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MEDIA LAW LETTER

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From the Executive Director's Desk

On Leakers and Lakers: Reflections on Two Recent MLRC Zoom Sessions

As the seemingly never-ending pandemic rolls well into its third year, the MLRC has by now had over 100 Zoom calls with expert lawyers and journalists on a range of timely and sometimes controversial subjects. Two of the more intriguing calls occurred last month – one on the leak of Justice Alito's draft opinion overturning the *Roe* precedent, the other on a threatened suit by former Los Angeles Lakers guard Jerry West over his portrayal in the recent HBO docudrama "Winning Time." While in this column I usually try to address topics that have not already been written about *ad infinitum*, our two sessions raised several important and thought provoking ideas that seem worthy of further discussion.

Our first session, on the SCOTUS leak, featured constitutional law experts and former Supreme Court clerks RonNell Andersen Jones of the Utah School of Law (Justice O'Connor) and Landis Best of Cahill Gordon (Chief Justice Rehnquist), as well as New York Times reporters Jeremy Peters and David Sanger. A Washington correspondent currently covering the White House and national security, Sanger is especially well versed in this area. As one of his colleagues told me, "David has probably been the recipient of more leaks than anyone at the Times."



George Freeman

The idea that the leak would somehow spoil the careful and confidential deliberations of the justices seems like lawyers and judges posturing that their work is somehow unique.

I began the session with the possibly deflating notion that the leak was actually not that big a deal. (Then why did you have a call about it, one may ask.) Every government branch and agency has suffered leaks in recent decades, and generally speaking there has not much damage other than embarrassment. Why did the Supreme Court – or our panel – feel this was any different? One response was that the leak would somehow spoil the careful and confidential deliberations of the justices. To me, this seems like lawyers and judges posturing that their work is somehow unique. Congressmen and executive branchers continue to work on drafts and proposed initiatives after leaks without any discernible debilitating problems. I'm confident the justices can still debate and refine Alito's draft even after it has gone public.

An even weaker argument is that the Supreme Court is different; they are not a political branch and therefore they have a greater right or need to be left alone. While the justices might believe this in theory, in practice their actions totally belie such a thesis. Ever since its hypocritical and result-driven decision in *Bush v. Gore*, any illusion that the Supreme Court is not political is just that. Especially in the last few years, with Trump's appointment of justices ideologically trained by the Federalist Society and vetted



Our Zoom session on the SCOTUS leak featured constitutional law experts and former Supreme Court clerks like Ronnell Andersen Jones (above), professor at the Utah School of Law and former clerk to Justice O'Connor.

by the right wing of the Republican party, not to mention Senator McConnell's Machiavellian blocking of Merrick Garland's confirmation hearings, the vision of the Court as being uniquely apolitical cannot seriously be considered. The Court simply has no standing to place itself above and apart from any other government agency.

Another reason why the outrage over this leak is silly – apart from the likely substantive result – is that there was nothing the least bit surprising in it. Even before oral argument, and certainly after it, it seemed a foregone conclusion that the *Roe* precedent would not be respected, and the right to an abortion would be severely eviscerated. The fact that this came out on paper a few months before its expected release, and before the majority justices agreed on final wording, was simply not that earthshaking.

At about the same time as the Alito leak, the world learned by way of another leak that it was American intelligence and weapons which were responsible for the sinking of a Russian warship off the Ukraine and the killing of some Russian generals. I posited that this was a far more significant leak than that of a draft Supreme Court opinion. After all, it might give Putin a justification, at least in his warped mind, to escalate the conflict or even make the U.S. the subject of some sort of attack. Certainly the ramifications of this leak could have been far graver than that of the SCOTUS leak, but to me somewhat inappropriately the Supreme Court leak received far more attention.

In part, of course, this is due to the gravity of the substantive issue the Court was deciding, but that doesn't explain all the shock and attention given to the leak itself. This seems like another example of how lawyers and judges tend to put legal issues and processes on a much higher plane than anything else – a very parochial instinct to somehow elevate the importance of what

they (or we) do. Often I have seen judges get far more outraged over breaches of the attorney-client privilege or the violation of a judge's order or agreement a judge oversaw than breaches of similar privileges or agreements outside the purview of the legal profession.

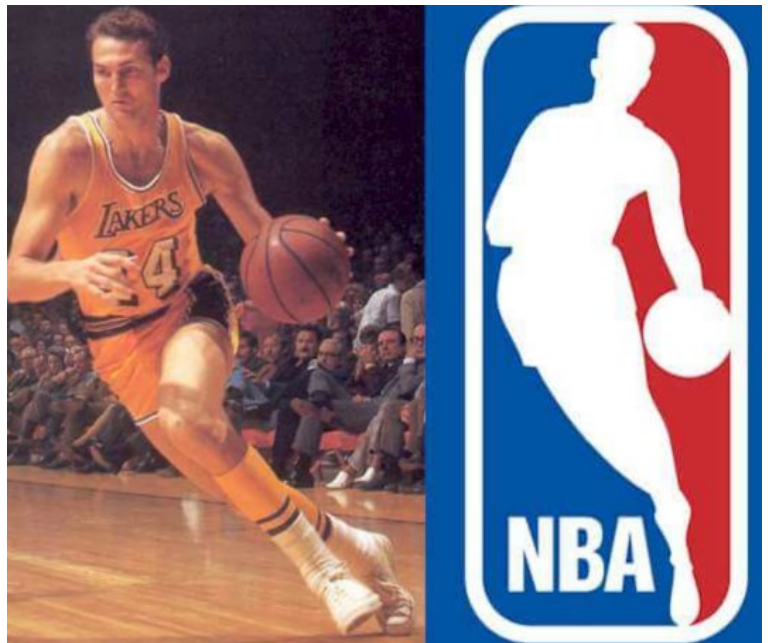
(By the way, even though many had guessed that the Ukraine leak came from the Biden Administration for the political purpose of showing America's strength and resolve, Sanger felt it was more likely that the leak came from an ally abroad. He quietly noted that often speculation about leakers turn out to be wrong, the actual leaker never even coming under serious consideration. Whether that suggests that the most likely suspect in this instance, a Supreme Court clerk, was not the leaker of the Alito draft is unclear. My own guess is that we may never know, since the Supreme Court marshals investigating are woefully inexperienced in conducting an investigation such as this.)

Our second Zoom discussion centered on "Winning Time: The Rise of the Lakers Dynasty." The HBO docudrama portrays the legendary 1980's Los Angeles Lakers with its star players Magic Johnson and Kareem Abdul-Jabbar, and its famously open-shirted, chest-bearing owner Jerry Buss. Our meeting was entertaining and provocative, and from a legal point of view there was a surprising lack of consensus as to the strength of potential claims against the show.

At the outset, it was agreed that "Winning Time" is an over-the-top production. Characters are exaggerated, conflicts elevated, and music and visual tactics add dramatic effect. Real names are used, so legally there is no question that the athletes and Laker officials are identifiable, but a standard disclaimer is shown at the beginning of each episode.

(Incidentally, I assume the title of the show, "Winning Time," was used as a poor substitute for "Showtime," the sobriquet by which the team was actually known, either because of IP concerns or because the producers didn't want to risk confusion with a competing network.)

Much of our session focused on a letter seeking a retraction on behalf of Jerry West. (For those who don't follow basketball, West is a Hall of Fame former Laker who was one of the best shooters in the history of the game – the ninth leading career scorer in NBA history.) In the 80's, the period the show depicts, West had retired as a player and occupied a front office position with the team. As the lawyer's letter describes, West is portrayed as an "out-of-control,



Jerry West, one of the greatest shooters in NBA history and the silhouetted dribbler in its iconic logo, sent a retraction letter to the producers of "Winning Time" over his portrayal in the show.

intoxicated rage-aholic” who drinks, curses and bullies, at one point throwing an MVP trophy through a window. The letter is supported by testimonials from several former Lakers and front-office personnel that West was none of these things, but rather a loyal, calm, polite teammate and colleague. (Personally, after watching most of the series, I thought a more likely claim might come from Abdul-Jabbar, who is portrayed as an insufferable, aloof and superior philosopher-egotist.)



The Los Angeles Lakers’ “Showtime” teams were led by the legendary Earvin “Magic” Johnson.

But the question on the Zoom was: does West (or Abdul-Jabbar) have a defamation or false light case? My feeling is probably not. There are many defenses the producers could call upon, but the one they used in response to the retraction demand is that the program was meticulously researched and, allowing for some dramatic license, factually accurate. (I was surprised they didn’t make the argument that the show was so dramatically over-the-top that viewers wouldn’t take it literally. There are reasons why such an argument might be unpalatable to voice, but I think it’s the stronger defense.)

But the producers would have many more standard defenses. Their letter stresses truth, claiming much of the material for the show was taken from a book on the subject. However, there seem to be quite a few divergences between the book and the show, so I fear that argument could work both ways. On the other hand, since the Laker players clearly are public figures, plaintiffs would have to prove actual malice, that the producers had a conscious awareness of their plot’s probable falsity. It is likely that they have sources who advised them that their major points were accurate, thereby giving them grounds to believe such versions, and thus denying a claim of actual malice. Additionally, one might ask what exactly was the defamatory fact – the general depiction of a character or a particular incident which perhaps did not take place in the exact way it was depicted?

If it is the general characterization of a player, that seems susceptible to a defense of opinion. For example, if the claim is that West was not a bully or rage-aholic, aren’t those characterizations opinion? First, are those terms exact enough to be classified as a fact: how are they defined; are they verifiable; and how does one judge where a person is guilty to a defamatory degree of such behavior? If saying an author is sloppy or a person is racist is adjudged as opinion and not a defamatory fact, I have a hard time seeing what West’s lawyer’s

letter claims as actionable. Further, even if some of the incidents depicted are not entirely true, the defense would have a good chance of successfully arguing substantial truth. The retraction letter takes aim at that, but facts may well be developed that there is no significant difference between the perception garnered from the program and the truth.

My problem is that even if “Winning Time” is legally defensible, do docudramas of this genre clarify or confuse history. It makes me uncomfortable that after watching a docudrama it’s totally unclear where facts end and fiction begins. For example, there is a scene in “Winning Time” where Magic Johnson, just drafted by the Lakers, meets his new teammates at a party. At the time Norm Nixon was the Lakers’ point guard and threatened by this rookie’s potential to perhaps take over his role, he challenges Magic to a one-on-one game and trounces him. It’s a great scene, but did it really go down like that? Probably not, but that wouldn’t be clear to the average viewer.

Similarly, there is a scene where the rookie Magic is told to deliver orange juice and a newspaper to Abdul-Jabbar’s room in the morning. He grudgingly does it, but the star center berates Magic for bringing the wrong newspaper and wrong type of juice. I also highly doubt that actually happened, but who is to know?.

To me the sorriest example of this problem came many years ago in Oliver Stone’s film “JFK,” which plays out a conspiracy theory about Kennedy’s assassination which has never been proved. While most people of a certain age still believe Oswald was the lone gunman, young folks who didn’t live through the tragedy and hadn’t studied it would come away quite certain that the Stone version they had just seen in the theater was the truth. That is disinformation many years before the term was coined.

When I was a kid, my favorite books were historical fictions, particularly about the Civil War. While the settings were accurately historically, the authors made clear that the main characters were clearly fictional. Most current docudramas, however, are about actual persons, so one leaves the show entirely unclear as to what actually happened and what was simply made up in Hollywood. To me, that is hugely frustrating. What is the purpose of watching a show about history if, when it’s over, one is totally confused about the facts? When I made this argument in our Zoom session, I was pithily told to relax – just sit back, watch it, and enjoy. This may be good advice for someone looking for entertainment, but as someone interested in learning about history, it’s still somewhat frustrating.

I’m sure many will disagree with some of the positions taken here. That is totally fine. The purpose of this column—and, in fact, of our Zoom calls—is to stimulate thought and debate in our close-knit community. I think it’s pretty clear our over 100 Zoom calls have engaged our members, whether they agree or disagree with all the theories put forth. I hope this monthly column similarly provokes some serious thinking on the issues before our bar.

Even if “Winning Time” is legally defensible, do docudramas of this genre clarify or confuse history? It makes me uncomfortable that after watching a docudrama that it’s totally unclear where facts end and fiction begins.

Los Angeles Jury Sides with Kardashian/Jenner Family in Lawsuit Brought by Reality-TV Personality Blac Chyna

By Rochelle Wilcox and Sam Cate-Gumpert

On May 3, 2022, a Los Angeles jury rejected a defamation and interference with contract lawsuit brought by reality TV personality Angela White, professionally known as Blac Chyna, against four members of the Kardashian/Jenner family – Kris, Kim, Khloe, and Kylie. Chyna once was engaged to, and had a child with, Rob Kardashian, as chronicled on the reality program “Rob & Chyna.” Her lawsuit claimed that statements made by the Kardashians defamed her and convinced the E! network not to proceed with a second season of the “Rob and Chyna” show. After a two-week trial, the trial judge dismissed the defamation claim against Kim Kardashian; the jury then deliberated for ten hours before returning a judgment for the Defendants.

Background

Chyna testified at trial that she began her career as an exotic dancer and quickly became a well-known social media influencer. In 2016, she started a relationship with Rob Kardashian. Soon after, they became engaged and had a daughter, Dream. Their relationship and Dream’s birth were documented on “Rob & Chyna” (R&C) one of several spin-offs of the ever-popular TV program “Keeping Up with The Kardashians” (KUWTK). According to the testimony of executives from the network and the show’s producer, Bunim/Murray, the show had been pitched as the story of a young couple in love, and showed a new couple learning about each other and excitedly preparing for the arrival of Dream. The first season included six episodes plus a “baby special” that focused on Dream’s birth. Executives described the show as profitable, and a ratings success.

But trial testimony detailed how Rob and Chyna’s relationship – and Chyna’s relationship with the Defendants, several of whom were executive producers on the show – took a turn for the worse after the first season aired. Witnesses testified that shortly after Dream was born, Rob and Chyna got into an all-night physical confrontation, in which Chyna allegedly pointed a gun at or near Rob’s head, choked him with a phone charger, hit him with a metal rod, and damaged the house they shared; the next day, Chyna moved out, and the couple never lived together again.

The trial focused on two issues – whether it was substantially true that Chyna had assaulted Rob in December 2016, and whether the Defendants’ statements to the E! network were the proximate cause of its decision to not exercise its option for a second season.

In the days that followed, some of the Defendants sent emails and texts to executives at the network and production company, in which they accused Chyna of abusing Rob and expressed concern for his safety. They also expressed concerns about R&C continuing as a series. Given the couple's difficulties, the network negotiated with Chyna for an extension of the deadline to exercise her option for a second season of R&C and an agreement for Chyna to appear with Rob on four episodes of KUWTK, in which the couple would undergo couples counseling. According to trial testimony, however, the couple's relationship continued to deteriorate and there was, accordingly, no creative direction for a second season of the show that worked for the network. The network did not exercise Chyna's option.

Chyna's Lawsuit and Trial

Chyna's lawsuit against the Kardashian/Jenner family members alleged that the Defendants' statements about her were false and defamatory, and that the Defendants' alleged threats to stop filming KUWTK if R&C remained on the air led the network to "cancel" the show's second season. (She has a separate lawsuit pending against Rob Kardashian.) She claimed reputational harm, lost wages and the loss of business opportunities. Following denial of the Defendants' motion for summary adjudication, Chyna's claims were tried to a jury.

The trial focused on two issues – whether it was substantially true that Chyna had assaulted Rob in December 2016, and whether the Defendants' statements to the E! network were the proximate cause of its decision to not exercise its option for a second season of R&C.

Witness testimony on the first issue was emotional. Corey Gamble – Kris Jenner's boyfriend – and Rob Kardashian testified that the Defendants' statements about Chyna's alleged physical abuse were substantially true. Gamble testified that he had to physically separate the couple when he arrived the morning after the altercation; that Rob had red marks on his body; and that Chyna threw lawn furniture at Rob's car as Rob was leaving. Rob's testimony expanded on the events described by Gamble, claiming that Chyna twice put a gun to his head and tried to choke him with a phone charger.

Testimony on the second issue focused on the mechanics of creative and financial decision-making for the show, and the reasons why R&C did not proceed to a second season. Executives from the network and production company all testified that it was the disintegration of Rob and Chyna's relationship – rather than anything the Defendants said about Rob and Chyna – that caused the network to ultimately decide not to exercise Chyna's season two option. Witnesses explained that numerous press reports about the nature of the relationship, accounts from production crew members, and Rob and Chyna's own actions made clear to them that the lighthearted romantic show they had made in season one was no longer viable. The network and

After closing argument, the trial judge dismissed Kim Kardashian from the defamation claim, finding that none of the allegedly defamatory statements were attributed to her. The jury found that it was substantially true that Chyna had physically attacked Rob and that the family was concerned for his well-being.

production company witnesses emphasized that R&C was a show about a couple, and without the couple, there was no show.

Chyna attempted to rebut the network and production company witnesses, claiming that the network had “greenlit” the show, allegedly effectively exercising Chyna’s season two option, based on a press release and her claim that the production company continued filming aspects of Chyna and Rob’s lives after season one aired. Chyna also tried to cast doubt on the validity of the option extension. But, as several witnesses made clear, Chyna’s talent agreement specified that the option only could be exercised via “written notice” – which neither Chyna nor her representatives ever received. Moreover, the executives pointed out that Chyna’s representative invoiced the network for the payment due when the extension lapsed.

After closing argument, the trial judge dismissed Kim Kardashian from the defamation claim, finding that none of the allegedly defamatory statements were attributed to her. The jury deliberated for roughly ten hours over two days, before announcing their verdict in favor of the Defendants on both claims. As to the defamation claim against the remaining Defendants, the jury found that it was substantially true that Chyna had physically attacked Rob and that the family was concerned for his well-being. Moreover, although the jury found that two statements by Kris and Kylie were false, the jury also found that neither statement was made with actual malice, precluding liability. The jury also found that Defendants did not interfere with Chyna’s talent agreement with the network, or the statements by Defendants were not a substantial factor in the harm Chyna claimed to have experienced. As a result, Chyna was awarded no damages. Chyna has said that she will appeal.

Rochelle Wilcox and Sam Cate-Gumpert are members of Davis Wright Tremaine LLP’s media practice, and represented non-parties, including E! Network and NBCUniversal, in the lawsuit.

Trump’s Use of Phrases Like “Kung Flu” and “China Virus” to Describe Covid-19 Is Not Defamatory

By Alexa Millinger

Donald Trump will not face legal recourse in a federal court in New York court for his use of the terms “Chinese virus” and “kung flu,” among other allegedly racist phrases, to describe the Covid-19 virus. [Chinese Americans Civil Rights Coalition, Inc. v. Trump](#), (S.D.N.Y. May 4, 2022).

The decision comes in [a case brought](#) by the Chinese Americans Civil Rights Coalition, Inc., a New York-based non-profit that represents individuals and community organizations. The organization brought a lawsuit in May 2021 against the former president alleging defamation and infliction of emotional distress arising out of his repeated use in Tweets and press conferences throughout 2020 of phrases like “Chinese virus” and “kung flu” to describe the Covid-19 virus.

Trump used these terms with increasing frequency throughout 2020, despite widespread criticism that the terms were inherently racist and feeding an uptick in xenophobia and anti-Asian sentiment in the United States. In 2020, Trump defended his statements as “not racist at all,” saying during a White House briefing, “it comes from China, that’s why.”

Judge John Koeltl of the U.S. District Court for the Southern District of New York issued a decision May 4, 2022 dismissing the complaint on multiple substantive and procedural grounds, including on the merits of the defamation claim. The claims alleged that Trump’s use of the allegedly offensive terms exposed Asian Americans to “public discrimination, hate, contempt, ridicule, verbal abuse and physical violence. . . across the country.”

Before reaching the merits of the tort claims, the court concluded the New York court did not have personal jurisdiction over Trump in his individual capacity, a Florida resident, as New York’s long-arm statute specifically excludes claims for defamation and the plaintiff did not state a prima facie claim for any other basis for jurisdiction. The plaintiffs also sued Trump in his official capacity, but those allegations were dismissed on sovereign immunity grounds, finding it had not been waived.

Next, the court held that the plaintiff did not plead a cognizable claim for defamation because the defamation claim was not “of and concerning” the plaintiff organization, an essential

The court viewed Trump’s statements as referring to all Asian-Americans with no specific reference to any member of the plaintiff organization that would support a group libel doctrine theory.

element of a prima facie defamation case. The court viewed Trump's statements as referring to all Asian-Americans with no specific reference to any member of the plaintiff organization that would support a group libel doctrine theory.

Finally, the court also dismissed the plaintiff's claims for negligent and intentional infliction of emotional distress to the extent they were duplicative of the failed defamation claim. The court also held Trump's statements could not be deemed "extreme and outrageous" because "[t]he remarks at issue referred to the geographical origin of the virus rather than the responsibility of the millions of Asian Americans who had nothing to do with the virus."

The court also held that even if it could find that Trump's conduct was "extreme and outrageous" to support a finding of intentional infliction of emotional distress, the First Amendment would bar recovery since the speech relates to an issue of public concern. Citing *Snyder v. Phelps*, 562 U.S. 443 (2011), the court said that "[n]o matter how deplorable the plaintiff finds the defendant's remarks, the First Amendment precludes civil liability for the remarks in order to protect the right to free and robust debate on matters of public concern, which the origin of the SARS-CoV-2 virus plainly is."

Alexa Millinger is an associate at Hinckley Allen & Snyder, LLP in Connecticut specializing in litigation and media law. Plaintiff was represented by Yu-Xi (Glen) Liu, Brooklyn, NY. Trump was represented by Jesse Binnall, Alexandria, VA and Peter H. Tilem, Tilem & Associates, White Plains, NY.

Washington Federal Court SLAPPs Project Veritas Lawsuit

First Case Granting Dismissal Under UPEPA

By Bruce E. H. Johnson

In July 2021, Washington became the first state to enact the [Uniform Public Expression Protection Act](#) (“UPEPA”), a model anti-SLAPP law adopted by the Uniform Law Commission. (On April 20, 2022, Kentucky became the second state to adopt the Uniform Law; Hawaii’s UPEPA bill was approved by the Hawaii State Legislature on May 6 and is likely to get Governor Ige’s signature soon).

In May 2022, not surprisingly, given Washington’s pioneering role, Judge Thomas S. Zilly, a federal judge in Seattle, became the first judge to grant a UPEPA motion for expedited relief and dismissal under the state’s new anti-SLAPP law, [RCW 4.105](#).

The Seattle case, [Project Veritas v. Leland Stanford Junior University](#), 2022 WL 1555047 (W.D. Wash. May 17, 2022), involved a Project Veritas (“PV”) defamation suit filed against Stanford University and University of Washington based upon a September 2020 blogpost by the Election Integrity Partnership (“EIP”), a nonpartisan coalition of researchers that included Stanford and UW employees, describing a recent PV video report that portrayed alleged “ballot harvesting” in Minnesota. In the blogpost, EIP was critical of the PV video, explaining that it “made several falsifiable claims that have either been debunked by subsequent reporting or are without any factual support.” The researchers also noted that data suggested that influencers had been involved in making the PV video go “viral” on social media, that these circumstances “strongly suggest the possibility of coordination between Project Veritas and official members of the Trump Campaign,” and that, as Election Day approached, PV would likely push “more misleading videos of this type.”

Two days after the EIP blogpost, *The New York Times* published a news article discussing the researchers’ investigation and their allegations that the PV video was “a coordinated disinformation campaign.” Other news articles followed.

Then, in March 2021, PV sued *The Times* in New York state court, alleging defamation based upon five articles, including three that discussed EIP’s investigations and allegations about PV’s disinformation campaign. In its New York complaint, PV also alleged that these news articles in *The Times* were “the result of a coordinated effort” between the newspaper and the EIP blogpost authors.

The Times moved to dismiss using that state’s newly amended anti-SLAPP law, but the New York court denied its motion, holding that “a reasonable reader could very well believe that the

challenged statements were conveying facts” about PV and therefore the allegedly defamatory statements in the articles “did not constitute opinions.” That decision is now on appeal.

Applying Washington law on First Amendment protections for statements of opinion, however, Judge Zilly took a different view of the allegations in PV’s complaint against Stanford and UW, a lawsuit that was filed in September 2021. “Viewing the totality of the circumstances, the Court concludes that the phrases in the Blog Post that Project Veritas challenges as defamatory are nonactionable opinions,” he said. He also noted that PV’s allegations that attacked the use of words like “debunked,” “misleading,” “inaccurate,” and “election disinformation” were insufficient because they were “incapable of being proven true or false.” Citing several Washington cases, Judge Zilly explained that the “context” of the blogpost also supported the court’s conclusion that these were statements of opinion, because they were part “of a political debate on whether rampant election fraud exists in America.”

Judge Zilly also observed that the New York court’s decision “did not explicitly address whether the Blog Post phrases at issue were opinions.” But it was “distinguishable because it applied New York law, whereas here the Court applies Washington law.” Washington opinion cases required the court “to construe the Blog Post in its ordinary meaning to a person reading it,” he noted, whereas New York’s opinion cases are based upon whether a “reasonable listener or viewer” could conclude that the statements were implying facts about the plaintiff.

Judge Zilly granted Stanford’s UPEPA motion and rejected PV’s challenge to the state law’s application in federal court.

Both universities had filed motions for expedited relief and dismissal under Washington’s UPEPA and motions to dismiss under Rule 12(b)(6). Judge Zilly granted Stanford’s UPEPA motion and rejected PV’s challenge to the state law’s application in federal court, citing multiple Ninth Circuit cases that have directly or “implicitly addressed” that topic in connection with cases applying California’s and Texas’s anti-SLAPP laws, which therefore confirmed that Washington’s substantive UPEPA protections also could be applied in connection with “purely legal arguments” on a Rule 12 motion to dismiss. There was no “collusion with the Federal Rules,” he said, because “UPEPA essentially mimics the language of Rule 12(b)(6) in stating the standards for courts to use when analyzing a special motion for expedited relief to dismiss based only on the legal sufficiency of the complaint.” (This “mimics” description will be very helpful for UPEPA’s viability, given that many courts, ranging from the Second Circuit in *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020), to the Washington Supreme Court in *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015), have struggled with California’s unusual statutory language that mandates dismissals of SLAPPs unless “the plaintiff has established that there is a probability that the plaintiff will prevail on the claim,” Cal. CCP § 425.16(b)(1).)

But the UPEPA dismissal was available only to Stanford, not UW. Judge Zilly ruled that UW could not take advantage of UPEPA, given the statute’s exemption (adopted directly from the Uniform Act) from its protections any liability for “official capacity” activities by governmental units, RCW 4.105.010(3)(a)(1), which prevented the state’s flagship university from obtaining

UPEPA statutory relief. Judge Zilly, however, said that UW was entitled to its dismissal under Federal Rule 12(b)(6), which applied the same standards as UPEPA.

“The Court concludes that UPEPA applies in federal court and will analyze Stanford’s UPEPA motion, and the motion to dismiss filed by UW, under the standards of Rule 12(b)(6).” Citing *Bell Atl. Corp. v. Twombly*, 540 U.S. 544 (2007), Judge Zilly said: “The complaint must indicate more than mere speculation of a right to relief....The question for the Court is whether the facts in the complaint sufficiently state a “plausible” ground for relief.” Given that the statements of opinion were nonactionable (Washington views the First Amendment opinion privilege as an issue of law, and thus susceptible to Rule 12(b)(6) dismissals), both defendants were entitled to dismissal of the PV complaint with prejudice without leave to amend.

The only difference between Stanford’s and UW’s dismissal orders was that the private university was entitled to a UPEPA prevailing party fee award under RCW 4.105.090, and the public university was not.

Finally, PV challenged some of the online articles that Stanford and UW had cited in their motions pursuant to judicial notice. Because it disputed some of these exhibits and hyperlinks, PV asked the court to convert the defendants’ Rule 12 motion into a Rule 56 motion and open the floodgates of discovery. Judge Zilly disagreed, explaining that he would take judicial notice only of the New York complaint and order, and had reviewed the documents referenced in the complaint. “Because the Court did not take judicial notice of any of the disputed exhibits, Project Veritas’s request is moot, and the Court will not convert the motions . . . to motions for summary judgment.”

Bruce E.H. Johnson, a partner in Davis Wright Tremaine LLP’s Seattle office, was heavily involved during early 2021 in advocating, lobbying, and negotiating the enactment of Washington’s UPEPA. He also serves, with Laura Prather, as co-chair of the MLRC Anti-SLAPP Committee. Project Veritas was represented by Elizabeth Locke, Clare Locke, VA; and Joel Ard, Ard Law Group, WA. University of Washington was represented by Orrick, Herrington & Sutcliffe. Stanford was represented by Pillsbury Winthrop Shaw Pittman.

UW could not take advantage of UPEPA, given the statute’s exemption (adopted directly from the Uniform Act) from its protections any liability for “official capacity” activities by governmental units.

Florida Court's Split on Appealability of Anti-SLAPP Denials

By Minch Minchin

A recent decision from Florida's Second District Court of Appeal has teed up for the state Supreme Court the issue of whether a trial court's denial of an anti-SLAPP motion is immediately appealable. Although Florida's anti-SLAPP statute has existed in its current form for seven years, only two intermediate appellate courts—the 2d and 4th DCAs—have meaningfully addressed the issue. Each has reached a different conclusion. [Davis v. Mishiyev](#), 2D21-1726, 2022 WL 1482687 (Fla. 2d DCA May 11, 2022).

Both courts agree that the applicable standard for granting certiorari for denied motions to dismiss requires the petitioner to satisfy three elements: (a) that the trial court departed “from the essential requirements of the law,” (b) resulting in “material injury for the remainder of the case” that (c) “cannot be corrected on postjudgment appeal.” *Williams v. Oken*, 62 So.3d 1129, 1132 (Fla. 2011). But the two courts cannot agree on whether the denial of an anti-SLAPP motion constitutes a material injury that cannot be remedied on postjudgment appeal.

Florida's 2d DCA—the first appeals court to substantively address the issue—held in 2019 that SLAPP-motion denials are appealable because the very pendency of a SLAPP suit chills the movant's First Amendment rights. *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 311 (Fla. 2d DCA 2019).

The *Gundel* court noted the stated purpose of the law—the protection of the “constitutional rights of free speech in connection with public issues”—and explained that “the harm that results from the court's improper denial of a motion to dismiss or in its failure to rule on pending motions for summary judgment and judgment on the pleadings is precisely the harm that the Anti-SLAPP statute seeks to prevent—unnecessary litigation.” *Id.* (citing § 768.295(1), Fla. Stat.). The court then concluded that “if certiorari review is not available, the substantive right created by the Anti-SLAPP statute is illusory and the very policy that animates the decision to prevent SLAPP suits is frustrated such that the statutory protection becomes essentially meaningless.” *Id.* (citation omitted).

Moreover, the court also noted the line of cases explaining that certiorari review is appropriate where an “order implicates a violation of the parties' constitutional rights which cannot be remedied on plenary review.” *See id.* at 310 (citing *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So.2d 1162, 1163 (Fla. 3d DCA 1999)). *See also Fountainbleau, LLC v. Hire Us*,

A recent decision from Florida's Second District Court of Appeal has teed up for the state Supreme Court the issue of whether a trial court's denial of an anti-SLAPP motion is immediately appealable.

Inc., 273 So. 3d 1152 (Fla. 2d DCA 2019) and *Baird v. Mason Classical Acad., Inc.*, 317 So. 3d 264 (Fla. 2d DCA 2021) (upholding *Gundel*'s central holding).

Mere months after *Gundel*, Florida's 4th DCA disagreed, pointing to a large body of case law holding that the "continuation of litigation does not constitute irreparable harm." *WPB Residents for Integrity in Gov't, Inc. v. Materio*, 284 So. 3d 555, 558 (Fla. 4th DCA 2019) (citation omitted). The *Materio* court opined that the *filing* of SLAPP suits, not necessarily the continuation of SLAPP suits, constitutes the real harm; it also noted that the Florida Supreme Court has refused to expand certiorari jurisdiction for denials of motions to dismiss in cases involving immunity—which feature similar public policy considerations as cases involving anti-SLAPP motions. *Id.* at 559–61. The court certified the issue to the Florida Supreme Court (which is one of only a handful of ways a case may reach the Supreme Court, which is highly limited in its jurisdiction), and suggested that the Supreme Court clarify the issue by creating a *per se* carve-out or rule to permit certiorari on denied anti-SLAPP motions. *Id.* at 560. But the petitioner did not pursue the appeal to the Supreme Court.

In May of 2022, the 2d DCA doubled down on *Gundel*, acknowledging an express disagreement with *Materio* and reiterating that "postjudgment appeal cannot remedy the very harm that the Anti-SLAPP statute seeks to prevent." [Davis v. Mishiyev](#), [2D21-1726](#), [2022 WL 1482687](#), at *3 (Fla. 2d DCA May 11, 2022). By explicitly pointing out the District split, the *Davis* court certified the issue to the Supreme Court, which is once again presented with an opportunity to resolve the conflict.

Whether certiorari is available on a denied anti-SLAPP motion is not the only SLAPP issue requiring the Supreme Court's attention, as the DCAs cannot agree on whether the statute imposes a different standard of persuasion for anti-SLAPP motions than for motions to dismiss or motions for summary judgment.

Looking to other states' anti-SLAPP statutes for guidance, the 2d DCA has interpreted Florida's law—which permits the moving party to file the anti-SLAPP motion as either a motion for summary judgment or motion to dismiss—as requiring the moving party to bear the initial burden of presenting a *prima facie* case that the statute applies; if so, according to the 2d DCA, the burden shifts to the plaintiff "to demonstrate that the claims are not primarily based on First Amendment rights in connection with a public issue and not without merit" *Gundel*, 264 So. 3d at 314 (quoting § 768.295(3), Fla. Stat.).

The 3d DCA, on the other hand, held that the 2d DCA has read into Florida's statute something that isn't there. In *Lam v. Univision Communications, Inc.*, 329 So. 3d 190 (Fla. 3d DCA 2021), the 3d DCA held that *Gundel*'s reliance on other states' anti-SLAPP jurisprudence was misguided because other the states' anti-SLAPP laws mentioned by the *Gundel* court explicitly include a burden-shifting provision or probability requirement. Florida's does not. The *Lam* court certified the issue to the Supreme Court, *id.* at 199, but the petitioner did not pursue the appeal.

Once again, the 2d DCA in *Davis* doubled down on the burden-shifting requirement by remanding the case to the trial court—which had denied the anti-SLAPP motion without explanation—to both apply the standard set by *Gundel* and explain the rationale for its holding. The *Davis* court reiterated that “if the burden was placed exclusively on the SLAPP defendant based solely on the plaintiff’s allegations, the plaintiff could avoid dismissal by being intentionally vague, thus thwarting the purpose of the statute.” *Davis* 2022 WL 1482687, at *3 (citation omitted).

Rachel E. Fugate, Allison S. Lovelady, and Minch Minchin of Shullman Fugate PLLC, Tampa, represented defendants. Erik Mishiyev acted pro se.



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Texas Lacks Jurisdiction for Defamation Suit Over Docudrama

By Cameron Stracher and Sara Tesoriero

Location, location, location. The real estate axiom has never been more relevant to defamation cases in light of the hodge-podge of state anti-SLAPP statutes, and federal courts' interpretation of those laws. In a recent case, the Southern District of Texas held that it lacked jurisdiction over the producer and individual defendants involved in the production of the documentary series "The Last Narc," opening the door to a more favorable jurisdiction where the anti-SLAPP laws apply. [James Kuykendall v. Amazon Studios LLC et al.](#)

Background

"The Last Narc" is a four-part documentary series about the 1985 kidnapping, torture, and murder of DEA agent Enrique "Kiki" Camarena by the Guadalajara Drug Cartel in Guadalajara, Mexico (the "Series"). The Series was produced by defendants IPC Television, LLC ("IPC"), a Delaware limited liability company with its principal place of business in California, and Tiller Russell, a resident of New Mexico. It was distributed by defendant Amazon Studios LLC ("Amazon") via its digital streaming service, Prime Video. Defendant Hector Berrellez is a resident of California and a former DEA Supervisor and Special Agent whose interviews were featured in the Series. Plaintiff James "Jamie" Kuykendall is a Texas resident and retired DEA agent who served as head of the Guadalajara DEA office when Camarena was kidnapped.

Texas Lawsuit

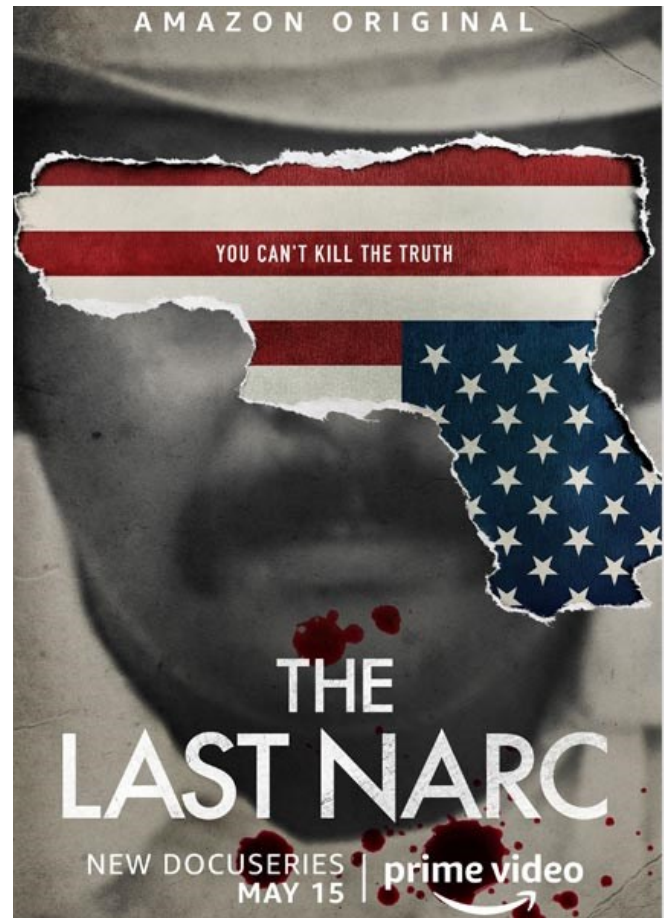
Plaintiff filed suit in the Southern District of Texas for defamation, intentional infliction of emotional distress, and violation of his right of publicity arising from allegedly false statements made about him in the Series. Defendants IPC, Russell, and Berrellez (the "IPC Defendants") filed a motion to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the case to the Central District of California. The IPC Defendants argued that the court lacked jurisdiction over them because they did not reside in Texas, they were not responsible for the distribution of the Series in Texas, the Series did not focus on activities in Texas, and the Series did not rely on any sources from Texas. In the alternative, the IPC Defendants moved to transfer the case to the Central District of California. Defendant Amazon also filed a motion to transfer.

The IPC Defendants argued that the court lacked jurisdiction over them because they did not reside in Texas, they were not responsible for the distribution of the Series in Texas, the Series did not focus on activities in Texas, and the Series did not rely on any sources from Texas.

After first holding that it lacked general personal jurisdiction over the IPC Defendants, the Court analyzed specific personal jurisdiction using the tests articulated by the Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984) and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). Under *Calder* and its progeny, to satisfy the constitutional minimum for exercising personal jurisdiction over a non-resident defendant, a plaintiff must demonstrate that the defendant “aimed” her defamatory statements at the forum state by showing that (1) the subject matter of, and (2) the sources for the defamatory content were in the forum state.

The fact that a plaintiff lives in the forum state, without more, is insufficient to confer jurisdiction over a non-resident defendant. Plaintiff argued that the subject prong of *Calder* was satisfied because the Series discussed his testimony about a Texas meeting during a murder trial in California, and also described an incident involving defendant Berrellez in El Paso. The Court held, however, that such “sporadic” references “collateral to the focus” of the Series did not satisfy the subject matter requirement. Plaintiff also argued that the sources prong was satisfied because defendant Russell emailed two individuals about allegations in the Series who, unbeknownst to him, resided in Texas, and the Series included an interview with a Texas resident. The Court noted that email communications do not necessarily convey the sender’s location, and the parties did not dispute that the information from these sources was not used in the Series. In addition, the Texas resident whose interview was included in the Series only discussed events that occurred in California and Mexico, not Texas. Thus, the Court held, the sources prong was not satisfied, and the Court lacked personal jurisdiction over the IPC Defendants under *Calder*.

In the alternative, Plaintiff argued the Court had jurisdiction under *Keeton* because Defendants exploited the Texas market by making the Series available for streaming in Texas and profiting from viewership of the Series in Texas. The Court noted that *Keeton*’s “circulation test” is typically used for distributors of defamatory content, and the distributor of the Series was Amazon, not the IPC Defendants. Thus, it held that a distributor’s targeting of a specific forum should not be imputed to defendants who created the allegedly defamatory content, and it rejected Plaintiff’s argument that the IPC Defendants participated in distribution by expecting Amazon to target the “widest audience possible” for the Series.



The Court also rejected the argument that a recent interpretation of *Keeton* by the Texas Supreme Court extended personal jurisdiction over the IPC Defendants. In *TV Azetca v. Ruiz*, 490 S.W.3d 29 (Tex. 2016), the Texas Supreme Court held that it had personal jurisdiction over two Mexican broadcast companies and a Mexican news anchor and producer under *Keeton* because of defendants' efforts to promote, distribute, and profit from the broadcasts at issue in the Texas market. The District Court noted, however, that it was not bound by state court interpretations of Due Process requirements. Nevertheless, it found that the IPC Defendants' "random" and "fortuitous" contacts with Texas, which included Russell's remote interview with a Texas-based podcast, did not constitute sufficient minimum contacts to convey personal jurisdiction. The Court also rejected Plaintiff's argument that "nationwide" marketing and promotional efforts are sufficient to show purposeful availment of the Texas market.

Rather than dismissing the case, the Court granted the IPC Defendants' alternative motion to transfer the case in the "interests of justice."

Rather than dismissing the case, the Court granted the IPC Defendants' alternative motion to transfer the case in the "interests of justice." The Court also granted Amazon's motion to transfer. The case is now pending in the United States District Court for the Central District of California, where defendants are preparing to file their anti-SLAPP motions.

Cameron Stracher and Sara Tesoriero of Cameron Stracher, PLLC and Laura Prather and Alexander Lutsky of Haynes and Boone, LLP represented the IPC defendants. Amazon was represented by Alonzo Wickers, Diana Palacios, and Cydney Swofford Freeman of Davis Wright Tremaine LLP. Gilberto Hinojosa appeared as local counsel for all defendants. Plaintiff was represented by Dicello Levitt Gutzler LLC and The Lanier Law Firm.

Section 230 Does Not Apply to Retweet Because Author Said He “Vouch[ed] for” the Retweeted Article

By Sara Benson & Cindy Gierhart

The U.S. District Court for the District of Columbia recently held that businessman Patrick Byrne’s retweet of a story claiming Dominion voting machines had been hacked was not protected by Section 230 immunity because Byrne added “I vouch for this” to the retweet. [US Dominion, Inc. v. Byrne](#), No. 1:21-cv-02131 (D.D.C. Apr. 20, 2022).

The case involves several statements by [Patrick Byrne](#), the former Chief Executive Officer of Overstock. In August 2021, Dominion filed suit against Byrne asserting eighteen allegedly defamatory statements were made through a variety of interviews, in print, and online.

Relevant to the Section 230 defense, Byrne retweeted a link to a story falsely claiming a Dominion voting machine had been hacked during the 2020 election. Byrne added the following statements to the retweeted link: “I vouch for this. I have seen the photographs, the computer forensics, the IP traces back to China. To a corporation whose name has long been linked to CP: Exam Indicates Georgia Tabulating Machines Sent Results to China.”

Byrne argued that the retweeted link, as well as the accompanying statements, were entitled to protection under Section 230 of the Communications Decency Act. But the Court held the accompanying statements fell outside Section 230.

The Court held that Section 230 “may provide immunity for someone who merely shares a link on Twitter” but “it does not immunize someone for making additional remarks that are allegedly defamatory.” Opinion at 14-15.

The Court compared *Roca Labs, Inc. v. Consumer Opinion Corp.*, [140 F. Supp. 3d 1311](#), 1321 (M.D. Fla. 2015), with *La Liberte v. Reid*, 966 F.3d 79, 89 (2d Cir. 2020). In *Roca Labs, PissedConsumer* – a consumer review website – tweeted excerpts of the negative consumer reviews submitted to its website, without adding any of its own commentary. It did shorten some reviews to fit within the character limits, but the court determined “[t]rimming the posts in length to fit within Twitter’s character limit and tweeting a ‘teaser’ [or preview of posts do not](#) preclude Consumer Opinion and Opinion Corp, from asserting Section 230 immunity, because the underlying information was provided by a third party.” 140 F. Supp. 3d at 1320.

The Court held that Section 230 “may provide immunity for someone who merely shares a link on Twitter” but “it does not immunize someone for making additional remarks that are allegedly defamatory.”

In contrast, *La Liberte* involved a reposted image of a woman (Roslyn La Liberte) wearing a “Make America Great Again” hat, standing with her mouth open and her hand in a choking position around her neck, in front of a fourteen-year-old Hispanic boy. Someone first tweeted the image with a caption stating that “persons (unnamed) had yelled specific racist remarks at the young man.” 966 F.3d at 83. Joy Reid, an MSNBC host, reposted the viral image on Instagram, adding the following caption: “He showed up to a rally to defend immigrants She showed up too, in her MAGA hat, and screamed ‘You are going to be the first deported’ ... ‘dirty Mexican!’ He is 14 years old. She is an adult. Make this picture black and white and it could be the 1950s desegregation of a school. Hate is real, y’all. It hasn’t even really gone away.” *Id.* at 89.

The boy thereafter publicly stated that La Liberte was not the one who made those statements to him. The court in *La Liberte* found that Reid’s added statements were not protected by Section 230 immunity because she was the “sole author” of those statements. .

In the *Dominion* case, the Court specifically noted that Byrne said he “vouch[ed] for” the statements in the article, causing the statements to fall outside Section 230 immunity.

Sara Benson and Cindy Gierhart are associates in the Washington, DC office of Holland & Knight. Dustin Andrew Pusch, Thomas A. Clare, and Megan Lambert Meier of Clare Locke LLP, as well as Jordan Mikhail Rux, I, Justin A. Nelson, Stephen Shackelford, Jr., and Davida Brook of Susman Godfrey LLP represented US Dominion, Inc., Dominion Voting Systems, Inc., and Dominion Voting Systems Corporation. Robert Neil Driscoll, Alfred Dumetz Carry, and Daniel T. Plunkett of McGlinchey Stafford, PLLC represented Patrick Byrne.

Parody Play “Vape” Receives Positive Review From SDNY

Theater Production Based on Grease Is Fair Use

By Judith B. Bass

For many of us baby boomers, the movie *Grease* brings back fond memories of Olivia Newton-John and John Travolta starring as high school kids in the 1950s singing and dancing their way through the trials and tribulations of young adulthood. The movie, based on a 1971 musical play written by Jim Jacobs and Warren Casey, was released in 1978 and became the highest-grossing musical film ever (supplanting “The Sound of Music”). Even today, it is the seventh highest-grossing live-action musical worldwide. A musical television series based on *Grease* is currently being filmed and is expected to premiere on Paramount+. The legacy of Danny Zuko and Sandy Olsson (Dumbrowski in the musical) lives on.

Against this backdrop, Sketchworks Industrial Strength Comedy, Inc. (“Sketchworks” or “Plaintiff”), an award-winning sketch comedy company based in Atlanta, Georgia, developed and produced a play entitled “Vape: The Musical” (“*Vape*”) that it advertised as “A Live Musical Parody of Grease!” *Vape* was first performed in Atlanta where it won a “Best New Work” award in 2018, and a performance was then planned in New York for August 2019 at the Improv Asylum on West 26th Street in Manhattan. The play also featured an opening credit screen saying that it was “Based on GREASE by Jim Jacobs and Warren Casey.” The copyright to “Vape” was registered by Sketchworks in 2019.

Before the show opened, the theatrical agents for *Grease* sent a cease and desist letter on behalf of the owners of *Grease* to Sketchworks and the New York theater asserting that *Vape* infringed on the rights of the *Grease* owners. As a result, the theater cancelled the upcoming performances, resulting in monetary losses to Sketchworks.

Sketchworks then [filed a declaratory judgment action](#) against the representatives of James H. Jacobs and the Estate of Warren Casey (“Jacobs and Casey” or “Defendants”), the original writers of *Grease*, in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 2201 seeking a determination that *Vape* was a fair use under the Copyright Act of 1976 (17 U.S.C. § 107). The case was assigned to Judge Laura Taylor Swain, Chief United States District Judge, Southern District of New York.

Following the initial filing of the action in August 2019, Defendants moved to dismiss. That motion was subsequently denied in March 2021. In April 2021, a Second Amended Complaint

The theatrical agents for *Grease* sent a cease and desist letter asserting that *Vape* infringed on the rights of the *Grease* owners. The theater cancelled the upcoming performances, then sought a determination that the show was a fair use.

(the “Complaint”) was filed by Plaintiff’s counsel, Jordan Greenberger, to substitute certain Special Trustees as parties. The Complaint itself is noteworthy in that it recites in detail a summary of the plot elements of *Grease* and then of *Vape*. For example, it provides as follows: “Roughly following the story-arc (and abrupt transitions) of *Grease*, *Vape* begins with Danny and Sandy on the beach at the end of summer. It is immediately apparent that *Vape* is a parody.” Throughout the balance of the Complaint, scene-by-scene action, dialogue and lyrics are set forth. It then goes on to describe exactly what about *Vape* is parodic:

Vape uses millennial slang, popular culture, a modern lens, and exaggeration to comment upon the plot, structure, issues and themes of *Grease* and to criticize its misogynistic and sexist elements. *Vape*, which was written and directed by women and has a largely female cast, reexamines *Grease* from a female perspective in the #MeToo era and exposes how the “humor” and rape-culture elements of *Grease* have not aged well. *Vape* directly criticizes *Grease*’s “happy ending,” where a woman completely changes who she is in order to please a man.

The Complaint goes on to say that “*Vape* not only comments upon controversial themes in *Grease*, it also explores whether modern society has progressed at all by pointing to current systemic issues that still exist based on the misogyny of the era in which *Grease* was written and is set.”

In answering the Complaint, Defendants denied that *Vape* is a parody. They also interposed counterclaims asserting that the Plaintiff wrongly copied, among other things, the music from *Grease*. For example, Defendants stated that Plaintiff’s song, “Vape is the Mood,” had the same vocal melody, chord progression and instrumental counterpoint as Defendants’ song “Grease is the Word” with only minor alterations, and that Plaintiff’s song “Summer Snaps” is nearly identical to Defendant’s song “Summer Nights.” Defendants further stated as follows:

Plaintiff merely changed the titles of the songs while stealing, note for note, the music owned by Defendants and others, using the actual recordings of said music produced, manufactured and/or licensed to or by third parties, without permission from Defendants or licensed third parties... Plaintiff’s use of music owned by Defendants and others is illegal and nothing more than blatant theft and infringement of Defendants’ and other parties’ copyrights and other rights in civil and criminal violation of copyright laws. Plaintiff’s claim of fair use/parody does not change or legally justify the fact of such thievery.

Defendants similarly complained about Plaintiff’s copying directly the names of the characters from *Grease*, the fictional name of Rydell High School, and the distinctive plot and original

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***Vape* is available on YouTube to [watch in full](#).**

settings of *Grease*, as well as its alleged misappropriation of the trademark of *Grease* and the name of co-author Jim Jacobs. By so doing, Defendants stated that ticket purchasers for *Vape* were likely to be misled and confused as to “the nature, origin and sponsorship of *Vape* and are likely to form the false impression that *Vape* has been authored, approved, licensed, endorsed or in same way affiliated with the Defendants.”

In responding to the counterclaims, Plaintiff admitted that *Vape* is “an intentional parody of *Grease*.” Plaintiff also asserted affirmative defenses that Plaintiff’s alleged conduct constituted fair use, that the use of Defendant’s protectable intellectual property was highly transformative and for purposes of parody, and that there was no likelihood of consumer confusion between the two works.

After the pleadings closed in May 2021, Plaintiff filed a Rule 12(c) motion for judgment on the pleadings. In filing his declaration in support of that motion, Plaintiff’s counsel included a video file of a performance of *Vape* as well as a link to [stream it online](#). He also submitted to the Court a DVD of the film version of *Grease*.

In its Memorandum of Law in Support of Motion for Judgment on the Pleadings, Plaintiff noted that to resolve the issue of fair use, the Court needed only to conduct a “side-by-side comparison of the works at issue.” *Lombardo v. Dr. Seuss Enterprises, L.P.*, 279 F. Supp. 3d 497, 504 (S.D.N.Y. 2017). Accordingly, Plaintiff specifically requested that the Court watch *Grease* and then *Vape* to decide the motion. Plaintiff further stated that “neither the usage of the same names or copied music removes *Vape* from the realm of fair use and any similarity in the plot arc and theme are used for parodic purposes and plainly transformative.”

In making its argument that *Vape* was fair use, Plaintiff cited a number of S.D.N.Y. decisions finding fair use. It also relied on *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) for

the proposition that parodies can refer to the original; the humor and comment “necessarily springs from recognizable allusion to its object through distorted imitation.”

Plaintiff also argued that use of the entirety of an underlying work is permissible “when the new usage is transformative. *See, Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1203 (2021).”

In reviewing the first of the four factors to determine fair use under Section 107 of the Copyright Act, Plaintiff relied as well on *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021) for the proposition that “[a]s recognized by the Supreme Court in *Campbell*, parody, which ‘needs to mimic an original to make its point,’ 510 U.S. at 580-81, is routinely held transformative. *Id.*, 992 F.3d at 110.”

As to whether *Vape* was indeed a parody, Plaintiff argued forcefully that, as set forth in the Complaint, the parodic character of *Vape* was clear. In addition, “*Vape* imitates the style of *Grease* for comic effect or ridicule, and reasonably may be perceived as commenting on *Grease* or criticizing it.” Plaintiff also asserted that even “if not a parody, *Vape* still is a fair use because it is highly transformative.” Plaintiff then asked the Court simply to compare *Vape* and *Grease*, stating as follows:

Vape does not merely repackage *Grease* to entertain fans of *Grease*... *Vape* contains original dialogue and has a different purpose and character that alters *Grease* with new expression, meaning, and message. *Vape* imbues *Grease* with a character different from that for which *Grease* was created and strives for new aesthetics with creative and communicative results distinct from *Grease*.

Plaintiff concluded its argument with a discussion of the other three factors. With respect to the third factor, the amount and substantiality of the use, Plaintiff noted that, in the case of parody, “[e]ven a substantial taking... can constitute fair use if justified.” *TCA Television Corp. v. McCollum*, 839 F.3d 168 (2d Cir. 2016). Plaintiff stated as follows:

To the extent that *Vape* mimics, draws upon, or copies *Grease*, it does so to make its point and such use of *Grease* is neither substantial nor excessive in relation to the parodic purpose... Any of *Vape*’s use of *Grease*’s characters, music, setting, plot, and style is in service of the parody and thus tethered to a valid, and transformative, purpose.

Concerning the fourth factor, the effect on the potential market for the copyrighted work, Plaintiff stated simply that “[t]here is virtually no possibility that consumers will go see *Vape* in lieu of watching an authorized version of *Grease*.” Plaintiff also argued that Defendants’ counterclaims involving trademark violations as well as a violation of right of privacy of the co-author could not be used “to trump Sketchworks’ First Amendment right of expression.”

In Defendants’ Memorandum of Law in Opposition to Plaintiff’s Motion to Dismiss, Defendants strongly pushed back on the argument that a parody is a fair use, stating that “[a] parody is not definitionally a fair use. A parody *may* be fair use if it meets the criteria of

Section 107 and *Vape* does not meet the criteria.” To the contrary, Defendants asserted that “*Vape* is a derivative work, admittedly a play version of the movie...*Vape* is either an updated version of, or sequel to, *Grease*, both derivative works belonging exclusively to the Defendants.”

In Defendants’ judgment, *Vape*’s authors merely used *Grease* to get attention and to advance their own particular views. Specifically, Defendants argued as follows:

Plaintiff, of course, has every right to critique its view of culture, on controversial themes and on modern society, but it does not have the right to do so by excessively using Defendants’ characters to mouth Plaintiff’s views on the #MeToo movement or to excessively use Defendants’ copyrighted songs and other copyrighted elements of *Grease* as a platform for its critique of political views, modern society or systemic issues. Such a critique is not a parody of *Grease*, but rather a critique of society and Plaintiff is not entitled to any asserted fair use protections of a parody.

To establish the purpose and character of Plaintiff’s use under the first factor, Defendants then provided their own side-by-side comparison between *Vape* and *Grease* that “overwhelmingly” established that *Vape* used “substantial portions, if not all, of every possible creative element of *Grease* to advance its societal views.” As such, Defendants argued that *Vape* was “not a transformative use” nor a fair use. Defendants also maintained that *Grease* and *Vape* essentially “have the same purpose”—to “portray life for teenage students in high school and observe the social customs of the students.”

In addition, Defendants stated that the Second Circuit decision in the *Andy Warhol* case “ends the argument that merely commenting on or poking fun at *Grease* means that *Vape* is transformative and a fair use.” They also asserted that the use of *Grease* was of a commercial nature given that the Plaintiff desired to produce *Vape* for profit, a factor favoring Defendants.

With respect to the second factor, the nature of the copyrighted work, the Defendants argued that there was no question that *Grease* was an expressive and creative work, a factor which also favored Defendants.

Considering the third factor, the amount and substantiality of the portion used in relation to the work as a whole, Defendants reiterated that the “taking of all the elements, whether for a parody or not, is excessive.” Specifically, “[t]here is no reason advanced by Sketchworks for taking a copyrighted song from *Grease* and using its copyrighted music, note for note, and in some cases, word for word, to parody misogyny.” Furthermore, “All of the songs in *Vape* take the copyrighted music, note for note...and use portions of the lyrics, word for word...It is a

Defendants argued that *Vape* was “not a transformative use” nor a fair use. Defendants also maintained that *Grease* and *Vape* essentially “have the same purpose”—to “portray life for teenage students in high school and observe the social customs of the students.”

copyright infringement to use the copyrighted music from one song, and there are seven infringements of seven songs.”

Finally, for the fourth factor, the effect of the use on the market, Defendants argued that *Vape* is either a sequel to, or an updated remake of *Grease*. As such, according to Defendants, there is “obvious and substantial potential harm to the derivative and licensing markets for *Grease*.”

In its reply brief, Plaintiff stated that Defendants’ focus on the Second Circuit decision in the *Andy Warhol* case was misplaced:

But the *Andy Warhol* case did not involve a parody; it did not change the law with respect to parodies being transformative fair use under the first fair use factor; and *Andy Warhol*’s clarification of what makes a secondary work transformative confirms the conclusion that *Vape* is fair use. In short, the *Andy Warhol* case is not a “dramatic and substantial change” in fair use law as it relates to parodies like *Vape*...The decision supports a fair use finding.

In addition, Plaintiff rejected Defendants’ characterization of *Vape* as a sequel to, or updated remake of, *Grease*: “*Vape* is not a sequel. The characters remain high school students, their personality traits are distorted and exaggerated for purposes of parody, and the story is not only different but in a different style (e.g., a female perspective in the #MeToo era exposing how the “humor” and rape-culture elements of *Grease* have not aged well).”

Defendants’ reply brief emphasized that Plaintiff had cited no case supporting its claim that “it is fair use, as legally determined, to take the music from at least seven copyrighted songs, the lyrics from certain songs, the copyrighted book from *Grease*, the characters, by name from *Grease*, the location, by name from *Grease*, the choreography, and every minor detail from *Grease* (i.e., the car racing scene, etc.). The taking, both individually and cumulatively, of all of these copyrighted elements is unprecedented and Plaintiff presents no case supporting the cumulative amount and substantiality of the taking from *Grease*.” Defendant further stated that *Vape*’s copying of all of the copyrighted elements of *Grease* “effectively destroys *Grease*’s licensing market, including Broadway, and the destruction is self-evident. No one would pay licensing fees if they could copy *Grease* as *Vape* has.”

The motions and briefs were fully submitted to the Court in October 2021. On March 28, 2022, Defendants’ counsel then submitted a letter to Chief District Judge Swain asking her to stay the case pending a decision by the Supreme Court following the granting of certiorari in *Andy Warhol Foundation*, No. 21-869 (U.S. Mar. 28, 2022). Defendants stated that the decision of the Supreme Court will “undoubtedly impact the fair use doctrine and the analysis of both transformative and derivative works” and will “establish authority for the result in the case pending before this Court.”

In his letter in opposition, Plaintiff’s counsel responded that “the granting of certiorari in a wholly unrelated case should not result in a stay of this action.” He noted that the Second Circuit had already issued a decision in another unrelated fair use case the day after certiorari

was granted, and that fair use cases are generally decided on a “case-by-case basis and are context-sensitive.” He also pointed out that the *Andy Warhol* case is primarily concerned with whether a work of visual art was “transformative.” Since the *Vape* case involves a parody, the *Andy Warhol* case is “unlikely to change the first fair use factor with respect to claimed parodies.” In addition, the Second Circuit decision in *Andy Warhol* expressly stated that “parody, which ‘needs to mimic an original to make its point,’ is routinely held transformative.”

The Court denied the application for a stay. Then, on May 12, 2022, Chief District Judge Swain issued a 22-page decision on the cross-motions for judgment on the pleadings, finding for the Plaintiff. [Sketchworks Industrial Strength Comedy, Inc., v. James H. Jacobs, et al.](#), No. 19-CV-7470-LTS-VF. In granting Plaintiff’s motion for judgment on the pleadings in its entirety and denying Defendants’ cross-motion, Judge Swain noted that the Court had “reviewed and considered” *Vape* and the film, *Grease*, in reaching her decision.

The Court then addressed each of the four factors under Section 107 of the Copyright Act. With respect to the first factor, the purpose and character of *Vape*, the Court reviewed Defendants’ argument that *Vape* did not comment on the substance of *Grease* but rather on “society writ large” and found “Defendants’ characterization of *Vape* to be overly simplistic and incomplete for multiple reasons.” Specifically, the Court stated that Defendants had overlooked “the manner in which *Vape* mocks specific elements of *Grease*, including absurdities in the plot line.” Second, the Court noted that *Vape* had changed certain elements of *Grease* to “emphasize the misogynistic features of the original work.” Third, the Court found that Defendants were taking “too narrow a view of the law” in requiring Plaintiff to justify or explain how each departure from *Grease* is commenting on the underlying work. The Court also rejected the assertion that *Vape* is merely a “derivative update” of *Grease*.

The Court also rejected Defendants’ reliance on the Second Circuit Court of Appeals decision in the *Andy Warhol* case. Contrasting that decision in which the court found that the photographs of Prince were not transformative, the Court determined that “*Vape*, when considered holistically, constitutes a parody of *Grease*.”

Regarding the second factor, the nature of the copyrighted work, the Court recognized that *Grease* was a work of creative expression and thus favored Defendants, but, citing precedent, stated that this factor was “‘not much help’ in determining whether the new work constituted fair use.

Addressing the third factor, the amount and substantiality of the portion used, the Court examined whether Plaintiff’s taking of substantial elements from *Grease* was excessive as

The Court found that Defendants were taking “too narrow a view of the law” in requiring Plaintiff to justify or explain how each departure from *Grease* is commenting on the underlying work. The Court also rejected the assertion that *Vape* is merely a “derivative update” of *Grease*.

Defendants argued. Citing the case of *Adjmi v. DLT Ent. Ltd.*, 97 F. Supp. 3d 512 (S.D.N.Y. 2015), where plaintiff's play was found to be a transformative use of the television show "Three's Company," the Court stated that the inquiry was to "draw a line between taking enough to evoke the original and excessive appropriation." *Id.* at 533. On balance, the Court found that the taking was not excessive "because the use of those elements was necessary for *Vape* to achieve its parodic purpose." Similarly, the Court stated that Plaintiff's use of notable character traits and scenes from *Grease* were also justifiable since "parody depends on recognizable allusion to the original work."

For the fourth factor, the effect of the use upon the potential market value of the copyrighted work, the Court found that the potential harm to *Grease* was minimal. The Court also rejected Defendants' description of *Vape* as a "derivative sequel" or "updated remake" of *Grease*. Citing *Campbell*, 510 U.S. at 592, the Court stated that "there is no protectible derivative market for criticism." Furthermore, if *Vape* "kills demand for" *Grease* due to its critical nature, that harm is not remediable under the Copyright Act." Accordingly, the fourth factor "weighs in favor of a finding of fair use."

In conclusion, after having considered the four factors and weighing them together, the Court found that *Vape* constituted a fair use of *Grease*. In addition, the Court rejected Defendants' claim that Plaintiff had infringed on the *Grease* trademark in its use of the mark in the opening credits where it stated "Based on *Grease* by Jim Jacobs and Warren Casey." The Court also determined that Defendants had failed to state a claim under the New York Civil Rights Law in connection with the use of Jim Jacobs' name in the advertising for *Vape* given that the name was used in the context of protected First Amendment speech. The Court also found that Plaintiff was entitled to recover its reasonable attorneys' fees.

Defendants' counsel has advised Plaintiff's counsel that they intend to file an appeal. Given that, there is one other citation in Plaintiff's Memorandum of Law that is worth noting and perhaps goes to the heart of the matter here:

Vape is "obviously a joke," but one that Defendants perhaps "cannot take." *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 430 (S.D.N.Y. 2016), *aff'd* 674 Fed. Appx. 16 (2nd Cir. 2016). "In some cases [like here]... it is better to accept the implied compliment in a parody and to smile or laugh than it is to sue." *Id.*, at 445.

What the Court addressed in its definitive ruling on *Vape* as a parody was a low-budget off-off-Broadway play that was designed to cast a new and critical light on a highly successful Hollywood and Broadway production that, even after more than 50 years since its initial Broadway run, is continuing to generate profits and new productions worldwide. The irony

The Court found that *Vape* constituted a fair use of *Grease*. In addition, the Court rejected Defendants' claim that Plaintiff had infringed on the *Grease* trademark in its use of the mark in the opening credits.

here is that, if the decision is affirmed in the Second Circuit, the legal battle will likely have enhanced the commercial appeal and viability of the objected-to parodic version, *Vape*. Of course, until the appeal is heard and decided, we will not know who will have the last laugh.

Judith (“Judy”) B. Bass is a media and entertainment lawyer with her own solo transactional practice in New York City. She is a former business and legal affairs executive with experience at a major law firm and at premier media and entertainment companies including Time Inc., Sports Illustrated, CBS and Marvel Entertainment. Sketchworks was represented by Jordan Daniel Greenberger, NY. Defendants were represented by Howard J. Schwartz, Monroe, NJ.

Second Circuit Affirms That Screenshot of Photograph Is Fair Use

Determination Made on Motion to Dismiss

By Eleanor M. Lackman and Lindsay R. Edelstein

Last year, the Second Circuit handed down its decision in *Warhol v. Goldsmith*, which represented a potential sea-change in the law of copyright, particularly with respect to the first fair use factor, “the purpose and character of the use,” and the fourth fair use factor, “the effect of the use on the potential market for the work that was copied.” This year, the Second Circuit had the opportunity to consider another case involving transformative use, this time in the context of news reporting and commentary. On March 29, 2022, in a Summary Order, the Second Circuit affirmed that Mic’s use of a composite screenshot from a *New York Post* article to report, criticize, and comment on the article, its subject, and the resulting backlash, was a fair use. [Yang v. Mic Network, Inc.](#) However, despite Mic successfully showing that Yang’s claim did not meet the plausibility standard on the merits, the Second Circuit declined to reverse the district court’s decision not to award fees or issue sanctions against Yang’s counsel, the now-defunct Liebowitz Law Firm.

Background

In 2017, the *New York Post* published an article that hypothesized – based heavily on narratives from 40-year-old private equity professional Dan Rochkind – that exceptionally attractive women are worse companions than “merely beautiful” women. Directly under the headline of the article, “Why I Won’t Date Hot Women Anymore,” the *Post* included a photograph of Rochkind, taken by plaintiff Stephen Yang on assignment for the *Post*, sitting at a bar with a bottle of beer in hand. The article itself praised Rochkind’s “muscular build and full head of hair,” and described his heroic decision to give up dating swimsuit models in favor of a “softer” woman who “isn’t a bikini model” and is too short to be a runway model. Perhaps for obvious reasons, the article created quite a bit of backlash online.

In response, Mic posted on its website a piece called “Twitter is Skewering the ‘New York Post’ for a Piece on Why a Man ‘Won’t Date Hot Women.’” Mic included at the top of its article a cropped portion of the *Post* article’s online version, which included, *inter alia*, a cut-off portion of the *Post*’s logo, the *Post* article’s headline, the author’s name, the date of the *Post* article, a significantly cropped version of a photograph of Rochkind that



appeared below the date, and a portion of the text of the article. As Mic reported in its article, many expressed outrage about the *Post* article and Rochkind’s views (particularly in light of his appearance, as shown in Yang’s photograph) as expressed therein. Some of the online comments that Mic discussed took shots at Rochkind’s physical appearance, who did not – in the eyes of many – deserve to be receiving laudatory news coverage for his categorization of women based on varying degrees of physical appeal. To further fill out its story about the backlash following the *Post* article’s publication, Mic aggregated a selection of the “skewering” tweets referenced in its headline and embedded them in its story. For example, one of the embedded tweets, commenting on the Photograph, writes “[s]orry ladies but you just lost your chance with Mr. February from my Passably Hot Substitute Teachers calendar.”

Eighteen months later, Yang commenced a copyright infringement lawsuit against Mic. Mic moved to dismiss on fair use grounds.

District Court Ruling

On September 23, 2019, Judge Alison J. Nathan of the U.S. District Court for the Southern District of New York issued a Decision granting Mic’s motion to dismiss without leave to amend. In weighing the four factors of the fair use balancing test, Judge Nathan found that the first factor, “the purpose and character of the use,” “strongly favor[ed] a finding of fair use,” and “even drawing all available inferences in [Yang’s] favor, Mic’s use of the Photograph was transformative in three ways”: (1) to identify the subject of controversy – the *Post* article and Rochkind; (2) to mock and criticize the *Post* article and its subject; and (3) to alter the meaning or message of the *Post* article by casting Rochkind in a negative light, rather than a “positive, or at least neutral” light, as the *Post* did. The district court further held that the second fair use factor, “the nature of the copyrighted work,” did “not point strongly in either direction,” and that the third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” weighed in favor of fair use because Mic’s use was reasonable given its purpose. With respect to the fourth factor, “the effect of the use upon the potential market,” the district court found that it was “implausible” that Yang’s market for the photograph could be supplanted by Mic’s use of the composite screenshot. Accordingly, the District Court found that the balance of the factors weighed in Mic’s favor as a matter of law.

With respect to the fourth factor, “the effect of the use upon the potential market,” the district court found that it was “implausible” that Yang’s market for the photograph could be supplanted by Mic’s use of the composite screenshot.

Thereafter, Yang moved for reconsideration and Mic filed a motion for attorney’s fees under 17 U.S.C. § 505 and sanctions under 28 U.S.C. § 1927 and the court’s inherent power. Judge Nathan denied both motions in a single Order, rejecting Yang’s attempts to assert “substantially similar argument” that the court had rejected earlier, and explaining that the role of the district court is not to decide copyright disputes based on policy arguments. While acknowledging that the Liebowitz Law Firm has engaged in “overaggressive assertions of copyright claims,” the

district court declined to award fees or impose sanctions based on its belief that Yang's opposition to the motion to dismiss raised reasonable arguments under the circumstances, and it could not at the pleading stage point to any improper motivation on behalf of Yang in bringing "this case." (Coincidentally, Judge Nathan served on the Committee on Grievances for the Southern District of New York, which concurrently oversaw the investigation that led to the suspension of Richard Liebowitz from practice before the Southern District of New York.)

Yang appealed the decision dismissing the operative complaint, and Mic cross-appealed the district court's determination regarding fees and sanctions, citing the district court's failure to appreciate that the overall purpose of the case was in line with the goals of copyright law (including to further speech) and the principles set out in the Supreme Court's 2016 ruling in *Kirtsaeng v. John Wiley & Sons, Inc.*

Second Circuit Proceedings

On appeal, Yang argued that the district court erred in finding Mic's use of the photograph transformative because, in Yang's view: (1) the photograph was used solely as an "illustrative" aid to enhance the Mic article; (2) the Mic article did not "comment" on the photograph itself; and (3) the determination was premature at the pleading stage because a "reasonable juror" could find that the *Post* article was itself critical of Rochkind. Yang further argued that the district court erred in its first factor analysis by "discounting" the commercialism and bad faith sub-factors (which the district court simply said had been pleaded sufficiently, not demonstrated). With respect to the district court's analysis of the third factor, Yang argued that Mic took more of the photograph than was necessary, naming five "legal alternatives" that Mic could have pursued, such as publishing the story without any photograph. On the fourth factor, Yang principally argued that the district court should have considered Yang's potential "commentary" market, purportedly available when photographs go viral online.

With respect to the district court's determination regarding fees and sanctions, Mic argued that the district court erred in failing to consider the objective unreasonableness of Yang's *overall* position on fair use; the two most important factors weighed in favor of fair use, and the one at the heart of the inquiry favored Mic three times over. Instead, the district court looked to whether *any* arguments Yang made in his briefing were reasonable, a standard that – Mic argued—was erroneous. As to Yang's motivation in bringing the lawsuit, Mic argued that, under *Kirtsaeng*, the district court should have considered Yang's demonstrated pattern and behavior in other, similar cases, and that even the record in this case amply showed improper motivation, including a bad faith amendment and reflexively-filed reconsideration motion.

Mic further argued that the district court also erred in failing to consider the *Kirtsaeng* factors of compensation and deterrence, which are particularly important in cases involving potential restraint on free speech, and that attorneys' fees should be awarded to encourage parties with strong legal positions to stand on them, and those with weak ones from proceeding with litigation. Failing to award fees, Mic argued, would allow Liebowitz to essentially censor media entities, as it would almost always be cheaper to settle (which would ordinarily include

an obligation to remove the image) than defend. As for sanctions, Mic argued that the district court improperly disregarded Liebowitz's behavior in other cases because, while sanctions traditionally look at the particular case, his outsized, nationwide presence necessitates a consideration of the wider pattern present.

In a Summary Order handed down on March 29, 2022 and the day after the Supreme Court granted *certiorari* in *Goldsmith*, the Second Circuit sided again with Mic on the merits of the dismissal. The Second Circuit panel roundly affirmed the district court's finding that Mic's use of the photograph was fair – even at the pleading stage where the standard is mere plausibility. The Court “reject[ed] Yang's arguments regarding the first statutory factor,” since Mic's banner image was “used not only to identify the source of its criticism but also as part of Mic's criticism of the *Post* article,” and the law imposes no requirement that a work comment on the original in order to be transformative. Regarding the fourth statutory factor, market harm, the panel agreed with the district court that it was “implausible” that the market for licensing Yang's photograph would be supplanted by Mic's use because it includes, *inter alia*, the *Post*'s headline and significantly crops the photograph.

The panel further agreed with the district court that the remaining factors did not counsel against a finding of fair use, since the second fair use factor has limited weight (due to the transformative use by Mic), and under the third factor, Mic's use was reasonable to satirize the *Post* article. Regarding fees and sanctions, under the applicable abuse of discretion standard, the Second Circuit affirmed the district court's finding that, while Liebowitz does have a history of sanctions, this particular case did not appear frivolous or improperly motivated. The Circuit had held similarly just a few weeks previously in another fair use case involving Liebowitz. *Boesen v. United Sports Pub'ns, Ltd.*, No. 21-1029-CB (2d Cir. Feb. 15, 2022).

Significantly, the opinion confirmed certain well-established fair use principles, particularly in the context of news reporting and commentary. Further, it quashed any argument that a “commentary” or “viral photograph” market exists sufficient to impinge upon the fair use doctrine. With respect to fees and sanctions, however, this case is less satisfying for those who are hit with claims over uses that are obviously fair uses. While the opinion adds to the body of law demonstrating Liebowitz's blind eye toward the law, the pursuit of fees in the fair use context remains an uphill battle. Nonetheless, perhaps with the growing number of rulings finding fair use in the context of online media, the courts might soon appreciate that some compensation will be warranted the next time an ambitious photographer pursues a media company for an obvious fair use.

Eleanor M. Lackman is a partner and Lindsay R. Edelstein is an associate of law firm Mitchell Silberberg & Knupp LLP. They both represented Mic Network Inc. at all stages in the above-referenced litigation. Plaintiff was represented in the Second Circuit by James Freeman, Sanders Law, and in the district court by Joe Dunne, Liebowitz Law Firm.

Supreme Court Clarifies What It Takes to Be Content Based, But Questions Remain

By Tobin Raju

The United States Supreme Court recently clarified an often dispositive issue in First Amendment cases—whether a regulation is content based. [*City of Austin v. Reagan Nat’l Advert. of Austin, LLC*](#), 142 S. Ct. 1464 (2022)

On April 21, 2022, the Court held that the City of Austin’s sign code which distinguishes between signs advertising things not located on the site where the sign is installed and signs advertising things that are located onsite is not a content-based regulation of speech subject to strict scrutiny. The Court concluded the message on the sign need only be examined to determine whether it is in a permissible location, and therefore the sign code is similar to a content-neutral time, place, or manner restriction.

The Sign Code

At issue was an Austin sign code that prohibited the construction of any new “off-premises signs”—signs that advertise “a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site,” Austin, Tex., City Code § 25–10–3(11) (2016). The sign code permitted existing off-premises signs to remain in their existing location. These pre-existing off-premises signs, however, are prohibited from being digitized. On-premises signs may be digitized. Respondent Reagan National Advertising of Austin owns billboards in Austin, including off-premises signs. Reagan National sought a permit to convert its existing off-premises signs to digital signs, but Austin denied this request pursuant to the sign code. Reagan National sued, alleging the sign code’s differing treatment of on- and off-premises signs was a content-based restriction of speech.

The United States Supreme Court recently clarified an often dispositive issue in First Amendment cases—whether a regulation is content based.

Fifth Circuit’s Read-the-Sign Approach

The district court found the sign code to be content neutral and narrowly tailored to serve Austin’s safety and esthetic interests. *Reagan Nat’l Advert. of Austin, Inc. v. City of Austin*, 377 F. Supp. 3d 670, 683 (W.D. Tex. 2019). The Fifth Circuit reversed. 972 F.3d 696, 710 (5th Cir. 2020). Relying on *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), the court of appeals held that the sign code was a content-based restriction because whether a sign is an on- or off-premises sign depends on its communicative content. “One must read the sign” and determine whether it advertises things located at the site of the sign. 972 F.3d 696, 705. Requiring the government to read the sign to determine whether the sign is subject to regulation was an “obvious content-

based inquiry” according to the court of appeals. *Id.* at 707. The inquiry requires the government to identify the speaker and what the speaker is saying—signatures of a content-based restriction. *Id.* at 706.

The Fifth Circuit acknowledged a disagreement among the circuits in applying *Reed* to similar regulations. For example, the Sixth Circuit held an analogous sign code was content based because a government official had to read the message on the sign to determine its function or purpose. *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019). But the D.C. Circuit found that a cursory examination of what a sign says to determine whether it is an event-related sign subject to regulation does not render the regulation content based. *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc’y Freedom Found. v. D.C.*, 846 F.3d 391, 404 (D.C. Cir. 2017). The Fifth Circuit adopted the Sixth Circuit’s approach and held that *Reed* required application of strict scrutiny to the Austin sign code because an official would need to read the sign to determine if the off-premises restriction applied. The court of appeals held the sign code failed strict scrutiny.

***Reed*: Regulating Speech Based on Its Communicative Content**

The Fifth Circuit recognized its read-the-sign approach was broad, but an expected consequence of *Reed*’s expansive rule. Prior to *Reed*, it was unclear whether a facially content-based restriction could be spared from strict scrutiny if the restriction was justified by reasons unrelated to the content of the speech. In *Reed*, Justice Thomas—writing for a majority that included Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor—explained that courts must first determine whether a law is content based on its face. 576 U.S. at 166. A facially content-based law targets speech based on its communicative content, that is, because of the topic discussed or the message expressed. *Id.* at 163–64. If the law is facially content neutral, courts then assess whether the purpose and justification for the law are content based. A regulation of speech must clear both hurdles to be content neutral. *Id.* at 166. The sign code at issue in *Reed* was content based because it treated certain subject matter (ideological and political messages) more favorably than others (directional messages).

Although *Reed* sought to clarify the law on content-based restrictions, since it was decided courts have inconsistently addressed what it means to target speech based on its communicative content. In a prescient concurrence, Justice Kagan warned that “courts will discover that thousands of towns have such ordinances, many of them ‘entirely reasonable’” and “as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.)” *Id.* at 185.

Majority Opinion

The Supreme Court reversed the Fifth Circuit in a 6-3 decision and remanded the case to the court of appeals to assess the sign code under intermediate scrutiny. Writing for the majority, Justice Sotomayor (joined by Chief Justice Roberts and Justices Breyer, Kagan, and Kavanaugh) explained the sign code distinguished signs based on their location and was

therefore akin to a time, place, or manner restriction “agnostic as to content.” *Austin*, 142 S. Ct. at 1471, 1473.

Justice Sotomayor applied the rule from *Reed*, that a regulation of speech is facially content based if it targets speech based on its communicative content—meaning it applies to speech because of the topic discussed or message expressed. *Id.* at 1471. The Court rejected the Fifth Circuit’s read-the-sign approach, finding it “too extreme an interpretation of this Court’s precedent.” *Id.*

The majority opinion took care to distinguish *Austin*’s sign code from that in *Reed*. The law in *Reed* treated ideological, political, and temporary directional signs differently. This differential treatment made the law in *Reed* content based—not because one would need to read the sign to know which of the three categories the sign fit into but because the three categories were treated differently based on their subject matter. Unlike the law in *Reed*, the subject matter of a sign is irrelevant to the application of *Austin*’s sign code. The Court emphasized that the sign code does not single out any topic or subject matter. The message on the sign is only relevant to the extent it informs whether the sign is in a permissible location. “A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not.” *Id.* at 1472–73. Some examination of the content of speech does not robotically render a regulation content based.

The Court rejected Reagan National’s attempt to leverage language in *Reed* recognizing that some content discrimination happens more subtly—by regulating speech because of its function or purpose instead of subject matter. The Court refused to extend *Reed*’s “function and purpose” language to mean any regulation that considers function or purpose will always be content based. *Reed* simply found that a regulation cannot substitute a content-based distinction for one that achieves the same result by targeting the function or purpose of speech. *Id.* at 1474.

The majority opinion also highlighted the long history and prevalence of jurisdictions regulating outdoor advertisements, including with on-/off-premises distinctions. In fact, “tens of thousands of municipalities nationwide” have adopted similar laws. *Id.* at 1465. Noting the reliance interests at stake, the majority opinion cautioned that the dissent would invalidate laws that thousands of municipalities have enforced for decades and survived judicial review.

Holding that the sign code was content neutral, the Court remanded the case for determination of whether the content neutral sign code could satisfy intermediate scrutiny.

Justice Breyer’s and Justice Alito’s Concurrences

Justice Breyer, recognizing *Reed* as binding precedent, joined the majority opinion but also wrote separately to reaffirm his disagreement with *Reed*’s reasoning. As with his concurrence in *Reed*, Justice Breyer would reject a rigid approach that automatically subjects content-based laws to strict scrutiny in favor of a proportional harm analysis that measures the harms to First Amendment interests against the regulatory objectives.

Justice Alito concurred in the judgment in part and dissented in part. Justice Alito wrote that the “provisions defining on- and off-premises signs clearly discriminate on those grounds, and at least as applied in some situations, strict scrutiny should be required.” *Id.* at 1480. Of note, the concurrence authored by Justice Alito in *Reed* asserted rules distinguishing between on-premises and off-premises signs would not be content based. Justice Alito concurred in the judgment in part because he doubted whether Respondents could successfully bring an overbreadth challenge, given that many of the applications of the sign code involve commercial speech. And as applied to Respondents’ non-conforming signs, the only restrictions applicable were content-neutral restrictions on digitization.

Justice Thomas’s Dissent

Writing in dissent, Justice Thomas (joined by Justices Gorsuch and Barrett) asserted the on-/off-premises restriction was content-based under *Reed*. In his view, the sign code discriminates against the message the speaker conveys: whether the sign advertises things on or off site. The sign code’s reliance on a content-neutral factor like the location of the sign does not change the fact that the government must assess the communicative content of the sign, which is a hallmark of a content-based inquiry. The dissent criticized the majority for “rewriting *Reed*’s bright-line rule for content-based restriction” by creating “substantive” and “non-substantive” categories of communicative content; targeting the former, but not the latter, category makes a regulation content based. *Id.* at 1484–85. Justice Thomas also contended that the majority appears to reward regulations on expression that are sufficiently general and encompass more expression, thereby avoiding the pitfalls of targeting a specific topic or subject matter.

Going Forward

The immediate impact of *Austin* is that municipalities with similar on-/off-premises regulations can breathe a sigh of relief knowing their regulations need not satisfy strict scrutiny as facially content-based regulations. The long-term impact is less clear and will depend on what level of inquiry into the content of speech courts will permit governments to conduct before it becomes content based. If the content-neutral regulation in *Austin* could examine speech when that examination was focused on characteristics unrelated to the subject matter, topic, or substantive message of the speech—here it was location—what other “content-agnostic” inquires will courts permit under *Austin*? Governments may try to advance an expansive view of what content is “non-substantive” or “agnostic” allowing more regulations to be classified as content neutral. In any event, it is unlikely *Austin* has resolved the uncertainty around what it takes to be content based.

What other “content-agnostic” inquires will courts permit under *Austin*? Governments may try to advance an expansive view of what content is “non-substantive” or “agnostic” allowing more regulations to be classified as content neutral.

Tobin Raju is the Stanton First Amendment Fellow at Washington University in St. Louis School of Law’s First Amendment Clinic.

The Intercept Fights for Public Records in North Dakota

By Victoria Noble

The North Dakota Supreme Court held last month that documents produced by a private security contractor, TigerSwan, LLC, to the government in discovery in an administrative proceeding constitute government records subject to the state's Open Records Act. [Energy Transfer v. North Dakota Private Investigative & Security Bd.](#), 2022 ND 84 (N.D. 2022).

Despite this victory, *The Intercept* still does not have the records due to obstructive tactics by a private company that claims to own them. Thus while this decision was an indelible win for government transparency, *The Intercept's* ongoing, costly fight to access the records at issue should serve as a cautionary tale to news organizations considering bringing similar cases for access to records provided to the government by a corporate third party.

Background

This case stems from a cache of approximately 16,000 documents produced by TigerSwan to a government agency in response to document requests and discovery orders issued in an administrative proceeding. The agency brought the action against TigerSwan for performing investigative and/or security services for Energy Transfer (“ET”) without the requisite licensure and sought records concerning these services. ET claimed that its contract with TigerSwan gave ET exclusive ownership over the records and required TigerSwan to keep them confidential, even from the government; because ET thought the government never should have received the records in the first place, it believed the agency should destroy them. After TigerSwan and the agency settled the underlying licensing dispute, ET filed a petition to intervene in the administrative case in order to seek a protective order barring disclosure of the documents and mandating their destruction. The agency denied the petition and closed the administrative case.

While this decision was an indelible win for government transparency, *The Intercept's* ongoing, costly fight to access the records at issue should serve as a cautionary tale to news organizations considering bringing similar cases.

Shortly thereafter, a journalist working for *The Intercept* requested the same documents under the North Dakota Open Records Act. The agency denied the request, prompting *The Intercept's* parent company, First Look Institute, Inc. (then-called First Look Media Works, Inc.), to file suit under the Open Records Act. *First Look Media Works, Inc. v. N.D. Priv. Investigative & Sec. Bd.*, Case No. 08-2020-CV-3093. The district court consolidated *The Intercept's* public records suit with a separate suit ET brought against the Board and TigerSwan related to the same documents. In relevant part, ET's complaint alleged that the agency's refusal to destroy documents that ET claimed TigerSwan produced in violation of its contractual obligations to ET amounted to tortious conversion and entitled ET to injunctive

relief and immediate destruction of the documents pending final resolution of the case on its merits.

All parties to the consolidated cases moved for summary judgment on a variety of issues, one of which remained relevant on appeal: whether the documents constituted government records governed by the North Dakota Open Records Act. Applying the plain meaning of relevant state statutes, the district court concluded they did. As a result, it dismissed ET's claims against the agency, reasoning that the agency cannot have wrongfully kept copies of records it was required to retain. ET appealed the decision, arguing that only records that an agency actually used, maintained, or reviewed could be public records. It further argued that the agency was required to conduct a line-by-line analysis to ensure that all disclosed information was directly related to its "public business," which here, was its investigation into and administrative proceeding against TigerSwan.

North Dakota Supreme Court Decision

The North Dakota Supreme Court affirmed the district court's opinion, reasoning that the plain text of the open records statutes precluded ET's overly restrictive interpretation. The crux of its case turned on a statute that defined the term "record" as used in the Open Records Act. Under the statute, governmental records include any "recorded information" that a public entity both possesses and "received...for use in connection with public business." N.D.C.C. § 44-04-17.1(16). The agency's "public business" includes "all matters that relate or may foreseeably relate in any way" to the performance of a "public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory functions[.]" N.D.C.C. § 44-04-17.1(12). The North Dakota Supreme Court held rejected ET's interpretation of N.D.C.C. § 44-04-17.1(16) as unsupported by the text of the provision, which it said does not expressly require that the agency use the records in any particular way.

The North Dakota Supreme Court held that the statutes mean what they say: that so long as a public entity receives records "for use in connection with" some official matter over which it has jurisdiction, the Open Records Act applies. It further held that the requirements of the statutes were satisfied here, because gathering information is integral to investigating and enforcing licensing regulations governing the provision of investigative and security services—a key governmental function of the agency. The agency obtained the documents received through discovery during an enforcement action the agency had jurisdiction to bring; as such, the documents constituted "records" governed by the Open Records Act.

While the court's decision was certainly a win for transparency, it did not end *The Intercept's* fight for these documents. The court did not order the agency to release the documents, and in a

The North Dakota Supreme Court held that the statutes mean what they say: that so long as a public entity receives records "for use in connection with" some official matter over which it has jurisdiction, the Open Records Act applies.

separate case ET filed concerning the same records, the court held that the agency was required to hold additional administrative proceedings to consider whether to grant ET a protective order barring disclosure of the documents. [Energy Transfer v. North Dakota Private Investigative & Security Bd.](#), 2022 ND 85 (N.D. 2022). The court suggested that such an order might well be granted as to any records that fall within a statutory exemption. As such, the Board and ET will each review and propose redactions to the documents or that certain records be withheld altogether. Then, an administrative law judge will rule on any proposed redactions that either the Board or ET disagrees with. *The Intercept* plans to participate in this process but will not have an opportunity to review any of the documents.

Conclusion

This case represents a positive development in North Dakota public records law and provides helpful precedent should similar issues arise in other states. However, it also should serve as a warning to media companies considering suing for access to records submitted to the government by a deep-pocketed corporation in a state without established reverse-public records present or procedures. After more than a year-and-a-half of litigation and over \$100,000 in legal fees, *The Intercept* merely managed to establish that these government documents are in fact subject to the public records laws; whether the government actually has to release them under those laws, or whether they are exempt in whole or in part, remains an open question. That is not to say that this was a pyrrhic victory, or that the press needs to shy away from important public records cases merely because they might find themselves opposite a well-resourced oil company. Rather, as this case shows, media companies can win these cases—provided they are prepared for the protracted fight that may be necessary to do so.

While the court's decision was certainly a win for transparency, it did not end *The Intercept's* fight for these documents.

Victoria Noble is a former First Amendment Fellow at First Look Institute, home of The Intercept, Field of Vision, and the Press Freedom Defense Fund. She will join Dentons LLP as a Litigation Associate this summer. Victoria represented The Intercept in this case together with General Counsel David Bralow and outside counsel Timothy Q. Purdon, Robins Kaplan, Bismark, ND.

Florida Court Rejects Bid to Conceal Records of Deceased Toddler

By Daniela Abratt

A Florida circuit court has [refused to interpret](#) a statute allowing immediate access to records concerning children who have died of abuse or neglect as providing the state Department of Children and Families (“DCF”) with an indefinite amount of time to release those records. For several years, despite the express wording and purpose of the relevant statute, DCF had developed a pattern and practice of delaying release until the agency completed its internal investigation. After the particularly troubling death of 22-month-old Rashid Bryant, a coalition of media companies and access advocates sued DCF when the agency refused to release its case file on the toddler.

Background

Rashid Bryant died on November 6, 2020, after being found unresponsive in his Opa-locka, Florida home. The initial medical examiner’s report revealed that he had suffered a fractured skull, ribs and a broken leg, among other injuries. Just a few months earlier, DCF had returned Rashid from foster care to his parents. They were arrested and charged with criminal neglect within a week of his death. Despite clear evidence that Rashid died of abuse or neglect, DCF refused to release its records absent a formal finding by the agency of his cause of death.

Carol Marbin Miller, a longtime *Miami Herald* investigative reporter who has for many years covered child abuse cases, immediately requested DCF’s file. DCF responded by asserting that its investigation into Rashid’s death was open and that, under Florida Statute Section 39.202, the records were exempt from disclosure. Section 39.202(2)(o) provides that DCF records on a child may be released to any person upon the death of a child when a “determination” has been made that the death was caused by abuse, abandonment, or neglect. DCF interpreted the statute as giving the agency the sole authority to make the required determination on an indefinite timeline, even when the manner of death was obvious.

Media Coalition’s Public Records Lawsuit

After repeated denials, the *Miami Herald*, along with The Associated Press, Gannett Co., Inc., Graham Media Group (d/b/a WJXT-TV4 and WKMG-TV6), The New York Times Company, the Florida Star Newspaper, Inc., Scripps Media, Inc., Times Publishing Company, WPLG, Inc., the First Amendment Foundation, and the Florida Press Association, sued DCF in Miami-Dade

After the particularly troubling death of 22-month-old Rashid Bryant, a coalition of media companies and access advocates sued DCF when the agency refused to release its case file on the toddler.

County circuit court. In their complaint, the news media parties asserted that DCF's interpretation of the statute violated the Florida Public Records Act and the state constitutional right of access.

Judge Barbara Areces ultimately agreed, and on March 8, 2022, entered an order requiring DCF to release its entire file on Rashid. Judge Areces' ruling came after more than a year of litigation, including an interlocutory appeal.

The access dispute began on November 17, 2020, less than two weeks after Rashid's death, when the *Miami Herald* requested DCF's file. In response, DCF produced a redacted two-page report and refused to produce additional records, asserting they were confidential and exempt under Florida Statute Section 39.202. DCF's position was directly contrary to what was publicly known in the wake of Rashid's death.

For example, police arrest affidavits described a harrowing tale of how Rashid had been removed from his parents' custody at birth and recently returned to them. Rashid's mother, Jabora Deris, told police she found Rashid unresponsive in his room, but waited 83 minutes before calling 911, after which she began CPR. Police detailed Rashid's numerous injuries, which were emblematic of child abuse.

Additionally, during the litigation, the Miami-Dade State Attorney's Office disclosed records from the ongoing criminal case. These records included the initial autopsy report prepared the day after Rashid died, in which the medical examiner found he suffered and died from numerous "blunt injuries" to his head, torso, and extremities. A subsequent report classified his manner of death as "homicide" and resulted in upgraded charges against Rashid's parents.

DCF, however, inexplicably continued to assert that the agency had not yet determined whether Rashid died as a result of abuse or neglect. In that regard, DCF first filed a motion to dismiss, which was denied by the Court, and a counterclaim, which was dismissed. DCF appealed the counterclaim dismissal to Florida's Third District Court of Appeal, which dismissed the appeal as premature.

DCF also filed a summary judgment motion, asserting that the Court could decide as a matter of law that the agency had the sole authority in child abuse cases to make the determination required to trigger release. The news media parties opposed the motion by citing to numerous factual issues raised by the record evidence, and successfully arguing that the Court should conduct an *in camera* inspection of all of DCF's records about Rashid.

Prior to the final evidentiary hearing, the parties exchanged limited discovery. The news media parties also took the deposition of a DCF representative, who testified that as a matter of policy and courtesy, DCF does not close its investigations without approval from law enforcement or the prosecutor in a criminal case. In this case, DCF testified that the State Attorney's Office had requested that the investigation remain open. This testimony subsequently was undermined by an affidavit from the lead prosecutor.

The Court held a final evidentiary hearing on March 1, 2022, which included testimony from the DCF representative and the prosecutor. At the hearing's conclusion, the court held that the testimony and record evidence conclusively established that DCF knew – as early as six days after Rashid's death – that he had died of abuse and neglect. Among other things, the Court pointed to a sworn dependency petition in which DCF sought to remove Rashid's siblings from his parents' custody for their safety.

The Court additionally and significantly rejected DCF's reading of the relevant statute, finding that DCF alone is not vested with the authority to make the triggering "determination" about a child's death. In so doing, the Court ruled that DCF must take into account all surrounding circumstances and cannot ignore the findings of other governmental agencies. Accordingly, the Court found that DCF's interpretation of the statute was contrary to the legislative history of Section 39.202(2) (o), and that DCF's administrative processes resulted in unlawful delays to the public's right of access to agency records where a child dies of abuse, abandonment or neglect. Going forward, the Court's ruling should provide a basis for timely release of DCF records and provide public accountability in cases involving child deaths.

Going forward, the Court's ruling should provide a basis for timely release of DCF records and provide public accountability in cases involving child deaths.

The plaintiff news media parties were represented by Thomas & LoCicero attorneys Carol Jean LoCicero, Mark R. Caramanica and Dana J. McElroy. Daniela Abratt is an associate in Thomas & LoCicero's South Florida office.

California “Public Right to Know” Bill Would Increase Access to Settlement Docs

By Tracy Rane

On May 23, 2022, the California State Senate approved [SB-1149 - also known as the “Public Right to Know Act”](#) - authored by Senator Connie M. Leyva (D-Chino), which seeks to protect the public’s right to know facts that are discovered during litigation involving claims for defective products or environmental hazards, and prohibits settlement agreements that restrict the disclosure of information about a defective product or environmental hazard that poses a danger to public health or safety. As set forth in the bill, a recent investigation by Reuters, revealed that judges sealed evidence relevant to public health and safety in about half of the 115 largest product-defect cases over the past 20 years due to the ease and tradition of secrecy in such complicated and costly court cases. *See* SB-1149 at Sec. 2(f).

Specifically, the bill, which was jointly sponsored by Consumer Reports and Public Justice, creates a presumption that no court order may conceal information about a defective product or an environmental hazard that poses a danger to public health or public safety unless the court finds that the public interest in disclosure is clearly outweighed by a specific and substantial need for secrecy. *See* SB-1149 Sec. 3(b) and (c). “Defective product or environmental hazard that poses a danger to public health or safety” is defined in the Act to mean a defective product or environmental hazard that has caused, or is likely to cause, significant or substantial bodily injury or illness, or death. *Id.* at Sec. 3(a)(2).

The proposed new law aims to strike a balance between protecting certain aspects of litigant privacy and encouraging settlements of conflicts on the one hand, while ensuring disclosure of evidence of dangers and harms vital to public safety on the other. *See* SB-1149 at Sec. 2(d). Information related to trade secrets, citizenship or immigration status, medical information and the amount of the settlement could still be protected from disclosure under the proposed new law. *See id.* at Sec. 3(d)(1) to (4).

Attorneys who fail to comply with the provisions of the Act would be subject to professional discipline. *See* SB-1149 at Sec. 3(h).

Significantly, the provisions of the Act can be enforced by any person, including “a representative of news media acting on behalf of the public” if it is “reasonably foreseeable that the person will be substantially affected” by a violation of the Act. The party affected by the violation “may challenge the provision, agreement, or order by motion in the covered civil

The bill creates a presumption that no court order may conceal information about a defective product or an environmental hazard that poses a danger to public health or public safety unless the court finds that the public interest in disclosure is clearly outweighed by a specific and substantial need for secrecy.

action, or by bringing a separate action for declaratory relief in the superior court.” SB-1149 at Sec. 3(f).

Perhaps the best support for the Act can be found within the proposed new law itself, which cites to former U.S. Supreme Court Justice Louis Brandeis: “Sunlight is said to be the best of disinfectants.” *See* SB-1149, Sec. 2(b).

The California assembly is set to vote on the bill within the next two weeks. If signed, California would join several other states that have enacted similar laws, including Florida, Louisiana, Montana, South Carolina, and Washington.

Tracy Rane is Of Counsel in the Los Angeles office of Ballard Spahr.

Northern District of California Dismisses Case Against Facebook and Twitter

White House Press Conference Not Sufficient to Show State Action

By Allyson Veile and Maggie Strouse

The Northern District of California's decision in [Hart v. Facebook, et. al.](#), 22-cv-00737-CRB (N.D. Cal. May 5, 2022), joins the growing collection of case law rejecting First Amendment claims against social media companies for exercising control over the content that appears on their platforms.

The Plaintiff in the case, social media user Justin Hart, sued Facebook, Twitter, President Joe Biden, and Surgeon General Vivek Murthy, for violating his First Amendment freedom of speech, among other claims. Giving rise to the suit, Facebook and Twitter removed Plaintiff's posts and restricted his accounts for violating their respective Community Standards to prevent the spread of COVID-19 misinformation. Hart also brought a FOIA enforcement action against the Department of Health and Human Services (HHS) and the Office of Management and Budget (OMB) for failure to respond to his FOIA requests, which sought evidence that his social media posts were specifically targeted by the White House campaign against COVID-19 misinformation on social media.

Hart argued that the social media companies were acting jointly with the federal government because of a series of pronouncements and statements from the Administration about social media misinformation regarding COVID-19. The Court, however, disagreed, dismissing Hart's First Amendment claims for lack of state action. In so doing, the Court also declined to exercise jurisdiction over Hart's related state-law claims, including Facebook and Twitter's Anti-SLAPP claim under California law.

Hart's FOIA claims against HHS and OMB will continue on, and the Court left the door open for Hart to amend his Complaint if Hart's FOIA claims provide facts that could plausibly support a claim of state action by the social media defendants.

Background

Hart's state action claims against Facebook and Twitter arose from several of Hart's posts that were flagged as containing misinformation about COVID-19. According to Hart's complaint,

The Northern District of California's decision in *Hart v. Facebook* joins the growing collection of case law rejecting First Amendment claims against social media companies for exercising control over the content that appears on their platforms.

Facebook restricted Hart’s account on several occasions and had flagged his posts for violations of its Community Standards. First, he alleged that in September 2020, Facebook banned him from advertising or using the Facebook Live feature for 30 days in response to one of his posts. Second, he alleged that in April 2021, Facebook restricted his ability to post or comment for 24 hours in response to another three of his posts. Third, he alleged that in July 2021, Facebook flagged one of his posts (an infographic opposing mask use for children) for violating its Community Standards, specifically citing “misinformation that could cause physical harm.” In response to the July 2021 post, Facebook also restricted Hart’s ability to post or comment for 3 days.

Hart’s complaint also alleged that Twitter had restricted his account once—after he tweeted about masks on July 18, 2021. In response, Twitter locked his account, stating that he had violated “the policy on spreading misleading and potentially harmful information related to COVID-19.”

On July 15, 2021, the White House held a press conference with Surgeon General Vivek Murthy. The press conference focused on Surgeon General Murthy’s 22-page advisory entitled “Confronting Health Misinformation.” At the press conference, White House Press Secretary Jen Psaki said the Administration was in “regular touch” with social media platforms and that it was “flagging problematic posts for Facebook.” In a statement to the press on July 16, 2021, President Biden stated that social media companies were “killing people” due to the spread of COVID-19 misinformation on their platforms. A week after the press conference, Hart submitted FOIA requests to the HHS and the OMB seeking communications with social media companies about him or his social media posts.

In August 2021, Hart filed suit against President Biden, Surgeon General Murthy, Facebook, Twitter, HHS, and OMB. Hart claimed that Facebook and Twitter had violated the First Amendment by flagging his posts and suspending his accounts, arguing that they had acted jointly with the President and the Surgeon General. Hart also brought various state law claims against Facebook and Twitter, including claims under the California Constitution’s Free Speech Clause, and promissory estoppel claims. Hart also brought claims against HHS and OMB were for failing to timely respond to his FOIA request. President Biden, Surgeon General Murthy, Facebook, and Twitter all moved to dismiss the claims against them, which the Court granted. HHS and OMB did not move to dismiss, so Hart’s FOIA suit is ongoing.

Court Ruling

The Court first addressed whether Hart adequately alleged state action to support a First Amendment claim against Facebook and Twitter. The Court concluded he had not, rejecting the two state action theories that Hart had proposed—the “joint action” theory and the “government compulsion or coercion” theory.

Hart relied on the Administration’s statements at the press conference about the dangers of COVID-19 misinformation and Surgeon General Murthy’s opinion to establish joint action

between the government and Facebook/Twitter. The Court rejected Hart's argument, emphasizing that Facebook and Twitter claim that they flagged Hart's posts based on their own policies and Community Standards. Because this explanation plausibly explains Hart's injury, the Court refused to find that Hart plausibly pled that the social media companies and the Administration engaged in secret illegal joint action to violate Hart's First Amendment rights. The Court also noted that most of Facebook's actions occurred before the Biden Administration issued any public guidance on the topic at all. Indeed, Hart's complaints regarding his social media posts in September 2020 occurred before the President Biden was even in office.

Even for the social media companies' July 2021 actions, which were closer in time to the press conference, the Court explained that the plausibility of joint action was lacking because the statements by Press Secretary Psaki and Surgeon General Murthy were too vague to constitute a directive to social media companies. And, importantly, the Administration's statements did not specifically relate to Hart himself. Accordingly, there was no "meeting of the minds" sufficient to suggest joint action to violate Hart's rights. The Court noted that, even if there had been communications specific to Hart, such communications would likely fall short of the kind of "substantial cooperation" required to show joint action.

As for government coercion, Hart argued that President Biden's public remark that social media companies were "killing people" was a threat to social media companies when considered in the context of the public controversy over Section 230 of the Communications Decency Act, as well as executive agency investigations of social media companies. The Court rejected these arguments, explaining that private companies do not commit state action by doing things that are "vaguely in line" with a President's stated preferences. The Court noted that it was "difficult to understand" how generalized legislative debate would give the President coercive power over private companies. Moreover, the Court again emphasized that the coercion would have to be specific as to Hart himself to constitute state action by government coercion.

The Court did not address the companies' arguments that Hart's claims were barred by Section 230. And because the Court dismissed the First Amendment claim, which was the only federal claim against Facebook and Twitter, the Court declined to exercise supplemental jurisdiction over the state law claims. In so doing, the Court avoided addressing the social media companies' arguments that Hart's state law claims were barred by California's Anti-SLAPP statute. Both companies argued that Hart's claims were barred because they arose from a protected activity: the constitutional right to exercise editorial control over their content.

The Court dismissed the First Amendment claims against President Biden and Surgeon General Murthy on standing grounds.

The Court then concluded that granting leave to amend would be futile, thus dismissing all the claims against Facebook, Twitter, President Biden, and Surgeon General Murthy. However, the FOIA claims against HHS and OMB were not the subject of any motion to dismiss, and thus, a part of the case will continue. The Court also noted that if Hart learns additional facts from his FOIA request that more plausibly suggest joint action, it would permit amendment. And

because the Court dismissed Hart's state law claims without prejudice, Hart could theoretically bring those claims separately in state court, although the social media companies could reassert their Anti-SLAPP defense.

We probably have not seen the last of these claims, as Hart's attorneys created a [webpage for this case](#) .

Allyson Veile and Maggie Strouse are associates with Ballard Spahr LLP in Washington, D.C. Plaintiff is represented by Liberty Justice Center. Twitter is represented by Willkie Farr & Gallagher LLP. Facebook is represented by Orrick, Herrington & Sutcliffe LLP.

No Joking Matter: Sarcastic Tweets Not (Yet) an Unfair Labor Practice

By Damon E. Dunn

In a win for internet jokers, the First Amendment trumped the National Labor Relations Board after a federal appellate court held that the Board “misconstrued a facetious remark as a true threat.” [NLRB v. FDRLST Media](#), (3d Cir. May 20, 2022).

In this case, the executive officer of a nonunionized “right-leaning internet magazine,” The Federalist, mocked reports that unionized employees of a “left-leaning” publication had walked off the job by tweeting: “FYI @fdrlst first one of you tries to unionize I swear I’ll send you back to the salt mine.”

Although the company had “just seven employees, six of whom were writers and editors” and “none had expressed concern,” a Twitter bystander filed an Unfair Labor Practice charge in the unrelated jurisdiction of New York. Affirming its administrative law judge’s findings of an unfair labor practice, the Board entered a cease-and-desist order and required the company to instruct the officer to delete his tweet.

Although the Third Circuit ruled that anyone can file a charge (one judge disagreed), it reversed because a reasonable employee would “read the tweet as mocking a rival” and the First Amendment narrows the National Labor Relations Act to “only statements that constitute a true threat to an employee’s exercise of her labor rights.” Here: “The image evoked—that of writers tapping away on laptops in dimly-lit mineshafts alongside salt deposits and workers swinging pickaxes—is as bizarre as it is comical.”

The Court also noted that the Board found no evidence any employee perceived a threat, the tweet was posted on the executive’s personal Twitter account to eighty thousand followers instead of to employee email inboxes, and the public platform encouraged “opinions in exaggerated or sarcastic terms.”

Exasperated by the Board having “lost the forest for the trees by failing to consider the tweet in context,” the Court pointedly summed up: “Here, the Board spent its resources investigating an online media company with seven employees because of a facetious and sarcastic tweet by the company’s executive officer.”

The pragmatic lessons are less comforting, however. The First Amendment shielded a “tiny media company” only because a court blocked an agency’s aggressive - and unconstitutional -

“Here, the Board spent its resources investigating an online media company with seven employees because of a facetious and sarcastic tweet by the company’s executive officer.”

attempt to cancel personal speech in a public forum. Unfortunately, self-preservation may require self-censorship if government prosecutes “pure speech” when any random person complains anywhere. Given the mismatch between bureaucratic resources and capacity for humor, managers should heed the Court on “the propensity for jokes to fall flat for want of context” and pause before posting.

Damon Dunn is a partner at Funkhouser Vegosen Liebman & Dunn in Chicago. FDRLST Media was represented by the Institute for Justice and was supported by a variety of amici, including CATO Institute, Reason Foundation, Individual Rights Foundation, DKT Liberty Project, Nadine Strossen, P.J. O'Rourke, Clay Calvert, Robert Corn-Revere, Michael James Barton, and Penn & Teller.

Ten Questions to a Media Lawyer: James McLaughlin

James McLaughlin is the Washington Post's deputy general counsel and director of government affairs.



1. How'd you get interested in media law? What was your first job in the business?

I come from a family of reporters, editors and publishers, so I guess you could say the “media” part of it is in the blood. My parents met as reporters at the Chicago Tribune in the late 1960s, and I was editor-in-chief of my high school newspaper (The Hawklet, St. Joseph’s Prep in Philly). I became interested in First Amendment and media law as a college undergrad – I took a course where we read landmark Supreme Court cases, including *Chaplinsky*, *Cohen v. California*, *Sullivan*, and *Pentagon Papers*. My first job in the field was a fellowship at The Reporters Committee for Freedom of the Press (serendipitously, the McCormick Tribune fellowship).

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

I enjoy most aspects of it. I like that whatever I’m working on is usually connected to the larger issues of the day – it’s more topical than most legal practices. It’s particularly rewarding to be involved in longer-term, investigative projects where legal support can be the difference between whether a story is possible or not. As for dislikes, there aren’t many, but the sheer pace can be exhausting at times – you might think your workday is over, and something comes p at 9 pm that has to be dealt with immediately.

3. What was your highest profile or most memorable case?

One of the very first matters I worked on at the Post was helping a team of lawyers prepare three reporters, including Bob Woodward, to testify in the Scooter Libby perjury trial. I remember being the junior lawyer in the room and thinking “I can’t believe I’m in this meeting.” Another memorable one was the 18-month effort to secure the release of Jason Rezaian from imprisonment in Iran.

4. Are you able to maintain a decent work-life balance? What are some rules you follow?

If you've got any, I'll gladly hear them! (Just kidding.) I think I'm generally able to maintain a decent balance, but it's a challenge for everyone in our profession. One thing that helps, I find, is the Eisenhower matrix – separate out what's important and urgent, urgent but not important, not urgent but important, and not urgent and not important (lowest priority).

5. Fake news, *Sullivan* under attack, reporters under attack – will things get worse before they get better?

I wish I knew the answer to that. I do know that media literacy skills are going to be incredibly important for the next generation. They have to be able to read or watch something and think critically about whether it's supported by evidence or just fits into a preferred narrative.

6. What's your favorite movie or book involving lawyers and the law?

There are so many good ones! I'll go off the beaten path and say "Denial," a 2016 movie about the UK libel case in which David Irving sued a Holocaust scholar, Deborah Lipstadt, over her criticism of his work. I think it's the best movie ever made about a libel case. ("Absence of Malice" fans will disagree, I know.)

7. Media law can be a difficult industry to break into. What would you suggest to a young lawyer or student trying to do so?

Keep following your passions, and don't be discouraged if you're not immediately able to get a job in the industry. Build as many contacts as possible, and work on your professional development as an attorney – even if it's not in media law at first.

8. What's a book, show, song, movie, podcast or activity that's been keeping you entertained during the pandemic?

I went on a John le Carré reading binge early in the pandemic, reading or re-reading the novels and digging up various TV and film adaptations. That, and a daily family walk with my wife, two boys and the dog.

9. What's a typical weekday lunch?

PB&J and a string cheese. Easy and cheap. (Takeout lunch prices in DC have gotten ridiculous.)

10. Your most important client takes you out for karaoke. What do you sing?

Hmmm... singing is not my strong suit. Maybe something from "Hamilton," because I've heard it so many times in the car (my 11-year-old is a huge fan) and many of the songs don't require a ton of range.