LDRC 1997 REPORT ON SIGNIFICANT DEVELOPMENTS

PART A: REPORT ON SIGNIFICANT DEVELOPMENTS IN THE LAW

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INTRODUCTION

This year's final LDRC Bulletin reviews the significant developments in the law of libel, privacy and related law over the past year. To place the year's events in perspective, Part I offers articles by practitioners who look back on a series of cases in three areas of active interest:

- **Incursions by plaintiffs into the realm of newsgathering.** Steve Perry looks at the growing number of cases in which courts permit the subjects of news reports to challenge the manner in which information about them is gathered. Given the formidable constitutional barriers to a defamation lawsuit, plaintiffs and their family members count on the development of side torts—from fraud to wrongful death actions—and statutory causes of action—from eavesdropping to deceptive business practices acts—to rein in the media and, of course, to obtain compensation.

- **Attempts to hold the media liable for the criminal acts of others.** Tom Kelley and Steve Zansberg discuss recent case law based on the law of incitement, which threatens to pin civil liability on media organizations that dispense information used by others to accomplish criminal ends. The facts of these cases may test a defense lawyer's dedication to the maxim of "freedom for the thought we hate."

- **Post-OJ access to the courts.** Sounding a brighter note, Steve Westman and Susan Infantino report that the feared over-reaction to the astounding publicity given to People v. Simpson has not occurred. Courts are letting cameras in, and keeping them out, with what appears to be the same frequency seen before that infamous trial.

These articles are followed in Part II by LDRC's summary of developments in the law. Most of these reports are taken from cases cited in the LDRC 50-STATE SURVEY 1997-98: MEDIA LIBEL LAW (October 1997), the LDRC 50-STATE SURVEY 1997-98: MEDIA PRIVACY AND RELATED LAW (June 1997), covering U.S. states, federal circuits and territories, and the LDRC LibelLetter. The findings are organized by topic and generally follow the outline format found in the SURVEYS.

Part III of this Bulletin, bound separately, is devoted to the 1996 Supreme Court Term. It includes a statistical analysis of the term's petitions for certiorari of interest to the media, as well as a descriptive summary of the outcome of those cases.
RECENT DEVELOPMENTS IN THE LAW OF NEWSGATHERING

By Steven M. Perry

The past 12 months have seen many opinions in the newsgathering area. The outcome in most of the reported opinions has been unfavorable to the media defendants. This article attempts to analyze the essential underlying facts of, and the important holdings in, some of these cases.

Invasion of Privacy


The plaintiff in *Green* alleged that Chicago *Tribune* photographers had taken pictures of her son — without his consent and without the plaintiff’s consent — as he was undergoing emergency treatment at Cook County Hospital for a bullet wound suffered in a gang battle. Plaintiff also alleges that shortly after her son died from his wound, *Tribune* photographers took more photographs of him and, for a time, blocked plaintiff’s access to her son. When plaintiff did reach her son, the *Tribune* staffers listened to, and wrote down, her statements to her dead son. The next day, the *Tribune* published a front-page article about Chicago’s record homicide rate. The article included a picture of the plaintiff’s son after his death and quoted the plaintiff’s parting words to him. Two days later, the *Tribune* published a different article that included a picture of the plaintiff’s son undergoing medical treatment.

Plaintiff’s complaint asserted claims for invasion of privacy, intentional infliction of emotional distress and battery. The trial court granted the *Tribune*’s motion to dismiss. In a 2-1 decision, the Illinois Court of Appeal revived plaintiff’s privacy and intentional infliction claims.

Because the Illinois courts have not definitively accepted the tort of intrusion on seclusion, the majority considered whether the plaintiff had stated a claim for public disclosure of private facts. Under the Restatement (Second) of Torts, as adopted in Illinois, the plaintiff must plead that: (1) the *Tribune* gave publicity to her private life; (2) the matter publicized was highly offensive to a reasonable person; and (3) the matter publicized was not of legitimate public concern. *Green*, 286 Ill. App.3d at 5. The trial court had found with respect to the first element that the plaintiff could not show that “private” matters had been publicized, since the plaintiff had “talk[ed] aloud in a public place” and had spoken “voluntarily with knowledge that *Tribune* staffers were present.” Id. The Court of Appeals disagreed, holding that plaintiff’s allegation that she had declined a *Tribune* reporter’s request for a statement might have been sufficient to put the *Tribune* staffers on notice that it should not disclose to the public the statements she subsequently made in their presence to her dead son. The Court of Appeals also held (apparently as a matter of law) that the hospital room into which the son’s body had been placed to await the coroner was “not a ‘public place.’” *Id.* at 6.

The Court next held that the plaintiff had alleged sufficient facts from which a jury could find that the *Tribune* article was highly offensive to a reasonable person. The Court noted that “the
publication concerned an extraordinarily painful incident in plaintiff's life, when she first set eyes on her minor son after he had been shot to death.” *Id.* at 9. The Court was also offended by the *Tribune* staffers’ (alleged) efforts to exclude the mother from her dead son’s presence while they photographed the body. *Id.* The dissent disagreed, noting that there were no allegations that the pictures were gruesome or that the quotation attributed to the plaintiff cast her in an unfavorable light. *Id.* at 18.

The Court next held that a jury could find that the matter publicized was not of legitimate public concern. In truly myopic fashion, the Court held that a jury could find that the *Tribune’s* readers “did not need” to hear what plaintiff said to her dead son, and “did not need” to see a photograph of the dead son, in order to understand “the human suffering behind gang violence.” *Id.* at 10.

As the dissent pointed out, however, while it may be true that the *Tribune* “did not need” to use any particular picture or quotation in order to write an article about gang violence, that is not a constitutionally permissible standard. After all, “[i]t is not for a jury to decide how a news story should be edited.” *Id.* at 19. The dissent explained that the *Tribune’s* article was protected from liability by the First Amendment because

> [t]he statements by plaintiff to her son and his photo are closely related to the subject matter of the news story, which documented the fact and effect of gang violence on the offenders and the victims... [T]he quotation and photograph contribute constructively to the impact of the article. They give a personalized frame of reference, allowing the reader to relate, perceive, and understand that the class of victims is not limited to gang members.

*Id.* at 19.

The majority also reversed the trial court’s dismissal of the mother’s claim for intentional infliction of emotional distress. The Court held that a jury could reasonably find that the *Tribune’s* conduct exceeded “all possible bounds of decency” and demonstrated “an alarming lack of sensitivity and civility.” *Id.* at 11-12. The dissent disagreed, and in closing predicted a future that may already have arrived:

> There are, no doubt, cases in the pipeline where the phenomena of “infomercials,” “info-entertainment,” “docu-dramas” and “reenactments” blur the differences between legitimate news and pulp fiction. The shield of the First Amendment may develop cracks as courts respond to this trend and the insensitive aggressiveness of legitimate news gatherers who must compete with the purveyors of soft core “information” to supply market demands.

*Id.* at 21.

The case was subsequently settled.
Electronic Eavesdropping


In *Dickerson*, the Michigan Court of Appeals addressed several issues arising under the Michigan eavesdropping statute. The plaintiff in *Dickerson* was a 65-year-old mother of eight who was a longtime member of the Church of Scientology. In 1991, one of her daughters, who felt that the Church had begun to dominate her mother and had forced her to sever her ties with her family, decided to confront her mother about these issues. After informing her mother of her intent to use the media to “expose” the Church, the daughter contacted the *Sally Jessy Raphael* show. The daughter suggested to the show’s producers that she surreptitiously audiotape a conversation with her mother. The producers provided the daughter with a transmitting device, which the daughter wore during a “heart-to-heart” conversation with her mother in a public park. The device transmitted the conversation to a van parked nearby, where employees of an audio-visual company hired by the show’s producers were recording the conversation. Four portions of the recording were played on the *Sally Jessy Raphael* show in July 1991.

The mother sued Sally Jessy Raphael and various individuals and entities affiliated with her show or with the story in question. After the trial court denied the mother’s motion for a directed verdict on her state statutory eavesdropping claim, the jury returned a verdict of “no cause of action.” *Dickerson*, 222 Mich. App. at 190.

The jury verdict was short-lived. The Michigan Court of Appeals reversed the trial court’s denial of the plaintiff’s motion for a directed verdict, holding that as a matter of law, the defendants’ conduct had violated the Michigan eavesdropping statute. The Court remanded the matter for a hearing on damages.

The Court began its analysis by explaining why it was substituting its judgment for that of the jury: “The voluminous record before us suggests that the jury was influenced unduly by numerous peripheral issues and could not easily focus on whether defendants' conduct violated the Michigan eavesdropping statutes.” *Id.* at 190 n.3. The Court then held that although the Michigan eavesdropping statute permits one party to a conversation to record that conversation surreptitiously, a third party may not record a conversation without the consent of all parties to it, even where one party to the conversation is knowingly transmitting the conversation to that third party for the purpose of having it recorded. In other words, the daughter could lawfully have made the recording herself and then provided it to the *Sally Jessy Raphael* show for broadcast. Under the Court of Appeal’s analysis, the question of legality or illegality turned on whether the recording device was on the participant’s person or in a van nearby, even though the tape recording itself would be identical if made in either location.

How did the Court reach this seemingly peculiar result? The Michigan statute in question provides that “[a]ny person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties
thereto is guilty of a felony . . . .” MSA 28.807(3). Id. at 191-192. The statute defines “eavesdropping” as “to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse.” MSA 28.807(1)(2). Id. at 192.

On its face, the statute could reasonably be interpreted as including a “two-party consent” requirement, thus barring participant or third party recording. In 1982, however, the Michigan Court of Appeals had held that because of the statute’s use of the phrase “the private discourse of others,” it did not address recordings made by participants to a conversation. Sullivan v. Gray, 117 Mich. App. 476, 483, 324 N.W.2d 58 (1982). The Sullivan court suggested that its construction of the eavesdropping statute might lead “to one anomaly,” namely, that “[w]hile a participant may record a conversation with apparent impunity, his sole consent is insufficient to make permissible the eavesdropping of a third party.” Id. The Court of Appeals in Dickerson embraced this dictum from Sullivan and turned anomaly into law. This result seems to ignore the fact that because it was the daughter who had first suggested that the conversation be audiotaped, it was she who was, in reality, recording the conversation. The mere fact that she was wearing a device that transmitted the conversation to a remote recorder rather than a device that itself taped the conversation should have been considered a distinction without a difference.

The result in Dickerson also ignores the clear possibility that the jury determined that the conversation in question did not involve “private discourse,” as required by the Michigan eavesdropping statute. The mother knew prior to the conversation that her daughter intended to enlist the national media in an effort to draw attention to her mother’s involvement with Scientology. The jury could easily have decided that the mother was, therefore, on notice that any statement she made to her daughter might be repeated to a national television audience. While the Court of Appeals would clearly reach a different conclusion on this issue (see 22 Mich. App. at 198-199), it hardly seems one capable of resolution in plaintiff’s favor as a matter of law. The Court of Appeals’ nullification of the jury’s verdict may well represent an example of increasing judicial hostility towards media use of eavesdropping devices. Defendants’ application for leave to appeal is currently before the Michigan Supreme Court.


Much has been written about the Food Lion case. This article will assume the reader’s familiarity with the essential facts of the case, and will focus on the post-trial opinions issued by Judge

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1 Some readers of this article may not consider this a news gathering case. It should be noted that at the time of the events in question, the nature and tactics of the Scientology Church were hotly debated national issues, and stories about the Church and its impact upon the lives of particular individuals had appeared in many media outlets. See, e.g., “Scientology: the Cult of Greed,” Time, May 6, 1991 (cover story). See also Church of Scientology Int’l. v. Time Warner, Inc., 806 F. Supp. 1157, 1162 (S.D.N.Y. 1992).

In his May 9, 1997 opinion, Judge Tilley explained why he had held, after the jury had returned its December 20, 1996 verdict finding ABC and the other defendants liable for fraud, trespass, and breach of a duty of loyalty, but before the jury awarded damages, that “proof of damages resulting from ‘lost profits, lost sales, diminished stock value or anything of that nature’ would not be permitted.” Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 958 (M.D.N.C. 1997). Because Food Lion had sought to recover approximately $5.5 billion in damages falling in these general categories, the court’s decision in this regard was not an insignificant one. As has been reported, the jury went on to award $1,402.00 in compensatory damages to Food Lion.

In a pre-trial ruling, the court had held that Food Lion could not recover damages flowing from the PrimeTime Live broadcast about its food handling practices unless it met the constitutional standards for recovery on a libel theory (e.g., falsity and actual malice). See Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 823 (M.D.N.C. 1995). Food Lion had not asserted a libel claim, and the court had assumed for purposes of the case “that the content of the Food Lion broadcast about Food Lion was true.” Food Lion, 964 F. Supp. at 959. The court instructed the jury that it should assume that the broadcast was truthful, although it did not permit the jury to view the broadcast.

The court’s May 9, 1997 post-trial opinion does not address the constitutional issues, holding instead that the lost profit/stock decline damages were not proximately caused by the acts that gave rise to the defendants’ liability. The court determined that while the defendants’ surreptitious and, in the jury’s opinion, tortious newsgathering efforts may have been the “but for” cause of Food Lion’s losses, “it was the food handling practices themselves — not the method by which they were recorded or published — which caused the loss of consumer confidence ‘which, in turn, caused Food Lion’s losses. Food Lion, 964 F. Supp. at 963. In the court’s view, this conclusion followed inexorably from the assumption that the broadcast was truthful, although it did not permit the jury to view the broadcast.

The Court did note that a different result might have been reached if there had been evidence that the ABC undercover investigators had “created[d] a situation which would not have otherwise existed in order to allow PrimeTime Live to report on that situation.” Id. at 964.


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In a later opinion, Judge Tilley granted Food Lion’s motion for entry of judgment on its claim under North Carolina’s Unfair and Deceptive Trade Practices Act (“UTPA”). *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 1997 U.S. Dist. LEXIS 11344 (July 9, 1997). The UTPA requires proof that: (1) the defendant committed an unfair or deceptive act or practice; (2) the act was in or affecting commerce; and (3) the act proximately caused injury to plaintiff. *Id.* The trial court decides whether a UTPA violation has occurred, based upon the jury’s findings of fact. *Id.* Trebling of damages is automatic under the UTPA, but punitive damages are not available.

At the trial, the jury answered special interrogatories in connection with Food Lion’s UTPA claim, which satisfied the first and third UTPA element — the commission of an unfair or deceptive act or practice. The court then held that journalism is a business and that the defendants’ newsgathering efforts had affected commerce. It then rejected the argument that the First Amendment protected the defendants from liability under the UTPA, for “[t]he press is not free to violate laws of general applicability in order to reach its ultimate goals.”

As for damages, the court held that because the acts that comprised the UTPA violation also underlay the jury’s finding of fraud, Food Lion had to choose between treble damages under the UTPA and compensatory damages under the fraud claim. Food Lion eventually elected to recover under its fraud theory, but also argued that the conduct underlying the UTPA violation was distinct from that underlying the fraud, so that it should be entitled to recover under both theories. In a July 25, 1997 opinion, the court rejected Food Lion’s argument and finally, formally entered judgment on the jury’s verdict in its entirety. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 1997 U.S. Dist. LEXIS 13391 (M.D.N.C. July 25, 1997). In an unpublished opinion issued on August 29, 1997, Judge Tilley also denied Food Lion’s claim for attorneys fees under the UTPA, which allows a fee award where the defendants’ conduct was willful and where there was “an unwarranted refusal [by the defendant] to fully resolve the matter . . . .” The court held that the defendants had valid reasons to litigate the matter to conclusion.

In his August 29 opinion, Judge Tilley also substantially reduced the punitive damage awards, but rejected the defendants’ motions for judgment as a matter of law. As widely reported, the jury had awarded Food Lion $1,402.00 in compensatory damages on its fraud, trespass and breach of duty of loyalty claims. The jury also awarded Food Lion $4,000,000 in punitive damages from Capital Cities/ABC, Inc.; $1,500,000 in punitive damages from American Broadcasting Companies, Inc.; $35,000 in punitive damages from ABC Executive Producer Rick Kaplan (now at CNN); and $10,750 in punitive damages from ABC Senior Producer Ira Rosen.

The court offered little new legal analysis in rejecting the defendants’ motions for judgment as a matter of law and relied heavily on its orders denying defendants’ summary judgment motions. One interesting issue that the court did address in some detail was whether the First Amendment permits the imposition of punitive damages against a media organization for the illegal gathering of information. The court noted that the Supreme Court had held in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the
information.” The court also noted that under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), presumed and punitive damages could not be awarded in a libel suit absent a finding of actual malice. The court then held that the jury’s finding, in connection with their punitive damage award, that the defendants had “acted with a consciousness of wrongdoing” was sufficient to “satisf[y] the dictates of *Gertz* and provide protection for a member of the press who acts negligently or without intent to violate generally applicable laws.” The court also distinguished *Smith* by noting that the punitive damage award did not “punish the publication of information but rather punish[ed] the actors for the tortious activities undertaken in gathering that information.”

The court reduced the total punitive damages awards from $5,545,750 to $315,000, contingent upon the filing of a remittitur by Food Lion. The remittitur was subsequently filed. While the outcome was a welcome one, portions of Judge Tilley’s analysis were disturbing. In discussing the ratio between compensatory damages and punitive damages, for example, the court speculated that “the potential harm could have been much greater than the actual harm found here,” and it noted that the “amount of harm that could have been created is virtually open-ended . . . .” The court premised this conclusion upon the notion that if an ABC employee had deliberately put out-of-date products on sale on her own initiative and if a Food Lion customer had become ill as a result, substantial actual damages would arise. Of course, none of this happened or was intended to happen. Judge Tilley also came very close to opining that the defendants had engaged in criminal conduct, and he cited in particular two North Carolina and South Carolina criminal statutes that outlawed the obtaining of property (here, presumably, a job) by false pretenses.

The court also allowed a punitive damage award to stand against Capital Cities/ABC, Inc. (the network’s parent) solely because an attorney employed by the parent had given legal advice regarding the legality of the undercover operation. Given the number of separate opinions on thorny issues of constitutional law and statutory interpretation that were issued by the court in this case, it is difficult to believe that an attorney’s legal opinion, even if wrong (which is not a proposition this writer is yet prepared to accept), could constitute sufficiently reprehensible conduct to justify a punitive damage award of any size.


In *Shulman*, two automobile accident victims asserted claims for invasion of privacy against a television production company that had, without their knowledge or consent, videotaped their rescue and the subsequent medical treatment of one of them during a helicopter transport. A cameraman employed by the production company had ridden to the accident scene in the rescue helicopter and “had roamed the accident scene, videotaping the rescue.” 59 Cal. Rptr. 2d at 440. A nurse working for the emergency medical service was wearing a microphone, which picked up the nurse’s conversations with the most seriously injured accident victim, Ruth Shulman, who was eventually transported to a hospital in the rescue helicopter. Portions of the video footage and audiotaped conversations were subsequently shown on the television show On Scene: Emergency Response. Mrs. Shulman saw the show in her hospital bed; she had not previously known that the
videotape or audiotape had been made.

The trial court entered summary judgment on both plaintiffs' claims. The Court of Appeal upheld the entry of summary judgment "to the extent appellants' claims are based on [the production company's] conduct in videotaping and broadcasting what took place at the accident scene itself. . . ." Id. at 449. The Court held that "there can be no reasonable expectation of privacy at the scene of an accident in public view. . . . Id. at 453. This conclusion was based in large part upon "the strong First Amendment policy favoring news coverage of auto accidents and other catastrophes . . . ." Id.

Plaintiffs contended that a "zone of privacy" had existed at the accident scene because their car, which had left the highway and ended up in a state-owned drainage ditch, was partially obscured from view by the surrounding terrain. The court declined "to hinge the media's right to freely report accidents and other catastrophes" on such "chance distinctions."

The court also held, however, that triable issues of fact existed as whether an invasion of privacy claim arose from the portion of the taping that occurred while the accident victim in that case was "receiving emergency medical care inside a closed air ambulance." The court noted that no California court had ever considered the privacy rights of an injured person while inside an ambulance, but it found that the facts before it were "almost factually identical" to those in Miller v. NBC, 187 Cal. App. 3d 1463 (1986). In Miller, an NBC camera crew had accompanied a paramedic team into the home and bedroom of a heart attack victim and had — without his consent or that of his wife — taped the paramedics’ unsuccessful attempts to revive the victim. Summary judgment on the wife's invasion of privacy and trespass claims had been reversed. The Court of Appeal held in Miller that "reasonable people could regard the NBC camera crew's intrusion into Dave Miller's bedroom at a time of vulnerability and confusion occasioned by his seizure as 'highly offensive' conduct . . . ." Id. at 1484. The court in Shulman applied the Miller analysis to bar press observation of accident victims "once the ambulance doors swing shut . . . ." Shulman, 59 Cal. Rptr. 2d at 453.

The media defendants in Shulman sought Supreme Court review of the Court of Appeal's holding that triable issues of fact existed on the ambulance-observation intrusion issue. The plaintiff in Shulman did not seek review by the California Supreme Court of the Court of Appeal's decision partially affirming the entry of summary judgment. As a result, the issue of whether a privacy claim can be asserted by a person photographed in public or from a public vantage point is apparently not before the Supreme Court.

- Sanders v. American Broadcasting Cos., 60 Cal. Rptr. 2d 595 (Ct. App. 1997), review granted, 64 Cal. Rptr. 2d 399 (May 21, 1997).

The plaintiff in Sanders was an employee of a "telepsychic" company that was featured in an ABC PrimeTime Live report on the "telepsychic" industry. As part of ABC's investigation, Stacy Lescht applied for and obtained employment with Sanders' employer, the Psychic Marketing Group ("PMG"). Lescht worked at PMG as a telephone operator for a few days, during which time she
surreptitiously videotaped two conversations with Sanders. ABC broadcast a few seconds from one of these conversations — in which Sanders is heard talking about his desire to pursue stand-up comedy — as part of its report.

After the broadcast, Sanders (and a fellow "telepsychic," Paul Highland, who was also shown on the broadcast) sued ABC for, inter alia, invasion of privacy and violation of the California electronic eavesdropping statute, Penal Code § 632. Many of the plaintiffs' claims were dismissed prior to trial. At trial, the jury found that Sanders (and Highland) did not have an objectively reasonable expectation that the videotaped conversations were confidential. This finding led the trial court to enter judgment on the plaintiffs' statutory claims, based on California Penal Code § 632, which bars the secret recording only of "confidential communications." The trial court then instructed the jury on the elements of a new, common law "sub-tort" relating to "the right to be free of photographic invasion." Sanders, 60 Cal. Rptr.2d at 596. The jury returned verdicts in favor of Sanders for $335,000 in compensatory damages and $300,000 in punitive damages. The trial court added $561,658 in attorneys fees to the total, and ABC appealed.

A divided panel of the Court of Appeal reversed the judgment. The majority held that there was no common law claim for invasion of privacy by "those secretly photographed who lack an objectively reasonable expectation of privacy . . . ." Id. at 598. As a result, the jury's finding that Sanders did not have a reasonable expectation of confidentiality required the entry of judgment on his statutory and common law privacy claims.

The dissenting justice contended that while Sanders may not have had an objectively reasonable expectation that the information he imparted to Lescht would be kept in confidence, he may have retained "an 'autonomy privacy' interest." Id. at 599. Under this approach, Sanders purportedly "had an interest in being free from unwarranted, i.e., public, observations of his workplace performance and conversation." Id. at 600.

In May 1997, the California Supreme Court accepted review in Sanders. The Court deferred briefing in Sanders, however, pending its resolution of Shulman. It is therefore likely that the Supreme Court will not issue an opinion in Sanders but will instead send the case back to the Court of Appeal for further consideration (or dismissal) in light of Shulman.


In DeTeresa, the Ninth Circuit affirmed the entry of summary judgment in favor of ABC and an ABC producer in a suit brought by a woman whose conversation with the producer was...
surreptitiously audiotaped and videotaped. The plaintiff, Beverly DeTeresa, was an American Airlines flight attendant on O.J. Simpson’s June 12, 1994 flight from Los Angeles to Chicago. Mr. Simpson’s estranged wife had been brutally slain a few hours before the flight.

One week after the flight, an ABC associate producer came to the front door of Ms. DeTeresa’s condominium. The front door was visible from the street, and an ABC cameraman was videotaping the producer from a van parked in the street. The producer was wearing a hidden microphone as well. When DeTeresa answered the door, the producer immediately gave her his name and said that he worked for ABC News. DeTeresa then volunteered to the producer that Simpson had not kept his hand in a bag or iced his hand during the flight, as other news reports had suggested. DeTeresa did not request “off-the-record” treatment or ask that anything she said be held in confidence.

On June 20, 1994, ABC aired a news report that described DeTeresa’s comments regarding Simpson’s demeanor on the flight to Chicago. ABC did not use any portion of the audiotape of the conversation between DeTeresa and the producer. Approximately five seconds of the videotape were broadcast.

DeTeresa subsequently sued ABC and the producer for: (1) unlawful recording of confidential communications under California Penal Code § 632 et seq.; (2) invasion of privacy; (3) unlawful electronic eavesdropping under 18 U.S.C. § 2511; (4) fraud; and (5) unfair business practices. The District Court entered summary judgment as to each of DeTeresa’s claims. The Ninth Circuit’s July 1997 opinion affirmed the District Court’s opinion in all respects.

The Court’s discussion of the California Penal Code claim revolved around the statute’s definition of “confidential communications” as “any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto . . . .” The Court held that DeTeresa’s Penal Code claim was doomed by the undisputed facts that she believed she was talking to a television news reporter and did not request that he keep her remarks in confidence. In a dissent, one judge argued that a triable issue of fact existed as to “whether DeTeresa had a reasonable expectation that [the ABC producer] knew she did not want her statements divulged . . . .” The dissenting judge noted that although DeTeresa’s claim was “not particularly strong,” the fact that she had been taped on her doorstep, from the moment she opened her door, by someone who was asking her to submit to an interview not at that moment but the next day, supported the view that she reasonably expected that her comments would not be disseminated. Id.

The Ninth Circuit unanimously disposed of DeTeresa’s remaining claims. The court rejected DeTeresa’s federal eavesdropping claim because the federal eavesdropping statute allows a party to a conversation to record it as long as he or she does not do so “for the purpose of committing any criminal or tortious act.” 18 U.S.C. § 2511(2)(d). The court observed that “DeTeresa has presented no evidence that this was Radziwill’s purpose” in taping the conversation.
The Court also rejected DeTeresa’s fraud claim, which was based on the producer’s failure to tell DeTeresa that he was taping their conversation. The Court explained that California law does not support “the imposition of additional liability on an intentional tortfeasor for failing to disclose his or her tortious intent before committing a tort.”

The Court also rejected DeTeresa’s unfair business practices claim. DeTeresa and her counsel, Neville Johnson (who has pursued numerous eavesdropping and privacy claims against each of the networks) had argued that ABC was “engaged on a massive scale in criminal and tortious conduct.” The Court held, however, that DeTeresa had failed to present any specific facts in support of this charge.

Finally, the Court also upheld the dismissal of DeTeresa’s common law invasion of privacy claim, which was based upon both the videotaping and audiotaping. As to the videotaping, the Court held that “[w]ith no dispute that ABC videotaped DeTeresa in public view from a public place, broadcast only a five-second clip of the tape, and did not broadcast either her name or her address, no intrusion into seclusion privacy claim lies as a matter of law.” With respect to the audiotaping, the court noted that the ABC producer had neither entered DeTeresa’s home nor recorded any intimate details of her life, and it pointed out that no portion of the audiotape was ever broadcast.

After plaintiff moved for reconsideration en banc, the Ninth Circuit asked the parties to brief the question of whether action on the motion for reconsideration should be deferred until the California Supreme Court decided the Shulman and Sanders cases, described above. This gave plaintiff’s counsel the opportunity to tell the Ninth Circuit that Princess Diana’s death “could have been prevented” by more rigorous restraints on newsgathering and to warn the Court that the news media had interpreted the panel’s original decision as having “loosened the standards.” A decision on the deferral issue is expected shortly.

Wrongful Death

The past 12 months have seen two pro-plaintiff opinions that resuscitated wrongful death claims against media defendants in cases based on newsgathering activities.3


In Clift, the Rhode Island Supreme Court reversed the entry of summary judgment on a claim that a television station had caused the suicide of the plaintiff’s husband. The decedent had told his wife that he intended to commit suicide; had turned on gas jets in his house; had fired guns repeatedly and indiscriminately; had cut his throat with a shard of broken glass; and had then become “especially...

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irate" when police arrived and surrounded his house. Several hours later, while the house was still surrounded by police, an "enterprising" local television reporter had telephoned the man's house and had recorded an interview with him. The reporter told the man that the interview would be broadcast on the 6:00 p.m. news. A few minutes after the broadcast, which the man apparently watched, he killed himself. *Cliff*, 688 A.2d at 805-807.

The decedent's widow sued, asserting claims for wrongful death, loss of consortium, invasion of privacy, and infliction of emotional distress. The trial court entered summary judgment as to all claims. The Rhode Island Supreme Court affirmed the entry of summary judgment on the invasion of privacy and infliction of emotional distress claims. The Court reversed the dismissal of the wrongful death and loss of consortium claims, holding that "notwithstanding First Amendment constitutional protections, everyone, including the press, should be answerable for unprivileged negligent actions that proximately result in suicide." Because the plaintiff had introduced a psychologist's affidavit that "suggest[ed] that the decedent's suicide resulted from an uncontrollable impulse that was brought about by a delirium or insanity caused by [the station's] negligence," summary judgment was improper as to the wrongful death and loss of consortium claims. The Court did hold that because the plaintiff's surviving claims sounded in negligence, punitive damages would not be available on remand.

* Kersis v. American Broadcasting Companies, Inc., et al., Ninth Circuit Case No. 95-55732 (Nov. 21, 1996)

In this unpublished, unsigned memorandum opinion, a Ninth Circuit panel reversed the trial court's Rule 12(b)(6) dismissal of plaintiffs' wrongful death claim against ABC. The plaintiffs in this case were the parents of Naras Kersis, a.k.a. Paul Highland, one of the two plaintiffs in the *Sanders* action described above. As noted above, Mr. Highland had died prior to the entry of judgment in the *Sanders* action, which prevented his recovery. Highland's parents then brought a separate suit against ABC, asserting claims for wrongful death and infliction of emotional distress.

The complaint did not explain how ABC had caused Highland's death, but did allege generally that his death "was caused as a direct result of the wrongful act negligence of the defendants in using the hidden cameras." After ABC filed a Rule 12(b)(6) motion that pointed out the inadequacy of this statement of proximate causation, plaintiffs told the District Court that after learning of the jury's compensatory damage award in his favor in the *Sanders* action, their son "went on a bender that one week later resulted in his death from acute alcohol poisoning." Plaintiffs also told the District Court that their son's death "could not have been foreseen at the time of the [ABC] broadcast" in question. The District Court then dismissed the complaint.

On appeal to the Ninth Circuit, the plaintiffs explained that if the dismissal were reversed, they "would prove at trial that Highland bought the bottle out of anger because Mark Sanders, his co-plaintiff, had obtained a higher verdict than him, and Highland believed this was unfair because he had suffered much more. This set him off on a two or three day bender." In other words, the appellants told the Ninth Circuit that their son was angry that his co-plaintiff had obtained a $335,000
compensatory damage award, while he had only obtained $225,000, and that his anger "set him off" on a bender, which resulted in his death.

Despite these representations regarding the true cause of death, the Ninth Circuit reversed the District Court's dismissal and reinstated the plaintiffs' claim for wrongful death. The Court relied upon a California Supreme Court case that had held that outrageous conduct that causes a suicide can be the basis of a wrongful death claim. The suicide theory had not been pleaded in the complaint nor argued to the District Court or to the Ninth Circuit; the plaintiffs had never contended that their son had intended to die as a result of his bender. The Court also did not mention the representations regarding the true reasons for the bender that plaintiffs had made to the District Court and to the Ninth Circuit. The Court appears to have determined instead that the causation issues raised by those representations could best be addressed at the summary judgment stage. The Court did affirm the dismissal of plaintiffs' claims for infliction of emotional distress, which had been brought on the plaintiffs' own behalf and not on behalf of the decedent.

The matter is now in discovery

Newsgathering May Face Rough Justice Ahead

If there is a pattern observable in the cases discussed in this article, it is an apparent tendency on the part of the courts to stretch the law in newsgathering cases in ways unfavorable to the media defendant. This may be the result of a growing judicial, and perhaps public, hostility towards both the media's apparent incivility as it goes about its business and its apparent willingness to use deception and hidden electronic devices to gather the news.

It is worth noting as well that not all of the cases reported on here have been definitively resolved. And there are many other newsgathering cases previously reported on in the LDRC LibelLetter in 1995 and 1996 that are still in the pre-trial process, or are up on appeal, which are likely to result in additional published opinions over the next 12 to 24 months. Stay tuned.

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RECENT DEVELOPMENTS IN THE LAW OF MEDIA LIABILITY FOR
ALLEGEDLY INSPIRING VIOLENT ACTS

By Thomas B. Kelley and Steven D. Zansberg

In the past year-and-a-half, four cases and one pending congressional bill have focused on the
issue of media liability for having inspired or influenced individual members of the audience to commit
criminal or tortious acts. Although three of the four cases have followed and reaffirmed the Supreme
Court's jurisprudence with respect to "incitement," and have dismissed plaintiffs' claims against media
defendants by applying the Brandenburg standard, one of the cases currently pending before the
United States Court of Appeals for the Fourth Circuit, as well as the pending federal legislation, pose
the prospect that profound changes in this area of the legal landscape may be afoot.

Four Trial Courts Dismiss All Claims Against Media Defendants

Perhaps as a testament to the popular "blame the media" sentiment (recall Bob Dole's highly
publicized crusade against Hollywood values), there has recently been an upsurge in the number of
cases in which media defendants are being blamed for having produced and disseminated a book, film,
or popular song that purportedly "caused" a member of the audience to commit a criminal or tortious
act. In all four recent high-profile cases of this ilk, trial courts have applied the test for "incitement"
prescribed by the Supreme Court in Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (holding
that speech advocating lawless conduct is protected by the First Amendment unless it is found to have
been "directed to inciting or producing imminent lawless action and is likely to incite or produce such
action"). As subsequent Supreme Court cases applying Brandenburg have made clear, unless the
speech at issue is of such a nature and uttered in such circumstances that it is both directed to and
likely to produce an instantaneous, reflexive, non-thinking response (akin to that produced by falsely
shouting "fire" in a crowded theater), the speech is not considered "incitement," and is therefore
886 (1982). All four of the trial courts that have addressed the claims for incitement discussed below
have applied the Brandenburg standard and have dismissed all claims against the media defendants.

The Natural Born Killers Cases

Two cases arose out of Oliver Stone's motion picture Natural Born Killers (Warner Bros.
1994), which depicts a young couple who ingest large quantities of LSD and embark upon a
murderous shooting spree. Both of the cases were based upon similar criminal acts committed by two
separate couples who engaged in a shooting and killing spree after ingesting hallucinogenic drugs and
viewing Natural Born Killers numerous times.

In one case, Miller v. Warner Bros., Inc., No. 96VS0117599-F (Ga. Fulton Cty., 1996),
plaintiff Margo Miller sued Oliver Stone, Warner Brothers, and Time-Warner, Inc. for the wrongful
death of her husband, who had been murdered in 1995, allegedly by Ronnie Beasley and Angela
Crosby. See LDRC LibelLetter, February 1997 at 10. Beasley and Crosby, the alleged murderers,
purportedly had viewed *Natural Born Killers* nineteen consecutive times before departing on their murderous crime spree. On December 3, 1996, Judge Melvin K. Westmoreland dismissed all claims against Oliver Stone and the media defendants. Judge Westmoreland ruled that as a matter of law, the plaintiff’s claims “cannot meet the requirements found in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which protects statements except direct incitement to imminent unlawful actions.” Judge Westmoreland also rejected plaintiff’s allegations that the film contained subliminal flash frame stimuli, a claim plaintiffs had apparently asserted hoping to benefit from the district court opinion in *Vance v. Judas Priest*, 1990 WL 130920 (Nev. Dist. Ct. 1990) (holding that subliminal messages do not enjoy First Amendment protection). On September 10, 1997 the Court of Appeals of Georgia dismissed Miller’s appeal.

The second case, *Byers v. Edmondson*, No. 95-02213 (La. 21st Judicial Dist. Ct. 1997), was brought by Patsy Ann Byers, who was shot and permanently paralyzed, allegedly by Benjamin Darris or Sarah Edmondson during their two-day shooting spree in 1995 in Louisiana and Mississippi. See Michael Shnayerson, “Natural Born Opponents,” *Vanity Fair*, July 1996 at 98. In an interview with *Vanity Fair*, Sarah Edmondson stated that the couple consumed nine tabs of acid each before watching *Natural Born Killers* numerous times in succession. Edmondson and Darris are accused of then embarking upon a shooting spree in which Mississippian Bill Savage was murdered and Ms. Byers was left paralyzed from the neck down. This case attracted national and international media attention because the murder victim, Bill Savage, was a friend of best-selling novelist John Grisham, who publicly called for Oliver Stone to be held liable for Savage’s death. See *Vanity Fair*, supra.

On January 23, 1997, Louisiana state judge Robert H. Morrison III dismissed Ms. Byers’ $20 million negligence action against Oliver Stone, Time-Warner, and other media defendants. Although Judge Morrison did not cite any legal authorities in his two-page Reasons for Judgment, he noted that “similar contentions have been almost universally rejected as stating causes of action in the courts of this country,” and ruled that dismissal of this case was proper because “the law simply does not recognize a cause of action such as that presented in plaintiffs’ petition.” Byers filed an appeal in May 1997.

The *2Pacalypse Now* Case

The third case arose out of the homicide of a Texas state trooper in April 1992. Officer Bill Davidson stopped a car driven by Ronald Howard in Jackson County, Texas. Howard, who had stolen the automobile, fatally shot Officer Davidson with a 9-mm Glock handgun. At the time of the shooting, Howard was listening to an audiocassette of the album *2Pacalypse Now*, a recording performed by the late rap artist Tupac Shakur. One of the songs on the album *2Pacalypse Now*, entitled “Crooked Ass Nigga,” describes shooting others, including police officers, with a 9-mm Glock pistol. When tried for Officer Davidson’s murder, Howard claimed that listening to *2Pacalypse Now* caused him to shoot Officer Davidson. Despite his novel defense (“the music made me do it”), Howard was sentenced to death.
The estate and surviving relatives of Officer Davidson sued Tupac Shakur, Time-Warner, Inc., Interscope Records, East West Records America, a division of Atlantic Recording Corporation, and Atlantic Recording Corporation, alleging that the album 2Pacalypse Now proximately caused the death of Officer Davidson. Plaintiffs argued in the alternative that 2Pacalypse Now was either obscene, “fighting words,” defamatory of police officers, or incitement to imminent illegal conduct like that committed by Ronald Howard.

On March 31, 1997, United States District Judge John D. Rainey granted defendants’ motion for summary judgment in a thorough, 41-page opinion. Davidson v. Time Warner, Inc., 25 Media L. Rep. 1705 (S.D. Tex. Mar. 31, 1997). Before addressing the merits, Judge Rainey ruled that the court lacked personal jurisdiction over Time-Warner and Tupac Shakur. Judge Rainey also found that under Texas tort law the remaining media defendants owed no duty of care to the plaintiff, that products liability law did not apply to lyrics and music content of a physical recording, and that the First Amendment barred imposition of liability on any of the media defendants under theories of obscenity, fighting words, or defamation. Finally, applying the test for incitement announced in Brandenburg v. Ohio, Judge Rainey found that even if Shakur had intended his music to incite imminent lawless conduct, which the court did not find, “the mere broadcast of 2Pacalypse Now is not likely to incite or produce illegal or violent action,” and that any such action would not “imminently occur after listening to the album.” The court concluded that “at best, the recording reveals that weak-willed individuals may be influenced by Shakur’s work.” However, the court continued, “swaying the weak-willed does not remove constitutional protection from speech . . . [and] the defendants cannot be responsible for determining the mental condition of each and every potential listener.” Thus, Judge Rainey concluded, “although the court cannot recommend 2Pacalypse Now to anyone, it will not strip Shakur’s free speech rights based on the evidence presented . . . .” No appeal was filed.

The Hit Man Case

The fourth case arose out of a 1993 contract murder in Silver Spring, Maryland. Former Motown record producer Lawrence Horn, living in Los Angeles, hired convicted felon James Perry of Detroit, Michigan to murder Horn’s ex-wife, Mildred, and his eight year old son, Trevor, with the objective of recovering the $1.7 million medical malpractice judgment that his ex-wife had recovered as a result of Trevor’s delivery. On the night of March 3, 1993, James Perry shot and killed Marilyn Horn, Trevor Horn, and Trevor’s on-duty nurse, Janice Saunders. Upon searching Perry’s Detroit home, police discovered a catalogue of Boulder, Colorado-based publisher Paladin Press. Paladin publishes, and distributes through mail-order, a variety of action/adventure titles, including books on surveillance and espionage techniques, explosives, and weaponry. Cooperating with federal authorities, Paladin Press searched its records and produced documentation that in January 1992 James Perry had ordered two volumes from Paladin: Hit Man: A Technical Manual for Independent Contractors and How to Make a Disposable Silencer, Volume II.

Maryland prosecutors subsequently used this evidence in obtaining a murder conviction and death sentence against James Perry. Prosecutors pointed to 22 purported instructions in the book.
That Perry had allegedly followed in committing the murders, including the choice of the AR-7 rifle, shooting the victims' eyes three times each from a distance of three feet, collecting the spent bullet shells from the scene of the crime, and drilling out the serial number of the gun. Lawrence Horn was also convicted of murder and sentenced to life in prison without parole.

Surviving relatives of Marilyn and Trevor Horn and of Janice Saunders sued Paladin Press and its president, Peder Lund, in the United States District Court for the District of Maryland for the wrongful death of Lawrence Horn's and James Perry's victims. Plaintiffs asserted four separate theories of liability: (1) strict products liability, (2) negligence, (3) civil conspiracy, and (4) intentionally "aiding and abetting" the crime of murder for hire. Lund challenged the court's personal jurisdiction over his person (the motion was never addressed by the trial court). Paladin moved for summary judgment on all claims on the grounds that plaintiffs could not, as a matter of law, establish that the book *Hit Man* constituted "incitement" under the *Brandenburg* test, and that therefore, the First Amendment barred the imposition of civil liability on the basis of protected speech.

Two aspects of the plaintiffs' case were particularly noteworthy. First, among plaintiffs' counsel was Rodney A. Smolla, Professor of Law at the College of William and Mary, and author of treatises on libel law and free speech. Second was plaintiffs' novel attempt to make an end run around the *Brandenburg* test. Although plaintiffs maintained that the *Brandenburg* test was satisfied in this case, their primary theory was that the court need not apply the *Brandenburg* incitement standard, because by publishing and distributing *Hit Man*, the defendants had intentionally "aided and abetted" Perry's crime, rendering the speech unprotected without resort to *Brandenburg*. Plaintiffs relied principally on a series of court of appeals rulings in cases involving seminars convened by so-called "tax resisters" who instructed seminar attendees how to cheat on their tax returns and "get away with it," several courts, including the Fourth Circuit Court of Appeals had upheld convictions of the seminar organizers and presenters for assisting the filing of a false tax return, some of the courts doing so by finding the *Brandenburg* test had been satisfied, others suggesting that the test need not be applied in such circumstances. See, e.g., *United States v. Fleschner*, 98 F.3d 155 (4th Cir. 1996); *United States v. Kelley*, 769 F.2d 1020 (4th Cir. 1995); *United States v. Rowlee*, 899 F.2d 1275 (2d Cir. 1990); *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985); *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978).

In order to have the court address plaintiffs' "aiding and abetting" theory head-on, Paladin stipulated, for purposes of its summary judgment motion only, that it published and distributed *Hit Man* with subjective intent to assist "criminals and would-be criminals who desire information on how to commit crimes" including the crime of murder for hire. The *Washington Post* reported that when noted First Amendment attorney Floyd Abrams was informed of the stipulation he "gasped." Plaintiffs stipulated that Paladin and Lund had no knowledge of James Perry and Lawrence Horn's criminal plans, and had no contact with either of these men other than filling the mail order submitted by Perry. Further stipulations by the Plaintiffs conceded that the book *Hit Man* had been sold to more than 13,000 readers over the course of ten years, and that the readership included law enforcement personnel, murder mystery enthusiasts, and others who had no criminal intentions. Paladin argued that when speech such as *Hit Man* was mass distributed to a general audience and had informational
value apart from assisting in the commission of a particular, specific criminal act, the publisher's subjective intent is irrelevant, and the speech is protected by the First Amendment unless the Brandenburg incitement test is satisfied. Paladin also submitted an unrebutted voluminous evidentiary record collecting numerous other works of fiction, including novels by Tom Clancy and Frederick Forsythe that conveyed the same detailed information on how to commit murder as was contained in Hit Man. Although the district court denied the request of several booksellers organizations, The American Library Association's Freedom to Read Foundation, E.W. Scripps Company, NAB, NAA, and the Reporters Committee for Freedom of the Press (among others), for permission to file an amicus brief, Paladin submitted a vast appendix including numerous works of "pulp fiction" that demonstrated that every "technique" mentioned in Hit Man was a virtual cliche of the murder/mystery genre. All of these works, Paladin argued, would be put at risk if liability were permitted to be imposed in this case.

In September 1996, Judge Alexander Williams granted Paladin's motion for summary judgment. Judge Williams explicitly rejected plaintiffs' theory that speech arguably "aiding and abetting" murder constituted a category of unprotected speech. Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 842 (D. Md. 1996). Instead, Judge Williams ruled, the only category of unprotected speech that could potentially apply to Hit Man in these circumstances was that of incitement, as defined by the Supreme Court in Brandenburg. Judge Williams also rejected plaintiffs' argument that the Brandenburg standard was to be applied only to political speech. Id. at 845. Applying the Brandenburg test to the facts of this case, Judge Williams found that Hit Man was protected speech:

[Although morally repugnant, [Hit Man] does not constitute incitement or "a call to action." . . . Nothing in the book says "go out and commit murder now!" Instead, the book seems to say, in so many words, "if you want to be a hit man, this is what you need to do." This is advocacy, not incitement. Advocacy is defined as mere abstract teaching . . . The Court finds that the book merely teaches what must be done to implement a professional hit. The book does not cross that fine between permissible advocacy and impermissible incitation to crime or violence. . . . The book does not purport to order or command anyone to any concrete action at any specific time, much less immediately.

940 F. Supp. at 847 (internal citations omitted). Furthermore, observing that Hit Man contained a disclaimer that the book was "[f]or informational purposes only!", Judge Williams ruled that the book did not satisfy Brandenburg's "likelihood" prong — the inclusion of such a warning "does not indicate a tendency to incite violence." Id. at 848. Accordingly, Judge Williams concluded that although the court found the book "is enough to engender nausea in many readers," and although the book contains information that "[in] the wrong hands, can be fatal, First Amendment protection is not eliminated simply because publication of an idea creates a potential hazard . . . It is simply not acceptable to a free and democratic society to limit and restrict creativity in order to avoid dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals." Id. (citations omitted).

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At press time, the plaintiffs' appeal from Judge Williams' decision granting Paladin Press summary judgment is pending before the United States Court of Appeals for the Fourth Circuit. Although it would be foolhardy to speculate about that court’s ultimate decision, at oral argument, one of the three judges on the Fourth Circuit panel indicated he was inclined to side with the plaintiffs and reverse Judge Williams' ruling. See LDRC LibelLetter, May 1997 at 9. At the outset of the hearing, Judge J. Michael Luttig ridiculed plaintiffs' “aiding and abetting” theory of the case, saying that it “seems limitless. If all you’re doing is merely providing information, that strikes me [as being] at the core of the First Amendment.” However, Judge Luttig stated from the bench that in his view, “if you read the words [of] the text and you get into the book, from start to finish it’s incitement.” Quoting excerpts from Hit Man that purported to extol the virtues of the contract killer, Judge Luttig expressed the opinion that the text of Hit Man glorified and hero-ified the professional assassin, and that such language, when combined with instructions on how to commit these acts, satisfied the Brandenburg test.

It remains to be seen whether Judge Luttig’s views, as expressed from the bench at oral argument, will command a majority of the three-judge panel, or provide a lone dissent. Needless to say, should Judge Luttig’s position command a majority of the Fourth Circuit, this decision will have profound ramifications for entire genres of action/adventure writing, films, and other media that can arguably be said to “inspire” or “encourage” members of the audience to commit crimes and/or torts.

An End Run Around Brandenburg

One week prior to oral argument before the Fourth Circuit in the Paladin case, the United States Department of Justice issued a report to Congress, as required by 1996 federal legislation, on the availability of bomb-making information, the extent to which such information is actually used in commission of crimes, and the constitutionality of imposing criminal sanctions upon the sale or distribution of such information. The Justice Department recognized the nearly insurmountable hurdle of the Brandenburg incitement standard, and, in particular, its “imminence” requirement. Nevertheless, its report, which repeatedly mentions Paladin Press and its action library, and specifically derides Judge Williams' opinion granting summary judgment to Paladin, concludes that federal legislation criminalizing the sale or distribution of information on how to make or use bombs would pass constitutional muster so long as it was limited to circumstances where the author, seller, or distributor of such information intended that the information be used by others to commit crimes.

A Reason for Pause

Although all four trial court decisions described above follow and reaffirm the Supreme Court’s jurisprudence beginning with Brandenburg v. Ohio, the potential for upheaval of the legal landscape concerning media liability is evident from Judge Luttig’s remarks from the bench in the Fourth Circuit. Like everyone else practicing in this area, the authors are holding their breath.

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FEARS OF POST-O.J. BACKLASH UNFOUNDED: ACCESS TO THE COURTS REMAINS VITAL

By Steve Westman and Susan Infantino

Two years after the much-criticized press coverage of the O.J. Simpson criminal trial, the feared judicial and legislative backlash against media access to the courts largely has not materialized. In the immediate aftermath of the Simpson trial, cameras were excluded from a handful of high profile cases, and there was a flurry of gag orders and other orders restricting access to the courts. Nevertheless, cameras remain a presence in courtrooms throughout the nation, and courts consistently have reaffirmed the First Amendment right of access to judicial proceeding and records. Thus, while the Simpson trial has provided a lightning rod for opponents of courtroom access, no consistent pattern of restricted access has emerged.

Cameras Remain A Presence In Courtrooms Nationwide

In the wake of the Simpson trial, courts nationwide have continued to allow televised coverage of trial proceedings. Recent cases that have been televised include a breach of contract suit involving actress Pamela Lee Anderson, the civil trial of New York subway shooter Bernhard Goetz, a criminal trial against Dr. Jack Kervorkian, a negligence suit brought against Disney by an ex-Mouseketeer, a breach of contract suit against actress Joan Collins brought by her book publisher, a slander suit against actor Carroll O'Connor, a much publicized criminal trial in New York arising from the shooting of an undercover police officer by another officer, the Massachusetts murder trial of an English nanny accused of killing her young charge, and a California murder trial involving charges that a woman plotted to kill her identical twin sister and assume her identity. This past May, a Los Angeles judge even allowed cameras into the post-judgment collection hearing held in connection with the multimillion dollar civil judgment rendered against none other than O.J. Simpson.

In addition, a federal district court in New York recently allowed Court TV to televise hearings in two of its civil cases. In Katzman v. Victoria's Secret Catalogue, 923 F. Supp. 580 (S.D.N.Y. 1996), Judge Sweet exercised his discretion in allowing Court TV to televise a hearing in a civil suit alleging price discrimination against Victoria's Secret Catalogue. The court stated that the First Amendment requires court proceedings to be open to the public and the news media, and that "there can no longer be a meaningful distinction between the print press and the electronic media" regarding access. The court rejected defendants' invocation of the Simpson trial as a reason to bar cameras: "Fears of attorney grandstanding and that the court's dignity will be compromised are unfounded. A comparison to the recent trial of O.J. Simpson is unwarranted." Another district court in New York had previously allowed Court TV to televise oral arguments in a civil case brought by a class of children against the New York City child welfare system for failing to protect their well being. See Marisol A. v. Giuliani, 929 F. Supp. 660 (S.D.N.Y. 1996).

Other opinions permitting courtroom cameras include the following:

• In Tennessee, a state appellate court reversed a trial court’s decision to ban the television broadcast of a highly publicized murder trial. Tennessee v. Morrow, 1996 WL 170679 (Tenn. Crim. App. 1996) (unpublished). Tennessee court rules were interpreted as creating a presumption in favor of in-court media coverage, including the presence of television cameras. This presumption, the court held, can only be overcome by “substantial evidence” that the media coverage would harm the administration of justice, cause unacceptable distractions, or harm the safety of trial participants. The court found that there was no such evidence presented in the lower court proceedings.

• The Supreme Judicial Court of Massachusetts rejected a trial judge’s attempt to partially restrict camera coverage of a murder trial. The trial court had limited television and radio broadcast to the opening statements, closing arguments, and the charge, verdict and sentencing portions of the trial. The Massachusetts Supreme Court modified the order to allow television and radio broadcasts of the entire trial. See Hearst Corp. v. Justices of the Superior Court, 24 Media L. Rep. 1478 (Mass. 1996).


Inevitably, not every courtroom has favored camera access since the Simpson case. Most notably, in the civil suit brought against O.J. Simpson for the deaths of Nicole Brown Simpson and Ronald Goldman, Judge Hiroshi Fujisaki denied requests for electronic, photographic, and sketch artist coverage of the trial (the exclusion of sketch artists was reversed on appeal). Rufo v. Simpson, 24 Media L. Rep. 2213 (Cal. Super. Ct. 1996). In a written order, Judge Fujisaki explicitly referred to “the experience of the criminal trial” as relevant to his decision to restrict access.

In addition, a Massachusetts trial court granted the parties’ motions to exclude television cameras from the courtroom (although it did allow the taking of still photographs) in the criminal trial of John Salvi, who was charged with two high-profile murders that occurred in December 1994 outside of a Planned Parenthood Clinic in Boston. Massachusetts v. Salvi, 24 Media L. Rep. 1734 (Mass. Super. Ct. 1996). Similarly, courts banned cameras in the prosecution of Yolanda Saldivar for the murder of pop singer Selena in Texas, the prosecution of Richard Allen Davis for the murder
of 12-year-old Polly Klaas in Northern California, and the retrial of the Menendez brothers for the murder of their parents in Southern California. In the South Carolina trial of Susan Smith for drowning her two young sons, cameras initially had been allowed in the courtroom during pretrial hearings. But when the trial began, the judge changed his mind and banned cameras access.

Legislative Action

A heightened skepticism over press coverage in the wake of the Simpson trial may be reflected in the fact that a handful of state legislative and judicial bodies recently have addressed the rules concerning cameras in the courtroom. The state legislature in Georgia enacted a law last year that was intended to restrict television access to the courts. The law lists numerous factors for a court to consider in determining whether to admit cameras. In response to the law’s passage, the Georgia Supreme Court amended its court rules to instruct judges to refer to the new statute when deciding on the issue. And in New York, the state legislature in June allowed a ten-year-old law to expire that had permitted cameras in the state’s courtrooms. The New York legislature had the opportunity to renew the law, but opted not to do so.

However, not all states that have considered camera coverage during the past two years have acted to restrict access. For example, in California, the Judicial Council revised its state court rule regarding media coverage of court proceedings, setting forth nineteen factors a judge shall consider in ruling on a request for media coverage, in addition to “[a]ny other factor the judge deems relevant.” See Cal. Rule of Court Rule 980 (1997). But despite Governor Pete Wilson’s request that the council ban televised coverage of criminal trials in California, the revised rule is substantially the same as it was before.

In Indiana, where cameras have long been banned from courtrooms, the state’s highest court decided in September to allow news cameras and tape recorders into the state’s court of appeals on an experimental basis; cameras had been allowed in the Indiana Supreme Court since the fall of 1996. Idaho, Missouri and North Dakota also have broadened electronic coverage of trials or made permanent experiments with cameras in the courtroom in recent years.

Finally, the United States Court of Appeals for the Ninth Circuit Court of Appeal recently adopted a rule permitting electronic coverage of civil cases when approved by a majority of the presiding panel. And although most federal courtrooms remain off limits to cameras, two Congressmen recently introduced legislation that would expand public access to the federal courts by allowing any presiding judge of a federal court to permit television and radio coverage of proceedings on a case-by-case basis.

Courts Continue To Affirm The First Amendment Right Of Access
In Various Civil and Criminal Trials

The legacy of the Simpson case has not dissuaded courts from affirming—and even expanding—the general right of press and public access to trial proceedings. In the two years since the Simpson
case, the First Amendment right of access to judicial proceedings and court records has been consistently affirmed. For example, a federal court in Texas recently concluded that the public has a right under the First Amendment to attend civil trials. See Doe v. Santa Fe Indep. School Dist., 933 F. Supp. 647 (S.D. Tx. 1996). A California appeals court similarly invoked the First Amendment in striking down a trial court order that had excluded the public and press from all non-jury proceedings in a civil case brought against actor Clint Eastwood. This case is currently pending before the California Supreme Court.

In criminal cases, courts have continued to reject the blanket closure of criminal proceedings as inconsistent with the First Amendment. For example, the Georgia Supreme Court reversed a trial judge's order that had closed all pre-trial evidentiary hearings in a case involving the kidnapping, torture, and murder of a grocery store clerk, which had received some local press attention. Rockdale Citizen Publishing Co. v. Georgia, 266 Ga. 579 (1996). To avoid prejudicial pretrial publicity, the court had ordered a change of venue to a different county, but also issued a closure order based on the "possibility" that prejudicial publicity "might" overflow into the new county. In overturning that order, the Georgia Supreme Court opined that "[a]ssumptions and speculation can never justify the infringement on First Amendment rights which the closure of criminal proceedings creates." Id. at 580.

Still, courts continue to issue orders restricting press access to particular hearings, documents, or court participants. See, e.g., United States v. MacDougall, 103 F.2d 651 (8th Cir. 1996), cert. denied sub nom. Citizens United v. United States (U.S. Oct. 7, 1997) (videotape of President Clinton's deposition not a judicial record to which common law right of access attached; if it were, due deference to trial judge's decision precluded access) (see LDRC Libel Letter, January 1997 at 15). See also United States v. McVeigh, 119 F.3d 806 (10th Cir. 1997) (sealing three sets of documents upheld); id., 918 F. Supp. 1452 (W.D. Okla. 1996) (initial sealing procedure).

The appellate courts have had varied reactions to such restrictive orders. The same court that allowed cameras in the "Jenny Jones" case also prohibited anyone other than the attorneys in the case from contacting any witness until the jury had returned a verdict, and prohibited any media coverage in the courthouse other than in the courtroom and a designated "media room." On appeal, the latter two prohibitions were vacated as overly broad and impermissibly restrictive of First Amendment rights. The court in California v. Rollins, supra, barred access to any pretrial motions and hearings on the admissibility of evidence, and sealed the jury voir dire questionnaires. In that case the California Supreme Court and the Supreme Court of the United States denied review of the court's order on appeal.

proceedings. New York’s highest state court denied an appeal of the ruling brought by the news media.

In another high-profile case in New York involving a minor, a New York family court restricted press access to the juvenile delinquency proceeding of the twelve-year-old grandson of Malcolm X’s widow Betty Shabazz. The grandson allegedly set fire to his grandmother’s home and caused her death; the incident received national press coverage. The judge’s restrictive order only permitted the presence of two members of the press to be seated in the rear of the courtroom, and prohibited cameras and other audio-visual equipment. See In re. M.S., 1997 WL 523254 (1997). The courts in both the Shabazz proceeding and the Culkin custody case emphasized that concern about harm to the children involved was the main factor justifying the restrictions on public and press access.

Gag Orders Have Been Imposed In A Handful Of Recent High-Profile Cases

A continuing concern to advocates of access over the past two years has been the imposition of “gag orders” in high-profile cases. For example, in addition to banning electronic and photographic coverage of the Simpson civil trial, Judge Fujisaki also imposed a gag order on extrajudicial statements by attorneys, parties, and witnesses, and ordered certain proceedings (e.g., bench conferences outside the hearing of the jury) temporarily sealed until the conclusion of the trial. The scope of these orders was subsequently limited on appeal.

In the prosecution of Timothy McVeigh in connection with the Oklahoma City bombing, Judge Richard Matsch also imposed a blanket gag order on attorneys and court personnel, prohibiting extrajudicial statements about the case. United States v. McVeigh, 931 F. Supp. 756 (D. Colo. 1996). A petition by the media to vacate the gag order was denied (id., 964 F. Supp. 313 (D. Colo. 1997)), but its appeal was withdrawn when Judge Matsch announced that he would not impose a similar blanket gag order in the trial of McVeigh’s co-defendant, Terry Lynn Nichols.

Further, in the highly publicized drug-possession prosecution of Dallas Cowboys star Michael Irvin, a Texas trial court judge imposed a gag order on attorneys, parties and witnesses. One of the witnesses was cited for contempt after he spoke about the case in an interview with the television program “Hard Copy.” When the witness challenged the gag order in federal court on First Amendment grounds, the federal court upheld the order, stating that the trial judge’s findings in support of the order were sufficiently specific and detailed, and that the trial court had properly considered and rejected alternative means of restricting pretrial publicity. See Peidini v. Bowles, 940 F. Supp. 1020 (N.D. Tex. 1996).

In at least one recent case, however, a gag order was vacated on motion by the press. That case, State of Nevada v. Jeremy Strohmeyer, involved the criminal prosecution of a California man in connection with the murder of a seven-year-old girl in a Nevada casino. On defendant’s motion, the Nevada court had issued a blanket sealing order applicable to all trial participants, as well as the local district attorney’s office and participating law enforcement agencies. After the Las Vegas
Review-Journal filed a motion challenging the constitutionality of the gag order, the court vacated the order in its entirety.

Business As Usual: Rocky, but Steady

In sum, the Simpson trial did not precipitate a sea change in the law of press and public access to the courts, as some had anticipated. Certainly the press coverage of that case has provided a convenient rallying cry for opponents of access, and, indeed, cameras have been barred from a handful of recent high-profile cases, and gag orders and other access-restrictive orders imposed in others. However, the First Amendment right of access to judicial proceedings and documents has been affirmed repeatedly since Simpson’s acquittal, access for cameras has been expanded and even permitted for the first time in some jurisdictions, and many judges across the country have continued to permit television cameras into their courtrooms. As was true before the Simpson case, access advocates have won some battles and lost others in the two years following that trial. In other words, it appears to be business as usual, even after O.J.

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PART II. NEW DEVELOPMENTS

A. FINDINGS OF THE LDRC 50-STATE SURVEY 1997-98: MEDIA LIBEL SURVEY

1. Defamatory Meaning

Examples of Defamatory and Nondefamatory Speech

In decisions in the past year, courts have held the following statements capable of defamatory meaning: stating that plaintiff did not pay a debt, Milsap v. Journal/Sentinel, Inc., 100 F.3d 1265, 1269, 25 Media L. Rep. 1046 (7th Cir. 1996); “bitch” was too imprecise to be defamatory, but “cunt,” as a synonym for prostitute, may, depending on the circumstances in which it is uttered, be defamatory as a charge of adultery or fornication, Cozzi v. Pepsi-Cola General Bottlers, Inc., 1997 WL 312048 (N.D. Ill., June 6, 1997); the term “slut” was held to be a defamatory accusation of fornication, Bryson v. News America Publications, Inc., 174 Ill.2d 77, 672 N.E.2d 1207, 25 Media L. Rep. 1321 (1996); imputing a sexually transmitted disease, Owens v. Schoenberger, 1997 LEXIS 773 at *6 (Ind. App. June 25, 1997); stating that a former employee was “fired for misconduct,” and was “not capable of handling cases” because she was “not a real lawyer,” but merely a “gopher” who “answered the phone,” was held defamatory in Kosmitis v. Bailey, 685 So. 2d 1177 (La. App. 2d Cir. 1996); asking a customer “what are you getting free today?” is an imputation of a crime, Gray v. HEB Food Store #4, 941 S.W.2d 327 (Tex. App. Corpus Christi 1997, n.w.h.).

The Fifth Circuit in Peter Scalamandre & Sons, Inc. v. Kaufman, 113 F.3d 556, 562-63 (5th Cir. 1997), noted, however, that strong and exaggerated statements do not equal defamation. Thus, Merco, a sludge dumping company, was not defamed by statements in a TV Nation broadcast that it was poisoning the people of Texas. Id. at 562. Similarly, a reporter’s statement in the broadcast that he followed the “smell of money to the county courthouse” did not suggest that Merco had bribed a judge. Id. at 563.

Similarly, a New Jersey court in Wilson v. Grant, 297 N.J. Super. 128, 687 A.2d 1009 (App. Div. 1996), certif. denied, 149 N.J. 34 (1997), held that on-air statements by controversial talk radio personality Bob Grant that a caller was “a sick, no good, pot-smoking, wife beating skunk” when taken in context of talk radio were not defamatory. A Georgia court ruled that asshole, son of a bitch and mother fucker were not defamatory. Bullock v. Jeon, 1997 Ga. App. Lexis 791 (1997). The court reasoned that degrading insults and invective were not factual accusations of sexual conduct.

In other cases reported in the 1997-98 LIBEL SURVEY, the following statements were held incapable of defamatory meaning: stating that an employee was terminated is not defamatory, Sullivan v. Conway, 959 F. Supp. 877 (N.D. Ill. 1997); “slumlord” in a headline was not defamatory when read in context of entire article and used by the plaintiff himself during an interview with the reporter, Ramunno v. Cowley, C.A. No. 96C-06-191 (Del. Super. Ct. Dec. 12, 1996); that a law firm dropped the ball in handling the law in briefing and argument, Friederichs v. Kinney & Lange, P.A.,
Per Se/Per Quod

The per se/per quod distinction continues to be of importance in many jurisdictions with respect to whether special damages must be established. Two states reported changes. The NEW MEXICO SURVEY reports that the per se/per quod distinction "has probably been overtaken by rulings of the New Mexico Supreme Court," Newberry v. Allied Stores, Inc., 108 N.M. 424, 429, 773 P.2d 1231, 1236 (1997), and though the distinction has not been abolished outright, the latest version of the New Mexico Uniform Jury Instructions does not contain any such distinction. North Dakota has abandoned the doctrine of requiring proof of special damages in libel per quod cases to collect damages. Vanover v. Kansas City Life, 553 N.W.2d 192 (1996).


In contrast, where a newspaper article misspelled the name of the plaintiff, who was not otherwise well known, extrinsic evidence was required to identify him. The alleged defamation was therefore libel per quod. Schwab v. Reflector-Herald, Inc., 1997 WL 306597 (Huron App. Ohio 1997).

Defamation by Implication or Innuendo

The Eighth Circuit held that a jury could find libel by implication in a television reporter's statement that an interview subject hung up when questioned by the reporter. Michaelis v. CBS Inc.,
F.3d 25 Media L. Rep. 1953 (8th Cir. 1997) (Minnesota law). The plaintiff performed an autopsy in a suspicious death case. Stating that plaintiff hung up when questioned about her qualifications could be construed to mean that she was unqualified or unprofessional.

In *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 1268, 25 Media L. Rep. 1046 (7th Cir. 1996) the statement in a newspaper columnist's piece that "if my case was typical" "[plaintiff] simply reneged on paying people" implied that plaintiff did not pay a debt to the columnist. To that extent, the statement was actionable.

Two recent decisions have held that at least with respect to issues of actual malice, a defamatory implication must be intended. In *Russell v. ABC, Inc.*, 94 C 5768 (N.D. Ill. September 12, 1997), plaintiff alleged that ABC's undercover report on selling practices in fish markets implied that she was dishonest or unscrupulous. In connection with plaintiff's punitive damages claim, the court noted that "the issue is not whether the segment conveyed the impression that [plaintiff] was dishonest, but whether [ABC] knew that the segment conveyed this impression or recklessly disregarded the risk that it did." Similarly, in *Corporate Training Unlimited, Inc. v. NBC*, 93-CV-4756 (E.D.N.Y. October 17, 1997), the court found that an alleged libel by implication (that plaintiff was dishonorably discharged from the army) was unsupported by any evidence that NBC was aware of that implication and therefore a reasonable jury could not find actual malice.

In a nonmedia case, *Perk v. Vector Resources, Ltd.*, a unanimous Virginia Supreme Court found no defamatory implication in accusing a debt collector of failing to report debtors' payments. 253 Va. 310, 316, 485 S.E.2d 140, 144 (1997). According to the court, the mere failure to report some payments was not defamatory *per se*, rejecting that the accusation implied dishonesty.

**Innocent Construction**

In *Pope v. Chronicle Publishing Co.*, 95 F.3d 607, 24 Media L. Rep. 2384 (7th Cir. 1996), the innocent construction rule was applied to assess an article and editorial critical of plaintiff's building project in Russia. Under the rule, statements critical of the project could not be reasonably read as impugning plaintiff's profession or trade. Several other Illinois cases also invoked the rule. Smith v. SRDS, Inc., 1997 WL 11014 (N.D. Ill., Jan. 7, 1997) (stating that "Ms. Smith's contract was not renewed," "Ms. Smith was unwilling to relocate to Des Plaines, Illinois," and "they were looking for someone with publishing experience" were subject to innocent construction); *Timemed Labeling Systems, Inc. v. Medplus, Inc.*, 1996 WL 467262 (N.D. Ill., Aug. 13, 1996) (innocently construing statements that plaintiff had "increasing supply problems and price increases" and defendant "has been pressured to modify its standards"; statements "do not necessarily assail [plaintiff's] financial position or business methods"); *Ecton v. Van Houten North America, Inc.*, 1996 WL 296587 (N.D. Ill. May 31, 1996) (statement that sales figures reflected year-end loading was subject to innocent construction).

On the other hand, the word "slut," which, according to the court, implied fornication, could not be innocently construed. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 672 N.E.2d...
Similarly, statements to prospective employer that plaintiff was "crazy"; "mentally ill"; a "Code Red"; and should be given psychological testing before hiring, were incapable of innocent construction. *Stratman v. Brent*, 1997 WL 441771 (Ill. App., Aug. 6, 1997). Another Illinois case rejected the innocent construction rule for statements that plaintiff violated ethical standards by encouraging other doctors to lie and conceal information. *Patlovich v. Rudd*, 949 F. Supp. 585 (N.D. Ill. 1996).

The Iowa Supreme Court appeared to reject the innocent construction rule, holding that if language is capable of two meanings, including the one ascribed by the complainant, it is for the jury to say whether such meaning was the one conveyed. *Kerndt v. Rolling Hills National Bank*, 558 N.W.2d 410 (Iowa 1997); see also *Green v. Mizner*, 692 A. 2d 169 (Pa. Super. 1997). And although Hawaii, like Pennsylvania, does not adhere to the innocent construction rule, the SURVEY reports that the Hawaii Supreme Court affirmed summary judgment in a nonmedia defamation case where the alleged defamation was equally capable of a non-defamatory meaning. *Dunlea v. Dapper*, 83 Haw. 28, 924 P.2d 196 (1996).

**Of and Concerning**

The Illinois Supreme Court issued a troubling decision in a media defamation case, *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 672 N.E.2d 1207, 25 Media L. Rep. 1321 (1996). *Bryson* involved a work of fiction entitled "Bryson," published in *Seventeen* magazine. The fictional Bryson was described as a "platinum-blond, blue-eye-shadowed, faded-blue-jeaned, black polyester-topped shriek," and a "slut" by the story's first-person narrator. The author was identified as a resident of southern Illinois. Enter the plaintiff, Kimberly Bryson, of southern Illinois. The court held the author’s description of “Bryson” as a “slut” actionable and, despite appearing in a fictional story, of and concerning the plaintiff.

In *Boese v. Paramount Pictures Corp.*, 952 F. Supp. 550 (N.D. Ill. 1996) even though a *Hard Copy* segment never referred to plaintiff by name, his image appeared prior to the allegedly defamatory “everybody lied” statement and it was held, therefore, to be of and concerning plaintiff. Similarly, in *Timemed Labeling Systems, Inc. v. Medplus, Inc.*, 1996 WL 467262 (N.D. Ill., Aug. 13, 1996) a letter that referred to “[o]ur label manufacturer” was of and concerning plaintiff, given previous trade announcements and identification on containers.

However, statements in a *TV Nation* broadcast by an arson victim in which he expressed his belief that his lumberyard had been burned because he opposed the plaintiff’s sludge-dumping operation were not of and concerning plaintiff. *Peter Scalmandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 562-63 (5th Cir. 1997). Viewers of the broadcast could conclude that the plaintiff was somehow implicated in the arson, but were equally likely to believe that some other supporter of the plaintiff’s sludge-dumping operation was responsible for the fire.
Group Libel

With respect to whether allegations against a group can be “of and concerning” a particular plaintiff or plaintiffs, a court in *Atlantis Int’l, Ltd. v. Houbigant, Inc.*, 1996 WL 527334, at *5 (S.D.N.Y., Sept. 16, 1996), noted that a publication referring only to a group may be actionable by individual members of that group if it “was reasonably understood [to target plaintiffs] by many of those who read” the publication. In *Atlantis*, the court found on a motion to dismiss that plaintiffs had raised an issue of fact as to whether the defendants had made it known, outside the allegedly defamatory publication, that the report referred to plaintiffs only. In *Adams v. WFTV, Inc.*, 691 So. 2d 557 (Fla. 5th DCA 1997), a Florida court, determined that Florida would follow the majority group libel rule that a group must be small enough for the defamation to be reasonably understood to refer to that member. The Court dismissed the defamation suit of 637 commercial net fishermen.


In *Chapman v. Byrd*, 124 N.C. App. 13, 475 S.E.2d 734 (1996), rev. denied, 485 S.E.2d 50 (N.C. 1997), an appellate court held that defendant’s statements that someone who worked at a restaurant had AIDS could not support a defamation claim by the restaurant’s nine employees because the statements were not of and concerning the nine but instead concerned a single unidentified member of the group.

2. Opinion

In *Levin v. McPhee*, 119 F.3d 189, 25 Media L. Rep. 1946, 1951 (2d Cir. 1997), the Second Circuit, referencing New York’s broader state constitutional based opinion privilege, affirmed the dismissal of a libel complaint under FRCP 12(b)(6) against writer John McPhee, his publisher and the *New Yorker* magazine. In *The Ransom of Russian Art*, excerpted in the *New Yorker*, McPhee discusses the suspicious death of a Russian painter and reports various scenarios to explain the death. These scenarios, based on interviews with former friends and colleagues of the dead painter, and specifically introduced as speculation and conjecture, include one in which plaintiff helped murder the painter. The court held that a reasonable reader would not view the scenario in question as conveying facts about the plaintiff, especially when the scenario was clearly introduced as speculation and conjecture.

In another New York case, the New York State Court of Appeals reversed an appellate decision that reinstated a libel action based on a newspaper editorial. New York’s highest court held that the opinion defense protected a *Newsday* editorial stating that a political candidate “admits he doesn’t expect to win and is relieved by the prospect.” The court rejected the lower court’s rationale that the word “admits” conveyed that the newspaper was giving a factual account of a statement made by the plaintiff. Viewing the editorial as a whole, a reasonable reader would interpret the word

The Ninth Circuit affirmed the dismissal of a libel lawsuit brought by the former mayor of Honolulu over a newspaper editorial. The editorial, entitled “Blackmail Incorporated,” was critical of the then-mayor’s response to a developer’s rezoning request. In affirming the dismissal, the Ninth Circuit held that the use of the words blackmail and extortion in the editorial were rhetorical hyperbole and not objective assertions of actual criminal wrongdoing by the former mayor. *Fasi v. Gannett Co., Inc.*, 930 F. Supp. 1403 (D. Haw. 1995), aff’d, 114 F.3d 1194 (9th Cir. 1997).


One the other hand, in *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 672 N.E.2d 1207, 25 Media L. Rep. 1321 (1996), the Illinois Supreme Court rejected an opinion defense with respect to a defamation in a work of fiction. Relying on *Milovich*, the court held that the word “slut” used in a fictional story was not loose, figurative or hyperbolic language, but rather a provably false factual assertion of unchastity about plaintiff who shared the same name as the fictional character. The court distinguished *Hustler v. Fahwell*, 485 U.S. 46 (1988) (ad parody) and *Flip Side, Inc. v. Chicago Tribune Co.*, 206 Ill. App. 3d 641, 564 N.E.2d 1244 (1991) (comic strip) on the grounds that the fictional story portrays realistic characters responding in a realistic manner to realistic events. Therefore, according to the court, a reader could reasonably think that the author drew upon her own experiences as a teenager when writing the story.

Similarly, a Tennessee court held that a caricature, in conjunction with its title and an article,
could be interpreted as stating actual facts about the plaintiff. The caricature could be reasonably understood to imply that the plaintiff took public money and moved to another city. *Moman v. M.M. Corp.*, No. 02A01-9608-CV 00182, 1997 WL 167210 (Tenn. Ct. App. Apr. 10, 1997).

A court held that advice in a travel guide stating “Let’s Go strongly recommends that travelers DO NOT stay here” was not a statement of opinion, because “it teems with suggestions that it is based on undisclosed, defamatory facts. In particular, the use of the term ‘strongly’ and the use of upper case letters for DO NOT connotes more than an opinionated emphasis; to the average reader it would suggest an underlying threatening or dangerous condition.” *Shaari v. Harvard Student Agencies*, 5 Mass. L. Rptr. 623, 627 (Middlesex Cty. Superior Ct. 1996) (direct review granted by Supreme Judicial Court).

In *Kanaga v. Gannett Co., Inc.*, 687 A.2d 173, 25 Media L. Rep. 1684 (Del. Supr. 1996), the Delaware Supreme Court reinstated a libel action, rejecting the opinion defense as applied to a news article describing a patient’s complaint against a doctor. The gist of the patient’s complaint was that surgery recommended by plaintiff was inappropriate, unnecessary and motivated by greed. The lower court held that the comments were “clearly opinion” based on stated facts. Reversing, the Delaware Supreme Court engaged in a lengthy analysis of *Milkovich*, finding that an ordinary reader could infer the existence of undisclosed facts. According to the court, a reader could infer the undisclosed fact that plaintiff doctor in fact knew the surgery was unnecessary.

In *Roussel v. Robbins*, No. 90-CA-00536-SCT, 1996 WL 560319, at *11-12 (Miss. Oct. 3, 1996), a nonmedia case, the Mississippi Supreme Court overruled its prior decision in *Meridian Star, Inc. v. Williams*, 549 So. 2d 1332, 1335, 16 Media L. Rep. 2446 (Miss. 1989) that held that “expressions of opinion . . . are entitled to absolute immunity from defamation suits.” The court reasoned that *Milkovich* deemed the opinion privilege “nonexistent” and that therefore *Meridian* was no longer good law.

Other cases rejecting application of the opinion defense include: *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 25 Media L. Rep. 1046 (7th Cir. 1996) (nonpayment of debt); *Patlovich v. Rudd*, 949 F. Supp. 585 (N.D. Ill. 1996) (participation in “coverup” and misconduct in medical practice); *Scandura v. Friendly Ice Cream Corporation*, 1996 WL 409337 (Conn. Super. 1996) (negative comments on ability to manage a store were expressions of opinion, but specific statement that plaintiff lied and made up economic figures is factual); *Idaho State Bar v. Topp*, 129 Idaho 414, 925 P.2d 1113 (1996) (stating that a judge’s decision was politically motivated insinuated private facts about the judge); *Doherty v. Kahn*, 1997 WL 333938 (Ill. App. 1st Dist., June 18, 1997) (“incompetent,” “lazy,” “dishonest,” “cannot manage a business,” not opinion)

3. Truth/Falsity

**Scope of the Truth Defense**

One decision reported in the 1997-98 MEDIA LIBEL SURVEY held that in a private figure case truth was not a complete defense. A Massachusetts court denied a motion for summary judgment
even when the statements in question were substantially true, because questions of fact remained as to whether defendants’ statements about a private figure were motivated by malice or “disinterested malevolence.” *Shami v. Harvard Student Agencies, Inc.*, 5 Mass. L. Rptr. 623, 627-28 (Middlesex Cty. Superior Ct. 1996). This case arose out of a hotel review in the *Lets Go* travel guide that urged travelers not to patronize a hotel. The Massachusetts Supreme Judicial Court accepted the case for review and will decide it in the 1997-98 term.

In another unfavorable decision, *Lundell Mfg. Co. v. American Broadcasting Cos.*, 98 F.3d 351, 25 Media L. Rep. 1001 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1470 (1997), the Eighth Circuit reinstated a jury verdict for just over one million dollars against ABC based on a news report about a garbage recycling machine manufactured by plaintiff. A news report stated that plaintiff’s machine “does not work.” ABC contended that the statement was substantially true because the machine did not work in a financially viable manner, as intended. The court held that, “as a matter of Iowa law, when the language used is capable of two meanings, including the one ascribed by a complainant, it is for the jury to decide the meaning conveyed.” 98 F.3d at 360. Substantial truth is a matter for the jury unless so plainly true that it could be so characterized as a matter of law. *Id.* at 358, 25 Media L. Rep. at 1005.

In *Morris v. Dallas Morning News, Inc.*, 934 S.W.2d 410 (Tex. App. Waco 1996, writ denied), the court held that the statement that a suspect died after being beaten by police officers was not substantially true. Although blows from officers contributed to the death, the court held that the word “beating” as used to describe the violent encounter between police and the suspect has the added element that suspect is in a helpless position while being repeatedly struck, while here the suspect received blows only in response to his own violent resistance.

Several defamation cases were resolved, in whole or in part, on ground of substantial truth: *Glogower v. Pulitzer Broadcasting Co.*, 1996 U.S. App. LEXIS 6th Cir. 1996 (applying Kentucky law) (unpublished) (news report on plaintiff’s role in the collapse of a health care trust was substantially true, despite erroneous mock up of checks payable to plaintiff); *Pope v. Chronicle Publishing Co.*, 95 F.3d 607, 24 Media L. Rep. 2384 (7th Cir. 1996) (critical statements regarding American home building project in Russia were substantially true); *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, No. 96CA0078, 1997 WL 94120, at *5 (Colo. App. Mar. 6, 1997) (report on allegations of sexual harassment was substantially true, regardless of whether the actual underlying allegations were themselves true).

Maine recently adopted the defense of substantial truth, following the *Restatement (Second) of Torts*, 581A. *McCullough v. Visiting Nurse Association of Southern Maine*, 1997 ME 55, 199 Me. LEXIS 67 (February 6, 1997). In applying the defense, the court asked whether an accurate statement would have been less damaging than the one which was published. Similarly, in *State ex rel. Suriano v. Vaughan*, 480 S.E.2d 548 (W.Va. 1996), the court adopted the position that a statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced.
In *Molin v. The Trentonian*, 297 N.J. Super. 153, 687 A.2d 1022 (App. Div. 1997), the court held that the truth or falsity of a headline is determined when read in the context of the article (“in the absence of evidence that a headline wields more influence than the more substantive body of the article, headlines should generally be read in conjunction with the articles that follow”).

**Burden and Quantum of Proof of Falsity**

Following up on a case reported in last year’s *Bulletin*, the Washington Supreme Court in *Richmond v. Thompson*, 130 Wash. 2d 368, 386, 922 P.2d 1343 (1996) resolved a split in state law on the burden of proof for the elements of libel other than actual malice. The court decided that a plaintiff must prove the other defamation elements, including falsity, by a preponderance of the evidence. The court rejected the argument that plaintiff should prove all elements of libel by clear and convincing evidence.

Several decisions reiterated plaintiff’s burden of proving falsity: *Ayala-Gerenu v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 98 (1st Cir. 1996), (nonmedia private figure case: Puerto Rico law requires that plaintiff prove that the alleged defamation is false); *Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997) (in all defamation cases, including private plaintiff/private matters, the burden of establishing each element of the claim including falsity, is on the plaintiff); *Moman v. M.M. Corp.*, No. 02A01-9608-CV00182, 1997 WL 167210 (Tenn. Ct. App. Apr. 10, 1997) (*Hepps* stands for the proposition that a statement must be provable as false before there can be liability under state defamation law, at least where a media defendant is involved); *Torgerson v. Journal/Sentinel, Inc.*, 563 N.W.2d 472, 481 (1997) (plaintiff bears the burden of proving falsity in public figure and private plaintiff defamation actions); *but see Kuselias v. Southern New England Telephone*, 18 Conn. L. R. 3, 80 (1996) (common law rule that defendant must plead and prove truth remains the law in Connecticut in defamation suits by private figures against nonmedia defendant involving matters of private concern).

4. **Fault**

**Determination of Public Figure Status under Gertz**

A narrow public figure definition was applied by an Oregon appellate court in *Reesman v. Highfill*, 149 Or. App. 374, ___P.2d___ (1997). A jet aerobatics pilot, who sought and received publicity for his performances and who was involved in a crash at a local airport was not a limited purpose public figure with regard to a publication concerning opposition to expansion of the airport. The court rejected the concept that a noted performer is a limited public figure for all matters relating to his performances. Plaintiff did not attempt to influence the airport controversy; and as to his well-publicized crash, the court found that plaintiff was an involuntary participant in a newsworthy event.

In another media case, the Eight Circuit affirmed that the manufacturer of a garbage recycling machine sold to a municipality was not a limited purpose public figure with regard to the political controversy surrounding the financial operation of the machine. *Lundell Manufacturing Company, Inc. v. American Broadcasting Companies, Inc.*, 98 F.3d 351, 25 Media L. Rep. 1001 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1470 (1997). Although plaintiff supplied the machine, it did not inject itself into the subsequent controversy over the operation of the machine.

**Public Officials**

The Eight Circuit in *Michaelis v. CBS, Inc.*, ___ F.3d ___, 25 Media L. Rep. 1953 (8th Cir. 1997), applied an extremely narrow definition of a public official, holding that a county coroner was not a public official in connection with a news report critical of an autopsy she performed. The court focused on the fact that plaintiff performed the autopsy not in her official capacity as a county coroner, but as a contract employee in another county coroner’s office. Plaintiff did not, according to the court, exercise substantial responsibility or control over government affairs.

The following persons were held to be public officials/public figures: former chief of police as long as his actions in office are newsworthy and “a matter of lively public interest,” *Van Englen v. Broadcast News Networks, Inc.*, 25 Media L. Rep. 1693 (D.N.J. 1997); a military officer, regardless of rank, while in command of subordinates under enemy fire, *Spitler v. Young*, 25 Media L. Rep. 1243, 1245 (Ma. Superior Ct. 1996); upper level police commander, *Landrum v. The Board*

But a Veterans Administration podiatrist was held not to be a public official because he did not have substantial control over government affairs. *Sparagon v. Native American Publishers, Inc.*, 542 N.W.2d 125 (S.D. 1996).

**Application of Actual Malice Rule**

The 1997-98 *MEDIA LIBEL SURVEY* reports several cases applying and describing the hurdle posed by the actual malice standard. In *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 560 (5th Cir. 1997) the Fifth Circuit, in reversing a $5 million libel judgment, discussed the heavy burden a public figure plaintiff shoulders under the actual malice standard. The court observed that simply because a defendant spoke out of dislike or with ill will does not mean defamatory statements were made with actual malice, even if the statements are shown to be false. Further, a defendant’s failure to investigate the subject of that publication will not in and of itself establish actual malice; nor does the mere fact that a defendant publishes statements anticipating financial gain.

The 1997-98 *TEXAS SURVEY* reports an interesting decision in a case of misidentification of a criminal suspect. *Gonzales v. Hearst Corp.*, 930 S.W.2d 275, 282 (Tex. App. Houston [14th Dist.] 1996, no writ) (affirming a directed verdict for defendant). The *Houston Chronicle* claimed a police spokesman supplied the incorrect name that the newspaper published. The police spokesman strongly denied this. Nevertheless, the court affirmed a directed verdict for defendant, noting the reporter’s reputation for fairness and accuracy. The court reasoned a jury could not reasonably find that the reporter fabricated details of his story, even assuming the truth of the police spokesman’s denial.

The D.C. Circuit affirmed summary judgment dismissing former National Security’s Advisor Robert McFarlane’s lawsuit over allegations that he acted as an Israeli spy even when the book publisher failed to contact anyone with first-hand knowledge of the alleged events. The court held that there is no actual malice as long as there is an attempt to corroborate and no contradictory evidence is uncovered. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1511, 24 Media L. Rep. 2249, 2255 (D.C. Cir. 1996).

Under the “subsidiary meaning doctrine,” allegation that “the notorious, self-regulated stock exchange in Vancouver” was a source of funds for the Church of Scientology was not actionable. The allegation was subsidiary to nonactionable and unchallenged statements in the same *Time* magazine article made without actual malice to the effect that Scientology’s purpose is making money by means legitimate and illegitimate. *Church of Scientology v. Time Warner*, 932 F. Supp. 589, 24 Media L. Rep. 2081 (S.D.N.Y. 1996).
In *Torgerson v. Journal/Sentinel, Inc.*, _Wis. 2d_, 563 N.W.2d 472, 480-482 (1997), the Wisconsin Supreme Court affirmed summary judgment in favor of a media defendant for lack of evidence of actual malice, even where there was evidence of a reporter’s destruction of notes. Newspaper’s failure to investigate and its erroneous interpretation of ambiguous facts did not amount to actual malice. Moreover, the reporter’s destruction of notes did not create a factual issue of actual malice where his testimony was corroborated by other evidence. In *Peeler v. Spartan Radiocasting, Inc.*, 478 S.E.2d 282, 25 Media L. Rep. 1310 (S.C. 1996), the erasure of a tape containing the alleged defamatory broadcast was not evidence of actual malice when erasure was a routine practice.

In *Student v. Denver Post Corp.*, No. 95CA0724, 24 Media L. Rep. 2527, 2530 (Colo. App. Aug. 29, 1996), a newspaper’s failure to investigate allegations in a court filing was not evidence of actual malice. The court held that there was no obligation to conduct an independent investigation when the article merely summarizes allegations of a complaint. Similarly, in *Coliniatis v. Dimas*, 965 F. Supp. 511, 516 (S.D.N.Y. 1997), evidence that newspaper failed to investigate the allegations and plaintiff’s emphatic denials before publication were insufficient to show actual malice.


A Pennsylvania case held that an issue of actual malice existed where (1) the headline was inaccurate; (2) an obvious disparity existed between the implications of the headline and article and the actual content of an indictment (thus negating the fair report privilege); and (3) an adverse inference could be drawn from the newspaper’s inability to identify the headline writer. These factors created a triable issue of actual malice irrespective of the article’s specific statement that plaintiff was not accused of wrongdoing. *Merriweather v. Philadelphia Newspapers, Inc.*, 453 Pa. Super. 464, 684 A.2d 137 (1996), *appeal denied*, 693 A.2d 967 (Pa. 1997).

Similarly, testimony showing that the defendant did not care whether the statements he published were true or false amounted to reckless disregard of whether the article was true or false. *Moman v. M.M. Corp.*, slip op., 1997 WL 167210 (Tenn. Ct. App., April 10, 1997).

**Private Figure Standard under Gertz**

According to the 1997-98 MEDIA LIBEL SURVEY, 43 jurisdictions apply the negligence
standard to private figure defamation cases under Gertz;6 New York applies a gross irresponsibility standard which is higher than negligence but not as demanding as actual malice; three jurisdictions require actual malice;7 and two jurisdictions require actual malice in some circumstances.8

In Kanaga v. Garnett Co., 687 A.2d 173, 25 Media L. Rep. 1684 (Del. 1996), the Delaware Supreme Court reaffirmed the application of a negligence standard for private figures suing media defendants, but approved a strict liability standard against a nonmedia defendant. Reversing a grant of summary judgment to media and nonmedia defendants based on an opinion defense, the Delaware Supreme Court “in the interests of justice . . . and in the event of trial” addressed the standards of liability and concluded that for the private figure plaintiff to recover against the nonmedia defendant in the case “it is sufficient that the jury find that the implied statements of fact were both false and defamatory.” 25 Media L. Rep. at 1691 (also quoting from Short v. News Journal Co., 212 A.2d 718, 719 (Del. 1965) that “neither good faith or honest mistake constitutes a defense, serving only to mitigate damages.”)

In contrast in Novecon, Ltd. v. Bulgarian-American Enterprise Fund, 1997 WL 369426, *9 (D.D.C. June 26, 1997) the district court held that the First Amendment applies with equal force regardless of whether the defendant is a member of the established media or not. Likewise, in Ayala Gerena v. Bristol Myers - Squibb Co., 95 F.3d 86 (1st Cir. 1996), no distinction was noted by the court between the burden of proof of the plaintiff against a nonmedia or media defendant.

In nonmedia cases, the negligence standard was reaffirmed in Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538, 560 (1st Cir. 1997) (Maine law); Boone v. Wal-Mart Stores, Inc., 680 So. 2d 844, 846 (Miss. 1996); and Greenfield v. Schmidt Baking Co., Inc., 485 S.E.2d 391, 400 (W.Va. 1997).

**Standard for Issues of Public Concern versus Issues of Private Concern**

In Student v. Denver Post Corp., 24 Media L. Rep. 2527, 2529-30 (Colo. App. 1996), the

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8. In Lousiana, private figure plaintiffs must establish actual malice in cases involving issues of public concern where defamation per se is not at issue. Hebert v. La. Ass'n of Rehabilitation Professionals, Inc. 657 So. 2d 998, 23 Media L. Rep. 2213 (La. 1995). In New Jersey, the actual malice standard applies to private persons where the communications at issue are of public concern and to businesses concerned with matters of public health and safety, businesses subject to substantial regulation and businesses charged with criminal fraud, substantial regulatory violations or consumer fraud. Turf Lawnmower Repair v. Bergen Record, Corp., 139 N.J. 392, 655 A.2d 417, 23 Media L. Rep. 1609 (1995), cert. denied, 116 S. Ct. 752 (1996).
actual malice standard applied to a private figure's libel suit over a news report on a Resolution Trust Corporation civil lawsuit. The RTC suit was a matter of general or public concern of which the public may need to be, or may appropriately be, informed even though the underlying transactions involved private individuals.


With respect to what constitutes an issue of public concern, two decisions noted that news coverage itself does not establish a public controversy; a public controversy is a dispute that attracts special attention because it affects persons who are not direct participants. Waicker v. Scranton Times, 113 Md. App. 621, 688 A.2d 535 (1997); State ex rel. Suriano v. Vaughan, 480 S.E.2d 548 (W. Va. 1996) (accord).

5. Liability for Reproduction

Internet Reproduction

In an important decision regarding the liability of Internet providers, a district court held that Section 230 of the Communications Decency Act (CDA) preempts defamation claims against Internet providers to the extent that a plaintiff seeks to impose liability on an Internet provider for distributing third party statements. Zeran v. America Online, Inc., 958 F. Supp. 1124 (E.D. Va. 1997). Plaintiff claimed that America Online (AOL) distributed defamatory material through its electronic bulletin board. The material had been created by an unknown AOL subscriber. Since the CDA expressly prohibits treating an Internet provider who distributes content provided by another as a publisher or speaker, the court found the claim was preempted.

Wire Service Defense


The wire service defense was also recognized in Howe v. Detroit Free Press, 219 Mich. App. 150, 555 N.W.2d 738, 25 Media L. Rep. 1602 (1996), where the court held that a newspaper had no duty to independently verify the accuracy of a wire release and was not negligent, as a matter of law, for failing to do so. See also In re Matter of Medical Laboratory Management, 931 F. Supp. 42A
1487 (D. Ariz. 1996) (wire service defense applied to affiliate TV station).

On the other hand, in Friedman v. Israel Labor Party, 957 F. Supp. 701 (E.D. Pa. 1997), the court in a final footnote stated without citation or discussion that the wire service defense "is currently unavailable under Pennsylvania law."

**Compelled Self-Publication**


**Other Publication Cases**

In Gomberg v. Zwick, Friedman & Goldbaum, P.A., __ So. 2d __, 1997 WL 249129 (Fla. 4th DCA 1997), there was no publication when a letter was faxed to an attorney who invited a response via fax by putting his fax number on his stationary. See also Carter v. Hubbard, 224 Ga. App. 375, 377, 480 S.E.2d 832, 838 (1997) (holding that the mere act of sending a letter to third parties who never read or received the letter did not constitute publication); Terrell v. Holmes, 1997 Ga. App. Lexis 559 (1997) (no publication where vice-president for academic affairs of a university was consulted by president of the university regarding the termination of another vice-president).


**Respondeat Superior and Other Cases**

In MMAR v. Dow Jones & Co., 25 Media L. Rep. 1747 (S.D. Tex. 1997) a record high $200 million punitive damage award was set aside on post-trial motion on the grounds that Texas law does not permit punitive damages to be assessed solely on the basis of respondeat superior. Rather, the principal must have ratified the defamation with actual malice.

Respondeat superior was also addressed in two nonmedia cases. In Ball v. British Petroleum Oil, 108 Ohio App. 3d 129, 670 N.E.2d 289 (1995), the court held that if there is a basis for a finding of malice by a corporate employee at any position in a chain of communication, there is a jury issue.
of corporate malice. In Smith v. Bridgeport Futures Initiative, Inc., 1996 WL 493229 (Conn. Super. 1996) the court held that the affairs of the principal, and not solely the affairs of the agent, must be furthered in order for doctrine of respondeat superior to apply and that the scope of the agent's authority is a question for the trier of fact.

6. Privileges

According to the 1997-98 Media Libel Survey, traditional common law privileges continue to play a significant role in libel suits.

Fair Report


In Doe v. Daily News, 25 Media L. Rep. 1673 (Sup. Ct. N.Y. Cty. 1997), New York's statutory privilege for the fair and accurate report of "official information" was broadly applied to cover inaccurate information given by police officials to a newspaper columnist who reported that plaintiff's rape claim was a hoax. The court held that although the police information was inaccurate, the columnist "reported that misinformation accurately and drew reasonable inferences from it." Id. at 1675.


In contrast, the Ohio Supreme Court substantially diminished Ohio's fair report statute in Young v. Morning Journal, 76 Ohio St. 3d 627, 669 N.E.2d 1136 (1996). In a case arising out of a news article about an attorney cited for contempt, the court held that omitting the middle initial in
reporting the attorney’s name raised an issue of fact regarding the article’s accuracy and the application of the fair report privilege in a defamation action brought by a plaintiff who had the same first and last names as the attorney.

The Delaware Supreme Court refused to extend the fair report privilege to cover a letter of complaint submitted to a government-authorized medical board because it was not a judicial or government body. Kanaga v. Gannett Co., 687 A.2d 173, 25 Media L. Rep. 1684 (Del. 1996). A First Circuit decision stated in dictum that the fair report privilege protecting fair and accurate reports of judicial proceedings applies only to reporters, by which it appeared to mean the news media. Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538, 561 n.30 (1st Cir. 1997). The court declined to apply the privilege to a media consultant hired by a party to a lawsuit.

**Fair Comment**

The fair comment privilege was applied in Molin v. The Trentonian, 297 N.J. Super. 153, 687 A.2d 1022 (App. Div. 1997) (holding that plaintiff’s arrest for stalking was a matter of legitimate public interest to which the fair comment privilege applied). Accusations against public officials made in recall applications are conditionally privileged as “comments upon the acts of public men in their public capacity.” Davis v. Shavers, 225 Ga. App. 497, 500, 484 S.E.2d 243, 246 (1997).

While in Kanaga v. Gannett, 687 A.2d 173, 25 Media L. Rep. 1684 (Del. 1996), the Delaware Supreme Court held that the fair comment privilege could be raised as a defense at trial, and it would be up to the jury to determine whether an article detailing a patient’s complaint against a doctor was a report on a matter of public concern.

**Neutral Reportage**

The Ohio Supreme Court declined to recognize the neutral reportage doctrine in Young v. Morning Journal, 76 Ohio St. 3d 627, 669 N.E.2d 1136 (1996), although a number of lower Ohio courts had already done so. Similarly, a Pennsylvania lower court held that Pennsylvania has not adopted the doctrine of neutral reportage. Lakeview Ambulance & Med. Serv., Inc. v. Gold Cross Ambulance & Med. Serv., Inc., 28 Mercer Cty. L.J. 67, No. 1994-2166 (March 17, 1997).

One recent Texas case applied a principle very close to neutral reportage without using the term. KTRK Television v. Felder, 1997 WL 167893 (Tex. App. Houston [14th Dist.] 1997, no writ) (unpublished). Because defendant accurately reported that parents of schoolchildren had accused plaintiff, a teacher, of physically threatening and verbally abusing their children, the story was substantially true, notwithstanding whether the parents’ allegations were accurate.

**Judicial and Official Proceedings Privilege**

The privilege for reporting judicial and other official proceedings was an issue in several newly reported cases.
Four California decisions involved the extent to which statements must relate to judicial proceedings in order to be covered by the privilege. An appeals court held that in order to be covered, a communication must function as a necessary or useful step in the litigation process and refused to apply the privilege to a press conference used to influence public opinion about a case. *Rothman v. Jackson*, 49 Cal. App. 4th 1134, 57 Cal. Rptr. 2d 284 (1996). Another refused to apply the privilege to statements made during negotiations where the record showed the parties were not contemplating litigation. *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15, 61 Cal. Rptr. 2d 518 (1997). In *Shatzter v. Israelis*, 55 Cal. App. 4th 1290 (1997) the court refused to apply privilege to publication of private mental health records for the purpose of gathering evidence in a criminal proceeding. But in *Freemont Compensation Ins. Co.*, 44 Cal. App. 4th 867, 52 Cal. Rptr. 2d 211 (1996) an insurer’s report to district attorney and Department of Insurance fraud bureau concerning alleged fraud was absolutely privileged.


Similar questions were addressed in other jurisdictions. In *Scott Fetzer Co. v. Williamson*, 101 F.3d 549, 554 (8th Cir. 1996), the court held that an attorney’s letter to a newspaper about planned litigation was not absolutely privileged. Similarly, the First Circuit refused to apply the privilege to statements made by a party’s media consultant at a press conference, published on the day of the filing of the complaint and before any courtroom activity began. *Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 560 (1st Cir. 1997). See also *Simon v. Navon*, 951 F. Supp. 279, 282 (D. Me. 1997) (applying privilege to pre-complaint communications by attorneys and parties); *Woodward v. Weiss*, 932 F. Supp. 723 (D.S.C. 1996) (absolute privilege for statements made as a preliminary step to a judicial proceeding which bear a reasonable relation to the litigation); *Mulshine v. Knight*, 16 Conn. L. Rptr. No. 1, 29-30 (Conn. Super. 1997) (no absolute privilege for statements made by defendants to members of town police department prior to plaintiff’s arrest and invocation of court’s criminal jurisdiction); *Pape v. Reither*, 918 S.W. 2d 376, 381-82 (Mo. App. E.D. 1996) (qualified privilege for statements made as a part of settlement negotiations); *Bennett v. Computer Associates, Inc.*, 932 S.W. 2d 197 (Tex. App. Amarillo 1996, n.w.h.) (statements made during settlement discussions fell within scope of absolute judicial privilege).

The judicial and official proceedings privilege was also applied in the following newly reported cases: *Smith v. Morgan*, CA-95-513-1-6 (D.S.C. 1996) (unpublished opinion), aff’d, 108 F.3d 1373 (4th Cir. 1997) (Table) (1997 U.S. App. LEXIS 1306) (state prosecutor has absolute immunity “for activities intimately associated with the judicial phase of the criminal process”); *Elliott v. Evans*, 942 F. Supp. 238, 243 (D. Md. 1996) (absolute privilege also extends to statements in pleadings, affidavits and other papers either filed in or directly related to proceeding); *Cushman v. Village of Manteno*, 1996 WL 529362 (N.D.Ill., Sept. 16, 1996) (statements made at village board meeting and

**Legislative and Official Acts Privilege**

Generally statements made in legislative proceedings and by government officials in the scope of official duty are privileged. Several new nonmedia cases were reported in the area of law enforcement. Statements to the press by a U.S. Attorney and an IRS official that were totally false, misleading, outrageous, and lacking in professionalism were nevertheless made within their scope of employment and were, therefore, absolutely privileged. *Averson v. United States*, 99 F.3d 1200, 1211, 25 Media L. Rep. 1033, 1041 (1st Cir. 1996). The absolute privilege for comments made during legislative hearings, however, did not apply to the dissemination of false, defamatory, and slanderous information press releases, interviews, and speeches occurring outside the strict scope of legislative duties. *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 30 (1st Cir. 1996), aff'g and quoting 876 F. Supp. 1332, 1342 (D.P.R. 1995). See also *Reiter v. Sears Roebuck & Co.*, 1996 WL 459852 (N.D. Ill., Aug. 13, 1996) (qualified privilege for police officer's statement to other officers that suspect had previously committed theft); *Minor v. Failla*, 329 Ark. 274, 946 S.W.2d 954 (1997) (qualified privilege for statements by city council members to another public official about potential criminal conduct).

**Privileges in Employment Context**

In *Simpkins v. Specialty Envelope, Inc.*, 1996 U.S. App. LEXIS 22327 (6th Cir. 1996) (unpublished), the Sixth Circuit, applying Ohio law, held that defamatory statements made in good faith between an employer and an employee, or between two employees, concerning a third employee, are protected by a qualified privilege that can only be overcome by actual malice. In *Luyon v. GTE, Inc.*, 107 F.3d 873, 1997 WL 73230 (7th Cir. 1997), a qualified privilege barred an employee's defamation claim based on a termination letter copied to various co-workers stating that employee
was being fired for "total lack of responsibility towards [her] job"; defendant "had good reason to believe what it said in the letter" and "the distribution list on the letter does not appear excessive."

Employers and supervisory employees have a qualified privilege against liability for defamation regarding matters that affect their business. *Freeman v. Bechtel Construction Co.*, 87 F.3d 1029 (8th Cir. 1996). In *Sawheny v. Pioneer Hi-Bred International, Inc.*, 93 F.3d 1401 (8th Cir. 1996), a qualified privilege was extended to defamatory statements about a former employee that were written to other firms and officials, as the court held that matters of legitimate concern existed for all involved parties. And in *Peterson v. Dacy*, 550 N.W.2d (S.D. 1996), employees told by their employer the reasons for the termination of a fellow employee were "interested parties." See also *Vance v. Ulrich*, ___ So. 2d ___, 22 Fla. L. Weekly D740 (Fla. 2d DCA 1997)(form U-5 provided to NASD subject to qualified privilege).

Courts have recognized that employers give their employers a qualified immunity when they consent to periodic evaluations. In *Johnson v. Baptist Medical Center*, 97 F.3d 1070 (8th Cir. 1996) the court recognized that under Missouri law an employer is given a qualified privilege with regard to potentially libelous statements contained in the employees personnel evaluation. See also *Olivares v. NASA*, 934 F. Supp. 698, 706 (D. Md. 1996) (qualified privilege applies to employer/employee relationship).

7. Damages

As noted in last year's fourth quarter *Bulletin*, the issue of damages continues to be a troubling area in defamation law. Justice Powell's observation in *Gertz* that "jury discretion over the [punitive damages] awarded is limited only by the gentle rule that they not be excessive" was borne out this past year in cases such as *MMAR v. Dow Jones & Co.* and *Food Lion*. However, both of these awards were substantially reduced by trial courts.

Although *Food Lion* was not a defamation case, and the jury was instructed to assume the truth of the broadcast, one decision in the case analyzed the important issue whether a plaintiff alleging tortious newsgathering claims can recover reputational damages. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 25 Media L. Rep. 1865 (M.D.N.C. 1997). In a post-trial ruling, the court held that publication damages such as lost profits or diminished stock value were not proximately caused by ABC's newsgathering and broadcast. In contrast, it was the conduct of Food Lion employees depicted in the broadcast that affected consumers and led to lower profits and other damages. Furthermore, even if the reputational harm was a foreseeable result of the broadcast, the conduct of Food Lion's employees was a superseding cause of the damage. See "Recent Developments in the Law of Newsgathering" by Steve Perry, on p. 3A.

In another media case, the Eighth Circuit held that under Iowa law a corporation may recover damages for injury to its reputation as well as lost profits. *Lundell Manufacturing Company, Inc. v. American Broadcasting Companies, Inc.*, 98 F.3d 351, 25 Media L. Rep. 1001 (8th Cir. 1996), cert. denied, 117 S. Ct. 1470 (1997). In *Lundell*, the plaintiff recovered $900,000 for reputation
damages and $158,000 for lost profits. With regard to lost profits, the decision also noted that inconsistent testimony would not preclude an award of lost profits because lost profits do not need to be shown with precision, rather they require just a reasonable basis for calculation.


**Actual Damages**

Whether a plaintiff must show injury to reputation to recover actual damages is a question determined by state law. Of the jurisdictions that have decided this issue in the post-Sullivan/Gertz era, five have found that such proof is required, while five have found that no such showing is necessary.

Minnesota, Iowa, Arkansas, Kansas, and the Fifth Circuit Court of Appeals (applying Mississippi law) have all ruled that evidence of damage to reputation is a prerequisite to the recovery of damages in a defamation action. Minnesota, in Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 24 Media L. Rep. 1897 (Minn. 1996), and Iowa, in Johnson v. Nickerson, 542 N.W.2d 506 (Iowa 1996), are the most recent jurisdictions to decide the issue. Arkansas decided the issue in Little Rock Newspapers, Inc. v. Dodrill, 281 Ark. 25, 660 S.W.2d 933, 10 Media L. Rep. 1063 (Ark. 1983); Kansas in Gobin v. Globe Publishing Co., 232 Kan. 1, 649 P.2d 1239 (Kan. 1982); and the Fifth Circuit in Garziano v. E.I. DuPont de Nemours & Co., 818 F.2d 380 (5th Cir. 1987) (applying Mississippi law). In addition, New York’s Appellate Division, First Department, has twice held that proof of loss of reputation is required. See France v. St. Clares Hosp. & Health Center, 441 N.Y.S.2d 79 (1981); Salomone v. MacMillan Publishing Co., 429 N.Y.S.2d 441 (1980). Both cases cited the 1858 New York Court of Appeals decision in Tenvilliger v. Wan&, 17 N.Y. 54 (1858), which held that recovery for emotional harm is foreclosed in the absence of proof of reputational harm, but the New York Court of Appeals has not revisited the issue since Gertz.


The Delaware Supreme Court appears to have approved the recovery of damages without proof of injury to reputation or actual harm, at least as to private figures and nonmedia defendants, in Kanaga v. Gannett Co., 687 A.2d 173, 182-83, 25 Media L. Rep. 1684, 1692 (1996). The court stated, “with respect to actual damages . . . proof of damages need not be shown to recover . . . as long as the jury finds that [plaintiff] is the victim of libel, she can recover actual damages.” Id.
In a recent Tennessee case, a jury was permitted to award a libel plaintiff damages for emotional distress despite lack of evidence of injury to reputation. *Myers v. Pickering Firm, Inc.*, 1997 WL 269468 (Tenn. Ct. App. May 22, 1997). A Louisiana court ruled that a jury award of $800,000 in a defamation action was an abuse of jury discretion where plaintiff failed to show any substantial damage to his reputation, but it nevertheless allowed an award of $20,000 as the court could see that the defamation would cause humiliation and mental anguish. *Gulf States Land & Development, Inc. v. The Ouachita Natl Bank*, 1997 LEXIS 933 (La. App. 2d Cir., April 4, 1997).

**Punitive Damages**

Punitive damages are determined by state law, with only rough guidance from the Supreme Court on the constitutionality of such awards in the First Amendment context. According to the 1997-98 MEDIA LIBEL SURVEY, eight jurisdictions do not permit punitive damages in defamation cases. Ten states impose statutory limitations on punitive damage awards and 15 states limit punitive damages through retraction laws.

In a recent decision in *Food Lion* remitting the punitive damage award from $5 million to $315,000, the federal district court rejected the argument that the First Amendment bars punitive damage awards for torts committed in the process of newsgathering. *Food Lion v. Capital Cities/ABC, Inc.*, No. 6:92CV00592 (M.D.N.C. August 29, 1997). But the court went on to analyze the award under *BMW v. Gore*, 116 S. Ct. 1589 (1996) and state law standards and found the punitive damage award to be constitutionally unsustainable. The court looked to the degree of reprehensibility of the conduct, the ratio of actual damages to punitive damages, sanctions for comparable conduct, ability to pay and the likelihood that the award would deter the defendant and others from similar conduct. In particular, the ratio of 1,701 to 1 in punitive to actual damages against ABC could not survive due process review.

A $5 million punitive damage award was reversed by the Fifth Circuit in *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556 (5th Cir. 1997). The court held there was no actual malice as a matter of law so it did not directly confront the constitutionality of the award. But the court did

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10 Louisiana, Michigan, Nebraska, Puerto Rico and Washington do not allow punitive damages; Massachusetts and Oregon prohibit punitive damages in cases involving the First Amendment; and New Hampshire, although prohibiting punitive damages permits plaintiffs an “enhanced recovery” in tort cases where defendant acted with malice or wanton disregard of plaintiff’s rights.

11 Colorado, Georgia, Kansas, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Texas and Virginia.

note with respect to the ratio of punitive damages ($5 million) to actual damages ($1) that "such a disproportionate award of punitive damages may also be unconstitutional" under *BMW v. Gore*.

In another media case, a Texas court set aside a $200 million punitive damage award against a newspaper publisher, the largest damage award ever, though it left standing a jury award of $22.7 million in compensatory damages and $20,000 in punitive damages against the reporter. *MMAR v. Dow Jones & Co.*, No. H-9-1262, 25 Media L. Rep. 1747 (S.D. Tex. May 23, 1997). The court did not engage in a due process analysis, but held that under Texas law punitive damages cannot be awarded against a corporate entity simply on the basis of respondeat superior. Here there was no evidence that Dow Jones authorized or ratified the publication with actual malice.

In other significant decisions this year, the Iowa Supreme Court stated that in reviewing punitive damage awards it would give greater weight to future deterrence. "Of minor significance is the ratio between the compensatory and punitive damages assessed." *Wilson v. IAP, Inc.*, 558 N.W.2d 132, 148 (Iowa 1996) (affirming remittitur of $15 million punitive damage award). In a nonmedia case, a New Jersey court upheld a punitive damage jury verdict of $4.5 million and $1.0 million to each plaintiff, in addition to compensatory damages, because of overwhelming evidence of defendants' intentional, malicious and egregious defamatory wrongdoing. *Almog v. Itas*, 298 N.J. Super. 145, 689 A.2d 158 (App. Div. 1997). A punitive damage award of $100,000 was supported by sufficient evidence of actual malice when the record showed that plaintiff requested correction of errors and a retraction but defendant failed to do so. *Myers v. Pickering Firm, Inc.*, slip op., 1997 WL 269468 (Tenn. Ct. App., May 22, 1997).

**Presumed Damages**

In *Jones v. Western & Southern Life Ins. Co.*, 91 F.3d 1032 (7th Cir. 1996), the court applied Illinois law, allowing plaintiff to "recover general compensatory damages (including non-quantifiable damages like humiliation or anxiety) under the doctrine of presumed damages. Illinois law does not, however, allow for recovery of economic damages, such as lost employment opportunities, unless these damages are pleaded and proven as special damages. . . . Otherwise plaintiffs could make up practically any number and call it presumed damages."

In *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324, 1335-36 (10th Cir. 1996), the court recognized that New Mexico law actual damages must be proved and that damages cannot be presumed. However, actual injury "include[s] impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."

**Special Damages**

Statements that relate to a single act of a business or professional misfeasance are not actionable unless special damages are alleged. *Houston*, 1997 WL 10034, at *3-*4 ("single instance rule" requiring special damages not applicable, however, to allegation of a non-business mistake affecting plaintiff’s competency as a professional entertainer).

In two nonmedia cases, libel claims were disposed of for failure to show economic damage caused by the defamation. *Scott Fetzer Co. v. Williamson*, 101 F.3d 549 (8th Cir. 1996) (no evidence linking lost profits to defamation); *Johnson v. Hospital Corp. of America*, 95 F.3d 383, 390-91 (5th Cir. 1996) (no proof of pecuniary loss from allegedly false communications). On the other hand in *Kuselias v. Southern New England Telephone Co.*, 18 Conn. L. Rptr. No. 3, 80, 90 (Super. Ct. 1996), an award of $120,000 for future economic loss was upheld because the jury “could, reasonably speculate” that plaintiff was damaged due to prospective employers’ probable reaction to defamatory accusations.

Where parents of a boy killed in a golf cart accident failed to allege special harm from insurance adjustor’s allegation that they were planning to retire on the settlement, summary judgment on the slander cause of action was warranted. *Yookum v. Hartford Fire Insurance Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

Damages for “great pain and anguish” suffered as a result of a *per quod* defamatory statement are “of such a nature that they do not necessarily follow from a defamatory remark” and are therefore special damages. *King v. Bogner*, 88 Ohio App. 3d 564, 624 N.E.2d 364 (Montg. 1993); *Stokes v. Meimaris*, 111 Ohio App. 3d 176, 675 N.E.2d 1289 (Cuyahoga 1996).

**Libel Proof Plaintiff**

In *Broome v. Biondi*, 1997 WL 83295, at *4 (S.D.N.Y. Feb. 10, 1997), the court held that the libel-proof plaintiff doctrine applies only where plaintiff’s prior bad acts were a matter of fact. Thus, the doctrine could not be invoked where the reader’s low regard of plaintiff prior to the publication was merely a matter of opinion.

8. **Procedural Matters**

**Statute of Limitations**

In a decision that should end forum-shopping by libel plaintiffs in Massachusetts federal courts, a court recently granted summary judgment for a New York magazine publisher on statute of limitations grounds. *Stanley v. CF-VH Associates, Inc.*, 956 F. Supp. 55 (D. Mass. 1997). A Texas plaintiff sued in Massachusetts two years and 11 months after the alleged defamatory publication to take advantage of Massachusetts 3-year statute of limitations, compared with the one-year period in both New York and Texas. The court applied the shorter period because
Massachusetts has "no relationship to the occurrence, no relationship to the defendants, and virtually no relationship to the plaintiff," thus Massachusetts has no substantial interest in allowing the claim to proceed in its courts.

A forum-shopping plaintiff had better luck in the Seventh Circuit. Faigin v. Doubleday Dell Publishing Group, Inc., 98 F.3d 268, 24 Media L. Rep. 2590 (7th Cir. 1996) (Wisconsin law). A nonresident plaintiff sued nonresident defendants in Wisconsin where 41 copies of the alleged defamatory book were sold. The court refused to apply a shorter statute of limitations under Wisconsin's borrowing statute because some publication occurred in Wisconsin. The decision effectively exempts all multi-state libel actions from Wisconsin's borrowing statute.

In another Seventh Circuit decision, the court in Schweiks v. Burdick, 96 F.3d 917 (7th Cir. 1996), held that the "discovery rule" did not apply where a "mass media" publication was at issue, but would be limited to situations where the defamatory material may likely be concealed, such as credit reports or confidential memoranda.

Motions to Dismiss

Several cases reported in the 1997-98 MEDIA LAW SURVEY discussed the pleading requirements for a defamation action in the context of a motion to dismiss. One court held that while the requirement of *in haec verba* pleading has been cited in the past in the Second Circuit, "the proper question . . . is whether plaintiff has provided enough detail about the statements so that defendant can adequately frame a responsive pleading." Sterling Interiors Group, Inc. v. Haworth, Inc., 1996 WL 426379, at *23-24 (S.D.N.Y. July 30, 1996); but see 2500 SS Limited Partnership v. White, 17 COM. L. Rptr. No. 13, 449 (1996) (court can in its broad discretion require that the complaint "must, on its face, specifically identify what allegedly defamatory statements were made, by whom, and to whom.")

Within the Seventh Circuit, the Northern District of Illinois has not been particularly consistent in its application of the "*in haec verba*" pleading requirement on motions to dismiss. See, e.g., Gay v. State of Illinois, 958 F. Supp. 1300 (N.D. Ill. 1997) ("In this district, courts have found that the federal pleading rules do not require a complaint to set forth the exact words, verbatim, of the alleged defamation . . . . Nevertheless, the basic substance of the statements must be alleged so that defendants can form their responsive pleadings."); Cozzi v. Pepsi-Cola General Bottlers, Inc., 1997 WL 312048 (N.D. Ill., June 6, 1997) (same); compare Woodard v. American Family Mut. Ins. Co., 950 F. Supp. 1382 (N.D. Ill. 1997) ("the precise language or 'in haec verba' requirement is employed by most courts in this district"); granting motion to dismiss); Smith v. SRDS, Inc., 1997 WL 11014 (N.D. Ill., Jan. 7, 1997) (allegation, "on information and belief," that defendants said plaintiff "stole from the company, intentionally derailed a potential sale for her own personal gain, and mismanaged a database project" were "too general to state a claim as they do not identify the precise statements that were made, when, by whom, and to whom," so that "it is impossible to determine whether the statements are defamatory, capable of an innocent construction or protected by privilege.").
Another Illinois case held that a plaintiff was not required to plead that an alleged defamation was not privileged. *Chisholm v. Foothill Capital Corp.*, 940 F. Supp. 1273 (N.D. Ill. 1996) (denying motion to dismiss).

A trial court has held that if the complaint does not specifically allege harm to reputation, but instead merely pleads falsity and embarrassment, the case must be dismissed. *Johnson v. Richmond Newspapers, Inc.*, 40 Va. Cir. 516, 25 Media L. Rep. 1541 (Cir. Ct. Richmond 1996).

**Summary Judgment**

According to the 1997-98 *MEDM LIBEL SURVEY*, 30 jurisdictions favor summary judgment in defamation cases,\(^ \text{13} \) 4 disfavor summary judgment,\(^ \text{14} \) with the remaining 20 jurisdictions holding to a neutral standard.\(^ \text{15} \)

In Florida, which generally adheres to a neutral standard, one court recently noted a constitutional preference for summary resolution of libel actions. *Stewart v. Sun Sentinel Company*, __So. 2d __, 22 Fla. L. Weekly D400 (Fla. 4th DCA 1997) (“Where the facts are not in dispute in defamation cases, however, pretrial dispositions are especially appropriate because of the chilling effect these cases have on freedom of speech.”).

The Wisconsin Supreme Court noted that summary judgment is favored in public figure defamation cases “because courts have a duty to review the record independently in public figure libel actions and this duty entails a constitutional responsibility that cannot be delegated to the trier of fact, summary judgment is an important and favored method for adjudicating public figure defamation actions.” *Torgerson v. Journal/Sentinel, Inc.*, __Wis. 2d __, 563 N.W.2d 472, 479 (1997).


A Louisiana court decided the preference for summary judgment does not apply to nonmedia


\(^{14}\) Alaska, Michigan, New Hampshire and New Mexico.

\(^{15}\) Delaware, Florida, Guam, Kansas, Kentucky, Maryland, Missouri, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virgin Islands and Virginia.
defendants because the chilling effect on freedom of the press is not implicated. *Guilbeaux v. The Times of Acadiana, Inc. (II)*, 693 So. 2d 1183 (La. App. 3d Cir. 1997).


Beginning September 1, 1997, Texas was scheduled to institute a new “no evidence” summary judgment motion on the ground “that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.” Tex. R. Civ. P. 166a(i). This new rule is significant in that it does not require the offering of evidence by the moving party, unlike other summary judgment procedures in Texas. The motion “must state the elements as to which there is no evidence,” and the motion must be granted unless the nonmovant produces evidence sufficient to raise a genuine issue of material fact. This new provision is a supplement to existing Texas summary judgment practice, not a replacement of old rules. The *Texas Libel Survey* reports that as a practical matter, defendants still may be required to present evidence in some summary judgment motions (for example, to establish that a plaintiff is a public figure).


*Expert Witnesses*

In a case with interesting implications for prepublication review, the Puerto Rico Court of Appeals in *Melendez Vega v. El Vocera*, KLCE96-0982 (1997), ruled in favor of admitting the results of a polygraph test that corroborated the allegations of the codefendant-source of an alleged defamatory publication. The ruling also allowed the polygraph expert to testify as to the truthfulness of the source.

With respect to expert testimony on journalist’s standards, there were two newly reported cases; one in a private figure case; the other, a public figure case.

In private figure defamation case, expert testimony was endorsed because evidence of customs and practices in the news profession, which the court stated was the best evidence of ordinary care, will normally come from experts. *Malson v. Palmer Broadcasting Group*, 936 P.2d 940, 1997 OK 42 (Okla. 1997).

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On the other hand, in a public figure case an expert's testimony that failure to print a retraction was evidence of reckless disregard was not probative of actual malice because such testimony can only relate to objective standards and not defendant's knowledge of falsity. *Gonzales v. Hearst Corp.*, 930 S.W.2d 275, 283 (Tex. App. Houston [14th Dist.] 1996, no writ).

**Appellate Review**

Several cases reported in the 1997-98 *MEDIA LIBEL SURVEY* analyzed whether independent appellate review should be applied to findings of falsity, in addition to actual malice.

In *Lundell Mfg. Co. v. American Broadcasting Cos.*, 98 F.3d 351, 25 Media L. Rep. 1001 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1470 (1997), the court discussed at length whether findings of falsity or substantial truth are constitutional rules subject to an independent evaluation of the record concluding that they are not. Analyzing the question under *Hepps, Masson and Milkovich*, the court concluded that in a defamation case brought by a private plaintiff against a media defendant a court need only review the record to determine whether a reasonable trier of fact could find that the statement could be interpreted as a false assertion of fact — in essence a sufficiency of the evidence analysis. 98 F.3d at 358, 25 Media L. Rep. at 1006.

Another Eighth Circuit decision employed more general language in adopting a distinction between critical facts and "non-critical facts" in determining the standard of appellate review in First Amendment cases. *Families Achieving Independence and Respect v. Nebraska Dept of Social Services*, 111 F.3d 1408 (8th Cir. 1997) (*en banc*). Noncritical facts — findings of fact in a defamation case that are irrelevant to the constitutional standard of *New York Times Co. v. Sullivan* — are reviewed for clear error, under Fed. R. Civ. P. 52(a). *Id.* at 1411. But, "[w]e independently review the evidentiary basis of critical facts, giving due regard to the trial court's opportunity to observe the demeanor of witnesses." *Id.*

Several state court decisions also explored this issue. The Washington Supreme Court held that appellate courts must make an independent examination of the record to determine whether there is sufficient evidence of actual malice. *Richmond v. Thompson*, 130 Wash. 2d 368, 388, 922 P.2d 1343 (1996). However, "[a] reviewing court should respect credibility choices made by the factfinder even in defamation cases involving independent review." 130 Wash. 2d at 389. The Supreme Court of South Carolina determined that independent appellate review applies only to the issue of actual malice and not falsity. *Peeler v. Spartan Radiocasting, Inc.*, 478 S.E.2d 282, 25 Media L. Rep. 1310 (S.C. 1996).

**Jurisdiction**

The Ninth Circuit held that a newspaper that published an allegedly defamatory article about a California resident and that was based, in part, upon information received from California sources purposefully availed itself of the privilege of conducting activities in California and thus was subject to personal jurisdiction, even though less than 20 copies of the newspaper were circulated in
California. *Gordy v. Daily News, L.P.*, 95 F.3d 829 (9th Cir. 1996). That only a few copies were circulated in California was irrelevant to the minimum contacts analysis. *Id.* at 834.

In a nonmedia case, an Arizona court found that it had personal jurisdiction over a New Mexico business that had no offices in Arizona but that did send defamatory e-mail messages to Arizona residents and did maintain a Web site containing defamatory material. The court applied the “effects test,” finding jurisdiction to be proper because it was reasonably foreseeable that the defendant’s acts would cause injury within Arizona. *Edias Software International, L.L.C. v. Basis International, Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996).

A federal court dismissed on personal jurisdiction grounds claims brought against rap singer Tupac Shakur and Time Warner alleging that lyrics in Shakur’s album *2Pacalypse Now* defamed and incited the murder of a police officer. *Davidson v. Time Warner, Inc.*, 25 Media L. Rep. 1705 (S.D. Tex. 1997). The court found that Time Warner, the parent of the record company that produced and distributed Shakur’s album, was a holding company that had no employees or real estate in Texas and it was not involved in the creation, production and distribution of the album. Similarly, Shakur, who created the album under contract, had no control over its distribution in Texas and no contacts to Texas. The court refused to permit “the exercise of jurisdiction over every voice heard on recordings sold in Texas, every face that appears on a cereal box sold in Texas, or every author of a news article found in the state.” *Id.* at 1711. For further discussion of this case see “Recent Developments in the Law of Media Liability for Allegedly Inspiring Violent Acts” by Thomas Kelley and Steven Zansberg, on p. 17A.

Finding that defendants’ activities were “purposefully directed” at the state, the Supreme Court of New Hampshire found sufficient minimum contacts to exert personal jurisdiction over Beach Boy Brian Wilson, his ghost writer and a California partnership in a libel suit arising out of the publication of Wilson’s autobiography *Wouldn’t It Be Nice. Brother Records, Inc. v. HarperCollins*, 141 N.H. 322, 682 A.2d 714 (1996), *cert denied*, 65 U.S.L.W. 3597 (1997). The court found that these out-of-state defendants retained power over the creation of the book and that their ultimate goal was nationwide distribution of the book.

In an unusual decision in a libel claim, a Maryland court ruled it lacked subject matter jurisdiction over defamation claim arising out of dispute involving ecclesiastical decisions such as determination of candidate’s qualifications for priesthood. *Downs v. Roman Catholic Archbishop of Baltimore*, 111 Md. App. 616, 622, 683 A.2d 808, 811 (1996).

**Choice of Law**

New Jersey defamation law applied in a nonmedia case where some defendants and plaintiffs were residents of Israel, some were New Jersey residents; egregious misconduct was committed in New Jersey, elsewhere in the United States, and in Israel by New Jersey residents; the alleged defamation was published in New Jersey; and where a fuller remedy was available to defendants under New Jersey law than in Israel, with regard to the scope of damages. *Almog v. ITAS*, 298 N.J. Super.
In *Northwest Airlines, Inc. v. Astrea Aviation Services*, 111 F.3d 1386 (8th Cir. 1997), the court applied Minnesota choice of law rules in holding that Minnesota defamation law applied to a claim concerning original publication within Minnesota and republication within Texas. Applying Minnesota law would, *inter alia*, advance Minnesota’s interest in requiring highly regulated corporations to meet the actual malice standard to recover for defamation. In *Bryks v. Canadian Broadcasting Corp.*, 928 F. Supp. 381, 383, 24 Media L. Rep. 2109 (S.D.N.Y. 1996), the court held that under New York law, “in defamation cases, the jurisdiction of the plaintiff’s domicile at the time of the alleged defamation usually has the greatest interest in the outcome of the litigation.”

The SURVEY also reports that a Florida court considered the contents of a newspaper article when deciding whether a libel action was governed by California or Florida law. *Jaisinghani v. Capital Cities/ABC, Inc.*, 1997 U.S. Dist. LEXIS 5745 (S.D. Fla., Mar. 22, 1997). Applying the most significant relationship analysis, the court in deciding that California law applied also considered that the allegedly defamatory article focused on plaintiff’s fundraising and other activities in California.

In an unpublished opinion, a federal district court held that Texas’ one-year statute of limitations for libel is procedural, not substantive, and thus will be applied to any libel claim filed in a Texas state or federal court, regardless of what state’s substantive law applies. *Laughlin v. Perot*, 1997 WL 135676 (N.D. Tex. 1997).
B. **FINDINGS OF THE LDRC 50 STATE SURVEY 1997-98: PRIVACY AND RELATED LAW**

1. **False Light**

According to the 1997-98 *MEDIA PRIVACY AND RELATED LAW SURVEY*, currently 33 jurisdictions recognize the false light tort, although in seven of these jurisdictions the tort has not been applied in the media context. Eight other jurisdictions have explicitly rejected the tort.

In the handful of new media cases involving false light, *Boese v. Paramount Pictures Corp.*, ___ F. Supp. __, 1996 WL 774569 (N.D. Ill. Oct. 29, 1996), stood out as the most troubling. In *Boese*, the court held that a nondefamatory statement can support a claim for false light, even where the court finds the statement to be a nonactionable opinion in the defamation context. Looking at the offensiveness requirement of the tort, the court also found that a trier of fact could decide that a charge that a person lied on the witness stand and in discharge of his duties would be highly offensive to a reasonable person.

Further, the court held that the plaintiff had set forth sufficient facts to demonstrate a genuine issue of material fact as to actual malice where the plaintiff alleged that the media defendant knew of the potential harm to the plaintiff's reputation that the publication would cause and that the source of the story was motivated by revenge. The court also noted that the defendant deviated from generally accepted standards of journalism by including the plaintiff's picture in its report while failing to contact him as a source and failing to investigate numerous other sources.

In *Kitt v. Pathmakers, Inc.*, 672 A.2d 76 (D.C. 1996), the District of Columbia Court of Appeals reversed a trial court dismissal holding that it could not conclude as a matter of law that the facts pleaded were insufficient to make out a prima facie case of false light. Plaintiff, the principal clarinetist for the National Symphony Orchestra ("NSO"), brought suit after a July 4th NSO concert was broadcast featuring an actor with poor musical technique impersonating the plaintiff while standing on the west porch of the Capitol. The trial court had dismissed the false light claim because, "a reasonable person viewing the performance would not have a reason to believe the actor was portraying the plaintiff; nor would he or she find the playing of a clarinet [at the Capitol] offensive." But the court of appeals reversed, stating that the trial court improperly considered facts outside the pleadings without giving the non-movant an opportunity to present factual material in response.

95 F. 3d 609 (7th Cir. 1996), the Seventh Circuit held that although the plaintiff may have had heightened sensitivities regarding his passion and commitment for a project to build an "American House" in a city in the former Soviet Union, the article and editorial questioning his methods would not have been so seriously offensive to a reasonable and dispassionate person as to be actionable under the tort of false light.

In a media decision addressing the statute of limitations for false light claims, the Illinois Supreme Court held that a false light claim, filed as part of an amended complaint after the expiration of the one-year statute of limitations, related back to the date of the original and timely filed complaint containing defamation counts, where the false light claim arose from the same publication giving rise to the defamation counts. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 672 N.E.2d 1207 (1996). Thus, the cause of action was saved.

In the non-media cases reported in the 1997-98 *MEDIA PRIVACY SURVEY*, several false light cases were dismissed for failure to prove sufficiently extensive publication. *See Cabanas v. Gloodt Associates*, 942 F. Supp. 1295 (E.D. Cal. 1996) (publication of a report to only the small group of individuals professionally interested in it is not sufficient public disclosure); *Carl v. Pantaleo v. Raskin et al.*, 19 Conn. L. Rptr. No. 1, 2 (May 5, 1997) (false light publicity requirement not satisfied in case where defendant-physician had given information to the police concerning the plaintiff's alleged abuse of his wife); *Lynne C. v. New Trier Township High School*, 1997 WL 43222 (N.D. Ill. 1997) (evidence that the defendant "at most spoke to a few other interested persons" failed to satisfy the "publicity" element of the claim); *Hamilton v. City of Chicago*, 1996 WL 501612 (N.D. Ill. 1996) (false light claim brought by a police officer was dismissed when the evidence indicated that the statements concerning his demotion were only accessible to officers in the plaintiff's district). In a Northern District of Illinois decision, however, the court held where the plaintiff has a special relationship with the individuals to whom the matter was disclosed, the "publicity" element may be satisfied by disclosure to a small number of people. *Chisholm v. Foothill Capital Corp.*, 940 F. Supp. 1273 (N.D. Ill. 1996).

Looking to the applicable fault standard, a Louisiana court of appeals held, in an opinion offering little explanation, that the actual malice standard does not apply to cases involving non-media defendants in false light cases. *Landrum v. Board of Commrs of Orleans Parish Levee District*, 685 So. 2d 382 (La. App. 4th Cir. 1996).

The 1997-98 SURVEY also reported a few cases in which courts applied the privileges of libel law to claims for false light. *See Buschel v. Metrocorp.*, No. 96-CV-3048, 1996 U.S. Dist. LEXIS 14094 (E.D. Pa. Sept. 17, 1996) (defendant attorney's privileged communications made prior to a contemplated judicial proceeding cannot serve as the basis of plaintiff's false light claim); *Thompson v. Community Nursing Service & Hospice*, 910 P.2d 1267 (Utah Ct. App. 1996) (a proceeding before the EEOC is a "judicial proceeding" for purposes of the absolute privilege); *Dobkin v. Johns Hopkins Univ.*, Civ. A. No. HAR 93-2228, 1996 U.S. Dist. LEXIS 6445 (D. Md. Apr. 17, 1996) ("the qualified privileges applicable in a defamation claim preclude a false light claim absent a showing of actual malice").
2. Private Facts

According to the 1997-98 MEDIA PRIVACY SURVEY, 39 jurisdictions currently recognize a claim for publication of private facts,\(^\text{19}\) (one more than in last year's SURVEY), although in five of these jurisdictions the tort has not been applied in a media context.\(^\text{20}\) Additionally the tort has specifically been rejected in five jurisdictions.\(^\text{21}\)

Hawaii's state supreme court recognized the private facts tort for the first time, but held that the release of police department records concerning disciplinary actions against officers did not violate the officers' right of privacy. *SHOPO v. Soc'y of Professional Journalists*, 83 Haw. 378, 927 P.2d 386 (1996). In defining the right, the court relied on § 652D of the *Restatement (Second) of Torts* (1977).

In addition, the Colorado Supreme Court affirmed a lower court's recent recognition of a private facts claim. *Robert C. Ozer, P.C. v. Borguez*, 1997 WL 340666 (Colo. June 23, 1997).\(^\text{22}\) Though the supreme court reversed and remanded in part the lower court decision, it affirmed the finding that a cause of action exists in Colorado for giving unreasonable publicity to private facts which a reasonable person would find offensive.

In Illinois, an appellate court reinstated a private facts claim against the *Chicago Tribune*, holding that reasonable people could differ as to whether the newspaper's publication of a photograph of the plaintiff's dead son and her last words to him were offensive. The photographs were taken in a hospital emergency room and the photographers allegedly obstructed the plaintiff from seeing her son. The plaintiff also alleged that she had informed the press that she did not wish to make a statement. *Green v. Chicago Tribune Co.*, ___ Ill. App. 3d ___, 675 N.E.2d 249 (1st Dist. 1996). The court held that public concern over gang violence did not apply to the intimate and specific matters publicized here. The dissent criticized the decision for confusing the law of private facts with that of intrusion, a tort not recognized in Illinois. For further information regarding this case, see "Recent Developments in Newsgathering" by Steve Perry, on p. 3A.

Other reported decisions, however, were resolved in favor of the media on a variety of grounds. Courts, in some instances, held that the facts disclosed were not private. *See Mojica Escobar v. Roca*, 926 F. Supp. 30 (D.P.R. 1996) (a newspaper's publication of a photograph of the

\(^\text{19}\) Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virgin Islands, West Virginia, and Wisconsin.

\(^\text{20}\) Colorado, Hawaii, Indiana, Nevada, and Virgin Islands.

\(^\text{21}\) Minnesota, Nebraska, New York, North Carolina, and Virginia.

\(^\text{22}\) This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.
home of the plaintiff — the wife of a prominent politician — was not an invasion of privacy because it was “the most adequate means for obtaining a lawful purpose”); Solomon v. National Enquirer, Inc., 24 Media L. Rep. 2269 (D. Md. 1996) (a photograph, taken from the street, of the plaintiff standing at her bedroom window is not a private fact); Pollack v. Rashid, 1996 Ohio App. LEXIS 5890 (Hamilton Cty.) (finding that a news broadcast of information already disclosed to the public in a plaintiff’s legal suit cannot sustain a private facts action against the broadcaster).

In other cases, courts found the facts disclosed were either newsworthy or matters of public concern. See Pierog v. Morning Call, Inc., No. 95-C-478, 1995 WL 813163, 24 Media L. Rep. 1218 (C.P. Lehigh Nov. 27, 1995) (reporting about a motor vehicle accident was a matter of public concern and not an intrusion that would offend the reasonable person); International Association of Fire Fighters, Local 1264 v. Anchorage and Anchorage Daily News, No. S-7993 (Alaska Super. Ct., 3rd Jud. Dist. 1997) (salary information of municipal employees is a matter of public concern); Wilson v. Grant, 297 N.J. Super. 128 (N.J. Super. A.D. 1996) (holding that for an issue to be of public concern, there must be an appropriate nexus between the plaintiff and the newsworthy issue, although that nexus is to be liberally construed); Hogan v. Hearst Corporation, 1997 WL 184108 (Tex. App. — San Antonio 1997, n.w.h.) (newspaper’s publication of information obtained from police reports did not constitute public disclosure of private facts); Conrad v. D’Apolito, 1996 Ohio App. LEXIS 1921 (Mahoning Cty.) (publicizing plaintiff’s disciplining a child by placing him in the trunk of a car did not support private facts claim since the conduct took place in a public place and involved the legitimate public concern of child welfare).

Finally, the Seventh Circuit, applying Wisconsin law, recently held that a party waives her right to protest the broadcast of private facts when she initiates the broadcast. Howell v. Tribune Entertainment Co., 1997 WL 47608 (7th Cir. 1997). In Howell, the plaintiff volunteered to accompany her sister and stepmother on a talk show about difficult relationships between stepparents and their stepchildren. The plaintiff joined her sister in accusing the stepmother of adultery and mistreatment of the stepdaughters but sued for invasion of privacy when her stepmother read from her confidential juvenile police report. The court affirmed the dismissal of the complaint on the pleadings, holding that “[the plaintiff] may not hide behind Wisconsin’s privacy law and from that shelter pelt her stepmother with defamatory accusations with impunity.”

In the non-media cases reported in the 1997-98 SURVEY, courts continued to employ strict definitions of “public disclosure,” requiring publication to a widespread audience. See Ali v. Douglas Cable Communications, 929 F. Supp. 1362 (D. Kan. 1996) (communication to a single person, or a small group of persons such as co-workers, does not constitute publication); Hanson v. Hancock County Memorial Hospital, 938 F. Supp. 1419 (N.D. Iowa 1996) (finding that no private facts violation occurred when the fact of plaintiff’s hospitalization was communicated only to a small group of persons); Balzac v. Stamford Hospital, 1996 WL 222406 (Conn. Super. 1996) (statement that the plaintiff was present at the hospital for an HIV test did “not rise to the level of publicity as required in an action for unreasonable publicity given to the other’s private life,” where it was made only in the presence of “several persons in the waiting room”); Ellis v. Luxury Hotels, Inc., 666 N.E.2d 1262 (Ind. Ct. App. 1996) (the requisite “publicity” was lacking when a hotel revealed a guest’s room
number to only one person); Swinton Creek Nursery v. Edisto Farm Credit, 483 S.E.2d 789 (Ct. App. 1997) (a lender’s disclosure of a plaintiff borrower’s financial condition to a single party was insufficient to constitute public disclosure).

Courts also limited private facts claims in cases where the plaintiffs were responsible for the publication. See Brown v. Pearson, 483 S.E.2d 477 (S.C. Ct. App. 1997) (private facts action does not lie where only publicizing of private facts was done by plaintiffs). Some courts have also clarified their definitions of those facts considered private in invasion of privacy cases. In Louisiana, for instance, a state court of appeals found that positive drug test results for a second-in-command police officer are private facts. Landrum v. Board of Comm’rs of Orleans Levee District, 685 So. 2d 382 (La. App. 4th Cir. 1996).

The majority of new private facts cases in the non-media context concerned those facts considered not private. See Rudas v. Nationwide Mutual Ins. Co., No. 96-5987, 1997 WL 11302 (E.D. Pa. Jan. 10, 1997) (facts of a harassment incident cannot be private when it was witnessed by coworkers and the plaintiff put the details of the incident in an internal letter charging the defendant with the harassment); Schmidt v. Ameritech Corporation, 1996 WL 153888 (N.D. Ill. April 1, 1996) (information about one’s telephone calling habits is not private and does not necessarily reveal an intimate detail, but “[t]here may be a situation in which revealing a number (probably one beginning with 1-900) may disclose an intimate detail.”); Canney v. City of Chelsea, 925 F. Supp. 58 (D. Mass. 1996) (plaintiff failed to allege “unreasonable, substantial, or serious interference” with plaintiff’s privacy, and offered no evidence of “any private facts . . . disclosed about him by any of the defendants”).

Some courts also dismissed private facts claims based upon a lack of offensiveness, or in situations in which the facts disclosed were of legitimate concern to the public. See Rothstein v. The Montefiore Home, 1996 Ohio App. LEXIS 5611 (Cuyahoga Cty.) (a nursing home’s release of financial and medical information to the stepdaughter of a patient was not highly offensive to the reasonable person); Sampson v. State, 919 P.2d 171 (Alaska App. 1996) (holding that, unlike telephone or bank records, utility records can be matters of public concern and do not reveal discrete information about an individual’s activities).

Some opinions reaffirmed the application of common law defenses in private fact cases. See Watters v. Dinn, 666 N.E.2d 433 (Ind. Ct. App. 1996) (state recognizes an absolute common law privilege for statements made in the course of judicial proceedings, unless irrelevant to the litigation or without some legitimate relationship to it); Lopinski v. State Farm Mutual Insurance, Co., 1996 Ohio App. LEXIS (Lucas Cty.) (absolute privilege from defamation for statements made during judicial procedures by judges, counsel, parties, and witnesses applied to privacy claims).

In recent years, over 25 jurisdictions have passed statutes regulating the disclosure of HIV-
related information, and several new judicial decisions have interpreted those statutes:

In Connecticut, for instance, two recent cases demonstrated the strength of the state's HIV-confidentiality law: Doe v. Marselle, 236 Conn. 845, 675 A.2d 835 (1996) (Connecticut Supreme Court held that a willful violation of the statute requires only a "knowing disclosure of confidential HIV related information;" the defendant need not have intended to injure the protected individual); Barese v. Clark, 1996 WL 663850 (Conn. Super. 1996) (refusing to strike the plaintiff's claims of defamation, fraud, and intentional infliction of emotional distress against a prosecutor who, during a sentencing hearing, revealed confidential HIV-related information about the plaintiff, the court held that "the special status afforded HIV-related information" under the state statute may trump the doctrine of absolute immunity given to a prosecutor).

In contrast, a Pennsylvania state court reaffirmed a section of that state's Confidentiality of HIV-Related Information Act which permits the disclosure of confidential HIV-related information if there is a compelling need to do so. Aiello v. Southeastern Pa. Transp. Auth., 687 A.2d 399 (Pa. Commw. 1996).

A number of other decisions addressed other statutes implicating privacy concerns. For example, the Texas Supreme Court held that the media does not have a constitutional right to the disclosure of hospital peer review documents, that are privileged and confidential under Texas law, even when the media is seeking the information as part of discovery during a defamation action. Memorial Hospital-The Woodlands v. McCown, 927 S.W.2d 1 (Tex. 1996).

On the other hand, in City of Helen, Georgia v. White County News, 25 Media L. Rep. 1123 (Ga. Super. Ct. White County 1996), a Georgia court permitted the release of city employment records holding that "[t]he right of privacy . . . extends only to unnecessary public scrutiny . . . . It does not protect legitimate inquiry into the operation of a government institution and those employed by it."

In Illinois, despite the Juvenile Records Act, which prohibits the transmission of a minor's fingerprints or photographs to the adult division of the Department of Corrections, an Illinois court held that the plain language of the statute permits interested persons, in this case the Department of Professional Responsibility, to inspect juvenile records, and such right of inspection is not limited to delinquency records. In re K.D., 279 Ill. App. 3d 1020, 666 N.E.2d 29 (2d Dist. 1996).

3. Intrusion

According to the 1997-98 MEDIA PRIVACY SURVEY, currently 40 jurisdictions recognize a

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claim for intrusion, although the tort has not been applied in the media context in 19 of these jurisdictions. Additionally three jurisdictions have explicitly declined to recognize intrusion, in one jurisdiction a federal court has opined that the jurisdiction does not recognize the tort, while in Illinois conflicting authority exists as to whether intrusion is recognized.

In the past year, North Carolina has become the most recent jurisdiction to recognize the tort of intrusion. In a non-media case, Miller v. Brooks, 123 N.C. App. 20, 472 S.E.2d. 350 (1996), disc. rev. denied, 345 N.C. 344 (1997), a state appellate court reversed the trial court’s granting of summary judgment for the defendant, concluding that invading a person’s home, surreptitiously videotaping their bedroom, and opening their mail are wrongs protected by the intrusion tort.

In Oregon, the state supreme court expressly adopted the definition of intrusion articulated in the Restatement (Second) of Torts § 652B. See Mauri v. Smith, 324 Or. 476, 929 P.2d 307 (1996).


Eavesdropping/Hidden Cameras/Other Forms of Surveillance

According to the 1997-98 MEDIA PRIVACY SURVEY, currently 52 jurisdictions have eavesdropping statutes. In 40 of these jurisdictions, however, it is not a violation of the statute if


26 Minnesota, New York, and Virginia.

27 Eighth Circuit opinion interpreting North Dakota law.

28 Only South Carolina and Vermont lack eavesdropping statutes. South Carolina does have a “peeping Tom” statute which prohibits eavesdropping on another’s property, but it is unclear if the statute would apply to electronic eavesdropping. Mississippi has a very narrowly drafted eavesdropping statute that is limited to criminal controlled substances investigations. See 1997-98 MEDIA PRIVACY AND RELATED LAW SURVEY, at 786.

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one party gives consent to the recording.\textsuperscript{29} The other 12 jurisdictions require the consent of all parties, at least in delineated circumstances.\textsuperscript{30} For a discussion of developments concerning federal eavesdropping law see "Federal Eavesdropping Law," \textit{infra}.

In addition to the extensively reported case of \textit{Food Lion, Inc. v. Capital Cities/ABC, Inc.}, (Case No. 6:92CV0592, M.D.N.C) (see "Related Newsgathering Torts" \textit{infra}, and "Recent Developments in Newsgathering" by Steve Perry, on p. 3A, for further discussion of this case), in which a jury awarded the plaintiff over $5.5 million in damages for an undercover report on food handling practices,\textsuperscript{31} a number of high profile and important media intrusion cases dealing with newsgathering techniques were decided in the last year.

In \textit{Wolfson v. Lewis}, 924 F. Supp. 1413 (E.D. Pa. 1996), a federal judge in Pennsylvania enjoined reporters' attempts to obtain information regarding the lifestyles of highly paid executives at U.S. Healthcare. \textit{Inside Edition} was reporting on U.S. Healthcare's decision to cut employee benefits despite evidence that the company's top executives were living extravagant lifestyles and being paid exorbitant salaries. In an effort to gather information regarding the executives' lifestyles, the reporters utilized high-powered camera lenses and shotgun microphones to briefly monitor the plaintiff's Florida home from a boat off-shore. The crew had previously staked out plaintiff's home and office from the street. Relying heavily on \textit{Gallarla v. Orass}, 353 F. Supp. 196 (S.D.N.Y. 1972), aff'd in part and rev'd in part, 487 F.2d 986 (2d Cir. 1973), the court found that "conduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of invasion of privacy based on intrusion upon seclusion." An appeal to the U.S. Court of Appeals for the Third circuit was withdrawn after a settlement was reached.

Showing similar hostility to newsgathering techniques that involve covert microphones, the Michigan Court of Appeals overturned a jury verdict in favor of the defendant in \textit{Dickerson v. Sally Jesy Raphael}, 1997 Mich. App. Lexis 87 (1997). In \textit{Dickerson}, the plaintiff's daughter, who had been outfitted by the show's producers with a microphone that transmitted to a nearby van, confronted her mother about her involvement in the Church of Scientology and its effects on their family. The conversation was taped and several portions were aired on the defendant's television program. The mother brought several claims, including invasion of privacy and violation of the Michigan eavesdropping statutes. At trial, the defendants argued that the First Amendment protected the children's right to relate the effect of Scientology on their family, and the right of the media to


\textsuperscript{31} That verdict was later remitted to $316,402.
provide a forum — the jury returned an almost immediate defense verdict on all counts. The Court of Appeals reversed and granted a directed verdict for the mother. Their decision rested on the differentiation between a participant taping a conversation unassisted (legal) and a participant wearing a microphone which relayed the conversation to a non-participant for taping. The court concluded that the latter is prohibited by Michigan eavesdropping statutes.

The California Supreme Court has taken review of two newsgathering cases. In Sanders v. American Broadcasting Companies, Inc., 52 Cal. App. 4th 543, 549, 60 Cal. Rptr. 2d 595, 598, 25 Media L. Rep. 1343 (1997), the court will decide whether or not an “invasion of privacy by photography” claim may be maintained, despite a jury finding that the plaintiff had no reasonable expectation of privacy, while in Shulman v. Group W Productions, Inc., 51 Cal. App. 4th 850, 59 Cal. Rptr. 2d 434 (1997), petition for review granted, 97 Daily Journal D.A.R. 437 (April 2, 1997), the court will address whether or not an accident victim has a reasonable expectation of privacy while being transported to the hospital by helicopter. Pending the decision in Shulman, the United States Court of Appeals for the Ninth Circuit has placed on hold a motion for rehearing in DeTeresa v. American Broadcasting Cos., Inc., 1997 U.S. LEXIS 19401, 25 Media L. Rep. 2038 (9th Cir. 1997), where the plaintiff was surreptitiously taped while talking to a reporter on the front steps of her house. The appellate court had affirmed a grant of summary judgment for ABC. For a more detailed discussion of Dickerson, Sanders, Shulman, and DeTeresa, see “Recent Developments in Newsgathering” by Steve Perry, on p. 3A.

Courts in Puerto Rico and Maryland also ruled on media intrusion claims related to unsolicited photography or video surveillance. In both instances the courts found that the lack of an expectation of privacy defeated the claims. See Mojica Escobar v. El Vocero de Puerto Rico, 926 F. Supp. 30 (D.P.R. 1996) (dismissing allegations that the taking of a photograph of a Senator's home from a public street, where no persons are present in the photo, constituted a violation of privacy); Solomon v. National Enquirer, Inc., 24 Media L. Rep. 2269 (D. Md. 1996) (plaintiff did not have an intrusion claim when photographed in her bedroom window from the street below, making no effort to “conceal herself from uninvited eyes”).

Related Newsgathering Torts

Plaintiffs continue to attempt, with varying degrees of success, to seek recovery by suing over the way in which the media gathered information rather than the matter that was eventually published. In Food Lion, Inc. v. Capital Cities/ABC, Inc., Case No. 6:92CV00692 (M.D.N.C 1997), for example, the jury awarded the plaintiff $1,402 in compensatory damages and over $5,500,000 in punitive damages on theories of fraud, trespass and breach of loyalty/duty for an undercover news story. Under all three theories, the court limited compensatory damages to non-reputational damages, principally losses associated with the hiring and training of the ABC producers who went undercover at Food Lion.

Obtaining jobs with falsified resumes, the ABC producers videotaped a number of questionable food handling practices utilizing hidden cameras. On post-trial motion the court gave
Food Lion the option to accept a remittitur of punitive damages to $315,000 or hold a retrial on the issue. Food Lion accepted the remittitur, while ABC has filed an appeal with the United States Court of Appeals for the Fourth Circuit. See “Recent Developments in Newsgathering” by Steve Perry, on p. 3A.

In *Homsy v. King World Entertainment, Inc.*, 1997 WL 52154 (Tex. App. — Houston [1st Dist.] 1997, n.w.h.), the Texas Court of Appeals affirmed the granting of summary judgment in favor of a media defendant on plaintiff’s fraud claims. The suit arose from a fraudulently obtained interview with Homsy, then chief of medical research at Promotus, a Swiss medical implant manufacturer. An assistant producer with “American Journal” had misrepresented himself as an investor seeking information regarding medical prosthetics; in actuality, the show wanted to interview Homsy regarding a number of medical implants (now banned in the U.S.) which he had invented. The court affirmed summary judgment for the defendant, holding that under Texas law “[i]njury for fraud must be established apart from damages suffered as a result of another act by the defendant,” and concluding that, “[a]ppellant has not established any injury directly traceable to the alleged fraud, nor has he established any injury separate and apart from his libel claim. In both cases, the injury was damage to his reputation.”

*Trespass*

Idaho recently passed I.C. §§ 18-7008 and 18-7011, defining acts which constitute trespass and criminal trespass respectively. Violation of either is a misdemeanor. Of interest to the media are three particular provisions: wilfully opening, tearing down or otherwise destroying and willfully leaving open any fence (I.C. §18-7008(6), §18-7011(1)); entering property bearing “No trespassing” signs without permission of the owner (I.C. §18-7008(9), §18-7011(1)); and willfully driving a motor vehicle onto, into, upon, over or through any private land actively devoted to cultivated crops without the consent of the owner of the land (I.C. §18-7011(2)).

In *Tumey v. State*, 922 P.2d 283 (Alaska Ct. App. 1996), the court held that government cannot generally bar an individual from a public facility for an indefinite period of time. The court engaged in an excellent discussion of constitutional aspects of trespass law (in the context of a protestors arrested for disrupting court business). The opinion noted that courts generally have not found a trespass unless the perpetrator ignores or refuses a *contemporaneous* request to leave. Owners of private property may sue for trespass based on a prior request.

In North Dakota, false imprisonment charges brought by an anti-abortion protester whose ads were rejected by a student newspaper were dismissed on a motion for summary judgment. The protester sued the editor of the paper after being reported to campus police for trespassing in the newspaper’s offices. *Wishnatsky v. Bergquist*, 550 N.W.2d 394 (N.D.), cert. denied, 117 S. Ct. 240 (1996). In a related action, *Wishnatsky v. Huey*, N.W.2d __, 1997 WL 81137 (N.D. Feb. 27, 1997), the court held that “disorderly conduct” is not a constitutionally protected activity.
Ride-Alongs

In Hagler v. Philadelphia Newspapers, Inc., C.A. 96-2154 (E.D. Pa. 1996), two reporters and a photographer for the Philadelphia Daily News accepted the police’s invitation to enter a woman’s home during the execution of a search warrant. Several photographs of the home’s occupants were subsequently published in the paper including photographs of the woman’s two children in their underpants. While the police officers’ motion to dismiss was granted in part, 1996 WL 408605, 24 Media L. Rep. 2332 (E.D. Pa. 1996), no action has been taken on the plaintiff’s trespass, intrusion upon seclusion, appropriation of likeness, or unjust enrichment claims against the newspaper.

A number of other courts have expressed hostility to ‘ride-alongs,’ but the decisions differed on the consequences. The California Court of Appeal, in Shulman v. Group W Productions, Inc., 51 Cal. App. 4th 850, 59 Cal. Rptr. 2d 434 (1997), petition for review granted, 97 Daily Journal D.A.R. 437 (April 2, 1997) held that accident victims had no reasonable expectation of privacy during a rescue operation off a public highway but did have a reasonable expectation of privacy during helicopter transport to the hospital. The state supreme court has agreed to hear the case. See “Recent Developments in Newsgathering” by Steve Perry, on p. 3A.

In Montana, a state district criminal court expressed disapproval of a “ride-along” but chose to pursue a different remedy. The court ruled that evidence obtained in a police search was inadmissible in the criminal prosecution because the police allowed a newspaper reporter and photographer to enter the accused’s home. The state’s actions were held to not only violate the accused's right to privacy, but also the constitutional provisions against unreasonable searches. State v. Baugus, (Mont., slip op. 1996).

The Fourth Circuit, in Wilson v. Lane, 1997 WL 169900 (4th Cir. Apr. 11, 1997), reversed an order denying summary judgment to several police officers who had allowed two still photographers to accompany them into a private residence to record the execution of an arrest warrant. The court observed that the unconstitutionality of such actions at the time of the event was not clear and thus the officers were entitled to qualified immunity.

The Sixth Circuit held that the presence of a news reporter and camera crew did not violate the constitutional rights of the plaintiff whose home and animal shelter were being searched. Key to the finding was the specificity of the search warrant — it explicitly authorized “videotaping and photographing” during the execution of the warrant. Stack v. Killian, 96 F.3d 159 (6th Cir. 1996).

Stalking/Harassment

While the trend to criminalize “stalking” through statutory provisions has continued, there do not appear to be any reported cases involving a media defendant. Notably, however, Texas has repealed a provision in its criminal stalking statute which provided an affirmative defense to prosecution if the actor was engaged in activity in support of constitutionally or statutorily protected
rights. The new stalking law (Texas Penal Code Ann. § 42.072 (West Supp. 1997)) does not specify such a defense.

A couple of other jurisdictions have taken statutory action related to harassment and stalking. Idaho has enacted an anti-stalking statute (I.C. § 18-7905) that criminalizes the willful, malicious, and repeated following or harassment of an individual. Constitutionally protected activity is not included within the meaning of the statute. The Virgin Islands has also recently passed an anti-stalking statute, 14 V.I.C. § 2072(a) (Supp. 1995).

Alaska, Connecticut, and Alaska courts have all held that their stalking statutes are constitutional. See Petersen v. State, 930 P.2d 414 (Alaska Ct. App. 1996) (court recognized potential due process and overbreadth problems in the definition of stalking but refused to invalidate the Alaska statute, preferring instead to confront those problems on a case by case basis, if and when they arise); State v. Culmo, 43 Conn. Supp. 46 (May 3, 1994), (Connecticut’s anti-stalking statute constitutional despite the defendant’s argument of overbreadth); State v. Helfrich, 276 Mont. 452, 922 P.2d 1159 (Mont. 1996) (affirming constitutionality of anti-stalking statute while simultaneously finding criminal defamation statute unconstitutional as it does not provide the defense of truth). In addition, the Minnesota Supreme Court has held that Minnesota’s anti-stalking statute (Minn. Stat. § 609.749 subd. 1) is a specific intent (to harass) crime. State v. Orsello, 554 N.W.2d 70 (Minn. 1996).

Harassing telephone calls garnered some attention in 1996 with courts divided on whether or not they represent actionable claims. In Alaska, nonconsensual telephone contact may qualify for criminal punishment under its anti-stalking statute. Petersen v. State, 930 P.2d 414, 430-431 (Alaska App. 1996). In Louisiana, harassing calls are statutorily illegal and thus per se actionable. Zellinger v. Amalgamated Clothing, 683 So. 2d 726 (La. App. 2d Cir. 1996). In Texas, courts have both dismissed and approved actions related to harassing calls. Compare Crocker v. Mallinckrodt Medical, Inc., 1996 WL 498188 (S.D. Tex. 1996) (dismissing allegations of unwanted telephone calls for failure to state a claim as plaintiff’s family, not plaintiff, was the recipient of the calls) with Carr v. Mobile Video Tapes, Inc., 893 S.W.2d 613 (Tex. App.— Corpus Christi 1994, no writ) (holding that harassing telephone calls are actionable claims). Finally, Idaho recently passed a statute making the use of a telephone to transmit false statements with the “intent to terrify, intimidate, harass or annoy” a misdemeanor; a second conviction results in a felony. See I.C. §18-6711. Notably, “[c]onstitutionally protected activity is not included within the meaning of [the course of conduct].” I.C. §7905(d)(2).

4. Misappropriation/Right of Publicity

According to the 1997–98 Media Privacy Survey, 43 jurisdictions currently recognize the tort of misappropriation.32 One jurisdiction has rejected the tort entirely,33 and in 10 jurisdictions the
courts have not yet had the opportunity to rule on the issue. 34

The protection derives from statute in 14 jurisdictions, in 9 of which the statute exists in addition to the protections provided at common law, 35 while in the remaining 5 jurisdictions the statute is the sole source for protection against misappropriation. 36

A federal district court in Minnesota stated that "[a]lthough the Minnesota state courts have not explicitly recognized (or rejected) [a misappropriation of publicity rights cause of action], the federal courts in this circuit and district have concluded that it exists in Minnesota." Hillerich & Bradsy Co. v. Christian Brothers, Inc., 943 F. Supp. 1136 (D. Minn. 1996). As a result, the defendant was barred from selling hockey equipment that had been imprinted, without authorization, with the name of hockey player Mark Messier. The opinion does not mention Ritchie v. Paramount Pictures Corp., 544 N.W.2d 21 (Minn. 1996), a case decided less than nine months earlier that seems to contradict the federal court's holding.

A California appeals court held that the federal copyright act preempts commercial misappropriation claims to the extent that the subject of a claim comes within the subject matter or scope of copyright protection and the right asserted is equivalent to the exclusive rights belonging to the copyright holder. See Fleet v. CBS, Inc., 50 Cal. App. 4th 1911, 58 Cal. Rptr. 2d 645 (1996) (§ 3344 claim to prevent use of actors' dramatic performances captured on film preempted because performances were copyrightable and claim involved rights of reproduction and display of film, which belonged exclusively to copyright holder).

In Shulman v. Group W. Productions, Inc., 51 Cal. App. 4th 850, 891, 59 Cal. Rptr. 2d 434, 25 Media L. Rep. 1289 (1996), review granted, 97 Daily Journal D.A.R. 4437 (Cal. Supr. Ct. Apr. 2, 1997), a California appeals court found that if a plaintiff alleges the unauthorized use of his or her image in a "photograph," which includes videotape and television transmissions, then the plaintiff must prove that he or she is "readily identifiable" in order to state a claim under the statute. Cal. Civ. Code § 3344(b). In Shulman, the court found that the one of the plaintiffs was not readily identifiable in the film because his voice was not heard and the film showed him only briefly and from a distance.

The U.S. Court of Appeals for the Tenth Circuit held that the First Amendment right to

33 Minnesota. Misappropriation has been recognized, however, by federal courts in Minnesota.

34 Alaska (no modern cases have ruled on the issue), Guam, Iowa, Montana, New Hampshire, North Dakota (no direct cases but addressed in dicta), Puerto Rico, South Dakota, Washington, and Wyoming.

35 California, Florida, Indiana, Nevada, Oklahoma, Tennessee, Texas (statute appears to only to apply to the misappropriation of the identities of the deceased), Utah, and Wisconsin.

36 Massachusetts, Nebraska, New York, Rhode Island, and Virginia.
parody celebrity major league baseball players outweighed the players association’s common law and statutory rights of publicity. *Cartoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 24 Media L. Rep. 2281 (10th Cir. 1996). The decision was a declaratory judgment in which the court recognized that “parody trading cards infringe upon MLBPA’s property rights…” and that “[w]ithout First Amendment protection, Cartoons’ trading cards and their irreverent commentary on the national pastime cannot be freely distributed to the public.” The court expressly disagreed with the decision in *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992), (which let stand a right of publicity claim for a parody contained in an advertisement because the advertisement was commercial speech), but held that the parody trading cards involved here did not constitute commercial speech. The court concluded, “[t]he justifications for the right of publicity are not nearly as compelling as those offered in other forms of intellectual property, and are particularly unpersuasive in the case of celebrity parodies. The cards, on the other hand, are an important form of entertainment and social commentary that deserve First Amendment protection.”

A federal district court in California found that the distributor of videos of old movies had a constitutional right to use a drawing of an actress who appeared in those movies to advertise a catalog containing the entire line of the distributor’s products because the drawing was used truthfully to demonstrate the quality and content of the distributor’s products. *Page v. Something Weird Video*, 908 F. Supp. 714 (C.D. Cal. 1996). The court also held that California law applied in a misappropriation case where the likeness of a current California resident was being used commercially, even though it had been made years before in New York, when plaintiff was a New York resident.

In *Allison v. Vintage Sports Plaques*, 1996 U.S. Dist. LEXIS 19783 (N.D. Ala. Jul. 29, 1996), the district court granted summary judgment to defendant on misappropriation of identity and conspiracy claims asserted by baseball player Orel Hershisher and the widow of race car driver Clifford Allison. Plaintiffs had sued to enjoin defendant’s distribution of wall plaques and clocks displaying the athletes’ playing cards. The court based its decision on the copyright doctrine of “first sale,” which provides that a copyright owner’s distribution right may be exercised with respect to the initial sale of copies of a work, but may not be invoked so as to prevent or restrict the resale or other further transfer of possession of the copies (i.e., it is legal for the legitimate buyer of a particular new book to trade or re-sell it). Defendant successfully argued that, because it legitimately obtained the playing cards from plaintiffs’ own licensees, the manufacturers of the cards, defendant had the right to re-sell the cards after incorporating them into its merchandise. The court agreed, holding that incorporating plaintiffs’ cards into a “Limited Edition” plaque or clock merely re-displayed the cards and did not void the first sale doctrine.

In Texas, a district court held that consent to the use of one’s name or likeness bars recovery for misappropriation. *King v. Ames*, 1997 WL 86416 (N.D. Tex. 1997) (but denying defendants’ motion for summary judgment on plaintiff’s claim that defendants commercially exploited the name and likeness of her father, blues musician Freddy King, beyond the scope of the parties’ agreement).

(E.D. Pa. July 19, 1996), the court held that in order to state a cause of action for appropriation of a plaintiff's name or likeness, the plaintiff must show that one or more of the values of reputation, prestige, social or commercial standing, public interest or other value of the plaintiff's name or likeness has been appropriated to the defendant's own use or benefit. The court then dismissed the misappropriation claim stating that the plaintiffs had failed to allege the value that the defendants appropriated from the likeness of a police officer, whose posed picture appeared on a compact disc cover.

In New York, a state trial court held that the state's statutory law prohibits the purely commercial misappropriation of a person's likeness. In Mason v. Hirschfeld, N.Y.L.J., Mar. 3, 1997, at 27 (N.Y. Sup. Ct.), the court held that the use of Jackie Mason's name in an advertisement for a charitable event was actionable, though the defendant did not stand to gain economically.

Courts in other states clarified the substantive elements of a cause of action for misappropriation. See Elvis Presley Enterp., Inc. v. Capece, 950 F. Supp. 783 (S.D. Tex. 1996) (to state a cause of action for misappropriation in Texas, the plaintiff must show, among other elements, that his name or likeness has been appropriated for the value associated with it, and not in an incidental manner or for a newsworthy purpose); Simpson v. Central Maine Motors, Inc., 669 A.2d 1324 (Me. 1996) (car dealership was not liable for telephone company's mistaken use of plaintiff's likeness in dealership's advertisement because dealership was not responsible for the alleged misappropriation).

In the Seventh Circuit, where the right of publicity was defined in Douglass v. Hustler Magazine, 769 F.2d 1128 (7th Cir. 1985) as a “right to prevent others from using one's name or picture for commercial purposes without consent,” a district court in Illinois held that “the plaintiff claiming the infringement of this right must show that, prior to the defendant's use, the plaintiff's name, likeness, or persona had commercial value . . . . Moreover, the plaintiff alleging unauthorized use of his likeness must show that the likeness was recognizable.” Pesina v. Midway Mfg. Co., 948 F. Supp. 40 (N.D. Ill. 1996).

A number of courts also ruled on the types of damages that plaintiffs could recover for misappropriation. See Robles v. Deutsch Advertising, Inc., 1997 WL 160491 (S.D.N.Y. 1997) (holding that defendants did not knowingly use plaintiff's likeness without consent and that plaintiff was not entitled to an award of punitive damages on his claims under § 51 of the New York Civil Rights Law); Sherman v. Bell Atlantic, 1996 WL 492985 (S.D.N.Y. 1996) (“[e]xemplary damages . . . differ from common-law punitive damages in that 'neither malice nor recklessness need be shown'; it is enough to show that defendant ‘knowingly used’ plaintiff’s likeness”); Polich v. Rafferty, 1997 WL 89152 (Mass. Super. 1997) (emotional distress damages may be awarded under Massachusetts General Law c. 214, § 3A , a statute that protects against the unauthorized use of the name, portrait or picture of a person for the purposes of trade).
5. **Intentional Infliction of Emotional Distress**

According to the 1997-98 MEDIA PRIVACY SURVEY, all 54 jurisdictions recognize the tort of intentional infliction of emotional distress, and 34 have case law specifically dealing with the tort in the media context. In the remaining 20 jurisdictions, the courts have yet to address the application of the tort to the media.

In suits against the media, most of the recent cases were resolved in favor of the defendant. Courts have been reluctant to allow these claims to stand without meeting the constitutional and common law requirements of defamation. See *Red Apple II, Inc. v. Hartford Courant*, 1996 WL 40952 (Conn. Super. 1996) (holding that an emotional distress claim was “derivative” of a defamation claim against a newspaper for its statement that health inspectors had found evidence of rodent infestation in the plaintiff’s restaurant. Because the alleged defamatory remark was a “fair and accurate report of a public record,” the court granted summary judgment on both claims); *Bowman v. Worcester Telegram and Gazette*, 6 Mass. L. Rptr. 324 (Mass. Super 1997) (publication of a letter to the editor that is neither false nor defamatory is not outrageous and therefore does not support an emotional distress claim); *Richette v. Philadelphia Magazine*, 24 Media L. Rep. 2425 (C.P. Phila. 1996) (publication of magazine article which contained unflattering descriptions of the plaintiff, a judge, did not constitute outrageous conduct); also see *Roach v. Stern*, N.Y.L.J., Dec. 16, 1996, at 31, col. 2 (Sup. Ct. Kings Co. 1996) (suit dismissed against radio host for rattling box containing remains of plaintiff’s deceased sister during broadcast).

Several courts reaffirmed both constitutional and common law privileges and defenses to claims of intentional infliction of emotional distress. In Texas, two state appellate decisions reaffirmed the requirement that a public official or figure asserting a claim for intentional infliction of emotional distress based upon a defamatory publication must prove actual malice. See *Rogers v. Cassidy*, 1997 WL 205355 (Tex. App. Corpus Christi 1997, n.w.h); *Hailey v. KTBS, Inc.*, 935 S.W.2d 857 (Tex. App. Texarkana 1996, no writ). Another Texas Court of Appeals decision found that a newspaper and its reporter could not be liable for intentional infliction of emotional distress for “acting within their legal rights when they published the names of the persons arrested for specific offenses.” *Hogan v. The Hearst Corp.*, 1997 WL 184108 (Tex. App. San Antonio 1997, n.w.h.).

In several recent decisions, state courts clarified the functional relationship between the tort of intentional infliction of emotional distress and defamation. See *Bass v. Hendrix*, 931 F. Supp. 523 (S.D. Tex. 1996) (holding that plaintiff is precluded from recovering “damages for the publication

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37 Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Kentucky (intermediate), Louisiana, Maine (federal), Maryland, Massachusetts, Michigan (intermediate), Minnesota, Mississippi (federal), Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma (intermediate), Pennsylvania, Rhode Island (federal), South Carolina, Texas, Utah, Virginia, Washington, and Wyoming.

38 Alaska, Delaware, Guam, Hawaii, Idaho, Indiana, Iowa, Kansas, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Puerto Rico, South Dakota, Tennessee, Vermont, Virgin Islands, West Virginia, and Wisconsin.
of a statement under a theory of intentional infliction of emotional distress when the plaintiff has failed to establish falsity of the statement"); Sullivan v. CBS Inc., No. 96-CA-197 (W.D. Tex. 1996) (adopting the Magistrate Judge’s opinion which concluded, among other things, that plaintiff was required to show falsity of the broadcast in order to recover damages for intentional infliction of emotional distress); Jahannes v. Mitchell, 220 Ga. App. 102, 469 S.E.2d 225 (stating that a claim for intentional infliction of emotional distress premised on alleged slanderous statements was not available where one-year statute of limitations for a claim of defamation had run), cert. denied, 220 Ga. App. 914 (1996); Hernandes v. Hayes, 931 S.W.2d 648 (Tex. App. San Antonio 1996, writ denied) (the same First Amendment protections afforded defendants in libel actions also protect defendants in actions for intentional infliction of emotional distress).

The California Court of Appeals reversed a lower court’s temporary restraining order and a preliminary injunction barring a media source from disseminating further information to the media about a well-known actress based upon substantive allegations including intentional infliction of emotional distress; the court struck down the injunction as an unconstitutional prior restraint. Gilbert v. National Enquirer, 43 Cal. App. 4th 1135, 51 Cal. Rptr. 2d 91, 24 Media L. Rep. 2377 (1996).

Finally, two courts in California held that claims for intentional infliction of emotional distress are subject to a special motion to strike under California’s anti-SLAPP statute, Code of Civil Procedure section 416.25. See Bradbury v. Superior Court, 49 Cal. App. 4th 1108, 57 Cal. Rptr. 207 (1996); Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (1996); For a discussion of other cases anti-SLAPP cases see “Anti-SLAPP Statutes” infra.

6. Prima Facie Tort

While relatively unutilized (and often rejected), a number of states have had the opportunity to comment on the theory of prima facie tort. Notably, none of these cases involved media defendants or relevant fact patterns.

In New Jersey, however, a superior court mentioned in dicta that the court had “no difficulty with the theoretical concept, expressed in various ways by modern jurisprudence, that willful or malicious harms of any kind are actionable unless justified,” and that therefore, had the claim not been precluded by New Jersey’s Conscientious Employee Protection Act, the trial court’s decision to allow the plaintiff to bring a prima facie tort cause of action may have been correct. Mehlman v. Mobil Oil Corp., 291 N.J. Super. 98, 676 A.2d 1143 (N.J. Super. A.D.), certif. granted, 147 N.J. 264 (1996).

The Utah Supreme Court observed that there is no precedent in Utah law for prima facie tort. The court continued to note that even if the state were to recognize the tort, plaintiff's prima facie tort claim would fail because it is premised upon the defendants' allegedly unlawful activity, while case law from jurisdictions recognizing prima facie tort suggest that the elements are "(1) an intentional lawful act done by a party with the intent to cause injury to another, (2) injury to such other, and (3) an absence of sufficient justification for the act charged." Doit, Inc. v. Touche, Ross & Co., 926 P.2d 835 (Utah 1996), quoting, Porter v. Crawford & Co., 611 S.W.2d 265 (Mo. Ct. App. 1980).

Both New York and Missouri have refused the application of prima facie tort where an existing theory of tort is more applicable. See Tasso v. Platinum Guild Int'l, No. 94 Civ. 8288, 1997 WL 16066 (S.D.N.Y. 1997) (holding that "once a traditional tort is established, the cause of action for prima facie tort disappears"); Chicago Truck Drivers v. Brotherhood Labor Leasing, 950 F. Supp. 1454 (E.D. Mo. 1996) (claims that fit into an existing theory of tort should not be maintained under the theory of prima facie tort).

7. Negligent Infliction of Emotional Distress

According to the 1997-98 MEDIA PRIVACY SURVEY, 45 jurisdictions currently recognize a cause of action for negligent infliction of emotional distress. In 15 of these jurisdictions the tort has been applied in the media context, in 29 jurisdictions there have been no cases involving the media, and one jurisdiction has expressly rejected its application in the media context. Seven jurisdictions have expressly rejected the tort in all cases and in two jurisdictions there are no cases reported.

Reversing previous interpretation, an appellate court in Georgia held that Georgia no longer recognizes a separate tort of negligent infliction of emotional distress. Ford v. Whipple, 1997 Ga. App. LEXIS 180 (Feb. 13, 1997). The court added, however, that a plaintiff still may recover


42 Michigan.

43 Alabama, Arkansas, Georgia, Iowa, Kentucky, Maryland, and Texas.

44 Kansas and South Carolina.
damages for emotional injury as part of an action for negligence.

In *Rosa v. Telemundo CATV, Inc.*, 907 F. Supp. 39 (D.P.R. 1995), however, a federal district court in Puerto Rico let stand a jury verdict awarding a plaintiff $10,000 damages for pain and suffering for a "practical joke" staged, but never broadcast, by a television show. Hidden cameras taped the plaintiffs' reaction as an actor dressed as ambulance driver delivered a fully bandaged "patient" to their doorstep and identified the "patient" as the plaintiffs' son. One plaintiff was immediately taken to a hospital with chest pains, and a pacemaker had to be installed.

In cases against the media, plaintiffs have had difficulty recovering for negligent infliction of emotional distress and several cases were recently dismissed. In *Gillyard v. New York City*, N.Y.L.J., May 7, 1996 at 25, col. 5 (Sup. Ct. N.Y. Co. 1996), the court dismissed a claim against a news reporter for a "surprising and intrusive" appearance at a crime victim's residence to record the victim's responses to questions. The court stated that "[t]he media owes the public a duty not to abuse the right of a free press but to utilize it with reason and dignity . . . . [But defendant's acts of surprisingly and intrusively interviewing crime victim] do not rise to the level of unreasonable abuse of the right of a free press or unreasonable endangerment of plaintiffs' physical safety." See also *Glendora v. Marshall*, 947 F. Supp. 707 (S.D.N.Y. 1996) (claim for alteration of a public-access cable host's programming schedule dismissed); *Roach v. Stern*, N.Y.L.J., Dec. 16, 1996, at 31, col. 2 (Sup. Ct. Kings Co. 1996) (plaintiff unsuccessfully sued broadcasters for negligent infliction of emotional distress stemming from a radio host's irreverent handling of a box containing the cremated remains of plaintiff's deceased sister); *Richette v. Philadelphia Magazine*, 24 Media L. Rep. 2428 (C.P. Phila. 1996) (negligent infliction of emotional distress claim against a magazine based on an article it published which contained unflattering and embarrassing remarks about the plaintiff, a judge, was dismissed based upon the finding that the plaintiff did not allege physical harm or injury in her complaint).

Courts in Connecticut reaffirmed that plaintiffs could support a case for negligent infliction of emotional distress on a theory of negligent conduct by the defendant in handling and publishing of information. *Balzac v. Stamford Hospital*, 1996 WL 222406 (Conn. Super. 1996) (holding that the plaintiff could assert a claim of negligent infliction of emotional distress for a hospital employee's unauthorized disclosure of confidential HIV-related information); *Raub v. Dream Factory, Inc.*, 1996 WL 364814 (Conn. Super. 1996) (stating that the plaintiff adequately alleged negligent infliction of emotional distress where former employer allegedly published a press release via national computer on-line services that the plaintiff was terminated for "willful misconduct or gross incompetence" and that the plaintiff was "subject to a restrictive covenant prohibiting competitive activities for two years").

States still differ on whether a plaintiff may recover for negligent infliction of emotional distress if the distress did not result in subsequent bodily injury and plaintiff was not at risk of harm from physical impact. See *Carroll v. Rock*, 220 Ga. App. 260, 469 S.E.2d 391 (1996) (physical injury required to recover for negligent infliction of emotional distress); *Ford v. Whipple*, 1997 Ga. App. LEXIS 180 (Feb. 13, 1997) (defendant's conduct must result in actual bodily contact to the plaintiff);
Geiger v. E.I. Du Pont Nemours & Co., Inc., 96 Civ. 2757 (LAP), 1997 U.S. Dist. LEXIS 2059 (citations omitted) (S.D.N.Y. 1997) (negligent infliction "must generally be premised upon conduct that unreasonably endangers plaintiff's physical safety"); Kraszewski v. Baptist Medical Center of Oklahoma, Inc., 916 P.2d 241, 246, 67 Okla B.J. 1985 (Okla. 1996) (general damages are recoverable for negligent infliction only where there is evidence of physical injury to the plaintiff, and the alleged "wrong" must be to the plaintiff personally; the plaintiff must be a "direct victim" rather than a "bystander"); Card v. Blakeslee, _ P.2d _ (Colo. App. No. 95CA1536, August, 22, 1996) (affirming the dismissal of a claim for negligent infliction of emotional distress based on an alleged defamatory publication on the ground that the plaintiff failed to plead or prove any evidence that she was subjected to an unreasonable risk of bodily harm); Lickteig v. Alderson, Ondov, Leonard & Sween, P.A., 556 N.W.2d 557 (Minn. 1996) (reaffirming that state's understanding that negligent infliction of emotional distress is not viable without an underlying independent violation of the plaintiff's rights, if there is no manifestation of physical injury).

In contrast, in Francis v. Health Care Capital, Inc., 1996 U.S. Dist. LEXIS 14605 (E.D. La. Sep. 30, 1996) a Louisiana federal court held that in the absence of physical injury or illness a claim for negligent infliction of emotional distress could still be stated in a variety of "special circumstances," including severe mental disturbance, the plaintiff being in fear for his personal safety or immediately concerned about his safety, and mental distress caused by property damage. See Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 672 A.2d 1190 (N.J. Super. A.D. 1996), aff'd as modified, 1997 WL 177552, _ A.2d _ (Apr. 15, 1997) (plaintiff must show that emotional distress is genuine and severe); Williamson v. Waldman, 291 N.J. Super. at 600, 677 A.2d at 1181 (N.J. Super. Law Div.), cert. granted, 147 N.J. 259, 686 A.2d 761 (1996) (plaintiff was not required to establish actual exposure but only "reasonable concern . . . [of] enhanced risk" in a case alleging negligent infliction based on a cleaning employee's fear of acquiring AIDS when receiving a puncture wound from medical waste). In an interesting employment decision in Massachusetts, a claim for negligent infliction of emotional distress caused by an employer's reading of an employee's e-mail survived summary judgment where the employer had no policy prohibiting employees from using e-mail for personal messages. Restuccia v. Burk Technology, 5 Mass. L. Rptr. 712 (Mass. Super. 1996)

8. Conspiracy

A federal district court in Massachusetts concluded that civil conspiracy "is recognized as a very limited cause of action in Massachusetts." Brown v. Armstrong, _ F. Supp. _, 1997 WL 112381 (D. Mass. 1997). In Brown, plaintiffs sued over defendants' production and distribution of instructional golf videotapes and a related infomercial. The Brown court went on to confirm that conspiracy requires a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means, and that the plaintiff must show that the defendants, acting in unison, had some particular power of coercion over plaintiff that they would not have had if acting independently. Finally, the court said that an unlawful or tortious act is a necessary requirement to a civil conspiracy claim.
In pleading a cause of action for conspiracy to defame in Pennsylvania, it is not necessary that the plaintiff set out the conspiracy with the same precision required to allege an action for defamation. In a case reported last year, however, the United States District Court for the Eastern District of Pennsylvania required parties pleading civil conspiracy to do so with specificity. *In Re Products Liability Litigation*, No. MDL 1014, 1996 WL 482977 (E.D. Pa. Aug. 22, 1996).

A district court in Illinois affirmed that Illinois recognizes a cause of action for conspiracy to commit media-related torts such as defamation and libel, but dismissed such a conspiracy claim for failure to meet the overt act requirement. *Kisser v. Coalition for Religious Freedom*, 1997 WL 83296 (N.D. Ill. 1997). To successfully state a conspiracy claim, the overt act must be "tortious or unlawful in character." The court held that the alleged act of defamation in question was not unlawful under defamation law because the statement was not published with actual malice.

In one case reported this year, the Court of Appeals for the Tenth Circuit affirmed the imposition of sanctions against plaintiff owners of a wilderness park who tried to amend their complaint to add an allegation that a television reporter conspired with state officials to broadcast the allegedly false report that bovine tuberculosis had been detected in elk at the plaintiffs' park. The circuit court affirmed the trial court's conclusion that plaintiffs had not conducted a sufficient legal or factual investigation to determine the adequacy of their claims. *Arbuckle Wilderness, Inc. v. KFOR TV, Inc.*, 1996 WL 29247, 24 Media L. Rep. 1702 (10th Cir. 1996).


While plaintiffs continue to assert 42 U.S.C. § 1983 claims against members of the media, these claims have met with little success. Most of the § 1983 claims reported this year arose out of media refusals to publish various material. See *Fyfe v. Canan*, 24 Media L. Rep. 2448 (M.D. Fla. 1996) (a newspaper did not violate § 1983 by refusing to run plaintiff prison inmate's personal advertisement, through which he hoped to communicate with his children, since plaintiff failed to demonstrate that newspaper conspired with government to deprive him of his constitutional rights, and since the newspaper had a First Amendment right to determine what it publishes); *Leeds v. Meltz*, 898 F. Supp. 146, 24 Media L. Rep. 1153 (E.D.N.Y. 1995), aff'd, 85 F.3d 51, 24 Media L. Rep. 1924 (2d Cir. 1996) (refusal by a state-sponsored law school newspaper to publish plaintiff's ads was not state action when there was complete lack of control over the paper by university officials); *Newman v. Associated Press*, 94 Civ. 3474, 1995 U.S. Dist. LEXIS 19588 (S.D.N.Y. July 28, 1995), aff'd, No. 95-7176, 1996 U.S. App. LEXIS 27141 (2d Cir. Oct. 15, 1996) (responding to the plaintiff's contention that the A.P. had violated § 1983 by failing to listen to plaintiff and publish her story, the court held that plaintiff did not have First Amendment right to require A.P. to listen to or disseminate her views).

On a related note, the United States Supreme Court has recently heard argument on the issue of whether a legally qualified, third-party candidate can demand to be included in a political debate sponsored by a state licensed, public television station. *Arkansas Educational Television Commission v. Forbes*, 96 F.3d 497, 24 Media L. Rep. 2295, cert. granted, 65 U.S.L.W. 3629 (U.S. 1996).
March 17, 1997) (No. 96-779). Forbes, a candidate for the Congressional seat in Arkansas' Third District in 1992, alleged 42 U.S.C. §§ 1981, 1983, and 1985 violations as well as First and Fourteenth Amendment violations following his exclusion from a televised debate sponsored by the public television station. While all Forbes' claims were initially dismissed by the United States District Court for the Western District of Arkansas, the United States Court of Appeals for the Eighth Circuit reversed the decision in part holding that Forbes “did allege a First Amendment violation well enough to survive a motion to dismiss.” Forbes v. Arkansas Educ. Television Communications Network Found., 22 F.3d 1615, 22 Media L. Rep. 1615 (8th Cir. 1994).

Despite the fact that on remand a jury found that Forbes was not excluded from the debate because of opposition to his views or because of political pressure and the district court found that the debate was a non-public forum, the Eighth Circuit reversed the case again finding that AETN’s reason for excluding Forbes — that he was not a “viable” candidate — was legally insufficient. The court found that the debate was a public forum and that while the decisions as to Forbes’ viability and exclusion from the debate were the types of determinations normally made by journalists and were made in good faith by the journalists at AETN, journalists employed by the government could not make those judgments because they were government employees. Argument was heard by the U.S. Supreme Court on October 8, 1997.

Further, a number of § 1983 claims against the media arose out of alleged interference with cable public access programming. See Glendora v. Hostetter, 916 F. Supp. 1339, 1341 (S.D.N.Y. 1996), aff’d, 104 F.3d 353 (2d Cir. 1996) (preliminary injunction denied because it was unlikely that a cable company’s decision to reduce plaintiff’s public access program dates occurred under the color of state law); Glendora v. Tele-Communications, Inc., 96 Civ. 4270, 1996 U.S. Dist. LEXIS 18650, at *6 (S.D.N.Y. Dec. 12, 1996) (private entertainment company responsible for audio lapse on plaintiff’s public access program not state actor); Glendora v. Marshall, 947 F. Supp. 707, 712 (S.D.N.Y. 1996) (private entertainment company and affiliated private persons cannot be regarded as state actors under either a “state function” or “symbiotic relationship” analysis).

A district court in Georgia dismissed a § 1983 claim against a television station in which plaintiff alleged that the television station had violated his civil rights by reporting a sheriff’s allegedly false statement to the press that the plaintiff had tested positive for HIV. The court held that the plaintiff had failed to allege that the television station had acted under the color of state law. Allison v. Barrett, 25 Media L. Rep. 1275 (N.D. Ga. 1996),

10. Interference With Contract/Business Relations

The elements of interference with contract vary from state to state. Plaintiffs have had no success in claims against the media for interference with contract in recent cases, and courts remain protective of media interests. In Kumaran v. Brotman, 24 Media L. Rep. 2339 (1996), for example, an Illinois court granted summary judgment in favor of the defendant newspaper in a defamation action by a plaintiff who claimed that the newspaper’s articles about him ruined his chances of future employment. The court found that the plaintiff failed to show that he had a reasonable expectancy of
receiving a job offer.

See Bularz v. Prudential Ins. Co., 93 F.3d 372 (7th Cir. 1996) (claim for tortious interference with contract under Wisconsin law failed because the alleged defamation that interfered with the plaintiff’s contractual relationship with a third party was never actually made); Collard v. Smith Newspapers, Inc., 915 F. Supp. 805 (S.D. W. Va. 1996) (claim for tortious interference with contract brought by terminated managing editor of newspaper against newspaper’s management company was dismissed because managing company was responsible for the welfare of the newspaper); Miami Child’s World, Inc. v. Sunbeam Television Corp., 669 So. 2d 336, 337 (Fla. 3d DCA 1996) (because the broadcast aired after the relevant meeting of the city commission, it could not have constituted intentional and unjustified interference with business relationships between the plaintiff corporation and the city commission); Buckhannon v. U.S. West Communications, Inc., ___ F.3d ___, 20 Brief Times Rprr. 384 (Colo. App. No. 94CA1287, Mar. 21, 1996) (the absolute privilege applicable to defamation claims for statements made during the course of judicial proceedings also bars claims for tortious interference with contract based on statements made during the conduct of litigation which have “some relation” to the proceeding); Guilbeaux v. The Times of Acadiana, Inc. (“Guilbeaux II”), 1997 La. App. LEXIS 587 (La. App. 3d Cir. 1997) (in a case involving claims for defamation and tortious interference with business relations, the court held that the plaintiff’s claims were properly dismissed because only tortious interference with contract has received limited recognition in Louisiana and plaintiff failed to show the existence of a relevant contract existed).

11. Injurious Falsehood/Product Disparagement/Slander of Title

North Dakota became the thirteenth jurisdiction to adopt an agricultural disparagement act. 1997 N.D.H.B. 1176 (SN) (Westlaw Database “ND-BILLS”).* The statute protects from disparagement “any plant or animal, or the product of a plant or animal, grown, raised, distributed or sold for a commercial purpose . . . also includ[ing] any agricultural practices used in the production of such products.”

In addition to providing for liability for any person who “willfully or purposefully disseminates a false and defamatory statement, knowing the statement to be false, regarding an agricultural producer or an agricultural product,” the law also permits courts to grant injunctive relief and allows plaintiffs to recover “up to three times the actual damages proven” when the defendant has disseminated the defamatory statement “maliciously.” The statute also places no limits on the potential size of a plaintiff class stating that “if a false and defamatory statement is disseminated referring to an entire group or class of agricultural producers or products, a cause of action arises in favor of each producer of the group or the class and any association representing an agricultural producer, regardless of the size of the group or class.”

In addition, a number of states have recently recognized, affirmed recognition, or refined the

* Alabama, Arizona, Colorado, Florida, Georgia, Guam, Idaho, Louisiana, Mississippi, North Dakota, Oklahoma, South Dakota, and Texas.
elements of product or commercial disparagement as a subspecies of injurious falsehood. Rhode Island recognized the tort in Quantum Electronics Corp. v. Consumers Union of United States, Inc., 881 F. Supp. 753 (D.R.I. 1995). Despite recognition of the tort, the court granted the defendant summary judgment because the plaintiff, a limited purpose public figure, had failed to show actual malice.

The Massachusetts legislature is currently considering the adoption of an agricultural disparagement bill that would impose liability for defamation of agricultural and aquacultural food producers or their products. The proposed law would make actionable the public dissemination of "any false information that a perishable agricultural or aquacultural food product is not safe for human consumption." The proposed law provides for punitive damages and attorney’s fees, as well as for multiple damages in cases of intentional disparagement.

Holding firmly that a public entity could not sue for disparagement, a federal district court applied principles well settled in traditional libel law. In College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 319 F. Supp. 75, 24 Media L. Rep. 1558 (D.N.J. 1996), a federal court in New Jersey dismissed claims of product disparagement and trade libel, holding that the First and Fourteenth Amendments protect statements of public importance about public entities and therefore justify a higher level of protection than purely commercial speech. Similarly, claims asserted under the Lanham Act are precluded by the First and Fourteenth Amendments when asserted by public entities.

Privileges and protections drawn from libel law are regularly applied. See Kass v. Great Coastal Express, Inc., 291 N.J. Super 10, 676 A.2d 1099 (1996) (recognizing a qualified privilege in trade libel actions which permits parties to publish statements that protect the interest of the recipient (e.g., an employer's good faith responses to specific inquiries from a third party regarding the qualifications of an employee)); Re/Mac Intern., Inc. v. Realty One, Inc., 724 F. Supp. 1474, 1502 (N.D. Ohio 1996) (traditional defamation privileges apply to disparagement actions brought pursuant to the Deceptive Trade Practices Act, O.R.C. § 4165.01-04); Soderlund Bros., Inc. v. Carrier Corp., 278 Ill. App. 3d 606 (1st Dist. 1995) ("expressions of opinion . . . cannot form the basis of . . . an action of commercial disparagement . . . .").

As in other areas of law, the potential repercussions of punitive damages for injurious falsehoods often overshadow the compensatory. In the Southern District of New York, in an injurious falsehood/defamation case, the plaintiff was awarded attorney’s fees as well as punitive damages of approximately five times their actual and statutory damages. Miele v. Sid Bailey, Inc., d/b/a/ The Master Collectors, 192 B.R. 611 (S.D.N.Y. 1996).

12. Lanham Act/State Unfair Competition Law

In National Basketball Association v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997), the United States Court of Appeals for the Second Circuit reversed an injunction barring distribution by defendants of certain NBA game statistics on a real-time basis, and dismissed the NBA's
misappropriation claim upon which it was based. The court held that sports statistics, or any other facts, cannot be "owned" once made public and rejected the plaintiffs' attempt to use New York's common law of commercial misappropriation to evade Congress's clear intention that such facts be in the public domain.

Finding that the use of a service mark did not create a likelihood of confusion as to the identity of the literature's author, the United States Court of Appeals for the First Circuit rebuffed a Lanham Act claim arising out of an employer's reproduction of a union's service mark in anti-union literature. *International Association of Machinists and Aerospace Workers v. Winship Green Nursing Center*, 103 F.3d 196 (1st Cir. 1996).

Similarly, in *Rotbart & J.R. Publishing Co., Inc. v. J.R. O'Dwyer Co., Inc.*, No. 94 Civ. 2091 (JSM), 1995 WL 46625 (S.D.N.Y. 1995), the United States Court of Appeals for the Second Circuit affirmed the inapplicability of the Lanham Act to "political speech, consumer or editorial comment, parodies, satires, or other constitutionally protected material" in granting summary judgment to the defendant whose publications were found to be newsletter comments rather than advertisements.

13. **Negligent Media Publication**

Rhode Island and Texas both heard cases involving suicides that were purportedly caused by negligent media publication. The courts, however, differed markedly in their approach. In *Cliff v. Narragansett Television, L.P.*, 688 A.2d 805 (R.I. 1996), a man who had barricaded himself into his home, threatening suicide, was telephoned by a television reporter. Having completed a taped telephone interview, the reporter assured the man that it would be aired on that evening's broadcast. The man committed suicide apparently immediately after the interview aired. The Supreme Court of Rhode Island overturned the superior court's granting of summary judgment for the defendant, concluding that there was sufficient evidence upon which a jury could find that the reporter's phone call to the decedent was negligent and had created a delirium or insanity, in effect causing the suicide. For further discussion of this case, see "Recent Developments in Newsgathering" by Steve Perry, on p. 3A.

In *Hogan v. The Hearst Corp.*, 1997 WL 184108 (Tex. App. San Antonio, 1997, n.w.h.), the defendant-newspaper had published an article that identified the names of suspects who had been arrested on sex offense charges. One of the named suspects committed suicide soon thereafter. The Court of Appeals affirmed summary judgment for the defendant finding that the newspaper had merely printed truthful information regarding a matter of public interest, the substance of which had been obtained from public records.

A Maryland federal district court held that the publication of inaccurate but nondefamatory information by a financial newsletter — even if negligently published — was not actionable, despite the information having caused financial loss to subscribers. *Ginsburg v. Agora, Inc.*, 915 F. Supp. 733, 738-40, 24 Media L.Rep. 1850 (D.Md. 1995). The court did note an exception where the plaintiff can show that a "special relationship" exists between the publisher and its subscriber that is
"greater than that between the ordinary buyer and seller."

Allegations that depictions of violence in *Natural Born Killers* caused viewers to shoot and seriously injure plaintiffs were rejected by courts in both Louisiana and Georgia. Dismissing the claims for failing to state a cause of action, a Louisiana state court noted not only the impossibility of ever drawing a line between permissible and impermissible depictions of such material but also the potential free speech issues raised by both the U.S. and Louisiana Constitutions. *Byers v. Edmonson*, No. 95-02213 (La. 21st J.D.C., Jan. 23, 1997). *See also Miller v. Warner Brothers, Inc.*, No. 96VSO117599-F (Ga. Fulton County, Dec. 3, 1996); *Davidson v. Time Warner, Inc.*, No. V-94-006 (S.D. Tex. Mar. 31, 1997). For further discussion of these cases, see "Recent Developments in the Law of Media Liability for Allegedly Inspiring Violent Acts" by Thomas Kelley and Steven Zansberg, on p. 17A.


In *Williams v. Continental Airlines, Inc.*, ___ P.2d ___ (Colo. App. 95CA0469, Sept. 5, 1996) the Colorado Court of Appeals reversed a jury verdict that had been premised on the tort of "negligent investigation," holding that plaintiffs had failed to state a claim as a matter of law. In the case, an employee sued his employer for negligence in conducting and reporting the results of an internal investigation that determined that the employee had committed sexual assault against two female co-employees. The investigation was conducted as a result of charges brought by the two female co-employees that the plaintiff had raped them.

14. **RICO**

The Fifth Circuit dismissed a RICO claim brought by a televangelist’s church against ABC for a *Prime Time Live* broadcast about the church. In *Word of Faith World Outreach Center Church, Inc. v. Sawyer*, 90 F.3d 118 (5th Cir. 1996), cert. denied, 117 S.Ct. 1248 (1997), the Fifth Circuit held that the church failed to state a RICO claim because the one newsgathering investigation of the church’s activities in question was part of a single, otherwise lawful transaction and could not constitute a "pattern of racketeering activity."

A Southern District of New York court dismissed a copyright owner’s RICO claim against defendants for unauthorized copying, sale and distribution of films on video. The court held that the plaintiff had failed to state sufficient facts to support a claim for mail or wire fraud. *United States Media Corp. v. Edde Entertainment, Inc.*, 94 Civ. 4849, 1996 U.S. Dist. LEXIS 13389 (S.D.N.Y. Sept. 10, 1996).
15. Employment Law and Privacy

In the employment context, courts have revisited questions of privacy expectations and offensiveness, generally siding with employers’ rights to search, test, monitor, inquire and record their employees. See Johnson v. C & L, Inc., 1996 WL 308282 (N.D. Ill. 1996) (workplace searches are not actionable, nor do employees have a reasonable expectation of privacy in an office desk owned by employer and under employer’s domain and control); Poulos v. Pfizer, Inc., 1996 WL 411967 (Conn. Super. 1996) (finding no evidence of an invasion of privacy even though the defendant employer conducted a drug test in violation of C.G.S. § 31-51s); Ali v. Douglas Cable Communications, 929 F. Supp. 1362 (D. Kan. 1996) (court maintained employer’s right to monitor or record employees’ phone calls at work); Roe v. Cheyenne Mountain Conference Resort, 920 F. Supp. 1153 (D. Colo. 1996) (employer policy of requiring employees to disclose the use of legal, prescription medication does not constitute an invasion of privacy); Hanson v. Hancock Memorial Hospital, 938 F. Supp. 1419 (N.D. Iowa 1996) (hospital employee seeking information concerning the identity of a patient was not “highly offensive,” as the employee was a supervisor and the search was limited in nature); Restuccia v. Burk Technology, Inc., 5 Mass. L. Rptr. 712 (Mass. Super. 1996) (a business may lawfully store office e-mail messages for the purpose of reviewing their content, but where the employer has no policy regarding the use of e-mail for personal reasons, summary judgment is inappropriate); Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174 (1st Cir. 1997) (non-clandestine video surveillance of employees in open work area, that does not involve electronically-assisted eavesdropping, does not violate constitutional right to privacy).

In Texas, the Eastern District held that invasion of privacy claims in the workforce are preempted by § 301 of the Labor Management Relations Act. The plaintiffs had brought a cause of action for intrusion based on their employer’s publication of a list of employees who had received “letters of concern” that were issued pursuant to the company’s absenteeism program. Noting that the Fifth Circuit had not ever addressed the issue, the district court conducted an extensive review of the law of other circuits and concluded that, as a general rule, state law invasion of privacy claims are preempted by § 301 because “[p]rivacy in the workplace is an ordinary subject of bargaining and the extent of privacy is a condition of employment” such that the resolution of the claim would require interpretation of a collective bargaining agreement. Dancy v. Fina Oil & Chem. Co., 921 F. Supp. 1532 (E.D. Tex. 1996).

While courts have generally sided with employers in on-the-job privacy claims, a number of decisions have permitted intrusion claims in the employment context. See WVIT, Inc. v. Gray, 18 Conn. L. Rptr. No. 6 (Conn. Super. Jan. 20, 1997) (surreptitiously tape recording co-workers’ conversations stated a claim for intrusion, even though the conversations concerned only business activities); Pulla v. Amoco Oil Co., 882 F. Supp. 836 (S.D. Iowa 1994) (Amoco’s methods of obtaining an employee’s confidential credit card records were “highly offensive to a reasonable person”); Clement v. Sheraton-Boston Corp., Suffolk Superior Court No. 93-0909-F (Feb. 21, 1997 Memorandum of Decision) (claim based on covert videotaping of employee in locker room survives summary judgment despite lack of objective physical evidence of harm); Schwartz v. Royal, 1996 WL 383334 (Conn. Super. 1996) (plaintiff’s claims of verbal and physical harassment were sufficient to
support an intrusion claim, despite plaintiff's failure to plead that the words were "highly offensive").

A few courts held that allegations sounding in sexual harassment did not support intrusion claims. See *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80 (5th Cir. 1997) (under Texas law, inappropriate or offensive comments and advances without physical invasion of property or eavesdropping are insufficient to form an intrusion cause of action); *Wilson v. Sysco Food Servs. of Dallas*, 940 F. Supp. 1003 (N.D. Tex. 1996) (based upon a lack of evidence, defendant-employer was granted summary judgment on the plaintiff's intrusion claim rooted in the defendant's inquiries about her sexual activities); *Rudas v. Nationwide Mutual Insurance Co.*, No. 96-5987, 1997 U.S. Dist. LEXIS 169 (E.D. Pa. January 13, 1997) (no intrusion where plaintiff had voluntarily disclosed the details of her sexual harassment grievance to her employer, the defendant).

In contrast, two jurisdictions recognized an intrusion claim on similar facts. See *Van Jelgerhuis v. Mercury Finance Co.*, 940 F. Supp. 1362 (S.D. Ind. 1996) (allegations of repeated questions and comments upon employees' sex lives and physical appearances are sufficient to survive summary judgment); *Schwartz v. Royal*, 1996 WL 383334 (Conn. Super. 1996) (court found that plaintiff's allegations of verbal and physical sexual harassment were sufficient to support intrusion claim).
C. **Statutes and Related Case Law Reported in the 1997-98 Surveys**

1. Reporters' (Shield Law) Privilege

According to the 1997-98 Surveys, all jurisdictions except North Carolina, Puerto Rico and Wyoming have recognized either by statute or case law some form of privilege to protect a reporter's confidential sources and unpublished information. The majority of these jurisdictions have also considered the privilege directly in defamation cases where First Amendment interests are balanced against a plaintiff's right to gather evidence.

Several states reported developments.

For the first time a Missouri state court recognized a reporter's qualified privilege under the First Amendment to protect confidential sources. *State ex rel. Classic III Inc. v. Ely*, W.D. No. 53850 CV95-11119 (October 28, 1997). In a libel case involving a truckers' magazine, the trial court held that no privilege existed and ordered the defendants to disclose confidential sources because ordinary discovery rules applied. In reversing, the appellate court held that a privilege does exist and it adopted a balancing test that must consider (1) whether there are alternative sources for the information sought; (2) the importance of protecting confidentiality under the circumstances; (3) whether the information sought goes to the heart of plaintiff's case; and (4) the strength of plaintiff's libel case.

For the first time in a published decision, a Mississippi federal district court recognized that under the First Amendment "journalists are afforded a qualified privilege from compelled disclosure of information gathered in the course of their duties as journalists." *Brishton v. Dunn*, 919 F. Supp. 240 (S.D. Miss. 1996). Applying a balancing test, the court refused to order a journalist to disclose unpublished nonconfidential information.

Although the Sixth Circuit has yet to address the reporters' privilege, a federal district court refused to allow a libel plaintiff to obtain the identity of or depose a confidential source. *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303 (W.D. Mich. 1996). Plaintiff, a member of a militia group, argued that as a limited-purpose public figure required to prove actual malice, he should be allowed to depose the source for a *Klan Watch* report on militia activity to prove unreasonable reliance, or the source's nonexistence. In granting summary judgment without testimony from the source, the court concluded that discovery cannot be used to destroy a reporter's qualified privilege to refuse to reveal confidential sources. But the court limited its ruling to the facts of this case, citing the safety of the source and the violent nature of the white supremacist groups involved.

A Minnesota appellate court detailed the factors to be considered in deciding whether Minnesota's statutory shield privilege should yield to allow disclosure of a confidential source in a defamation case. *Bauer v. Gannett Co., Inc.*, 557 N.W.2d 608, 611-12, 25 Media L. Rep. 1532 (Minn. Ct. App. 1997). A court should consider: (1) the nature of the litigation and whether the news organization from whom disclosure is sought is a party; (2) the relevance to the action of disclosure;
(3) effort made to obtain the information from alternative sources; and (4) whether there is a compelling interest in the information or source. Before weighing these factors, the court may require plaintiff to make a prima facie showing that the alleged defamatory statements are false. Id. at 612. After weighing the factors, the court has a duty, where applicable, to review in camera any evidence to determine relevance before ordering disclosure. Id. at 613. The decision, though, does not address whether the in camera review should occur after a determination on the factors.

The Minnesota Supreme Court, in a criminal case, narrowed the scope of the statutory shield law to apply to unpublished information that tends to identify a confidential source, rejecting the claim that the privilege applies to all unpublished information, such as notes and outtakes. State v. Turner, 550 N.W. 2d 622 (Minn. 1996).

In Massachusetts, which has a common law rather than statutory privilege, an appellate court ruled that a reporter may be required to disclose the source of a political candidates criminal record if the source obtained the record in violation of law and if alternative means of identifying the source have been exhausted. Lazo v. Town of Southbridge, 5 Mass. L. Rptr. 419 (Mass. Super. 1996).

In Food Lion, the court enforced a discovery request that ABC turn over material relating to other hidden camera investigations. Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1211, 25 Med. L. Rep. 1182 (M.D.N.C. 1996). After reviewing reporter’s privilege decisions in other circuits, and applying a three-part balancing test for evaluating the privilege, the court held the privilege did not protect the material at issue because 1) the requests were directly relevant to plaintiff’s claims and involved discovery from a party to the litigation; 2) the material necessarily was unavailable from another source; and 3) no First Amendment interest could be asserted to justify otherwise illegal conduct (i.e., fraud and trespass, as alleged here).

The Idaho Supreme Court recently construed the reporters’ privilege in State of Idaho v. Salisbury, 129 Idaho 307, 924 P.2d 208, 24 Media L. Rep. 2454 (1996). Applying a balancing of interests test, the court refused to quash a subpoena for a videotape of an accident scene taken by a local television station to further the criminal prosecution of a news reporter for obstructing a police officer. No confidential informant was involved. Furthermore, the videotape was of a public event readily viewable to anyone present.

In De La Paz v. Henry’s Diner, Inc., 946 F. Supp. 484 (N.D. Tex. 1996), a private figure nonmedia libel case, a nonparty reporter who had interviewed defendants was required to be deposed and produce documents when subpoenaed by the plaintiff. The court refused to extend the reporters’ privilege to non-confidential sources or material.

2. Anti-SLAPP Statutes

Based on the 1997-98 SURVEYS, anti-SLAPP (strategic lawsuits against public participation) laws are emerging as the most significant remedy against meritless libel suits. According to the SURVEYS, California, Delaware, Georgia, Massachusetts, Minnesota, New York, Rhode Island and
Washington have enacted anti-SLAPP laws. Anti-SLAPP laws generally provide for the early dismissal of meritless claims, and may also provide for the recovery of legal fees.

Several cases and important developments occurred in California. The California statute, Code of Civ. Proc. sec. 425.16, allows a defendant in any lawsuit “arising from any act of person in furtherance of the person’s right of petition or free speech . . . in connection with a public issue” to bring a special motion to strike the complaint unless plaintiff establishes “a probability that the plaintiff will prevail” on the merits. In August, 1997 the statute was amended specifically to provide for a broad interpretation. In addition, the statute was extended to protect conduct, in addition to statements.

Just as the new amendments to the California law were enacted, the California Supreme Court accepted for review a nonmedia case specifically involving the scope of the statute. Briggs v. Eden Council for Hope and Opportunity, 54 Cal. App. 4th 1237, 63 Cal. Rptr. 2d 434, review granted, (1997). In Briggs, an appellate court applying a narrow interpretation denied defendant’s anti-SLAPP motion on the ground that the fair housing activity out of which the defamation claim arose was not a matter of public concern and that therefore the statute did not apply.

This narrow interpretation of the California law was rejected in the following reported cases: Braun v. Chronicle Publ’g Co., 52 Cal. App. 4th 1036, 61 Cal. Rptr. 2d 58 (1997) (upholding the striking of defamation claims arising from newspaper report on a confidential investigation); Macias v. Hartwell, 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222 (1997) (affirming judgment striking libel complaint brought by losing candidate in union election); Bradbury v. Superior Court, 49 Cal. App. 4th 1108, 57 Cal. Rptr. 2d 207 (1996) (district attorney’s report questioning the veracity of affidavit fell within the statute).

However, the law was held not to apply to a consultant’s report because consultant was primarily fulfilling a private contractual obligation. Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecomms. Eng’rs, 49 Cal. App. 4th 1591, 57 Cal. Rptr. 2d 491 (1996). Likewise it did not apply to a securities arbitration. Linco/Private Ledger, Inc. v. Investors Arbitration Servs., Inc., 50 Cal. App. 4th 1633, 58 Cal. Rptr. 2d 613 (1996).

A decision in the 1997-98 term by the California Supreme Court in Briggs, supra, should resolve questions about the scope of the statute.

The 1997-98 MEDIA LIBEL SURVEY also reports anti-SLAPP decisions from Georgia, Massachusetts, New York and Rhode Island.

In Georgia, the law was put to effective use at the trial court level. It appears to apply to claims based on news stories relating to issues under government review. Boyd v. News World Communications, No. 961507435 (28 (Cobb Cty. Sup. Ct., July 11, 1996); Citizens for Safe Govt. v. Cox Enter., No. 97-28385 (Fulton Cty. Sup. Ct. April 25, 1997). And was used by homeowners who successfully moved to dismiss a libel complaint by a developer. Providence Constr. Co. v.

The Massachusetts Supreme Judicial Court is scheduled to consider its anti-SLAPP statute for the first time in 1997-98, in two cases, one raising the issue of whether the statute’s protection extends beyond private citizens to corporations and other entities, Triandafilou v. Krauchuk, SJC No. 07070, and the other raising the questions whether the protected petitioning activity must involve an “issue of public concern” and whether it is applicable in a civil action asserting a cognizable claim based on a pre-existing contract. Duracraft Corp. v. Holmes Products Corp., 42 Mass. App. Ct. 572 (1997) (further review granted). In one other case, an anti-SLAPP motion was denied on the ground that there was no legitimate purpose to the defendant’s government-petitioning conduct. Zuppo v. Foster, 6 Mass. L. Rptr. 543 (Norfolk Cty. Superior Court 1997).

A New York trial court recently refused to dismiss a defendant’s anti-SLAPP counter claim in Adelphi University v. Committee to Save Adelphi, N.Y.L.J., Feb 6, 1997 at 33 (Sup. Ct. Nassau Co. 1997). At issue were statements made by the defendant to government authorities and the media. The court found that the anti-SLAPP law applies to statements made to the press.

The Rhode Island Supreme Court declared its 1993 anti-SLAPP law constitutional in Hometown Properties, Inc. v. Fleming, 680 A2d 56 @I. 1996), and noted that the state constitution and anti-SLAPP law protect the right of the people to petition governmental bodies for the redress of grievances, including access to the courts. Cove Road Development v. Western Cranston Industrial Park Associates, 674 A.2d 1234, 1236-37 (R.I. 1996).

3. Criminal Libel

California considered but failed to enact a measure that would allow for the criminal prosecution of people who make a malicious false defamatory statement of fact to another person with the knowledge that the other person may, for financial profit, publish, broadcast, or otherwise disseminate the malicious false defamatory statement to the general public. The measure would have made such libel a misdemeanor punishable by up to a year in jail and a $10,000 fine. Although the measure was passed by the Senate, it was defeated in the Assembly by a vote of 50-24.

4. Cameras in the Courtroom

The issue concerning whether cameras should be allowed in the courtroom again generated a significant amount of attention this year. See generally “Fears of Post-O.J. Backlash Unfounded: Access to the Courts Remains Vital” by Steve Westman and Susan Inantino, on p. 23A, for a discussion of this topic.


In California, in the wake of the O.J. Simpson trial, the Judicial Council amended California Rule of Court 980 which prohibits "photographing, recording or broadcasting of court proceedings by the media," except by written order of the judge. As of January 1, 1997, media agencies are required to file a request and completed proposed order at least five court days before the proceedings to be covered unless good cause is shown. Cal. Rule of Ct. 980(e)(1); see Judicial Council Forms MC-500 and MC-510. Furthermore, only one television camera and one still photographer will be permitted into the proceedings. If the media cannot agree on a pooling arrangement, the judge may deny media coverage by that type of media agency. Cal. Rule of Ct. 980(e)(8).

Under the amended Rule 980, the "judge in his or her discretion may permit, refuse, limit or terminate media coverage," and is not required to hold a hearing or to make any findings or a statement of decision. Rule 980(e)(2) and (4). In considering the request, the judge must consider 19 factors, including the following: the importance of maintaining public trust and confidence in the judicial system; promoting public access to the judicial system; the parties' consent; privacy rights of the participants, including witnesses, jurors and victims; effect on any minor in the proceedings; effect on the parties' ability to select a fair and unbiased jury; effect on any ongoing law enforcement activity in the case; effect on any subsequent proceedings in the case; effect on witness testimony; difficulty of jury selection; undue administrative or financial burden to the court or participants; maintaining orderly conduct of the proceeding; and "[a]ny other factor the judge deems relevant." Rule 980(e)(3).

Rule 980 specifically prohibits media coverage of proceedings held in chambers, proceedings closed to the public, jury selection, jurors or spectators and conferences between an attorney and client, witnesses or aide, or conferences with the judge or between counsel. Rule 980(e)(6). If a judge grants a request to provide media coverage, the media may be required to pay any increased court-incurred costs resulting from the permitted coverage. Rule 980(e)(4). Finally, amended Rule 980 authorizes the imposition of sanctions for any violation of the rule or order, including termination of media coverage, citation for contempt, or imposition of monetary or other sanctions. Rule 980(f). It should be noted that no cases dealing with the amended rule have been reported since the amendments took effect on January 1, 1997.

In a year in which the New York state legislature found itself mired in a highly charged debate over rent regulations, the statute which permitted cameras in courtrooms was allowed to expire in June 1997.

Tennessee opened its courts to cameras as Rule 30 of the Rules of the Supreme Court of the State of Tennessee went into effect (as a pilot project) on January 1, 1996, and was made permanent at the end of the year. Rule 30 opens the courtrooms of Tennessee to the media, except in juvenile court, and does not require party consent. Because it is so new a rule, there is little case law.
involving it. There are, however, two unreported decisions of the Tennessee Court of Criminal Appeals addressing Rule 30 and a trial judge's discretion thereunder. In one case, *Tennessee v. Morrow*, 1996 WL 170679 (Tenn. Crim. App., 1996), the court of appeals found that the trial judge had abused his discretion in banning television cameras from a high-profile criminal trial, stating that, "Rule 30 creates a presumption in favor of in-court media coverage, including the presence of television cameras," in judicial proceedings. Because the criminal trial in the case had already been held, the court of appeals was limited to ruling that all future hearings in the matter were to be held in accordance with its opinion. In the other case, *Tennessee v. Mathews*, 1996 WL 269465 (Tenn. Crim. App. 1996), the court of appeals affirmed the trial judge's decision to place significant limitations on the use of cameras in a criminal trial, finding that there was a sufficient evidentiary record to support the trial judge's conclusions regarding the disruptive effect of coverage, despite the fact that the media had been excluded from the evidentiary hearing on the subject.

In Utah, photography in a trial courtroom is generally prohibited, but the presiding judge at a hearing may permit still photography at his or her discretion. *See* Utah Code of Judicial Admin. R. 4-401(4)(1997). A request to photograph in a courtroom must be filed with the presiding judge at least 24 hours prior to the hearing unless good cause is shown for shorter notice. *Id.* Filming, video recording, or audio recording by the media in a trial courtroom is prohibited. *Id.* R. 4-401(1)(a). In general, trial courts use a video recording system to maintain the official verbatim record of a proceeding (*id.* R. 4-201(1)), and that video signal may be transmitted to an overflow room. *Id.* R. 4-401(1)(a). The media may record this video signal with the permission of the presiding judge of the court and the judge presiding at the proceeding, as authorized by a pilot program approved by the Judicial Council. *Id.* In addition, because the official videotaped record of a court hearing is a public court record, except when otherwise classified by the court, the media may access the videotaped record of a proceeding through normal procedures for obtaining judicial records. *Id.* R. 4-202.02(2)(B).

In addition, a number of cases reported this year dealt with the issue of media access to the courtroom. In a Connecticut case involving the Freedom of Access to Clinic Entrances Act, 18 U.S.C. §§ 248(a)-(e), the district court granted a protective order providing that videotapes depicting patients at a clinic would be played out of the presence of the jury. *United States v. Scott*, 1997 WL 160456 (D. Conn. 1997), Order No. 3:95CV1216 (D. Conn. Feb. 26, 1997). Subsequently, on a motion to modify the protective order filed by the *Hartford Courant* the court held, relying on a representation that the media would not publish the identities of any patients seen on the tapes, that members of the news media could view the videos used during the trial. No. 3:95CV1216 (D. Conn. March 11, 1997).

In contrast, a New York court decided to close a custody trial after finding that the child involved would likely suffer psychological trauma from public disclosure, and that this harm outweighed the rights of the public and the press to attend the proceeding. *Matter of C.V. (M.V.)*, N.Y.L.J., June 10, 1996 at 25 (Sup. Ct. Kings Co. 1996).
5. Federal Eavesdropping Law

**Procuring Electronic Communications — Elements**

A number of courts have refused to recognize claims brought under the federal wiretap act’s prohibitions. 18 U.S.C. §§ 2510-2521. In *Reynolds v. Spears*, 93 F.3d 428 (8th Cir. 1996), for example, the court held that a wife was not liable for acquisition by use of “electronic, mechanical, or other device” where she listened to a conversation her husband had previously recorded via an extension telephone, notwithstanding her “passive knowledge of her husband’s interceptions.”


The U.S. District Court for the District of Nevada held that “electronic communication” does not contemplate electronic storage. Therefore, the court found that a conduit computer’s storage of a paper message, “whether that storage was ‘temporary’ . . . or more permanent for backup purposes,” was “electronic storage,” not an “electronic communication.” *Bohach v. City of Reno*, 932 F. Supp. 1232 (D. Nev. 1996).

Further, the U.S. Court of Appeals for the Sixth Circuit recently affirmed the proposition that where an individual’s purpose in recording a conversation is neither criminal nor tortious, the wiretap statute is inapplicable. *United States v. Miller*, 91 F.3d 145 (6th Cir.) (unpublished disposition), *cert. denied*, 117 S. Ct. 485 (1996). The court found that the conversation at issue was recorded with a view towards preventing future distortions, rather than with an intent to blackmail. The Sixth Circuit also held that a federal agency may, within certain parameters, use and disclose contents of an illegal wiretap provided to it so long as it did not participate in the interception. *Doe v. Securities & Exchange Comm’n*, 86 F.3d 589 (6th Cir. 1996) (withdrawn), *vacated and reh’g en banc granted*, 86 F.3d 599 (6th Cir. 1996).

In Georgia, the Wiretap Statute was held to be inapplicable to individuals in a police car, as they have no expectation of privacy. *Burgeson v. State*, 475 S.E.2d 580 (Ga. 1996).

In one recent case involving a media defendant, however, the U.S. District Court for the District of Kansas denied a motion for summary judgment in part, because the ordering and purchasing of recording devices presented a legitimate question as to whether the defendants were liable for ‘procuring’ an interception. *Ali v. Douglas Cable Communications*, 929 F. Supp. 1362 (D. Kan. 1996).
Damages

There is currently a split among the circuits on whether a court may deny damages despite a violation of the federal eavesdropping statute. The trend appears to give courts leeway in deciding whether or not damages are applicable. See Reynolds v. Spears, 93 F.3d 428 (8th Cir. 1996) (where the court addressed an issue of first impression for the Eighth Circuit and held that statutory damages under the act were discretionary with the district court); Morford v. City of Omaha, 98 F.3d 398 (8th Cir. 1996) (where the court applied the Reynolds rule regarding statutory damages and held that a trial judge did not abuse his discretion in refusing to award the damages in a case of minimal interception); Romano v. Terdick, 939 F. Supp. 144 (D. Conn. 1996) (rejecting plaintiff’s damage claim of $10,000 per intercepted conversation in a case that found forty-nine conversations illegally recorded); Lewis v. Village of Minerva, 934 F. Supp. 268 (N.D. Ohio 1996) (holding that municipalities are not subject to punitive damages for violations of the wiretap statute). But see Rodgers v. Wood, 910 F.2d 444 (7th Cir. 1990) (holding that court has no discretion to deny damages under the statute).

Consent

Two courts have dealt with the question of consent in the context of recorded telephone calls. The Northern District of Illinois has held that beep tones on a recorded line do not justify summary judgment on issue of implied consent where a memorandum had previously indicated that the line would be for private use. Abbott v. Village of Winthrop Harbor, No. 93-C-4642, 1996 WL 741845 (N.D. Ill. Dec. 13, 1996). See also Ali v. Douglas Cable Communications, 929 F. Supp. 1362 (D. Kan. 1996) (denying summary judgment on issue of consent in the business context because evidence suggested the absence of full knowledge or adequate notification of the monitoring and recording of phone calls).

The Southern District of New York has recently held that inmates impliedly consent to having their telephone calls monitored. The implication was based on signed forms confirming the inmates understanding of a monitoring policy, the fact that the inmates had been informed of monitoring by a handbook, and the existence of posted signs indicating that phone calls would be monitored. United States v. Perez, 940 F. Supp. 540 (S.D.N.Y. 1996).

Conflict of Laws/Preemption

An open issue under the Federal Eavesdropping Statute is the handling of conflicting state laws involving interstate communications. A recent case in Hawaii suggests that interstate communications that do not violate federal law may have to be resolved on a state-by-state basis. See State of Hawaii v. Bridges, 925 P.2d 357 (Haw. 1996) (state eavesdropping statute was not intended to have extra-territorial affect and therefore would not operate to suppress evidence obtained by Hawaii law enforcement agents in California, where their actions violated Hawaii’s eavesdropping statute but were in compliance with federal and California law).
Regarding preemption, the general consensus is that states are free to adopt more or equally restrictive regulations. Less restrictive statutes, however, are preempted by the federal statute. See generally State v. Gilmore, 549 N.W.2d 401 (Wis. 1996); People v. Chavez, 52 Cal. Rptr. 2d 347 (Ct. App. 1996).

Other Developments

In Reynolds v. Spears, 93 F.3d 428 (8th Cir. 1996), the court held that the two-year statute of limitations begins to run after the date upon which "the claimant has a reasonable opportunity to discover the violation."

In T.B. Proprietary Corp. v. Sposato Builders, Inc., No. Civ. A. 94-6745, 1996 WL 290037 (E.D. Pa. May 31, 1996) (unreported), summary judgment was granted on the basis of the telephone extension exception where a businessman had used a speaker phone without disclosing the presence of another in his office.

In the Northern District of Illinois, an eavesdropping claim was dismissed where the plaintiff could not identify the responsible parties, the means employed, or the conversations that were intercepted. Maddox v. Capitol Bankers Life Insurance Co., No. 94-C-5207, 1997 WL 47449 (N.D. Ill. Jan. 30, 1997) (not reported).