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MLRC Media Law Resource Center

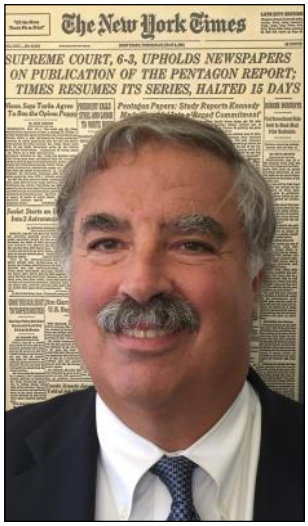
MEDIALAWLETTER

Reporting Developments Through March 25, 2020

From the Executive Director's Desk

Balancing Unity, Truth and the First Amendment in a Pandemic

These are chaotic and volatile times. Beyond the obvious scary health jeopardies, there are many frightening unknowns as well. No one knows how long this will last or how a rebound will play out.



George Freeman

Clearly, concerns about our health and wellness, and those of our families, friends, colleagues and communities ought to be more important at this time than our interest in First Amendment freedoms. But the First Amendment does have a significant role in the drama and plague which is occurring around us. There are two themes in which I see these areas intersecting: unity and truth.

First, we are all in this together. It goes without saying that our health is dependent on the responsibility and morality of those around us – and vice-versa. We should all give aid and show compassion to those who are suffering. (It's frightening to read how many of us, including me, are in the over-60 age group which is considered highly vulnerable.) This is not a time to worry about whether a neighbor is a First Amendment advocate or a press foe, a Democrat or a Republican. The more we unite in aid of health throughout our communities and across the country, the better and sooner we will succeed.

While I hesitate to foist my sports obsession on you, nowhere was this said better than by a soccer coach, in this case Liverpool's Jürgen Klopp. Please read the following letter he wrote to Liverpool fans, keeping in mind he is a German for whom English is a second language, and perhaps substituting First Amendment and media for football and team:

> *I don't think this is a moment where the thoughts of a football manager should be important, but I understand for our supporters they will want to hear from the team and I will front that.*
>
> *First and foremost, all of us have to do whatever we can to protect one another. In society I mean. This should be the case all the time in life, but in this moment I think it matters more than ever.*
>
> *I've said before that football always seems the most important of the least important things. Today, football and football matches really aren't important at all.*

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Liverpool coach Jurgen Klopp

Of course, we don't want to play in front of an empty stadium and we don't want games or competitions suspended, but if doing so helps one individual stay healthy - just one - we do it no questions asked.

If it's a choice between football and the good of the wider society, it's no contest. Really, it isn't.

Today's decision and announcement is being implemented with the motive of keeping people safe. Because of that we support it completely. We have seen members of teams we compete against become ill. This virus has shown that being involved in football offers no immunity. To our rival clubs and individuals who are affected and to those who later will become so, you are in our thoughts and prayers.

None of us know in this moment what the final outcome will be, but as a team we have to have belief that the authorities make decisions based on sound judgement and morality.

Yes, I am the manager of this team and club and therefore carry a leadership responsibility with regards to our future on the pitch. But I think in the present moment, with so many people around our city, the region, the country and the world facing anxiety and uncertainty, it would be entirely wrong to speak about anything other than advising people to follow expert advice and look after themselves and each other.

The message from the team to our supporters is only about your well-being. Put your health first. Don't take any risk. Think about the vulnerable in our society and act where possible with compassion for them.

Please look after yourselves and look out for each other.

Can't be said better than that. At such a time of national emergency, truth and transparency are vital as well. This is not a war against other nations who can glean advantageous information from listening to our leaders. But it is an epidemic where the more accurate information the populace has, the better and safer they can lead their lives, and the better decisions they can make in terms of their health.

Thus, while as First Amendment lawyers we must be mindful and sensitive to the critical nature of this crisis, when we are summoned, we must also be firm in advocating for the right of the people to know. As I recall from arguments I made following 9/11, it's a difficult

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balance. We must pay heed and respect to the turmoil this unprecedented situation has placed on peoples' lives - acknowledging that those are priorities. At the same time, we must argue forcefully for our clients and the public to get maximum access to information about the situation. Keeping medical information and facts about our governments' responses away from the public could wrongly prejudice individuals' decisions and ultimately cost lives. (While some might disagree, I would submit that the balance is somewhat different if you are seeking non-Corona based documents or information from the government.)

President Trump with Dr. Anthony Fauci

We must pay heed and respect to the turmoil this unprecedented situation has placed on peoples' lives - acknowledging that those are priorities. At the same time, we must argue forcefully for our clients and the public to get maximum access to information.

From the perspective of both truth and transparency, our federal government has failed us. It is in a crisis like this where all of the ills and lies of the past come home to roost. After all, what is the credibility of a Chief Executive whose false and misleading statements have numbered over 16,000 in his first three years, who lied about something as petty as the crowd at his inaugural and as serious as altering a weather map forecasting a major hurricane.

Yet in this crisis, when informing and uniting the country is of critical importance, the lies continue. Thus, mirroring the description of his quid pro quo-ish telephone call with Ukraine's President, Trump said that our Coronavirus testing supplies are "perfect," a statement clearly belied by the shortages all over the country. Even more telling, he blatantly lied about his early views of the dangers of the pandemic. Despite being dismissive about the number of cases and the gravity of the possible harm, saying that it was no worse than the flu, when circumstances dictated him to take the situation more seriously, he facilely denied or ignored his prior position. His misstatements have caused the scientific experts on his team, such as Dr. Fauci, to squirm and cringe, such as when he said that a vaccine would be available "relatively soon" despite being told that the process would take over a year.

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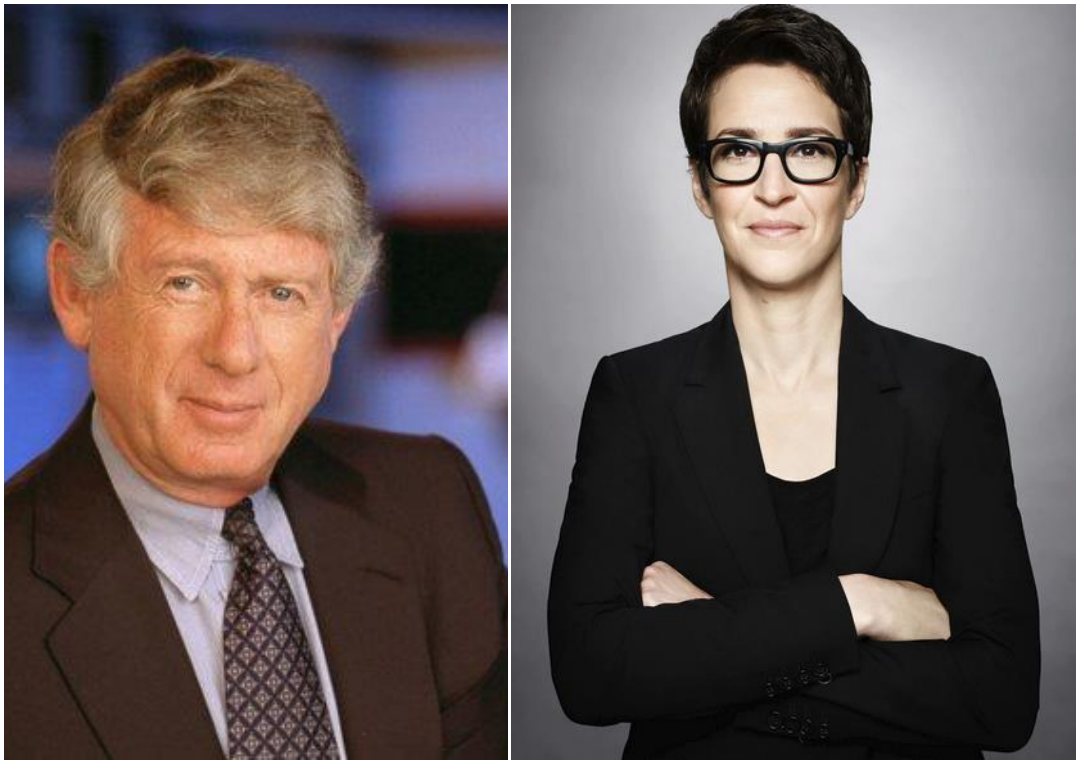

As Rachel Maddow said, "I would stop putting those briefings on live tv - not out of spite, but because it's misinformation." Or as Ted Koppel says, putting a camera on a live event "is technology, not journalism; journalism requires editing and context."

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Maybe worse, he has promoted a cure, chloroquine, which his own experts recognize has not been approved and may be unsafe. And reverting to form, he has blamed the Obama Administration for a detrimental decision on testing and its response to a prior epidemic, both of which were simply untrue.

One might say that all politicians puff, but this is not mere puffery. Trump's are blatant misstatements and lies when the country is aching for leadership, and urgently needs useful and accurate information from its government.

Aside from letting the public down – yet again making clear that his priorities are his ego and his political and financial ends – Trump's misstatements have led to a unique situation where some news networks have decided not to carry his press briefings live because of the misleading information he is offering. It's hard to imagine that in a time of national emergency the networks wouldn't televise live press conferences of any past president. After all, the historic presumption is that the public ought to hear what their leader has to say. But here they have determined that the false information Trump is putting out is too dangerous to transmit live and without context.

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As Rachel Maddow said, "I would stop putting those briefings on live tv - not out of spite, but because it's misinformation." Or as Ted Koppel says, putting a camera on a live event "is technology, not journalism; journalism requires editing and context." Koppel added that even though presidential pronouncements usually are treated differently, "President Trump has created a special compartment all his own."

Finally, we circle back to the theme of unity. Here was a chance for the president to lead and unite the country. But aside from a few formulaic niceties, Trump's press briefings have been more like campaign rallies than statements of clear thinking and inspired leadership. What other leader in our history would use the platform he is given during a national emergency to brag (falsely) about what a great job he is doing or, more outrageously, gloat that his briefings received higher ratings than "The Bachelor?" (That his performance has resulted in a rise in his approval rating is as depressing as it is absurd.)

Here was a chance for the president to lead and unite the country. But aside from a few formulaic niceties, Trump's press briefings have been more like campaign rallies than statements of clear thinking and inspired leadership.

Worse, especially to us, he is exploiting this terrible crisis to espouse the same divisive propaganda he has relied on for years – not least blasting the press. In one briefing, Trump declared that the press was "siding with China" in covering the pandemic. He tweeted that "the LameStream Media is the dominant force in trying to keep our Country closed as long as possible in the hope that it will be detrimental to my election success." And when asked by an NBC reporter what he'd say to comfort frightened Americans, Trump responded "I say that you're a terrible reporter."

Such gratuitous bullying at a time of national urgency is unspeakable. To attack journalists when they are, with dedication and courage, delivering accurate and critical facts to the American people is absurd. One only wishes that our President would be one-tenth as selfless and brave as the doctors and nurses who have been putting themselves in harm's way every day for the benefit of all of us.

The opinions expressed in this column are those of the author and not the MLRC. We welcome responses at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

March Gladness! Two March 2020 Court Decisions Recalibrate Music Copyright Law

By Kenneth D. Freundlich

March 2020 will be remembered at least in part (coronavirus notwithstanding) as the month when the pendulum swung back to reality in the music copyright sphere.

In the well-publicized *Blurred Lines* decision, Williams v. Gaye, 895 F. 3d 1106 (9th Cir. 2018), brought by Marvin Gaye's heirs for infringement of Gaye's "Got To Give It Up" by Pharrell Williams' and Robin Thicke's "Blurred Lines," the Ninth Circuit cast a long shadow over the songwriting industry by affirming a jury verdict that found copyright infringement based on alleged similarity between a so-called "constellation" of unprotected elements presented by Plaintiff's "expert" musicologist and no similarities of melody, harmony or rhythm. Amici musicologists, whom I represented in that case, criticized the decision as casting a "pall on th[e] [music] industry, and specifically [inhibiting] songwriters at their core, given the threat of far-fetched claims of infringement bolstered by speculative and misleading music testimony like the testimony presented in the *Blurred Lines* case." Judge Nguyen, in the now famous *Blurred Lines* dissent, criticized her majority colleagues for allowing the Gayes to "copyright a musical style" and went on to criticize the Gayes' expert for "cherry-picking brief snippets of music to opine that a 'constellation' of individually unprotectable elements in the music made them substantially similar."

Defendants, as well as the amici musicologists I represented, argued to the en banc Court that Plaintiff's expert's implication that infringing melodic and harmonic similarities can result from common generic musical elements was sophistic.

Following the *Blurred Lines* verdict and the Ninth Circuit's affirmance, songwriters have worried about when their "homage" to a prior genre of music would cross the line into copyright infringement. How would they decide whether a short phrase of commonplace, non-copyrightable musical elements (pitches, rhythms, harmonies, key signatures, tempos, genres, etc.) crossed the line into something actionable *vis-a-vis* a pre-existing song? The number of consultations with lawyers about works-in-progress, as well as copyright claims in general, skyrocketed. Copyright attorneys were faced with a plethora of potential new cases and could offer only limited advice as to how a songwriter or other copyright defendant might avoid *Blurred Lines*-styled claim.

But the defense bar pushed back, and the tide has begun to turn beginning with the Ninth

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Circuit's *en banc* decision in Skidmore v. Led Zeppelin, 2020 WL 1128808 (9th Cir. Mar. 9, 2020).

Ninth Circuit en banc Affirms Led Zeppelin Jury Verdict

In *Led Zeppelin*, the Plaintiff, who is the trustee for Randy California's heirs, sued Led Zeppelin and related Defendants alleging that the song "Taurus" infringed the iconic song "Stairway to Heaven." The music in question consisted of alleged common arpeggios, repeated eighth notes and repeated two-note phrases, extracted from their larger contexts. The jury was not convinced and rendered a defense verdict.

The Plaintiff appealed. On appeal, a Ninth Circuit three-judge panel vacated the jury verdict based on what it found were faulty jury instructions. The Defendants filed a petition for a rehearing *en banc*, which the Ninth Circuit granted. Defendants, as well as the amici musicologists I represented, argued to the *en banc* Court that Plaintiff's expert's implication that infringing melodic and harmonic similarities can result from common generic musical elements was sophistic. We urged that these common elements comprised nothing more than a descending chromatic bass line and its associated chords, both of which are commonplace and unprotectable musical scènes à faire.

In its *en banc* decision, the Ninth Circuit affirmed the jury's verdict and made several key holdings. First, that the scope of a pre-1978 musical composition copyright is determined by what is in the deposited sheet music as mandated by the statutory language of the 1909 Copyright Act which required the deposit of a complete copy of the musical work for copyright protection at a time when sound recordings were not accepted as a deposit by the Copyright Office. The Court rejected Plaintiff's argument that restricting protection to the deposit copy

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would restrict claims by musicians who do not read or write music.

The *Led Zeppelin en banc* Court's sheet music holding has already had a significant impact on copyright litigation, even outside the Ninth Circuit. As I write this article, word comes that in *McDonald, et al. v. Sheeran, et al.*, 17 Civ. 5221 (S.D.N.Y. Mar. 24, 2020)—which the presiding judge (Hon. Louis Stanton) had stayed pending the outcome of the *Led Zeppelin en banc* proceedings—cited the *en banc Led Zeppelin* decision in granting Defendants' motion *in limine.* The effect of this ruling is to limit Plaintiffs to comparing Defendant Ed Sheeran's song "Thinking Out Loud" with the musical composition "Let's Ge It On" as reflected in the deposit copy filed with the U.S. Copyright Office. This is no doubt a great victory for the defense in that case and a testament to the reach of the Ninth Circuit's *en banc* decision.

The *Led Zeppelin en banc* Court also took the opportunity in its decision to jettison the oft-criticized inverse ratio rule which had permitted juries to find substantial similarity with a lesser showing of proof of substantial similarity when a high degree of access is shown. Scholars roundly criticized this rule on the grounds that whether a defendant had access to a plaintiff's work should have no bearing on the calculus for determining substantial similarity of two works. Moreover, Judge Nguyen in her *Blurred Lines* dissent, as well as the amici musicologists I represented, had urged the Court to invalidate the inverse ratio rule. While the *Blurred Lines* majority did not outright reject the inverse ratio, all references to the inverse ratio rule were removed in the amended *Blurred Lines* majority opinion following the denial of rehearing *en banc* in that case. The Ninth Circuit in *Led Zeppelin* Court took this even further, by not only granting the Led Zeppelin Defendants petition for rehearing *en banc*, but by also expressly and emphatically rejecting the inverse ratio rule. The law within the Ninth Circuit is now clear that the degree of access has no relevance in proving substantial similarity.

The Led Zeppelin en banc Court also took the opportunity in its decision to jettison the oft-criticized inverse ratio rule which had permitted juries to find substantial similarity with a lesser showing of proof of substantial similarity when a high degree of access is shown.

From a musicological copyright perspective, however, the gemstone of the *Led Zeppelin en banc* decision was its treatment of the "selection and arrangement" jury instruction in its dicta (the Court did not need to reach the issue in its decision). Defendants and amici musicologists argued that the only copyright protection the allegedly infringed portions of "Taurus" might receive, if any, was a copyright in the "selection and arrangement" of the generic commonplace elements, not a copyright in the elements themselves. In dicta in footnote 13, the Ninth Circuit presented a nuanced view of this issue, acknowledging for the first time in a music case that under appropriate circumstances the so-called "thin copyright" doctrine might apply to require

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proof of virtual identity between two songs where there was a "narrow range of available creative choices." Stopping short of saying that all "selection and arrangement" copyrights were "thin," the Ninth Circuit left open the possibility that a future Court might apply the "thin copyright" doctrine in a worthy case.

The *Led Zeppelin en banc* decision arrived merely a week before the Defendants and amici musicologists (again represented by my firm) prepared for oral argument on Defendants' renewed motion for judgment as a matter of law (*i.e.,* judgment notwithstanding a jury verdict) ("Renewed JMOL"), or, in the alternative, new trial before Judge Christina Snyder in *Gray, et al v. Perry, et al.*, 2020 WL 1275221(C.D. Cal. Mar. 16, 2020)

District Court Overturns Katy Perry Verdict

In *Perry*, Plaintiff Gray and his co-Plaintiffs alleged that Katy Perry's song "Dark Horse" infringed Gray's song "Joyful Noise." Here, the only similarities alleged were a pitch sequence of scale degrees 3-3-3-3-2-2, the eighth note spacing of the notes, the length of the notes, the pingy sound (timbre), and the placement of the ostinato in the songs. A jury found that the Defendants infringed Plaintiffs' copyright by Defendants' song "Dark Horse" and awarded Gray $2.8 million in damages.

In what can be described as one of the most comprehensive musical analysis ever provided by a judicial opinion, Judge Snyder's opinion granting Defendants' Renewed JMOL masterfully goes through the expert testimony and applies the "extrinsic test." First, the Court separated out the protected elements from the unprotected ones. In so doing, the Court agreed with the Defendants that none of the individual elements that Plaintiffs' expert found similar were protectable – neither the "3-3-3-3-2-2 pitch sequence, the eighth note rhythm, the timbre ,nor the texture. The heart of the Court's opinion included a nine bullet-pointed reference guide detailing the commonplace musical elements that have routinely been denied copyright protection standing alone such as key, scale, length of notes, pitch sequence, etc.

But the *Perry* decision did not end there. Judge Snyder next took up the nature of protection for a combination of unprotectable elements, the issue *Led Zeppelin* had touched on only in dicta. The Court adapted the *Led Zeppelin* footnote to made clear that the "thin copyright" doctrine would, in certain circumstances, apply in music cases and required a plaintiff to prove as a threshold matter, that the similarities were "numerous enough, and their selection and arrangement original enough" to warrant copyright protection at all. The Court reviewed the limited Ninth Circuit precedent and distinguished "Dark Horse" from those cases because the portion of "Dark Horse" at issue was an otherwise unprotectable musical phrase which appeared in prior art isolated from the rest of the song. The Court also cited to two databases cited by amici musicologists which found numerous examples of the ostinato in question. In concluding, the Court found that since the sole musical phrase that Plaintiffs' claim was based upon is not protectable, the Plaintiffs' case failed as a matter of law. In effect, it should never

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have gone to the jury.

Judge Snyder concluded her analysis of the music stating that even if the ostinato were protected expression, because the range of expression in an eight note pop music ostinato made up of individually unoriginal elements "narrow," the Plaintiffs would have to prove "virtual identity." And both experts in the case conceded that the two works were not virtually identical.

Why This Matters

A copyright plaintiff must satisfy both an "extrinsic test" of infringement which is based on expert testimony, and then an "intrinsic test" which is the subjective impression of the fact finder of the similarity (or lack thereof) of the two works in question. In music cases, this is the difference respectively between an analytical dissection of music by experts and the simple listening to a recorded version of the compositions (whether a popular sound recording or an analog recording of the actual notes without performance elements) by the fact finder.

The law requires judges to perform the "extrinsic test" before a case even goes to the jury and here is where there is mischief. In music cases, as in *Blurred Lines,* judges may be (and have been) hesitant to prefer one expert report over another because of the lack of clear judicial framework for analyzing music. Such a handicap does not exist for example in a case of literary work infringement – judges have effective tools for comparing two literary works but lack similar tools for music. How is a Judge supposed to make the comparison? Is it the Judge's musical clerks we should rely on? Or the luck of the draw as to whether our Judge has musical training? One idea might be to move under the Federal Rules for the Judge to appoint a special master musicologist to assist in the screening process.

Neither Blurred Lines, Led Zeppelin, nor Perry, should ever have made it to a jury. But thankfully the tide has shifted with the dynamic duo of March 2020 decisions.

But one thing is for sure: The care and attention Judge Snyder put into her decision will be a template on which judges can rely to screen cases on the "extrinsic test" and keep the objectively meritless ones from the jury. Neither *Blurred Lines*, *Led Zeppelin*, nor *Perry*, should ever have made it to a jury. But thankfully—subject of course to the expected appeal of the *Perry* decision to the Ninth Circuit and the possible filing and granting of a writ of certiorari in the *Led Zeppelin* case so that the U.S. Supreme Court might be final arbiter of the copyright issues therein—the tide has shifted with the dynamic duo of March 2020 decisions in the *Led Zeppelin* and *Perry* cases. Indeed, if those two decisions stick, it may be a while before we see another far-fetched copyright case come before a jury.

Ken Freundlich is the founding partner of Freundlich Law admitted to practice in New York and California. He represented Amici Curiae Musicologists in the three cases discussed in this article. A full list of case counsel is in the linked opinions.

Minnesota Supreme Court Expands Scope of Fair Report Privilege

But Leaves Water Muddy On When Privilege Is Defeated

By Leita Walker

In a long-awaited decision—oral arguments were heard in early January 2019—the Minnesota Supreme Court issued an opinion holding that the state's fair report privilege extends to official press conferences and press releases.

It nevertheless remanded the case for a new trial on 5 of the 11 challenged statements, concluding that jury instructions had not adequately set forth the relevant factors for determining whether the privilege was defeated.

In a long-awaited decision, the Minnesota Supreme Court issued an opinion holding that the state's fair report privilege extends to official press conferences and press releases.

Background Facts

The case, *Larson v. Gannett Co.*, 2020 Minn. LEXIS 87 (Minn. Feb. 26, 2020), arose from the 2012 shooting death of a Cold Spring, Minnesota police officer and the arrest that same night of appellant Ryan Larson, who was booked on suspicion of second-degree murder. The county website's publicly available jail log listed Larson's name, age, "charge" of "MURDER 2," and photograph.

The next day, representatives from three law enforcement agencies held a press conference to announce Larson's arrest and to discuss the ongoing investigation. At the press conference, the Sheriff made clear that the investigation was ongoing but stated that "Ryan Larson was taken into custody and was booked into the Stearns County jail in connection with this incident."

During the press conference, a member of the media asked whether there was "any reason to believe that there might be some other individual involved," and a law enforcement officer responded that "we don't have any information to believe that at this time." At the end of the press conference, the same officer also stated, "from our preliminary investigation, . . . it's apparent to us that the officer was ambushed at the scene."

That same day, the Minnesota Department of Public Safety issued a corresponding press release. The release stated that "within an hour" of launching a search for the suspect, "investigators took Ryan Michael Larson, 34, of Cold Spring into custody. Larson was booked into the Stearns County Jail on murder charges early this morning."

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Within a matter of days, law enforcement realized they had made a mistake. Larson was released from jail without being charged with a crime and then later cleared as a suspect. By then, however, various media organizations had identified him as the suspect in the case, including KARE 11 (a TEGNA station) and the *St. Cloud Times* (a Gannett publication), which Larson sued for defamation over 11 separate statements.

The statements were:

1. Police say that man—identified as 34-year-old Ryan Larson—ambushed officer Decker and shot him twice—killing him.

2. Investigators say 34-year-old Ryan Larson ambushed the officer, shooting him twice. Larson is in custody.

3. He [Officer Decker] was the good guy last night [*13] going to check on someone who needed help. That someone was 34-year-old Ryan Larson who investigators say opened fire on Officer Tom Decker for no reason anyone can fathom.

4. Investigators believe he fired two shots into Cold Spring Police Officer Tom Decker, causing his death.

5. Police say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker.

6. [The officer's mother] holds no ill-will against the man accused of killing her son.

7. Ryan Larson, the man accused of killing Officer Decker, could be charged as early as Monday.

8. Man faces murder charge.

9. His mind must have really been messed up to do something like that. I know Tom would have forgave him.

10. He does not have an extensive criminal history, but was cited with disorderly conduct in 2009. He was a second year machine tool student at St. Cloud Tech. Larson is being held in the Stearns County Jail.

11. [She] said she came to the jail Tuesday because she had one thing she wanted to say to Larson if she got to [sic] the chance to see him leave the jail. "This isn't over," she said.

Procedural History

The case took an unlikely route to the Minnesota Supreme Court. It went to trial in November 2016 after the trial judge had ruled that the fair report privilege did not apply to the challenged

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statements. As a result, the jury did not receive instructions on the privilege but instead got a straight defamation instruction, including this model instruction on falsity:

> A statement or communication is false if it is not substantially accurate. Substantial accuracy does not require every word to be true. A statement or communication is substantially accurate if its substance or gist is true.

Nevertheless, the jury returned a defense verdict, finding that certain statements were defamatory but that Larson failed to prove any of them false. Consequently, the jury did not make any findings on negligence or damages.

The district court then granted partial judgment as a matter of law to Larson. It again rejected the media defendants' argument that the statements were protected by the fair report privilege, concluding that the information relayed by law enforcement at the press conference and in the news release went "beyond the mere fact of arrest or charge" and thus fell outside the scope of the privilege. It then went on to conclude that "the implication of each statement was that Mr. Larson killed Officer Decker" and that the statements were false as a matter of law. It set the case for a new trial on negligence and damages only.

The *Larson* decision expands the privilege, but does little to clarify when and how it is defeated—and likely will leave those vetting Minnesota-focused news reports at a bit of a loss on how to advise their clients.

The Court of Appeals reversed, concluding that 8 of the 11 statements were protected by the fair report privilege. It further held that whether the news reports were fair and accurate was a fact question for the jury, but that the question was resolved by the jury's decision that the statements were not false. As for the remaining statements, the intermediate court held that dismissing them was harmless under the common law incremental-harm doctrine.

When the Minnesota Supreme Court granted Larson's petition for review, observers hoped the Court would take the opportunity bring clarity to the body of law surrounding Minnesota's fair report privilege, last considered by the state's highest court two decades ago in *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 328 (Minn. 2000). There, the Court held that the fair report privilege extends to city council meetings but that it can be defeated by including material reporting on events other than those that occurred at the city council meeting.

What we got was a mixed bag. The *Larson* decision expands the privilege, but does little to clarify when and how it is defeated—and likely will leave those vetting Minnesota-focused news reports at a bit of a loss on how to advise their clients.

Supreme Court Expanded Scope of Privilege

The defense bar should be gratified by the first part of the Court's decision, in which it extended the fair report privilege to official law enforcement news conferences and official

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press releases. This is especially true because two justices dissented from this part of the opinion, suggesting deep divisions within the Court over the scope of the privilege.

The Court explained that "that the public interest is served by the fair and accurate dissemination of information concerning the events of public or official actions or proceedings." *Larson*, 2020 Minn. LEXIS 87, *22. It also relied on the "agency" principle underlying the privilege, noting that "'because the meeting was public, a fair and accurate report would simply relay information to the reader that she would have seen or heard herself were she present at the meeting.'" *Id*. (quoting *Moreno*, 610 N.W.2d at 331).

Importantly, the Court described its approach as "incremental" and reminded readers that its decision was based on the facts at hand. It noted, for example, that the statements made at the press conference and in the press release stood "in stark contrast to informal interviews or private conversations with arresting officers or investigators, which are neither official actions or proceedings nor open to the public." *Id.* at 28. Guidance on whether those statements are also subject to Minnesota's fair report privilege will have to wait for another day.

The Court Struggled to Articulate When The Privilege Is Defeated

Despite finding the privilege applied—and despite acknowledging that the press is allowed some "leeway in its depiction and reporting of public events," *id.* at *23—the Court nevertheless remanded the case for a new trial on statement Nos. 1-5. (The Court found that statement Nos. 7-8 were fair and accurate summaries of the press conference and press release, and it found that statement Nos. 6 and 9-11 were not actionable for other reasons.)

Remand was necessary, the Court explained "[b]ecause the district court incorrectly determined that the fair and accurate reporting privilege did not apply to the news reports here," and thus "did not instruct the jury on the factors to consider in deciding whether the privilege had been defeated." *Id*. *35-36. Instead, the district court had simply instructed the jury on the element of falsity. In concluding this instruction fell short, the Supreme Court rejected the Court of Appeals' decision to "credit[] the jury's finding that the statements were not false as resolving the issue of whether the privilege was defeated." *Id.* at *38.

The irony of this conclusion, of course, is that the Court remanded so a new jury could be instructed on a privilege that the media defendants ultimately *did not need* to prevail in the first trial (because the jury determined the statements were true). In any event, the Court's decision attempts—query whether it succeeds—to articulate both a standard for when the privilege is defeated and also how a jury should be instructed on that issue.

While acknowledging that the "substantial accuracy" standard is "relevant to the jury's inquiry in determining whether the fair and accurate reporting privilege was defeated," the Court went on to state that "to be protected by the privilege, '[n]ot only must the report be accurate, but it must be fair,'" and that "[a] news report may not be fair if the report omits or misplaces law

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enforcement statements or adds contextual material in a way that changes the meaning of the statements." *Id.* at *41 (quoting Restatement (Second) of Torts § 611 cmt. f).

Later, the Court explained that the privilege may not apply if the report is "misleading," if it is not a "'fair abridgement'" of events, or if it contains "'additional contextual material . . . that conveys a defamatory impression or comments on the veracity or integrity of any party.'" *Id.* at 42 (quoting *Moreno*, 610 N.W.2d at 332). Because the jury instructions did not reference these factors, the Court determined, a new trial was necessary.

And yet, time and again, the Court returned to the substantial truth doctrine. Summarizing its analysis, it said, "[i]n other words, a news report is fair and accurate if the report has 'the same effect on the mind' of the listener or reader as that which attending the press conference or reading the press release would have had. *Id.*at 42 (quoting *McKee v. Laurion*, 825 N.W.2d 725, 730 (Minn. 2013), a substantial truth case that did not involve the fair report privilege).

And later, it said, the crucial question, "is whether the statements in the news reports communicated to the viewer or reader the same meaning that someone who actually attended the press conference or read the press release would have taken away from the press conference or press release." *Id.* at 43. "Did the reported statements produce the same effect on the mind of the listener or the reader as the oral and written statements of the law enforcement officers at the press conference or in the press release," the Court asked. *Id.* at 44. "If the [trial] court had framed the issue this way, the jury would have clearly understood that its charge was to determine the fairness and accuracy of the reported statements and not whether the underlying substance of those statements—that Larson killed Officer Decker—was true or false." *Id.* But because the jury instructions did not make this distinction clear, they were "were misleading as to a crucial inquiry in this case." *Id.*

If law enforcement "accuse" a man of killing a police officer, arrest him, and book him on suspicion of second-degree murder, it should be fair to assume—and to report—that they "believe" he did it.

Motion for Rehearing Denied

Despite the Supreme Court's explanation—perhaps *because* of the Court's explanation and its heavy reliance on the substantial truth doctrine—it is difficult to understand how the jury's finding that statements about what law enforcement believed or said were substantially true does not *inevitably* lead to the conclusion that the statements were fair and accurate summaries of the press conference and press release.

Further, it is hard to understand how that statement "Ryan Larson, the man accused of killing Officer Decker, could be charged as early as Monday"—which the Supreme Court dismissed—is any different than, say, the statement that "Investigators believe he fired two shots into Cold Spring Police Officer Tom Decker, causing his death"—which the Court remanded for new

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trial. After all, if law enforcement "accuse" a man of killing a police officer, arrest him, and book him on suspicion of second-degree murder, it should be fair to assume—and to report—that they "believe" he did it. As any first-year law student can recite, "probable cause" to arrest means probable cause *to believe*.

That the court dismissed one of these statements but sent the other back for new trial creates a very difficult task for journalists who are covering breaking news stories and attempting to summarize and distill complicated facts for an information-hungry public. Indeed, the decision encourages reporters to view themselves as mere megaphones for the government, simply regurgitating what official actors say, and discourages them from pursuing the laudable goal of practicing journalism in a way that provides context and analysis. One need only read the current headlines—which show how our government misled the public regarding the ongoing pandemic—to understand the dangers of such journalistic passivity.

Unfortunately, however, the media defendants' petition for rehearing was denied on March 30. That petition had argued (1) that there is "no basis for a remand on the fair and accurate reporting privilege because the jury has already found that, even in the absence of privilege, Larson failed to meet his constitutional requirement for proving falsity" and (2) that, rather than remand for new trial, the Supreme Court should remand to the Court of Appeals so that it can consider arguments that there Larson has no evidence of negligence or causation of damages.

The Court of Appeals may eventually get another crack at the case—but only after a second trial.

The Court of Appeals may eventually get another crack at the case—but only after a second trial.

Leita Walker is a partner in the Minneapolis office of Ballard Spahr LLP and a member of the firm's Media & Entertainment Group. She represented a coalition of media organizations that submitted amicus briefs in the Larson case at both the Minnesota Court of Appeals and the Minnesota Supreme Court. Plaintiff was represented by Stephen C. Fiebiger, Burnsville, MN. Gannett was represented by Steven J. Wells, Timothy J. Droske, Nicholas J. Bullard, Dorsey & Whitney LLP, Minneapolis.

Massachusetts High Court Averts "Fair Report" Disaster

By Jeffrey J. Pyle

In 2018, the intermediate Appeals Court in Massachusetts held that a student newspaper editor could be held liable for accurately reporting information in a state university's police blotter. Thankfully, on New Year's Eve 2019, the Supreme Judicial Court ("SJC") reversed that alarming and restrictive interpretation of the state's fair report privilege. Butcher v. Vishniac.

At the same time, the SJC's decision in *Butcher v. Vishniac* reinforces a stringent limit on the privilege: the police must take an "official action" or make an "official statement" before a blotter entry is protected.

Background

The case arose on March 13, 2013, when officers from the Campus Safety department of the University of Massachusetts Boston responded to a report of suspicious activity on a shuttle bus between campus and the nearby subway station. The bus driver told officers that an unknown man who did not appear to be a student had been taking photographs of women without their permission. The bus driver said he confronted the alleged creep, who responded by attempting to hide his face with a newspaper. The bus driver sent a photograph of the man to Campus Safety.

A Massachusetts statute requires that all local and university police departments maintain a public log of "responses to valid complaints received, crimes reported, the names, addresses of persons arrested and the charges against such persons arrested." M.G.L. c. 41, § 98F. Campus Safety duly logged the bus incident, including a short description of the driver's statement. Shortly thereafter, the UMass Boston student newspaper, *Mass Media*, published a verbatim excerpt of the entry.

A few days later, Campus Safety gave the bus driver's photograph of the suspect to *Mass Media* to enlist its help identifying him. The newspaper later published the photo alongside an article titled, "Have you Seen This Man?" The article repeated the substance—or at least the defamatory sting—of the earlier blotter entry:

> On the morning of March 13, the man in the photograph allegedly walked around the UMass Boston campus snapping pictures of female members of the university community without their permission. According to the student who reported him, he did not appear to be a student as he was not carrying a backpack. If you see him, please call Campus Safety . . . .

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Soon thereafter, the man in the photo was identified as Jon Butcher, a university IT worker. Campus Safety interviewed Butcher, who vehemently denied that he had taken any photographs of women on the day in question. Rather, he said he was photographing what he perceived to be safety violations at the bus station. Sure enough, the police seized Butcher's phone and found no photos of women taken that day.

Feeling persecuted, Butcher filed a *pro se* defamation complaint against a collection of UMass officials, as well as Cady Vishniac, the student news editor of *Mass Media*. Vishniac filed a motion for summary judgment, arguing that the fair report privilege protected her from liability over the second article. The trial court agreed, holding that all of the allegedly defamatory statements in the story were "in police logs, which are public records," and "[a] fair and accurate report of matter contained in a public police record is privileged." (The first story, which merely reprinted the log entry, did not include the plaintiff's picture or identify him, so the claim based on it failed on "of and concerning" grounds).

Butcher appealed, and in 2018, to everyone's surprise, the Appeals Court reversed the allowance of summary judgment. The court framed the fair report issue as "whether, *in the absence of any official government action*, the fair reporting privilege extends to a newspaper's publication of a witness's statement to police." The court noted that the police log did not reflect any arrest, search warrant, or other formal process. The privilege, the court held, "does not apply to witness statements to police, whether appearing in an official police report or not, where no official police action is taken." The Appeals Court also held there "was no official police statement" about the incident—notwithstanding the statutorily-required log entry.

To its credit, the Massachusetts Attorney General's Office stepped in to represent Vishniac, the *Mass Media* editor, and sought further appellate review on her behalf with the Supreme Judicial Court. The SJC granted this relatively unusual relief. Gatehouse Media and other press entities submitted an *amicus* brief that laid out the harm to the media the Appeals Court decision threatened.

In an opinion by Justice Barbara Lenk (former First Amendment counsel to the *Boston Herald*), the high court began with the definition of the privilege in the Restatement: "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported." Restatement (Second) of Torts, § 611 Included in this privilege, the court noted, are "reports of official statements" and "reports of official action."

The rationale for the privilege, the court noted, is not to ensure the public has access to newsworthy information in general, but rather to facilitate the "public supervision" of official proceedings and actions. The public has a right to know "of official government actions that affect the public interest," and the only way the media will report on such actions is if they are

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free from liability, "provided that their report was fair and accurate."

Turning to the case at hand, the court rejected the editor's argument that information in official police blotters is always subject to the fair report privilege. The fact that the police write something in a blotter does not make it an "official statement." "Rather, we look to the contents of the actual records themselves to determine whether they are reports of either official statements or official actions."

The statute governing police blotters, the court noted, requires recording of three kinds of events: "responses to valid complaints received," "crimes reported," and "the names, addresses of persons arrested and the charges against such persons arrested." G. L. c. 41, § 98F. Reports of arrests are always privileged as "official actions," but a complaint or a "report of a crime" by a witness, standing alone, is not. Rather, there must be some "subsequent response by police" to the report for it to be protected as an "official action."

In support of this limitation, the *Butcher* court relied on the longstanding Massachusetts rule that civil complaints are not subject to the fair report privilege unless and until they lead to judicial action. This rule has its most famous expression in *Cowley v. Pulsifer,* 137 Mass. 392, 394 (1884), in which Justice Oliver Wendell Holmes, Jr. wrote that the privilege has "no application whatever to the contents of a preliminary written statement of a claim or charge." Such documents "do not constitute a proceeding in open court," and public knowledge of their content "throws no light upon the administration of justice." Holmes was also concerned that such an extension of the privilege would invite mischief: "It would be carrying privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and filing it in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity."

Picking up on Holmes' theme, the *Butcher* court held that like a civil complaint, the "form and contents" of a witness's complaint to the police "depend wholly on the will of a private individual," who is under no obligation to tell the truth. If bogus witness statements that lead to no "police action" are protected, the court worried, then a defamer need only slander someone to the police, and the press could then broadcast the calumny far and wide, without fear of liability.

So, what about the *Mass Media* article? *Contra* the Appeals Court, the SJC held that the story reflected police action, in the form of an investigation. The blotter entry itself showed that the police responded to the bus driver's account by making the discretionary decision to visit him and take a statement. The article also reflected "ongoing police action, i.e., the search for an unknown man, and the reasons underlying that action." In other words, a police investigation is sufficient "official action" to activate the privilege; formal process like an arrest is not

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necessary.

To the relief of law enforcement, the court also held that the Campus Safety-provided photograph included in the article was protected. "[W]hen the police reach out to local journalists and ask for their assistance in identifying an unknown person, they are performing an official act that falls under the fair report privilege."

So, the SJC's decision has served to allay the media's worst fears about the *Butcher* case. Journalists in Massachusetts can still report on investigations that are reflected in police blotters, and can publish police-provided photos of suspects to ask the public to "be on the lookout" for them. Also, *Butcher's* limitations on the privilege likely won't be likely to lead to routine libel suits against the news media, because most police departments in the Commonwealth do not identify suspects unless they've been arrested.

The SJC's decision has served to allay the media's worst fears about the Butcher case. Journalists in Massachusetts can still report on investigations that are reflected in police blotters.

Still, the *Butcher* court missed an opportunity to re-align the common law fair report privilege with the need for accountability journalism. For one thing, the SJC failed to recognize that the very fact that a witness allegation is made to police may be important and worthy of the privilege, whether or not the police choose to investigate. To take an extreme example, under *Butcher,* if a victim calls the police and accuses a specific individual of assault, but the police simply choose not to investigate, then any log entry about the assault would not be privileged because there was no "official action" or "official statement." Yet a report on the *absence* of such official action clearly merits protection.

Similarly, why shouldn't the Massachusetts news media be protected when they report on the content of newly-filed civil complaints? In many cases, it can be months before a judge takes "official action" in a civil case, and some cases settle before a judge, or even a clerk, takes any action at all. Yet complaints contain newsworthy information unavailable anywhere else, and the public is entitled to know how the court system is being used. The availability of sanctions for sham pleadings should alleviate any danger that the court system will be misused simply to avail a defamer of a media megaphone.

The complexity of the *Butcher* analysis also poses practical difficulties for the press. What if the press suspects that a complaint has triggered a police investigation, but the police won't comment? Is the press protected in reporting on the blotter entry if it later turns out that an investigation had begun? Or must the investigation be apparent on the face of the blotter?

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Finally, *Butcher* holds that if the police include information in a blotter that is not strictly "required" by the blotter statute, such as a call for medical assistance or a request to rescue a cat stuck in a tree, those entries too are unprivileged. This appears to mean that news editors, many of whom have no regular access to legal advice, must now determine whether a particular blotter entry falls into one of the statutory categories of information required to be included in the log. If they guess wrong and publish, they'll be left without the privilege.

The nice thing about common law privileges is that they can be modified by statute. Other states have statutory fair report privileges that broadly protect reporting derived from official public records. Perhaps, in light of *Butcher,* the Massachusetts legislature should consider something similar.

Jeffrey J. Pyle is a partner at Prince Lobel in Boston. Plaintiff acted pro se. David C. Kravitz, Deputy State Solicitor, and Denise Barton, represented student journalist Cady Vishniac.

Second Circuit to King of Bullshit News: "No Redo on Review: You Lose, Fake News."

Katherine Bolger, Rachel Strom and John Browning

Heavy is the head that wears the crown - and the head of Central European News boss Michael Leidig must weigh a little heavier after the Second Circuit twice declined to revive his defamation lawsuit against BuzzFeed for publishing an article anointing him "King of Bullshit News."

As BuzzFeed reported, Mr. Leidig's news organization – Central European News (or "CEN") – churned out click-bait stories from far-flung corners of the globe that often turned out to be "inaccurate or downright false." Leidig sued for libel. Late last year, the Second Circuit affirmed a decision granting summary judgment in BuzzFeed's favor and – on January 31, 2020 – Leidig's petition for leave to reargue *en banc* was denied.

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Background

The English journalist Michael Leidig founded CEN as a Vienna-based newswire service that specializes in outlandish tabloid news stories, often originating from far-flung corners of Eastern Europe or China. For example, CEN has produced stories about a Russian man who survived a bear attack after his Justin Bieber ringtone scared off his grizzly assailant and a series of articles about men being castrated by an angry mob, jealous wife or unhinged aunt, respectively. These viral news stories are widely published by CEN's tabloid newspaper clients, including the *Daily Mail*, *Metro* and *The Mirror* in the United Kingdom, apparently because they tend to generate the sort of heavy online traffic that can be converted into advertising revenue.

Three reporters at BuzzFeed News – including Craig Silverman (who coined the term "fake news" to describe the kind of dubious viral content proliferating online) and Tom Phillips (who specializes in debunking online hoaxes) – became suspicious of CEN's content and spent many months researching the veracity of its viral news stories. On April 24, 2015, BuzzFeed published an article about CEN and Leidig entitled *The King of Bullsh*t News: How a small British news agency and its founder fill your Facebook feed with stories that are wonderful, wacky – and often wrong*. BuzzFeed identified eleven CEN stories that were "completely false or … based on images that did not match the stories" and an additional eight articles that "contained suspicious details such as perfect quotes that appeared in no other coverage."

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Based on the analysis presented in its article, BuzzFeed concluded that "an alarming proportion of CEN's 'weird news' stories are based on exaggeration, embellishment, and outright fabrication – and that the company has scant regard either for the accuracy of its content or for what happens to the people … whose names and images are spread across the world." Irked at this characterization of his content, Leidig and CEN sued BuzzFeed for defamation in January 2016.

Judge Marrero of the Southern District of New York granted BuzzFeed's motion for summary judgment lawsuit on March 21, 2019, holding that he had failed to shoulder the burden of proving that BuzzFeed's reporting was substantially false. Leidig v. BuzzFeed, Inc., 371 F. Supp. 3d 134 (2019).

Reaffirming the traditionalist view that facts matter, Judge Marrero rejected Leidig's own "self-serving and discredited testimony" that CEN did not make up stories in the absence of a shred of evidence capable of proving that any of the stories discussed in BuzzFeed's article were true. Indeed, Leidig conceded the truth of 215 out of the 216 statements of undisputed material fact that BuzzFeed advanced in support of its reporting, including substantial evidence demonstrating that CEN could not identify the source of fabricated quotations or other information that BuzzFeed concluded to be made up.

Ultimately, Judge Marerro held that "no jury could find BuzzFeed's statements to be false" on the basis of Leidig's declaration alone – and in the absence of reliable evidence supporting CEN's reporting – because "the First Amendment demands more" in defamation cases than the "bland cryptic claims of falsity supported by the credibility of a witness" that "might be sufficient to establish a proposition in other civil cases." *Id*. at 144, *quoting Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 188 (2d Cir. 2019).

Leidig and CEN appealed Judge Marrero's meticulously reasoned opinion to the Second Circuit. On December 2, 2019, a Second Circuit panel comprised of Judges Carney, Park and Jacobs heard oral argument. His majesty's attorney, Harry H. Wise III, argued that Judge Marrero's opinion should be reversed because Leidig had submitted a declaration stating that he had never falsified a story and because some of CEN's articles were true. Referring to one of the CEN stories about a two-headed goat in China – which contained fabricated quotes according to BuzzFeed's article – Mr. Wise invited the court to "actually see the two-headed

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goat" in a photograph.

Immune to the allure of this invitation to the carnival side show, Judge Park asked "to just get away from the two-headed goat for a second." He asked whether it was significant that BuzzFeed reported that 15 CEN stories were false, but CEN was only "challenging five of them" – and tacitly accepting that BuzzFeed's reporting on the other 10 were true. Judge Carney picked up the argument and asked why Leidig's libel claim should survive dismissal when he admitted that two-thirds of CEN's articles were false. Wise responded that BuzzFeed was wrong to report that CEN always made up its news. "Your answer is, 'Not always?'" asked Judge Carney. "Yes," Wise replied, apparently arguing that Leidig should succeed on his defamation claim because CEN does not always make up its content, leaving aside the fact that Leidig conceded that 10 of the CEN stories out of the 15 addressed by BuzzFeed were fabricated.

Moreover, Leidig's counsel did not identify the source of any of the many quotations BuzzFeed alleged to be made up. We can only assume that Leidig left Court muttering, "A source, a source, my kingdom for a source."

We can only assume that Leidig left Court muttering, "A source, a source, my kingdom for a source."

The Second Circuit, perhaps unsurprisingly, took little over two weeks to affirm Judge Marrero's order in a summary order issued on December 19, 2019. Leidig v. BuzzFeed, Inc., 788 Fed. Appx. 76 (2d Cir. 2019). The Court held that "the District Court correctly determined that Plaintiffs failed to establish any genuine issue of material fact with respect to the falsity of BuzzFeed's contested statements." *Id*. at 78. Importantly, the Second Circuit endorsed and approved of Judge Marrero's application of the *Celle* standard – which requires libel plaintiffs to pass a heightened evidentiary threshold to survive dismissal on summary judgment. "As we held in *Celle*," the Court wrote, "[w]hile a bland cryptic claim of falsity supported by the credibility of a witness might be sufficient to establish a proposition in other civil cases, the First Amendment demands more." *Id*. Here, Judge Marrero:

reasonably determined that Plaintiffs' conclusory assertions alone are insufficient to establish a genuine issue of material fact with respect to the falsity of the contested statements made by Buzzfeed. We explained in *Celle* that, "[t]o accept such a colorless denial as sufficient proof would effectively shift plaintiffs' burden of establishing falsity onto media defendants to establish truth." Our reasoning applies just as strongly here, where Plaintiffs published the stories that BuzzFeed described as fabricated. Plaintiffs "can be expected to have easy access to additional proof of

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falsity." That is, Plaintiffs are better positioned than Defendants to show whether their reports of two-headed goats, people walking cabbages out of loneliness, and so on, were accurate and substantially true.

Id. at 78-79. Having failed to even lay a "foundation for their bald assertion of falsity," Leidig's arguments on appeal were rejected and dismissal of his claim was affirmed.

Unwilling to accept defeat, Leidig filed a petition for rehearing *en banc* arguing that his "declaration that he never created a fake story or added a fake quote to a story, and that financial difficulties did not cause him or his company to turn to fraud is sufficient to create a question as to whether BuzzFeed's allegation of those things is false." Unfortunately for Leidig, the Second Circuit disagreed and declined his petition on January 31, 2020. As of this date, Leidig has not petitioned the United States Supreme Court for *certiorari*, but that remains his only option to prolong his campaign against BuzzFeed.

The Second Circuit's opinion will help media organizations seeking summary judgement on substantial truth grounds by precluding a libel plaintiff from creating a material issue of fact simply by denying any wrong doing.

In the meantime**,** the Second Circuit's opinion will help media organizations seeking summary judgement on substantial truth grounds by precluding a libel plaintiff from creating a material issue of fact simply by denying any wrong doing. In addition, the Court's endorsement of Judge Marrero's clear-eyed decision – which zeros in on just the facts (ma'am) – provides some reassurance and respite to those feeling disoriented by the fake news vortex.

Kate Bolger, Rachel Strom and John Browning, attorneys in the New York office of Davis Wright Tremaine LLP, represented BuzzFeed, Inc. in the libel suit brought by CEN and Michael Leidig. CEN and Leidig are represented by Harry H. Wise, III of the Law Office of Harry H. Wise, III.

Fair Report Privilege Protects WSJ Article About Sale of Looted Artifacts

Court Rejects Plaintiff's Survey Evidence on Meaning

By Jacob P. Goldstein

On February 20, a unanimous panel of the New York Appellate Division, First Department, affirmed the dismissal of a libel by implication claim asserted by prominent antiquities dealer Hicham Aboutaam against Dow Jones, the publisher of The Wall Street Journal. Aboutaam v. Dow Jones.

The article at issue was published on the Journal's website on May 31, 2017, under the headline, "Prominent Art Family Entangled in ISIS Antiquities-Looting Investigations - Long-time dealers Ali and Hicham Aboutaam are under scrutiny, as authorities in multiple countries look into how Islamic State finances itself by trafficking in ancient objects." The article was also published with slightly different headlines in the Journal's U.S. and European print editions.

The article reported that Swiss, Belgian, and French authorities were investigating whether the Aboutaam brothers were involved in sales of ancient artifacts looted by the Islamic State, or ISIS. The article further reported that the U.S. Immigration and Customs Enforcement was investigating whether they trafficked in looted material. The article included several comments on behalf of the Aboutaams, including their denial of trading "any looted items, let alone items looted by ISIS," and noted that neither "has been charged with any wrongdoing related to these investigations."

The article reported that Swiss, Belgian, and French authorities were investigating whether the Aboutaam brothers were involved in sales of ancient artifacts looted by the Islamic State.

Plaintiff's amended complaint set out a claim for libel, based on several alleged inaccuracies in the article, and a claim for libel by implication. Justice Kalish of Supreme Court, New York County, granted Dow Jones's motion to dismiss all claims on March 26, 2019. [See May 2019 MediaLawLetter]

On appeal, Plaintiff raised no challenge to the dismissal of the claim for express libel, focusing his efforts solely on his libel by implication claim. Essentially, Plaintiff claimed that the article falsely implied he was guilty of helping to finance ISIS.

Under New York law, an implication claim can survive a motion to dismiss only where the plaintiff makes "a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the

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author intended or endorsed that inference." Stepanov v. Dow Jones, 120 A.D. 3d 28, 37-38 (1st Dep't 2014).

Plaintiff attempted to satisfy this test by pointing to the article's layout and photographs, a reader survey he commissioned, and various other factors.

The article was accompanied by several photographs, including one showing the ISIS-damaged amphitheater in the ancient city of Palmyra and another showing a gold ring that was the subject of a U.S. Department of Justice civil forfeiture action against items alleged to have been sold to finance ISIS's terror operations.

The First Department rejected Plaintiff's arguments that these implied he played a role in the looting of Palmyra and of the ancient ring. "The photographs in the article are appropriately related to the subject of the article and are accompanied by accurate captions. Their inclusion was a reasonable exercise of editorial discretion." The court also noted that "the caption beneath the photograph of the gold ring in the print version and the text adjacent to the photograph in the online version state that no dealer was implicated in the disappearance of the ring."

The court held that the discussions of the various investigations were privileged under N.Y. Civil Rights Law § 74 as fair and true reports of governmental proceedings. The court also rejected Plaintiff's argument that the article falsely implied the U.S. ICE investigation was related to ISIS. Even if it could be read that way, "Plaintiff failed to establish that any potentially defamatory implication imparted by the description of the ICE investigation would have had any discernibly different impact on readers in light of the Belgian, French, and Swiss investigations that the article also described." Other aspects of Plaintiff's claim were rejected insofar as the challenged statements were focused on activities of his brother, also an antiquities dealer, and therefore were not "of and concerning" the Plaintiff.

The court held that the discussions of the various investigations were privileged under N.Y. Civil Rights Law § 74 as fair and true reports of governmental proceedings.

Plaintiff argued that the survey of 400 readers he commissioned showed that 73% of them believed after reading the article "that the Aboutaam brothers have helped finance ISIS by selling looted antiquities." Citing the use of surveys in trademark and false advertising cases, Plaintiff sought to use his survey results to satisfy the "rigorous" showing that the article is reasonably read to impart the allegedly defamatory inference and that Dow Jones intended or endorsed that inference.

The First Department affirmed Justice Kalish's rejection of Plaintiff's survey: "Whether a statement is defamatory is a legal question to be determined by the court, not by survey participants." The court went on to criticize the survey's methods, specifically, its introduction, which summarized the article and explained to survey participants: "The suggestion is that,

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through middlemen, the Aboutaam brothers purchased the stolen or looted artifacts from ISIS and transported the pieces to their art galleries in Geneva, Switzerland and New York City to put them up for sale." The First Department concluded that this "highly prejudicial introduction precludes a finding that the participants were the 'reasonable readers' contemplated by the test of defamation by implication."

Plaintiff has indicated his intent to seek leave to appeal the First Department's ruling.

Jacob P. Goldstein is an associate general counsel at Dow Jones & Company, Inc. Defendant Dow Jones was represented on appeal by Robert P. LoBue and Tara J. Norris of Patterson Belknap Webb & Tyler LLP, and before Justice Kalish by Laura R. Handman, Rachel F. Strom, and Abigail B. Everdell of Davis Wright Tremaine LLP. Plaintiff Hicham Aboutaam was represented by Richard D. Emery and David A. Lebowitz of Emery Celli Brinckerhoff & Abady LLP.

Eleventh Circuit Rejects Request to Create Exception to Actual Malice Standard

NASA Official Sued Producers of The Challenger Disaster Docudrama

By Daniel Kaufmann and Kim Martin

The Space Shuttle *Challenger* tragically exploded seventy-three seconds after liftoff when an O -ring failed to properly seal. President Ronald Regan appointed a commission to investigate the cause of the horrific loss of the seven astronauts aboard the *Challenger*. Dr. Judson Lovingood was one of the individuals who testified before the presidential commission on behalf of NASA. Dr. Lovingood was the deputy manager of the space shuttle projects office at NASA's Marshall Space Flight Center.

The British Broadcasting Company, Discovery, Inc., and The Open University co-produced a docudrama entitled *The Challenger Disaster*. The docudrama portrayed the efforts of the presidential commission to understand the cause of the *Challenger* explosion. In the docudrama, Dr. Lovingood was portrayed giving testimony before the presidential commission about what NASA calculated the probability of shuttle failure to be. Dr. Lovingood was portrayed testifying that the calculation was one in ten to the power of five (1 in 100,000). Dr. Richard Feynman, a member of the presidential commission, was portrayed responding incredulously that the probability analysis was not a scientific calculation but a wish on the part of NASA's management.

Discovery aired *The Challenger Disaster* on its Discovery Channel and Science Channel in 2014. Dr. Lovingood sued Discovery Communication for libel and invasion of privacy for his portrayal in this fictionalized scene. Dr. Lovingood contended that he was defamed when he was portrayed testifying about the probability of shuttle failure being 1 in 100,000 when NASA's own engineers had said it was more like 1 in 200. He asserted that this portrayal made him appear to have been lying in testimony to the Commission. He sought seven million in compensatory and seven million in punitive damages, invoking the memory of the seven deceased *Challenger* astronauts.

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Discovery was granted summary judgment as to both claims at the trial court level. *See Lovingood v. Discovery Comm'ns, Inc.*, 275 F. Supp. 3d 1301 (N.D. Ala. 2017). As for the libel claim, the District Court found that Dr. Lovingood was a public official and that he failed to prove that Discovery had acted with actual malice. On the invasion of privacy claim, the District Court opined that Dr. Lovingood had failed to show that Discovery had acted recklessly. Dr. Lovingood appealed the grant of summary judgment as to his libel claim.

11th Circuit Decision

On appeal, Dr. Lovingood initially challenged the District Court's finding that he was a public official. Instead, he claimed that he was merely a public employee. The Eleventh Circuit rejected this argument. Lovingood v. Discovery, (Feb. 7, 2020). In doing so, it relied upon the proposition in that "'the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs.'" *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

The Eleventh Circuit agreed with the District Court that Dr. Lovingood was a public official since he served as a NASA deputy manager with substantial responsibility for the space shuttle's propulsion systems. It was further persuaded to this conclusion by the fact that NASA had held Dr. Lovingood out as a representative to testify twice before the presidential commission. Finally, the Eleventh Circuit upheld the District Court's conclusion because Dr. Lovingood has appeared in two documentaries concerning the *Challenger* disaster and has been quoted in numerous newspaper articles on the topic.

The Eleventh Circuit found that a "overall format, tone, and direction of the film" would lead a reasonable viewer to the conclusion that he was watching a dramatization of a historic event.

The Eleventh Circuit next turned to Dr. Lovingood's main argument on appeal. Dr. Lovingood asked the Eleventh Circuit to create an exception to the well-established *New York Times* standard for situations involving the fictionalization of sworn testimony. He urged the Eleventh Circuit to find that the actual malice standard should not apply in the context of depictions of perjury.

The Eleventh Circuit initially rejected Dr. Lovingood's request by pointing out that it was not at liberty to ignore Supreme Court precedent. It noted that the Supreme Court has refused to make new exceptions in defamation law for the last fifty years. Aside from this procedural limitation, the Eleventh Circuit opined that the "actual malice" inquiry must take into account how a reasonable viewer would interpret the contents of the scene. The Eleventh Circuit found that a "overall format, tone, and direction of the film" would lead a reasonable viewer to the conclusion that he was watching a dramatization of a historic event. To this end, the Eleventh Court noted that one of the title cards disclosed that "[s]ome scenes have been created for dramatic purposes." It theorized that the use of actors to portray historical individuals and the

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shrinking of months of events into ninety minutes would lead a reasonable viewer to recognize that he was not watching a documentary or the reading of historical transcripts.

After making this observation, the Eleventh Circuit stated that the fact that Discovery altered historical dialogue does not, in itself, evidence that Discovery made statements with knowledge that they were false. It further opined that it would not apply a novel libel-per-se rule for depictions of sworn testimony. Instead, it would apply the actual malice standard articulated by the Supreme Court in *New York Times*.

That Discovery altered historical dialogue does not, in itself, evidence that Discovery made statements with knowledge that they were false.

The Eleventh Circuit initially found that there was no evidence in the record to conclude that Discovery actually knew the lines spoken by Dr. Lovingood's character in the docudrama were false. It further opined that Discovery's executive producer did not act with reckless disregard for the truth by failing to read the transcripts from the presidential commission hearings. In short, it concluded that there was no evidence that anyone at Discovery had actual doubts about the scene in question. Finally, the Eleventh Circuit refused Dr. Lovingood's request to apply the criminal doctrine of "willful blindness" to establish recklessness for actual malice purposes. In doing so, it declared that the Supreme Court had not applied this criminal doctrine to the civil context of defamation.

Furthermore, it opined that this doctrine would be inapplicable because Dr. Lovingood had produced no evidence that Discovery had acted with willful blindness to the falsity of the statements. Thus, it concluded that Dr. Lovingood had failed to establish a genuine issue of material fact as to whether Discovery acted with actual malice. Therefore, Discovery was entitled to the protections of the First Amendment and the grant of summary judgment was due to be affirmed.

Daniel Kaufmann and Kim Martin, partners at Bradley Arant Boult Cummings in Huntsville, AL, represented Discovery. Plaintiff was represented by Stephen Don Heninger.

News Commentary Calling State Senator a "Fool" and "Clown" Is Protected Opinion

By Brett Spain

On January 9, 2020, the United States District Court for the Eastern District of Virginia dismissed a libel suit filed by Joseph Morrissey, currently a Virginia State Senator, against WTVR, LLC. Morrissey v. WTVR. The lawsuit arose out of a 2016 video "commentary" concerning Morrissey's leading the race to be Mayor of the City of Richmond. Morrissey is a well-known public figure in Richmond. He is a former lawyer, a former Richmond Commonwealth's Attorney, and a former member of the Virginia House of Delegates. Morrissey's checkered past, beginning with a fist fight with opposing counsel while he was Commonwealth's Attorney, was well documented. Morrissey's mayoral campaign occurred after he had been a member of the General Assembly where he pled guilty (in an *Alford* plea) to contributing to the delinquency of a minor stemming from reported sexual encounters with a then 17-year-old employee whom Morrissey later married. The allegedly defamatory broadcast noted Morrissey's repeated citations for contempt as a lawyer, his disbarment, a criminal conviction, and his reporting to the General Assembly as a member of the House of Delegates while on work release.

Morrissey alleged that the broadcast defamed him by saying he was a "fool" and that he was lying to the reporter and investigators in connection with the criminal investigation concerning his underage employee/future wife (and the paternity of their first child). Morrissey also alleged that the station implied that he was a racist when stating that he had "famously and stupidly" published a picture of himself and his new wife and child in what Morrissey described as "a plantation style 'Gone With the Wind'" photograph. Morrissey and his family had posed for the picture at an "Old Time" photo store. The Court held the entire broadcast was nothing more than protected commentary on an election, expressing nothing other than the personal opinion of the reporter. The Court also held that Morrissey failed to allege actual malice sufficiently as to certain portions of the commentary and that a recent decision from the Supreme Court of Virginia affirming Morrissey's disbarment supported any factual assertions regarding his criminal investigation.

The Court held the entire broadcast was nothing more than protected commentary on an election, expressing nothing other than the personal opinion of the reporter.

Morrissey complained about the statement made by the reporter that "During the past couple of years, Richmond has made national news and international news as a cool place to live, to visit, to play and party. Now we're making national news because of *this fool*"? The Court concluded this was protected opinion.

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Morrissey also complained about the use of "a plantation style 'Gone With the Wind'" photograph of himself and his African-American wife, claiming this was defamatory even though he and his wife posed for the photograph. The reporter concluded the broadcast by saying, "Do we really want to elect this clown, this nonstop, one ring circus, this liar? Or do we want to elect somebody that gonna lift us up to the heights that Richmond so richly deserves." The Court had no difficulty concluding that the publication of the photograph did not imply that Morrissey was a racist, that the reference to Morrissey as a "clown" was opinion, and that the references to "fool," "famously and stupidly," and "this clown, this nonstop, one ring circus, this liar" were non-factual commentary and "tame in light of the tenor of contemporary political debate."

The most serious issue was the allegation Morrissey was lying to investigators. The complaint alleged that:

> [The reporter] intentionally spliced together Joe's comments regarding his son, Chase, and Holmberg's [the reporter's] statement that Joe was 'lying,' to make it appear that Joe was 'lying' about being Chase's father. During the interview Joe stated, 'do you think for a moment if that child [Chase] is mine, I would run from that? No—not going to happen.

The reporter stated, "He [Morrissey] was lying to me then. He's lied to the investigators and everybody else in this case. That's why the state bar is coming after him, again."

In the face of Morrissey's argument that there was no factual support for the claim he was lying, the Court referenced an opinion [Morrissey v. Virginia State Bar, 829 S.E. 2d 738 (2019)] issued by the Supreme Court of Virginia in 2019 affirming a lower court's revocation of Morrissey license to practice law and found that this opinion confirmed a factual basis for much of the reporter's commentary. The opinion supported allegations that Morrissey had been convicted of contributing to the delinquency of a minor by engaging in a sexual relationship with a juvenile female and had made false statements concerning that relationship. The opinion also referenced Morrissey's "long and notorious book" of disciplinary history with the state bar.

In light of Morrissey's documented history, one questions why he filed a defamation action. But, in spite of his history, Morrissey retains a loyal following in Richmond. While he was not elected to be Richmond's mayor, he was elected to the Virginia Senate and was beginning his term as a state senator when the lawsuit was dismissed. Morrissey may have had a basis for feeling a Richmond jury would be sympathetic to his claims.

Brett Spain, Willcox & Savage PC, represented WTVR. Plaintiff was represented by Steven Biss.

Court Throws Out Defamation Suit Over Report About "Creepy" Messages to Girls

Illinois' Innocent Construction Rule Bars Plaintiff's Defamation Per Se Claim

By Matthew E. Kelley

A federal judge in Chicago has dismissed a defamation lawsuit by a creator of online "memes" over an article reporting allegations that he had sent "creepy" online messages to teenage girls, holding that the article could be interpreted as accusing the plaintiff of merely online flirting rather than criminal solicitation of sex from minors. Wedgewood v. Daily Beast.

The ruling by U.S. District Judge John Z. Lee applied Illinois' "innocent construction" rule, under which a statement cannot be actionable as defamation *per se* if it is capable of any reasonable, non-defamatory interpretation.

Plaintiff Eric Wedgewood was the man behind the "Content Zone," a popular source on social media for memes – the graphical images with words superimposed on them meant to convey a humorous, political or social message. In the spring of 2018, an Instagram account using Wedgewood's pseudonym Heiko Julien began posting content accusing Wedgewood of making inappropriate advances on underage girls. The news website The Daily Beast published an article about the controversy that included quotes from two anonymous women who said that Wedgewood had sent them messages when they were teenagers that made them uncomfortable.

Judge Lee ruled, the "innocent" interpretation that Wedgewood was just engaging in online flirting sufficed to render the article not actionable as defamation per se.

Wedgewood filed suit in Illinois state court, claiming defamation, false light and intentional infliction of emotional distress. New York-based The Daily Beast removed the case to the U.S. District Court for the Northern District of Illinois.

Wedgewood claimed that the article was defamatory *per se* because it implied he had committed the crime of soliciting sex from minors, although the article did not state that Wedgewood ever had sex with anyone under the age of 18 or had even met any of the girls he messaged in real life. Under Illinois law, false accusations of criminal activity are among the types of statements considered defamatory *per se*, such that the plaintiff does not have to prove he suffered any actual harm to his reputation.

Judge Lee agreed that one possible interpretation of the Daily Beast article was that Wedgewood had solicited sex from teenaged girls. But he also ruled that another plausible

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interpretation was "that although Wedgewood communicated with underage girls, he never meant to take things further." Illinois is one of a handful of states that apply the innocent construction rule, which holds that a statement is actionable as defamation *per se* only if there is no reasonable, non-defamatory interpretation of it. Thus, Judge Lee ruled, the "innocent" interpretation that Wedgewood was just engaging in online flirting sufficed to render the article not actionable as defamation *per se*.

Wedgewood did not make out a claim for defamation *per quod* because his vague references to loss of income and loss of reputation fell far short of the requirement to plead specific monetary damages, Judge Lee held. The court also held that because the article was not actionable as defamation, it was not actionable as false light, either. And Wedgewood's claim for intentional infliction of emotional distress failed because even defamatory statements are insufficiently outrageous to justify an IIED claim.

The court did not reach The Daily Beast's alternative argument that the article was substantially true.

The Daily Beast was represented by Chad Bowman and Matthew E. Kelley of Ballard Spahr LLP. Wedgewood was represented by Mason Cole of Cole Sadkin, LLC.

Sixth Circuit Court Affirms Dismissal of NCAA Ref's Claims Over Fan Criticism

By Griffin Terry Sumner and Jason Renzelmann

A unanimous panel of the Sixth Circuit Court of Appeals affirmed the dismissal of all claims by an NCAA referee against popular sports radio hosts and a website, holding that the First Amendment barred the referee's state tort claims. Higgins v. Kentucky Sports Radio, (Feb. 27, 2020). The referee alleged that the defendants' commentary about his calls in an NCAA Elite Eight game, and about the fan reaction to his officiating after the game, encouraged fans to make harassing communications and post false negative online reviews of his roofing business. The Court held that the First Amendment protected the defendants' commentary because the comments constituted speech on a matter of public concern. It added that the statements alleged in the referee's complaint could not be characterized as "incitement" that was excluded from First Amendment protections, even at the motion to dismiss stage.

The suit arose from the fan reaction following the Elite Eight game in the 2017 NCAA Tournament between the University of Kentucky and the University of North Carolina, which Kentucky narrowly lost on a last-second shot by UNC. After the game, Kentucky fans and many in the media, including the defendants expressed widespread criticism of the referee's officiating. Some fans began posting negative and harassing comments about the referee's business online. Defendants discussed this fan conduct on-air and online. While the defendants repeatedly stated they did not condone or agree with efforts to disrupt the referee's personal life, the referee alleged that the content of the reporting on the fan conduct nonetheless signaled an implicit approval and encouragement.

The Court held that the referee's allegations did not satisfy the first element of the constitutional incitement test, because the defendants did not "specifically advocate" for listeners to take unlawful action.

The Sixth Circuit, in an opinion written by Judge Jeffrey Sutton, held the defendants' commentary was protected from state tort liability under the First Amendment to the U.S. Constitution. The Court observed that the U.S. Supreme Court has afforded special protection from tort liability for speech related to matters of public concern, and concluded that public commentary about a high-profile college sports event, as well as coverage of fan reaction toward an official in such an event, fell within that category. The Court explained, "[p]ublic commentary about sports, some have said, is no less protected than commentary about 'economics [or] politics.'" Opinion at 6 (quoting Regan v. Time, Inc., 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part)).

The Sixth Circuit also rejected the referee's argument that the defendants' speech constituted

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"incitement" of unlawful conduct, which would be excluded from First Amendment protection. The Court held that the referee's allegations did not satisfy the first element of the constitutional incitement test, because the defendants did not "specifically advocate" for listeners to take unlawful action. Opinion at 9. The Court noted that it may be possible to imagine cases when a speaker could use sarcasm or a "wink and a nod" to incite unlawfulness, even though the speaker's literal words did not advocate unlawful conduct, but concluded, "that doesn't describe this case." Opinion at 11-12. The Court acknowledged that the defendants may have done a "poor job dissuading listeners from mischief," but concluded, "a party cannot be sued for incitement merely because it failed to condemn the behavior of others with sufficient firmness or clarity." Opinion at 12.

The Court emphasized the dangers of hinging First Amendment protection for speech on the reaction of third parties who hear it: "We cannot curtail a speaker's First Amendment protection on the grounds that an otherwise permissible message might touch a nerve with an easily agitated audience…. Any other approach would especially burden the speech most in need of a safe harbor: discussions of hot-button and divisive social issues." Opinion at 12.

The defendants were represented by Griffin Terry Sumner and Jason Renzelmann of Frost Brown Todd LLC. Jason Renzelmann argued the appeal. Kent Wicker, Louisville, KY, represented plaintiffs.

Academic's Libel Suit Alleging Media "Russiagate" Conspiracy Dismissed

By Eric J. Feder

On February 27, 2020, Judge Leonie M. Brinkema of the U.S. District Court for the Eastern District of Virginia issued an order dismissing the lawsuit of Svetlana Lokhova against NBCUniversal; the New York Times, The Washington Post, The Wall Street Journal, and an academic and former government operative, Stefan A. Halper. Lokhova v. Halper.

Ms. Lokhova is represented by Steven S. Biss, a Virginia lawyer famous for filing numerous libel lawsuits against publishers, journalists, and anonymous Twitter users on behalf of Rep. Devin Nunes. Ms. Lokhova's suit alleged an elaborate conspiracy among Halper, numerous media institutions, and unnamed others to "smear" her and former National Security Advisor General Michael Flynn, and "fuel and further" what she describes as "the now debunked and dead narrative that the Trump campaign colluded with Russia." She asserted claims for defamation, common law conspiracy and tortious interference with business expectancies. All defendants moved to dismiss and the court granted all of the motions, resolving a number of novel media law issues along the way.

Lokhova is represented by Steven S. Biss, a Virginia lawyer famous for filing numerous libel lawsuits against publishers, journalists, and anonymous Twitter users on behalf of Rep. Devin Nunes.

Background

Ms. Lokhova is a Russian-born citizen of the United Kingdom. In 2012, after a career in finance, she began pursuing a Ph.D in Soviet Intelligence Studies at Cambridge University, regularly participating in the Cambridge Intelligence Seminar ("CIS"), an academic forum focusing on intelligence issues. The lawsuit stems from a series of articles from a number of news outlets in 2016-2018 that discussed a February 2014 dinner associated with CIS. That dinner was attended by General Michael Flynn, who was then the head of the U.S. Defense Intelligence Agency under President Obama. General Flynn was appointed the National Security Advisor to incoming President Trump, but he resigned on February 13, 2017, after allegedly misleading Vice President Pence and the administration regarding communications he had had with Russian officials in the preceding months. (He was later charged with making false statements to the FBI about those communications.)

Ms. Lokhova was invited to attend the 2014 dinner by one of her academic advisors. While there, she met and briefly interacted with General Flynn, though the precise nature of the interaction is in dispute. Lokhova acknowledges having a short, public conversation with General Flynn and others. During that conversation, she showed him a postcard she had discovered in her research, which had been sent by Josef Stalin to the young fiancée of a friend

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in 1912. The front depicted a partially clothed couple passionately embracing, and, on the back, Stalin wrote (in Russian) that he was sending it with "not just a simple kiss, but a hottttttttttt one (because there is no point kissing any other way.)!"

According to Lokhova, after the public conversation in which she showed the group the postcard, she and General Flynn only had occasional email contact and otherwise had not spoken to or met General Flynn. However, in the wake of General Flynn's resignation from the Trump administration, the UK press began reporting that his dismissal was related in part to the 2014 dinner and his interaction with a "Russian-born graduate student," which later articles identified as Ms. Lokhova. Some of the articles cited sources claiming that the two stayed in close touch after the meeting, that General Flynn invited Lokhova to accompany him on an official trip to Russia, and that he signed his emails to her "General Misha," a Russian nickname for "Michael."

In March 2017, the Wall Street Journal published an article reporting that General Flynn's interaction with Ms. Lokhova had come to the notice of U.S. intelligence officials, but that he did not disclose the incident to the Defense Department, despite the expectation that, as direct of the Defense Intelligence Agency, he would report any interactions with previously unknown foreigners. Spokespeople for Flynn said nothing inappropriate had occurred, but the article quoted sources stating that Flynn should have reported the interaction. (The Journal article did not include the detail about Flynn signing his emails "General Misha," nor that he had invited Lokhova to accompany him to Russia, focusing instead on his failure to report the meeting.)

Ms. Lokhova alleged that defendant Stefan A. Halper, a foreign policy scholar and former White House official during the Nixon, Ford and Reagan administrations, was the source for the reporting on her interactions with General Flynn, and was seeking to smear her as a Russian spy who was sent to serve as a "honeytrap" to "turn" General Flynn. In public interviews during 2017 and 2018, as well as in the lawsuit itself, Lokhova staunchly denied these accusations.

In Spring 2018, Halper's identity as a key informant for the FBI about alleged connections between the Trump campaign and the Russian government emerged. Articles published in the New York Times (on May 18, 2018) and the Washington Post (June 5, 2018) reported on Halper's background generally, and his role in the FBI investigation, including his interactions with numerous prominent Trump campaign officials who were later the targets of the investigation, such as Carter Page. Both articles also briefly referenced the fact that Halper had expressed concern about General Flynn's interaction with a Russian woman at a dinner in February 2014, though neither article identified Ms. Lokhova by name.

Periodically, during 2017 and 2018, as the reporting on General Flynn (including the reporting on the February 2014 dinner) was emerging, Malcolm Nance, a commentator on terrorism and intelligence, and contributor to cable news network MSNBC, published a number of tweets

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from his personal Twitter account commenting on the developments. Some of the tweets identified in the complaint referenced Lokhova; others appeared to be totally unrelated to her. Nance also commented on the controversy in appearances on MSNBC during 2017, but none of the tweets at issue linked to or directly referenced any content published or aired by MSNBC.

The Lawsuit

Ms. Lokhova filed her lawsuit in the U.S. District Court for the Eastern District of Virginia against Halper, the Journal, the Times, the Post and NBC on May 23, 2019, more than two years after the publication of the Journal article, just over a year after the publication of the Times article, and more than a year after most of Nance's tweets and the various MSNBC broadcasts she discusses in the complaint. The statute of limitations for libel actions is one year in Virginia. Only the Post article and two of Nance's tweets had been published less than a year prior to the filing of Lokhova's complaint.

Over the course of the complaint, Lokhova weaves a tale of back-stabbing and smear campaigns by Ms. Lokhova's former colleagues and advisors at the CIS—particularly Halper, whom she accuses of "collud[ing] with rogue agents of the [FBI], political operatives at Cambridge University, and with 'journalists' employed by the Wall Street Jounral, the Guardian, the New York Times, the Washington Post and other mainstream media outlets" in a "conspiracy to undo the 2016 Presidential election and topple the President of the United States of America." In later dismissing the complaint, the court noted that a number of allegations in the complaint do not focus on Lokhova at all, but instead discuss Flynn, Halper, President Trump or others, which "suggest[ed]" to the court that "political motives, more than legitimate jurisprudential concerns, drive this litigation." Slip Op. at 3 n.3.

The complaint asserts claims for defamation, common law conspiracy and tortious interference with contracts and business expectancies (based in part on the alleged cancellation of book contracts that Lokhova had held).

The Issues on the Motions to Dismiss

The defendants each moved to dismiss the initial complaint. In response, Lokhova filed an amended complaint that slightly expanded on certain allegations, and named Malcolm Nance as an additional defendant in the case. All of the defendants (except Nance, who was never served) then moved to dismiss the amended complaint.

Each defendant raised numerous defenses, both substantive and procedural. (For example, Halper asserted that Lokhova had declared bankruptcy in the UK prior to filing the lawsuit, and therefore lacked standing to assert the claims, which could only be brought by the bankruptcy trustee.) In the end, the court decided the motions based on three issues: statute of limitations, respondeat superior, and lack of defamatory meaning.

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Statute of Limitations / Republication

As noted above, all of the publications at issue in the case, other than the Washington Post article and two Nance tweets, had been published more than a year prior to the filing of the lawsuit. However, Lokhova argued that the lawsuit was still timely because the articles had been "republished" when hyperlinks to the articles were posted online within the statute of limitations period. Indeed, Lokhova argued, the articles had been republished not only when links were posted by the defendants themselves, but also when links to the articles were tweeted or retweeted by third party social media users after the fact.

Ordinarily, under the "single publication rule," only one claim can be brought in connection with an allegedly defamatory publication, regardless of how many people ultimately receive the communication. The statute of limitations for the claim begins to run upon the first publication of the statement. However, the law in numerous jurisdictions, including Virginia, holds that "where the same defamer communicates a defamatory statement on several different occasions to the same or different audience, each of those statements constitutes a separate publication, triggering a[]new the statute of limitations." Slip Op. at 17-18 (citation omitted). In the online context, courts have held that a statement on a website may be considered republished if it is "substantively altered or added to, or the website is directed to a new audience" by the same defendant. *Id.* at 18 (citation omitted).

Lokhova argued that the lawsuit was still timely because the articles had been "republished" when hyperlinks to the articles were posted online within the statute of limitations period.

The court first addressed whether the New York Times could be considered to have republished the May 18, 2018 article when it included a hyperlink to the article in the online version of a different article published on April 9, 2019. The 2018 Times article had "briefly" mentioned that General Flynn's "apparent closeness with a Russian woman" at the February 2014 dinner had "prompted another person to pass on a warning to the American authorities that Mr. Flynn could be compromised by Russian intelligence." *Id.* at 18-19. The court noted that it was "extremely dubious" that these statements were defamatory of Lokhova but that, regardless, the claim was time-barred.

The court cited recent decisions from other Circuit Courts of Appeals, holding that, although hyperlinks to older publications "technically direct audiences' attention to the prior dissemination of those statements, such links do not constitute republication." *Id.* at 19. The court quoted the Third Circuit's observation that

> [w]ebsites are constantly linked . . . . If each link . . . were an act of republication, the statute of limitations would be retriggered endlessly and its

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> effectiveness essentially eliminated. A publisher would remain subject to suit for statements made many years prior, and ultimately could be sued repeatedly for a single tortious act the prohibition of which was the genesis of the single publication rule.

Id. (quoting *In re Philadelphia Newspapers*, 690 F.3d 161, 175 (3d Cir. 2012)).

The court acknowledged that a hyperlink could potentially reopen the statute of limitations period if it "included additional content beyond a hyperlink" that, in effect, "restat[ed] the defamatory material." *Id.* at 20 (citation omitted). Here, the April 2019 Times article linked to the May 2018 article via a hyperlink from the underlined phrase in the sentence "Mr. Halper's contacts have prompted Republicans and the president to incorrectly accuse the F.B.I. of spying on the campaign," which the court held did not "substantially alter or add to the portion of the May 18, 2018 article that allegedly defamed Lokhova." *Id.*

The court rejected Lokhova's effort to liken the case to the litigation over Rolling Stone's reporting on rape at the University of Virginia. There, Rolling Stone had published an editor's note on the online version of the article that was later the subject of multiple lawsuits. The note explicitly acknowledged that questions that had been raised about the reporting, but did not retract or remove the story. In that case, the court held that there were genuine issues of fact as to whether this constituted a republication. The court in *Lokhova* distinguished this from the "passing reference to a general conclusion in the original article" that appeared in the April 2019 Times article.

The court was even more skeptical of Lokhova's attempt to argue that links to the past articles by third-parties tweeting, commenting on or referencing the stories could somehow reset the statute of limitations period.

The court was even more skeptical of Lokhova's attempt to argue that links to the past articles by *third-parties* tweeting, commenting on or referencing the stories could somehow reset the statute of limitations period for the original publishers of the articles. The court noted that Lokhova had "not cited any case holding that a media organization is liable in perpetuity for third-party tweets of its allegedly defamatory materials." Slip Op. at 22. The court quoted past decisions noting that "the ability of third parties to comment on articles is a unique advantage of the internet, and thus application of the republication concept" to third-party comments would be inappropriate." *Id.* at 23 (citation omitted). In fact, the court observed, "availability of forums like Twitter can sometimes enable people who believe they have been defamed to be able to debunk the statements they believe are defamatory," and, "[i]ndeed, Lokhova herself has used Twitter to dispute some of the allegations in defendants' articles." *Id.* Accordingly, the court squarely rejected Lokhova's argument that her lawsuit would be timely so long as random Twitter and Facebook users had linked to the article within the past year.

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Respondeat Superior

Apart from the Post article, the only other timely publications were two tweets by Malcolm Nance from 2018. Lokhova had named Nance as a defendant in the Amended Complaint, but had failed to serve him, so the court dismissed the claims against him. However, Lokhova also sought to hold NBCUniversal vicariously liable for Nance's tweets, since he is an MSNBC contributor. The court rejected this argument.

In today's media climate, journalists are expected to engage with their audience via social media. However, there has been little law determining when a media outlet can be held liable for the social media posts of its reporters, let alone its non-employee contributors.

Under Virginia law, a rebuttable presumption of vicarious liability may be created when a plaintiff alleges the existence of an employer-employee relationship. Slip Op. at 35. Here, Lokhova did not allege such a relationship between Nance and NBCUniversal, nor could she have, since he is a contributor to, but not an employee of, MSNBC. Nevertheless, as the court described, "[t]he complaint appears to presume that because Nance is associated with NBCUniversal in some capacity, listed 'NBC/MSNBC' as the last of many identifiers in his biography, and issued the allegedly defamatory tweets 'during normal business hours,' his tweets were necessarily issued 'while performing the business of MSNBC,' for which NBCUniversal must be liable." *Id.* The court found these allegations "conclusory" and insufficient. *Id.* at 34.

There has been little law determining when a media outlet can be held liable for the social media posts of its reporters, let alone its non-employee contributors.

The court noted further that "relying on the respondeat superior doctrine to hold NBCUniversal liable for every tweet issued by one of its employees or agents during business hours, without requiring more specific allegations from the plaintiff, would lead to undesirable consequences." *Id.* at 36. The court quoted the Fourth Circuit, which had recently observed:

> It is difficult to see how employers could prevent all offensive or defamatory speech at the proverbial watercooler without transforming the workplace into a virtual panopticon. For all its undoubted value, respondeat superior and the resultant fear of liability should not propel a company deep into the lives of its worker whose . . . speech interests deserve respect.

Garnett v. Remedi Seniorcare of Virginia, LLC, 892 F.3d 140, 144 (4th Cir.), *cert. denied*, 139 S. Ct. 605 (2018).

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NBCUniversal had also argued that Nance's tweets were non-actionable opinion and/or were not of and concerning Lokhova, but the court did not need to reach those issues, since the plaintiff had failed to serve Nance, and the court found that NBCUniversal could not be held vicariously liable for the tweets, regardless of whether the underlying claims would have had merit.

Defamatory Meaning

The only article published within the statute of limitations period was the Post article. That article—an extensive profile of Halper—did not mention Lokhova by name. The claim was based on a single paragraph in the article:

During a dinner Flynn attended, Halper and Dearlove were disconcerted by the attention the then-DIA chief [Flynn] showed to a Russian-born graduate student who regularly attended the seminars, according to people familiar with the episode. The student and a Defense Department official traveling with Flynn have denied that anything inappropriate occurred.

Lokhova alleged that the article contained two "falsehoods": that Halper "attended" the February 2014 dinner, which Lokhova denied, and that Halper and Dearlove were "disconcerted" by the incident at the dinner.

The court had little trouble finding that these statements could not be reasonably construed as defamatory of Lokhova. The statement about Halper attending a dinner, whether true or false, does not concern Lokhova at all, and "does not defame anyone." Slip Op. at 32. And the second statement "[a]t most … suggests there were concerns about Flynn's behavior towards Lokhova, without stating or implying that Lokhova herself did anything improper." *Id.* The court rejected the notion that the statements—either separately or in the context of the article as a whole—could be reasonably read to imply that Lokhova was a "Russian spy," a "traitor to her country," or "had an affair with General Flynn on the orders of Russian intelligence" in order to "compromise" him, as the complaint had alleged.

Other Issues

Because the above grounds were sufficient to dismiss all of the defendants, the court did not reach all of the defenses raised by the various defendants. One that deserves note is the Virginia Immunity Statute. Section 8.01-223.2 of the Virginia Code provides immunity to individuals exercising their right to speak on matters of public concern. That recently-enacted statute provides, in relevant part, that

> [a] person shall be immune from civil liability for … a claim of tortious interference with an existing contract or a business or contractual expectancy, or a claim of defamation based solely on statements … regarding matters of public

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> concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party.

Va. Code § 8.01-223.2(A) (2017). The statute further provides that it "shall not apply to any statements made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false." *Id.* In essence, the statute imposes an actual malice standard of fault for statements on "matters of public concern," regardless of whether the plaintiff is a public or private figure. The statute also allows for an award of reasonable attorney fees and costs to "[a]ny person who has a suit against him dismissed pursuant to the immunity." Va. Code § 8.01-223.2(B).

Notably, the statute is a purely *substantive* immunity—it does not provide any alternative procedure for resolving a suit at an earlier stage, the way many state anti-SLAPP statutes do. As a result, there should be no impediment to applying the statute in federal court. *Cf. Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1336 (D.C. Cir. 2015) (Kavanaugh, J.) (holding that the D.C. Anti-SLAPP Act "answers the same question" as the Federal Rules of Civil Procedure, and therefore cannot be applied in federal court).

The Washington Post and NBCUniversal argued that, even apart from the other substantive deficiencies with the claims, the Immunity Statute barred Lokhova's claims for defamation and tortious interference. If the court dismissed on those grounds, those defendants could have sought attorney's fees. However, because the court dismissed on other grounds, it did not reach the Immunity Statute issue. *See* Slip Op. at 14 n.13.

Finally, Halper had moved for sanctions against Lokhova and her counsel, including for making various scandalous allegations in the complaint, such as referring to Halper as a "ratf***er" in the very first numbered paragraph. The court acknowledged another recent opinion from the same district that warned Lokhova's lawyer, Steven Biss, to refrain from making *ad hominem* attacks against litigants and opposing counsel. The court noted that the complaint contained additional such attacks against Halper and others. However, while explicitly stating that she "does not condone the tactics employed by Biss and Lokhova in this action," Judge Brinkema declined to impose sanctions at this time. She did warn that "should Biss file further inappropriate pleadings or pursue frivolous post-judgment litigation against any of these defendants, sanctions might well be justified."

Lokhova has filed a notice of appeal of the decision to the Fourth Circuit.

Laura R. Handman, Eric J. Feder, and Patrick J. Curran of Davis Wright Tremaine LLP represented the Washington Post and NBCUniversal Media. NBCUniversal was also represented in-house by Andrew Jacobs. Dow Jones & Company, Inc. was represented by Seth D. Berlin and Matthew E. Kelley of Ballard Spahr LLP. The New York Times Company was represented by Dana Green, Counsel for the New York Times. Stefan A. Halper was represented by Terrance G. Reed and Robert K. Moir of Lankford & Reed PLLC.

Gray Television Wins Privacy Victory in Mississippi

By Jacquelyn N. Schell

A recent Mississippi decision re-affirmed both the limits of Mississippi's youth court confidentiality statutes and the First Amendment protections for reporting on matters of public concern. Doe v. Community Newspaper Holding, No. 18-CV-038(C), 2020 Miss. Cir. LEXIS 1 (Miss. Cir. Mar. 3, 2020).

Juvenile Sues for Reporting on Arrest of Unnamed High School Students

Plaintiffs, a former high school student and his mother, as next friend, filed suit against WTOK -TV, The Meridian Star, and several reporters in Meridian, Mississippi, based on their reporting on the arrest of five juveniles for sexual assault of a high school classmate. Although the reports did not identify the students by name or photograph, the John Doe plaintiff claimed he was identifiable because the reports noted that one accused student was a baseball player.

Doe asserted claims for invasion of privacy, negligence, and intentional/negligent infliction of emotional distress. Plaintiffs alleged that Mississippi's youth court statutes prohibited defendants from publishing information about the arrest and events underlying the records of the youth court. He also alleged that, by asking law enforcement and the school superintendent about the arrests, the reporters had unlawfully "encouraged" disclosure of youth court records, which is expressly prohibited by the youth court records statute.

The Court also rejected Plaintiffs' theory that the reporters had unlawfully "encouraged" disclosure of the youth court records.

Court Affirms Protections for Reporting on Matters of Public Concern

The Court rejected Plaintiffs' theories and dismissed all three claims against the news outlets and their reporters. First, the Court made clear that the youth court statute "on its face, ... prohibits only the disclosure of sealed youth court records," not discussion of underlying events, under governing Mississippi Supreme Court precedent. *See id.* at *6 (citing Miss. Code Ann. § 43-21-261 and *In re R.J.M.B.*, 133 So. 3d 335, 346 (Miss. 2013)). In explaining that the news reports fell outside the prohibitions of the youth court statute, the Court noted that the reports relied in part on an interview by the chief deputy, a law enforcement official who was expressly permitted to disclose information regarding the arrests of juveniles under the statute. *Id.* at *6-7.

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The Court also rejected Plaintiffs' theory that the reporters had unlawfully "encouraged" disclosure of the youth court records, explaining that the youth court records must be construed narrowly and that Plaintiffs' broad reading of the statute would "assuredly violate[] the First Amendment" by penalizing routine reporting techniques, which "include asking questions of people with confidential or restricted information." *Id.* at *10-11 (citing *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 64 (Cal. Ct. App. 1986)).

Next, the Court re-affirmed the First Amendment's broad protection for reporting on matters of public concern. *See id.* at *11-12 (citing *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979), and *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989)). The Court reiterated that "[i]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at *12.

This is the second time the Court has dismissed this lawsuit on similar grounds, *see Doe v. Community Newspaper Holding, Inc*., No. 18-CV-038(C), 2018 Miss. Cir. LEXIS 1, at *11-12, 2018 Media L. Rep. 429 (Miss. Cir. Nov. 6, 2018), with this latest dismissal disposing of Plaintiffs' First Amended Complaint.

Seth D. Berlin and Jacquelyn N. Schell, Ballard Spahr LLP, Washington D.C. and New York, and William W. Simmons, Glover, Young, Hammack, Walton & Simmons, PLLC, Meridian, MS, represented Defendants Gray Television Group, Inc. d/b/a WTOK-TV and Candace Barnette.

Leonard D. Van Slyke, Jr. and Karen Howell, Brunini, Grantham, Grower & Hewes, PLLC, Jackson, MS, represented Defendants The Meridian Star, Whitney Downard, and Cheryl Owens.

O. Stephen Montagnet III and Zachary M. Bonner, McCraney Montagnet Quin & Noble, PLLC, Ridgeland, MS, represented Plaintiffs John Doe and Jane Doe.

J. Richard Barry of Barry, Thaggard, May & Bailey LLP represents Defendant Superintendent Randy Hodges.

8th Circuit Affirms Dismissal of Auto Dealer's Lawsuit Over TV News Report

By Steven J. Wells

On March 5, 2020, the Eighth Circuit Court of Appeals affirmed dismissal of a defamation case against Multimedia Holdings Corp. and Tegna Inc., owners of KARE 11 (the NBC network television affiliate in Minneapolis/St. Paul), brought by a prominent Minnesota automobile dealer. Nelson Auto Center, Inc. v. Multimedia Holdings Corp. and Tegna, Inc., (8th Cir., March 5, 2020)

The lawsuit alleged that KARE 11 had defamed the dealer when it published several online stories about the financial fraud of the dealer's former fleet manager, who pled guilty to defrauding local police departments throughout Minnesota by overcharging them for accessories in connection with the dealership's police vehicle fleet sales. The dealer/plaintiff, a corporation, claimed that by identifying the perpetrator of the fraud as "the vendor," the stories falsely suggested that the dealer entity—not the employee—had committed the fraud. Plaintiff also claimed that a "correction" published by KARE 11 shortly after the stories initially ran (clarifying that the fraud had been committed by the former fleet manager and not the dealer entity) had not appeared in all of the social media/online platforms that ran the original story, and that the original story remained available online.

The Court rejected the theory that publishing the "correction" on some, but not all, online platforms could itself constitute reckless disregard.

Defendants moved to dismiss under Fed. R. Civ. P 12(b)(6), arguing that a corporation is a limited purpose public figure under Minnesota law, requiring that plaintiff allege facts sufficient to establish actual malice; and that the plaintiff had failed to allege any such facts. Plaintiff argued that only certain "large" and/or "highly regulated" corporations were limited purpose public figures under Minnesota law; and that, in any event, it had sufficiently alleged actual malice, in particular pointing to the fact that the "correction" seemed to admit falsity and yet had not been published on all of the online/social media platforms on which the original stories had appeared and that, by leaving the "uncorrected" original story on one platform, KARE 11 had in effect republished the false story. The district court granted the motion to dismiss.

In affirming the dismissal, the 8th Circuit noted that earlier Circuit decisions had held that Minnesota law, unlike federal law, holds that *all* corporations are limited purpose public figures when the challenged statements "concern matters of legitimate public interest in the geographic area in which the defamatory material is published." Here, there was no doubt that a state-wide fraud scheme directed to police departments using public monies to purchase police vehicles was a "matter of legitimate public interest." Thus, the plaintiff was required to

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make plausible allegations of actual malice in order to survive a motion to dismiss; such allegations were lacking. The use of the word "vendor" in the published stories was at most imprecise, and the Court noted that other statements in the stories made clear that it was the fleet manager who was the subject of criminal charges. Further, the Court rejected the theory that publishing the "correction" on some, but not all, online platforms could itself constitute reckless disregard for the truth, at least in the absence of allegations that would suggest that this was anything more than an oversight.

Steven Wells and Nick Bullard of Dorsey and Whitney LLP represented Multimedia Holdings Corp. and Tegna, Inc. Plaintiff was represented by Stephen F. Rufer and Kendra Elizabeth Olson, of Fergus Falls, MN.

MLRC Roundtable: Tulsi Gabbard vs. Hillary Clinton

Is "Russian Asset" Defamatory? Do Libel Suits Between Political Figures Hurt or Help Democracy? Will the Complaint Get Past a Motion to Dismiss?

In January, Rep.Tulsi Gabbard filed a defamation suit against Hillary Clinton alleging she was "distorting the truth in the middle of a critical Presidential election" by referring to her as a "Russian asset." The specific statement was: "She's the favorite of the Russians. They have a bunch of sites and bots and other ways of supporting her so far. And, that's assuming Jill Stein will give it up, which she might not because she's also a Russian asset. Yeah, she's a Russian asset."

Our respondents:

- **Carol LoCicero**, partner, Thomas LoCicero, Tampa, FL
- **Marc Randazza**, partner, Randazza Legal Group, Las Vegas
- **Lincoln Bandlow**, head of Lincoln Bandlow Law, Los Angeles

1) Is calling a presidential candidate a "Russian asset" defamatory? In this case, does it imply that Gabbard is deliberately lying about her campaign?

Carol LoCicero: If this question means are the words actionable, certainly not in the context of the Clinton interview, maybe never in the context of discussing Russia's efforts to meddle in US political campaigns. In the full context of the podcast, the "Russian asset" comment is directed at Russia's efforts to meddle and the facts underlying the comment are disclosed to the listener. If the question is focused on the technical definition of whether the words "Russian asset" can damage a person's reputation, then maybe depending on the context. There's nothing in this podcast, however, to reasonably suggest that Gabbard is some kind of willing Russian spy/collaborator, for example. The Russian asset statement is clearly tied to Russia's efforts to choose independently the candidates it seeks to use for its own political objectives. The candidates are often unwillingly used by Russia. If, in context, someone is called a literal spy for Russia in the sense of a true traitor selling State secrets to a foreign government, then "Russian asset" might be actionable in that other context. Does it imply that Gabbard is deliberately lying about her campaign? That implication seems like a big stretch. In an innocent construction jurisdiction, this implication should fail as a matter of law. In a reasonable construction jurisdiction, it still seems like an unreasonable stretch of the words in context to go so far as to convey that Gabbard is lying about her campaign in some way. I'd argue that, as a matter of law, that implication wasn't reasonable either.

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Marc Randazza: I do not think it is per se defamatory. But it certainly could imply a false statement of fact. What does "Asset" mean to the average reader? That would at least make me think that it means that Clinton (as a prior secretary of state) could be implying "Agent" here. I just don't know what "Asset" means anymore, since every single person who disagrees with Clinton or AOC is somehow an "Asset" of the Soviets, I mean Russians, I mean, didn't the 1980s want their foreign policy back when Romney was running against Obama?

Lincoln Bandlow: It could be argued that Hillary was simply saying that Gabbard was a favorite of the Russians because the Russians prefer Trump and the Russians think Gabbard would lose to Trump, so that is an "asset" to them. That would likely be seen as simply a statement of opinion that is not actionable. On the other hand, it could be argued that it states or implies some kind of collusion between Gabbard and the Russians and that Gabbard is lying about running to help better America when in reality she is simply a traitorous ally of the Russians. In light of the fact that those opposing Trump for the last four years have basically been saying for those four years that the absolute worst thing in the world a human being could be is someone who "colludes with the Russians" it seems a stretch to say that Hillary's statement is not a defamatory one.

2) How are the allegations against Gabbard different from the allegations in the Steele Dossier? Those were treated as factual but reporting on the allegations was protected on other grounds. They weren't dismissed as hyperbole and opinion.

Marc Randazza: They kind of aren't. But, in the Steele Dossier lawsuit, you had a pretty less-than-credible attorney representing a crook who happened to claim that he was defamed.

Lincoln Bandlow: The Steele Dossier had allegations of very specific conduct, with dates and name and events. These allegations are, of course, significantly less specific and only a broad allegation of being an asset of Russia with the implication (particularly strengthened by Hillary's experience as Secretary of State, candidate for President and Senator that give her statements the imprimatur of "she must have something to back this up") that there must be some specifics backing it up.

Carol LoCicero: I think the fair report privilege was a more comfortable way for the *Gubarev* court to deal with the lengthy dossier's publication. The podcast is a give-and-take, impromptu Q&A session where Clinton is responding to speculative questions about Russian activity posed in a podcast where Gabbard's known activities and her potential appeal for Russian manipulations are disclosed in the course of the podcast. Beyond opinion based on disclosed facts, the words "Russian asset" in context could also constitute rhetorical hyperbole in the truest sense of the term, as well as its legal meaning.

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3) In determining meaning, does it make a difference that Hillary Clinton was a former Senator and Secretary of State as opposed to a journalist?

Marc Randazza: I think it does. Let's say a guy gets drunk at a bar in Missoula, Montana, because the beer is so cheap, then stumbles out into the alley, thinking it is the bathroom, and a 7-foot tall Indian hands him a joint, and he smokes it in his expensive suit, and then starts talking about a "fact" then that is a lot different from a former secretary of state, who you presume has special access to intelligence briefings. You do not presume that the secretary of state just says things like "Russian Asset" without knowing more than you and me.

Lincoln Bandlow: As mentioned above, of course it makes a difference. Just like it is different if the town drunk says there are atrocities in Vietnam versus Walter Cronkite saying so, whether a person is inclined to believe a serious allegation is being made depends on who it comes from. Hillary is someone that particularly has the background to suggest that if there were solid information supporting an assertion that Gabbard was working with or otherwise an asset of the Russians, Hillary would be the one who would know it.

Carol LoCicero: Clinton's former roles shouldn't matter; many journalists and commentators come from government backgrounds. If Clinton had implied or said she had special knowledge about Gabbard and illicit activities through her work as a senator or as Secretary of State, then that would likely impact a court's analysis of opinion based on disclosed facts. But Clinton's various roles shouldn't automatically put her in a different category.

4) Should Gabbard be allowed to use statements on Twitter and other social media at evidence of how the public understood the statements?

Lincoln Bandlow: That kind of evidence can be concerning due to the ability for it to be "manufactured" to support a claim but assuming you can get past evidentiary issues, and assuming the reactions are not an entirely unreasonable reaction to the statements, it seems there could be a strong argument to allow that into evidence to demonstrate reputation harm.

Marc Randazza: Sure she should. There needs to be a way to gauge what the terms actually mean.

Carol LoCicero: I'd argue no generally. There's not a proper basis for assuming statements on social media are based on a full, contextual review of the actual podcast. And it's likewise difficult to determine the comments reflect a speaker's reasonable understanding of the podcast itself. Certainly, Gabbard's own efforts to frame the podcast on social media would impact this analysis as well. Obviously, there are several evidentiary issues.

5) What are the dangers of political candidates suing rivals for defamation?

Lincoln Bandlow: The main danger is that it will dampen legitimate debate about important issues and also that it will be used simply as a political ploy, not as an effort to address serious

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and egregious acts of defamation. I don't imagine there would ever be a significant amount of such litigations for a variety of reasons (hard to win, distracting, makes a candidate look like a cry baby, etc.).

Carol LoCicero: It's a tactic right now from the local to the national level. The chilling effects on public discourse are real. Libel litigation is obviously costly. Candidates, aspiring candidates and office holders seem to be using litigation as a political strategy, not as a means of addressing honestly perceived false statements. Running for public office shouldn't involve assessments about litigation risks arising from robust public discourse, including discourse about opponents. I genuinely believe that the marketplace of ideas often sorts things out, given time. But the marketplace often isn't given the time, so the lawsuits make open public discourse more challenging.

Marc Randazza: Herein lies the rub — in our political system, we don't tend to let defamation claims fly in this context. Nobody expects candidates to tell the truth. We all expect puffing and bluffing. If this kind of claim were to be widespread, it would simply amp up the arms race. All candidates are public figures, so their burden is pretty high anyway. For the candidates suing, you also have to consider the Streisand effect — the best way to ensure that something defamatory is repeated a lot is to sue over it. You also run the risk of being seen as thin skinned — politics is bloodsport. I don't want someone with a thin skin making my laws. I can't say that it is disqualifying, but it makes me question their judgment.

6) Are there any benefits to such suits, such as deterring deliberate lies in political campaigns?

Marc Randazza: You know, sometimes I actually think that we would be better off if we *did* have the fear of defamation claims in political campaigns. The "Marketplace of Ideas" is a theory I hold dear, but when you have a marketplace where at any moment, there will be a sniper attack, or just a hot air balloon overhead that drops 500 pounds of steaming horse-shit on the stalls, you really don't have a functioning marketplace. Maybe we would be better off if candidates had to be held to a higher standard, or suffer some consequences. But, that thought is the stuff of philosophical ruminations. It is not likely to be the way things go.

Lincoln Bandlow: I think all politicians know that opposing candidates will dance around the edges of the truth on competing ads or statements, will skew some facts a particularly bad way or otherwise play a bit fast and loose with some of the "truth" regarding opposing candidates. But the benefit to these suits is to make candidates think twice about making the sort of nuclear bomb false statements that they know will destroy an opponent based on something that is knowingly false. And knowing that this remedy is out there may help encourage people we want to be in the political arena to get in (instead of stay on the sidelines for fear of having defamatory false statements made about them and feeling as if there is no remedy if that happens).

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Carol LoCicero: That gets to the heart of actual malice. It's hard to argue that a candidate should be categorically prohibited from suing for the utterance of a knowingly false, defamatory statement of fact by his opponent. So the tension isn't going to be resolved easily.

7) Will Gabbard's lawsuit survive a motion to dismiss?

Carol LoCicero: That's always hard to say, but it shouldn't. The full context of the podcast should result in full dismissal on at least one of the dismissal grounds.

Marc Randazza: No. First of all, if she wanted it to, she would have filed somewhere other than New York - since the Clintons are practically granted halos there. There's just no way a NY judge, even a federal one, is going to make that political mistake. Even in a clean game, I still think that it *should* get dismissed. This is a public figure in a political campaign. Clinton can easily muck up the waters about what "Asset" means - and that it is an indefinite meaning. Conde Nast v. Biro gets cited, and case is dismissed.

Lincoln Bandlow: Barring a court saying that "no reasonable person could have heard that statement and thought it meant that Gabbard actually was working with or colluding with the Russians as part of her presidential campaign" then this strikes me as a matter that will have to proceed past a motion to dismiss.

Note: On March 13, Hillary Clinton filed a motion to dismiss Tulsi Gabbard's suit arguing foremost that in the context of a political podcast her comment was opinion. You can read the brief here. On March 31, Gabbard filed an amended complaint emphasizing that the Podcast where Clinton called Gabbard a Russian Asset is "viewed as—by its audience and by others—a serious political podcast that engages with issues seriously and rigorously. It is not viewed as— and it is not—a podcast known for pedaling conspiracy theories or tabloid speculation… It was not a setting where emotions or other factors might lead to exaggerated statements."

Broad Gag Order in High-Profile Murder Case Survives Challenge

By William Fish and Alexa Millinger

The Connecticut Supreme Court dismissed a First Amendment challenge to an expansive gag order in the case against now-deceased criminal defendant Fotis Dulos, charged with killing his ex-wife in Fairfield County, Connecticut.

Dulos became the subject of national attention on May 24, 2019 when his estranged ex-wife Jennifer Dulos was reported missing. She had last been seen taking their five children to school in New Canaan, Connecticut, an affluent suburb of New York City. Public speculation quickly focused on Dulos, who had been ensnared in a years-long custody battle with his ex-wife. But it was not until more than seven months later, in January 2020, that Dulos was charged with the kidnapping and murder of Jennifer Dulos. Weeks after being charged, in late January 2020, Dulos was found dead in an apparent suicide.

More than six months before he was charged with murder, on June 3, 2019, the state arrested Dulos and his girlfriend Michelle Troconis, on charges of tampering or fabricating physical evidence and hindering prosecution. Three months later, Dulos was arrested on a second warrant charging him with an additional count of tampering with evidence.

The Hartford Courant argued that the gag order threatened the newspaper's First Amendment protections, as it would undoubtedly deter sources from speaking with the media.

On September 21, 2019, the Connecticut Superior Court, Judicial District of Stamford (Blawie, J.) issued a decision and order in Dulos' case, acting on a one-page motion by the state, barring all "insiders" involved in both the investigation and the criminal case pending against Dulos from making extrajudicial statements to the public and the media. The gag order was sweeping in its scope as to who and what was covered, extending beyond just "counsel for both sides" and applying to Dulos, his family, associates, law enforcement, all potential fact and expert witnesses, private citizens, and anyone involved in the *investigation* into Ms. Dulos' disappearance (separate and apart from the pending criminal case against Dulos). The gag order was so broad that it inevitably applied to individuals who were unaware of the gag order or that it nominally applies to them (presumably this is why the gag order orders counsel to notify these individuals).

Days after the court issued the gag order, Dulos took an appeal of the order directly to the Connecticut Supreme Court under a provision that allows for a direct public interest appeal. The Hartford Courant joined in the Supreme Court appeal, filing an amicus brief in support of Dulos' challenge to the gag order. In its amicus brief, the Hartford Courant argued that the gag

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order threatened the newspaper's First Amendment protections, as it would undoubtedly deter sources from speaking with the media rather than risk a possible contempt proceeding, which would in turn will affect newsgathering and limit information available to the public on this matter.

The Hartford Courant's amicus brief argued that the Supreme Court should strike down the gag order as a prior restraint and a content-based restriction on speech. A line of cases, including the 2018 Fourth Circuit case *In re Murphy-Brown, LLC*, 907 F.3d 788, 796-797 (4th Cir.2018), hold that a gag order is a content-based restriction on speech because its purpose is to regulate what may or may not be said on a particular topic.

As a content-based restriction, the Hartford Courant argued, the gag order should be subject to strict scrutiny, which the gag order would only survive if it furthers a compelling interest and is narrowly tailored to achieve that interest. The Hartford Courant argued that the gag order was not narrowly tailored to achieve the government interest of curtailing pretrial publicity and ensuring Dulos' right to a fair trial, particularly in Connecticut, which allows for individual voir dire of jurors. The Hartford Courant also argued that the gag order was overly broad considering that at that point, Dulos had only been charged with tampering with evidence and hindering prosecution – he had not been charged with murder.

The Supreme Court heard oral argument on the gag order appeal on December 12, 2019. Dulos died in late January before the Court could issue a decision. The Court then issued a directive to the parties asking for briefing on why the appeal should not be dismissed as moot given Dulos' death. Counsel for Dulos argued that the appeal was not moot because the gag order still applied to Dulos' counsel and other defendants charged in Jennifer Dulos' disappearance, including Mr. Dulos' girlfriend Michelle Troconis. The Hartford Courant argued that even if the Court decided to dismiss the appeal as moot, it should vacate the gag order to prevent it from spawning legal consequences. On February 26, 2020, the day after the parties submitted their briefs, the Court issued an order dismissing the appeal without any explanation.

The Court has not vacated the gag order, and it remains in place. Meanwhile, despite Dulos' death, the cases continue against Dulos' former girlfriend Troconis, as well as Dulos' former attorney Kent Mawhinney, both of whom were charged with conspiracy to murder Jennifer Dulos.

William S. Fish, Jr. is a partner and Alexa Millinger is an associate at Hinckley, Allen & Snyder LLP in Hartford, Connecticut. They represented the Hartford Courant in Fotis Dulos' gag order challenge to the Connecticut Supreme Court.

Court Orders DOJ to Submit Unredacted Mueller Report for In Camera Inspection

By Matt Topic

Readers of this publication are well aware that victories under the federal Freedom of Information Act can be hard to come by. The deck is stacked tremendously in the government's favor, so much so that one District of D.C. judge recently held that following the appeal instructions in the government's own denial letter doesn't exhaust administrative remedies when the denial letter doesn't comply with the agency's regulations! But it is because the fight is often so hard that the victories can be oh so sweet.

Shortly after the Mueller Report was furnished to the Justice Department by the Special Counsel, BuzzFeed News and its reporter Jason Leopold, and the Electronic Privacy Information Center, filed separate suits on their separate unanswered requests for copies of the report. (Many readers already know that federal agencies rarely comply with the statutory deadlines and do next to nothing to reduce their backlogs, presumably because they believe they are above the law and any information released could embarrass them or their political-appointee overlords.) The cases were eventually consolidated.

Unfortunately, agencies are usually afforded great deference on their exemption claims because there is a legal fiction that presumes that agency officials always act in good faith and are telling the truth. Nonetheless, given the importance of the Mueller Report to this country, especially in light of the constant Presidential drumbeat of "witch-hunt," BuzzFeed and EPIC insisted that the government prove up all of its exemption claims in the redacted report and asked the court to conduct an *in camera* inspection—a commonsense way of resolving FOIA cases that has become rarer and rarer as the years since FOIA's passage have gone by.

Given the importance of the Mueller Report to this country, BuzzFeed and EPIC insisted that the government prove up all of its exemption claims in the redacted report and asked the court to conduct an in camera inspection—a commonsense way of resolving FOIA cases.

On March 5, 2020, following extensive briefing and argument, Judge Reggie B. Walton, a George W. Bush appointee, issued his opinion on the parties' cross-motions for summary judgment and ordered the government to submit the report for *in camera* inspection. Electronic Privacy Info. Ctr. v. United States Dep't of Justice, No. CV 19-810 (RBW), 2020 WL 1060633 (D.D.C. Mar. 5, 2020). After reviewing the varied case law on *in camera* inspection, some of which stunningly suggests there "must be tangible evidence of bad faith[, without which] the court should not question the veracity of agency submissions," Judge Walton relied on D.C.

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Circuit's decision in *Spirko v. U.S. Postal Service*, 147 F.3d 992, 996 (D.C. Cir. 1998), which rejected a strict bad-faith requirement and held: "A judge has discretion to order *in camera* inspection on the basis of an uneasiness, on a doubt that he wants satisfied before he takes responsibility for a de novo determination. . . . The ultimate criterion is simply this: Whether the district judge believes that *in camera* inspection is needed in order to make a responsible *de novo* determination on the claims of exemption. Thus, in cases in which a look at the withheld material itself would be useful, we have fully approved *in camera* examination of the withheld material by the trial court."

Relying on that law, Judge Walton held that, "although it is with great consternation, true to the oath that the undersigned took upon becoming a federal judge, and the need for the American public to have faith in the judicial process, considering the record in this case, the Court must conclude that the actions of Attorney General Barr and his representations about the Mueller Report preclude the Court's acceptance of the validity of the Department's redactions without its independent verification."

The actions of Attorney General Barr and his representations about the Mueller Report preclude the Court's acceptance of the validity of the Department's redactions without its independent verification."

Powerful stuff. So what was it that gave Judge Walton enough pause to believe that his judicial oath required him to question the actions of the Attorney General himself and undertake a rare *in camera* inspection? The Court had "grave concerns about the objectivity of the process that preceded the public release of the redacted version of the Mueller Report and its impacts on the Department's subsequent justifications that its redactions of the Mueller Report are authorized by the FOIA." Comparing the redacted report to Attorney General Barr's press conference exoneration, Judge Walton agreed with "Special Counsel Mueller's assessment that Attorney General Barr distorted the findings in the Mueller Report." Those are the Court's words, not mine: "distorted." By the Attorney General.

Continuing, the Court explained that Barr—who has openly criticized both FOIA and Congressional oversight of the executive branch power he holds so much more dear—"failed to disclose to the American public" that Mueller did ***not*** make a "traditional prosecutorial judgment" on whether the President obstructed justice in light of constitutional issues with charging a sitting president with a crime. "The speed by which Attorney General Barr released to the public the summary of Special Counsel Mueller's principal conclusions, coupled with the fact that Attorney General Barr failed to provide a thorough representation of the findings set forth in the Mueller Report, causes the Court to question whether Attorney General Barr's intent was to create a one-sided narrative about the Mueller Report—a narrative that is clearly in some respects substantively at odds with the redacted version of the Mueller Report." These issues "cause the Court to seriously question whether Attorney General Barr made a calculated

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attempt to influence public discourse about the Mueller Report in favor of President Trump despite certain findings in the redacted version of the Mueller Report to the contrary."

But there's more. "These circumstances generally, and Attorney General Barr's lack of candor specifically, call into question Attorney General Barr's credibility and in turn, the Department's representation that 'all of the information redacted from the version of the [Mueller] Report released by [ ] Attorney General [Barr]' is protected from disclosure by its claimed FOIA exemptions." As a result, "it would be disingenuous for the Court to conclude that the redactions of the Mueller Report pursuant to the FOIA are not tainted by Attorney General Barr's actions and representations." No summary could do these words justice, but in short, Judge Walton found that he could not believe what the Justice Department said about the redactions to the report without violating his judicial oath because Attorney General Barr's obvious efforts to spin the report's release in President Trump's political favor tainted everything the government had to say about its exemption claims. "Adherence to the FOIA's objective of keeping the American public informed of what its government is up to demands nothing less."

But in short, Judge Walton found that he could not believe what the Justice Department said about the redactions to the report.

Few FOIA cases involve a document as monumental as the Mueller Report, and rarely will the taint of political interference in transparency be so obvious. But hopefully what will endure and will benefit all FOIA requesters is Judge Walton's willingness to use *in camera* inspection in the way it was intended: to ensure a fair *de novo* review whenever circumstances suggest it should be done, not only in the rare-if-ever case in which the public has definitive evidence of government bad faith. Indeed, the very purpose of FOIA is to uncover government misconduct and ensure that government acts in the public interest in the first place. Restricting meaningful judicial *de novo* review through *in camera* inspection to cases in which we already know the government has acted in bad faith results in a fairly redundant exercise.

Matt Topic leads the FOIA practice at Loevy & Loevy in Chicago and represents BuzzFeed News and Jason Leopold in this and many other FOIA cases. Email: foia@loevy.com; Twitter: @mvtopic

Ninth Circuit Succinctly Shuts Down Conservative Censorship Lawsuit

By Jeff Hermes

Back in June 2019, the U.S. Supreme Court issued its opinion in Manhattan Community Access Corp. v. Halleck, 139 S.Ct. 1921 (2019) on the question of whether the private operator of a public access cable channel was a state actor for the purposes of a First Amendment claim. As I wrote at the time, the case drew a great deal of attention not because of its narrow fact pattern, but because of its potential implications for the status of another set of private companies operating forums for speech: social media sites. And indeed, the Court's decision sent a message that the circumstances in which a private company would be considered a state actor for First Amendment purposes are extremely narrow – a message that the Ninth Circuit heard loud and clear as shown in its recent decision in Prager University v. Google LLC, No. 18-15712 (9th Cir. Feb. 26, 2020).

Factual Background

Prager University (aka "PragerU"; also: not an actual school of higher learning) is a non-profit that produces short form videos on a wide range of issues for high school, college, and graduate school audiences. These videos are intended to "provide conservative viewpoints and perspective on public issues that it believes are often overlooked." Google is in this case because it operates YouTube; if you don't know what either of those are, permit me to extend the greetings of the 21st century to your far-future society. If you have time travel, pop back and say hi (after a thorough decontamination regime).

Given that it many of its videos are intended for high-school students, PragerU was not best pleased when it found that some of its videos had been flagged by YouTube as containing "potentially mature content" and thus subject to blocking when users activate "Restricted Mode." Restricted Mode is an optional setting used primarily by libraries, schools, and businesses, as well as some individuals, totaling about 1.5% to 2% of YouTube's user base. YouTube also apparently demonetized some of PragerU's videos.

Cue the inevitable back and forth as PragerU demands that the flags/demonetization be lifted and YouTube agrees as to some videos but not as to others. Dissatisfied, PragerU files the instant lawsuit alleging that YouTube violated its First Amendment rights, falsely advertised (as in Lanham Act false advertising) its commitment to freedom of speech, and committed a variety of state law torts.

The district court denied a preliminary injunction and dismissed the complaint with leave to amend the federal claims. PragerU doubled down on its existing claims by declining to amend its complaint, and instead appealing the dismissal of the First Amendment and Lanham Act claims.

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The First Amendment Claim

Right off the bat, the Ninth Circuit cites *Halleck* and lets us know that PragerU is in trouble:

> PragerU runs headfirst into two insurmountable barriers—the First Amendment and Supreme Court precedent. Just last year, the Court held that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1930 (2019). The Internet does not alter this state action requirement of the First Amendment.

Slip op. at 5. From there, the opinion mostly consists of shooting down PragerU's various attempts to get around this baseline principle.

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In response to PragerU's argument that YouTube's self-designation as a public forum for speech subjected the company to First Amendment limitations, the Court of Appeals stated that "Such a rule would eviscerate the state action doctrine's distinction between government and private entities because 'all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints.'" Slip op. at 9, citing *Halleck* at 1930-31. The court further found that this limitation on the state action doctrine was consistent with earlier Supreme Court rulings, slip op. at 9, quoting *Lloyd Corp v. Tanner*, 401 U.S. 551, 569 (1972) ("private property does not 'lose its private character merely because the public is generally invited to use it for designated purposes'"), and with the Ninth Circuit's own precedents and those of other federal courts with respect to the treatment of online services, slip op. at 9-10 & n.3.

Nor does YouTube perform a "public function" sufficient to treat it as a state actor. The Ninth Circuit pointed out that this exception is traditionally narrow and "difficult to meet," and not satisfied merely because a private organization performs functions that are also historically performed by the state. Slip op. at 10. "Rather, the relevant function must have been 'traditionally the *exclusive* prerogative of the [s]tate.'" *Id.* at 11, quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). Contrasting YouTube's operations with the traditional examples of running elections (*see Terry v. Adams*, 345 U.S. 461 (1953)) and company towns (*see Marsh v. Alabama*, 326 U.S. 501 (1946)), the Ninth Circuit held that opening up one's property for the speech of others does not fall into this category. *Id.*

Perhaps the most interesting argument that PragerU makes in response is that it is necessary to take YouTube's size into account when determining whether it is serving a "public function." Citing *Marsh*, PragerU suggested that there is a sliding scale as to the degree to which private

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property is opened to the public, and that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the … constitutional rights of those who use it." Slip op at 11, quoting *Marsh*, 326 U.S. at 506. But this argument, the Court of Appeals held, ran afoul of later Supreme Court decisions clarifying that the ruling in *Marsh* depended on a "private actor 'perform[ing] the full spectrum of municipal powers,'" and not just opening a forum for speech. *Id.* at 12, quoting *Lloyd Corp.*, 407 U.S. at 569.

But, PragerU asks, what about the whole line of cases involving First Amendment rights in public forums? Some of those involved private property, no? Doesn't help, said the Ninth Circuit; those cases involve the government, not the private party, making the decision to use private property as a public forum:

> [C]asting a private property as a public forum 'ignores the threshold state-action question.'… Whether a property is a public forum is not a matter of election by a private entity. We decline to subscribe to PragerU's novel opt-in theory of the First Amendment.

Slip op. at 13, quoting *Halleck*, 139 S.Ct. at 1930.

Perhaps the most interesting argument that PragerU makes in response is that it is necessary to take YouTube's size into account when determining whether it is serving a "public function."

It is worth noting that the Ninth Circuit did not specifically discuss dicta in the Supreme Court's ruling in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, suggesting that constitutional public fora might include "private property dedicated to public use." 473 U.S. 788, 801 (1985). The Supreme Court called the scope and validity of this dicta into question in *Halleck*, 139 S.Ct. at 1931 n.3, giving the Ninth Circuit room to ignore it. *See also Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 827-28 (1996) (Thomas, J., concurring in judgment in part and dissenting in part) (dicta in *NAACP* referred to the specific circumstance where a government body obtains an easement on private land in order to transform it into streets or parks).

Concluding, the Ninth Circuit stated that this was not a case that turned on either party's prognostications of doom regarding the future of the internet if the other side claimed victory. While the court recognized that these arguments had "interesting and important roles to play in policy discussions concerning the future of the Internet," it held that "they do not figure into our straightforward application of the First Amendment." Slip op. at 14. Accordingly, the court affirmed the dismissal of PragerU's First Amendment claim.

The Lanham Act Claim

Turning to PragerU's other federal claim for false advertising under the Lanham Act, the Ninth Circuit had little difficulty in finding that there was no basis for such a claim. To plead such a

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claim, held the court, "PragerU must allege a false or misleading representation of fact in commercial advertising or promotion that misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." Slip op. at 14 (internal quotation marks omitted).

None of the statements on which PragerU based its claim satisfied all of these elements. First, statements by YouTube regarding its Restricted Mode, while possibly commercial in nature, were "made to explain a user tool, not for a promotional purpose[.]" *Id.* Second, the designation of PragerU videos for Restricted Mode did not constitute advertising or promotion because neither the tagging nor the reason for the designations was made available to the public. *Id.* at 15. Moreover, such designations did not convey any specific representation about the videos. *Id.* at 15-16. And finally, YouTube's general "braggadocio about its commitment to free speech" was not a matter of fact but opinion. *Id.* at 16.

Accordingly, the dismissal of this claim was upheld as well.

Conclusion

This was a straightforward analysis by the Ninth Circuit with few surprises, and even fewer cracks left open for future claims of this type. Plaintiffs bringing these claims in the future might seek to head for other jurisdictions, but the clarity of this opinion and its reliance upon the clear message of the Supreme Court in *Halleck* make it likely that other federal circuits will follow suit.

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The major issue that remains open is what happens if lawmakers attempt to respond to complaints about platforms' alleged political bias by mandating open access on digital platforms. The question of whether a platform is a state actor is a different question from whether the platform's own First Amendment rights would prevent it from being required to carry third party speech. On which latter point, contrast *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) with *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Section 230 of the Communications Decency Act, 47 U.S.C. § 230, would – for the present, at least – prevent states from punishing digital platforms for the removal of content, but it remains possible that federal legislation in this space could give rise to a significant First Amendment battle.

Jeff Hermes is a Deputy Director at MLRC. PragerU was represented by Peter Obstler, Browne George Ross LLP, San Francisco. Google was represented by Brian M. Willen, David Kramer, Lauren Gallo White, and Amit Q. Gressel of Wilson Sonsini Goodrich & Rosati, in New York and Palo Alto.

10 Questions to a Media Lawyer: Jay Ward Brown

Jay Ward Brown is a partner at Ballard Spahr in Washington, D.C.

1. How'd you get interested in media law? What was your first job in the business?

My parents had always expected me to be a lawyer (argumentative three-year-old), but I secretly applied to Columbia's J-School instead of law school. During Spring term, I took Fred W. Friendly's ethics class, and one afternoon he interrupted me while I was answering a question, barking, "Be in my office at nine tomorrow morning." I thought I was being expelled, but instead I was offered a job, and spent the next several years producing PBS programs about the press, law and ethics. One early program was about the use of anonymous sources and the reporter's privilege.

Some lawyer named Levine and a professor named Langley had just published a law review article about that. I took them out to lunch in DC and reported back to Fred that "Although the Levine guy is incredibly smart and talkative, our panel is all white Jewish men, and his co-author is a woman who is equally smart if a bit shy." Fred, who really valued and pursued

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This dates to about 1986, on the set of a TV shoot for the series, "Ethics in America" for PBS. Left to right: Then-Harvard Law Professor Arthur Miller, yours truly at age 21, and Fred W. Friendly.

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diversity, invited the woman. Who didn't make it to the taping. I had to pull Floyd Abrams out of the studio audience to sit in as the First Amendment expert. Yep, a non-diverse panel after all.

Meanwhile, Nina Totenberg was a guest on several of my programs, and I decided I wanted her job covering the Supreme Court. I figured I needed to go to law school to do that, so I did. (As Fred put it, "I died and went to law school" – which he said pointing downward). When graduating, I thought it wouldn't hurt to practice for a year or two before pushing Nina out, and I remembered that Levine fellow and his First Amendment practice in DC, at a firm then called Ross Dixon & Masback. I figured what are the odds he'd remember me picking his co-author over him for the TV program years before? I showed up for the interview at the firm, the recruiting director took me into Lee's office, and he looked up and said, "I remember you—you're the guy who thought I was too stupid to be on your TV program."

I showed up for the interview at the firm, the recruiting director took me into Lee's office, and he looked up and said, "I remember you—you're the guy who thought I was too stupid to be on your TV program."

Fortunately, they were desperate, and I got the job. Working for Lee Levine and Michael Sullivan was the best thing that could have happened to a would-be press lawyer. And you might have noticed—Nina Totenberg still has her job.

2. What do you like most about your job? What do you like least?

I think what we do—that is, advising and representing journalists—makes a difference, both at the macro level for our country and human society generally, and at the micro level for real people who only obtain their rights or basic necessities of life because of the work of journalists. That makes the long days and sometimes dreary lawyer tasks well-worthwhile. And I love to write.

I like least dealing with nasty, dishonest people. I guess there are very few professions in which you can avoid that altogether, but it does seem to happen with some frequency in our practice.

3. Highest profile or most memorable case?

Second-chairing Lee Levine in the U.S. Supreme Court in *Bartnicki v. Vopper*, for all of the obvious reasons. But one detail that is less well known: My husband Kevin, who is an accomplished artist, was seated in the public gallery at the Court the day of the argument. When Lee and I sat down at counsel table, Kevin took out a small pad and pen to sketch me, and was promptly arrested by one of the marshals. (Members of the public were not allowed to sketch or take notes.) He talked himself out of trouble and was allowed to stay.

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4. It's almost a cliché for lawyers to tell others not to go to law school. What do you think?

Clichés, like trouble, should be avoided at all costs. There certainly are unhappy lawyers, but there are many happy ones. I'm one of them. I wouldn't give advice about career paths to someone I didn't know well, because it depends so much on a person's individual skills, likes, and goals.

5. How has quarantine affected your work and routines?

My practice requires me to be something of Road Warrior, with court appearances around the country on a regular basis. The sudden postponement of most litigation deadlines and all conferences and other meetings means I don't have a single air or train ticket or hotel reservation in my Apple Wallet at the moment, and I don't think that's been true once in the last decade.

With literally every lawyer and staff member of our firm equipped and working from home, the lack of in-person contact is, frankly, depressing. But my colleagues have set up a Facebook group for us all to keep in touch on a personal level, and video conferencing has helped a lot to keep team spirit going on the work front.

6. What's your home office set-up?

As many readers of this know, my husband and I have lived in rural Virginia for about 15 years. I have kept a private office walking distance from our house (in our town of 131 people) that is set up, well, just exactly like my office in Ballard's DC location: Ballard telephone, Ballard computer, filing cabinet, hard-bound copies of the MLRC's 50-State Surveys – oh, and

In the "home" office

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marvelous views of the Blue Ridge Mountains and Shenandoah National Park. (There's also a certain 3-Michelin Star restaurant literally next door.)

In normal times, I telecommute a couple of days a week to save the hours otherwise lost on the train and subway. In these times, of course, I telecommute every day. But no bunny slippers for me.

7. What's a typical weekday lunch?

When in my DC office, sushi from the place in the lobby of our building. (My husband is emotionally allergic to fish so I eat it every chance I get when alone). When working from my private office, my husband brings me a sandwich and, if I've been good, a cookie, and we eat together at my desk. I am hoping he has stockpiled cookies.

8. What's a book, show, song, movie, podcast or activity that's been keeping you entertained?

Walking in the forest is always both entertaining (deer, bear, skunks) and calming (except when there are bear or skunks). We've been trying to like *Schitt's Creek*, which people kept recommending to us. They said, "It gets better." We're waiting.

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And so that I do not get a flood of emails from readers who know me, saying, "Dude, you lied by omission when you answered number 7": Did you know there is a whole genre of e-books loosely called "Gay Harlequin Romance Novels?" They are brilliant literature. Really.

9. Your most important client takes you out for karaoke. What do you sing?

My most important clients know me well enough never to ask me to sing. I am tone deaf. (Certified as such by one of Broadways' greatest vocal coaches, who made the mistake of insisting she could teach me to sing. She played slowly three notes on the Steinway in her Fifth Avenue apartment and told me to sing them. She then said, "You are tone deaf. I cannot help you. Please leave.") But if I could sing, I'd do one of Ben Platt's or Tom Odell's love songs.

10. Where's the first place you'd like to go when the quarantine is lifted?

To see the Broadway production of *Moulin Rouge*. Kevin's birthday is April 4, and that is his favorite movie. I had gotten us the on-stage "café table" seats as a surprise. Instead, we will be watching the DVD at home, just the two of us. But he assures me that is just fine, and I think so, too.

Wedding photo from 5 years ago, outside Town Hall in our village of 131, just down the block from my current "home office."

If you'd like to participate in the 10 Questions series, email us:[*medialaw@medialaw.org*](mailto:medialaw@medialaw.org).