MLRC Media Law Resource Center
MEDIA LAW LETTER

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From the Executive Director's Desk

Palin v. New York Times: Testing the Actual Malice Standard

The Sarah Palin v. New York Times trial last month garnered lots of press attention. Presumably that was why Ms. Palin chose to sue in New York rather than in a jurisdiction where she likely would have faced friendlier red state jurors.

Indeed, the trial gave rise to lots of colorful storylines: the folksy right wing hockey mom against the New York Times, pillar of the liberal establishment; the team of lawyers who bankrupted Gawker in the Hulk Hogan case facing off against an elite media boutique; a clever, idiosyncratic judge who seemed bent on quickly advancing the case on his terms without much regard for the usual rules and procedures; a trial held in the midst of a pandemic, but widely accessible by phone; a trial delayed by Palin testing positive for COVID and her dining indoors without a mask (with Judge Rakoff sniping "She is, of course, unvaccinated"); the question of who, if anyone, was financing Ms. Palin's litigation; the editorial at issue written in the aftermath of the shooting of a leading Congressman at a Republican baseball team practice; how this charismatic maverick campaigner would fare on the witness stand (poorly, as it turned out); and, at least to this longtime hockey aficionado, the disclosure that Ms. Palin's new boyfriend is former Ranger star and man about town Ron Duguay.

George Freeman

The Palin trial last month garnered lots of press attention. Presumably that was why Ms. Palin chose to sue in New York rather than in a jurisdiction where she likely would have faced friendlier red state jurors.

But amidst all those stories, probably the most ink was spilled on the question of whether this litigation was perhaps a vehicle to get the Supreme Court to take the case for the purpose of revisiting and potentially overruling Times v Sullivan.

For reasons I will detail below, I believe it is a huge longshot that, even in the unlikely event that four justices vote to revisit Sullivan, they will use this case to do so.

More importantly, instead of focusing on whether this litigation will be used to overrule Sullivan, its real significance was as a test of whether Sullivan works. The facts adduced at trial presented a perfect scenario to see if a jury (and trial judge) would follow the rather

technical rule of actual malice or whether they would fall back, as juries are prone to do, on their subjective likes and impressions, and find for the good guy/gal victim rather than the negligent big bad institutional defendant.

As the Times pretty much admitted at trial, this was a fact situation where they were sloppy and did not meet their usual high journalistic standards. Whether it was because the editor, James Bennet, was on deadline, miscalculated how people might read his words, or just plain inexplicably screwed up, the editor, and to a lesser degree his staff, were somewhere between negligent and sloppy. And Bennet, the Times' main witness, is Yale educated and was often described as an intellectual, not characteristics that would endear him to most jurors.

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In contrast, the victim, who said she couldn't sleep at night because of the libel suggesting she was responsible for attempted murder (although painfully unable to articulate any further damage), was a former national candidate. She is generally described as folksy or charismatic, adept at connecting with average Joes, and she had done little over the past few years other than being a mom and performing on tv – ideal training for the witness stand.

This set-up seemed dangerously poised for a jury verdict for plaintiff. Indeed, even with less one-sided facts and characters as here, MLRC research shows that through the last 40 years, plaintiffs have won 60-67% of libel trials against media defendants. The niceties of actual malice law generally do not overcome the feelings and impressions of the jury – even if, as is not always the case, the jury understands actual malice. And that is not really the jury's fault, as actual malice has nothing to do with malice as laypeople commonly understand the word. And when a judge's instruction then defines actual malice as involving "reckless disregard," that adds to the confusion as recklessness seems synonymous with negligence. That is, of course, precisely the opposite in libel terms from actual malice.

On the other hand, the judge in this case did carefully lay out what actual malice really means, and he did it both at the beginning of the case as well as in his instructions at its end. It was clear from the start

Jed Rakoff, a clever, idiosyncratic judge who seemed bent on quickly advancing the case on his terms without much regard for the usual rules and procedures.

of the litigation, as the early motion practice amply showed, that there was no evidence of legal actual malice in this case, let alone by clear and convincing evidence. There was not even a shred of evidence that the editor intentionally tried to railroad Ms. Palin, or that he doubted anything he wrote. Plaintiff's attempts to prove actual malice were implausible: that the editor's brother was a Democratic Senator from Colorado and thus he had an animus against Palin; that The Atlantic had written articles contrary to what was in the editorial, and that since he had been its top editor he was surely aware of that as he wrote; and even more outlandishly, that this was a brazen attempt by the Times to sensationalize in order to get more subscribers and more clicks.

That is simply laughable as Times writers are punctilious in trying to get all their facts right, and, as was demonstrated by numerous internal emails at the trial, get very upset if they make an error and work to correct it immediately. From personal experience, I can attest they really don't care or consider the business side or the circulation ramifications. Anyhow how are two sentences deep in an editorial, which itself is deep inside the paper, going to serve to grow circulation? It's a preposterous plaintiff manta.

So the trial presented a stark dilemma. Would the jury go with their gestalt feelings - that the Times screwed up, at least somewhat hurt the plaintiff, and deserved to pay for it. Or would they hew to the technical and nuanced definition of actual malice as directed by the jury instructions, and then inevitably decide that there simply was no subjective intent to falsify, and therefore no actual malice. Of course, we now know that the jury did what it was supposed to – followed the instructions, and, after lengthy deliberations, found for the Times. So to the credit of the jurors, and to the wisdom of following Justice Brennan's opinion in Sullivan, the idea was reinforced that we must sometimes live with unintentional errors for the more important value of robust, uninhibited and wide- open speech on public issues. Although it would have been easy for the jury to go with its gut, it followed the law. Sullivan and the use of the actual malice standard passed the test.

Two side notes: First, the lawyers for the Times could have tried to minimize their client's error to convince the jury that it wasn't that much of a screw-up after all. That is a human instinct in the face of wrongdoing – "what we did wasn't so bad!" To their credit, they underplayed that argument, and that's fortunate as I believe it would have alienated the jury. Rather, they fully admitted error, and relied on the jury's following the actual malice rule. That confidence in the jury was rewarded.

Second, and relatedly: It is extremely unfortunate that we haven't heard from any juror. For all the reasons set forth in this essay, it would be invaluable to get a sense of how the jurors analyzed the facts and the law, and how they came to their decision. But the judge strongly suggested to them that they need not talk to the press, and they apparently have heeded that advice. So much that we lawyers could learn about how actual malice is interpreted has been lost because of their silence.

So the main significance of the trial is that the Sullivan standard held, that it was correctly and strictly followed by both judge and jury. But more discussion about the case focused on whether the trial court proceedings were just a prelude to get to SCOTUS reconsideration. This played into the speculation of who, if anyone, was financing the litigation for Ms. Palin, since if there were a rich financier, his/her priority would likely have been a general revamping of libel law, not merely a recovery by Palin at trial.

The map distributed by Sarah Palin's PAC in 2011, which was referenced in the Times' editorial.

Yet I believe the chances of the Court's accepting the Thomas/Gorsuch invitation to take any case to reconsider and overturn Sullivan are slim. First, they are poised this term to overturn the almost 50-year precedent of Roe v. Wade, a controversial decision which will spur controversy and be attacked as trashing *stare decisis* for political ends. A Court already deeply troubled by the public perception that it is a politicized body, made worse by its upsetting the status quo in the abortion arena, is highly unlikely to want to upset another super precedent in an area - media law - which it is not so interested in and, indeed, has not taken a case in over 20 years.

Second, for all the reasons set out in the awesome MLRC White Paper to be released on March 9, there is no good reason to overturn Sullivan. The White Paper amply demonstrates the weaknesses of Justice Thomas' historical and legal analyses, and also shows that Justice Gorsuch's comments about the changed media landscape since 1964 have, at bottom, no bearing on Sullivan. In fact, the data gathered by MLRC provides evidence that the actual malice standard has not meaningfully affected the bringing nor succeeding of libel cases in recent years.

There are other reasons Palin v New York Times seems like a most unlikely case for SCOTUS to accept. First, given the pressure from the public – and the justices themselves – that the Court ought to be a less politicized institution, it seems obvious that the last case they would want to wrestle with is one between a former Republican candidate for Vice President and current right wing supporter of conservative causes and candidates and a paragon of the liberal establishment. Thus, even if four votes could be garnered for reconsideration, of the

many cases where cert is being sought to review and abandon Sullivan, this would appear to be the last one the Court would take.

Second, I would think even if four votes were getable, it would come in a public figure celebrity case, not one involving a former public official and candidate for national office. Since a public official case is one where the base rationale of Sullivan and Justice Brennan's opinion are most applicable, it would be surprising if, in the unlikely event they took a challenge to upset Sullivan, it would be in the public official, rather than public figure, arena. Indeed, a reading of Justice Gorsuch's critique shows clearly that he is mainly questioning the applicability of the actual malice standard in public figure cases.

I am very heartened that the actual malice standard was correctly and rigidly applied at this trial, and not too worried that the Palin case will spell the end of 58 years of libel law under New York Times v. Sullivan.

Third, due to the weirdest of circumstances, it would appear that even if the Court were to decide that the Constitution did not demand following the Sullivan standard, the result of the Palin case would not be altered. That is because under a very broadening amendment to New York's anti- SLAPP statute, the state's law now provides that for a plaintiff to prevail in a case involving a public issue, actual malice must be shown. So under state law, the ultimate result would seem to be protected.

Of course, the Palin case already has taken some unorthodox twists and turns, so making these sort of predictions are perilous. In any event, I am very heartened that the actual malice standard was correctly and rigidly applied at this trial, and not too worried that the Palin case will spell the end of 58 years of libel law under New York Times v. Sullivan.

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

Roy Moore #MeToo Libel Suit Results in a "Dogfall"

By Dennis R. Bailey

The Meriam-Webster defines "dogfall" as "an inconclusive result to any kind of contest" e.g. a draw or tie." After litigating libel claims and cross-claims since December 2017, "dogfall" is the first word that comes to a "southern" mind after seeing the February 2, 2021 handwritten jury verdict in the case between former Alabama Supreme Court Justice and failed Senate candidate Roy Moore and Leigh Corfman, who accused Moore of abusing her in 1979.

The jury verdict concluded: "[N]either party recover from the other." However, both sides claimed victory and neither side said they will appeal.

The case was filed in the Circuit Court of Montgomery County, Alabama and styled *Leigh Corfman v. Roy Moore*, CV-2018-900071.00. John E. Rochester was the presiding Circuit Judge.

Background

The case arose after a published allegation by Leigh Corfman who claimed that Roy Moore had sexually assaulted her in 1979 when she was 14-years-old and Moore was a 32-year-old assistant district attorney. She made those allegations during Moore's US Senate campaign. Her allegations were first published in a Washington Post article dated November 9, 2017. Moore lost the election to democrat Doug Jones on December 12, 2017 after claiming to be up 11 points in a poll.

Moore first filed a lawsuit December 27, 2017 seeking to challenge the election results on the grounds of alleged voter fraud. In that complaint Moore alleged Ms Corfman's account of sexual abuse was "false and malicious." In February 2018, Corfman filed a civil suit against Moore and his campaign seeking only (1) a declaratory judgment that Moore and his campaign defamed Corfman; (2) an order that Moore retract the alleged defamatory statements; (3) a published apology and (4) an injunction against Moore from making future defamatory statements. Her prayer for relief contained no claim for compensatory or punitive damages. Corfman said in her complaint Moore accused her of lying for political purposes. She claimed it was defamatory for Moore to say her account was "completely false," "politically motivated" and reflected "the immorality of our time." The complaint claimed she was a private citizen.

Moore counterclaimed against Corfman seeking (1) a finding that Corfman defamed Moore; and (2) an award of damages for harm to his reputation, occupation, and social standing in the community. He claimed it was defamatory for Corfman to claim that in 1979 Moore had picked her up, drove to his home, gave her alcohol and sexually abused her when she was 14.

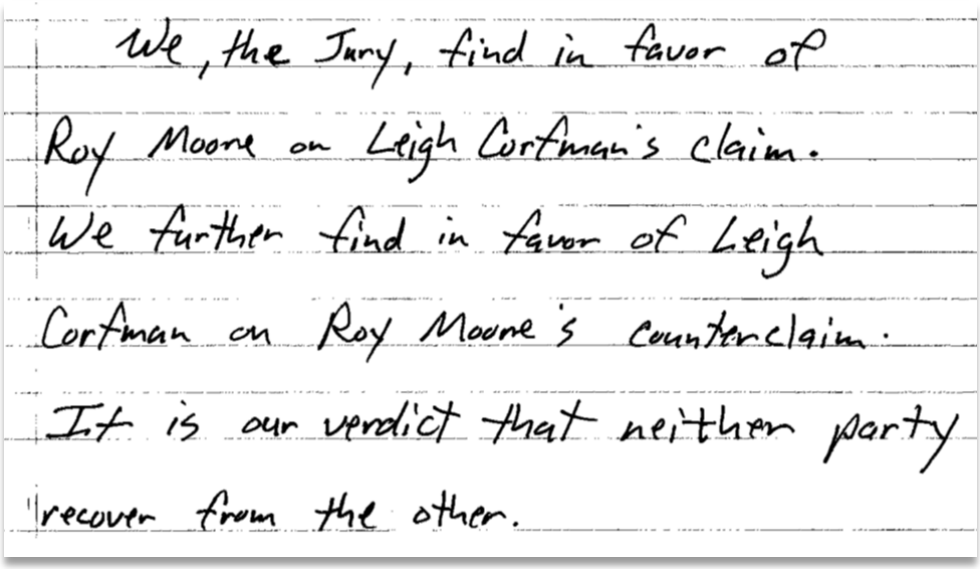
Moore claimed she voluntarily injected herself into the vortex of public controversy and became a limited purpose public figure.

The claims and counterclaims were vigorously and aggressively litigated. The presiding judge found Corfman was a limited purpose public figure as a matter of law.

Corfman filed a motion in limine regarding deposition questions regarding her sexual history, use of drugs or alcohol and political beliefs on "hot-button issues" such as abortion, LGBTQ rights and separation of church and state. The motions on those issues were denied requiring objections to be made at trial. Corfman's motion to allow a jury questionnaire was denied.

Apparently, during opening statements counsel for Moore argued that ruling for Corfman would establish a "dangerous and hugely un-American" precedent that a person could not deny a false charge without being sued for defamation. Corfman filed a bench memo to the effect such arguments were juror nullification, and the jury should be instructed to follow Alabama law on defamation. It is unknown whether that argument was made during closing arguments. Corfman also asked the court to deny a pattern jury instruction on the applicability of a qualified privilege defense to Roy Moore. Unfortunately, the record does not reflect what jury charges were denied or given. However, counsel for Corfman (Melody Eagan) remembers the court charged the jury using the public figure standard for Corfman and Moore.

After 8 days of trial the jury deliberated three hours before issuing a handwritten verdict:


We, the Jury, find in favor of Roy Moore on Leigh Corfman's claim. We further find in favor of Leigh Corfman on Roy Moore's counterclaim. It is our verdict that neither party recover from the other.

"We, the Jury, find in favor of Roy Moore on Leigh Corfman's claim. We further find in favor of Leigh Corfman on Roy Moore's counterclaim. It is our verdict that neither party recover from the other."

One of Moore's lawyers, Julian McPhillips of Montgomery saw it this way:

"It was very interesting case. The evidence was undisputed that Judge Moore never called Ms. Corfman a liar. Both were public figures with a higher degree of proof to meet. Judge Moore was delighted with the outcome. I felt he was being bullied and scandalized unfairly."

Melody Eagan of Birmingham had this to say:

"We are very pleased that Roy Moore lost his defamation claim against our client, Leigh Corfman. Indeed, we believe it strange that Mr. Moore would claim vindication when the jury found he was not defamed by Ms. Corfman's allegation that he sexually assaulted her when she was 14 years old. While we are disappointed that the jury did not find in favor of Ms. Corfman on her defamation claim related to Mr. Moore's statements in 2017, we have no plans to appeal at this time."

Any way you want to spin the result, this case involved claims and counterclaims of defamation between public figures. The outcome appears to squarely meet the definition of ending in a "dogfall."

Dennis Bailey is a partner at Rushton, Stakely, Johnston & Garrett, P.A., Montgomery, and General Counsel for the Alabama Press Association.

Texas Federal Court Denies Motion to Dismiss Defamation and §1983 Case Over Academic Freedom

By Kayla Bright

Courts and schools alike have long wrestled with the extent to which public educational institutions may regulate the speech of their students, faculty, and employees. The debate regarding First Amendment rights on college campuses – especially in today's contentious environment over the boundaries of acceptable speech – is well illustrated in the recent decision Jackson v. Wright, (E.D. Tex. Jan. 18, 2022).

The Initial Controversy

As a professor of music theory at the University of North Texas ("UNT"), plaintiff Dr. Timothy Jackson has focused his scholarship on the work of Austrian Jewish music theorist Heinrich Schenker. During Jackson's tenure at UNT, he served as the director of the Center for Schenkerian Studies. He was also a founding member and lead editor of the *Journal of Schenkerian Studies*, which – prior to this lawsuit – was published by the UNT Press. While the Journal is small, with only about 30 paid subscriptions per year, its publication, content, and editorial process are at the heart of this dispute. See Michael Powell, *Obscure Musicology Journal Sparks Battles Over Race and Free Speech*, N.Y. Times (Feb. 14, 2021).

The Schenkerian controversy began in 2019, when Philip Ewell, a Black professor of music theory from Hunter College, gave a speech during a convention of the Society for Music Theory. Ewell's speech alleged that Schenker was an ardent racist and that Schenkerian theory perpetuated white dominance in music theory. Jackson and his assistant editor organized a symposium in response, and published symposium contributions (including a piece written by Jackson suggesting that Ewell's criticisms of Schenker might be anti-Semitic) in the Journal's July 2020 issue.

This symposium was not well-received. Jackson heard loud criticism from the UNT community, as well as the music theory community at large. The Executive Board of the Society for Music Theory chastised the symposium's failure to live up to "ethical, professional and scholarly standards," while a group of UNT graduate students signed a statement calling Jackson's actions "particularly racist and unacceptable" and accusing the Journal of "platforming racist sentiments." Many of Jackson's department colleagues signed a letter endorsing the student statement, and the Dean of the UNT College of Music announced a formal investigation into the Journal's July 2020 issue.

The investigation found that the Journal failed to observe scholarly best practices, and provided Jackson with a list of recommendations to implement, including changing the Journal's editorial structure and creating greater transparency in the editorial and review processes. Jackson was

also informed that he would be removed from the Journal, and that both the Journal and the Center would lose university-provided resources. When Jackson expressed his intent to remain a part of the Journal's editorial board, the Journal was essentially put "on ice" with no editorial board and no applications for the open editor-in-chief position.

Legal Claims and Responses

Following the Journal's "icing," Jackson filed suit against members of the UNT Board of Regents in their official capacities under 42 U.S.C. § 1983, alleging violations of his First Amendment rights. Jackson also sued the group of graduate students who signed the student statement for defamation. The defendants filed a motion to dismiss, claiming that the Court lacked subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and that Jackson failed to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6).

Court Has Subject Matter Jurisdiction

The defendants argued that the Court's jurisdiction was improperly invoked because Jackson lacked Article III standing to sue the Board defendants, and further because the Board defendants were protected by sovereign immunity and because the Court could not (or should not) exercise supplemental jurisdiction over the defamation claim. Following *Ramming v. United* States, 281 F.3d 158 (5th Cir. 2001), the Court considered the jurisdictional attack first, and found the defendants' arguments unpersuasive.

Because Jackson successfully established a cognizable injury, causation, and redressability under the standard set by *Lujan v. Defs. Of Wildlife*, 504 U.S. 555 (1992), he had Article III standing. And because Jackson satisfied the *Ex parte Young* exception, suing the Board defendants in their official capacities while seeking only declaratory and prospective injunctive relief and demonstrating some connection between the Board defendants and the ongoing alleged violation of Jackson's First Amendment rights, he defeated the Board defendants' claim to sovereign immunity. The Court then disposed of the defendants' supplemental jurisdiction argument (regarding the defamation claim), finding that state law matters did not substantially predominate and that the Court's exercise of supplemental jurisdiction was proper under 28 U.S.C. § 1367.

Professor Properly Stated a First Amendment Claim

The Court next addressed the defendants' motion to dismiss for failure to state a claim upon which relief could be granted. Applying the standards of *Twombly* and *Iqbal*, the Court analyzed whether Jackson's complaint contained "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In analyzing Jackson's First Amendment claim, the Court emphasized that the Supreme Court's precedent regarding free speech in academia "could not be clearer," citing *Sweezy v. State of N.H. by Wyman* ("to impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the

future of our Nation") to show the precedential importance of unrestricted speech in public academic institutions. *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957).

The Court acknowledged that Jackson's complaint and response provided a "muddled" characterization of his claim, confounding a First Amendment claim for suppression of speech with a retaliation claim for adverse employment action following protected speech, and thus analyzed Jackson's claim under the tests for workplace retaliation and suppression of speech. Defendants argued that Jackson failed to satisfy the first prong of the *Anderson v. Valdez* test for workplace retaliation because he alleged no facts showing an adverse employment action, but the Court did not agree, finding Jackson's allegation that he was essentially removed from the Journal in retaliation for the July 2020 issue to be a "plausible assertion that states a legal claim." *Anderson v. Valdez*, 845 F.3d 580, 590 (5th Cir. 2016).

The Court emphasized the importance of unrestricted speech for professors in the context of academia.

The Court then applied the *Buchanan* standard and the *Pickering-Connick* balancing test addressing a § 1983 claim for suppression of protected speech in the university context. *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019). Under *Buchanan*, a professor must show that "(1) they were disciplined or fired for speech that is a matter of public concern, and (2) their interest in the speech outweighed the university's interest in regulating the speech." *Buchanan*, 919 F.3d at 853. Defendants conceded that Jackson's speech was about a matter of public concern, and as the court previously found, Jackson's assertion that he was removed from the journal for that speech is sufficiently plausible to survive the defendants' motion to dismiss. In applying the *Pickering-Connick* balancing test, the Court considered whether "Plaintiff's interest in the prohibited speech outweigh the [university's] interests." Under this test, the Court found it plausible that "Plaintiff's interest in his speech outweighs Defendants' interests in regulating it." Applying both the *Anderson* and *Buchanan/Pickering-Connick* tests, the Court found that Jackson had shown a plausible First Amendment violation under § 1983.

Defamation Claim

The Court quickly disposed of the defendants' motion to dismiss Jackson's defamation claim. Viewing the well-pleaded facts in Jackson's complaint in the light most favorable to him, the Court found that Jackson's defamation claims "plausibly suggest an entitlement to relief," and emphasized that in the absence of an obviously insufficient claim, a court should not grant a motion to dismiss under Rule 12(b)(6). Issues related to Jackson's defamation claim, the Court opined, would be better resolved at the summary judgment stage.

The Future of Professor Jackson's Claim

Defendants have appealed and have sought to stay discovery pending appeal. For the reasons discussed above, the Court denied the defendants' motion to dismiss Jackson's claim. In crafting its denial, the Court emphasized the importance of unrestricted speech for professors in

the context of academia, as well as the importance of allowing Jackson and similarly-situated plaintiffs the opportunity to further develop facts in support of their original complaints before a Rule 12(b)(6) motion to dismiss is granted. Given the Court's discussion in this case, and the weight given to Supreme Court precedent regarding free speech in academia, it seems likely that future academic plaintiffs' First Amendment claims in this court will survive motions to dismiss as long as the constitutional claims contain, at bare minimum, some degree of plausibility.

Kayla Bright is a 2L in the First Amendment Clinic at Southern Methodist University Dedman School of Law. Tom Leatherbury and Michael Shapiro are the Clinic's Director and Fellow, respectively. Plaintiff is represented by Jonathan Mitchell, Mitchell Law, Austin, TX, and Michael Thad Allen, Allen Law, Quaker Hill, CT.

Nevada Court SLAPPs False Light and Right of Publicity Claims Against 'Confronting: O.J.' Podcast

By Michael Beylkin, Michael Twersky and Colleen McCarty

A Clark County, Nevada state district court has granted, in full, the Anti-SLAPP Motion filed by a host of media defendants seeking dismissal of all claims brought by Malcolm LaVergne, O.J. Simpson's civil lawyer and self-appointed spokesman, in connection with a 2019 podcast. *LaVergne v. Glass Entertainment Group, LLC et al.*, No. A-21-837667-C (Nev. 8th Jud. Dist. Feb 11, 2022).

The court dismissed the plaintiff's claims for false light invasion of privacy and misappropriation of his right of publicity, as well as his ancillary claims for aiding and abetting, concert of action and conspiracy. Defendants included podcast producers Glass Entertainment Group LLC, SQRL Media LLC and Nancy Glass, podcast distributor Wondery Inc., podcast host Kim Goldman, and public relations firm Garson & Wright Public Relations along with its principal, Michael Wright.

Background

The "Confronting: O.J." podcast, produced by SQRL Media and Glass Entertainment Group, was hosted by Kim Goldman, the sister of Ron Goldman, who was killed in 1994 along with Nicole Brown Simpson in Brentwood, California. The podcast looks back over the events of the 25 years since the murders, O.J. Simpson's arrest and criminal trial, and explores relevant issues, past and present, with prosecutors, investigators, witnesses and jurors. In June 2019, podcast producer Nancy Glass telephoned LaVergne, O.J. Simpson's civil attorney who handled Simpson's 2017 parole hearing, to invite him and Simpson to appear on the podcast. Glass requested permission to record the call and LaVergne assented.

A special episode of the podcast titled "Get Over It" aired on July 10, 2019 and contained almost the entirety of the recorded telephone conversation between LaVergne and Glass. Nearly two years later, LaVergne brought the action for false light invasion of privacy,

misappropriation of his right of publicity under NRS § 597.790 *et seq.*, and related claims for civil conspiracy, aiding and abetting and concert of action. He alleged that the podcast episode placed him in a false light because he never stated that Goldman should "Get Over It" and never called Goldman a specific derogatory phrase as alleged by Glass during the telephone call. He also claimed that while he consented to the telephone recording, he never gave permission for that recording to be broadcast and therefore the episode violated his right of publicity.

SLAPP Ruling

All of the defendants joined in a special motion to dismiss under the procedures set forth in Nevada's anti-SLAPP statute, NRS § 41.660 *et seq.* Under that statute, the defendants bore the initial burden to show, by a preponderance of the evidence, that the claims were "based upon a good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern." NRS § 41.660(3)(a). One of the categories of protected speech under that statute is a "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood." NRS § 41.637(4). If defendants met this initial burden, then LaVergne would bear the burden to make a *prima facie* showing that he had a probability of prevailing on the claim NRS § 41.660(3)(b).

The podcast looks back over the events of the 25 years since the murders, O.J. Simpson's arrest and criminal trial, and explores relevant issues, past and present, with prosecutors, investigators, witnesses and jurors.

After the parties briefed and argued the special motion to dismiss under the Nevada anti-SLAPP statute, the court rejected both of LaVergne's primary causes of action, finding there were few factual disputes to resolve. First, the court found that the defendants had shown by a preponderance of the evidence that the claims were all based upon a good faith communication in furtherance of free speech in connection with an issue of public concern as defined by the five-factor test articulated in *Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (2017). Specifically, the court concluded that the podcast, the 25th year anniversary of the murders of Nicole Brown Simpson and Ronald Goldman, and the very public tweets and newspaper articles in which LaVergne had, among other things, stated that Goldman and her family need to "move on," had rendered the topic one of substantial public concern. Relatedly, the podcast was "a public forum," the court found, because the purpose of the call was newsgathering rather than merely a private telephone conversation.

Turning to the false light claim, because the determinative question was whether the gist or sting of the statement is true, the court found it compelling that LaVergne had publicly urged Goldman and her family to "move on" both before and after the podcast episode. Whatever the slight differences between the phrases "move on" and "Get Over It" (the title of the podcast episode at issue), those differences were insufficient to sustain LaVergne's claim, as the "gist" or "sting" was the same. Likewise, while LaVergne did not use the specific derogatory phrase in question to describe Goldman, he had tweeted a common abbreviation of the term, directed at

Goldman, and affirmed his use of the abbreviation during a radio appearance. The court held that this distinction too was insufficient to sustain LaVergne's false light claim.

The court likewise found that LaVergne could not make a prima facie case for a violation of Nevada's right of publicity statute. While noting that LaVergne "undoubtedly has a statutory right of publicity under NRS 597.790(1)," the court found that "the exception set forth under NRS 597.790(2)(c) is applicable as the podcast's use of the telephone conversation between Plaintiff and Glass clearly constitutes a use 'in connection with news, public affairs or sports broadcast or publication.'" Thus, LaVergne's permission to use his name, image, voice or likeness was not necessary. Finally, because the underlying tort claims failed, the court found that the remaining causes of action for civil conspiracy, aiding and abetting and concert of action must also fail.

Whatever the slight differences between the phrases "move on" and "Get Over It," those differences were insufficient to sustain LaVergne's claim

All defendants are represented by Michael Beylkin, Michael Twersky and Colleen McCarty of Fox Rothschild LLP.

Texas Court Affirms Denial of Anti-SLAPP Motion to Dismiss

By Storm Lineberger

A Texas Court of Appeals ruled in favor of Tommy Coleman, a Polk County assistant district attorney, in his libel case against the Polk County Publishing Company and its former reporter, Valerie Reddell. Polk Cnty. Publ'g Co. v. Coleman, No. 09-20-00298, 2021 WL 61838973, at *1 (Tex. App.—Beaumont Dec. 20, 2021, no pet. h.) (mem. op.). The trial court denied the defendants' motions to dismiss filed under the Texas anti-SLAPP law, and the Beaumont Court of Appeals affirmed. The Texas anti-SLAPP law, the Texas Citizen Partnership Act (TCPA), has broadly safeguarded the constitutional rights of the press to publish freely on matters of public concern. The decision in *Polk County Publishing Company v. Coleman*, however, provides an example of the outer limits of the TCPA's protection.

The *Polk County Enterprise* printed, as part of "an ongoing series about the need for criminal justice reform," an article discussing Coleman's career as a prosecutor and his alleged involvement in the infamous prosecution of Michael Morton, who was exonerated after many years in jail. The court noted the stain of "possibly unethical, possibly criminal events" that took place during the Williamson County District Attorney's 1987 prosecution of Morton. Coleman took particular offense to the use of the term "prosecution," claiming it falsely suggested he was part of Morton's initial 1987 prosecution, and demanded the *Enterprise* run a correction.

The court found that the first step of the inquiry—the controversy at issue must be public and impact non-participants—was not met because the article did not tie Coleman to any pending or recent public matter.

The *Enterprise* ran a correction stating that the article had mischaracterized Coleman's involvement in the Michael Morton case and that the post-conviction proceedings that occurred between 2005 and 2011 should not have been referred to as a "prosecution." Coleman nevertheless filed suit against PC Publishing and the author, Reddell. Following the trial court's denial of their TCPA motion to dismiss, PC Publishing and Reddell appealed.

Court of Appeals Decision

On appeal, PC Publishing and Reddell argued that Coleman was a limited purpose public figure who had failed to meet his burden of showing clear and specific evidence of actual malice and that Coleman had otherwise failed to make a *prima facie* case of defamation. The court was unpersuaded by the appellants' attempt to couch the article as one concerning a public controversy. Applying the three-part public figure test adopted by the Texas Supreme Court in *WFAA-TV, Inc,. v. McLemore*, 978 S.W.2d 568 (Tex. 1998), the court found that the first step

of the inquiry—the controversy at issue must be public and impact non-participants—was not met because the article did not tie Coleman to any pending or recent public matter.

Responding to Coleman's argument that the use of the term "prosecution" falsely stated that he was involved in the initial 1987 prosecution, the appellants argued that the term "prosecution" is a broad one, encompassing the post-judgment proceedings that occurred between 2005 and 2011. Coleman argued that the *Enterprise*'s correction admitted that the proceedings Coleman participated in between 2005 and 2011 "should not have been referred to as "prosecution." The court agreed, finding that "prosecution" is limited to the initial 1987 trial, or at least that the statement was ambiguous. Thus, the court found "that the [original] article published by PC Publishing and Reddell about Coleman was false because it asserted that Coleman was involved with the prosecution of Michael Morton." Moreover, that false connection was reasonably capable of injuring Coleman professionally because it implied that he was unethical and untrustworthy, and had wrongfully prosecuted Morton.

The court of appeals found that Coleman met his burden to prove that the article was false and defamatory in light of his clear and specific affidavit evidence that he was not involved in the initial 1987 prosecution and the ready accessibility of that information. Notably, the article did not contain any dates regarding Coleman's career or his tenure at the Williamson County DA's office. Coleman produced undisputed evidence that he was seventeen years old in 1987 and that he was not even licensed as an attorney until 2002, some fifteen years after the initial prosecution. Finding this oversight constituted a *prima facie* case of negligence**,** the court admonished that "the proof that [Coleman] was not part of the initial prosecution was readily available *with a simple internet search*."

The court admonished that "the proof that [Coleman] was not part of the initial prosecution was readily available with a simple internet search."

Given, the *per se* nature of the alleged libel, appellants' oversight, and the evidence of falsity, the court concluded that Coleman established a *prima facie* case of defamation. It is worth noting that this is a memorandum opinion. Thus, the ruling holds no more precedential value than a court wishes to give it. Nevertheless, this case demonstrates that the TCPA protections, though broad, are not limitless. Indeed, this decision seems to exemplify that even where a term like "prosecution" could be *broadly* construed so as to make a statement *true*, if an average reader could adopt a *narrower* construction that is *false* and capable of professional injury, courts may be reticent to dismiss the claims at such an early stage.

Storm Lineberger is a 3L in the First Amendment Clinic at Southern Methodist University Dedman School of Law. Tom Leatherbury and Michael Shapiro are the Director and Fellow of the Clinic, respectively. Polk County Publishing is represented by Ryan Gertz, Gertz Kelley, Beaumont, TX. Reporter Valerie Reddel is represented by K. Susie Adams, Loring & Assoc., Livingston, TX. Plaintiff is represented by Tanner Franklin, Etoile, TX.

Court Orders Disclosure of Redacted Briefs in Constitutional Challenge to Substance Use Treatment Law

By Jack Greiner & Darren W. Ford

The Kentucky Supreme Court recently held that a news organization was entitled to redacted copies of briefs filed in appeals raising constitutional challenges to a Kentucky substance use disorder treatment law in *The Cincinnati Enquirer v. Dixon*, Case No. 2021-SC-0379-OA, 2022 WL 243787 (Ky. Jan. 20, 2022).

Background

The Kentucky General Assembly passed the Matthew Casey Wethington Act for Substance Abuse Intervention, known as "Casey's Law," in 2004. The law allows family and friends of individuals with a substance abuse disorder to petition a court for an order requiring the individual to undergo treatment for substance abuse. To order treatment, a court must make several findings, including that the individual presents "an imminent threat of danger to self, family, or others as a result of a substance use disorder" or there exists a "substantial likelihood of such threat in the near future." Casey's Law also allows a court to order emergency hospitalization for 72 hours upon making this "imminent danger" finding by clear and convincing evidence upon examination by the court and certification by a qualified health professional.

Casey's Law mandates that court records of respondents (those who for whom treatment is sought) are confidential, and not open to the public.

The Cincinnati Enquirer ("The Enquirer"), which covers news and events in northern Kentucky, has covered the drug epidemic's impact on the greater Cincinnati region in depth for several years, winning a Pulitzer Prize for its "Seven Days of Heroin" report in 2018. In July 2020, The Enquirer moved to intervene in an appeal pending before the Kentucky Court of Appeals that involved a constitutional challenge to Casey's Law, seeking copies of the briefs filed by the parties, with personally identifying information redacted. Casey's Law mandates that court records of respondents (those who for whom treatment is sought) are confidential, and not open to the public.

While The Enquirer's motion to intervene was pending, the respondent passed away, and the court consequently dismissed the appeal. In conjunction with its dismissal of the underlying appeal, the court of appeals denied The Enquirer's motion to intervene, holding that its request for access to the filed briefs was also moot.

In March 2021, The Enquirer filed a motion to intervene in another appeal involving a constitutional challenge to Casey's Law seeking the same relief. The court of appeals again

denied The Enquirer's motion, this time holding that Casey's Law prohibited disclosure of the briefs, even in redacted form.

Following the second denial, The Enquirer filed a petition for a writ of mandamus with the Kentucky Supreme Court, requesting that the Court direct the court of appeals to allow it to intervene**,** and to provide copies of the briefs with the respondents' personal information redacted, or at a minimum, hold a hearing on its request for access. The Enquirer sought relief under both Section 14 of the Kentucky Constitution, and the First Amendment.

Kentucky Supreme Court Decision

In a unanimous decision, the court granted the requested writ, and directed the court of appeals to provide The Enquirer with briefs "after all names or initials, personally identifying information, or facts and procedural history specific to the controversy which could potentially reveal the identity of the real parties in interest has been redacted."

The court first addressed the procedural propriety of the writ, reaffirming existing Kentucky precedent that provides the news media with special standing to intervene in Kentucky civil cases for the purposes of obtaining access to court records, and to seek mandamus where access is denied. In doing so, the court acknowledged the "unique position as the eyes and ears of the public" news outlets occupy, and the need to afford news outlets a status authorizing them "to demand access as the public's representative whenever the public's right to know outweighs the litigants' lawfully protected rights."

The Enquirer filed a petition for a writ of mandamus with the Kentucky Supreme Court, requesting that the Court direct the court of appeals to allow it to intervene.

Turning to the merits, the court first acknowledged that proceedings under Casey's Law are confidential, and that the "[t]he assurance of secrecy and confidentiality contained in the statutory provisions exists to protect the privacy of the person subject to an involuntary substance use treatment petition." The court found that the legislative purpose for the confidentiality was "to encourage and foster opportunities for rehabilitation for a vulnerable portion of the populace" and a "policy determination which favors nondisclosure of public records over the general policy of open courts and records."

Casey's Law is not without a "safety valve" (to use the court's term), however, as it expressly permits a district court to disclose case information when "appropriate under the circumstances," and when it "is in the best interest of the person or of the public." But the court held that this provision did not apply to the court of appeals, and as such, disclosure was governed by the court of appeals's "inherent, supervisory power over its own records and files."

Although The Enquirer had invoked its right of access to the records under both the Kentucky Constitution and the First Amendment, the court found The Enquirer's common law right of access sufficient to resolve the issue in its favor. The court held that its task was "to balance any supposed interest the Court of Appeals may have in keeping the contents of legal arguments

made before it secret, as opposed to the Enquirer's common-law right to access judicial records."

The court had little trouble in finding that The Enquirer's (and the public's) right to access the legal arguments being made in challenge to, and in defense of, the constitutionality of Casey's Law outweighed any interest that might exist for keeping them secret. Central to the court's decision was the fact that The Enquirer had not sought the identities of the parties, or personally identifying details of the individuals involved in the petition for treatment. The court noted that Casey's Law "was one of the more significant pieces of legislation to emerge out of the opioid epidemic" and that the public had a right to know the particulars of arguments being made in connection with any constitutional challenges to the law. The court thus directed the court of appeals to provide The Enquirer with redacted copies of the briefs, after redacting all names or initials, personally identifying information, or facts and procedural history specific to the controversy which could potentially reveal the identity of the real parties in interest."

The court found The Enquirer's common law right of access sufficient to resolve the issue in its favor.

The decision is a welcome addition to the body of Kentucky case law defining the media's right of access to judicial records. Although Casey's Law, on its face, would appear to require that a court maintain the confidentiality of all court records throughout litigation, the court looked past this seeming legislative intent, and empowered the court of appeals to exercise its own inherent supervisory power to permit disclosure of information to the media of undeniable public interest and import. Further, the decision provides a procedural roadmap for media organizations in Kentucky seeking access to court records at the appellate level, and solidifying the right of the media to sue presiding appellate judges in mandamus in the Kentucky Supreme Court when access is denied.

Jack Greiner and Darren Ford, Graydon Head & Ritchey LLP, Cincinnati, OH, represented The Enquirer in this case.

Ninth Circuit: FCC Stymied Its Own Ability to Block State Net Neutrality Rules

By Jeff Hermes

In a precedential opinion, the Ninth Circuit affirmed the denial of a preliminary injunction against the enforcement of California's state net neutrality rules, as set forth in the California Internet Consumer Protection and Net Neutrality Act of 2018 ("SB-822"). ACA Connects – America's Communications Association v. Bonta, No. 21-15430 (9th Cir. Jan. 28, 2022).

Background

The case involves a challenge to SB-822 brought by broadband service providers, who argued that the Federal Communications Commission had preempted net neutrality rules under state law when it rescinded the FCC's own net neutrality rules in its 2018 Restoring Internet Freedom Order (the "2018 Order").

The Ninth Circuit held that the manner in which the FCC undertook that rescission – by declaring that broadband services were "information services" under Title I of the federal Communications Act of 1934 – meant that the FCC did not have the authority to address net neutrality at all, and that therefore whatever policy preferences it might have intended to express by virtue of its 2018 Order could not amount to binding preemption. The Court of Appeals also rejected arguments that SB-822 either conflicts with the text of the Communications Act itself or intrudes on interstate commerce.

The Ninth Circuit held that the FCC did not have the authority to address net neutrality at all, and that therefore whatever policy preferences it might have intended to express by virtue of its 2018 Order could not amount to binding preemption.

This lawsuit was essentially an attempt by broadband service providers to make an end run around the ruling of the U.S. Court of Appeals for the D.C. Circuit in *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019), in which the D.C. Circuit upheld the 2018 Order's reclassification of broadband under Title I but struck down the FCC's explicit preemption of state net neutrality laws in the 2018 Order itself. The D.C. Circuit reasoned that preemption is an exercise of regulatory authority, and by proceeding with Title I reclassification – which limited regulation of broadband as an "information service" – the FCC had specifically deprived itself of that very authority. *See Mozilla* at 74-76. As we say in the trade, "whoops."

To get around that not-insignificant problem, the service providers invoked the doctrine of conflict preemption. They argued that regardless of its power to explicitly preempt state regulation, the FCC's 2018 Order expressed a general policy against net neutrality regulation and that a patchwork of state regulations would conflict with that policy. The Ninth Circuit,

however, found that to be a distinction without a difference, because without regulatory authority the FCC's policy preferences are irrelevant:

[T]he Supreme Court has expressly rejected the argument that an agency's policy preferences can preempt state action in the absence of federal statutory regulatory authority. *See Louisiana* [*Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374-75 (1986)].The Supreme Court warned that to permit preemption on the basis of policy rather than legislation would allow a federal agency to confer power upon itself and override the power of Congress. *Id.* As the Supreme Court said, "[t]his we are both unwilling and unable to do." *Id.* at 375.

ACA Connects at 21. Nor, held the Ninth Circuit, could the power of preemption be derived from the FCC's underlying authority under *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837 (1984) to resolve ambiguities in scope of Titles I and II:

The D.C. Circuit … strenuously rejected this attempt to turn the authority to make statutory choices under *Chevron* into an engine for preemption. *See Mozilla*, 940 F.3d at 82-85. The court explained that the discretion to classify a communications service under federal law does not permit the FCC to impose upon the states the policy preferences underlying that definitional choice. *See id*. As the D.C. Circuit explained, "[This] theory of *Chevron* preemption, in other words, takes the discretion to decide which definition best fits a real-world communications service and attempts to turn that subsidiary judgment into a license to reorder the entire statutory scheme to enforce an overarching 'nationwide regime' that enforces the policy preference underlying the definitional choice. Nothing in *Chevron* goes that far." *Id.* at 84[.]

This lawsuit was essentially an attempt by broadband service providers to make an end run around the ruling of the U.S. Court of Appeals for the D.C. Circuit in *Mozilla v. FCC*.

ACA Connects at 22-23.

The Ninth Circuit also rejected the argument that its prior decision in *California v. FCC*, 39 F.3d 919, 931–32 (9th Cir. 1994) supported Title I preemption. In that case, the court noted, the FCC had actually issued regulations under Title I that would conflict with state laws, whereas in the case of the 2018 Order there were no such regulations. *ACA Connects* at 24-25. While the 2018 Order did create transparency requirements for broadband providers in place of full net neutrality requirements, the Ninth Circuit noted that there was no actual conflict with states imposing the latter regime. *Id.* at 25.

As an alternative to preemption by the FCC, the plaintiffs argued that SB-822 conflicted with the text of the Communication Act itself and was thus preempted by Congress. Specifically, they argued that two provisions of the Act specifically prohibit any regulations that the FCC itself could impose only on common carriers. The Ninth Circuit disposed of that argument by pointing out that these provisions restrict treating certain service providers as common carriers "under this chapter," i.e., per the exercise of the FCC's authority, but say nothing about state

regulatory authority. *Id.* at 26-27. Moreover, the Act is subject to a savings clause that makes clear that any preemption of state or local law must be express. *Id.* at 29.

Finally, the plaintiffs argued that SB-822 impermissibly stepped on Congress' exclusive authority to regulate the field of interstate communications. This argument was no more successful.

The Court of Appeals first noted that it had upheld regulation of online activity by a statute that, like SB-822, limited its reach to content and services provided to California consumers, finding that such laws do not regulate wholly interstate conduct. *Id.* at 30, *citing Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 433 (9th Cir. 2014). Moreover, it held that, while the FCC's authority under the Communications Act is limited to interstate and foreign commerce, the Act does not prohibit state regulation of intrastate services that touches on the FCC's sphere. *ACA Connects* at 30. To the contrary, the Court of Appeals noted that the Supreme Court has rejected a rigid division between state and federal authority over the communications sphere. *Id.* at 31, quoting *Louisiana*, 476 U.S. at 360.

In the Ninth Circuit's view, Congress does not preempt state regulation when it leaves room for states to supplement the federal scheme and noted that there are many examples of such augmentation. *ACA Connects* at 32. On the other hand, the many examples of explicit preemption in the Communications Act would be unnecessary if Congress had intended to preempt the entire field. *Id.* at 32-33.

As a result of the foregoing, the Ninth Circuit held that the district court did not err in determining that the broadband service providers had failed to establish a likelihood of success on the merits of their claim.

Ultimately, however, it might be that the regulatory uncertainty created by the relentless back-and-forth between net neutrality proponents and opponents is more effective at curbing exploitative behavior than any actual regulatory scheme.

Conclusion

The plaintiffs faced an uphill battle after *Mozilla*, and the outcome was relatively predictable. When you have one U.S. Court of Appeals declaring that the FCC shot itself in the foot on preemption, trying to stanch the bleeding by moving to progressively broader and more difficult theories of preemption comes across as a desperation move.

Ultimately, however, it might be that the regulatory uncertainty created by the relentless back-and-forth between net neutrality proponents and opponents is more effective at curbing exploitative behavior than any actual regulatory scheme. Net neutrality opponents point to the fact that the worst fears of proponents have not come to pass in the wake of the 2018 Order, but is that because proponents' fears were always unfounded, or because broadband providers are well aware that net neutrality can reappear either in the states or with a change in control at the FCC?

Oddly, it is conceivable that enforcement of the California law could ultimately tilt the balance such that Congress moves to resolve the uncertainty (possibly in the opposite direction). It will be worth watching how aggressively SB-822 is enforced, to see if California is subtle enough to have its law make an actual difference while not provoking federal action.

Jeff Hermes is a deputy director of MLRC.

Texas Special Court of Review Vacates Sanction Against County Judge on First Amendment Grounds

By Randee Williams-Koeller

The Special Court of Review has ruled in favor of former Travis County Judge Sarah Eckhardt on First Amendment grounds, vacating the sanctions levied by the Texas State Commission of Judicial Conduct in 2020 and denying further sanctions. In re Inquiry Concerning Honorable Sarah Eckhardt (Jan. 11, 2022).

After a complaint was filed concerning Eckhardt's ability to make unbiased decisions based on her partisan political views, the Commission publicly admonished Eckhardt for two separate instances where she allegedly "engag[ed] in willful conduct that cast public discredit upon the judiciary in violation of Article V, Section 1-a(6) of the Texas Constitution."

The two incidents at issue took place two years apart. The first occurred in 2017 when then-County Judge Eckhardt wore "a pink knitted beanie with cat ears, referred to as a 'pussy hat,' while presiding over a meeting of the Travis County Commissioners Court." Eckhardt acknowledged that she wore the hat as a symbol of her dissent in response to tasteless comments about women made by then-President Trump, and at a meeting when an agenda item concerned women's health and reproductive rights.

After a complaint was filed concerning Eckhardt's ability to make unbiased decisions, the Commission publicly admonished Eckhardt for two separate instances where she allegedly "engag[ed] in willful conduct that cast public discredit upon the judiciary in violation of … the Texas Constitution."

The second incident involved an indiscreet comment that Eckhardt made in 2019 regarding Governor Greg Abbott's role during a panel discussion on state pre-emption of local ordinances, including an Austin ordinance about tree preservation. Eckhardt remarked that Governor Abbott "hates trees because one fell on him," alluding to the permanent paralysis he sustained when a falling tree struck him. On both counts, the Commission concluded that public admonition was necessary to preserve and promote the public's confidence in the judicial system.

The Special Court of Review first re-addressed the Commission's jurisdiction to reprimand a County Judge (who presides over the Travis County constitutional court—also known as the County Commissioners' Court). Eckhardt argued that the Commission lacked jurisdiction to discipline her because her position did not entail the performance of any traditional judicial functions. In response, the Special Court quoted its original order on the matter, restating that "whether Eckhardt performed any judicial functions as County Judge for

Travis County is inconsequential." The Commission's jurisdiction to discipline depended upon whether she held the post of judge of a court established by the Constitution or legislature. No one questioned that she did.

Next, the Special Court turned to the merits of the complaints and accepted the Commission's invitation to apply the two-step analysis for government employee speech espoused in *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990). In the first step of the analysis, the court evaluates whether the form and context of the purportedly protected speech implicated a matter of legitimate public concern. *Scott*, 910 F.2d at 210. The second step requires the court to balance the individual's First Amendment rights against the government's interest in promoting the efficient performance of its functions. *Id.* at 210.

In considering the first step, the Special Court of Review found that both women's rights and the State's intervention in local environmental matters were legitimate matters of public concern. While the court noted that Eckhardt admitted her intended "joke" about Governor Abbott may have been injudicious and callous, the court emphasized that "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed." *Yankee Publ'g, Inc. v. News Am. Publ'g, Inc*., 809 F.Supp. 267, 280 (S.D.N.Y. 1992). Making comments on matters of public concern and wearing politically symbolic clothing are still protected expression, even if they are repugnant and improper in the eyes of some. In solidifying their opinion, the Special Court emphasized that "[w]e cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, … fundamental societal values are truly implicated." *Cohen v. California*, 403 U.S. 15, 24-26 (1971).

Turning to the second step, the Special Court discussed the limitations that may be placed on one's First Amendment rights when matters of public concern are involved to continue promoting important government interests. In light of Eckhardt's functions, which the court "likened to those of a county executive or legislator, not a 'judge,'" the Special Court chose not to elevate form over substance and found the interest proffered by the Commission did not justify the discipline imposed or sought. The Special Court opined that the interest in restricting a judge from injuring public confidence in the integrity of the judicial branch "wanes when their status as a 'judge' is in name only." Therefore, the second step in the *Scott* test weighed in Eckhardt's favor and justified vacating the sanctions levied by the Commission and denying any further sanctions in the matter.

Randee Williams-Koeller is a 3L in the First Amendment Clinic at Southern Methodist University Dedman School of law. Tom Leatherbury and Michael Shapiro are the Clinic's Director and Fellow, respectively.