political, the absence of a comprehensive, regulatory scheme that could have justified concerns for potential free riders rendered the provisions unconstitutional

Question Presented: Do assessments imposed by 1990 Mushroom Promotion, Research, and Consumer Information Act on members of the mushroom industry for advertising programs designed to support the industry violate the First Amendment?

Supreme Court Holding: The Supreme Court affirmed that the compelled advertising program at issue violated the First Amendment, in a 6-3 opinion written by Justice Kennedy, in which Chief Justice Rehnquist and Justices Scalia, and Souter joined, with Justices Stevens and Thomas concurring. According to the Court, just as the First Amendment prohibits the government from prohibiting speech, it may also prevent the government from compelling speech. Here the defendant wants to convey the message that its brand of mushroom is superior to those of other producers and

objects to being compelled to pay for advertising promoting competitors nonbranded mushrooms. According to the Court's opinion, this government mandated speech is contrary to First Amendment principles set out in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity. *See, e.g.*, *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal*., 496 U.S. 1 (1990).

The Court found that the advertising in the case was substantially different than the compelled advertising program in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) which passed constitutional muster. In *Glickman*, the compelled advertising was part of a broad scheme regulating California tree fruit producers that involved cooperative marketing. In this case, the generic advertising is the only object of the regulatory scheme and there are no other marketing regulations.

In dissent, Justice Breyer, joined by Justices Ginsburg and O'Connor, argued that the mushroom advertising program was indistinguishable from that in *Glickman* since the extent of regulation in that case was not critical to the decision and should not in any event make a critical First Amendment difference. According to Breyer, the mushroom advertising program is a species of economic regulation not warranting special First Amendment scrutiny. In a section of his dissent which O'Connor did not join, he added that even if the advertising were deemed commercial speech entitled to some First Amendment scrutiny, the program would directly advance a substantial government interest that could not be served by more limited restrictions.

2. Copyright / Fair Use

a. U.S. Supreme Court Judgments (1)

Tasini v. New York Times Co., Inc., 206 F.3d 161 (2d Cir. 1999), *cert. granted*, 531 U.S. 978 (2000) (No. 00-201), *aff'd*, 121 S. Ct. 2381 (U.S. 2001). *See LDRC LibelLetter* Aug. 1997 at 27, Oct. 1999 at 47, Apr. 2000 at 18, Oct. 2000 at 38, Nov. 2000 at 24, July 2001 at 7.

Second Circuit Decision: The Second Circuit granted summary judgment in favor of six freelance authors in a copyright infringement action against the New York Times Company, Newsday, Time, Inc. and several electronic databases. The publishers included the freelancers' copyrighted articles, which had originally appeared with permission in defendants publications, in the LEXIS/NEXIS electronic database and on searchable CD ROMs (collectively referred to as "databases") without the freelancers consent. The publishers argued that this use was not infringing because it constituted a revision of a collective work (defendants' newspapers and magazines) in which they owned the copyright. The Second Circuit held that the databases did not constitute a revision of defendants' collective publications, but were instead compilations of numerous separately retrievable articles taken from different periodicals. Accordingly, the court concluded that the publishers could not license the re-publication in databases of individual articles in which they owned no rights.

Question Presented: Is a publishers' reproduction and distribution of its entire periodical not only in print, but also electronically, privileged under the Copyright Act, or does it instead infringe upon copyrights held by contributing freelance authors?

Supreme Court Holding: The Court affirmed in a 7-2 decision written by Justice Ginsberg, ane joined by Justices Kennedy, O'Connor, Rehnquist, Scalia, Souter and Thomas, holding that the publishers inclusion of the freelancers' copyrighted articles in the databases was not a permissible revision under § 201(c) of the Copyright Act because the databases reproduce and distribute articles standing alone and not in context. Section 201(c) of the Copyright Act, 17 U.S.C. § 101 *et seq*., provides that the owner of the collective work may only copy the individually copyrighted work "as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." Here the databases present articles to users clear of the context provided by the original periodical editions. In the NEXIS database retrieved articles appear without the original graphics, formatting and the surrounding articles. One CD-ROM database presents an article as it originally appeared on the page but lacks the surrounding material of the original and a user cannot view the surrounding pages without engaging in a separate search. According to the Court these databases are not "revisions" of the collective work as understood in the Copyright Act or by ordinary English language.

To illustrate defendants' infringement, the Court analogized to an imaginary library containing separate copies of articles rather than intact editions of periodicals. The library would store indexed folders of articles from vast numbers of periodicals which could be retrieved by request based on specified criteria. "Viewing this strange library, one could not, consistent with ordinary English usage, characterize the articles as part of 'a revision' of the editions in which the articles first appeared. . . . The crucial fact is that the Databases, like the hypothetical library, store and retrieve articles separately within a vast domain of diverse texts."

The Court rejected the publishers' claim that upholding the finding of infringement would have devastating consequences to the historical record provided by the databases. On remand, the lower court could fashion a licensing agreement, noting that an injunction against including the articles in the databases "hardly followed" from the Court's decision.

Justice Stevens, joined by Justice Breyer, dissented, arguing that the databases provide sufficient context for the articles to be considered permissible revisions under § 201(c).

b. Review Denied (3)

Philadelphia Church of God Inc. v. Worldwide Church of God, 227 F. 3d 1110 (9th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3645 (Apr. 2, 2001)(U.S. No. 00-1276).

Ninth Circuit Decision: Worldwide Church of God (WCG) owned the copyright to its founder's book, *Mystery of the Ages*, and decided after his death to withdraw the work from circulation because it was doctrinally obsolete. Philadelphia Church of God (PCG), a breakaway church, continued to use the book and distribute it to their membership. WCG filed a claim against PCG for copyright infringement, but the District Court granted summary judgment to PCG, ruling that PCG's use of the complete text was statutorily protected "fair use" of the work under 17 U.S.C. § 107. The Ninth Circuit reversed the District Court's decision. It found that WCG did indeed own the copyright to the book, which was passed to the organization in the author's will, and that PCG's defense of fair use must fail because the statutory elements of the fair use doctrine weigh heavily in WCG's favor. Because neither PCG's religious or non-profit status nor the First Amendment protect PCG from any illegal publishing of the text, the court permanently enjoined PCG from reproducing or distributing the book and remanded the case for trial on any damages and final adjudication.

Questions Presented: (1) Does "right to hoard" work require the denial of the "fair use" defense when a copyright holder seeks to prevent dissemination at no charge and for religious and educational purposes of previously published work, not to protect work's future value, but to suppress views copyright holder now abhors? (2) Does receipt of "benefit" or "advantage" of any kind from use of copyrighted work prevent "fair use" finding under first statutory factor, even when use is noncommercial? (3) Is "fair use" limited to uses that are transformative and for different purpose from that of original work? (4) Can work designed to critique and discredit original work be found to compete in same market as original work for purposes of fourth statutory "fair use" factor?

PrimeTime 24 Joint Venture v. National Football League, 211 F.3d 10 (2d Cir. 2000), *cert. denied*, 2001 U.S. LEXIS 2486 (U.S. Mar. 26, 2001) (No. 00-1134).

Second Circuit Decision: The Second Circuit affirmed an order permanently enjoining satellite carrier PrimeTime from providing secondary transmissions of NFL games to Canadian satellite subscribers, holding that the transmissions infringed the NFL's copyrights to public performance and display under the Copyright Act 17 U.S.C. § 106(4). PrimeTime argued that the only infringement happened in Canada, where the games were broadcast, not in America, where the games were uplinked, and that therefore Canadian copyright laws applied. The Second Circuit, drawing on *WGN Continental Broad. Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982) and citing *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752 (S.D.N.Y. 1988), held that "the most logical interpretation of the Copyright Act is to hold that a public performance or display

includes 'each step in the process by which a protected work wends its way to its audience.'" The Second Circuit noted that it did not rely on the Satellite Home Viewer Act, 17 U.S.C. § 119, in reaching its decision.

Question Presented: Does the Copyright Act apply to satellite retransmission of domestic television signals to Canada, the issue on which the Second and Ninth Circuits disagree?

Sony Computer Entertainment, Inc. v. Connectix Corporation, 203 F.3d 596 (9th Cir. 2000), *cert. denied,* 531 U.S. 871 (No. 00-11)(October 2, 2000).

Ninth Circuit Decision: The Ninth Circuit reversed a grant of a preliminary injunction against Connectix Corp., a company that sold a software program and a video game system called Virtual Game Station that allowed users to play Sony PlayStation video games on their computers via CD-ROM drives, rather than the PlayStation console. The court held that the Virtual Game Station itself did not infringe Sony's copyrights, and although Connectix had developed its product by making intermediate copies and observing how Sony's BIOS system ran, this copying was protected by fair us, 17 U.S.C. § 107 as interpreted by *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1993). The court also disagreed with the lower court, finding that the Virtual Game Station did not tarnish Sony's PlayStation mark. The court declined to find whether Connectix was protected by 17 U.S.C. § 117, which permits copies created as an essential step.

Questions Presented: (1) Is the Ninth Circuit's newly fashioned per se fair use rule for computer software, which excuses any direct copying of copyrighted software undertaken for purpose of quickly and inexpensively making "emulation" product, regardless of impact on copyright holder's potential rewards, consistent with the provisions and purposes of Copyright Act? (2) Even if copying for purposes of reverse engineering copyrighted software could be properly excused as fair use, is additional, unnecessary copying for related product development and other purposes also excused as fair use?

3. Election Law/Campaign Finance

a. U.S. Supreme Court Judgments (1)

Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 213 F.3d 1221 (10th Cir. 2000), *cert. granted,* 531 U.S. 923 (2001) No. 00-191, *judg. rev'd,* 121 S. Ct. 2351 (2001).

Tenth Circuit Decision: The Tenth Circuit Court of Appeals struck down the Party Expenditure Provision of the Federal Election Campaign Act of 1971, 2 U.S.C. § 441a(d)(3), saying the government violated the First Amendment rights of political parties by placing limits on party spending. The limits restricted so-called "coordinated expenditures," for which there is close coordination between a political party and its candidate on things such as the content and placement

of advertisements ultimately paid for by the party. The Federal Elections Commission (FEC) had previously looked at coordinated expenditures as contributions rather than expenditures because of the candidate's involvement and the candidate's direct benefit that invariably resulted. Current constitutional law generally allows contributions to be regulated, but prohibits regulation of election expenditures since expenditures are closer to political speech and any limitations would infringe on political expression protected by the First Amendment. *Buckley v. Valeo*, 424 U.S. 1 (1976).

The Colorado Republican Election Campaign Committee (the Party) ran a commercial in 1986 that criticized Tim Wirth, then a Democratic Congressman who had just announced that he was running for the Senate. Wirth was not yet the official Democratic candidate and there was no Republican candidate at the time of the commercial. Still, the FEC counted the expenses for the commercial against the Party's campaign spending limits. The Party filed suit, challenging the FEC's ruling and the Party Expenditure Provision (the Provision). The case first reached the Supreme Court in 1996, when the Court held that the limits were unconstitutional as applied to pure expenditures that were independent and not coordinated with a candidate, such as the anti-Wirth commercial. *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996) (*Colorado I*). The case was remanded for more arguments on the facial challenge to the Provision.

On remand, a three-judge majority in the Tenth Circuit found the Provision unconstitutional because of the importance of political speech and the role political parties have long played in such speech. The majority noted that the risk of an individual donor using the party's coordinated spending to circumvent the individual contribution limits was foreclosed by another provision in the Act. That provision, 2 U.S.C. § 441a(a)(8), states that contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to a particular candidate shall be treated as contributions from the original source to the candidate.

Question Presented: Does a political party have the First Amendment right to make unlimited campaign expenditures in coordination with that party's congressional candidates, notwithstanding limits on such coordinated expenditures imposed by 1971 Federal Election Campaign Act?

Supreme Court Holding: In a 5-4 decision written by Justice Souter and joined by Justices Stevens, O'Connor, Ginsburg, and Breyer, the Court held that the Party Expenditure Provision is constitutional. The risk of corruption and circumvention of the Act's contribution limits was so high, the Court wrote, that the government could restrict a party's coordinated expenditures. The Court rejected the argument that the Party Expenditure Provision imposes an "unusual burden" on political parties. "If the coordinated spending of other, less efficient and perhaps less practiced political actors can be limited consistently with the Constitution," the Court asked, "why would the Constitution forbid regulation aimed at a party whose very efficiency in channeling benefits to candidates threatens to undermine the contribution (and hence coordinated spending) limits to which those others are unquestionably subject?" The fact that the Party Expenditure Provision had been in effect for nearly three decades influenced the Court; the majority observed that parties had not yet been rendered "useless." Instead, the Court noted, every entity involved in elections, from candidates to parties to donors, test the boundaries of the law with systems such as the Democratic Senatorial Campaign Committee's tallying system, which ensures that individual party donations are matched by party expenditures for the candidate. If the limits were struck down, the Court said,

the inducement to circumvent the rules would "almost certainly intensify," noting that without the limits a candidate could raise $1 million with as few as 46 donors (each donating the maximum $2,000 allowed to the candidate and the maximum $20,000 allowed to the party), compared to a minimum of 500 donors necessitated under current law (if each donates the maximum).

Justice Thomas dissented in two parts. The main part, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, argued that the Provision infringed the parties' political expression. Justice Thomas discounted the Court's fear that individual donors could control the party or their candidates, and noted that in *Colorado I* the Court called similar corruption fears "at best, attenuated." Even if the fears of corruption were justified, Justice Thomas said that there were better tailored alternatives that did not infringe the First Amendment, and cited *Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001) to state that "the normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." The other part of Justice Thomas's dissent, joined only by Justices Scalia and Kennedy, argued that *Buckley* should be overruled.

4. Internet / Pornography

a. Review Granted

Ashcroft v. ACLU *(formerly ACLU v. Reno)*, 217 F.3d 162, 28 Media L. Rep. 1897 (3d Cir. 2000), *cert. granted*, 69 U.S.L.W. 3739 (U.S. May 21, 2001)(No. 00-1293).

Third Circuit Decision: The Third Circuit affirmed the issuance of a preliminary injunction which prevented the enforcement of the Child Online Protection Act (COPA), 47 U.S.C. § 231, a statute aimed at protecting minors from "harmful material" knowingly posted on the Internet, as measured by "contemporary community standards." In affirming the preliminary injunction, the Third Circuit noted that it was "confident" that the ACLU's attack on COPA's constitutionality was "likely to succeed on the merits." The court reasoned that material posted on the Web may be viewed by users worldwide, and current technology does not exist to allow a Web publisher to restrict access to its site by geographic location of each user, and thus COPA essentially requires every publisher that is subject to the statute on the Web to reduce itself to the "most restrictive and conservative state's community standards in order to avoid criminal liability." The court found this to be an impermissible burden on protected First Amendment speech.

Question Presented: Did the court of appeals properly bar enforcement of the Child Online Protection Act, 47 U.S.C. § 231, on First Amendment grounds because it relies on community standards to identify material that is harmful to minors?

Reno v. Free Speech Coalition, 198 F.3d 1083 (9th Cir. 1999), *cert. granted*, 69 U.S.L.W. 3495 (U.S. January 22, 2001) (No. 00-795). *See LDRC LibelLetter* Feb. 2001 at 35.

Ninth Circuit Decision: The Ninth Circuit reversed in part and affirmed in part a lower court's decision concerning the constitutionality of the Child Pornography Prevention Act of 1996 ("CPPA"), 18 U.S.C. §§ 2252A, 2256(8) (B)-(D). In relevant portions the statute criminalizes visual images and depictions that "appear to be" or "convey the impression" of child pornography even where no child is actually used. The court affirmed the district court's finding that CPPA was not a prior restraint of speech, but it held that it constituted a content-based restriction and subjected it to strict scrutiny, holding that criminalizing child pornography where no real children are involved is unsupported by any compelling governmental interest. The statutory phrases "appears to be" and "conveys the impression" of child pornography, as used in CPPA, are impermissibly vague and over broad. The Ninth Circuit's decision conflicts with decisions from the First, Fourth and Eleventh Circuit Courts of Appeal rejecting First Amendment challenges to the same provisions of CPPA. See *U.S. v. Hilton*, 167 F.3d 61 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999); *U.S. v. Mento*, 200 WL 1648878 (4th Cir. Nov. 3, 2000); *U.S. v. Acheson*, 195 F.3d. 645 (11th Cir. 1999).

Question Presented: Is the First Amendment violated by the Child Pornography Prevention Act's prohibition of shipment, distribution, receipt, reproduction, sale, or possession of any visual depiction that appears to be of a minor engaging in sexually explicit conduct, 18 U.S.C. §§ 2252A and 2256(8)(B), and by the Act's prohibition of any visual depiction that is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct, §§ 2252A and 2256(8)(D)?

b. Review Denied

Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3455 (January 8, 2001)(U.S. No. 00-466).

Fourth Circuit Decision: The Court of Appeals for the Fourth Circuit reversed *en banc* by a vote of 7-4 a district court grant of summary judgment for plaintiffs, public college and university professors, on claims challenging the constitutionality of a Virginia state law that prohibits state employees from accessing sexually explicit content on computers owned or leased by the state without a prior grant of permission from the head of the public agency. Va. Code Ann. §§ 2.1-340.1 to 346.1 (Michie Supp. 1999). Defendant Virginia Governor James S. Gilmore III appealed the district court's opinion which declared that the Act violated the First Amendment rights of the university professors. *Urofsky v. Allen*, 995 F. Supp. 634 (E.D. Va. 1998).

Appellees challenged the Act on two levels: first arguing that the Act is unconstitutional to all state employees, and second, even if it is not unconstitutional, that it is a violation of their right to academic freedom. As to the first argument, the Fourth Circuit applied the *Pickering* test, which

balances the rights of government employees as private citizens to speak on matters of public concern and the rights of the government to maintain an efficient and appropriate operation of the workplace. *Pickering v. Board of Educ*., 391 U.S. 563 (1968). Reviewing the case *de novo*, the court found that access to sexually explicit material does not touch on a matter of public concern, therefore the state, as an employer, may regulate such behavior without infringing any First Amendment protection of its employees. As to the second argument, the court concluded that despite a frequent reference to "academic freedom" in federal case law, there does not exist a constitutional right to "academic freedom" for university professors over and above the First Amendment rights guaranteed to any citizen. Therefore, concluded Circuit Judge Wilkins for the court, because the Virginia Act is not unconstitutional with regard to state employees as a whole, it does not violate the rights of public college and university professors.

Questions Presented: (1) Do state-employed scholars have a First Amendment-based right of academic freedom in connection with their job-related research and writing? (2) Can job-related research and writing by public employees, including but not limited to professors, ever be on matters of public concern? (3) Does a content-based licensing scheme that bars state-employed scholars from conducting job-related research and writing on "sexually explicit" subjects without obtaining prior written permission violate the First Amendment? (4) Under heightened scrutiny applicable to content-based restrictions on academic freedom, or under *U.S. v. National Treasury Employees Union*, 513 U.S. 454 (1995)/*Pickering v. Board of Educ*., 391 U.S. 563 (1968) balancing test, did Virginia fail to justify its prohibition of professors' and other public employees' job-related research and writing on "sexually explicit" subjects?

5. Public Forum

a. Review Granted

Thomas v. Chicago Park District, 227 F.3d 921 (7th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3748 (U.S. May 29, 2001)(No. 00-1249).

Seventh Circuit Decision: The Seventh Circuit affirmed a grant of summary judgment to defendant park district against plaintiff's claim that the Park District Code of Chicago, which requires organizers to obtain a permit before holding a rally with more than 50 people, violated their free speech rights. Plaintiffs, who wanted to use the park for rallies in support of repealing laws that criminalize the sale of marijuana, claimed that the regulation was a facial violation to the free speech clause to the First Amendment, since requiring prior permission presented a prior restraint on the exercise of free speech in a public forum. The court found, however, that the regulation at issue did not authorize any judgment regarding the content of the speech or expressive activity, and was not a prior restraint. Furthermore, the plaintiffs had previously made "material misrepresentations" regarding the nature or scope of the event, which was a sufficient and neutral ground on which to deny the permit.

Questions Presented: (1) Does immediate access to courts following denial of a permit for core political speech in traditional public forum constitute prompt judicial review, as required by

Freedman v. Maryland, without regard to length of time allowed for judicial decision? (2) Must an ordinance requiring a permit for core political speech in a traditional public forum include each of the procedural safeguards established in *Freedman v. Maryland*, or is that case only applicable to sexually explicit speech presented by adult entertainment businesses? (3) Is a content-neutral ordinance that requires a permit for core political speech in a traditional public forum analyzed as a prior restraint or under a more deferential standard applicable to time, place, and manner regulations? (4) May plaintiff bring a facial challenge to a permit ordinance that restricts political speech in a public forum without first having to prove that the ordinance has been unconstitutionally applied to him because of the government's hostility to plaintiff or his proposed speech? (5) Can an ordinance requiring a permit for core political speech in a traditional public forum include unfettered discretion to issue or withhold the permit?

b. Review Denied

Knights of the Ku Klux Klan v. Curators of the University of Missouri, 203 F.3d 1085 (8th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3224 (U.S. Oct. 2, 2001) (No. 99-1838).

Eight Circuit Decision: The Eighth Circuit ruled that a not-for-profit public radio station owned and operated by the University of Missouri, a public corporation, and licensed by the FCC, did not violate the First and Fourteenth Amendment rights of the Ku Klux Klan when it refused to accept the organization as an underwriter of the station's programming. In exchange for underwriting funds, the station would broadcast an acknowledgment and description of the underwriter. The Klan submitted the following message to be read: "The Knights of the Ku Klux Klan, a White Christian organization, standing up for rights and values of White Christian America since 1865. For more information please contact the Knights of the Ku Klux Klan, at P.O. Box 525 Imperial, Missouri 63052. Let your voice be heard!"

Affirming summary judgment in favor of the University, the court first rejected the Klan's argument that the radio station's underwriting program created a public forum noting that "such forum requirements are for the most part inapplicable in the context of public broadcasting, where substantial discretion is accorded to broadcasters with respect to the daily operation of their stations." Second, the court held that the radio station's underwriting acknowledgments constituted government speech by the University in which it can exercise "control not only over the decision to accept or reject the donations, but also over the form and content of the announcements themselves."

Questions Presented*:* (1) Does a not-for-profit radio station's voluntary underwriting program and their federally mandated requirement of sponsorship identification constitute government speech and therefore shield it from forum analysis under *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 66 (1998)? (2) Is an enhanced underwriting program merely a revenue-generating operation without journalistic or editorial character and, as such, not protected from forum analysis under *Forbes*? (3) Can forum analysis be properly applied under *Forbes* where the broadcaster intentionally sets aside time for the presentation of third party views?

6. Punitive Damages

a. U.S. Supreme Court Judgments (1)

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 1999 U.S. App. LEXIS 33657 (9th Cir. Or. Dec. 17, 1999), *judg. rev'd*, 121 S. Ct. 1678, 69 U.S.L.W. 4299 (2001). *See LDRC LibelLetter* June 2001 at 13.

Ninth Circuit Decision: In a Lanham Act case, the Ninth Circuit affirmed an award of punitive damages under an abuse-of-discretion standard of review. Plaintiff Leatherman Tool Group filed claims for trade-dress infringement, unfair competition, and false advertising under the Lanham Act against defendant Cooper Industries. Defendant used photographs of plaintiff's "pocket survival tool," removing trademarks and otherwise retouching the photographs, in marketing materials for defendant's competing tool. After trial, the jury awarded plaintiff $50,000 in compensatory damages for Lanham Act violations and $4.5 million in punitive damages. The trial court found that the award of punitive damages was "was proportional and fair," notwithstanding Cooper Industries' argument that the punitive damage award was so grossly excessive as to violate the Due Process Clause of the U.S. Constitution (*see BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)). The Ninth Circuit affirmed, finding that despite the "very unusual" claim of "passing off" one product for another which is functionally identical, the trial court was not compelled to reduce the punitive damages award.

Questions Presented: (1) Did Ninth Circuit, aligning itself with the Second and Seventh Circuits, err in using the "abuse of discretion" standard to review the trial court's ruling on a challenge to the constitutionality of a punitive damages award, as opposed to applying the de novo review standard, as the Third, Eighth, Tenth, and Eleventh Circuits have done? (2) Does a punitive damage award that is 90 times purely economic compensatory damages violate petitioner's due process rights under *BMW of North America Inc. v. Gore*, 517 U.S. 559, 64 U.S.L.W. 4335(1996)?

Supreme Court Holding: In an 8-1 decision written by Justice Stevens, the Supreme Court vacated and remanded the Ninth Circuit's decision, holding that *de novo* review is the proper standard for reviewing punitive damage awards. The Court reiterated that the Due Process Clause of the Constitution bars "grossly excessive" punitive damages in light of the nature of the defendant's conduct, the relationship between the penalty and the harm caused, and sanctions imposed in other cases for comparable misconduct. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In fact, conducting *de novo* review on appeal will flesh out and clarify these criteria, helping "to assure the uniform treatment of similarly situated persons that is the essence of law itself." *De novo* review of punitive damages does not offend the Seventh Amendment (which limits reexamination of facts tried by a jury). Whereas compensatory damages reflect the jury's factual determination of harm, punitive damages represent the jury's moral outrage and is not entitled to the same deference on appeal.

Justices Thomas and Scalia authored separate short concurrences agreeing in the result under *BMW*, but noting their dissenting position in *BMW* that excessive punitive damage awards do not

violate the Due Process clause of the Constitution. Justice Ginsburg dissented on the grounds that an award of punitive damages reflects a finding of fact that should be subject to the abuse of discretion standard of review on appeal.

7. Telecommunications

a. Review Denied

Time Warner Entertainment Co. v. FCC, 211 F.3d 1313 (D.C. Cir. 2000), *cert. denied*, 69 U.S.L.W. 3556 (U.S. February 20, 2001) (No. 00-623).

D.C. Circuit Decision: The D.C. Circuit Court of Appeals ruled that the provisions of the Cable Television Consumer Protection and Competition Act of 1992 that authorize the Federal Communications Commission to impose limits on the number of subscribers a cable operator may reach and on the number of channels on a cable system that could be devoted to programming in which the operator has a financial interest do not facially violate the First Amendment. The court found that both provisions were content-neutral and thus subjected them to intermediate scrutiny. As far as the subscriber limits provision was concerned, the D.C. Circuit held that Congress had a reasonable interest in wanting to prevent excessive concentration in the cable industry, since, in the light of existing evidence, such concentration can threaten diversity and competition. The court considered the provision a legitimate structural prophylaxis and concluded that it did not impose excessive burdens on operators' speech. The channel occupancy provision was also found constitutional, since Congress had a legitimate interest to prevent cable operators from favoring their affiliated programmers over others.

Questions Presented: (1) Is strict scrutiny triggered when Congress imposes direct limits on quantity of cable operators' expression in attempt to enhance overall diversity of speech content within cable medium? (2) Is law restricting speech as "structural prophylaxis" invalid under intermediate scrutiny when it is justified only by speculation undermined rather than supported by record evidence?

8. Trademark / Internet Domain Names

a. Review Denied

Northern Lights Club v. Northern Light Technology Inc., 236 F.3d 57 (1st Cir. 2001), *cert. denied*, 69 U.S.L.W. 3763 (U.S. June 11, 2001) (No. 00-1651).

First Circuit Decision: Plaintiff Northern Light Technology, owner of the search engine northernlight.com, sued Canadian owner of domain name "northernlights" under the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d). Based on the likelihood of confusion between the two web sites and evidence of defendant's bad faith, the district court issued a preliminarily injunction requiring defendants to remove all content from the northernlights.com site and post in its place a blacked-out screen with links to defendant's noninfringing web sites. The First Circuit affirmed finding sufficient evidence of bad faith based on defendant's pattern of registering other domain names containing famous trademarks. The First Circuit declined to review defendant's claim that the scope of the injunction violated the First Amendment, noting that free speech objection could be raised at trial.

Questions Presented: (1) If defendant attends live, court-noticed Fed.R.Civ.P. 12(b)(2) hearing, and enters forum to assert defense of lack of personal jurisdiction, but plaintiff attempts "second service" of summons in courtroom, does defendant thereby lose very defense that induced him to be present? (2) Does assertion of personal jurisdiction when minimum contacts are otherwise lacking, based on in-courtroom "second service," violate either prong of applicable due process standard – minimum contacts or fair play and substantial justice? (3) Does injunction against Canadian publishers of Web site violate due process clause? (4) Is First Amendment violated by injunction that dictates entire substantive content of Web site homepage?

9. Zoning / Adult Businesses

a. Review Granted

Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3591 (U.S. Mar. 5, 2001) (No. 00-799).

Ninth Circuit Decision: The Ninth Circuit affirmed a permanent injunction barring Los Angeles from enforcing an ordinance prohibiting more than one adult entertainment establishment in the same building. L.A.M.C. § 12.70(C) (1983). Reviewing the injunction *de novo*, the Ninth Circuit found that the ordinance was a time, place, or manner restriction that failed the test of "substantial government interest." A government study that linked adult businesses to increased prostitution and other crime could not support the ordinance since study did not address issue of adult businesses occupying the same building.

Question Presented: Is zoning ordinance that prohibits operation of more than one adult entertainment business at single location, including adult bookstore and adult arcade, invalid because city did not study negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions?

b. Review Denied

Lim v. City of Long Beach, 217 F.3d 1050 (9th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3574 (U.S. Feb. 26, 2001) (No. 00-1043)

Ninth Circuit Decision: The Ninth Circuit held that a Long Beach, California adult zoning ordinance did not violate the Equal Protection Clause since it was rationally related to a permissible governmental objective of curbing the secondary effects of adult businesses. The court, however, reversed as clear error the district court's determination that the city did not bear burden of proving available relocation sites for adult businesses affected by zoning ordinance. On remand adult business owner could challenge adequacy of alternative sites.

Questions Presented: (1) When adult business claims that adult zoning ordinance deprives them of reasonable opportunity to relocate within a city, does city bear burden of proof that there is sufficient number of alternative sites available for these adult businesses to relocate? (2) In determining whether there are sufficient alternative sites for adult businesses to relocate, is property encumbered by long-term lease part of relevant real estate market within meaning of *City of Renton v. Playtime Theatres,* 475 U.S. 41 (1986)? (3) If more alternative locations are available than number of adult businesses that demand them, has city provided constitutionally sufficient number of sites?