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MLRC MediaLawLetter

First Circuit Lays Down the Gauntlet in Pleading Actual Malice

Affirms Dismissal of Candidate's Libel Claim for Failure to Adequately Plead Fault

By Sigmund D. Schutz,

Jonathan S. Piper, Benjamin S. Piper

The First Circuit has become the first Court of Appeals to apply the *Iqbal/Twombly* federal pleading standard to a claim of actual malice. *Schatz v. Republican State Leadership Cmte*, No. 11-1437, 2012 U.S.App. LEXIS 2653 (1st Cir. Feb. 10, 2012). The First Circuit's decision in *Schatz* is now the leading case supporting application of a rigorous pleading standard to claims of actual malice.

Background

The pleading standard was addressed in the context of affirming dismissal of a political candidate's claim that he was defamed by misleading political attack ads. The plaintiff, Democratic politician Jim Schatz, had good reason to complain at his treatment by his political opponents. He lost his bid for a Maine Senate seat in 2010 following attack ads run by Maine's Republican State Leadership Committee. The ads

asserted, essentially, that while serving as a Selectman for the Town of Blue Hill, Schatz diverted \$10,000 in taxpayer dollars from a July 4, 2009 fireworks celebration, which was cancelled, to a political organization.

In fact, Schatz was against cancelling the fireworks, but was outvoted 2-1. As for the contribution to a political organization, the Town voters, not Schatz, approved that amount in 2008 – a year before the vote on the fireworks. In Blue Hill, as in nearly all small Maine towns, only the voters can approve the expenditure of funds, although the Selectmen have discretion not to spend approved funds. As the First Circuit wrote, "The reality, at least according to the complaint, is that town residents had voted in January 2008 to contribute to the Coalition and that he had voted in March 2009 to fund the fireworks display." *Schatz*, 2012 U.S.App.

LEXIS 2653, *14.

In addition to attaching copies of the attack ads as published and copies of the daily newspaper articles on which they were based, Schatz included in his complaint the words "actual malice" and pled that the statements in the ads were reckless. He also alleged that the Republicans had not bothered to confirm the truth of their assertions and had done nothing to double-check the articles' accuracy.

The Republicans' response was a motion to dismiss for failure to state a claim under Rule 12(b)(6). The Republicans argued that Schatz, who was admittedly a public figure, had not adequately pled actual malice. District Judge D. Brock

Hornby expressed "serious doubts" about whether the statements at issue were defamatory, but did not reach that question because he concluded that the complaint did not plausibly allege that the Republicans had acted with actual malice. *Schatz*, 777 F.Supp.2d at 187-91.

The First Circuit began its analysis by finding that the use of "actual-malice buzzwords" are not sufficient – they are "merely legal conclusions, which must be backed by well-pled facts."

First Circuit Decision

On *de novo* review, the First Circuit affirmed after applying the now familiar "plausibility" pleading standard mandated post-*Iqbal/Twombley*. The focus of the First Circuit opinion is "whether Schatz's complaint . . . plausibly alleges actual malice" *Schatz*, 2012 U.S.App. LEXIS 2653, *12.

The First Circuit began its analysis by finding that the use of "actual-malice buzzwords" are not sufficient – they are "merely legal conclusions, which must be backed by well-pled facts." *Id.* *14. So much for getting by with a rote allegation that a defendant had knowledge that its statements were false or had serious doubts about their truth or acted with reckless disregard of truth or falsity. Not good enough. *Id.*

The First Circuit then tackled the substantial discrepancy between the truth (as alleged) and the statements in the

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Republicans' ads. Having attached the two newspapers that formed the basis for the ads to the complaint, the Court compared the content of the published news stories with the content of the ads. The Court found that the articles "synced up with" or at least were not "out of line with what the stories said." *Id.* *19.

In the story describing Blue Hill's decision to cancel fireworks, Schatz defended the decision not to pay for fireworks. He is quoted has saying, "Given the economy, we felt that in good conscience we couldn't do it this year. . . . We thought that to spend that much money on something that will light things up for a few seconds and then is gone was not the thing to do." There is no indication in the story that he dissented from that decision. The story reads as if all the Selectmen, including Schatz, took the decision to cancel the fireworks.

The other news story reported that Blue Hill paid \$10,000 to the political organization, with the final expenditure coming the day before Independence-Day festivities. The article does not say that voters approved the expenditure in 2008, or that Schatz' role as a Selectman was limited to refusing to expending the approved funds. Yet, Schatz is quoted defending the expenditure toward the Coalition, even though the voters, not the Selectmen, authorized the expenditure. Schatz said, "If (one) were to examine the issue, it would seem appropriate' to contribute to the repeal campaign."

The Court also rejected Schatz' final argument. He alleged that the Republicans "passed on doing 'additional' legwork to verify the truth behind its statements" and that this was enough to state a claim of actual malice. *Id.* *19. The Court acknowledged that it may be reckless to rely on a source when there is obvious reason to doubt its veracity, but

Schatz did not allege any factual basis to doubt the accuracy of the published news stories. *Id.* Likewise, he alleged no facts from which it might plausibly have been inferred that the Republicans deliberately ignored evidence that called the published statements into question. *Id.*

In concluding that Schatz had not pled enough to state a claim for actual malice, the First Circuit is not the first court to hold plaintiffs' feet to the actual-malice fire at the motion to dismiss stage. See Diario El Pais, S.L. v. Nielsen Co., (US), No. 07-CV-11295 2008 U.S. Dist. LEXIS 92987, at *20 (S.D.N.Y. Nov. 6, 2008); Rutherford v. Katonah-Lewisboro Sch. Dist., No. 08-Civ.-10486, 670 F. Supp. 2d 230, 242 (S.D.N.Y. 2009); Orenstein v. Figel, 677 F. Supp. 2d 706, 711 (S.D.N.Y. 2009); Hakky v. Wash. Post Co., 2010 U.S. Dist. LEXIS 63065, No. 8:09-cv-2406-T-30MAP, at *17 -*18 (M.D. Fla. June 24, 2010); Parisi v. Sinclair, Civil No. 10-897 (RJL), 2012 U.S. Dist. LEXIS 25364 at *6 (D.D.C. Feb. 28, 2012); Hanks v. Wavy Broad, LLC, 2:11cv439 2012 U.S. Dist. LEXIS 15729, at *35-*36 (E.D. Va. Feb. 7, 2012); Egiazaryan v. Zalmayev, 11 Civ. 2670 (PKC), 2011 U.S. Dist. LEXIS 140851, at *22-*23 (S.D.N.Y. Dec. 7, 2011). However, the First Circuit is the first court of appeals to hold that "to make out a plausible malice claim, a plaintiff must still lay out enough facts from which malice might reasonably be inferred" Id. *20. Schatz should be top of mind in evaluating the sufficiency of any complaint in a public figure defamation case.

Sigmund D. Schutz, Jonathan S. Piper, and Benjamin S. Piper are attorneys at Preti Flaherty, LLP in Portland, Maine. Plaintiff was represented by Barry K. Mills, Hale & Hamlin, LLC, Ellsworth, ME. Defendants were represented by Timothy F. Brown, Arent Fox LLP, D.C.; Andrew M. Friedman, Patton Boggs LLP, D.C. and Verrill Dana, LLP, Portland, ME.







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Iqbal and Twombly Applied to Dismiss Libel Claim

Conclusory Allegations of Actual Malice Insufficient to State a Claim

The D.C. District Court recently dismissed libel and related claims against a fringe book publisher, holding that conclusory allegations of actual malice were insufficient to state a claim. *Parisi v. Sinclair*, No. 10-897, (D.D.C. Feb. 28, 2012) (Leon, J.).

Background

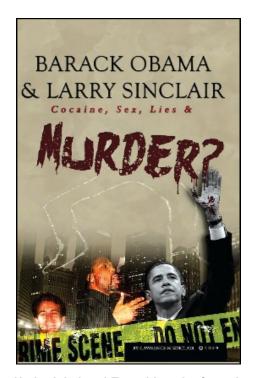
Defendant Larry Sinclair gained media attention in 2008 when he claimed that years earlier he and Barack Obama had taken crack cocaine together and had a sexual relationship. The plaintiff, Daniel Parisi, a web entrepreneur, paid Sinclair \$20,000 to take a polygraph exam to test the truth of the allegations and promised \$100,000 more if he passed the exam. Sinclair failed the exam – and Parisi apparently tried to stop payment on the \$20,000 check.

In 2009, Sinclair self-published a book entitled "Barack Obama & Larry Sinclair: Cocaine, Sex, Lies & Murder?" which, among other things, recounted his take of the polygraph exam arranged by Parisi.

Parisi sued Sinclair for libel, false light invasion/misappropriation of privacy. He alleged that three statements in the book were actionable: 1) that "the polygraph was rigged and was arranged by Dan Parisi and Obama Campaign advisor David Axelrod"; 2) that "Axelrod and the Obama Campaign had agreed to pay Dan Parisi of Whitehouse.com \$750,000 to arrange a rigged polygraph"; and, 3) the description of Parisi as an "internet pornography fraud."

Iqbal and Twombley Applied

The court first noted that plaintiff's libel and privacy claims were based on the same factual allegations and could be analyzed identically. Second, as a public figure, plaintiff was required to plead actual malice. His <u>complaint</u>, however, only contained



Under Iqbal and Twombley, the factual allegations in a complaint, even though assumed to be true, must still "be enough to raise a right to relief above the speculative level."

conclusory allegations that "defamatory statements were made and published by defendants with knowledge of their falsity or with reckless disregard of the truth."

This bare allegation was insufficient under the heightened pleading standards set out by the Supreme Court in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Under *Iqbal* and *Twombley*, the factual allegations in a complaint, even though assumed to be true, must still "be enough to raise a right to relief above the speculative level."

Plaintiff's complaint was further undercut by the book passages he cited in his complaint. Among other things, plaintiff cited a passage of the book where Sinclair explained that he got an anonymous telephone tip that the polygraph exam was rigged, asked plaintiff for comment about the allegation, and contacted a Chicago Tribune reporter who made contact with the tipster and heard the same story. Thus instead of suggesting evidence of actual malice, the passage suggested at least some effort at verification of the allegations against plaintiff.

Plaintiff was represented by Richard Oparil and Kevin Bell, Patton Boggs LLP, Washington, DC. Defendant acted pro se.

Denial of Nevada Anti-SLAPP Motion Not Appealable in Federal Court

Statute Creates Immunity from Liability Not Immunity from Suit

"Immunity from 'civil

liability' is unquestionably

different than immunity from

'suit' or 'trial," the Court

conlcluded

An order denying a motion to dismiss under Nevada's anti-SLAPP statute, Nev. Rev. Stat. §§ 41.635-670, is not immediately appealable in federal court, the Ninth Circuit ruled last month in a non-media case. Metabolic Research, Inc. v. Ferrell, No. 10-16209 (9th Cir. Feb. 9, 2012) (Bybee, Murguia, Singleton, JJ.).

The Court reasoned that the enhanced protection for speech provided by the Nevada anti-SLAPP statutes does not in and of itself satisfy the strict collateral order doctrine governing when non-final judgments are appealable. "In other words," the Court wrote, "we have recognized that an

anti-SLAPP statute's aim of protecting its citizens' First Amendment rights can, in some circumstances, be adequately protected without recourse to immediate appeal."

This is the third time the Ninth Circuit has considered whether denials of anti-SLAPP motions are appealable in federal court. In Batzel v. Smith, 333

F.3d 1018, 1025 (9th Cir. 2003), the Court held that the denial of a motion to strike under California's anti-SLAPP statute is immediately appealable. Later in *Englert v*. MacDonell, 551 F.3d 1099, 1103-07 (9th Cir. 2009), the Court ruled that the denial of an anti-SLAPP motion under Oregon law is not immediately appealable.

The difference, according to the Ninth Circuit, is that the California statute, Cal. Civ. 425.16 et seq., was designed to provide "substantive immunity from suit" and the law provided for an immediate appeal in state court. In contrast, the Oregon statute "was not intended to provide a right not to be tried." Instead the Oregon statute creates a right to have the legal sufficiency of the evidence underlying a complaint tested before trial - which can be reviewed on ordinary appeal. Significantly, the Oregon statute, O.R.S. 31.50, does not provide for an immediate appeal of a denial to strike.

In this most recent opinion, the Ninth Circuit held that Nevada's anti-SLAPP statute is similar to Oregon's. First, the Nevada anti-SLAPP statute does not expressly provide for an immediate right to appeal. The statute does state that discovery shall be stayed pending "the disposition of any appeal from the ruling on the [special motion to dismiss]," but the Court was not persuaded that this implicit reference confers an "immediate right of appeal."

Second, the Court looked to the text of the Nevada statute which provides that a "person who engages in a good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon the communication." Nev. Rev. Stat. § 41.650. "Immunity from

> 'civil liability' is unquestionably different than immunity from 'suit' or 'trial," the Court concluded.

[T]he absence of an immediate appeal provision, coupled with the law's use of the phrase "immunity from civil liability" provision of other

safeguards, including attorneys' fees, leads us to conclude that Nevada's anti- SLAPP statute is similar to the Oregon statute we addressed in *Englert*. Like the Oregon law, it appears to be a mechanism that allows a citizen to obtain prompt review of potential SLAPP lawsuits and have them dismissed before she is forced to endure the burdens and expense of the normal litigation process, not an immunity to suit or right not to be tried.

Neither party in the case asked the Court to consider whether the Nevada anti-SLAPP statute is applicable in federal court.

Plaintiff was represented by Beverly Salhanick, Las Vegas, NV. Defendant was represented by Bevin E. Allen, Khorrami Pollard & Abir LLP, Los Angeles, CA.

D.C. Anti-SLAPP Law Not Applicable in Federal Court

District Court Rejects Precedent from First and Ninth Circuits

In a non-media case, a D.C. federal district court recently held that the District's anti-SLAPP statute, Section 16-5501 et seq., does not apply in federal court. 3M Company v. Boulter, et al., 2012 U.S. Dist. LEXIS 12860 (D.D.C.) (Wilkins, J.).

The plaintiff 3M Company sued an investment company and other defendants over a soured business transaction. Among other things, 3M alleged that defendants, including former Clinton Administration lawyer Lanny Davis, initiated a "defamatory media blitz" against 3M.

In a lengthy decision, Judge Robert Wilkins, reasoned that the anti-SLAPP statute's special motion to dismiss restricts the procedural right to maintain an action in federal court and fatally conflicts with Rules 12 and 56 of the Federal Rules of Civil Procedure. According to the court, "Rules 12 and 56 provide the exclusive means for challenging the merits of a plaintiff's claim based on a defense either on the face of the pleadings or on matters outside the pleadings."

Simply put, the Act allows a defendant on a preliminary basis to deal a deathly blow to a plaintiff's claim on the merits based either on the pleadings or on matters outside the pleadings. There is no question that the special motion to dismiss under the Anti-SLAPP Act operates greatly to a defendant's benefit by altering the procedure otherwise set forth in Rules 12 and 56 for determining a challenge to the merits of a plaintiff's claim and by setting a higher standard upon the plaintiff to avoid dismissal. Indeed, that is the precise reason that the District enacted the statute and why Defendants so vigorously seek

protections. Upon careful examination of the Act's special motion to dismiss procedure, this Court holds that it squarely attempts to answer the same question that Rules 12 and 56 cover and, therefore, cannot be applied in a federal court sitting in diversity.

The district court relied on the Supreme Court's recent decision in *Shady Grove Orthopedic Assocs.*, *P.A. v. Allstate*

Ins. Co., 130 S. Ct. 1431 (U.S. 2010). At issue in *Shady Grove* was whether a New York State statute governing certain class action lawsuits applied in federal court. The Second Circuit Court of Appeals found no conflict between the statute and the provisions of FRCP Rule 23 governing class actions in federal court and applied the state statute. In a 5-4 decision, the Supreme Court reversed. In a decision by Justice Scalia, the Court held that if a Federal

Rule governs the dispute the Federal Rule applies, unless it exceeds statutory authorization or Congress's rulemaking power.

The District Court considered and rejected decisions from other federal courts analyzing the applicability of state anti-SLAPP statutes in federal court.

For example, in Godin v. Schencks, No. 09-2324, 2010 U.S. App. LEXIS (1st Cir. Dec. 22, 2010), the First Circuit held that the Maine anti-SLAPP statute applies in federal court because the statute can "exist side by side" with federal procedural rules for motions to dismiss and summary judgment "each controlling its own intended sphere of coverage without conflict." See also United States v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999) (no conflict between Federal Rules 12 or 56 and the California Anti-SLAPP statute); La. Crisis Assistance Ctr. v.

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Marzano-Lesnevich, 2011 WL 5878159 at *7-8 (E.D. La. 2011) (Louisiana anti-SLAPP statute applicable in federal court).

In *Godin, t*he First Circuit explained that FRCP 12 provides a mechanism to test the sufficiency of a complaint; FRCP 56 provides for judgment before trial where material facts are not in dispute. In contrast, the Maine anti-SLAPP statute creates a mechanism to test the merits of a claim against protected petitioning and speech activity. Thus it is not in conflict with Rules 12 and 56.

The D.C. District Court disagreed, writing that Rules 12

and 56 "expressly prohibit" any pre-trial fact-finding and thus the D.C. anti-SLAPP statute directly collides with the Federal Rules.

3M was represented by David I. Ackerman, Kenneth John Pfaehler, SNR Denton US LLP, Washington, D.C.; and Michael J. Collins, Robert W. Gifford, Bickel & Brewer, Dallas, TX. Defendant Porton Capital was represented by Christopher E. Duffy, Melissa Felder, Boies Schiller & Flexner LLP, NY, NY. Defendant Lanny Davis was represented by Raymond Gerard Mullady, Jr., Blank Rome, D.C.

New Jersey Supreme Court Reaffirms High Bar to Prove Reckless Disregard

No Actual Malice on Mistaken Headline about SEC Charges

By Bruce S. Rosen and Kathleen A. Hirce

The New Jersey Supreme Court has reaffirmed both the state's high bar for showing reckless disregard, and the use of summary judgment in actual malice cases, even where the publisher's credibility is at issue.

In *Ronald Durando and Gustave Dotoli v. The Nutley Sun and North Jersey Media Group Inc.*, No. A-105-09 (Feb. 28, 2012), the high court, by a 5-2 vote, upheld summary judgment for the media in a false light and defamation case for failure to demonstrate actual malice. The case involved a news story about the Security and Exchange Commission's civil charges against two Nutley, N.J. men for their alleged involvement in a \$9 million penny stock "pump and dump" scheme and a direction to "See Page 11."

Background

After North Jersey Media Group's *The Record* correctly wrote about the civil suit, an editor at the *Nutley Sun*, one of the NJMG's weeklies and a tabloid, copied the story, cut the bottom three paragraphs to fit and rewrote the headline. The next night in the heat of deadline, the editor, Paul Milo, wrote as the third of a stack of teasers on a Christmas-themed cover: "Two local men arrested in "pump and dump" scheme." However, the men had never been arrested.

It took six years and three separate plaintiffs' counsel for extensive discovery, two summary judgment motions, an appellate argument and two Supreme Court arguments to result in a dismissal. Plaintiffs had sought an immediate retraction in the next week's issue but because of personal circumstances in the counsel's office, a front page retraction was published in the issue following that. By that time, plaintiffs had already filed suit.

Initially, the trial court dismissed the defamation and ancillary claims at summary judgment for failure to produce evidence of sufficient damages, but also ruled there was sufficient actual malice for the only remaining claim, false light, to go to trial. Plaintiffs had alleged that NJMG had ill motive because the headline was meant to grab attention in a promotional issue and Milo's answers at his deposition created credibility issues, which should be decided by a jury.

Milo had been asked whether it was "possible that [he] entertained serious doubts as to whether or not [plaintiffs] had been arrested? Milo answered "It's possible, but I don't remember," echoing his consistent responses that he did not recall specifically what happened on publication night, and that he didn't realize he had made a mistake until he was contacted by counsel. They also alleged that defendant's counsel coached Milo during the lunch break to clarify his

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answer, and that should create an inference against his credibility. Defendants won reconsideration on the actual malice issue and the Court agreed that the deposition testimony was not evidence of actual malice, nor were there motive issues. The Appellate Division upheld that decision in a per curium opinion.

NJ Supreme Court Decision

The Supreme Court majority opinion, written by Justice Barry Albin, reiterated New Jersey's application of actual malice to matters of public concern and reiterated the federal standard from *Garrison v. Louisiana* that reckless disregard requires a showing that the defendant made the statement with a "high degree of awareness of [its] probably falsity," which is a much more stringent standard than whether an editor "should have known" or "should have doubted," a published statement.

The Court said while the standard is "difficult to meet," it can be met if a plaintiff can show the story was fabricated, a product of the editor's imagination, or so inherently improbable that only a reckless person would have put the story into circulation, essentially the *St. Amant* standard. The Court also tacitly acknowledged the negligent nature of errors made in the heat of deadline. (Although plaintiffs technically appealed all orders, they never briefed dismissal of the libel claim on failure to show damages; nevertheless, the Court treated the case as if the libel claims were still viable and analyzed the claims on the basis of defamation, rather than false light).

Justice Helen Hoens, joined by Jaynee LaVecchia, concurred in the majority's statement of the law, but dissented from application of the law: "The Court today moves the considerable bar that a defamed Plaintiff must overcome ever higher, with the likely consequence that sloppy and unprofessional journalistic practices will become the norm," Hoens wrote.

The majority opinion acknowledged defendant's argument that Milo's shoddy editing was based on his hectic schedule and failure to understand the difference between a criminal and civil securities case. In fact, the Court acknowledged defendant's incremental harm argument by noting that the news story itself, which plaintiffs acknowledged was correct, contained all the elements of a

crime in describing the SEC civil charges. "Plaintiffs' case can go forward only if, reviewing the entirety of the record in the light most favorable to them, Milo's professions are unworthy of belief," the Court said, upholding the matter, "[g]iven the heightened protections for free speech and a free press under the actual malice standard." The Court also echoed previous decisions dismissing defamation claims involving negligent editing or writing, warning that these errors caused harm to the credibility of the press.

The dissent, which appeared to conflate recklessness with actual malice, said the matter should be sent to a jury because the matter involved a front page teaser, and the majority failed to weigh the factual assertions in accordance with summary judgment standards. Justice Hoens argued that teaser headlines should not necessarily be evaluated with the adjacent headline and the news story, but she failed to address the fact that the teaser in this matter did not identify plaintiffs.

Hoens wrote that there was enough evidence from which a jury could have concluded by clear and convincing evidence that Milo acted with reckless disregard, and that the majority and Appellate Division deprived plaintiffs the benefit of inference to which they were entitled.

She also dismissed Milo's claims of deadline pressure and wrote that a jury might conclude that to be an excuse for a reckless choice. "Today's majority opinion creates a new approach, one that will completely shield a newspaper if the author or editor responsible for publishing the defamatory falsehood simply has the presence of mind to say what amounts to magic words," she added, in essentially criticizing defense counsel for putting words in Milo's mouth when consulting with Milo at a break in the deposition and when drafting a certification to be submitted by Milo at summary judgment.

Justice Hoens, a Republican appointee who has long been married to a now retired veteran newsman, similarly dissented from application of the law in urging a trial in the Court's 2010 *Salzano v. North Jersey Media Group* case, which strengthened the fair report privilege.

North Jersey Media Group Inc. and the Nutley Sun were represented by Bruce S. Rosen and Kathleen "Katie" Hirce at Florham Park, N.J.'s McCusker, Anselmi, Rosen & Carvelli, P.C., DCS members. Plaintiffs were ultimately represented by Glenn Finkel of Schepisi & McLaughlin of Englewood Cliffs, N.J.

Proof of Injury to Reputation Required Under New Mexico Libel Law

By Gregory P. Williams

In the most significant defamation decision in New Mexico in many years, the New Mexico Supreme Court has ruled that New Mexico requires a showing of injury to one's reputation to establish liability for defamation. <u>Smith v. Durden</u>, No. 32,594 (N.M. March 5, 2012).

Background

Plaintiff Walter Smith III was an Episcopal priest in Rio Rancho, New Mexico. Defendant Will Durden, a parishioner at Plaintiff's church, had compiled a packet of documents

which alluded to alleged sexual misconduct involving Plaintiff and minor parishioners, as well as other supposed misconduct. Defendant Durden and other defendants disclosed the documents to parishioners and a committee of the Diocese of Rio Grande.

Plaintiff sued Defendants for defamation. Defendants moved for summary judgment on the ground that Plaintiff failed to establish a cause of action for defamation because he did not demonstrate that he had suffered any actual injury to his reputation as a result

of the publication of the material. Plaintiff responded that falsely accusing a religious leader of pedophilia is always defamatory and that personal humiliation and mental anguish, as defined in the New Mexico Uniform Jury Instruction for damages in defamation claims (UJI 13-1010 NMRA), qualified as the requisite actual injury.

The district court granted Defendants' motion, finding that Plaintiff was unable to demonstrate actual injury to his reputation because he never suffered any adverse employment consequences or other related losses from distribution of the information.

The New Mexico Court of Appeals reversed the entry of summary judgment, holding that UJI 13-1002(B)(8), the subsection of the Uniform Jury Instructions requiring a plaintiff to prove actual injury to reputation as one element of

the prima facie case for defamation, is an inaccurate statement of law because evidence of mental anguish and humiliation is sufficient to establish actual injury for liability purposes.

New Mexico Supreme Court Decision

The New Mexico Supreme Court reversed the Court of Appeals and reinstated the summary judgment on the claim of defamation. The court concluded that a plaintiff must first establish the prima facie case for defamation – which includes proof of actual injury to reputation – before a jury can award damages for mental anguish, humiliation, or any

other recoverable harm.

In doing so, the New Mexico Supreme Court gave a detailed history of the development of the law in New Mexico regarding defamation. It made special note of case law that requires defamation plaintiffs to prove actual damages rather than rely on presumed damages, as well as decisions that stated that the primary basis of an action for libel or defamation is contained in the damage that results from the destruction of or harm to reputation.

The Court acknowledged that defamation law in New Mexico "will not

perfectly align" with the Restatement (Second) of Torts (1977) in regard to requisite injury to reputation in defamation actions, as the Restatement defines defamatory communication as that which tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him, and specifies that actual harm to reputation [is] not necessary to make [a] communication defamatory.

The Court also stated that it was aware that proof of actual damage will be impossible in a great many cases, but because the interest served by allowing recovery for defamation is the interest of compensating individuals for injury to reputation, recovery for a mere tendency to injure reputation, or only upon a showing of mental anguish, is not

(Continued on page 12)

In the most significant defamation decision in New Mexico in many years, the New Mexico Supreme Court has ruled that New Mexico requires a showing of injury to one's reputation to establish liability for defamation.

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only too speculative but it inappropriately blends defamation, a tort properly limited by constitutional protections, with other causes of action.

The Court did note that a showing of actual injury to reputation is not so high a barrier to surmount that it limits recovery only to monetary loss and employment termination, and that injury to reputation may manifest itself in any number of ways.

The Court stated that depending on the facts presented in

a given case, alternative tort recovery may more appropriately provide redress for a plaintiff truly seeking recovery for injuries other than injury to reputation, such as tort claims like false light invasion of privacy, prima facie tort, and intentional infliction of emotional distress.

Gregory P. Williams is Of Counsel at Peifer, Hanson & Mullins, P.A., Albuquerque, NM. Plaintiff was represented by William G. Gilstrap and Daymon B. Ely, Albuquerque, NM. Defendant was represented by Emily A. Franke, Jane A. Laflin, Butt, Thornton & Baehr, P.C., Albuquerque, NM.

Indiana Appellate Court Adopts Test Protecting Anonymous Internet Speech

By Drew E. Shenkman & Charles D. Tobin

In a matter of first impression in Indiana, the state's Court of Appeals adopted a qualified privilege, under the U.S. and state constitutions, that protects the identity of an anonymous Internet communicator. <u>In re Indiana Newspapers, Inc.</u>, 2012 WL 540796 (Indiana App. February 21, 2012).

The appeals court unanimously reversed the trial court's order compelling the Indianapolis Star, in response to a defamation plaintiff's subpoena, to turn over documents that would have revealed the identity of anonymous Internet commenter "DownWithTheColts." The court adopted a balancing test that requires a person seeking to the identity of a commenter to produce prima facie evidence of every element of their claim that does not depend on the communicator's identity, and further requires trial courts to balance that evidence against the constitutional interests.

The dispute arose in a lawsuit brought by former Junior Achievement of Indiana CEO Jeffrey Miller. In March, 2010, the Star newspaper, owned by Gannett subsidiary Indiana Newspapers, Inc., published an article about Junior Achievement's financial condition. The article included statements made by current Junior Achievement leadership and by partner organizations regarding missed payments to contractors on a coordinated construction project, as well as unaccounted-for grant money. On April 6, 2010, DownWithTheColts posted on the Star's website, in the public comments below the article: "This is not JA's responsibility. They need to look at the FORMER president

of JA and others on the board. The 'missing' money can be found in their bank accounts."

In response to the article, Miller filed a complaint claiming defamation against the individuals and organizations quoted in the story, but not against the Star. Miller then issued a subpoena to the Star seeking documents relating to the identity of DownWithTheColts. The Star objected on the grounds and that DownWithTheColts identity and his right to speak anonymously was protected by the United States and Indiana Constitutions, and that the documents were privileged under Indiana's Shield Law. Miller moved to compel, the trial court granted the motion and ordered the Star to comply with the subpoena, and the Star appealed.

Reversing the trial court's order, the Indiana Court of Appeals adopted the constitutional arguments. Supporting these arguments were two amicus briefs, one filed by a consortium of media including Lee Enterprises, LIN Media, E.W. Scripps, Gray Television, the Hoosier State Press Association Foundation, and the Electronic Frontier Foundation, and the other by Public Citizen. The court adopted a stringent balancing test ensuring that anonymous speakers are not unjustifiably stripped of their anonymity, holding that "while we do no not want defamatory commenters to hide behind the First Amendment protection of anonymous speech, we must balance the prospect of too readily revealing the identity of these anonymous commenters."

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To strike the appropriate balance, the court adopted a modified version of the test from the seminal case Dendrite International, Inc. v. Doe No. 3, 342 N.J.Super. 134, 775 A.2d 756 (N.J.Super.Ct.App.Div.2001). Under the four-part Dendrite test, to strip a speaker of his anonymity, a plaintiff must first (1) give notice of the subpoena to the person whose identity is sought, (2) identify the allegedly defamatory statements, (3) produce prima facie evidence supporting every element of the plaintiff's cause of action, and then if all three elements are satisfied, the court must (4) "balance the First Amendment right of anonymous free speech against the strength of the prima facie case presented."

Indiana's modified test slightly alters the third prong, requiring plaintiffs to "produce prima facie evidence to support only those elements of their cause of action that are not dependent on the commenter's identity." By doing so, the Indiana court specifically exempted the requirement that a plaintiff establish "actual malice" under the test; Indiana defamation law requires proof of actual malice on all matters of public concern (in cases involving private and public plaintiffs alike). The court found that requiring such proof would be impossible for a plaintiff without first knowing the defendant's identity, and that would otherwise unnecessarily bar potentially viable claims.

The Indiana Court of Appeals returned the case to the trial court to apply the new test.

Charles D. Tobin and Drew E. Shenkman, of Holland & Knight LLP in Washington, D.C., and Steven C. Shockley of Taft Stettinius & Hollister LLP, Indianapolis, Indiana, represented Amici Curiae Lee Enterprises, LIN Media, E.W. Scripps, Gray Television, the Hoosier State Press Association Foundation and the Electronic Frontier Foundation in this matter.

Jan M. Carroll and Paul L. Jefferson of Barnes & Thornburg LLC, Indianapolis, Indiana, represented Indiana Newspapers., Inc. d/b/a The Indianapolis Star.

Kevin W. Betz and Jamie A. Maddox of Betz & Blevins, Indianapolis, Indiana, represented Appellees-Plaintiffs Jeffrey M. Miller and Cynthia S. Miller.

Paul Alan Levy of Public Citizen Litigation Group and Steven M. Badger of Bose McKinney & Evans LLP, Indianapolis, Indiana, represented Amicus Curiae Public Citizen, Inc.



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Celebrity Midwife's Libel Suit Dismissed

Recorded and Published Admissions Support Truth of Article

By Itai Maytal

The New York State Appellate Division has once again saved the day. On March 1, 2012, the Appellate Division, First Department partially reversed a lower court decision, and affirmed that truth is a valid ground for early dismissal of a defamation claim – particularly when supported by undisputed and properly authenticated audio and video recordings and published admissions of the plaintiff.

In <u>Muhlhahn v Goldman et. al.</u>, 2012 NY Slip Op 01562, 2012 WL 653432 (1st Dep't March 1, 2012), the First Department dismissed a libel claim brought by certified nurse midwife Cara Muhlhahn against a contributing editor and the publisher of *New York* magazine. The court partially reversed

a lower court's decision that denied a 3211(a)(1) and (a)(7) dismissal motion as to certain challenged statements after finding that the statements were true or, in the alternative, were not capable of defamatory meaning, were opinion or were barred by the single instance rule.

The First Department dismissed a libel claim brought by certified nurse midwife Cara Muhlhahn against a contributing editor and the publisher of New York magazine.

Background

Plaintiff Cara Muhlhahn

("Muhlhahn") is a certified nurse midwife with a thriving midwifery practice. She is also a home birth celebrity, having starred in an independent, influential documentary, *The Business of Being Born* ("BOBB"), a film that has become a must-see for mothers-to-be. Featured in a *Vogue* magazine article, Muhlhahn also authored her own book, *Labor of Love: A Midwife's Memoir*, and has offered her views on home birth safety, physicians and hospital delivery in news publications, radio programs, a speaker panel and blogs.

BOBB, a "candid eye-opening documentary" on the "politics of birth in the United States" tackles the controversial debate between at-home and hospital births," according the Cara Muhlhahn Midwifery website. BOBB advocates home birth, with its strong emotional, political and social underpinnings, and presents the hospital birth model as one of unnecessary medical and surgical intervention, based

largely on avoiding liability. As the Cara Muhlhahn Midwifery website stated, the film "reveals shocking facts regarding the historical and current practices of the modern child-birthing industry contrasted with the realities of childbirth at home."

BOBB presents Muhlhahn as the face of those homebirth "realities." It showcases her as the midwife that anchors the film – as a professional, caring, capable and an altogether attractive alternative to the medical morass. It was this film that earned Muhlhahn the attention of *New York* magazine. In 2009, Andrew Goldman, ("Goldman") a contributing editor to New York magazine, viewed BOBB at his wife's suggestion, who was also expecting. He quickly perceived

from the film that there was a heightened interest of mothers-to-be in giving birth at home and that Muhlhahn had become a home birth celebrity. She was someone in whom *New York* magazine readers would undoubtedly be interested.

The New York article

In March 2009, *New York* magazine weighed into the home/hospital birth

controversy and Muhlhahn's rising fame. It published an article, authored by Goldman, which it entitled "Extreme Birth," and subtitled "The fearless –some say too fearless – new leader of the home-birth movement" (the "Article").

The Article discussed the influence of BOBB and profiled Muhlhahn, her philosophy, practice and perspective. It explored the controversy over home birth versus hospital birth and the differing emotional, political, social and medical points of view that drive the debate, through Muhlhahn, her patients (many enthusiastic, some not), their home birth experiences (many successful, some unfortunate), obstetricians, and Goldman himself, as he and his wife navigated birthing options for the delivery of their son. It was apparent that most of the differing viewpoints were stronglyheld, diametrically opposed, and personal.

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The charged nature of this debate was apparent even to Muhlhahn, who acknowledged in her book, *Labor of Love*, that many still perceive her practice as "radical," and that "[o] ne of the biggest misconceptions some doctors promote is that their patients won't be safe in the hands of midwives." To fully report the debate, then, the Article gave fair coverage to Plaintiff, but could not withhold other viewpoints, including opinions from her ideological adversaries. Still, the Article offered a fair, accurate and positive portrayal of Plaintiff, and the home birth side of the controversy.

Among the many sources interviewed for the Article, which included doctors, patients and other midwives, Goldman spent hours with Plaintiff and accompanied her on some home visits to patients. With her knowledge, he recorded virtually all of her interviews. He also consulted many other sources in preparing the Article. Goldman read Muhlhahn's book, a *Vogue* article that featured her and other publications in which she commented, attended her book launch and listened to her radio guest appearances.

The Complaint

Almost a year after the Article was published, Muhlhahn brought suit against Goldman and New York Media LLC ("Defendants") in New York State court. In a single libel cause of action, she alleged that she was defamed by a metatag posted on-line and by alleged so-called "facts" published in the Article, which are listed as follows:

Alleged Fact 1 [metatag]. "Is Midwife Cara Muhlhahn Too Fearless in Her Home-Birth Advocacy?"

Alleged Fact 2 [subtitle]. "The fearless-some say too fearless-new leader of the home-birth movement.

Alleged Fact 3. "More than anything else, BOBB [the film The Business of Being Born] de-radicalized home birth, conflating it with garden-variety natural childbirth and allowing Muhlhahn, largely unchallenged, to argue for its safety."

Alleged Fact 4. "She regularly does vaginal births after C-section at home and has even home-delivered the riskiest births, breeches and twins."

Alleged Fact 5. "But I was concerned by her lack of experience with lupus and mystified by her reaction when Robin brought up the idea of delivering with a highly recommended midwife who delivers the babies of high-risk

patients at St Vincent's. Muhlhahn rolled her eyes. 'You might as well go with an obstetrician,' she scoffed."

Alleged Fact 6. "But labor is an unpredictable thing, and sometimes the experience is more nightmarish than poetic. Muhlhahn's patient Sandra Garcia was one week overdue when her water finally broke on a Sunday night in early November. She labored that night and through the next day assisted by her husband, Jeff Wise, and her doula, a former NYU postpartum nurse who was now working for Muhlhahn, (Muhlhahn, busy with another labor, appeared only sporadically.)"

Alleged Fact 7. "The doula had somehow misjudged her progression. Still, Muhlhahn wasn't concerned."

Alleged Fact 8. "'How long is too long for a woman to be in labor?' Wise demanded to know when Muhlhahn finally returned to the apartment that night, 'Never,' Muhlhahn replied flatly."

Alleged Fact 9. "St. Vincent's is her dump,' says one former obstetrics resident who's treated Muhlhahn's transfers. 'She could say any hospital is her backup, because no hospital is ever going to deny a woman care. She'd bring her patients in, holding their hands, find out we were going to have to do a section, and then she's out the door. To me, that's a dump.' Other doctors on the floor have referred to her transferred patients as 'train wrecks.'"

Alleged Fact 10. "Muhlhahn claims that she could have privileges at St. Vincent's as well, but she prefers not to be encumbered by the hospital's restrictions. 'I actually like legitimacy. I don't enjoy being an outlaw,' she says."

Alleged Fact 11. "But there are ways in which she has made herself an outlaw of sorts-by not carrying malpractice insurance, for instance. 'I think she's dangerous,' says a member of the obstetrics staff at St. Vincent's. 'You need to be accountable. Something bad is going to happen with her approach to management. Bad things happen to all of us.'"

Alleged Fact 12. "Though it is required by law for every midwife in New York to have one, Muhlhahn also doesn't have a signed practice agreement with a physician, a document that outlines the parameters of a midwife's care and the protocols under which a mother would automatically 'risk out' of home birth."

Alleged Fact 13. "Recently, she has more than tripled the number of births she takes on, to ten a month."

Muhlhahn alleged, without explanation, that these (Continued on page 16)

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statements were made with "actual malice and/or a reckless disregard for the truth," "reflect negatively on the Plaintiff's performance of her occupation and are incompatible with the proper conduct of her business," and "were and are libelous per se and disparaged plaintiff in her trade, business and professional and further brought plaintiff into public contempt." Negating special damages, she nevertheless sought \$1 million, along with punitive damages.

Lower Court Decision

The Defendants moved to dismiss the Complaint under CPLR 3211 (a)(1) and (7), or for summary judgment under CPLR 3211(c). In support of the motion, they submitted

affidavits from Goldman which (i) properly authenticated and rendered admissible numerous admissions made by Muhlhahn that contradicted her unverified pleading of falsity as to nine of the thirteen Alleged Facts in her Complaint, and provided (ii) connecting links between the admissions and the Alleged Facts and (iii) separate testimonial evidence of those admissions, most directly to Goldman.

They also argued that the balanced of the Alleged Statements, along with many Muhlhahn admitted, were not capable of defamatory meaning, were nonactionable opinion based on disclosed

facts, barred by New York's "single instance rule" or failed to allege requisite special damages.

Muhlhahn's opposition rested on her conclusory pleading and argument, unsupported by any sworn statement or other evidence, or even by any factual allegation indicating falsity. She did not deny any of the admissions adduced.

Nevertheless, the New York State Supreme Court for the County of New York *refused to consider the evidentiary record at all.* In an August 24, 2011 decision and order, the lower court partially granted the motion to dismiss as to Alleged Facts #1, 2, 3 and 13, but otherwise denied the motion, sustaining Alleged Facts #4 through 12. *Muhlhahn v Goldman*, 32 Misc 3d 1242(A) (Sup. Ct. N.Y. Co. August 24, 2011).

In sustaining Muhlhahn's libel per se claim based on those nine statements, the Court found that the Goldman affidavits were not documentary evidence under CPLR 3211 (a)(1), and could not authenticate attached exhibits. The Court reasoned that Goldman's authentication of attached exhibits was somehow "self-serving," and misstated Defendants' position by holding that the exhibits were "admittedly 'highlighted' portions and 'excerpts' of record statements allegedly made by Muhlhahn in various forums."

The Court also denied Defendants' motion under 3211(a) (7), holding that the Defendants did not "conclusively establish that the statements [at issue] are true" since the only alleged support for that assertion was "plaintiff's failure to dispute the purported truth of certain statements in the exhibits."

The Court below then ruled that the Plaintiff did not have to dispute the truth shown of the allegedly false statements at all so as not to improperly "penaliz[e]" her. The Court also rejected Defendants other defenses (lack of defamatory meaning, opinion and the application of the single instance rule) on various grounds, and denied Defendants' alternate request for conversion to summary judgment under CPLR 3211(c).

In granting an early
dismissal of Muhlhahn's
libel claim largely on the
basis that the Article was
true or substantially true, the
First Department helped
encourage good
investigative reporting in
New York and ensure that an
important public debate
would advance unimpeded
by a groundless legal action.

The Appeal

Defendants Goldman and New York Media LLC appealed the decision and

order as to the sustained nine of the thirteen statements in issue. They argued that the lower court erred by refusing to consider Plaintiff's admissible, undisputed and properly authenticated admissions which conclusively established the truth of seven of the nine sustained statements. They noted several appellate authorities that held that where, as here, the truth of a statement is established on a motion under CPLR 3211(a)(1) and/or (7), dismissal of the defamation Complaint was warranted.

Defendants further argued that the lower court erred in rejecting the Goldman affidavits in that they properly authenticated documentary evidence admissible under CPLR 3211(a)(1) and could be used to demonstrate "connecting

(Continued on page 17)

The affidavit was "an

appropriate vehicle for

authenticating and

submitting relevant

documentary evidence"

(Continued from page 16)

links" between allegedly defamatory statements and Muhlhahn's own admissions. The Goldman affidavits, in addition to submitting admissible and conclusive documentary evidence, also presented separate testimonial evidence under CPLR 3211(a)(7) of Muhlhahn's admissions in audio and video recordings, on the radio and in her book, blog and website. Defendants argued that Goldman attested to the statements so made, which were not "self-serving," mere "excerpts" or "highlights" as the court below mischaracterized. They were instead full and complete conversations between Goldman and Muhlhahn, covering particular topics in context.

By not considering the Goldman affidavits, the Defendants argued that the Court did not consider the definitive content of Plaintiff's admissions, that Muhlhahn's Complaint was not verified and that her pleading of falsity was wholly conclusory.

Moreover, the Defendants asserted that the Goldman recordings were categorically different from the mere transcripts of interviews that were the subject of Springer v. Altmontaser, 75 A.D.3d 539 (3d Dep't 2010), the only case relied on by the lower court to erroneously disqualify the Goldman recordings as documentary evidence.

The Plaintiff in her opposition did not dispute the evidentiary record, but instead rested on her unverified Complaint, devoid of factual assertion to support its conclusory, and negated, falsity allegations.

In addition, Defendants reargued that eight of the nine challenged statements would fail on their face on grounds other than truth and that Plaintiff failed to provide any support for the decision of the lower court to the contrary.

In a decision and order dated March 1, 2012, the Appellate Division, First Department reversed the lower court's decision and order as to the nine sustained challenged statements and dismissed the complaint in its entirety. It held that "the Goldman affidavit and the attached recordings of his interviews with plaintiff should have been considered on the motion." The affidavit was "an appropriate vehicle for authenticating and submitting relevant documentary

evidence" and could "provide 'connecting links' between the documentary evidence and the challenged statements."

The First Department also noted that the affidavit was sufficient to authenticate the recordings of his interviews since Goldman stated in his affidavit that "he was a participant in the recorded conversations and that the recordings were complete and accurate and had not been altered." Muhlhahn v Goldman et. al., 2012 WL 653432 at *1 (citing People v. Elv, 68 N.Y.2d 520, 527 (1986); Lipton v. New York City Tr. Auth., 11 A.D.3d 201 (1st Dep't 2004)).

The First Department also confirmed from the record that Goldman never stated that the recordings were "excerpts or "highlights" of plaintiff statements, but rather "some of the many recorded interviews of plaintiff that he had conducted."

Based on the documentary evidence and Goldman's affidavit, the First Department found that the bulk of the challenged statements to be true or substantially true and thus not actionable. In addition, it dismissed many of the

> statements on the grounds that they were non-actionable opinion, not reasonably susceptible of a defamatory connotation

or barred by the single instance rule.

Conclusion

A party should not, "simply by filing suit and crying 'character assassination!',

silence those who hold divergent views, no matter how adverse those views may be to [her] interests." Underwager v. Salter, 22 F.3d 730, 736 (7th Cir. 1994). The Article in issue presented divergent views and opinions from the medical community, parents, patients and the plaintiff herself on a controversial medical topic. In granting an early dismissal of Muhlhahn's libel claim largely on the basis that the Article was true or substantially true, the First Department helped encourage good investigative reporting in New York and ensure that an important public debate would advance unimpeded by a groundless legal action.

Defendants Andrew Goldman and New York Media LLC were represented by Louise Sommers, David S. Korzenik and Itai Maytal of Miller Korzenik Sommers LLP, New York City. Plaintiff Cara Muhlhahn was represented by Jacque Catafago of Catafago Law Firm, P.C., New York City.

Court Upholds Congress's Right to Restore Copyright Protection to Public Domain Works

Majority Rejects First Amendment and "Limited Time" Challenges

By Kenneth P. Norwick

During the 1990s the U.S. Congress passed, and President Clinton signed, two separate changes to the Copyright Act that were both challenged as unconstitutional and that both led to important Supreme Court decisions, the most recent in January 2012. *See Golan v. Holder*, No. 10–545 (Jan. 18, 2012).

Background

In 1994, ostensibly as a result of the U.S. joining the Berne Copyright Convention in 1989, the Copyright Act was amended to "restore" to U.S. copyright protection numerous

works of foreign authorship that were previously in the public domain in the U.S. Congress concluded that this "restoration" was necessary to comply with Berne's requirement that all member nations provide copyright protection to all works that are protected by copyright in the country of their origin. In 1998, in the "Sonny Bono" Copyright Extension

Act, the Copyright Act was amended to add twenty years to the then current terms of copyright.

These amendments were challenged in separate cases as 1) violating the "Copyright Clause" in the U.S. Constitution - and more specifically its provision that copyrights may only be granted for "limited times" – and 2) violating the First Amendment, in that they prevent the public from freely utilizing works that would otherwise be in the public domain.

The Sonny Bono extension reached the Supreme Court first, in 2003 in *Eldred v. Ashcroft*, 537 U.S. 186. By a 7-2 vote, the Court rejected both arguments and fully upheld the law. The Court's majority opinion, by Justice Ginsburg, found that the law had a rational basis

because it "sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts" and because the extension "may also provide greater incentive for American and other authors to create and disseminate their work in the United States."

The Court also held that the law was consistent with its view "that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." The majority also held that the "First Amendment securely protects the freedom to make – or decline to make – one's own speech; it bears less heavily when speakers assert the right to make other people's speeches.... [W]hen, as in this case, Congress has not altered the traditional contours of copyright protection, further First

Amendment scrutiny is unnecessary."

Justices Stevens and Breyer dissented. Justice Breyer summarized his view as follows: "I would find that the statute lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive

values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective."

Golan v. Holder

After two trips to the Tenth Circuit – it first reversed the District Court because it failed adequately to consider the First Amendment arguments against the 1994 restoration and it then reversed the same court when it held that the law violated the First Amendment – the Supreme Court essentially followed its *Eldred* ruling and rejected the plaintiffs' Copyright Clause and First Amendment arguments. The vote was 6-2, with Justice Ginsburg again

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writing for the majority and with Justice Breyer again dissenting, in an opinion joined by Justice Alito. (Justice Kagan did not participate.)

The plaintiffs included "orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works [the law] removed from the public domain." Invoking both the Copyright Clause and the First Amendment, they asserted, as summarized by Justice Ginsburg, that "a work that has entered the public domain, for whatever reason, must forever remain there."

Relying in large part on its *Eldred* opinion, the majority held that the restoration law was within Congress's authority under the Copyright Clause. First, it rejected the plaintiffs' argument that the law violated the "limited times" restriction in the Clause because the "limited time" for the restored works was "zero," which could not subsequently be extended. Second, it rebuffed the plaintiffs' contention that the law "cannot serve the Clause's aim unless the legislation 'spurs the creation of . . . new works." As the Court declared, "The creation of at least one new work, however, is not the sole way Congress may promote knowledge and learning.... [In *Eldred*] we held that the Copyright Clause does not demand that each copyright provision, examined discretely, operate to induce new works. Rather ... the Clause 'empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause.""

As to the plaintiffs' First Amendment argument, the majority again cited *Eldred*, stating: "Given the 'speech protective purposes and safeguards' embraced by copyright law" – essentially the "idea/expression" distinction and the "fair use" doctrine – "we concluded in *Eldred* that there was no call for the heightened review petitioners sought in that case. We reach the same conclusion here."

Addressing the plaintiffs' argument that once a work is placed in the public domain they had "vested" First Amendment rights in the work, the majority declared: "To copyright lawyers, the 'vested rights' formulation might sound exactly backwards: Rights typically vest at the <u>outset</u> of copyright protection, in an author or rightholder. . . . Anyone has free access to the public domain, but no one,

after the copyright term has expired, acquires ownership rights in the once-protected works."

The Dissent

Justice Breyer, joined by Justice Alito, summarized his dissent as follows: "The statute before us . . . does not encourage anyone to produce a single new work. By definition, it bestows monetary awards only on owners of old works – works that have already been created and already are in the American public domain. At the same time, the statute inhibits the dissemination of those works, foreign works published abroad after 1923, of which there are many millions, including films, works of art, innumerable photographs, and, of course, books – books that (in the absence of the statute) would assume their rightful places in computer-accessible databases, spreading knowledge throughout the world."

Addressing the plaintiffs' First Amendment claims, Justice Breyer declared: "Taken together, these speechrelated harms (e.g., restricting use of previously available material; reversing payment expectations; rewarding rentseekers at the public's expense) at least show the presence of a First Amendment interest. And that is enough. For present purposes, I need not decide whether the harms to that interest show a violation of the First Amendment. I need only point to the importance of interpreting the Constitution as a single document – a document that we should not read as setting the Copyright Clause and the First Amendment at crosspurposes. Nor need I advocate the application here of strict or specially heightened review. I need only find that the First Amendment interest is important enough to require courts to scrutinize with some care the reasons claimed to justify the Act in order to determine whether they constitute reasonable copyright related justifications for the serious harms, including speech related harms, which the Act seems likely to impose."

Kenneth P. Norwick is a partner at Norwick, Schad & Goering in New York. Anthony Falzone, Center for Internet and Society at Stanford Law School, argued the case for plaintiffs in the Supreme Court. Solicitor General Donald Verrilli, Jr., argued the case for the government.

MLRC MediaLawLetter

Court Dismisses Claims by "Naked Cowboy" Against CBS and Bell-Phillip Television

By Shaina Jones

Judge Barbara S. Jones of the Southern District of New York recently granted a motion to dismiss all claims against CBS Broadcasting Inc. and Bell-Phillip Television Productions asserted by The Naked Cowboy, whose real name is Robert Burck. *Naked Cowboy, d/b/a Naked Cowboy Enters. v. CBS and Bell-Phillip Television*, No. 1:11-cv-00942 (S.D.N.Y. Feb. 23, 2012).

Burck asserted claims for trademark infringement, dilution, unfair competition, and fraud arising from the alleged use of his Naked Cowboy character in an episode of the daytime drama *The Bold and the Beautiful*. In granting the motion to dismiss, the Court found that the defendants made no trademark use of the term "Naked Cowboy," and even if Burck's character was entitled to protection, the soap opera character that Burck claimed infringed on his trademark lacked the distinctive elements of Burck's character.

Background

Plaintiff Robert Burck, who calls himself The Naked Cowboy, and has registered the word mark under this name, is a street performer in New York City's Times Square. When he performs as The Naked Cowboy, Burck plays a guitar while wearing only a cowboy hat, briefs, and cowboy boots. Burck's guitar, cowboy hat and briefs are all emblazoned with the phrase "Naked Cowboy," and his cowboy boots display the words "Tips" or "\$."

Defendants CBS and Bell-Phillip Television broadcast the daytime television soap opera *The Bold and the Beautiful*. In one episode of the show, a character named Oliver attempts to charm the character Amber by playing a guitar and singing to her while wearing only his briefs, cowboy boots, and a cowboy hat. Each week, Bell-Phillips distributes a recap of the preceding week's episodes of *The Bold and the Beautiful* called "The Clarence B&B Update."

In a November 2010 episode of the B&B Update, the show's recap included the same scene in which Oliver sings and plays the guitar for Amber. CBS also posted a clip of the episode on CBS's YouTube channel under the title "The Bold and the Beautiful—Naked Cowboy," and Bell-Phillips posted the Clarence B&B Update on *The Bold and the Beautiful* YouTube Channel.

Plaintiff filed a lawsuit against both CBS and Bell-Phillip, asserting nine claims arising from the alleged use of Burck's Naked Cowboy costume, as well as the use of the words "naked," "cowboy," and "Naked Cowboy" as tags in connection with the YouTube clips of the Oliver episode and the Clarence B&B Update. Burck alleged that *The Bold and the Beautiful* episode infringed and diluted his trademark in the word mark "Naked Cowboy" as well as in his overall character.

Defendants moved to dismiss all claims, contending that the words "Naked Cowboy" were never spoken or displayed in the episode, and even if the episode referred to Burck's mark, such use was non-infringing, fair use. The district court granted the motion and dismissed the action.

Decision - Federal Claims

Burck first asserted a claim of trademark infringement under Section 32(a) of the Lanham Act, 15 U.S.C. § 1114, alleging that defendants made use of the "Naked Cowboy" trademark. While noting that "Naked Cowboy" is a registered mark, the Court found that "[n]one of the contents of the Episode could have violated Plaintiff's trademark rights because

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the word mark 'Naked Cowboy' does not appear anywhere in it." Moreover, even if the term "Naked Cowboy" was used in the title of CBS's YouTube video clip, the court deemed such use as non-trademark, fair use in that it merely described the contents of the video and did not serve to identify the source of the video clips. Rather, as the court noted, because CBS's own "Eye" logo was prominently displayed on the episode, the clips clearly demonstrated that the episode's source was CBS and not Burck. Finally, the court found that Burck failed to sufficiently allege that defendants' challenged use of the mark was in bad faith.

The court similarly found that Burck's claims of false endorsement, false description, and false advertising (collectively grouped by the court as unfair competition claims under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)) were without merit. In support of these claims, plaintiff argued that defendants' alleged use of the word mark "Naked Cowboy" was false and misleading. The court again noted that any use of the phrase "Naked Cowboy" was descriptive rather than identifying Burck's mark.

The court also observed that while the Naked Cowboy costume may be a protectable mark, Oliver's costume contained "none of the distinctive characteristics of the Naked Cowboy costume," such as the phrase "Naked Cowboy" on the hat, briefs or guitar, or the words "Tips" or "\$" on the boots. In sum, Oliver did not wear the Naked Cowboy costume, and therefore defendants did not use Burck's mark. Moreover, in applying the factors set out in *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961), the court found that none of the factors weighed in Burck's favor and thus there was no likelihood of confusion among the public about the "origin, sponsorship, or approval" of the episode.

Burck also claimed dilution of his mark under Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c). As with Burck's infringement claim, the Court found that Oliver's costume was not similar enough to the Naked Cowboy costume to constitute use of the mark, and accordingly dismissed this claim.

New York State Law Claims

Burck also asserted a series of claims under New York state law. The court dismissed Burck's claims for unfair competition under the New York Deceptive Acts and Practices statute, using the same standards applied to claims under Section 43(a) of the Lanham Act. Likewise, the court dismissed Burck's state law dilution claim, again holding that Oliver's costume did not contain the distinctive characteristics of the Naked Cowboy costume. Burck also attempted to assert right of publicity claims under Sections 50 and 51 of the New York Civil Rights law.

Rejecting those claims, the court noted that another court in the Southern District previously rejected similar civil rights claims made by Burck against Mars, Inc. when he had challenged advertisements featuring cartoon candy M&Ms dressed as the Naked Cowboy. *See Burck v. Mars, Inc.*, 571 F. Supp.2d 446 (S.D.N.Y. 2008). The court in that case concluded that Sections 50 and 51 are applicable only to real people, and do not extend to fictitious characters adopted or created by celebrities.

Applying that holding to this case, the court dismissed Burck's civil rights claims. Finally, the court summarily dismissed Burck's common law fraud claim as "frivolous." Burck contended that defendants' broadcast falsely communicated to the public that he participated in or was otherwise affiliated with defendants' show. The court found that Burck's assertion of "fraud on the public" was subsumed by his meritless trademark infringement and unfair competition claims, and that Burck could not "plausibly plead that he relied on Defendants' alleged misrepresentation or that such reliance could have been justifiable."

CBS and Bell-Phillip Television were represented by Robert Penchina and Shaina Jones of the New York office of Levine Sullivan Koch & Schulz, LLP and Anthony M. Bongiorno and Naomi B. Waltman of the CBS Law Department. Plaintiff was represented by Joey Jackson of the New York firm Koehler & Isaacs LLP.

MLRC MediaLawLetter

Court Dismisses Trademark Claims Against Hearst on Trademark Use and Fair Use Grounds

By Ravi V. Sitwala

Judge Paul A. Crotty recently granted Defendants' motion to dismiss trademark claims brought by motivational speaker Simone Kelly-Brown and her company Own Your Communications, Inc. against Hearst Communications, which publishes *O Magazine*, Harpo Productions, which produces *The Oprah Winfrey Show*, Oprah Winfrey personally, and several advertisers and related entities. *Kelly-Brown v. Winfrey*, No. 11 Civ. 787s (S.D.N.Y. March 6, 2012).

The complaint alleged that Defendants' use of the

phrase "Own Your Power" on the cover of one issue of *O Magazine* and in connection with a related event infringed on Kelly-Brown's registered Own Your Power trademark. Defendants moved to dismiss the case on the merits based on First Amendment, lack of trademark use, and fair use grounds. The Court granted the motion on the latter two grounds and declined to reach the First Amendment issues, which nonetheless set an important backdrop for the case.

The Dispute

The theme of the October 2010 issue of *O Magazine* was power and, as the Magazine had done before, included an "O

Power List" of influential people. The cover of the issue included as the cover line the phrase "Own Your Power!," which was depicted in the center of the cover, with the standard mark of the magazine in the top left corner where it customarily appears. The cover, as always, featured a large picture of Oprah Winfrey. In connection with the Power List, the Magazine held an invitation-only subscriber event at the Hearst Tower in New York where several members of the Power List were interviewed by journalists in panel discussions.

The event was mentioned in the October issue and recapped in the November issue, and also discussed on the

Oprah.com website, which included video from the panels. During one episode of her television show, Oprah held up a copy of the issue during a discussion with Serena Williams.

Plaintiff Simone Kelly-Brown is a motivational speaker located in Florida who runs a website and hosts a radio show under the Own Your Power name as part of her services. She also hosts periodic Own Your Power conferences and has a federal trademark registration for the "Own Your Power" mark. Plaintiff claims to have been using the Own Your

Power mark since late 2006.

Procedural History

Approximately six months after the *O Magazine* October 2010 issue hit newsstands, Simone Kelly-Brown's attorney wrote to numerous entities, including several Hearst and Harpo – Oprah's company – entities and the sponsors of the event to complain about the use of the Own Your Power phrase. Several months later, Kelly-Brown and her company Own Your Power Communications, Inc. filed suit in the District of

New Jersey and moved for a preliminary injunction. The case was assigned to Judge Stanley R. Chesler.

Defendants responded to the complaint and preliminary injunction motion by moving to transfer or dismiss the case and opposing injunctive relief. (Plaintiffs at one point moved for an ex parte temporary restraining order, which the Court denied based on a lack of any showing of irreparable harm. The Court rejected Plaintiffs' reliance on a presumption of harm flowing from the alleged infringement, finding that no such presumption survived the Supreme Court's decision in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).) Defendants successfully persuaded the Court to transfer the case to the Southern District of New York, given that the case

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had no connection to New Jersey beyond the fact that Plaintiffs' counsel is located there.

Upon transfer to the Southern District of New York, the case was assigned to Judge Paul A. Crotty. Defendants renewed their motion to dismiss on the merits, and Judge Crotty instructed the parties to file limited supplemental briefing. He deferred Plaintiffs' request to renew the preliminary injunction motion until after he ruled on the motion to dismiss.

The Merits Arguments

Defendants' motion to dismiss rested on three primary arguments – (1) the First Amendment protects Defendants' speech against any Lanham Act claims; (2) the lack of a trademark use of the Own Your Power phrase renders the Lanham Act inapplicable; and (3) Defendants' use of the phrase was a fair use. The motion also sought dismissal of the peripheral defendants based on their lack of any meaningful participation in the alleged infringement.

Defendants' First Amendment argument was two-fold. First, Defendants argued broadly that the Lanham Act's reach is limited to pure commercial speech and simply does not reach non-commercial or mixed speech, as the Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have all held. Second, even if the Lanham Act could reach the speech at issue, Defendants argued that it was protected under the Second Circuit's decision in *Rogers v. Grimaldi*. The two-part test for creative use from *Rogers* protects the use of a mark if it has some relevance to the creative work and does not explicitly mislead as to the source of the work.

Plaintiffs argued that Defendants' speech was purely commercial under *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), which considered the extent that the speech promoted another product in deciding the commercial speech issue. Plaintiffs further contended that the *Rogers* test was not appropriate for a motion to dismiss. Defendants countered that the speech at issue was the product and not an advertisement for any other good, and that the complaint, its exhibits, and the materials incorporated by reference conclusively established the applicability of *Rogers*.

Defendants' non-trademark use argument also concerned a threshold question of whether the Lanham Act applies at all to Defendants' expressive speech. Relying on *Hensley Manufacturing v. ProPride, Inc.*, 579 F.3d 603 (6th Cir.

2009) and *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F 3d 400 (2d Cir. 2005), Defendants argued that their use of the Own Your Power phrase was not used to indicate the source of any goods or services and therefore was not a trademark use subject to the Lanham Act.

Defendants argued that their use of the phrase was akin to the use of the headline "The Joy of Six" by the Chicago Tribune to describe the Chicago Bulls' sixth championship, which was found by the Seventh Circuit not to be a trademark use in *Packman v. Chicago Tribune*, 267 F.3d 628 (7th Cir. 2001). Plaintiffs responded by pointing to other trademarks owned by Harpo that they contended covered similar uses to the uses Defendants claimed were not trademark uses in this case.

Finally, Defendants argued that even if the Lanham Act applied, their use of the phrase was a classic fair use as a matter of law. Fair use is statutorily defined as "a use, otherwise than as a mark, ... which is descriptive of and used fairly and in good faith only to describe goods or services of [a] party, or their geographic origin." 15 U.S.C. § 1115(b)(4). Defendants claimed that their use of the "own your power" phrase was not as a mark for the reasons discussed above, and that it was descriptive in that it described the contents of the issue and event and also exhorted readers to own their power.

And Defendants contended that there was no evidence of bad faith whatsoever, as bad faith in the fair-use context requires intent to trade on plaintiff's good will and cause confusion. Plaintiffs countered that the prominence of the phrase on the issue negated any descriptiveness argument and argued that Defendants' must have known about their mark negating good faith.

The Dismissal

The Court granted the motion to dismiss as to the federal claims and declined to exercise supplemental jurisdiction over the state and common-law claims. The Court first considered the trademark-use issue. It explained:

A trademark use involves an indication of the source or origin of the goods. A non-trademark use of a phrase is evident where the source of the defendants' product is clearly identified by the prominent display of the defendants' own trademarks. The fact that a phrase is used in a

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descriptive sense, as analyzed below, also suggests a non-trademark use.

Opinion at 5 (citations, quotations, and alterations omitted).

Based on the prominent and consistent use of Defendants' own marks in connection with the use of the "own your power" phrase and clear identification of the magazine as the source of the issue and the event, the Court found no trademark use. The Court also agreed with Defendants that trademark use is a threshold issue under the Lanham Act such that the lack of a trademark use negates any trademark claim.

While the Court implied that its trademark-use finding was sufficient to dispose of the federal claims, it nonetheless went on to consider the other fair-use factors. It explained that uses are descriptive if they convey the nature of a product rather than its source or if they convey to consumers actions the user hopes consumers will take. The Court found that Defendants' use both described the contents of the magazine issue and event and an action the magazine wanted readers to take, satisfying the descriptive element of the fair-use inquiry.

Finally, the Court found that "Plaintiffs have not alleged facts to plausibly suggest that Defendants intended to capitalize on Plaintiffs' good will or that there was a likelihood of consumer confusion." The Court rejected as a matter of law Plaintiffs' contentions that Defendants' limited continued use of the phrase after Plaintiffs complained showed bad faith and that Defendants were required to conduct a trademark search prior to using the phrase.

Having found all elements of fair use satisfied, the Court found that Defendants conduct was not trademark infringement and rejected all of Plaintiffs' federal claims against all defendants. Having disposed of all federal claims, the Court declined to reach the First Amendment arguments made by Defendants.

The Court also declined to exercise supplemental jurisdiction over the state and common-law claims.

All defendants were represented by Jonathan R. Donnellan, Ravi V. Sitwala, and Debra S. Weaver of Hearst Corp. Defendants were also represented by Michael R. Griffinger and James Lee of Gibbons P.C., Newark NJ, while the case was pending in New Jersey. Chip Babcock of Jackson Walker L.L.P. appeared for Oprah Winfrey in her personal capacity. Plaintiff was represented by Patricia Lawrence Kolaras of The PLK Law Group, P.C.



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Court Dismisses Copyright and Misappropriation Claims Against The Cartoon Network

Rule 12(b)(6) Motion Granted Where No Protectible Elements at Issue

By Gordon P. Katz

In 2006, The Cartoon Network began airing the animated half-hour television series, *Class of 3000*. The series was cocreated and co-produced by well-established producer Tom Lynch and Andre "Andre 3000" Benjamin. Benjamin is a musical artist/entrepreneur who is perhaps best known as half of the hip hop duo, Outkast.

Class of 3000 chronicled the adventures of a classroom of early teenage music students and their whimsical teacher at the Westly School for Performing Arts in Atlanta. The show ran on The Cartoon Network

for two seasons.

Just as the second season was coming to a close in 2008, the show became the belated subject of a suit for copyright in fringement and misappropriation of ideas filed against Benjamin, The Cartoon Network, and Turner Broadcasting Systems (The Cartoon Network's parent company) in federal court in Boston by Timothy McGee, a former art student in Atlanta.

McGee claimed that his work was the inspiration for the *Class of 3000* series. Specifically, McGee alleged that *Class of 3000* was based upon and infringed a 1997 treatment and script he authored and copyrighted, entitled, *The Music Factory of the 90's*. McGee's treatment outlined the idea of an animated series where, in each episode, a group of young adult characters would interact with well known guest artists who would impart lessons about the music industry and life. McGee claimed that he had twice submitted the treatment and script to The Cartoon Network. And even though his submissions were rejected, McGee claimed that his materials were never returned by The Cartoon Network and that his ideas had been

used by the defendants.

After amendments to the complaint by McGee and following defendants' attempts to settle the case for nuisance value, the Cartoon Network and Turner Broadcasting brought a motion to dismiss under Federal Rule of Civil Procedure (12)(b)(6). On March 20, 2012, the court granted the motion, and dismissed McGee's case in its entirety. <u>McGee v. Benjamin, et al.</u>, No. 08-11818 (D. Mass.) (Woodlock, J.).

Because McGee's amended complaint made reference to both his *Music Factory of the 90's* work and to *Class of 3000*,

the Court was able to review thoroughly all of the relevant materials without converting the motion to dismiss into one for summary judgment.

After making this careful review, the Court was able to conclude that there was no viable copyright infringement claim because there was no copying (no "probative similarity") and no "substantial similarity," and that there was no misappropriation of McGee's ideas for a television show

because, simply stated, the defendants did not use McGee's ideas.

Copyright Infringement

In approaching the issue of "probative similarity," the Court required McGee to point to specific similarities and engaged in a "dissection of the copyrighted work by separating its original, protected expressive elements from those aspects that are not copyrightable because they represent unprotected ideas or unoriginal expressions."

The specific similarities McGee cited were insufficient to (Continued on page 26)

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base a copyright claim. He pointed to three elements: (1) both creative works take place in Atlanta; (2) the main character in each becomes involved in the music industry; and (3) each main character has left his former job.

The Court had no difficulty finding that the location of a creative work is not copyrightable. "By copyrighting a cartoon set [in Atlanta], McGee [did] not acquire the exclusive right to use the city of Atlanta as a setting for an animated series."

So, too, with respect to the fact that both works involved music. "[F]igures involved in the music industry – musicians, singers, technicians, and producers – naturally appear in cartoons focusing on musicians and bands, and the figures portrayed in *Music Factory* and *Class of 3000* are similar only in their association with music and that common industry. This is not enough to demonstrate probative similarity."

Finally, the Court found little similarity between the *main characters* of the respective works. "Playmaker," from the *Music Factory*, was a rich kid who became a lawyer to satisfy his father, and had quit his job to buy a production studio to try to become a successful producer. On the other hand, Sunny Bridges, the main character in *Class of 3000*, was a successful musician/producer who had left the industry to return home to be a mentor to young music students.

Finding that McGee failed to demonstrate actual copying (via establishing probative similarity), the Court dismissed his copyright infringement claim. However, the Court went further, and ruled that McGee's complaint also did not sufficiently allege "substantial similarity." Class of 3000, the Court found, "is a children's cartoon that is fast-paced, whimsical, and laden with traditional cartoon slapstick comedy. By contrast, Music Factory is aimed at an adult

audience, serious in tone, not comedic, and uses more slang. Moreover, *Class of 3000* is full of fantasy and magic (for example, Sunny lives in a magical forest with a bear who drives a convertible and a boombox-toting rabbit), whereas *Music Factory* is grounded in reality." No ordinary viewer could find the two works substantially similar, the Court determined.

Misappropriation

McGee's remaining claim was that defendants had misappropriated his concept for a television show. The Court made short work of this claim.

The Court applied Georgia law, because McGee had alleged that he had both created *Music Factory* in Atlanta and pitched the project to The Cartoon Network in Atlanta. However, under Georgia law, the plaintiff must show, among other elements, that his "idea [was] adopted and made use of by the defendant." Because the Court had previously found that "the defendants did not copy McGee's idea," they could not be found liable for misappropriation, thus mandating dismissal of McGee's state law claim.

As the procedural history of this case shows, McGee has been a determined litigant. Whether he will appeal the dismissal of his case is uncertain as of this writing. Equally uncertain is whether the decisive rebuff rendered against McGee will serve as a deterrent to future litigants who seek to claim rights in successful films or television programs created and produced by others.

Gordon P. Katz is a litigation partner in the Boston office of Holland & Knight LLP. He and Benjamin McGovern represented The Cartoon Network and Turner Broadcasting Systems, Inc. in the McGee case. Plaintiff acted pro se.







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Reynolds Given a Shot in the Arm By the UK Supreme Court

By David Hooper

On March 21, 2012 a very important decision was given unanimously by the UK Supreme Court in *Flood v Times Newspapers Limited* [2012 UKSC11]. They reversed the decision of the Court of Appeal (2011 EWCA Civ 804) which had ruled that the Reynolds defence did not apply as details were given of a defamatory allegation which had not been verified.

The Court of Appeal decision was well on the way to emasculating the Reynolds defence and depriving it of the flexibility that should be at its heart. The importance of the Supreme Court decision lies in its clear enunciation of the principles of the Reynolds defence and its firm rejection of the need to be able to demonstrate that you are in a position

to verify the allegations in cases where it can be established that there are grounds of public interest for publishing the details of the allegations rather than simply the bare fact that they have been made.

The Supreme Court stressed the need for public interest to be established but their ruling has made it clear that there will be a greater degree of flexibility in

the application of the defence. The procedure will be simplified in that these cases will be heard by a judge alone and will not require the sort of complex findings of fact that bedevilled some of the early Reynolds cases such as *Loutchansky*. The case is important for its analysis of comparable approaches in the European Court of Human Rights and the Supreme Court has made it clear that the Reynolds defence is at the centre of the jurisprudence of the European Court of Human Rights.

The case is also some indication of the importance that the Supreme Court attaches to the Article 10 Freedom of Speech provisions in the European Convention of Human Rights. In this regard the judgments of Lord Mance and Lord Dyson who had not previously given Article 10 judgments in the Supreme Court in a media case augured well for the media in future.

Background

The case revolved around a detailed report of the investigations into the allegations made against Detective Sergeant Flood who found himself accused of involvement in police corruption. Russian oligarchs (anxious to find out if they were likely to be put on a plane to go back and face justice in Russia) – including, it was alleged, that well known libel litigant Boris Berezovsky – were said to be passing not insubstantial sums of money to a company run by a solicitor who had met an untimely death in a mysterious helicopter accident and who was suspected of making payments to a police officer connected with the Extradition Unit who had the code name Noah.

The question was whether – by some happy biblical coincidence – Flood was Noah. When the Sunday Times had put these allegations to the police, the police had begun an investigation. The police had announced that there was such an investigation and the fact of the investigation could certainly had been published, as it would as a statement issued by the police have attracted

qualified privilege under Schedule 1 of the Defamation Act 1996. The paper however wanted to publish the details of the allegations as they were unquestionably of enormous public interest and additionally the papers suspected that the police had no enthusiasm for properly pursuing the investigation.

At the time the article was published in June 2006 the enquiry was ongoing. Subsequently in September 2007 it was established that Flood had been exonerated by the enquiry. The paper was not in a position sufficiently to verify or prove the allegations against Flood. Its position in June 2006 was that it believed that there was substance in the allegations and that those allegations were supported by strong circumstantial evidence. The background detail of the activities of the oligarchs and the deceased solicitor who had accumulated money with oligarch-like speed and ruthlessness

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were reported in detail, but the paper was not in a position to prove the allegations. The report had a defamatory meaning which was either that Flood was reasonably suspected of being guilty of corruption or that there were reasonable grounds to conduct an investigation into whether or not Flood was corrupt.

Mr Justice Tugendhat [2009] EWHC2375 had examined the steps taken by the newspaper prior to publication and had concluded that the Reynolds defence did apply at least until such time in September 2007 when the newspaper became aware of the fact that Flood had been exonerated at which time the Judge felt that the newspaper was bound to add a report of that exoneration to the version of the story still being displayed on line.

The Supreme Court has yet to rule on the Judge's finding in relation to their liability at the time that they acquired knowledge of Flood's exoneration. It may very well be that this point will not in fact be argued in the Supreme Court. It may well be that the approach of English courts will be that there is a real risk of losing the privilege if some exonerating fact is drawn to the newspaper and if the newspaper has an opportunity to investigate the new facts and if it would be reasonable for such a footnote to be published. It is unlikely that the court would impose an obligation to alter the original article itself or on the newspaper to keep the facts under review in case there are future developments. The advice which English media defence lawyers are likely to give in such circumstances would be to add an explanatory note at the foot of the online article.

In a sense the decision of the Court of Appeal in the *Flood* case was a retrograde step. Certainly the need to verify was one of the 10 factors (number four) laid down in the *Jameel* case, but effectively the Court of Appeal was saying that there was a duty to verify and that the supporting or background facts of what were merely allegations would not be covered by the Reynolds privilege if the paper was not in a position to verify the facts. No such argument about the alleged "blacklist" had been raised in the *Jameel* case.

Analysis

The Flood case is important for its explanation and reiteration of the principles of the Reynolds defence. The Court approved the three ingredients of the defence identified

by Lady Hale namely "the general obligation of the press, media and other publishers to communicate important information upon matters of general interest and the general right of the public to receive." She also added that "there must be some real public interest in having this information in the public domain." The Court has to consider "the extent to which the subject matter is a matter of public concern" and "whether the public was entitled to know the particular information." Lord Nichols referred to this as the "right to know test." Reynolds privilege "arises not simply because of the circumstances in which the publication is made, although these can bear on the test of responsible journalism. Reynolds privilege arises because of the subject matter of the publication itself. It arises only when the test of responsible journalism is satisfied."

Lord Phillips and Lord Mance examined the comparable European cases in *Polanco Torres v Spain* the Spanish principle of "due diligence" namely that if such publication is to be protected the journalist responsible for it must have taken "effective steps" to verify the published information showed a similar approach to the Reynolds case as did the case of *Flux v Moldova* "in situations where on the one hand a statement of fact is made and insufficient evidence is adduced to prove it and on the other the journalist is discussing an issue of genuine public interest, verifying whether the journalist acted professionally and in good faith becomes paramount."

To similar effect was the recent case of Axel Springer v Germany "special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable."

Mr Justice Tugendhat on an examination of the steps taken by the newspaper was satisfied that appropriate journalistic steps had been taken to enable the Reynolds defence to be applied. The Court of Appeal was of the view that the fact of the investigation could be reported but that the investigation should be allowed to take its course and that one repeated details of the allegations at one's peril.

How then is the Reynolds defence likely to be applied in the future? The key question in such cases will be whether it

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was in the public interest that the supporting facts should be published. The Supreme Court showed itself somewhat more liberal in approach than the Court of Appeal. The Judges were persuaded that there were instances where publishing the detail was very much part of the story and that where one had a public official and very serious allegations publication of the name could be important and that the story might scarcely be publishable if the report was disembodied.

Paramount is the question of public interest which will involve looking at the nature of the individuals concerned and the allegations involved. A distinction is likely to be drawn between those carrying out public functions and allegations of a non-public nature against an individual who does not carry out public functions. When evaluating the application of the Reynolds defence there is "the need to look at the

position in the round." It is for the Court to determine whether any publication was in the public interest but the Court gives weight to the ordinary standards of responsible journalism. It does so in a broad and practical way.

Of particular significance in the Supreme Court decision was the underlining of the fact that while "the Court must have the last word in setting the boundaries of what can properly be

regarded as acceptable journalism, within those boundaries the judgement of responsible journalists and editors merits respect." This is in line with the approach of the European Court Jersild v Denmark [1994] 19EHRR1. "It was not for national courts or the European Court of Human Rights to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In essence Article 10 leaves journalists to decide what details it is necessary to reproduce to ensure credibility."

So what then are the practical effects of the judgment? English media lawyers are likely to draw the attention of their clients to the passage in the Supreme Court's judgment making it clear that the Reynolds defence has "both a subjective and objective element" as Lord Phillips pointed out. The defence is unlikely to apply unless the journalist believes that what he has written in true. The Court will objectively look – albeit in a flexible manner – to form a

judgment as to whether in all the circumstances the journalist has acted responsibly.

In forming that judgment the Court will "give due weight to the importance of editorial judgement and will not readily substitute its own judgment for those of editors." To carry out that evaluation the Court has to decide what the words mean as if, to take the example of the Flood case, the Court had in fact held that the words meant that Flood was guilty of corruption, the steps which a Court would expect the responsible journalist to take would be that much more onerous than if the words simply meant there were reasonable grounds to suspect guilt. Therefore newspapers who are relying on the Reynolds defence may well be advised not to over-write their stories which would otherwise mean that they are assuming a higher standard of responsible journalism, thereby making the risk of the Reynolds defence

failing potentially larger.

The Supreme Court has not rewritten the Reynolds defence. The Flood decision is essentially applying the principles that were previously laid down in both the Reynolds case itself and the Jameel case. However the key thing with the Reynolds case has been the approach to the application of the 10 indicators laid down by Lord Nicholls in the Reynolds case. Initially those indicators were

treated by the courts as hurdles which the defendant had to get over. A number of judges had no particular enthusiasm for the Reynolds defence, wondering why it could be in the public interest to publish matters which were not true (by which they really meant which could not be proved to be true).

What defendants also found was that the Reynolds defence could also spawn satellite litigation where much time and money was spent poring over how the journalist put the story together. Furthermore some judges were not above applying their own editorial judgement armed with the benefit of hindsight.

The case of Jameel was really a sea-change, but the decision of the Court of Appeal in the Flood case looked as if it might greatly weaken the application of the Reynolds defence. A considerably more liberal approach is evident in the judgements given in the Supreme Court. The Supreme

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Court recognised the importance of detail in newspaper articles and that there were good reasons for going into the detail rather than being confined to a short recital of the fact of the investigation. The Supreme Court was prepared to look closely at what was behind the story and particularly the fact that the newspaper felt that it had good grounds for giving this investigation the oxygen of publicity and the Supreme Court also examined how the journalists had researched the story and what facts they had uncovered to substantiate what they wrote, even if it fell short of the legal requirements of the defence of justification.

The Supreme Court also stressed the need for flexibility in the application of the Reynolds defence which had been somewhat lacking in the Court of Appeal, where the predominant view had been to let the investigators investigate and to avoid at all costs "trial by newspaper" The Flood

decision certainly does not permit the publication of lurid details of all allegations and investigations to be published. Those are still likely to be caught by the repetition rule, particularly if they relate to those who are not in the public eye.

The media would also be well advised in cases where they are likely to rely on the Reynolds defence to ensure that they produce a balanced account

and do not lay themselves open to the accusation that they have adopted the allegations – the problem which the Daily Telegraph faced when it published details of allegations about a too close relationship between a Member of Parliament, George Galloway, and Saddam Hussein.

The Flood case also had an interesting analysis in the judgement of Lord Phillips of the "reportage" defence, where defamatory allegations are reported in the course of an ongoing debate without any attempt having been made to verify the applications, Roberts v Gable (2007) EWCA 721. Reportage is "a special kind of responsible journalism but with distinctive features of its own." In such cases there would be "a public interest which would justify the publication of facts which carry defamatory inferences without imposing on the journalist any obligation to attempt to verify the truth of those inferences."

That might be appropriate in cases reporting a political controversy in which the media remain strictly neutral or reporting the fact that someone has been investigated by the police or arrested – again in neutral terms and without adopting the allegations made. The Flood case was not a reportage case. The paper had gone further than simply outlining the allegations and answers to the allegations and it had suggested either that there were reasonable grounds to suspect that Flood was guilty of corruption or that his conduct merited investigation.

After the Jameel case the media might have been forgiven for thinking that they had a Reynolds defence which was really effective. It would be an overstatement to say that that was a false dawn, but there was a real risk that it would be undermined. The Flood decision does seem to have consolidated the Reynolds defence and to have tied it in with European jurisprudence.

It is that much more an effective weapon in the media armoury as a result. Litigants such as Flood will now be very

much more cautious about bringing such claims, as the judiciary have stressed the importance of editorial judgement. Such litigants also have the problem when they are thinking of bringing defamation proceedings that while they may know the facts and may be aware of some errors in the report complained of, they will not know all the steps taken by the paper to establish the facts and what looked to the complainant like a clear defamation may

after a costly analysis turn out to be accepted to have been responsible journalism.

Quite apart from the cost of the proceedings – although the Times were required to give an assurance that they would not seek their costs in the Supreme Court against Flood as a condition of being given permission to appeal – Flood must rue this litigation as in place of a report of his exoneration, his reputation will have been bruised by the detailed analysis of any involvement on his part with the murky world of the Russian oligarchs.

David Hooper is a partner at RPC in London. The Times was represented by Pia Sarma, Editorial Legal Director, Times Newspapers Limited; and barristers Richard Rampton QC, Heather Rogers QC and Kate Wilson. Claimant was represented by barristers James Price QC and William Bennett, instructed by Edwin Coe LLP.

UN: Philippine Criminal Libel Law Violates Freedom of Expression

By Harry Roque

The Philippine Revised Penal Code's provisions penalizing libel is "incompatible with Article 19, paragraph three of the International Covenant on Civil Political Rights," or freedom of expression. This was the View expressed by the Human Rights Committee in a View adopted last October 26, 2011 during the 103rd session of the UN Body. The Committee is a treaty monitoring body created by the Optional Protocol of the International Covenant on Civil and Political Rights. It has power to declare that a State party to the Convention is in breach of its obligations as provided in the Covenant.

The View was expressed in a complaint filed by Davao City based broadcaster Alex Adonis who was jailed for more

than two years pursuant to a conviction for libel in a complaint filed by the former Speaker of the Philippines House of Representatives, Prospero Nograles. In his radio broadcast, Adonis read and dramatized a newspaper report that the former Congressman was seen running naked in a hotel after being caught in bed by the husband of the woman with whom he was said to have spent the night with.

Residents of Davao City in Southern Philippines have since referred to the Nograles incident as the "burlesque" king incident. In a decision rendered by the Regional Trial Court of Davao, the counterpart of a District Court, Adonis was sentenced to imprisonment from 5 months and one day to four years, six days and one day imprisonment. In the decision, the local court concluded: "the evidence was sufficient to prove the author's guilt beyond a reasonable doubt for a malicious, arbitrary, abusive, irresponsible act of maligning the honor, reputation and good name of Congressman Nograles."

After having served two years in prison, Adonis questioned the compatibility of libel with freedom of expression under Art 19 of the ICCPR. Adonis argued that "the sanction of imprisonment for libel meets fails to meet the standard of necessity and reasonableness." Imprisonment is unnecessary since there are other effective means available

for protection for the rights of others. He also argued that it was not a reasonable restriction because it does not admit proof of truth as a complete defense but only allows it under very restricted conditions. He also questioned his conviction as a result of a trial in absentia when his counsel of record at the RTC withdrew without informing him accordingly.

In ruling in favor of Adonis, the UN Body ruled that his rights were violated when he was tried in absentia without notice of his lawyer's withdrawal. Said the Committee: "the State party does not provide evidence showing that the Court sought to notify the author of the withdrawal of his lawyer, and the decision is unclear whether another counsel was appointed to represent the author."

Moreover, in ruling that Philippine criminal libel law was

inconsistent with freedom of expression, the Committee recalled its General Comment No. 34 which reads: "Defamation laws should not stifle freedom of expression. Penal defamation laws should include defense of truth. At least with regard to comments about public figures, consideration should be given to avoiding penalties or otherwise rendering

unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defense. State parties should consider the decriminalization of libel."

In a statement, the Center for International Law that acted as counsel for Adonis said: "The Committee's view is a very big win for freedom of expression. Hopefully, the Philippine government under President Noynoy Aquino will comply with the Committee's view and proceed to decriminalize libel and to provide reparations to Adonis for time he spent in prison. No one should be imprisoned for expressing his or her views, full stop".

The Committee ordered the Philippine government to "provide the author with an effective remedy, including adequate compensation for time served in prison, The State is

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After having served two years in prison, Adonis questioned the compatibility of libel with freedom of expression under Art 19 of the ICCPR.

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also under obligation to take steps to prevent similar violations occurring in the future".

Two Committee members dissented only insofar as the Committee did not expressly order the Philippine government to decriminalize libel. Fabian Omar Salvioli argued that [pursuant to Art 2.2 of the Covenant, the State party undertakes to take all necessary steps, in accordance with constitutional processes, to give effect to right recognized in the Convention." Hence, by not ordering the repeal of

Philippine libel laws, "the Committee has missed a clear opportunity expressly and unambiguously to indicate to the State party that it must change its criminal law.

The Adonis View is the first view of the UN Committee on Human Rights that criminal libel infringes on freedom of expression.

Harry Roque is a lawyer with Roque and Butuyan in Manila, Philippines and Chair of the Center for International Law which represented Alex Adonis in this matter.

Illinois' Strict Eavesdropping Law Under Attack in Courts and Legislature

By Samuel Fifer and Gregory R. Naron

Illinois' eavesdropping law is among the nation's strictest. Over the past year, it has been subject to attack in the courts and state legislature, on the grounds that its application to citizens who seek to record the public activities and statements of on-duty law enforcement officers is unconstitutional.

Beardsley Decision and Legislature's Response

The eavesdropping statute, 720 ILCS 5, Article 14, makes it a felony to record any conversation without the consent of all parties. The Act provides: "A person commits eavesdropping when he ... [k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation ... unless he does so ... with the consent of all of the parties to such conversation" 720 ILCS 5/14-2(a)(1)(A).

Several years ago, the Illinois Supreme Court issued an opinion – in a case involving a defendant's recording of law enforcement officers – that would have significantly reined in the statute's scope.

In *People v. Beardsley*, 115 Ill. 2d 47 (1986), a sheriff's deputy stopped defendant for a speeding violation; defendant refused to produce his driver's license, and was arrested. The deputy noticed that defendant had a tape recorder and instructed him not to use it because the deputy did not consent to being taped. Nevertheless, while waiting in the

squad car, defendant recorded the deputy's conversation with another officer.

The Illinois Supreme Court reversed defendant's eavesdropping conviction, holding the conversation he recorded was not private and the statute is "based on the assumption that if the parties to a conversation act under circumstances which entitle them to believe that the conversation is private and cannot be heard by others...." *Id.* at 53.

[I]f the officers intended their conversation to be entirely private, then they would have left the squad car instead of carrying on their conversation in the defendant's presence. Thus, under the circumstances, the officers cannot be heard to allege that they intended their conversation to be private. Because there was no surreptitious interception of a communication intended by the declarants to be private, secret, or confidential, under circumstances justifying such expectation, there was no violation of the eavesdropping statute.

Id. at 55 (citing Cassidy v. American Broadcasting Cos., 60 Ill. App. 3d 831 (1978); People v. Klingenberg, 34 Ill. App. 3d 705 (1975)).

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The *Beardsley* era was to be short lived; in 1994, responding directly to *Beardsley*, the Illinois General Assembly extended the Act to encompass conversations where there is no reasonable expectation of privacy, enacting the current definition of "conversation": "any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." 720 ILCS 5/14-1(d).

To make matters worse, from a civil libertarian perspective, if a police officer or court official is recorded without his or her knowledge, the punishment is enhanced: recording such individuals is a Class 1 felony, 720 ILCS 5/14-4(b), carrying a sentence of four to fifteen years, 730 ILCS 5/5-4.5-30; recording anyone else is a Class 4 felony, 720 ILCS 5/14-4(a), carrying a sentence of one to three years, 730 ILCS 5/5-4.5-45.

Recently, however, courts and state legislators have questioned the validity of the current eavesdropping law, specifically challenging its constitutionality in the context of recording law enforcement officers in the performance of their duties.

Illinois Trial Court Decisions

Christopher Drew, an artist, was arrested in 2009 for selling art on a Chicago street without a permit. Drew was also charged with eavesdropping when the police discovered that, during his arrest, he had used a digital audio recorder in his pocket to capture his conversations with police. This month, on Drew's motion, Cook County Circuit Judge Stanley Sacks ruled that the Illinois eavesdropping law was unconstitutionally overbroad, potentially criminalizing "wholly innocent conduct." (*People v. Drew*, No. 10 CR 00046 (Cook County Cir. Ct., Crim. Div.), Mar. 2, 2012 Order, p. 11.)

The Judge cited various examples, including that of a parent recording her child's soccer game and inadvertently capturing a conversation between two bystanders; "[a]lthough it is extremely unlikely that this doting parent would be charged with a felony offense, the fact remains that she could, thusly punishing innocent conduct." *Id.* The Cook County

State's Attorney, Anita Alvarez, has said she plans to appeal Judge Sacks' decision to the Illinois Supreme Court.

Last year, Judge David K. Frankland of the Crawford County, Illinois Circuit Court also held the eavesdropping law unconstitutional. *People v. Allison*, No. 2009-CF-50 (Cir. Ct., 2d Judicial Cir., Crawford County, Ill.), Sept. 15, 2011 Order. In that case, defendant was accused of surreptitiously recording police and court officials in connection with an ordinance violation concerning his property.

As in *Drew*, the court found "[t]he Illinois Eavesdropping Statute would potentially punish as a felony a wide array of wholly innocent conduct" and hence violated the Constitution's substantive due process guarantee. Id., pp. 6-7. It further held that the statute violated defendant's First Amendment right to gather information about public officials performing their duties. Reviewing the limited persuasive authority on point, the court noted that while the "First Amendment right to record is not absolute as it is subject to reasonable time, place and manner restrictions" - for example, Ill. Sup. Ct. Rule 63(A)(7), which addresses the recording of courtroom proceedings - the eavesdropping statute contained "no limitations" and constituted a "blanket rule on forbidding all recordings in such case without the consent of the public servant." Id., pp. 11-12. "A statute intended to prevent unwarranted intrusions into a citizen's privacy cannot be used as a shield for public officials who cannot assert a comparable right of privacy in their public duties." *Id.*, p. 12.

Prosecutors have appealed the *Allison* decision directly to the Illinois Supreme Court (Case No. 113221); their opening brief is due to be filed this month and the case will be argued in the Fall of 2012.

ACLU v. Alvarez Litigation

In reviewing the precedent applicable to defendant's First Amendment argument, *Allison* cited a federal suit against Cook County State's Attorney Alvarez, in which the ACLU claimed that the Illinois eavesdropping law violated the First Amendment "as applied to [the ACLU's] program of promoting police accountability by openly audio recording police officers without their consent when: (1) the officers are

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performing their public duties; (2) the officers are in public places; (3) the officers are speaking at a volume audible to the unassisted human ear; and (4) the manner of recording is otherwise lawful." *ACLU v. Alvarez*, No. 11-1286 (7th Cir.), Appellant's Opening Br., p. 2.

Judge Suzanne Conlon of the Northern District of Illinois dismissed the case, holding "[t]he ACLU has not met its burden of showing standing to assert a First Amendment right or injury" but instead "proposes an unprecedented expansion of the First Amendment." *ACLU v. Alvarez*, No. 10-cv-5235, 2011 WL 66030 (N.D. Ill., Jan. 10, 2011).)

Last September, the U.S. Court of Appeals for the Seventh Circuit heard oral argument in the ACLU's appeal. The ACLU argued that "speech about how government officials perform their duties lies at the core of the First Amendment," particularly with respect to "the manner in which police perform their duty to protect expressive activity in public forums," and that the eavesdropping law was not narrowly tailored to protect any legitimate privacy interest. (Appellant's Opening Br., p. 12.)

The Reporters Committee for Freedom of the Press and other newsgathering associations filed an *amicus* brief in support of the ACLU, emphasizing that the Illinois statute was "a national outlier among the states, the overwhelming majority of which ... require the subject of a recording to have a reasonable expectation of privacy in the communication." (Amicus Br., p. 1.) "Where parties to an intercepted conversation do not have a reasonable expectation of privacy, no state interest is advanced by criminalizing the recording of that conversation. Such criminalization burdens the First Amendment right to record public events." (*Id.*, p. 2.)

The *Alvarez* appellate panel included Judge Richard Posner, who has written many of the Seventh Circuit's significant First Amendment-related opinions. The <u>oral argument</u> featured lively and pointed exchanges between the ACLU's counsel and Judge Posner, concerning, among other things, whether the ACLU's position would interfere with law enforcement operations, including the use of confidential informants, and the impact it would have on third party privacy rights.

The panel also pressed Alvarez' counsel on how law enforcement officials could possibly have a privacy interest in publicly audible statements. A detailed recounting of the argument can be found in Mickey H. Osterreicher, "Seventh Circuit Panel Hears Arguments in *ACLU v. Alvarez*: Judge Posner Concerned With 'Snooping' by Reporters and Bloggers," *MLRC Media Law Letter (Oct. 2011*). A decision in *Alvarez* is expected sometime this year.

House Bill 3944

Meanwhile, state Representative Elaine Nekritz has introduced a bill in the Illinois General Assembly that would modify the current law to make it legal for citizens to record law enforcement officers who are on duty and in public. The terms of House Bill 3944 echo the relief that the ACLU was seeking in the *Alvarez* case; it would amend 720 ILCS 5/14-3 to add a new subsection (q) that reads:

A person who is not a law enforcement officer nor acting at the direction of a law enforcement officer may record the conversation of a law enforcement officer who is performing a public duty in a public place and any other person who is having a conversation with that law enforcement officer if the conversation is at a volume audible to the unassisted ear of the person who is making the recording. For purposes of this subsection (q), "public place" means any place to which the public has access and includes, but is not limited to, streets, sidewalks, parks, and highways (including inside motor vehicles), and the common areas of public and private facilities and buildings.

The proposed amendment cleared the Illinois House Judiciary Committee on a 9-2 vote in February. Civil libertarians who support the bill would like to see it come to a vote soon so the law might be changed before the NATO summits in Chicago this coming May.

With all of the assaults on the legislative and judicial fronts, it will be remarkable if the Illinois eavesdropping law survives the year in its current form.

Samuel Fifer is a partner, and Gregory R. Naron is counsel at SNR Denton in Chicago, Illinois.

Photojournalist Loses Privacy Protection Act Case

Probable Cause Existed to Search Photographer's Home

The Fourth Circuit recently affirmed summary judgment dismissing a photographer's <u>Privacy Protection Act</u> claim arising out of the search of her home following a violent protest. <u>Sennett v. U.S.</u>, No. 11-1421 (4th Cir. Jan. 30, 2012) (Traxler, Motz, Keenan, JJ.). In a cautionary tale for citizen journalists, the Court held that the "suspect" exception to the Privacy Protection Act applied where there was probable cause to suspect the photographer was one of the violent protestors.

Background

The plaintiff, Laura Sennett, is a Washington D.C. based photographer with a self-described "special interest in

covering protests, political demonstrations, and 'grassroots activism.'" Her photographs have appeared in various publications under the pseudonym "Isis" as well as on her own website and blog.

At issue in the case was a violent late night protest at the Four Seasons Hotel in Washington, D.C. in April 2008. At 2:30 a.m. about 16 protestors wearing black jackets, masks and backpacks vandalized the hotel lobby with firecrackers, smokegenerating pyrotechnic devices and paint

filled balloons, causing \$200,000 in property damage.

Sennett was outside the hotel taking photographs. As seen in security camera footage, Sennett was dressed in dark clothing, a light colored beret, black combat boots and a gray and black backpack. She had a small handheld camera and did not display any press credentials. She was seen arriving at the same time as, and fleeing the scene with, other protestors (she later explained, out of concern for her own safety).

Based on the security camera footage, and two unidentified informants, Sennett was identified as the photographer at the Four Seasons Hotel and at two earlier protests in the D.C. area. Virginia police then obtained a warrant to search Sennett's residence in Arlington, VA for evidence related to the hotel incident. On September 23, 2008 they searched Sennett's apartment and seized an external hard

drive containing more than 7,000 photographs, two computers, several cameras, and camera memory cards. Sennett was never charged with any crimes.

Sennett sued state and federal law enforcement officials for violation of the Privacy Protection Act, alleging, inter alia, that the officers who executed the search knew she was a photojournalist covered by the statute. Last year, the district court granted summary to defendants. *See Sennett v. United States*, 778 F. Supp. 2d 655, 666 (E.D. Va. 2011).

Privacy Protection Act

The <u>Privacy Protection Act</u> makes it illegal for government officials to search for documents and materials

that are intended for publication; in other words, to protect the press from being targeted in an investigation if they are not themselves suspects. The statute was written to overrule *Zurcher v. Stanford Daily*, 436 U.S. 547 (1970), in which the Supreme Court held that the Fourth Amendment did not prohibit a search of newspaper offices for evidence relating to the identity of criminal suspects. In *Zurcher*, the newspaper was not itself a suspect in the criminal investigation

suspect in the criminal investigation.

The Act, however, contains a "suspect exception", and its restrictions on searches generally do not apply where "there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate."

Fourth Circuit Decision

In a decision that will have some resonance in an age of increasing citizen journalism, Sennett's claim was dismissed at the summary judgment stage, because she fell under the "suspect exception" of the Privacy Protection Act. Officials argued that Sennett, because of her suspicious appearance,

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her lack of press credentials, and her apparent association with the protestors, was herself participating in the criminal vandalism at the Four Seasons.

Based on these facts, the Fourth Circuit affirmed that probable cause existed at the time the search was executed based on the totality of circumstances. Sennett's status as a photojournalist and her own innocent explanation for her presence at the protest were insufficient to negate probable cause. The court noted that the possibility of an innocent explanation does not vitiate properly established probable cause.

Moreover, even if the police knew Sennett was a photojournalist this would not destroy probable cause. As the

district court observed, "to accept Sennett's argument that her status as a photojournalist is a game changer in the probable cause analysis . . . is tantamount to doing what Congress declined to do, namely exclude journalists from the PPA's 'suspect exception.'" *See Sennett*, 778 F. Supp. 2d at 666. Although Sennett's occupation provided an innocent explanation for her presence at the protest, the other facts permitted police to reasonably conclude she was involved in the acts of vandalism.

Plaintiff was represented by Jeffrey Louis Light, Washington, D.C. Assistant U.S. Attorney Julie Ann Edelstein, argued the appeal on behalf of the United States.

Newspaper Defeats Attempted Prior Restraint

State Attorney General Withdraws Emergency Appeal at Eleventh Hour

By Gerald F. Lutkus and Eric R. Thomason

On Friday afternoon, March 9, 2012, the Indiana Court of Appeals granted an emergency motion to stay a lower court's order which had authorized the release to the *South Bend Tribune* of certain telephone calls recorded by the Indiana Department of Child Services ("DCS"). The Court of Appeals' order caused *The Tribune* to remove from its website links to one of the recordings as well as a news report on the content of that recording.

The Tribune had objected to the entry of the order on the grounds that the release was authorized by Indiana law and that the Court's entry of a stay was a prior restraint. The Court of Appeals set a hearing for Monday afternoon, March 12, 2012, but just hours before oral argument was to take place, the Indiana attorney general intervened in the case and moved to dismiss DCS' appeal, thereby allowing *The Tribune* to publish the story and the recording.

Tribune's Successful Request for Public Records

On November 4, 2011, ten year-old Tramelle Sturgis of South Bend, Indiana suffered a brutal death at the hands of his father. After providing initial coverage of the tragic event, *The Tribune* requested records from DCS pursuant to an Indiana statute (Ind. Code 31-33-18-1.5) which permits disclosure of child fatality "records" to "any person" as long

as the records contain certain privacy-related redactions. The local probate court has jurisdiction over these records, and permitted them to be disclosed to *The Tribune* in late December of 2011.

Just days after receiving the records, *The Tribune* learned that DCS also recorded and kept all incoming phone calls to its centralized child abuse hotline. *The Tribune* requested DCS to provide them with both the transcripts and the actual recordings of all calls received concerning Tramelle Sturgis. DCS refused, so *The Tribune* petitioned the probate court to order DCS to comply with the child fatality records statute.

DCS argued that the records were confidential, that their publication would have a chilling effect on people who would otherwise come forward to report child abuse in the community, and that the audio files were not "records," a term the statute leaves undefined. DCS also asked for a stay pending appeal if the probate court should rule in *The Tribune's* favor.

The Tribune countered that the statute has built-in privacy protections, that publication of the records would raise awareness of child abuse in the community and thereby encourage more people to report it, and that the term "records" certainly encompassed "tape-recorded messages recorded off a state phone line onto a state-purchased recording device and then stored in a state facility on state

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equipment." *The Tribune* also noted that the premature motion for a stay would constitute a de facto prior restraint.

The probate court agreed with *The Tribune* and on March 6, 2012, ordered DCS to provide the transcripts and audio files and refused any stay pending appeal. Three days later, on Friday, March 9, 2012, DCS was informed that *The Tribune* would be a publishing a story utilizing the newly obtained records. That afternoon, DCS filed a motion for an emergency stay with the Court of Appeals. At about the same time, *The Tribune* published an online article drawing heavily on quotations from the records and also posted a link to the key recording.

About an hour after *The Tribune* posted the article, the Court of Appeals granted the emergency stay and ordered oral argument for the following Monday afternoon. After receiving the order, *The Tribune* removed the story from its website, explaining that it was complying with a court order.

Tribune's Prior Restraint Argument

In *The* Tribune's brief to the court of appeals opposing the stay, *The* Tribune argued that the order was a prior restraint on the press as would be any continuing such order. *The Tribune* relied on classic prior restraint cases – *New York Times v. United States*, *Near v. Minnesota*, *Nebraska Press Assoc. v. Stuart* – to establish the heavy constitutional presumption against prior restraint.

The Tribune then attacked DCS' stated privacy concerns

by citing Florida Star v. B.J., which allowed publication of a rape victim's identity, Oklahoma Publishing Co., v. District Ct., which allowed publication of a juvenile's identity, and New York Times, supra, which allowed publication of the Pentagon Papers. In light of these cases, DCS' privacy concerns could not overcome The Tribune's First Amendment rights, especially when the statute at issue mandated certain redactions in the interest of privacy.

The Attorney General Intervenes

Within hours of *The Tribune* filing its brief, the Indiana Attorney General intervened on behalf of the state and soon thereafter voluntarily dismissed the appeal, asking the Court to dissolve the emergency stay. At his press conference that same day, Attorney General Greg Zoeller stated: "Prior restraint on the news media publishing public records is inconsistent with the First Amendment... As the lawyer for state government, the Office of the Indiana Attorney General now asserts the legal position of the state that in the interest of openness and transparency, the publication of public records should not be halted."

After its triumph before the court, *The Tribune* published online and print stories in the ensuing days featuring information obtained from the records. Links to these stories and the recordings are available on the newspaper's website.

Gerald F. Lutkus and Eric Thomason, Barnes & Thornburg LLP, South Bend, IN, represented The Tribune in this matter.

Upcoming Events

MLRC/Stanford Digital Media Conference May 21-22, 2012 | Stanford, California

MLRC/NAA/NAB 2012 Media Law Conference Sept. 12-14, 2012 | Reston, Virginia

> MLRC Annual Dinner November 14, 2012 | New York, NY

Defense Counsel Section Meeting and Lunch November 15, 2012 | New York, NY