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MEDIALAWLETTER

Reporting Developments Through January 25, 2017

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From the Executive Director's Desk

Ten Questions to a Media Lawyer

New MediaLawLetter Feature

It's my pleasure to introduce a new, hopefully regular MediaLawLetter feature - Ten Questions to a Media Lawyer. Each month, we'll pick an experienced attorney and ask him or her the same ten questions covering career, views of the industry, advice for newcomers, office décor, and other issues of greater or lesser importance. I hope you'll enjoy it.

My colleague Jake Wunsch, who originated this concept, asked me to kick it off, and to take one for the team, I agreed. My answers are more from the perspective of my 30-plus years as an attorney at the New York Times than as executive director of the MLRC.

If you'd like to participate (and no complaining if you don't!), write us: medialaw@medialaw.org.

George at work. Note the old Yankee Stadium photo and Leroy Neiman tennis print behind him.

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

My first job, when I acquired a SS#, was to be a ballboy at the US Open at Forest Hills, close to my childhood home. My first legal job was to teach at the Univ of Miami Law School the year after I graduated law school. I taught Torts, had office hours by the pool and had an altogether great time. But the following year I returned to NYC and began working at Cahill Gordon, where I had been a summer associate.

An unorthodox and risky decision there propelled me into media law, though I had summered at Cahill in part because they represented The New York Times (and, in part, because they were one of the few firms to give me an offer). One day all the 20 or so members of my Cahill class were paged, one-by-one, to see the senior labor associate. When I got there, it was clear everyone before me had rejected the offer of becoming a labor associate. But I accepted: the labor clients were The Times, NBC, Columbia University and the NY Racing Ass'n, all more interesting than the stable of accounting clients the firm had; I would be working on a much smaller team, so I foresaw that I would get greater and quicker experience taking deps, writing

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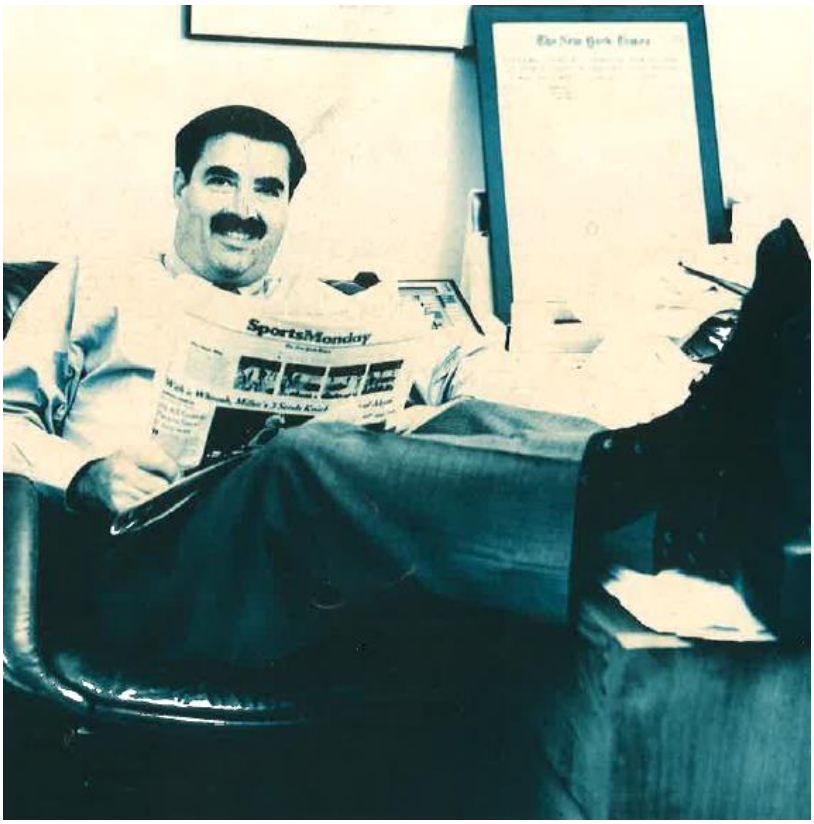

Freeman, hard at it at the *Times*, circa 1998

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briefs, etc.; I would have a safe harbor, so when I was called on Friday evening to work all weekend, I could safely say no since I had this labor niche; and I cut a deal whereby if I took the position, I could spend all my non-labor time working for Floyd Abrams.

All my colleagues were dumb-founded, saying I had exiled myself to the Siberia of the firm. But soon I was spending most of my time at The Times, working on two massive class actions they had defending Title VII cases, going through all the reporters' personnel files and evaluations and all of Abe Rosenthal's files; and sometime after that I was offered a job to come in-house with The Times. I was hired as a generalist, but in the first few months the main First Amendment lawyer switched to the business side (he later became COO), and I took over his newsroom portfolio.

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

I loved the variety: vetting stories, overseeing libel litigations, crafting classy f.u. letters, arguing motions in court, learning the newspaper business and giving circulation advice, all within one day. I also was thrilled and honored to be working with the smartest and best clients a lawyer could have – the reporters and editors of The Times. It wasn't bad for cocktail party conversation, either. I hate to say it, but the part I liked least was doing FOIA and public records demands. I found it frustrating and unrewarding, since even when we got the documents, it was so much later than our demand that it barely was included in the paper. Those cases were mainly worthwhile, I felt, when they taught a lesson to a recidivist agency which really flouted the sunshine laws.

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

That's easy. It deals with an article that was mentioned quite a few times this fall during the campaign. In the 80's and 90's, before computers and faxes, we vetted stories on weekends and

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at nights by phone. One Sunday, during the 1996 campaign, Bill Safire – a lovely man and wonderful client – called to ask that I review his op-ed column for the next day. As I stretched out on my bed, his assistant started reading it to me: it was about Hillary Clinton.

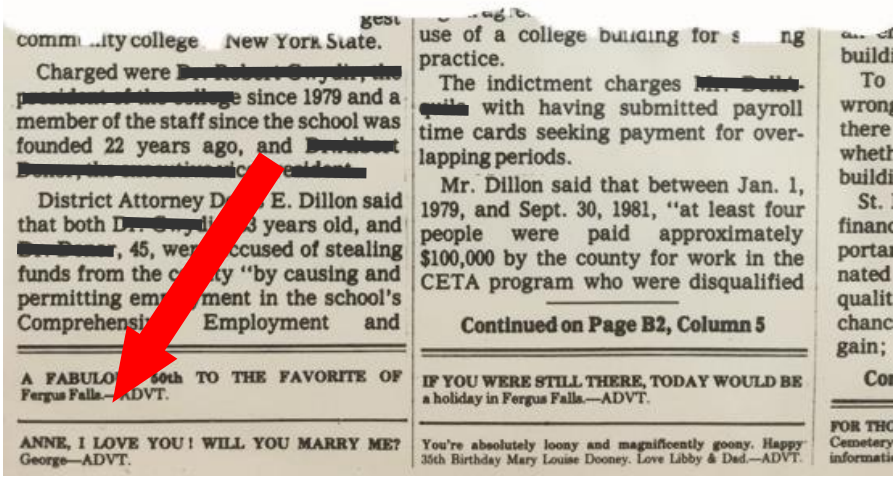
It was pretty innocuous, and as it approached the end, my then 3-year old son came into my room, bounced on my bed, and jumped on my groin area. I was briefly in pain, as the assistant read a sentence about Hillary's being a "congenital liar". Had I heard that sentence, I am confident I would have asked him to rewrite it, since I wouldn't approve a layman using such a scientific term without any scientific proof. But in the throes of pain, I didn't hear it; ok'd the column; and the next day all hell broke loose at that unfounded allegation. Fortunately, Safire was a wordsmith, and defended the piece by quoting the fourth definition of congenital – someone who does something a lot – rather than by dealing with its common meaning – genetically present from birth.

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

I've argued a couple of times in the Second Circuit and once in the very beautiful Appellate Division (1st Dep't) in Manhattan, New York state's mid-level appellate court. There I represented all major New York media in arguing that television camera coverage be allowed in the Robert Chambers case, known more commonly as the Central Park Preppie Sex Murder case. New York's experimental period for courtroom camera coverage (defunct since the OJ case) began about 2 weeks into the criminal trial of Chambers, accused of killing a girl in Central Park during sex and after meeting her at a Second Avenue bar. The fact that camera coverage could, per the legislative act, only begin while the trial was under way proved a high hurdle, and both prosecution and defense strongly opposed our application. We lost, I think unanimously, but at least Justice Theodore Kupferman, who had officiated at my wedding a few years earlier, wrote a somewhat favorable concurring opinion.

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

Talking about my wedding, the most unique object in my office is probably a framed first page of The Times which contains my wedding proposal to my lovely wife as a small classified



comm ...ity college ... New York State.

Charged were [redacted] since 1979 and a member of the staff since the school was founded 22 years ago, and [redacted]

District Attorney D... E. Dillon said that both D... ...3 years old, and [redacted], 45, wer... ...ccused of stealing funds from the c... ...ty "by causing and permitting em... ...ment in the school's Comprehensi... Employment and

A FABULO... ...50th TO THE FAVORITE OF Fergus Falls.—...ADVT.

ANNE, I LOVE YOU! WILL YOU MARRY ME? George—ADVT.

use of a college building for s... ...ng practice.

The indictment charges [redacted] with having submitted payroll time cards seeking payment for overlapping periods.

Mr. Dillon said that between Jan. 1, 1979, and Sept. 30, 1981, "at least four people were paid approximately $100,000 by the county for work in the CETA program who were disqualified

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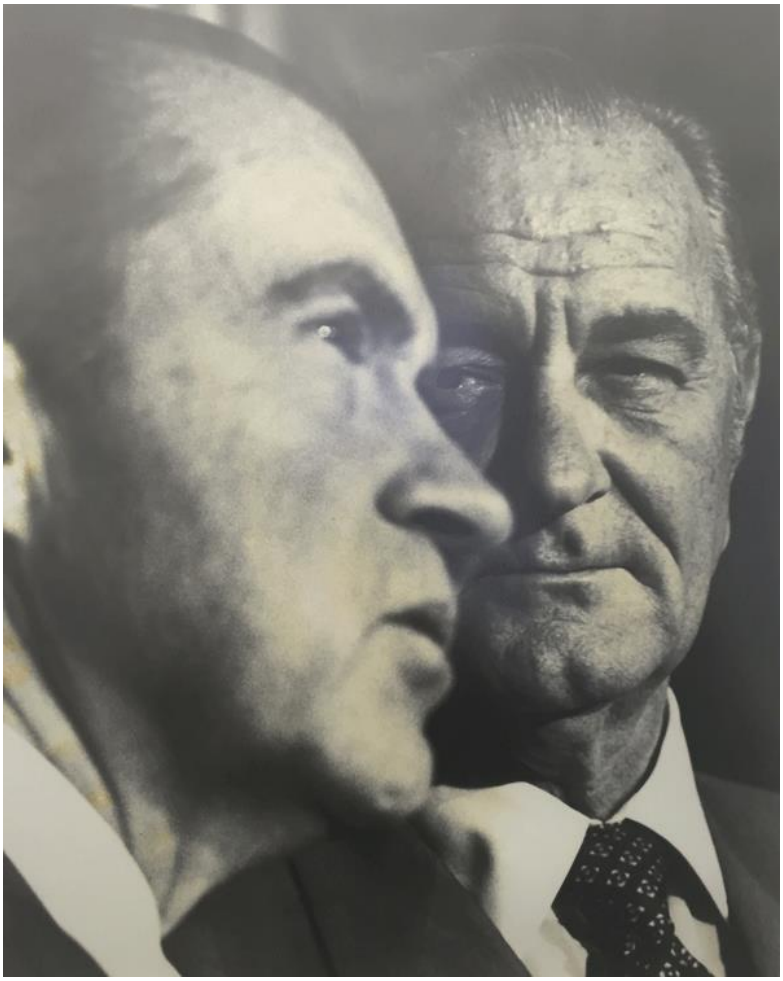
IF YOU WERE STILL THERE, TODAY WOULD BE a holiday in Fergus Falls.—ADVT.

You're absolutely loony and magnificently goony. Happy 35th Birthday Mary Louise Dooney. Love Libby & Dad.—ADVT.

Front page of the New York Times for October 30, 1981, which contains Freeman's wedding proposal as a small classified ad in the bottom-left corner. She accepted. (As an employee, he received a 15 percent discount.)



Two Times photos on Freeman's wall. Top: George Tames' portrait of Kennedy "The Loneliest Job." Below, Lyndon Johnson regards Richard Nixon with disdain.

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ad at the left bottom of the first page. (Publisher Punch Sulzberger suggested my wife-to-be respond in a full page ad.) Among the various family, tennis and Yankee posters and photos on my wall is my favorite photo: Lyndon Johnson looking down at Richard Nixon with absolute disdain. When The Times moved from its old building to its current one, it put on auction all sorts of artwork from throughout the building; I had my eye on that photo for years and was able to buy it for a pittance. I also love a famous photo shot by Times photog George Tames, "The Loneliest Job," of JFK looking out the window of the Oval Office; the Times gave it to me as a gift when I left.

I also treasure a framed article I wrote for TENNIS Magazine about being a tennis camper, containing a photo of me playing with Pancho Gonzalez, Bobby Riggs, and Don Budge.

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

First thing in the morning, I read Jim Warren's blog on the Poynter Institute's website, a daily roundup of all things media. Warren was a star reporter and editor at the Chicago Tribune, and also was a friend a few years behind me at both The Collegiate School, where I went to high school, and Amherst College. I also take a peek at si.com. Of course, most important is when I get to read a first draft of the MLRC's Daily Report a little later in the morning.

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Bookshelf curiosities including a red Chinese constitution (with free speech clause) acquired on a 1979 bar association trip to China; *Make No Law*, autographed by Anthony Lewis to my "student, teaching colleague, and lawyer"; and a Russian nesting doll of U.S. Presidents, starting with Bill Clinton, purchased on a press delegation to Moscow.

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

I had to face this question as my daughter was leaning towards law school a few years ago. I said nothing as to whether she should go in that direction partially because a dad's opinion tends to carry too much weight, but mainly because I was pretty neutral as to the right answer. (She went, and now is a litigation associate at a big MLRC-member firm.) Given the current costs of time and money, as well as the general unpleasantness of the law school experience which I vaguely recall and the more risky career it has become, I wouldn't advocate going to law school now for the reason many of us of a certain age did, to keep your options open. But if a student really wants to become a lawyer, it remains a very interesting and rewarding profession – and that's true even if one doesn't practice media law.

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

Broaden the definition of media law to include intellectual property. That's the growth area; trying to be an old-time media lawyer doing libel and reporters' privilege is an extremely low-odds proposition.

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

I had seriously thought about going into journalism school (ironic, since I teach in three J-schools now), so I may well have become a journalist. I decided against it because I thought my chances of spending my life covering fires in Dubuque were greater than my becoming James Reston or Tom Wicker (or even Walter Cronkite or Howard Cosell). Fortunately, I ended up with a career which merged journalism and law.

10. What issue keeps you up at night?

While at The Times I worried for years about a government subpoena to James Risen and Eric Lichtblau seeking their confidential source(s) for their Pulitzer Prize-winning article on the Bush Administration's warrantless (and unconstitutional) wiretapping of Americans. Bush, Cheney and Rumsfeld all threatened to prosecute The Times for violation of the Espionage Laws (which I didn't lose any sleep about), but a subpoena for the government employee(s) they got the story from was frightening: it would have raised the same legal issues in a similar factual setting as the unsuccessful Judy Miller battle we just had waged. Fortunately, for reasons I can only guess at, a subpoena never came. Now, of course, I lose sleep worrying about the financial well-being of the MLRC, the happiness of our members and the security of our staff — and, since Jan. 20, how badly Pres. Trump will endanger press freedoms and our relationships with the rest of the world.

District of Columbia Court Issues Key Ruling on D.C. Anti-SLAPP Statute

Climate Scientist's Libel Suit Survives Motion to Strike

The District of Columbia Court of Appeals issued an important decision on December 22, 2016 interpreting and applying the D.C. Anti-SLAPP Act, D.C. Code § 16-5501 to 5505 ("the Act"), in an opinion that holds both good news and potential risk for media defendants and others engaged in editorial commentary. *Competitive Enterprise Institute et al. v. Mann*, and *National Review, Inc. v. Mann.*

The court for the first time articulated the precise legal standard for evaluating a special motion to dismiss under the Act, and it also held that defendants can immediately appeal the denial of a special motion to dismiss. These rulings bolster the safeguards that the Act provides to individuals and publishers engaged in speech on matters of public concern.

At the same time, however, the court found that the plaintiff in the case has provided enough evidence to survive an Anti-SLAPP motion. The court's analysis of the merits of the plaintiff's defamation and related claims, and its decision to allow the suit to proceed, threaten to chip away at the protections that D.C. courts have traditionally provided to sharp commentary and criticism.

The court found that the plaintiff in the case has provided enough evidence to survive an anti-SLAPP motion.

Background

The case arises from blog posts by Rand Simberg, a contributor to an on-line blog of the Competitive Enterprise Institute ("CEI"), and Mark Steyn, a former contributor to National Review On-line, that focused on what they believed to be inadequate investigation by Penn State University of Professor Michael Mann, a well-known climate scientist, concerning his "hockey-stick" graph depicting long-term temperature data.

Mann filed suit in October 2012 against Simberg, Steyn, CEI and National Review alleging defamation and intentional infliction of emotional distress for their criticism of Mann, including that he "molested and tortured data in service of politicized science" and that he "was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus." The defendants filed special motions to dismiss under the Act and motions to dismiss under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure.

The trial court denied the motions in their entirety and the defendants, except for Mr. Steyn, appealed. More than two years after oral argument, the D.C. Court of Appeals issued its ruling.

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DC Court of Appeals Decision

Key findings in the long-awaited, 105-page opinion include:

Interlocutory Appeal. The court held that a trial court's denial of a special motion to dismiss can be appealed immediately, even though the Act does not contain an interlocutory appeal provision. The court noted that the Act is intended to provide a substantive right not to stand trial when faced with a "SLAPP" (which stands for strategic lawsuit against public participation), and it recognized that this right would be lost if defendants did not have the ability to bring an interlocutory appeal after the denial of a special motion to dismiss. The court found it had jurisdiction to hear such appeals under the collateral order doctrine.

Summary Judgment-Like Standard. The court articulated the legal standard that trial courts should use in evaluating a special motion to dismiss. Under the Act, once a defendant moves to dismiss and makes a prima facie showing that the plaintiff's claim arises from the defendant's advocacy on a public issue, the burden shifts to the plaintiff to demonstrate that the claim is "likely to succeed on the merits." The court held that, in order to show that a claim is likely to succeed and defeat a special motion to dismiss, the plaintiff must produce enough evidence "to permit a jury properly instructed on the applicable constitutional standards to reasonably find in the plaintiff's favor." As the court notes, this standard is similar to the standard typically applied at the summary judgment stage and requires a plaintiff to make a sufficient proffer or showing of evidence. If courts apply the standard faithfully, it should result in the early dismissal of specious defamation claims, including those that may have survived a Rule 12(b)(6) motion.

The Other Scandal In Unhappy Valley

Rand Simberg • July 13, 2012

TWITTER FACEBOOK GOOGLE+ PRINT E-MAIL

So it turns out that Penn State has covered up wrongdoing by one of its employees to avoid bad publicity.

But I'm not talking about the appalling behavior uncovered this week by the Freeh report. No, I'm referring to another cover up and whitewash that occurred there

The case arises from blog posts focusing on what the authors believed to be inadequate investigation by Penn State University of Professor Michael Mann, a well-known climate scientist, concerning his "hockey-stick" graph depicting long-term temperature data.

Opinion. In evaluating whether the claims are likely to succeed, the court found that the plaintiff, a controversial climate scientist, had made a sufficient showing to meet this standard as to four of the six counts for defamation in the Amended Complaint. Mann claims that he was defamed by blog posts that challenged his scientific conclusions and accused him of "molesting" data. The defendants, along with many members of the media bar who joined as amicus curiae, have argued that the blog posts represent the sort of editorial commentary about

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a public figure that falls squarely within the ambit of the First Amendment. The court for the most part sided with Mann, holding that a reasonable jury could find that the blog posts falsely accused him of professional misconduct. Some aspects of the court's analysis appear to conflict with decades of jurisprudence on opinion journalism—in particular, the court's suggestion that merely comparing Mann by analogy to "notorious persons," such as Jerry Sandusky, Bernie Madoff and Joe Paterno, could be a defamatory statement of fact.

Actual Malice. The court found that Mann, as a public figure, has produced sufficient evidence that the defendants acted with actual malice. Relying on the fact that several investigations of Mann's scientific findings and conduct by government agencies and universities had purportedly exonerated him of any wrongdoing, the court concluded that a reasonable jury could find that the defendants acted with actual malice when, in contradiction to those investigations, they accused him of misconduct in his research. The court appears to make the remarkable holding that mere investigative reports and findings – which were challenged in the defendants' commentaries as being inadequate – can "definitively" establish the truth of the matter such that a jury can find actual malice by clear and convincing evidence.

Intentional Infliction of Emotional Distress. The court also found that Mann was not likely to succeed on his claim for emotional distress because he did not produce any evidence that, as a result of defendants' publications, he suffered mental anguish and stress "of so acute a nature that a harmful physical consequences are likely to result."

The Court of Appeals' decision may embolden other public figures to file lawsuits against their critics.

By finding that the speech at issue is potentially actionable and allowing the lawsuit to proceed, the Court of Appeals' decision may embolden other public figures to file lawsuits against their critics—a development that could undercut the court's otherwise-protective rulings on the interlocutory appeal right and the heightened legal and proof requirements.

On January 19, 2017, National Review, CEI and Rand Simberg filed Petitions for Rehearing or Rehearing *En Banc*. The petitions address only the ruling that Mann is likely to succeed on the merits, challenging the court's conclusions that the Appellants made statements of fact about Mann or that there is sufficient evidence in the record that they published with actual malice. A number of *amici* have filed briefs supporting the petitions for rehearing.

Michael Mann is represented by John B. Williams of Williams Lopatto PLLC and Chad Kurtz and Peter J. Fontaine of Cozen O'Connor. National Review, Inc. is represented by Michael A. Carvin and Anthony J. Dick of Jones Day. Competitive Enterprise Institute and Rand Simberg are represented by David B. Rivkin, Jr., Mark I. Bailen, and Andrew M. Grossman of Baker Hostetler.

No Defamation/False Light Claim Based on Hollywood Reporter's Sony Hack Article

By Natalie J. Spears and Gregory R. Naron

The U.S. District Court for the Northern District of Illinois has found that a defamation and false light complaint against the publisher of The Hollywood Reporter ("THR"), arising from its reporting on the notorious 2014 hack of Sony Pictures, failed under Illinois law. *Basile v. Prometheus Global Media*, Case No. 1:15-cv-10138 (Dec. 7, 2016). The decision, by Judge John Z. Lee, granted THR judgment on the pleadings, finding the complained-of statements were not defamatory per se and were subject to an innocent construction; the court did not reach the issue of whether California's anti-SLAPP statute applied and warranted dismissal.

Background

In November 2014, Sony Pictures Entertainment was the victim of a cyberattack; the hackers obtained and released some of the company's confidential data, including unreleased films and personal information about employees. The plaintiff, Nicole Basile, had worked in the film industry as a freelance production accountant, including for a Sony film. In December 2014, while the investigation of the hack was ongoing, THR published an article entitled, "Sony Hack: Studio Security Points to Inside Job." Ms. Basile complained of the following passage from the article:

Screenshot from the Hollywood Reporter's 2014 article

> "[E]mails pointing journalists to allegedly stolen files posted on a site called Pastebin came from a sender named 'Nicole Basile.' A woman by that name is credited on IMDb as an accountant on the studio's 2012 hit film The Amazing Spider Man, and her LinkedIn page says she worked at Sony for one year in 2011. Basile couldn't be reached for comment and the studio declined to confirm if she works or has worked there."

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District Court Decision

Judge Lee dispensed with plaintiff's argument that the article was defamatory per se because it imputed that she committed a crime -- i.e., the cyberattack -- noting that under Illinois law "it is not enough to state that a person is merely being investigated for a crime or is otherwise associated with a criminal act." *Basile,* Slip Op. at 4 (citing *Kapotas v. Better Gov't Ass'n*, 30 N.E.3d 572, 587 (Ill. App. Ct. 2015)).

Like *Kapotas* (which found articles reporting that a surgeon employed by county hospital was "given checks amounting to six figures with no work to show for it" and was "double dipping" did not impute criminal activity), the THR article did not state that Basile herself had committed any criminal acts -- only that "her name was used in conjunction with an email that was sent to the media informing them of the cyberattack." *Id.* at 5.

The court emphasized the article's greater context in finding no criminal imputation: the article explicitly "recognizes that the identity of the actual perpetrators are unknown, calling the incident 'a chilling Hollywood whodunit,'" and, in view of the "prevalence of email hacking," was "careful to indicate that the perpetrators had used an email account 'from a sender named Nicole Basile'; it did not claim that Basile was the one who actually sent the email in question." *Id.*

The article did not state that Basile herself had committed any criminal acts -- only that "her name was used in conjunction with an email that was sent to the media informing them of the cyberattack."

Nor did the article constitute defamation per se as imputing that Basile was "unable to perform or lacks integrity in performing her employment duties" or "lacks ability or otherwise prejudices that person in her profession." Under Illinois law, as interpreted by the Seventh Circuit, it is not sufficient that a statement implies that "the subject lacked integrity or judgment" in general, if it does not disparage the subject's professional skills. *Id.* at 5-6 (citing *Cody v. Harris*, 409 F.3d 853, 857-58 (7th Cir. 2005)). "[N]othing in the article disparages her skills as a production accountant or accuses her of being unable to perform the specific duties of a production accountant. Nor does Plaintiff argue that maintaining the integrity of Sony's computer systems was part of her job responsibilities." *Id.* at 6.

The Illinois innocent construction rule also foreclosed plaintiff's defamation claim; the court found *Salamone v. Hollinger Intern. Inc.*, 807 N.E.2d 1086 (Ill. App. Ct. 2004) instructive. There, the Appellate Court had innocently construed an article's characterization of plaintiff as a "reputed organized crime figure," finding it "characterized plaintiff not as a mobster, but as a person who is believed to be, possibly erroneously, an organized crime figure." *Id.* at 1091.

Judge Lee held that if "the statement in *Salamone* is reasonably capable of an innocent construction, the statement in the instant case is as well," since it "asserts only that an email

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address bearing Basile's name had been used in connection with the attack and that Basile had some connection to Sony, as shown by her LinkedIn profile. The article does not even go so far as to call Basile an 'alleged hacker' or 'reputed hacker,' and it does not identify Basile as someone who is the subject of an investigation of any kind." *Basile,* Slip Op. at 7. The innocent construction was buttressed by the article's context, which "explains the ongoing investigations of the cyberattack and lays out other possible avenues for inquiry." *Id.* at 7-8.

Since Basile's false light claim was grounded on the same statements that were insufficient to support a claim of defamation per se, the court granted judgment on the pleadings as to that claim as well.

Prometheus Global Media was represented by Jack J. Carriglio and James G. Argionis, of Cozen O'Connor, Chicago and Erik L. Jackson of Cozen O'Connor, Los Angeles, with assistance from Natalie J. Spears and Gregory R. Naron of Dentons, Chicago, and General Counsel for The Hollywood Reporter, Michele Singer. Plaintiff Basile was represented by Alexander Rufus-Isaacs, of Rufus-Isaacs, Acland & Grantham, LLP, Beverly Hills, California; Rodney A. Smolla, Wilmington, Delaware; and Gregory A. Bedell, of Knabe, Kroning & Bedell, Chicago.

"Clock Boy's" Claims Stop Ticking with Anti-SLAPP Dismissal

By Laura Prather and Alicia Calzada

Most Americans heard the viral tale in 2015 of the high school student in Irving, Texas who brought a "clock" to school and was arrested when a teacher thought it looked like a bomb. But as the story unfolded, many—especially conservative commentators—began to question the motives of the family, and the storyline itself.

The family of the boy, Ahmed Mohamed, who acquired the nickname "Clock Boy," was masterful at gaining beneficial publicity after the incident, so much so that a *Washington Post* reporter noted that the family became "its own public relations firm, founded September 14, 2015 as they brought Ahmed home from the police station."

Ahmed Mohamed on the Nightly Show with Larry Wilmore

Ahmed toured the morning talk show circuit and the late night comedy circuit, was invited to participate in the Google Science Fair, visited the White House and met President Obama, was named by *Time* Magazine as one of its "30 Most Influential Teens of 2015," received scholarship offers for himself and his family across the globe, and was invited to visit Facebook, MIT and NASA, and received offers for internships at Twitter and Reddit, and a scholarship to SpaceCampUSA.

Then the family demanded a combined $15 million from the City of Irving and the Irving Independent School District for their alleged unfair treatment, stemming from what they claimed to be racial profiling. *Mohamed Elhassan Mohamed v. Irving Independent School District et al.,* Case No. 3:16-cv-02283-L (N.D. Tex., filed Oct. 11, 2016).

As more information came out about the family, including the fact that the father participated in an infamous and inflammatory "mock trial" of the Koran in 2011 after which the holy book was burned, and had run twice previously for the presidency of Sudan and was planning to run again, many began to speculate that this was just a publicity stunt by the family.

See Enayat Najafizada and Rod Nordland, "Afghans Avenge Florida Koran Burning, Killing 12," New York Times, April 2, 2011 (The public outrage over the mock trial incident caused an

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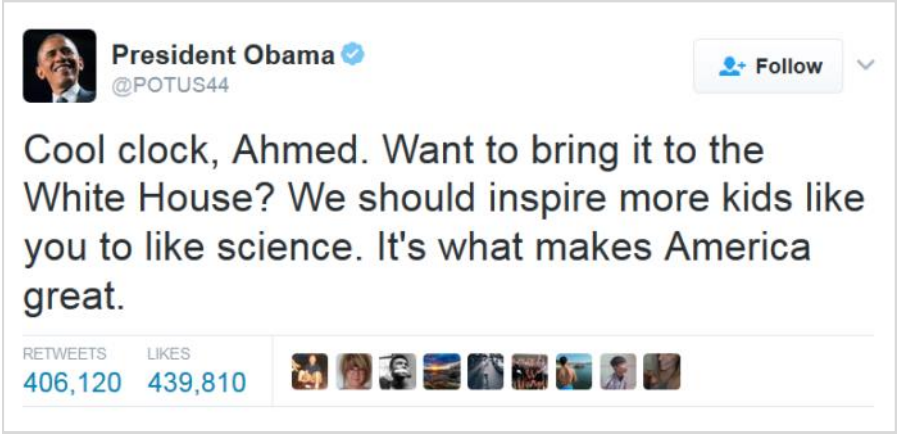

outbreak of deadly rioting in Afghanistan, killing at least 21 people, including seven United Nations workers.)

Some commentators opined that the clock was not really a homemade clock, but just a store-bought clock, disassembled, and placed into a briefcase-style pencil case in order to make it look like a bomb. Several YouTube videos showed how a clock from Radio Shack could be disassembled and placed in the pencil case to look just like the device Mohamed brought to school. Many—including Irving Mayor Beth Van Duyne, conservative talk show host Glenn Beck, the Executive Vice President of the Center for Security Policy Jim Hanson, and Ben Shapiro, openly criticized the family and began questioning their motives and their story. Dallas area television station KDFW FOX 4 reported on the initial arrest and the developments in the case, including the demand letters, and its political analyst Ben Ferguson discussed the controversy during a segment on KDFW FOX 4.

Just prior to the statute of limitations running, Mohamed's attorneys filed a defamation suit on behalf of Ahmed Mohamed and his father against Ferguson, Beck, Hanson, Shapiro, Mayor Van Duyne, KDFW FOX 4, The Blaze, and the Center for Security Policy. The suit alleged that various statements made by these individuals and organizations were false and defamatory and demanded retractions and monetary damages.

Anti-SLAPP Motions

All parties filed motions to dismiss under the Texas Citizens Participation Act, Texas' Anti-SLAPP law. The first Anti-SLAPP motion was filed by Ferguson and KDFW FOX 4, and was heard in December by the Honorable Michael J. O'Neill. Judge O'Neill, a former appellate judge who was only sitting by designation through the end of the year, had a keen understanding of the Anti-SLAPP statute.

There was no dispute that the Anti-SLAPP statute applied to the lawsuit, and the judge held the Plaintiffs to their burden of presenting clear and specific evidence of each element of their claim. In this case, the Mohameds' attorneys presented no evidence in response to the motion, and instead tried to argue that the pleadings were sufficient to support their claim under Texas case law.

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The judge didn't agree, and the case that Plaintiffs relied on, *In re Lipsky*, outlines the clear and specific evidence standard as something requiring actual, specific evidence, beyond just pleadings and speculation. In addition, the petition itself failed to articulate the standards for Plaintiffs' claims of defamation *per se* and actual malice. The Plaintiffs moved for a continuance in an attempt to get evidence to support their claim, but when pressed what the evidence would like look, Mohamed's lawyer indicated she needed affidavits from her own clients.

The judge determined that was not a sufficient basis for granting a continuance. Similarly, Plaintiffs sought specified and limited discovery provided for under the statute but could not articulate what outcome determinative discovery they hoped to obtain. The judge denied this secondary attempt to delay the proceedings as well. Finally, although the Plaintiffs had conceded their public figure status at one point and later tried to crawl that back, this too did not matter. Ultimately, the Court found that the statute applied and the Plaintiffs presented no evidence on any of the elements of their claims. Consistent with the Anti-SLAPP statute's mandatory fee award, the judge awarded over $80,000 in attorney's fees to KDFW FOX 4 and Ferguson.

The "Clock Boy" case demonstrates how a group of politically conservative pundits saw enormous benefit from the statute, in a lawsuit that targeted their viewpoints and speculation on a matter of public concern.

In January, a newly elected judge, Maricela Moore, heard the motions filed by several other defendants: conservative radio personality Glenn Beck, digital network THE BLAZE, Jim Hanson, and the Center for Security Policy. Although it had already been determined in December that the Anti-SLAPP statute applied to the claims and that the Plaintiffs had failed to present evidence of their claims, between the December and January hearings, the Plaintiffs did nothing to amend their pleadings or obtain additional evidence. As a result, Judge Moore dismissed the claims against these four Defendants. A hearing on the motion to dismiss for Ben Shapiro is set for January 30, 2017. No hearing has yet been set on the two motions to dismiss filed by Mayor Van Duyne, but because there are still parties in the case and no final judgment, the appellate clock has not started ticking for "Clock Boy."

When Texas enacted the TCPA, it received broad bipartisan support and it has since benefitted a broad spectrum of businesses, consumers, media companies, individuals, and politicians. The "Clock Boy" case demonstrates how a group of politically conservative pundits saw enormous benefit from the statute, obtaining early, rapid dismissals, with no discovery, in a lawsuit that targeted their viewpoints and speculation on a matter of public concern.

Laura Prather is a partner and Alicia Calzada an associate at Haynes & Boone LLP. They represented KDFW FOX 4 and political analyst Ben Ferguson.

Colorado News Magazine Wins Summary Judgment

Allegations Reported as Such are True Without Regard to the Substance of Those Allegations

By Steven Zansberg

On January 3, 2017, Denver District Court Judge Karen Brody issued an order granting summary judgment to Denver Westword, LLC, publisher of *Westword* weekly news magazine, in a defamation case brought by Dr. Louis C. Hampers. The ruling is of some significance, and of potential help to others, because the court found that in assessing published third-party *allegations* – identified clearly as such and where the publisher neither adopts nor endorses the substance of those allegations – substantial truth turns on whether the allegations were reported accurately, not on the substance of those allegations. Because it was uncontested that the third party had actually uttered her allegations against Dr. Hampers, the court found that the two challenged news articles reciting those allegations were substantially true.

The Underlying Facts

The two challenged news articles reciting those allegations were substantially true.

Hampers' lawsuit, filed in May 2015, alleged a single claim for libel based upon two *Westword* publications, each of which was purportedly published in June of 2014. The first of the two articles was originally published in June 2010, and reported that Hampers, then the head of the Emergency Department at the Children's Hospital Colorado, had engaged in a series of bizarre dating escapades with two women, Sandra Ebersohl, and Deborah Sherman.

Ms. Sherman was then a popular, on-air investigative reporter for the NBC affiliate, KUSA□TV. The article, entitled "When This Physician Gets the Fever, It's the Women He Dates Who Can't Shake the Bug" (the "Fever" article), described how Hampers, who was going through a divorce, had entered the "swingers," "no holds barred" dating scene, through which he had met both Ebersohl and Sherman.

In addition to recounting courtroom testimony in Sherman's permanent protection order proceeding against Hampers, and the events that gave rise to that proceeding, the article published a series of allegations that Ebersohl had made against Hampers, including that he had driven at excessive speeds on their way home from a night at a swingers club and talked his way out of the speeding ticket by lying to the officer about a medical emergency; that he had physically accosted Ebersohl on one occasion and taken her car keys from her; that he had confiscated her prescription medications, for a seizure disorder, and refused to return them; that he had smashed her car's windshield and had threatened her if she did not testify in his favor in

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Sherman's protection order proceeding; and, that he had offered Ebersohl $2,000 to provide false testimony at the protection order hearing (although she was not called as a witness).

Hampers' personal situation changed dramatically two months later, when federal authorities indicted him on 655 counts of procuring prescription drugs (Oxycontin, Ativan, and Ritalin) for his personal use, using eight different aliases at multiple pharmacies throughout the Denver metro area. Ultimately, Hampers pleaded guilty to fourteen felony counts, surrendered his medical license, and was sentenced to sixty months of supervised probation. All of the above events received extensive media coverage throughout the Denver media market, as well as nationally.

Displeased with the portrayal of his interactions with Ebersohl, Hampers' attorneys provided *Westword* with extensive documentation, compiled by private investigators, showing Ebersohl's extensive history of fabricating similar allegations of abuse by men she had dated. As a result, in June 2014, *Westword* ran a follow-up story entitled "Snake Charming: Sandy Ebersohl's Twenty-Year Trail of Deceit and Fabrication" (the "Snake Charming" article). That article surveyed Ebersohl's history of false reports and fabricated claims against other men.

It also recounted that Ebersohl had made allegations, including those recited above, against Hampers, which had been published in the June 2010 article, and that 2010 article (online version) was linked from *Westword*'s web archives. In describing Ebersohl's role in the "Fever" story, *Westword* published "Ebersohl was a source in that story, but it now appears that she may have fabricated much of the information she gave to *Westword*, the police, and other people involved in that situation." *Westword* noted that "neither Ebersohl nor Hampers spoke to us for this story." After pointing out that some of the e□mails Ebersohl had provided to *Westword* in 2010, which she claimed Hampers had sent her, contained an additional character in the sender's e□mail address, thereby establishing that those e-mails, in fact, had likely not originated from Hampers, *Westword* concluded the piece as follows:

> So how much of what Ebersohl told *Westword* [in 2010] was true?
>
> Ebersohl didn't return multiple phone calls or a letter sent to her home asking her to comment for this story. Given that, her record will have to speak for itself.

Westword that same day appended an Editor's Note to the top of the "Fever" story, which stated:

> In the spring of 2014, it came to *Westword*'s attention that Sandra Ebersohl, who was one source in this story about Louis Hampers, has a history of fabricating information. *Westword* obtained more than two decades' worth of police

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> reports, court documents, and copies of restraining orders that reveal a pattern: Ebersohl starts dating a man, and when he tries to break up with her, she harasses him. Or she claims that he's harassing her. However, documents show that her accusations are usually unfounded . . .
>
> For more on Ebersohl, read our June 19, 2014 feature story, "Snake Charming."

Subsequent to the publication of "Snake Charming" article in June 2014, Hampers requested that *Westword* remove the original "Fever" article from its online archives. *Westword* acceded to that request. It also removed dead hyperlinks to that article, even though Hampers' name did not appear in it. Nevertheless, in May 2015, Hampers sued *Westword*, alleging that both the republished June 2010 article (claiming it was published anew in June 2014 through the addition of the Editor's Note) and those same allegations contained in the June 2014 "Snake Charming" article, defamed him by accusing him of having *committed* the acts of which Ms. Ebersohl had accused him.

Motion to Dismiss Denied

In August 2015, *Westword* moved to dismiss Hampers' case, arguing it failed to state a claim upon which relief can be granted. In addition to arguing that Ebersohl's statements, contained in various police and court files, were entitled to the fair report privilege, *Westword* also argued that at the time of publication – in June 2014 – Hampers' reputation for the character traits of trustworthiness, truthfulness, and his harassment of women, was libel-proof as a result of all of the prior publications on those topics, including on his federal felony conviction. *Westword* also argued that the articles were non□actionable under incremental harm doctrine as recognized in Colorado (because the unchallenged statements in the articles caused far more harm to his reputation than all of those that were challenged).

Most importantly, *Westword* argued that because the two articles in question had reported Ebersohl's allegations as such (and also stated that Hampers denied at least one of those allegations), and did not endorse or embrace the substance of her allegations, the articles were substantially true. After all, it was uncontested that Ebersohl had made those allegations, not only to *Westword*, but to several law enforcement agencies, and under oath in courts of law.

On July 27, 2016, Judge Brody denied *Westword*'s motion to dismiss, rejecting all four bases asserted. Specifically, Judge Brody found that, even though Ebersohl's allegations were published in various official public records, the two Westword articles did not *attribute* them to public records sources and therefore the fair report privilege did not apply. Judge Brody also found that Hampers was not libel-proof, and that the allegedly false statements in the articles

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caused incremental harm to his reputation. Judge Brody rejected *Westword*'s argument that the "substantial truth" of the articles turned on whether Ebersohl had actually uttered the allegations reported in the article against Hampers, and not on the substance of those allegations.

Following the denial of *Westword*'s motion to dismiss, Judge Brody granted *Westword*'s motion to bifurcate discovery and to allow for two rounds of summary judgment briefing, the first devoted solely to the issue of substantial truth, and the second, if necessary, to actual malice.

Westword's Summary Judgment Motion

In its summary judgment motion in Phase I, *Westword* made two alternative substantial truth arguments: First, *Westword* urged Judge Brody to reconsider her denial of its motion to dismiss and noted that the judge who would be rotating into this court division on January 10, 2017 had, in a prior ruling, granted summary judgment to *The New York Times* in a libel suit upon finding that its article reporting allegations (made by a witness in a probate hearing) was substantially true so long as those allegations had actually been made and were fairly and accurately described.

Without applying the fair report privilege, the judge had determined that a minor error in reporting the witness' allegations did not render the *New York Times*' report of those allegations materially false. That judge made clear the substantial truth of the publication turned on the accuracy of reporting the allegations, as such, and not on the substance of those allegations. *See Stone v. N.Y. Times Co.*, 98CV2264 (Colo. Dist. Ct., Denver Cty. June 14, 2001) ("Truth of the Defendant's publication turns on *whether* certain allegations were actually made at the probate hearing. *It does not turn on whether the allegations were true, only if they were made* . . . ." (emphasis added)); *aff'd*, No. 01CA1187, 30 Media L. Rep. (BNA) 1918, 1921 (Colo. App. May 23, 2002).

In the alternative, *Westword* argued that Hampers could not establish the falsity of the substance of Ebersohl's allegations by the requisite clear and convincing evidence. In support of this argument, *Westword* tendered a voluminous evidentiary record establishing that Hampers had committed acts of harassment and had, in fact, pleaded guilty to harassment through physical contact with respect to women *other than* Ms. Ebersohl. Thus, *Westword* argued, the statements accusing Hampers of having committed those acts against Ebersohl were substantially true because the particular identity of the victim of such acts is not material. *See, e.g., Shihab v. Express-News Corp.*, 604 S.W.2d 204, 205-06 (Tex. Civ. App. 1980) (holding there is no material difference between false statement "X murdered A," and the truth "X murdered B").

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The Judge's Ruling

Judge Brody granted *Westword*'s motion for summary judgment, deciding the matter only on the first of the two grounds asserted. Specifically, the court accepted *Westword*'s invitation to reconsider its earlier ruling denying *Westword*'s motion to dismiss on grounds of substantial truth. After concluding that she was not bound by the "law of the case doctrine" to follow her earlier ruling, Judge Brody stated that

After revisiting the Court's prior analysis, and the relevant case law, the Court concludes that it did apply the wrong test and finds that because *Westword*'s reporting on the allegations made by Ebersohl concerning Hampers' conduct was substantially true, Hampers' defamation claim fails as a matter of law. The Court's prior analysis focused on the content of the June 2010 ["Fever"] article only, overlooking the fact that the alleged defamation is based on the Editor's Note article and the "Snake Charming" article, and that the question of substantial truth must be based on a review of the articles as a whole.

Because Westword's reporting on the allegations made by Ebersohl concerning Hampers' conduct was substantially true, Hampers' defamation claim fails.

The "context" of *Westword*'s reporting in 2014 was that Ebersohl's earlier allegations were part of a pattern of lies and deception that was Ebersohl's *modus operandi*: "Ebersohl was a source in [the 2010 "Fever"] story, but it now appears that she may have fabricated much of the information she gave to *Westword*, the police, and the people involved in that situation." In its 2014 publication, *Westword* set Ebersohl's allegations against Hampers in the broader context of other men whom she had also falsely accused of wrongdoing: '"I wouldn't believe anything she says,' says one man. Another of her exes agrees. 'She's a devious, diabolical woman,' he says."

Examining *Westword*'s restatement of Ebersohl's four-year-old allegations against Hampers in that broader context, the court concluded:

> Undeniably, the substance of gist of the two 2104 article at issue in this case is that Ebersohl made the various allegations about Hampers and that it is unclear whether they were ever true, not that the underlying allegations are true. The [two articles] do not allege or suggest that the underlying allegations are true. Rather, they simply report that Ebersohl made the allegations and invites the reader to draw his or her own conclusion as to whether what she stated is true. . . . In short, the [Snake Charming] article is simply a report of Ebersohl's allegations without implying that the underlying allegations are true. Because Hampers admits that Ebersohl made the allegations –thus, the allegations were

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> accurately reported by *Westword* – the articles are substantially true, regardless of whether the underlying statements with which Hampers takes issue are actually true.

Exception to the Republication Doctrine

From the libel defense perspective, what made this a challenging case was the two-fold problem of admitted falsity and actual malice: by stating, in 2014, that "it [now] appears that some of the accusations Ebersohl made against Hampers [in 2010] may have been fabricated," *Westword* essentially conceded it harbored "serious doubts" as to the truth of *the substance* of those allegations. Thus, *Westword* necessarily relied on the body of case law recognizing that the news media is entitled to republish serious allegations leveled by third parties so long as the media publisher does not embrace or endorse the substance of those allegations.

Colorado's Court of Appeals adopted this exception to the "republication doctrine" in *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 944 P.2d 646, 651 (Colo. App. 1997) (in a defamation suit concerning articles over school board members' statements that there had been "allegations of sexual harassment" levied against the plaintiff, holding that "the truthfulness of the harassment allegations themselves is not at issue . . . . Rather, plaintiff's defamation claim concerns only the truth of the factual statements . . . that 'allegations of sexual harassment' were made . . .'"), *rev'd on other grounds*, 981 P.2d 600 (Colo. 1999).

The two articles do not allege or suggest that the underlying allegations are true. Rather, they simply report that Ebersohl made the allegations.

Colorado trial courts have done so as well. *See, e.g., Shoen v. Watkins*, No. 09CV10, 39 Media L. Rep. (BNA) 1085, 1093 (San Miguel Cty. Dist. Ct. Nov. 5, 2010) (holding television program not actionable as defamation where *allegation* made by plaintiff's brother, that plaintiff was involved in his wife's murder, was presented as an unproven and refuted allegation: "the Turner Defendants need not show that Sam's allegations are true, but only that the allegations were made and accurately reported"); *Cooley v. Kenda*, No. 13CV31974, 42 Media L. Rep. (BNA) 1397, 1398-99 (El Paso Cty. Dist. Ct. Mar. 7, 2014) (defendant's documentary program provided substantially accurate account of *allegations* contained in a police report, and was therefore substantially true).

As Judge Brody noted, this exception to the republication doctrine has amassed a substantial pedigree across the nation. *See, e.g. Green v. CBS Inc.*, 286 F.3d 281, 284 (5th Cir. 2002) ("[i]n cases involving media defendants, such as this, the defendant need not show the allegations are true, but must only demonstrate that the allegations were made and accurately reported"); *Melton v. City of Oklahoma City*, 928 F.2d 920, 928 (10th Cir. 1991) (public statement

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concerning allegations of perjury in Oklahoma City Police Department being investigated by the FBI was true because the investigation was in fact underway, and there was "nothing contained in [the defendant's] publication which suggests . . . defendant either accepted the accusation as true or embraced it as his own"); *Vachet v. Cent. Newspapers, Inc.*, 816 F.2d 313, 316-17 (7th Cir. 1987) (report of information provided by the police was substantially true, regardless of truth of those accusations); *Basilius v. Honolulu Publ'g Co.*, 711 F. Supp. 548, 552 (D. Haw. 1989) (gist of defendant's report was that letter accusing plaintiff of crimes existed, and this was substantially true regardless of the truth or falsity of the underlying allegations); *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 649 (8th Cir. 1985) ("materially accurate report" of rape charge was not "an assertion by Newsweek that [plaintiff] committed the alleged crime"), *aff'd* 788 F.2d. 1300 (8th Cir. 1986); *see also* Jennifer O'Brien, *MLRC Report: The Substantial Truth Defense and Third Party Allegations*, MediaLawLetter, Apr. 2005, at 47-60; Jonathan Donnellan and Justin Peacock, *Truth and Consequences: First Amendment Protection For Accurate Reporting On Government Investigations,* 50 N.Y.L.J. 237, 266-68 (2005) (discussing cases in which "courts have focused on the first level of truth in adjudicating cases against the press based on its reporting of allegations leveled by *private* third parties" (emphasis added)). Recent events (numerous accusations of rape against Bill Cosby and of sexual assault against Donald Trump) show how common are such reports of third-party allegations. *See also* Eugene Volokh, *When 'there is serious reason to doubt' rumors and allegations, is it libelous to publish them?*, Wash. Post. (Jan 13, 2017).

As Judge Brody noted, this exception to the republication doctrine has amassed a substantial pedigree across the nation.

Judge Brody noted that when the Texas Supreme Court appeared to reject the above line of cases in 2013, it left open the "the possibility that the gist of some broadcast [or print publication] may merely be allegation reporting, such that one measure for the truth of the broadcast could be whether it accurately relayed the allegations of a third party." *Neely v. Wilson*, 418 S.W. 2d 52, 65 (Tex. 2013). This, Judge Brody decided, was precisely the type of case the Texas Justices had in mind.

Shortly after the summary judgment decision, on January 13, 2017, Hampers voluntarily dismissed his lawsuit against *Westword* with prejudice, so Judge Brody's ruling will not be appealed.

Steven D. Zansberg, a partner at Levine Sullivan Koch & Schulz in Denver, CO, represented Westword in this case.

Twitter Defamation Suit vs. Donald Trump Dismissed

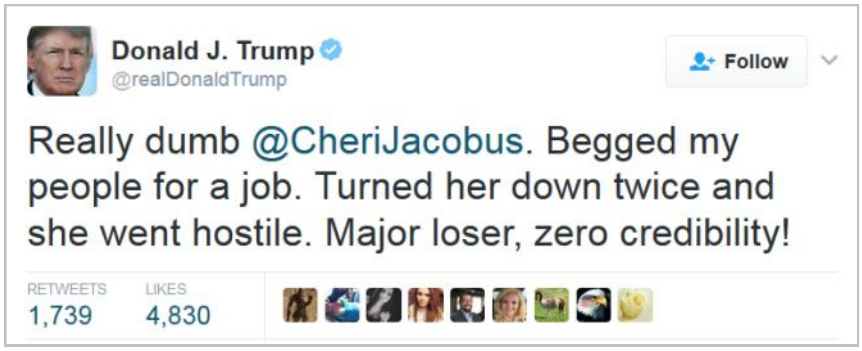
By Allison Venuti

A New York trial court dismissed a defamation suit against Donald Trump and his former campaign manager, holding that tweets and statements on TV about a political consultant were expressions of opinion. *Jacobus v Trump*, 2017 N.Y. Misc. LEXIS 96 (N.Y. Misc. 2017).

The plaintiff, Cheryl Jacobus, political strategist, commentator, and P.R. consultant, sued Trump, former campaign manager Corey Lewandowski, and Donald J. Trump for President, Inc., for allegedly deliberately lying that she sought a job from them and, after being turned down, made biased comments about Trump and his campaign.

The court granted defendants' motion to dismiss, holding that in context the statements were opinion and hyperbole and thus plaintiff failed to state a cause of action.

Background



According to the complaint, Jacobus was approached to be the Trump campaign's communications director. But she walked away from discussions following a meeting with then-campaign manager Lewandowski who was "loud, and rude" and critical of plaintiff's knowledge of how "FOX works."

Later on a January 2016 appearance on CNN again, Jacobus "characterized Trump as a 'bad debater' and stated that he 'comes off like a third grader faking his way through an oral report on current affairs' and was using the Megyn Kelly dispute with FOX as an excuse for avoiding the debate." The next day, Lewandowski stated on MSNBC that she "came to the office on multiple occasions trying to get a job from the Trump campaign, and when she wasn't hired clearly she went off and was upset by that."

On February 2, 2016, after Jacobus appeared on CNN, Trump tweeted that Jacobus "begged us for a job. We said no and she went hostile. A real dummy!" The next day Jacobus sent Trump a cease and desist letter. Then on Feb. 5, Trump tweeted "Really dumb @CheriJacobus. Begged my people for a job. Turned her down twice and she went hostile. Major loser, zero credibility!" Jacobus was then met with attacks by Trump's twitter followers.

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Jacobus sued alleging the statements meant she acted unprofessionally after being turned down for a job.

Motion to Dismiss Granted

The court began by explaining that to sustain a cause of action for defamation, the plaintiff must plead "1) a false statement, and 2) publication of it to a third party, 3) absent privilege or authorization, which 4) causes harm, unless the statement is defamatory per se, in which case harm is presumed." Highlighting the key role of context in defamation suits, the court noted that "statements advanced during the course of a heated public debate, during which an audience would reasonably anticipate the use of 'epithets, fiery rhetoric or hyperbole,' are not actionable."

Next, the court explained the distinction between privileged opinion and actionable fact. A fact "(1) has a precise, readily understood meaning, that is (2) capable of being proven true or false, and (3) where the full context in which it is asserted or its broader social context and surrounding circumstances indicate to readers or listeners that it is likely fact, not opinion." Regarding the broader context, the court added that apparent statements of fact may be statements of opinion if made in a "public debate, heated labor dispute, or other circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole."

Moreover, the court stressed that Internet culture encourages more "freewheeling" writing and television talk shows encourage "spirited" verbal exchanges. See, e.g., *Sandals Resorts Intl. Ltd. v. Google, Inc*., 925 N.Y.S.2d 407 (N.Y. App. 2011) (The culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a "freewheeling, anything-goes writing style"). Moreover, the court noted that under New York law being fired, absent any insulation of misconduct, does not imply incompetence or misconduct in one's profession.

Plaintiff's claim centered on the statements by Trump and Lewandowski that she "begged for a job and was turned down," and subsequently "exacted her revenge by attacking Trump on television." She acknowledged that the insults leveled against her, e.g., "a real dummy," and "major loser, zero credibility," were nonactionable hyperbole, and/or opinion.

The court found that because of the tone and context, the statements are reasonably viewed as expressions of opinion. First, the characterization of having "begged" for a job is "loose, figurative, and hyperbolic." The defensive tone of that tweet signaled to readers that Jacobus and Trump "were engaged in a petty quarrel," and Lewandowski's comments were speculative, vague, and a matter of opinion. The immediate context of the tweets was "the familiar back and forth between a political commentator and the subject of her criticism."

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In the context of the campaign and Trump's frequent use of Twitter, the statements as a whole were an "imprecise and hyperbolic political dispute *cum* schoolyard squabble." Furthermore, Trump's "tweets about his critics, necessarily restricted to 140 characters or less, are rife with vague and simplistic insults such as "loser" or "total loser" or "totally biased loser," "dummy" or "dope" or "dumb," "zero/no credibility," "crazy" or "wacko," and "disaster," all deflecting serious consideration."

Allison Venuti is MLRC's 2017 Legal Fellow. Plaintiff was represented by Jay R. Butterman, Butterman & Kahn, LLP, New York. Defendants were represented by Lawrence S. Rosen and Patrick McPartland, Larocca Hornik Rosen, New York.

New Law Restricts Contractual Attempts to Silence Unflattering Consumer Reviews

By Will Knapp

A new federal law aims to prevent businesses from using contracts to restrict their customers from posting negative reviews. The Consumer Review Fairness Act, signed into law by President Obama on December 14, 2016, prohibits businesses from including non-disparagement clauses in form contracts.

Consumer review websites often restrict companies themselves from changing or removing negative reviews, but some businesses have sought to chill criticism by imposing penalties directly in their contracts with consumers. Some wedding professionals, for example, were reported to use non-disparagement clauses with such frequency that The Knot warned brides to check for them before signing anything, and some businesses have even threatened to fine consumers thousands of dollars for negative reviews.

The CRFA prevents businesses from obtaining via contract the intellectual property rights of customer reviews as well, which was a creative maneuver that allowed companies to take down negative reviews using a DMCA notice.

Criticism plays a valuable role in our economy: allowing potential customers to choose the best products and services and, in more extreme circumstances, protecting the public from hoaxes. If customers cannot post negative reviews, then companies have less incentive to improve their services because customers have no way of being warned of their flaws.

Effective as of March 14, businesses will no longer be able to enforce non-disparagement clauses and existing clauses will become void.

Effective as of March 14, businesses will no longer be able to enforce non-disparagement clauses and existing clauses will become void. As of December 2017, the Federal Trade Commission can proactively enforce the Act as it does other unfair trade practices. State attorneys general and state consumer protection officers can also enforce the CRFA, and the Act does not preempt any other applicable state causes of action.

The CRFA is limited, though. It only applies to "form" contracts for goods or services that the customer does not have a chance to negotiate.

Employer/employee contracts and independent contractor agreements are specifically exempted. Congress also carved out exceptions related to contractual prohibitions against the disclosure of trade secrets, personnel and medical records. Similarly, the CRFA does not overcome any duty of confidentiality under agency law, and it has no effect on the terms and conditions for pictures or video used commercially where created by an employee or independent contractor of that commercial entity.

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The Act is intended to have no effect on defamation law, meaning that a business could still allege a libel claim against a consumer arising out of an unflattering post.

In other words, companies who were including non-disparagement claims can still use the threat of a defamation suit to pressure negative reviewers into taking down their posts simply to avoid the expense of litigating. Customers who live in states without anti-SLAPP laws may be particularly susceptible to this tactic. Because businesses can still sue for defamation, the CRFA may not lighten many dockets.

Still, the CRFA protects unsuspecting customers from contracting away their free speech rights. Businesses no longer have an easy way to censor speech in order to protect their Yelp rating. The Act may not completely halt the chilling of speech, but it is a step in the right direction.

Will Knapp is a third-year student at the Washington & Lee University School of Law and an extern in the Gannett law department.

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.

MLRC Bulletin: Legal Frontiers in Digital Media
The Test of Time: Section 230 of the Communications Decency Act Turns 20; The Good, the Bad & the Ugly of Recent CDA Decisions; The Potentially Serious Implications of Federal Court Injunctions that Purport to Bind Non-Party Internet Service Providers in Trademark and Copyright Infringement Actions; Preparing for the EU General Data Protection Regulation; An Overlooked First Amendment Milestone: The Copyright Fight Over the Rodney King Beating Video

From the Next Gen Committee

How Should Social Media Platforms Deal with Fake News?

By Alexia Bedat

In the wake of the fake news scandals of the 2016 U.S. presidential election, social media platforms such as Facebook and Snapchat are increasingly being held to standards expected of media, rather than tech, companies. Fact-checkers and editors are entering the scene, raising the question whether social media platforms will continue to be passive Internet service providers, or content providers, or perhaps both.

The U.S. election catapulted fake news to the center stage of public debate. Which social media engines perpetrated the most fake news? Who believed the most fake news? How did fake news contribute to Donald Trump becoming President-elect?

The more pressing question at this point is *how* social media can correct the fake news problem.

Following strong criticism after the election, Facebook announced on December 15, 2016 new measures it is taking to address the issue of hoaxes and fake news.

Facebook reiterated its commitment to giving people a voice and its belief that it cannot become an arbiter of truth itself. Instead, Facebook has announced that it will partner with third-party fact-checking organizations. As a precondition to partnering with Facebook, the fact-checking organization must be a signatory of Poynter's International Fact Checking Code of Principles. This Code is the result of international consultations among fact-checkers and sets out principles for fact-checkers to aspire to in their everyday work. Signatories must produce a public report indicating how they have lived up to each of the five principles within a year from signature, and once a year thereafter.

If a fact-checker identifies a story as fake, it will get flagged as "Disputed by 3rd Party Fact-Checkers", with a link to an article explaining why. Although it will still be possible to share flagged stories, a warning that the story has been disputed will be displayed upon sharing.

Facebook is also tackling the financial incentives inherent in fake news. Hoaxers posing as news organizations are able to drive people to their websites that are usually advertisements. Facebook is eliminating the ability to spoof domain names and will analyze publisher sites to

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detect where policy enforcement action is necessary. The platform will also ensure that once a story is flagged, it is no longer be possible to make it into an ad or promote it.

Is this approach the correct one? The answer turns on how one perceives Facebook. Mark Zuckerberg has consistently described his platform as a "tech company", not a "media company", maintaining that it is up to users to decide who to follow. In an update posted after the election, Zuckerberg reiterated "*We believe in giving people a voice, which means erring on the side of letting people share what they want whenever possible. We need to be careful not to discourage sharing of opinions or to mistakenly restrict accurate content.*"

On the one hand, Facebook is primarily a social platform, not a news organization. Its users should be expected to exercise a minimum amount of good judgment when assessing the content that appears in their News Feed. We cannot, as an ever-growing online community, completely absolve ourselves from responsibility either.

On the other hand, with its 1.79bn users, Facebook wields incredible power. Until now, Facebook has relied mostly on algorithms, keeping human editorial judgment to a minimum – an approach that has not always worked for Zuckerberg's data empire. The platform has been repeatedly criticized for taking down socially important content (e.g. its removal in October 2016 of a Swedish breast cancer awareness video or recent censoring of the Dakota Access pipeline protest livestream) and for favoring liberal viewpoints in its trending topics. Speaking at the Future Today Summit on December 6, 2016 in NYC, Judith Miller, an American journalist and commentator, shared her frustration at Facebook's censorship of one of her articles on the war in Iraq. Miller questioned whether Facebook would "become our censors", a status quo people should be "outraged" about as it is "not even possible to get someone on the phone to explain to you why your article was removed". Meredith Broussard, an assistant professor at NYU's Arthur L. Carter Journalism Institute, also called for greater editorial control, criticizing Facebook's algorithm for optimizing what is "popular", not what is "good". Broussard also expressed skepticism that an algorithm is more neutral than editorial control as algorithms are made by people who have biases that can be replicated in the algorithm.

Facebook's partnership with third party fact-checkers should herald an improvement in the quality and accuracy of the news on the platform.

Snapchat, by way of comparison, exercises greater editorial control over news. Its news section, Discover, was introduced in 2015. Unlike social media companies that present users with content that is recent or popular, Discover counts on editors and artists, not clicks and shares, to determine what is important. Snapchat's intention to rely on human editing and curation was made clear with its hiring in 2015 of Peter Hamby, a national political reporter for CNN, to head its news division. The benefits of these developments have not gone unnoticed,

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and are elegantly summarized by the title of Farhad Manjoo's New York Times November 2016 article "*While We Weren't Looking, Snapchat Revolutionized Social Media.*"

Facebook certainly has been looking, and appears to be drawing back its algorithm "shield". Its new feature, Collections, will highlight news stories submitted by "handpicked media partners", according to Business Insider. Unlike news stories that appear in the News Feed at present based on likes or as paid content, publishers will see their content inserted into the News Feed, as well as on Collections.

The combination of Collections and Facebook's partnership with third party fact-checkers should herald an improvement in the quality and accuracy of the news on the platform. Whether one views Facebook as a tech giant or a media company, the move away from pure algorithms is a positive development. Hiding behind algorithms has, correctly, been described as increasingly untenable. After all, "algorithms are *made by humans*; choosing which story appears in your Facebook feed is the responsibility of Facebook whether they choose it explicitly or implicitly via an algorithm."

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Processing-Before-Access Policy for Civil Complaints Declared Unconstitutional

Third in a Line of Similar Victories for Courthouse News Service

By Jacquelyn Schell and Rachel Matteo-Boehm

A civil court complaint is a quintessential public document. It is an important source of news about the courts, and its filing marks the initiation of a new government proceeding. Traditionally, in our nation's largest and most active courts, reporters reviewed new complaints on a daily basis. This review was usually conducted near the intake counter of the clerk's office, where the complaints received earlier that same day were placed in a bin or basket for press review before being sent for further administrative processing or to judges.

In the last several years, however, clerks of some state courts have taken the view that a complaint submitted to a clerk's office for filing can be properly withheld from press and public review until after the clerk's office has completed "processing," *i.e.*, until employees have completed the clerical tasks associated with the intake of a new complaint. Even some clerks who provided immediate access in the paper-filing world have adopted a processing-first policy since their office transitioned to electronic filing. The New York Supreme Court was one of those courts, but will be no longer.

Some state courts have taken the view that a complaint submitted to a clerk's office for filing can be properly withheld from press and public review until after the clerk's office has completed "processing."

Observing that "there is of course, an important First Amendment interest in providing timely access to new case-initiating documents," on December 16, 2016, Judge Edgardo Ramos of the Southern District of New York granted Courthouse News Service ("CNS") a preliminary injunction prohibiting the New York County Clerk, Milton Tingling, from delaying access to newly-filed, New York Supreme Court civil complaints – the vast majority of which are now e-filed – until after the completion of administrative processing. *Courthouse News Serv. v. Tingling*, Civil Action No. 1:16-cv-08742-ER (S.D.N.Y. Dec. 16, 2016).

Before this ruling, an average of one in three newly-filed civil complaints was withheld from review by the press and public for at least one business day, with percentages often higher and delays often exacerbated by intervening weekends or holidays. Now, in response to the preliminary injunction, the Clerk's Office has assured the court it will be providing immediate, pre-processing access online by January 31, 2017.

This victory is the third in a series of victories in 42 U.S.C. § 1983 actions brought by CNS to challenge the recent state court trend of withholding new complaints until after administrative

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processing – the specifics of which vary from court to court but commonly include clerks checking complaints for compliance with form and formatting requirements, putting complaints in a file folder, "quality control," accepting or processing payment, assignment of a case number, and, in the e-filing context, "acceptance" of the complaint as an official court document – however long that may take.

In 2009, Judge Melinda Harmon of the United States District Court for the Southern District of Texas declared unconstitutional the Houston state court clerk's practice of delaying access to both paper and e-filed complaints (called petitions in Texas) until after completion of clerical review and other administrative tasks. Judge Harmon granted CNS a preliminary injunction requiring that CNS "be given access on the same day the petitions are filed." *Courthouse News Serv. v. Jackson,* 2009 WL 2163609, at *2 (S.D. Tex. July 20, 2009). That order was followed by a stipulated permanent injunction, *Courthouse News Serv. v. Jackson*, 2010 U.S. Dist. LEXIS 74571 (S.D. Tex. Feb. 26, 2010), under which the Houston state court clerk is to provide access to newly-filed civil petitions by the end of the day on which they are received, with certain enumerated exceptions.

This victory is the third in a series of victories in 42 U.S.C. § 1983 actions brought by CNS to challenge the recent state court trend of withholding new complaints until after administrative processing.

In May of 2016, Judge S. James Otero of the United States District Court for the Central District of California granted summary judgment to CNS in a long-running case against the California Superior Court for the County of Ventura, finding a First Amendment right of timely access to new civil complaints that attaches "when a complaint is received by the court, rather than after it is 'processed,'" *Courthouse News Serv. v. Planet*, 2016 WL 4157210, *13 (C.D. Cal. May 26, 2016) ("*Planet Order*"); issuing a permanent injunction prohibiting the clerk from "refusing to make newly filed unlimited civil complaints and their associated exhibits available to the public and the press until after such complaints and associated exhibits are 'processed;'" and directing the clerk to "make such complaints and exhibits accessible to the public in a timely manner from the moment they are received by the court." *Courthouse News Serv. v. Planet*, 2016 WL 4157354, at *1 (C.D. Cal. June 14, 2016) ("*Planet Judgment*") (judgment for declaratory relief and permanent injunction). That decision followed two prior appeals of the clerk's motions to dismiss in the same case, both of which were granted by the previously assigned judge, Central District Judge Manuel Real, and reversed by the Ninth Circuit on appeal. *See Courthouse News Serv. v. Planet*, 750 F.3d 776, 787-88 (9th Cir. 2014) ("*Planet I*") and 614 Fed. App'x 912, 914 (9th Cir. 2015) ("*Planet II*").

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New York: CNS v. Tingling

While the Texas *Jackson* and California *Planet* cases laid much of the groundwork, the New York *Tingling* action was the first of these cases to specifically address timeliness of access in the context of a court that has adopted 24/7 mandatory e-filing, where some of the delays result from e-filing of complaints in the early evening, while lawyers are still working but after clerk's office employees have left for the day. In New York, new complaints receive a "filed" date for statute of limitations and other purposes as of the date of receipt, even if the complaint is received on an evening or weekend.

CNS, a nationwide legal news service for lawyers and the news media, has been reporting on newly-filed civil complaints at New York Supreme Court on a daily basis for at least twenty years. Historically, this court provided some of the best press access in the country, with CNS's reporters joining other journalists to review the newly-filed complaints in the intake area, where complaints were collected in a bin and made available to the press immediately upon filing.

With the advent of e-filing, however, access declined dramatically. Instead of a bin of paper complaints at the intake counter, the clerk's office began making new civil complaints available to the press and public through its websites. Yet the e-filed complaints were not posted to those websites until after the clerk's office had completed a series of administrative tasks concluding with the assignment of an index number. The result was persistent delays in access, in direct contrast to the 100 percent same day access that characterized the paper filing era. In the months leading up to the filing of CNS's complaint, on average, one of every three complaints CNS sought to review was not available until the next court day, and the delays often carried over for two to three calendar days. Some days were even worse; it was not uncommon for the press, including CNS, to be denied access to 40% or 50% of complaints filed on a given day. These delays in access would be notable in any court and were even more so in New York Supreme Court, which hosts some of the most newsworthy cases in the country.

During these temporary denials of access, plaintiffs could control which news outlets saw the complaints. For example, at 4:36 p.m. on June 30, 2015, then-presidential candidate Donald Trump sued Univision over its cancellation of his beauty pageant contract based on his remarks about Mexicans. The New York Clerk did not make the complaint public until early afternoon the next day, a delay of almost 24 hours. Meanwhile, by 5:49 p.m. on June 30, the New York Post's online Page Six had already reported on the complaint, which that publication no doubt received from Trump's attorneys, as evidenced by the filed copy of the complaint accompanying the news report, which bore the court's "received" stamp but did not yet have a time stamp or index number. Similarly, on July 15, 2016, at 4:30 p.m., former New York Attorney General Eliot Spitzer sued a former girlfriend, accusing her of attempting to extort payment from him by accusing him of assault. Although filed while the New York Clerk's

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office was open, the case, *Spitzer vs. Zakharova,* was not made available to the press until three days later, July 18 at 10:17 a.m. By that time, the case was old news, having been reported in the New York Times online at 6:25 p.m. on July 15.

Meanwhile, by contrast, new complaints filed electronically in the Southern District of New York are automatically assigned a case number and released onto the Public Access to Court Electronic Records ("PACER") website, where they are available to the public and press immediately upon filing and without processing by court personnel. This practice continues the pre-processing access that existed at that court before the transition to e-filing, when complaints were paper-filed. The three other District Courts in New York State also make newly e-filed complaints available to the public and press upon filing and before processing, as do the vast majority of federal district courts and several state courts that have transitioned to e-filing.

After more than a year of negotiations failed to elicit change, CNS brought suit against the New York Clerk in his official capacity on November 2016 under 42 U.S.C. § 1983, seeking both declaratory and injunctive relief. CNS's suit alleged that the Clerk's policy of withholding new complaints until after clerical processing, and the resulting denial of timely access, violated CNS's First Amendment right of access to court records. The Second Circuit had recently ruled that complaints are judicial documents, entitled to the First Amendment presumption of access. *Bernstein v. Bernstein, Litowitz Berger & Grossman LLP*, 814 F.3d 132, 140-41 (2d Cir. 2016). This, coupled with the court rulings from the CNS *Planet* and *Jackson* matters, along with other Second Circuit case law "emphasiz[ing] the importance of immediate access where a right to access is found," *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006), provided the basis for CNS's motion for preliminary injunction, which followed its complaint.

The New York Clerk did not dispute the existence of the delays or the constitutional standards under *Lugosch* and *Bernstein*. Instead, the Clerk argued that the delays were not constitutionally significant, and that New York rules and statutes "imbued validity" into the practice of a clerk checking complaints for caption, signature, venue, and other requirements, and assigning an index number, before providing to access to those complaints.

In a ruling from the bench following an hour-long preliminary injunction hearing on December 16, Judge Ramos rejected those arguments and granted CNS's motion for a preliminary injunction, agreeing with CNS that none of the statutes or rules cited by the New York Clerk created an obligation to process new complaints before providing them for public view. Specifically, Judge Ramos ruled that CNS had demonstrated a likelihood of success on the merits because "the clerk has failed to meet its burden of demonstrating that its processing-before-access policy is either essential to preserve higher values or is narrowly tailored to serve that interest" and that "the clerk has alternative constitutional ways to address its administrative concerns." (The transcript is expected to be available on PACER within 90 days.)

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Citing *Lugosch*, *Planet*, and *Jackson*, the Court further explained that CNS would be "irreparably harmed without the injunctive relief" because "the loss of First Amendment freedoms even for minimal periods of time unquestionably constitute irreparable jury." *See Lugosch*, 435 F.3d at 127. In addition, Judge Ramos rejected the Clerk's federal abstention argument under *O'Shea v. Littleton*, 414 U.S. 488 (1974), a seldom used and narrow application of the doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971) – the same argument that the Ninth Circuit had previously rejected in *Planet I*.

At a status conference on January 12, the New York Clerk informed Judge Ramos that his office will be providing "immediate public online viewing of case initiating electronic filings in New York County including new complaints without prior County Clerk staff review" and before index numbers are assigned. (This transcript is also expected to be available on PACER within 90 days.) The Clerk further indicated that such access will be provided by January 31, 2017. The Court has stayed discovery for ninety days to allow the parties to evaluate the effectiveness of this access and discuss long-term settlement options.

California: CNS v. Planet

CNS challenged a similar processing-before-access policy held by the clerk of the California Superior Court for the County of Ventura.

Prior to the *Tingling* litigation, CNS challenged a similar processing-before-access policy held by the clerk of the California Superior Court for the County of Ventura, where complaints are currently received only in paper form, but where e-filing is anticipated in the next few years. As in *Tingling*, CNS's action sought both declaratory and injunctive relief under § 1983 and the First Amendment. CNS alleged that Planet's policy of denying access to new civil complaints until after they were "processed" and the resulting delays violated CNS's First Amendment right of access. The case was initially assigned to the Honorable Manuel Real, who twice granted motions to dismiss filed by Defendant, both of which were reversed by the United States Court of Appeals for the Ninth Circuit. *Planet I*, 750 F.3d at 787-88; *Planet II*, 614 Fed App'x at 912. In *Planet II*, the Ninth Circuit also granted CNS's request to have the case assigned to a different district judge, resulting in reassignment to Judge Otero.

In a 30-page order issued on May 26, 2016, Judge Otero granted in part CNS's motion for summary judgment and denied Planet's cross-motion in full. Applying the Ninth Circuit's two prior decisions, Judge Otero held that there is a First Amendment right of timely access to newly-filed civil complaints that "arises when a complaint is received by a court, rather than after it is 'processed'" and explained that:

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> [I]t would be nonsensical for a qualified right of access to arise only after a complaint has been "processed," for such a rule would run contrary to the text of and purpose underlying various rules of court – including California Rule of Court 1.20(a), which requires that complaints be "deemed filed on the date [they are] received by the court clerk" – every time a complaint is not processed the day it is received for filing.

Planet, 2016 WL 4157210, at *13. Finding that Planet had not met his burden to justify delays in access either under the compelling government interest test or as a reasonable time, place, and manner restriction, Judge Otero entered judgment for declaratory relief in favor of CNS and permanently enjoined Planet "from refusing to make newly filed unlimited civil complaints and their associated exhibits available to the public and the press until after such complaints and associated exhibits are 'processed,' regardless of whether such complaints are filed in paper form or e-filed." *Planet Judgment*, 2016 WL 4157354, at *1.

At the outset of the case, Planet's policy delayed access to the vast majority of complaints for two or more court days, with actual delays in access continuing for as many as 34 calendar days. In 2014, shortly after the Ninth Circuit's ruling in *Planet I*, the Ventura Clerk implemented a new access policy whereby new complaints were scanned and made available on terminals in the courthouse. While this was a substantial improvement in access, the fact that the room with the terminals closed at 3 p.m. but complaints could be filed until at least 4:30 p.m. created "a distinct possibility that complaints filed late in the day may not be viewable by the public until the next day," and the district court issued an injunction requiring access to those complaints in a "timely manner." *Planet,* 2016 WL 4157210, at *20.

CNS successfully challenged the Houston court clerk's practice of delaying access.

The district court's judgment is currently on appeal to the Ninth Circuit. In the meantime, as a result of the injunction, the press now has access to nearly 100% of each day's new civil complaints filed in Ventura County Superior Court.

Texas: CNS v. Jackson

The first of this series of cases, CNS successfully challenged the Houston court clerk's practice of delaying access, typically for 24 to 72 hours, in order to verify filings for correct case number, proper court, accurate title of document, and proper category. *Jackson*, 2009 WL 2163609, at *2-4. In that action, Judge Harmon of the Southern District of Texas issued a preliminary injunction requiring that the Houston Clerk restore same-day access to new civil complaints. The Court ruled:

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> While the parties in the instant case agree that there is a right of access to newly-filed petitions in civil cases, they disagree on whether the delay in the availability of these documents is the "functional equivalent" of an access denial and is, thus, unconstitutional.
>
> * * *
>
> Defendants attempt to analogize the 24 to 72 hour delay in access in this case to the district court's refusal to release transcripts of closed proceedings prior to the jury verdict in *Edwards*.... The Court is unpersuaded by Defendants' argument and finds that the delay in access to the newly-filed petitions in this case is not a reasonable limitation on access. Defendants' administrative goal of getting online and not in line fails to rise to the level of significance that a trial court's interest in maintaining an impartial jury does. Assuming, *arguendo,* that Defendants have an overriding interest, the Court finds that they have failed to demonstrate that the 24 to 72 hour delay in access is narrowly tailored to serve such an interest and that no less restrictive means of achieving that interest exists.

Id. at *4 (citing *United States v. Edwards*, 823 F.2d 111, 115 (5th Cir. 1987)). The parties later agreed to a stipulated permanent injunction which required same-day access, except in certain limited and enumerated circumstances.

CNS was represented in the Tingling *action by Rachel Matteo-Boehm, William Hibsher, Jacquelyn Schell, and Daniel Lewkowicz of Bryan Cave LLP. Defendant Milton Tingling was represented by Lee Adlerstein of the New York Office of Court Administration.*

CNS was represented in the Planet case by Rachel Matteo-Boehm, Roger Myers, Jonathan Fetterly, and Leila Knox of Bryan Cave LLP, along with former Bryan Cave counsel David Green. Defendant Michael Planet was represented by Robert Naeve, Erica Reilley, and Nathaniel Garrett from Jones Day and Frederick Hayes of the Hayes Law Office. The Reporters Committee for Freedom of the Press provided amicus support for CNS at several stages of the case. The Planet case was also the subject of an April 2014 article in the MediaLawLetter.

CNS was represented in the Jackson case by Rachel Matteo-Boehm, Katherine Keating, and Laurie Rust of Holme Roberts & Owen LLP (which combined with Bryan Cave LLP in 2012) and John Edwards of Jackson Walker LLP. Defendants, Loren Jackson as Harris County District Clerk and Wes McCoy as Chief Deputy, were represented by Mary Baker, Office of Harris County Attorney. The Jackson case was the subject of two prior reports in the MediaLawLetter, in July 2009 and March 2010.

D.C. Circuit Rules Citizens Can Sue to Force Probe of Federal Records Violations

Case Stems from Clinton Email Scandal

By Matthew E. Kelley

In one of the dozens of federal records cases related to the use of a private email server by then-Secretary of State Hillary Clinton, the D.C. Circuit has ruled that nongovernmental parties can sue to enforce the Federal Records Act's mandatory referral of violations to the Attorney General. *Judicial Watch v. Kerry*, 2016 WL 7439010 (D.C. Cir. Dec. 27, 2016).

Although the ruling in *Judicial Watch, Inc. v. Kerry* did not settle the question of whether the Justice Department could be forced to initiate enforcement proceedings in such a situation, it did provide a potential mechanism for pressuring federal agencies to preserve records subject to the Freedom of Information Act.

Background

The D.C. Circuit has ruled that nongovernmental parties can sue to enforce the Federal Records Act's mandatory referral of violations to the Attorney General.

Conservative groups Judicial Watch and Cause of Action Institute were among those who filed suit against the State Department after the *New York Times* revealed that Clinton had used a private email account housed on a server in her suburban home during most of her tenure as Secretary of State. But rather than relying on the Freedom of Information Act, the suits consolidated before the D.C. Circuit relied on the Administrative Procedure Act, 5 U.S.C. § 706(1). The relevant provision of the APA allows federal courts to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* The groups invoked the APA to argue that the State Department and National Archives had unreasonably failed to ask the Attorney General to initiate an enforcement action to recover all of the Clinton emails that should have been preserved by the government under the Federal Records Act, 44 U.S.C. § 3301 et seq.

The FRA prohibits the destruction of federal records other than pursuant to the disposal provisions of the statute, which gives the National Archives the authority to determine whether the records have "sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government." 44 U.S.C. § 33303(a). The Supreme Court in *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148-150 (1980) held that the FRA does not createn an express or implied cause of action against an agency for actions that violate its discretionary provisions.

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However, the FRA also states that the National Archives and the head of the relevant federal agency have a responsibility to prevent the "unlawful removal, defacing, alteration, or destruction of records" and the agency head must initiate action through the Attorney General to recover records that have been improperly removed. *Id.* §§ 2905(a), 3016. If the head of an agency refuses to seek the Attorney General's assistance, the FRA says the National Archives "shall request the Attorney General to initiate such action, and shall notify the Congress when such a request has been made." *Id.* § 2905(a). The D.C. Circuit previously has held that a nongovernmental party can sue under the APA to enforce the mandatory provisions of the records statute. *Armstrong v. Bush*, 924 F.2d 282, 296 n.12 (D.C. Cir. 1991).

Judicial Watch and CAI argued that the State Department and National Archives had violated the mandatory provisions of the FRA by failing to ask the Attorney General to initiate an enforcement action to recover all of Clinton's government-related emails, both from the private email server and from a Blackberry that she used during the first few weeks after she became Secretary of State. In other words, the groups' position was that State and Archives were violating the mandate of the FRA by refusing to ask the Attorney General to take action to recover all of the missing Clinton emails that qualified as federal records.

The trial court didn't buy that argument. It held that, while the FRA required the agency and the Archives to take *some* action, it didn't mandate an immediate referral to the Attorney General. Because the State Department had worked with Clinton's attorneys to recover copies of what her lawyers determined were government-related emails, the trial court held, it was not required to make a referral for further enforcement action. Only when an agency and the Archives took minimal or no action to remedy the removal or destruction of federal records would an APA suit to force a referral to the Attorney General be cognizable, the trial court held. Thus, the trial court held, the case was moot because State and the Archives had "taken a number of significant corrective steps to recover Clinton's emails."

D.C. Circuit Opinion

The D.C. Circuit reversed and remanded. The case was not moot, the Court held, because State had not, either before or after the suit was filed, given the plaintiffs "everything they wanted," *i.e.*, "an enforcement action through the Attorney General." It wasn't enough, the panel said, that State had asked Clinton to voluntarily turn over her emails and had obtained from the FBI a copy of the emails that it recovered during its now-closed criminal investigation. "Even though those efforts bore some fruit, the Department has not explained why shaking the tree harder—*e.g.*, by following the statutory mandate to seek action by the Attorney General—might not bear more still," the Court held. Thus, "[a]bsent a showing that the requested enforcement action could not shake loose a few more emails, the case is not moot."

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That is true even if the FBI had recovered and provided to State all of the emails from Clinton's private server, because that batch of emails did not include those Clinton sent and received on her Blackberry at the start of her term in office, the Court said. There was no evidence, therefore, that a referral to the Attorney General would have been pointless, the Court said.

The panel said the trial court was wrong to hold that the FRA was not violated so long as the agency took some action to recover the improperly removed records. The statute's entire enforcement scheme "assumes that the agency head (or Archivist) will actually refer cases to the Attorney General—as the statute requires," and if not, "there will be no effective way to prevent the destruction or removal of records." The statue, the Court said, provides no discretion for agencies and the Archives to determine which cases to refer for legal action.

In remanding the case, the D.C. Circuit declined to address the questions of "whether the Attorney General's action or inaction in response to a referral would be reviewable," and whether the State Department could successfully raise separation-of-powers or other constitutional defenses to the FRA's restrictions on its discretion.

The D.C. Circuit's ruling could be helpful to journalists and other FOIA plaintiffs in cases involving government officials' use of personal email or other digital communications.

As is apparent from the facts of the case, the D.C. Circuit's ruling could be helpful to journalists and other FOIA plaintiffs in cases involving government officials' use of personal email or other digital communications to conduct government business. An APA action could, at a minimum, put pressure on a federal agency to take steps to recover those records so they could be subject to release under FOIA. While it remains unclear whether the FRA's mandatory referral and enforcement provisions would survive constitutional scrutiny (no constitutional arguments were advanced by the parties in this case), the mere possibility of costly litigation over the issue could prompt federal agencies to take the necessary steps to recoup and preserve government records.

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John J. Vecchione of Cause of Action Institute argued the case for the appellants. With him on the briefs were James F. Peterson of Judicial Watch and Alfred J. Lechner, Jr., Lee A. Steven, and R. James Valvo, III of Cause of Action Institute. Daniel Tenney of the U.S. Justice Department, Appellate Division, argued the case for the appellees. On the briefs were Principal Deputy Assistant Attorney General Benjamin C. Mizer, U.S. Attorney Channing D. Phillips, and Matthew M. Collette of the Appellate Division.

Federal Court Finds For-Profit Safety Blog Qualifies As "News Media" Under FOIA

By Cindy Gierhart

The U.S. District Court for the District of Columbia ruled last month that a blogger for a for-profit consumer safety company qualified for a Freedom of Information Act (FOIA) fee waiver as a "representative of the news media." *Liberman v. U.S. Dep't Transp.*, No. 15-CV-1178 (D.D.C. Dec. 31, 2016).

Background

Ellen Liberman writes for *The Safety Record*, a blog formed in 2004 that focuses on consumer safety news, regulatory affairs, and litigation. It is wholly owned and operated by Safety Research & Strategies (SRS), a company that conducts research and analysis on consumer issues for paying clients. The blog is not separately incorporated from SRS, and they do not have separate employees.

Under the federal FOIA, "when records are not sought for commercial use" and the requester is "a representative of the news media," the requester may qualify for a fee waiver and pay only for document duplication costs and not the cost of searching and producing documents.

Liberman submitted a FOIA request for documents relating to testing of "smart key" technology by the National Highway Traffic Safety Administration (NHTSA). She requested a fee waiver and stated that the request was being made "solely for the purpose of publication and dissemination of the requested information via *The Safety Record*." When the blog's parent company, SRS, submits FOIA requests for its own research purposes, it does not request a fee waiver.

NHTSA denied Liberman's fee-waiver request on the grounds that *The Safety Record* is "an arm of" SRS, and that together the entities "perform activities as a commercial research and advocacy organization, not as … representative[s] of the news media." Liberman appealed to NHTSA's chief counsel, who upheld the denial, finding that *The Safety Record* was not a "representative of the news media" and that Liberman was seeking records for a commercial use. Following an opinion from the U.S. Court of Appeals for the D.C. Circuit (*Cause of Action v. FTC*, 799 F.3d 1108 (D.C. Cir. 2015)), NHTSA's chief counsel revisited its opinion

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and again denied the fee waiver, this time resting solely on the grounds that Liberman sought to use the records for commercial use.

District Court Decision

The District Court reversed, finding that Liberman was a representative of the news media and that she was not seeking records for commercial use. The Court emphasized that these two inquiries are separate, and that the same entity may qualify for a fee waiver in one request but not the next, depending on the purpose of each request. A newspaper, for example, will be entitled to a fee waiver when it requests records to further its reporting function but not when it seeks records for its internal corporate needs.

FOIA defines a "representative of the news media" as "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."

The District Court reversed, finding that Liberman was a representative of the news media and that she was not seeking records for commercial use.

The Court dismissed the agency's contention that *The Safety Record* is merely a marketing tool of SRS and "easily conclude[d]" that Liberman "clearly" is a representative of the news media. The statute plainly defines news as any "information that is about current events or that would be of current interest to the public," regardless of whether it is "expressed in a commercial context," the Court said.

The Court next found that her request was not aimed at a commercial purpose. The Court wrote, "news-dissemination activity is not a 'commercial use,' even when undertaken by a commercial entity." The records requested were clearly meant for public dissemination via *The Safety Record*; therefore, the purpose of the request was not for commercial use.

The Court found that the inquiry rests in *how* the requested records will be used, and "the mere fact that such an entity may have a commercial interest in the information that it seeks does not automatically turn its request into one for commercial use."

Finally, the Court rejected the agency's assertion that Liberman must provide "more than conclusory allegations about the anticipated use for the requested information." The Court held that her "plain statement of fact" that the request was being made "solely for the purpose of publication and dissemination of the requested information via *The Safety Record*" was sufficient to prove her purpose.

Cindy Gierhart is an associate with the Washington, D.C., office of Holland & Knight LLP. Ellen Liberman was represented by David L. Sobel of Electronic Frontier Foundation, Washington, DC.

Georgia Court Grants Review of Denial of Public Access to Hospital Records

The Georgia Supreme Court has agreed to resolve a long simmering dispute over public access to business records of the state's many 'privatized' public hospitals. *Smith v. Northside Hospital, Inc.*, Case No. S16G1463 (Georgia Supreme Court).

Most of Georgia's large metropolitan health systems—including Northside Hospital in Atlanta—were built with state and federal funding by county public hospital authorities created pursuant to a statewide enabling law passed in the 1940s.

In the 1980s and 1990s, ostensibly to afford the flexibility to better compete with private healthcare providers, many of these public hospital authority systems—including Northside—were restructured as private nonprofits pursuant to a template approved by the Georgia Supreme Court. *Richmond Cty. Hosp. Auth. v. Richmond Cty.*, 255 Ga. 183 (1985) (authorizing restructuring).

A fierce media-fueled battle ensued over whether the restructured nonprofits were, like the public hospital authorities that created them, subject to the state's open records and meeting laws—a battle that the hospitals appeared to have finally lost in 1995 with the Georgia Court of Appeals' decision in *Nw. Ga. Health Sys. v. Times-Journal*, 218 Ga. App. 336 (1995).

A fierce media-fueled battle ensued over whether the restructured nonprofits were subject to the state's open records.

In *Northwest Georgia*, a case for which the hospitals did not seek Georgia Supreme Court review, the court held that "[w]ithout question, these private, nonprofit corporations became the vehicle through which the public hospital authorities carried out their official responsibilities" and "[c]onsequently, despite the[ir] private, nonprofit status … the requested documents were 'public records.'" 218 Ga. App. at 339.

Although *Northwest Georgia*'s application of Georgia's open government laws to the state's privately restructured public hospital authority health systems held sway for the next two decades, that all changed last March with a decision by a divided Georgia Court of Appeals.

The decision came in a case in which Jones Day attorney E. Kendrick Smith sought access to the Northside health system's records of a $100 million acquisition of four physician practices—all the assets and liabilities of which thus became the ultimate responsibility of Northside's creator and lessor, the Fulton County Hospital Authority. *Smith v. Northside Hospital, Inc.*, 336 Ga. App. 843 (March 30, 2016).

Sidelining the *Northwest Georgia* decision, the Court held 5-2, over a vigorous dissent, that Smith was not entitled to access to the records requested unless he could demonstrate that the

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Authority, as opposed to its nonprofit Northside, controlled the acquisitions or was itself involved in their negotiation. 336 Ga. App. at 849.

Contending that this control-and-involvement requirement had no basis in the Georgia open records law's statutory text or longstanding case law, Smith sought certiorari.

The Atlanta Journal-Constitution, Georgia First Amendment Foundation and Georgia Press Association appeared as amici in support of Smith, as did the Savannah Morning News, the Chatham County Hospital Authority and state public consumer watchdog Georgia Watch.

In granting review, the Georgia Supreme Court set oral argument for a date to be announced in April.

Plaintiff E. Kendrick Smith is represented by Peter Canfield, Lucas Andrews and Andrew Pinson, Jones Day, Atlanta, Georgia. Amici Georgia Press Association, Georgia First Amendment Foundation and The Atlanta Journal and Constitution are represented by David Hudson, Hull Barrett, PC, August, Georgia. Amicus Savannah Morning News is represented by James B. Ellington, Hull Barrett, PC, Augusta, Georgia. Amicus Chatham County Hospital Authority is represented by Steven Elliot Scheer, Scheer, Montgomery & Call PC, Savannah, Georgia. Amicus Georgia Watch is represented by Sarah R. Craig, Akerman LLP, Tampa, Florida.

Defendant Northside Hospital, Inc. is represented by J. Randolph Evans, Thurbert E. Baker, Bryan E. Bates, Nathan L. Garroway, Dentons, Atlanta, Georgia; James C. Rawls, C. Derek Bauer, Ian K. Byrnside, Baker & Hostetler, Atlanta, Georgia; and Susan V. Sommers, Atlanta, Georgia. Defendant Intervenor Atlanta Cancer Care, P.C., is represented by S. Wade Malone, Charles T. Huddleston, Jessica Watson, Nelson Mullins Riley & Scarborough, LLP, Atlanta, Georgia. Defendant Intervenor Atlanta Gastroenterology Associates is represented by Edward Charles Konieczny, Edward C. Konieczny LLC, Atlanta, Georgia. Georgia Cancer Specialists is represented by Sidney Summers Welch, Jeremy P. Burnette, Polsinelli, P.C., Atlanta, Georgia.

Second Circuit Affirms Louis Vuitton Can't Take a Joke

By Allison Venuti

The Second Circuit recently affirmed summary judgment dismissing trademark infringement, trademark dilution, and copyright infringement claims brought by luxury goods maker Louis Vuitton against the manufacturer of utilitarian tote bags that playfully parody expensive brands. *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 2016 U.S. App. LEXIS 23014 (2d Cir. N.Y. Dec. 22, 2016) (Calabresi, Raggi, Lynch), affirming, 156 F. Supp. 3d 425, 430 (S.D.N.Y. 2016).

Background

Louis Vuitton (LV) is an indisputably famous and recognizable designer of luxury handbags which sell for hundreds if not thousands of dollars. My Other Bag (MOB) sells canvas tote bags with cartoon depictions of luxury handbags on one side, and the words "My Other Bag" on the other, for approximately $38-$58. Some of these totes feature images which invoke LV bags, with LV's trademark linked L and V changed to an MOB.

Opposing summary judgment in the district court, LV relied heavily on its victory in an unpublished 2012 case over a Hyundai car commercial. *Louis Vuitton Malletier, S.A. v. Hyundai Motor Am.*, No. 10-CV-1611 (PKC), 2012 WL 1022247 (S.D.N.Y. Mar. 22, 2012).

In that case, a thirty-second commercial titled "Luxury" included a brief scene of a basketball decorated with marks evoking LV's famous Toile Monogram. The court rejected Hyundai's parody defense in large part it stated it had no intention of making any statement about Louis Vuitton at all.

In contrast, here the court stated "it is self-evident that MOB did mean to say something about Louis Vuitton specifically," i.e., to evoke, and invite an amusing comparison between MOB and the luxury status of Louis Vuitton. Thus MOB's use of LV's marks in an obvious attempt at humor that would not cause confusion or blur the distinctiveness of LV's marks. "[I] f anything, it is likely only to reinforce and enhance the distinctiveness and notoriety of the famous brand."

Second Circuit Opinion

The Second Circuit affirmed "for substantially the reasons stated by the district court in its thorough and well-reasoned opinion."

On the issue of trademark infringement, the district court applied the non-exclusive eight-factor *Polaroid* balancing test, and found no likelihood of consumer confusion. LV argued that

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Left to right: Louis Vuitton Toile Monogram, Louis Vuitton SPEEDY® Toile Monogram, My Other Bag's Zoey - Tonal Brown Tote (Front), My Other Bag's Zoey - Tonal Brown Tote (Back)

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the lower court ignored or discounted evidence in the record favorable to LV. But the Second Circuit, emphasizing the weight of evidence against LV, noted that whether reviewed *de novo* or deferentially, it would have reached the same decision. The evidence included 1) obvious differences in MOB's mimicking of LV's mark; 2) the lack of market proximity; and 3) unconvincing evidence of consumer confusion.

Next, the Court affirmed that MOB's use of LV's marks was parodic, and thus within the fair use exception to liability for federal trademark dilution claims. The analysis for dilution, a six-factor assessment stated in 15 U.S.C. § 1125(c)(2)(B), can be conducted either before or after a court determines that the use is parodic.

An MOB bag, being parody, successfully conveys two simultaneous messages: "that it is the original, but also that it is not the original and is instead a parody." Such a joke need not be harsh, but may, as in the case here, be gentle and/or complimentary. While LV cited cases in which marks were impermissibly used to promote or sell goods or services, the point of MOB's "plebian" use of LV's "luxury" mark was parody. MOB's use was also not a designation of source because of the nature of MOB's business and the presence of their own designating mark.

Similarly, the Court affirmed summary judgment on LV's state law dilution claim. NY does not provide a fair use exception to N.Y. Gen. Bus. Law § 360-l, but MOB's parodic use precludes a finding of substantial similarity necessary for liability.

Copyright Infringement

Finally, the Second Circuit affirmed that MOB's usage fell under the fair use exception to copyright liability. The parody constitutes a transformative use, and in sum the other fair use factors either weighed in favor of MOB or were irrelevant, according to the Court.

Allison Venuti is MLRC's 2017 Legal Fellow. Louis Vuitton Malletier, S.A. was represented by Robert D. Shapiro, Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago. My Other Bag was represented by David Korzenik (Terence P. Keegan, on the brief), Miller Korzenik Sommers Rayman LLP, New York, New York; Brian J. Philpott, Corey Donaldson, on the brief, Koppel, Patrick, Heybl & Philpott, Westlake Village, California.