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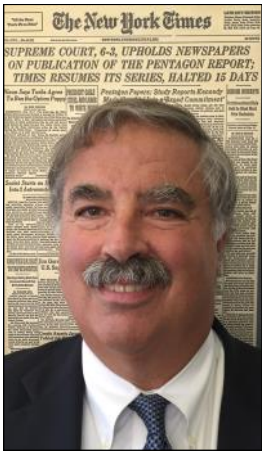
From the Executive Director's Desk

Trump's Legal Threats Against Bannon and Wolff Are as Empty as They Are Foolish

This column was originally published by the Daily Beast on January 9th.

It's been five days since President Donald Trump's lawyer sent "cease and desist" letters threatening to sue Stephen Bannon and Michael Wolff. Far from getting them to cease or desist, the book is a runaway best-seller and Bannon has belatedly apologized. If Trump actually sued either man, he would be an almost certain loser.

In any event, three themes going well beyond the legal analysis are of overarching importance, give vital context to the issue, and will likely drive the outcome of this brouhaha.



George Freeman

First, the three antagonists, Trump, Bannon, and Wolff are all of a piece and, in a sense, all deserve each other. They are hucksters, self-promoting salesmen and, ultimately, egotistic provocateurs. This whole incident will only add to the undeserved publicity they will all receive. Moreover, while I am unaware of Bannon's proclivities for falsehoods, Trump and Wolff have a similar, distant relationship with the truth, though Wolff's falsities may be not as continual and blatant as the president's.

Second, Trump's bullying litigation strategy, and his history of threatening lawsuits which never get filed are well-known. A lawsuit would open Trump and the White House up to broad discovery that would be extremely detrimental. Since Donald Jr.'s and Kushner's meetings with the Russians would be the basis of a libel claim—Bannon called them "treasonous" and "unpatriotic"—it would force the White House, in discovery, to produce both documents and testimony from an unending list of witnesses about the Russian connection. Moreover, a libel claim would doubtless focus on statements by many White House staffers that the president is childlike and dumb. If such claims weren't dismissed at the outset, they would lead to wide-ranging inquiries on those issues—both inappropriate and embarrassing to the so-called leader of the free world.

The three antagonists, Trump, Bannon, and Wolff are all of a piece and, in a sense, all deserve each other. They are hucksters, self-promoting salesmen and, ultimately, egotistic provocateurs.

In any event, Trump's history is to threaten lawsuits, but not to pull the trigger—for example, in his similarly written letter to *The New York Times* threatening a libel suit over an article detailing some of his sexual harassments. But when he has sued for libel, he has a totally losing record. Trump's record in the speech-related cases he brought before his election is four dismissals on the merits, two voluntary withdrawals, and one lone

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The 'very stable genius' doesn't seem understand how libel law works or that non-disclosure agreements don't apply to federal government employees.

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"win" in an arbitration won by default (as pointed out by Susan Seager, a former First Amendment attorney and USC professor, in an article that was censored by the American Bar Association—ironically, because of fears of a Trump lawsuit—but then published by my organization, the Media Law Resource Center).

The most noteworthy was his case against author Timothy O'Brien and his publishers over his book's report that Trump was worth "only" between $150 and $250 million, not the multi-billions Trump claimed.

The suit was tossed by a New Jersey state court judge but not before Trump was deposed, wherein he admitted that his view of his net worth "goes up and down with markets and with attitudes and feelings, even my own feelings…" I guess it was his feelings that drove his statements about Inauguration Day crowds and electoral results. And to show his real motive for suing, Trump later boasted to *The Washington Post* that he didn't mind losing because "I spent a couple of bucks on legal fees but they spent a whole lot more. I did it to make [O'Brien's] life miserable, which I'm happy about.

Sadder still is that Trump's bullying and unprincipled tactics—which one may be used to seeing in, say, a sleazy real estate developer—are the same as those he is now undertaking as president of the United States. In any event, for all these reasons, it would be shocking if this lawsuit ever saw the light of day.

Third, more shocking still is the notion that any such lawsuit would include the essence of a "cease and desist" letter—a motion or attempt by Trump to actually stop publication and distribution of Wolff's book. In legal parlance, that is asking for a prior restraint. Having government actually prevent publication and distribution of an individual's or private company's speech is the most unfavored step possible in First Amendment jurisprudence: that

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is because the very words of the First Amendment, saying that government cannot abridge freedom of speech, or of the press, directly prevents any such action.

Of course, that lesson was taught in the Pentagon Papers case, where the Nixon administration failed to have the courts restrain *The New York Times* from publishing classified documents detailing how the U.S. got involved in the Vietnam War while the war was still raging. If the president read *New York Times Co. v. United States*, or even saw the newly released Steven Spielberg movie *The Post*, he would know that a book could only be enjoined if it would "surely result in direct, immediate and irreparable damage to our nation or its people." That is far different than if the book, even perhaps based on some false statements, causes embarrassment to the president.

Whatever the merits of Trump damage claims, his attempt to stop or limit distribution of the book is downright laughable. Indeed, as the book has by now already been released, it is also moot. Other than pique, it's hard to see what sane reasoning Trump's lawyer or his client used to include a threat of a prior restraint in his letter.

If the president read *New York Times v. U.S.*, or even saw the Steven Spielberg movie *The Post*, he would know that a book could only be enjoined if it would "surely result in direct, immediate and irreparable damage to our nation or its people" and certainly not just because it's embarrassing.

Is 'Dumb as a Brick' a Fact?

If you assume—as we must—that Trump's lawyer's plea for a prior restraint is pure fantasy, the chief focus of the two letters is defamation. According to basic and well-settled defamation law (libel is merely a defamation which is written or recorded, such as a book), Trump would have to prove that Bannon or Wolff made statements of fact, not opinion, which harmed the president's reputation, and—since Trump is a public official—those statements were made with "serious doubts as to the truth" or a "high degree of awareness of their probable falsity." That latter formulation comes from Supreme Court cases directly following the court's legendary decision in *New York Times v. Sullivan*, where for the first time the court constitutionalized libel law and held that public officials—because of our national commitment to "uninhibited, robust and wide open" debate on public issues—had to prove that high standard of fault on the part of the publisher.

But before getting to the actual malice stage, Trump would have to convince the court that the statements he is suing on are fact, not opinion. That is because falsity is the prime element of a libel claim, and as we learned as kids, and as the Supreme Court opined, there is no such thing as a false opinion. But what is fact and what is opinion is a beguiling question. In a major case 27 years ago, the court said that the way to determine this is to see whether the statement in question is verifiable, that is, whether it can be proven true or false. Only if so, is it a fact.

But almost every other court throughout the country has ignored that narrow decision, with the New York Court of Appeals leading the way in calling it "hypertechnical." Courts generally

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also look to context—would a reader, in the context it was published, such as whether it was in a review or editorial, or in a straight news piece, treat it as fact or opinion.

Given those rules, it is still difficult to determine whether a court would find words such as "treasonous," "unpatriotic," or "dumb as a brick," all terms the book reports Bannon described Trump's offspring as, actionable fact or protected opinion. "Dumb as a brick" would probably be adjudged to be nonactionable rhetorical hyperbole; "unpatriotic," similar to other descriptions in the book of Trump as "a moron" or "childish," probably is too subjective to be a fact; but since treason is a crime, it could be considered a fact, although in the context it was spoken I would bet a court would dismiss that claim as opinion as well.

Paradoxically, these were the very grounds Trump used to get dismissed a recent libel suit against him, brought by a would-be campaign worker whom Trump called a "loser" who "begged" him for a job. A New York trial court, affirmed by an appellate court, dismissed the case because those terms, while negative, were subjective opinion, not actionable false statements of fact.

One of the many faults with Trump's lawyer's letter is that he gives no specific examples of what he claims to be defamatory; to a lawyer who has read hundreds of these types of letters, that's a clear signal that the would-be plaintiff is unhappy with the article, but doesn't really have evidence of any specific falsehood.

Where Is the Proof?

One of the many faults with Trump's lawyer's letter is that he gives no specific examples of what he claims to be defamatory; to a lawyer who has read hundreds of these types of letters, that's a clear signal that the would-be plaintiff is unhappy with the article, but doesn't really have evidence of any specific falsehood. But assuming I am wrong as to one of these examples or, more likely, that there are other more factual and false statements Trump will allege, the case would go on and discovery would ensue. That would give plaintiff Trump a chance to learn on what basis the statements were made—by whom, was the source anonymous, do Bannon and Wolff have proof of exactly what statements were made—and the publisher to probe and the world to learn lots of new facts about Trump's and his kids' intelligence, the Russian connection, and lots of other White House dirt.

That would lead to a defense motion for summary judgment on the grounds that Trump could not prove actual malice, i.e., that the statements were not made with serious doubts as to their truth. Here, the analysis differs as to whether the defendant is Bannon or Wolff and his publisher Henry Holt. With respect to a defamation suit against Bannon, his belated denial, on Sunday, that he made the "treasonous" and "unpatriotic" statements about Trump's family members casts the issue in a new light: a preliminary question, perhaps based on what Wolff has in his tapes or notes, would be what Bannon actually said. If he was found to have defamed Trump and his family, and if the judge rules these are not opinions, then the issue would be whether they are true, and, if so, whether Bannon made the statements knowing they were false

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or, at least, with "serious doubt" as to their truth. The betting odds are strong that Bannon would prevail on one or both of those issues, but it is even clearer that the testimony on these issues would be the media's—and the viewers'—delight.

Wolff Bites Himself

If some libel claims against Wolff and the book publisher survive a defense motion that they are opinions, then the normal rules of defamation law would apply. Most fundamental is that Wolff and the publisher would be responsible for defamatory statements made by their sources. It is not a defense to say that source said it, so therefore it's true; the writer and publisher are responsible for the truth of the underlying statements.

Wolff may have shot himself in the leg here, as in an "author's note" at the beginning of the book, Wolff writes that "Many of the accounts of what happened in the Trump White House are in conflict with one another. Many, in Trumpian fashion, are baldly untrue."

Since publishing false facts which he believes are untrue would be fatal, Wolff—perhaps at the urging of his lawyer—adds to his note that he has allowed his sources to present conflicting versions of the truth and hopes the reader can judge their veracity—somewhat of an abdication of a journalist's role. But he then concludes that he "settled on a version of events I believe to be true." If Wolff can convince a judge on a motion, or a jury if the case gets to a trial, that he did believe the otherwise defamatory statements to be true, he should prevail. If not, and if judge or jury believes he had serious doubts about their truth but published them nonetheless, he and his publisher would be in trouble.

This conclusion may seem counterintuitive, as one would think that repeating what public figures say about each other, even if nasty and false, should be protected. Who would not publish an accusation of bribery Gov. Cuomo might make against Mayor de Blasio, even if the reporter didn't believe it to be true? Isn't such a statement inherently newsworthy as are statements by Cabinet officials about their president? In fact, aren't such statements more about the venom of the person who made them than about the person alleged to have committed some dastardly, but likely unbelievable, act? Though such unsupportable allegations surely are news—and newsworthy—under our republication doctrine they are not protected if the writer doesn't believe the accusations he is repeating.

This conclusion may seem counterintuitive, as one would think that repeating what public figures say about each other, even if nasty and false, should be protected. Though such unsupportable allegations surely are newsworthy under our republication doctrine, they are not protected if the writer doesn't believe the accusations he is repeating.

Although a few courts have recognized an exception to this somewhat crazy rule in the doctrine of "neutral reportage"—if the media is reporting the charges and countercharges of responsible public figures without taking sides, they should be protected—most courts have not recognized this most-worthwhile doctrine.

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The White House Shouldn't Be Run as a Real Estate Company

A stronger case against Bannon than straightforward defamation might arise from the nondisclosure agreement Bannon apparently signed upon assuming his job. According to Trump's lawyer's letter, this NDA bars Bannon from disclosing confidential information (outrageously broadly defined), making disparaging statements (without having to overcome the constitutional standards of libel), and talking to the media (such as Wolff).

First, it must be emphasized that Trump's running the White House much as he ran his real estate business—and making such government employees, who ultimately work for us, sign such NDA's is as inappropriate as it is unprincipled. It is another bit of evidence that he is trying to run the country just as he ran his business, with total control over everything, such niceties as separation of powers be damned. Fortunately, about 10 years ago the Supreme Court weighed in on this question, and ruled that the Constitution would not allow for a government employee's free speech rights to be limited where they pertain to matters of public concern. Since Bannon's comments clearly concerned public matters, Trump's claim, based on the NDA Bannon apparently signed, would be blocked by the First Amendment if Bannon made the statements as a government employee. If they were made prior to January 2017, but after the NDA was signed, then Bannon might face a tougher battle.

Trump's running the White House much as he ran his real estate business—and making such government employees, who ultimately work for us, sign such NDA's—is as inappropriate as it is unprincipled. It is another bit of evidence that he is trying to run the country just as he ran his business—with total control, such niceties as separation of powers be damned.

Finally, Trump's lawyer alleges the tort of tortious interference with contract against Wolff. That is that Wolff knew of the NDA, but nonetheless induced Bannon to breach his agreement with Trump. For a number of reasons, this claim is about as weak as his libel threats. Tortious interference with contract is one of a number of so-called newsgathering torts which can be brought against reporters, that is, claims which arise out of the reporting process. Trespass, fraud, actual breach of contract are others. Reporters are not treated differently in these cases from other folks. But unfortunately for Trump and his lawyer, the only newsgathering tort for which this is not true is tortious interference with contract. There, the societal interests in inducing the breach are considered, and since the public interest in disseminating newsworthy information certainly would trump Trump's interest in enforcing his NDA contract, it would put his claim on a very weak footing.

Moreover, the very tort of interference with contract was aimed to protect one competitor from another. In fact, the tort was first recognized in the middle of the 19th century where an opera singer of some distinction, while on contract to one opera house, was "enticed" to break her contract by a rival opera house which sought to procure her services. This case presents facts wholly different: Trump and Wolff are not competitors; they are not even in the same industry so relying on this tort seems awfully far-fetched.

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In the end, the letters of Trump's lawyer, Charles Harder, are seeming to backfire. They certainly have not scared Wolff or Henry Holt—indeed, in the face of the cease and desist letter, they moved up the date of publication. Bannon has become contrite, but that seems far more due to his personal situation with Breitbart and his purported relationship with Trump than with any fear of lawsuits. Like many of Trump's lawyers' similar threatening letters through the years, the chances of a lawsuit suggested in the letter are very slim—and with good reason, as for the reason set forth above, the claims are likely losers. What they have done is given Wolff and his book almost unprecedented publicity—the last thing Wolff deserves—and a rush on bookstores rarely seen. Why these letters were sent is a mystery. The only conceivable answer is Trump's thin skin and his obsession to punch back in public.

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

Virginia Court Quashes Subpoena for TV Station's Interview with Alleged Sexual Assault Victim

Defendant Failed to Show Outtakes Were Essential to His Defense

By Matthew E. Kelley

A Virginia court quashed a sexual assault defendant's subpoena for unaired portions of a television station's interview with his accuser, holding that the defendant had not shown that the outtakes were material to his defense. Commonwealth v. Townley, No. CL-1827 (Jan. 31, 2018).

The ruling in favor of WDBJ-TV, a Roanoke, Va., CBS affiliate owned by Gray Television, Inc., marks a rare application of the journalists' privilege that the Virginia Supreme Court recognized more than 40 years ago. The court in *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974), held that journalists have a privilege under the First Amendment and the Virginia Constitution to withhold information obtained from confidential sources that "should yield only when the defendant's need is essential to a fair trial" and the defendant cannot obtain the information through other means. *Brown* remains the only Virginia appellate case law regarding the privilege, and few trial court rulings applying the privilege are available.

Background

The Roanoke case began in September 2017, when Brent Townley, then a Roanoke City Sheriff's deputy, was accused of sexually assaulting a woman he met at a bar while off-duty. In November, WDBJ-TV broadcast a report on the case that included excerpts of an interview with the alleged victim, who was identified by the pseudonym "Rachel" and whose face was not shown. The report also included portions of an interview with Townley's defense attorney, Deborah Caldwell-Bono, who said that her client contended that the sexual activity was consensual.

Less than two weeks after the broadcast, Caldwell-Bono served a subpoena *duces tecum* directed to WDBJ-TV, seeking copies of all documents in the station's possession related to the case, including the unaired portions of the interview with Rachel. Caldwell-Bono attached a supporting affidavit that said the records were material to Townley's defense but did not state any basis for that assertion.

Appearing specially, WDBJ-TV filed a motion to quash the subpoena in the Roanoke City General District Court, the limited-jurisdiction trial court that holds preliminary hearings in felony cases such as the one against Townley. The station argued that "Rachel" was a confidential source (although Townley knew her identity), and Townley had not made the required showing under *Brown* that the outtakes were essential to Townley's right to a fair trial.

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At a hearing on the motion, Caldwell-Bono argued that Townley needed the outtakes of the alleged victim's interview for potential impeachment purposes, claiming that there were unspecified "inconsistencies" between what the alleged victim said in the broadcast portions of the interview and what she told police. (The prosecutor in the Townley case, Assistant Commonwealth's Attorney Joshua Dietz, attended the hearing but took no position on the motion to quash.)

The General District Court issued a written decision denying the motion to quash, reasoning that because impeachment evidence can be crucial for a criminal defendant, "the rights of an accused to properly defend himself are paramount to the First Amendment rights that are tangentially affected in this matter."

Circuit Court Ruling

The station appealed the ruling *de novo* to the Roanoke City Circuit Court, arguing that the lower court had not properly applied *Brown* and that Townley had not made a sufficient showing that the interview was essential to his defense. WDBJ-TV also noted that even in cases in which the First Amendment privilege is not at issue, under Virginia law a criminal defendant must make a threshold showing of materiality before obtaining records from a third party via a subpoena *duces tecum*.

At oral argument in the Circuit Court, Caldwell-Bono elaborated on her client's asserted need for the interview, saying that the relevant inconsistencies included that the alleged victim said in the broadcast portion of the interview that she had been drinking heavily before the alleged assault, but the police officer who interviewed her hours later did not believe that the alleged victim was drunk. Townley's attorney said the court should deny the motion to quash because the credibility of the defendant and the alleged victim were key issues in the case and therefore impeachment evidence was crucial.

Chief Circuit Judge Charles N. Dorsey ordered the subpoena quashed in a January 31, 2018 ruling. Dorsey noted that under the balancing test the Virginia Supreme Court laid out in *Brown*, the privilege may be overcome only when the information sought is material to any element of or defense to the crime. The party seeking the records has the burden "to show with particularity the material aspects of the information sought;" a subpoena *duces tecum* cannot be used as a "fishing expedition," the court said.

The subpoena should be quashed, the court ruled, because Townley "is not able to show specifically whether there is information [in the interview] that would show a contradiction." Townley already has information to attack the alleged victim's credibility: the portions of the interview WDBJ-TV already broadcast, the court said. The court said the defendant could not overcome the privilege merely with "guesswork or sheer speculation" that the interview could have material impeachment evidence.

Charles D. Tobin and Matthew E. Kelley of Ballard Spahr, LLP, represented Gray Television, Inc. and WDBJ-TV. Deborah Caldwell-Bono represented Defendant Brent Matthew Townley.

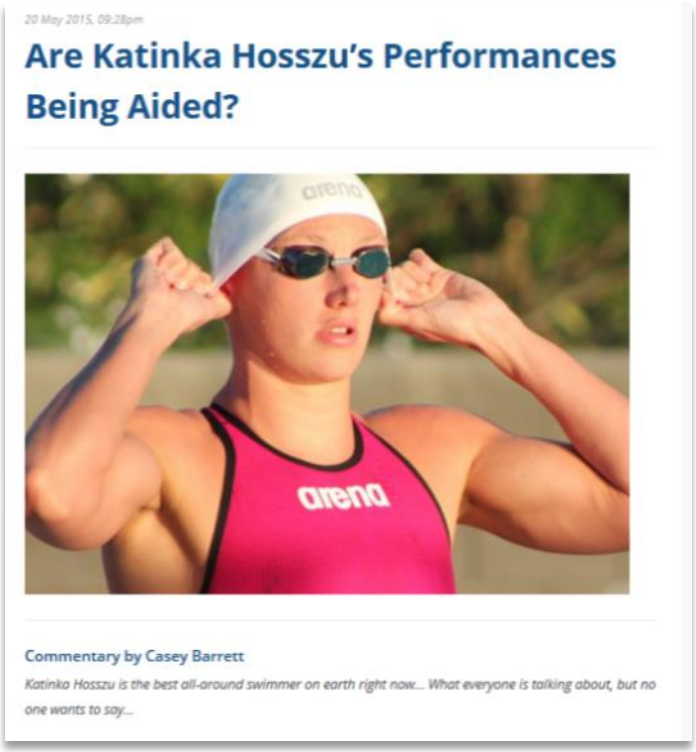
Ninth Circuit Affirms Dismissal of Hungarian Olympian's Defamation Claims

Speculation About Use of Performance Enhancing Drugs Not Defamatory

By Naomi Sosner

A divided Ninth Circuit panel recently affirmed the dismissal of Olympian swimmer Katinka Hosszu's defamation claims against Casey Barrett and *Sports Publications International*. *Hosszu v. Barrett*, 2017 U.S. App. LEXIS 25202 (9th Cir. 2017) (unpublished) (Thomas, Reinhardt, and Trott, JJ).

Hosszu sued over four articles, three published in SPI-owned *Swimming World Magazine* and all written by Barrett, that discussed performance enhancing drugs in competitive swimming. Two of the articles explicitly speculated on Hosszu's use of the drugs. The majority held that Barrett's articles were interpretations of facts available to both writer and reader, and thus protected by the First Amendment.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Are Katinka Hosszu's Performances Being Aided?

Commentary by Casey Barrett

Katinka Hosszu is the best all-around swimmer on earth right now... What everyone is talking about, but no one wants to say...

Background

Hosszu, a Hungarian professional swimmer nicknamed the "Iron Lady," first competed in the 2004 Olympics in Athens at the age of fifteen. Ten years later, she became the first swimmer to earn over $1 million in race prize winnings. Today, she is a four-time Olympian and five-time World Champion in swimming, and holds the world record in five short course events.

Hosszu's present-day success follows a 2012 defeat at the London Olympics that thrust her into a depression from which she emerged, gradually and then quickly, as a transformed swimmer. Barrett, a Canadian swimmer who has become, since competing in the 1996 Olympics, a sports writer and broadcaster, views Hosszu's transformations as suspect.

On May 20, 2015, *Swimming World* published an article, written by Barrett, entitled "Are Katinka Hosszu's Performances Being Aided?" (the "May 20 article"). Barret published a second article on his blog that linked to the May 20 article in referencing Barrett's opinion of Hosszu as well-known, "unchanged, unwavering, and [ ] defended by world class counsel." Casey Barrett, Women Rule the Worlds.

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Swimming World published two subsequent articles by Barrett that mused generally on the use of performance enhancing drugs in the swimming world. Hosszu's federal and state law claims for defamation and false light followed.

The district court granted the defendants' motion to dismiss in August of 2016. *Hosszu v. Barrett*, 202 F. Supp. 3d 1101 (D. Ariz. 2016). Focusing on the May 20 article, the district court analyzed the threshold question of defamation—whether a reasonable factfinder could conclude the statement implies an assertion of objective fact—according to the Ninth Circuit's three-part inquiry:

> (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false.

Id. at 1105 (quoting *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995)).

The court ruled that Barrett based his conclusions on facts, which he recounted, and the veracity of which Hosszu did not dispute, concerning Hosszu's "recent achievements, her unusual ability to recover in between races, and her body type changes." *Id.* at 1105-06. As such, both the May 20 article and *Women Rule the Worlds* were protected by the First Amendment as offering a personal perspective based on fully disclosed facts. The court further ruled that the two articles subsequently published did not mention Hosszu, and thus were not "of and concerning" her and could not give rise to liability. *Id.* at 1108-09.

The court pointed, among other things, to the question mark in the May 20 article's headline; the third line of the article ("There is no proof."); and, the "colorful, and at times crude," language Barrett used.

Ninth Circuit Decision

The Ninth Circuit affirmed in a 2-1 opinion. *Hosszu v. Barrett*, 2017 U.S. App. LEXIS at *2. Using the same three-part analysis, the court likewise concluded that no reasonable reader would think that Barrett implied an assertion of objective fact. *Id.* at *3-5. The court pointed, among other things, to the question mark in the May 20 article's headline; the third line of the article ("There is no proof."); and, the "colorful, and at times crude," language Barrett used, which the court ruled "stop[ped] short of making an accusation, raising instead a question of public concern[.]" *Id.*

The majority also focused on the difficulty, discussed by Barrett, of successfully testing athletes for performance enhancing drugs, which reduced the probability that Barrett's statements were susceptible of being proved true or false. *Id.* at *4-5. Though Barrett's articles may imply that Hosszu uses the drugs, the court ruled, they are protected nonetheless by the First Amendment. *Id.* at *5. The court went on to dismiss Hosszu's remaining claims for the reasons cited by the lower court.

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Dissent

In dissent, Judge Trott argued that Barrett's caveats were sly throwaways that did not and were not intended to reduce his "inescapable" conclusion that Hosszu used performance enhancing drugs. *See id.* at *7. Judge Trott referenced Barrett's swimming expertise several times in concluding that Barrett "presents his allegedly conclusive evidentiary case against Hosszu in a manner that demands only one conclusion, one verdict in the mind of the reader." *Id.* at *9. On its face, Trott states, Hosszu's case should survive the defendants' motion to dismiss. *Id.* at *12.

Naomi Sosner is MLRC's Legal Fellow. Plaintiff was represented by Todd A. Roberts, Ropers Majeski Kohn & Bentley PC, Redwood City, CA. Defendants were represented on appeal by Jeffrey Becker, Swanson, Martin & Bell, Chicago.

Burke Ramsey Defamation Suit Against CBS Survives Motion to Dismiss

Program on Murder of JonBenet Ramsey Not Opinion as a Matter of Law

A Michigan Circuit Court this month denied a motion to dismiss a defamation complaint seeking $750 million in damages over a true crime program which examined the unsolved JonBenet Ramsey murder case and hypothesized that she was killed by her brother Burke Ramsey. Ramsey v. CBS Corp. et al., No. 16-017577-CZ (Jan. 5, 2018).

Background

The true crime show entitled "The Case of: JonBenet Ramsey" aired in September 2016. It featured seven experienced investigators, including former FBI agent Jim Clemente, and medical examiners Dr. Henry Lee and Dr. Werner Spitz. They reviewed evidence from the unsolved 1996 murder, including the 911 call, ransom note, and forensic evidence. They concluded that Burke Ramsey, then 9 years old, hit his sister over the head with a flashlight in a fit of rage accidentally killing her. Parents John and Patsy Ramsey covered up the murder to shield their son. The show was bookended with disclaimers stating this conclusion was one possible scenario and encouraged viewers "to reach their own conclusions."

Burke Ramsey sued CBS, the production company, and the seven investigators who appeared in the program for defamation, denying that he killed his sister and alleging the show was based on lies, half-truths, manufactured information, and factual omissions.

Motion to Dismiss

Defendants moved to dismiss the complaint arguing the show's conclusion was a matter of opinion based on disclosed facts. In a short analysis, the circuit court rejected this argument. The judge viewed the program and concluded that it could reasonably be understood as a factual assertion that Burke Ramsey killed his sister and the disclaimer did not negate this defamatory meaning. Citing to the Supreme Court's 1990 decision in *Milkovich*, the judge noted that "viewers of the CBS docu-series were similarly told that only one conclusion was possible and they were not presented with all facts."

Plaintiff is represented by L. Lin Wood, Atlanta. Defendants are represented by James Stewart, Honigman Miller Schwartz and Cohn LLP, Ann Arbor, MI.

New York Appellate Court Affirms Dismissal of Trump Tweet Libel Suit

Tweets, Related Statements Were Opinion and Hyperbole

A New York appellate division panel affirmed dismissal of a defamation suit against Donald Trump, Corey Lewandowski and the Trump campaign over tweets and related statements directed at a political strategist. Jacobus v. Trump, 2017 NY Slip Op 08625 (Dec. 12, 2017).

At issue were a series of tweets aimed at Cheryl Jacobus, a political strategist, commentator, and P.R. consultant. During the campaign, Jacobus criticized Trump on CNN calling him a "bad debater" who "comes off like a third grader faking his way through an oral report on current affairs."

In response, Trump unleashed a series of tweets saying that she "begged us for a job. We said no and she went hostile. A real dummy!" "Turned her down twice and she went hostile. Major loser, zero credibility!" Lewandowski made similar remarks in television interviews.

The court noted that Internet culture encourages more "freewheeling" writing and television talk shows encourage "spirited" verbal exchanges.

The trial 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. The court noted that Internet culture encourages more "freewheeling" writing and television talk shows encourage "spirited" verbal exchanges. The tone and context of the statements came in the "the familiar back and forth between a political commentator and the subject of her criticism." In addition, the defendants' statements that they turned Jacobus down for a job could not constitute defamation per se since "professional misconduct, incompetence, or a lack of integrity may not be reasonably inferred from being turned down for a job."

In its short affirmance, the Appellate Division First Department stated "The alleged defamatory statements are too vague, subjective, and lacking in precise meaning (i.e., unable to be proven true or false) to be actionable." Moreover, "Plaintiff's defamation per se claim was correctly dismissed in the absence of actionable factual allegations that tended to disparage her in the way of her profession, trade or business."

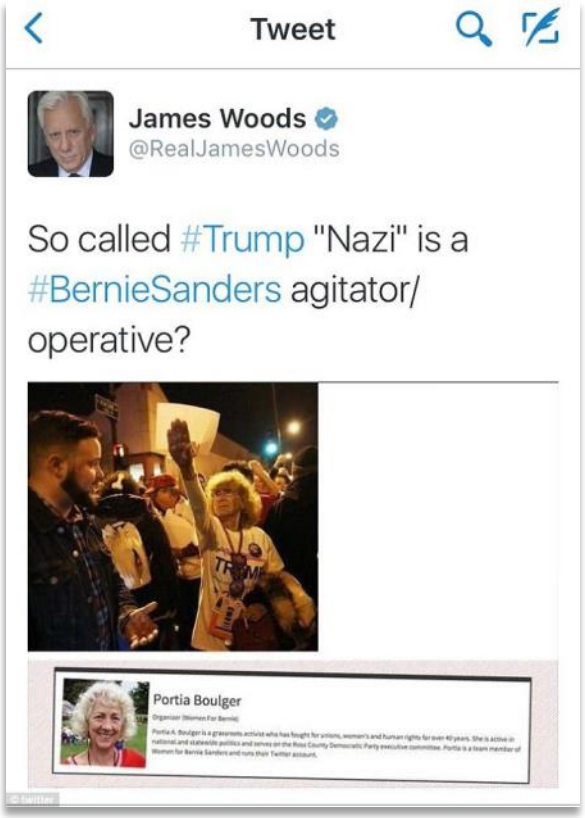
Plaintiff was represented by Jay Butterman, Butterman & Kahn, New York. Defendants were represented by Patrick McPartland, LaRocca, Hornik, Rosen, Greenberg & Blaha LLP, New York.

Libel By Twitter Claim Against Actor James Woods Dismissed

Question Mark Meant Tweet Was Not a Statement of Fact

An Ohio federal district court dismissed defamation and false light claims against actor James Woods over a tweet suggesting that plaintiff, a Bernie Sanders supporter, was giving a Nazi salute at a Trump rally. *Boulger v. Woods,* No. 2:17-cv-186 (S.D. Ohio Jan. 24, 2018) (Smith, J.).

The specific language at issue stated "So-called #Trump 'Nazi' is a #BernieSanders agitator/operative?" It appeared over two photographers. One of a woman giving a Nazi salute at a Trump rally; the other, an online profile picture of plaintiff, who was erroneously identified as the woman at the Trump rally. The tweet related to an issue being discussed on Twitter of whether Sanders supporters were infiltrating Trump rallies to pose as extremists.



The statement was retweeted over 5,000 times, including by Donald Trump, Jr. Plaintiff alleged she received hundreds of obscene and threatening messages and phone calls in response.

Granting the motion to dismiss, the court noted that "were it not for the question mark at the end of the text, this would be an easy case." The question mark, however, indicated a lack of definitive knowledge and invited the reader to consider various possibilities. While acknowledging that a question mark would not insulate a statement from defamation liability as a matter of law, the court could not find a case holding a question to be defamatory. *Citing, e.g., Abbas v. Foreign Policy Group,* 783 F.3d 1328, 1338-39 (D.C. Cir. 2015) ("posing questions has rarely given rise to a successful defamation claims").

Moreover, even if the tweet could be understood by some as accusing plaintiff of giving the Nazi salute, under Ohio's innocent construction rule the complaint would fail because of the reasonable non-defamatory meaning.

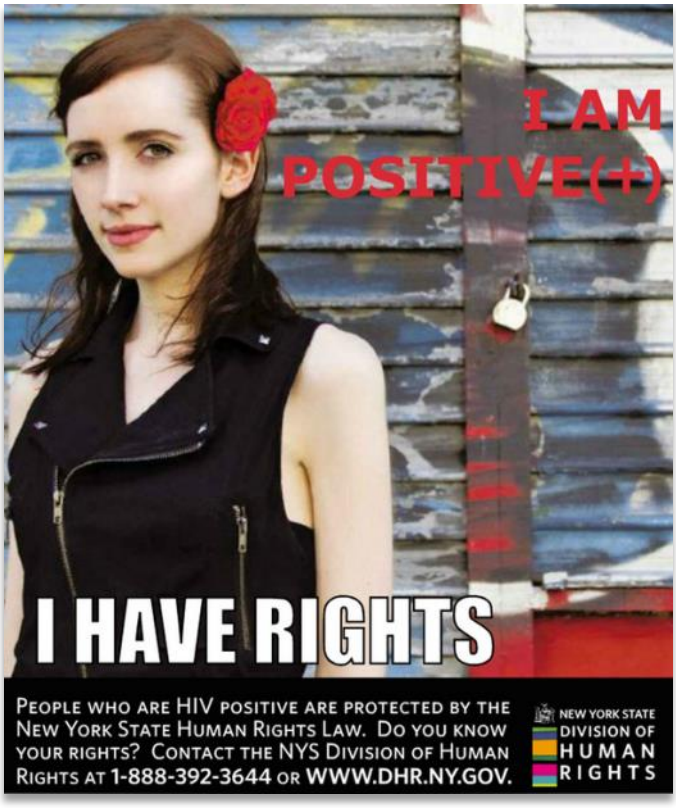
Finally, plaintiff's false light claim failed on the ground that there was no false statement of fact at issue.

HIV Positive Status Is Defamatory Per Se Under NY Law

Court Rejects Argument That "Loathsome Disease" Category is Archaic

In an interesting non-media decision, a New York appellate court panel affirmed that a model whose photograph was used without permission in a public service advertisement about the rights of HIV positive people had stated a claim for defamation per se. Nolan v. New York, 2018 NY Slip Op 00269 (Jan. 16, 2018).

The court reasoned that the imputation that plaintiff had HIV or AIDS could reasonably be characterized as falling within the "loathsome disease" category of statements defamatory on their face, notwithstanding the evolving sympathetic societal views towards those with HIV or AIDS.



Background

The ad was part of a public education campaign instituted by the New York State Division of Human Rights and Department of Health. Next to plaintiff's photograph (obtained under license from Getty Images) was copy stating, "I AM POSITIVE(+)" and "I HAVE RIGHTS," with smaller print stating "People who are HIV positive are protected by the New York State Human Rights Law. Do you know your rights? Contact the NYS Division of Human Rights." The ad appeared in three print newspapers and as an online banner ad on three websites.

Plaintiff sued New York State for defamation and defamation per se; and violation of New York Civil Rights Law §§ 50-51, alleging the defendants used her photograph for advertising or trade without consent. A separate lawsuit against Getty Images was settled on confidential terms.

The trial court granted summary judgment in favor of plaintiff on her defamation per se claim and her Civil Rights Law causes of action.

Appellate Court Decision

Affirming the defamation per se ruling, the appellate court reasoned:

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> Since it can still be said that ostracism is a likely effect of a diagnosis of HIV, we hold that the defamatory material here falls under the traditional "loathsome disease" category and is defamatory per se. Further, to the extent that certain medical conditions such as HIV unfortunately continue to subject those who have them to a degree of societal disapproval and shunning, we decline to entertain the State's argument that the entire "loathsome disease" category is archaic and has no place in our jurisprudence.

The court, though, recommended a reworking of the category to make clear that an imputation of a particular disease is not defamatory per se because it is objectively shameful, but rather because a still significant portion of people adhere to "outmoded attitudes and discrimination." This was demonstrated by the public service ad campaign itself which was designed to counter discriminatory treatment of people with HIV.

The state fared better on appeal of plaintiff's §§ 50-51 privacy claim. The court reversed the judgment below and dismissed the claim, ruling that the public interest advertisement was a "decidedly noncommercial campaign designed to advance [the state's] mission of promoting civil rights."

Plaintiff was represented by Erin Lloyd, Lloyd Patel LLP, New York. Defendants were represented by NYS Attorney General Eric Schneiderman (Eric Del Pozo and Anisha S. Dasgupta of counsel).

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Section 230 Shields Twitter, Facebook, and Google from Terrorism and Emotional Distress Claims

By Michael J. Lambert

The Northern District of California dismissed a lawsuit alleging that three social media companies were partially responsible for the death of five police officers by providing support to a terror group through their online platforms. *Pennie v. Twitter, Inc.*, No. 17-CV-00230-JCS, 2017 WL 5992143 (N.D. Cal. Dec. 4, 2017). The decision joins a growing list of cases rejecting similar claims under Section 230

This recent attempt to hold social media platforms liable for allowing terrorist organizations to use their services came in the wake of a 2016 shooting of five police officers in Dallas, Texas. The father of a deceased officer and a Dallas police officer sued Twitter, Facebook, and Google, claiming that the social media platforms were responsible, in part, for the deaths because the shooter was radicalized online.

Granting defendants' motion to dismiss, the court concluded that Section 230 of the Communications Decency Act barred claims that the social media platforms provided support to terrorist organizations. The court also determined that there was no plausible causal connection between the social media platforms and the shooting.

The court determined that there was no plausible causal connection between the social media platforms and the shooting.

Background

On July 7, 2016, Micah Johnson killed five police officers and injured nine others during a Black Lives Matter protest of the police shootings of Alton Sterling and Philando Castile. Dallas police authorities said Johnson was motivated by Sterling and Castile's deaths and "wanted to kill white people, especially white officers." *See, e.g.,* Police in Dallas: "He wanted to kill white people, especially white officers," The Washington Post (July 8, 2016). An investigation after the shooting revealed that Johnson, a U.S. Army veteran, posted anti-police messages on social media and "liked" Facebook pages of black nationalist organizations.

Complaint and Motion to Dismiss

Demetrick Pennie and Rick Zamarripa brought five claims against Twitter, Facebook, and Google: (1) aiding and abetting an act of international terrorism under 18 U.S.C. § 2333; (2) conspiring in an act of international terrorism under 18 U.S.C. § 2333; (3) providing material support to terrorists under 18 U.S.C. § 2333 and § 2339; (4) providing material support to a

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designed foreign terrorist organization under 18 U.S.C. § 2333 and § 2339; and (5) negligent infliction of emotional distress.

The complaint alleged that defendants "knowingly and recklessly provided the terrorist group HAMAS with accounts to use its social networks as a tool for spreading extremist propaganda, raising funds, and attracting new recruits." The "material support" provided by the social media platforms, according to the complaint, "enabled [Hamas] to carry out numerous terrorist attacks and to incite others to carry out terrorist attacks, including the July 7, 2016 shooting of Dallas Police Officers by Micah Johnson who was radicalized, in part, by HAMAS' use of Defendants' sites."

Hamas, a militant Palestinian organization designated by the United States as a "Foreign Terrorist Organization," operates accounts on Twitter, Facebook, and YouTube (Google). Plaintiffs argued that the social media platforms provided "infrastructure" to Hamas, profited from its use of their services, and shared advertising revenue with Hamas.

In response to the complaint, Twitter, Google, and Facebook filed a Rule 12(b)(6) motion to dismiss, asserting that they are immune from liability under Section 230. They also contended that plaintiffs did not sufficiently allege adequate causation between the Dallas shooting and Hamas' use of the social media platforms.

In response to the motion to dismiss, plaintiffs amended their complaint, arguing that Section 230 did not apply because the recently enacted Justice Against Sponsors of Terrorism Act ("JASTA") trumped Section 230 immunity and that the actions of defendants fell outside Section 230 because defendants allowed an accountholder to create a new account after removing an account, paired Hamas content with advertisements targeting particular users, and shared advertising revenue with Hamas.

The court concluded that defendants were not responsible for content created by Hamas and its affiliates. Thus, CDA was a "separate and sufficient basis for dismissal" for "most if not all" of plaintiffs' claims.

The Court's Order

Before assessing the merits of plaintiffs' complaint, the court noted the similarity of their case to three other cases in which courts struck down all claims under Section 230: *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964 (N.D. Cal. 2016); *Gonzales v. Google, Inc.*, No. 16-CV-03282, 2017 WL 4773366 (N.D. Cal. Oct. 23, 2017); and *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140 (E.D.N.Y. 2017). The court recognized that plaintiffs' complaint borrowed specific allegations and headings from *Fields* and identical paragraphs from *Gonzales.* Rather than allege support for Hamas, plaintiffs in *Fields*, *Gonzales*, and *Cohen* claimed that social media platforms were liable for supporting ISIS.

While the *Gonzales* and *Cohen* cases have concluded, plaintiffs in *Fields* filed an amended complaint after the failure of their first lawsuit. *Fields v. Twitter, Inc*., 217 F. Supp. 3d 1116

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(N.D. Cal. 2016). The court dismissed the amended complaint, but plaintiffs appealed to the Ninth Circuit. (The Ninth Circuit just affirmed the lower court's dismissal on causation grounds, holding that plaintiffs did not plead that Twitter had any direct relation to plaintiffs' injuries. The Ninth Circuit did not address Section 230. Fields v. Twitter, Inc., No. 16-17165 (Jan. 31, 2018)).

On December 4, 2017, Chief Magistrate Judge Joseph Spero followed the lead of other federal judges and granted Twitter, Facebook, and Google's motion to dismiss because "Plaintiffs have not plausibly alleged a causal connection between the shooting and Defendants' alleged conduct, and because the Communications Decency Act immunizes most if not all of the conduct at issue."

Causation

The court first determined that plaintiffs failed to plead that any support provided by the social media platforms to Hamas was a substantial factor in the attack. According to the court, plaintiffs did not allege that Hamas carried out the shooting, intended for it to occur, had any connections with other black nationalist organizations, or directly communicated with Johnson.

Section 230

Turning to Section 230, the court concluded that defendants were not responsible for content created by Hamas and its affiliates. Thus, CDA was a "separate and sufficient basis for dismissal" for "most if not all" of plaintiffs' claims. Addressing each of plaintiffs' arguments, the court reasoned that JASTA does not trump Section 230 because JASTA did not contain clear legislative intent to repeal or amend the CDA. Citing *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1174 (9th Cir. 2008), the court wrote that good faith efforts to remove objectionable content does not create liability for failure to remove all such content and that the use of neutral tools such as targeted advertising does not amount to "development" under the CDA.

The court stopped short of resolving plaintiffs' argument that Google's sharing of advertising revenue with Hamas removed Section 230 immunity. Because plaintiffs failed to allege a causal connection between Hamas and the shooting, the court declared it could decide the case without settling the "novel issue" of whether the CDA immunizes payments made by interactive service providers to content developers. "With respect to all other theories of liability against Google, however, as well as all claims against Defendants Twitter and Facebook, section 230 of the CDA is a separate and sufficient basis for dismissal," the court held.

Michael J. Lambert is a News Group Law Clerk at NBCUniversal in New York.

Arizona Court of Appeals Declares Media Restrictions Unconstitutional

By David J. Bodney and Chase Bales

On January 23, 2018, the Arizona Court of Appeals issued a unanimous opinion reaffirming the strict requirements for limiting the media's ability to disseminate public information and strongly cautioning trial courts against imposing prior restraints in all but the most exceptional circumstances. *Phoenix Newspapers, Inc. v. Otis*, No. 1CA-SA 17-0286 (Ariz. App. Jan. 23, 2018).

Background

The case arose from the high-profile capital murder trial of John Michael Allen, who was charged in connection with the death of a seven-year-old girl. The lead prosecutor in the case, Jeanette Gallagher, had made a career of prosecuting capital murder cases and was set to retire at the conclusion of the Allen trial. Coincidentally, concurrent with that trial, Gallagher appeared and testified as an alleged victim in the unrelated stalking trial of Albert Karl Heitzmann.

The Court issued a unanimous opinion reaffirming the strict requirements for limiting the media's ability to disseminate public information and strongly cautioning trial courts against imposing prior restraints.

After *The Arizona Republic* requested placement of a still camera in the courtroom at the Allen murder trial, Gallagher argued for prohibiting media coverage, claiming that she did not "want to see it affect [the Heitzmann] jury and have me as a victim have to go through that trial again." One week later, during a hearing on *The Republic*'s camera coverage request in the Allen case, the trial court barred the media from publishing Gallagher's name and likeness until the conclusion of the Heitzmann stalking trial. Arizona Superior Court Judge Erin Otis premised her order censoring this information on a purported desire to protect the rights of the two criminal defendants and any victims. Judge Otis issued this order from the bench despite arguments by the newspaper's lawyer explaining that the order would be an unconstitutional prior restraint and offering to brief the issue.

Several news organizations – Phoenix Newspapers, Inc. (*The Arizona Republic*), Meredith Corporation (KPHO-TV and KTVK-3TV), KPNX-TV Channel 12 and The Associated Press – sought "special action" review of the trial court's order by the Arizona Court of Appeals, arguing that there would be no adequate remedy on appeal and that the case raised issues of statewide constitutional importance. After briefing and oral argument, the court accepted jurisdiction, rejected the State's argument that the case was moot and found instead that the issues raised were capable of repetition yet evading review.

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Appellate Court Decision

After acknowledging that prior restraints are "the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), the appellate court evaluated whether Judge Otis' order restricting the media's ability to print Gallagher's name was constitutionally impermissible. Citing the three-factor test articulated in *Nebraska Press Ass'n*, the court evaluated and rejected the alleged justifications for the trial court's order.

Regarding the first factor, the Court of Appeals concluded that although the State has an interest in protecting the sanctity of criminal proceedings, the alleged harm was too speculative to satisfy the rigorous constitutional requirements. Next, the court found that the trial court had failed to consider less restrictive alternatives before imposing an outright ban on the dissemination of Gallagher's name and likeness.

The Arizona Court of Appeals concluded that the trial court's order constituted "an impermissible prior restraint on the media's constitutional right to cover the Allen trial."

In doing so, the court explained that there were several other potential limitations that the trial court could have imposed to prevent either jury from learning details of the other case short of censorship. Finally, the court found that the prior restraint was ultimately ineffective at accomplishing its alleged purpose. Specifically, the court noted that the case was already a matter of public interest and that Gallagher's name had been widely published in news accounts of the Allen trial. Accordingly, the court held that the prior restraint was "likely unnecessary and ineffective, and it infringed the media's right to truthfully disseminate public judicial records that already identified the prosecutor."

For all of these reasons, the Arizona Court of Appeals concluded that the trial court's order constituted "an impermissible prior restraint on the media's constitutional right to cover the Allen trial." It criticized the lower court for not "memorializ[ing] its findings," including its weighing of the rights of defendants, the press and any victims. By reaffirming the principles announced by the U.S. Supreme Court in *Nebraska Press Ass'n*, the Arizona Court of Appeals underscored the importance of trial judges carefully safeguarding the media's right to publish details of criminal trials.

David J. Bodney serves as Co-Chair of the Media and Entertainment Law Group at Ballard Spahr LLP and argued the case for the news organizations. Chase Bales is an associate in the Phoenix office of Ballard Spahr and likewise served as Petitioners' counsel.

Media Coalition Wins Access to Warrant Materials in Las Vegas Mass Shooting

A Las Vegas judge, at the urging of a coalition of news media organizations and over the objection of police, today ordered the release of sealed search warrant materials connected to the investigation of the largest mass shooting in modern U.S. history.

The warrants authorized the search and seizure of people, cars, computer hard drives, telephones, and other items found at the home of Stephen Paddock, whom police identified as the man who killed 58 people and injured 500 more at a crowded music festival on the Las Vegas Strip on October 1, 2017. Paddock committed suicide as police stormed his Vegas hotel room.

The news media group—American Broadcasting Companies, the Associated Press, Cable News Network, KSNV-TV, KTNV-TV, the *Los Angeles Times*, the *New York Times*, and *The Washington Post*—argued that the public has a right to access the warrant materials under the First Amendment and Nevada common law. Police officials countered that because the investigation of the shooting is ongoing, the documents should remain sealed.

Clark County District Judge Elissa F. Cadish agreed with the media group that most of the records should be made public. She noted that there is still an ongoing investigation regarding one other individual connected with the shooting. The court concluded, however, that "the vast majority of the documents Petitioners seek to unseal do not contain any information that would compromise the ongoing investigation in any way nor present any danger to a private citizen."

The court concluded, that "the vast majority of the documents Petitioners seek to unseal do not contain any information that would compromise the ongoing investigation in any way nor present any danger to a private citizen."

Judge Cadish temporarily ordered the redaction of 13 isolated phrases to protect the investigation while satisfying the public's right of access. The court released nearly 200 pages of records after the hearing.

Judge Cadish's ruling follows a decision made by a federal court earlier this month, which unsealed some 350 pages of federal warrant materials related to the Las Vegas shooting. Ballard Spahr represented the media group in this action.

The news media coalition is represented by Joel E. Tasca, Steven Zansberg, Ashley I. Kissinger, and Justin A. Shiroff of Ballard Spahr.

From the MLRC Insurance Committee

This Means War: Dispute Over Scope of Insurance Policy's "War" Exclusions Rests On "Layperson" Understanding of Term

By Terence P. Keegan

Like many insurance policies, coverage agreements for media companies generally exclude losses that arise out of "war." Yet "war" is not always defined in these agreements. A recent case over denial of coverage to a television production caught in the middle of a sudden conflict has prompted questions for insureds, insurers and brokers as to whether war exclusions encompass acts of terrorism, or even cyberattacks—which, if not expressly covered by these policies, may have been understood as distinct from "war."

In Univ. Cable Prods. LLC & Northern Entm't Prods. LLC v. Atlantic Specialty Ins. *Co.*, No. CV 16–4435, 2017 WL 4676587 (C.D. Cal. Oct. 6, 2017), the task of defining the scope of "war" was deemed to fall on the shoulders of the proverbial "layperson" — as viewed by a judge.

In October, U.S. District Judge Percy Anderson ruled that the applicability of an insurance policy's "war" exclusion rested upon whether "a layperson" would consider events as such — and that hostilities between Hamas and Israel in the summer of 2014, which prompted plaintiffs' relocation a Jerusalem-set TV production, "easily" fell within the "ordinary and popular sense" of the word.

A recent case over denial of coverage has prompted questions for insureds, insurers and brokers as to whether war exclusions encompass acts of terrorism, or even cyberattacks.

The court denied the summary judgment motion of plaintiffs, Universal Cable Productions, LLC and Northern Entertainment Productions LLC (both "indirect subsidiaries" of NBCUniversal Media, LLC), which postponed and relocated shooting of their action series *Dig* in July 2014 following rocket attacks on Israel by Hamas and Israel's launch of a response offensive. The plaintiffs had sought coverage for the postponement and relocation under a production policy from defendant insurer Atlantic Specialty Insurance Co. (part of the OneBeacon Insurance Group). But the insurer denied coverage after investigating the claim. The production companies' losses, Atlantic concluded, had not been caused by "terrorism"—which the policy could have covered—but by "[w]ar" or "[w]arlike action by a military force," which the policy expressly excluded.

However, none of the policy's "war" exclusion terms were specifically defined. Plaintiffs, through NBCUniversal's insurance broker Aon/Albert G. Rubin Insurance Services, Inc., had applied to Atlantic to add *Dig* to the existing policy as an insured production without changing any of the policy's "standard" terms. Atlantic agreed to do so, notwithstanding the parties having discussed the higher risks associated with the Israel location and additional security measures that the *Dig* production would implement.

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The production companies sued Atlantic in June 2016, claiming in excess of $6.9 million in losses from the postponement and relocation of the production. Both sides moved for summary judgment, after discovery that included depositions of witnesses in the U.S. and Europe.

The court ordered summary judgment for Atlantic, framing the scope of the policy's war exclusions as the "central issue." Applying California contract law—which both sides had argued applied— the court noted, "By statute, '[t]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." Additionally, the court stated that under California case law, "if the meaning a layperson would ascribe to contract language is not ambiguous, [California courts] apply that meaning."

The court had "little trouble" concluding that the hostilities between Hamas and Israel "would be considered a 'war' by a layperson." It premised its conclusion upon the nature of the violence ("rocket fire and mortar shells from Hamas into Israel, airstrikes and a ground operation … by Israel, and seaborne attacks from both sides") and the consequences of the conflict ("substantial casualties on both sides …, hundreds of thousands displaced, and billions of dollars in damage to infrastructure").

The court had "little trouble" concluding that the hostilities between Hamas and Israel "would be considered a 'war' by a layperson."

Although the court acknowledged that its summary of the conflict "reflect[s] the entire 50-day period of hostilities"—a majority of which occurred after the *Dig* production was moved out of Israel—the court concluded that the summary for the entire conflict "give[s] a sense of the degree of violence, which indisputably began, and continued to escalate, prior to the decision to relocate."

Notably, the court did not construct its "layperson" or "ordinary" definition out of news reports or dictionaries. Instead, it stated that "references to the conflict as a war by news outlets around the world" and definitions of "war" by Merriam-Webster and *Black's Law Dictionary* merely "confirmed" the court's own "layperson" assessment.

Moreover, the "standard" nature of the "war" term cut against any contention by plaintiffs that the term was ambiguous. And "Plaintiffs' attempt to present" expert testimony in favor of "an alternative meaning as reflecting the parties' intended special or technical meaning fails because it contradicts the clear language of the Policy, " the court held.

Even common descriptions of Hamas as a "terrorist organization" — and the U.S. government's designation of Hamas as such — did not mean that Hamas' actions were inherently acts of terrorism and therefore distinct from "war" under the policy. Here the court offered a corollary to its "common meaning" of "war": it "can include conflicts both between sovereign entities and between other groups; the word does not require a detailed assessment of the structure of one or more of the parties to the conflict or their precise international standing." In any event, the court found that Hamas had displayed "sufficient characteristics of a sovereign entity"—for example, its role in establishing a consensus Palestinian Authority government in 2014—"that it can wage 'war' within the meaning of the Policy."

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While the court awarded some $42,000 in costs to Atlantic in December, it approved on January 10 the production companies' application for a $53,000 supersedeas bond pending their appeal of the court's summary judgment ruling to the Ninth Circuit.

The court cautioned that its analysis of the "war" terms in the case was relatively narrow: on the ambiguity point, for example, it observed that it need only decide whether "war" was "ambiguous in the context of this policy and the circumstances of this case." **But** the ruling invites insureds, insurers and brokers to reexamine various policy contingencies nevertheless.

For example, what if a cyberattack indisputably caused a loss that would trigger policy coverage—but for, perhaps, the policy's "war" exclusions? News reports and government findings, even if largely unanimous in labeling such an act as one of "war" or "terrorism," may not carry the day in a court's determination of a policy term's "ordinary" or "layperson" meaning.

The ruling invites insureds, insurers and brokers to reexamine various policy contingencies.

For parties and stakeholders in media insurance agreements, perhaps the big question the *Universal Cable Productions* case illuminates is not whether a "standard" war exclusion is more all-encompassing than previously thought. Rather, it's whether the risk of a dispute and an adverse outcome justifies the cost of negotiating specific definitions for such events—to prevent years of conflict in court.

Terence P. Keegan is an associate at Miller Korzenik Sommers Rayman LLP and a member of the new MLRC Insurance Committee. This article is not legal advice and is for informational purposes only. Plaintiffs are represented by Mitchell Silberberg and Knupp LLP, Los Angeles. Defendant is represented by Anderson McPharlin and Conners LLP, Los Angeles, and Strasburger and Price LLP, Dallas.

Recently Published

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

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

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

Ten Questions to a Media Lawyer: Julie Ford

Julie Ford is currently of counsel to George, Brothers, Kincaid & Horton in Austin, Texas.

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

It all started when I failed - miserably, horribly - at trying to get work as a news reporter. In 1974, after working for my college newspaper, I figured I could breeze back home to Houston and get a job at one of the papers there. Ha! Timing is everything, and this happened right after Watergate, when *everyone* wanted to be a reporter. The *Houston Chronicle's* city editor told me, "This building is surrounded by the bleached bones of inexperienced reporters trying to get in." The *Houston Post* was a little kinder. They offered to set me up with interviews at newspapers in places like Odessa, Texas. And Beaumont, Texas. I had no intention of going into small–town exile, so I ended up doing what every failed journalist does - I got a job in public relations. Then in advertising. Then I taught journalism in an inner city junior high school. After a few years of those adventures, I washed up on the shores of the University of Texas Law School.

Ford and the "wise and wonderful" Fifth Circuit judge Hon. Homer Thornberry

My timing was much better this time. In the early 80s, the law business was booming and law firms were snapping up eager young law grads. After clerking for a wise and wonderful Fifth Circuit judge, Hon. Homer Thornberry, I spent a couple of years at Vinson & Elkins getting a first rate education. But I wanted to do more trial work, so I joined up with Jim George and David Donaldson at Graves Dougherty in Austin. In those days, Jim and David represented pretty much every news organization in central Texas. Revenge against the

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gods of bad timing was sweet! I got to work on hard-hitting stories *and* get paid a lot more than a reporter!

From the early 90s: Founders of George, Donaldson & Ford – complete with T-shirts.

A few years later, Jim, David and I started our own law firm, along with some brilliant young lawyers, including MLRC members Jim Hemphill and Pete Kennedy. When Laura Prather joined us, our killer media defense team was complete. Thanks to NBC, CBS, Cox, Dow Jones, HBO, Simon & Schuster, and others, we were, as they say down here, in high cotton. Later, Jim and David gravitated toward high stakes commercial litigation (where they did very well) and the firm went through many changes. But I'm not much of a gambler, so I stuck with media defense and prepublication review.

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

It's hard to pick one thing because I really, really love what I do. One day I may be working under deadline to help get a story out the door. Other days I'm doing battle for truth and justice against some unreasonable opposing counsel. But some days you'll find me curled up at home with my cat, reviewing a book manuscript. I need those adrenaline rush days, but I love it that sometimes I can lounge around reading books. So does my cat.

What do I like least? Dealing with certain insurance claims managers. I'm not talking about our dear MLRC insurance folks, of course. But sadly, some of my clients' insurers use adjusters who (a) are on serious power trips, (b) are required to micro-manage litigation in ways that are downright embarrassing and (c) think First Amendment litigation is no different than car crash claims.

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

I'm sure there are plenty of candidates for "biggest," but I'll go with this one, and I'm going to blame it on my former partner David Donaldson, just to be mean. One of our clients was sued in a small town, and the plan was to remove the case to federal court. But for some reason we decided to wait to file the answer until after we removed the case. To make sure we got the

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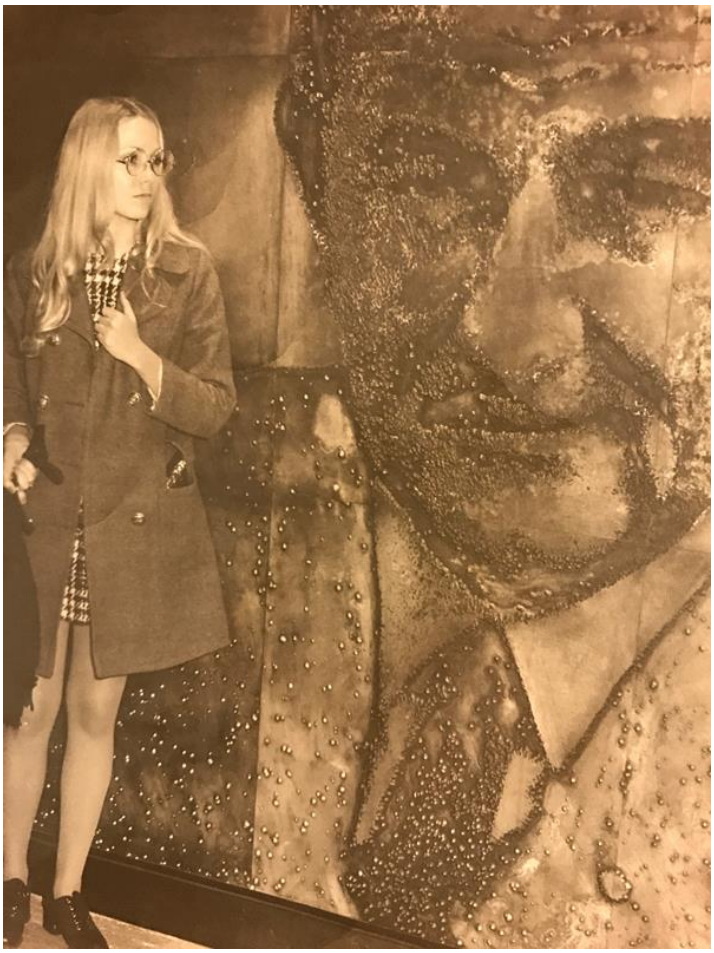

From the early 70s: A photo of Ford at the LBJ Library during her *Daily Texan* reporter days.

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state court answer deadline right, David and I each counted out the days - on a paper calendar. Counting out loud. Twice. And we got it wrong.

We removed the case, but not before the plaintiff had raced to the local state court and gotten a huge default judgment against our client. Getting out of a default judgment in Texas is complicated, expensive and very scary. We did it, but I can tell you we learned a big lesson. If you get sued in Texas, unless you have a venue issue, don't even bother to count the days - just file the #@%&* answer - immediately!

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

The highest court I've argued in so far is the Texas Supreme Court. And one of those arguments might also fall under the "biggest blunder" category. It all started with a documentary aired by HBO (produced by one of the best documentary filmmakers on earth, Sheila Nevins, and directed by Lee Grant). The film trashed the family law court system in Houston, which certainly deserved trashing. But the good ol' boys featured in the film didn't take it lying down. A judge (Dean Huckabee), a court-appointed shrink, a police officer and even a fireman sued HBO for libel. We managed to pick off most of the claims in interlocutory appeals, but for some reason the Texas Supreme Court decided to take up Judge Huckabee's appeal. Remember the *Far Side* cartoon of a court room with a dog in the witness box, being defended by a dog lawyer - and the judge and the jury were all cats? Arguing against Judge Huckabee to a panel of nine judges was sort of like that. We did win! But about that blunder.....

This was an actual malice case, but I was convinced our case was so strong that I should take it to the next level. I argued that the Court didn't even need to reach actual malice because the speech about Judge Huckabee wasn't about him personally. It was a criticism of his *judicial rulings* and not *the man* who made them, which meant the speech should be protected by an absolute privilege. Well, that argument got one of the Justices riled up. He said it was "ludicrous" to argue that the robe was separate from the man.

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I explained that a judge's rulings were nothing more than government action, like a law passed by the legislature, and the First Amendment simply does not permit liability for speech criticizing government action. And to suggest otherwise would be ludicrous. I thought it was a brilliant response. But a collective gasp went up among the court-watchers that day - apparently I had just told one of justices that *he* was ludicrous. (And here I thought I was just talking to the robe.) As I said, we won (no actual malice - they didn't buy my "absolute privilege" argument), but that justice filed a dissent. A silly "revenge" dissent, in my view, but he had the robe. The next time I argued before the Texas Supreme Court, I was terrified he might remember me. But happily, he said nothing. I later heard he was under the weather that day. Maybe seeing my face again made him ill.

I have to mention one other high-profile case from long ago, where we represented Phil Donahue (remember him?). That case had it all: A woman whose stepfather started raping her when she was 9 or 10 (he said it was love at first sight), a child born as a result and raised by the woman's mother (the subhead of the Donahue show was "Daughter had her husband's baby"), a rapist father/stepfather who was an Arkansas state trooper at the time (while Bill Clinton was governor), a deposition at a maximum security prison for the criminally insane, and testimony about how the father had had sex with a cow. You can't make this stuff up. The daughter and her child sued Donahue *and* their own mother/grandmother for invasion of privacy. The legal argument that won the day was simple: The mother/grandmother had a first amendment right to tell her own story.

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

Nothing is surprising, really, although the level of clutter might be considered appalling. But I do have a few cool things on my bookshelf - the complete Oxford English Dictionary, all 20 volumes. A four-volume Comprehensive History of England (a little out of date - it was printed in 1865). And a 1968 faded photograph of Earth taken from Apollo 8 and inscribed to my father by astronauts Frank Borman, James Lovell and Bill Anders.

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

I'm a dinosaur. I get the *New York Times* and our local paper, the *Austin American Statesman,* delivered to my house - it's news *on paper*! But online, I usually check out *The Guardian*, BBC, the *Washington Post*, CNN, then the *Texas Tribune*, Texas Monthly.com and, of course, the MLRC MediaLawDaily. (No wonder I have trouble getting any work done.)

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

I say "Don't go!" Why on earth would I want more competition? As the late Joan Rivers once said: "I hate young people - they are trying to replace us."

Okay, okay I probably wouldn't say that. I would say - go, go. It's a blast. I loved every minute (which is true). Even if you don't end up practicing law, your parents will be very proud.

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

I say, "No! Don't go!" Again, why on earth would I want more competition?

Okay, I probably wouldn't say that either. I would say this: Go east, young lawyer. Or west. Either way, you need to be on the coast - that's where most of the media action is. It can be hard to make media law a full-time gig when you are based in flyover country. Also, if you want to do media defense - trial work, that is - first you need to handle a few trials from start to finish. It doesn't matter whether they are media-related or not. Once you've done that basic training in litigation, you'll be much better prepared to defend your media clients against all of those evil people who want to do them harm. Or you could aim for an in-house position by going the corporate route, but again, get ready to move to one of the coasts. (Just avoid those buildings surrounded by the bleached bones of young lawyers trying to get in.)

9. What issue keeps you up at night?

One recurring worry for me is sort of a flight or fight issue. When faced with a claim, should you try to settle it, or should you tell your whiny, self-righteous, arrogant, bully adversary to bring it on? I rarely know what the right answer is to that question.

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

No idea. I guess if I hadn't gone to law school I'd still be writing press releases or ad copy. (I was pretty good at writing "bait and switch" ads, now that I think about it.)

But my non-lawyer dream job? That would be to go to work for Reporters Without Borders. In Paris.