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SUPREME COURT

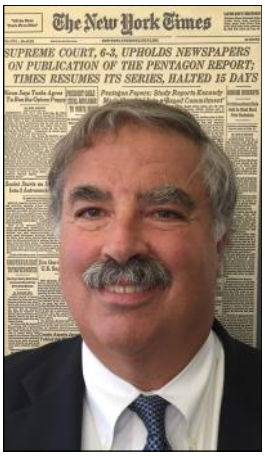
LIBEL & PRIVACY

From the Executive Director's Desk

The Espionage Act Turns 100: Will Trump Use It Against Journalists?

On June 15 we "celebrated" the 100th birthday of the passage of the Espionage Act. Whether a celebration, a eulogy or a careful reading of the Act is appropriate is a good question, but, in any case, as President Trump threatens both leakers and journalists, a careful look at its history, purpose, meaning and constitutionality is timely.

In the World War I era when it was passed, the Act was used to prosecute thousands of dissenters, while today it is employed sparsely, if at all. It is particularly poorly drafted – a "singularly opaque statute" wrote Justice Harlan; a "singularly impenetrable warren of provisions" said Anthony Lewis – but, of course, that aids defendants who can utilize the argument that it is void for vagueness. And its ostensible purpose is to ensure the nation's security, but it does so while simultaneously limiting the public's ability to understand and question what the Government is doing in the foreign policy realm.



George Freeman

Most important, it has never been used to prosecute a journalist – let alone successfully. But as the Act turns 100, that crucial distinction is somewhat in doubt. For all his badmouthing of the press and outrageous attacks on individual reporters, for all his "enemy of the American people" blustering, for all of his empty threats about changing the libel laws, Trump – who clearly enjoys reporters and can't do without the media - hasn't really taken any anti-media legal steps. But if he actually tries to prosecute a journalist or publication which merely accepts and publishes a leak of information arguably covered by the Espionage Act – as opposed to just the leaker him/herself – that's when the Trump offensive against the press will go to a whole new and terribly dangerous level.

Most important, it has never been used to prosecute a journalist – let alone successfully. But as the Act turns 100, that crucial distinction is somewhat in doubt.

It would be a gamechanger in what has been called the delicate balance between the press and the government. Traditionally, that balance has been premised on the notion that (save for FOIA) government can keep its secrets and need not disclose its plans and considerations to the public. But if information somehow leaks out of the government box, it is without power to

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recover that information or prevent the press from distributing it. See the press' 6-3 victory in the Pentagon Papers case.

That system has worked well throughout our history, particularly since the main players acted responsibly. Just because the press acquired information from the government box, it didn't automatically publish it; it embarked on an inquiry as to whether the information would harm national security. I remember when the New York Times got the first dump of documents from Julian Assange and Wikileaks, it spent countless hours, days, weeks poring through the documents and redacting any that would cause jeopardy to agents abroad or the country. And while this informal protocol was endangered by the digital revolution and the ability of non-responsible players, dare we say nihilists, to receive and disseminate sensitive documents, from the President's vantage point today, the purveyors of information he doesn't want out are not the Assanges of the world, but the MSM, The New York Times and Washington Post.

If he actually tries to prosecute a journalist or publication which merely accepts and publishes a leak of information arguably covered by the Espionage Act – as opposed to just the leaker him/herself – that's when the Trump offensive against the press will go to a whole new and terribly dangerous level.

But despite leaks of sensitive government information which the press has published throughout our history, no President nor prosecutor has gone after the press. President Obama, to be sure, prosecuted more leakers than any of his predecessors, but, in the end, defended ordinary newsgathering, seemingly including the reception of leaks. And while the prosecuting of government employees for leaking classified information does chill relevant information from going to the citizenry, it's hard to be morally outraged about government trying to punish its own people from breaking their commitments, for intentionally letting information escape from the government's own box.

In the Pentagon Papers case, at least three justices suggested that while the Times could not be enjoined from running the articles, it might well be punished, after the fact, for publishing. Yet such a prosecution never occurred – because the US Attorney felt it would be a loser; he didn't want to prosecute the Times in New York for a hated President Nixon during the unpopular Vietnam War. And despite top Bush (43) White House officials saying that the Times should have been prosecuted for its warrantless wiretapping article (and W saying that the Times would have the blood of Americans on its hands if it ran the article and there was another terrorist attack), no prosecution (or subpoena seeking the

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identity of the paper's source) was forthcoming. Perhaps President Bush didn't want a long-lasting litigation keeping his warrantless wiretapping, which was found to be unconstitutional by one judge, in the headlines; that would certainly be a rationale for Pres. Trump not initiating unprecedented litigation which would keep his Administration's Russian connections or his alleged obstruction of justice on the front pages for years.

As Susan Buckley of Cahill Gordon wrote in a comprehensive and sharply analytical piece on the Espionage Act, whether the fact that no member of the press has been prosecuted under the Act "is a function of our nation's commitment to the principles embodied in the First Amendment, of the government's reluctance to air sensitive information in the course of a public prosecution or of the political untenability of prosecuting news organizations for reporting news and information to the public, it is a fact that should provide considerable comfort." The only problem is that the history and these words were written before the ascent of Donald Trump – and we know he thrives on litigation, prioritizes punishing his avowed enemies and enjoys going after the media. So predicting whether or not he may try to prosecute the press for publishing sensitive leaked information is a very iffy proposition.

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The question then becomes who would win. Would such an unprecedented case be successful in the courts? While it seems not to be a slam dunk for the defense, there are a myriad of potential defenses.

First, as adverted to earlier, the Act is hopelessly vague and ambiguous. As we know, particularly in regulating speech, laws should be clear and exact lest the speaker be needlessly chilled from expressing himself due to the lack of clarity of the regulation. This would give any defendant an opening argument, though it should be emphasized that in no case has this defense been accepted.

Second, the language of the Act itself lends itself to many defense arguments. Secs 793 (d) and (e), the core of the Act, require the information to be "relating to the national defense." If the information the current administration focuses on deals with the Russian connection, election interference or obstruction of justice, these seem a long way from the national defense, which generally is defined as referring to the military and related activities of national

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preparedness. Similarly, the defendant must have reason to believe the information "could be used to the injury of the United States or to the advantage of any foreign nation." This requirement, too, might be hard to fulfill, though it should be noted that it pertains only to "information"; the quoted phrase does not apply to the distribution of documents or materials. Additionally, there is a scienter requirement. The argument can be made that the word "willfully" in the statute ought to modify more than just "communicates", since that would be a pretty weak scienter standard, indeed; obviously a media communicator intends to distribute information. But what an intent requirement involves is unclear, perhaps a bad faith requirement, which a MSM would unlikely be guilty of.

Third, there is a strong argument that the legislative history indicated that the Act, or, at least sec 793(e) was not meant to apply to the press. Judge Gurfein, the federal district judge who first heard the Pentagon Papers case, was persuaded by the fact that since sec. 793(e) does not prohibit "publishing", unlike other sections which do include that term, "newspapers were not intended by Congress to come within the purview of section 793." At the Supreme Court, Justices Douglas and Black took the same view. And in their seminal article on the Act, Harold Edgar and Benno Schmidt argued that 793 (d) and (e) were not intended to be applied to the "publication of defense information that is motivated by the routine desires to initiate public debate or sell newspapers."

Finally, perhaps the strongest argument is the constitutional argument that a publisher cannot be punished, notwithstanding a statute barring speech, for disseminating information which is (i) truthful, (ii) newsworthy and (iii) not acquired illegally.

Finally, perhaps the strongest argument is the constitutional argument – founded in *Smith v. Daily Mail*, affirmed in *B.J.F. v. Florida Star*, and narrowed but reasserted in *Bartnicki v. Vopper* - that a publisher cannot be punished, notwithstanding a statute barring speech, for disseminating information which is (i) truthful, (ii) newsworthy and (iii) not acquired illegally. If, as in the case with the Trump leaks, they are passively received by the media – and they surely are both truthful and of legitimate public interest – they would seem to surely be protected. However, there is a little known fourth prong of the test – absent a government interest of the highest order. Most cases occasioning this issue deal with the naming of rape victims or juvenile delinquents, the leaking of grand jury transcripts and the tapping of phone calls, none meeting the high standard of a compelling government interest. But whether the publishing of sensitive national security information, even such that meets the

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(Continued from page 6)

first three prongs of the test, might not be protected because it would undercut a government interest of the highest order is an open question. Since no prosecutions against journalists have been attempted, there is not much authority on this point.

If such a case were brought, there would be three wild cards which, in my view, could easily affect the result. First, this has been a strong First Amendment court. In case after unpopular case, the Supreme Court has come out on the First Amendment side – Citizens United and the Westboro Baptist Church cases, to cite the two most pertinent examples. On the other hand, none of the favorable First Amendment cases in the last 15 years have dealt with the media. Indeed, there have been no old-fashioned media law cases decided by the Court since Bartnicki at the turn of the century. So it's hard to know how this factor would play out.

If such a case were brought, there would be three wild cards which, in my view, could easily affect the result. First, this has been a strong First Amendment court. Second, this has been a very government-favoring Court. Third, may be the joker: I imagine that judges across the nation, including on the High Court, will not be very sympathetic to this President.

Second, this has been a very government-favoring Court. Thus, on the question of whether disclosures would be damaging – the key question in the Pentagon Papers case – it's hard not to see this Court giving the government lots of deference. Likewise, on the issue of whether the harmful disclosures injure a government interest of the highest order. So these two factors might cancel each other out or lean somewhat to the prosecutor's side.

Third, may be the joker: I imagine that judges across the nation, including on the High Court, will not be very sympathetic to this President or his arguments. After all, he has attacked and belittled the judiciary almost as much as the media – no great surprise since we and they are the two institutions with the greatest ability (other than a Republican and meek Congress) to hinder and block his initiatives. Therefore, it wouldn't be hard to imagine "so-called judges", if everything else is even, supporting the public's right to know over the unprecedented imprisoning of a newspaper publisher.

Let's hope it doesn't come to that. Because the spectre of putting a journalist or publisher behind bars for publishing accurate and newsworthy information given by a government leaker is an ugly and scary prospect – not only for journalism, but for our Republic.

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

Trademark Disparagement Clause Violates First Amendment

The More Things Change…

By John C. Connell and Ronald D. Coleman

"What is freedom of expression? Without the freedom to offend, it ceases to exist."

- Salman Rushdie

On June 19, 2017, the Supreme Court of the United States ruled in *Matal v. Lee*, No. 15-1293, that the disparagement clause of §2(a) of the Lanham Act, 15 U.S.C. §1052(a), violated the First Amendment. That clause authorized the United States Patent and Trademark Office to prohibit the registration of a trademark that "may disparage … persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." In so ruling, the Court affirmed the decision of the United States Court of Appeals for the Federal Circuit that the denial of Mr. Tam's application for trademark registration of THE SLANTS was unconstitutional.

This case has always "been about the rights of all marginalized communities to determine what's best for ourselves," the band said in a statement.

The issue has necessarily galvanized support and opposition, but not exactly as one would expect: the positions taken by various interest groups, whether political, ethnic, or racial, has not been uniform. This has made for some unusual bed-fellows, forging alliances between the likes of the United States Chamber of Commerce and the American Civil Liberties Union, among others. On the other hand, the same general reference group has expressed conflicting views, with dividing lines drawn between the Korematsu Center and the Pacific Legal Foundation, both representing Asian interests. Bottom line: some people take offense, and some do not.

(Continued on page 9)

(Continued from page 8)

So, what will the world look like now that the United States Patent and Trademark Office is no longer permitted to reject trademark registration applications because the marks "may disparage"? Will our sensibilities be daily barraged by an incessant cacophony of offensive language? Will the divisions among us increase? Will our good intentions be able to withstand the onslaught?

There is no conclusive answer to these questions, only attempts at speculation and conjecture. But the same consequential questions could be posed if the United States Patent and Trademark Office were allowed to ban offensive trademarks. That is, would the government's power to determine the propriety of speech save us from offensive language or socio-political divisions, much less facilitate our best aspirations? Or would such government control exacerbate the inherent tensions, like a tight lid on a pressure-cooker?

The history of the disparagement clause confirms that the clause was not intended to protect racial and ethnic groups. The clause was added in 1939 to one of the bills that eventually became the Lanham Act in 1946. H.R. 4744, 76th Cong., 1st Sess. (1939), §2(a). It is very unlikely that members of Congress were concerned about trademarks that were disparaging to racial or ethnic groups in a period when much worse forms of discrimination were common and civil rights legislation was not yet on the horizon. Unsurprisingly, therefore, there is no evidence that the disparagement clause was intended to halt the registration of such trademarks. Rather, when the clause was discussed in Congress, the only examples of disparagement anyone mentioned concerned natural persons (such as Abraham Lincoln and George Washington) and juristic persons (including the New York Athletic Club and Harvard University). *Trade-Marks: Hearings on H.R. 4744 Before the Subcomm. on Trade-Marks of the H. Comm. on Patents*, 76th Cong., 1st Sess. 19-21 (1939).

So, what will the world look like now that the United States Patent and Trademark Office is no longer permitted to reject trademark registration applications because the marks "may disparage"?

The historical record strongly supports a conclusion that the purpose of the disparagement clause was not to protect minority groups but, instead, to bring American trademark law into conformity with American treaty obligations. One of the primary objectives of the Lanham Act was, as the House and Senate reports both explained, "[t]o carry out by statute our international commitments." H.R. Rep. No. 219, 79th Cong., 1st Sess. 4 (1945); S. Rep. No. 1333, 79th Cong., 2d Sess. 5 (1946). Indeed, the full title of the Lanham Act is "An Act to provide for the

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registration and protection of trade-marks used in commerce, to carry out the provisions of certain international conventions, and for other purposes." 60 Stat. 427 (1946).

At the time, the most recent of these international conventions was the Inter-American Convention for Trade Mark and Commercial Protection, which the United States ratified in 1931. 46 Stat. 2907 (1931). *See* Stephen P. Ladas, *The Lanham Act and International Trade*, 14 Law & Contemp. Probs. 269, 270 (1949) ("Prior to the adoption of the Lanham Act, our federal trade-mark legislation did not accord, in several respects, with the stipulations of the international or Pan American Conventions"); Harry Aubrey Toulmin, Jr., *The Trade-Mark Act of 1946* at 6 (1946) ("The bill ... eliminates those sources of friction with our Latin-American friends").

Thus, the mistaken notion that trademark registration was intended to be an oasis of inoffensiveness in a world full of turmoil and conflict is a fiction. Registrations such as BLACK SAMBO for candy (No. 521,115, registered in 1950), HONEY CHILE food (No. 534,667, registered in 1950, consisting of an image of a "pickaninny"), HIM HEEP BIG TRADER auto repair (No. 560,255, registered in 1952, consisting of an image of a Native American speaking to a motorist), GOLLIWOGG perfumes (No. 565,420, registered in 1952), WAMPUM INJUN corn chips (No. 734,604, registered in 1962), and U-NEED-UM tires (No. 797,805, registered in 1965, including an unflattering image of a Native American) are merely the ones that can be reprinted in relatively polite company. So the suggestion that a certain kind of otherwise legitimate trademark should continue to be rejected under certain circumstances to maintain that fiction is unsupportable, unrealistic, and unconstitutional.

The mistaken notion that trademark registration was intended to be an oasis of inoffensiveness in a world full of turmoil and conflict is a fiction.

It was not until 1999, more than half a century after the enactment of the Lanham Act, that the TTAB first found a mark non-registrable under the disparagement clause for including a word offensive to a racial or ethnic group. *See Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 1999 WL 375907 (TTAB 1999) (holding that REDSKINS disparages Native Americans), *rev'd*, 284 F. Supp. 2d 96 (D.D.C. 2003). Since 1999, the TTAB has refused registration to several other marks on similar grounds. *See In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d 1264, 2006 WL 1546500 (TTAB 2006) (holding that SQUAW disparages Native Americans); *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071, 2008 WL 5065114 (TTAB 2008) (holding that HEEB disparages Jews); *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 2010 WL 766488 (TTAB

(Continued on page 11)

(Continued from page 10)

2010) (holding that KHORAN, used for wine, disparages Muslims); *In re Geller*, 2013 WL 2365001 (TTAB 2013) (holding that STOP THE ISLAMISATION OF AMERICA disparages Muslims); *In re Beck*, 114 U.S.P.Q.2d 1048, 2015 WL 1458229 (TTAB 2015) (holding that PORNO JESUS disparages Christians).

The PTO's change of view is readily understandable. In recent years there has been an enormous change for the better in mainstream sensibilities concerning the use of derogatory words referring to racial, ethnic, and religious groups. Epithets that were once common are now far outside the bounds of acceptable social discourse. The PTO—with the best of intentions—had responded to this change in sensibilities by refusing to register marks that disparage such groups. Unfortunately, however, by doing so it read into §2(a) a grant of power to engage in social engineering that Congress never purported to bestow on it. That interpretation runs afoul of the First Amendment right to free speech.

Removing the limitation of the disparagement clause restores the capacity to speak freely without government constraint. The government control exercised by the PTO is tantamount to censorship based on the government's determination of what is and is not offensive speech. But even the groups referenced by such speech do not necessarily agree that the content is offensive. The position of Amanda Blackhorse *et al.* as *amicus* for the government was not supported by a national poll in 2016, which found widespread indifference among Native Americans, 7 in 10 of whom said that "they did not feel the word 'Redskin' was disrespectful to Indians", with 8 in 10 saying that "they would not be offended if a non-native called them that name." "New poll finds 9 in 10 Native Americans aren't offended by Redskins name", *The Washington Post* (May 19, 2016).

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So who is right? The question is valid, but the answer is not to be supplied by the government but by ongoing social discourse. In the wake of the Court's decision, there could be trademarks added to the Principal Register which, under §2(a)'s disparagement clause, may have been rejected. They would not be missed by most of us. But the standard of free expression is not measured by the government. Rather, under the Constitution, it is the very occasion of offense that invokes the protection of the First Amendment. "'The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'" *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 5

(Continued on page 12)

(Continued from page 11)

(1988) (quoting *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745 (1978)). "'If there is a bedrock principle underlying the *First Amendment*, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" *United States* v. *Eichman*, 496 U.S. 310, 319 (1990) (quoting *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989)).

What will the world look like when hurtful, nasty slurs are allowed to be registered? We doubt, in fact, that the world will look much different at all. Trademark registration is not, contrary to popular conception, a way to obtain a monopoly on phrases or slogans, be they clever or nasty. Merely plastering a meme or rallying cry on t-shirts or tote bags does not make it a trademark. While many will apply, few will be allowed, and ever fewer will see the filing of a §8 affidavit of use on their fifth anniversaries. Very few people are prepared to build businesses around offensive trademarks. Doing so is not good business. Trademarks that are not connected with ongoing commercial concerns do not remain trademarks, registered or not. Likewise, the expensive novelty of spending hundreds of dollars to apply to register gross or hateful marks for no legitimate reason will wear out quickly. Indeed, prospective applicants will learn that they have to put their names and addresses on trademark registrations, or those of a lawyer, which will deter some tasteless "joy riders" as well.

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So yes, it is likely that some outrageous new trademarks will work their way through the PTO and be allowed registration. But in all probability that is where they will stay, to die the ignominious deaths that they deserve. They will not be missed, but neither will the suppression and wasted resources engendered by §2(a) of the Lanham Act.

John Connell, Ronald Coleman, and Joel G. MacMull of Archer & Greiner, P.C.; and Professors Stuart Banner and Eugene Volokh of the UCLA Law School and its Supreme Court Litigation Clinic, represented Simon Tam in this case. This article draws substantially from the Brief for Respondent in Lee v. Tam and from a May 12, 2017 post entitled, "Après Tam, le déluge? Nah." on Mr. Coleman's blog about trademark law, "Likelihood of Confusion" (www.likelihoodofconfusion.com). Briefs and transcript of oral argument are available at ScotusBlog.

Supreme Court Upholds First Amendment Right to Use Social Media

By Jeff Hermes

On June 19, 2017, the U.S. Supreme Court handed down its decision in *Packingham v. North Carolina*, No. 15-1194. Decided almost exactly twenty years after the Court's last discussion of the intersection of the Internet and the First Amendment in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), *Packingham* is equally likely to be cited for its broad statements in support of online liberty.

Background

After being arrested for having sex with a minor in 2002, Lester Packingham pleaded guilty in North Carolina to charges of taking indecent liberties with a child and was required to register as a sex offender. As a consequence, he was bound by § 14-202.5 of North Carolina's General Statutes, which makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. Ann. §§ 14-202.5(a), (e) (2015). Under the statute, a "commercial social networking Web site":

Decided almost exactly twenty years after the Court's last discussion of the intersection of the Internet and the First Amendment, *Packingham* is equally likely to be cited for its broad statements in support of online liberty.

- "Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site";
- "Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges";
- "Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site"; and
- "Provides users or visitors . . . mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger."

§ 14-202.5(b). A "commercial social networking Web site" does not include sites that:

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- "[p]rovid[e] only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform"; or
- have as their "primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors."

§ 14-202.5(c)(1), (2).

Packingham ran afoul of § 14-202.5 in 2010, when he took to Facebook to celebrate the dismissal of a traffic ticket. Though Packingham used a pseudonym, the timing of the post led a Durham, N.C., police officer charged with enforcement of § 14-202.5 to connect Packingham to the post. Packingham was indicted, convicted, and given a suspended sentence. On appeal, the North Carolina Court of Appeals held that § 14-202.5 was not narrowly tailored to meet its objective of protecting minors. 229 N.C. App. 293, 304 (2013). The state's Supreme Court reversed, finding that the statute was "carefully tailored . . . to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors" while leaving open other channels online. 368 N.C. 380, 389 (2015).

U.S. Supreme Court Decision

The United States Supreme Court reversed, holding that § 14-202.5 swept in too much communicative activity for its intended purposes. Justice Kennedy, writing for the Court (himself, plus Ginsburg, Breyer, Sotomayor, and Kagan, JJ.), declined to resolve a dispute between the parties regarding the specific standard of review that should apply to § 14-202.5. The state argued for intermediate scrutiny, claiming that the law presented a content-neutral restriction on access to a public forum, while Packingham urged the application of more rigorous scrutiny because of the breadth of the prohibition and the critical role of social media in modern life. The Court held that it did not matter, because the statute would fail to meet the lesser standard. Opinion of the Court, slip op. at 6.

While not questioning the state's interest in in protecting children against sexual abuse, the Court noted § 14-202.5's application to sites like Facebook, LinkedIn, and Twitter, and found that "the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens." *Id.* at 8. The Court assumed (without holding) that the First Amendment would not prohibit a more narrowly tailored law prohibiting conduct more directly related to sexual offenses, such as contacting a minor online or using online resources to gather information about a minor, *id.* at 7, and stated that such measures "must be the State's first resort to ward off the serious harms that sexual crimes inflict, *id.* at 8.

In contrast, the Court held, North Carolina had failed to establish the need for a blanket ban on social media access. *Id.* at 9. The Court held that § 14-202.5 was less like the electioneering restriction permitted in *Burson v. Freeman*, 401 U.S. 191 (1992), which was limited to a short

(Continued on page 15)

(Continued from page 14)

range around polling places, and more like the broad ban on "First Amendment activities" at Los Angeles International Airport that was stricken in *Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). *Id.* Because § 14-202.5 was not narrowly tailored to meet the asserted interest, it was unconstitutional.

Justice Alito, writing for himself as well as the Chief Justice and Justice Thomas (Justice Gorsuch took no part in deciding the case), concurred with this basic analysis, stating that "[t]he fatal problem for § 14-202.5 is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child." Opinion of Alito, J., slip op. at 6. He noted that the four-factor test in § 14-202.5 for identification of a "commercial social networking Web site" could apply to sites as diverse as Amazon.com, the *Washington Post*'s website, and health-resource site WebMD. *Id.* at 6-9. The nature and structure of such websites, he said, "provide essentially no aid to a would-be child abuser." *Id.* at 9.

Where the Court's opinion and the concurrence parted ways was less in the legal analysis and more with respect to the policy framework in which the discussion was set. Kennedy's opinion contains striking and broad pronouncements about the importance of social media, such as:

> "A basic rule, for example, is that a street or park is a quintessential forum for the exercise of First Amendment rights. ... While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general ..., and social media in particular." Opinion of the Court, slip op. at 4-5.

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> "The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it. And when awareness comes, they still may be unable to know or foresee where its changes lead. ... While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow. ... As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." *Id.* at 5-6.

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> "Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. ... By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Id.* at 8.
>
> "In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives." *Id.*

Justice Alito questioned the comparison of social media sites to traditional public forums,

The concurrence, however, expressed concern about such broad commentary, finding it unnecessary to determination of the case and potentially problematic in its implications. In particular, Justice Alito questioned the comparison of social media sites to traditional public forums, because it would suggest an inability to limit access despite "important differences between cyberspace and the physical world." Opinion of Alito, J., slip op. at 10. In the context of protecting children, he pointed to the difficulty of monitoring children's online activity and detecting inappropriate contact from adults (who might be hiding their identities) as key differences between social media and physical spaces. *Id.* at 10-11.

Notwithstanding the concurrence's qualms, the Court's opinion is a welcome reaffirmance of principle for attorneys fighting for free speech online. One can easily see the passages above being invoked in digital media cases in a wide variety contexts, alongside the quotations from *Reno v. ACLU* on which they build. *Packingham* could, for example, be particularly helpful to support Section 230 defenses involving unappealing third party content on social media; in such cases, it can be important to explain the free speech policy considerations that justify granting special protection to digital platforms.

Jeff Hermes is a Deputy Director at MLRC.

New York Court Grants Directed Verdict in Public Official's Defamation by Implication Claim

By Michael J. Grygiel

In what has become a rare occasion in New York State − a media defamation case that reaches a jury trial − on June 1, 2017, Orange County Supreme Court (Hon. Elaine Slobod) granted a defense motion for a directed verdict at the close of Plaintiff's case after five days of testimony in *Kevin M. Hudson v. Times Herald Record, et al.* (Orange County Index No. 2014-006496).

The Plaintiff, Kevin M. Hudson, is the former Mayor of the Town of Washingtonville, New York, who was denied re-election to office in March of 2013. His Complaint, which sought $30 million in damages, alleged that he was defamed by Defendant the *Times Herald-Record* ("*THR*" or the "Newspaper"), a community newspaper in Middletown, New York, in two independent but related news articles published on the same date. Additional Defendants in the case included editorial personnel who had worked on the articles and the estate of John Sullivan, the reporter who wrote the articles and who had passed away prior to the filing of the lawsuit.

A Tale of Two Fires

In companion investigative "Special Reports" published on August 25, 2013, *THR* reported on Plaintiff's involvement, before he was elected to office, in two fires of suspicious circumstances. The first article, titled "*Fiery Death, Lingering Questions*," reported the following true facts.

- Plaintiff had been named as the beneficiary on a life insurance policy procured by an individual named Anthony Rhein, a part-time taxi driver who was not related to and had no business relationship with Plaintiff.
- A few months after the policy had been taken out by Mr. Rhein in March of 2008, he died in his sleep in an electrical fire while living rent-free in a building that was being spruced up for the rental market by Plaintiff and Plaintiff's long-time business partner.
- Plaintiff had visited Mr. Rhein at the apartment at about 10:30 p.m. on the evening before Mr. Rhein perished in the fire.

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- Plaintiff subsequently collected approximately $253,000 on the insurance policy, after which he was sued in a wrongful death action brought by Mr. Rhein's mother and sister.
- Mr. Rhein's family members discontinued their lawsuit against Plaintiff several months later after Plaintiff extinguished their claims by filing for bankruptcy.

The first article also reported that police and fire department investigators had determined that the cause of the fire was accidental, and presented Hudson's explanation of events.

The second article, headlined "*Hudson, Orange family at odds over another fire*," reported the following true facts:

- In December of 2003, Plaintiff and his business partner had purchased a local family-owned agricultural feed store business.
- About four months after the transaction, the business's landmark main building burned to the ground.
- Plaintiff subsequently became embroiled in litigation with the former owners over the sale of the business that had been destroyed in the fire, including the issue of which party was entitled to collect the property insurance proceeds.
- The litigation was eventually settled with Plaintiff receiving $100,000 from the insurance proceeds and walking away from the business.

The second article also reported the conclusion of insurance company investigators that the building fire was likely caused by a malfunctioning electric incubator.

"Issues of Fact" Regarding Plaintiff's Defamation By Implication Claim

The Complaint alleged that no less than twenty-eight statements from the two articles had defamed Plaintiff, both *per se* and by implication. After the completion of discovery, Defendants moved to dismiss the Complaint in its entirety as a matter of law based on several constitutional and statutory defenses. Orange County Supreme Court held that Plaintiff was a public official for First Amendment purposes and dismissed five of the Complaint's six causes of action as legally insufficient, ruling in a Short Form Order:

> Suffice it to say that none of the statements which the plaintiff cites as demonstrably false meet all five elements of defamation as a matter of law. As for whether the plaintiff has been defamed by implication, there are, at the very

(Continued on page 19)

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> least, issues of fact regarding whether the defendants intended to impart a defamatory inference or endorsed such an inference.

The Court set an expedited trial date for Plaintiff's sole remaining libel by implication claim, which presupposed the truth of *THR*'s news accounts as published. *Tannerite Sports, LLC v. NBCUniversal Media, LLC*, 135 F. Supp. 3d 219, 232 (S.D.N.Y. 2015) (" 'Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements.' ") (quoting *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 381 (1995)); *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 464 (S.D.N.Y. 2012). The New York Court of Appeals has yet to recognize the validity of libel by implication claims. *Armstrong*, 85 N.Y.2d at 381-82.

The Trial

Thus, Defendants were placed in the unusual position of having to defend at trial the publication of statements that the Court had already determined as a matter of law could not be proven false. The trial commenced with jury selection on May 23, 2017. Six jurors were empaneled and three alternates were selected. During his opening statement, Plaintiff's counsel charged that the articles were hit pieces masquerading as journalism which, by implication, accused Plaintiff of committing murder, arson and insurance fraud.

Defendants were placed in the unusual position of having to defend at trial the publication of statements that the Court had already determined as a matter of law could not be proven false.

In their opening, Defendants countered that the articles nowhere stated that Plaintiff had engaged in any criminal activity but instead reported the true facts of his involvement in two suspicious fires − one of which resulted in a tragic fatality − and his collection of the insurance proceeds resulting therefrom. Defendants emphasized that their testimony would demonstrate the comprehensive and painstaking internal vetting the articles had undergone prior to their publication, a process which implicated several layers of editorial review and took place over nearly a full year.

Defendants also informed the jury that they would hear testimony from an expert witness, a journalism professor with extensive experience in the newspaper publishing industry who, after examining the reportage and its underlying sourcing and documentation, had concluded that it represented exemplary investigative reporting that not only complied with but in many respects surpassed standard professional journalistic practices and procedures. The expert witness would further testify that the articles provided conscientious and responsible news coverage

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that allowed *THR*'s readers to draw potential implications from true published facts, a hallmark of good journalism that informs the public about matters of public interest.

Finally, Defendants pointed out that under the guise of a disfavored libel by implication claim Plaintiff was attempting to punish the Newspaper for the publication of true but embarrassing facts that he would have preferred were kept hidden from the public at a time when he was campaigning for election to the NYS Assembly.

In somewhat of a surprising move, Plaintiff's counsel began his case by questioning three principal defense witnesses − the Newspaper's former Executive Editor and current Managing Editor, who had worked on the articles with reporter Sullivan, and its Publisher. Through their testimony, the jury learned in detail about Defendants' exhaustive newsgathering efforts and editorial review process that had extended through multiple drafts over many months prior to publication and involved numerous on-the-record interviews and re-interviews by the Newspaper with fire and police department officials and insurance company representatives who had investigated the fires, Plaintiff and various of his supporters, and the deceased tenant Anthony Rhein's family members, among other sources.

In the course of their reporting, Defendants had also examined hundreds of pages of court records and other official government documents as source materials. Only after presentation of this testimony did Plaintiff take the stand and admit during a three-hour cross-examination that (1) each and every statement he disputed reported true factual information, often based on official source documents; (2) the articles presented his version of events and other information favorable to him, including the conclusions of police, fire and insurance investigators that both fires were accidentally caused; and (3) the articles nowhere stated that he committed any crimes, and that any conclusions in that regard were left to readers' imaginations.

Plaintiff was attempting to punish the Newspaper for the publication of true but embarrassing facts that he would have preferred were kept hidden from the public.

Defendants' Motion for Directed Verdict

At the close of Plaintiff's case, the Newspaper requested removal of the jury from the courtroom and moved orally for a directed verdict based on arguments anticipated in Defendants' Pretrial Memorandum of Law, as enumerated below.

(1) *Stepanov*'s Objective Test: A Threshold Question of Law
Based on the Plain Language of the Articles.

(Continued on page 21)

(Continued from page 20)

- Plaintiff failed to carry his burden of showing that the articles, considered in their full context, (1) could be reasonably read to impart a defamatory inference and (2) affirmatively suggested that Defendants intended or endorsed the purported defamatory inferences. *Stepanov v. Dow Jones & Co.*, 120 A.D.2d 28, 38 (1st Dep't 2014). The *Stepanov* court emphasized that this is an "objective" standard that "asks whether the plain language of the communication itself suggests that an inference was intended or endorsed," a question of law for the court in the first instance. *Id.*; *see also Biro v. Condé Nast*, 883 F. Supp. 2d at 470; *Young v. Young*, 2016 N.Y. Misc. LEXIS 243, at *7 (N.Y. Sup. Ct., Suffolk Cnty. Jan. 28, 2016) ("It is for the court to determine, initially, whether the words ascribed to the defendant are reasonably capable of conveying a defamatory import.") (discussing application of *Stepanov* standard); *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 255 (S.D.N.Y.) ("conclud[ing] as a matter of law that [the statement at issue] is not defamatory by implication" because it fails to support "[p]laintiff's claim of innuendo"), *aff'd*, 578 F. App'x 24 (2d. Cir. 2014).

- On their face, the articles included numerous exculpatory facts relative to Plaintiff's association with the two fires, including that police and fire department personnel as well as insurance company investigators had all concluded that the causes of both fires were accidental. Moreover, in order to make sure that both sides of the story were presented, Defendants sought out Plaintiff − who had a standing invitation in the form of a certified letter to contact the Newspaper − as well as his supporters for interviews, all of which were published in the articles. The express contents of the articles therefore objectively refuted the contention that Defendants "endorsed any particular inference" alleged by Plaintiff. *Kshetrapal v. Dish Network, LLC*, 90 F. Supp. 3d 108, 136 (S.D.N.Y. 2015).

(2) The Subjective Actual Malice Requirements: No Proof of Intent to Communicate a Defamatory Implication.

- As a public official, Plaintiff was also required under the First Amendment to prove, by clear and convincing evidence, publication of the articles with "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Mahoney v. Adirondack Pub. Co.*, 71 N.Y.2d 31, 38-39 (1987). When similarly confronted with libel by implication claims asserted by public officials, courts have warned against exposing defendants to liability "not only for what was not

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said but also for what was not intended to be said" because such a result would "eviscerate[] the First Amendment protections established by *New York Times [v. Sullivan]*." *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 681 (9th Cir. 1990). The United States Court of Appeals for the Third Circuit has emphasized the significance of this risk, warning that absent a heightened state-of-mind requirement for defamatory implications, "actual malice could be found no matter how unlikely it is that a listener would interpret the statement as having the defamatory meaning" urged by Plaintiff. *Kendall v. Daily News Pub. Co.*, 716 F.3d 82, 91 (3d Cir. 2013). Any other rule would require a publisher to anticipate every possible meaning which a reader might draw from the text and impose the very self-censorship which is abhorrent to the First Amendment.

- Consistent with these First Amendment limitations, the Third Circuit articulated in detail the significant obstacles to demonstrating actual malice required for a public official to sustain a libel by implication claim. *Kendall* clarified that a plaintiff alleging defamation by implication must establish at the outset *two separate elements* of actual malice: "a 'falsity' element and a 'communicative intent' element." *Id.* at 89. The first element requires a showing that a defendant "knew that the defamatory meaning of [its] statement was false or w[as] reckless in regard to the defamatory meaning's falsity." *Id.* The second element requires a demonstration that the defendant "intended to communicate the defamatory meaning or knew of the defamatory meaning and was reckless in regard to it." *Id.* at 90. Importantly, "mere knowledge of the defamatory meaning of a statement that also has a nondefamatory meaning" is insufficient to find communicative intent, because this would chill protected speech under the First Amendment. *Id.* at 91.

- According to the trial testimony of the Defendants, the Newspaper did not intend to portray Plaintiff as committing any criminal acts, and specifically refrained from reporting any conclusions in that regard. Each defense witness testified that the purpose of the articles was to report a series of true facts from which readers could make up their own minds and draw their own conclusions − a paradigmatic function of investigative news reporting that promotes vigorous discussion of public affairs. *Chapin v. Greve*, 787 F.Supp. 557 (E.D. Va.), *aff'd, Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993); *see also Rashada v. New York Post*, 100776/11, 2011 N.Y. Misc. LEXIS 4079, at *7-*8 (Sup. Ct., N.Y. Cnty Aug. 17, 2011) ("the article is plainly intended to raise issues, rather than

(Continued on page 23)

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convey specific, objective facts about [Plaintiff's] role in the radicalization of inmates"); *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990) ("If the communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can be reasonably be drawn, the libel is not established."); *Janklow v. Newsweek, Inc*., 759 F.2d 644, 648-49 (8th Cir. 1985), *aff'd*, 788 F.2d 1300 (8th Cir.) (*en banc*), *cert. denied*, 479 U.S. 883 (1986).

- Based on this uncontradicted testimony, not a scintilla of proof existed in the record that Defendants intended to communicate or were reckless in endorsing the implications complained of in reporting the true facts of Plaintiff's involvement in two separate fires under unusual circumstances. Absent such proof, Plaintiff's libel by implication claim was legally insufficient and should not have been permitted to go to the jury.

In what seemed tacit but clear acknowledgment that, as with the Complaint's libel *per se* causes of action, the libel by implication claim should have been disposed of on summary judgment − in particular, through application of *Stepanov*'s objective standard, which is designed to keep constitutionally problematic implication claims away from juries − the Court granted Defendants' motion and directed a verdict in their favor. Based on the plain language of the articles, Hudson's allegations of implied defamation were not actionable as a matter of law and were properly removed from consideration by the jury. The articles nowhere accused Plaintiff of criminal misconduct, and no evidence had been presented that Defendants intended or endorsed any inference that he committed any crimes. To the contrary, the articles presented true facts on matters of legitimate public concern and left the conclusions arising therefrom to *THR*'s readers − the prerogative of a free press in a democratic society.

The Court granted Defendants' motion and directed a verdict in their favor.

Post-Trial Jury Interview and Takeaways

Although they were not called on to issue a verdict, defense counsel requested authorization from the Court to interview the jurors, which was granted. All nine jurors were willing to speak with us and advised that, had the case gone to a verdict, their vote would have been unwavering and unanimous in finding no liability on the part of *THR*. In sum and substance, their comments indicated that they did not view the issue as a close call given the evidence that had been presented up to that point in the case.

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Notably, the jurors' post-trial observations underscored the value of carefully calibrated pre-trial motion practice by defamation defendants, including motions *in limine* and for bifurcation of trials into separate liability and damages phases. In advance of jury selection, Judge Slobod had granted several of *THR*'s motions *in limine* along with its motion to bifurcate, as a result of which Plaintiff was precluded from cluttering the trial at the outset with irrelevant, inadmissible and prejudicial evidence, including testimony about the purported emotional impact the articles had on him and his family members and the alleged damage their publication caused to his political fortunes and standing in the community. A couple of jurors pointed out the absence of such testimony from Plaintiff − which, of course, reinforces the propriety and importance of bifurcation as a necessary means of avoiding unfairness and prejudice to defamation defendants through sympathetic initial testimony by a plaintiff and his witnesses that can sway a jury in favor of finding liability.

At the risk of stating the obvious, the *voir dire* process is also critical for a successful trial outcome. Because of the nature of the case, we had determined that education level was the most important consideration in selecting the jury, and were fortunate that four of the jurors on the panel had college and advanced degrees. Indeed, one of the jurors told us that he would have been reluctant to find the Newspaper liable where the factual information reported in the articles was true, consonant with a principal defense theme − *i.e.*, that libel claims premised on alleged implications, which by their very nature are vague, amorphous and subjective, present a serious threat to the First Amendment by leaving publishers to the mercy of readers' minds and imaginations. As the Seventh Circuit cautioned in *Woods v. Evansville Press Co.*, "requiring a publisher to guarantee the truth of all the inferences a reader might reasonably draw from a publication would undermine the uninhibited, open discussion of matters of public concern." 791 F.2d 480, 487 (7th Cir. 1986).

All nine jurors were willing to speak with us and advised that, had the case gone to a verdict, their vote would have been unwavering and unanimous in finding no liability.

This fundamental principle was vindicated by the Court's grant of a directed verdict to Defendants in this case. The role of professional journalists is to marshal facts, thus sparking their readers to draw various potential implications from the stated facts. Others, in turn, may present similarly accurate facts in such a fashion as to suggest different implications or conclusions. This process is at the very heart of debate on public issues protected under the First Amendment. To hold the press responsible for every potential implication that could be drawn from accurately reported and true facts would impede this critical function in what has unquestionably become a challenging environment for the media.

Michael J. Grygiel, Co-Chair of Greenberg Traurig, LLP's National Media and Entertainment Litigation Group and William A. Hurst of the firm's Albany office represented Defendants Times Herald-Record, Dominick Fiorille, Michael Levensohn, Derek Osenenko, Local Media Group, Inc. and GateHouse Media, LLC.

Judge Upends Jury's Defense Verdict for Minnesota Media

By John Borger and Leita Walker

KARE-TV and the *St. Cloud Times* won a two-week jury trial in November 2016, only to see the plaintiff prevail on post-trial motions before Minnesota district court judge Susan Burke, who ruled as a matter of law that their news coverage was defamatory and false, vacated the defense judgment, and granted a new trial on whether the reporting was negligent and on the amount of damages. *Larson v. Gannett Company, Inc.*, Hennepin County File No. 27-CV-15-9371 (Minn. Dist. June 13, 2017) .

The new trial is set for mid-August to mid-September.

Background

Plaintiff Ryan Larson was living above a Cold Spring bar in 2012 when police officer Tom Decker was on his way to make a welfare check on Larson. Two shotgun blasts killed Decker. Law enforcement officials arrested Larson and held him for four days without charging him, but named him as a suspect at a news conference and in a press release.

The Bureau of Criminal Apprehension cleared Larson after a new suspect emerged, who killed himself in a stand-off with police. Larson sued numerous media outlets, but only KARE-TV (owned by Gannett at the time of broadcast but now owned by Tegna) and the *St. Cloud Times* (a Gannett paper) went to trial, where they prevailed. *See* T. Curley, "Minnesota Television Station and Newspaper Win Libel Trial," MediaLawLetter November 2016 at 8.

Post-Trial Ruling

In her post-trial order and memorandum, Judge Burke concluded that she had erred in refusing to submit the question of defamation by implication to the jury, and then ruled that all of the specific statements at issue conveyed the same defamatory implication—that Larson had killed Decker—and as a matter of law were false, even though each statement attributed its specific message either to law enforcement or to distraught family members.

"[T]hose who repeat defamatory statements are subject to liability as if they had originally made them," the court stated. The court's approach to libel by implication—finding as a matter of law that the statements had only one implication and that the implication was false—departed from prior case law in Minnesota requiring plaintiffs to prove both that the publication is capable of being interpreted as alleged and that the defendant intended the alleged implications. *See Johnson v. Columbia Broadcasting System, Inc.*, 10 F. Supp.2d 1071, 1075-76 (D. Minn. 1998).

(Continued on page 26)

(Continued from page 25)

Ignoring the intent element is troublesome here, where in addition to reporting law enforcement and victim family member comments, the defendants' coverage of the events included Larson's protestations of innocence and his subsequent vindication as the focus of the investigation shifted elsewhere. *See* Curley, *supra*. The court even asserted that one reason for allowing a defamation-by-implication claim here was that Larson "does not have access to public mediums for answering disparaging falsehoods like a public official."

The court rejected defendants' assertion of the fair report privilege on the basis that the privilege does not apply to statements by law enforcement officials that go beyond the mere fact of arrest or charge before official judicial proceedings commence, citing *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321 (Minn. 2000). (In similar fashion, Minnesota does not fully immunize law enforcement officials for statements to the press that go beyond the contents of written public records. *Carradine v. State*, 511 N.W.2d 733, 737 (Minn. 1994).)

The court denied Larson's request for judgment as a matter of law on the issue of negligence, noting that although defendants intentionally communicated their statements to people other than Larson, a question remained whether defendants "knew, or in the exercise of reasonable care, should have known that the published statements were false." Minnesota adopted a negligence standard in private-figure defamation actions in 1985, explaining that "[c] ustoms and practices within the profession are relevant in applying the negligence standard." *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 491-92 (Minn. 1985).

Judge Burke's June 13, 2017, ruling did not discuss any circumstances creating a factual issue for a jury regarding whether defendants in the exercise of reasonable care should have known that the published statements (including the implication that she found as a matter of law) were false or that defendants departed from customs and practices within the profession. This departed from the approach of other courts around the country that have concluded, as a matter of law, that allegedly defamatory publications based upon statements from law enforcement sources were not made negligently. *See* J. Borger, M. Kovata, and K. Vogele, "Prevailing on Summary Judgment on a Negligence Standard," MLRC Pretrial Committee Report, October 2008.

John Borger recently retired as a media lawyer at Faegre Baker Daniels in Minneapolis. Leita Walker is a media partner at the firm.

Steven J. Wells, Angela Porter and Emily Mawer of Dorsey & Whitney LLP in Minneapolis represented Tegna and Gannett at trial. In addition, Mark R. Anfinson of Minneapolis represented the media defendants in pretrial motions. Tegna was also represented by Associate General Counsel Christopher Moeser and Gannett was also represented by Associate General Counsel Thomas Curley. Plaintiff Ryan Larson was represented by Stephen C. Fiebiger of Burnsville, Minnesota.

Court Finds Gun Documentary Was Neither False Nor Defamatory, Dismisses Claims By Gun-Rights Advocates

By Mara Gassmann

A federal district court in Virginia dismissed all claims arising out of the documentary film *Under the Gun* brought against film producer Atlas Films, narrator and executive producer Katie Couric, and distributor Epix by a gun-rights advocacy organization and two of its members. Virginia Citizens Defense League et al v. Couric et al, No. 3:16-cv-00757, 2017 WL 2364198 (E.D. Va. May 31, 2017) (Gibney, J.).

The plaintiffs had alleged that they were defamed by a scene in the documentary that featured Couric's interview with some members of the organization. The Court held that the challenged scene was neither defamatory nor false. It also held that it was not "of and concerning" the organization.

Under the Gun **is a two-hour documentary about the controversial topic of guns in America.**

The Documentary Film

Under the Gun is a two-hour documentary about the controversial topic of guns in America from award-winning writer-director-producer Stephanie Soechtig. Like many documentaries, *Under the Gun* has a point of view: It favors gun-safety laws to decrease the number of mass shootings and other gun-related deaths. The film features, *inter alia,* interviews with lawmakers, advocates, and victims' families who support such legislation as well as research and statistics pertaining to various aspects of the gun debate.

At the same time, the film also includes excerpts of interviews, speeches, testimony, and other statements from supporters of more expansive gun rights, including about three minutes of excerpts from an interview between Couric and some members of the gun-rights advocacy group Virginia Citizens Defense League ("VCDL"), including Patricia Webb, who owns and operates a Virginia firearms store, and Daniel Hawes, an attorney whose practice includes firearms and personal defense-related litigation.

(Continued on page 28)

(Continued from page 27)

Members of VCDL first appear about twenty minutes into the documentary. In that scene, they answer multiple questions about guns. In the course of the discussion, Couric asks the interviewees whether they support mandatory background checks before an individual may purchase a gun. They express their opposition to such checks and explain some of the reasons for their views.

The film shifts briefly to an explanation of Supreme Court precedent on gun possession, and when it returns to the group interview, Couric asks: "If there are no universal background checks, how can felons and terrorists be prevented from accessing guns?" During the actual interview, one of the interviewees responded that any felon who has served their time should be able to buy guns, and did not address terrorism. Rather than showing that or other similarly non-responsive answers that followed, for about eight seconds the film shows a few of the interviewees, including Hawes and Webb, sitting silently, each for a few seconds.

The Lawsuit

Upon release of *Under the Gun*, VCDL publically criticized the film and its portrayal of VCDL's members. In addition to its criticisms directed through the media, the VCDL, Webb, and Hawes filed a two-count complaint in the Richmond division of the Eastern District of Virginia alleging defamation *per se* and defamation by implication over the eight-second pause. The complaint alleged that the challenged scene "falsely informed viewers" and "falsely implied" that the VCDL members "had been stumped and had no basis for their position on background checks" and made the plaintiffs appear unfit in their respective trades. Compl. ¶¶ 103, 127.

Defendants argued, any implication conveyed by the pause simply did not rise to the level of defamatory as a matter of Virginia law.

In a joint motion to dismiss, the defendants argued that the film was not capable of the defamatory meaning alleged by the plaintiffs. As the defendants pointed out, the film had included answers by the gun advocates about their opposition to universal background checks; as a result, it could not reasonably be viewed to imply that plaintiffs had no basis for their opposition. Moreover, defendants argued, any implication conveyed by the pause simply did not rise to the level of defamatory as a matter of Virginia law. For example, a pause—even assuming, as plaintiffs contend, that it made them appear "stumped" in the face of Couric's policy question—did not render the plaintiffs "odious" or "ridiculous," nor did it make them appear unfit in their trades or professions.

Defendants noted in this regard that plaintiffs' claim was really one for false light invasion of privacy, a cause of action not cognizable in Virginia, masquerading as one for defamation. Defendants then argued that VCDL could not proceed for the additional and separate reason

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(Continued from page 28)

that any defamatory implication conveyed about two individual members of a general membership organization is not defamatory of the organization itself. In addition to joining the motion filed by Atlas Films and Couric, Epix separately moved for dismissal of the complaint on the grounds that it failed to plead that Epix had acted with actual malice.

The plaintiffs responded that a defamation claim was adequately alleged because the film used deceptive editing techniques to make the plaintiffs look ridiculous, incompetent, and ignorant; "tricked" viewers into thinking they had seen Hawes and Webb stumped "with their own eyes"; and was libelous of these plaintiffs in particular because their professions (in the case of the individual plaintiffs) and organizational mission (VCDL) pertained to firearm issues. Their opposition to the motion to dismiss proffered numerous possible defamatory meanings arising from the edit. But as the defendants observed on reply, plaintiffs' theory depended on the proposition that any competent "Second Amendment activist" must view Couric's question about background checks as anti-gun and be poised to refute it, based on an undifferentiated opposition to background checks. This, defendants argued, was for the court of public opinion alone, not for a claim sounding in defamation.

The Court's Decision

That unedited footage made clear that "members of the VCDL did not answer the question posed by Couric.

On May 31, 2017, the Court issued its written decision dismissing the complaint on several separate bases. *First*, the Court compared the unedited footage of Couric's interview with the VCDL members to the film itself, each of which was annexed to plaintiffs' complaint as an exhibit, and found that the film's "interview scene is not false." 2017 WL 2364198, at *3. That unedited footage made clear that "members of the VCDL *did not* answer the question posed by Couric. They talked about background checks and gun laws generally, but did not answer the question of how to prevent felons or terrorists from purchasing guns without background checks." *Id.* (emphasis original).

Second, the Court considered the four defamatory meanings from the film proffered by the plaintiffs and found that each failed either to be a reasonable reading of the documentary or to carry a "sting" sufficient to be defamatory. As part of this discussion, the Court also rejected plaintiffs' contention that they were presented as unfit in their professions, addressing each plaintiff in turn and finding that any implication arising from the pause in response to Couric's particular policy question "had no bearing on [plaintiff] Webb's fitness in her trade as a gun store owner," *id.* at *5, did "not involve [plaintiff Hawes'] practice of law," *id.*, and did not imply incompetence by VCDL as an advocate without "inferential leaps," *id.* at *6. And as for the VCDL, the Court held that its claims failed for the additional reason that the edited scene

(Continued on page 30)

(Continued from page 29)

was not *about* the organization, which could therefore not satisfy the constitutional "of and concerning" requirement in defamation law. *Id.* at *6 n.9.

Following the Court's decision, Epix made the documentary again available for streaming at its website: https://www.epix.com/movie/under-the-gun. The plaintiffs have appealed to the U.S. Court of Appeals for the Fourth Circuit.

Atlas Films is represented by Nathan Siegel, Mara Gassmann, and Matthew E. Kelley of Levine Sullivan Koch & Schulz, LLP; Katie Couric is represented by Kevin T. Baine, Thomas G. Hentoff, Nicholas G. Gamse, and Emily A. Rose of Williams & Connolly, LLP; Epix is represented by Elizabeth A. McNamara, Linda J. Steinman, and Patrick J. Curran, Jr. of Davis Wright Tremaine, LLP. Virginia Citizens Defense League and the individual plaintiffs are represented by Thomas Clare, Elizabeth Locke, and Megan Meier of Clare Locke, LLP.

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D.C. Circuit Reverses Order Denying Summary Judgment to BNA

Honest Misinterpretation Did Not Constitute Sufficient Evidence of Actual Malice

By Laura Handman and Lisa Zycherman

In May, the U.S. Court of Appeals for the District of Columbia Circuit reversed a district court order denying the Bureau of National Affairs' motion for summary judgment on a defamation suit filed by a federal inmate. *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106 (D.C. Cir. 2017). The order affirms that an "honest misinterpretation" alone does not constitute sufficient evidence of actual malice.

Background

The plaintiff Yorie Von Kahl, who in 1983 was convicted in connection with the killing of two U.S. Marshals and sentenced to life in prison, alleged that he was defamed by a Bureau of National Affairs (BNA) news digest in the *Criminal Law Reporter* reporting on his petition for writ of mandamus. The publication at issue, a summary report on Kahl's 2005 mandamus petition to the U.S. Supreme Court, mistakenly attributed a statement by the prosecutor to the sentencing judge, stating: "Petitioner, who showed no hint of contrition and made statements to press that he believed that murders of U.S. marshals in course of their duties were justified by religious and philosophical beliefs, is committed to custody of U.S. Attorney General for imprisonment for life…."

The D.C. Circuit issued an opinion agreeing with BNA that the inaccuracy of its publication alone does not constitute sufficient evidence of actual malice.

BNA's motions for dismissal of the claim were denied, including denial of BNA's contention that Von Kahl was a libel-proof plaintiff. After discovery, BNA sought summary judgment on several grounds, including asserting that because plaintiff has been found to be a limited public figure he must, and could not, meet the high hurdle of demonstrating that a reasonable jury could find that BNA acted with actual malice. On cross-motions for summary judgment the U.S. District Court for the District of Columbia concluded that because BNA's description of plaintiff's mandamus petition was inaccurate, those "discrepancies" were

(Continued on page 32)

(Continued from page 31)

"sufficient to create a genuine dispute of material fact regarding whether BNA acted with reckless disregard with respect to the truth or falsity of the statements in its summary."

D.C. Circuit Opinion

BNA sought and obtained certification for an interlocutory appeal from the district court's denial of summary judgment. The D.C. Circuit issued an opinion agreeing with BNA that the inaccuracy of its publication alone does not constitute sufficient evidence of actual malice for Von Kahl to overcome summary judgment. The court's opinion also emphasizes that BNA's clarification to its initial publication was reasonable and reinforces that falsity and failure to retract are not actual malice. The appeal was supported by a media amicus brief with 39 amici.

Noting that "[c]ostly and time-consuming defamation litigation can threaten" "essential" First Amendment freedoms, Judge Kavanaugh, writing for a unanimous court, emphasized that "[t]o preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits."

The court affirmed the lower court's ruling that Von Kahl is a limited purpose public figure, finding that there was a public controversy concerning the 1983 shootout "as well as the underlying issues of taxation and federal government power," that Von Kahl and his father espoused. Relying on the history of media reporting on Von Kahl, the Court noted that the press not only covered Von Kahl's trial, but extended "to include discussion of [his] and his father's association with anti-tax and anti-government movements, as well as explorations and discussions of the political and religious ideologies underlying those movements."

The Court further found Von Kahl "assumed a public role in the controversy when he used his access to the press to promote his cause," by, for example, giving "extensive interviews for the 1993 documentary, *Death and Taxes*, where he tied his participation in the shootout (and lack of remorse for his actions) to his 'political and religious ideology,'" as well as publishing a book "about his case and its relationship to the anti-government and anti-tax movement." The Court concluded BNA's report was germane to Von Kahl's role in the public controversy because it covered Von Kahl's conviction and his petition to have his sentence vacated and "highlights Kahl's ideology" as well as his "engagement with the press."

Observing the "daunting" nature of the actual malice standard, the D.C. Circuit determined that Von Kahl failed to come forward with sufficient clear and convincing evidence that either BNA's original report, or the clarification it published at Von Kahl's request, were published

(Continued on page 33)

(Continued from page 32)

with knowledge that the challenged statements were false or with reckless disregard of whether they were false or not. Noting that "falsity alone does not equate to actual malice," the Court concluded Von Kahl "has offered insufficient evidence, direct or circumstantial, that any BNA employees had actual malice – that is, that any BNA employee actually knew that the prosecutor made those statements or recklessly disregarded whether the statements were made by the prosecutor rather than by the judge."

In particular, the D.C. Circuit rejected Von Kahl's two arguments to support an inference of actual malice. First, the mistake in the initial report was insufficient to infer actual malice because "BNA's mistake – suggesting that statements were made by the judge rather than the prosecutor – occurred because BNA relied on the excerpted transcript that was attached as an appendix to Kahl's mandamus petition," and "a reasonable reader of the excerpted transcript would have thought it was the sentencing judge speaking throughout." The Court concluded, "[i]t was therefore not unreasonable, much less evidence of actual malice, for BNA to read the transcript that way and report it in that fashion."

Second, the D.C. Circuit rejected Von Kahl's contention that the clarification BNA published at his counsel's request was published with actual malice because BNA was aware of the mistaken attribution and the clarification failed to correct the error. The clarification read: "[T]he summary of the sentencing judge's ruling below should have begun: 'Petitioner who was said to have believed that murders were justified,….'"

The Court observed that Von Kahl's counsel's letter to the BNA failed to alert the publication that the statement regarding lack of contrition was made by the prosecutor (and not the judge), and that it was reasonable for BNA to conclude, after receiving the letter and reviewing the transcript excerpt appended to Von Kahl's mandamus petition, "that the excerpted transcript quoted the sentencing judge," because "[t]he source of the problem in this case was Kahl's poorly put-together excerpted transcript." Even if BNA "could have connected some dots and suspected that the prosecutor made the statements at issue," an "honest misinterpretation does not amount to actual malice even if the publisher was negligent in failing to read the document carefully."

Since publication of the panel's decision, the Court has denied Von Kahl's request for rehearing by the panel and *en banc*.

Laura Handman and Lisa Zycherman of Davis Wright Tremaine LLP and Jay Ward Brown of Levine, Sullivan Koch & Schulz, represented The Bureau of National Affairs. Amici Curiae Coalition of Media Organizations were represented by Kevin Baine, Thomas Hentoff, and Nicholas Gamse of Williams & Connolly LLP. Plaintiff appeared pro se. Gregory J. Dubinksy, of Holwell Shuster & Goldberg LLP, appointed by the court, argued plaintiff's cause as amicus curiae, and with him on brief was Michael J. Gottlieb of Boies Schiller Flexner LLP

Dallas Court Delivers Defamation Victory to D Magazine in "Party Crasher" Case

By Jason P. Bloom

The Dallas Court of Appeals, in a significant decision, recently reaffirmed that statements amounting to opinion, rhetorical hyperbole, and even "extravagant exaggeration" in media publications are absolutely protected by the First Amendment. *D Magazine et al. v. Reyes*, (Tex. App. April 18, 2017). The Court thus reversed the trial court and rendered judgment in favor of D Magazine, while at the same time adding another well-reasoned decision to the body of law supporting Texas media entities.

Background

In July of 2013, the Dallas Symphony Association cut ties with one of its volunteers, Jose Reyes, and publicly announced the ouster via a media advisory to several media outlets, including D Magazine. D Magazine began investigating the peculiar circumstances that led to Reyes' public ouster as a volunteer and, a month later, published an article on the topic entitled "The Talented Mr. Reyes: How a Man of Meager Means and a Mysterious Past Duped Dallas Society." The article discussed how Reyes, though appreciated in some circles for his volunteer efforts, ran afoul of the symphony's high society by repeatedly forcing his way into photographs at events, making donors feel uncomfortable, and crashing symphony parties where he was unwelcomed.

Statements amounting to opinion, rhetorical hyperbole, and even "extravagant exaggeration" in media publications are absolutely protected by the First Amendment.

Reyes sued D Magazine and the Dallas Symphony for an assortment of claims, including defamation per quod, defamation per se, negligence, conspiracy, intentional infliction of emotional distress, and tortious interference with his employment. In doing so, Reyes identified 15 statements from the article that he contended defamed him, including statements that he had a "mysterious past," "crashed parties," "blustered his way into photos," "misrepresented his role with charities," "crossed the line," and that members grew tired of him "lurking and hanging around."

The trial court dismissed Reyes' claims against D Magazine for defamation per se, intentional infliction of emotional distress, and tortious interference at summary judgment, but declined to dismiss his defamation per quod, negligence, or conspiracy claims. The trial court also declined to dismiss Reyes' claim against the Dallas Symphony for conspiracy and tortious interference.

(Continued on page 35)

(Continued from page 34)

Both D Magazine and the Dallas Symphony appealed the decision under Texas' interlocutory appeal statute, which permits media entities and their sources to appeal the denial of a motion for summary judgment based on the assertion of First Amendment or statutory defenses.

Court of Appeals Opinion

As to D Magazine, the Court of Appeals examined each of the 15 statements in turn and, as to most, found that the statements amounted to non-actionable opinions, rhetorical hyberbole, and, in some cases, "extravagant exaggeration." To the extent any of the statements alleged verifiable facts about Reyes, the Court found that they were true and, accordingly, non-actionable.

In examining the statements in the article, the Court observed that they conveyed a common and repeated theme—that Reyes was not welcomed at the Dallas Symphony's high society events. The Court acknowledged that much of what the article conveyed may well have been offensive to Reyes or hurt his feelings, but harsh words and hurt feelings alone cannot support a defamation claim. Rather, the media, as long as it is reporting matters truthfully, must be given wide latitude with respect to matters of word choice, theme, tone, and perspective, and must certainly be given liberty to express opinions based on true facts. Because the article accurately conveyed the views of the Dallas Symphony as to why Reyes was cut loose, Reyes' claims failed.

The Court thus dismissed Reyes' remaining claims against D Magazine for defamation per quod, negligence, and conspiracy. As to the latter claims, the Court acknowledged that, as pled, they were either dependent upon the success of Reyes' defamation claim or simply restated the defamation claim's elements. The Court thus rendered judgment in D Magazine's favor on all of Reyes' claims and, in doing so, added another well-reasoned opinion to the arsenal of favorable law available to Texas media defendants.

The Court of Appeals also rendered judgment in favor of the Dallas Symphony on Reyes' conspiracy claim, which it concluded fell within the interlocutory appeal statute because it was based on statements in the article. Significantly, however, the Court found that it lacked jurisdiction over Reyes' tortious interference claim against the Dallas Symphony because it was based on statements and conduct apart from the article. The Dallas Symphony has sought rehearing en banc, contending that Texas' interlocutory appeal statute allows for the appeal of an entire order as long as some part of the order is appealable, and does not permit courts to parse between appealable and non-appealable claims. This issue will be closely watched.

Jason P. Bloom, a partner at Haynes and Boone LLP in Dallas, represented D Magazine in this case together with Thomas Wilson, Ryan Paulsen and Sally Dahlstrom. The Dallas Symphony was represented by Marc H. Klein, Thompson & Knight. Plaintiff was represented by Eric Fein and Vickie Brandt, The Fein Law Firm, Addison, Texas.

MLRC Pre-Pub Committee LIVE: The Rolling Stone/UVA Case

This May our Pre-Publication/Pre-Broadcast Committee organized an in-depth discussion, both live and via webinar, on the recently resolved Rolling Stone/ University of Virginia case. The case, which inspired coverage for months in both the legal and entertainment pages, set troubling precedent which may impact journalists, publishers, and their attorneys approaching vetting and retractions for the foreseeable future. Lisa B. Zycherman of Davis Wright Tremaine and Co-Chair of the MLRC's Pre-Publication/Pre-Broadcast Committee hosted the event at the DWT offices in New York City. The panel consisted of Rolling Stone's defense team- Elizabeth McNamara, partner at Davis Wright Tremaine, and Natalie Krodel, GC for Wenner Media, Rolling Stone's publisher. Our own George Freeman, Executive Director of MLRC, moderated the event.

Nicole Eramo, a dean of UVA responsible for the university's sexual misconduct board, sued Rolling Stone in May 2015 over a November 2014 article entitled "A Rape on Campus." She claimed the article defamed her by holding her out as the "chief villain" of a university indifferent to campus sexual assault.

The article's author, Sabrina Rubin Erdley, interviewed and wrote of "Jackie," and her particularly brutal story of being sexually assaulted at a frat house. The article addresses campus sexual assaults and administrative responses (or lack thereof) with a focus on UVA, which was then subject to Title IX review. Erdley was introduced to a UVA representative and student activist working on sexual assault issues at UVA, who subsequently introduced Erdley to Jackie.

The panel discussion, as well as the case, focused greatly on the issue of republication.

Jackie's story was vetted, and the article was published with the confidence of Erdley and Rolling Stone. After publication Jackie's story was called into question, most notably by the Washington Post. Upon further questioning of her subject, Erdley lost faith in Jackie's story. Rolling Stone then promptly issued an "editor's note," believing it to be a retraction of any information in the article attributed to Jackie. The note was posted online at the same URL above the article and noted Rolling Stone's loss of faith in Jackie's account.

Jann Wenner of Wenner media then commissioned a Columbia Journalism Review investigation and review of the editorial process. At the same time Rolling Stone published the CJR report, Rolling Stone removed the article from its website. Eramo's lawsuit followed shortly thereafter.

The panel discussion, as well as the case, focused greatly on the issue of republication. But to begin, George Freeman asked Elizabeth McNamara and Natalie Krodel to discuss the events leading up to the publication, and then to the trial. Prior to publication, Rolling Stone and

(Continued on page 37)

(Continued from page 36)

Erdley researched, vetted, and believed the story of Jackie. It was oft repeated that they "reasonably relied" on Jackie's account of the events at the time of publication. From the audience Samuel Bayard, also of DWT, highlighted the great amount of faith which was placed in Jackie that did not falter until the phone call between Erdley and Jackie when questions began to arise. It was directly after this phone call that the editor's note was posted.

When asked about the decision to commission the CJR report, the balance between journalistic and legal standards was stressed. Editorially, for Jann Wenner the report was a sign of good faith on the part of Rolling Stone. Legally however, an investigation which looked to journalistic standards, not to the legal standards at issue at trial, may not have been advised by counsel.

Eramo's attorneys brought three groups of claims- statements made by Jackie in the article, statements made by Erdley or Rolling Stone outside of the publication, and republication of the statements from the article. The trial was bifurcated for liability and damages. The Eastern District of Virginia judge did not have a significant track record with media libel issues. Multiple claims arising out of the various statements were given to the jury.

The Eastern District of Virginia judge did not have a significant track record with media libel issues.

However, helpfully to Rolling Stone, Eramo was found to be a limited purpose public figure as a matter of law. After very detailed special interrogatories were presented to the jury, they assessed Erdley to be liable for $2,000,000 for some statements in the article and post publication, and Rolling Stone for $1,000,000 for the republication only. Erdley, though a freelancer, was indemnified by Rolling Stone. Neither party argued for a specific amount of damages at closing, so the panelists posited that the three million total award may have been a "compromise verdict."

The amount was much lower than Eramo asked for at trial, but enough that the jury may have been expressing that they did not approve of Rolling Stone's actions. After the decision, and prior to an appeal, Rolling Stone and Eramo came to an undisclosed settlement.

Turning to the crucial issue of republication, the panel noted that this was an area of apparent confusion for the jurors, and, looking forward, a problematic dilemma both editorially and legally.

Prior to this case, republication theory has been used largely as a means to overcome the statute of limitations. For Eramo and Rolling Stone however, it appears that republication was used as a back-door to a finding of actual malice in conjunction with the Editor's Note. The republication standard is two-pronged, requiring 1) publication with the affirmative intent to reiterate the statements at issue, and 2) that the publication is done with the intent to reach a new and different audience.

Rolling Stone argued that there was no evidence that the Editor's Note was published with any intent to reiterate Jackie's statements, only to disavow them. Plaintiff's counsel argued -

(Continued on page 38)

(Continued from page 37)

apparently successfully - that Rolling Stone intended to, and did, reach a new audience when it appended the Editor's Note to the article and that Jackie's statements were therefore repeated. It was argued that Rolling Stone could have, and should have, removed the article. In effect, McNamara and Krodel both felt that the two prongs were conflated at trial by the judge and plaintiff's side, leading to confusion for the jury. This conflation has certainly brought about great confusion for attorneys and members of the media following the case as well.

Allegedly, and under the apparent theory of the case, the republication occurred when Rolling Stone published the editor's note in early December 2015 but left the original article up. The confusion seemed to come greatly from the judge and jury mistakenly equating new readers (of the note) with a new audience. Jann Wenner (in a recorded deposition) when asked how one would know what statements from Jackie the editor's note intended to retract, replied that they would have to read the article.

However, legal precedent demonstrates that someone looking to the editor's note and reading the article for understanding may be a "new reader," but not, in the opinion of Rolling Stone's counsel, a "new audience." So though only one prong was somehow - and dubiously - met, the Editor's Note was found to be a republication of the article by reaching a new audience. While Rolling Stone thought they fulfilled their journalistic duty by their honest and prompt editor's note, apparently the jury felt the article should have been removed entirely.

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Finally, the panel opened the discussion to the audience for questions. When asked if, in hindsight, the better approach would have been to take down the article with the editor's note only in its place, it was noted that Rolling Stone wanted to leave the article up to present the full picture of the story beyond Jackie's statements.

But, if it were taken down, the jury likely would not have been able to find any liability for republication. McNamara added that, ironically, the safest thing to do legally may have been to leave the article up entirely, without a retraction or any note.

But such a decision would be contrary to both law and public policy encouraging prompt retractions. An audience member posited instead that the appropriate move, in an internet world, is to take down the article immediately. In addition to those approaches already mentioned, other possible strategies brought up included editing the text of the article itself, or issuing an editor's note on a separate URL.

While the necessary balance between editorial and legal decision making was appreciated, the discussion evinced a lack of consensus for what lesson the Rolling Stone case truly provides. So, although the Rolling Stone case brought the issue of republication to the foreground, it likely added more confusion than clarity as to how to proceed in future cases.

Allison Venuti is MLRC's 2017 Legal Fellow.

Texas Rejects "Self-Publication Theory" of Defamation

By Thomas H. Wilson and Andrew J. Clark

Employers often avoid defamation suits from their former employees by refusing to disclose any information about them, except for providing names, dates of employment, and job titles to prospective employers calling for a reference. But may an employer still face liability for defamation if it tells its former employee the reasons it fired him?

In certain states, the answer is yes. Under the "self-publication theory" of defamation, a former employee may claim defamation if (1) an employer makes a defamatory statement to an employee as part of its grounds for termination and (2) it is likely that a prospective employer will ask the employee the reasons he left his previous position and that the employee will repeat the defamatory statement to the prospective employer. A former employee may have a meritorious claim even if the former employer has not itself communicated a defamatory statement to a third party.

But many states have rejected the self-publication theory as a basis for liability. In May 2017, the Supreme Court of Texas became the latest court to do so. In *Exxon Mobil Corp., et al. v. Rincones*, an employer stopped assigning a refinery technician work after the technician failed a random drug test administered by a third party. The technician disputed the test, denying that he had done drugs and questioning the administrator's testing procedures. Less than five months later, the technician filed for unemployment benefits with the Texas Workforce Commission, which found that he had been discharged because of the results of the drug test.

May an employer still face liability for defamation if it tells its former employee the reasons it fired him?

Among other common law claims against his former employer, the technician filed a defamation claim under the self-publication theory and argued that he would be forced to disclose the results of his disputed test to prospective employers. The elements of a defamation claim in Texas "include (1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases." Publication, defamation's first element, is not generally met by "a defendant who communicates a defamatory statement directly to the defamed person, who then relays it to a third person."

The Court rendered judgment against the technician, expressly declining to recognize a "self -publication" exception to the publication element and further holding that "there is no independent cause of action for compelled self-defamation." In rejecting the self-publication theory, Texas joins Alabama, Connecticut, Hawaii, Massachusetts, Tennessee, and

(Continued on page 40)

(Continued from page 39)

Washington, whose highest courts have each done the same, as well as Colorado, Minnesota, and Oregon, whose legislatures have limited the theory as a basis for liability.

These states have cited to a number of public policy concerns with the self-publication theory, including the following:

Chilling the honest evaluation and communication between employer and employee. To avoid the time and costs of defending a defamation claim, an employer may implement a policy of self-censorship in which it refuses to openly communicate to employees the reasons for its employment decisions. Without such communication, an employee may be left in the dark about how to improve his or her job performance or about why his or her employment was terminated. Further, the employee would likely be deprived of any opportunity to contest the employer's decisions.

Impinging on the employment at-will doctrine. The self-publication theory is incompatible with an at-will employment system in which an employee may be terminated with or without reason and for any reason, as long as the reason is not illegal. Employers are generally not required to be reasonable—or even rational—when making employment decisions. But by giving former employees a cause of action when an employer's stated reason for termination turns out to be false, employers are forced to carefully conduct internal investigations and make accurate findings before coming to a final termination decision.

Providing plaintiffs with an unsatisfactory end-run. Defamation claims brought under a self-publication theory typically mask employees' deeper complaints (which are usually about a termination decision and the reasons for that decision, not about the communication of those reasons to a potential employer). When plaintiffs bring employment law claims under the pretense of defamation—rather than under applicable employment statutes and employment agreements—courts are left to deal with the harms of termination under the law of libel and slander, which is inadequate to address the employment issues at play.

Giving plaintiffs control over the period of limitations and damages. Defamation claims arise on the date of publication. Under the self-publication theory, a former employee is free to publish and republish an allegedly defamatory statement for the remainder of his or her professional life—and thus start and restart the period of limitations every time he interviews with a new, prospective employer. Further, because the claim begins upon the *plaintiff's* publication of the statement, the plaintiff, free to publish the statement to many prospective employers, is not reasonably bound by any duty to mitigate damages.

(Continued on page 41)

(Continued from page 40)

Despite these concerns, a number of courts (including courts in Arkansas, California, Connecticut, Georgia, Iowa, Kansas, Maine, Michigan, Missouri, North Carolina, and Ohio) continue to recognize the theory in various forms. (see box below) Some require that the compelled publication of the statement be reasonably foreseeable or that the former employer act recklessly or maliciously in communicating its defamatory statement. In these states, employers must be careful to provide a terminated employee with a termination reason that is true or with no reason at all.

In Texas, however, and in a growing number of states, an employer may now communicate to a former employee the lawful reasons for his or her separation—such as failing a drug test, even if the test is disputed—without fear of a defamation claim under the self-publication theory.

Thomas H. Wilson is a partner, and Andrew J. Clark an associate, at Vinson & Elkins LLP in Houston.

Cases Recognizing Self-Publication Theory

Coatney v. Enterprise Rent-A-Car Co., 897 F. Supp. 1205 (D. Ark. 1995); McKinney v. Cnty. of Santa Clara, 168 Cal. Rptr. 89 (Cal. Ct. App. 1980); Blake-McIntosh v. Cadbury Beverages, Inc., 1999 WL 464529 (D. Conn. Jun. 25, 1999); Colonial Stores, Inc. v. Barrett, 38 S.E.2d 306 (Ga. Ct. App. 1946) (limited by Brantley v. Heller, 112 S.E.2d 685 (Ga. Ct. App. 1960))**;** Belcher v. Little, 315 N.W.2d 734, 738 (Iowa 1982) (limited by Theisen v. Covenant Med. Ctr., Inc., 636 N.W.2d 74 (Iowa 2001))**;** Polson v. Davis, 635 F. Supp. 1130 (D. Kan. 1986)**;** Carey v. Mount Desert Island Hosp., 910 F. Supp. 7 (D. Me. 1995); Grist v. Upjohn Co., 168 N.W.2d 389 (Mich. App. 1969); Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 70 (Mo. 2000) (outside of employment context); Hedgpeth v. Coleman, 183 N.C. 309, 313–314 (1922) (outside of employment context); Bretz v. Mayer, 203 N.E.2d 665 (Ohio C.P. Cuyahoga County 1963).

Cases and Statutes Rejecting Self-Publication Theory

Cases: Exxon Mobil Corp., et al. v. Rincones, 2017 WL 2324710, at *4 (Tex. 2017); Gore v. Health -Tex, Inc., 567 So. 2d 1307, 1308-1309 (Ala. 1990); Cweklinsky v. Mobil Chemical Co., 267 Conn. 210, 212–213 (2004); Gonsalves v. Nissan Motor Corp. in Haw., Ltd., 100 Haw. 149, 171–173 (2002); White v. Blue Cross and Blue Shield of Massachusetts Inc., 442 Mass. 64, 72 (2004); Sullivan v. Baptist Memorial Hosp., 995 S.W.2d 569, 574 (Tenn. 1999); Lunz v. Neuman, 290 P.2d 697, 701–702 (Wash. 1955).

Statutes: Colo. Rev. Stat. Ann. § 13-25-125.5 (current through May 10, 2017); Minn. Stat. Ann. § 181.933(2) (current through May 31, 2017); Or. Rev. Stat. § 30.178(2) (current through May 18, 2017).

New Jersey Reporter and Newspaper Get Prior Restraint Dissolved

By David Bralow

The Superior Court of New Jersey in March dissolved a prior restraint injunction, prohibiting *The Trentonian* and its reporter, Isaac Avilucea, from publishing information obtained from a "confidential" child protection complaint because the documents were "lawfully obtained." More precisely, the court found that the Attorney General's Office for the State of New Jersey had not demonstrated that Mr. Avilucea had unlawfully obtained the complaint.

And while the newspaper and its reporter successfully defeated a patently unconstitutional order, the emphasis on the reporter's conduct rather than the State's compelling interest in confidentiality demonstrates that the First Amendment right to gather news is in jeopardy at the local as well as the national level.

The story began with a reporter doing his job. On September 15, 2016, *The Trentonian* published an article about a five-year-old boy found with 30 packets of heroin in his lunch box. Police charged the father with child endangerment and the State of New Jersey intervened with a child protection plan, giving custody to the boy's grandmother. A month later, the child's mother approached *The Trentonian* with a horrifying update.

Notwithstanding the child protection plan, the school discovered that the boy had crack cocaine in a school folder, the mother said. The mother had been summoned to an emergency hearing that afternoon; she wanted to tell her story to regain custody and asked Mr. Avilucea to attend the hearing. Clearly, *The Trentonian* had reason to question the State's competency in dealing with these types of child protection cases.

While the newspaper successfully defeated a patently unconstitutional order, the emphasis on the reporter's conduct rather than the State's compelling interest in confidentiality demonstrates that the First Amendment right to gather news is in jeopardy at the local as well as the national level.

Before the hearing, Mr. Avilucea interviewed the mother, the custodial grandmother, and other witnesses. During this time, a case worker gave the mother a "Verified Complaint," that included allegations concerning the child's possession of cocaine and investigative reports. Visibly upset, the mother handed the reporter the complaint, saying: "You can have it." No stamp or legend indicated the complaint's confidential status. (Later, the State would testify that it never stamps these complaints confidential.)

It is upon this record that New Jersey first sought the injunction. At the initial ex parte hearing, the State argued that *N.J.S.A.* 9:6-8.10a made the complaint confidential, and, that *The*

(Continued on page 43)

(Continued from page 42)

Trentonian's mere possession was unlawful and should be restrained. The trial court granted the injunction and ordered a subsequent hearing to provide the *The Trentonian* an opportunity to argue on why the injunction should be vacated. The extreme measure occurred even though the State told the trial court that the reporter received the complaint voluntarily from the mother. Transcript of October 26, 2016, Hearing at 6:1-5. Notwithstanding the Order, *The Trentonian* published a story based on its interviews of the trial participants.

After the subsequent hearing, the Court accepted that there was a compelling state interest in confidentiality sufficient to permit a prior restraint without any showing of harm to the child, witnesses, or investigatory process or any analysis required under *State v. Neulander*, 173 N.J. 193, 204 (2002), New Jersey's Supreme Courts powerful affirmation of *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). Instead, the Court parroted *N.J. Div. of Youth & Family Serv. v. J.B.*, 120 N.J. 112 (N.J. 1990), an access to judicial records case that found a compelling interest to withhold judicial records from a newspaper. It ignored contrary arguments relying on in *Florida Star v. B. J. F.*, 491 U.S. 524, 532-41 (1989), and *Smith v. Daily Mail*, 443 U.S. 97, 103-06 (1979). It refused to acknowledge that the publication by *The Trentonian* of an article that detailed most of the facts in the Verified Complaint made such restraint unnecessary. *Florida Star*, 491 U.S. at 535 ("[P]unishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act"). It failed to give weight to the fact that the State of New Jersey did absolutely nothing to protect the confidentiality of the complaint. *Florida Star*, 491 U.S. at 538 ("Where, as here, the government has failed to police itself in disseminating information, it is clear . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity.")

Despite New Jersey's failure to demonstrate any particularized harm to the child, the witnesses or the process, the Court put the reporter on trial.

Despite New Jersey's failure to demonstrate any particularized harm to the child, the witnesses or the process, the Court put the reporter on trial. The Court ordered a hearing on the "disputed facts as to how the defendants Trentonian and Mr. Avilucea came into possession" of the complaint. January 27, 2017 Order, Superior Court of New Jersey, Docket No. FN-11-51-17. It focused on the criminal penalty section of the New Jersey statute that made child protection records confidential. That provision stated:

(Continued on page 44)

(Continued from page 43)

> Any person who willfully permits or encourages the release of the contents of any record or report in contravention of this act shall be guilty of a misdemeanor and subject to a fine of not more than $1,000.00, or to imprisonment for not more than 3 years, or both.

N.J.S.A. 9:6-8.10b. If the reporter's request violated the Statute, the Court reasoned that the documents were not "lawfully obtained" and the prior restraint could continue.

Such a hearing should have been unnecessary. Initially, an Assistant Attorney General told the Court that the mother had voluntarily given the complaint to Mr. Avilucea. But in an Amended Verified Complaint, the State alleged that an employee of Division of Child Protection and Permanency heard the mother say that "Mr. Avilucea had taken it her against her consent." In a subsequent declaration, supporting a memorandum of law, an Assistant Attorney General -- the same who represented to the court that it was a voluntary transfer – stated that the mother "blurted out that he (Mr. Avilucea) had taken the complaint from her." One can only question the State's motives on relying on these hearsay statements.

The Court ruled that there was no evidence that the complaint was unlawfully obtained and vacated the injunction.

The Trentonian argued that applying *N.J.S.A.* 9:6-8.10b in this way would infringed on the Mr. Avilucea's and its First Amendment right to gather news. Encouraging people to provide information is among the most fundamental of news gathering methods. *See Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99, 103-04 (1979) (explaining that, by asking witnesses for the name of a juvenile murder suspect, the press was using "routine reporting techniques"). In *Atlantic City Convention Center Auth. v. S. Jersey Publ'g Co.*, 135 N.J. 53, 67 (1994), the New Jersey Supreme Court recognized that "the right to . . . gather information is central to the First Amendment and basic to the existence of constitutional democracy."

While the right to gather news may be limited in some circumstances, any such limitations must be "content neutral" and "narrowly tailored to serve a significant government interest." *Ramos v. Flowers*, 429 N.J. Super. 13, 32 (App. Div. 2012). For the same reasons that a prior restraint would not meet constitutional standards, *N.J.S.A.* 9:6-8.10b application to would fail as well.

But the Court didn't need to reach the constitutional issue. During the hearing, the State provided no competent evidence that rebutted Mr. Avilucea's testimony. The State called the child's mother, who invoked the Fifth Amendment right against self-incrimination. The State called other witnesses who did not see or hear what transpired between Mr. Avilucea and the mother. Indeed, the State could not adduce any testimony different from what it told the Court

(Continued on page 45)

(Continued from page 44)

in the original ex parte hearing, five months earlier – that mother gave the reporter the complaint voluntarily.

The Court ruled that there was no evidence that the complaint was unlawfully obtained and vacated the injunction. Soon, thereafter the Superior Court of New Jersey Appellate Division and the New Jersey Supreme Court refused to grant interim emergency relief. And the complaint and its exhibits were published on The Trentonian's website (with medical information and the name of the child redacted). The case ended in a whimper.

But maybe not. This week, the reporter filed a motion seeking the Court impose sanctions, requiring the reimbursement of the reporter's legal costs and fees, arguing that the State "knew the Complaint was voluntarily provided," and its reliance on the hearsay statements unnecessarily prolonged the proceedings and, perhaps, violated the Rules of Professional Conduct. Furthermore, the reporter --through different counsel than the attorney who represented him in the prior restraint proceeding -- filed a defamation claim against the State.

David Bralow and Eli Segal of Pepper Hamilton LLP represented The Trentonian. Bruce Rosen of McCusker, Anselmi, Rosen & Carvelli, P.C., Florham Park, NJ, provided pro bono

Pulse Nightclub: One Year After the Tragic Shooting, Litigation Over 911 Calls Finally Comes to a Close

By Mark R. Caramanica and Allison Kirkwood Simpson

In the early morning hours of June 12, 2016, Omar Mateen entered Pulse Nightclub in Orlando, Florida and began randomly shooting patrons. All told, forty-nine people were killed that fateful night, and fifty-three others were seriously injured. After a three-hour hostage standoff, Orlando police stormed the nightclub and killed Mateen. The incident was and remains the deadliest mass shooting in modern history.

Naturally, the news media were interested in understanding exactly how events unfolded that night and sought access to emergency call public records related to the incident. However, attempts to obtain those 911 calls were rebuffed and approximately ten days after the shooting, a coalition of media entities sued the City of Orlando (the "City") in Florida state court seeking access to the hundreds of emergency calls placed that night (which the City initially said included roughly 600 recordings).

The City refused to release the recordings, claiming that they were all exempt from disclosure under section 119.071(2)(c)1, Florida Statutes, the "active criminal investigation" exemption, because the FBI was conducting an investigation and ordered the City not to release any records that would impede the investigation. In addition, the City also asserted that the calls were subject to another exemption found at section 406.136(2), Florida Statutes, which exempts the release of audio or video recordings that depict the "killing of a person." (This exemption is no longer in effect in Florida. The exemption was narrowed by amendment effective October 1, 2016 and now prohibits the release of information that depicts the "killing of a law enforcement officer." Since that amendment, however, there have been efforts to reinstate the exemption to once again apply to the "killing of a person." *See, e.g.,* Fla. H.B. 661 (2017); Fla. S.B. 968 (2017)).

Ultimately, the 911 recordings sought came out in either audio or written transcript form.

This article looks back on the year-long litigation odyssey of what should have been a fairly straightforward access lawsuit, but was derailed by the City's actions in response to the request for records, which began with the filing of a declaratory judgment action on the same day the news media coalition filed its complaint. Ultimately, the 911 recordings sought came out in either audio or written transcript form, including the four crucial recordings between the City

(Continued on page 47)

(Continued from page 46)

and Mateen, and the City was ordered to pay the news media coalition's fees with respect to a large portion of the litigation.

Procedural Detours and Delay

Less than one hour after a coalition of national, state, and local news media filed their complaint to enforce Florida's public records on June 23, 2016, the City filed a separate declaratory judgment action against The Associated Press only (which was one of the media entities requesting records from the City), seeking a declaration that all responsive 911 recordings were exempt under the active criminal investigation exemption and/or the killing of a person exemption. The two lawsuits were soon consolidated and an expedited hearing on the matter was set for June 28, 2016.

The Associated Press immediately moved to dismiss the City's declaratory judgment action, arguing it was duplicative and inappropriate given the news media coalition's first-filed complaint. That same day, the City amended its declaratory judgment action to add the U.S. Department of Justice ("DOJ") as a co-defendant, purportedly because of the FBI's role in ordering the records be kept secret. The Associated Press again moved to dismiss the amended action on June 28, 2016. However, upon being sued, DOJ immediately removed the case to the U.S. District Court for the Middle District of Florida. Attorneys for the news media arrived at the Orange County courthouse to find the scheduled expedited hearing canceled as the news media's first-filed complaint was swept up in the declaratory judgment action's removal to federal court.

On June 29, 2016, the news media coalition filed an emergency motion to remand the case back to state court, which, after briefing and argument, the federal court ultimately granted on August 25, 2016. In short, the Court found that the DOJ could not be sued by the City in a state public records action as DOJ never waived its sovereign immunity to be sued in such a case, and therefore, there was no subject matter jurisdiction. With no federal defendant remaining, the Court remanded the case back to state court. In so doing, however, the Court denied the news media coalition's request for attorneys' fees and costs because it still found that, once sued, DOJ properly removed the action. After this two-month side-track created by the City, the case headed back to state court.

State Court Proceedings

Once back in state court, The Associated Press renewed its motion to dismiss the declaratory judgment action. After hearing argument, the Court granted that motion on September 22,

(Continued on page 48)

(Continued from page 47)

2016. It found that the news media coalition's complaint was filed first, the City's declaratory action involved the same issues and was duplicative of the complaint, and that the City made no showing of exceptional circumstances in order to permit the later-filed declaratory action to proceed.

After approximately three months of procedural delays, the lawsuit was now in the same posture as when the news media coalition initially filed its complaint. The Court could finally move on to determine the merits of the cited exemptions.

A. The Asserted Public Records Exemptions

At a September 2, 2016, status conference, the state court had ordered the City to produce an exemption log itemizing each of the withheld calls and the nature of the exemption asserted for each. The City filed its log on September 21, 2016. It revealed that the City continued to claim that all of the 400+ calls on the log were exempt under the active criminal investigation exemption, but that the City now claimed that only approximately 230 of those calls were also subject to the "killing of a person" exemption. The latter exemption was asserted for all calls going into or out of the Pulse Nightclub, including the four between the City and Mateen.

At the September 22, 2016, hearing on the active criminal investigation exemption, a City witness eventually admitted that the City transferred only forty to seventy 911 recordings to the FBI as part of a joint investigation. As to the remaining calls, an FBI witness testified that the FBI had no opinion as whether those calls should be publicly released. The City argued, nonetheless, that the active criminal investigation applied to all of the recordings because of a joint investigation between the City of Orlando Police Department and the FBI. In response, the news media coalition argued that Florida law was clear that 911 calls are not per se investigatory records, the existence of a federal government's criminal investigation did not change the City's obligation to produce the records because the records were created by the City, and providing otherwise public records to the FBI did not transform them into exempt investigative records.

Before the Court could decide the applicability of the active criminal investigation exemption, the City released all recordings for which it was claiming only the active criminal investigative exemption. This was because the FBI suddenly announced it no longer had an investigative interest in the 911 recordings. Thus, the Court did not rule at that time on whether the City had unlawfully refused to release those records.

Through separate briefing and evidentiary hearings held in October, the Court next addressed the "killing of a person" exemption. The City argued that the 230 remaining calls

(Continued on page 49)

(Continued from page 48)

depicted the killing of a person as defined in the applicable exemption, which includes "all acts or events that cause or otherwise relate to the death of any human being, including all related acts or events immediately preceding or subsequent to the acts of events that were the proximate cause of death." According to the City, many of the withheld calls contained sounds of gunfire and/or suffering and were otherwise temporally connected to the shooting. They therefore related to the "killing of a person."

In response, the news media coalition argued that the City applied the exemption too broadly by attempting to assert a blanket exemption for all calls into and out of the nightclub for the time period at issue. Withholding all of the calls because they generally related to the shooting was argued to be an arbitrary reading of the statute. Finally, even if the exemption applied, the news media argued that there was "good cause" under the good cause exception to the exemption for the release of the recordings. The City ultimately did not oppose a finding of good cause to release the calls between the City and Mateen, but opposed it for all remaining calls.

In October, the Court quickly granted the news media coalition's good cause petition with respect to the Mateen calls, and those were released soon thereafter by the City. At the same hearing where it order the Mateen calls released, the Court also heard testimony from family members of the deceased and later conducted an *in camera* review of the 230 calls to determine whether the killing of a person exemption applied. The Court ultimately ruled that under the "unique and specific facts" of the case, it was "an impossible burden" for the City to determine on a record-by-record basis whether each recording related to an individual who ultimately died. The Court therefore held that the "killing of a person" exemption applied to all 230 calls coming into or out of the nightclub. In that same ruling, however, the Court also found that the news media coalition established good cause for the release of the remaining 911 calls (with all but a small number, those determined to be especially graphic, being released in audio form). Save for the few graphic calls that were required to be released in transcript form only, by mid-November (five months after the shooting), all City 911 calls related to the shooting had been wrestled free by the media.

B. The Push Attorneys' Fees and Costs.

In December 2016, the news media coalition filed its motion for fees for the City's "unlawful refusal" to release public records. The news media contended that the City unlawfully refused access to public records in four ways: (1) the unlawful assertion of the active criminal investigation exemption because the FBI's investigation had no bearing on its

(Continued on page 50)

(Continued from page 49)

duty to release the City records; (2) even if the FBI investigation required the City to withhold records, only a small portion (40-70) of the 911 recordings were ever provided to the FBI; (3) the unlawful assertion of the "killing of a person" exemption, at the outset, to all recordings was abandoned when the City filed an exemption log and thus an unlawful assertion; and (4) the unlawful initial assertion of the "killing of a person" exemption to the four audio recordings between Mateen and City officials.

The City argued that it did not unlawfully refuse access to the records for the following reasons: (1) the active criminal investigation applied to *all* withheld records; (2) even though the FBI only received a portion of the records, that fact alone did not defeat the application of the active criminal investigation exemption to all of the records; (3) the City only claimed that the killing of a person exemption *may* apply to all responsive records; and (4) the killing of a person exemption was properly applied to the four calls between Mateen and City officials. The City also argued that the media coalition should not be awarded fees for the federal court litigation or the litigation over the declaratory judgment action that was dismissed.

After hearing the motion for fees and costs in January 2017, the Court issued its fee order on May 5, 2017. The Court found the following as to each category:

(1) Active Criminal Investigation Exemption.

Because the Court had not previously decided whether the active criminal investigation exemption applied, it did so in order to determine whether the exemption was rightfully asserted from the beginning for purposes of the fee request. It was not disputed that the FBI was conducting an investigation. At some point early in the investigation, the City reviewed the 911 recordings and provided a subset (40-70) calls to the FBI. But the City withheld all 400+ calls on the purported basis that they were part of the federal investigation. Nor did the City conduct any exemption review of each responsive record when the media first made the public records request. In fact, the City did not review the records until ordered to do so by the Court in September 2016 to create an exemption log, which was three months after the initial public records request.

The Court noted that the existence of a federal criminal investigation does not render otherwise public records in the custody of the City exempt under the active criminal investigation exemption. The fact that the City provided records to the FBI did not make them confidential if they were not initially confidential. But, in a somewhat contradictory conclusion, because there was indeed a federal investigation until at least September 2016, the

(Continued on page 51)

(Continued from page 50)

Court also found that the 40-70 calls provided to the FBI were exempt pursuant to the active criminal investigation exemption. The remaining records for which the exemption was asserted were found to be unlawfully withheld. It was of no legal consequence that the City, during the course of the litigation, eventually released approximately 230 recordings it withheld pursuant to the exemption once the FBI determined it no longer had an interest in those calls. The media coalition was entitled to fees for enforcing their rights to those unlawfully withheld records.

(2) "Killing of a Person" Exemption.

When the Court found good cause to release the Mateen calls, it did not actually rule on whether the "killing of a person" exemption applied to the four calls between Mateen and City officials in the first place. A review of the calls revealed that they contained no background noise of shooting victims and thus did not capture or reflect the killing of a person. Rather, to say that they generally related to the "killing of a person" because Mateen was the perpetrator or was later killed by police stretched the exemption too far. Thus, the Court concluded that the City unlawfully withheld the four perpetrator recordings, and the media coalition was entitled to fees and costs for their efforts to enforce their right of access to the recordings.

The parties ultimately reached agreement on a fee award, with the City paying $100,000.00 in fees in late June.

(3) The Declaratory Judgment Action and Federal Court Proceedings.

The Court had previously found that the declaratory judgment action was improper and duplicative of the news media coalition's initial complaint, of which, the court noted, the City was on actual notice before filing the duplicative declaratory action one hour later. The City then added DOJ, which resulted in the immediate removal to federal court. The City's actions indeed forced the media coalition to litigate two lawsuits to enforce their rights to Florida public records. The Court acknowledged that this was unnecessary, drove up costs, and caused a significant delay in resolving the case on the merits. It therefore ordered that the media coalition was entitled to the fees incurred related to the declaratory judgment action, but only to the extent the time concerned the unlawfully withheld records. The Court also found that the media coalition was not entitled to fees related to the removal and remand of the declaratory action to federal court because DOJ was found to have properly removed, with the federal court declining to award fees against DOJ for improper removal.

(Continued on page 52)

(Continued from page 51)

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The parties ultimately reached agreement on a fee award, with the City paying $100,000.00 in fees in late June. The case was voluntarily dismissed exactly one year after the news media filed their complaint. Because of the later-filed declaratory judgment action, the City's decision to add DOJ, DOJ's subsequent removal of the case to federal court, and the remand back to start court, the unusual procedural posture of the case meant that the litigation stretched nearly a year, delaying final resolution of the merits, and release of all requested records, until November. In the end, it was revealed that the City did not even attempt to review any of the requested records when the request was made, and simply blanketly asserted exemptions. The City should have released the calls between Mateen and the City on request, those calls were the ones most sought after and ultimately found never subject to exemption.

Had the City resolved to work with the news media in the wake of the tragedy, rather than simply stonewalling, litigation may have been avoided.

Moreover, it was only after the news media filed suit that it was revealed that the overwhelming bulk of the records never even reached the FBI. In retrospect, had the City resolved to work with the news media in the wake of the tragedy, rather than simply stonewalling, litigation may have been avoided. Deciding not to release a single record (and apparently not even reacting to the request other than to deny it) ultimately led to litigation that the City itself then prolonged, running up fees and delays for all sides. Most importantly, for months while the public struggled to come to grips with this tragedy, it was denied crucial information from the killer's own mouth.

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