

MULRC *Media
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MEDIA LAW LETTER

October 2021

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From the Executive Director's Desk

A Recent History of the MLRC

By George Freeman

This month's column is from an essay in the program of MLRC's Annual Dinner, held November 10 in New York City.

On the occasion of our 40th Anniversary last year, I had planned to republish articles written by the MLRC's past leaders Henry Kaufman and Sandy Baron, published in the Dinner Program commemorating our 35th year (and [available on the MLRC website](#)), on the history of our organization until then. Of course, because of Covid, we didn't have an actual Dinner last year, and didn't publish a program. So now, I thought I would add to their excellent pieces by reviewing the six years since our 35th.

Of course, the biggest development and greatest challenge to confront us has been the Covid pandemic. In that second week of March 2020, the future looked glum – for media companies, for law firms and for us. But somehow, while human tragedy very sadly surrounded us, our members and our organization, on the whole, survived quite nicely.

In that scary week, we already decided to have a staff conference call each morning at 9:30 to decide when we could return to the office – we assumed it would be a week or two – to have a semblance of togetherness during lockdown, to report on our plans and assignments for the coming day, and to share ideas and suggestions for the projects we were working on. Within a couple of weeks, that telephone call morphed into a daily morning Zoom call – and it has



MLRC Executive Director George Freeman, left, interviews Justice Stephen Breyer at the 2019 London Conference

continued daily, with hardly an exception, to the present day. It has enabled us to work efficiently together, and I feel we have been as productive working from home as we were in those bygone office days. Remarkably, when we all met for the first time in person at our Media Law Conference in Virginia last month, the much anticipated meeting was anticlimactic, as we were so used to seeing each other on screen so often.



MLRC's Covid-era Zoom meetings featured such luminaries as Bob Woodward

More important, as the out-of-office regime lingered on and lockdown threatened to keep all our members remote and apart, we thought we should take steps to try to bring the community together. So we began a series of Zoom calls, open to all members, featuring expert guest speakers to discuss the pandemic and its effect on journalism and the law. After the first month or two, we had covered these Covid issues pretty thoroughly, so we adjusted our agenda to focus on timely, important and interesting journalistic developments and legal issues.

In the succeeding months we have had close to 100 such calls, generally engaging an audience of between 75-250. We have had star speakers, from Bob Woodward to Nick Kristof; we have explored timely topics – the NY Times' controversial Sen. Tom Cotton op-ed piece, the Julian Assange extradition ruling, the Amber Heard/Johnny Depp UK trial of the century, and the Supreme Court's new open telephonic oral arguments; we have delved into interesting legal issues such as Trump as a Libel Bully, the constitutionality of laws barring mass gatherings because of Covid, libel based on quasi-fictional characters, and leaks and national security with Columbia University President Lee Bollinger; and we've just had fun discussing the legal issues arising from the Borat movies.

When I arrived at MLRC in September 2014, it was pretty clear that we needed to grow in the digital area – both in terms of our membership and in the content we were offering members. We've succeeded on both fronts. Major digital companies, such as Facebook, Netflix and Apple have become valuable members. We also have added to our list of publications a Digital Review, a very thorough monthly newsletter on tech developments authored by a true expert, our Deputy Director Jeff Hermes.

At the same time, I felt opportunities for expansion existed in Europe. We have long had a rather vibrant membership in the UK, but not really across the Channel. So to enlarge our footprint, to proselytize First Amendment values in the EU and to bring free speech lawyers throughout Europe together, we began having a small conference annually in Europe geared specifically to European media lawyers. The first three were in Paris, the first in the aftermath of the Charlie Hebdo killings, and the next two in Berlin; unfortunately in the last two years

planned conferences in Amsterdam were cancelled because of the pandemic. The conferences have highlighted some of the stark differences between European and American principles regarding free expression, and have served as a provocative first step in nudging the EU needle a bit in favor of greater free speech rights.

We have focused on growth and expansion in other areas as well. To ensure a vibrant future, and in recognition that some (but, hypothetically, not all of us) are aging, we recognized that to remain vibrant, we needed the involvement and enthusiasm of younger and putative media lawyers. So we have begun a new student membership program, as well as an actual membership category for law clinics at law schools with whom we have collaborated on some projects. We also established a Next Generation Committee, and I'm happy to say that it has become one of our most active and popular committees.

In addition to the new Digital Review mentioned above, we have also added a new weekly publication, the brainchild of our Production Director Jake Wunsch, entitled In Case You Missed It (ICYMI). It is distributed every Saturday morning and is a compilation of the most interesting, but somewhat light, articles of the week which have appeared in our ever-popular MediaLawDaily. It's designed to be perfect weekend reading, on engaging, but not too heavy, media law topics.

Speaking of new committees, the changing times have inspired us to inaugurate committees to cover a variety of new issues which have come to the fore. Thus, in a way unfortunately, all the altercations between journalists, protesters and the authorities were the genesis of the formation of a Criminal Law Committee, which has been a great addition, particularly in light of all the BLM demonstrations in the last few years. We have added both a Data Privacy Committee and an Insurance Committee as a response to the increased importance of those areas. We are currently working on commencing a Media Deals Committee, to expand our reach a bit more into the transactional work sector.

The Trump years afforded us no shortage of challenges and issues; never in our history has a President had such an antipathy, if not hatred, for the press – and for the core values which are our lifeblood. I am particularly proud of a project which was the result of a collaboration of three of our committees stemming from our anticipating the White House's barring journalists it deemed unfavorable from press conferences and other forms of access to the Executive Branch. The committees put together a template of a brief which could be used to make legal



To enlarge our footprint, proselytize First Amendment values, and bring free speech lawyers throughout Europe together, MLRC launched an annual European Conference.



A panel at our Virginia Conference on the 50th Anniversary of the Pentagon Papers featured Times journalists (left to right) Fox Butterfield, Janny Scott, Linda Amster, and Hedrick Smith. Above (left to right): Butterfield, Amster, and Smith in 1971, working on the story in a clandestine hotel room.

arguments about such an issue – and, bingo, as if on schedule, just months later Trump barred a CNN reporter from such conferences seemingly because he didn't like his reporting.

I would be remiss if I didn't report on a similarly timely project which is ongoing. In light of Justices Thomas and Gorsuch's recent dissents suggesting reconsideration of the Supreme Court's 57-year old precedent in *New York Times v. Sullivan*, of course the leading libel case in our jurisprudence, the MLRC is working on a White Paper which refutes those dissents on legal, factual, empirical, practical and comparative law grounds. We hope, when completed, it will be used not only to influence public opinion, but to aid lawyers faced with attacks on the *Times v. Sullivan* "actual malice" rule. Needless to say, as our highest honor, the William J. Brennan Jr. Defense of Freedom Award, is named after the author of that historic opinion, this issue goes right to the core of our mission and values.

Another innovation in the last few years was the member listserv. It was designed as a vehicle through which members could chat with one and other – about recent Supreme Court opinions and other legal developments, about politics and current events, and even about movies, tv shows, sports and just plain juicy gossip. But, interestingly, it has come to be used by members more as a legal help line. Participants have posted thorny legal problems which have arisen in their practice and received valuable advice and counsel from their fellow members. It has become an intriguing and profoundly helpful means of communication for our members.



2021 Nobel winner Maria Ressa accepts the Brennan Award on behalf of besieged journalists abroad at MLRC's 2019 Annual Dinner

Also aiding our members' legal research and work has been a practical innovation with a mainstay of our resources, our 50-state surveys on libel and privacy laws. Through a contract we negotiated with Lexis, these tomes are now available digitally – no need to carry around those weighty over-thousand page volumes anymore. More important, while doing research, the reader can often link to the very case they are reading about, making one's work so much more efficient.

Finally, we have forged a close relationship with the Knight Foundation which gave us a very generous three-year grant to finance legal workshops we have presented to journalists all over the country. At the outset we organized and promoted these seminars for journalists in various cities, but with Knight's aid, we have focused our more recent efforts on giving these workshops at journalistic conventions, such as those of the National Association of Black Journalists (NABJ), the Investigative Reporters and Editors (IRE), and so on.

Of course, at bottom, in the years 35-41 we have also relied on the established benefits which have long been the basis of our success. Our ongoing conferences, publications, committees and legal initiatives have continued as the mainstays of our operation, although in many cases we have tweaked them somewhat to make them more timely, more relevant, more useful and sometimes just more fun. For example, we have continued and perhaps improved our very popular London Conference by moving it from Stationers Hall, which we had grown out of, to the stately Law Society, where we most recently featured Supreme Court Justice Stephen Breyer as a keynote speaker. And my co-impresario Deputy Director David Heller and I began a new tradition on the Saturday before the Conference of leading a sporting group of two dozen to a Premier League soccer game just to be a bit inculcated in English culture.

Likewise, last month we moved the Virginia Conference from its old home in Reston to the lovely and much greener Lansdowne resort hotel, hard by the banks of the Potomac. That Conference was also noteworthy in being our first in-person conference in 20 months, but beyond the social delight in seeing old friends and colleagues, it was perhaps our best Conference ever just in terms of our substantive programs: a timely program on the problematic poor perception of journalism and journalists, featuring the Executive Editor of the Washington Post; a program on the thorny subjects of Sec. 230, disinformation and social media content moderation; one on the continued vitality of *Times v. Sullivan* in light of the aforementioned attacks on it; a truly all-star cast of lawyers discussing the fascinating voting machine company libel cases against Fox, Rudy Giuliani, et al., where our allegiances are all over the lot; and a riveting retrospective commemorating the 50th anniversary of the Pentagon Papers, featuring the New York Times journalists who in 1971 were squirreled away at a hotel for months secretly working on the series. Btw, tapes of those sessions will be available to those who were not able to attend the conference.



Hugh Grant and Katie Couric at our 2014 Dinner

Lastly, and coming full circle to this Dinner which brings you here tonight, we have had some simply terrific Annual Dinner programs. In my first month as E.D., we enjoyed Katie Couric interviewing Hugh Grant on his experiences involving invasion of privacy. In November 2016, less than 24 hours after Donald Trump won the Presidency, we held our Dinner in a funeral atmosphere, but were somewhat uplifted by listening to Daniel Ellsberg (who then received the Brennan Award), Edward Snowden (by Skype from Moscow) and Floyd Abrams on leaking and national security. We also have had great group panels featuring former presidential press secretaries (including Ari Fleischer and Dana Perino) discussing Trump's relationship with the media, women reporters (such as Maggie Haberman) on covering the presidential election campaign, and a program commemorating the 50th anniversary of 1968 (with Jeff Greenfield moderating for Max Frankel, Marvin Kalb and others). And last year we had a Zoom call program starring N.Y. Times and Washington Post executive editors Dean Baquet and Marty Baron, along with tv news anchors Andrea Mitchell and John Dickerson.

In sum, it has been an eventful period in MLRC's history. That said, looking forward, I think we could well do without a global pandemic which has caused so much pain and suffering and which has certainly hindered our activities. And we could also do without a President who was at war with our members and our values, just for his personal political gain. Let's hope these blights are in the past, and that we can continue providing valuable, educational and engaging benefits to our members in more normal and happier times.

Baltimore Jury Returns Defense Verdict in Public Official Media Defamation Trial

By Chad R. Bowman, Maxwell S. Mishkin, and Emmy Parsons

A Baltimore jury returned a defense verdict at the end of a two-week, in-person trial against Sinclair Broadcast Group and its investigative reporter Chris Papst, in a media defamation and false light invasion of privacy case over a series of broadcast news reports. *Freedom & Democracy Public Charter Schools Northwood Appold Community Academy, Inc. v. Sinclair Broadcast Group, Inc.*, Case No. 24-C-20-118 (Md. Cir. Ct. 2021).

The Plaintiffs were Freedom and Democracy Charter Schools Northwood Appold Community Academy, Inc. (“NACA”) and its executive director, the Reverend Dr. Cecil Gray. They served as the “operators” of two troubled Baltimore public charter schools. The Baltimore City Board of School Commissioners shut down one of those schools in January 2019, and the other the following year. Their defamation action challenged several news reports that were part of WBFF-TV’s national award-winning “Project Baltimore” series about the public education system in Maryland, reports that raised questions about NACA.

The claims survived motions to dismiss and for summary judgment, but steadily narrowed as the trial progressed. Baltimore City Circuit Court Judge Shannon E. Avery granted a motion to dismiss all claims by NACA during pre-trial motions, leaving Dr. Gray as the sole plaintiff. Following the close of Dr. Gray’s case and argument on a defense motion for directed verdict on eight statements challenged in the Complaint, the Court granted the motion except as to a single statement—an alleged false implication that Dr. Gray had failed to pay his *personal* taxes. That statement alone ultimately went to the jury.

Deliberations proceeded for portions of three days, became heated—shouting was audible in the courtroom and juror notes came at a rapid clip—and appeared close to deadlock. However, on Friday, October 1 the jury returned its unanimous verdict for Defendants.

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Background

Plaintiffs

Dr. Gray, pastor at the Northwood Appold United Methodist Church in Baltimore, founded and leads NACA, a nonprofit that operated two schools within the Baltimore City Public School System (“City Schools”): an elementary school, known as “NACA I,” and a middle-and-high school, “NACA II.”

The schools and their leadership became troubled. City Schools officials sent a series of written warnings and reprimands to NACA and Dr. Gray in 2017 and afterward, citing a failure to comply with system policies or other deficiencies. In January 2019, the Baltimore City Board of School Commissioners voted not to renew NACA I's charter. The vote followed a public presentation that described NACA I as having "a pattern of Title I noncompliance which places the entire district's Title I award at risk" and its operator as having "a history of non-compliance in meeting district and contractual obligations" and having "violated Human Capital requirements and the Family Education Rights and Privacy Act." NACA appealed that decision to the State Board of Education, which upheld the non-renewal.

The following year, the Board of School Commissioners voted to close NACA II as well, following a public presentation that described the school as "Not Effective" in "Academic Performance" and "Financial Management / Governance" and that noted its "operator has had a myriad of issues related to Title I management, Human Capital concerns, and has needed supplemental funding/loans to meet staffing requirements."

Project Baltimore

In March 2017, Sinclair Broadcast Group's Baltimore station WBFF-TV launched an independent investigative reporting team called "Project Baltimore" to focus on long-term investigations of major issues facing the Baltimore region and Maryland, with a first look at education. Project Baltimore in four years has received numerous accolades and awards, including 21 Emmy awards and national awards from groups like Investigative Reporters & Editors (IRE). The team has also received formal recognition from the Maryland House of Delegates and the Maryland State Comptroller for making an outstanding contribution to the betterment of Maryland's education systems. Mr. Papst has been the lead reporter for Project Baltimore since its launch.

From August 2017 through September 2019, WBFF broadcast several news reports about the NACA schools among its hundreds of investigative reports during this time. Five of these news reports were later identified in Plaintiffs' Complaint.

In the [first report](#) at issue, broadcast on August 2, 2017, WBFF explained that "a months-long Project Baltimore investigation has raised serious questions about how NACA II is being run and how students there are graduating." The other four reports at issue were all broadcast in 2019—on [May 6](#), [May 8](#), [May 29](#), and [Sept. 2](#)—after City Schools voted to close NACA I. They reported on the incongruity of the closure compared with a prestigious grant that NACA had recently received from the federal Department of Education—an award of \$1.5 million, just one of 17 such merit awards given to charter schools across the country in 2017. The news reports all raised questions about NACA, and Mr. Papst regularly solicited comment from NACA and Dr. Gray.

By the end of the trial, only a statement in [the May 29, 2019 news report](#) remained at issue. That report noted that NACA's related organization, Northwood Appold United Methodist

Church, was three years in arrears in federal taxes and the subject of a federal tax lien, even as NACA received a significant federal grant. *Id.* The broadcast included an image of the relevant court document, but Dr. Gray argued that readers could understand an online version of the news report as referring to his personal taxes rather than the lien against his church.

Proceedings Prior To Trial

In January 2020—a year after the official vote to close NACA I, and just days before the official vote to close NACA II—Dr. Gray and NACA filed their Complaint in Baltimore City Circuit Court. Defendants moved to dismiss on various grounds, including the fair report privilege. A motions judge denied the motion without prejudice in May 2020.

The parties then proceeded through discovery. Plaintiffs served written requests but opted not to depose Mr. Papst or any other WBFF employees. Following the close of discovery, Defendants moved for summary judgment, principally on the grounds that (1) Plaintiffs could not prove that the challenged reports were substantially false and (2) Plaintiffs are public officials and they failed to establish that Defendants published the challenged reports with actual malice fault. Plaintiffs argued that actual malice could be inferred by clear and convincing evidence from the news reports themselves.

A different motions judge heard oral argument by remote video conference on the summary judgment motion in August 2021, and denied that motion in its entirety from the bench. The case was then set for trial the following month.

Pandemic Trial Issues

In the weeks before a scheduled September 20, 2021 trial date, Defendants filed various motions *in limine*, including a motion to bar claims by NACA given that it was of asserting a defamation claim over its functions operating a public school, and therefore acting as an arm of the state. Baltimore trial co-counsel for Defendants also entered appearances.

However, the logistics for the trial—and, indeed, whether it would proceed on schedule—were not clear until several days beforehand, when Judge Avery was assigned on the afternoon of Thursday, September 16. During a pre-trial telephone conference on Friday, September 17, the judge explained that she would start with jury selection on Monday morning, then take up pending motions, before opening statements.

Due to COVID-19 capacity restrictions in the courtroom, potential jurors would be brought into the courtroom in small groups, for successive rounds of voir dire by the court based on party submissions. Strikes for cause would be handled at the bench at the end of each round, with preemptory strikes coming at the end of the day.

Everyone in the courtroom, including jurors, lawyers, and witnesses, were required to wear masks throughout the proceedings. Plastic barriers surrounded the witness box.

Everyone in the courtroom, including jurors, lawyers, and witnesses, were required to wear masks throughout the proceedings. Plastic barriers surrounded the witness box. The combination of masks and barriers—as well as a circular courtroom—made sound difficult. Microphones were mounted in the witness box, at the bench, and at counsel table (a table shared by both plaintiff’s counsel and defense counsel) and loudspeakers were pointed to the gallery, where six jurors and two alternates sat in socially distanced, assigned seats. Jurors regularly sent notes complaining when witnesses or lawyers sat too far from microphones, or spoke too quickly. One witness was given a paper mask after she was unable to be heard clearly through a thick cloth mask.

The Trial

Jury selection began on September 20, 2021 and took a full day. During a hearing the next morning, the Court heard argument on the motion to dismiss NACA and—following a demand for additional time to respond by counsel for Plaintiffs--adjourned the hearing for 24 hours and allowed a supplemental written response. After additional oral argument on Wednesday morning, Judge Avery granted the motion, deferred remaining evidentiary motions *in limine* for resolution when they arose during trial, and called in the jury for opening statements.

Counsel for Plaintiff then called a series of former NACA students—including Plaintiff’s daughter—and other community members as witnesses to testify to their positive impressions of the school and warm feelings towards Dr. Gray personally. Notably, none of the student witnesses had attended the NACA schools during the time period on which WBFF reported. Dr. Gray did not call any faculty or administrators from the school to testify.

Dr. Gray testified last, after which Defendants moved for a directed verdict. The court granted that motion in part, narrowing the case to the one challenged statement.

The second week of trial began with Mr. Papst’s testimony about his reporting. He was followed by former NACA teacher, a former principal of NACA II (who was later named Maryland’s principal of the year for her work in her subsequent role, and indeed [featured](#) on the *TODAY* show during the first day of trial) and a senior City Schools official who was closely involved in the recommendation to close the NACA schools. Defendants then unsuccessfully renewed their motion for directed verdict, the parties delivered closing arguments, and the jury was instructed and received the case on Wednesday, September 29.

The six-person jury proceeded to deliberate through Wednesday afternoon and all day on Thursday, with a steady stream of jury notes that on Thursday began to ask questions about hung juries. (Under Maryland law, the verdict must be unanimous unless both parties agree to a majority verdict.) At times, shouting and raised voices from the jury room could be heard in the courtroom, through multiple closed doors. While specific words could not be made out, it was clearly that jurors were engaged in a spirited discussion. The Court commented during one discussion of the response to a jury note: “I understand it’s hot in there.”

Deliberations on Friday morning became “confrontational,” and the Court called in a deputy and recalled the jury to instruct them. When asked if they were able to continue, one juror suggested a deadlock but the jury foreperson, after consulting the other four jurors, asked for deliberations to proceed. Shortly afterward, the jury unanimously determined that the one remaining challenged statement—the alleged implication that Dr. Gray failed to pay personal taxes—was not published with actual malice. The Court entered judgment for the defense.

Plaintiffs did not file either post-trial motions or notice an appeal.

Trial counsel for defendants were Chad R. Bowman of Ballard Spahr LLP and Christopher C. Jeffries and Amy E. Askew of Kramon & Graham, P.A. in Baltimore, supported by Maxwell S. Mishkin, Emmy Parsons, and trial paralegal Ryan Relyea of Ballard Spahr. Plaintiffs were represented by F. Joseph Gormley of FJGormley LLC.



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Winning Under the Negligence Standard: CBS Affiliate Reasonably Relied on Law Enforcement When Airing Wrong Mug Shot

By Michael J. Lambert

“The negligence element of the defamation claim is dispositive in this case.”

Media law practitioners do not expect to see this sentence in an opinion at the motion to dismiss stage, especially when viable privileges are still available, but that’s how the Texas Court of Appeals resolved a defamation case against CBS-owned television station KTVT in late September. The Court held that KTVT was not negligent for airing the wrong mug shot of a bank robbery suspect that it had received from law enforcement: “[T]here is no evidence supporting a conclusion that a photograph obtained from a law enforcement agency after a public-information-act request using the correct name and birth date of the individual would warn a reasonably prudent broadcaster of its defamatory potential.” [CBS Stations Group of Texas, LLC v. Burns](#), No. 05-21-00042-CV, 2021 WL 4398031 (Tex. App.—Dallas Sept. 27, 2021, no pet. h.).

Background

In early 2019, Dallas-based KTVT prepared a report on four individuals, including a man named Cedric Burns, who had robbed a bank at gunpoint and were arrested in a high-speed chase in Hurst, Texas. After learning the names and birth dates of the suspects from authorities, KTVT submitted Texas Public Information Act requests to law enforcement agencies, including the Tarrant County Sheriff’s Office (TCSO), seeking mug shots of the suspects. Instead of sending the mug shot of the Cedric Burns suspected of bank robbery, TCSO gave KTVT a mug shot of another Cedric Burns in its database from a previous arrest. KTVT, having no reason to know of the mix-up, included the mug shot in its 5:00 p.m. broadcast. Soon after, the Cedric Burns featured in the broadcast (but not arrested for bank robbery) informed KTVT about the error. The station immediately removed the image from its website and future newscasts.

“The negligence element of the defamation claim is dispositive in this case.” Media law practitioners do not expect to see this sentence in an opinion at the motion to dismiss stage.

Dallas County District Court Denies TCPA Motion

A year later, Burns sued KTVT for defamation and intentional infliction of emotional distress in Dallas County District Court. In response, KTVT filed a Motion to Dismiss under the Texas Citizens Participation Act (TCPA), the state’s anti-SLAPP law, asserting various grounds for dismissal. Tex. Civ. Prac. & Rem. Code Ann. §27.001, *et seq.* Two days after the expiration of

the statutorily required 30-day time period to rule on the TCPA Motion, the court issued an Order denying the TCPA Motion without explanation. KTVT appealed.

Texas Court of Appeals Reverses and Dismisses Case

KTVT argued to the Court of Appeals that constitutional, common law, and statutory privileges protected its use of the mug shot and that it had the right to rely on law enforcement's representations in newsgathering, even if the information received is ultimately false. It explained that the report was protected under the fair report and fair comment privileges and as a substantially true recounting of a third-party allegation about a matter of public concern. Tex. Civ. Prac. & Rem. Code §§ 73.002(b)(1), 73.002(b)(2), 73.005(b). It also argued that the report was substantially true and that Burns failed to establish clear evidence of actual malice.

Presented with all of KTVT's defenses, the Court of Appeals relied on a less common off-ramp at the motion to dismiss stage—negligence. In its opinion, the Court first found that Burns was a private figure because, “while the controversy—the identity of the persons arrested for the robbery and involved in the high-speed chase—was likely a topic of public discussion, there is no evidence that the plaintiff here, Burns, had more than a tangential role in the controversy at the time his photograph was published.” Burns also did not seek publicity about the robbery, have access to the media, or voluntarily engage in activities involving an increased risk of exposure and injury to his reputation, the Court wrote.

The Court next turned to whether KTVT aired the report negligently—that is, whether it knew or should have known the mug shot was false. As purported evidence of fault, Burns attached to his response to the TCPA Motion a screenshot of Google search results for “cedric burns cbs,” a letter from his psychologist, a letter stating that he had eight speaking engagements cancelled because of the report, and an affidavit. In the affidavit, Burns testified that he received many calls and texts from individuals about his picture being linked to “these horrible crimes,” that he called KTVT and spoke to a manager about the problem, and that the report harmed his career and health. Even taking all his submissions as true, the Court held that Burns did not show CBS was negligent in publishing the photograph: “We conclude Burns failed to present clear and specific evidence that CBS knew or should have known that publication of the photograph in connection with the report on the robbery was false.” The Court then dismissed Burn's IIED claim because it was based on the same facts as the defamation claim. It also awarded costs and attorney's fees to KTVT under the TCPA.

Conclusion

Although media lawyers shouldn't expect to see a trend of negligence-based decisions, it's comforting to know the possibility exists. The Court's unusual decision to dismiss the case on negligence grounds in the face of many other defenses serves as a reminder that, at times, libel defendants can still succeed on fault if a plaintiff is not a public figure.

Laura Lee Prather and Catherine Robb of Haynes and Boone, LLP represented KTVT. Michael J. Lambert is an associate at the firm.

Unanimous Georgia Supreme Court Resuscitates Georgia Anti-SLAPP Law

Schools Georgia Court of Appeals on First Amendment Doctrine

A long-awaited decision of the Georgia Supreme Court has restored life to the state's anti-SLAPP statute, reversing decisions by a state trial court and the Georgia Court of Appeals that backhanded basic First Amendment principles and threatened to leave the law's protections an empty shell. [American Civil Liberties Union v. Zeh](#), 2021 Ga. LEXIS 656, 2021 WL 4848265 (October 19, 2021).

Background

In 2018, the American Civil Liberties Union published a blog post entitled, "Glynn County, Georgia's Crooked Public Defender," asserting that B. Reid Zeh, the public defender for misdemeanor cases in Glynn County, Georgia, had charged an indigent criminal defendant a fee for his public defense service.

The blog's assertions tracked those in a proposed amended complaint filed by the ACLU the day before in a federal civil rights class action lawsuit pending against Zeh and others. The lawsuit alleged that those charged with misdemeanor crimes in Glynn County were subject to a "two-tiered pretrial justice system" in which "[t]hose who cannot afford a predetermined monetary bail or to hire a private attorney are jailed indefinitely, while those who can pay go free."

A long-awaited decision of the Georgia Supreme Court has restored life to the state's anti-SLAPP statute.

Two months after the blog post, Zeh responded with a state court defamation suit, claiming that the referenced fee charged was for a felony representation, unrelated to his public service. He sued both the ACLU and a local newspaper, which had published an article headlined, "ACLU alleges lawyer 'extorted' arrestee's mother for son's defense."

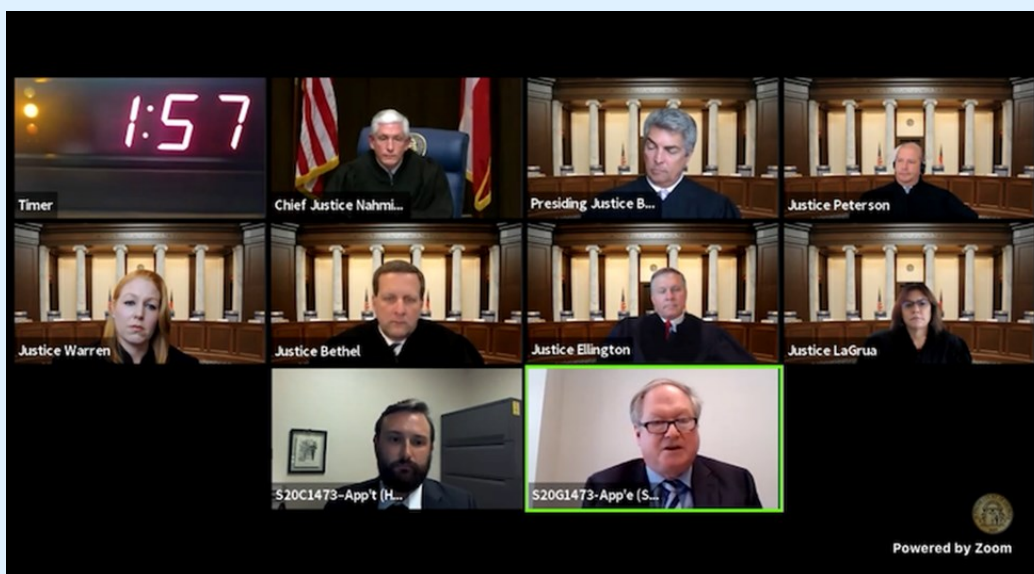
Each defendant filed an anti-SLAPP motion to strike and, in May 2019, following argument, the trial court granted the newspaper's motion but summarily denied the ACLU's. Taking advantage of the anti-SLAPP statute's interlocutory appeal provision, the ACLU appealed.

Georgia Court of Appeals Decision

In June 2020, the Court of Appeals affirmed. In the trial court, the ACLU had supported its motion to strike with affidavits from the blog post's author and editors stating that they had relied upon filings in the federal case and had no knowledge, information or belief that any of

the statements there were incorrect. But the Court of Appeals made no reference to these affidavits in its decision.

Approaching the issue as it would the denial of a motion to dismiss, the Court of Appeals looked instead only to Zeh's complaint and concluded in a few terse shotgun paragraphs that, accepting the complaint's allegations as true, Zeh had "established a prima facie case" that the blog post had made or at least "implied" an assertion of objective fact that was false and defamatory and not made in good faith but with actual malice, or at least negligence, and that it had caused Zeh special damages and constituted defamation per se.



- Readers may recall that this summer's virtual oral argument in the *Zeh* case went viral. See, e.g., ['I can't keep up with you on this stuff,' busy trial lawyer tells Georgia justices in public defender's libel suit](#) (ABA Journal).
- In its decision, the Georgia Supreme Court noted calls by Justices Thomas and Gorsuch for reconsideration of *Sullivan*, concluding, "But these are not debates in which our Court must engage, as we must apply the existing First Amendment doctrine established by the United States Supreme Court."
- Plaintiff B. Reid Zeh is no longer Glynn County public defender for misdemeanor cases. In fact, the Georgia State Bar reports he is currently ineligible to practice law in Georgia due to non-compliance with CLE rules and regulations. Indeed, a day before the Georgia Supreme Court issued its decision it docketed a petition Zeh filed for voluntary discipline. In 2019, Zeh was jailed without bond on charges that included aggravated assault, sexual battery, kidnapping, robbery and influencing a witness.

Along the way, the Court also concluded that Zeh “has made a prima facie showing that, as a part-time misdemeanor public defender, he is not a public official” within the meaning of *Sullivan*; and “that the ACLU should have determined from public court records whether there was any truth to [Zeh’s former client’s] contentions.” The Court cited in support of the latter conclusion an affidavit from the client that the ACLU had filed in federal court in which he had stated that he struggled with an alcohol abuse disorder and had been arrested more times than he could remember and that his memory had to be refreshed with some court records by the ACLU’s lawyers.

Georgia Supreme Court Decision

In March 2021, the Georgia Supreme Court granted the ACLU’s petition for certiorari and in October issued its decision, reversing the denial of the ACLU’s anti-SLAPP motion and remanding the case for reconsideration in light of requests for discovery by Zeh that were unresolved below.

With respect to how courts should consider anti-SLAPP motions, the Court made clear that the merits of the plaintiff’s claim are to be evaluated not by the standard applicable to a motion to dismiss that had been employed by the Court of Appeals but using a summary-judgment-like procedure. Quoting precedent from California, which Georgia’s anti-SLAPP statute substantially tracks, the Court explained:

For purposes of this inquiry, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant; though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim. In making this assessment[,] it is the court’s responsibility to accept as true the evidence favorable to the plaintiff.

In then analyzing Zeh’s action pursuant to this standard, the Court reiterated a number of First Amendment principles to which the Court of Appeals had given short shrift:

The Court held that the record established that Zeh qualified as a public official and the statements at issue related to his official conduct, thus requiring him to show actual malice.

The Court specifically rejected as unpersuasive the ‘actual malice’ arguments credited by the Court of Appeals, including that the ACLU must have doubted the trustworthiness of the arrestee’s allegations given his admitted alcoholism and criminal background and that its failure to further investigate and refusal to retract in the face of Zeh’s denials established bad faith.

Putting aside other elements of Zeh’s defamation claim, including whether there actually was falsity, which the Court expressly declined to decide, the Court explained and concluded that

The record established that Zeh qualified as a public official and the statements at issue related to his official conduct, thus requiring him to show actual malice.

actual malice was a “demanding” and “extremely high” standard that, based on the current record, Zeh could not satisfy.

Nevertheless, the Court held that because Zeh had filed unresolved motions for discovery and “we cannot say as a matter of law that the discovery requested could not lead to additional evidence that would support Zeh’s defamation claim and make granting the ACLU’s motion to strike improper,” a remand was necessary to permit the trial court to rule on the discovery motions and then proceed in a manner consistent with the Court’s opinion.

In closing, the Court noted a peculiarity of Georgia’s anti-SLAPP statute that may receive attention on remand. In 2016, on the eve of the statute’s enactment, a state senator with a plaintiffs’ libel practice added a provision that, in considering a motion to strike, “if there exists a claim that the nonmoving party is a public figure plaintiff, then the nonmoving party shall be entitled to discovery on the sole issue of actual malice” whenever that issue is relevant to the court’s determination. O.C.G.A. § 9-11-11.1(b)(2). The Court noted that the ACLU has argued that it has alleged only that Zeh is a “public official,” not a “public figure,” therefore the discovery entitlement is inapplicable. Although the Court left the issue for decision by the trial court, it observed the case law “sometime appears to treat ‘public officials’ ... as a subset of ‘public figures.’ Put another way, all ‘public officials’ may be ‘public figures,’ even though all ‘public figures’ are not ‘public officials.’”

Brent J. Savage and Kathryn Hughes Pinckney of Savage Turner Pinckney & Savage, Savannah, Georgia represent B. Reid Zeh.

Brian M. Hauss and Arianna M. Demas of the American Civil Liberties Union Foundation, New York, New York, together with Sean J. Young of the American Civil Liberties Union Foundation of Georgia, Atlanta, Georgia, Leslie K. Eason and Tiffany N. Taylor, Gordon Rees Scully Mansukhani LLP of Atlanta, Georgia, and John P. Batson of Augusta, Georgia represent the American Civil Liberties Union.

Amicus briefs in support of the American Civil Liberties Union were filed by the University of Georgia School of Law First Amendment Clinic, the Georgia First Amendment Foundation, the University of Virginia School of Law First Amendment Clinic and the Southern Center for Human Rights represented by Clare R. Norins and law student Michael Sloman of the University of Georgia School of Law First Amendment Clinic, Athens, Georgia and by the Home Park (Atlanta) Civic Improvement Association represented by Josh Belinfante of Robbins Ross Alloy Belinfante Littlefield LLC, Atlanta, Georgia.

Federal Court Dismisses Defamation, Fraud Claims Against Producers and Spotify for “Son of a Hitman” Podcast

By Reid Pillifant

In 1982, a young lawyer named Chrys Lambros was the lone eyewitness placing the hitman Charles Harrelson at the scene of federal Judge John Wood Jr.’s murder in San Antonio.

Nearly 40 years later, inside a federal courthouse named for Judge Wood, attorneys for Lambros (now Chrys Parker) argued she had been defamed and defrauded by a recent podcast that re-examined Harrelson’s life and crimes.

The podcast, “Son of a Hitman,” explores the claims made by Harrelson’s sons – including, most notably, the actor Woody Harrelson – that their father may have been innocent of Wood’s murder.

Parker’s lawsuit claimed the 10-part series had “irrevocably damaged her reputation” by insinuating she had schemed with the F.B.I. to convict Harrelson, and that producers had fraudulently induced her participation in the podcast when they failed to disclose that Harrelson’s son, Brett, served as an executive producer.

On Nov. 1, three days after hearing oral arguments, Judge David Alan Ezra dismissed all of Parker’s claims, holding that the podcast “would not lead a reasonable listener to believe that [Parker] was complicit with the FBI,” and that producers had no duty to disclose Brett Harrelson’s involvement in the series.

Background

In “Son of a Hitman,” producer Jason Cavanagh delves into Harrelson’s life as a womanizer, gambler, and hitman—examining his ties to two prior murders, and, most notably, his conviction for the killing of Judge Wood. On May 29, 1979 Wood became the first sitting federal judge to be assassinated in more than 100 years, when he was gunned down with a high-powered rifle while fixing a flat tire outside his San Antonio townhouse. Wood’s killing was seen as a direct assault on the federal judiciary, and it prompted a massive FBI investigation that eventually came to focus on Harrelson and an El Paso drug trafficker named Jamiel “Jimmy” Chagra. Chagra had been set to appear before Wood—known as “Maximum John” for his history of harsh sentences—on the morning the judge was killed.

In the podcast, Cavanagh interviews law enforcement officials who participated in the investigation and prosecution of Harrelson, detailing the extensive evidence that Harrelson had been paid \$250,000 by Chagra to kill Wood.

The podcast, “Son of a Hitman,” explores the claims made by Harrelson’s sons – including, most notably, the actor Woody Harrelson – that their father may have been innocent.

Cavanagh also speaks to members of the Harrelson and Chagra families—including Harrelson’s sons, Brett and Jordan, and two of Chagra’s daughters—about the evidence in the case, and whether federal authorities may have railroaded Harrelson and Chagra to secure a conviction for Wood’s murder.

Parker recounts her own brush with Harrelson in the sixth episode of the podcast, titled “A Very Unusual Witness”—taken from prosecutor Ray Hahn’s description of Parker as a “very unusual witness and very, very effective witness.”

In an interview with Cavanagh, Parker says Harrelson purposefully bumped into her outside the judge’s apartment building on the morning of the murder. After contacting the F.B.I. and working with agents to produce a sketch of the suspect, Parker says “it didn’t quite come together,” and the next step was “to start working with the hypnotist.” Before playing a clip of one of Parker’s hypnosis sessions, Cavanagh calls this “a display of questionable judgment” on the part of the F.B.I., and Parker acknowledges there was controversy over the use of hypnosis, even at the time. But, she says, the importance of Wood’s case meant that the admissibility “was stretched to its absolute limits.”

Parker also tells Cavanagh that, in the years after the murder, she participated in an episode of the television show *FBI: The Untold Stories*, directed by the actor Christopher Walken, who she describes as exceptionally nice. But Cavanagh explains on the podcast that representatives for Walken and the show deny he was ever involved with such a project. Pondering this bit of misinformation, Cavanagh calls it an “unusual mistake for Chrys Lambros to make” and admits at the end of the episode that he’s “not sure how to feel about it.”

Parker’s Claims

The podcast was released in weekly installments beginning in May of 2020. In February of 2021, Parker filed suit in the Western District of Texas alleging defamation and fraudulent inducement by Cavanagh, production companies High Five Content and Tradecraft Alternative, and Spotify, which exclusively distributed “Son of a Hitman.”

Parker objected to the description that she had been “found” by the F.B.I. after an exhaustive search, and to the characterization of her as both a “very unusual witness” and a “star witness” in the case. She alleged the podcast led listeners to believe she “was either complicit or actively participated in manufacturing evidence to perpetuate an unfair trial” of Harrelson.

Parker, a licensed attorney with multiple health care degrees who often testifies on the effects of post-traumatic stress disorder, claimed the podcast damaged her credibility, and “could” cost her employment opportunities to appear in court as an expert witness on PTSD.

Parker also asserted a claim of “fraudulent inducement,” alleging that producers purposefully withheld the involvement of Brett and Jordan Harrelson in order to secure her participation in the podcast. Parker stated she was familiar with “the Harrelson’s crusade to cast doubt on their father’s conviction,” and she “would never have agreed to be interviewed had she known that Brett and Jordan Harrelson were involved.”

Court Ruling

On Nov. 1, just three days after hearing oral argument, Judge Ezra rejected all of Parker's claims in a 36-page opinion, finding that a reasonable person would not conclude from the podcast that Parker was complicit with the F.B.I. in railroading Harrison.

Many of Parker's own statements undercut her claims that she was unfairly portrayed in the podcast. The court held that describing Parker as being "found" by the F.B.I. did not suggest complicity, in part because the podcast also included Parker's own statement describing how she immediately contacted the F.B.I. after hearing of the murder.

Referring to Parker as the trial's "star witness" was also not defamatory, the court held, because it is "substantially true." The court's opinion notes that Parker *was* the only eyewitness at Harrelson's trial, and that Parker described herself as "a principal witness" on the podcast.

The court also ruled that the description of Parker as an "unusual witness" was presented in the context of her hypnosis by the F.B.I., and that she herself acknowledged the controversy, and questionable admissibility, of such testimony. Ultimately, the court held the "unusual" descriptor to be "nonactionable opinion," because it is "impossible to verify."

Judge Ezra noted that, throughout the podcast, when Cavanagh presents his doubts about witnesses or evidence in the case, "he does not present it as fact," and instead specifically encourages readers to draw their own conclusions. "While it is possible that stating someone is an unreliable witness could injure her reputation as a reliable witness or for truthfulness, expressing an opinion that injures someone's reputation for truthfulness does not amount to defamation," the judge wrote.

The judge also held that the complaint failed to adequately plead the fraudulent inducement claim under Texas law, since it failed to demonstrate why defendants owed a duty to disclose Harrelson's involvement to Parker. The complaint also failed to show why such disclosure was material – that is, why "disclosure of the [Harrisons'] involvement would induce a reasonable person not to participate," the judge wrote.

Judge Ezra dismissed Parker's claims without prejudice, giving Parker 30 days to file an amended complaint. But the judge cautioned against "[s]imply changing the words of the complaint without facts to support the change."

Reid Pillifant is an associate with Haynes Boone in the Austin office, and a former reporter and editor at the New York Observer, Politico and Slate. Laura Lee Prather and Catherine Robb of Haynes Boone represented Spotify USA, High Five Content, Tradecraft Alternative, and producer Jason Cavanagh.

Michigan Court Rejects Defamation and Related Claims Against Independent Investigative Journalists

By Brian D. Wassom

On October 27, 2021, the Michigan Circuit Court for Ingham County dismissed as a matter of law a SLAPP-like lawsuit targeting East Lansing Info (“ELI”), an independent, locally focused news outlet, and its publisher, Alice Dreger. The case had been filed by real estate developer Scott Chappelle and one of his development companies. The result demonstrates that, even in the absence of an anti-SLAPP statute, Michigan courts can be persuaded to immediately dispose of bogus attempts to chill unwanted reporting.

Background

Chappelle is a developer who tried and failed for over a decade to redevelop the “Park District” in downtown East Lansing, including through the project known as “City Center II.” It is common knowledge in the area, and beyond dispute, that these properties were abandoned and blighted for several years, to the dismay of many residents and municipal officials, resulting in public hearings and foreclosure proceedings (including before the very judge who ultimately decided the case). Even after Chappelle lost the properties, he delayed their development by litigating over his entitlement to Michigan Business Tax credits that had been issued for the project. Only this year did a different developer finally complete the project, where new retail, apartments, and a hotel now operate.

Even in the absence of an anti-SLAPP statute, Michigan courts can be persuaded to immediately dispose of bogus attempts to chill unwanted reporting.

Eventually, Chappelle’s business practices earned him a criminal indictment from a federal grand jury that remains pending as of this writing, and which the U.S. Department of Justice announced to the world in a press release headlined “Michigan Real Estate Developer Indicted For Tax And Bank Fraud: Lansing-Area Real Estate Developer Lied and Hid Income and Assets.” Consistent with its mission statement to “bring East Lansing the news,” Dreger reported on these events and articulated opinions about them in two separate articles that formed the basis of Chappelle’s lawsuit.

The primary statement with which Chappelle took issue was the following: *“The blight downtown lasted years before Chappelle’s company finally lost the properties to foreclosure. Today, new buildings rise in this location, and Chappelle has been indicted.”* According to Chappelle, this statement, when read in context, falsely suggests that the pending federal charges arose out of the East Lansing development effort, when in fact they pertain to entirely separate transactions. But that argument failed on multiple levels.

First, the statement itself is indisputably true, as Chappelle has, in fact, been indicted. Even the implication is substantially true, since the same company participated in both the East Lansing project and the transactions underlying the indictment. Second, the article as a whole reported the precise basis of the indictment, even including a hyperlink to the text of the document. Third, the statement falls within Michigan's statutory protection for fair reports of public records. Fourth, Michigan law is generous in protecting publishers from false inferences a reader may hypothetically draw from a true statement. Fifth, even if the article misidentified the exact factual basis of the indictment (which it did not), the gist and sting of the statement—that he had been indicted—remained the same.

Chappelle also complained about characterizing the properties as “blighted.” This court was not the first, however, to recognize that word as inherently subjective, and thus incapable of being defamatory. *See Letourneau v Zittel*, (Conn Super, Jan 25, 2013) (No DBDCV126008811, unpublished), 2013 Conn Super LEXIS 197, at *18-22. Further, “blight” is used to describe the *properties*, not Chappelle's *actions*, so the statement is not “of and concerning” him, and is incapable of defamatory meaning as to Chappelle. It is indisputably true that Chappelle's companies lost the properties to foreclosure. In addition, ELI produced multiple statements from public records in which third parties described the properties as “blighted,” rendering its articles fair reports.

Chappelle had no more success regarding statements regarding his potential bad acts, such as “*Chappelle is known to many in East Lansing as the developer whose actions caused prolonged blight in East Lansing's downtown at the northeast corner of Abbott Road and Grand River Avenue,*” and “*Chappelle stepped in and effectively killed the deal ... with a claim he still had rights to tax credits related to the properties ... DRW [the successor developer] got around this through what has generally been presumed to be an unspecified pay-off of Chappelle.*” These statements, the court held, were merely expressions of opinion based on disclosed facts.

The same was true of the statement “*I shared with the FBI numerous documents that looked like mortgage fraud to a layperson. Since nothing came of this, I assumed sophisticated legal tricks were at work and the transactions could not be prosecuted.*” Not only does this convey an “assumption” derived from disclosed facts, but it was not even made by Dreger or ELI. Rather, it was said by Eliot Singer, another journalist who had been investigating Chappelle's activities. Singer was also named as a defendant in Chappelle's initial complaint, and litigated with Chappelle for months before ELI and Dreger were served. Rather than continue his defense, Singer capitulated and issued a retraction. In Chappelle's First Amended Complaint, he tried to leverage this fact against ELI and Singer, but failed—because the retraction did not provide any additional basis for considering anything the defendants had said as being actually false. Rather, it amounted to little more than Singer crying “uncle.”

The remaining statements identified by Chappelle were even less arguable, and in many cases plainly had nothing to do with him at all. In an attempt to plead around his obligation to identify defamatory statements with particularity, Chappelle's complaint also listed at least as many

“implications” that a reader would infer from the text. Here, again, however, ELI and Dreger were shielded by the inarguable substantial truth of their factual statements and the disclosed bases of their expressed opinions. The court also made short work of the complaint’s tag-along torts of false light invasion of privacy (Count II), injurious falsehood/trade libel (Count III), and tortious interference (Count IV), holding that these were barred by the same First Amendment-based privileges that required dismissal of the defamation claims.

Chappelle’s procedural gamesmanship did not benefit him either. Even though ELI and Dreger are located in East Lansing and the publications pertained to East Lansing (which is in Ingham County), Chappelle filed his original complaint in the adjacent Washtenaw County—based solely on the allegation that the computer servers ELI rented to host its website are physically located there. The assigned Washtenaw County judge granted ELI’s motion to change venue. The case was then assigned by blind draw to an Ingham County judge, until Judge Joyce Draganchuk, who hears Ingham’s business court docket, *sua sponte* transferred to the case to herself. She then denied Chappelle’s motion to remand from the business court docket, reasoning that the claims of injury to the business reputations of Chappelle’s company were more than sufficient to bring the case within the mandatory jurisdiction of Michigan’s business court statute. Her reasoning could be of use to future Michigan litigants who would prefer their case to be decided by the local business judge.

This is a reassuring victory for the First Amendment and for investigative journalism across the State of Michigan.

This is a reassuring victory for the First Amendment and for investigative journalism across the State of Michigan. There was never any serious doubt that ELI’s reporting was well-sourced and a fair report of public records. But in an environment where basic principles of free speech and the liberty of the press are under constant attack, it is profoundly gratifying when a court issues such a full-throated and well-reasoned endorsement of First Amendment values as Judge Draganchuk did in this case.

Brian D. Wassom is a litigation partner at the Michigan-based firm Warner Norcross + Judd LLP. He represented the defendants in this case. Plaintiffs were represented by Chris Cataldo of the Jaffe Raitt firm in Detroit, and by Daniel Powell of Minc Law in Ohio.

Third Circuit: Section 230 Does Not Bar Pennsylvania Statutory Right of Publicity Claim Against Facebook

By Dori Hanswirth, Michael E. Kientzle, Rachel Carpman

On September 23, 2021 the Third Circuit Court of Appeals held that Section 230(c) of the Communications Decency Act (CDA), 47 U.S.C. § 230, did not immunize Facebook from a Philadelphia news anchor's Pennsylvania statutory right of publicity claim. [Hepp v. Facebook, Inc.](#), Nos. 20-2725 & 2885, 2021 WL 4314426 (3d Cir. 2021). In so ruling, the Third Circuit split with a leading Ninth Circuit opinion holding that internet service providers (ISPs) are immune from all state intellectual property law claims. Federal appellate courts have rarely addressed the applicability of Section 230(c) to state intellectual property law claims, and the Third Circuit's decision is also noteworthy for its thorough discussion of the issue.

Background

Karen Hepp co-anchors a television morning show on Philadelphia's Fox affiliate, WTXF, and has been a professional journalist for more than two decades. Sometime in 2017, a New York City convenience store security camera captured a photograph of Hepp without her consent, and the photograph subsequently appeared on numerous internet platforms. On Facebook, the photograph appeared in an advertisement for the dating service FirstMet, alongside text soliciting Facebook users to "meet and chat with single women." On the social media platform Reddit and on the image-hosting service Imgur, the photograph appeared alongside derogatory and indecent user commentary about Hepp's physical appearance.



An Exhibit to Hepp's Complaint shows the store security camera photo and its subsequent appearance on numerous internet platforms.

Hepp sued Facebook, Reddit, and Imgur, among several other defendants, in the Eastern District of Pennsylvania, alleging that each had violated Pennsylvania's statutory and common law right of publicity laws. The Pennsylvania statutory right of publicity, codified at 42 PA. Cons. Stat. § 8316, protects those whose names and likenesses have "commercial value," which is "developed through investment of time, effort, and money," *id.* § 8316(e), by creating a right of action to enjoin the unauthorized use of such name or likeness for a commercial or advertising purpose, and to recover damages for any loss or injuries caused by such use, *id.* § 8316(a). Pennsylvania common law provides a similar cause of action where a defendant "appropriat[es a plaintiff's] valuable name or likeness, without authorization" and uses it "to defendant's commercial advantage." *Eagle v. Morgan*, 2013 WL 943350, at *8 (E.D. Pa. Mar. 12, 2013) (internal quotation omitted).

Hepp alleged that Facebook, Reddit and Imgur violated her statutory and common law rights of publicity by "appropriat[ing Hepp's] likeness, which has commercial value, and us[ing] same for commercial purposes without plaintiff's written consent." She alleged further that each company's actions had caused "serious, permanent and irreparable harm to [Hepp's] reputation," which she had built up over her decades-long journalism career. She sought an injunction requiring each company to remove her image immediately from its service, as well as compensatory damages.

Facebook, Reddit and Imgur jointly moved to dismiss Hepp's claims, arguing that they were barred by Section 230(c) of the CDA. Congress enacted the CDA in 1996. It states that ISPs, like Facebook, shall not be "treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The effect is to immunize ISPs from most forms of liability for content originating with third party users of their services. Congress's policy goal, codified in the text of the CDA, was to "to preserve the vibrant and competitive free market that present exists for the Internet . . . unfettered by Federal or State regulation." *Id.* §230(b)(2). The immunity Congress provided, however, is not unlimited; among other exceptions, Section 230(c) shall not be interpreted to "limit or expand any law pertaining to intellectual property." *Id.* § 230(e)(2). As a result, ISPs are not immune under Section 230 from laws that "pertain[] to intellectual property."

In their motion to dismiss, Facebook, Reddit and Imgur argued that Section 230(c) barred Hepp's statutory claims because the companies qualified as ISPs and it was the companies' users, and not the companies themselves, that had caused the photograph of Ms. Hepp to appear on their services. They argued further that Hepp's claims did not fall within the intellectual property exception provided by Section 230(e)(2) because the exception applies only to federal intellectual property law.

The companies relied primarily upon [Perfect 10, Inc. v. CCBill LLC](#), 488 F.3d 1102 (9th Cir. 2007), a leading federal appellate court decision addressing the applicability of Section 230(e)(2) to state intellectual property laws. In *Perfect 10*, the United States Court of Appeals for the Ninth Circuit held that Section 230(c) barred state law unfair competition and false advertising claims made by an adult magazine publisher against a pair of ISPs. The Ninth Circuit reasoned

that it was best to construe the term “intellectual property” in Section 230(e)(2) to refer exclusively to “federal intellectual property” in light of “Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes.” Furthermore, because material posted online may be viewed in any state, according to the Ninth Circuit to do otherwise would be to “permit[] the reach of any particular state’s definition of intellectual property to dictate the contours of this federal immunity.” *Id.* at 1118.

The district court, quoting extensively from *Perfect 10*, dismissed Hepp’s statutory and common law right of publicity claims against Facebook, Reddit and Imgur. Hepp appealed. On appeal, the Third Circuit’s analysis of Section 230(e)(2)’s intellectual property exception focused solely on Hepp’s Pennsylvania statutory right of publicity claim against Facebook. In a 2-1 decision, the Third Circuit reversed the district court’s dismissal of that claim and remanded for further proceedings. It upheld the dismissal of Hepp’s claims against Imgur and Reddit on personal jurisdiction grounds, which the district court had not reached. It vacated the district court’s order dismissing Hepp’s common law right of publicity claim, but in so doing “offered no opinion about the Pennsylvania common law claim,” which was “best left to the District Court on remand” because neither Hepp nor Facebook had “focused on it” during the appeal.

Third Circuit’s Majority Opinion

Writing for the majority, Judge Hardiman, joined by Judge Phipps, analyzed the application of Section 230 in two steps. First, does Section 230(e)(2)’s intellectual property exception encompass only federal intellectual property law, or state intellectual property law as well? And, if it encompasses state intellectual property law, does the Pennsylvania statutory right of publicity law count as a form of “intellectual property”?

Step 1: Section 230(e)(2) Encompasses State Intellectual Property Law

Turning first to the applicability of Section 230(e)(2) to state intellectual property laws, the majority focused on the language of the text itself. The text of Section 230(e)(2)’s intellectual property exception is terse, referring simply to “any law pertaining to intellectual property,” and does not contain any qualifying language. The majority held that there was no compelling reason not to adhere to “the most natural reading” of this phrase, which in its view encompasses both federal and state laws pertaining to intellectual property. As the court put it, “[s]imply put, a state law can be a ‘law pertaining to intellectual property,’ too.”

It rejected Facebook’s argument that the overall structure of Section 230 “reveals that Congress intended to limit the exclusions from immunity primarily to certain federal statutes, and included state laws only where they are coextensive with federal law.” According to Facebook, in that context, the phrase “any law pertaining to intellectual property” should likewise be understood to refer only to federal intellectual property law. To the majority, however, the evidence from the structure of Section 230 “cut both ways,” because it also suggests that “when Congress wanted to cabin the interpretation about state law, it knew how to do so—and did so

explicitly,” and Congress had not made any explicit reference to state law in the intellectual property exception.

The majority was also not persuaded by Facebook’s policy arguments. Facebook argued, for example, that the codified policy provisions in Section 230(b) indicate that “Congress enacted Section 230 to avoid subjecting internet service providers to a web of inconsistent, ‘fettering’ state regulations like the laws governing rights of publicity.” To the court, however, there was no clear tension between preserving state intellectual property claims against ISPs and promoting a vibrant internet marketplace, because “state property rights can facilitate market exchange” as well. And to the extent that Facebook raised policy concerns independent of the statute’s text, such as concerns that the majority’s reading would increase uncertainty about the scope of immunity provided by Section 230(c), the majority dismissed them on the basis that “policy considerations cannot displace the text.”

Step 2: Pennsylvania’s Statutory Right of Publicity is an “Intellectual Property” Law

The majority then turned to whether the Pennsylvania statutory right of publicity law counted as an “intellectual property” law within the meaning of the CDA. To analyze this issue, it conducted a survey of dictionary definitions of the term “intellectual property,” focusing in particular on legal dictionaries. The majority concluded that dictionary definitions for “intellectual property” typically include the right of publicity, either explicitly or implicitly, and therefore it ruled that the Pennsylvania statutory right of publicity is an “intellectual property” law within the meaning of the CDA.

The majority cited to numerous dictionaries that define “intellectual property” to include rights of publicity. For example, Black’s Law Dictionary defines the term to include “publicity rights” and McCarthy’s Desk Encyclopedia of Intellectual Property defines the term to include “the right of publicity.” A third dictionary, The Wolters Kluwer Bouvier Law Dictionary, sets for the following standard: “[t]o have intellectual property in a thing is to have an effective monopoly on its use, such that the property rights holder may enjoin or recover from others who infringe on the rights . . .” The majority explained that Pennsylvania’s statutory right of publicity meets this standard, because it “provides for property-like relief, including the ability to obtain damages and injunctions against trespassers.”

The majority noted further that several dictionaries, despite omitting explicit references to “rights of publicity,” include trademark laws within their definitions of “intellectual property.” The majority reasoned that such definitions include rights of publicity “by analogy,” in light of the similar functions served by publicity and trademark rights. Quoting from the Supreme Court’s well-known decision in *Zacchini v. Scripps-Howard Broadcasting Co.*, the majority

The majority was also not persuaded by Facebook’s policy arguments. Facebook argued, for example that “Congress enacted Section 230 to avoid subjecting internet service providers to a web of inconsistent, ‘fettering’ state regulations like the laws governing rights of publicity.”

explained that both legal doctrines “secure commercial goodwill” and “also foster the marketplace because they protect consumers’ ability to distinguish between competitors,” and therefore are “close analogues.” Surveying the case law, it further explained that courts have “recognized ... for over a century” the analogy between trademark law and rights of publicity.

Judge Cowen’s Dissent

Judge Cowen dissented, writing that he would have followed the Ninth Circuit’s holding in *Perfect 10* and held Facebook to be immune from Hepp’s statutory right of publicity claim. He argued that the majority’s decision “is the first circuit court ruling to hold that the intellectual property exception applies to state ‘intellectual property laws’ and therefore threatened to ‘open the floodgates’ to additional litigation in the future. This, according to Judge Cowen, was exactly why the Ninth Circuit had been correct to exclude state intellectual property laws from the scope of Section 230(e)(2). To do otherwise puts ISPs in an uncertain position, in which they face “the real possibility of being held liable under disparate and often very expansive state law ‘intellectual property’ regimes.

The decision shows how far the court had to reach, using the libel-by-implication doctrine and a new theory of republication, to keep the Nunes case alive.

Conclusion

The majority emphasized that its holding is narrow. It explained that “Hepp’s statutory claim against Facebook is about the commercial effect on her intellectual property, not about protected speech,” rejecting Facebook’s argument that requiring ISPs to navigate a “web of inconsistent state law would require them to mitigate legal risks in ways that would have ‘an obvious chilling effect’ on protected speech. Further, it rejected Judge Cowen’s concern that its decision would “open the floodgates,” noting that its determination is limited to the Pennsylvania statute, which provides a right of publicity only for those individuals whose interest in their likeness “is developed through the investment of time, effort, and money.” 42 PA. Cons. Stat. § 8316(e), and it offered no opinion on the rights of publicity laws of other states.

[Facebook has petitioned for rehearing en banc. In its brief, it challenges both aspects of the majority’s ruling](#), arguing that the exception in Section 230(e)(2) only applies to federal intellectual property law, and that Pennsylvania’s statutory right of publicity is not a law that pertains to intellectual property. Facebook engages in extensive textual analysis of both the wording of §230(e)(2) and the overall structure of §230. Notably, it argues that the majority erred by ignoring the significance of Congress’s use of the word “expand” in Section 230(e)(2), which provides that “[n]othing in this section shall be construed to limit *or expand* any law pertaining to intellectual property.”

In Facebook’s view, “[w]hile Acts of Congress might unintentionally expand existing federal rights . . . Congress cannot expand existing state law.” Therefore, it argues, the use of the word

“expand” in Section 230(e)(2) indicates Congress’s intention that the Section apply solely to federal intellectual property law. Facebook’s brief also argues—as Judge Cowen noted in dissent—that “Congress has been active in fine tuning and calibrating the scope of the intellectual property exception, which reinforces that §230(e)(2) refers only to federal intellectual property law.” Facebook points to examples such as the 2016 Defend Trade Secrets Acts, which specified that federal trade secrets law “shall not be construed to be a law pertaining to intellectual property for purposes of any other Act of Congress.”

The Electronic Frontier Foundation and the Internet Association, joined by several internet and intellectual property organizations, have each filed amicus briefs in support of rehearing. The amici raise concerns about the practical difficulties the majority’s holding presents to their members. [The Internet Association’s brief argues](#) that the majority’s ruling incentivizes forum shopping and artful pleading, “potentially carving out exceptions for every claim that can arguably be categorized under state intellectual property law,” and burdens courts with the task of classifying state laws as those that “pertain[] to intellectual property.”

Should the Third Circuit deny rehearing—or grant it but refuse to vacate the panel’s ruling—it would fall to the Supreme Court to decide whether any tension between this decision and the Ninth Circuit’s in *Perfect 10* may eventually require it to weigh in on the scope of the CDA’s intellectual property exception.

Dori Hanswirth co-leads Arnold & Porter’s Technology, Media & Telecommunications industry group. Michael E. Kientzle is a senior associate at Arnold & Porter’s Washington D.C. office, where his practice focuses on intellectual property litigation. Rachel Carpman, not admitted to the practice of law, is a graduate of the University of Michigan Law School and is employed at Arnold & Porter’s New York office.

Karen Hepp is represented by Samuel Fineman, Cohen Fineman, Cherry Hill, NJ. Facebook is represented by Craig S. Primis and Paul Clement, Kirkland & Ellis.

The Copyright Small Claims Court

By Michael Lambert

Changes are coming for copyright law. Federal courts will soon no longer have exclusive jurisdiction over federal copyright claims. Instead, the Copyright Claims Board (CCB), a three-judge panel within the U.S. Copyright Office that will hear “small” copyright claims, will begin operating as soon as December 27, 2021 (but no later than June 2022). The copyright small claims court, designed to provide copyright claimants a quicker and less expensive way to enforce their rights, will hear limited types of copyright claims, counterclaims, and defenses. Monetary damages will be capped at \$30,000 per proceeding with statutory damages limited to \$15,000 per work infringed. Importantly, participation in this court is voluntary, and respondents who prefer to adjudicate in federal court can opt out of the CCB. Unlike federal courts, the CCB will operate online and through other remote means.

In December 2020, then-President Donald Trump signed the Copyright Alternative in Small-Claims Enforcement Act (CASE Act) into law as part of the Consolidated Appropriations Act of 2021. *See* 17 U.S.C. §§ 1501–1511. Congress passed the CASE Act after legislative reports found that “the costs of litigating in federal court have become increasingly prohibitive,” and technology has led to a rise in illegal copying of works “at virtually no cost, much to the detriment of authors and the market for their works.” *See* [House Judiciary Report](#), No. 116-252 (September 12, 2019). The copyright small claims court is intended to give content creators “a realistic ability to enforce [their] rights when they have a comparatively modest claim for damages.” *Id.* The U.S. Copyright Office has promulgated proposed regulations implementing the CASE Act, *see* [Proposed Regulations](#), 86 Fed. Reg. 53897–53913 (Sept. 29, 2021), and the CCB is scheduled to begin operations as soon as December 27, 2021. Before then, content creators should begin considering whether to use the CCB to enforce their rights or defend against claims. This will depend on several factors explored in this article, such as the:

- Nature and complexity of each claim, defense, and counterclaim
- Number and nature of the parties and third parties
- Nature of each party’s representation (attorney or pro se)
- Parties’ resources and financial limitations
- Type and amount of discovery needed to prove a claim or defense
- Potential maximum and minimum actual and statutory damages that may be awarded
- Importance of recovering attorney’s fees and costs

- Timetable for resolution of the claim
- Convenience of proceeding remotely

Nature of the claim and filing requirements: The CCB can only hear limited types of copyright claims, namely claims for infringement under 17 U.S.C. § 106, declarations of non-infringement, and claims for misrepresentation under the Digital Millennium Copyright Act (DMCA). § 1504(c). It cannot hear claims by or against any federal or state governmental entity. § 1504(d). A claim must (1) contain a statement identifying the parties, the claim asserted, the alleged injury, and the relevant facts; (2) certify that the statement is accurate and truthful to the best of the claimant’s knowledge; and (3) be served on the respondent. § 1506(e). The CCB will dismiss a claim without prejudice for failure to join a necessary party; lack of an essential witness, evidence, or expert testimony; or if the relevant issue of law or fact could exceed the number of proceedings the CCB can “reasonably administer” or the CCB’s “subject matter competence.” § 1506(f)(3). A claim can be filed in the CCB once a work has been submitted for registration, but registration must be issued before a decision is made. § 1505(a). In federal court, the work must be registered before a claim is filed. *See Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019).

Nature of representation: Rules governing representation are similar for the CCB and federal courts, although pro se parties may be more likely to file in the CCB. Claims and assertions made by a pro se party will be “construed liberally.” *See Proposed Regulations at 53898*. Law students may represent parties under “applicable law governing representation by law students.” § 1506(d)(2).

Costs: Litigating a case in the small claims court should be less expensive than in federal court because CCB proceedings will be more streamlined, discovery will be abbreviated, and there should be no travel costs for the remote proceedings. The filing fee in the CCB is expected to be \$100 per claim.

Responding to a claim: The CCB is voluntary, but a respondent must affirmatively opt out within 60 days of receipt of the claim to preserve the right to litigate in federal court. § 1506(i). If a respondent opts out, the claim will be dismissed without prejudice. *Id.* If a respondent does not timely opt out, the proceeding becomes active, and the respondent waives the right to a jury trial and will be bound by the CCB’s decision. *Id.* If the respondent fails to opt out, the CCB will issue a scheduling order with a 30-day deadline for the respondent to file a response to the claim. §§ 1506(k); 1506(g)(7)(B). The response must include a short statement disputing the facts, describing why the claim is meritless, and identifying all relevant defenses. *See Proposed Regulations at 53903*. A respondent may also raise counterclaims that arise out of the same transaction or occurrence. § 1506(g)(7)(B).

Discovery: Discovery will be more limited in the small claims court than in federal court. The CCB allows for production of documents, written interrogatories, and written requests for admission, but depositions and third-party subpoenas are not routinely allowed. Additional

discovery and expert witness testimony may be permitted in an “exceptional case.” § 1506(n), (o).

Procedural rules and substantive law: Procedural rules will be “relaxed” for CCB claims, while substantive copyright law will largely be the same in either venue. Traditional rules of civil procedure are expected to be “relevant” for CCB claims, but they may be “significantly relaxed in order to save litigants effort and expense.” *See* Proposed Regulations at 53903. The CCB will not make new law and must follow existing copyright precedent. If precedent is conflicting on an issue, the CCB will apply the law of the federal jurisdiction where the action could have been brought, or if it could have been brought in more than one jurisdiction, the jurisdiction with “the most significant ties to the parties and the conduct at issue” will control. § 1506(a)(2). Oral hearings may be held on issues of fact or law. § 1506(p).

Damages: In CCB proceedings, total damages are capped at \$30,000, and willfulness is not considered. Statutory damages are limited to \$15,000 per work. § 1504(e)(1)(A)(ii). A claimant before the CCB may elect actual damages and profits or statutory damages. § 1504(e)(1)(B). Either way, however, a claimant’s total monetary recovery cannot exceed \$30,000, exclusive of attorney’s fees and costs. § 1504(e)(1)(D). By comparison, in federal court there is no cap on actual damages and statutory damages range from \$750 to \$30,000 per work, which can be increased to \$150,000 in cases of willful infringement. In assessing damages, the CCB will consider whether the infringing party has agreed to cease or mitigate the infringing activity. § 1504(e)(1). Unlike in the CCB, a claimant cannot recover statutory damages in federal court unless the work is registered before the infringement began or within three months after first publication. § 412.

Attorney’s fees: Attorney’s fees and costs are more likely to be awarded in federal court than in the CCB, which may award attorney’s fees and costs only up to \$5,000 and only if a party pursued a claim, counterclaim, or defense for a “harassing or other improper purpose, or without a reasonable basis in law or fact.” §§ 1504(e)(3), 1506(y)(2). A party that pursues a claim, counterclaim, or defense for an improper purpose more than once in a year will be banned from the CCB for a year. § 1506(y)(3). In federal court, attorney’s fees are discretionary. § 505. Federal courts have “wide latitude” to award attorney’s fees and often consider “frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence.” *See Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 136 S. Ct. 1979, 1985 (2016).

Deciding a claim: CCB claims will be decided by a three-judge panel instead of a federal court judge or magistrate. The CCB must make factual findings based on a preponderance of the evidence and issue written decisions with an explanation of the factual and legal basis for the decision. § 1506(s), (t). Decisions must be made by at least two of the three judges. § 1506(t). The judges, who will serve renewable terms of six years, must have at least seven years of legal experience and “substantial” experience in copyright litigation, and one judge must have experience in alternative dispute resolution. § 1502(b). At least two attorneys with at least three years of “substantial” copyright experience will assist the judges. *Id.*

Appeals: Most CCB claims will not be reviewable by a federal court. Parties before the CCB have 30 days from a decision to request reconsideration from the CCB. § 1506(w). If a request for reconsideration is rejected, the parties will have another 30 days to request review from the Register of Copyrights. § 1506(x). Review of a CCB claim by a federal court is only permitted if a decision was issued because of “fraud, corruption, misrepresentation, or other misconduct” or if a party refuses to comply with a judgment. § 1508(a), (c)(1).

Conclusion: These are some of the many differences between the CCB and federal courts that content creators should assess before litigating before the CCB. Anecdotal evidence will likely guide decisions for the first few months before data can be collected. CCB decisions will be available online, but all other information relating to CCB proceedings will be exempt from disclosure under the Freedom of Information Act. § 1506(t)(3), (4). After three years of the CCB’s operation, the Register of Copyrights must file a report with Congress assessing the CCB’s effectiveness. *See House Judiciary Report*. Ultimately, the copyright small claims court will serve as a legislative experiment. Its success could lead to the creation of similar courts for other types of disputes, while its failure will have the opposite effect. For now, content creators should prepare for what is to come by weighing the pros and cons of litigating in the CCB.

Michael Lambert is an associate at Haynes & Boone in Austin, TX.

Fifth Circuit Decision: “It Is Not a Crime to Be a Journalist.”

By JT Morris

A recent decision from the Fifth Circuit concluded that officials have no qualified immunity after they arrested a citizen journalist for asking a police officer for information as part of reporting the local news. [Villarreal v. City of Laredo, et al.](#), No. 20-40359 (5th Cir. Nov. 1, 2021)

Background

Priscilla Villarreal is a citizen journalist in Laredo, Texas, a border town of around a quarter-million people. Since 2015, she has livestreamed and reported on many local issues, including crime and government. Far from a traditional journalist, Villarreal uses only Facebook to publish her news and commentary.

Her gritty reporting quickly became popular on the Texas border. And it also caught the eye of local officials—especially her unflattering reporting on local law enforcement. At one point, the district attorney took Villarreal behind closed doors to chastise her after she criticized his office for withdrawing an arrest warrant.

In spring 2017, Villarreal published two stories: one about a high-profile suicide, and one about a fatal car accident in Laredo. She got tips about both stories from private citizens. And as all good journalists do, she sought to verify those tips. So Villarreal reached out to a Laredo police officer and asked her to confirm the identities of the victims, which the police officer did.

Months later, Laredo law enforcement issued two warrants for Villarreal’s arrest. The warrants accused her of violating Texas Penal Code § 39.06(c). That law states it is a felony “if, with intent to obtain a benefit . . . [a person] solicits or receives from a public servant information that: (1) the public servant has access to by means of his office or employment; and (2) has not been made public.”

The arrest warrants claimed Villarreal violated the statute—which no local official had enforced in its 23-year history—because she asked for and received “nonpublic” information from a police officer. And they also stated Villarreal did so to “gain popularity on Facebook.”

After turning herself in, Villarreal responded with a habeas petition. She argued that Section 39.06(c) was unconstitutionally vague and violated the First Amendment. The Texas trial court granted the petition, finding the law unconstitutionally vague. But it did not reach the First Amendment question.

Villarreal then sued various city and county officials, the city, and Webb County, Texas under § 1983. The federal lawsuit alleged violations of Villarreal’s First, Fourth, and Fourteenth Amendment rights.

Finding Qualified Immunity, District Court Dismisses Villarreal’s Suit

As expected, the defendants moved for 12(b)(6) dismissal. This included the individual defendants moving to dismiss under qualified immunity. After holding a lengthy hearing, the district court ultimately granted the motions in full.

The district court determined the individual defendants had qualified immunity for two chief reasons. First, it concluded Villarreal failed to point out a First Amendment right clearly established at the time of her arrest. And second, it found the defendants had arguable probable cause to arrest Villarreal under § 39.06(c). As well, the district court dismissed Villarreal’s selective enforcement claim under the Equal Protection clause, concluding her allegations failed to show the defendants singled out Villarreal for arrest.

Soon after, Villarreal appealed to the Fifth Circuit.

Fifth Circuit Reverses Finding “Obvious” First Amendment Violation

After holding oral argument in February, a Fifth Circuit panel majority released an opinion on November 1, ruling largely in Villarreal’s favor. The majority reversed the dismissal of Villarreal’s First Amendment, Fourth Amendment, and Equal Protection Clause claims.

Judge James Ho, writing for the majority, reasoned “[i]f the First Amendment means anything, it surely means that a citizen journalist has the right to ask a public official a question, without fear of being imprisoned.” In affirming Villarreal’s core First Amendment right to ask officials for information as part of reporting the news, Judge Ho pointed to benchmark First Amendment decisions like *New York Times v. United States*, *Florida Star v. B.J.F.*, and *Chaplinsky v. New Hampshire*. And because Villarreal simply asked a police officer for facts as part of her routine reporting, the majority found her arrest to be “not just an obvious constitutional infringement—it’s hard to imagine a more textbook violation of the First Amendment.”

“If the First Amendment means anything, it surely means that a citizen journalist has the right to ask a public official a question, without fear of being imprisoned.”

To that end, the majority held the individual defendants have no qualified immunity. Its conclusion flowed from the Supreme Court’s decision in *Hope v. Pelzer*, 536 U.S. 730 (2002). In *Hope*, the Supreme Court clarified that if a reasonable official would have “fair warning” that certain conduct would violate the Constitution, there is no qualified immunity for that conduct. From that, the majority concluded “[t]he point is this: The doctrine of qualified immunity does not always require the plaintiff to cite binding case law involving identical facts.

An official who commits a patently ‘obvious’ violation of the Constitution is not entitled to qualified immunity.”

What is more, the majority rejected the defendants’ argument that they had qualified immunity because they relied on § 39.06(c). It agreed with other circuits that have held government officials cannot “invoke patently unconstitutional statutes like § 39.06(c) to avoid liability for their actions.”

And to drive home why it was an obvious constitutional violation to arrest Villarreal for no more than routine journalism, the majority called upon Hollywood:

Indeed, even Captain Lorenzo, the stubborn police chief in *Die Hard 2*, acknowledged: “Now personally, I’d like to lock every [expletive] reporter out of the airport. But then they’d just pull that ‘freedom of speech’ [expletive] on us and the ACLU would be all over us.” *DIE HARD 2* (1990).

(For all that, the opinion did not weigh in on the debate over whether *Die Hard 2* is a Christmas movie).

Reversing the dismissal of Villarreal’s selective enforcement claim, the majority declared “[w]e have no difficulty observing that journalists commonly ask for nonpublic information from public officials.” In the end, the majority found Villarreal sufficiently pled a selective enforcement claim under the Equal Protection Clause, recognizing that “Defendants chose to arrest Villarreal—and only Villarreal—for violating § 39.06(c),”

The majority did affirm the dismissal of some claims, including Villarreal’s claim based on First Amendment retaliation. Sticking to the Fifth Circuit’s subjective test for a retaliatory chilling injury, the majority found Villarreal failed to allege a chilling injury because she “has continued reporting since her arrest—consistent with the highest traditions of fearless journalism.” This maintains a split with other circuits, including the Ninth and Tenth Circuits, that use an objective chilling injury test focused on “a person of ordinary firmness.”

Chief Judge Owen dissented. The majority opinion notes that Chief Judge Owen “will file a forthcoming dissenting opinion.” As of November 11, she has not filed that opinion.

JT Morris of JT Morris Law, PLLC, Austin, TX, represents Priscilla Villarreal. Laura Prather and Catherine Robb of Haynes and Boone, LLP represented an amici curiae group of press and open government organizations that filed a brief in support of Villarreal. The Institute for Justice also filed an amicus brief in support of Villarreal.

Police Officer Who Fired at Journalists During Protest Protected by Police Immunity Law

By Andrew M. Pauwels

On Tuesday, October 26, 2021, Judge Roberta Archer of the 36th District Court, Wayne County, Michigan granted a motion to dismiss felony assault charges against Corporal Daniel Debono. The dismissal represented a disappointing conclusion (at least for now) to a series of events that began roughly 15 months ago when unrest seized the streets of Detroit and cities across the United States.

Last year, on Saturday May 30, 2020, three photographers—Nicole Hester, of MLive, Matthew Hatcher, on assignment for Getty Images, and Seth Herald, on assignment for Agence France-Presse—covered the second straight night of demonstrations in Detroit that had erupted following the murder of George Floyd by a police officer in Minnesota.

As the protests dragged on, interactions between protesters and the police became more violent, with protesters throwing objects at the police and police deploying tear gas and other non-lethal force in response. An unlawful assembly was declared and protesters ordered to disperse.

Following several hours of covering the protests, the three photographers decided to return to their vehicle and leave for the night.

In the early morning hours of May 31, as they were walking down Woodward Avenue, a major thoroughfare in downtown Detroit, a

police officer in riot gear fired rubber pellets at the photographers. At

the time, the photographers were not near an active protest. The photographers were wearing press badges and carrying cameras, and all three raised their arms in the air upon seeing the police officers in riot gear with anti-riot weapons. The police officer fired regardless, and all three photographers sustained injuries including to their faces, arms, and torsos.

The Detroit Police Department investigated the incident, following complaints made on behalf of the photographers. The Detroit Police identified Daniel Debono as the officer who fired the anti-riot weapon at the photographers and suspended him on June 10, 2021. The Wayne County Prosecutor's Office then took up the case, ultimately charging Corporal Debono with three counts of felonious assault, one of the very rare instances in the United States of a police officer being charged for such an action.

The case dragged on for months due to courthouse COVID restrictions and the resulting backlog. Debono filed a motion to dismiss based on a 90-year old Michigan statute providing

A police officer in riot gear fired rubber pellets at the photographers. At the time, the photographers were not near an active protest.

immunity for police officers during efforts to quell unlawful assemblies. The statute is lengthy but bears quoting in full here, to underscore the complexity and confusion of the language:

If, by reason of any of the efforts made by any 2 or more of the said magistrates or officers, or by their direction, to disperse such unlawful, riotous or tumultuous assembly, or to seize and secure the persons composing the same, who have refused to disperse though the number remaining may be less than 12, any such person, or any other person there present as spectators or otherwise, shall be killed or wounded, the said magistrates and officers and all persons assisting by their order, or under their direction, shall be held guiltless and fully justified in law.

Corporal Debono relied on this statute to argue that he could not be held criminally liable for actions taken during the protests, as long as an unlawful assembly had been declared. The prosecution argued that the statute was more nuanced, requiring a consideration of whether the people harmed were participants in the protest and refusing to disperse or were there for some other purpose – like journalists or, more broadly, anyone who happened to be on the street during an assembly, such as residents living nearby.

This interpretation of the Michigan statute adds another risk that journalists must be aware of and consider.

Judge Archer combined the defendant's motion to dismiss with the preliminary exam, taking testimony from a number of witnesses before ruling. Though finding that the photographers were not participants in the protest, were wearing press badges, and had not refused to comply with any specific direction from police, Judge Archer ruled that the statute immunized Corporal Debono from the charges and dismissed the case.

This broad interpretation of the statute raises very serious concerns about the relationship between police and the citizens they are duty bound to protect generally and protections for the press more specifically. The trial court refused to entertain any argument that the First Amendment protected the photographers and other members of the press from such actions. Journalists acknowledge that, in certain circumstances, their profession necessary entails a number of risks, including risk of bodily harm. This interpretation of the Michigan statute adds another risk that journalists must be aware of and consider.

The prosecution is expected to appeal the trial court's decision.

Andrew Pauwels, a partner at Honigman LLP in Detroit, represented MLive and Nicole Hester throughout these proceedings.

Maryland “Broadcast Ban” Is Unconstitutional as Applied to NPR Podcast

By Leslie Minora, Max Mishkin, and Charles D. Tobin

A Maryland federal judge has ruled that a state law banning the broadcast of lawfully-obtained recordings of criminal trials violates the First Amendment as applied to a National Public Radio podcast. [*National Public Radio v. Klavans*](#).

The podcast, which has [now aired](#), includes audio from the trial and sentencing of Jarrod Ramos, who murdered five journalists in 2018 in the offices of the *Capital Gazette*. *NPR, Inc. v. Klavans*, No. RDB-21-2247 (D. Md. Sept. 21, 2021) (granting permanent injunction) (Lexis citation unavailable at time of publication); 2021 U.S. Dist. LEXIS 175456 (D. Md. Sept. 15, 2021) (granting preliminary injunction). Maryland, following its decision not to appeal the injunction, agreed to reimburse NPR \$40,000 in attorneys’ fees and costs.

Background

Maryland Law. The State of Maryland mandates the official recording of state trial court proceedings “verbatim in their entirety,” and provides that the public, including members of the press, has the right to obtain copies of these recordings, save for certain limited exceptions. *See* Md. Rule 16-502 (requiring electronic recordings of district court proceedings); Md. Rule 16-503 (same for circuit courts).

Another law, however, prohibits the broadcasting of criminal trial court proceedings and provides that violators may be held in contempt of court. Md. Code Ann., Crim. Proc. § 1-201 (a), (c) (the “Broadcast Ban”). Maryland law therefore requires the court to provide journalists with official recordings but threatens them with contempt if they broadcast the same recordings.

The Soderberg v. Carrion Litigation. At the same time as NPR challenged the application of the Broadcast Ban against it, a group of journalists, criminal justice advocacy organizations, and a community organizer have been litigating a facial challenge to the same law. These plaintiffs had their claim dismissed by Maryland District Judge Richard D. Bennett, but the U.S. Court of Appeals for the Fourth Circuit reversed, concluding that the district court had “erroneously treated the Broadcast Ban as a content-neutral time, place, and manner regulation and thus subjected it to intermediate scrutiny,” and remanded the case for the application of strict scrutiny. *Soderberg v. Carrion*, 999 F.3d 962, 969-70 (4th Cir. 2021). (NPR was among the press amici in *Soderberg* at the Fourth Circuit.) The case remains pending before Judge Bennett on remand.

The Capital Gazette Shooting and NPR’s Reporting. On June 28, 2018, Jarrod Ramos entered the offices of the *Capital Gazette* newspaper in Annapolis, Maryland, and murdered five

journalists. His case was one of the most significant criminal proceedings in Maryland history. Ramos pleaded guilty but not criminally responsible to the charges against him, and after a two-week trial in July 2021, a jury rejected that mental illness plea.

After NPR's award-winning podcast *Embedded* reported a four-part series focused on the surviving staff, NPR decided to devote a fifth episode to in-depth coverage of Ramos's trial—and decided to include excerpts from the audio recordings it obtained from the court. But NPR found itself facing the untenable choice of either airing the audio and potentially being held in contempt of court or forgoing its use of the lawfully-obtained recordings.

NPR's Challenge. In August 2021, [NPR submitted a letter](#) to the Maryland Office of the Attorney General to “respectfully request that the State commit not to seek sanctions against NPR for [its] reporting in the public interest.” In response, the [Attorney General's Office refused](#) to commit not to enforce the Broadcast Ban against NPR, stating that “[i]t would not be appropriate for the State to commit in advance to not take enforcement action for a hypothetical violation of the law that has not yet occurred.”

Unable to reach a resolution, and considering the lingering risk of being held in contempt for releasing its podcast, NPR filed its complaint on September 1, 2021 and simultaneously moved for a preliminary injunction.

The Court's Rulings

Judge Bennett, the same judge overseeing the *Soderberg* litigation, was assigned to this case and promptly scheduled a hearing on NPR's motion for a preliminary injunction. At the hearing, NPR's motion was granted from the bench. The court issued a thorough written [preliminary injunction opinion](#) two days later.

The court's analysis focused on the first preliminary injunction factor: whether the movant is likely to succeed on the merits. The court noted at the outset that it must apply strict scrutiny to the Broadcast Ban, “a penal sanction for publishing information released to the public,” in line with the Fourth Circuit's ruling in *Soderberg*. The court held that “on the facts of this case, the state's asserted interests in witness protection and trial fairness are too speculative—and its solution too loosely tailored—to justify prohibiting NPR's broadcast of the Ramos trial.”

The court emphasized the long line of Supreme Court precedent holding that state action to punish the publication of lawfully-obtained truthful information violates the First Amendment, absent a state interest of the highest order, citing (among other cases) *Bartnicki v. Vopper*, *Florida Star v. B.J.F.*, *Smith v. Daily Mail Publishing Co.*, and *Cox Broadcasting Co. v. Cohn*.

The Maryland Office of the Attorney General had asserted that the Broadcast Ban is necessary to avoid making witnesses more hesitant to testify and placing them at higher risk of retaliation, and thus to maintain the integrity of criminal trials. The court observed that, although this “unequivocally qualifies as ‘a state interest of the highest order,’” as applied here, it is “prophylactic at best, and speculative at worst.” The court emphasized the State's lack of

evidence that NPR’s podcast would “endanger witnesses or undermine the fairness of the proceedings against Jarrod Ramos—whose trial is concluded, whose sentencing is imminent, and whose potential appeal will not require witness participation.” And it concluded that “mere speculation about serious harms” is insufficient to survive strict scrutiny.

The court additionally held that the Broadcast Ban is not narrowly tailored to the State’s asserted interest. Responding to the State’s argument that broadcasts of criminal trial proceedings will undermine courts’ ability to hold fair and just trials, the court stressed the First Amendment principle that “public scrutiny of trials is preservative—not deleterious—of fairness.”

After the court granted NPR’s motion, the parties agreed to stand on their preliminary injunction briefing and arguments for the court’s consideration of a permanent injunction. On September 21, 2021, the [court granted](#) NPR’s request for a permanent injunction.

Notably, Judge Bennett stressed the differences between NPR’s as-applied challenge to the Broadcast Ban and the facial challenge against the same law in *Soderberg*. In NPR’s case, the court noted, “Defendants must demonstrate that applying the Broadcast Ban to NPR’s podcast is necessary to advance a ‘state interest of the highest order’—it is not enough to argue that the Broadcast Ban would be justified by a compelling state interest in other, hypothetical circumstances.” But the court stated that “[i]n cases featuring evidence of witness intimidation, harassment, or other serious safety and fairness concerns, the Broadcasting Ban may well be ‘narrowly tailored’ to protect witnesses and preserve the integrity of criminal proceedings.”

NPR had included in its complaint a request for an award of attorneys’ fees and costs under 42 U.S.C. § 1988. The State agreed to pay NPR \$40,000 to resolve that claim.

In the criminal case that was the subject of NPR’s reporting, on September 27, 2021, circuit court judge, the Hon. J. Michael Wachs, sentenced Ramos to five consecutive terms of life in prison without the possibility of parole. NPR then obtained recordings from the proceeding. On October 14, 2021, NPR aired the episode of its *Embedded* podcast that included the recordings of both the trial and the sentencing.

The public can now hear for itself the story of Ramos’s trial and sentencing from the perspective of victims who survived the attack on the *Gazette* and testified in court, and the pivotal contribution the audio recordings made to NPR’s reporting. The audio includes victim-impact statements made in court by survivors and a stirring observation at the proceedings by Judge Wachs, just before he sentenced Ramos, noting that the *Capital Gazette* newspaper continued to publish from makeshift facilities immediately following the horrific shooting. He told the courtroom: “The defendant did not get the final say. The First Amendment and the community got the final say.”

Plaintiff National Public Radio, Inc. was represented by Charles D. Tobin, Maxwell S. Mishkin, and Leslie Minora of Ballard Spahr LLP. The State of Maryland was represented by Robert A. Scott and Ann Marie Sheridan of the Maryland Office of the Attorney General.

Case Closed: Alabama Supreme Court Guts Open Records Law

By J. Evans Bailey

In May 2017, a Sheriff's deputy in Baldwin County, Alabama shot and killed Jonathan Victor. Almost two years after the grand jury cleared the deputy of any wrongdoing, a reporter with the local Baldwin County paper, *Lagniappe*, sought public records related to the Victor shooting, specifically:

“All of the records related to the shooting of Jonathan Victor on May 12, 2017, including but not limited to dash cam, body cam, and thirdparty video; the audio from any 911 calls or radio communications; photographs from the scene; autopsy records; and communications such as emails, text messages, and other forms of messaging”

A short letter writing campaign and some confusion over the actual custodian of the records led to litigation which ended badly for proponents of open government. The recent, sweeping opinion from the Alabama Supreme Court in [Something Extra Publishing v. Mack](#) led Chief Justice Tom Parker to pen a blistering dissent:

“With one sweeping stroke, today's decision spells the end of public access to law-enforcement records that are connected in any way to an investigation. Hidden now from the public eye are body-cam videos, dash-cam videos, 9-1-1 recordings, and anything else that is remotely connected to a crime or even potential crime. After today, as to law-enforcement agencies at least, the statute might as well be titled the Closed Records Act.”

The sweeping ruling stands as a high-water mark for government secrecy of law enforcement records in Alabama.

With this ruling, it appears that the media will only be able to access law enforcement records if law enforcement makes a voluntary disclosure, the records are introduced as exhibits at trial, or, possibly, if the case is already closed. The sweeping ruling stands as a high-water mark for government secrecy of law enforcement records in Alabama.

At issue in *Mack* was Alabama's law enforcement investigative privilege statute, Ala. Code § 12-21-3.1(b). It says “[l]aw enforcement investigative reports and related investigative material are not public records.”

The statute is poorly worded to say the least; any lay person could read this language and conclude that “investigative material” has to be “related” to an “investigative report” to not be a public record. Indeed, solid legal precedent and public policy would support this conclusion. It's long been the law in Alabama that law records that reflect the who, what, when, and where of an incident are public, while on the other hand information related to confidential informants

and law enforcement work-product (i.e. their thoughts and opinions regarding an investigation) have not been public.

Even if “related” could be interpreted broadly in this context, it should not be. Alabama supposedly has a long-standing public policy in favor of openness and transparency. Its open records act is nearly 100 years old and courts have said that there is a presumption that all government records are public. This public policy means it’s the government’s burden to prove a record is not public, and any statutory exceptions to the open records act should be narrowly construed.

The majority opinion in *Mack* gave little consideration of these public policy concerns. Instead of finding, like both sides in the suit urged, that some records were privileged, and others were not, the Court said every record that law enforcement deems “related” to an “investigation” is privileged—regardless of when it was created, who created it, or whether it reflected an officer’s thought processes. In the Court’s own words:

The phrase "related investigative material" that follows "[l]aw enforcement investigative reports," however, is much broader and would encompass not only officer work product but also any materials related to a particular investigation. That would include items of substantive evidence that existed before the investigation began, such as video recordings or documentary evidence relevant to the crime being investigated.

Taking this impermissibly broad approach to the privilege, the Court found that *Lagniappe*’s open records request was properly denied. Unless the privilege statute is amended, *Mack* will stand as an almost insurmountable obstacle to any public records requested directed at law enforcement and related to an investigation. Following this ruling, law enforcement can hide anything they want from the public just by saying it is in an investigative file.

Chief Justice Parker, a staunch conservative, was unsparing in his dissent. He first chided the Court for misreading the privilege statute. The majority, he said, interpreted “related” too broadly and ignored other provisions in the same statute which draw a distinction between records documenting an event contemporaneously and records generated by law enforcement after the fact. The statute said the latter should be public, but the former could be privileged.

The Chief Justice then upbraided the Court for giving short shrift to prior case law interpreting the open records act generally and the law enforcement privilege specifically. In a prior case, the Court said that an “incident report” depicting the who, what, where, and when was public, but an investigative report containing officer conclusions was privileged. The Chief Justice

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correctly noted that the majority's decision in *Mack* obliterated this distinction and overruled prior case law, without expressly saying so (or being asked to do so). His summation did not hold back:

“I cannot sit idly by while this Court shrinks a legal right of the people of Alabama to the vanishing point. And I especially cannot do so when that shrinkage flies in the face of text and precedent. If the public's access to law-enforcement records is to be eviscerated via the investigative-privilege statute, that may be a right of the Legislature, but the statute's language as it stands today cannot bear that load.”

So, what is left for the reporter or the practitioner seeking law enforcement records in Alabama? Outside of generating public outcry and legislative action, at least four paths are still available.

The first somewhat well-travelled path involves seeking law enforcement records after they are admitted as exhibits at trial. This approach has garnered recent success in Alabama, especially relating to requests for body camera videos admitted as exhibits. The obvious downside to this approach is that there are a relatively few numbers of investigations that actually wind up in trial. And, in cases of civil suits arising out of incidents of officer violence, the civil court judge will often enter protective orders that create an additional burden on public access.

The second path involves requesting records in closed cases. Now, as noted above, the Johnathan Victor shooting investigation was a “closed” case when *Lagniappe* made its request for records, but *Lagniappe* did not argue to the Court that the “investigative” privilege should not apply because there was no existing investigation. Due to the quirks of appellate law, the majority left open the possibility that it would be open to such an argument in a future case. The argument that only records in pending investigations are protected from public scrutiny can be supported with prior case law and language elsewhere in the privilege statute, which also discuss the disclosure of law enforcement records subject to a civil subpoena in cases that are “disposed.” Whether this path is open, closed, or covered in thorns will be left to future determination.

The third path is a less-direct approach: request records from someone or some entity other than law enforcement. Records generated by third parties, like surveillance videos, may still be in the possession of non-law enforcement and could be willingly turned over. Other records that wind up in investigative files, like 911 records or autopsy reports, are held by non-law enforcement agencies and may, in some instances, have specific procedures for obtaining them as public records. Prior case law supports the notion that records that are otherwise public do not become secret records just because they are handed to law enforcement. Reporters and practitioners may want to exhaust third-party efforts first before approaching law enforcement and trying to navigate through *Mack*.

The last, and least appealing, path is to simply hope law enforcement will release records voluntarily. As experience dictates, this approach will mostly just result in the release of

records that are favorable to law enforcement, such as body camera videos of officers rescuing animals from danger. Chief Justice Parker correctly slammed this approach as naïve: “Like law in general, the [Open Records] Act exists to compel people to do what they will not do voluntarily. So the fact that some people do not need the prod of the law in no way lessens the harm of removing that prod from those who do.” Nevertheless, law enforcement in Alabama has been increasingly hesitant to release any records that might paint them in a negative light, especially in the wake of the Black Lives Matter demonstrations and counter-demonstrations in the summer of 2020.

Unfortunately, in the aftermath of *Mack*, there is little the public can do to hold law enforcement up to public scrutiny in Alabama. Law enforcement, who can deprive the public of their liberty, can now operate largely in the shadows. Unless the Legislature acts, as Chief Justice Parker noted, *Mack* “will be relied on by every smart lawyer who must defend any denial of a public-records request by a law-enforcement agency. And nothing in the decision gives any reason to believe that such a defense will ever lose.”

J. Evans Bailey is a partner at Rushton Stakely in Montgomery, AL and General Counsel of the Alabama Press Association.

Utah Court Rules Journalist Entitled to Names of Lobbyists Hired to Delist Gray Wolf

By Jeffrey J. Hunt, David C. Reymann, and Jeremy M. Brodis

The Utah Legislature has spent millions of dollars on contracts with a government contractor—Big Game Forever (“Big Game”)—with the goal of permanently removing federal protections for wolves. What Big Game has done with those funds has been largely unknown for nearly a decade. Now a Utah court has ruled that the list of subcontractors contained in Big Game’s expenditure reports must be disclosed to the public.

In a ruling issued October 11, 2021, the court held that the names of the subcontractors being paid with state funds to lobby for wolf-delisting were not properly classified as protected “trade secrets” or “commercial information,” under Utah’s open records statute, and that in any event the names must be released because the public interest in access outweighs any interests in restriction of access.

Background

Since the listing of the gray wolf on the Endangered Species List in the 1970s, a debate has raged about whether gray wolf reintroduction efforts have been successful enough that wolves should be delisted from federal protection, returning management authority to individual states. For at least the last decade, the State of Utah has weighed in on the debate by appropriating public funds to pay for lobbying efforts seeking a change in federal law that would permanently return control of wolf management to the State.

Big Game, a nonprofit organization that seeks to delist the gray wolf at both the administrative and congressional levels, has been the principal recipient of State funds earmarked for this effort. To date, the State of Utah, through the Utah Department of Natural Resources (“UDNR”), has paid Big Game a total of \$5,100,000. The State’s contracts require Big Game to, for example, “[w]ork with State & Federal agencies to pursue legal and legislative solutions to achieve legal and management authority over wolves to protect wildlife in the State of Utah.”

The names of the subcontractors being paid with state funds to lobby for wolf-delisting were not properly classified as protected “trade secrets” or “commercial information.”

In July 2018, following years of media and public attention seeking additional transparency into the expenditure of these funds, UDNR and Big Game amended their contract to require that Big Game provide expenditure reports to UDNR that detail the billable hours of each subcontractor

working under the contract, though Big Game filed written claims of business confidentiality seeking to protect the subcontractor names in the reports.

On October 29, 2019, investigative journalist Eric Peterson, through the Utah Investigative Journalism Project, submitted a request under Utah's Government Records Access and Management Act ("GRAMA") to UDNR seeking copies of the expenditure reports. UDNR denied the request in part, providing the expenditure reports but redacting the identities of the subcontractors, claiming that the names constituted "trade secrets" and "commercial information" that was "protected" under GRAMA. *See* Utah Code § 63G-2-305(1), (2).

Mr. Peterson appealed to UDNR's chief administrative officer for GRAMA appeals, who affirmed the redactions. Mr. Peterson then appealed to the Utah State Records Committee, which rejected the arguments that the names of subcontractors could be withheld, finding instead that the names should be public given the public interest in obtaining information regarding the spending of public funds.

Big Game appealed to district court, repeating its arguments that the subcontractors' names were trade secrets and commercial information. Peterson moved for summary judgment that the subcontractors' names should be released, and Big Game cross-moved, conceding that there were no genuine disputes of material fact, but arguing that as a matter of law the names were non-public.

District Court Decision

The district court rejected all arguments against access and granted summary judgment in favor of Peterson that the names of the subcontractors are public.

Trade Secrets

The court first rejected the argument that the subcontractors' names are trade secrets. GRAMA provides that records that contain "trade secrets" may be classified as "protected." Utah Code § 63G-2-305(1). This provision adopts Utah's statutory definition of a trade secret, found in Utah Code section 13-24-2, defining trade secrets as information that: "(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

First, the court observed that it was undisputed that "the identity and involvement of several individuals or entities is already public and known." Moreover, the court found that "most of the expenditures were for 'public outreach' and 'legislative/legal,'" and that "[t]he entities and individuals who were on the receiving end of the public outreach and lobbying efforts by Big Game and its subcontractors would know, or could learn, the identity of the individuals making those communications and performing those efforts." The court found it significant that under

both state and federal law, lobbyists are required to publicly disclose their relationships with their principals.

The court further rejected the argument that Big Game derived independent economic value from the supposed secrecy of its vendors, noting that Big Game only “vaguely asserts that unidentified vendors were poached by unidentified competitors and used in an attempt to compete with Big Game on unidentified proposals,” and finding this insufficient to meet the burden to deny access. The court observed that “[u]se of a vendor by a competitor is not uncommon and does not automatically make the identity of all vendors a trade secret.” Although Big Game had submitted a written claim of business confidentiality contemporaneous with its expenditure reports, the court found that “Big Game has not identified any other specific efforts it has taken to prevent public disclosures of the names of subcontractors,” nor had Big Game presented any evidence that it used *its own* resources—as opposed to the public funding it has received since 2011—to develop its list of subcontractors.

Commercial Information

The court next concluded that the subcontractors’ names were not protected commercial information under Utah Code section 63G-2-305(2). GRAMA provides that “commercial information” may be designated as “protected” if: “(a) disclosure of the information could reasonably be expected to result in unfair competitive injury to the person submitting the information or would impair the ability of the governmental entity to obtain necessary information in the future; (b) the person submitting the information has a greater interest in prohibiting access than the public in obtaining access; and (c) the person submitting the information has provided the governmental entity with the information specified in Section 63G-2-309.”

Though it was undisputed that Big Game satisfied subsection (c) of the above test, the court concluded that Big Game had not demonstrated that disclosure of the entire list of the subcontractors’ names “could reasonably be expected to result in unfair competitive injury to [Big Game] or would impair the ability of the governmental entity to obtain necessary information in the future,” at least in part because the identity of several of the subcontractors “is publicly known or readily ascertainable.”

Balance of Interests

Finally, the court concluded that, “even if the subcontractor list is properly classified as protected, the interest favoring access is greater than or equal to the interest favoring restriction of access.” *See* Utah Code 63G-2-404(7)(a). In reaching this conclusion, the court reiterated its rejection of Big Game’s arguments that unfair competition would result from access. The court further rejected Big Game’s argument that access could jeopardize the safety of its subcontractors, noting that Big Game had failed to present anything to support this assertion other than “the conclusory statement” of Big Game’s CEO that “as an organization that provides wildlife advocacy, [Big Game] has historically been targeted by extremist animal

rights groups.” But Big Game failed to “provide any specifics as to the conduct by animal rights groups,” and “[m]ore importantly, no evidence was presented that the several already publicly identified individuals and entities on Big Game’s subcontractor list have received threats or harassment due to their open involvement in the wolf delisting effort.”

On the other side of the balancing analysis, the court concluded that “the public’s interest in obtaining access to the information regarding who is receiving public funds, and what they are doing to perform the public contract, is high.” This is so because “[t]he public has a great interest in the accountability and transparency of the expenditure of millions of dollars under the public contracts with Big Game,” and “[p]roviding the redacted subcontractor information will allow the public to more meaningfully assess the work being performed, how the money was spent, and evaluate any alleged improprieties.”

This case highlights the significant public interest in access to information about the flow of public funds, especially when they are being used for lobbying on issues of public concern. Access in this case is particularly crucial for the public to be able to meaningfully evaluate the millions of dollars it has spent on wolf delisting.

Eric Peterson and the Utah Investigative Journalism Project were represented by Jeffrey J. Hunt, David C. Reymann, and Jeremy M. Brodis of Parr Brown Gee & Loveless, P.C. Big Game Forever was represented by Loren Washburn and Trinity Jordan of Armstrong Teasdale LLP. Utah Department of Natural Resources was represented by Heather Chesnut, Adam Wentz, Gregory Hansen, Martin Bushman, and Kyle Maynard.

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A View From the Inside

‘The Rich Don’t Always Fight Fair’: Guardian Lawyers, Libel and Lawsuits

By Gill Phillips

It was 9pm on a Friday and I had finally sat down with a gin and tonic to watch a bit of catch-up television when the phone rang. It was an American lawyer fuming about a piece the Guardian had just published. As I scrambled to read into the story and figure out how I would raise the journalist involved, an urgent sport story landed in my inbox following a punch-up at a football match, quickly followed by a 2,000-word Observer story that needed to be 100% legally watertight.

Such is the lot of the media lawyer, often the last line of defence between a publisher and a hefty lawsuit. Freedom of speech is a fundamental part of any democracy, but exercising and defending it can be a difficult and expensive thing.

The rich, the famous and the powerful don’t like criticism and don’t like having their dirty laundry aired in public. They can be well-resourced, and will spend heavily on expensive lawyers. They don’t always tell the truth, or fight fair. In April 1995, Jonathan Aitken, then a Treasury minister, denounced the “wicked lies” told by the Guardian and Granada TV’s World in Action about his business activities.

But the Guardian held its nerve and two years later his legal action collapsed and he was jailed for perjury and perverting the course of justice.

That story set the tone: never again would the Guardian be considered a soft touch when it came to defending itself. But the implication was that it would have to be sure of itself on every contentious story it published.

The Guardian operates with a team of in-house editorial lawyers who are available to work closely with its journalists to get legally difficult stories successfully over the line.

Our small team look after all publishing related legal issues for the Guardian and the Observer – from whether it is OK to publish a particular story or picture, to advising on leaked



documents and court reporting. We also pick up and respond to legal complaints after publication.

Our primary aim is to ensure that what is published has been legally and editorially risk-assessed. Of course, not every article needs legalling. We could get sent up to 50 articles a day for pre-publication legal review or checking, and we won't know in advance, in most cases, what an article is about, so we need to be nimble and ready to move quickly from, say, a sport story to a science one, to a long read on sexual abuse, to a foreign investigation about corruption. Ultimately, the decision on what to publish lies with the editors. There's an old adage – lawyers advise, but editors decide.

Making a serious legal mistake can be time-consuming, costly and reputationally damaging. The prevailing global media landscape is pretty hostile. It's not just about facing down legal threats. Donald Trump referred to reporters as “enemies of the people”. Attacks such as this have been a gift to strongmen dictators who wish to silence the press, and have increased the risk and likelihood of physical attacks on journalists.

The UK is not so friendly either. It is very expensive to fight a case all the way to a trial here. It can easily mean costs running into the hundreds of thousands of pounds. Even if you win you may still be well out of pocket, because of the way the legal costs regime works.

And if you lose, you may have to pay damages as well as the other side's costs. As Voltaire said: “I was never ruined but twice – once when I lost a lawsuit, once when I won one.”

London is considered by some as the libel capital of the world, and many use English lawyers to silence their critics. Because we publish via a website, where anyone can access and read our stories, we face the possibility of being sued anywhere in the world.

Big investigative series generally present the biggest legal challenges, as they often publish material that powerful interests do not want aired – and involve many stories by a number of journalists, based in the UK and abroad. Here, editorial lawyers tend to get involved early on, so we can advise on what is being planned, and facilitate discussions around the public interest or what the editorial code is saying.

Later, the journalists will put together any “right to reply” letters that will be sent out seeking comment from those who may be criticised. Once those letters go out, we can usually expect to get a barrage of responses, often from expensive claimant-friendly lawyers, some of whom are hired to try to put journalists off publishing, usually by whatever means they can – threats,

We could get sent up to 50 articles a day for pre-publication legal review or checking, and we won't know in advance, in most cases, what an article is about, so we need to be nimble and ready to move quickly from, say, a sport story to a science one, to a long read on sexual abuse, to a foreign investigation about corruption.

bluster, as well as, where appropriate, pointing out that we have misunderstood something or missed a key bit of evidence.

These letters are often headed “private and confidential and “not for publication” and can be tricky and time-consuming to respond to, particular as things near the publishing deadline. We have to take on board what these letters say, consider how they might affect what the journalists want to write, and discuss any next steps.

Publishing 24 hours a day, 365 days a year around the world is a legally fraught business. The law can change very rapidly and we have to try to make sure we are up to date with how the courts at looking at things.

For example, over the past five to 10 years, the courts have got very hot on what they call audit trails – they like to see evidence of journalists and editors’ workings and thought processes before something contentious gets published. This is a relatively new court-created development. It’s not something the government or a regulator have put in place. And it can be tricky when there’s a deadline looming.

A free press stands for the kind of liberties and tolerances that are vital and precious to all of us. As the philosopher JS Mill and the poet John Milton recognised, we need to believe and have faith that in a free and equal encounter with falsehood truth will emerge, that differences of opinion encourage debate and help truth emerge, and that by this process we have a better chance to get the whole picture and not a partial one fed to us by those in power or who are able to influence it.

My team are very privileged to be working for a news organisation that does its best to espouse these high standards and contribute in our own small way to trying to get the story, and hopefully the truth, over the finishing line.

Gill Phillips is the Guardian’s director of editorial legal services and is a former member of MLRC’s Board of Directors. This essay was originally published in the Guardian, and is used with their kind permission. © Guardian News & Media

Presentation of William J. Brennan Jr. Defense of Freedom Award to Barbara W. Wall

Former Gannett general counsel Barbara Wall was awarded MLRC's highest honor, the William J. Brennan Jr. Defense of Freedom Award, at our annual Gala Dinner November 10. The following are excerpts of the speeches from the ceremony.

Address by George Freeman

I thought I'd start by describing why Barbara belongs among the giants and well-known names in our field who are previous winners of this award: Daniel Ellsberg, Tony Lewis, Fred Friendly, Floyd Abrams, Ted Turner, and Justices Blackmun and William Brennan, for who our award is named.

Why this diminutive, soft-spoken woman should be so honored. And regarding Woman, I'm proud to say that in the 30 years MLRC has been giving the Brennan award, Barbara is the first woman to win it!

That's right, the first woman to win it in her own right - a few years ago Maria Ressa accepted the award, but as a symbol of persecuted journalists globally – we were a few years ahead of the Nobel Committee who just last month awarded Maria the Nobel Peace Prize ...

... The inscription goes on to give praise to “her exceptional strategic and practical skills as a FA lawyer.”

Barbara is quite simply the savviest, cleverest, but most subtle and diplomatic lawyer I've ever seen. All with her characteristic modesty and understated way.

And she has used those skills to full advantage. Often she has fought vigorously to uphold a strong First Amendment position. But when appropriate, she has soft-spokenly, skillfully and strategically negotiated and compromised, to get pretty close to what her original goal was.

And always practical. As a speaker on panels for decades, Barbara doesn't abstractly dissect a recent decision of the Idaho Supreme Court or the 10th Circuit, but rather, far more usefully, discusses what practical steps to take when a subpoena or certain type of Complaint hits your desk.

We haven't included in her plaudits that she was chosen as COO of Gannett at a crucial time for the Company, when its future was at stake. While that's quite a coda on the list of her

Barbara is quite simply the savviest, cleverest, but most subtle and diplomatic lawyer I've ever seen.

achievements, I mention it more because its Board – made up, I assume, mainly of old white men – decided that of all people, Barbara, with the characteristics, skills and abilities I have just described, was the person to lead them at that critical time. This only confirms the views all of us have had about Barbara for years, and why we honor her tonight.

Finally, the inscription praises ” her steadfast promotion and support of women in the media bar.”

I won’t embarrass anyone by asking you to raise hands, but I bet there are scores of people, men and women in this room, whose careers were enhanced by something Barbara did for them.

As an example, on numerous occasions when an oral argument was approaching on one of her cases, and the presiding grayhaired partner was assuming he would do it, Barbara intervened: No she said, why don’t we let young Ms. Associate argue: she wrote the brief and knows the case best. Her getting those young female lawyer to take that role in court catapulted one after another of them to successful careers, if not stardom.

She recognized talent, made a point of not letting her or anyone else be limited by the usual stereotypes, and in so doing advanced the position of women in the media bar.

In short, Barbara not only talks the talk, she most assuredly has walked the walk...

Address by Charles D. Tobin

In the decades since Justice Brennan wrote the Supreme Court’s decision in *NYT v. Sullivan*, generations of strong lawyers have built the body of case law we rely on in defending journalists throughout the United States.

Early on, most of that case law was built by white men. But as our bar matured, as lawyers came to understand that diversity, equity and inclusion makes us stronger, many superb women lawyers and lawyers of color have joined in this important work. We have made progress. But we still have so much more work to do.

Tonight, I will make the case that the practice of media law would be far less successful, far less diverse, far less widespread – and far less fun – without the efforts of tonight’s recipient of the MLRC’s William J. Brennan Defense of Freedom Award, my dear friend and mentor Barbara Wall.

As George mentioned, I had the privilege of working as Barbara’s direct report for 8 years at





Gannett, in the 1990s. Since then, she and I and our families have remained close, and I have been privileged to continue to serve Gannett’s newsrooms as one of its outside counsel.

But the impact Barbara has made on my career is just a tiny example of the powerful and enduring influence she has had on the course and scope of our entire practice area ...

... Barbara worked steadily, for years, to train an entire army of great First Amendment defenders. We all became a part of the “Barbara Brigade.”

And she also introduced local media counsel to each other. She co-founded the annual conference

of the ABA Forum on Communications Law. To bring this emerging talent together. To cross-pollinate ideas. To meet each other’s family. To build bonds on the golf course, by the pool, and around the bar. We owe much of the warm camaraderie we’re enjoying tonight to Barbara’s innovation ...

... How many of us have ever been able to say no to one of Barbara’s calls. She asks if she can “just run something by you?” But she really means, “I need you to do this – I really hope you will – I know I can count on you.” And we always say yes.

Indeed, I would wager that Barbara’s organizational skill, motivational insight, fierce powers of persuasion – and the sincerity of her friendship – is what first brought most of you, and if not you, your mentor, to your first PLI, ABA Forum, and MLRC gathering.

And throughout her career, Barbara and the network of counsel she developed have enabled so much impactful local and national journalism. Here are just a few examples of the really important battles the Barbara Brigade won during her time at the helm of the Gannett Law Department:

The *Pensacola News Journal* persuaded the Florida Supreme Court to reverse an \$18 million jury verdict. And at the same time, Gannett killed false light as a viable tort claim in Florida.

The *Louisville Courier-Journal* litigated into the Sunshine hundreds of federal safety violations in Kentucky coal mines, and uncovered records on the deaths of infants under state agency care

Barbara and a team of outside counsel – and I was proud to be a part of that particular brigade – convinced a Birmingham judge to dissolve a prior restraint against *USA TODAY* barring publication of gas line safety plans for the city’s ancient and crumbling utility system.

Working with journalists and her inhouse peers, Barbara spearheaded the adoption of anti-SLAPP statutes along with improved or new reporter shield statutes.

Under Barbara's leadership, *Detroit Free Press* reporters, for 11 years, battled a civil subpoena in litigation brought by a former U.S. Attorney – setting an important precedent in the Sixth Circuit, which had none.

And Barbara worked day and night to secure the release of *USA TODAY* reporter Clair Gillis when she was kidnapped and held 45 days in Libya.

And all through this wonderful work, Barbara has always prioritized and promoted the development of younger lawyers – not only, but especially, young women lawyers and lawyers of color.

I was in Barbara's office in the 90s when our Marin County lawyer suggested postponing an important hearing because he had a conflict. Barbara said to him, "Well, what about that associate who has done all that great work on the case? Why not send her to argue?" The lawyer who went to court that day – and won – is Nicole Wong. And as many of us well know, she went on to prominence as a founding lawyer at Google and later an official in the Obama Administration.

Barbara has been the First Amendment backbone for literally thousands of local journalists.

As for me: I met Barbara while interviewing for a summer associate position at Gannett in 1987. She was my fourth interview that day. For all I know, I was her 10th. She had a terrible cold. But she leaned into the conversation with a warmth and sincerity that I always try to emulate as I meet with so many young, wide-eyed student.

At one point in our meeting, Barbara told me, "I Have the Perfect Book for You!" – and she eagerly got up from her desk to reach for the bookshelf. I hadn't even noticed until then that she was very pregnant, with her daughter Louisa.

Barbara grabbed a worn copy of a really thick tome and told me I could have it. She said that it would teach me much about this practice area I was hoping to join. That book was the LDRC's – the forerunner to the MLRC – 50-state survey of libel law. I lugged that tome back to law school at the University of Florida and kept it as a prized possession for many years.

That was my introduction to this bar and to Barbara's terrific mentorship. I guarantee you, somewhere in your own origin story as a media lawyer, there's a connection to Barbara.

From Great Falls to Sioux Falls, Greenville to Asheville, Montgomery to Marin, Hattiesburg to Honolulu, Bellingham to Boise – there is no one – no one – who has influenced more media lawyers, or enabled more important journalism, than Barbara.

Please rise and join me in congratulating our friend and colleague Barbara Wall, recipient of the MLRC's William J. Brennan Defense of Freedom Award.

Chuck Tobin was Assistant General Counsel at Gannett from 1993-2001. He is now the practice leader of the Media & Entertainment Law Group at Ballard Spahr LLP and is based in Washington, D.C.

Address by Barbara Wall

Thank you for the generous introductions, George and Chuck. And thanks to MLRC Chair Randi Shapiro, to the MLRC board, and to every member of the MLRC for this award. Since its founding in 1980, the MLRC has been the leading resource for those on the front lines of defending press freedom. Never was that leadership more needed—or more appreciated --than it is today.



So what can I say but wow?—I am so grateful to all those who made it possible for me to be here tonight.

First and foremost, my deepest thanks go to all the journalists who trusted me to help them tell their important stories -- and to defend their outstanding work ...

... I want to say a few words about my support of women in the media bar, which—as you’ve heard-- is one of the reasons MLRC thought I was deserving of this award. On that subject one thing must be said: with over 100 daily newspapers and 47 TV stations in 36 states, Gannett needed strong First Amendment

representation in abundance. That meant that we desperately needed all the talent we could find! Through MLRC and ABA Women in Communications Law gatherings, I got to know many of the women who were coming into the media bar, and found that they were passionate, ambitious and whip smart. Of COURSE I wanted them on our side. So to all of women I tapped over the years, here’s a secret: I needed you more than you needed me! Thanks to all of you for your commitment to the First Amendment and for your dedication to Gannett’s journalists.

I should also point out that I recruited many talented men to defend Gannett’s journalists too. Chuck Tobin, of course, is Exhibit A, but there are hundreds of others--far too many to name. So to every lawyer who has defended a Gannett libel suit, moved to quash a reporter’s subpoena or brought an access suit on our behalf, which probably includes about half the lawyers in attendance tonight, Thank you.

There are a few other organizations I’d be remiss not to mention:

-To Satterlee & Stephens, the firm that started me on the journey leading to this room tonight, thank you. I was 23 when I arrived at Satterlee's doors and over the next six years was given the chance to work on some of the most interesting First Amendment cases anyone could ask for. Without the opportunities you all gave me, I'd never be standing here tonight.

-To the News Media Alliance --whose Legal Affairs Committee has been a godsend for every newspaper lawyer in the room, --thank you ...

... Finally to my family --my parents, my children, my brothers and sister and my wonderful husband Chris-- I owe you everything.

When I began my practice in 1979, I had dreams of becoming an advocate for press freedom. Over the years, I've been fortunate enough to develop the practice I'd hoped for. What I didn't realize in 1979 is that I would make some of the best friends of my life doing so. To everyone in attendance tonight, Thank you for your leadership, for your fearless defense of journalism, and for your friendship.