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MEDIALAWLETTER

Reporting Developments Through February 25, 2017

MLRC

LIBEL & PRIVACY

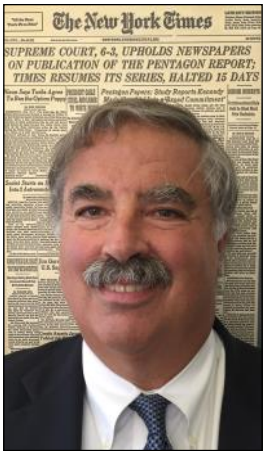
From the Executive Director's Desk

Protecting a Press and First Amendment Under Fire: A Blueprint for Action

Free Press Coalition Forming; Pro Bono Help Sought

"How're you doin?" used to be the usual way I was greeted. In the age of Trump, that has changed to "What are you doin'?" The unspoken tail of that question/sentence is…"about the attacks on the media and First Amendment."

It's not an easy question to answer, although many of us – the MLRC, in particular – are beginning to take some steps and are contemplating others. But amidst everyday attacks, moving targets, a sense of being used and baited by the White House, a hostile sector of the public, and a split in public opinion, what exactly the MLRC should do is not totally obvious. Herewith some ideas and some developments.



George Freeman

From a legal point-of-view, the two areas I'm least concerned with are "opening up the libel laws" and FOIA. Although the President may not know it, the courts determine libel laws, not the Executive; and, indeed, it's the law of each of the 50 states, not federal law. Moreover, when he tried to explain what he meant, Trump said that public figures ought not be allowed to intentionally lie. But, of course, that's pretty close to the actual malice standard we already have in place. And, finally, his nominee to the Supreme Court seems to be pretty supportive of today's libel law, so it's hard to really see much of a threat there.

The only troubling counterpoint is if President Trump or some billionaire goes after publishers they don't like, much as Peter Thiel financed litigation to ruin Gawker. Although I can't think of a Presidential family member who has ever brought a defamation suit, Melania is suing the Daily Mail in an unaccountable libel suit for reporting on the rumor that she was an escort. Why FLOTUS would want to open up her sex life to possible discovery is unfathomable, but if Trump, even as President, bankrolls litigation against financially challenged and anti-Trump entities, that would be both troubling and astounding. (Recall that, as Susan Seager reported in her article which we published after the ABA censored it, a number of the losing libel suits Trump has brought were, by his own words, for the purpose of financially squeezing media entities he felt had treated him unfavorably; put more simply, Trump has admitted filing SLAPP suits.)

FOIA would not be a priority simply because every President, while talking a good FOIA game, has done what he could to block or slow the passage of government documents to the press. The Trump administration will do so, too, but probably no more or less effectively than

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its predecessors. On the other hand, getting documents from this Executive Branch might be easier than in past administrations – because of the torrent of leaks which are flowing from well -meaning government employees.

What worries me most – and last week's events have begun to prove me right – are legal investigations and prosecutions, certainly against our sources, but, more frighteningly, perhaps against journalists as well. Trump's reaction to the leaks about his aides' contacts with Russia was nothing if not predictable: not responding to the substance, but blasting the leakers and the media, and calling for an investigation.

Thus, it's clear that there will be leak investigations and prosecutions, as there were under Obama, and concomitant subpoenas on reporters. This might well be in tandem with moves by Attorney General Sessions to weaken the DOJ Guidelines – indeed, the new Attorney General approved of a subpoena on a reporter in a case in Oregon moments after his swearing-in.

But the real scare, in my view, is if the Administration goes beyond these steps to actually prosecute journalists under the Espionage Act - even where they are passive recipients of the leak and therefore should be constitutionally protected by *Bartnicki* and its forerunners. That would be precedent-breaking – there was no prosecution of the New York Times in the Pentagon Papers case even though four justices suggested it would be appropriate, and there was no prosecution of the Times after its warrantless wiretapping exclusive in 2005, even though President Bush, Vice President Cheney, and Secretary Rumsfeld all publicly said the Times should be prosecuted for undermining the War on Terror. But given the breadth of the President's attacks on the media, I wouldn't be that shocked if such a prosecution occurred.

What worries me most - and last week's events have begun to prove me right - are legal investigations and prosecutions, certainly against our sources, but, more frighteningly, perhaps against journalists as well.

The other issue worth preparing for is Trump's actions against the press in terms of access to the White House. He already disfavors certain journalists and publications in terms of whom he calls on in press conferences; it's only one step further to keep them out of a press conference - or the White House altogether – and we saw this play out last week when Press Secretary Spicer disinvited "unfavorables" such as The New York Times, CNN and the Daily News from attending his informal gaggle.

Similarly, he has already shown a penchant to circumvent the Fourth Estate by going directly to the people on social media; what's to keep him from having no press conferences or White House photo ops at all? The law is not well settled or particularly strong in these areas, but a lawsuit claiming retaliation for unfavorable coverage by barring access could be successful as could one objecting to banning the press from fora traditionally and historically covered by the media. Indeed, MLRC's Newsgathering Committee is presently working on a model brief to be prepared for such litigation. Other access issues - from not being called on at

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a "presser", to the President's choosing to whom to give interviews, to keeping the press from seeing Trump on the golf course or not letting the press be privy to his dining plans - could be very difficult and self-defeating. Hopefully, there will be industry consultation - as described below - before such an offensive is attempted.

All that said, these legal issues pale before the biggest danger: Trump's impugning the credibility of the media and his attempts to delegitimize it, all of which seem aimed at blunting any criticism we offer. As the media and the judiciary are the two institutions - the 3rd and 4th Estates - which can monitor and limit the Executive's action, and are bulwarks of our democracy and a curb on Presidential power, it is not surprising that they are the two which Trump has attacked most forcefully.

Put simply, as John McCain intimated last week, such attacks are the first step of dictatorship. As an aside, I do not think Trump is an anti-Semite, let alone a Hitler. And I have - probably wrongfully - tended to bypass my family's survival during World War II, rather than be emotionally laden or bogged down by it. But when in New Orleans last month, I went to the World War II Museum, and saw a special exhibition on Nazi propaganda. It was downright frightening. Every exhibition, every explanation, almost every fact paralleled what has come from the President and his team In the last few months. I finally just couldn't take it any longer and left - but the experience was equally shattering and scary.

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So what is the MLRC doing about all this? First, I think it's vital that we coordinate with other non-profit groups in our space. The MLRC brings a lot of unique resources and talents to the fray, but we can't go it alone.

Through our members, we count thousands of attorneys who are in the trenches fighting for freedom of speech and press every day. Thus, as to legal resources and coverage, the impact of our efforts is not limited to legal matters which can be handled only through an internal legal staff. With the help of our members - who by all signs are ready, willing and able to meet this challenge - we can scale our efforts and respond to needs throughout the country. Second, as a membership organization, we are not dependent on foundation grants or donations from the public, and are not subject to federal limitations on political lobbying or activities. Therefore, we don't need to compete with charitable organizations for funding and can objectively

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collaborate on policy and legal issues for the good of the public without having to factor in pressures of clients' contributions.

Beyond the unique resources and talents MLRC brings to the group, we will have more authority if we team up with a few other similarly situated organizations. Thus, say in a few weeks we need to form a negotiating team regarding proposed legislation or regulations. Or, say we think it would be useful to deter an access case complaining about the press not being able to go with the President to dinner at the 21 Club. Getting buy- in from all interested parties would be a lot more likely if the MLRC wasn't taking these steps alone, but if we come at these problems in tandem with other respected organizations in the field.

The NAACP and the civil rights movement had a steering committee to help coordinate and strategize on litigation. Ditto the NRA. Some sort of coordinated strategy, run through some quasi-organized body of which MLRC would be a part, would certainly behoove us rather than have each entity - non-profit or media companies - work separately.

In addition, we have been solicited by foundations and others in the last few months who want to give assistance, in contributions, reimbursements or otherwise. So, for sure, have our likely collaborators. But the foundations want us to coalesce with our colleagues, so for that reason too, coming together as a team is vital.

In fact, we have begun discussions with the Reporters Committee for Freedom of the Press and the Committee to Protect Journalists to work on just such a free press coalition.

It's early, but events threaten to overtake us, so we must move swiftly. (Indeed, literally as I am writing this, the Times, CNN and other alleged purveyors of fake news have been disinvited from a Sean Spicer briefing.) Obviously other groups, media companies, and individual lawyers will want to join - and will be enlisted - in this effort. But for efficiency's sake, these three groups would appear best situated to be the core of any coalition.

Beyond the unique resources and talents MLRC brings to the group, we will have more authority if we team up with a few other similarly situated organizations. A coordinated strategy would certainly behoove us rather than have each entity work separately.

Finally - as I set out the question at the outset - what will we do? I see our main efforts in two areas. First, litigation, both defense and sometimes as an access plaintiff. And my own view is that it will be hard to be successful without support from the public: so we really need a PR campaign. It can't be the old fashioned way with full page ads in the New York Times and Washington Post since that's probably preaching to the converted. Rather, it should be aimed at the heartland, the voters in red states, who, for whatever misguided reason, seem to be buying in to the President's nonsense - I'm sorry but it's hard to use a more respectful word - about fake news, and who need to see the value of what the press does for them.

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From a litigation defense point-of-view, we need to be ready to defend defamation and privacy cases aimed at harming "unfavorable" media entities or which have a political agenda; and we need to be ready to defend reporters subpoenaed in leak investigations. In many such cases, defendants will be well insured and have lawyers set to go. But in many instances, they will not - we need to be geared up for those as well. So one thing I am asking from the MLRC membership right now is for attorneys who would be generally available to handle such cases - and they might be relatively long and complex - on a pro bono basis. Ted Boutrous has publicly volunteered himself, and Gary Bostwick and Bruce Johnson have indicated to me that they are willing to do so. *But please email me if you are willing to be on such a pro-bono list too.* Such a list of potential pro bono attorneys not only will put us in good stead when dangerous cases strike; they might deter such cases being brought in the first place.

From a plaintiff's access point-of-view, we should also agree as a team on whether there are appropriate cases to bring. The main take-away from the meeting of inside counsel MLRC convened in December was that we should pick and choose any such cases wisely. All the more reason for a coordinated effort to manage that process. But if the right cases arise - say, repeated denied access to the White House because of "unfavorable coverage" - we should have some decision-making imprimatur, lawyer manpower and expertise, and funds available to go forward.

I see our main efforts in two areas. First, litigation, both defense and sometimes as an access plaintiff. Second, it will be hard to be successful without support from the public: so we really need a PR campaign.

There also is the issue - quite likely sooner rather than later - of investigations and legal proceedings brought against our sources. Both because of potential conflicts between sources and publications and because our members might not be best equipped to handled what, at bottom, are criminal defense cases, these might not be cases for us to handle. But we should start identifying criminal attorneys whom we could suggest for such cases.

Finally, and, like a Beethoven symphony, this essay seems never-ending, the President - known to be a frequent purveyor of public opinion polls - the Congress and the Judiciary all take careful note of public opinion. So our industry must take action to move the needle on public opinion polls somewhat to our side, or at least to rebut and rebuff Trump's attacks on the media, or else we truly will have no leverage.

Though it will be a challenge, we need to change hearts and minds in the heartland among the electorate to whom Trump's message of media bias and fake news resonate. Therefore, it probably needs to be a social media campaign aimed at non-newspaper readers. Perhaps some of our digital members can aid in this endeavor. I am certainly no PR expert, and we will need lots of help to execute this, but it seems to me we ought to have a three-pronged message:

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(i) that there is truth and falsity about actual facts, and that, as an objective observer, the media is best positioned and aims to report on true facts – we do not make stuff up;

(ii) that the tradition of the press in this country is to help the people - to protect them from the abuses of government and the negligence and greed of corporations (Finding some personal examples of people whose lives were forever improved by media reporting would be helpful); and

(iii) that from the beginning of the Republic, the press' role was to monitor and oversee the government, and that we will continue to do that as best we can whatever party is in the White House (and in doing so, when we call a lie a lie, it is not biased reporting, it is just telling it like it is).

Additionally, I am contemplating going to the large chains and asking that they ask their local editors/news directors and publishers/owners to hold town meetings where these points can be discussed. After all, although the public seems to distrust the media as an institution, it generally loves its local paper and station. So I would think that could be one easy and direct way to influence minds of people in small towns all over the country.

All of the above are just preliminary thoughts rumbling in my head. I would be very appreciative of thoughts or comments that any of you have.

We welcome responses to this column at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

Texas Supreme Court Reverses and Remands Important Media Defamation Case for New Trial

Newspaper to Seek Rehearing to Have Case Dismissed

By John K. Edwards, Amanda Bush, and Luke Gilman

In this time of intense debate over the appropriate scope of free speech rights on matters of public concern, the Texas Supreme Court recently sided in favor of broadly protecting such speech. Hopefully, this will represent a harbinger of further speech protection to come.

On Friday, January 27, 2017, the Texas Supreme Court issued its 5-4 opinion in *Brady v. Klentzman et al.*, No. 15-0056, affirming a decision by the Houston First Court of Appeals to reverse and remand for new trial a defamation case filed by Wade Brady against a newspaper, *The West Fort Bend Star* (*Star*), and reporter (Lea Anne Klentzman) involving the question whether speech in a newspaper article related to matters of public concern.

Before trial in 2011, the trial court concluded that the article in question involved matters of only private concern, and thus instructed the jury that the defendants bore the burden to prove truth (instead of plaintiff proving falsity) and plaintiff could recover punitive damages by a showing of common law malice (*i.e.*, ill will, spite, or evil motive) instead of constitutional "actual malice" (*i.e.*, knowledge of falsity or reckless disregard for the truth).

In this time of intense debate over the appropriate scope of free speech rights on matters of public concern, the Texas Supreme Court recently sided in favor of broadly protecting such speech.

The jury returned a 10-2 verdict in favor of the plaintiff, awarding $50,000 in actual damages and, after a required reduction by law, $200,000 in punitive damages. The First Court of Appeals reversed and remanded for a new trial, holding that the article involved matters of public concern and thus the jury should have been instructed consistent with the requirement that the plaintiff prove falsity and, to obtain punitive damages, actual malice.

While the majority opinion by the Texas Supreme Court was only signed by five of the nine justices, all nine justices agreed that the speech at issue related to matters of public concern, and thus the trial court erred in its instructions to the jury. The dissenting opinion stated: "This is a suit against media defendants for *public* speech." (emphasis added). The four dissenters would have ended the case without a remand and retrial, arguing that there was insufficient evidence of actual damages as a matter of law, and thus the Court should have reversed and rendered judgment for the media defendants.

The Jackson Walker team of partners John K. Edwards and Amanda Bush and associate Luke Gilman have represented the media defendants in this case on a *pro bono* basis since the

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case began over 13 years ago. During oral argument in September, 2016 before the high court, we emphasized the importance of the public concern and damages issues to free speech protections in Texas, urging the Court to reverse and render judgment to finally end the long running dispute. While the 5-4 decision did not end the fight just yet, there remains an opportunity if a motion for rehearing on the damages question is successful. In the meantime, the majority opinion on the issue of speech on matters of public concern remains an important one that hopefully signals consistent free speech protection by the Court in the near future.

The Majority Opinion

The newspaper article at issue involved the alleged abuse of office by a public official – Chief Deputy Craig Brady of the Fort Bend County Sheriff's Department – who allegedly intervened repeatedly on behalf of his son – Wade Brady – whenever the son was involved in law enforcement entanglements. One of the key questions at trial and on appeal was whether the article related to matters of public concern or purely private concern, which affects the burdens of proof at trial. The jury was instructed consistent with the lesser burdens of proof associated with speech on matters of private concern, leading to the verdict by the jury in favor of the plaintiff.

Four of the Justices would have gone a step further, reversing and rendering judgment in favor of the defendants without a new trial.

On appeal, the media defendants contended that the trial court erred by instructing the jury in this manner because the speech related to matters of public concern, namely the conduct of a public official and law enforcement matters. The defendants also alleged that the evidence of actual damages – mental anguish and reputational harm – was so deficient that it constituted no evidence as a matter of law. Ultimately, the Texas Supreme Court agreed that the speech at issue related to matters of public concern, but split over whether legally sufficient evidence of actual damages existed.

The Majority Opinion, authored by Justice Devine, first addressed the threshold question of whether the article describing plaintiff's encounters with the police only embraced matters of public concern and found that it did. The Court relied upon the United States Supreme Court's public concern test set forth most recently in *Snyder v. Phelps*, 562 U.S. 443, 453 (2011), which asked whether the speech "can be fairly considered as relating to any matter of political, social, or other concern to the community." The Court found that plaintiff's encounters with law enforcement related to the general subject matter of the article—the Chief Deputy's use of authority on his son's behalf. Further, the Court declined plaintiff's invitation to second guess the editorial decisions of the newspaper with respect to specific descriptions and details of the encounters, requiring only a "logical nexus" between any particular detail and the general subject matter of the article. The "logical nexus" test was first set forth in *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474 (Tex. 1995).

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The Court also rejected plaintiff's argument that this test should change if some statements in the article can be shown to be false. The Court properly concluded that the truth or falsity of the statements did not change the fact that the *subject matter* of the speech related to matters of public concern. The trial court thus erred in (1) requiring the defendants to prove truth instead of plaintiff proving falsity; and (2) failing to require plaintiff to establish actual malice before obtaining punitive damages.

On the issue of whether adequate damages had been presented at trial, the Court found general testimony that "some people had a low opinion of Wade following the article" to be a sufficient showing of "actual loss of reputation." It placed particular weight on plaintiff being asked to quit his job with a company that installed decals on the county's patrol cars as proof of loss due to the article. The Court did not address the sufficiency of the evidence for mental anguish damages.

Dissenting Opinion

Four of the Justices would have gone a step further, reversing and rendering judgment in favor of the defendants without a new trial. Chief Justice Hecht authored the opinion, which pointedly addressed the lack of sufficient evidence of mental anguish damages to support any judgment and suggested closer scrutiny of such damages in media defamation cases:

> If this were a slip-and-fall case, there would be no evidence of compensable mental anguish. But it is not. This case necessarily involves the media defendants' exercise of First Amendment rights. Juries in defamation cases are not charged with protecting those rights in awarding damages. That responsibility belongs to the courts reviewing the evidence to support jury findings. The Court notes, but does not take seriously, that responsibility in this case.

With respect to reputational harm, the dissent likewise took the majority to task over the sparse evidence presented at trial. The majority found sufficient general statements that plaintiff's reputation before the article "was that he was a good kid" contrasted with his father's testimony that he had encountered (unidentified) "people in the community that had a negative impression" to justify a damages award. It further pointed to evidence that plaintiff was asked to leave his job for a company that installed decals on the county's patrol cars because of the article, although the evidence did not establish affirmatively that this request resulted from reputational harm caused by the article. The evidence also showed that plaintiff resumed work at the same business. The dissent found this evidence woefully short of that required to sustain an award of reputational harm damages.

John K. Edwards, Amanda Bush, and Luke Gilman of Jackson Walker LLP, Houston, TX represented Ms. Klentzman and The West Fort Bend Star. Plaintiff is represented by John Zavitsanos, Todd Mensing, and Jane Robinson of Ahmad, Zavitsanos & Anaipakos, Houston, TX.

Massachusetts High Court: Anti-SLAPP Law Protects Opinion Writing

By Jeffrey J. Pyle

The Massachusetts Anti-SLAPP Law does not have a particularly good reputation in media circles. By its terms, it applies only to claims based on "a party's exercise of its right of petition," not to claims based on the exercise of free speech. However, in a recent case, *Cardno Chemrisk v. Foytlin*, the Supreme Judicial Court extended the statute's protection to environmental activists who published an opinionated news article on the *Huffington Post* website. In the process**,** the court clarified the scope of protected "petitioning" in a manner that may bode well for journalists in future cases**.**

Background

The defendants, Cherri Foytlin of Louisiana and Karen Savage of Massachusetts, are environmental activists concerned about the effects of the Deepwater Horizon oil spill on the Gulf Coast, and on the cleanup workers helping to mitigate the disaster. On October 13, 2013, they published an article on the *Huffington Post* criticizing ChemRisk, a scientific consulting firm that BP had retained to examine the toxic effects on workers. ChemRisk was described in the press as having provided an "independent" analysis of BP's data, and it concluded that the spilled oil did not expose cleanup workers to harmful levels of certain chemicals. The blog post disputed ChemRisk's independence, and stated it had "a long, and on at least one occasion fraudulent, history of defending big polluters, using questionable ethics to help their clients avoid legal responsibility for their actions."

The court clarified the scope of protected "petitioning" in a manner that may bode well for journalists in future cases.

ChemRisk filed a one-count complaint for libel against Foytlin and Savage. They responded with a special motion to dismiss under the Massachusetts anti-SLAPP law, Mass. Gen. Laws c. 231, § 59H, contending that the article amounted to statements "reasonably likely to enlist public participation in an effort to effect . . . consideration" or review of an issue by the government (in the words of the statute). The trial court acknowledged that "Foytlin and Savage wrote and posted the article as part of their work to influence ongoing governmental proceedings and court cases," yet he summarily denied their motion on the ground that the article addressed only the grievances of cleanup workers, not those of Foytlin and Savage *themselves*.

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As arbitrary as the trial court's ruling may seem, it was grounded in three Massachusetts appellate decisions denying anti-SLAPP protection where the speaker was not personally aggrieved. In all three cases, the courts held that the defendants were not seeking redress "for . . . grievance[s] of [their] own," or "otherwise petitioning on [their] own behalf," and therefore did not qualify for protection. The cases involved (1) a physician hired by the Board of Registration in Medicine to investigate and testify as an expert for the government in a disciplinary action, *Kobrin v. Gastfriend*, 443 Mass. 327 (2005); (2) a state police sergeant who submitted a report as part an internal investigation relating to another officer's misconduct, *Fisher v. Lint*, 69 Mass. App. Ct. 360 (2007); and, most importantly, (3) *Fustolo v. Hollander*, 455 Mass. 861 (2010), where a news reporter was sued for an objective article about a controversial development project.

Thankfully, the SJC declined to extend the reasoning of these cases to Foytlin and Savage. The notion that these longtime environmental activists were not exercising their own right to "petition" when they published an opinionated news article about environmental devastation against the backdrop of pending court proceedings was, in the court's opinion, "a constrained view" of the First Amendment with no basis in its history, logic, or caselaw.

In the early years of the republic, the court noted, "petitions flooded Congress on many topics," some of them amounting to matters of "personal concern," such as "the payment of individual Revolutionary War pensions," and others on public issues, such as the abolition of slavery. Never had it been suggested that the right to present such petitions only extends to those advancing the speaker's narrow self-interest.

The Massachusetts legislature should amend its anti-SLAPP law to protect not only the right to petition the government, but the right to speak out on any issue of public concern.

The SJC also distinguished the *Fustolo* decision, which denied anti-SLAPP protection to a news reporter. In that case, the court explained, the journalist "was employed to write, and did write, impartial news articles, despite having personal views on the same subjects," and her "objectivity was pivotal to the decision insofar as the reporter was not exercising her own constitutional right to petition when authoring the challenged articles." That wasn't the case with Foytlin and Savage, whose point of view was reflected clearly in their article.

As welcome as the *Cardno Chemrisk* decision is for opinion writers, journalists in Massachusetts now face something of a paradox: those who espouse "personal views" are protected, while those who provide the essential service of simply reporting the facts may not be. The SJC (wisely) did not attempt to define "impartial" and "objective" news reporting—concepts that have less of an agreed-upon meaning now than at any time in modern history. Nor did the court explain how the impartial/non-impartial standard might apply to, say, a muck-

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raking investigative article about a social or political problem that screams for government reform—but which does so without stating or implying the writer's "personal views."

In another sticking point, the SJC distinguished an earlier decision that denied anti-SLAPP protection to a physician expert testifying for the government in a regulatory proceeding on the ground that the physician was acting not as a petitioner but as a "vendor of services" who had a "merely contractual" relationship to the issues in the case. The same, however, could arguably be said of a journalist assigned by her boss to report on an issue, or an attorney representing a party petitioning the government. Hopefully in future cases, the SJC will clarify this "vendor" exception. After all, it previously held that a certain kind of "vendor" - "attorneys who are sued for 'voicing the positions of a petitioning client'"- are protected by the statute. See *Cadle Co. v. Schlichtmann*, 448 Mass. 242, 252 (2007).

Regardless of the good outcome, the difficult distinctions to which the *Cardno Chemrisk* Court had to resort help demonstrate why *all* speech on public issues should be protected from SLAPP suits. Simply put, no person sued primarily for the purpose of discouraging her exercise of First Amendment rights should be left without a speedy and effective remedy. To fully address this problem, the Massachusetts legislature should amend its anti-SLAPP law to protect not only the right to petition the government, but the right to speak out on any issue of public concern.

Jeffrey J. Pyle is a partner in the Media and First Amendment Law Practice Group at Prince Lobel Tye in Boston, Massachusetts. Along with Thomas Sutcliffe of Prince Lobel and Sarah Wunsch of the American Civil Liberties Union of Massachusetts (ACLUM), Jeff submitted an amicus brief in Cardno Chemrisk v. Foytlin on ACLUM's behalf.

New and Recent MLRC Publications

MLRC Bulletin: Articles on Significant Developments of the Year
A roundtable with Professors Clay Calvert, Amy Gajda, and Kyu Ho Youm discussing the Gawker trial, right of publicity law, Section 230, disparaging trademarks, and publishing hacked e-mails. Also: Access in the Trump Era; Link Liability: An EU/US Comparison; and Will Trump's Short-Listers "Open Up" Libel Law?

Legal Considerations for U.S. Media Companies Who Send Employees Into "Harm's Way"
An updated outline containing practical tips and guidance to help keep media employees safe whether working in the U.S. or abroad.

Using Trademarks in Expressive Works
An in-depth discussion of the main legal defenses that may enable content creators to avoid the time and expense of establishing that consumer confusion is unlikely under the applicable multi-factor test.

11th Circuit, Applying CA Anti-SLAPP Law, Holds No Actual Malice in Doctors' Dispute

Court Also Finds No Commercial Speech on Lanham Act Claim

By Marc Randazza

In a hotly-contested case, the U.S. Court of Appeals for the Eleventh Circuit recently gave a double First Amendment win to Dr. Steven Novella, the well-known host of *The Skeptics Guide to the Universe* and a science journalist on the blog *Science Based Medicine*. *Tobinick v. Novella*, No. 15-14889 (11th Cir. Feb. 15, 2017).

Background

The case was originally filed in the Southern District of Florida. There, two doctors sparred over claims regarding a controversial Alzheimer's treatment. Tobinick claimed to be able to use the drug Embrel with positive results for Alzheimer's patients. His treatment was the subject of a Los Angeles times exposé, and Novella wrote further about it. Novella took the position that Tobnick's claims were well ahead of the evidence.

Tobinick sued Novella for defamation and related claims under state law, as well as a federal Lanham Act claim. Essentially, the Lanham Act claim stated that Novella's scientific articles were "false advertising." But advertising for what? That seemed to change throughout the case. It shifted from Novella selling "skeptic related activities" to selling souvenirs to Novella selling his medical services. Novella also sought donations to his legal defense fund, which Tobinick cited as a basis for considering Novella's articles to be commercial speech.

In a creative defensive move, Novella invoked the California anti-SLAPP statute in the South Florida federal court. This was possible because Tobinick filed not only in his own name, but also in the name of a California corporation. The Southern District of Florida, using conflict of law rules, applied California law and awarded Novella a win on the state law claims.

The case then continued to the Lanham Act claims. Novella defeated Tobinick's attempt to get a preliminary injunction, censoring the articles. To refute the argument that the legal defense fund was a commercial solicitation of funds, Novella presented the court with "Heed their rising voices" – the actual full page ad that was at issue in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That ad, too, sought legal defense fund support. Thereafter Novella filed a motion for summary judgment on the Lanham Act claim and was successful. The district court awarded attorney's fees against Tobinick.

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11th Circuit Decision

Tobinick appealed the decision to the U.S. Court of Appeals for the Eleventh Circuit, and an oral argument was held on January 20, 2017. On appeal, Tobinick first argued that state anti-SLAPP statutes should not apply in federal court under the *Erie* doctrine. However, the Eleventh Circuit recognized that not only had Tobinick explicitly conceded this argument below, but the lower court considered the matter nonetheless and came to the conclusion that the application of the anti-SLAPP statute was proper. While Tobinick cited to the decision of the Seventh Circuit in *Intercon Solutions, Inc. v. Basel Action Network*, 791 F.3d 729 (7th Cir. 2015) as a basis for rejecting the district court's reasoning, the Eleventh Circuit noted that the district court's decision predated *Intercon* and that Tobinick had failed to mention *Intercon* in a later motion for reconsideration. Thus, the Eleventh Circuit declined to review the merits of the *Erie* argument on appeal and proceeded to apply California's anti-SLAPP law.

Turning to the merits of the state law claims, the Eleventh Circuit held that, as a matter of law, there was no "actual malice" and thus Tobinick could not prevail against Novella on his defamation-related claims. Quoting *Sullivan*, the Eleventh Circuit recognized that calling Florida a "quack friendly state" was a matter of opinion and that isolated incorrect statements, which did not "pertain to the article's essential criticism," were not evidence of a reckless disregard for the truth. "Erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"

With respect to district court's grant of summary judgment on the Lanham Act claim, the Eleventh Circuit agreed with the lower court that Tobinick could not use a false advertising claim in order to make an end run around the First Amendment. False advertising and the Lanham Act only apply to "commercial speech," and Novella's articles did not advertise or promote products or services; their only mention of a product was in their discussion of Tobinick's treatments. Even though there may have been some profit motive in Novella's writing his articles and advertising alongside their publication, that does not make speech "commercial" or deprive it of full First Amendment protection.

The Opinion is to be published as a recorded decision of the Eleventh Circuit and should stand as an important win for freedom of expression. The Opinion is available online at http://media.ca11.uscourts.gov/opinions/pub/files/201514889.pdf, and the recording of the oral argument is available at https://www.dropbox.com/s/1y2xlrxow1eqg1s/15-14889.mp3?dl=0.

Marc Randazza, Randazza Legal Group, represented Dr. Steven Novella before the Southern District of Florida and the U.S. Court of Appeals for the Eleventh Circuit. Plaintiff was represented by

Georgia Court Rules Anti-SLAPP Law Cannot Be Used in Federal Court

SLAPP Law Conflicts With Federal Motion to Dismiss Standard

Siding with the D.C. Circuit Court of Appeals and dicta from the Ninth Circuit, a Georgia federal district court recently denied a motion by CNN to strike a defamation complaint under the state's anti-SLAPP statute, holding that the Georgia statute directly conflicted with Federal Rule 12(b)(6) and thus could not be raised in a diversity action in federal court. *See* *Carbone v. Cable News Network*, 1:16-CV-1720 (N.D. Ga. Feb. 14, 2017) (Evans, J.).

The conflict, the court explained, arises because Federal Rule 12(b)(6) requires "plausibility" on the face of the complaint, while the state anti-SLAPP law, Section 9-11-11.1 (b)(1), requires a "probability of prevailing." By its very definition, therefore, the federal plausibility requirement "not only conflicts, but also cannot coexist" with the Georgia anti-SLAPP probability requirement.

The court acknowledged that it was wading into a Circuit split (the First, Fifth and Ninth Circuits finding no conflict; the D.C. Circuit holding to the contrary). But it found the minority position more persuasive, relying on Judge Kavanaugh's analysis of the issue in *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015) ("Federal Rules 12 and 56 answer the same question as the D.C. Anti-SLAPP Act …. A federal court exercising diversity jurisdiction therefore must apply Federal Rules 12 and 56 instead of the D.C. Anti-SLAPP Act's special motion to dismiss provision.").

The court also cited with approval dicta from Ninth Circuit Judge Kozinski sharply criticizing his Circuit's decisions allowing the California anti-SLAPP statute to be used in federal court. See, e.g., *Makaeff v. Trump University, LLC*, 715 F.3d 254, 274 (9th Cir. 2013) ("Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules.").

Defamation Claim

The plaintiff, Davide Carbone, is the former CEO of St. Mary's Pediatric Hospital in Atlanta. He is suing CNN over a report about the infant mortality rate for open heart surgery at the hospital, alleging that CNN compared "apples to oranges" to report St. Mary's had a mortality rate three times the national average.

Drawing all inferences in favor the plaintiff, the complaint was sufficient to withstand a traditional motion to dismiss.

Plaintiff is represented by Lin Wood, Atlanta. CNN is represented by Charles Tobin, Holland & Knight, Washington, D.C.

DC Superior Court Grants Anti-SLAPP Motion and Dismisses Liberian Public Works Minister's Libel Complaint

By Alexandra Daniels

On December 12, 2016, the District of Columbia Superior Court dismissed a defamation claim brought by W. Gyude Moore, Liberia's Minister of Public Works, against a Delaware radio host: Henry Costa. *Moore v. Costa*.

Judge Steven M. Wellner granted Costa's anti-SLAPP special motion to dismiss because Moore could not show that the challenged statements were made with actual malice, and thus could not show that he was likely to prevail on the merits.

Background

According to the Complaint, Moore served various government roles before becoming Liberia's Minister of Public Works. The Complaint alleged that Costa is also a citizen of Liberia and his radio show, the "Costa Show," is very popular among Liberians all over the world.

Moore took exception to five specific episodes of Costa's radio show between December 22, 2015 and January 19, 2016. During those shows, Costa alleged that Moore awarded contracts for personal gain, received kickbacks, accepted bribes, and received an expensive vehicle in exchange for a contract. According to Moore, the last straw was on January 19, 2016, when Costa made the following comments:

> Gyude Moore, we are still waiting for you to tell us whose vehicle is that. How did you come to have it in your possession? Did you find it in front of your house? Was it a Christmas gift? Did Santa Claus bring that vehicle to you wrapped in a gift paper? How you got that car, Gyude? Because I know your private vehicle was a Pathfinder. You've really upgraded, my brother, to an $80,000 car. Gyude, I understand, I am still … I am still checking. I understand that he's doing a big construction on the Robertsfield Highway. You have crooks

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> at the Ministry, what do you expect? You think Gyude will stay there a day without getting corrupted?

In response to Moore's Complaint, Costa filed an anti-SLAPP special motion to dismiss. Costa argued that the suit arose from "an act in furtherance of the right of advocacy on issues of public interest," as required to trigger the DC anti-SLAPP statute, because the challenged statements concerned an issue of public interest (suspected corruption by a public official); because Moore was a public figure; and because the statements were made in a public forum (the internet and radio). Costa argued that Moore was not likely to succeed on the merits because he could not show that the challenged statements were made with actual malice, they were protected opinions, and they were rhetorical hyperbole.

Moore's opposition brief argued that the challenged statements, and thus the suit, were not about an issue of "public interest," even if Moore was a public official. Moore also argued that, because he denied Costa's allegations in a signed affidavit, that was sufficient to carry his burden of showing likelihood of success on the merits. Moore acknowledged that it was "impossible for Plaintiff to prove conclusively, at this preliminary stage of proceedings, that Defendant acted with malice," although Moore argued actual malice was evidenced by the fact that publicly-available documents were apparently not reviewed, that Costa never contacted Moore, that Costa continued to "utter highly critical statements" about Moore after receiving a cease-and-desist letter, and that Costa never revealed his sources. Although the DC anti-SLAPP statute allows "targeted discovery" in certain circumstances, Moore did not make such a request.

Motion to Dismiss Granted

The Superior Court granted Costa's anti-SLAPP special motion to dismiss. First, the court easily concluded that Costa's statements were made "in furtherance of the right of advocacy on issues of public interest." The court first considered whether Moore was a "limited-purpose public figure" under the three-prong *Waldbaum* test. It held that Moore was a "limited-purpose public figure" because (1) corruption within Liberian government has been a topic of discussion prior to Moore obtaining his position, which meets the first prong; (2) the second prong is satisfied because "persons beyond the immediate participants in the dispute" are affected; and (3) Moore satisfies the third prong because his position as Minister of Public Works could reasonably be expected to influence the outcome of the controversy. The court additionally noted that, because Costa made the comments on the radio, they were made in a public forum connected to the issue of public interest.

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Because Costa met the requirements of the *prima facie* showing for the anti-SLAPP statute, the burden then shifted to Moore to prove that he would likely win on the merits. This required him to show that Costa acted with actual malice. The Court held that he could not do so.

According to the Court, Costa's continued conduct after receiving the cease-and-desist letter did not show clear and convincing evidence of malice because "an author's knowledge of 'denials, however vehement' does not show actual malice," under DC law. With respect to Moore's argument that Costa's failure to identify his sources was evidence of actual malice, the court correctly held that it was Moore's burden to show actual malice, and not Costa's burden to contradict Moore's assertions. Finally, the court rejected Moore's argument that Costa failure to investigate sources, contact Moore or review public documents constituted actual malice, explaining that any such failure was not "clear and convincing evidence of actual malice."

The Superior Court accordingly granted Costa's anti-SLAPP motion to dismiss, dismissed the Complaint with prejudice, and indicated a willingness to award fees. Costa thereafter filed a Notice, advising the Court that he was not pursuing fees.

Alexandra Daniels is a second-year law student at Syracuse University College of Law and intern at LeClair Ryan, Washington, D.C. Plaintiff was represented by Steven M. Schneebaum and Cynthia L. McCann of Steven M. Schneebaum, P.C. Defendant was represented by Eric J. Menhart of the Lexero Law Firm.

New York Appellate Court Reinstates Statutory Privacy Case Against Lifetime Docudrama

Axe Murderers Have Name & Image Rights, Too!

By Ed Klaris & Alexia Bedat

Christopher Porco, the man convicted in 2006 of killing his father and attempting to kill his mother with an ax while they slept in their home, has a claim under New York's Civil Rights Law § 50 and 51, the New York Appellate Division decided. *Porco v. Lifetime Entertainment*, (Feb. 23, 2017).

Background

In 2013, Lifetime Entertainment broadcast the film "Romeo Killer: The Christopher Porco Story." Upon learning that Lifetime Entertainment planned to broadcast the movie, Porco sued under New York's Civil Rights Law § 50 and 51 ("50/51"), the only of the four traditional Prosser torts recognized by the state of New York. In 2015, the New York Supreme Court granted Lifetime Entertainment's motion to dismiss the complaint for failure to state a cause of action. Porco, acting pro se, appealed.

The Statute

The limited statutory right of privacy in 50/51 makes it a misdemeanor for a firm or corporation to use the name, portrait or picture of a person for the purpose of advertising or trade without their written consent. A successful plaintiff is entitled to both an injunction and damages.

The statute does not apply to "newsworthy events or matters of public interest", which are protected by the First Amendment. (*Messenger ex rel. Messenger v. Gruner + Jahr Printing & Pub.*, 94 N.Y.2d 436 (2000)).

Appellate Division Decision

On Thursday 23, February 2017, the Appellate Division of Albany County held the lower court had erred in granting Lifetime Entertainment's motion to dismiss for failure to state a

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cause of action. The Appellate Division considered the "newsworthiness" exception alongside Court of Appeals precedent on the application of 50/51 to biographies.

Where a work is "so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception", the exception will not apply (*Messenger v. Gruner*, 94 N.Y.2d 436 at 446). In such cases, the biography is nothing more than an "attempt to trade on the persona of the plaintiff" (*Id.*) and the fact that the work revolves around a "true occurrence" is not enough to bring it within the exception (*Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 58, 103 N.E. 1108 (1913)). Extending liability in such cases, the Court of Appeals has held, does not violate the constitutional protections of freedom of speech (*Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124 (1976)).

To determine the merit of Porco's claim, the Appellate Division focused on one fact (only): the film's producer had written a letter to the plaintiff's mother indicating that she was involved in the production of a documentary intended to accompany the film that she "hope[d]…[would] provide the platform for [the mother's] family to state their position in a non-fictional program after the [film] airs".

Viewing the letter in the light most favorable to the plaintiff—the standard of review in a motion to dismiss—the Appellate Division found it reasonable to infer that the producer's letter indicated that the film was considered to be a fictitious program. Accordingly, the court concluded, it could not be said that the plaintiff had failed to sufficiently allege the same degree of fictionalization as that which had been found to violate the statutory right to privacy without running afoul of constitutional protections of speech in *Spahn* and *Binns*.

The Appellate Division's decision (barely five pages) gives unduly short shrift to the newsworthiness exception.

Consequently, the Appellate Division held, the defendant's motion to dismiss should have been denied.

Comment

The Appellate Division's decision (barely 5 pages) gives unduly short shrift to the newsworthiness exception. First, the producer's letter, of itself, cannot constitute *sufficient* evidence to hold that the film was so infected by fiction, dramatization or embellishment that it could not be said to fulfill the purpose of the newsworthiness exception. The making of a "non-fictional program" in parallel to a film does not, without more, strip that film of its non-fictional elements.

Second, the degrees of fictionalization that have been found to violate 50/51 without running afoul of the protection of free speech differed *significantly* from the case at hand.

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In *Binns*, the plaintiff had obtained wide notoriety for the heroism he had displayed rescuing passengers during a ship collision. He sued the defendant for using his picture in a "moving picture" purporting to show the ship wreck and exhibiting him in a "ridiculous posture". The moving picture, the Court of Appeals held, was not representative of the shipwreck and merely used the picture "to amuse those who paid to be entertained". In *Spahn*, the defendant published a fictionalized biography of a well-known baseball pitcher, in which the author used invented dialogue, imaginary incidents and attributed thoughts and feelings.

The Appellate Division did not explain how Lifetime Entertainment's film contained similar degrees of fictionalization to the "moving pictures" in *Binns* or the fictional biography in *Spahn*. Contrary to those works, Lifetime Entertainment's movie is based on Christopher Porco's life, is entitled "Rome Killer: The Christopher Porco *Story*" and followed not only local, but extensive national coverage by the media. There is nothing in the Appellate Division's decision that suggests Lifetime Entertainment invented a biography of Porco's life, or imagined the events at issue.

Finally, *Binns* (1913) and *Spahn* (1967) are now dated decisions. A closer reading of both cases makes it clear that these decisions were heavily shaped by the profit making motives of the defendants. Since then, a number of Court of Appeal decisions have emphasized that the newsworthiness exception applies irrespective of the defendant's profit motives. *See e.g. Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433, 440, 434 N.E.2d 1319, 1322 (1982); *Stephano v. News Grp. Publications, Inc.*, 64 N.Y.2d 174, 184–85, 474 N.E.2d 580, 585 (1984); *Messenger ex rel. Messenger v. Gruner + Jahr Printing & Pub.*, 94 N.Y.2d 436, 442, 727 N.E.2d 549, 552 (2000). This subsequent line of cases, which provides important context to the newsworthiness exception, does not feature in the Appellate Division's opinion.

Lifetime Entertainment's film was undoubtedly an "expressive" work, deserving of the highest First Amendment protection: a consideration which does not appear anywhere in the Appellate Division's decision.

Missing the Bigger Picture—"Expressive" vs Purely "Commercial" Works

Lifetime Entertainment's film was undoubtedly an "expressive" work, deserving of the highest First Amendment protection: a consideration which does not appear anywhere in the Appellate Division's decision.

This lack of discussion re the "expressive" nature of a challenged work is not new. In *Nieves v. HBO, Inc.*, 30 A.D.3d 1143 (2006), a woman sued under 50/51 after she had been filmed and appeared in a reality TV show where her sexual allure had been commented on. The New York Supreme Court merely concluded HBO had failed to demonstrate that the use of the plaintiff's

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image had a "real relationship" to the subject matter of the show. The words "First Amendment" did not appear in the decision.

And yet, as early as 1965, that same Supreme Court was persuaded by the argument that 50/51 "was mainly designed to operate in connection with the sale of goods and services" and its application to works involving literary and artistic expression protected by the First Amendment "remote from the Legislature's contemplation". *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp*., 22 A.D.2d 452, 456, 256 N.Y.S.2d 301, aff'd, 15 N.Y.2d 940, 207 N.E.2d 508 (1965), cited recently by Justice Tom, concurring in *Nussenzweig v. diCorcia*, 38 A.D.3d 339, 346, 832 N.Y.S.2d 510, certified question answered, order aff'd, 9 N.Y.3d 184, 878 N.E.2d 589 (2007).

The chilling effect of imposing liability under 50/51 on creators of expressive works like Lifetime Entertainment was surely not in the Legislature's contemplation. Filmmakers need a degree of creative license when producing biographic works. While anchored in facts, biographic films will often trace a person's life with a degree of dramatization—*The Wolf of Wall Street*, *American Sniper*, *The Social Network*, *Spotlight* and *Sully*, being but some recent examples. Were these movies too infected with dramatization and embellishment to be protected by the First Amendment? The Appellate Division's decision would seem to suggest so.

Whether the case will be appealed remains to be seen. It certainly presents an interesting opportunity for a new Court of Appeals decision on 50/51—the last one dates from 2007, *Nussenzweig v. diCorcia*, 9 N.Y.3d 184, 878 N.E.2d 589 (2007).

Edward Klaris is a partner and Alexia Bedat an associate at Klaris Law PLLC. Defendant is represented by David Schulz, Levine Sullivan Koch & Schulz in New York. Plaintiff acted pro se.

Defamation Case vs. Texas Newspaper Survives Summary Judgment

Series of Articles as a Whole Could Be False and Defamatory

By Allison Venuti

A Texas Appeals Court affirmed in part denial of summary judgment to the Corpus Christi *Caller-Times* newspaper. *Scripps NP Operating, LLC v. Carter*, 2016 Tex. App. LEXIS 13519 (Tex. App. Corpus Christi Dec. 21, 2016). The court held that a reasonable jury could find that a series of articles taken together created a false and defamatory impression of plaintiff – and that the articles were published negligently. However, there was no evidence of actual malice to support a claim for punitive damages.

Background

In early 2008, the *Caller-Times* published twenty-four articles and one editorial reporting that Terry Carter, former President and CEO of the Corpus Christi Chamber of Commerce, was accused of financial improprieties by other officials in the Chamber of Commerce.

The Caller-Times published twenty-four articles and one editorial reporting that Terry Carter, former President and CEO of the Corpus Christi Chamber of Commerce, was accused of financial improprieties.

In prior proceedings, the trial court denied a motion for summary judgment that contended that the plaintiff was a public figure but that there was no evidence of actual malice. The Court of Appeals affirmed, holding that plaintiff was a private figure notwithstanding his role as CEO of the Chamber of Commerce, and, therefore, did not reach the malice issue.

On remand, the newspaper filed a second motion for summary judgment arguing that the articles were not defamatory; were substantially true and/or statements of opinion; privileged as fair reports of judicial proceedings, and published without negligence. The newspaper also sought summary judgment on Carter's claim for exemplary damages based on lack of evidence of actual malice. The trial court denied the motion and the newspaper appealed.

Court of Appeals Decision

The Court first held that taken together the articles could be defamatory per se. The newspaper argued that the articles did not impute a crime, but rather accurately reported

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allegations in a civil dispute. The Court disagreed. First, it found that the articles, though they carefully attributed allegations to particular sources, could reasonably be perceived as defamatory. Second, the articles and editorial taken together implicitly suggested Carter committed a crime and acted improperly as CEO.

Next, the Court rejected the newspaper's defense that the articles and editorial were an accurate summary and a substantially true report of the allegations against plaintiff. The Court found that, taken together, the articles and editorial, "went beyond mere 'allegation reporting.'" Instead, the "gist" of the articles was that the allegations were true. Additionally, according to the Court, the articles were not opinion but statements of fact. Particularly, while parts of the editorial may be "fairly characterized as opinions," it was supplemented by the underlying factual allegations in the editorial and prior reporting.

The newspaper's fair report privilege defense succeeded in part. Plaintiff had argued that the privilege could only apply to all the articles as a whole. The Court found no authority to support this. Thus claims over three of the articles were dismissed as fair and accurate accounts of judicial proceedings.

A question of fact existed as to negligence where the newspaper failed to review certain documents surrounding plaintiff's employment.

As to negligence, the newspaper offered an expert report from Tony Pederson, a former editor of the Houston Chronicle and professor of journalism at Southern Methodist University. His report concluded:

> In examining the 25 articles specified in the complaint, there is nothing that stands out as lacking in conformance with journalistic standards or professionalism. Was there published criticism of Terry Carter? Yes. Did some of the criticism seem harsh? Yes. Was the reporting, writing and editing of the stories flawless? No, but then few news organizations can produce sustained coverage of a major issue such as this without a few minor errors. Did the newspaper form an opinion on the matter in the editorial published March 2? Yes, and that opinion was certainly critical of Carter, suggesting that the chamber get rid of him and move on. The newspaper was absolutely within its right to have and publish such an opinion. But the line between the news operation and the opinion side of the newspaper was maintained…. Given the circumstances, the newsworthiness of the narrative and the solid sourcing that was available, the Caller Times would have [been] derelict in its duty as the primary newspaper in Corpus Christi not to have reported this story in the 24 news articles and one editorial that are part of the record.

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The Court held, however, that a question of fact existed as to negligence where the newspaper failed to review certain documents surrounding plaintiff's employment, including his employment contract with the Chamber, the Chamber's accounting standards and guidelines, which allegedly would have dispelled the allegation of financial irregularity. In addition, the Court noted that the publisher of the newspaper was formerly a board member of the Chamber and thus a jury could infer the publisher had knowledge of mitigating facts.

The Court found no evidence of actual malice to support the plaintiff's claim for exemplary damages.

Carter has not produced evidence from which a reasonable trier of fact could infer that the *Caller-Times* reporters subjectively knew that their reports were false, that they in fact "entertained serious doubts" about the truth of their publication, or that they "actually had a high degree of awareness of the probable falsity" of the statements at issue.

Accordingly, the Court reversed the denial of summary judgment as to Carter's claim for exemplary damages.

Non-Defamation Claims

Lastly, the Court dismissed for lack of evidence plaintiff's non-defamation claims alleging that the newspaper conspired with Chamber officials to injure him. Summary judgment was also granted to parent company E.W. Scripps as there was no basis to depart from the rule of respondeat superior.

The *Caller-Times* has given notice of intent to file a petition for review in the Texas Supreme Court.

Plaintiff is represented by Carol T. Jackson, Karolyne Garner, Craig S. Smith, Angelica E. Hernandez, Rene Rodriguez, Bryan A. Garner. The Caller-Times is represented by Jorge as Jorge C. Rangel, The Rangel Law Firm, P.C., Corpus Christi, TX, and Paul Watler, Jackson Walker LLP, Dallas TX.

Biometric Privacy Class Action Falls Flat Under *Spokeo*

By Jeff Hermes

On January 27, 2017, the U.S. District Court for the Southern District of New York (Koeltl, J.) dismissed a putative class action against New York-based game developer Take-Two Interactive Software ("Take-Two"), over facial capture technology implemented in its "NBA 2K15" and "NBA 2K16" video games. The decision, *Vigil v. Take-Two Interactive Software, Inc.*, No. 15-cv-8211 (S.D.N.Y. Jan. 27, 2017), was notable for its consideration of the intersection between emerging concerns over digital biometric privacy and the implementation of Article III limitations on standing following last year's decision of the U.S. Supreme Court in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016).

The suit was filed by a brother and sister living in Illinois who used the "MyPlayer" feature in NBA 2K15 to create personalized avatars in the game; the same feature is available in NBA 2K16, the next entry in the popular basketball game franchise. MyPlayer, which was advertised as an innovative feature of these games, requires the player to undergo a facial scanning process to create a character in the game that bears the player's likeness. Before using MyPlayer, the player is required to agree to a statement which reads, in part, "Your face scan will be visible to you and others you play with and may be recorded or screen captured during gameplay." The customized avatar may, at the player's option, be used in online multiplayer games where the player's facial likeness will be visible to others (such as it is; the pleadings were devoid of allegations as to the quality or accuracy of these likenesses).

The plaintiffs alleged that the biometric information gathered during the scanning process was stored indefinitely by Take-Two, and was transmitted without encryption across the internet. They also alleged a lack of notice regarding the specific functioning of the MyPlayer feature, and a lack of internal policies regarding maintenance and deletion of biometric information. On that basis, they claimed that Take-Two had violated Illinois' Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/1 et seq. ("BIPA"), which (1) imposes certain limitations and procedural requirements on the collection, dissemination, and storage of information based on biometric identifiers such as retina scans, fingerprints, and facial geometry, and (2) requires written notices and consent regarding the fact, purpose, and duration of retention of biometric information.

However, the plaintiffs did not allege that their facial scans were misused by Take-Two, that any third party gained access to the in-game images other than through the multiplayer gaming

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function, or that the MyPlayer feature worked in any way other than that in which they understood it would work. On that basis, Take-Two moved to dismiss under Fed. R. Civ. P. 12 (b)(1) and (b)(6), arguing that the plaintiffs had failed to allege an injury in fact that would support standing under either Article III or under the text of BIPA.

The plaintiffs responded that the mere allegation of violations of BIPA by Take-Two, including failures with respect to both the procedural requirements regarding gathering and use of data and the related notification and consent requirements, were sufficient to plead injury. Specifically, they alleged that the pleaded violations automatically resulted in: an increased risk of their biometric data being leaked or misused; invasion of privacy and misappropriation of their likenesses for Take-Two's commercial gain; the denial of an entitlement under BIPA (namely, a right to information regarding the use of their facial scans); apprehension regarding future biometric-related transactions; and diminished benefit of the bargain in the purchase of NBA 2K15.

Addressing the Article III question first, the district court noted that standing in a potential class action depends on the standing of the named plaintiffs, and recognized the plaintiffs' claims as implicating the issue considered by the Supreme Court in *Spokeo*. Judge Koeltl focused on *Spokeo*'s statement that

> although "Congress may elevate to the status of legally cognizable injuries concrete, *de facto* injures that were previously inadequate at law," ... a "bare procedural violation" under a federal statute, "divorced from any concrete harm," that "may result in no harm," would not "satisfy the injury-in-fact requirement."

Plaintiffs alleged that the biometric information gathered during the scanning process was stored indefinitely by Take-Two, and was transmitted without encryption across the internet.

Vigil, slip op. at 17, quoting *Spokeo* at 1549. He further (slip op. at 18) took guidance from the Second Circuit's interpretation of *Spokeo* in *Strubel v. Comenity Bank*, No. 15-528-CV (2nd Cir. Nov. 23, 2013), in which the Court of Appeals held that

> *Spokeo,* and the cases cited therein, ... instruct that an alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a "risk of real harm" to that concrete interest. But even where Congress has accorded procedural rights to protect a concrete interest, a plaintiff may fail to demonstrate concrete injury where violation of the procedure at issue presents no material risk of harm to that underlying interest.

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Strubel, slip op. at 16. Put another way, statutes can impose procedural requirements to protect against a specific type of harm (such as invasion of biometric privacy) that might not have been recognized under prior law, but it is not necessarily the case that a procedural violation will always cause the contemplated type of harm. In cases where the causal link between the procedural violation and the contemplated harm is abstract or theoretical, actual injury must be pleaded. *See Vigil*, slip op. at 19-22 (reviewing cases).

In that regard, Judge Koeltl found particularly illuminating a ruling from the Northern District of Illinois, *McCollough v. Smarte Carte, Inc.*, No. 16-cv-03777 (N.D. Ill. Aug. 1, 2016). *McCollough* involved the plaintiff's use of the defendant's fingerprint-based storage lockers, and her claim under BIPA that the defendant failed to inform her about its data retention policies. The Northern District of Illinois held that the plaintiff lacked Article III standing, because (1) even without a formal notice she would have understood that her fingerprint data would need to be retained until she finished using the locker, and (2) under the circumstances, the potential harm from mere retention of her fingerprint for any longer period was too abstract. *McCullough*, slip op. at 5-6.

Applying those precedents to the siblings' use of MyPlayer, Judge Koeltl rejected the plaintiffs' allegations of concrete injury. With respect to the plaintiffs' argument that Take-Two's alleged failure to use encryption or other safety measures enhanced the risk of their information being stolen or misused, the court found that to be a speculative concern in the absence of any data breaches or other evidence of a threat. *Vigil*, slip op. at 25-26. While the plaintiffs argued that the particular sensitivity of biometric data raises greater privacy concerns because such information cannot be easily changed if disclosed to third parties, the court held that a risk of harm that is abstract or speculative remains so for Article III purposes regardless of the magnitude of the potential injury. *Id.* at 27.

Judge Koeltl rejected the plaintiffs' allegations of concrete injury.

The plaintiffs' other theories of injury fared no better. Echoing right of publicity cases, plaintiffs argued that Take-Two had unlawfully profited from their likenesses and violated their privacy; but the court held that any profit was from the attractiveness of the MyPlayer feature to gamers, not the use of the plaintiffs' likenesses in particular. *Id.*, pp. 27-28. Moreover, the plaintiffs consented to the use of their facial scans; any technical flaws in the notice provided by Take-Two did not vitiate that consent, because the plaintiffs nevertheless correctly understood how their likenesses would be used. *Id.* at 37, 41.

The court also rejected the argument that BIPA established an affirmative right to information in the form of the required disclosures, which the plaintiffs were denied to their detriment. In contrast to statutes such as the Truth-in-Lending Act or the Federal Election Campaign Act where the core purpose of the law is to make information available, the court

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held that the BIPA disclosures were simply a measure to protect the privacy interests at the core of the statute. *Id.* at 29-31. "Even without fully compliant notice and consent, no concrete BIPA interest can be harmed so long as the private entity only uses the biometrics collected as both parties intended." *Id.* at 32.

The court found that the plaintiffs' claim that they were deterred from future biometric transactions by their experience with NBA 2K15 was based on self-inflicted apprehension of speculative harm, and could not generate standing. *Id.* at 36. And finally, their "diminished benefit of the bargain" argument was held to be (1) inappropriate in a case with no contract claims and (2) unsustainable inasmuch as they received a product that worked as both parties understood that it was to work. *Id.* at 42-44.

In short,

> None of the plaintiffs' allegations of procedural violations, on their own, demonstrate a material risk of harm to the BIPA's concrete data protection interest because there is no plausible allegation that there is a material risk that the plaintiffs' biometrics may be used in a way not contemplated by the underlying use of the MyPlayer feature. ... The plaintiffs ... allege that the MyPlayer feature functioned exactly as anticipated. There is no allegation that Take-Two has disseminated or sold the plaintiffs' biometric data to third-parties, or that Take-Two has used the plaintiffs' biometric information in any way not contemplated by the only possible use of the MyPlayer feature: the creation of personalized basketball avatars for in-game play.

Id. at 23-24. Accordingly, the district court held that the plaintiffs lacked Article III standing. *Id.* at 45.

The court likewise held that the plaintiffs lacked standing under BIPA itself, inasmuch as the private cause of action under the statute was reserved to "aggrieved" persons. That limitation, held the court, under Illinois law required the plaintiffs to connect a statutory violation to actual injury, which they had not done. *Id.* at 45-49. The district court accordingly dismissed the operative complaint with prejudice.

This case serves as an illustration of the difference between legitimate fears and compensable injury. It is difficult to fault the Vigil siblings for expressing concern over the potentially inadequate protection of their biometric information; indeed, the Illinois legislature shared such concerns when passing BIPA. But while legitimate fears might justify legislative activity, it normally takes more than apprehension of possible problems to create Article III standing.

Jeff Hermes is a deputy director of the Media Law Resource Center.

Tennessee Appellate Court: Press Shield Law Protects Dateline from Disclosing Unaired Interview

By Kevin Delaney and Samantha Williams

Affirming the decision of the Criminal Court in Knoxville, the Court of Appeals of Tennessee ruled 3-0 on February 13, 2017 that state prosecutors had failed to show that Dateline NBC is not entitled to protection under Tennessee's Press Shield Law, Tenn. Code Ann. § 24-1-208. Tennessee v. Clark.

Under the ruling, NBCUniversal, which produces Dateline, is protected from being forced to hand over an unaired videotaped interview its journalists conducted in the fall of 2015 with Norman Eugene Clark and his attorney, following Clark's August 2015 trial for murder in connection with the deaths of his pregnant girlfriend and their unborn son. Clark's trial ended in a mistrial because of a hung jury and the State announced in January 2016 that it will retry Clark.

The Court of Appeals held that the State failed to prove by clear and convincing evidence that the information sought cannot reasonably be obtained by alternative means – concluding that to strip a journalist of the shield law's protections, the State would have to show it could not obtain the information on the videotape, and not just the videotape itself, by alternative means.

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Background

Tennessee prosecutors sought a copy of Dateline's entire unedited Clark interview, which was conducted by Dateline correspondent Andrea Canning and producer Tim Beacham. NBC has said it does not plan to air any portion of the interview until after Clark's second trial.

In April 2016, Tennessee prosecutors obtained a certificate from the Criminal Court in Knoxville pursuant to the Uniform Law to Secure the Attendance of Witnesses. This triggered proceedings in New York Supreme Court to determine if a subpoena should be issued to NBCUniversal, Canning and Beacham. After a hearing, the New York court directed that the matter first be taken to the Tennessee courts, with the option to return to the New York courts for a resolution of New York shield law issues if necessary.

Following the New York court's order, NBCUniversal moved in the Tennessee Criminal Court to quash the Certificate, and the State cross-moved to divest NBCUniversal of the protection of the Tennessee shield law. The Criminal Court held an evidentiary hearing on the

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motions in June 2016. At the hearing, a representative of the State prosecutor's office testified that the police had conducted two recorded interviews with Clark the day after the crime, but prosecutors had shown only one of those recordings to the jury. The State's witness further testified that he was unaware of the contents of the Dateline interview and that he had no reason to believe that Clark admitted to guilt during it.

In a written order, the Criminal Court held that the State had failed to sustain its burden to show that NBCUniversal should be divested of the shield law's protection. The court held that NBCUniversal's motion to quash was premature, as no subpoena had been issued.

Under Tennessee's Press Shield Law, a person engaged in newsgathering is not required to disclose any information obtained for publication or broadcast unless a court determines that the person seeking the information has shown by clear and convincing evidence each of three elements:

- There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law;
- The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and
- The person has demonstrated a compelling and overriding public interest of the people of the state of Tennessee in the information.

To date, no reported Tennessee decision has divested a press entity of its protection under the statute.

Court of Appeals Decision

The Court of Appeals found in NBCUniversal's favor on two of the three shield law prongs, and therefore refused to divest NBCUniversal of the privilege. The Court referenced in large part the Criminal Court's opinion, which discussed the three-prong test in detail.

The first prong required a showing of probable cause to believe that the person from whom information is sought has information clearly relevant to a specific probable violation of law. The Court found for the State on this prong, stating that Clark's interview and his behavior during the interview were clearly relevant to the charge of first degree murder. This tracked the finding of the Criminal Court on this prong of the test, which NBCUniversal did not challenge on appeal.

The second prong of the test required the State to demonstrate that the information sought could not be reasonably obtained by alternative means. Though the State argued that every

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statement made by Clark was unique and therefore unattainable by other means – despite having in its possession its own interviews with Clark – the Court of Appeals was unconvinced. The Court found that the State provided no proof as to the content of the Dateline interview, nor could the State articulate the nature of Clark's demeanor, attitude and mannerisms during the interview.

"Without having any information as to what mannerisms Mr. Clark displayed, or what he said, or how he looked when he said it, or what he didn't say," the Criminal Court opined and Court of Appeals ultimately agreed, "this court cannot find that there is clear and convincing evidence that the information sought is unobtainable by alternative means." The Court of Appeals further noted that the second prong of this test would be rendered meaningless as to protected information were the State's line of reasoning – that every video statement was unique and thus unavailable through other means – to be followed. The Court of Appeals consequently found in favor of NBCUniversal on this element.

Although the State's failure to overcome any one element of the shield law was sufficient for the Court of Appeals to hold in NBCUniversal's favor, the Court also addressed the third prong of the test, which required the State to demonstrate a compelling and overriding interest of the public in obtaining the interview footage. Though the Court of Appeals noted the State's interest in prosecuting people charged, and observed that Clark was charged with serious crimes, the Court held that the State's interests did not override the protections of the shield law. At issue was the potentially boundless consequences of finding for the State here – "to hold that the third prong of the test for divestment is automatically satisfied if 'the specific probable violation of law' is murder," said the Court, "would be to read terms into the statute that do not appear within it." Thus, the Court of Appeals also found for NBCUniversal on this prong.

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In closing, the Court acknowledged the difficulty in meeting the test for a party seeking divestment pursuant to TCA § 24-1-208. Nonetheless, it opined that such a challenging bar was clearly the intent of the legislature, and that the ability to diminish such a protection lay with the legislature and not with the courts.

The State has the option to petition the Tennessee Supreme Court to exercise its discretion to review the Court of Appeals decision.

Kevin Delaney and Samantha Williams are law clerks in the NBCUniversal law department. NBCUniversal was represented in the Tennessee proceedings by Richard L. Hollow of Hollow & Hollow in Knoxville, and by Erik Bierbauer, Vice President, Litigation, in the NBCUniversal law department.

Ten Questions to a Media Lawyer

Laura Prather

The second subject of our ongoing series, Laura Prather is chair of the MLRC Defense Counsel Section and a partner at Haynes and Boone in Austin. If you'd like to participate (either by email or phone interview) let us know - medialaw@medialaw.org.

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

I developed a love of First Amendment issues in the tenth grade. I had a wonderful government teacher, Mrs. Peterson, who really fostered that interest in me. We were studying the Constitution and I just did a deep dive into First Amendment issues. I decided if I were able to do something to help defend the right of people to speak freely, that would be one of the most important things I could do.

My first job in media law was working for Jim George at a small media boutique called George, Donaldson and Ford. When I joined, I was the 6th lawyer there. At the time, we represented a significant number of media outlets throughout the Southwest - Time Warner, HBO, CBS, Dow Jones, Gannett. That was an incredible job. My boss had clerked for Thurgood Marshall and was brilliant. Then there was Julie Ford - she was a female named partner of the law firm 15 years out of law school. That was unheard of at the time. Julie was such a motivating factor for me.

Some people thought I was crazy because I left O'Melveny & Myers – a firm that had been around for more than 100 years to join a litigation start up, but it was one of the best professional decisions I've ever made. I got tons of client contact there. I got to run with cases - first and second chair, and Jim basically gave me as much rope as I wanted to hang myself.

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

I'm very fortunate to get to do something I believe in to my core every day. I get to work with smart, high-caliber clients, and I get to become a quasi-expert in whatever

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the publication I'm defending is about. So for instance, I recently worked on a case for A&E involving a short-lived television show, "Lady Hoggers," about women who hunt feral hogs. I had no idea that was even a sport!

Prather at law school graduation

With the legislative work that I do, I find it tremendously satisfying to be a part of the solution, to help enact laws that will protect free speech rights into the future. It's nice to be able to address chronic problems that face the media (and Texas citizens) in a proactive fashion, rather than just defending them in a lawsuit.

What I like least about my job is email - the constant barrage of information coming at you, disrupting your day. What I do to address it when I'm working on something that requires my undivided attention, like an appellate brief, is I go into seclusion and separate myself from my computer. Then, my secretary checks my emails and calls if there is an emergency.

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

I think the biggest blunder happened when Catherine Robb and I opened the Austin office of Sedgwick. We had to office-share and we sublet some space from a friend of a friend, but the problem was the space did not have a photocopy machine. The good news was the space was directly above a Kinko's. Still, this arrangement was not optimal for a litigation practice! Thankfully, we were able to move into our own office space, with a copy machine, about nine months later.

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

I've been in the Texas Supreme Court, 12 out of the 14 Texas appellate courts, and all four of the federal district courts.

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As far as high profile cases, we handled a case for the New York Times, *New York Times v. Darby*, that dealt with the Texas Two and their alleged plot to overthrow the Republican National Convention with Molotov cocktails. We won on summary judgment, but it went all the way to the Texas Supreme Court.

Office mascot Charlie

More recently, we handled a case involving "Clock Boy," the student who brought a clock to school that authorities suspected of being a bomb. That case just finished. We got our client, a Fox Television station and its political analyst, out of the case in a record 70 days. We got the case dismissed under the Texas anti-SLAPP statute and our fees awarded.

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

A teddy bear. My father gave it to me when I was in college to keep me company and to let me know that he was thinking about me while I was away. His name is Charlie (he's got a bow around his neck that reminds me of my granddad Charles). He sits on my couch all the time - whether clients are there or not!

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

I check email first, of course. Then the Austin American-Statesman, CNN, and the New York Times.

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

If you're passionate about the law, then go to law school. It's a versatile degree, but there are a lot of people who might go because they want three more years to figure

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Office art courtesy of Prather's four year-old twins

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out what to do. I think those people might be better off with an MBA. I saw several of my classmates who didn't have a particular interest in the law, go into private practice and hate it. Many got out of law immediately and went into things like investment banking.

In terms of getting a job, the market in Texas has suffered just as it has nationally. I think Austin is kind of a bubble - we've had population growth and job growth here year after year. We were just voted the number one city to live in America. So there may be more opportunities in Austin than there are in other parts of the state.

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

You have to be very dedicated in your approach both to your education and job search and really learn the area as best you can. Demonstrate passion and be willing to get involved whether or not there's monetary gain to begin with.

I'll give you an example: Alicia Calzada, who works with us now, became a student liaison to the ABA Forum on Communications Law. As a result, she got exposure to a significant number of media lawyers at the meetings, and I was assigned as her mentor through the ABA Women in Communications Law. One day over lunch, we

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were discussing her interest in public policy and some of the work Alicia had done with the National Press Photographers Association. I had just started working on our legislative efforts to get an anti-SLAPP statute passed in Texas, and I asked if she wanted to get involved. I needed some help compiling examples of demonstrated need and Alicia said she would love to help. As a result of her willingness to perform on a volunteer basis, I was able to see her work, her passion and her dedication, and we ultimately hired her after she graduated.

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

Assuming the whole Olympic gymnast thing didn't happen? I would've been an investigative journalist. I had a wonderful mentor in my career, Carole Kneeland, who many Texas media lawyers will know. She was a legend, a news director at one of the stations here in Austin. She told me at one point, "Look, if the law doesn't work out for you, I'll hire you as an investigative journalist." She saw how tenacious I was at finding witnesses, interviewing them, going down every trail necessary to get answers for a case and saw those as the same qualities needed in investigative journalism.

10. What issue keeps you up at night?

First, what I didn't get done that day. After that, protecting Texas anti-SLAPP statute. During the legislative sessions, it's a constant concern. As far as this session, all the bills haven't been filed yet, but one public policy group who previously supported anti-SLAPP has listed narrowing the statute as one of their legislative agenda items. I had spoken with them before the session and they said, "We won't do anything without consulting with you." Then last week, I saw their legislative agenda on their website. It's a matter of trust, but verify.

Raising two teenage daughters and having four-year-old twins who crawl into bed with me in the middle of the night - that keeps me up, too!