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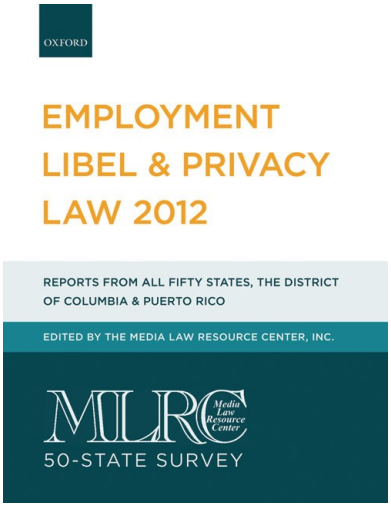

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Honor, Lies & Videotape

Supreme Court Argument in U.S. v. Alvarez

By Mickey H. Osterreicher

It was anticipated that *United States v. Alvarez* would be argued before a divided Supreme Court in the wake of much handwringing and prognostication. The case met or exceeded those expectations.

Background

By way of background the issue in *Alvarez* is whether a federal law (the Stolen Valor Act of 2006 ("the Act"), 18 U.S.C. §704(b)) subjecting a person to criminal penalties for making false statements that they received military medals or honors, violates the free speech clause of the First Amendment.

Prior to the February 22nd argument much had been written about whether or not the Roberts Court would uphold the First Amendment as they had done in two prior cases (*Snyder v. Phelps*, 131 S. Ct. 1207 (2011) and *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011)). In *Snyder* the Court held 8-1 that the right of protestors to express offensive speech at a military funeral was protected by the First Amendment, noting that the government could impose less restrictive measures rather than banning such protests entirely. The 7-2 decision in *Brown* struck down a California law that criminalized the sale or rental of violent video games to minors without parental consent, which was held to be an impermissible restriction on speech, because it was not content neutral and did not pass the strict scrutiny test of being needed to achieve a compelling governmental purpose.

For the most part the argument centered on the constitutionality of a false statement lacking any value and a falsity accompanied by some articulable harm.

Conversely, in a number of other recent cases the Roberts Court has limited free speech while also nibbling away at First Amendment protections. As in *Alvarez*, the issue for both the majority and the dissent in cases like *Holder v. Humanitarian Law* Project, 130 S. Ct. 2705 (2010) dealt with protecting or punishing speech without any indicia that such speech was likely to cause harm.

That again was one of the main arguments before the Court as they struggled with the 9th U.S. Circuit Court of Appeals decision striking down the Act as unconstitutional in the criminal case of Xavier Alvarez, a California politician who was charged under that law for claims made during a public speech that he was a Medal of Honor recipient, when he had never actually served in the military.

Argument in Alvarez

Solicitor General Donald Verrilli Jr. opened by talking about the vital role that military honors play in upholding "the core values of our nation's armed forces" as well as the "exacting criteria" used in awarding those honors, along with a long tradition of Congressional legislation "to protect the integrity of the honor system." He also argued that the Act "regulates a carefully limited and narrowly drawn category of calculated factual falsehoods" by advancing "a legitimate substantial, indeed compelling, governmental interest, and it chills no protected speech."

Jonathan Libby, the California Deputy Federal Public Defender, countered in his opening that "the Stolen Valor Act criminalizes pure speech in the form of bare falsity, a mere telling of a lie." He also asserted that the Act was overly broad and "punishes false claims to a military award regardless of whether harm results." He went on to state his position "that all speech is presumptively protected unless we go back and it fits into one of the historical categories of speech that this Court has found historically is unprotected."

Justice Sotomayor posed the first hypothetical by asking whether or not a Vietnam War protestor who held up a sign that read, "I won a Purple Heart – for killing babies" but hadn't been awarded that medal would be liable under the Act? General Verrilli dodged that bullet by saying it would depend on whether the audience took the sign to be a statement of fact or "an exercise in political theater." This raises the question of whether the subjective intent of the speaker or the objective opinion of the listener is prosecutable under the Act, but that line of questioning did not ensue. The

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argument then turned to the intrinsic question regarding the "value" of speech and First Amendment protection of a "calculated factual falsehood."

Seeking to clarify things further, Justice Sotomayor asked Mr. Libby "if I understood your argument, you're saying historically we have not protected false statements that cause harm," to which he replied, "that's correct, yes, Your Honor."

For the most part the argument centered on the constitutionality of a false statement lacking any value and a falsity accompanied by some articulable harm. Justice Kennedy noted that "it is well understood that speech can injure" and that "it's a sweeping proposition to say that there's no value to falsity," adding "falsity is a way in which we contrast what is false and what is true."

Chief Justice Roberts pointedly asked Mr. Libby "what is the First Amendment value in a lie, pure lie?" Mr. Libby repeated the question while searching for an answer (to many seasoned Court observers this appeared to be characteristic of his performance). Justice Alito sarcastically joined in by asking Mr. Libby if he believed if "there is First Amendment value in a bald-faced lie about a purely factual statement that a person makes about himself?"

In an unsuccessful attempt to save Mr. Libby, Justice Breyer interjected a well-known safe haven question from the Second World War, "Are you hiding Jews in the cellar? [Answer] No," which drew laughter in its timing – coming during an exchange between the Chief Justice and Mr. Libby – in that the question appeared to be directed at the Chief Justice, who reacted somewhat theatrically.

It was one of a few lighter moments during the judicial struggle between two ideological camps. The Roberts-Scalia-Alito (and probably Thomas) faction of the Court sounding (with the exception of Justice Thomas in his continuing role as Harpo) as if they were in support of upholding the Act, and the Ginsberg-Sotomayor-Kagan (and maybe Breyer) bloc questioning the Act's constitutionality. Slippery-slope worries were ever-present with Justice Kagan positing that since there is a strong governmental interest in preserving the sanctity and stability of families – what was to prevent it from criminalizing "the telling of lies" about "extramarital affairs?"

The other "parade-of-horribles" came in the form of concern over invalidating the laws under which it is a crime to make a false statement to a federal agent (which was the downfall of another Libby). Justice Scalia mused that a solution to the problem might come by "giving a Medal of Shame to those who have falsely claimed to have earned the Medal of Valor?"

As expected the "swing vote" was embodied in Justice Kennedy who appeared willing to argue both sides of the issue. At one moment he made an argument against the Act in that, "The whole breathing space thing almost has it backwards. It presumes that the government is going to have a ministry of truth and then allow breathing space around it, and I just don't think that's our tradition." Then in the same breath, he made one favoring the Act by saying, "I have to acknowledge that this does diminish the medal in many respects." He even offered a compromise proposal that the Court could carve out a narrow trademark exception for "a medal in which the government and the armed forces have a particular interest."

In his argument General Verilli insisted that the "breathing space analysis" adequately prevents the Act from having a "chilling effect" on free speech. In other words, the language in the statute is sufficiently narrow so as to limit no more speech than is necessary to achieve a substantial government interest – that being the harm that comes from the virtual theft by lying about receiving a government bestowed honor; as well as the diminution in value of those military awards.

Justice Kagan offered Libby another life-line in the form of the question: "What truthful speech will this statute chill?" His ninth inning strikeout answer: "Your honor, it's not that it may necessarily chill any truthful speech ... we certainly concede that one typically knows whether or not one has won a medal or not. We certainly – we concede that point." Both Justice Kagan and those in attendance were taken aback, with Justice Kagan responding: "So, boy [as in boy-oh-boy], I mean, that's a big concession, Mr. Libby."

Libby's attempts to rehabilitate his argument sputtered from that point forward. In response to a First Amendment hypothetical from Justice Scalia and a follow-up from Justice Alito, Libby answered "That's a difficult question, Your Honor" to which Justice Alito replied, "Well, that's sort of the question we have to answer here." The agony ended when Libby ran out of steam before his allotted time had expired with "Unless the Court has additional questions" to which Chief Justice Roberts said, "Thank you, Mr. Libby."

On rebuttal General Verrilli had no such problem and concluded by saying, "As respondent concedes, there is no chill here, so this statute is constitutional."

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Based on that performance, there are some who hope that the Court relies more on the briefs than on the oral argument in making their decision. Aside from the brief of the United States and Xavier Alvarez, six Amicus Briefs were filed in Support of the Petitioner, eight in support of the Respondent and one in support of neither party.

The brief for the Reporters Committee for Freedom of the Press and Twenty-Three News Media Organizations takes the position that "the Stolen Valor Act is presumptively unconstitutional as a content-based regulation of pure speech." Concisely stated the brief argues that the government's attempt to create "a broad exception to First Amendment protection for any knowingly false statement of fact," would reverse the well-established "presumption against official oversight of expression." In contravention of current First Amendment jurisprudence, it is one in which the exceptions could eventually subsume the rule and turn back the clock "to a time before *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Near v. Minnesota*, 283 U.S. 697 (1931), when newspapers were prosecuted for making what the government called 'false reports.' *United States v. Schaefer*, 251 U.S. 466 (1920)."

"This case is not just about the rights of some serial prevaricator like Xavier Alvarez...It implicates the core First Amendment question of whether the government may act as the arbiter of truth, and the Court's decision could have a wide-ranging impact beyond the narrow facts of this case."

"This case is not just about the rights of some serial prevaricator like Xavier Alvarez," said Robert Corn-Revere of Davis Wright Tremaine LLP, counsel of record for the news media amicus group. "It implicates the core First Amendment question of whether the government may act as the arbiter of truth, and the Court's decision could have a wide-ranging impact beyond the narrow facts of this case," he added.

Many groups, including the media amici, have suggested that the purpose of the Act would be "better served by reliance on the marketplace of ideas than criminalizing pure speech." In a time of databases and search engines, the truth may have finally gained an advantage and negate Mark Twain's quote that "a lie can travel halfway around the world while the truth is putting on its shoes." Xavier Alvarez learned that lesson the hard way. It would now be a dishonor to those in the military to criminalize a freedom that some died to protect. A less restrictive means is not only proper and technologically available but also upholds our fundamental notions of liberty and justice.

As stated by Justice Brandeis in his concurrence in *Whitney v. California*, 274 U.S. 357(1927), "If there be time to expose through discussion the falsehood and fallacies ... the remedy to be applied is more speech, not enforced silence."

As a final observation – while it was very gratifying to have been one of the approximately 400 people in the courtroom, I could not help but to once again wonder what harm there would have been in allowing unobtrusive cameras to record/broadcast this argument. As was recently stated in a NY Times opinion "the authority of the Supreme Court depends on the trust of the public."

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), Chief Justice Burger observed that "people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." Despite prior statements by some Justices the ability of the public to these proceedings should not be trivialized. It touches on an important right, which goes well beyond the mere satisfaction of a viewer's curiosity. That right, advanced by cameras in the Supreme Courtroom, is the right of the people to monitor the official functions of their government, including that of the judicial system. Nothing is more fundamental to the democratic system of governance, especially in a case involving the First Amendment.

To paraphrase Justice Harlan in *Estes v Texas*, 381 U.S. 532 (1965) – the day has long since passed when television was first considered so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.

Mickey H. Osterreicher is of Counsel to Hiscock & Barclay and serves as general counsel for the National Press Photographers Association (NPPA). He attended the oral argument in US v Alvarez, was one of the signatories to the RCFP Amicus brief and is a long-standing proponent of permitting audio-visual coverage of Supreme Court Proceedings.

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Online Article with "Share Button" Not a New Publication

Single Publication Rule Applied to Bar Judge's Defamation Suit

By Anne B. Carroll

In a decision with potential implications for news websites' incorporation of new technologies, a New York trial court has ruled that the addition of "share buttons" enabling readers readily to send links to Facebook, Twitter and other social media and networking sites does not "republish" an online article or column so as to start a new statute of limitations. *Martin v. Daily News, L.P., et al.*, No. 103129/ 11 (N.Y. Sup. Ct., N.Y. Co., Feb. 10, 2012).

Since such features now widely appear in the templates news websites use to present both new and old content, and are regularly updated, the case presented the question of whether each such site-wide update of sharing functionality re-starts the limitations period for all content on the site.

The addition of "share buttons" enabling readers readily to send links to Facebook, Twitter and other social media and networking sites does not "republish" an online article .

In its 2002 *Firth v. State* decision, New York's highest court established that the single publication rule applies to material published on the Internet, a principle that has subsequently been adopted almost unanimously by courts around the country considering the issue. The claimant had argued that an allegedly defamatory online report about him posted on a state agency website was republished for limitations purposes every time the agency modified its website. Rejecting this notion, *Firth* pointed out that "many Web sites are in a constant state of change, with information posted sequentially on a frequent basis," and held that "[a] rule applying the republication exception under the circumstances here would either discourage the placement of information on the Internet or slow the exchange of such information, reducing the Internet's unique advantages."

The *Martin* case posed a variation on this theme, with the plaintiff invoking the traditional exception to the single publication rule, explicitly recognized in *Firth*, that "[r] epublication, triggering the period of limitations, occurs upon a separate aggregate publication from the original, on a different occasion, which is not merely 'a delayed circulation of the original edition.'" The justification for the exception, the court said, is that "the subsequent publication is intended to and actually reaches a new audience."

Martin involved both the restoration to the Daily News' website of an allegedly defamatory column which had been inadvertently removed owing to a technological glitch (though it always remained in the paper's internal digital archive), and its reappearance in a template that displayed an array of share buttons – including an embedded feature which showed that, by the time of suit, the column had been shared with 31 Facebook "friends."

Plaintiff argued that the appearance of the buttons in the restored version showed it was plainly intended to, and actually did, reach a new audience. Since he could not demonstrate any material change in the content the column, the addition of the share buttons became essentially the exclusive basis for plaintiff's theory that a republication falling outside of the single publication rule had occurred.

Background

Plaintiff Larry Martin, a New York state trial court judge sitting in Brooklyn, filed his original libel action against the New York *Daily News* and its then op-ed columnist Errol Louis in January 2008, based on two columns and two blog posts by Louis in January and February of 2007 ("*Martin I*"). On defen-dants' motion challenging the entirety of that complaint, the trial court in Manhattan dismissed all claims except those pertaining to the February 2007 column ("Weed Out Bad Judges") about the need for more resources for New York's Commission on Judicial Conduct (the "CJC").The court believed three aspects of the column were susceptible of

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a defamatory interpretation: a statement that Martin had a conflict of interest when he decided motions in one of a number of related and complex real estate suits; a claimed false implication that the conflict was being investigated by the CJC; and another claimed false implication that Martin was corrupt, derived from the column's drawing attention to two prior CJC admonishments of him (neither involving corruption) and several notoriously corrupt Brooklyn judges.

In March 2011, more than three and a half years after the initial suit, and well into the discovery process in *Martin 1*, plaintiff filed the second action ("*Martin 2*"), alleging that because the column still in suit had been restored to the Daily News' website in March 2010, after having "fallen off" the site during a conversion from one content management system to another, and because of the added features it exhibited, the column had been "repub-lished" such that a new statute of limitations had begun.

The restoration of the column to the site was "akin to a delayed circulation of the original rather than a republication."

Plaintiff's purpose in commencing *Martin 2* was set out clearly: defendants knew for a certainty that the content of the column was false and defamatory of him, he averred, by virtue of the allegations contained in the *Martin 1* complaint -- and this supposed knowledge was in turn proof positive that the "republication" of the identical material was made with actual malice. (Without discernible logic, Justice Martin also claimed that the restoration of the column proved actual malice for purposes of the *initial* publication.) It is relevant that during extensive discovery over more than two years in *Martin 1*, he has made no apparent headway in his effort to prove that either Errol Louis or the Daily News had in fact acted with that level of fault.

The Court's Decision

The trial court noted Justice Martin's assertion that the new sharing functions permitted the column to be "circulated to a new audience on a potentially exponential basis." Nonetheless, it did not agree that the restored content was a separate republication: "Notwithstanding the fact that hyperlinks to social media and networking sites arguably increase the number of people who may ultimately read the 2007 Article, DNLP's targeted audience consists of visitors to its website. This is not a new audience; rather it is the same audience as when the [column] first appeared on DNLP's website."

The decision further observed that "this audience has always had the capacity to share Internet news items by e-mail or by print and distribution to whomever they choose. Significantly," it added, "the creation of this purported 'new audience' plaintiff attempts to identify depends not on DNLP's actions, but rather those of third-parties, to wit, DNLP's website visitors who forward website content to non-visitors by whatever means." The court concluded that the restoration of the column to the site was "akin to a delayed circulation of the original rather than a republication." Thus *Martin 2* was time-barred, and the court did not reach the issue of actual malice.

Neither the court – nor even plaintiff in the course of briefing – addressed defendants' point that if the column at issue *had* successfully migrated to the new content management system, it (just like every other piece of Daily News content uploaded from 1996 until the date of the CMS conversion and thereafter) would have exhibited the exact same sharing functionality as the restored version. But this fact serves to highlight the dramatic consequences had the court not rejected the claim that any sophisticated technical change in a news (or other) website designed to facilitate readers' sharing of content constituted a new-audience-driven "republication" such that every article or other item on the site, no matter how old, was vulnerable to liability in defamation for at least a year after the modification.

The Daily News and Louis were represented by the author, who is the News's deputy general counsel, and Laura R. Handman and Erin N. Reid of Davis Wright Tremaine, LLP, Washington, D.C. Martin was represented by Harold Schwab of Lester Schwab Katz & Dwyer, LLP, of New York, N.Y. Defendants plan to move for summary judgment in Martin 1 *at the close of discovery in that case.*

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No Privacy Act or Private Facts Claim for Embarrassing Viral Video

Dismissal of DEA Agent's Claims Affirmed

The D.C. Circuit Court of Appeals last month affirmed summary judgment dismissing a Drug Enforcement Administration agent's statutory Privacy Act claim and state law private facts claim over the leak of an embarrassing video. Paige v. Drug Enforcement Administration, No. 11-5023 (D.C. Cir. Jan. 17, 2012) ((Henderson, Tatel, Brown, JJ.).

In 2004, speaking in Orlando about gun safety before an audience of 50 school children and parents, plaintiff accidentally shot himself in the thigh with his own gun. The incident was captured on video by one of the parents. That was the only video of the incident and it was taken into evidence by the DEA. The video later leaked and is available to this day on YouTube.

In 2006, plaintiff sued the DEA alleging that disclosure of the video violated the federal Privacy Act. Plaintiff also sued under the Federal Torts Claim Act, alleging the leak constituted the tort of disclosure of private facts under Florida law. After discovery, the district court granted summary judgment to the government. *See Paige v. U.S. Drug Enforcement Admin.,* No. CV 1:06-644, 2010 WL 7758769 (D.D.C. Dec. 29, 2010).

YouTube clip shows plaintiff accidentally shooting himself in the thigh.

Privacy Act Claim

Subject to certain exceptions, the Privacy Act prohibits federal agencies from "disclos[ing] any record which is contained in a system of records by any means of communication to any person." 5 U.S.C. § 552a(b). In a detailed review of the underlying facts, the D.C. Circuit found that a copy of the videotape leaked before it was formally included in an investigative file. Thus plaintiff's Privacy Act claim failed because the tape – at the time of the leak – was not retrieved from "a system of records."

Although the government escaped liability on this ground, the Court pointedly noted that the DEA's handling of the videotape fell short of the Privacy Act's design to prevent "such actions as the publicizing of information of a sensational or salacious nature or of that detrimental to character or reputation." (internal quotation marks and citation omitted). Indeed, the Court cautioned that the incident "demonstrates the need for every federal agency to safeguard video records with extreme diligence in this internet age of iPhones and YouTube with their instantaneous and universal reach."

Private Facts Claim

Plaintiff's private facts claim failed because the incident occurred in a public place and plaintiff knew he was being videotaped. The video contained no private facts, but merely gave further publicity to what plaintiff "himself left open to the public eye."

Moreover, the video involved a matter of public concern. Surveying Florida law on the subject, the Court noted that plaintiff was speaking in his official capacity as a federal official and the accidental shooting received media coverage even before the disclosure of the videotape.

Plaintiff was represented by Ward A. Meythaler. Helen L. Gilbert, U.S. Department of Justice, argued the case for defendants.

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An Illinois Right of Publicity Decision for Media Defendants to Relish

Putative Class Action Suit Over Food Show Dismissed

By Jeff Davis

Producers of reality TV shows and documentaries—and their counsel—have a recent federal court decision to applaud. Citing First Amendment concerns, Judge Charles R. Norgle of the United States District Court for the Northern District of Illinois dismissed a lawsuit alleging the Illinois Right of Publicity Act (IRPA) was violated when Sharp Entertainment produced and The Travel Channel aired an episode of the television show *Extreme Fast Food*. *Zglobicki v. The Travel Channel, LLC, et al.*, No. 11-CV-6346 (N.D. Ill. Feb. 2, 2012).

Background

The show featured customers (one of whom was the plaintiff) and staff at The Wiener's Circle, a popular late-night hot dog stand on Chicago's north side. Judge Norgle seemed to agree that the restaurant fit the "extreme" billing, noting it "is famous not just for its hot dogs, but also for the abrasive nature of the staff who are, shall we say, not the sort of people you would take home to tea."

Jennifer Zglobicki was at The Wiener's Circle when the cameras were rolling, and she appeared in *Extreme Fast Food* as it was broadcast. After the broadcast, she sued, claiming IRPA was violated because she had not given prior written consent (no release was signed) before the show aired. Plaintiff also sought to represent a class of others whose image or likeness was broadcast. (The case had been removed from state court in Chicago under the Class Action Fairness Act.)

But IRPA prohibits only the unauthorized use of a person's identity for "commercial purposes," a narrowly defined category that includes advertisements for a defendant's product or services. IRPA excludes from its coverage the non-commercial use of a person's image in works of art and matters touching upon public affairs, including television programs.

Judge Norgle agreed the broadcast of plaintiff's image in *Extreme Fast Food* amounted to an exempt non-commercial use. And he expanded the analysis to address First Amendment issues. He noted that courts construe IRPA's non-commercial use exemption to avoid First Amendment infirmity, citing the U.S. Supreme Court's decision in *Snyder v. Phelps*, as well as a Northern District of Illinois decision applying First Amendment protection to *Female Forces,* an unscripted reality show featuring women police officers.

Judge Norgle concluded that The Wiener's Circle was "a subject of general interest and of value and concern to the public," amounting to protected non-commercial speech.

And he gave some parting advice, quoting the Supreme Court's *Time v. Hill* decision: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of the press." The suit was dismissed with prejudice.

Jeff Davis is an attorney with Lathrop & Gage LLP in Chicago. Mr. Davis, along with Lathrop & Gage partner Blaine Kimrey and associate Jordan Stein, represented Sharp Entertainment and The Travel Channel in the case. Plaintiff was represented by Terrence Buehler, Touhy, Touhy, Buehler & Williams, LLP, Chicago, IL.

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Citing Potential Chill on Speech, New York Court of Appeals Affirms Narrow Construction of New York's Long-Arm Statute in Defamation Cases

By Henry R. Kaufman and Michael K. Cantwell

The New York Court of Appeals reaffirmed its long-standing policy of narrowly construing the state's "long-arm" statute (NY Civil Practice Law and Rules 302(a)(1)) in defamation actions. *SPCA of Upstate New York, Inc. v. American Working Collie Association*, No. 6 (N.Y. Feb. 9, 2012).

In SPCA, by a narrow 4-3 majority, the Court affirmed dismissal of the defamation claim, based on statements made on an out-of-state web site, holding that plaintiffs had failed to establish personal jurisdiction under CPLR 302(a)(1).

Background

The SPCA case pitted two organizations engaged in animal welfare – the plaintiff, SPCA of Upstate New York (a New York corporation) and its executive director Cathy Cloutier against the American Working Collie Association ("AWCA," an Ohio not-for-profit corporation) and its president, Jean Levitt (a Vermont resident). AWCA had 13 members in New York but it had no offices or employees in New York.

In close cases at least a majority of the Court of Appeals is likely to continue to place its thumb on the scale against the assertion of long-arm jurisdiction in deference to free speech concerns.

Levitt telephoned Cloutier to offer AWCA's assistance with 23 mistreated dogs that had recently been rescued and were being cared for by SPCA in New York. Subsequently AWCA sent a $1000 donation to SPCA and Levitt placed a second call to advise Cloutier that AWCA had purchased collars and leashes and to make arrangements for their delivery.

In a visit to New York lasting under one hour Levitt delivered the leashes and collars, toured the SPCA facility, and wrote a check to cover the costs of certain veterinary care. Levitt then placed a third and final telephone call to Cloutier in New York in which they discussed proper veterinary care for the dogs. In addition, on several weekends AWCA volunteers assisted in caring for the dogs in New York. Levitt then visited the SPCA facility one final time, for about an hour and a half, to check on the collies.

After she returned to Vermont, Levitt posted comments on the AWCA web site addressing the care and treatment being provided by SPCA. Alleging that the statements were defamatory, plaintiffs brought suit and the defendants moved to dismiss on the ground of a lack of personal jurisdiction. The trial court denied the motion but the Appellate Division reversed and dismissed the suit.

The Opinions

Chief Judge Lipmann began by noting the New York Legislature's express exclusion of defamation claims from tortious acts that would otherwise support the exercise of jurisdiction under CPLR 302(a)(2) and (3). Although defamation claims may be brought under the "transacting business" clause of the long-arm statute, CPLR 302(a)(1), as noted by the majority here too they are treated differently: "Defamation claims are accorded separate treatment to reflect the state's policy of preventing disproportionate restrictions on freedom of expression." Slip op. at 6. Nevertheless, where a non-domiciliary defamation defendant has engaged in "purposeful transactions of business" within New York State, it is not an "unnecessary inhibition on freedom of speech or the press" to subject that defendant to the state's jurisdiction under CPLR 302(a)(1). *Id.*

To assert personal jurisdiction under CPLR 302(a)(1), the Court must find not only "purposeful activities" within the state but "some articulable nexus between the business transacted and the cause of action sued upon." *Id.* at 5 (*citing* McGowan v. Smith, 52 N.Y.2d 268, 271, 272 (1981)). Whether the actions of Levitt and the AWCA were sufficiently purposeful, and the nexus between the business transacted and the claim sufficiently close, was what divided the Court.

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The majority found the defendants' activities (three phone calls and two short visits) to be "quite limited." The allegedly defamatory statements, posted on AWCA's website, were neither written in nor directed to New York State; although accessible in the state, they were equally accessible in any other jurisdiction, according to the majority opinion.

Moreover, Chief Judge Lippman noted, the donations (of cash and leashes) were not purposeful activities related to the defamation claim. Rather, defendants' in-state activities were designed to "help provide financial and medical assistance for the dogs." The alleged mistreatment was observed during Levitt's visits but written about only after she returned to Vermont. Had the defendants actually placed the dogs with the plaintiffs or complained of the plaintiffs' treatment of its (New York-based) members, long-arm jurisdiction might have been warranted, but the majority concluded that the connection was simply too tangential to support the exercise of jurisdiction. *Id*. at 6-7.

The dissent, written by Judge Pigott and joined by Judges Graffeo and Smith, found the defendants' activities neither "quite limited" nor unconnected with the defamation claim. In addition to the three phone calls and two visits by Levitt, and the various donations, the AWCA sent members and volunteers over eight weekends to assist in the care of the dogs. Moreover, the allegedly defamatory posts addressed the conditions of the dogs "and the inference can be drawn from the complaint that Levitt's purpose for going to New York (and for sending volunteers to assist at the SPCA) was to garner attention" for the plight of the dogs. Dissent, at 2-3.

Discussion

The result in SPCA continues the marked and longstanding trend of pro-defendant results in the Court of Appeals in deference to New York's well-established tradition of solicitude for the protection of freedom of expression in defamation cases. While cases involving application of CPLR 302(a)(1) will always be fact-intensive, it seems clear that the New York Court of Appeals intends to continue to construe the statute more narrowly in defamation cases than in other sorts of litigation:

> Through CPLR 302, the Legislature has manifested its intention to treat the tort of defamation differently from other causes of action and we believe that, as a result, particular care must be taken to make certain that nondomiciliaries are not haled into court in a manner that potentially chills free speech without an appropriate showing that they purposefully transacted business here and that the proper nexus exists between the transaction and the defamatory statements at issue.

The SPCA case also makes clear that the mere operation of a web site view in New York State does not constitute the type of purposeful availment that would constitute the transaction of business:

> Moreover, it is of importance that the statements were not written in or directed to New York. While they were posted on a medium that was accessible in this State, the statements were equally accessible in any other jurisdiction.
>
> Slip op. at 7.

Although at least some out-of-state media defendants active on the web may have sufficient contacts with New York State to allow a court to conclude that they are transacting business within the state, jurisdiction over defamation claims will still be impermissible unless the plaintiff can establish "a substantial relationship between the purposeful activities and the transaction out of which the cause of action arose," *id*. at 5 (internal citation and quotation omitted), and in close cases at least a majority of the Court of Appeals is likely to continue to place its thumb on the scale *against* the assertion of long-arm jurisdiction in deference to free speech concerns.

Henry R. Kaufman and Michael K. Cantwell, practice media, publishing and IP law with Henry R. Kaufman, P.C. in New York City (www.hrkaufman.com). Plaintiff in this case was represented by Martin J. McGuinness, Glens Falls, New York (Stanclift Law Firm, P.C., Glens Falls, New York on the brief). Defendant was represented by Jonathan M. Bernstein, Albany, New York (Goldberg Segalla, L.L.P., Albany, New York on the brief).

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Texas Interlocutory Appeal Statute Applied to Website

Defendant a Media Member; No Actual Malice

By Jim Hemphill

A Texas appellate court has held that a doctor who wrote newspaper editorials, had a radio show, and maintained websites was a member of the media entitled to take an interlocutory appeal from a denial of summary judgment in a libel claim against him. *Hotze v. Miller*, 2012 WL 76151 (Tex. App. – Tyler Jan. 11, 2012, no pet. h.). The court further held that the plaintiff produced no evidence of actual malice and that the doctor conclusively negated actual malice, and therefore entered judgment in the doctor's favor.

Background

The plaintiff, Keith E. Miller, M.D., was a practicing doctor who also had been appointed to the Texas Medical Board (TMB) and was the chairman of the TMB's Disciplinary Process Review Committee. The TMB is defined by the Texas Occupation Code as "an agency of the executive branch of state government with the power to regulate the practice of medicine." In addition to practicing medicine and serving on the TMB, Miller also testified as an expert witness for plaintiffs in medical malpractice cases and was on an advisory board for Blue Cross Blue Shield.

A question remaining unanswered is whether defendant's maintenance of his own websites, taken alone, would have qualified him as "a member of the electronic media" for purposes of the interlocutory appeal statute.

The defendant, Steven F. Hotze, M.D., also was a practicing physician. In addition, according to the court's opinion, Hotze "has been a political writer and journalist for thirty years" whose "editorials are published in a weekly newspaper," "hosts two websites that also publish his articles," and "has hosted a radio broadcast."

Hotze wrote editorials (at least one of which was published in the weekly newspaper) "describing the alleged denial of constitutional rights of physicians who appeared before Miller and the TMB." Hotze also invited as a guest onto his radio show another doctor critical of Miller "to share her experiences with TMB and to describe her investigation into Miller' dual roles as a TMB member and an expert witness against physicians in medical malpractice cases."

Miller sued Hotze for libel, slander, libel per se, slander per se, and civil conspiracy. Hotze moved for summary judgment on multiple grounds, including truth, opinion, and actual malice. Hotze's motion was denied by the trial court.

Interlocutory Appeal: Was Hotze a Member of the "Media"?

A Texas statute provides for interlocutory appeals in libel and other cases for "a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media." (Tex. Civ. Prac. & Rem. Code § 51.014(a)(6).) Miller argued that the Court of Appeals had no jurisdiction over the case because, he contended, Hotze was not a media defendant.

The court disagreed. The opinion outlines the record evidence of Hotze's long-standing involvement in the media to conclude that he was a "member of the electronic or print media" entitled to an interlocutory appeal. The court further noted that Hotze had an additional basis for his interlocutory appeal, because his communications appeared in the electronic and print media.

This result is consistent with Texas precedent, though it does leave some unanswered questions. One previous case held that a defendant who had a "journalistic background" and wrote for websites that were "independent from [the defendant's] articles" – that is, not his personal blog – to be a "member of the electronic media" entitled to take an interlocutory appeal. (*Kaufman v. Islamic Society of Arlington*, 291 S.W.3d 130 (Tex. App. – Fort Worth 2009,

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pet. denied.) Another case allowed an interlocutory appeal for a defendant who posted an unfavorable review of a lawyer on www.ripoffreport.com on the theory that the defendant's communication was published by the electronic media, though the parties in that case did not challenge the court's jurisdiction over the interlocutory appeal. (*Franco v. Cronfel*, 311 S.W.3d 600 (Tex. App. – Austin 2010, no pet.)

A question remaining unanswered is whether Hotze's maintenance of his own websites, taken alone, would have qualified him as "a member of the electronic media" for purposes of the interlocutory appeal statute – particularly given that Hotze appeared to have made his living practicing medicine, with journalism as perhaps an unpaid sideline.

Was There Evidence of Actual Malice?

Although Hotze raised several grounds in his summary judgment motion, the Court of Appeals discussed only actual malice, because its ruling on that ground was dispositive of the entire case.

First, the court determined that Miller was a public official due to his service on the TMB, and because Hotze's criticisms all related to Miller's public service.

The court then discussed Hotze's evidence, focusing on his own detailed affidavit. Hotze swore that he began investigating Miller after being "shocked" by an account of Miller making a threat to a doctor the TMB was investigating. Hotze said he interviewed "many dozens" of Texas doctors who described similar threats and intimidation, and described TMB proceedings as "cloaked in secrecy and lacking in due process." Hotze further stated that he believed all his statements about Miller were either true factual statements or opinions that could not be factually verified, and that he never entertained any serious doubts about the truth of any statement he made about Miller.

The court held that Hotze's affidavit was sufficient under Texas summary judgment procedure to shift the burden to Miller to produce some evidence of actual malice.

Miller argued that Hotze did not adequately verify his statements, and that Hotze was motivated by a feeling that his "'alternative' form of medicine is under attack." The court held that this was insufficient to raise a fact issue on actual malice. The fact that a defendant has "a particular point of view" is no evidence of actual malice, nor is a plaintiff's denial of allegations. Similarly, evidence that a defendant "had a personal vendetta" against the plaintiff is no evidence of actual malice.

The court's ruling on the malice issue is largely consistent with Texas precedent crediting a defendant's sworn denial of actual malice as sufficient summary judgment proof, as long as the denial is sufficiently detailed, free form contradictions and inconsistencies, and clear, positive and direct. However, there is some Texas precedent suggesting that specific ill will or a vendetta between a defendant and plaintiff may be evidence of actual malice sufficient to defeat summary judgment.

The opinion has not been released for publication; plaintiff filed a motion for rehearing on Feb. 22, 2012, upon which the court has not ruled.

Jim Hemphill is a shareholder at Graves Dougherty Hearon & Moody, P.C. in Austin, Texas and is co-chair of the MLRC DCS Litigation Committee. Plaintiff was represented by Christina L. McCracken, Scott P. Hazen and Andrew L. Schlafly. Defendant was represented by Corey D. McGaha, Richard A. Adams, Grover M. Russell and Andy Tindel.

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Juxtaposition of Photo and Article on Gang Violence Can Be Defamatory

Court Reinstates Defamation Claim Against Newspaper

A New York appellate court reinstated a defamation claim against Metro International, publisher of the daily Metro newspaper in New York, holding that a photograph of plaintiff used to illustrate an article on gang violence could be defamatory. *Knutt, et al. v. Metro International*, No. 19237/10, 2012 LEXIS 785 (N.Y. App. Jan 31, 2012).

At issue was a December 2009 article entitled "Call to Get Tougher on Gang Activities," about rising gang violence in the Bronx. To illustrate the article the newspaper used an archived crime scene photograph. The photo showed the plaintiff, a 10 year old African-American boy, peering over a yellow police tape line at a crime scene in the Bronx. The photo was placed directly below the headline.

In July 2010, plaintiff and his parents sued the newspaper for invasion of privacy, emotional distress and defamation. They alleged the article falsely implied the boy was involved in criminal gang activity and that his photo was used without consent. In March 2011, the trial court granted the newspaper's motion to dismiss for failure to state a claim. The trial court first dismissed the misappropriation and emotional distress claims, finding the use of the photograph was newsworthy. The court dismissed the defamation claim on the ground that publication was not grossly irresponsible as a matter of law. Gross irresponsibility is the New York fault standard for private figure cases involving matters of public concern. "Since the infant [plaintiff] was not named in the publication as being involved in criminal activity and his image has a journalistic connection to the theme of the publication, i.e., a youth affected by gang violence, editorial judgment will not be second guessed."

The trial court did not address the newspaper's main arguments that the article was not "of and concerning" the boy and did not have a defamatory meaning. Plaintiffs appealed only the dismissal of the defamation claim.

Appellate Court Decision

In a short decision, the appellate court reinstated the defamation claim, holding 1) that the juxtaposition of photo and text could create a defamatory impression; and 2) that dismissal for lack of fault was premature.

As to defamatory meaning, the court recited hornbook law that imputing a serious crime to a person constitutes defamation per se. As applied to the particular article, the court simply concluded that "considered as a whole" the article was reasonably susceptible of a defamatory meaning. Thus, it would be a question for the jury whether the ordinary and average reader would understand the meaning as such.

As to fault, the court held that plaintiffs adequately pled the elements of gross irresponsibility at least to survive a motion to dismiss. The complaint stated "Metro acted in a grossly irresponsible and reckless manner without due consideration for the standards of information gathering and dissemination, and showed a reckless disregard for the truth, by prominently displaying the unrelated photograph of an African American child next to an article on gang violence in the city."

The court noted that prior to discovery plaintiffs could not plead any factual allegations concerning Metro's methods for gathering information, researching, writing and editing the subject article. Thus giving the complaint a liberal construction, the claim should not have been dismissed.

Plaintiffs were represented by Barbara S. Mehlsack and Michael R. Nerenberg, Gorlick, Kravitz & Listhaus, P.C., New York, N.Y. Metro International was represented by John J. Lynch, New York, N.Y.

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N.C. Appeals Court Affirms $5 Million Award to Policemen in Suit Against Rapper

Rapper's DVD Included Footage of Policemen

The North Carolina Court of Appeals affirmed a $5 million damage award to five North Carolina policemen in a libel and privacy lawsuit over a documentary-style DVD profiling a best-selling rapper. *Nguyen v. Taylor*, No. COA11-369 (N.C. App. Feb. 21, 2012). The music star and a record label failed to respond to plaintiff's discovery requests for admissions. This prompted the trial court to grant summary judgment to plaintiffs and hold a bench trial solely on damages for claims of libel, misappropriation and unfair and deceptive trade practices.

The Court of Appeal held that all the allegations against defendants were properly admitted at trial and conclusively established the factual basis for the $5 million compensatory damage award. The court remanded the $10 million punitive damage award instructing the trial court to clarify whether actual malice was established by "clear and convincing" evidence as required by North Carolina law on punitive damages.

Background

At issue in the case was a documentary-style DVD featuring rapper Jayceon Taylor, better known as "The Game." The DVD featured footage of an altercation with the plaintiffs. In 2005, Taylor and his entourage were videotaping in a Greensboro, North Carolina mall. They refused orders to stop filming. When police came to arrest Taylor a melee ensued with the supportive crowd that had gathered at the scene.

Taylor's videotape of the incident was later included in a DVD entitled "Stop Snitchin–Stop Lyin." The back cover of the DVD featured the image of one of the arresting officers under the caption "Exclusive: The full 15 minute footage of The Game being wrongfully arrested in North Carolina." The DVD was also advertised as including the "Entire footage of Game being wrongfully arrested and brutalized by the Police in North Carolina."

Plaintiffs sued Taylor, Bungalo Records and a host of other related distributors and producers. The defendants initially defaulted, were subsequently allowed to answer, but later did not respond to plaintiffs' requests for admissions in discovery. The trial court entered summary judgment in favor of plaintiffs and conducted what appeared to be an unopposed bench trial on the issue of damages. Only Taylor and Bungalo Records appealed.

Court of Appeals Decision

The Court of Appeals affirmed liability and compensatory damages on each of the claims based on defendants' failure to contest the admissions. These admissions included that the footage used in the DVD "was intentionally misleading" and intended to "defame the Plaintiffs" and "injure the Plaintiffs in their trades or professions"; that Taylor appropriated plaintiffs' likenesses for his own advantage; and "made plaintiffs unwitting performers in his commercial DVD" and "defamed plaintiffs while profiting at their expense."

The size of the compensatory damage award was similarly supported by the uncontested admission that defendants made in excess of $10,000,000 in profits on the DVD.

The plaintiffs were represented by Dan M. Hartzog and Dan M. Hartzog Jr., of Cranfill Sumner & Hartzog LLP, Raleigh, NC. Defendant Jayceon Taylor was represented by Curtis C. Osborne, Osborne Law Firm, P.C. Bungalo Records was represented by Peter J. Juran, Blanco Tackaberry & Matamoros, P.A.

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Massachusetts Appeal Court Affirms Summary Judgment for Local Newspaper

Minor Discrepancies Do Not Make Articles False

In an unpublished decision, the Massachusetts Court of Appeals affirmed summary judgment in favor of the *Cape Cod Times*, a Dow Jones Local Media Group newspaper, on defamation and emotional distress claims. *Boyle v. Cape Cod Times, et al.*, No. 11-P-196, 2012 Mass. App. LEXIS 14 (Jan. 6, 2012) (Green, Vuono & Milkey, JJ.). The court held that 1) minor inaccuracies in describing plaintiff's business problems did not make the statements about him false; 2) the statement that the newspaper "could not reach plaintiff for comment" was not defamatory even if false; and 3) the articles could not reasonably be read as accusing plaintiff of murder. Moreover, since plaintiff's libel claims failed, his emotional distress claim based on the same facts failed as a matter of law.

At issue were two articles published in 2006 about John Boyle, then the owner of a Cape Cod limo company and garbage hauling business. The plaintiff bought the garbage hauling business from the estate of Shirley Reine, a Cape Cod women murdered in 2005. The unsolved murder was a matter of local interest and a *Cape Cod Times* reporter contacted plaintiff to interview him in connection with her investigation into the murder. That ripened, however, into articles about plaintiff's own problems with his limo business. Among other things, the articles reported that employees were seeking unpaid wages, customers had complained of false billings, the business was unlicensed and under investigation by the state Attorney General. One article briefly mentioned plaintiff's connection to Shirley Reine, stating that plaintiff "struggled financially last year after buying Five Star Enterprises, a trash business owned by Shirley Reine of East Falmouth, who was found shot dead in her garage in May 2005."

In 2009, the trial court granted summary judgment to the newspaper, holding its articles were true or not defamatory. *See Boyle v. Cape Cod Times,* 2009 Mass. Super. LEXIS 418 (Mass. Super., Nov. 9, 2009). The appellate court agreed. For example, plaintiff argued the newspaper defamed him by stating he owed $33,000 in back wages to employees; but he admitted they had made claims for $20,000 against him. He admitted that his limo company was unlicensed but objected to the report that he was operating "illegally." Affirming summary judgment for the newspaper, the court noted that "minor factual discrepancies" are insufficient to defeat summary judgment.

The court also affirmed that no reasonable reader could infer that the article implicated Boyle in murder of Reine. Plaintiff also alleged that the newspaper falsely reported that his bookkeeper quit (as opposed to being fired) and that it sought comment from him. "Whether true or not, neither has the potential to discredit Boyle in the mind of a reasonable reader." Finally, the court held that an intentional infliction of emotional distress claim based on the same facts as the libel claim, failed as a matter of law.

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Virginia Federal Court Dismisses Defamation Claim Against Broadcast Warning Of "Unscrupulous" Tax Preparers

By Thomas J. McIntosh and Charles D. Tobin

A TV news broadcast warning consumers about "unscrupulous" tax-return preparers, and recounting one man's frustration with a Virginia company that made a mistake on his returns, did not defame the company's owner, a federal court has ruled. The decision, *Hanks v. WAVY Broadcasting, LLC*, No. 2:11-cv-439 (E.D. Va. Feb. 8, 2012), should support future consumer reporting in the Commonwealth.

In his decision, which cited Virginia common law, the First Amendment, and even Thomas Jefferson, Senior Judge Robert Doumar held that plaintiff Timothy Hanks failed to demonstrate the broadcast imputed to him personally an unfitness to perform the duties of his profession, a lack of integrity in the discharge of his duties, or the commission of a crime. In dismissing Hanks' defamation lawsuit, the court found the broadcast was not of and concerning him, was protected opinion, that Hanks could not rely on the antiquated doctrine of presumed damages for libels per se, and that boilerplate allegations of actual malice were insufficient.

Background

In April 2010, defendant WAVY, a LIN Media station, and its sister station Fox 43 in Hampton Roads, VA, broadcast a news story about tax preparers and the looming income tax filing deadline. WAVY also published a substantially similar print story on the television station's website. According to the complaint, the newscast informed viewers to "[s]tay tuned and we are going to show you how to avoid unscrupulous tax preparers," and allegedly warned "[i]f you're one of the many who have waited until the last minute to file, you could run the risk of working with unscrupulous preparers. " The website article, which was attached to the complaint, also stated, "[i]f you're one of the many who have waited until the last minute to file, you could run the risk of working with unscrupulous preparers or even increasing you chances of mistakes." Notably, a video embedded in the website did not use the term "unscrupulous."

After discussing the potential dangers associated with tax preparation in general terms, the newscast and the web article included an interview with a consumer whose tax preparer had made a mistake on his return, causing him to owe more taxes than he was initially led to believe. The stories quote the consumer as saying: "I gave you $400. You're only going to give me $54 back of the $400 I paid you all. I said that's not fair."

The newscast identified the tax preparer as Reliable Tax, which is a Virginia corporation owned by plaintiff, Timothy Hanks, its president. Reliable Tax was not a plaintiff.

Based on the alleged statements and the context of the news stories, the plaintiff claimed that the defendants had falsely implied that "the plaintiff was an 'unscrupulous tax preparer' who had unlawfully converted customers' incomes tax refund payments, or unlawfully withheld payments owed to customers, or fraudulently filed false tax returns for customers." The complaint included counts for both libel per se and libel per quod.

The Decision

The court found defendant's defamation claims wanting for a number of reasons. First, the complaint failed to satisfy Virginia's requirement that the allegedly defamatory statements be "of and concerning" the plaintiff. The plaintiff sued in his individual capacity, but the stories referenced only his company, Reliable Tax.

The court drew on Virginia precedent holding that owners and employees lack standing to sue for injuries sustained by corporations. *See Landmark Commc'ns, Inc. v. Macione*, 334 S.E.2d 587, 589 (Va. 1985). In addition, the court recognized that references to a broader class of which the plaintiff is a member (e.g., "tax preparers") are generally insufficient to sustain a cause of action for defamation. *See Ewell v. Boutwell*, 121 S.E. 912, 914 (Va. 1924). The reaffirmation of the "of and concerning" requirement is significant not only in that it provided a ground for dismissal in this particular case, but also because it prevents individuals

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from recovering general reputational damages through the back door, which are often not available to corporations.

The second ground for dismissal was constitutional. After quoting Thomas Jefferson's adage that courts should not regulate opinion "where reason is left free to combat it," the court cited a series of Virginia cases which indicated that "characterizations of a business's performance or a professional's character are generally considered to be expressions of opinion and are thus protected speech." Taking into account the immediate context of the article as well as the broader social context of the impending tax-filing deadline, the court concluded that the alleged use of the term "unscrupulous" "was a broad, unfocused, and wholly subjective comment."

In other words, it was not capable of defamatory construction. The court's recognition that "unflattering" descriptions of a business deserve constitutional protection helps temper the advantage afforded plaintiffs in cases invoking defamation per se, which often presumes damages when the plaintiff's economic interests are at stake.

Finally, the court concluded that dismissal was warranted due to the complaint's pleading defects. In Virginia, "where a private individual alleges defamation by a new-media defendant involving a matter of public concern, presumed damages cannot be awarded in the absence of actual malice." *WJLA-TV v. Levin*, 564 S.E.2d 383, 391-92 (Va. 2002). These "presumed damages" are what distinguish liber per se from libel per quod, both of which were alleged in the complaint. While the plaintiff made "boilerplate" allegations of actual malice in asserting a libel per se claim, the court found that simply including "a recitation of the *New York Times v. Sullivan* standard" is insufficient to state a claim for defamation against a media defendant reporting on matters of public concern. With regard to the libel per quod count, the court found that complaint's failure to plead special damages—*i.e.*, damages which are not presumed but with relate to the "special character, condition, or circumstances of the person wronged"—was similarly fatal.

The court dismissed the complaint with prejudice.

As of press time, Hanks' appeal deadline had not run, and he had not filed an appeal.

Charles D. Tobin and Thomas J. McIntosh, of Holland & Knight LLP, Washington, D.C., represented WAVY Broadcasting, LLC and LIN Television Corporation. Jeremiah A. Denton, III, of Jeremiah A Denton, III, P.C., Virginia Beach, Virginia, represented Timothy B. Hanks.

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Lawyer's Tortious Interference and Libel Claims Dismissed

Web Postings by Disgruntled Exes' Not Actionable

A New York federal district court this month dismissed with prejudice a lawsuit brought by an attorney against two ex-girlfriends over web postings accusing him of being a "liar" and "cheater." *Couloute v. Ryncarz, et al.,* No. 11 CV 5986 (S.D.N.Y. Feb. 15, 2012) (Baer, Jr., J.). The court held that plaintiff failed to state a claim for tortious interference with prospective business relations. Plaintiff's proposed amended complaint containing additional facts about his client relations and a defamation claim was similarly defective. The web postings were clearly opinion and even if those opinions harmed plaintiff's professional reputation they were not targeted at any specific professional relationships to support a claim for tortious interference.

Background

The plaintiff is a lawyer living in New Jersey and working in New York. He had previously been in relationships with the two defendants while living in Florida. The defendants are both Florida residents. Any thorny choice of law issues were avoided because all the parties assumed that New York law applied.

Judge Baer went on to explain that "The average reader would know that the comments are "emotionally charged rhetoric" and the "opinions of disappointed lovers."

At issue were statements posted to the website www.liarscheatersrus.com, which describes itself as a place that allows "individuals who have been lied to and cheated on in their personal relationships to express themselves about their experience and to find support." The website invites users to post information and photos about ex-partners who have done them wrong. Other users can chime in with comments.

Plaintiff alleged that the first defendant, Amanda Ryncarz, named and wrote of him: "Cheated on ALL of ex-girlfriends. Lied and cheated his entire way through his 40 years of life. Uses people/his son/women to get what he wants then dumps you when he's done with them. Has no long term friends. He rents or finances everything and owns absolutely nothing." Plaintiff alleged that the second defendant, Stacey Blitsch, shortly thereafter commented "what these ladies have said about his character is very true."

Tortious Interference

The court began by reciting the federal pleading requirement that a complaint state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Under this standard the complaint failed to state any cause of action.

First, under New York law a claim for tortious interference with prospective business relations requires "(1) business relations with a third party; (2) the defendant's interference with those business relations; (3) the defendant acted with the sole purpose of harming the plaintiff or used dishonest, unfair or improper means; and (4) injury to the business relationship." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 114 (2d Cir. 2010).

Plaintiff's original complaint solely for tortious interference failed to state a cause of action because it did not identify any specific client relationships that had been harmed. He proposed to amend the complaint to explain that four potential clients refused to engage in business with him after reading the website; and that defendants' sole motive was to interfere with plaintiff's current and prospective clients.

This proposed amendment was similarly defective to state a claim for tortious interference. Judge Baer explained:

> Plaintiff provides no cases to support the idea that potentially harmful statements posted on a website such as this one,

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> coupled with the knowledge that the statements might be read by third parties, is sufficient to show that one or more relationships were intentionally interfered with by Defendants. In their search for a lawyer, the clients, as asserted by Plaintiff, were influenced by the comments in their decision not to retain Plaintiff's services. Even though Plaintiff's reputation has suffered, I am unwilling to take the leap from generalized comments calling Plaintiff a "liar" and a "cheater"—on a website called "liarscheatersrus" no less—to actions directed at specific business relationships.

Defamation

Plaintiff also sought to amend his complaint to add claims for defamation. The court held that all of the comments were hyperbolic statements of opinion. Only one statement was factual in nature, that plaintiff "rents or finances everything and owns absolutely nothing." Standing alone this statement could be proven true or false. But "when viewed within the larger context of the website on which they were posted, there can be no doubt that a reasonable reader would understand the comments to be opinion."

Judge Baer went on to explain that "The average reader would know that the comments are "emotionally charged rhetoric" and the "opinions of disappointed lovers." Moreover, even though publication on the Internet amplified the scope and impact of the statements, "this does not change the underlying nature of the comments themselves."

Plaintiff acted pro se. Defendants were represented by Gloria Allred.

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Court Reaffirms Partial Dismissal to Newspaper on Opinion and Jurisdictional Grounds But Factual Issues Remain

By Collin J. Peng-Sue

Last month, a New York state court judge once again considered an allegedly libelous column (the "Column") written by freelancer Patrick Dunleavy ("Dunleavy") and published in the *New York Post* (the "*Post*"). In a decision and order in *Muhammad v. NYP Holdings, Inc.*, Index No. 103184/2011 (N.Y. Sup. Jan. 9, 2012), Justice Saliann Scarpulla reaffirmed her holding in *Rashada v. The New York Post*, No. 100776/11 (N.Y. Sup. Aug. 11, 2011) (*see* September 2011 MLRC MediaLawLetter) that the statements in the Column regarding the possible radicalization of prison inmates were non-actionable opinion, and that the court lacked personal jurisdiction over Dunleavy under New York's long arm statute. Nevertheless, because certain issues of fact remained as to the claims of plaintiff Salahuddin Muhammad, the court declined to grant defendants' motion to dismiss in full.

While it is known that prison wardens and other law enforcement personnel are public officials, NYP had not been able to gather sufficient proof in the absence of discovery "that chaplains hold a similarly substantial responsibility for or control over the conduct of governmental affairs."

Background

A *Post* editor had seen a version of the Column published on an investigative website. The editor contacted Dunleavy and obtained permission to publish a version of the Column. The editor made some minor changes to the Column, received Dunleavy's approval and had the Column published the next day in the September 2, 2010 issue of the *Post*. He did not ask Dunleavy about the factual background for the Column, but relied on Dunleavy's history as a former Deputy Inspector General in the New York State Department of Correctional Services.

In the Column, Dunleavy, who had spent time investigating radical Islamist recruitment in the prison system, discussed four individuals (then on trial in federal court in New York) who were accused of plotting to bomb synagogues in the Bronx. He raised the question of "how the four accused were radicalized to the point where they'd even consider plotting to bomb synagogues in The Bronx and shoot down aircraft with missiles."

Dunleavy then noted that the four criminal defendants had ties to a mosque in Newburgh, New York, and that three others who work at the mosque—including Muhammad—were chaplains in the New York State prison system. Dunleavy further discussed the dominance of a particular Islamic theology in the prison system and the radicalization of inmates while they are in prison, and posed the question, "[w]here and when were these seeds of hatred planted—and where was the prison chaplain when all this was going on?"

Dunleavy then related details of an interview Muhammad had given with the *New York Times* in May 2009 after the four defendants' arrest, and noted that while Muhammad "insisted he'd seen little evidence of radicalization in prison," he had "hired several inmates with known radical Islamic ties as clerks in the chaplain's office." Dunleavy further stated that Muhammad "allowed the inmates to use his office phone to call the Middle East and North Africa."

Muhammad sued Dunleavy and NYP Holdings, Inc. ("NYP"), the publisher of the *Post*, claiming that the Column either stated or implied that he engages in the radicalization of prison inmates and encourages them to engage in acts of terrorism. On May 6, 2011, NYP and Dunleavy moved to dismiss the complaint on the grounds that the Column was non-actionable opinion. Dunleavy also moved on the separate ground that he had done nothing more than grant NYP the permission to publish the Column and that as a

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resident of the State of Washington, the Court lacked personal jurisdiction over him. Finally, NYP claimed that Muhammad, a prison chaplain, was a public official and could not demonstrate that it acted with actual malice in publishing the Column.

Motion to Dismiss

By the time that Justice Scarpulla heard oral argument on the motion, she had already decided the *Rashada* motion to dismiss and thus reaffirmed her view that the Column as to the general statements about prison chaplains was constitutionally protected opinion and that the court did not have jurisdiction over Dunleavy. The closer issue was, considering the statements in the Column as to what Muhammad did with respect to certain inmates, whether Muhammad was a public official and whether there was sufficient evidence that NYP (as distinct from the freelancer Dunleavy) acted with constitutional malice in republishing the Column.

NYP first argued that as a prison chaplain, Muhammad was a public official. New York courts have consistently held that correction officers are public officials. *See, e.g.*, *Sweeny v. Prisoners' Legal Servs. Of New York, Inc.*, 84 N.Y.2d 786, 622 N.Y.S.2d 896 (1995). According to New York State Depart of Corrections Directives, however, Muhammad, as a prison chaplain, had authority and responsibility over prisoners' lives that exceeded that of an ordinary correction officer—specifically, his responsibility over the congregational worship and prayer services of certain inmates, and authority rising to that of the Watch Commander in certain situations. Defendants argued that if a regular corrections officer is a public official, so too is a prison chaplain like Muhammad.

NYP next argued that as a public official, Muhammad could not survive a motion for summary judgment because he would not be able to demonstrate by clear and convincing evidence that NYP acted with constitutional malice in relying on Dunleavy. To support its claim, NYP submitted an affidavit from Mark Cunningham, the editor who had obtained Dunleavy's permission to publish the Column, in which he stated that he relied on Dunleavy's credentials, knowledge, and experience for his belief in the truth of the Column.

Even if the court did not rule on the plaintiff's public status prior to discovery, there was still New York case law which permitted a court to grant a motion to dismiss prior to discovery, if there was insufficient evidence that the publisher was not grossly irresponsible in relying on a trustworthy source, such as Dunleavy, who again was a former Deputy Inspector General in the New York State Department of Correctional Services and had spent time investigating radical Islamist recruitment in the prison system. *See* *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 66 (1975).

The Decision

In a Decision and Order dated January 9, 2012, Justice Scarpulla granted the motion to dismiss in part, and denied it in part. In her decision, she relied heavily on her earlier opinion in *Rashada*, reaffirming her decision that any implication in the Column regarding the radicalization of prison inmates was "constitutionally protected, non-actionable opinion" and that Dunleavy was not subject to long-arm jurisdiction under New York CPLR 302(a)(1).

Justice Scarpulla, however, permitted Muhammad's defamation claim to go forward based on two specific factual statements: (1) he knew the prison clerks he hired had radical Islamic ties, and (2) he allowed inmates to make phone calls from his office phone to the Middle East and North Africa. According to the Court, these allegations were "sufficient to require denial of the pre-answer motion to dismiss."

The Court further held that while it is known that prison wardens and other law enforcement personnel are public officials, NYP had not been able to gather sufficient proof in the absence of discovery "that chaplains hold a similarly substantial responsibility for or control over the conduct of governmental affairs." The court then directed the parties to proceed to discovery.

NYP served its answer on February 2, 2012 and Muhammad served an amended complaint on or about February 10, 2012.

Slade R. Metcalf and Collin J. Peng-Sue of Hogan Lovells US LLP, New York City represented defendants NYP Holdings, Inc. and Patrick Dunleavy. Plaintiff Salahuddin Muhammad was represented by Hyder A. Naqvi of Ahmad Naqvi Rodriguez LLP, New York City.

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Ninth Circuit Holds That Roommates.com Does Not Violate Fair Housing Act

Statute Not Intended to Reach Choice of Roommates

After eight years of litigation and two appeals, including an en banc rehearing, the Ninth Circuit ruled this month that the Roommates.com website did not violate federal and state housing laws by requiring users to state their gender, orientation, and whether they lived with children. *Fair Housing Council v. Roommates.com, LLC.*, No. 09-55272 (9th Cir. Feb. 2, 2012) (Kozinski, Reinhardt, Ikulta, JJ.).

Ironically, these allegations were the basis for the Ninth Circuit's 2008 decision that Roommates.com was not entitled to full protection under the Communications Decency Act of 1996, 47 U.S.C. ¶ 230 ("CDA"). *Fair Housing Council v. Roommates.com, LLC,* 521 F.3d 1157 (9th Cir. 2008) (en banc) ("*Roommates I*").

Background

In *Roommates I*, the Ninth Circuit held that the open-ended essay portion of the website's user profiles was fully protected by the CDA. But the court rejected the defendant website's contention that answers to multiple-choice questions in which the user described him- or herself were user-generated content.

Many of the subsequent decisions applying *Roommates I* have been victories for computer services, however. Courts have focused on the fact that the Roommates.com website *required* responses to questions about gender, orientation, and children, making the website into a developer of the content – thereby distinguishing those services that merely permit (or are even particularly receptive to) the posting of objectionable content. *See, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.,* 591 F.3d 250, 254 (4th Cir. 2009); *Goddard v. Google Inc.,* 640 F. Supp. 2d 1193, 1198 (N.D. Cal. 2009); *Jane Doe IX v. MySpace, Inc.,* 629 F. Supp. 2d 663, 665 (E.D. Tex. 2009); *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC,* 809 F.Supp.2d 1041, 1051-52 (E.D. Mo. 2011).

In *Roommates I,* a three-member panel (Kozinski, Reinhardt, Ikuta), and an 11-member en banc panel declined to decide whether Roommates.com's practices actually violated the federal Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("FHA"), or the California Fair Employment and Housing Act, Cal. Govt. Code §12955 ("FEHA"). Roommates.com had argued in the alternative that if it was not immune under section 230, the court should find that the housing laws' restrictions on preferential statements did not apply to choice of cohabitants, as a matter of statutory construction and under the First Amendment. Rather than reach that question, the en banc panel remanded the case.

This resulted in another summary judgment motion and the second appeal in which the reach of the FHA was squarely presented. *Fair Housing Council v. Roommates.com, LLC,* 2012 WL 310849 (9th Cir. 2011) ("*Roommates II*").

By way of background, the FHA prohibits discrimination on the basis of "race, color, religion, sex, familial status, or national origin" in the "sale or rental of a dwelling." 42 U.S.C. § 3604(b). It also makes it illegal to "make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." *Id.* § 3604(c). (The state FEHA also includes sexual preference among the protected categories.)

The Fair Housing Councils of the San Fernando Valley (a portion of Los Angeles) and San Diego sued Roommate.com, LLC, the operator of the Roommates.com website, in December 2003, in U.S. District Court for the Central District of California, alleging violation of the FHA, the FEHA, the Unruh Civil Rights Act, and the state unfair competition statute, as well as negligence. Following limited discovery, both sides moved for summary judgment.

The plaintiffs contended that the website was serving as a "crucial intermediary" for discriminatory actions; Roommates.com contended that the preferential statements were user-generated content for which it was immune as a publisher under section 230, and, further, the First Amendment right to intimate association required an

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interpretation of the FHA that precluded its application to shared housing.

Judge Percy Anderson granted summary judgment to Roommates.com, primarily based on the Ninth Circuit's decision in *Carafano v. Metrosplash.com,* 339 F.3d 1119 (9th Cir. 2003). There, the court held that responses to multiple-choice questions on a dating matching site, and website formatting and search functions, fell within the protection of the CDA, because the responses were created by users, not the web service. Judge Anderson did not address the First Amendment question.

The Fair Housing Councils appealed, and the Ninth Circuit reversed in part and affirmed in part in *Roommates I.* The panel was fractured, however, with three opinions, and Roommate's petition for rehearing en banc was granted. (In the Ninth Circuit, an en banc panel is comprised of the presiding judge and 10 randomly selected active judges .) Two of the original panel members – Kozinski and Reinhardt – were on the en banc panel. Following oral argument, the panel ruled 8-3 that Roommates.com was protected by the CDA for publishing the "Additional Comments" essay section, but not for (1) using questionnaires requiring the disclosure of sex, sexual orientation and familial status, (2) limiting the scope of searchers by users' preferences regarding a roommate's sex, sexual orientation, and familial status, and (3) a matching system that paired users based on those preferences. *Roommates I*, 521 F.3d at 1166, 1174-75.

After remand, additional discovery was conducted and the parties again cross-moved for summary judgment. Judge Anderson granted summary judgment to plaintiffs under the FHA and FEHA, finding that there was no exception in the statutes for roommates. The other state claims were dismissed. Avoiding the expense of a trial, the parties engaged in mediation and arrived at $175,000 as "diversion of resources" damages for the Fair Housing Councils, conditional upon prevailing on appeal. Plaintiffs moved for their attorneys' fees and costs, and Judge Anderson awarded approximately half of the figure sought, $494,714.

Judge Anderson entered a broad injunction that prohibited Roommates.com from making any reference to gender, orientation, or children, even if responses were voluntary. The court granted Roommates.com's motion to stay the injunction pending the appeal, however, given that the case involved an important question of unsettled law relating to speech.

(Throughout the litigation, the website has functioned without change, although while the second appeal was pending, responses to the questions regarding users' gender, orientation, and children were made voluntary, and users could post profiles to the site without making those disclosures. Users never were required to state preferences for prospective roommates.)

Return to the Ninth Circuit

Roommates.com appealed the grant of summary judgment, the injunction, and the award of attorneys' fees. The Fair Housing Councils cross-appealed as to the amount of the fees. Argument was held on July 14, 2011, before the same three-member panel as the first appeal, Kozinski, Reinhardt, and Ikuta.

The atmosphere at the hearing on the second appeal was friendlier to Roommates.com than during the hearings on the first appeal. The judges pressed plaintiffs' counsel as to how "dwelling" should be defined in a situation where all the residents of a home have, in Judge Kozinski's words, "the run of the place." The panel also expressed concern as to how they could forbid individuals from looking for roommates who have safety or privacy worries, or have religious needs, such as a kosher kitchen.

In an opinion penned by Judge Kozinski, the court observed that "[i]t would be difficult, though not impossible, to divide a single-family house or apartment into separate 'dwellings' for purposes of the statute." *Roommates II,* Slip Op. at 981. "It makes practical sense to interpret 'dwelling' as an independent living unit and stop the FHA at the front door." *Id.* Also, the court said,

> There's no indication that Congress intended to interfere with personal relationships *inside* the home. Congress wanted to address the problem of landlords discriminating in the sale and rental of housing, which deprived protected classes of housing opportunities. . . . Could Congress, in the 1960s, really have meant that women must accept men as roommates? Telling women they may not lawfully exclude men from the list of

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> acceptable roommates would be controversial today; it would have been scandalous in the 1960s.

Id. (original emphasis).

The constitutional right of intimate association also supports an interpretation that does not extend the FHA to shared homes, the court said. "Aside from immediate family or a romantic partner, it's hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms." *Id.* at 983. "Holding that the FHA applies inside a home or apartment would allow the government to restrict our ability to choose roommates compatible with our lifestyles. This would be a serious invasion of privacy, autonomy and security." *Id.* at 984.

"Because the construction of 'dwelling' to include shared living units raises substantial constitutional concerns,'" the court concluded, "we adopt the narrower construction that excludes roommate selection from the reach of the FHA." *Id.* at 985. These constitutional concerns required the same narrow construction of the state FEHA, which uses the term "housing accommodation," rather than "dwelling." *Id.* at 986. "Therefore, we hold that Roommate's prompting, sorting and publishing of information to facilitate roommate selection is not forbidden by the FHA or FEHA." *Id.* at 987-88. The court directed entry of judgment for Roommates.com.

Judge Ikuta concurred and dissented. She joined in the majority's holding that the FHA was properly interpreted as not applying to roommate matching. However, an exception in FEHA for sexual preference in shared housing suggests that the state act was intended to reach roommates, so Judge Ikuta favored remanding the FEHA claim to district court for briefing on the issue and a determination as to whether the statute is constitutional.

Judge Ikuta also indicated (but did not explicitly state) that she disagreed with the majority's finding that the Fair Housing Councils had standing, because they had not suffered an injury-in-fact due to Roommates.com's activities. Judge Ikuta urged en banc review, in the hope that the Ninth Circuit would reconsider its test for organizational standing, and bring it into compliance with *Luzan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (requiring a "concrete and particularized injury").

Timothy L. Alger represented Roommates.com throughout the litigation in district court and the Ninth Circuit. He recently joined the Palo Alto office of Perkins Coie LLP, while the second appeal was pending. The Fair Housing Councils were represented by Christopher and Elizabeth Brancart, of Brancart & Brancart, Pescadero, California.

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Recent Section 230 Cases Analyze Immunity for Defamatory Third Party Postings

Florida Court Applies 230; Kentucky Court Denies Immunity

By Jennifer A. Klear

Two recent online defamation decisions illustrate growing strains in applying Section 230 immunity to websites that willingly host defamatory third party content.

The first case, *Giordano v. Romeo and Xcentric Ventures, LLC* (Fla. App. Dec. 28, 2011), involves the consumer complaints website www.ripoffreport.com. The appellate court reluctantly affirmed that Section 230 protected the website even when it refused to remove postings found to be defamatory. However much the court disapproved of the website's practices, it found that "the law on this issue is clear." The website enjoyed complete immunity in any defamation action over third party postings.

The second case, *Jones v. Dirty World Entertainment Recordings LLC*, (E.D. Ky. Jan. 10, 2012), involves a notorious gossip website. Here in contrast the court looked to the Ninth's Circuit's 2008 *Roommates.com* decision to deem the website the "creator" of the online content.

The court noted that "the name of the site in and of itself encourages the posting only of 'dirt,' that is material which is potentially defamatory or an invasion of the subject's privacy."

Ripoff Report and Section 230

In *Giordano,* the court reluctantly upheld a lower court decision granting Xcentric Ventures, LLC ("Xcentric"), the website operator of the www.ripoffreport.com, immunity under the CDA for failure to remove posts from its website that were deemed by the lower court to be defamatory *per se.*

In September 2009, John Giordano ("Giordano") and his company, G&G Addiction Treatment, Inc. ("G&G"), sued Xcentric and a user of ripoffreport.com for defamation and injunctive relief upon noticing false and defamatory statements posted to the site. The post identified Giordano as a convicted felon and further claimed that the employees of G&G illegally disbursed medications and that the facility itself is dangerous. Ripoffreport.com is a website dedicated to complaints about companies or individuals. As the Third District Court explained, "Xcentric does nothing to prevent users of its website from posting false and defamatory statements."

This appeal arose from the trial court's dismissal of Xcentric from the case and the dissolution of the injunctive relief. Specifically, Xcentric moved to dismiss the complaint on the ground that it is immune from suit under the CDA, which provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

While the trial court granted Xcentric's motion, it found that a portion of the online post constituted defamation *per se*. Despite the court ruling, Xcentric refused to remove the defamatory post "even after the original user was subjected to an injunction prohibiting her from allowing the post to remain on the website." Plaintiffs ultimately obtained an injunction "prohibiting the maintenance of the posting on Xcentric's website," which was later dissolved.

While the appellate court found Xcentric's business practices "appalling," it recognized that Xcentric "enjoys complete immunity from any action brought against it as a result of postings of third party users of its website." In particular, the court noted that:

> Xcentric appears to pride itself on having created a forum for defamation. No checks are in place to ensure that only reliable information is publicized ... Even when, as here, a user regrets what she has posted and takes every effort to retract it, Xcentric refuses to allow it.... It will not entertain any scenario in which, despite the clear damage that a defamatory or illegal post would continue to cause so long as it remains on the

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> website, Xcentric would remove an offending post.

Nevertheless, the Court relied on Florida Supreme Court precedent set in *Doe v. America Online, Inc.*, 783 So.2d 1010 (Fla. 2001), which held that "an internet service provider that had allowed third parties to publish allegedly illegal postings in the internet was deemed immune from suit." Thus, the Third District Court held that "section 230 of the CDA 'creates a federal immunity to any cause of action that would make service providers liable for information originating with a third party user of the service.'"

TheDirty.com and Section 230

On January 10, 2012, the United States District Court for the Eastern District of Kentucky in *Jones v. Dirty World Entertainment Recordings, LLC, et al.* held that Dirty World Entertainment Recordings, LLC ("Dirty World") was not immune from liability under the CDA for allegedly defamatory posts made by its users on its website www.thedirty.com.

The appellate court reluctantly affirmed that Section 230 protected the website even when it refused to remove postings found to be defamatory. However much the court disapproved of the website's practices, it found that "the law on this issue is clear."

In this case, plaintiff Sarah Jones ("Jones"), a high school teacher and Cincinnati Bengals cheerleader, filed an action for defamation and invasion privacy against Dirty World for posts made by a third party to the dirty.com website implying that she engaged in promiscuous behavior. Jones contacted the website seeking the removal of the post. Initially, the site agreed, but later informed Jones that the post would not be removed. Soon after, the another post appeared on the site stating, among other things, that

> Her ex Nate . . cheated on her with over 50 girls in 4 yrs. . in that time he tested positive for Chlamydia Infection and Gonorrhea . . so im sure Sarah also has both . . what's worse is he brags about doing sarah in the gym . . football field . . her class room at the school where she teaches at DIXIE Heights.

In response to the post, Nik Richie "(Richie"), who runs the site and publishes his own comments on the site, posted "Why are all high school teachers freaks in the sack? – nik." Jones again requested several times that the posts be removed, but her requests were ignored.

Defendants "admitted that facially defamatory and privacy violating posts were made to their website concerning …Jones." However, on their motion for judgment as a matter of law, defendants sought immunity under the CDA for those posts. The Court disagreed. The court relied on *Fair Housing Council of San Francisco Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008), which held that defendant "was not entitled to immunity under the CDA because the defendant required subscribers to the site as prospective landlords or tenants to include information that was illegal under the Fair Housing Act." 512 F.3d at 1165.

In examining this case under the lens of the *Roomates.com* decision, the Kentucky federal court found that defendants "through the activities of defendant Richie, 'specifically encourage development of what is offensive about the content' of 'the dirty.com' website. The court noted that "the name of the site in and of itself encourages the posting only of 'dirt,' that is material which is potentially defamatory or an invasion of the subject's privacy." It was further persuaded by the fact that Richie acts as editor of the site, selects a small percentage of submission to be posted, does not vet comments for accuracy, decides whether posts should be removed, and adds his own comments to postings. Consequently, the court held that defendants were not immune from liability under the CDA for third-party posts to its website.

Jennifer A. Klear is a media and technology attorney at the Law Offices of Jennifer A. Klear, New York, NY. Plaintiff in Giordano was represented Rosen, Switkes & Entin. Miami Beach, FL. Defendants were represented by Maria Crimi Speth, Jaburg & Wilk, Phoenix, AZ; and Brian J. Stack, Stack Fernandez Anderson & Harris, Miami, FL. Plaintiff in Jones was represented by Eric C. Deters & Associates, Independence, KY. Defendants were represented by David Gingras, Phoenix, AZ; and Huddleston, Bolen, LLP Ashland, KY.

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ECHR Issues Important Press Privacy Decisions Sides with Press in German Privacy Cases

By David Hooper

On February 7, 2012 the European Court of Human Rights issued two important press privacy decisions. Axel Springer v Germany Application number: 39954/08; Von Hannover v Germany Application numbers 40660/08 and 60641/08.

Both cases are well worth reading, as unlike so many decisions of the European Court of Human Rights the law is clearly set out in a fashion which is easier to follow than often is the case and logically explained – at any rate to those familiar with the common law system – quite possibly because the decisions were presided over by an English Judge, Sir Nicolas Bratza, the President of the Court.

Privacy and Reporting Convictions

The first of these was the Axel Springer case where a television actor had under Article 823 of the German Civil Code obtained injunctions in respect of two articles which had reported his arrest and conviction for possessing cocaine.

The applicant was a well-known television star who had appeared in over a 100 episodes of a detective series on German television where he played the part – ironically – of a police superintendent. When he was for the second time arrested at the Munich Beer Festival for possession of cocaine and subsequently given a five month suspended prison sentence and fined €5,000, a German tabloid, *Bild* published two articles about the actor's other favourite lines.

The Hamburg Regional Court granted an injunction and ordered the publishers to pay €5,000 (ironically the sum which the cocaine-sniffing superintendent had been fined) for infringing his rights of personality. That fine was subsequently reduced on appeal to €1,000 but the injunction was upheld.

The matter went to the European Court of Human Rights where the issue was whether this admitted infringement of the magazine's Article 10 Right of Freedom of Speech was a justifiable restriction of the Freedom of Speech which was necessary in a democratic society. By a majority of 12 to 5 the Court held that there was a violation of Article 10. The dissenters disagreed primarily on the application of the law contending that it was really a matter for the German Courts with the advantage of knowing the cultural and social reality of Germany to decide whether or not privacy had been infringed and that it fell within the margin of appreciation of the German Courts and the decision should not be interfered with by the European Court of Human Rights.

In both the Axel Springer and Von Hannover cases there were interventions by the Media Lawyers Association, Media Legal Defence Initiative, International Press Institute and the World Association of Newspapers and News Publishers.

While the Court recognised the importance of freedom of speech in familiar terms, it made clear that for Article 8 to come into play an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life.

The German Courts had taken the view that although the applicant had been convicted of an offence of medium seriousness – he was not involved in trafficking drugs – he was entitled to his rights of personality and privacy rights and that he had not held himself out as an emblem of moral virtue or a role model. The magazine contended that this was a story of legitimate public interest not least because some 4.7 million Germans watched the applicant upholding the law on their televisions.

While the Court recognised the importance of freedom of speech in familiar terms, it made clear that for Article 8 to come into play an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life. It noted that Article 8 cannot be relied upon to complain of a loss of reputation which is the foreseeable consequence of one's own actions for example in committing a criminal offence.

The Court also recognised that it was not in its supervisory function its task to take the place of national Courts and to substitute its views for those of the domestic

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Courts. Importantly the Court also made it clear that in considering the outcome of any Application to the Court it should not be influenced by whether the case was one lodged under Article 10 (Freedom of Speech) or Article 8 (the Right of Privacy). The balancing exercise should be the same.

So how then is the balancing exercise to be carried out? The Court laid down a number of criteria:

- What contribution did the publication of the photographs or article make to a debate of general interest? This debate would not be confined simply to political issues or crime but could also extend to sporting issues or performing artists. However, matters such as the rumoured marital difficulties of a President of the Republic or the financial difficulties of a famous singer, would probably fall the wrong side of the line.

- The Court would also look at the question of how well known was the person concerned and what was the subject of the report. A distinction is likely to be made between politicians in the exercise of their official functions and reporting the details of the private life of an individual who did not exercise such functions. The distinction was really between a public watchdog and commentaries which went into the details of people's private life with the aim of satisfying the curiosity of their readers.

- The Court would also look at the prior conduct of the person concerned. Merely having co-operated with the press would not of itself be sufficient. In the Leveson inquiry in the United Kingdom the actor Hugh Grant gave an interesting response to questions based on the fact that he was willing on occasions to talk about his private life. He said – with some force – that as an actor he was from time to time required to give interviews to help promote his films and that if, as happened from time to time, he was asked about his private life he had to choose either between giving a prim answer that he never discussed his private life and possibly alienating the press or dealing with the question raised. He argued that that did not give the press liberty hall to write about his private life and it would seem that the European Court of Human Rights take rather the same view.

- The Court will also look at the way that the information was obtained and its veracity

- The Court will also look at the way in which the photo or report are published and the manner in which the person was represented in the photograph or report. That turned out to be of some significance in the Axel Springer case, as the report was about the fact of the conviction and did not seek to delve into the actor's private life.

Applying these factors the Court considered that there was a degree of general interest in the arrest and conviction of the actor and that the public did have an interest in being informed. He was a very well-known and popular figure and even if he had not set himself up as a role model, the fact that he had become famous as a television police superintendant entitled the public to have a legitimate interest in knowing whether he behaved as his television persona. He had a number fan clubs and was a public figure. He had been arrested in a public place and it was relevant that he had given a number of interviews about his private life.

Furthermore, the magazine had behaved responsibly having obtained this information and checked it with the press officer at the Public Prosecutor's Office. The Court accepted that there had been a balancing exercise undertaken properly by the German Courts, but for these reasons it reached a different conclusion and decided that there was insufficient evidence to show that this undoubted interference with the magazine's Article 10 rights was necessary in a democratic society. The decision was therefore an important triumph for responsible journalism.

Privacy and Photography

The Von Hannover case involved the publication of a number of photographs of the Von Hannovers who were respectively Princess Caroline of Monaco and her husband Prince Ernst August who had by that time become serial privacy litigants. The photographs were taken of the couple while enjoying skiing holidays in Switzerland and Austria.

The photographs themselves were not offensive or taken

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in unfair circumstances, but the German Courts had initially upheld injunctions in relation to the photographs published in Frau im Spiegel and Frau Aktuell, on the grounds that they infringed the sphere of their private life and were published just for the curiosity of the public. The cases therefore raised in sharp focus the ability of the press to publish photographs of well-known people taken in public places.

As the case had gone through the German appeal procedure, a distinction had been drawn between the photographs which could be said to be related to a story about the illness of her father Prince Rainier and those which were really just general interest pictures of celebrities and some of the German Courts were somewhat dubious about the attempts to justify the publication of these photographs by linking them to the Rose Ball a charitable event with which the Princess was connected. The decision of the German Federal Constitutional Court had been that there was not an infringement of Article 8 and that the couple's rights under Article 2 of the German basic law relating to the free development of their personality had not been infringed.

The Court noted that one should be on one's guard against what is merely a pretext for publishing the photograph of a prominent person.

The approach of the Court was similar to that in the Axel Springer case. The argument of the couple was that none of the photographs contributed to a debate of public interest in a democratic society and they complained that they had been hounded by paparazzi and that their rights of privacy entitled them to enjoy their holiday undisturbed by the attentions of the press and photographers. The Court recognised that a person's image constituted one of the chief attributes of his or her personality and that Article 8 of the Convention was primarily intended to ensure the development of their personality without outside interference.

Article 8 does not merely compel the State to abstain from such interference, there may be positive obligations on the state to ensure such rights inherent in effective respect for private or family life. A balance has to be struck between the Applicant's right to respect for their private life and the right of the publishing company to freedom of expression. The press played an essential role in a democratic society, but it must not overstep certain bounds regarding in particular the protection of reputation and the rights of others. It is not for the national Courts to substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case.

Freedom of expression, the Court observed, includes the publication of photographs, although it recognized that this was an area of particular importance when it came to the protection of the rights and reputation of others. The Court also had to be sensitive to what on occasions became a climate of continual harassment, particularly where one was dealing with the sensationalist press aiming to satisfy the public's curiosity regarding the details of a person's strictly private life. The Court's role itself is a supervisory one and the European Court of Human Rights' task is not to take the place of the national courts, but rather to review in the light of the case as a whole as to whether the decisions taken by the national courts pursuant to their margin of appreciation are compatible with the provisions of the Convention.

As was made clear in the Axel Springer case, it matters not in carrying out the balancing exercise whether the Application was brought under Article 8 or Article 10. Both rights deserve equal respect and the margin of appreciation should in theory be the same in both cases. The Court would require strong reasons to substitute its view for that of the domestic Courts. The Court applied the same criteria set out in the Axel Springer case to the Von Hannover case. It took note of a fact that when this matter had been reconsidered by the Federal Court of Justice in Germany, the court there had noted the issue of whether the report in question contributed to a factual debate and went beyond a mere desire to satisfy public curiosity.

The greater the information value for the public, the more interest of a person being protected against its publication had to yield and visa versa. Freedom of expression did include the entertainment press, but the readers' interest in being entertained generally carried less weight than the interest in protecting the private sphere.

The Court upheld the view of the German Federal Constitutional Court that the articles did have a sufficient element of public interest in that it was reporting the reigning Prince of Monaco's illness and the issue of family solidarity amongst the Prince's children and that there was a sufficiently close link between the photograph and the events

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described in the article. In other words to justify the publication of such photographs, there must be some element of public interest upon which to hang the publication of the photographs.

The Court noted that one should be on one's guard against what is merely a pretext for publishing the photograph of a prominent person. Here the Applicants were public figures and undeniably very well-known and the photographs had not been taken in unfavourable circumstances, although they had been taken without the Applicants' knowledge, but there was no indication that they had been taken surreptitiously and they were photographs taken in the middle of a street in a skiing resort. The Court therefore concluded that the Appellate German Courts had carried out a proper balancing exercise in the light of the case law of the European Courts of Human Rights and that therefore there was no infringement of Article 8.

Both decisions therefore do seek to strike a balance between Article 8 and Article 10 and are generally speaking favourable to the media. Intrusive photographs which merely pander to the curiosity of the public are likely to be actionable but those which can reasonably be attached to events of public interest can lawfully be published.

David Hooper is a partner with Reynolds Porter Chamberlain in London.

The Honourable Nathaniel Rothschild Receives a Birching

Daily Mail Wins Libel Bench Trial on Substantial Truth

By David Hooper

Earlier this month Mr Justice Tugendhat rejected financier Nat Rothschild's claim for substantial libel damages against the Daily Mail for its article published in May 2011 headlined "Revealed: The astonishing story of the night Lord Mandelson was flown to Moscow by private jet to join a billionaire friend desperate to strike a deal that cost British jobs." *Rothschild v. Associated Newspapers*, [2012] EWHC 177 (QB).

The striking thing about this libel action was that it was primarily about a somewhat Machiavellian politician called Peter Mandelson, now Lord Mandelson of Foy, who had been the European Union Commissioner for Trade at the material time and a controversial Russian oligarch called Oleg Deripaska. Nat Rothschild's part in the article was a relatively minor one yet it was he, armed with the aggressive advice of his lawyers Schillings, who sued whereas Lord Mandelson and Mr Deripaska had the good sense not to bring an action.

The upshot was that the newspaper won a fully contested libel action where the issue was whether the paper had justified the meaning of the article as being substantially true. The Daily Mail succeeded – something which does not happen that often under the tough libel laws of the United Kingdom. Nat could be as much as £1.5m out of pocket in terms of legal costs. The Judge's comments about the evidence which he gave in Court will not have done anything for his reputation as a financier. His thin skin that is evident in matters of press coverage did no service to his very formidable reputation as a billionaire financier. This really was a libel action which he was very unwise to bring and a good example of sue in haste and repent at leisure.

Background

The real sting of the article was a criticism of the non-suing Lord Mandelson. The backdrop of the libel action was that Mandelson was responsible for the European Commissioner's Directorate General for Trade. The various protagonists had between 26 and 29 January 2005 attended the World Economic Forum held at Davos in Switzerland.

On Sunday 30 January Mandelson flew on a jaunt to Russia with Nat in Nat's private plane. That this was a last minute decision appears to be borne out by the fact that Mandelson had not even got a Russian visa. The Daily Mail

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article focussed on a dinner that was then held in a Tuscan eatery in Moscow called the Cantinetta Antinori. The Daily Mail's article focussed on the fact that at the restaurant a dinner was being held between executives of Alcoa who had acquired interests in the Russian aluminium manufacturers Rusal when there was a full blown European Commission enquiry proceeding into alleged dumping of Russian aluminium foil onto the European market.

In November 2004 the European Commission had started a review into possible anti-dumping regulation of the Russian aluminium industry. Eventually on 20 December 2005 it was Lord Mandelson himself who signed a Commission decision which repealed the decision to require the principal Russian exporter Sayanal (a company owned by Oleg Deripaska) to give undertakings about their price levels on the grounds that those undertakings were no longer necessary.

It was an unwise decision for Lord Mandelson to jet off to Russia with Nat, although the review of the evidence in the libel action did not indicate any impropriety by Lord Mandelson in respect of the aluminium trade. The problem was the *suspicion* of potential conflicts of interest or improprieties. The matter was further complicated by the fact that Mandelson, in his political career in England before he wound up in Brussels, had been dogged by just such apparent conflicts of interest.

The newspaper won a fully contested libel action where the issue was whether the paper had justified the meaning of the article as being substantially true.

He had lost his job first as Trade and Industry Secretary of State, when he had omitted to declare a house loan of £370,000 from an influential fellow MP and he lost his next job a few years later as Secretary of State for Northern Ireland when he faced accusations of improperly exploiting his official position by making representations to the Home Office on behalf of an Indian businessman who was seeking a UK passport.

Mandelson's colorful life style, which had included holidaying on Deripaska's yacht off Corfu in 2008, attracted more than its fair share of newspaper coverage. It was into this hornet's nest that Nat charged with his libel lawyers. After his Tuscan meal in Moscow, Mandelson flew on the Sunday evening with Rothschild to Abakan in Siberia this time on Deripaska's private plane with Deripaska on board. The purpose of this visit which involved over four hours flying to a country where the ambient temperature was at best -25°and where daylight was at that time of year a sparse commodity was, Nat insisted, purely recreational.

Ironically the newspaper had not known about this Siberian jaunt and this only emerged when Nat with some evident glee pointed out the errors of detail in the Defence submitted on behalf of the Daily Mail. It was, for example, pointed out that the Rusal/Alcoa deal had already been signed before the dinner and that Mandelson himself had eaten with a Russian Minister , not with Rothschild or Deripaska, and had done no more than stop by the Deripaska table to say hello.

Nat however volunteered the fact that the group had for purely recreational reasons visited Siberia which was a place which Mandelson had not been to before and wanted to see, albeit that it was mid-Winter, very cold and involved a great deal of flying and he had to be back in Brussels on the Tuesday. Siberia just happened to be where Oleg Deripaska's aluminium smelters and foil plant were situated (the same plant that was the subject of an ongoing European Commission review). Deripaska was, perhaps not surprisingly, very proud of the aluminium business he had built up and he invariably took visitors to inspect the facilities.

A Libel Own Goal

This information contained in the Reply proved to be something of a libel own goal for Nat, as the Daily Mail contended that even if the information about the dinner at the restaurant in Moscow was incorrect, this proved the sting of the criticism that the paper had been making. The Judge was satisfied that the article was defamatory of Nat, as it could be interpreted as meaning that Rothschild had risked bringing Mandelson into disrepute, because of this use of private jets and hospitality on a trip where Mandelson had had no official reason to go.

Furthermore the article could give rise to the suspicion that Mandelson had engaged in improper discussions about the Rusal and Alcoa deal - which the Judge found on the evidence Mandelson had not in fact done. The Judge also considered that the article could be taken as suggesting that

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Rothschild had sought, by getting Mandelson over to Russia, to impress Deripaska who controlled Rusal and of whose Advisory Board Rothschild was a member.

Nat was adamant that the trip was recreational and any visits to the aluminium facilities were coincidental and lasted no more than a "nano-second". The reality according to Nat was that this was a purely recreational trip – albeit a rather short and chilly one – which involved ice hockey, five-a-side football and Russian billiards. The Press particularly enjoyed reporting Nat's description of having "*a delightful banya,*" which is a form of Russian sauna, which ended up, Rothschild told the Court, with the participants being beaten by a 25 year old Russian male banya keeper with birch leaves. It was, he said, "*incredibly enjoyable*" and a wonderful antidote to jet lag.

One of the unusual features of the case was that the defence of justification rested entirely on the case advanced by Rothschild in his Reply. The Daily Mail did not call any witnesses except one on an unrelated topic. The Judge concluded that the newspaper report was, despite the errors about the attendance at the dinner, substantially true. The Judge indicated that had he found in favour of Rothschild he would not have awarded the very substantial damages Rothschild was demanding but would have awarded the relatively modest sum of £3,000 – another reason it might be thought wise not to have brought the action in the first place.

It appeared that the Judge was less than wholly impressed by the way that Rothschild gave his evidence referring to *unrealistic answers*, *differing and developing accounts* and to his being *not entirely candid*. Rothschild has indicated that he will be seeking permission to appeal and requesting the Court of Appeal to quash the decision of Mr Justice Tugendhat.

Conclusion

This case does show that it is possible for the English media to win fully contested libel actions, even where they may not be able to prove all of what they wrote and to win without calling evidence and relying just on the Claimant's case. Rothschild's appeal still remains to be resolved. Whatever the ultimate outcome, this does seem to be a classic case of it being immeasurably wiser not to take action in respect of an article which you may feel is hostile, unfair and in many respects untrue.

Libel actions have their own perils and Claimants would do well to remember that they attract considerable press publicity, even victories can sometimes be pyrrhic and that losing such actions with the sort of press coverage it attracts e.g., a profile in the Sunday Times *Nat Rothschild: Giving himself a good thrashing* can do far more damage to one's reputation than the offending article. There is no obligation to sue on everything you may find defamatory and ignoring such articles or answering them outside the courts may often be the better choice.

David Hooper is a partner at Reynolds Porter Chamberlin LLP in London. Associated Newspapers was represented by barristers Andrew Caldecott QC and David Glenn and instructed by Jaron Lewis and Brid Jordan at Reynolds Porter Chamberlain LLP. The Claimant was represented by Hugh Tomlinson QC and Justin Rushbrooke instructed by Schillings.

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Second Circuit Affirms Grant of Motion to Quash Subpoena to Reporter

Plaintiffs Sought Reporter's Testimony to Prove Negligence by Goldman Sachs

By Gayle C. Sproul

The Second Circuit has unanimously affirmed the grant of a motion to quash a subpoena directed to former *Wall Street Journal* reporter Jesse Eisinger. *Baker v. Goldman Sachs & Co.*, No. 11-1591 (2d Cir. Feb. 15, 2012).

The subpoena sought his testimony in a case brought in federal court in Massachusetts by plaintiffs Janet and James Baker against Goldman Sachs & Co. ("Goldman"), arising from services Goldman provided in connection with the merger of the Bakers' voice recognition software company, Dragon Systems, with Belgian speech technology company Lernout & Hauspie ("L&H") in 2000.

The Court concluded that the testimony sought from Eisinger, whether in direct or cross-examination, was protected by the New York Shield Law, and that plaintiffs had failed to make the requisite showing to overcome the law's qualified privilege. The opinion thus provides some helpful ammunition in subpoena battles in which the party seeking testimony claims to want only testimony regarding published information, which is not protected by the Shield Law.

The opinion thus provides some helpful ammunition in subpoena battles in which the party seeking testimony claims to want only testimony regarding published information, which is not protected by the Shield Law.

Background

In March 2000, plaintiffs agreed to merge Dragon with L&H. The merger deal, under which plaintiffs exchanged 51% of their interest in Dragon for approximately $300 million in L&H stock, closed in June 2000. Plaintiffs had hired Goldman to be Dragon's "exclusive financial advisor" in connection with the sale of the company, then valued at over $600 million. The L&H stock became worthless shortly after the merger upon the discovery of various financial frauds perpetrated by L&H, which declared bankruptcy in November 2000.

In the underlying suit, plaintiffs claim that Goldman breached its professional, fiduciary and contractual duties by failing to fully investigate L&H and failing to uncover, among other things, L&H's overstated reporting of revenue, particularly with respect to customers in Asia.

Among plaintiffs' theories is that Goldman was negligent because it apparently did not do what the *Journal* did to uncover L&H's fraud. Eisinger, then a *Journal* reporter (who now reports for ProPublica), authored and co-authored several articles about L&H, which quoted analysts who were skeptical of L&H's claimed sales successes in Asia. One article of particular interest to the Bakers, published on August 8, 2000 and entitled "Lernout & Hauspie Surges in Korea, Raising Questions," described the results of an inquiry by the *Journal* into L&H's purported Korean client list, which revealed that some of the listed clients did not even do business with L&H and that others had made far less significant contributions to L&H's revenues than the company claimed.

The publication of the August 8 article was followed by a significant drop in L&H's stock price, an SEC investigation, L&H's declaration of bankruptcy and criminal convictions.

Plaintiffs subpoenaed Eisinger in the Southern District of New York, contending that they needed to depose him as "the individual who did exactly what Goldman should have done." Eisinger filed a motion to quash, arguing that, under the New York Shield Law, N.Y. Civ. Rights L. § 79-h, which is applicable in this diversity case, he could not be compelled to testify because plaintiffs could not meet the stringent test for discovery of non-confidential information and that confidential information, also implicated here, was absolutely protected.

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Plaintiffs opposed the motion, arguing that the Shield Law protected only unpublished information and that they sought only testimony concerning published information. However, their brief made clear that they hoped to inquire into "what Eisinger did" and "what he did and what he found as he reported," most of which was not explained in the articles. Plaintiffs also argued that they were in any event able to satisfy the demanding test imposed by the Shield Law. Goldman submitted a "statement" objecting to plaintiffs' characterization of the facts and supporting the motion to quash.

District Court's Decision

Judge Jones ruled in April 2011 that, in asking Eisinger "what he did," the plaintiffs would certainly ask questions touching on unpublished information. She asked plaintiffs' counsel several times during oral argument to provide her with examples of questions they would ask that would not implicate unpublished information, and found each of counsel's examples wanting. She concluded that "plaintiffs inevitably would have to ask questions regarding Eisinger's techniques for conducting his investigation, the backgrounds of Eisinger's co-authors, and the [*Journal's*] editorial staff, and whether he consulted with any experts or other sources in the course of the investigation." Judge Jones held that "these topics are key parts of the newsgathering process, and as such are protected by the New York Shield Law."

The Second Circuit entirely agreed with Judge Jones, and affirmed her decision quashing plaintiffs' subpoena.

Judge Jones further reasoned that plaintiffs' inquiry would logically delve into unpublished details given that (1) the August 8 article was co-authored by three journalists and the article did not identify precisely who had taken which steps in the *Journal's* investigation and (2) if deposed, Eisinger would be subject to cross-examination by counsel for Goldman, who represented to the Court that he would need to conduct an in-depth examination into the circumstances of Eisinger's investigation.

The court thus determined that the Shield Law applied, and held that the qualified privilege applicable to non-confidential unpublished information could not be overcome on this record. Observing that it was "even doubtful Mr. Eisinger's testimony would be relevant," the court found that plaintiffs had "not demonstrated how testimony about a journalist's investigative techniques and process of reporting are a relevant comparison to Goldman Sachs' duty of care in this situation. The fact the Wall Street Journal conducted an investigation into L&H sheds no light on the scope of Goldman's obligations to Dragon and the Plaintiffs." Based on this conclusion, the court held that the Shield Law's requirement that testimony be "critical or necessary to the maintenance of the claim," which required that plaintiffs demonstrate that their claims "virtually rise or fall with the admission or exclusion of the evidence" sought, could certainly not be met. Judge Jones thus granted the motion to quash, *In re Subpoena to Jesse Eisinger*, No. 11-mc-00060 (S.D.N.Y. Apr. 12, 2011) (Jones, J.), and plaintiffs appealed.

Second Circuit Appeal

The Second Circuit entirely agreed with Judge Jones, and affirmed her decision quashing plaintiffs' subpoena. Of particular importance, the Court concluded that cross-examination of the reporter is part and parcel of the deposition sought by the subpoenaing party and must be taken into consideration in determining whether information protected by the Shield Law is implicated by the subpoena.

In their appeal, which was expedited by the Second Circuit, plaintiffs attempted to reformulate the statements they made to the District Court regarding their proposed questions, now stating that they simply wished to ask Eisinger whether he believed that what was published was accurate and nothing more. They asserted that they understood that the customers' statements to the *Journal* were hearsay, but that they did not intend to admit these statements for their truth, wishing simply to "use the testimony to admit the information in the articles into evidence."

Plaintiffs urged the Second Circuit to reject the District Court's holding that the deposition would "inevitably" delve into unpublished information, pointing out that no state or federal court had ever held that a court was empowered to apply the Shield Law based on its own surmise as to what questions might be asked. They forcefully argued instead

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that their proposed questions to Eisinger should be viewed in isolation and that it was unfair to them to include the cross-examination in the analysis.

Finally, the Bakers contended that the District Court had applied an "overly restrictive standard" to the criticality element, attempting to persuade the Court that the "virtually rises and falls" standard could be satisfied if the testimony could "very significantly . . . bolster" any of plaintiffs' claims.

In response, Eisinger argued that plaintiffs' effort to convince the Court that they sought to ask only limited questions to confirm the narrow details of the *Journal's* investigation published in the articles was incredible and belied by statements in their own brief and even by their contention that Eisinger's testimony was critical to show that Goldman should have done what Eisinger and other *Journal* reporters did.

In addition, Eisinger argued that plaintiffs were attempting to isolate their questions artificially and that they must be considered along with the obviously broad inquiry that would immediately follow in cross-examination. Here, Eisinger cited, among other things, the Second Circuit's recent decision in *United States v. Treacy*, 639 F.3d 32 (2d Cir. 2011), for the proposition that the expected cross-examination by the defendant must be considered by the Court in determining how to resolve a motion to quash.

He also cited the rule of completeness -- an evidentiary rule of fairness that enables an opposing party to introduce during cross-examination portions of a document ignored in direct examination. Eisinger also contended that the privilege applicable under the Shield Law could not be defeated by plaintiffs for a number of reasons, including (1) plaintiffs had already established on the record that Goldman employees had not made calls to L&H's purported customers, a fact that Goldman claimed was due to a confidentiality agreement in place regarding the merger; (2) the investigation by the *Journal* did not occur within the same timeframe as the due diligence associated with the merger; and (3) anything the customers had to say to *Journal* reporters was objectionable hearsay.

Eisinger also maintained that the information sought was available from an alternative source -- the Asian customers identified by L&H -- and that plaintiffs' attempt to undermine the criticality requirement was unjustified under federal or state law. Finally, Eisinger argued, as he did in the court below, that even if the Shield Law did not apply, the independent protections of Rule 45(c)(1) should be applied to protect him from the undue burden imposed by the subpoena.

Goldman submitted a brief "solely to rectify the abundance of mischaracterizations . . . contained in the Bakers' brief and enable the Court to consider this appeal in the proper context." The brief again made clear Goldman's intention to conduct a cross-examination that would be a searching examination of the *Journal's* reporting process and pointed out that the admission of any direct examination without countervailing cross-examination would be unfair and objectionable.

Second Circuit's Decision

After holding oral argument in August 2011, the panel, comprised of Judges Winter, Miner and Hall, affirmed the District Court's ruling in an opinion authored by Judge Winter, issued on February 15, 2012.

Judge Winter recounted in detail the proceedings in the court below, in particular noting that the answers given by plaintiffs' counsel at "oral argument and the findings of the district court render it virtually self-evident that the Shield Law would protect Eisinger from compelled testimony." He then surmised that "[p]erhaps in recognition of these obstacles, appellants' counsel took a new tack during oral argument in this appeal, announcing that the only question he intended to ask -- apart from the usual pedigree inquiries -- was whether the published information, which is not subject to the qualified privilege, was 'accurately reported.'"

Judge Winter suggested that plaintiffs hoped that the trier of fact would draw inferences favorable to plaintiffs from this question and the expected answer, and noted that in response to a question from the panel suggesting that such a question would "open the door to [defendants] asking all sorts of questions, counsel responded, 'because someone else wants to cross-examine in a way that may implicate the shield law, that does not prohibit us from asking legitimate questions that do not implicate the shield law.'" The Court's succinct response: "We reject this argument."

The Court explained that it rejected this approach for three reasons. *First*, "the question counsel proposes to ask cannot be divorced from unpublished material relating to the article." It concluded that the question sought the reporter's opinion regarding the accuracy of the report and that such an opinion could not be admitted into evidence without

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permitting an inquiry into its factual foundation, pursuant to Rules 701 or 702 of the Federal Rules of Evidence.

Second, the Court disagreed with plaintiffs that "the nature of the cross-examination that would inevitably follow is not before us at this time," observing that "[i]t is beyond cavil" that the cross-examination here would intrude on privileged information, and noting that "the would-be cross-examiner is not required to seek a second subpoena to ask questions within the scope of the direct." The Court also extended its ruling in *Treacy* to civil matters and held that, although there may be exceptions, in this case it is "absolutely clear" that the cross-examination would delve into matters protected by the Shield Law:

> Indeed, in a criminal case, we have recently held with regard to a journalist's privilege that once the prosecution has overcome the claim of privilege and conducted its desired direct examination, the Confrontation Clause requires that the usual cross-examination as to credibility and matters within the scope of the direct examination be allowed. We see no great impediment to extending that approach to civil cases. The law of evidence embodies a rule of completeness requiring generally that adversaries be allowed to prevent omissions that render matters in evidence misleading. . . . To be sure, some close questions may arise in future proceedings in which the need for cross-examination into materials privileged under the Shield Law would be doubtful. That is not a problem in this matter, however, because the need for cross-examination within the area of the privilege is absolutely clear.

(citing *Treacy*, 639 F.3d at 44-45).

Third, the Court answered plaintiffs' contention that no previous decisions permitted the Court to include cross-examination in the analysis by noting that "under the New York statute, the application of the privilege turns on the subject matter of the inquiry and does not distinguish between direct and cross-examination." The Court then concluded its opinion by astutely observing that to rule otherwise would allow litigants to twist the requirements of the Shield Law to defeat its application in any case in which cross-examination will impinge on protected information:

> If the proposed question was allowed to be asked and answered on the ground that it sought information outside the protected area, the cross-examiner could then easily overcome the privilege by showing a critical need to establish Goldman's defense to the inferences to be drawn from the answer. The result would turn the statute on its head by allowing an evasion of the privilege through a question deliberately framed to be (supposedly) outside the scope of the privilege to have the effect of compelling testimony on cross-examination within the privilege. We decline to follow a route leading to this result.

The Court then concluded its opinion by astutely observing that to rule otherwise would allow litigants to twist the requirements of the Shield Law to defeat its application in any case in which cross-examination will impinge on protected information.

A more minor point, but one still worth noting, is that in describing the requirements for overcoming the privilege of the Shield Law, the Court silently rejected plaintiffs' invitation to weaken the criticality requirement. The Court reiterated its clear statement in *In Re Application to Quash Subpoena to Nat'l Broad. Co*., 79 F.3d 346, 351 (2d Cir. 1996), that in order to satisfy the criticality requirement, "'there must be a finding that the claim for which the information is to be used virtually rises or falls with the admission or exclusion of the proferred evidence.'"

Mr. Eisinger was represented by Jason Conti of Dow Jones & Company and Gayle C. Sproul of the Philadelphia office of Levine Sullivan Koch & Schulz, L.L.P. and Amanda M. Leith, formerly of the firm's New York office, and now in-house counsel at NBC Universal. Plaintiffs Janet and James Baker were represented by Alan K. Cotler, Joan A. Yue and Andrew J. Soven of Reed Smith, LLP. Defendant Goldman Sachs & Co. was represented by Paul Vizcarrondo of Wachtell, Lipton, Rosen & Katz.

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Reporter's Testimony Found Critical in Privacy Lawsuit

Plaintiff Sued Doctors Over Before and After Surgery Photos

By Mark Sableman

A newspaper published highly embarrassing nude photos of a woman, without her authorization. A lawsuit ensued. Discovery was sought from the newspaper. Ultimately the reporter's testimony became the focus of the case, and the appeals court found that testimony critical. *Doe v. Young*, No. 10-3442 (8th Cir. Dec. 28, 2011) (Riley, Colloton, Gruender, JJ.).

This sounds like a media liability and reporter's privilege nightmare. But in fact, the newspaper had no liability, the reporter's privilege was protected, and the reporter's testimony was limited to what was essentially occurrence eyewitness testimony.

Background

Significantly, the *Riverfront Times* (RFF), an alternative newspaper in St. Louis, wasn't a defendant. The woman whose before-and-after plastic surgery photos (from the neck down) were published sued her doctors, not the newspaper.

The Court's favorable rulings on the reporter's privilege were not at issue on the appeal.

And when the doctors' lawyers twice sought broad discovery from the *Riverfront Times* and its reporter, Kristen Hinman, the RFT opposed those requests on reporters' privilege grounds and the court sustained the motions.

The paper and the reporter were brought into the case only on the third request directed at them, a narrow request from the plaintiff, seeking communications between the doctors and the newspaper, including communications connected with the transmittal of the photographs to the newspaper. The RFT opposed that request, too, but suggested in its briefs that if the court opened up depositions of newspaper employees, they should be limited only to such communications, and inquiries into the editorial process should be prohibited.

The court agreed, and imposed those conditions. In this way, the newspaper's involvement would be limited to the key facts about its non-confidential interactions with the doctors regarding the photographs, which were, of course, key issues in the case.

In the ensuing depositions of the reporter and the newspaper's art director, questions were confined to how the newspaper received the photos from the doctors. (Interestingly, it turned out that the doctors initially gave the reporter low-resolution photos, and later complied with a request for higher resolution copies, the ones that were ultimately published.)

In the depositions, plaintiff's counsel never directly asked the reporter if the doctors told her not to use the photos, or if she had any agreement with the doctors not to publish the photos, or to let them review the article before publication.

At trial, the doctors acknowledged that they made a mistake in giving the photos to the *RFT*, but asserted that they told the reporter that she could not use the photos. They also claimed that the reporter had promised to let them review and approve the article before it was published.

Plaintiff then subpoenaed Ms. Hinman for trial. RFT's attorneys accompanied her, determined to preserve their objections to any inquiries into the editorial process, but willing to allow her to testify as to communications with the doctors concerning the photos.

Defendants objected to the testimony, claiming that plaintiff would be asking about a matter not covered in Ms. Hinman's deposition—namely, whether she ever made the agreements that the doctors claimed she made. They asserted, essentially, that anything not covered in the deposition had been off-limits because of the editorial process exclusion. Plaintiff's counsel countered that questions about agreements with the doctors fell outside of the editorial process exclusion, regardless of whether they were asked at deposition.

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Calling it a close question, the court excluded the reporter's testimony. Plaintiff made an offer of proof (with consent of RFT's attorneys) in which Ms. Hinman testified that the doctors never asked her not to publish the photos, and she never agreed to allow them to review and approve the story before publication.

The jury returned a verdict for plaintiff on her breach of fiduciary duty claim (but not her invasion of privacy claim) and awarded $100,000 in compensatory damages, but no punitive damages. Plaintiff appealed, claiming the exclusion of Ms. Hinman's testimony as error.

Eighth Circuit Decision

The Eighth Circuit reversed and ordered a new trial on punitive damages only. It found Ms. Himan's proffered testimony highly relevant, particularly on punitive damages:

> A juror would more likely find the appellees showed reckless indifference toward their fiduciary duties to Doe if the juror believed the appellees gave Hinman the PowerPoint presentation without instructing her not to use the pictures, or, at a minimum, without getting Hinman's assurance the appellees would have an opportunity to approve the article before the article was published.

Because the Court's favorable rulings on the reporter's privilege were not at issue on the appeal, the Eighth Circuit did not address them directly, and in a footnote "offer[ed] no opinion as to whether the district court was correct" on that issue. The footnote used a "compare" cite to refer to several circuit court precedents recognizing the privilege and one that did not. It noted that any such privilege would be qualified "and the newspaper's First Amendment rights were to be balanced against the importance of the testimony."

The footnote is dictum, however, because, as the court noted, the RFT did not object to Ms. Hinman providing the testimony in issue, concerning her communications with the doctors.

Judge Colloton dissented in part, arguing that the retrial should have been granted on all grounds, including invasion of privacy liability, not just on punitive damages.

Mark Sableman and Michael Nepple of Thompson Coburn LLP in St. Louis represented the Riverfront Times and Kristen Hinman. Richard Witzel and Jay Kanzler of Witzel, Kanzler, Dimmitt, Kenney & Kanzler, LLC in St. Louis represented plaintiff. David P. Bub of Brown & James in St. Louis represented defendants.

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Tenth Circuit Holds That Detainees Enjoy a Privacy Interest in Booking Photos

Court Compared Mug Shots to Rap Sheets

By Blake Lawrence

In late February, the Tenth Circuit Court of Appeals held that booking photographs ("mug shots") taken by the United States Marshals Service ("USMS") are excluded from disclosure under the Freedom of Information Act ("FOIA"). *World Publishing Co. v. United States Dept. of Justice*, 2012 WL 560891 (10th Cir. 2012) (Kelly, Baldock, Tymkovich,JJ.).

World Publishing Company, the parent company of the Tulsa World Newspaper, requested the booking photographs of six pretrial detainees in the custody of USMS through a FOIA request. The Marshals denied the request pursuant to 5 U.S.C. § 552(b)(7)(C), which exempts disclosure of requested information if the material "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.*

After the Company appealed the decision to the Department of Justice and was denied, it brought an action against the DOJ and the United States Marshals in the Northern District of Oklahoma. The District Court, Judge Terence Kern, held that the USMS properly withheld the requested booking photographs pursuant to Exemption 7(C), and granted the government's motion for summary judgment.

The court expressed concern that mug shots carry a special connotation of criminal activity, or at least malfeasance.

Tenth Circuit Decision

In reviewing a denial of a FOIA request pursuant to Exemption 7(C), the Tenth Circuit used a three-part test. "A court must (1) determine if the information was gathered for a law enforcement purpose; (2) determine whether there is a personal privacy interest at stake; and if there is (3) balance the privacy interest against the public interest in disclosure." *World Publishing Co.*, 2012 WL 560891, *2; *see Prison Legal News v. Exec. Office for the U.S. Attorneys*, 628 F.3d 1243, 1247-48 (10th Cir. 2011). In this case, it was undisputed that the booking photos were taken for a "law enforcement purpose." Therefore, the majority of the opinion was devoted to determining whether detainees retain a privacy interest in their mug shots and whether that privacy interest, if it exists, outweighs the public interest in disclosure.

Privacy Interest in Booking Photographs

To begin its analysis, the Tenth Circuit drew a parallel between the facts of this case and the United States Supreme Court's denial of disclosure of a criminal's "rap sheet" under Exemption 7(C). In *U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press* (489 U.S. 749 (1989)), the Court held that the availability of a criminal rap sheet was limited, despite the fact that all information contained on that rap sheet could be a matter of public record. Importantly, the Court stated that "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *Id.* at 770.

In *Prison Legal News*, the Tenth Circuit similarly denied access to autopsy photographs and a video taken after a prison murder despite the fact that those same items were shown to a jury in open court, and determined that the privacy interests of Exemption 7(C) survived public exposure of the information. *See Prison Legal News*, 628 F.3d at 1252-53.

The court expressed concern that mug shots carry a special connotation of criminal activity, or at least malfeasance. The court quoted at length, and found persuasive, the decision of the District Court for the Eastern District of Louisiana, which denied access to an individual's mug shots based on Exemption 7(C). That court stated that "[m]ug shots, in general are *notorious for their visual association of the person with criminal activity*." *Times*

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Picayune Pub. Corp. v. U.S. Dept. of Justice, 37 F.Supp. 2d 472, 477 (E.D. La. 1999) (emphasis added by the court).

The *Times Picayune* decision further reasoned that "a mug shot's stigmatizing effect can last well beyond the actual criminal proceedings…. A mug shot preserves, in its unique and visually powerful way, the subject individual's brush with the law *for posterity*." *Id.* (emphasis added by the court). Further, the Eleventh Circuit has exempted disclosure of booking photos on Exclusion 7(C) grounds because "mug shots carry a clear implication of criminal activity" and "a booking photograph is a unique and powerful type of photograph that raises personal privacy interests distinct from normal photographs." *Karantsalis v. U.S. Dept. of Justice*, 635 F.3d 497, 503 (11th Cir. 2011), *cert denied*, 132 S. Ct. 1141 (2012).

While a Louisiana Federal District Court and the Eleventh Circuit found a personal privacy interest in booking photographs, the Sixth Circuit has held to the contrary. It stated that disclosure of a booking photograph "in an ongoing criminal proceeding, in which the names of the defendants have already been divulged and which the defendants themselves have already appeared in open court" does not implicate an individual privacy right. *Detroit Free Press, Inc. v. U.S. Dept. of Justice*, 73 F.3d 93, 97 (6th Cir. 1996). In so holding, the court explained away the stigma that attaches to mug shots by stating that "the personal privacy of an individual is not necessarily invaded simply because that person suffers ridicule or embarrassment from the disclosure of information in the the possession of government agencies." *Id.* at 97. The Sixth Circuit seems to be the only circuit that has addressed this issue and found that no personal privacy right exists.

In *World Publishing Co.*, the Tenth Circuit elected to follow the reasoning of the Eleventh Circuit and held that an individual retains a personal privacy right to their booking photographs. While acknowledging that there are differences between rap sheets (held exempted from disclosure in *Reporters Committee*, *supra*), the court "[drew] a comparison between the sensitive nature of the subject matter in a rap sheet, and the vivid and personal portrayal of a person's likeness in a booking photograph." *World Publishing Co.*, 2012 WL 560891, *4. After finding a privacy interest existed, the court must continue its analysis and balance that privacy interest against the public interest in disclosure of the photographs.

Public Interest in Disclosure

According to the United States Supreme Court,

> [the purpose of the FOIA] is not fostered by disclosure of information about private citizens that is accumulated in various governmental files *but that reveals little or nothing about an agency's own conduct*. In this case—and presumably in the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records.

Reporters Committee, 489 U.S. at 773.

Therefore, in order to shift the balance to favor the requester of information, that party must successfully argue that disclosure would assist the public in determining "what their government is up to." *Times Picayune*, 37 F.Supp. 2d at 479 (citing *Reporters Committee*, 489 U.S. at 773).

Here, the Tenth Circuit leaves no doubt as to its view on the relevance of booking photographs shedding light on the propriety of the government's actions:

> Based on the purpose of the FOIA, there is little to suggest that disclosing booking photos would inform citizens of a government agency's adequate performance of its function. We agree with the district court that disclosure of federal booking photographs is not likely to contribute significantly to public understanding of federal law enforcement operations or activities.

World Publishing Co., 2012 WL 560891, * 6 (internal quotations omitted).

In reviewing the reasons advanced by Tulsa World for disclosure of the booking photographs, the court dismissed three of the nine claims based on their relation "to the public's ability to assist federal law enforcement - not to the

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ability of citizens to know how well the government is performing its duties," and dismissed another claim because it did not concern the law enforcement's role in investigation or arrest of a detainee. *See id.*

The court found Tulsa World's remaining assertions to be "legitimate public interests under the FOIA, [but] there is little to suggest that releasing booking photographs would significantly assist the public in detecting or deterring any underlying government misconduct." *Id.* Those public interests included the following: detecting fair versus disparate treatment; racial, sexual, or ethnic profiling in arrests; the outward appearance of the detainee (whether they may be competent or incompetent or impaired); a comparison in a detainee's appearance at arrest and at the time of trial. *See World Publishing Co.*, 2012 WL 560891, * 5.

Since Tulsa World failed in establishing an interest that would assist the public in determining whether a government agency was rightfully performing its duties, the personal privacy interest of the detainees in their booking photographs outweighed the public interest in disclosure.

Despite the court's strict adherence to the three-part test established in *Reporters Committee*, the opinion intimated that given the appropriate set of facts it may use an "as-applied approach," finding that public interest in disclosure of information may outweigh even an extremely compelling privacy interest. *See World Publishing Co.*, 2012 WL 560891, * 6, n.1. Such a factual scenario may be present "[i]f a request was made on the basis of case-specific 'compelling evidence' of illegal activity" on the part of the governmental agency. *Id.*

Therefore, if a party argues that its requested information would confirm or refute alleged illegal activity, documents that would ordinarily be protected from disclosure under the FOIA may be revealed. *See Safecard Serv., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991) ("unless access to … [information] is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure").

Conclusion

World Publishing Co. further affirms the use of the three-part test within the Tenth Circuit to evaluate whether Exemption 7(C) properly prevents certain pieces of information from being disclosed under the Freedom of Information Act. It also represents the Tenth Circuit's alignment with the Eleventh Circuit (and against the Sixth Circuit) in holding that an individual retains a compelling privacy right in any booking photograph taken of them, since those photos have an extremely negative connotation which carries "a clear implication of criminal activity." *Karantsalis*, 635 F.3d at 503. While the Tenth Circuit may allow the disclosure of booking photos in certain instances (*see* discussion regarding evidence of illegal activity, *supra*), the arguments advanced by Tulsa World were found to be unpersuasive.

Blake Lawrence practices First Amendment and Media Law for the Oklahoma City, Oklahoma office of Hall, Estill, Hardwick, Gable, Golden and Nelson. World Publishing Company was represented by Schaad Titus, Titus, Hillis, Reynolds, Love, Dickman & McCalmon, Tulsa, OK.

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Judge Finds That FBI in FOIA Case "Officially Confirmed" Identity of Civil Rights Informant

By Christine N. Walz and Charles D. Tobin

In a significant victory for the cause of government transparency, a D.C. federal judge has ruled that the FBI must produce a full accounting of noted Civil Rights photographer Ernest Withers' file as a confidential informant. *Memphis Publishing Company v. Federal Bureau of Investigation*, 2012 WL 269900 (D.D.C. January 31, 2012 D.D.C.). This ruling comes in response to the FBI's consistent denials that it had any obligation under the Freedom of Information Act (FOIA) to acknowledge that Withers had been an informant.

The *Commercial Appeal* newspaper, which is part of the E.W. Scripps group of newspapers, and its reporter Marc Perrusquia have spent years chasing down rumors of Withers' relationship with the FBI. Withers was the most well-known photographer from the era, creating some of the iconic images of the Civil Rights Movement through the trust and unparalleled access the leadership gave him. After Withers died in 2007, the newspaper filed a FOIA request for Withers' FBI file. Documents the FBI released in response showed that Withers had served as a FBI informant confidential informant number ME-338-R. The "R" designation belonged to the category of "racial informants" recruited by the FBI to monitor civil rights organizers.

The ruling also sharply curtails the government's ability to withhold older documents that would shed light on troubling episodes in the country's history.

Despite the release of this information, the FBI continued to refuse to admit the existence of an informant file -- or even that Withers was an informant -- relying on a seldom-invoked exception to FOIA, 5 U.S.C. §552(c), which allows the agency to shield information about informants when a FOIA request asks about the informant by name. The statute was enacted in 1986 as part of President Ronald Reagan's war on drugs policy, with a legislative history making clear the FBI and Department of Justice were concerned with organized crime bosses using FOIA to root out informants in their midst. The statute provides that the FOIA exception is not available, however, when an informant's status has been "officially confirmed."

When the FBI continued to hide Withers' role in responding to the newspaper's summary judgment motion, the newspaper filed a motion to compel the FBI to provide a Vaughn index of Withers' file. The newspaper argued that the FBI's previous releases had "officially confirmed" Withers' work for the bureau. Because of that confirmation, the newspaper asserted, the FBI had to follow ordinary FOIA procedure by listing all documents it wanted to withhold, with citations to specific FOIA exemptions.

In her January 31 ruling, U.S. District Court Judge Amy Berman Jackson in Washington D.C. agreed with the newspaper and said that the FBI could not continue to deny that Withers was an informant. The court rejected the FBI's claims that the records released did not on their face disclose Withers' work for the FBI, holding, "This argument is not worthy of serious consideration and it insults the common sense of anyone who reads the documents." The court also dismissed the agency's claims that the documents had been inadvertently released, finding that documents had not been "leaked or disclosed by some other agency or a rogue employee" and that the "claim of inadvertence being advanced here is a day late and a dollar short."

In addition to being the first public finding that Withers was an informant, the court's ruling requires the FBI to produce a full index of records in his informant file. This index is expected to provide insight into the extent of the relationship between Withers and the FBI. With this ruling, the newspaper will be better positioned to press the FBI for full access to the file's contents.

The ruling also sharply curtails the government's ability to withhold older documents that would shed light on troubling episodes in the country's history. Citing a case decided in another D.C. federal court last year involving the Nixon grand jury proceedings, the court in this case noted that there may be special circumstances in which an "undisputed historical interest in the requested records—far outweigh[s] the need to maintain the secrecy of the records."

Specifically, the court said that the agency's use of the exclusion for records pertaining to confidential informants in this case was under less than compelling circumstances, as the FBI invoked the exclusion "not to protect a living

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informant, but only the deceased informant's descendents; not to protect them from danger or bodily harm, but only from the potential stigma or embarrassment, some of which has already come to pass as a result of previous media articles on the subject; and not to avoid revealing the informant's participation in an ongoing, legitimate criminal investigation that could be compromised, but simply to withhold information related to an unfortunately episode in our nation's history from which lessons can be learned."

Charles D. Tobin and Christine N. Walz of Holland & Knight, LLP, Washington, D.C. represent the Commercial Appeal and its reporter Marc Perrusquia. Lesley R. Farby and Wendy M. Doty, Federal Programs Branch, U.S. Department of Justice, Washington, D.C., represent the Federal Bureau of Investigations.

Benay v. Warner Bros. – Happy Valentine's Day for Warner Bros. and John Logan

By David Aronoff

On February 14, 2012 in the long-running case of *Benay v. Warner Bros., et al.*, CV 05-8508, Judge Gutierrez of the U.S. District Court for the Central District of California issued a Valentine's Day Order granting summary judgment for several (but not all) defendants and denying a motion for terminating sanctions.

This most recent ruling in *Benay*, a case in which the Ninth Circuit previously had rendered the decision *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620 (9th Cir. 2010), both (a) illustrates the importance of basic contractual defenses, such as lack of privity, now that Copyright Act preemption of implied-in-fact contract claims for the use of ideas seems to be a dead letter in the Ninth Circuit following *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975 (9th Cir. 2011) and (b) serves as a cautionary reminder that forged documents can be an invidious risk even in the most high-profile cases.

The Prelude

The *Benay* case was filed on December 5, 2005 by two brothers, Aaron and Matthew Benay, who contended that their screenplay entitled "The Last Samurai" ("the Screenplay") had been infringed by the motion picture starring Tom Cruise also entitled "The Last Samurai" ("the Film"), which was released exactly two years earlier, on December 5, 2003. They sued Warner Brothers Entertainment, Inc. ("WB"), the distributor of the Film, Radar Pictures, Inc. and Bedford Falls Productions, Inc. ("Bedford Falls"), the two production companies that produced the Film, Edward Zwick and Marshall Herskovitz, two of the producers of the Film and the founders of Bedford Falls (Zwick also directed the Film), and John Logan, the screenwriter of the Film.

The Benay brothers alleged claims for copyright infringement under federal law and breach of implied-in-fact contract under California law, based on allegations that their agent had "pitched" the Screenplay to Bedford Falls before the Film was produced. *Desny v. Wilder*, 46 Cal. 2d 715 (1956).

On January 11, 2008, the Defendants filed a joint motion for summary judgment, contending that (a) as to the copyright claim, the Film was not substantially similar to the protectable expression contained in the Screenplay under the Ninth Circuit's "extrinsic test" for substantial similarity (*Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072 (9th Cir. 2006)), and (b) as to the breach of implied-in-fact contract claim, the undisputed evidence established that the ideas in the Film had been created independently of the screenplay. *Hollywood Screentest of Am., Inc. v. NBC Universal, Inc.*, 151 Cal. App. 4th 631 (2007).

The District Court granted the motion in full, dismissing the action. However, on appeal, the Ninth Circuit affirmed only the dismissal of the copyright claim, and remanded the breach of implied contract claim for further proceedings in the District Court. *Benay*, 607 F.3d at 634.

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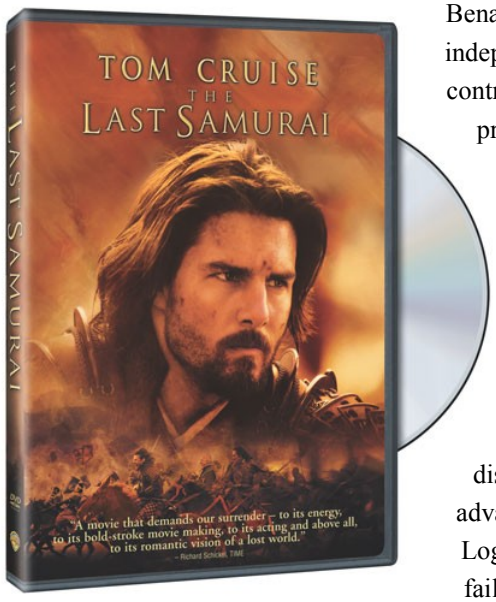
The Forged Documents

Only a few days before the April 4, 2011 scheduling conference before the District Court on remand following the Ninth Circuit's ruling in *Benay*, most of the attorneys of record received an anonymous letter via first class mail. It was a bombshell. The text of letter appeared to be from an unidentified disgruntled insider, seemingly an employee or former employee of WB, Bedford Falls or one of their outside law firms, and it accused WB of various kinds of litigation misconduct. In addition, the letter attached four documents that seemed devastatingly adverse to the defendants.

The letter described these four documents as "communications between the producers of 'The Last Samurai,' which they intentionally withheld from the court." These documents consisted of several pages of the Benay brothers' Screenplay bearing the distinctive handwritten annotations of Zwick, including such comments as "LOVE THIS HERO," and three emails bearing dates during May 2000 between Zwick, Logan and a WB executive referring to the Benay brothers' Screenplay (collectively "the Anonymous Documents").



Because all of the defendants' witnesses had testified previously that the script for the Film had been developed and written independently and without knowledge of the Benay brothers' Screenplay, the Anonymous Documents seemed extraordinary inculpatory. At the April 4th scheduling conference, plaintiff's counsel advised the Court of these materials, accusing the defendants of concealing the documents and lying under oath, and stating "I have no doubt that these documents are authentic." Shortly thereafter, plaintiffs moved to reopen discovery in light of the allegations of the Anonymous Documents. The defendants did not oppose this motion, but asserted that further discovery would enable them to prove that the documents were forgeries.

The New Motions

During December 2011, after the completion of the reopened discovery, all of the defendants (except defendant Radar Pictures, which was not implicated in the Anonymous Documents and was dismissed voluntarily by plaintiffs shortly after the reopened discovery began) filed new motions seeking summary judgment on the sole remaining claim for breach of implied-in-fact contract – primarily based on their lack of contractual privity with the Benay brothers. In addition, WB filed a motion seeking terminating sanctions on the grounds that the Anonymous Documents were forgeries that allegedly had been created by plaintiffs or their representatives.

Specifically, on December 2, 2011, WB and Logan filed a joint summary judgment motion arguing, among other things, that (a) plaintiffs had not alleged or provided evidence on any direct submission of the Screenplay to WB or Logan, (b) the purported submission of the Screenplay by the Benay brothers' agent to Bedford Falls, an independent production company, did not create contractual privity with WB, (c) plaintiffs' late-presented theory that the Screenplay also had been pitched by their agent to Silver Pictures ("Silver"), an independent production company based on the WB studio lot, did not create privity with WB because Silver was not an authorized agent of WB and the facts supporting this theory of privity had not timely been disclosed in plaintiffs' pleadings or discovery responses, (d) plaintiffs had failed to advance any theory establishing privity with Logan, and (e) the Anonymous Documents failed to raise a genuine issue as to privity because they were both unauthenticated and forged.

On December 19, 2011, Bedford Falls and its principals Zwick and Herskovitz filed their own summary judgment motion, arguing that (a) plaintiffs' alleged submission of the Screenplay to Rick Solomon, the president of Bedford Falls, did not create contractual privity with Zwick and Herskovitz, the founders and owners of Bedford Falls, in their individual capacities, and (b) plaintiffs' claims against Bedford Falls, Zwick and Herskovitz were all barred by the two year statute of limitations for breach of implied-in-fact contract claims because, although the lawsuit was filed exactly two years after the release of the Film, the Benay brothers both knew of

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their claims and had suffered damages even before the Film was first released; in fact, their attorney had sent to WB a demand letter threatening litigation and including a draft complaint in May 2003 – over 6 months before the Film was released.

Finally, on December 21, 2011, WB and Logan filed a motion seeking terminating or other sanctions against plaintiffs on the grounds that they had refused to withdraw their reliance on the Anonymous Documents, notwithstanding strong proof (which they had disclosed to plaintiffs' counsel prior to filing the motion) that these materials were forged and fraudulent. This motion was accompanied by expert evidence establishing that (a) each example of Zwick's distinctive handwriting on the pages of the Benay brothers' Screenplay had been fraudulently inserted there by digital "cut and paste" manipulation from other documents containing Zwick's writing that had been produced in discovery earlier in the case, and (b) the three emails had all been forged by someone using a "cut and paste" template of the exact same AOL.com interface frame and were all time-stamped as "Pacific Standard Time" on a date when genuine emails automatically would have been stamped as "Pacific Daylight Time."

Judge Gutierrez's decision is also important in highlighting the importance of basic nuts and bolts contract formation issues .

The Outcome

On February 14, 2012, Judge Gutierrez issued his Order adjudicating the above motions. First, the Court addressed the motion for sanctions, denying it on the grounds that there was an insufficient showing that the Anonymous Documents had been created by plaintiffs or their representatives. The Court held that while "Defendants have made a strong showing regarding [the] falsity [of the Anonymous Documents] …, there simply is not enough evidence that Plaintiffs authored the documents, sent them to Defendants' counsel or sought to reopen discovery with the knowledge that they were false."

In reaching this conclusion, the Court was unpersuaded by defendants' effort to prove that plaintiffs were the source of the Anonymous Documents through "circumstantial evidence establish[ing] that the documents were prepared by someone with intimate knowledge of the case, access to the Court record and documents produced during discovery, and a motive to fabricate the new evidence."

Second, the Court granted the summary judgment motion for WB and Logan, dismissing them from the case. Interestingly, however, as to WB, the Court did not find (even as an alternative ground for its decision) that the undisputed facts established an actual lack of privity between WB and the Benay brothers. Instead, the Court held that the alleged submission to Bedford Falls did not create privity with WB and that the plaintiffs' pleadings and discovery responses had failed to adequately disclose their new theories of privity, such as their assertion that Silver was acting as WB's agent when it supposedly accepted a pitch of the Screenplay from the Benay brothers' agent.

The Court ruled that such new "facts and legal theories [regarding privity] not pleaded in the [complaint] and not disclosed in Plaintiffs' discovery responses will not be considered." With regard to Logan, the Court held that plaintiffs' claims that Logan supposedly had received the Screenplay from Zwick and knew of Bedford Falls' supposed obligation to plaintiffs, amounted to mere allegations of "access," which would only be material to a copyright claim but failed to evidence contractual privity between plaintiffs and Logan individually.

Finally, the Court denied the summary judgment motion of Bedford Falls, Zwick and Herskovitz. On the issue of privity, the Court noted that Solomon, in his capacity as president of Bedford Falls, looked at proposed projects with a "multi-faceted" point of view, meaning that he considered submissions with an eye towards determining whether Zwick or Herskovitz would personally be interested in directing or producing them.

The Court found that this "multi-faceted" role created a genuine issue for trial as to whether Solomon was acting not merely in a corporate capacity, but also as the actual agent of Zwick and Herskovitz individually, when he supposedly accepted the pitch of the Screenplay from the Benay brothers' agent. With regard to the statute of limitations defense, the Court found that a genuine issue existed for trial as to whether the filing of plaintiffs' complaint on December 5,

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2005 fell within the applicable two-year statute of limitations because the defendants had failed to establish as a matter of undisputed fact that an "actionable use" of plaintiffs' ideas, triggering accrual, occurred prior to the general release of the Film on December 3, 20003, under the unspoken terms of the alleged implied contract between the Benay brothers and Bedford Falls.

Judge Gutierrez's Valentine's Day decision in *Benay*, although it was a welcome result for WB and Logan, is a sad reminder that at the lowest rungs of morality, some people are willing to do or say anything – and will even forge documents – to benefit one side or the other in a hotly contested litigation. Even more distressing, however, is the fact that this conduct occurred without punishment in *Benay*. Judge Gutierrez's decision is also important in highlighting the importance of basic nuts and bolts contract formation issues – such as lack of privity – now that Copyright Act preemption of implied contract claims based on the use of literary properties has been curtailed in the Ninth Circuit under *Montz v. Pilgrim Films & Television, Inc*., 649 F.3d 975 (9th Cir. 2011). The remaining claims against Bedford Falls, Zwick and Herskovitz in *Benay* are set for trial on March 26, 2012.

David Aronoff is a partner who specializes in media, entertainment and copyright litigation in the Los Angeles office of Lathrop & Gage LLP. He represented defendant Radar Pictures in the case.

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