

Media Law Newsletter 2001

Introduction

In perhaps the most significant decision of the past year, the U.S. Supreme Court found that the media are not liable for disclosing the contents of an illegally intercepted communication when it was of significant public interest and the journalist played no role in the illegal activity.

Bartnicki v. Vopper concerned a radio commentator's use of an illegally recorded cell phone conversation, which he had received anonymously, concerning a planned teachers' strike. The Court found that the First Amendment trumped federal and state wiretap laws and protected the commentator from liability.

The copyright case of *New York Times Co. v. Tasini*, one of the higher profile cases of the U.S. Supreme Court's recent term, will have wide-ranging ramifications on the use of the work of freelance journalists. The Court in *Tasini* held that copyright laws prevent publishers from posting freelancers' contributions online or in other electronic formats without the freelancers' consent, whether given freely or in return for an extra fee.

For their part, Illinois courts have, in the past year, reiterated the importance of providing the media with access to court records and protecting reporters who express their opinions in columns from liability.

Two long-running local defamation cases also appear to have come to a close - both in favor of the national media defendants. In *Wilkow v. Forbes*, a federal appellate court upheld the dismissal of a defamation lawsuit, and a federal appellate court has affirmed the dismissal of the final surviving claim in *Desnick v. ABC*.

In a significant case for freelance photographers, an Illinois court found that they are sole authors and copyright holders of their pictures. This case could have important implications for media organizations that use freelance photographers.

ILLINOIS DEVELOPMENTS

Defamation

STATEMENT THAT REAL ESTATE PARTNERSHIP "STIFFED" BANK DEEMED PROTECTED OPINION

A federal appeals court affirmed the dismissal of a defamation lawsuit against *Forbes* magazine, deeming language in an article on alleged abuses of U.S. bankruptcy code nothing more than "uncharitable opinion."

The article recounted the maneuvers of a Chicago real estate partnership under the Bankruptcy Code. Under the "new value" exception, a real estate partnership went into bankruptcy yet retained ownership of a building while the lender, as the article noted, "takes an up-to-\$38 million haircut." The article also noted that judges were "allowing unscrupulous business owners to rob creditors" and that plaintiff Mark Wilkow and his partners "pleaded poverty" when they tried to hold on to the building through bankruptcy proceedings.

The court noted that "[a]lthough the article drips with disapproval of Wilkow's (and the judges') conduct, an author's opinion about business ethics isn't defamatory under Illinois law. . . . Although a reader might arch an eyebrow at Wilkow's strategy, an allegation of greed is not defamatory . . ." The court also noted the incongruity of a bankrupt defendant taking umbrage at being characterized as "pleading poverty."

Wilkow v. Forbes, Inc., 241 F.3d 552, 29 Media L. Rep. 1412 (7th Cir. 2001).

AUTHOR OF LETTER ALLEGING CRIMINAL BEHAVIOR MAY FACE DEFAMATION LIABILITY

An allegation of extortion, even if prefaced with the words "in my opinion," may give rise to a valid defamation claim, the Illinois Appellate Court recently held.

The case involved a defendant who sent a letter to the mayor of the Village of Wheeling alleging "extortion" and "criminal behavior" by a village employee. Defendant argued that his allegedly defamatory statements were "mere expressions of opinions" since he prefaced his allegations with "in my opinion." The court disagreed, finding the statements to be actionable assertions of fact.

The lower court had ruled that defendant's letter was protected by a "qualified privilege" and dismissed plaintiff's claims. The appellate court reversed. The letter was subject to the protections of a qualified privilege because village officials have an interest in the free flow of correct information about the job performance of village employees. But the court noted that such a privilege may be lost through abuse. The question of abuse is a factual question for a jury.

Stavros v. Marrese, 323 Ill. App. 3d 1052, 753 N.E.2d 1013 (1st Dist. 2001).

DEFAMATION SUIT REINSTATED AGAINST WOMAN WHO MADE ACCUSATIONS OF FAVORITISM IN PUBLIC BIDDING PROJECT

Letters alleging favoritism by an engineer in a public project involved an issue of social importance and were subject to a qualified privilege. But a jury could find that the author of the letters abused her privilege and, accordingly, the Illinois Appellate Court reinstated a defamation and false light action against the author.

Theodore Parker, an engineer for a company designing part of the new Cook County Hospital, filed suit against Susan Larson, former president of a lighting fixture business, after she sent letters alleging that Parker "rigged" lighting specifications in the new hospital to favor a family member.

The appellate court reversed a lower court's order granting summary judgment in favor of Larson. The court rejected Larson's argument that her statements were subject to an "innocent construction." The court further held that substantial truth was not a viable defense for Larson because there was no evidence of any family relationship between Parker and the supplier Parker had been accused of favoring.

The appellate court agreed with the trial court's finding that Larson's allegedly defamatory statements involved an issue of social importance and, therefore, were subject to a qualified privilege. But the court further ruled that the issue of whether Larson abused her qualified privilege was a question for a jury to decide.

Parker v. House O'Lite Corp., 324 Ill. App. 3d 1014, 756 N.E.2d 286 (1st Dist. 2001).

COURT BROADENS FAIR REPORT PRIVILEGE

Illinois courts are divided over the dimensions of the fair report privilege. The privilege protects stories based on public documents (such as police reports) and proceedings (such as city council meetings) and statements by public officials. If the story is a fair and accurate summary of the document or proceeding, it generally cannot be the basis for a defamation suit.

Illinois courts have split over the question of whether a showing of "actual malice" will defeat the fair report privilege. For example, if one city council member calls another a "thief and a liar" in a city council meeting, would a reporter be liable for publishing that accusation if she knew it was not true?

Most Illinois courts say no - actual malice will not defeat the fair report privilege. The First District Appellate Court, which covers Cook County, has arguably followed the opposite position.

Recently, however, a Cook County trial judge determined that, in light of U.S. Supreme Court and Illinois Supreme Court precedent as well as other factors, even a showing of actual malice could not defeat the fair report privilege. This decision, which is favorable to media defendants, is a step toward harmonizing Illinois law on this issue.

Cherry v. CBS Broad., Inc., 28 Media L. Rep. 2468 (Cir. Ct. Cook Cty. 2000).

COURT REJECTS MEDIA'S FAIR REPORT DEFENSE

In a case involving a newspaper's misidentification of plaintiff in stories about a drug bust, an appeals court held the fair report privilege inapplicable. The court also found that the defendant journalists should be held to an ordinary standard of negligence, not a special journalistic practice standard.

Plaintiff Christopher M. Edwards sued Paddock Publications, publisher of the *Daily Herald*, and several journalists after his photograph and name appeared in stories about a drug operation that resulted in felony charges. Christopher A. Edwards (not Christopher M. Edwards) was charged with the crimes.

Defendants argued that the fair report privilege applied because the police had given them the wrong photograph of the suspect. The court rejected defendants' privilege arguments and held that the news story did not fairly and accurately reflect the information allegedly provided by police officers.

On remand, the appellate court instructed that an ordinary standard of negligence should be used to determine whether defendants were liable for defamation.

Edwards v. Paddock Publ'ns, Inc., 2001 Ill. App. LEXIS 858, No. 1-00-0599 (1st Dist. Nov. 15, 2001).

NEWSPAPER MAY NOT QUALIFY FOR PROTECTION UNDER FAIR REPORT PRIVILEGE

A jury could find that a newspaper misquoted a public official in an important way by not including information about who was being investigated for criminal activity, according to the Illinois Appellate Court. Such a finding would render the newspaper ineligible for the protections of the fair report privilege.

The fair report privilege immunizes media organizations from liability for stories based on statements in government records or by government officials and agencies. The privilege is not available if the story does not accurately summarize the allegedly defamatory statements and the inaccuracy makes the news report more harmful than a verbatim account of the government report.

Plaintiff Maple Lanes sued News Media, publisher of the *Rochelle News Leader*, for defamation based upon the following published statement attributed to a sheriff: "We are targeting businesses that supplement their income with cocaine and drug sales, just like we did with Frankies in Rochelle." Plaintiff owns the restaurant Frankies.

The trial court granted summary judgment to News Media, holding that the newspaper accurately summarized the sheriff's statement and, as a result, the fair report privilege sheltered News Media from liability.

The Illinois Appellate Court reversed, however, because a jury could find that the newspaper changed the "gist" of the sheriff's statement. The sheriff claimed he actually stated, "We are targeting businesses whose employees are supplementing their income with cocaine and drug sales, just like we did with Frankies in Rochelle." The reporter filed an affidavit saying that she accurately quoted the sheriff.

A jury now will determine whether the newspaper fairly summarized the sheriff's statement.

Maple Lanes, Inc. v. News Media Corp., 322 Ill. App. 3d 842, 751 N.E.2d 177 (2d Dist. 2001).

MIXED DECISION ON DEFAMATION CASE IN EMPLOYMENT CONTEXT

Many defamation cases in Illinois arise not from media reports but from communications regarding employees. In *Gardner v. Senior Living Systems, Inc.* ("SLS"), the plaintiff, who had left SLS to work for a competitor, sued based on statements in letters to present and potential SLS customers.

The letters stated that the plaintiff had taken actions that were "illegal," that she had engaged in "software piracy and industrial espionage related to theft of trade secrets," and that "suit will be filed shortly against her."

The lower court found that the statements were reasonably susceptible to an innocent construction and were therefore not defamatory, but the appellate court reversed. Although the appellate court's decision favored the plaintiff, it was not uniformly negative for media defendants.

According to the court, "[s]tanding alone, the word 'illegal' may be innocently construed." This is a positive result, but the court then went on to say that the word "illegal" could not be innocently construed in the context of the letter. The court also found that the word "unethical" was constitutionally protected opinion.

Finally, one of the categories of defamation is accusing someone of committing a crime. This naturally brings up the question of how specific the defendant must be in making the accusation to be liable. Although one court has recently stated that the accusation must be highly specific in order to be actionable, the *Gardner* court noted that "it is not necessary that the words state the commission of a crime in terms of art or with the particularity of an indictment for such words to be libelous." The court found that the accusation that Gardner made was sufficiently specific.

Gardner v. Senior Living Sys., Inc., 314 Ill. App. 3d 114, 731 N.E.2d 350 (1st Dist. 2000).

PUBLIC OFFICIAL'S DEFAMATION CLAIM AGAINST NEWSLETTER FUNDER FAILS IN COURT

A Chicago alderman's unique theory of defamation liability against a mere funder of a grassroots organization's newsletter failed to survive defendant's summary judgment motion.

An Illinois state court dismissed Crossroads Fund, a not-for-profit foundation, from the alderman's defamation and false light invasion of privacy action. Crossroads' only involvement was its grant of \$400 to the community group that published the newsletter. Crossroads did not write, edit, review, publish or disseminate the newsletter.

Schulter v. Crossroads Fund Inc., No. 01 L 6366 (Cir. Ct. Cook Cty. 2001).

Access to Information

MEDIA PREVAIL IN BALANCING OF PUBLIC DISCLOSURE, PRIVACY INTERESTS

The Seventh Circuit Court of Appeals ordered a trial court to reveal the identities of unindicted co-conspirators whose statements were admitted into evidence in the 1997 criminal trial of James Berger. Berger was charged with bank fraud and money laundering in connection with a scheme to defraud the Illinois Department of Public Aid.

The Associated Press, Chicago Tribune Co., Copley Press, Inc., and other news outlets sought relief from the Seventh Circuit after a district court judge refused to disclose the names of the co-conspirators.

In its opinion, the Seventh Circuit emphasized the media's right to be present in court proceedings and the public's interest in maintaining the integrity of the judicial process. The court stated that "to hide from the public eye entire proceedings, or even particular documents or testimony forming a basis for judicial action that may directly and significantly affect public interests, would be contrary to the premises underlying a free, democratic society."

This was the second time the media filed an appeal with the Seventh Circuit seeking access to documents from the Berger trial. In 1998, the Seventh Circuit allowed several media organizations to intervene in the Berger proceedings in order to gain access to records sealed by the district court.

Following the Seventh Circuit's 1998 decision, the district court unsealed almost all of the documents requested by the media. But the lower court kept under seal the names of the unindicted co-conspirators because the judge thought that the individuals had a significant privacy interest in remaining anonymous.

United States v. Ladd, 218 F.3d 701, 28 Media L. Rep. 2002 (7th Cir. 2000).

BID TO OPEN ETHICS COMMISSION MEETINGS DENIED ON PROCEDURAL GROUNDS

Finding that Governor Ryan was not the proper party defendant, the Illinois Supreme Court vacated a trial court ruling that would have forced a state ethics commission to open its meetings to the public.

The Illinois Press Association and some of its members brought the lawsuit to try to gain access to meetings of the ethics commissions, which were formed to enforce the State Gift Ban Act's prohibition on public officials accepting certain gifts. The trial court agreed in part, determining

that the ethics commission created for the legislative branch must conduct its meetings in public. Governor Ryan, the only defendant, argued that he was not a proper party because he had no control over the commissions beyond his power to appoint members to the ethics commission for the Governor.

The Illinois Supreme Court determined that, because the legislative ethics commission was the only commission at issue, there was no actual controversy between the plaintiffs and the Governor. The Court therefore dismissed the case for want of a proper plaintiff.

Illinois Press Ass'n v. Ryan, 195 Ill. 2d 63, 743 N.E.2d 568 (2001).

INVESTIGATIVE PRIVILEGE INVOKED TO PREVENT ACCESS TO LAW ENFORCEMENT RECORDS

State and local officials successfully invoked the "investigative privilege" to prevent access to reports on an ongoing criminal investigation into the 1993 murder of seven people at a Brown's Chicken & Pasta, Inc. restaurant in Palatine, Illinois. Law enforcement officials have not yet charged anyone with the murders.

The estate of one of the victims sued Brown's in 1995, claiming that the restaurant failed to provide adequate security. The plaintiff subpoenaed the State's Attorney and the Village of Palatine for investigatory records about the murders. The trial judge determined that the investigative privilege protected the officials from having to produce the documents. The Illinois Appellate Court affirmed that decision.

The appellate court found that the trial court properly balanced the public interest in maintaining confidentiality with the plaintiff's need to receive the requested documents. Because the investigation is not yet complete and could be impaired if the files were released, the court struck the balance in favor of secrecy.

An Illinois court first recognized the investigative privilege in 1992. The common law privilege serves "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witnesses and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation."

The decision in this case follows the Illinois and federal Freedom of Information Acts, which state that certain investigatory files in open criminal matters need not be released if disclosure would interfere with pending law enforcement proceedings.

Castro v. Brown's Chicken & Pasta, Inc., 314 Ill. App. 3d 542, 732 N.E.2d 37 (1st Dist.), *appeal denied*, 191 Ill. 2d 527, 738 N.E.2d 924 (2000).

NON-PARTY LACKS STANDING TO REVIEW SEALED EAVESDROPPING-RELATED DOCUMENTS

The Illinois Appellate Court recently held that there is no public right of access to documents relating to law enforcement officials' use of eavesdropping devices. The court rejected Northwest Newspapers' requests for access to sealed documents relating to a court's overhear order. The court held that the newspaper lacked standing to bring its petitions.

The McHenry County State's Attorney applied for an overhear order as part of a criminal investigation. After a trial court granted the request, Northwest Newspapers sought access to the application, the overhear order, and related documents.

The appellate court affirmed the trial court's decision to deny Northwest Newspapers' request. The court interpreted Illinois law on eavesdropping devices to permit only parties to overhear applications or recorded conversations to review the documents. Under this interpretation, Northwest Newspapers lacked standing to intervene in the case or to obtain the documents.

The court wrote, "To allow the public to access such sensitive matters not only would set a dangerous precedent but also would thwart our lawmakers' intent to limit access to one's private affairs and to protect and preserve issues cultivated during the course of criminal investigations." The court stated that legislative intent and policy considerations supported its decision.

In re Consensual Overhear, 323 Ill. App. 3d 236, 753 N.E.2d 389 (2d Dist. 2001).

COURT OPENS PRIVATE DISCOVERY DOCUMENTS TO MEDIA IN POLICE MISCONDUCT CASE

An Illinois federal court enhanced the media's access rights to court-protected documents to aid the fight against the "ugly and expensive" bad cop syndrome.

The court allowed a weekly newspaper and reporter to intervene in an action that had been settled nine months earlier to obtain access to documents under a protective order. The court based its ruling on the public's need to review police misconduct files. It championed the theory that publicity helps remedy social ills.

In the underlying case, the plaintiff alleged that a police officer used his position to commit a sexual crime against her. The parties settled the lawsuit. Subsequently, the *Chicago Reader* and staff writer Tori Marlan filed a petition to intervene to challenge a protective order. The *Reader* sought access to confidential documents that defendant City of Chicago had given to the plaintiff in the lawsuit but that had never been filed in court.

Noting that intervention is "the procedurally appropriate course for third-party challenges to protective orders," the court granted the *Reader's* petition to intervene. Defendants had objected to intervention because, in producing various confidential materials, they had relied on the court's protective order. Consequently, they argued it would be unfair to let a non-party intervene to obtain access to private documents. The court dismissed defendants' argument, finding that it did not sufficiently outweigh the "strong public interest in disclosure."

The court commended the *Reader* and Marlan for shining light on incidents of police misconduct. Quoting Justice Brandeis and Martin Luther King, Jr., the court concluded that appropriate media scrutiny is necessary to air police misconduct issues and assist society in searching for a remedy.

Doe v. Chicago Police Officer, 202 F.R.D. 233, 2001 U.S. Dist. LEXIS 11680, No. 97 C 3913 (N.D. Ill. Aug. 6, 2001).

SHERIFF'S DENIAL OF JAIL ACCESS UNCONSTITUTIONAL

The Cook County Sheriff usually has a bigger problem with people trying to get out of jail than get in, but when a *Chicago Reader* reporter was barred from attending a class for female inmates, she and the *Reader* sued.

After *Reader* reporter Tori Marlan wrote an article entitled "Strip Search," she began researching a story on a program for female inmates with children. She requested permission to observe a class, but the Sheriff refused to grant her permission, instead offering a variety of alternatives, such as viewing a class videotape.

Marlan claimed the action was retribution for her prior negative coverage. Defendants claimed Marlan was denied access to the class because she had deceived them in reporting the "Strip Search" article. The court found that defendants "have, in effect, admitted their decision to refuse her access was content based," and therefore violated the First Amendment.

The decision provides a strong defense of First Amendment rights. First, the court was unmoved by defendants' offer of an alternative, such as watching a videotape, to actually attending the class. Plaintiffs offered evidence, including an expert, to show the importance of observing the class in person, and the court readily agreed, stating that "the potential chilling effect is so obvious experts are hardly necessary."

Addressing the defendants' claim that Marlan had deceived them in reporting the "Strip Search" story, the court noted that "[r]eporters . . . may occasionally use deception in gathering information as necessary to their First Amendment function of revealing what government officials may not want the public to know." This is an important validation of reporting techniques in light of the increasing number of lawsuits over investigative newsgathering methods.

Chicago Reader v. Sheahan, 141 F. Supp. 2d 1142, 29 Media L. Rep. 1925 (N.D. Ill. 2001).

Courtroom Access

JUDGE PERMITTED TO RESTRICT ENTRY INTO/OUT OF COURTROOM DURING MURDER TRIAL

The Illinois Appellate Court upheld a trial judge's decision to restrict entry into and out of the courtroom during a trial in which the defendant was accused of killing his estranged wife. A jury found the defendant guilty of first-degree murder.

The trial judge addressed spectators on two occasions, noting his policy of not allowing people to enter or leave the courtroom while court was in session. In one statement the judge said, "Everyone has a right to be in the courtroom, but they do not have a right to turn the courtroom door into a revolving door at a department store that's having a sale."

The appellate court held that because the defendant failed to object to the judge's entry/exit policy during trial, he waived his right to appeal the issue of whether his constitutional right to a public trial was violated. The plain error doctrine, which allows an appellate court in a criminal case to review issues that have been waived, did not apply because the evidence against the defendant was overwhelming and the judge's policy did not result in an unfair trial.

The appellate court emphasized that trial courts may reasonably restrict the public from entering or exiting the courtroom to avoid "a carnival atmosphere" and "unnecessary distractions."

State v. Gostele, 2000 Ill. App. LEXIS 498, No. 2-98-1567 (2d Dist. June 21, 2000).

FOIA

COURT FINDS CANCER RECORDS NOT EXEMPT FROM DISCLOSURE UNDER FOIA

An Illinois appellate court recently came down in favor of disclosure in another battle in the oft-repeated FOIA tug of war between privacy and the public interest.

At issue are records of incidences of neuroblastoma collected by the Illinois Department of Public Health for the Illinois Cancer Registry. The *Southern Illinoisian* sought the records in order to determine whether there were clusters of neuroblastoma in Southern Illinois. In order to identify cancer clusters, the newspaper sought only information showing, for each individual, type of cancer, zip code, and date of diagnosis.

The Department refused to release the records, claiming that they were exempt under FOIA's privacy exemption and that they were exempt under another FOIA exemption because the Cancer Registry Act prevented release of the data. The trial court ordered the disclosure of the information and also, in a rare occurrence under Illinois FOIA, granted attorneys' fees to plaintiff. The appellate court affirmed in part and reversed in part.

The appellate court first determined that the records sought did not fall under any of the specifically enumerated privacy exemptions of FOIA¹ which would have made them automatically exempt from disclosure. The court then employed a balancing test, one factor of which was the degree of invasion of personal privacy.

Significantly, the court determined that "even assuming that the information sought . . . could be used to determine the identities of persons, we do not believe that the degree of the invasion of those persons' privacy rises to the level of 'a clearly unwarranted invasion of personal privacy' that is required by section 7(1)(b)." The court found that the information was not covered by FOIA's privacy exemption.

The court, however, reversed the grant of summary judgment on the question whether the requested data "tends to lead to the identity, of any person," the release of which is prohibited under the Cancer Registry Act. The case was remanded to the trial court for resolution of this and other remaining issues. The parties are now proceeding with discovery.

The Illinois Press Association filed an amicus brief with the appellate court in this case.

S. Illinoisian v. Dep't of Pub. Health, 319 Ill. App. 3d 979, 747 N.E.2d 401 (5th Dist. 2001).

MIXED RESULT ON FOIA FOR NON-MEDIA PLAINTIFF

An Illinois appellate court has reversed in part a lower court's decision denying a request for various law enforcement records. Plaintiff Michael Carter, Jr., a local attorney, had sought Effingham County's Special Operations Group ("SOG") manual as well as any sheriff's department memorandums bearing his name.

The sheriff denied the request, claiming that the SOG manual and memos fell under the FOIA exemption for information relating to internal personnel rules and practices and that the SOG manual was also covered by the exemption for material relating to criminal and tax liability. After privately reviewing the documents at issue, the lower court upheld the denial, refusing to order the production of even redacted copies of the documents.

The appellate court disagreed with the outcome, determining that the SOG manual should be produced in redacted form and that the memo (it turned out there was only one) should be disclosed in its entirety.

The court's decision provides no new interpretation of the law but is valuable in reinforcing the FOIA principle that a simple refusal to turn over a document is unsupported when a redacted copy can be made available.

Carter v. Meek, 322 Ill. App. 3d 266, 750 N.E.2d 242 (5th Dist. 2001).

Reporter's Privilege

APPEALS COURT OVERTURNS EDITOR'S CONTEMPT CITATION

The Illinois reporter's privilege was broadly interpreted by the Illinois Appellate Court to protect unpublished photographs taken by a photojournalist at a crime scene.

The appellate court overturned a lower court's order requiring Decatur *Herald & Review* editor Peggy Bellows to produce unpublished photographs relating to the investigation of the murder of Karyn Hearn Slover. The defense attorney in the murder case had requested the photos in an attempt to support the defense's contention that the crime scene was contaminated by the investigation.

When Bellows refused to turn over the photographs, the trial court found her in contempt of court. Enforcement of the contempt citation, which would have resulted in the jailing of Bellows, was put on hold pending resolution of Bellows' appeal.

Bellows argued before the trial judge that the defense had failed to exhaust other sources of information before coming to the paper. The Illinois State Police, for instance, had taken more than 1,000 pictures of the same scene. Yet the trial judge found that the reporter's privilege did not apply.

The appellate court reversed, finding that the statutory reporter's privilege was applicable. The appeals court first construed the statutory term "reporters" to include photojournalists. The court then held that a photograph taken by a journalist constitutes a "source" of information within the meaning of the statute.

State v. Slover, 323 Ill. App. 3d 620, 753 N.E.2d 554 (4th Dist. 2001), *appeal denied*, 2001 Ill. LEXIS 1464, No. 92201 (Ill. Dec. 5, 2001).

Privacy

FAIR REPORT PRIVILEGE DEFEATS FALSE LIGHT CLAIM

A 1995 rape in Southern Illinois with seemingly no connection to media law is making a second appearance in the Illinois Media Law Newsletter, although on a completely different issue than was originally reported. The last newsletter included a piece on *People v. Pawlaczyk*, a reporter's privilege case that went to the Illinois Supreme Court. (See "Loss for Reporters in Illinois Reporter's Privilege Case," 1999-2000 Illinois Media Law Newsletter.)

The reporter's privilege case arose from a complaint brought by a former sheriff over two media reports that he had been questioned in connection with the 1995 rape. The alleged witnesses denied that they had been sources for the stories, and a grand jury was convened to determine whether two witnesses had committed perjury in denying their involvement. For their part, the reporters refused to reveal their sources.

Meanwhile, the sheriff's underlying case continued. An Illinois appellate court recently weighed in and determined that plaintiff did not have a claim for false light invasion of privacy against the *Belleville News-Democrat*. The court determined that simply stating that someone had been interviewed in connection with a crime was not tantamount to an accusation of commission of a crime. Significantly, the article did not state that plaintiff had been accused of a crime. The court did not allow plaintiff to apply his own spin to the statement and bridge the gap between the actual statement and an actionable statement. Furthermore, the court determined that the article was subject to the fair report privilege, reiterating the principle that the privilege is not defeated by a showing of actual malice.

Hurst v. Capital Cities Media, Inc., 323 Ill. App. 3d 812, 754 N.E.2d 429 (5th Dist. 2001).

CASES OF NOTE ON THE NATIONAL SCENE

Newsgathering

SUPREME COURT DECREES NO MEDIA LIABILITY FOR ILLEGALLY INTERCEPTED PHONE TRANSMISSION

In what arguably was the most important First Amendment case for journalists before the Supreme Court last term, and probably over the last several terms, the Court has decided in favor of the journalists, finding that the First Amendment shields them from liability for disclosing the contents of an illegally intercepted communication.

Bartnicki v. Vopper concerned a radio commentator's liability for re-playing the tape of an illegally intercepted and recorded cellular telephone conversation. The tape contained a conversation between the head of a teacher's union and the union's chief negotiator regarding a planned strike. After the teachers accepted a contract proposal, Vopper, a local radio commentator, played the recording on his public affairs show. Other media organizations subsequently released the contents of the tape.

Plaintiffs sued, alleging that defendants had violated state and federal laws prohibiting the knowing disclosure of illegally intercepted communications. In determining whether the statutes violated the First Amendment, the Court made the following assumptions: 1) defendants had played no role in the illegal interception; 2) defendants had lawfully obtained the tape, even if the tapes themselves were illegally recorded; and 3) the tape contained a conversation on a matter of public concern.

The Court then weighed the countervailing constitutional interests in privacy (including the possible chilling effect publication could have on private communications) and freedom of speech and determined that "privacy concerns give way when balanced against the interest in publishing matters of public importance." According to the Court, "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."

As encouraging as the holding is, it does not validate violations of the law by journalists themselves. Journalists continue to remain liable for newsgathering activities that violate laws of general application. In addition, the Court emphasized the public interest at stake in the intercepted communication and the fact that the media had played no role in the interception.

Bartnicki v. Vopper, 532 U.S. 514 (2001).

Copyright

COPYRIGHT LAWS REQUIRE PUBLISHERS TO OBTAIN ADDITIONAL PERMISSION FROM FREELANCERS TO DISTRIBUTE STORIES ON-LINE

Freelance journalists and the media organizations for which they work found themselves on opposite sides in the high-profile case of *New York Times Co. v. Tasini*. The Supreme Court ruled in favor of the freelancers, holding that publishers that contract with freelancers to publish stories in print publications must obtain additional consent, or pay an extra fee, to republish the same pieces on-line or in another electronic format.

The Court affirmed an order granting summary judgment in favor of six freelance writers—including Jonathan Tasini, president of the National Writers Union—whose copyrights were violated when publishers and database owners republished their individual pieces electronically without their permission.

Generally, reproducing a copyrighted story without the author's authorization constitutes copyright infringement. But the publishers argued they were exempt from liability because the revision privilege in 17 U.S.C. § 201(c) allows them to republish "collective works" without having to ask permission from the authors.

The Supreme Court rejected the publishers' argument that they were sheltered from infringement liability by section 201(c). The Court found that the publishers did not reproduce and distribute the articles at issue "as part of" a collective works "revision." Rather, the articles were individually retrievable on-line as separate items and, thus, could no longer constitute part of a collective work.

In light of the *Tasini* decision, without a well-written initial contract with freelancers setting forth standards for electronic republication, media organizations may expose themselves to liability for copyright infringement by placing freelancers' work on-line.

N.Y. Times Co. v. Tasini, 533 U.S. 483 (2001).

UPDATES ON PREVIOUSLY REPORTED CASES

COURT CHALLENGE TO PRETRIAL PUBLICITY RULES FAILS

A federal judge has thrown out a lawsuit brought by 10 state prosecutors challenging new attorney disciplinary commission rules on pretrial publicity. The rules took effect in March of 2000 over the protests of many, including the IPA, which appeared as an amicus in the rulemaking process. They concern the statements prosecutors are allowed to make in pending cases. (See "Change in Pretrial Publicity Rules," 1999-2000 Illinois Media Law Newsletter.)

Dick Devine, State's Attorney of Cook County, and nine other prosecutors sued, alleging that the new rules violated their First Amendment rights. Specifically, plaintiffs claimed the rules were vague and overbroad and would have a chilling effect on their speech. For instance, one of the new rules prohibits statements that would "pose a serious and imminent threat of heightening public condemnation of the accused," without regard to whether such a statement is, for instance, true.

The court determined, however, that the plaintiffs had not shown that there was an actual case or controversy; plaintiffs had not shown what speech would be prohibited under the rules or that any prosecutions had taken place or were even imminent.

The court did not declare the rules constitutional: "Our holding is simply that the rules are fairly susceptible to an interpretation that would render them constitutional, so that we 'cannot discount the possibility that the purported controversy' concerning the constitutionality of these ethical rules 'may prove to be nonexistent.'"

Nearly nine months after the district court's decision, the Illinois Press Association convened a panel of prominent attorneys and law enforcement officials to discuss the effects of the pretrial publicity rules. The panel met in September 2001 and . . . **[Do we know what the result of this panel discussion was? Perhaps the IPA can fill in a sentence or two detailing the outcome of that panel discussion. In particular, it would be of interest to hear the law enforcement officials' perspectives.]**

Devine v. Robinson, 131 F. Supp. 2d 963, 29 Media L. Rep. 1301 (N.D. Ill. 2001).

FINAL DESNICK CLAIM DISMISSED

A seven-year odyssey through the federal courts may finally have come to an end with the dismissal of the Desnick eye clinic's last remaining claim against ABC, Sam Donaldson, and a *PrimeTime Live* producer.

Desnick had sued based on a 1993 *PrimeTime Live* segment that alleged fraud in the diagnosis and treatment of cataract in Medicare patients at the eye clinic.

A federal district court judge in Chicago dismissed the case in the mid-1990s, and the appellate court affirmed the dismissal with regard to such claims as trespass and fraud, which related to *PrimeTime Live's* newsgathering techniques. Plaintiffs' defamation claim survived, however. (See "Undercover Investigative Work Gets Boost, 1995-96 Illinois Media Law Newsletter.) The defendants settled with the two individual plaintiffs but continued to battle the eye center. (See "Desnick Update," 1997 Illinois Media Law Newsletter.)

The defamation claim related to *PrimeTime Live's* allegation that an "auto-refractor" machine had been rigged to register false positives for cataract. Plaintiff contended that *PrimeTime Live* had acted with actual malice in using Paddy Kalish, a former clinic optometrist, as a source for the story.

The district court disagreed, granting summary judgment to the defendants, and the appellate court affirmed. In a lengthy discussion of actual malice, the appellate court showed how difficult it is for a plaintiff to meet the standard. Actual malice means that the defendant either knew the statement was false or acted with reckless disregard to the truth or falsity of the statement. Because defendants did not know the statements at issue were false, the issue was whether they had acted recklessly in relying on Kalish.

Plaintiff identified several factors, including the fact that the clinic had won a previous state court lawsuit against Kalish based on his tampering accusations, that it believed should have led *PrimeTime Live* to question Kalish's credibility. The court noted that Kalish had lost the state court case because of his attorney's "bobble," not on the merits. As the court noted, the requisite recklessness needed to show actual malice is such that a defendant suspecting that the statement might be false "must deliberately close his eyes to the possibility. This is the criminal sense of recklessness." The court found that nothing in the record "that would have cast any doubt on Kalish's truthfulness" and upheld the dismissal.

J.H. Desnick, M.D., Eye Servs. Ltd v. ABC, Inc., 233 F.3d 514, 29 Media L. Rep. 1053 (7th Cir. 2000).

CHIQUITA CHECK

It was previously reported that Gannett had settled with Chiquita Brands International in a lawsuit arising from a *Cincinnati Enquirer* exposé on Chiquita's business practices. (See "Chiquita Chill," Illinois Media Law 1998.) As part of the settlement, the *Enquirer* ran a page-one apology for three consecutive days, but the monetary amount was simply reported as "more than \$10 million." The settlement amount was later revealed in a lawsuit filed by the former *Enquirer* editor, who claimed he had been scapegoated by Gannett. According to the court papers, Gannett paid Chiquita \$14 million.

This newsletter was prepared for Illinois Press Association members and friends by Dick O'Brien, Eric Mattson, Brendan Healey, and Jamie Secord of Sidley Austin Brown & Wood. Sidley Austin Brown & Wood is a law firm with offices in Chicago, Dallas, Los Angeles, New York, San Francisco, Seattle, Washington, D.C., Beijing, Hong Kong, London, Shanghai, Singapore, and Tokyo. The firm represents media clients on a wide variety of media law issues, including defamation and Freedom of Information Act litigation.

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