520 Eighth Avenue, North Tower, 20th Floor, New York, New York 10018 (212) 337-0200

MEDIA LAW LETTER

Reporting Developments Through December 31, 2017

MLRC

REPORTER'S PRIVILEGE

LIBEL & PRIVACY

INSURANCE

PRIOR RESTRAINT

INTELLECTUAL PROPERTY

ACCESS

From the Executive Director's Desk

Santa's Gift List for Media Players Naughty and Nice

To Donald Trump – The Constitution

To Donald Trump – Reading lessons so he can read #1; only a few should be necessary since the First Amendment is quite short

To Sarah Huckabee Sanders – A top or dreidel – which she can spin, rather than the facts

George Freeman

To Steven Spielberg – A new script of a movie entitled "The Times," about how the N.Y. Times broke the Watergate story

To Fake News – A undistinguished burial for a meaningless concept in one of Trump's bankrupt casinos

To Sean Spicer – Six Geese a Laying

To the Trump administration for banning the CDC from using 7 words, such as "science-based," "diversity" and "transgender" – Homage to two Georges: Orwell and Carlin

To Greg Gianforte – An orange jumpsuit and a pair of boxing gloves so that he can improve his body-slamming techniques

To Donald Trump – An ineffective plumber

To Kellyanne Conway – Orwell's "1984", and a dictionary showing that "alternative facts" means falsehoods and lies

To Matt Lauer – A one-way ticket to Sochi

To Charlie Rose – A reality check

To Bill O'Reilly – ∅; Santa can't deal with such arrogance and hypocrisy

To Donald Trump – Pinocchio's nose

To Sarah Huckabee Sanders – A truth serum

To Sarah Palin – A copy of *N.Y. Times v. Sullivan*, to understand why she is losing her libel case against the Times

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To Justice Ginsberg – Good health

To Justice Kennedy – Continued interest in serving

To Donald Trump – The MLRC's *50-State Surveys* to be read before he says things like he wants to "open up the libel laws" or strip NBC of its FCC license

To Time Inc. – The Say It Ain't So award; and a happy and healthy life in the Meredith family

To ABC – a microphone, to explain to the rest of us their decision to settle the Pink Slime case for hundreds of millions of dollars

To Michael Pence – Photos of him at the 2005 MLRC Dinner speaking out in favor of a federal shield law – when he was one of us

To Katy Tur – A bestselling book depicting Trump's inane bullying of her (Santa has already come through on that one)

To Katy Tur, Ari Fleischer, Joe Lockhart, Dana Perino and Mark McKinnon – Our thanks and an MLRC beer mug for a great presentation at our Annual Dinner

To Donald Trump – A Twitter filter

To Fraser Campbell – A "best debater ever" trophy for his stupendous performance arguing for strict privacy laws at our London Conference

To BuzzFeed – Sexy evidence to support its Trump dossier

To John Oliver & The New York Times – Coal to put in Bob Murray's stocking

To Roy Moore – A horse on which to ride out into the sunset

To Jeff Sessions – A mirror reflecting Kate McKinnon

To The New York Times and The Washington Post – Our congratulations and thanks for a great year of journalism

To the MLRC Staff – My heartfelt thanks for all your work, effort and dedication in producing Daily Reports, Legal Letters, Bulletins, 50-State Surveys, Conferences and Committee work every day, and without which we would not be able to give the benefits we do – professional, intellectual, social and fun – to our members

And, finally, I wish our loyal readers and members a very happy and healthy new year.

Illinois Court Quashes Subpoena of Reporter in High Profile Chicago Police Shooting Case

Reporter Supported by RCFP - Media Coalition Amicus

By Brendan Healey

A high-profile Chicago murder prosecution took a detour this past October, when the defendant, a Chicago police officer, subpoenaed a reporter for information about his interactions with sources.

Jason Van Dyke is facing first-degree murder and battery charges in the 2015 death of Chicago teenager Laquan McDonald. That shooting and associated police cover-up led to protests across the city of Chicago, cost the police superintendent his job, and threatened the tenure of Mayor Rahm Emanuel.

Van Dyke subpoenaed the independent journalist Jamie Kalven, who helped bring the McDonald incident to light, for "reports and/or information" Kalven had received about this case.

The McDonald shooting initially received little attention, given the Chicago Police Department's official account that McDonald was shot and killed after he had lunged at police with a knife. A source, however, told Kalven that there was more to the story and that a police dashboard camera had captured the shooting on video. Kalven interviewed an eyewitness to the shooting, and ultimately obtained McDonald's autopsy report, which showed that McDonald had been shot 16 times, even though the Chicago Police Department stated that McDonald had died from a chest wound.

The court agreed that the subpoena was "nothing more than a fishing expedition" and that Van Dyke was seeking "information that the timeline of events, discovery documents, and testimony suggest simply does not exist."

Kalven's story about the shooting and autopsy report, Sixteen Shots, was published in Slate, and won him the 2015 George Polk Award for Local Reporting. According to the New York Times, Sixteen Shots "forced the case out of obscurity in the Police Department and City Hall and into public view." Eventually, the Chicago police were forced to disclose the dashboard camera video, and Van Dyke was arrested the day the video was released.

It is not entirely clear why Van Dyke was seeking information from Kalven, since his opposition to Kalven's Motion to Quash the Subpoena was filed under seal. However, Van Dyke appeared to argue that Kalven had tainted a prosecution witness by providing him with statements Van Dyke had made to police investigators, in violation of *Garrity v. New Jersey*, 385 U.S. 493 (1967). Garrity prohibits the use in subsequent criminal prosecutions of incriminating statements made by public employees during investigatory interviews conducted by their employers.

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Kalven moved to quash the subpoena, arguing that the only reports Kalven had received about the case were released by the city under FOIA and that Van Dyke had not complied with the demands of the Illinois Reporter's Privilege Act, such as exhaustion of other sources of information.

The Reporters Committee for Freedom of the Press organized a consortium of 18 other media organizations. Together they sought leave to appear as amici and filed a brief in support of the Motion to Quash. In their brief, the amici discussed the broad protections of the Illinois Reporter's Privilege Act as well as the public policy concerns that underlie those protections and their applicability to this case.

At a December 6 hearing, presiding judge Vincent Gaughan granted the media organizations' motion for leave to appear as amici. The judge also directed Kalven to take the witness stand and give testimony on his status as a reporter under the Reporter's Privilege Act. After a short direct examination (there was no cross examination), the judge found that Kalven was a reporter.

The parties, as well as the amici, all gave oral presentations on the Motion to Quash. Interestingly, the prosecution argued in favor of the Motion to Quash. The court took the matter under advisement and issued a ruling one week later.

The court granted the Motion to Quash, finding that "Kalven's source of information is protected by the Reporter's Privilege" and that the subpoena sought "irrelevant and privileged material." *People of Illinois v. Van Dyke*, (Dec. 14, 2017).

With regard to the Garrity-protected statements, the court determined that there was no evidence that Kalven had received Garrity-protected material or that he had shared it with a witness. Indeed, the court noted "the timeline suggests that is not possible." The court further emphasized that the information in the Garrity-protected statements was also made available through other, non-protected sources the day after the shooting.

Ultimately, the court agreed with Kalven that the subpoena was "nothing more than a fishing expedition" and that Van Dyke was seeking "information that the timeline of events, discovery documents, and testimony suggest simply does not exist."

In addition to the Reporters Committee, the amici consisted of the following: American Society of Journalists and Authors, American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, BuzzFeed, Chicago Tribune Company LLC, Dow Jones & Company, Inc., First Look Media Works, Inc., Gannett Co., Inc., Illinois Broadcasters Association, Illinois Press Association, News Media Alliance, Online News Association, Radio Television Digital News Association, Society of Professional Journalists, Sun-Times Media, LLC, and Univision Communications Inc.

The Reporters Committee for Freedom of the Press is represented by Bruce Brown, Gregg Leslie, and Sarah Matthews of the Reporters Committee and by Brendan Healey and Natalie Harris of Mandell Menkes LLC. Jamie Kalven is represented by Matthew Topic of Loevy & Loevy. Jason Van Dyke is represented by Daniel Herbert of Daniel Q. Herbert & Associates. The State is represented by Greg Sams of the Kane County State's Attorney's Office.

En Banc Pennsylvania Superior Court Unanimously Vacates Defamation Judgment Against Newspaper

By Mara Gassmann

The Pennsylvania Superior Court has vacated a jury's libel judgment in favor of a prominent doctor in his long-running action against a local newspaper**.** Following a trial in which the jury awarded the doctor $1 million in compensatory damages and $1 million in punitive damages, the trial judge vacated the punitive damages award, but left intact the compensatory damages award. On appeal, the appellate court sitting *en banc* unanimously vacated the judgment for the plaintiff and remanded the case for entry of judgment in the newspaper's favor. *See* Menkowitz v. Peerless Publications, Inc., et al., 2017 PA Super 397 (Dec. 15, 2017).

The Challenged Articles and Subsequent Lawsuit

In 1997, a hospital suspended a prominent orthopedic surgeon. The local newspaper, *The Pottstown Mercury*, then owned by Peerless Publications, Inc., reported on the suspension in a front-page news article. In the article, the newspaper reported that the doctor's "sudden absence from the hospital has spawned rampant rumors of professional misconduct regarding his treatment of an older female patient." Over the next week, the newspaper published two additional articles about the situation, first reporting that the doctor had sued the hospital and then reporting that the two sides had reached an accord. The newspaper later published an editorial criticizing the hospital for not providing information about the doctor's suspension.

The jury awarded the doctor $1 million in compensatory damages and $1 million in punitive damages

Nearly a year later, the doctor filed suit against the newspaper and its reporter, asserting claims for defamation, false light invasion of privacy, tortious interference, and intentional infliction of emotional distress.

Trial Court Proceedings

In 2014, seventeen years after publication of the initial article, the doctor's claims for defamation, false light, and tortious interference proceeded to trial in the Court of Common Pleas of Montgomery County. At trial, the doctor and two family members testified variously that the initial article about his suspension implied that he "hit" a patient, "did something of a sexual nature," or "did something medically." To support their varying interpretations, each pointed to the article's statement referencing "rampant rumors of professional misconduct regarding his treatment of an elderly female patient."

The jury rendered a verdict in the defendants' favor on the false light and tortious interference claims, but found for the doctor on the defamation claim. It awarded him $1

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million in compensatory damages – $200,000 for reputational harm and $800,000 for economic damage. In addition, the jury awarded the doctor $1 million in punitive damages.

After defendants filed a post-trial motion, the trial court vacated the punitive damages award, holding that the plaintiff had failed to establish actual malice. Nevertheless, it let the verdict and compensatory damages award stand. Both sides appealed to the Superior Court.

Appellate Court Proceedings

On appeal, the defendants argued that the verdict should be vacated for two reasons: First, they contended that the doctor had failed to meet his burden of proving material falsity because the reporting was substantially true and the defamatory implications alleged at trial were not reasonable. Second, they argued that the doctor failed to show that the alleged defamation caused any actual injuries. In addition, the defendants challenged the trial court's exclusion of a key piece of evidence – minutes of the hospital board meeting where the doctor's suspension was approved. And, the defendants argued that the trial court's charge to the jury was erroneous for a variety of reasons, including that the court failed to instruct the jury that any falsehood must be material and it failed to instruct the jury on which statement was at issue, or even which of the publications was in dispute.

The doctor failed to meet his burden with respect to damages. He could not recover presumed damages because he failed to show the article was published with actual malice.

The doctor countered that the jury's verdict was correct and that the trial court erred in vacating the punitive damages award because he provided sufficient evidence of actual malice.

Following briefing and oral argument in front of a three-judge panel of the Superior Court in 2015, the Court *sua sponte* decided to hear the case *en banc*. The *en banc* court heard oral argument, and then, on December 15, 2017, it unanimously reversed the judgment entered for plaintiff. Although the decision was unanimous, four judges issued a concurring opinion, differing with the majority opinion about whether the alleged implications were reasonable.

The court's opinion explained that the doctor proceeded on two theories, defamation per se and defamation by implication. The doctor's defamation per se theory failed as a matter of law because he could not establish that the "professional misconduct" statement was materially false. In particular, the court pointed to the doctor's trial testimony, in which he said that he could not recall why he was suspended, while the defendants introduced evidence that he was suspended after staff reported the doctor had "verbally intimidated" an elderly female patient.

The five-judge majority ruled that the "professional misconduct" statement was capable of being understood to convey the various defamatory implications alleged by the doctor and his family and those implications were false. But, the majority held, the doctor failed to meet his burden with respect to damages. He could not recover presumed damages because he failed to show the article was published with actual malice. And, the doctor failed to establish that the

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alleged defamatory implications caused his reputational harm, which, under Pennsylvania law, meant that he was not entitled to any damages, including for alleged economic harm.

The concurring opinion, joined by four judges, agreed with the majority opinion, save that they concluded that the implications alleged by the doctor were unreasonable. In a well-reasoned opinion, the judges found that the implications were "not . . . justifiable when viewed in the context of the publication as a whole" and that the majority had wrongly viewed the statement about professional misconduct with an older female patient in isolation rather than in context. The judges also stated that they would have ruled "the trial court erred in treating its threshold determination [of the reasonableness of the alleged meaning of the article] as one of sufficiency of the evidence." The concurrence further observed the inherent problem for a defendant seeking to prove that its words are materially true when a plaintiff may "proceed[s] on both defamation *per se* and implication theories premised on the same words."

Mara Gassman is an associate at Ballard Spahr LLP, Washington, D.C. Michael Berry of the Philadelphia office of Ballard Spahr LLP led a team from the firm in representing defendants Peerless Publications and its reporter during post-trial motions before the trial court and on appeal in the Superior Court, and Gregory M. Harvey of Montgomery McCracken Walker & Rhodes LLP served as trial counsel and has represented the defendants throughout the litigation. Plaintiff Elliot Menkowitz was represented by Alan B. Epstein and Jennifer Myers Chalal of Spector, Gadon & Rosen P.C.

Georgia Court Dismisses Libel Claims Against Reporter Who Questioned Plaintiff's Military Service Record

By Cynthia Counts, Brian Biglin, Ken Argentieri

The Georgia Court of Appeals in *Ladner v. New World Communications of Atlanta, Inc.*, A17A00883 (Ga. App. 2017) has upheld the dismissal of a libel suit brought by a military veteran against WAGA-TV FOX 5 Atlanta. FOX 5 broadcast a series of investigative reports by reporter Randy Travis challenging plaintiff Shane Ladner's statements that he fought in the United States Invasion of Panama and received the Purple Heart Award.

FOX 5 successfully argued that Ladner was a limited-purpose public figure, and that Ladner could not show evidence of actual malice sufficient to have his case heard by a jury.

Ladner sued FOX 5 contending that Travis falsely reported on Ladner's military history. Ladner had claimed to have a Purple Heart and was regularly recognized in various public and charity events—including a parade in Midland, Texas, where he and his wife were injured in a collision between the parade float and a freight train. After the accident, the Ladners filed a civil lawsuit in connection with the accident and at least "tacitly supported" charitable drives that addressed Ladner's military service. Once news stations began reporting differing accounts about Ladner's war record, some of Ladner's in-laws began to question Ladner's claims. One in-law wrote a letter to the attorney general asserting that Lander had misrepresented his military service. Ladner joined the Army in 1990, but he had claimed to have served in the United States Invasion of Panama in 1989—when he was still enrolled in high school. Ladner's in-law also questioned Ladner's Purple Heart claims which, aside from frequent public recognition, obtained him a free vanity license plate and special tax remission from the state of Georgia. Having received a tip from one of the in-laws, Travis investigated these matters, reviewing military, employment and academic records, speaking with military experts, and taking statements from Ladner and his attorney.

Travis reported, during his FOX 5 investigative segments, that military and academic records showed that Ladner's claim that he was injured during his service in Panama were false, and that his discharge records in his official military file made no mention of Ladner's claimed Purple Heart. Travis also reported on Ladner's contention that his superiors ordered him to lie about the circumstances surrounding his injuries, because he was wounded during a "sensitive" drug interdiction tactic. Based on numerous facts set forth in his full report, Travis asserted that "Ladner had no business being on the float with other war heroes" and that "the Army says Ladner never received a Purple Heart." Following Travis' report, Georgia prosecutors filed criminal charges against Ladner for making false statement in an application for a Purple Heart license plate.

FOX 5 successfully showed the trial court that Ladner was a "limited-purpose public figure," and not a private person. This, in the Court of Appeals' words, was "a critically

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important issue" because a private person must simply show that the defendant was negligent, whereas a public figure must prove actual malice by clear and convincing evidence.

Limited Public Figure Status

The trial court found, and the Court of Appeals affirmed, that Ladner voluntarily assumed the role of a limited-purpose public figure.

First, the Court of Appeals found that a public controversy existed relating to the accident at the parade and the ensuing investigations and fundraising efforts that focused on Ladner's prior military service.

Second, the Court of Appeals held that Ladner was involved in the public controversies insofar as he (a) voluntarily sought recognition for his military service, such as by applying to participate in the Texas event where the accident occurred, (b) did in fact participate prominently in the Texas parade and spoke prominently in the aftermath, taking actions which "raised his public profile," and (c) similarly engaged in public affairs, ranging from charity events and fundraising to his display of a Purple Heart license plate, which implicitly or explicitly "touted his military accomplishments." Thus, a reasonable person would have concluded based on objective indicia (Ladner's conduct and speech) that Ladner voluntarily injected himself into a public controversy.

Finally, the Court of Appeals found that the alleged defamation concerned Ladner's involvement in these public controversies.

The real gravamen of the Court of Appeals holding that Ladner was a limited-purpose public figure was its finding that, although Ladner did not comment on the public controversy at issue, his "conduct" in "rais[ing] his public profile" made him a limited purpose public figure required to prove actual malice by clear and convincing evidence.

Actual Malice

Having found that Ladner was a limited-purpose public figure, the Court of Appeals ruled that Ladner could not establish that Travis acted with "actual malice." The Court of Appeals reasoned that:

- The impetus to investigate originated not with Randy Travis, but with Ladner's wife's family members.
- Travis investigated thoroughly, requesting and obtaining public records from military and academic institutions, reviewing documents furnished by Ladner, speaking with experts, confronting Ladner with records negating his claims and forcing Ladner to concede certain falsehoods (*i.e.*, about his alleged service in Panama).
- Travis provided Ladner an opportunity to respond, and stated the positions of Ladner and his attorney in his broadcasts.

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Travis at all times believed that his findings were accurate.

Because defendants set forth evidence sufficient to negate a finding of actual malice, the burden shifted to Ladner to show that there was evidence of malice sufficient to create a genuine issue of material fact for a jury to decide. Ladner failed. The Court of Appeals ruled:

- Ladner's contention that Travis rushed his reporting and should have investigated further does not create a genuine issue as to malice, since even a failure to fully investigate does not, as a matter of law, "evince actionable reckless disregard."
- Ladner's contention that Travis adopted certain experts' opinions but not others, and that he adopted certain views about the authenticity of the records provided by Ladner, does not evidence malice, because Travis was entitled to select among differing opinions and because Travis had a good-faith basis to subjectively believe that Ladner provided records that lacked authenticity.

Ladner's contention that Travis employed "strong language" in his reports did not tend to show actual malice because "knowledge of falsity or reckless disregard of the truth may not be presumed nor derived solely from the language of the publication itself," and moreover, all of Travis' statements reflected Travis' reasonable beliefs and conclusions based on the facts obtained.

Key Takeways

Ladner stands out as a particularly thorough appellate opinion with a close inspection of the facts. The Court of Appeals took a more inclusive and factual approach in defining the pre-existing "public controversy." This illustrates how a libel defendant can benefit from a comprehensive, rather than targeted, approach to discovery and to development of the facts at the summary judgment stage. A broad investigation of possible pre-existing public controversies gives a defamation defendant the opportunity to argue more than just one public controversy, which provides more chances for success on the initial prong of the limited-purpose public figure analysis. An appellate court, even in issuing an affirmance, may well be compelled by different facts than the trial court.

In addition, *Ladner* illustrates how a reporter's inclusion of the plaintiff's arguments is important. The Court of Appeals found that the inclusion of information favorable to the plaintiff helped establish a lack of actual malice. As the court explained, "reporting perspectives at odds with the publisher's own tend[s] to rebut a claim of [actual] malice, not establish one."

Finally, *Ladner* clarifies that the determination of whether a person is a limited-purpose public figure is not based solely upon whether the individual comments directly about a pre-existing controversy or "subjectively" intends to influence a public controversy. Rather, courts must consider the public figure question "through the eyes of a reasonable person" and should consider not only the plaintiff's public statements, but also his "position" and "conduct" that

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places his "personality" into the public eye and "invites attention and comment." Indeed, even an *absence* of conduct—such as failing to correct false statements about one's achievements—may be deemed "tacit" support of those false statements sufficient to make one a public figure.

Cynthia L. Counts is a partner at Duane Morris in Atlanta and represented FOX 5 together with associate Chris Kanne. Kenneth M. Argentieri and Brian N. Biglin are attorneys in the Media and Communications group at Duane Morris. Plaintiff was represented by Randolph A. Mayer, Atlanta.

Tennessee Court Reverses Order Compelling Reporter Sued for Defamation to Reveal Sources and Documents

Plaintiff Not Entitled to Sources and Documents to Challenge Fair Report Defense

On interlocutory appeal, the Tennessee Court of Appeals reversed a motion to compel a reporter to disclose his sources and investigative files to a public figure plaintiff suing the reporter for defamation and false light. Funk v. Scripps Media, No. 16C-333 (Nov. 30. 2017).

Analyzing the interplay of the state fair report privilege and shield law in the context of defending a suit, the Court reasoned:

> "We believe a better interpretation would be to allow a media defendant to assert the fair report privilege while also subjecting to disclosure only the sources the media defendant identifies as the basis for the story. In other words, once a news gatherer asserts the fair report privilege, the protections of section (a) of the Shield Law come into play to protect sources."

Background

The plaintiff, Glenn R. Funk, is the District Attorney for Davidson County, Tennessee. He sued Scripps Media, owner and operator of NewsChannel 5, WTVF in Nashville, and investigative reporter Phil Williams for libel and false light over two news stories that aired in February 2016. The reports concerned allegations made in a federal civil lawsuit. Funk alleged the reports falsely accused him of extortion, bribery and blackmail.

Defendants moved to dismiss on the basis that the stories were fair and accurate reports of the allegations in the federal lawsuit or otherwise not defamatory of Funk. Over defendants' objection, the trial court granted a motion to compel discovery of the sources and documents reporter Phil Williams relied on for his reports. The trial court held that the Tennessee shield law did not apply and that plaintiff was entitled to discovery on actual malice to respond to the defendants' fair report defense.

The court granted defendants' motion for interlocutory appeal and the appellate court agreed to decide whether (1) the trial court erred in concluding that actual malice is an element of the fair report privilege when it is asserted as a defense to a defamation claim, and (2) whether the shield law applied to protect the reporter's sources and documents.

Fair Report Not Defeated by Actual Malice

The Court of Appeals began by surveying the history of the fair report privilege under Tennessee law from its recognition in 1871 to contemporary case law. The court concluded that

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"under the current state of the law the fair report privilege cannot be defeated by a showing of actual malice by the plaintiff." The privilege is qualified only insofar as the media report of official proceedings must be "a fair and accurate summation of the proceeding, and must display balance and neutrality." Citing Lewis v. NewsChannel 5 Network, L.P., 238 S.W.3d 270, 284 (Tenn. Ct. App. 2007) ("The privilege enables persons reporting on official actions or proceedings to broadcast, print, post, or now blog about official actions or proceedings without the fear of being subjected to a tort action for fair and accurate reports, even if these reports contain defamatory or embarrassing statements by governmental employees.") *See also* Restatement (Second) of Torts § 611 cmt. a (1977) ("the privilege exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false.")

The Court of Appeals specifically repudiated a 2015 decision which stated that actual malice court defeat the privilege. See *Grant v. The Commercial Appeal*, No. W2015-00208COA-R3-CV, 2015 WL 5772524 (Tenn. Ct. App. Sept. 18, 2015).

Thus in the instant case, plaintiff "cannot defeat the privilege by presenting evidence of actual malice, and the Defendants are not required to show an absence of actual malice in asserting the privilege."

Tennessee Shield Law

The trial court also erred in interpreting the state shield law, Tenn.Code Ann. §24-1-208. Under the statute, the protection for a reporter's sources and information does not apply "in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information." The trial court found that by raising the fair report privilege, defendants were raising a defense based upon the source.

"Under the current state of the law the fair report privilege cannot be defeated by a showing of actual malice by the plaintiff."

But this construction, according to the Court of Appeals, results in the exemption's swallowing up the protection for media defendants "whenever disclosure of a source is sought." As the Court explained:

> In most, if not all, cases, a news gatherer is going to rely on a 'source of information' as the basis for his or her publication or broadcast. According to the trial court's ruling, any time a news gatherer defends a defamation claim by invoking the fair report privilege, the news gatherer loses the entire protection provided under … the Shield Law and must disclose every source collected, whether used in the story or not.

The better interpretation, according the Court, is to allow a media defendant to assert the fair report privilege while also subjecting to disclosure only the sources the media defendant identifies as the basis for the story. This would be limited to the sources or documents relied on to assert the fair report defense – and which would allow the court to "compare the alleged source with the publication or broadcast to determine whether the news gatherer is, in fact,

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entitled to assert the fair report privilege as a defense to the claim for defamation, i.e., whether the publication or broadcast was a fair and accurate report of the proceeding or document and whether the report was balanced and neutral."

Thus the trial court's order compelling defendants to "describe their investigations and produce all documents they obtained or relied on" is contrary to this interpretation of the statute.

Scripps Media and Phil Williams are represented by Ronald Harris, Jon D. Ross, and William J. Harbison, II, at Neal & Harwell, Nashville, TN. Plaintiff is represented by James Kay, John B. Enkema, and Michael Johnson, at Kay Griffin, PLLC, Nashville, TN.

Recently Published

The Naughty, Nice, and Nonsensical: Media Law in 2017
Deputy Director Jeff Hermes presents the 2017 Yearly Monthly Daily Awards.

The Monthly Daily
Media law round-up from MLRC Deputy Director Jeff Hermes. In this issue: Jeff slices into Masterpiece Cakeshop | Moore and Mooch vie for embarrassing defamation threat of the month | Amazon gronks out | No, really, play whack-a-mole | Actual knowledge of what, precisely? | "Just one more thing..."

MLRC Bulletin: Developments in International Media Law
Brexit, Trump and the Rise of Populism; How Europe is Tackling Fake News; Could the U.S. Espionage Act Be Used to Prosecute Journalists?; An Introduction to the EU General Data Protection Regulation for US Lawyers; Privacy and the Press in the Digital Age: The Right to Know vs. the Right to Be Forgotten; Media Litigation in the High Court: Doing Justice in the Media and Communications List and more.

Challenges and Solutions for Media Companies and Their Journalist Workforces in Harnessing the Internet's Power While Avoiding Its Pitfalls
A report from the Employment Committee addressing two very timely issues: (1) How to encourage journalist employees' use of social media while attempting to reasonably limit that use through policies and workplace rules; and (2) How to deal with the increased frequency with which journalists are subjected to abuse and harassment due to works published online.

Model Brief on Access to the Executive Branch
Model brief setting forth arguments and legal arguments meant to form the basis for a motion seeking media access to the executive branch. The Model Brief includes multiple potential constitutional arguments that could be made to obtain access to various activities of the executive branch.

From the MLRC Insurance Committee

The "Pink Slime" Insurance Coverage Dispute Shines a Spotlight on Media Liability Insurance

By Evynne Grover

The notorious "Pink Slime" defamation lawsuit and the staggering sum of its unprecedented settlement have given rise to a dispute that highlights the important role that media liability insurance plays in today's media business environment. Even a company as well-capitalized as Disney recognized the necessity of maintaining substantial media liability coverage.

Disney, as the parent company of ABC, tendered the "Pink Slime" claims to its primary and excess media liability insurers and sought payment of those policies' limits toward the settlement. While most carriers appear to have resolved any coverage disputes and contributed to the settlement, one of the excess insurers, Chartis Specialty Insurance Company ("Chartis"), n/k/a AIG Specialty Insurance Company, has refused to pay on the ground that the policy did not cover the settlement. Specifically, Chartis contends that, pursuant to the terms of Disney's media liability policy, the claims in the "Pink Slime" lawsuit are barred by a "dishonesty exclusion" and that Disney failed to satisfy the manuscripted terms of a carve-out to the exclusion which, it maintains, required an outside attorney's prior written approval of the statements challenged in the defamation lawsuit.

In the discussion below, we provide an in-depth examination of media liability insurance, discuss the significance of clearance in the insurance context, and explain the impact of excess insurance, all of which provide a framework to examine the "Pink Slime" insurance coverage dispute.

We provide an in-depth examination of media liability insurance, discuss the significance of clearance in the insurance context, and explain the impact of excess insurance, all of which provide a framework to examine the "Pink Slime" insurance coverage dispute.

Media Liability Insurance - How Does It Work?

Individuals and corporate entities purchase insurance policies to transfer various kinds of risk from the policyholder to an insurance company. Professionals such as doctors and lawyers purchase what is known as "errors and omissions" insurance, which is an insurance contract whereby the insurance company generally agrees to provide a legal defense and indemnity for claims based on the professional's alleged negligent error. Similarly, media liability insurance is a unique insurance contract purchased by media companies to transfer the risks of errors and omissions made in connection with "content" created, published, broadcast, or otherwise distributed by the insured.

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The scope of media content that is covered by media liability policies has grown with the pace of evolving technology. Media liability policies can be issued for traditional media, such as newspapers, books, film and television productions, commercials, theatrical presentations, audio productions, concerts, musical recordings, and magazines, and also for new media, like websites, blogs, webisodes, and social media, such as Twitter, Facebook, and Instagram. Sometimes a media company will purchase a media liability policy to insure all of its content, known as a "blanket policy," and other times it will separately purchase policies limited to specific scheduled media, such as a single motion picture or a full season of a television production. The media liability policy may be a standalone policy, or it may be bundled together with other risks such as professional liability, technology liability, or cyber liability.

The types of errors and omissions covered by media liability policies are also unique. Media liability policies usually provide coverage for acts, errors, omissions, misstatements, and negligence, but only when related to "media activities" specified in the policy. Media activities typically include researching, creating, editing, performing, producing, distributing, publishing or broadcasting content. Common claims arising out of content include copyright infringement, trademark infringement, defamation, false light invasion of privacy, violation of the right of publicity, public disclosure of private fact, or failure to give credit. Of course, each media liability policy is different and covers content and wrongful acts pursuant to the specific contract of insurance purchased.

Media liability policies tend to have exclusions similar to those found in most professional errors and omissions policies, with some critical and unique distinctions. As in errors and omissions policies, media liability policies frequently have exclusions for unfair competition, employment practices liability, fee disputes, bodily injury claims, disputes with directors and officers, and breach of contract claims. Like in errors and omissions policies, media liability policies also frequently have a "dishonesty exclusion" which excludes coverage for acts that are dishonest, intentional, deliberate, and/or fraudulent. However, in media policies, the dishonesty exclusion usually contains an exception (also known as a "carve-out") to the exclusion if certain conditions are met, typically related to having an attorney approve the content prior to publication. This is a key issue in the "Pink Slime" coverage dispute addressed in detail below.

Finally, it is important to note the distinction between "form" language and "manuscript" language in insurance contracts. Commonly, an insurance company will draft insurance policy language that details the specific scope of risk that the company intends to assume, along with the specific rights they intend to provide to the insured, and uses this language on standardized forms that are issued to many policyholders. By contrast, when the policy terms are negotiated with the insured and written only for their individual policy, it is called a "manuscripted" policy. This was the case for Disney's media liability policy.

Clearance Procedures and Media Liability Insurance

Media companies and their liability insurers have a common interest in minimizing claims arising out of the company's content. One of the principal means of reducing such claims, or at

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least reducing the likely exposure should such a claim be filed, is to have potentially risky content reviewed by counsel prior to publication. Such "clearance," also known as pre-publication review or "vetting," is the practice of analyzing the personal and property rights at issue and securing any necessary rights, ensuring the legality of newsgathering techniques, and conducting a legal review of the content to identify and minimize risks of third party claims or lawsuits, such as defamation or invasion of privacy. Before an insurance company issues a media liability policy, the underwriter needs to understand the extent to which the company to be insured has taken steps to minimize the risks covered by the policy.

Accordingly, applications for media liability insurance usually contain extensive inquiries about the potential insureds' clearance policies and practices. For a media company that continually generates content, the underwriter will want to know what procedures are in place to vet content on an ongoing basis. For example, the application may seek a description of the media company's policies regarding review and editing of communications prior to dissemination, guidelines for referral to outside counsel, and the identity of the individuals conducting such review. The application may ask whether the media company has access to experienced in-house or outside legal counsel for consultation regarding pre-publication review. In fact, the policy itself may require, under certain circumstances, legal clearance as a condition of coverage. Most media liability policies require legal clearance in order to avoid the carrier's denial of coverage based on a "Dishonesty Exclusion." That is the situation presented in the "Pink Slime" coverage dispute, which will be addressed in detail further ahead.

Most media liability policies require legal clearance in order to avoid the carrier's denial of coverage based on a "Dishonesty Exclusion." That is the situation presented in the "Pink Slime" coverage dispute.

Excess Liability Insurance – Divvying Up the Risk

When the potential risk to be insured is very large and an insurance carrier will not or cannot insure the entire risk, excess insurance comes into play. Excess insurance typically is provided in layers above the primary insurance, with the layers together referred to as a "tower." Each layer of excess coverage typically does not come into play unless and until the underlying layers are exhausted. That is, in the event of a loss, the primary policy's limits would need to be fully paid before the first excess layer would pay anything, and so on up the tower. Most often, excess policies "follow the form" – meaning that, except for their limits, they adopt the terms and conditions of the policy below them in the tower. As a result, the policy language of the primary policy usually provides the terms and conditions of all of the policies in the tower.

If a claim is made, each of the insurers will be notified. The carrier who issued the primary policy will investigate the claim and evaluate insurance coverage under its policy's wording. If covered, defense counsel will be retained, and the primary insurer will otherwise manage the claim through resolution. If the excess policies "follow the form" of the primary policy, the

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excess insurers will each make their insurance coverage determination based on the wording of the primary policy. Excess insurers may monitor the claim and await additional information, or may get further involved in the claim, depending on factors that include the nature of the risk, and facts and circumstances surrounding the specific claim.

In the "Pink Slime" matter, Chartis was one of a number of excess insurers on the "tower" over a primary policy. They took an individualized coverage position that was based upon interpretation of unique wording of the primary policy because they "followed the form" of the primary policy. Accordingly, understanding the basics of media liability insurance, clearance principles, and excess liability insurance are each essential to comprehending the dispute between Chartis and Disney over whether the settlement of the "Pink Slime" litigation is covered by Chartis' excess media liability policy.

The ABC Broadcasts

Beef Products, Inc. ("BPI") is a producer of lean finely textured beef ("LFTB"). According to BPI, LFTB is lean beef that has been mechanically separated from trimmings and further processed into a product that, when added to ground beef, lowers the fat content of ground beef, lowers the costs of ground beef to consumers, and decreases the number of animals that need to be slaughtered in the US to produce lean beef. In early 2012, ABC News broadcast a series of reports that explored LFTB and its production, composition, uses, nutrition, and labelling, and detailed the mechanical process used to create LFTB. In subsequent broadcasts, ABC News continued to investigate and report on LFTB and the evolving public, private, and governmental responses to ABC News' initial reports, including identification of supermarkets that sold ground beef containing LFTB, supermarket chain policy changes, government policy changes, meat industry responses, and the debate over labelling of LFTB.

The "Pink Slime" Complaint

In response to the ABC News broadcasts, BPI and its related companies filed a lawsuit in South Dakota state court against American Broadcasting Companies, Inc., ABC News, Inc., journalists Diane Sawyer, Jim Avila, and David Kerley, and individuals Gerald Zirnstein, Carl Custer, and Kit Foshee (collectively, "ABC"). BPI alleged that ABC's reports on LFTB were false and disparaging, that ABC knew the reports were false and disparaging, and that ABC essentially engaged in a "disinformation campaign" against BPI. The complaint contained 27 counts set forth in 699 paragraphs over 263 pages, with claims alleging defamation, common law product disparagement, violation of South Dakota's Food Products Disparagement Act, and tortious interference with business relationships. BPI contended that ABC knowingly misled the public into believing that LFTB was not beef at all, but rather, was an unhealthy "Pink Slime" "hidden" in ground beef as part of an "economic fraud" masterminded by BPI.

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BPI expressly alleged that each of the defendants acted with "actual malice" because the statements made about LFTB in the news reports were allegedly made while the defendants possessed knowledge of their falsity or recklessly disregarded the truth. As a result of ABC's news reports, BPI alleged it lost business from most of its major grocery store chain customers; ground beef processors stopped purchasing LFTB; revenue sharply declined; and it was forced to close processing facilities and lay off employees. BPI pled actual and consequential damages in excess of $400 million, statutory and treble damages pursuant to South Dakota's Agricultural Food Products Disparagement Act, and punitive damages.

Procedural Developments and Settlement of the "Pink Slime" Case

ABC responded to the complaint with a motion to dismiss for failure to state a claim. The Court granted dismissal of five of the common law disparagement claims as duplicative, but permitted the remainder of the claims to remain. The case proceeded through discovery and summary judgment, which was denied, sending the case to trial commencing June 5, 2017. BPI's attorneys told the jury that BPI sustained $1.9 billion in damages and that with trebling they were seeking a total of $5.7 billion. After three weeks of trial, the case was settled. The terms of the settlement were not made public; however, it has been reported to be in excess of $177 million based on Disney's quarterly earnings report for the relevant period, which included a $177 million expense in connection with the settlement of litigation. See Christine Hauser, *ABC's 'Pink Slime' Report Tied to $177 Million in Settlement Costs*, N.Y. TIMES August 10, 2017, Retrieved from http://www.nytimes.com

The terms of the settlement were not made public; however, it has been reported to be in excess of $177 million based on Disney's quarterly earnings report.

The "Pink Slime" Coverage Dispute

After paying the "Pink Slime" settlement on behalf of its subsidiary, ABC, Disney asked its media liability insurers to pay their respective shares of the settlement pursuant to the terms of each policy. Disney had purchased a manuscripted, primary media liability policy with limits of $15 million, subject to a $10 million retention, for the May 1, 2012 to May 1, 2013 policy period ("the Primary Policy"), which included coverage for its subsidiaries, including ABC. Disney had also purchased excess policies that followed the form of the Primary Policy. Although it is not publicly known how many layers of coverage were available in addition to the Primary Policy to participate in the settlement, three layers are identified in the coverage litigation: a first excess policy with limits of $15 million excess of $15 million; a second excess policy with limits of $10 million excess of $30 million; and a third excess policy with limits of $25 million excess of $40 million. It is this third excess policy issued by Chartis ("the Chartis Policy") that gave rise to the coverage dispute. Chartis contended that the dishonesty exclusion

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in the Primary Policy barred coverage for the BPI settlement, and refused to contribute its policy limits. (Another excess carrier, a Chartis/AIG affiliate, has also refused to tender its limits due to the coverage dispute.)

In October 2017, two actions were filed related to the coverage dispute. First, on October 17, 2017, Disney filed a petition in the United States District Court for the Central District of California to compel arbitration pursuant to a dispute resolution provision in the applicable policy. *See The Walt Disney Company v. AIG Specialty Insurance Company*, Case No. 2:17-cv-07598 (C.D. Cal.). Then, Chartis filed a lawsuit in New York state court seeking a declaration that there is no coverage under the Chartis Policy for the BPI settlement, and an order enjoining arbitration of the coverage dispute. *See AIG Specialty Insurance Company f/k/a Chartis Specialty Insurance Co. vs. ABC, Jim Avila, and the Walt Disney Co.,* No. 656581/2017 (N.Y. Supreme Ct.) ("the Coverage Action").

The complaint filed in the Coverage Action attached a copy of the Chartis Policy. The Insuring Agreement of the Chartis Policy states in pertinent part:

> This policy shall provide coverage in accordance with the same terms, conditions and limitations of the Followed Policy, as modified by and subject to the terms, conditions and limitations of this policy.
>
> The Insurer's coverage obligations under this policy attach to the Insurers only after the Total Underlying Limits have been exhausted through payments by, on behalf of or in the place of the Underlying Insurers of amounts covered under the Underlying Policies.

After paying the "Pink Slime" settlement on behalf of its subsidiary, ABC, Disney asked its media liability insurers to pay their respective shares of the settlement pursuant to the terms of each policy.

The Chartis Policy follows the form of the second excess policy below it, which in turn, follows the form of the Primary Policy. Therefore, determination of coverage under the Chartis Policy requires an analysis of the Primary Policy that is followed. The Primary Policy provides coverage, in relevant part, for "defamation or harm to the character or reputation of any person or entity including but not limited to libel, slander, trade libel, product disparagement or injurious falsehood and emotional distress or outrage to the extent it is based on harm to character or reputation" arising from "Multimedia Activities" which is defined to include "news gathering, news programming, and news distribution of informational content, programming or materials."

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The Primary Policy contains a number of exclusions, including a "dishonesty exclusion" applicable to all claims made under the policy, which states in pertinent part:

> III EXCLUSIONS
> The Insurer shall not be liable for **Damages**, **Claims Expenses**, or **Data Breach Expenses** on account of any **Claim**:
> Alleging, based upon, arising out of or attributable to any dishonest, fraudulent, criminal, malicious or intentional act, error or omission, or any intentional or knowing violation of the law by an Insured. However, this exclusion shall not apply to **Claims Expenses** or the **Insurer's** duty to defend any such **Claim** until there is a final judgment against the **Insured** as to such conduct, at which time the **Insured** shall reimburse the **Insurer** for any **Claims Expenses** paid by the **Insurer**. Only facts pertaining to and knowledge possessed by any member of the **Control Group** shall be imputed to any other member of the **Control Group** or to the **Named Insured** or a **Subsidiary**.

Chartis argues that its policy "does not cover judgments or settlements of claims where the Insured defamed a public person with 'actual malice' unless the Insured obtained an advance written opinion from outside counsel…"

However, the dishonesty exclusion also has a carve-out solely applicable to media liability claims, that provides that the exclusion will not apply to the extent that:

> Prior to the date the **Insured** engaged in such excluded conduct, the **Insured** had received from its outside legal counsel a written opinion and authorization stating that based on counsel's good faith and reasonable legal evaluation and analysis of the existing law, counsel has concluded that such conduct was legal under and protected by the First Amendment of the United States Constitution or any similar provision of a State Constitution protecting freedom of speech or freedom of the press; and
>
> The **Claim** alleges actual malice, as defined by the law, in conjunction with allegations of defamation, libel or slander of a public person, as defined by the law.

Chartis and Disney appear to disagree about a number of issues related to the dishonesty exclusion and the carve-out. First, while both seem to acknowledge that prong 2 of the carve-out has been met, Chartis maintains that both prongs of the carve-out must be satisfied while ABC contends that each prong is independent, such that satisfaction of prong 2 is sufficient to bring the claim back within coverage.

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In addition, Chartis argues that its policy "does not cover judgments or settlements of claims where the Insured defamed a public person with 'actual malice' unless the Insured obtained an advance written opinion from outside counsel stating that the counsel has concluded that the statements the Insured intends to make are legal." A number of allegations in the Coverage Action complaint are redacted and unavailable to the public, however by deduction, it appears that Chartis may be contending that ABC did not obtain written approval from outside counsel before broadcasting the news reports. Chartis argues the rationale for requiring outside counsel approval is to diminish the likelihood the insured will engage in conduct that gives rise to liability. Essentially, they contend a media company should be insulated from exposure if it vets potentially defamatory statements prior to publication, but should not be protected for statements made without outside counsel approval or against outside counsel's advice. They suggest that, without reliance upon advice of outside counsel, the insured would be "disadvantaged in disproving actual malice."

Dishonesty Exclusion Carve-outs in Media Liability Policies

As the language of this dishonesty exclusion and the carve-out is manuscripted, it is not applicable to analysis of other media liability insurance policies. However, the issues it raises and principles it is based on are relevant and instructive. Dishonesty exclusions in media policies often have carve-outs with respect to vetting by counsel. Most require that conduct/ content be approved based on a good faith belief or determination that the subject conduct is protected from liability by the First Amendment or other similar law.

There are three key distinctions between the carve-out in the manuscripted Primary Policy and most other media liability policies. The first is the identity of who must vet the content. The manuscripted Primary Policy mandates that conduct must be vetted by *outside* counsel. Most dishonesty exclusion carve-outs have a broader allowance for who can conduct the review. Sometimes policies permit the insured media company alone, or require the media company's legal counsel, and some provide a choice of "in- house or outside legal counsel."

The second distinction concerns how the approval is communicated. While the manuscripted Primary Policy requires a *written* opinion, most dishonesty exclusion carve-outs only require the media company to obtain "approval" or "authorization" of the conduct at issue. Thus, the standard of review required by the Primary Policy to avoid application of the dishonesty exclusion is much higher and would have a significantly greater impact on day-to-day business than the standard of review contained in most media liability policies.

While we cannot be sure without access to the redacted information, this may be the basis of Disney's position in the Coverage Action – that it would be commercially unreasonable to require written opinions from outside counsel before reporting a news story. While we are not privy to Disney's possible commercial reasonableness arguments, the Coverage Action does raise questions of how much clearance can be expected of a news program or other regularly scheduled media broadcasts, particularly in today's fast paced news environment.

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Did Chartis intend that outside counsel would review and provide written legal analysis of all content prior to being broadcast by ABC news? Where a media company needs to expediently vet content that is time-sensitive or "breaking," what is the best path to clearance, and how do we balance that against the need to manage risk? As technology and the speed of news grow ever faster, this challenge will continue to be the subject of attention.

The third distinction stems from the unusual nature of the second prong of the Primary Policy carve-out, purporting to limit it to public person defamation claims requiring actual malice. Dishonesty exclusion carve-outs in media policies do not typically limit the types of media claims that remain covered, nor do they reference actual malice.

Disposition of the "Pink Slime" Coverage Dispute

On November 16, 2017, the federal judge in California granted Disney's request to compel arbitration of the coverage dispute, and the ruling is now on appeal to the United States Court of Appeals for the Ninth Circuit.

Meanwhile, in New York, Disney has filed a motion to dismiss on a number of procedural grounds or, in the alternative, a stay of the New York action pending resolution of the California arbitration. The Motion is scheduled to be heard January 8, 2018.

Conclusion

Although the Pink Slime coverage dispute involves an insurer's attempt to enforce what it believes is a contractual impediment to coverage, it also provides a launchpad to address the significance of media liability insurance in general, as well as highlight some key provisions, principles, and policy language. Media liability insurance allows media companies to create, publish, and disseminate content and conduct their business supported by the knowledge that all or a portion of risk of exposure to claims is transferred to media liability insurers. With the assistance of media liability insurance, newspapers and television stations can report the findings of investigations, documentary filmmakers can delve deep into fascinating stories, and movie studios can feel confident investing in scripts and making movies without yielding to the pressures of those who wish to quash their First Amendment rights. Insurance companies ask in return that media companies do their best to evaluate and minimize the risks via clearance and pre-publication review.

Evynne Grover is AVP, Claims Practice Leader – Media Liability, QBE NA, and a member of the new MLRC Insurance Committee. This article is for general informational purposes only and is not legal advice and should not be construed as legal advice. The information in this article is descriptive only. Actual coverage is subject to the language of the policies as issued.

Michigan Court of Appeals Reverses Probate Court's Admitted "Prior Restraint" Against Local News Reporter

By Andrew M. Pauwels

In an order entered on December 7, 2017, the Michigan Court of Appeals reversed as unconstitutional a prior restraint issued by a probate court judge in Oakland County, Michigan, against WXYZ-TV, a local television station, and one of its reporters, Heather Catallo. In re Guardianship of Janet Kapp, No. 340838.

The Court of Appeals peremptorily reversed the probate court, finding that "the need to protect" certain individuals before the probate court from "potential mental stress, embarrassment, or anguish was not a compelling interest which could justify prior restraint of appellants' First Amendment rights."

Background

WXYZ and Heather Catallo have been reporting for months on the broad issues surrounding proceedings in Michigan's probate court system. The reports have typically used a specific probate court proceeding to shed light on broader issues of public concern, including the potential for wasteful spending and abuse of the system.

WXYZ and Catallo received an Ex-Parte Temporary Restraining Order forbidding them from displaying any photographs or videos of Janet and Milan Kapp.

On October 12, 2017, WXYZ and Catallo prepared to air one such report. Catallo had been investigating the contentious proceedings between four sisters surrounding the conservatorships and guardianships for their elderly parents, Janet and Milan Kapp. Though two of the sisters refused to comment, another of the daughters, Mila Kapusta, sat down with Catallo for an interview. WXYZ and Catallo intended to show Kapusta sitting at her table, with an array of pictures of her parents spread before her, and in fact did so in promotional videos for the story.

The story, however, was unexpectedly derailed when WXYZ and Catallo received an *Ex-Parte* Temporary Restraining Order from the probate court, forbidding them from displaying any photographs or videos of Janet and Milan Kapp in the October 12, 2017 story, and ordering the station and Catallo to appear for a hearing as to whether an injunction should issue that would prohibit any future publication of such images. WXYZ ran the story that night, but, to avoid further sanction, it pulled all promotional materials for the story and did not include any images of the Kapps in the broadcast.

WXYZ and Catallo contested the order, arguing in their papers and at a hearing before the probate court that any order dictating what they could or could not publish constituted a presumptively unconstitutional prior restraint on speech. WXYZ and Catallo relied on decades

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of controlling precedent from the United States Supreme Court stating that prior restraints "are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

They further emphasized the Supreme Court's holding in *New York Times v. United States*, 403 U.S. 713 (1971), which places an incredibly high burden on the government when it endeavors to restrain speech: "[O]only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." Their argument was simple: while the interests at issue in the probate court were concededly important, they did not arise to the level of the compelling interests articulated in *NY Times* and elsewhere to justify any prior restraint on speech.

These arguments failed to persuade the probate court. In his opinion, delivered on the record, the probate court judge determined that the case before him was "unique," requiring "different types of…rules and decisions." The judge focused on his role protecting vulnerable individuals who become subjects of the court's jurisdiction through guardianships or conservatorships: "There is a very real danger that things that affect their emotional and mental health will affect their physical health and, quite frankly, could lead to their death.... This is important and, to me, it's a compelling government interest."

The probate court entered a preliminary injunction, admitting that his action "is, in fact, a prior restraint."

Essentially turning the constitutional burden on its head, the probate court repeatedly asked counsel for WXYZ and Catallo to direct him to a case in which a restraint on speech in such a situation was reversed. With no case before him, the probate court entered a preliminary injunction, admitting that his action "is, in fact, a prior restraint," and ordered that no photos or video of Milan and Janet Kapp could be used in any broadcast by WXYZ and Catallo.

The Court of Appeals Reverses

WXYZ and Ms. Catallo filed an emergency application for leave to appeal to the Michigan Court of Appeals and, with it, a motion for peremptory reversal, asking the court to immediately reverse and vacate the probate court decision. Citing *NY Times*, the Court of Appeals, in a brief order, vacated the probate court's injunction "as an unconstitutional prior restraint on speech in violation of" the First Amendment "which was not justified by a clear and present danger or serious or imminent harm to a protected competing interest."

The need to protect individuals from potential mental and emotional harm, even vulnerable individuals like the Kapps, could not justify a prior restraint.

Scripps Media, Inc. d/b/a WXYZ-TV and Heather Catallo were represented by James E. Stewart, Leonard M. Niehoff, and Andrew M. Pauwels of Honigman Miller Schwartz and Cohn LLP, who worked closely with David M. Giles, Deputy General Counsel of The E.W. Scripps Company.

Iowa Supreme Court Lifts Prior Restraint Against Des Moines Register

By Tom Curley

The Iowa Supreme Court recently lifted a prior restraint against the *Des Moines Register* which prohibited the newspaper from publishing the contents of once-public court records. McCleary v. Kauffman and Des Moines Register, No. 17-1982 (Dec. 19, 2017).

Entered by a single justice, the temporary injunction came without an opportunity for the newspaper to be heard and at the request of a lawyer whom the *Register* was intending to profile in an upcoming article.

However, the same justice declined to continue the injunction after the *Register* filed an opposition to the order challenging it as "an undesirable and unsustainable outlier in the law and policy of this State and this Nation."

In terminating the injunction, Justice David S. Wiggins wrote that "The stay was strictly temporary in nature, its duration limited to the time necessary for the filing of the defendants' response, the plaintiff's reply and this court's entry of a ruling on the plaintiff's combined applications."

The prior restraint, which remained in effect for eight days, came at the request of Jaysen McCleary, an Iowa-licensed attorney whom the *Register* had interviewed for an article it ultimately published once the injunction was lifted.

The prior restraint, which remained in effect for eight days, came at the request of an Iowa-licensed attorney whom the Register had interviewed for an article.

Pre-Publication Suit and Injunction Request

Prior to publication, McCleary filed a complaint against the *Register* captioned "Prior Restraint, Intrusion on Seclusion, and Negligent and Intentional Infliction of Emotional Distress."

While the remainder of the litigation remains pending, a Polk County district court initially rejected McCleary's request for an injunction to prohibit publication of information contained in certain court documents which had been publicly filed, but which were later sealed.

The *Register* was not a party to the case in which the documents were filed, but had instead obtained the records in the course of its newsgathering concerning McCleary.

As the district court summarized, "Mr. McCleary's attorneys filed expert reports allegedly containing medical information in the public court file without marking them 'confidential' or requesting that the court make them confidential."

"Later, Mr. McCleary's attorneys requested and obtained a consent protective order prohibiting dissemination of the reports. Mr. McCleary alleges that [*Register* reporter] Clark Kauffman obtained copies of said reports during the period they were part of the public court file."

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In declining to issue an injunction, the trial court held that "Even if true, this court cannot enjoin publication of the reports, as such an injunction would violate the First Amendment and Article I, Section 7 [of the Iowa Constitution]. Moreover, the defendants in this case were not parties to [the case in which the protective order was entered], and are not bound by orders in that case." *McCleary v. Kauffman*, 2017 WL 6330635 (Iowa Dist. Ct. Dec. 7, 2017).

Separately, the plaintiff also sought to have the defendants held in violation of the sealing order by a different district court judge. This effort also failed.

However, McCleary petitioned the Iowa Supreme Court for emergency review, arguing that the records at issue contained "highly confidential medical and financial records that were inadvertently filed" and which were still subject to a protective order against dissemination.

McCleary contended that the information was "not a matter of public concern, is privileged and confidential and would damage the undersigned's and his clients' due process rights if this information is revealed to the public in pending litigation as well as do irreparable harm."

McCleary also argued that he was a "private figure" with a constitutional right to privacy protection and that Kauffman "should be enjoined from reporting about matters concerning McCleary's 'manner' of practice which is nothing more than smear piece that is not a legitimate matter of public concern."

Prior Restraint Granted

Although plaintiff was unsuccessful at the trial court level, a justice of the Iowa Supreme Court granted McCleary a temporary injunction against publication of information contained in the court records and then invited the *Register* to file a response.

A justice of the Iowa Supreme Court granted McCleary a temporary injunction against publication of information contained in the court records and then invited the Register to file a response.

"Pending further order from this court, the defendants shall not disclose or share (other than with legal counsel) any information in the defendants' possession that was obtained exclusively from the reports," the Supreme Court order stated.

In response to the order, the *Register* argued that "McCleary's conduct as a lawyer and the medical reasons he has relied upon to defend it are matters of public record, both in orders filed by multiple courts and in pleadings and records filed by McCleary or parties and lawyers adverse to him that were cast into the public domain by their public filings."

"McCleary's underlying lawsuit, at best, raised only personal privacy interests as a basis for his request that the judicial system take the unprecedented step of enjoining the press from reporting about matters concerning the courts and his practice before them," the *Register* contended. "Those private interests could not and do not rise to the level of a compelling state interest justifying consideration of, let alone entry of, a prior restraint."

In declining to leave the injunction in place, Justice Wiggins did not detail his reasoning but noted that, following briefing by the parties, he had had decided to deny "the plaintiff's combined applications for interlocutory and certiorari review. Because this court has denied

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the plaintiff's combined applications the temporary stay is lifted, mooting the need for this court to address the defendants' motion to vacate."

Plaintiff then sought review by a three-justice panel of the seven-member Iowa Supreme Court, which panel declined to reinstate the injunction.

Tom Curley is Associate General Counsel at Gannett Co., Inc. Michael Giudicessi and Susan Elgin of Faegre Baker Daniels LLP represented journalist Clark Kauffman and the Des Moines Register. Plaintiff Jaysen McCleary represented himself.

Sixth Circuit Rules That Anonymous Speaker May Preserve Anonymity Even After Plaintiff Wins Judgment

By Joshua Koltun

In an important case of first impression, the United States Court of Appeals for the Sixth Circuit ruled that entry of judgment against an anonymous speaker defendant will not necessarily require the public disclosure of the speaker's identity. There is a presumption in favor of such disclosure, but the strength of that presumption, and whether the speaker's interest in remaining anonymous overcomes that presumption, is a multi-factor, "fact-intensive" inquiry within the discretion of the trial court. *Signature Management Team, LLC v. Doe,* (6th Cir., Nov. 28, 2017).

Background

Plaintiff Signature Management Team ("TEAM") is a multi-level marketing company. Defendant Doe anonymously publishes a blog that is highly critical of multi-level marketing companies, and has focused much of his criticism on TEAM. *Id.* at 2. Doe posted on his blog a downloadable copy of an out-of-print TEAM textbook. When TEAM served the blog's host with a DMCA subpoena, Doe promptly removed the hyperlink to the book. *Id.*

The Sixth Circuit ruled that entry of judgment against an anonymous speaker defendant will not necessarily require the public disclosure of the speaker's identity.

When it was unable to learn Doe's identity via the DMCA subpoena, TEAM filed a copyright action in the Eastern District of Michigan. *Id.* Team sought no monetary relief, only a a permanent injunction against future infringement, an order that Doe destroy all copies of the work in his possession, and an order that Doe be publicly identified. *Id.*

Doe appeared in the action and asserted fair use and copyright misuse defenses, and opposed disclosure of his identity on the grounds that the First Amendment protected his right to remain anonymous. *Id.*

TEAM moved to compel discovery of Doe's identity. *Id.* at 3. The district court applied the test from *Art of Living Found. v. Does 1–10*, 2011 WL 5444622 * 7 (N.D. Cal. Nov. 9, 2011). Balancing "the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant," the court required Doe to disclose his identity subject to an "attorneys-only" protective order. Slip.op. at 3.

TEAM's attorneys, after learning his identity, filed TEAM's opposition to the summary judgment motion. The district court rejected Doe's affirmative defenses. The Court tentatively indicated, however, that it was not inclined to grant a permanent injunction against future infringement, but only an order that Doe destroy any copies of the work in his possession. *Id.*

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After further briefing, the district court granted summary judgment for TEAM but declined to issue any injunctive relief. It reasoned that injunctive relief was "unnecessary to ensure that defendant would not engage in future infringement of the work," and that Doe had already destroyed any copies of the work in his possession. *Id.* at 3-4.

TEAM limited its appeal to the district court's failure to identify Doe in the judgment *Id.* at 4.

The court of appeal reviewed for abuse of discretion. *Id.* A number of tests have been developed to balance the First Amendment rights of an anonymous speaker defendant to preserve his anonymity against the rights of a plaintiff. *Id.* at 5. The court distinguished these "pre-judgment" cases on the grounds that these tests were designed, in part, to "safeguard against unmasking potentially nonliable defendants." *Id.* That concern is not present once plaintiff establishes liability. *Id.* "On the other hand," the court noted, "where the anonymous defendant is determined to have fully complied with the relief granted, there is no practical need to unmask the defendant." *Id.*

The court held that there is a "presumption in favor of unmasking anonymous defendants when judgment has entered for a plaintiff." *Id.* at 5-6. Although the court analogized this presumption to the "strong presumption" against sealing judicial records, it indicated that this presumption would be stronger or weaker depending on several factors. The district court should consider: (1) the public interest in open records, (2) the plaintiff's need to learn the anonymous defendant's identity in order to enforce its remedy. (3) the Doe defendant's First Amendment interest in anonymity. *Id.* at 6-8

Defendant Doe anonymously publishes a blog that is highly critical of multi-level marketing companies, and has focused much of his criticism on TEAM.

The ***public's interest*** in knowing Doe's identity is "fact intensive," depending on the subject matter of the litigation. *Id.* at 7 The district court must consider "such factors as the content and subject matter of the speech, the frequency of the speech, the size of the audience for the speech, and the intent of the speaker." Widely circulated, intentionally libelous speech on a topic of public concern would weigh more heavily than negligent speech, read by few people, concerning a "personal feud." *Id.* In a copyright case, "the court should consider the reach of the copyrighted material, the economic losses suffered by the copyright holder, the reach of the infringed version of the copyrighted material, and the intent of the infringer." *Id.*

Plaintiff's interest in identifying Doe will depend on whether plaintiff needs to know defendant's identity to enforce a judicial remedy. *Id.* A plaintiff who obtains "an ongoing remedy such as a permanent injunction will have a strong interest." *Id.* But a plaintiff will have little need to unmask a Doe defendant who has willingly participated in the litigation and complied with all relief ordered." *Id.* Indeed, in a case with minimal public interest and in which Doe's interest in anonymity is substantial, "a district court could reasonably enter a judgment that conditions a defendant's continued anonymity on the satisfaction of the judgment within a certain timeframe." *Id.* at 7-8.

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Defendant's interest in anonymity might be substantial even though the litigation has determined that at least some of his speech was unprotected by the First Amendment. Defendant may rebut the presumption of openness, for example, by showing that he "participates in a significant amount of ***other, non-infringing*** anonymous speech that would be chilled if his identity were revealed." *Id.* at 7, 8 & n. 3 (emphasis added). Doe's showing must be balanced against the "strength" of the public's and plaintiff's interests in identifying Doe. *Id.*

Remand. The court of appeal noted that district court had already "properly considered factors such as the non-necessity of a permanent injunction, Doe's compliance with all relief ordered, and that the majority of Doe's anonymous blogging constitutes protected speech." *Id.* at 8. The district court must now weigh "these factors favoring anonymity against the public's interest in open proceedings in general and in this particular copyright infringement lawsuit, as well as plaintiff's interest in unmasking Doe."

The court of appeal's outlining of the relevant factors gives Doe substantial reason to hope that he may persuade the district court to continue to protect his anonymity. In the meantime, however, TEAM has petitioned for *en banc* review..

Dissent. Judge Surheinrich, dissenting, commented that "the majority's concern here is like that of an overprotective parent. *Id.* at 13. He reasoned that determination of infringement disposed of the case, since infringing speech is not protected by the First Amendment. That identifying Doe would strip him of his anonymity with respect to other speech was a "collateral" issue not before the court. *Id.* at 11. The majority disagreed. *Id.* at 9.

This decision emphatically ruled in favor of a robust and nuanced balancing test.

The dissent complained that without knowing Doe's identity, TEAM would find it very difficult to "monitor" Doe's "compliance." *Id.* at 12. As the majority noted, however, the district court had not issued any ongoing injunctive relief, so there was nothing to monitor. *Id.* at 9. In any event these were (according to the majority) arguments that the district court could consider on remand. *Id.* How exactly Judge Suhrheinrich imagined that knowing Doe's identity would enable TEAM to monitor Doe's future (presumably anonymous) online activities is not clear.

Takeaways. Courts have split over the proper test for balancing the needs of plaintiffs against anonymous speaker's right to remain anonymous. A number of courts have held that that an anonymous speaker's identity may be protected only so long as the plaintiff cannot make a *prima facie* case as to all elements not within the defendant's control. *See, e.g., Doe v. Cahill,* 884 A.2d 451, 457 (Del. 2005); *Krinsky v. Doe 6,* 159 Cal.App.4th 1154, 1172 (2008). Many other courts have held that even once plaintiff makes such a *prima facie* case, the court must still perform a balancing of interests. *See, e.g., Art of Living, supra*; *Dendrite Intern., Inc. v. Doe*, 775 A.2d 756, 770 (App.Div. 2001).

This doctrinal disagreement has taken place in something of a vacuum, however. The cases have almost always been disposed of on the ground that plaintiff failed to make a *prima facie*

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case. Thus the doctrinal issue whether there is a further "balancing prong" has not been presented on the facts of the case.

Here, the further "balancing prong" was essential to the outcome. Under the *Cahill* line of cases, Doe would have lost. This decision emphatically ruled in favor of a robust and nuanced balancing test. It is not necessarily enough for plaintiff to have presented a *prima facie* case; indeed, it may not be enough to have established liability. The reasoning of the decision indicates that an anonymous speaker who appears in the case and defends on the merits will have powerful arguments to preserve his anonymity up through trial, unless plaintiff is able to show that the defendant's identity is relevant to a contested issue, and even then discovery might be granted pursuant to an attorney's only" protective order. Once liability is established, the balance shifts somewhat in favor of disclosure of defendant's identity, but in many cases a defendant may still be able to preserve his anonymity.

Joshua Koltun, a solo practitioner in San Francisco, represented Doe. Michael A. Sneyd and Joanne Geha Swanson, of Kerr, Russell and Weber, PLC, Detroit, Michigan, represented TEAM. Aaron Mackey of the Electronic Frontier Foundation filed an amicus curiae brief supporting Doe.

Public Officials' Personal Texts and Emails May Be Subject to Arizona Public Records Law

Courts Must Determine if Information Qualifies as Public Record

By Dan Barr

In a ruling that rejects the reasoning of an Arizona Attorney General's Opinion issued five months earlier, the Arizona Court of Appeals ruled on December 7 that public officials cannot evade the Arizona Public Records Law by using their own cellphones for texts, emails and social messages. Lunney v. State of Arizona, No 1 CA-CV 16-0457 (Ariz. App. Dec. 7, 2017).

The ruling concerned multiple public records requests filed by John and Robin Lunney to the Arizona Department of Public Safety and the Arizona Department of Transportation following the death of their son in a 2012 car crash. Among other things, the Lunneys sought information from various databases about the police officers who were on duty the night of the accident and the personal cell phone records of two DPS officers at the scene of the accident. After a four-day hearing, the trial court entered judgment for the State, holding that DPS was not required to consult multiple databases to respond to the Lunneys' public records request. As for the cell phone records, the trial court found, based upon the DPS officers unchallenged avowals, that there was no evidence that the records still existed.

Public officials cannot evade the Arizona Public Records Law by using their own cellphones for texts, emails and social messages.

On appeal, the Court of Appeals reversed the trial court's ruling regarding a public agency's duty to search its databases for responsive records. Writing for a unanimous court, Judge Paul McMurdie noted:

> [A] distinction exists between "searching an electronic database to produce existing records and data" and "searching an electronic database to compile information about the information it contains." Here, the Lunneys did not request information *about* information, they simply wanted the names and related information about the officers on duty during a specified period.

Slip Op. at 10. Judge McMurdie noted that while the "State is not required to create a single comprehensive document responding to the Lunneys' request," it is required to "'query and search' its electronic databases and produce any responsive documents that result from those searches." *Id.* (internal citation omitted).

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As for the cell phone records of the DPS officers at the scene of the accident, the Court of Appeals held that a "public employee's private cellphone records pertaining to the conduct of public business may become public records subject to disclosure if a public records requestor establishes the employee used the cellphone for a public purpose." *Id.* at 12.

While "an individual has a cognizable private interest in her or her personal cell phone," the Court of Appeals observed that "the line between public and private records is not always clear, and when a 'substantial question' exists as to whether information is subject to disclosure, courts must first determine if the information qualifies as a public record." *Id.* at 11 (internal citation omitted).

"In the case of a public employee's personal cell phone records," the Court of Appeals wrote, "a requestor can raise a 'substantial question' by showing that the employee used his or her cellphone for a public purpose…If the threshold showing is met, the burden then shifts to the party claiming the record is private to so establish." *Id.* at 12 (internal citation omitted).

Because there was "no evidence presented that the [cell phone] records are available," the Court of Appeals did not decide if the threshold showing was made in this case that the officers' cell phone records were public.

"A requestor can raise a 'substantial question' by showing that the employee used his or her cellphone for a public purpose."

The Court of Appeals' holding regarding personal cell phone records followed the reasoning of the Arizona Supreme Court's decision in *Griffis v. Pinal County*, 215 Ariz. 1, 4 (2007), that the "nature and purpose" of a document determines its status as a public record and that the document must have a "substantial nexus with a government agency's activities" to be considered a public record. In doing so, the Court of Appeals impliedly rejected a formal opinion issued only five months earlier by Arizona Attorney General Mark Brnovich, who opined that if an "electronic message is solely on a private electronic device or through a social media account that an agency has not established as a system for conducting government business, then ... the electronic message is not a public record." Op. Ariz. Att'y Gen., No. I17-004 (July 7, 2017) at 8.

Finally, the Court of Appeals held that the State's taking 135 days to respond to the Lunneys' request was not a "prompt" response as required by the public records law. Although acknowledging that deciding whether a public agency's response is "prompt depends of the factual circumstances of the request," *Slip Op.* at 13, the Court of Appeals observed that the State in this instance "did not provide a legally sufficient reason for the delay." *Id.* at 14.

Dan Barr is a partner at Perkins Coie in Phoenix, AZ. Plaintiff was represented by Julio M. Zapata, Zapata Law PLLC.

Media Coalition Gains Access to Sentencing Letters

Florida Court Releases Letters in Former Congresswoman Corrine Brown Corruption Case

By Jennifer Mansfield

In response to requests from multiple media entities, on December 18, 2017, United States District Judge Timothy J. Corrigan, Middle District of Florida, released to the press letters sent to him, either directly or through the United States Probation Office, as part of the District Court's sentencing decision-making of former Congresswoman Corrine Brown ("Brown"), who a jury found guilty of 18 counts related to fraud, financial disclosure, and income tax-related charges. The charges arose out of a scheme to solicit charitable donations for educating youth at risk but then divert money from the charity to Brown and two others. The Court later sentenced Brown to five years in prison and restitution.

After sentencing, multiple media entities asked the District Court to allow access to the letters from members of the public that the Court received, either directly or through the Probation Office, in advance of Brown's sentencing. On December 5, 2017, the Court requested the media provide legal briefing. In response, a coalition of local media entities, including two Tegna television stations, a Graham Media Group television station, the local PBS affiliate WJCT, Cox Media Group, and *The Florida Times-Union* newspaper, submitted a legal memorandum setting out the qualified rights of access to sentencing proceedings, including to the materials submitted to a court as part of the sentencing process.

On December 18, 2017, the District Court granted access to the letters, and released the letters as exhibits to its Order. The Court's order held that "[t]he integrity of our judicial process is secured in large measure by the public's longstanding right of access to that process," but noted that there is no controlling Eleventh Circuit authority governing the public release of sentencing letters. The Court also noted that other courts around the country have ruled both in favor and against their disclosure. In making its decision to release the letters, the Court held:

> It does not seem likely in this case that letter writers expected that their letters would remain private. Moreover, the Court stated in its Sentencing Order that it considered character letters when weighing an appropriate sentence for Ms. Brown. This case generated much public interest and, in light of the media's request, and the lack of objection by Ms. Brown or the government, the Court finds that the balance weighs in favor of releasing the sentencing letters.

Recognizing that release of sentencing letters may depend on the facts attendant in each

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case, the District Court noted in a footnote that its decision "is not intended to serve as precedent for future cases."

The media coalition members were Multimedia Holdings Corporation d/b/a WTLV/WJXX First Coast News; WJCT, Inc.; Graham Media Group, Florida, Inc. d/b/a WJXT-TV4 and News4Jax.com; Cox Media Group Jacksonville, owner of WJAX-TV; and CA Florida Holdings, Inc. d/b/a The Florida Times-Union, who were all represented by Jennifer A. Mansfield of the Jacksonville office of Holland & Knight LLP.

MLRC 2017 Annual Meeting

New Director Elected; A Review of MLRC Projects and Events

The Annual Meeting of the Media Law Resource Center, Inc. was held on November 8, 2017, at the Grand Hyatt in New York.

Chair of the Board of Directors, Lynn Oberlander, called the meeting to order. The first item of business was the election of Directors.

Elections of Directors

The membership elected one new Director to serve a two-year term: Ted Lazarus of Google, Inc.

The membership also reelected four current Directors for additional two-year terms: David McCraw of The New York Times Company, Gillian Phillips of The Guardian, Randy L. Shapiro of Bloomberg L.P., and Regina Thomas of Oath, Inc.

The Directors who were elected last year and will be entering the second year of their two-year terms are:

- Jonathan Anschell, CBS Broadcasting, Inc.
- Karen Kaiser, The Associated Press
- Andrew Mar, Microsoft
- Lynn Oberlander, Gizmodo Media Group

Finance Committee Report

Regina Thomas delivered the Finance Committee's report. She referred the Board and attendees to the Statement of Financial Position and noted that MLRC had a good year. Executive Director George Freeman added that while the organization had a few more expenses than usual, MLRC's reserves are healthy and its financial situation is sound.

Executive Director Report

George Freeman reported that membership increased by thirteen: a testament to the membership drives and other efforts the organization has engaged in. Given the current economic climate, Freeman said, MLRC should be pleased with membership levels. As a whole, the state of MLRC is healthy.

George announced a major personnel shift that will take place by the end of the year: Debra Danis Seiden, MLRC Administrator, is retiring after 17 years. Debra's work has been invaluable to MLRC. Though irreplaceable, she has found a very competent successor in

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Elizabeth "Liz" Zimmerman. MLRC welcomes Liz, and will more extensively fete Debra before she leaves.

George also introduced MLRC new Legal Fellow, Naomi Sosner, who comes to MLRC following a federal court clerkship in Texas and two years' experience at Skadden.

George also highlighted MLRC's new initiative: A consortium with the Reporter's Committee, CPJ, and PEN in response to the increasingly hostile relationship between the press and the current administration. The first project will be a digital publicity campaign focusing on the importance of a free press and the First Amendment. The message is still being formulated, but will not be overtly political.

Miami, Berlin, and London Conferences

Deputy Director Dave Heller announced that MLRC had an extremely successful year with its international conferences.

The Latin American Law Conference held in March was a success, and has become a hub for media lawyers in South Florida to meet with counterparts from Latin America. The 2017 conference included sessions on press freedom in Cuba; combatting online piracy; and political and journalistic challenges faced covering populist leaders in Latin America.

The European Media Lawyers Conference, which has taken place in Paris for the past three years, will be held next year in Berlin in June 2018. The goal is to continue to reach out and build relationships with foreign lawyers. MLRC is already working with MLRC members in Germany to plan the event. The Chairs of MLRC's International Media Law Committee have attended the Paris conferences and it was suggested that they and more members be encouraged to attend the Berlin Conference.

The London Conference in September was by all accounts a great success. Over 230 media lawyers from around the world attended to discuss developments in libel, privacy, newsgathering and related law. Highlights included an opening panel that thoughtfully discussed the challenges posed by "fake news"; and an end of conference US vs. UK debate on privacy law.

Entertainment Law Conference and Northern California Initiatives

Deputy Director Jeff Hermes reported on last year's Entertainment Conference, which included sessions on musicology, fan-created works, and legal and practical issues involved in producing films in China.

The next Entertainment Conference, co-sponsored by Southwestern University College of Law, will be held on January 18, 2018. The venue will shift from its prior home, at the LA Times Building, to the Japanese American National Museum. There will be sessions addressing Trump-related issues in entertainment; discrimination in creative environments; and influencer-related advertising issues.

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MLRC's Northern California meetings now take place as quarterly open conference calls operating under modified Chatham House rules. The first two calls have gone well, and have covered SESTA, Section 230, and how to deal with Russia-related takedown notices. Both MLRC members and non-member companies have participated.

Digital Conference

Staff Attorney Michael Norwick reported that the 2018 Digital Media Conference will be held in San Francisco, rather than in Silicon Valley. It will take place on May 17-18, 2018.

Unlike past years, there seems to be a theme uniting several of the planned sessions: pushback against digital companies by the public and elected representatives, and those companies' struggles to respond and include social responsibility as part of their corporate missions. Among the session topics to be addressed: Hosting and Unhosting Objectionable Content (e.g. white supremacist and terrorist propaganda, and content abetting sex trafficking); Russian Interference and Fake News; a tutorial on how algorithms and machine learning work to moderate content; a session on data scraping and the Computer Fraud & Abuse Act; and a session addressing the challenges that women working in the tech world face.

MLRC Institute Media Law for Journalists Workshops

Jake Wunsch, MLRC Production Manager, reported on the MLRC Institute's Media Law for Journalists Workshops. The final workshop of the year took place in October, in Chicago, and was extremely well-attended by both journalists and journalism students. The faculty came from member firms and media companies. It capped a year of workshops held in New York, Washington D.C., Boston, Miami, San Francisco, and Los Angeles. Mutual Insurance and the MacArthur Foundation sponsored the workshops.

The MLRC Institute received a new 3-year grant from the Knight Foundation to support the workshops. The Knight Foundation would like the MLRC Institute to begin holding workshops as part of existing conferences, which may help to expand the workshops' audiences.

DCS Report

DCS Secretary Jay Brown reported on the work of MLRC's committees and task forces (set out in detail in the DCS Annual Meeting Report in this issue). George Freeman thanked Jay and the entire Executive Committee for their excellent work in overseeing all the committees and their projects.

Conclusion

There being no further business, the 2017 Annual Meeting concluded.

Ten Questions to a Media Lawyer: Gregg Thomas

Gregg Thomas is a partner at Thomas & LoCicero in Tampa, FL.

1. How'd you get into media law? What was your first job?

I got into media law because I was totally enamored with the constitutional law class I had at the University of Florida College of Law – the history of the First Amendment and its application. Going to law school in the 1970s, after everything that happened in the '60s, made me think that doing constitutional law would be the best thing possible.

My first job was clerking for Ben Krentzman, a United States District Judge in Tampa. He'd been on the bench for about a dozen years. After that, I clerked for United States District Judge George Carr, who'd just been appointed by president Carter and confirmed by the Senate. So, two really interesting experiences – one with a senior judge and one with a judge who was just learning.

My first job working in media law was actually on "the other side" – working against the press. My law firm at the time was the largest in Florida. There was a sunshine litigation case involving media access into the selection process for the next dean of the University of Florida College of Law. I think I was a first-year associate. The senior partner of the firm, the former president of the American Bar Association, asked if I would help him write the briefs and take part in the argument.

We lost, and ironically it ended up being the best media access case in Florida at the time, an incredible win for the next 40 years for the eventual media clients that we developed.

In terms of working for media clients, there was a media group in Tampa, Media General, that had three television stations and three newspapers. So we were vetting stories, defending them in litigation, defending subpoenas that had been served, and doing access litigation, particularly in first degree murder cases. To me, it was the most wonderful job in the world. I always worried about becoming a lawyer who ended up just being in commercial litigation, dividing

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United States District Judge Ben Krentzman with all his former law clerks. Says Thomas: "I'm the last person on the right in the back row. Beard and glasses and still some hair back then."

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money between two clients, without some overarching principle. Doing media law, working with people with history and principles, was the best possible job to end up in.

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

What I like the most is the variety of media law cases. While many of the principles may be the same, the fact patterns constantly make you think about the application of libel laws and the First Amendment. No case is ever the same. While the law can be applied in a similar fashion, the facts drive the decision making.

What I like the least is the thing I like the most: the variety can sometimes be very difficult. You'd think a motion to quash a subpoena would be the same over and over again, but it never is.

3. What's the biggest blunder you've committed on the job?

In the midst of an argument in front of the Supreme Court (see question four below), Justice Scalia turned to me and said "Are you ever going to answer Justice Kennedy's question?" For

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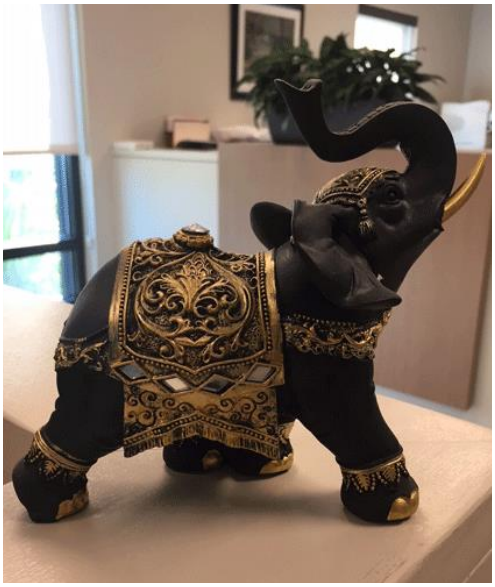
the life of me, I could not remember what Justice Kennedy's question was. I just said "yes" and went on. It was unusual because Scalia didn't nail me or pin me down any further than that.

I never did find out what the question was. I have friends who have listened to my oral argument, but it's something that I haven't done. It's been 20 years and I don't really like to hear my own voice. I'm a southerner and sometimes it sounds like I'm a hillbilly.

4. Highest court you've argued in or most high-profile case?

A case called *Butterworth v. Smith*, decided by the Supreme Court in 1990. It was a case involving a reporter who had been called before a grand jury to testify about the malfeasance of a local sheriff. As he was leaving the grand jury, the attorney told him he could never talk about what had happened during his session – essentially a lifetime gag on talking about what had happened.

The court decided that it was an unconstitutional restraint: the reporter could certainly talk about it. The distinction was information you gained outside the grand jury as a citizen could never be suppressed. So information he learned during his reporting days could not be subject to some sort of statutory gag order. In fact, Florida had a statute that prohibited him talking, but the court found that that statute was unconstitutional.



I was the sole person arguing on behalf of our client, Mike Smith. It was fun because the court really gave my opponent a hard time.

5. What's a surprising object in your office?

A toy elephant, a present for vetting a television story. There was a story about a zoo in Portland Oregon and its treatment of elephants. Typically, in deep news stories, you vet for one of the cycles, quarterly periods of time when investigative stories are running. I think it took us three cycles to finally get this story on the air. The reporter sent me a toy elephant to indicate how much effort we'd put in.

6. What's the first website you check in the morning?

New York Times followed by The Intercept.

7. It's almost a cliché for lawyers to tell those contemplating law school: "Don't go." What do you think?

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I say go to law school, but don't necessarily be a lawyer. The intellectual rigor of a legal education makes you better at analyzing all sorts of issues and creates a paradigm for thinking through statutes and decisional issues. I'm always disappointed that my son, who can argue better than I do, never went to law school. (Although he did go into media: he's a photographer in New York who's clients include National Geographic, NPR and the New York Times.)

8. One piece of advice for someone looking to get into media law?

Go to J-School and be a journalist for a while, then try to get into media law. Journalists develop the ability to write, to work on deadline, and they have fire in the belly. I think if you were thinking of hiring someone to be in a media law group, that experience and those skills would be invaluable.

9. What would you have done if you hadn't been a lawyer?

I would've done something in which there is not as much adversity. The adversary process can really take it out of you sometimes. I think if you were in some sort of business innovating and creating, it would be interesting.

That's not to say I'm a born lawyer. In fact, after college I was accepted into the history graduate program at the University of North Carolina. After going to Chapel Hill and not finding a room (because I was a bad planner), I went back to Florida, audited classes and applied to law school. I thought I was better suited to be a lawyer than a professor and that's probably right.

10. What issue keeps you up at night?

The last story I vetted. Every day it's a different, although there is one of particular interest.

There was a guy named Denny McLain, who was a pitcher with the Detroit Tigers. When he left baseball. he apparently had a lot of money and bought doctor-in-a-box facilities all over Florida. We had a reporter who went undercover and found that McLain was actually doctoring. He had no medical degree, no medical experience, but occasionally he would step-in in minor doctor-patient circumstances and render medical advice.

I was just enormously worried that McLain, who was well known, a very popular person both in Detroit and Florida, would be this enormous celebrity if the case ever went to trial. The way it ended was about six months after the story ran, after we'd had threatening demands for retraction, he was indicted by the federal government for doing the very thing the story depicted. It was an enormous relief to know that instead of going after us, our client, he was going to have to face criminal charges.