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MLRC Media Law Resource Center

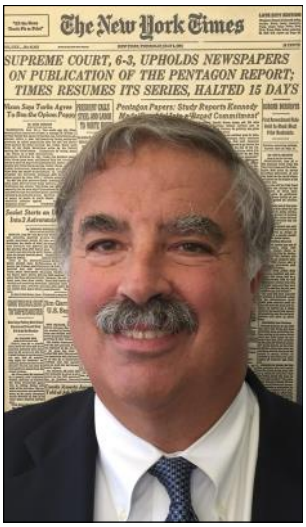
MEDIALAWLETTER

Reporting Developments Through September 30, 2020

From the Executive Director's Desk

Trump Glorifies Violence Against Journalists: Where's the Outrage?

The list of President Trump's outrageous statements and actions is so long it could take up this whole column. Coming back from Walter Reed Hospital after being treated for the coronavirus and taking off his mask as he entered the White House; covering up first the existence, then the dangers, of the pandemic from the American people; mimicking a disabled person; belittling a political opponent because he alleged she has an ugly face; saying of white supremacists, after Charlottesville, that there were "very fine people on both sides"; stating that John McCain was not a war hero because he was captured; declaring our servicemen "losers" and "suckers"; defacing a hurricane map with a Sharpie to comport with his self-serving predictions; lying about the size of his inaugural crowds in the face of photographs showing precisely the opposite; telling Attorney General Barr to indict his political nemeses; while married, paying off women he had affairs with to keep quiet; not to mention bragging that women love it when he grabs them and other egregious statements on the infamous Access Hollywood tape; and so on and on.


The New York Times

SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS

George Freeman

The problem is that the frequency of these inanities is such that none seem to have any lasting consequences. Our expectations of Trump are so low that another few blatant lies and bullying have no moment. While any one – yes, one – of these bizarro acts would have been enough to torpedo an Obama campaign or Presidency (think the tumult when Carter said he had lust in his heart – quaint by comparison), they are generally dismissed as "Trump being

Trump said John McCain was not a war hero because he was captured.

Karen McDougal, left, and Stormy Daniels, two of the women a married Trump had affairs with and paid to keep quiet.

Trump." We have become conditioned to think that these egotistical attacks are somehow acceptable, not the radical departures from presidential behavior and norms– or, for that matter, normal human behavior – that they certainly are.

But I don't intend a political rant here. Rather, we are an organization whose mission is to support journalists and enhance First Amendment freedoms. And I fear that in the outpouring of craziness from the White House – three of the incidents above came just in the last two weeks – a recent Trumpian attack on the press was barely noted and slid by as though it was nothing. But it was such an attack on our clients that it makes his diatribes against "the enemy of the people" and his cheerleading mockery of "fake news" pale by comparison.

I fear that in the outpouring of craziness from the White House a recent Trumpian attack on the press was barely noted and slid by as though it was nothing.

Thus only on Thursday, September 24 did The New York Times publish pieces on Trump rallies of the previous Friday and Tuesday where he made the most outlandish attacks on journalists. It reported that at a Minnesota rally six days earlier, Trump "went after" MSNBC anchor Ali Velshi by name, describing how he was hit by a rubber bullet while reporting on a George Floyd protest. "It was the most beautiful thing," our President preened (after incorrectly stating he had been hit by a tear-gas canister). He added, "It's called law and order."

Trump did not answer Velshi's tweet which asked "What law did I break while covering an entirely peaceful march?" NBC issued a statement saying "When the president mocks a

Trump mocks a disabled New York Times reporter

journalist for the injury he sustained while putting himself in harm's way to inform the public, he endangers thousands of other journalists and undermines our freedoms."

Needless to say, these responses did not deter our Chief Executive. At a rally in Pennsylvania on Tuesday, Trump repeated the attack, referring to Velshi incorrectly as "that idiot reporter from CNN" and remarking on his baldness (shades of George Costanza). "And he went down" Trump said, getting laughs from the crowd. "I've been hit! I've been hit!" Then our Commander in Chief went on to describe the National Guard's advancing on a crowd of protestors and reporters. "They grabbed one guy – 'I'm a reporter! I'm a reporter!' They threw him aside like he was a little bag of popcorn," he cracked, to more laughs from the audience.

He concluded with a coda, "Honestly, when you watch the crap that we've all had to take for so long, when you see that, it's actually – you don't want to do that – but when you see it, it's actually a beautiful sight.

In sum, here is an incident where the President of the United States is gleefully gloating over the assault by the U.S. military on a reporter who was simply doing his job covering a peaceful protest rally. And almost as bad, as outlandish as his actions are, they were covered so sparsely and matter-of-factly that I bet many of us – media lawyers who count on journalists such as Velshi as our clients – weren't even aware of this outrage.

Here is an incident where the President of the United States is gleefully gloating over an assault by the U.S. military on a reporter who was simply doing his job covering a peaceful protest rally. And almost as bad, it was covered so sparsely and matter-of-factly that I bet many of us weren't even aware of this outrage.

Of course, what we can do about this sad state of affairs is another question. Certainly giving these unfounded and constitutionally inappropriate attacks more visibility is one thing. To report often and loudly on these rants, and to point out how unprecedented and dangerous they are, would be the first step. Sure, they will lead to Republican claims of bias, but such arguments would have no more credibility than contending it is subjective to say Trump is lying when he has lied over 20,000 times.

In my view, the media too often pulls back from reporting about itself, especially as victim. Thus, many establishment newspapers don't want to write about how some agency is disobeying the law by not timely responding to the paper's FOIA request. I often counseled smaller, less formal papers to write about such agency's violations of law, and it was interesting how often an article would cause the agency to comply. In a similar fashion, the story of Trump's dangerous attacks on Velshi and other journalists should have received far more play.

These wild and unwarranted attacks must be viewed in the context of Trump's even greater assaults on the Constitution – indeed, the most fundamental value our democracy is based on, the sanctity of the ballot.

Additionally, these wild and unwarranted attacks must be viewed in the context of Trump's even greater assaults on the Constitution – indeed, the most fundamental value our democracy is based on, the sanctity of the ballot. The very same day the Times reported on the President's flagrant attacks on Velshi, it also ran an article saying that Trump yet again declined an opportunity to endorse a peaceful transfer of power after the election. Instead, he gave meritless warnings about voter fraud and the dangers of mail-in ballots (into what river were those ballots dumped?). As the Times wrote, " Mr. Trump's refusal – or inability – to endorse perhaps the most fundamental tenet of American democracy, as any president in memory surely would have, was the latest instance in which he has cast grave uncertainty around the November election and its aftermath."

Couple that with all the ways Trump and his Republican cronies are trying to keep Americans from voting – the threat of armed militiaman at the polls to intimidate voters; closing polls in largely minority and Democratic leaning districts to create hours long lines; going to court to try to establish laborious registration requirements, again to disenfranchise likely Democratic voters; and just this week, in California, Republicans set up fake drop-boxes for mail-in ballots, and in Texas three Trump appointed federal judges upheld a GOP Governor's edict allowing only one drop-box per county in that rural state – and a stark pattern of undermining and violating the spirit, if not the letter, of the Constitution is obvious. We should try to ensure that these attacks on the First Amendment and our Constitution will not exist in the next four years.

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

Clifford v. Trump: The Ongoing Battle Between Fact and Opinion

By David Halberstadter

At the end of July 2020, the Ninth Circuit issued an unpublished decision in Clifford v. Trump, 818 Fed.Appx. 746 (9th Cir. 2020), a lawsuit in which Stephanie Clifford, professionally known as Stormy Daniels, sued the President for defamation. Although decided under Texas law, it was the federal appellate court's most recent foray into the ongoing struggle to define which published comments constitute actionable statements of fact and which ones constitute non-actionable opinions.

Background

As most readers undoubtedly are aware, Ms. Clifford claims that she was involved in an intimate relationship with Mr. Trump in 2006. In 2011, Ms. Clifford agreed to cooperate with a magazine that intended to publish a story about their relationship. According to Ms. Clifford's complaint, a few weeks after she agreed to assist with the magazine story, she was approached by an unknown man in a Las Vegas parking lot who warned her, "Leave Trump alone. Forget the story." The man allegedly threatened that harm would come to her if she continued to cooperate with the magazine.

According to Ms. Clifford's complaint, she was approached by an unknown man in a Las Vegas parking lot who warned her, "Leave Trump alone. Forget the story."

In 2018, after Mr. Trump had become President, Ms. Clifford went public with her account of the incident in Las Vegas. With the assistance of a sketch artist, she prepared a composite sketch of the man from the parking lot, which was then disseminated publicly. Soon after the sketch was released, a Twitter user tweeted the sketch juxtaposed with a photograph of Ms. Clifford's ex-husband, together with a message suggesting that the two men resembled one another. Mr. Trump then retweeted this tweet, adding his own message: "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!"

Ms. Clifford's defamation claim is based on Mr. Trump's retweet about the composite sketch. She offered two arguments for why the tweet was defamatory. First, she claimed that the use of the term "con job" implied that she had literally committed fraud. Second, Ms. Clifford asserted that the tweet accused her of lying about having been threatened over her participation in the magazine story about her relationship with Mr. Trump.

The Path Through the District Courts

Ms. Clifford's lawsuit followed a windy path before ending up in the Ninth Circuit, where the court applied Texas state law. She originally filed her lawsuit in federal court in New York,

contending that venue was appropriate in the Southern District of New York because that is the district in which Mr. Trump resided at the time. Mr. Trump moved to transfer the case to the Central District of California on the basis that the lawsuit related to other litigation between the parties in this district (regarding the enforceability of her non-disclosure agreement). Eventually, Ms. Clifford and Mr. Trump stipulated to the transfer.

Clifford's defamation claim is based on Trump's Tweet about this composite sketch.

Once the case had been transferred to the Central District of California, Mr. Trump filed a special motion to strike under Texas' anti-SLAPP statute. The district court therefore had to resolve as an initial matter whether the Texas anti-SLAPP statute applied to Ms. Clifford's claims, as Mr. Trump contended, or whether New York's anti-SLAPP statute applied, as Ms. Clifford argued. The district court found that: (i) New York choice-of-law principles applied to the diversity action, notwithstanding its transfer to California; (ii) for multistate defamation actions, where the situs of the injury may be in multiple jurisdictions, New York applies the law of the state with the most significant interest in the litigation, which generally is the state where the plaintiff is domiciled; and, (iii) because Ms. Clifford is a citizen of the state of Texas, Texas law applies to the action, including its anti-SLAPP statute. *Clifford v. Trump*, 339 F.Supp.3d 915, 921-922 (C.D.Cal. 2018).

After disposing of several other procedural issues in Mr. Trump's favor – e.g., that it was appropriate to apply the Texas anti-SLAPP statute in federal court, that it was appropriate to adjudicate Mr. Trump's anti-SLAPP motion prior to any discovery and that the motion should be considered even if the statutory deadline had expired – the district court proceeded to consider the merits of Mr. Trump's anti-SLAPP motion. *Id.* at 922-924. It ultimately concluded that Mr. Trump had satisfactorily demonstrated by a preponderance of the evidence that Ms. Clifford's claim related to Mr. Trump's exercise of his right of free speech, and that Ms. Clifford had failed to establish a *prima facie* case for defamation based upon the statements at issue. *Id.* at 925-928.

The district court concluded that the tweet in question was not actionable as defamation because it constituted the "'rhetorical hyperbole' normally associated with politics and public discourse in the United States." The court observed: "It is well settled that the meaning of a publication,

and thus whether it is false and defamatory, depends on a reasonable person's perception of the entirety of a publication and not merely on individual statements." *Id.* at 926 (quoting *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002)). To assess whether a statement is "rhetorical hyperbole," the district court continued, the court must look to the statement "as a whole in light of the surrounding circumstances and based upon how a person of ordinary intelligence would perceive it." *Id.* (quoting *Campbell v. Clark*, 471 S.W.3d 615, 625 (Tex. App. 2015)).

The court found that Mr. Trump's tweet involved a matter of public concern, including purported acts committed by the now President of the United States. It therefore applied three legal principles, which the court collectively labeled the "Bentley/Milkovich analysis," in order to determine whether Mr. Trump's tweet was actionable as defamation:

(1) a statement on matters of public concern must be provable as false before there can be liability for defamation;

(2) the United States Constitution protects statements that cannot reasonably be interpreted as stating actual facts about an individual made in debate over public matters in order to provide assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of the United States; and

(3) where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth, and where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault. *Id.* at 926 (relying on *Bentley*, 94 S.W.3d at 580 and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990).

The district court concluded that Mr. Trump's tweet constituted "rhetorical hyperbole;" *i.e.*, "extravagant exaggeration [that is] employed for rhetorical effect." Specifically, Mr. Trump's tweet displayed, in the court's view, "an incredulous tone, suggesting that the content of his tweet was not meant to be understood as a literal statement about Plaintiff. *Id.* Instead, Mr. Trump sought to use language to challenge Plaintiff's account of her affair and the threat that she purportedly received in 2011." The district court also observed that Mr. Trump's tweet, like the statements at issue in *Milkovich*, were "pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage" and therefore could not constitute a defamatory statement. *Id.*

Ninth Circuit Decision

The Ninth Circuit affirmed the dismissal of Ms. Clifford's complaint, but for slightly different reasons than those the district court had relied upon. First, the appellate court affirmed that the motion to dismiss procedures of Texas's anti-SLAPP law applied in federal court. Because Mr. Trump's motion challenged the legal sufficiency of the allegations of Ms. Clifford's complaint,

the appellate court applied the federal Rule 12(b)(6) standard to determine whether a claim was properly stated. *Clifford*, 818 Fed.Appx at 747.

The Ninth Circuit then turned to the substance of Ms. Clifford's defamation claim. It noted that under Texas law, the elements of a defamation claim are (i) the publication of a false statement of fact to a third party, (ii) that is defamatory concerning the plaintiff, (iii) made with actual malice (with respect to a public figure) and (iv) damages, in certain cases. *Id.* (citing *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015)). Texas law also makes clear, the appellate court found, that "statements that are not verifiable as false are not defamatory. And even when a statement is verifiable, it cannot give rise to liability if the entire context in which it was made discloses that it was not intended to assert a fact." *Id.* at 749 (citing *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 638 (Tex. 2018)).

Moreover, Texas law refers to statements that fail either the "verifiability" or "context" tests as nonactionable "opinions." *Id.* The determination of whether a statement is "reasonably capable of a defamatory meaning" focuses on how the statement would be interpreted by an "objectively reasonable reader." *Id*. (citing *Dallas Morning News*, 554 S.W.3d at 624, 631).

The Ninth Circuit rejected Ms. Clifford's assertion that Mr. Trump's statements implied that she had literally committed the crime of fraud:

> [I]t would be clear to a reasonable reader that the tweet was not accusing Clifford of actually committing criminal activity. Instead, as used in this context, the term 'con job' could not be interpreted as anything more than a colorful expression of rhetorical hyperbole. Because the tweet could not reasonably be read as asserting that Ms. Clifford committed a crime, this theory of defamation is not viable.

Id. at 749-750.

The appellate court next addressed Ms. Clifford's allegation that Mr. Trump's tweet was defamatory because it accused her of lying about having been threatened because of her participation in a magazine story about her relationship with Mr. Trump. The court agreed that this was a reasonable interpretation of Mr.Trump's tweet, but concluded that it nevertheless was not actionable. *Id.* at 750.

Under Texas law, the Ninth Circuit observed, a statement that does no more than interpret disclosed facts constitutes an opinion, which cannot form the basis of a defamation claim. In the appellate court's view, Mr. Trump's tweet, when considered from the perspective of an objectively reasonable reader, merely reflects his opinion about the implications of the allegedly similar appearances of Ms. Clifford's ex-husband and the man in the sketch. In other words:

> Mr. Trump's reference to a "sketch years later of a nonexistent man" signals that the allegedly defamatory conclusion that followed—that Ms. Clifford was pulling a "con job" and "playing the Fake News Media for Fools"—plainly

> concerns the similarities between the sketch and the photograph of Ms. Clifford's ex-husband. Because the tweet juxtaposing the two images was displayed immediately below Mr. Trump's tweet, the reader was provided with the information underlying the allegedly defamatory statement and was free to draw his or her own conclusions. . . . Accordingly, the tweet, read in context, was a non-actionable statement of opinion.

Id.

The Ongoing Fact vs. Opinion Debate

This fact-versus-opinion debate has a long history in American jurisprudence. And despite decades of litigation, courts continue to struggle with the distinction. A full discussion of this topic is beyond the scope of this article. But suffice it to say that the Ninth Circuit's decision in *Clifford* is unlikely to be the last word on the subject.

In fact, just two weeks prior to the *Clifford* decision, the Second Circuit issued its own most recent decision addressing the distinction between actionable fact and nonactionable opinion in *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020). The appellate court in *La Liberte* reversed the decision of the district court to both dismiss the plaintiff's defamation claim against television journalist Joy Reid and to strike the claim under California's anti-SLAPP statute. Among other things, the Second Circuit concluded (i) that California's anti-SLAPP statute was inapplicable in federal court because it conflicts with Federal Rules 12(b)(6) and 56, (ii) the plaintiff was not, as the district court had found, a limited-purpose public figure and (iii) the alleged defamatory statement was not, as the district court had determined, a nonactionable opinion.

This fact-versus-opinion debate has a long history in American jurisprudence. And despite decades of litigation, courts continue to struggle with the distinction.

Ms. Reid had made several allegedly defamatory posts about the plaintiff on Twitter. In one post, she reposted a photograph of the plaintiff appearing to yell at a minority teenager and attributed specific racist remarks to the plaintiff; in another, she juxtaposed the photograph of the plaintiff with a 1957 image of a white woman in Little Rock screaming at a black child attempting to go to school. With regard to the latter post, the Second Circuit found that it could be interpreted as accusing La Liberte of engaging in specific racist conduct, which is a provable assertion of fact and therefore actionable. In its view, a reader could have understood the post to mean that the plaintiff, just like the woman in the 1957 image, screamed at a child out of racial animus. According to the court, "Reid thus portrayed La Liberte as a latter-day counterpart of the white woman in 1957."

And most recently, a federal district court in New York weighed in on the fact-opinion distinction in *McDougal v. Fox News Network*, 2020 WL 5731954 (Case No. 19-cv-11161) (S.D.N.Y. Decided September 24, 2020). Karen McDougal claimed that she was defamed by a segment on the Fox News program "Tucker Carlson Tonight" when the host of the show

accused her of extorting now-President Donald Trump in exchange for her silence about an alleged affair. Among other things, Mr. Carlson stated during his program: "Two women approached Donald Trump and threatened to ruin his career and humiliate his family if he doesn't give them money. Now, that sounds like a classic case of extortion."

The court granted Fox News' motion to dismiss. It found that "[t]he context in which the offending statements were made here make it abundantly clear that Mr. Carlson was not accusing Ms. McDougal of actually committing a crime." Rather, the court concluded, the use of the word "extortion" was simply "loose, figurative, or hyperbolic language that does not give rise to a defamation claim." If this sounds similar to the Ninth Circuit's characterization of Mr. Trump's tweet in *Clifford*, that's because it is. In fact, the district court in *McDougal* cited to the district court's decision in *Clifford* to support its conclusion that Mr. Carlson's statement, like that of Mr. Trump, was "just one type of the '"rhetorical hyperbole" normally associated with politics and public discourse in the United States.'"

Without some way of clearly distinguishing between actionable statements of fact and nonactionable expressions of opinion, two outcomes are likely: some free expression will be chilled, and more litigation will be filed.

And so, the debate goes on. What one court considers permissible "rhetorical hyperbole," another may consider actionable statements of verifiable fact. Perhaps there is no way to draw a clear line between the two, and perhaps the context in which a statement is made is the most critical factor. But without some way of clearly distinguishing between actionable statements of fact and nonactionable expressions of opinion, two outcomes are likely: some free expression will be chilled, and more litigation will be filed.

David Halberstadter is a partner at Katten Muchin Rosenman in Los Angeles. Charles Harder represented President Trump. Clifford was represented by Clark O. Brewster, Tulsa, OK.

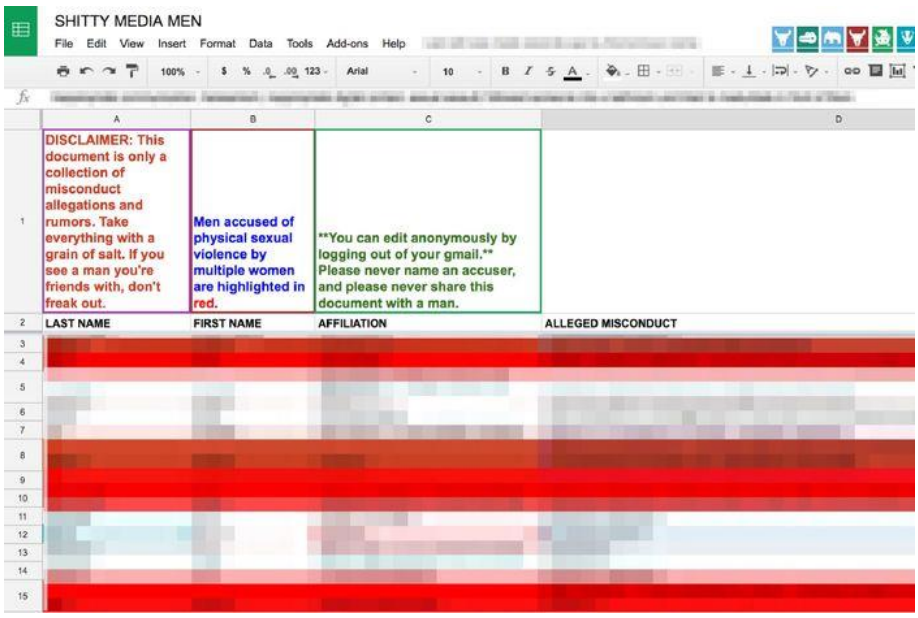
"Shitty Media Men" Defamation Suit Survives Motion to Dismiss

Plaintiff Not a Public Figure in #MeToo Controversy

By Allyson Veile

In June, the Eastern District of New York rejected a motion to dismiss in Elliot v. Donegan, 18-CV-05680 (June 30, 2020), a defamation case that arose out of a Google spreadsheet entitled "Shitty Media Men," which circulated early in the #MeToo movement. In doing so, the Court held that Stephen Elliot, an author who was anonymously accused of sexual misconduct on the spreadsheet, was not a limited-purpose public figure for the purposes of the public controversy surrounding the #MeToo movement.

The Court also declined to find that the spreadsheet's creator, Moira Donegan, was protected by § 230 of the Communications Decency Act (CDA) at the motion to dismiss stage but acknowledged that CDA immunity may be a gating issue in the case. Accordingly, the Court bifurcated the issues and directed the parties to engage in narrow discovery on Donegan's CDA immunity before proceeding to discovery on the defamation claim.



A Google spreadsheet entitled "Shitty Media Men" began circulating among women in the media industry.

Background

Only a few days after news of allegations of sexual misconduct against Harvey Weinstein broke in October of 2017, a Google spreadsheet entitled "Shitty Media Men" began circulating among women in the media industry, mostly by email. In it, anonymous users posted allegations of sexual misconduct against men working in the media industry. The top of the spreadsheet contained a disclaimer: "This document is only a collection of misconduct allegations and rumors. Take everything with a grain of salt."

By October 12, over 70 men had been named on spreadsheet, including Stephen Elliot. Elliot's entry on the spreadsheet was highlighted in red, indicating that he was "accused of physical sexual violence by multiple women."

Elliot is an author and content creator who has published opinion pieces, essays, and books. His written work includes graphic and violent descriptions of sex, often BDSM. His work also includes characters who have survived sexual assault, and he has written about his own experience as a victim of sexual assault.

The spreadsheet was taken down just hours after it ultimately went viral. It was not until January 2018 that Moira Donegan identified herself as its creator in an article published by *The Cut.* In October 2018, Elliot sued Donegan and 30 anonymous Jane Does allegedly involved in the creation of the spreadsheet for defamation. Donegan moved to dismiss, arguing that Elliot's work made him a limited-purpose public figure. She proposed defining the public controversy at play in the case as the "#MeToo story," which she argued encompassed "sex, consent, morality and power." Donegan also argued that Elliot's suit was barred under § 230 of the CDA.

Court Ruling

The court first addressed the defamation claim, finding that Elliot was not a limited-purpose public figure for purposes of his claim, thus he was not required to plead actual malice. In so holding, the court defined the public controversy of the early #MeToo movement as limited to "sexual assault, sexual harassment, and consent in the workplace."

Elliot's writings and interviews did not transform him into a limited-purpose public figure because they were unrelated to workplace issues.

Relying primarily on the Second Circuit's decision in Lerman v. Flynt Distribution Co., Inc., the court rejected Donegan's proposed definition of the controversy—encompassing sex, consent, morality and power—as too broad. Instead, the Court emphasized that it was bound to consider the specific question being discussed at the time of the defamatory statement. The court acknowledged that the #MeToo movement may be used today as a shorthand for larger discussions about sex, consent, morality and power, but ultimately concluded that the public controversy that arose in the immediate wake of the Weinstein allegations was tied to workplace misconduct. In doing so, the court emphasized that the spreadsheet itself was directed at workplace misconduct—it was aimed at exposing men in the media industry and was circulated among women in that industry.

Having defined the controversy in this way, the court concluded that Elliot's writings and interviews did not transform him into a limited-purpose public figure because they were unrelated to workplace issues. Thus, Elliot was not required to plead actual malice. In a lengthy footnote, however, the court observed that Donegan's reliance on unverified, anonymous sources likely would support an inference of actual malice, at least for purposes of a motion to

dismiss. The court did not address whether Elliot would qualify as a general-purpose public figure.

The court next turned to Donegan's claim of CDA immunity under § 230, resolving three important issues relating to this claim.

First, the court concluded that Donegan qualified as a provider of an "interactive computer service" during the time the spreadsheet was live, likening the spreadsheet to an online message board. The court also declined to decide, however, whether Donegan had created or developed the unlawful content herself, which would have precluded CDA immunity. The complaint did not foreclose the possibility that Donegan fabricated the allegations against Elliot herself or published accusations relayed to her by a third-party.

Second, the court rejected Elliot's argument that the design of the spreadsheet and the disclaimer at the top specifically encouraged unlawful content, which would have precluded CDA immunity. Nevertheless, the court concluded that Elliot was entitled to discovery on Donegan's actual conduct during the period the spreadsheet was online to determine whether she had specifically encouraged unlawful conduct in any other ways.

Third, the court rejected Elliot's argument that Donegan materially contributed to the defamatory statement if she highlighted Elliot's entry in red to indicate that he was "accused of physical sexual violence by multiple women." The court rejected "in the strongest possible terms" Elliot's arguments that the words "multiple" as opposed to "two" or "physical sexual violence" as opposed to "rape" altered the meaning of the allegations in the spreadsheet. Instead, the court viewed the highlighting as mere "neutral assistance," thus it did not bring Donegan outside the protection of the CDA.

Recognizing that many of the remaining factual issues relating to Donegan's CDA immunity claim could not be resolved at the motion to dismiss phase, the court ordered the parties to engage in limited discovery on this claim before proceeding to discovery on the defamation claim. While the court ultimately rejected Donegan's motion to dismiss, this ruling essentially fast-tracks summary judgment on CDA immunity because the issue could be dispositive.

Allyson Veile is a third-year law student in the First Amendment Clinic at Duke Law School. Plaintiff is represented by Andrew Miltenberg, Nesenoff & Miltenberg, NY. Defendant is represented by Roberta A. Kaplan, Kaplan Hecker & Fink, NY.

Nevada Supreme Court Rules for Former Hairstylist Sued for Defamation by Steve Wynn Over Sexual Misconduct Allegations

By Sam Dangremond

On September 1, the Supreme Court of Nevada sided with Jorgen Nielsen, a former Wynn Resorts hair stylist, in a defamation suit that his former employer, Steve Wynn, brought against him. Nielsen v. Wynn. Justices Gibbons, Silver, and Stiglich reversed and remanded the district court's denial of a special motion to dismiss the defamation claim.

Background

Jorgen Nielsen, who worked as artistic director for the Wynn Las Vegas and Encore salons, went on the record with several national media outlets about his former boss Steve Wynn's alleged misconduct involving Wynn Resorts employees.

Wynn subsequently sued Nielsen for defamation, alleging that he had made "false and defamatory" statements to the outlets including the *Wall Street Journal*. The newspaper quoted Nielsen in a January 27, 2018 article in this way: "Everybody was petrified," said Jorgen Nielsen, a former artistic director at the salon. Mr. Nielsen said he and others repeatedly told high-level company executives Mr. Wynn's sexual advances were causing a problem, but "nobody was there to help us."

In April 2018, Wynn sued Nielsen for defamation. Nielsen moved to dismiss the case under Nevada's anti-strategic lawsuit against public participation (anti-SLAPP) statutes. The district court denied Nielsen's motion under the first prong of the anti-SLAPP analysis, concluding that Nielsen failed to establish that Wynn's defamation claim was "based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a).

The Court's Opinion

The Supreme Court of Nevada reversed and remanded the district court's decision. The court noted that under the first prong of an anti-SLAPP analysis, a defendant must show, "by a preponderance of the evidence, that the [plaintiffs] claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). Relevant to this case, a "good faith communication" is a "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood." NRS 41.637(4); *see* *Shapiro v. Welt*, 133 Nev. 35, 40, 389 P.3d 262, 268 (2017) ("[N]o communication falls within the purview of NRS 41.660 unless it is truthful or is made without knowledge of its falsehood." (internal quotation marks omitted)). In

determining whether a communication was "made in good faith, the court must consider the `gist or sting' of the communication as a whole, rather than parsing individual words." *Rosen v. Tarkanian,* 135 Nev. 436, 437, 453 P.3d 1220, 1222 (2019) (internal quotation marks omitted).

The Nevada Supreme Court concluded that Nielsen's communication to national media outlets about Wynn's alleged harassment of his employees was made in direct connection with an issue of public interest in a public forum. *See Shapiro,* 133 Nev. at 39, 389 P.3d at 268 (adopting guiding principles on what constitutes "public interest"); *Damon v. Ocean Hills Journalism Club,* 102 Cal. Rptr. 2d 205, 209, 212 (Ct. App. 2000) (holding that a "public forum" is defined as a place that is open to the public or where information is freely exchanged, regardless of whether it is uninhibited or controlled).

The court also concluded that Nielsen demonstrated that the gist of his communication was truthful or made without knowledge of its falsehood. In an affidavit, Nielsen declared that the allegedly defamatory statements attributed to him were fairly accurate and truthful, explaining that the only discrepancy was that he did not tell ABC News that Wynn chased a manager. *See Delucchi v. Songer,* 133 Nev. 290, 300, 396 P.3d 826, 833 (2017) (holding that a defendant demonstrated that his communication was true or made without knowledge of its falsehood when, in a declaration, he stated that the information contained in his communication "was truthful to the best of his knowledge, and he made no statements he knew to be false" (alterations omitted)); *see also Taylor v. Colon,* 136 Nev., Adv. Op. (2020) (holding that a declarant denying that he made a communication constituted a showing of good faith). Furthermore, the truthfulness of Nielsen's communication was corroborated by June Doe's declaration explaining the harassment she experienced. While Wynn presented some evidence of alleged falsities contained in Nielsen's communication as well as Nielsen's potential motivation to lie, the casino owner ultimately did not establish that Nielsen made his communication with knowledge of its falsehood.

The court held that because Nielsen showed that his communication was made in direct connection with an issue of public interest in a public forum, and was truthful or made without knowledge of its falsehood, Nielsen met his burden under the first prong of the anti-SLAPP analysis. It therefore reversed the district court's order and remanded for the district court to proceed to the second prong of the anti-SLAPP analysis—deciding whether limited discovery is appropriate. As the court noted in a footnote, since it relied only on Nielsen's affidavit and Doe's declaration in its determination, it did not need to address whether it was appropriate for the district court to consider the sixteen articles Nielsen attached to his anti-SLAPP motion to dismiss or the investigative report he attached to his motion for reconsideration.

Takeaways

Wynn resigned from his company in February 2018, the month following the publication of the sexual harassment allegations, and has denied all allegations against him. The Nevada Gaming Commission fined Wynn Resorts a record $20 million in 2019 for its failure to investigate the sexual misconduct claims made against him.

In October 2019, Nielsen filed a separate lawsuit against Wynn's former company and some of its top executives for allegedly engaging in a surveillance operation to extract information from Nielsen that could be used against him.

A Wynn spokesperson told the *Las Vegas Review-Journal*, "This lawsuit is without merit, and we will vigorously defend ourselves against it." The case is pending and has a jury trial scheduled for next year, according to the *Nevada Independent*.

Sam Dangremond is a J.D. candidate at Fordham University School of Law; he received an M.B.A. from Fordham's Gabelli School of Business earlier this year.

Court Sends Sarah Palin's Lawsuit Against New York Times to Trial

By Al-Amyn Sumar

On August 28, 2020, Judge Jed Rakoff of the Southern District of New York denied dueling motions for summary judgment in Sarah Palin's long-running libel lawsuit against The New York Times and journalist James Bennet (together, "The Times"). Palin v. The New York Times. Both motions centered on the actual malice standard: Palin argued that the standard is no longer good law (or at least does not apply to her), while The Times argued that no reasonable jury could make a finding of actual malice on the evidence in the record.

Background

Palin's suit concerns a June 2017 editorial published in *The New York Times* following the shooting of Republican Congressman Steve Scalise and several others at a Virginia baseball field. The editorial was initially drafted by Elizabeth Williamson, a member of the editorial board, and then substantially rewritten by Bennet, then-Opinion Editor of the *Times*. The theme of the editorial was that a toxic political culture fostered acts of violence.

Palin's suit concerns a June 2017 editorial published in *The New York Times* following the shooting of Republican Congressman Steve Scalise and several others at a Virginia baseball field.

At one point the editorial mentioned the 2011 attack on Congressman Gabby Giffords and others by Jared Loughner. The editorial said: *"The link to political incitement was clear. Before the shooting, Sarah Palin's political action committee circulated a map of targeted electoral districts that put Ms. Giffords and 19 other Democrats under stylized cross hairs."* It then compared the Virginia shooting and the Giffords shooting. *"There's no sign of incitement as direct as in the Giffords attack,"* the editorial said. The editorial contained a hyperlink to an ABC story, initially inserted by Williamson, that said there was no evidence that the SarahPAC map had caused Loughner to shoot Giffords and the others.

The day after publication, the *Times* issued multiple corrections to the editorial. The final version of the correction noted that the initial editorial had "incorrectly stated that a link existed between political rhetoric and the 2011 shooting of Representative Gabby Giffords. In fact, no such link was established."

Less than two weeks later, Palin brought suit. On August 29, 2017, following an unusual evidentiary hearing that both parties consented to, Judge Rakoff dismissed the complaint for failure to plausibly allege actual malice. Roughly two years later, the Second Circuit reversed that ruling and remanded the case for discovery. Following discovery, both Palin and The Times moved for summary judgment.

The Court's Opinion

The court first addressed Palin's motion for partial summary judgment challenging the actual malice standard. Palin's motion, the court noted, effectively asked it "either to 'overrule' *New York Times v. Sullivan* or else distinguish that case on the facts and refuse to apply the actual malice rule" to her. The court did neither. Citing the doctrine of vertical stare decisis, the court noted that binding precedent does not "come with an expiration date" and advised Palin to direct her arguments to the Supreme Court.

Judge Rakoff then turned to the defendants' motion for summary judgment. The Times argued that no reasonable jury could find actual malice on its part for two reasons. The first was that there was no evidence that Bennet was aware that the editorial's statements about Palin carried a defamatory meaning. In other words, Palin could not show that "at the time Bennet wrote the allegedly defamatory portion of the Editorial, he knew that, or was reckless with respect to whether, readers would understand his words in the defamatory sense." The second reason was that in any event, there was no evidence that Bennet knew that the map did not provoke the shooting.

SarahPAC ad referenced in the NYT editorial

On the first point, the court ruled—over Palin's arguments to the contrary—that awareness of defamatory meaning is a component of actual malice. Judge Rakoff saw "no controlling precedent squarely on point," but noted that the Ninth Circuit, California Supreme Court and others had concluded that actual malice has an awareness requirement. Judge Rakoff concluded that these decisions were consistent with "the values underlying *Sullivan*" and that the absence of an awareness requirement "would create precisely the chilling effect on speech which the *New York Times* rule was designed to avoid."

Still, the court found sufficient evidence to create a genuine dispute as to whether Bennet was aware of the defamatory meaning of the editorial's statements. It acknowledged Bennet's testimony that he did not intend for his statements to be read to mean that "Loughner himself was directly inspired or motivated by the Map to engage in the shooting." The court also observed that this testimony was independently corroborated by an email sent by Bennet to opinion columnist Ross Douthat immediately after the editorial was published.

But the court pointed to four pieces of evidence that cut against The Times: (i) the language of the editorial itself, which referred to the SarahPAC map as a "direct" form of "incitement" (ii) Bennet's own recognition that the term "incitement" could be understood by some as "a call to

violence," (iii) Bennet's revisions to Williamson's draft, which introduced the challenged statements and which a reasonable jury could view as intentional; and (iv) the nature of the corrections issued by the *Times*, which, according to the court, itself conceded that the initial editorial drew a link between the SarahPAC Map and Loughner shooting.

On The Times' second ground for summary judgment—that no reasonable jury could find that Bennet subjectively knew the editorial's statements were false—the court also ruled in Palin's favor. Here Judge Rakoff looked back to the Second Circuit's prior decision in the case, which said that three of Palin's allegations "paint[ed] a plausible picture" of her actual malice theory. On that theory, Bennet had a "pre-determined" argument in mind for the editorial that led him to make statements he knew or probably knew were false. Judge Rakoff found insufficient evidence on two of those allegations, but not on the third.

First, the fact that Bennet had served as editor-in-chief of *The Atlantic* from 2006 to 2016—a period when the magazine published articles stating there was no link between the SarahPAC map and Loughner shooting—did not provide sufficient evidence of actual malice. The record showed that Bennet was not responsible for editing any of these articles, and that they were published by sister publications over which Bennet had no editorial control.

Second, there was nothing to support the allegation that that The Times's quick correction was proof that The Times made "a calculus that standing by the editorial was not worth the cost of the public backlash."

However, on the *third* allegation—that the manner in which Bennet handled Williamson's draft and the hyperlink reflected actual malice on his part—Judge Rakoff found enough evidence in the record to deny The Times' motion for summary judgment. He noted that Bennet had asked Williamson to research the SarahPAC map and the Giffords shooting and that Williamson's draft embodied the results of that research: that there was no causal link. Williamson also included the hyperlink to the ABC article that said there was no link. Though The Times contended that Bennet asked Williamson to research only whether there had been prior *Times* editorials about the map, Judge Rakoff said a jury might find that the request was for research about whether a causal connection existed and that Bennet chose to disregard her conclusion, implicit from her draft, that no causal link existed and go instead with a pre-determined narrative that the map caused the shooting.

Judge Rakoff said a jury might find that the request was for research about whether a causal connection existed and that Bennet chose to disregard her conclusion, implicit from her draft, that no causal link existed and go instead with a pre-determined narrative that the map caused the shooting.

Judge Rakoff also placed significance on the inclusion of the hyperlink and the research process. Bennet testified he never clicked on the hyperlink, which—Judge Rakoff said—could be viewed as evidence of Bennet's purposeful avoidance of the truth. During the writing of the editorial, moreover, Bennet asked a researcher whether the editorial board had ever written

anything connecting the shooting to some sort of incitement. When the researcher responded that the board had not, Bennet replied, "Good for us." The court said that a jury could infer that from the response that Bennet felt free to advance his pre-determined narrative of causality. Bennet's testimony that he had not read other articles the researcher sent that disclaimed the idea that Loughner was motivated by violent political rhetoric could be viewed as further evidence of avoidance of the truth, the court said.

Judge Rakoff acknowledged the "considerable evidence" that "Bennet simply drew the innocent inference that a political circular showing crosshairs over a Congressperson's district might well invite an increased climate of violence with respect to her." But he ultimately concluded that there was enough evidence in the record supporting Palin's theory to warrant a trial. That trial is tentatively scheduled to begin in February 2021.

Al-Amyn Sumar is counsel at The New York Times. The Times is represented by Jay Ward Brown, David L. Axelrod, Thomas B. Sullivan, and Jacquelyn Schell of Ballard Spahr LLP. Sarah Palin is represented by Kenneth Turkel and Shane B. Vogt of Bajo Cuva Cohen Turkel P.A., and S. Preston Ricardo of Golenbock Eiseman Assor Bell & Peskoe LLP.

Massachusetts Adopts Single Publication Rule for Online Publications

By Jonathan M. Albano

The Massachusetts Appeals Court has held that the single publication rule applies to defamatory statements published on a newspaper's website and that the statute of limitations begins to accrue when the statements first are published online. Robert Wolsfelt v. Gloucester Times, 98 Mass. App. Ct. 321, 2020 WL 5184202 (Mass. App. Sept. 1, 2020).

The plaintiff, Robert Wolsfelt, was arrested in 2011 and again in 2012 on domestic violence charges. The *Gloucester Times* reported on both arrests in print and online. The online versions of the articles were updated after subsequent events in the cases.

On February 17, 2012, about three months after Wolsfelt's first arrest, the court entered a "general continuance" and a "no abuse" order in the case. On that same day, the newspaper added an "update" to the online version of the first article reporting that the case was "continued without a finding," a Massachusetts procedure that is similar to a plea of *nolo contendere*, except that the plea is not considered a conviction if the defendant complies with the terms set by the court. Three months after the update was published, the first charge was dismissed. Id., 2020 WL 5184202, at *1-2.

About one year later, on February 19, 2013, Wolsfelt admitted to sufficient facts on the second charge and the case was continued without a finding. The newspaper added an update to the online version of the second article reporting that the charge was continued without a finding for 18 months. The second charge was dismissed in August 2014. Id., 2020 WL 5184202, at *2.

The Appeals Court recognized that Massachusetts applies the single publication rule to print and oral communications but that no Massachusetts appellate court had yet addressed whether it applies to online publications.

Wolsfelt claimed that he did not learn of the articles or the updates until February 2013, when he applied for a job. On June 12, 2015, he brought an action for defamation and injunctive relief seeking the removal of the two articles and the updates. The case was brought more than three years after the first article, the first update, and the second article, but within three years of the second update. Although Massachusetts has a three year statute of limitations for libel, Wolsfelt argued that his action was timely because each time a third party accessed the website on which the articles and updates were published, a new communication occurred triggering a new statute of limitations. Id., 2020 WL 5184202, at *2-3.

The Appeals Court recognized that Massachusetts applies the single publication rule to print and oral communications but that no Massachusetts appellate court had yet addressed whether it applies to online publications. The Court found that the rule benefited libel plaintiffs by

allowing the recovery of all damages caused by an aggregate publication in one action, and benefited libel defendants by preventing multiple suits based on the same communication. Surveying the law of other jurisdictions, the Court joined the unanimous state court rulings extending the single publication rule to articles posted to an online media's publicly available website.

The Court recognized that permitting a separate cause of action for each "hit" of an online defamatory statement would result in a "serious inhibitory effect" on the free dissemination of information on the Internet, but nevertheless limited its holding to mass communication websites, distinguishing case law involving online databases that grant limited accessibility to authorized users. Id., 2020 WL 5184202, at *3-4 & n.11 (internal quotation marks and citations omitted).

Wolsfelt also argued that the update to the second article, which was published within three years of his suit, acted as a republication of that article, triggering a new statute of limitations. The Court cited numerous cases from other jurisdictions holding that non-substantive changes to an Internet posting do not amount to a republication. Id., 2020 WL 5184202, at *5 & n.12 (citations omitted). Because the Court held that the second update was a privileged fair report of events in Wolsfelt's criminal case, it found it unnecessary to decide whether the update amounted to a republication.

Jonathan M. Albano of Morgan, Lewis & Bockius LLP represented CNHI, LLC, publisher of The Gloucester Times. Stephen C. Goldwyn, Altman & Altman, LLP represented Robert Wolsfelt

Nunes Family Defamation Claim Over Allegedly Employing Undocumented Workers Survives Motion to Dismiss

By Nathaniel Boyer

In the last MediaLawLetter, we reported on an Iowa federal district judge's dismissal, with prejudice, of Congressman Devin Nunes's lawsuit against Hearst and Ryan Lizza. Devin Nunes has appealed the decision to the Eighth Circuit Court of Appeals, and he recently filed his opening appellate brief.

While the Congressman's case plays out in the Court of Appeals, a related defamation case is still pending before Judge C.J. Williams in the Northern District of Iowa. This related case was brought by the Congressman's father (Anthony Nunes, Jr.), brother (Anthony Nunes III), and their dairy farm (NuStar Farms, LLC), also against Hearst and Ryan Lizza, concerning the same article.

On September 4, Judge Williams granted in (large) part Lizza and Hearst's motion to dismiss the *NuStar* Case. The parties are now proceeding to discovery on the sole remaining defamation claim. Nunes, Jr. et al. v. Lizza.

Case Background

Devin Nunes is from a family of farmers. His connection to agriculture has played a central role in his political persona. But unbeknownst to many, in 2006, his family's farming operation (together with Devin Nunes's immediate family) ceased to operate in the Central Valley of California, and moved to the small town of Sibley, Iowa.

Political reporter Ryan Lizza sought to learn more about Nunes's family farm. Engaged by *Esquire* magazine, a Hearst publication, Lizza began an investigation that yielded an *Esquire* article titled "Devin Nunes' Family Farm is Hiding a Politically Explosive Secret," which first ran on the esquire.com website on September 30, 2018. Like many *Esquire* articles, Lizza's article was written in the style of literary journalism; it combined journalistic research with the techniques of prose writing and first-person perspective to report on a real-life, public-interest event.

The article takes the reader into Lizza's investigation into the Nunes family farm. It begins by revealing that "[t]he Nunes family dairy of political lore—the one where his brother and parents work—isn't in California. It's in Iowa." The article explains that Nunes appears to have kept this fact a "secret," and that he "tried to conceal" it." For example, "until late August, neither Nunes nor the local California press that covers him had ever publicly mentioned that his family dairy is no longer in Tulare [California]" according to the author's research. The article then

asks, "Why would the Nuneses, Steve King, and an obscure dairy publication all conspire to hide the fact that the congressman's family sold its farm and moved to Iowa?"

The balance of the 68-paragraph article concerns Lizza's experience reporting on this story in and around Sibley. Members of the Nunes family followed Lizza around town as he conducted his reporting, as reported in the article. Anthony Jr. was unwilling to be interviewed for the article; at one point he "warned" Lizza: "'If I see you again, I'm gonna get upset.'" In the course of his reporting, Lizza learned, and reported, that "Midwestern dairies tend to run on undocumented labor." And NuStar is no exception: "According to two sources with firsthand knowledge, NuStar did indeed rely, at least in part, on undocumented labor." Lizza further reported that "[o]ne source, who was deeply connected in the local Hispanic community, had personally sent undocumented workers to Anthony Nunes Jr.'s farm for jobs. 'I've been there and bring illegal people,' the source said, asserting that the farm was aware of their status."

In January, Anthony Jr., Anthony III, and NuStar sued Hearst and Lizza for defamation. In May, the Court granted the defendants' motion for a more definite statement, ruling that the plaintiffs had failed to plead factual matter sufficient to make their allegations of falsity plausible. The plaintiffs responded with an amended complaint that challenged 14 explicit statements in the article, and alleged that the article falsely implied "that [p]laintiffs conspired with others . . . to hide and conceal a 'politically explosive secret'—that NuStar knowingly employs undocumented labor on its dairy farm." Hearst and Lizza moved to dismiss the amended complaint, arguing that (i) none of the challenged statements or charged implication were actionable, and (ii) the plaintiffs were, based on their own allegations, involuntary limited purpose public figures who had failed to plausibly allege actual malice.

Only one claim survived the motion to dismiss: "[A] claim that defendants defamed plaintiffs by falsely alleging that they knowingly employed undocumented workers."

The Court's Opinion

In a 42-page ruling, the Court held that all but one of the 14 challenged explicit statement in the article were not actionable, each for one or more reasons. For example, "[t]he statement that plaintiffs' farm is hiding a secret does not have a "precise core meaning for which a consensus of understanding exists." The Court also emphasized that the context of the publication, "which includes the style of writing and the intended audience," supports a finding that various statements concerning "secrets" and "conspiracy" were statements of opinion. The Court also explained Lizza disclosed the factual bases for his conclusions, further supporting that the challenged statements were non-actionable opinions.

For other challenged statements, Plaintiffs failed to plausibly allege that they were false. And some others were not defamatory at all. For example, Plaintiff did not deny that Anthony Jr. told Lizza that he was "gonna get upset" if he saw him again, and the Court found that that would not be defamatory, anyway. Moreover, the Court found that statements that NuStar hired

or relied on undocumented labor were not defamatory, because reporting on "[t]he unwitting employment of undocumented workers is not defamatory." And, with regard to the charged implication, the Court held that the article does not support that implication, and that in any event "[P]laintiffs do not identify any additional, affirmative evidence in the Article or elsewhere to show that defendants intended the implication plaintiffs read into the Article."

Only one claim survived the motion to dismiss: "[A] claim that defendants defamed plaintiffs by falsely alleging that they knowingly employed undocumented workers." "Falsely accusing someone of knowingly employing undocumented workers is accusing someone of committing a crime" and is therefore defamatory, the Court held.

Plaintiffs are not involuntary public figures, at least on these pleadings.

As for Defendants' argument that Plaintiffs were involuntary limited purpose figures, Judge Williams wrote that the doctrine presents a "fascinating" "intellectual issue," citing to multiple law review articles. The Court included a footnote about whether the rationale supporting the "public figure" doctrine may have softened a bit in recent years, given the ease by which everyone can make public statements through social media. However, the Court wrote that it was compelled not to "make law," and held that Plaintiffs are not involuntary public figures, at least on these pleadings. Notably, the Court went on to hold that, if Plaintiffs *had* been public figures, then they have failed to plead actual malice (and so, at a minimum, Plaintiffs will not be entitled to punitive damages in this case).

Takeaways

Plaintiffs' broad complaint has been winnowed down to a narrow claim: "[A] claim that defendants defamed plaintiffs by falsely alleging that they knowingly employed undocumented workers." As the parties enter discovery, Plaintiffs will now be subject to a thorough review of that claim. And the involuntary public figure issue could develop further, as this case progresses. As Judge Williams observed, "[s]ome federal courts have found that relatives of famous people could be involuntary public figures," and "[a] few other courts have found that plaintiffs may be deemed involuntary public figures simply by reason of being in the wrong place at the wrong time when a public controversy swirled around them." This case presents a confluence of those both of those lines of cases, in the context of important reporting about a nationally prominent public official.

Defendants Hearst Magazine Media, Inc. and Lizza are represented by Jonathan Donnellan, Ravi Sitwala, and Nathaniel Boyer of the Hearst Corporation's Office of General Counsel. Plaintiff Devin Nunes is represented by Steven Biss.

Jersey Boys: Backstage With the Ninth Circuit – *Corbello v. Valli*

By David S. Korzenik

This September the 9th Circuit disposed of the lengthy copyright battle over *Jersey Boys* on the same grounds we had advanced in our Motion to Dismiss in 2008. Donna Corbello v Frankie Valli.

Our 2008 Motion to Dismiss had insisted on the clean lack of copyrightability of any possible alleged similarity – not on fair use. We argued that historical works, works like the DeVito Autobiography that the Plaintiff wrote with ex-Four Season's band member Tommy DeVito, were only "thinly protected." Thin as it was in *Hoehling*; thin as it was in *Narrel*; thin as it was in *Benay*, in *Crane*, in *Nash*, and in all the other historical works cases of the past many decades.

The 9th Circuit began its analysis with a statement of that principle: "Our decision rests primarily on 'the unremarkable proposition that facts in and of themselves, may not form the basis for a copyright claim.'" (Citing *Nimmer*)

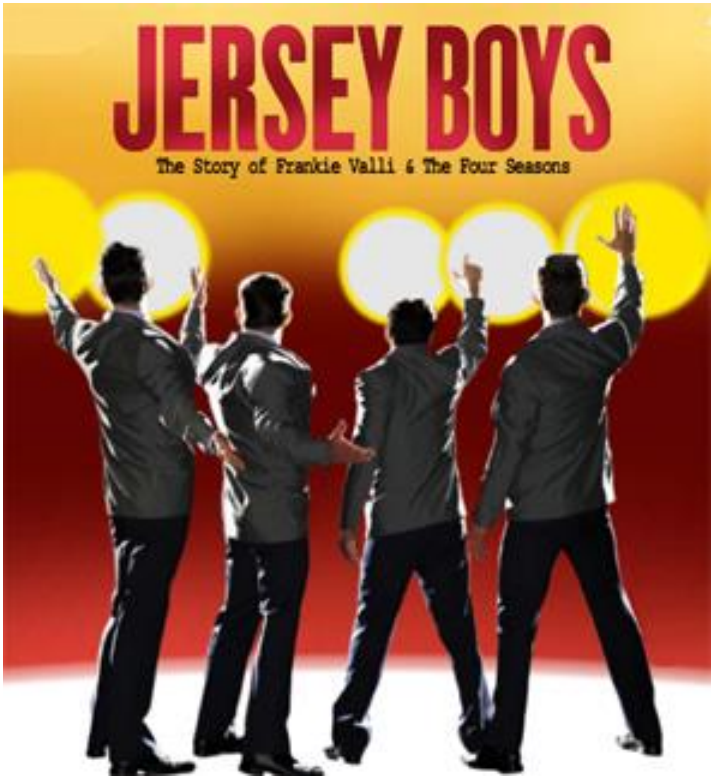
It is not that copying historical works wholesale could not amount to infringement. But events, personalities, historical sequences, the argot and cliches of an era (here the 50's and 60's) cannot be protected as a matter of law. That was not new law. It was solidly established before *Hoehling*. And as in *Hoehling*, the "facts" did not have to be "true facts." They could be investigative hunches, theories or hypotheticals. In *Hoehling*, the plaintiff had written his theory of who might have caused the Hindenburg to blow up at its mooring in New Jersey in 1937. Historical accounts are regularly disputed. But, disputed or not, none of them are protected. No one can own them. If something is *asserted* as historical fact, then it can be *used* as historical fact. Not a remarkable or novel idea, but it is on that note that the *Jersey Boys* case finally ended.

"Our decision rests primarily on 'the unremarkable proposition that facts in and of themselves, may not form the basis for a copyright claim.'"

Thin: The word "thin" is itself copyright argot. It was used by the Supreme Court in *Feist v Rural Tel.* 499 U.S. 340 (1991). And it is regularly used in the 9th Circuit, to describe the lower level of protection generally given to facts, history, natural objects, etc. *Apple Computer v. Microsoft Corp.,* 35 F.3d 1435 (9th Cir. 1994). It is not exactly a technical term. It is more like a yellow light signaling that the analysis of similarities will be more "discerning," to use more 2nd Circuit lingo. The analysis though is the same.

Rick Elice and Marshall Brickman wrote the Broadway Play, *Jersey Boys: The Story of Frankie Valli & the Four Seasons*. They interviewed Frankie Valli, Bob Gaudio (who wrote the *Four Seasons'* songs), their extraordinary producer Bob Crewe, and many others. They also interviewed Tommy DeVito, a founding member of the *Four Seasons* who left the band in 1971

under adverse circumstances involving the mob. DeVito, eager to convey his side of the story, knew that Frankie had a less than favorable view of him and a very different account of why the band broke up. As his interview concluded, Tommy told Rick and Marshall that he had an unpublished Autobiography that he had written with a ghost writer/co-author. It could never find a publisher. After the interview DeVito mailed it to them. That is where the trouble began. Access . . .



Dangerous Research: If you are the writer/ creator of an historical work, you will have done research into both published and unpublished works to understand the subject of your work and to develop your own. That's what you are supposed to do. But that means that you will have had "access" to all those works to which you had resorted in the course of your research. That also means that you will now have multiple big red targets painted on your back. The likelihood of your being sued for this research, in ascending order of probability, is this: a) documentary, b) book, c) play, d) feature movie, e) successful play.

The last is guaranteed, not just probable. Successful Broadway shows are a rarity. Four out of five "go dark" – they fail and do not earn out their investment. Of those that earn out, some, but not all, do incredibly well, far better than almost any successful movie. Mix such golden success with "access" and there dangles an extremely attractive nuisance for any potential plaintiff. A large regional firm joined up with the plaintiff's counsel in this suit against the *Jersey Boys* production. They likely invested huge amounts in the over 30 depositions that they noticed all around the country. We sought only two.

We Made It Up: When plaintiffs are confronted with the "thin" protectability of their historical works, they adopt a common move: They quickly shift gears and insist that their work was "fictionalized"; that dialogue, for example, was "invented" or "reconstructed." That the events they recount are not all correct or, at least disputed, and therefore "made up." Their hope is that this will raise the level of protection that they need – to get them out of the "thin" trap. Courts have over the years declined to entertain this kind of disingenuousness from the owners of works that present themselves as factual. One term that some courts have used is "copyright estoppel" - ruling that a plaintiff is "estopped" from calling their work "fiction" when it is objectively read and presented as factual.

There is also a rather serious ethical problem with such a pivot: If you sell or pitch your manuscript to a publisher as "non-fiction" and then later announce that you had "fictionalized" some of it or "invented" portions, the publisher would rightfully be upset and would correctly view that as a breach of any publishing agreement. Certainly, Oprah Winfrey would take you to severe task if that is what you were doing on her Show. (e.g., *A Million Little Pieces*.) As Doug Wright, one of our experts, and President of the Dramatists Guild, observed: When a historical work's account of events is disputed, we do not just re-shelve it in the Fiction section of the library or bookstore. The distinction between Fiction and Non-fiction is not taken lightly.

The Plaintiff in *Jersey Boys* made a "fictionalization" claim when the weaker protection due historical works either dawned or fell upon them. They first protested that defense counsel had "invented" the thin copyright doctrine (a fiction of my own?) and that *Hoehling* had been "eviscerated." When that gained no traction, they then insisted that their Autobiography had been "fictionalized" and that some dialogue had been "made up" or at least "reconstructed." That would be a dangerous thing to say to a publisher or to Oprah. But it's not as dangerous in court. It is just an "argument."

Yeah, asshole, what're you gonna do about it? So, for example, plaintiff argued that the phrase "*Well, asshole, what do you plan to do about it?*" as used in the fake shooting event in the Autobiography was infringed by "*Yeah, asshole, what're you gonna do about it?*" as used in the fake shooting scene in the Play. In spite of the fact that this line is an unprotected cliché used by any thug looking to start a fight, plaintiff's counsel insisted that they had "made it up." Likely the line appears in every other episode of *The Sopranos*.

Pitching the "fictionalization" claim wasn't easy for Plaintiff. DeVito's co-author Rex Woodard had died in 1991. Plaintiff Corbello, his widow acting for his estate, testified that she could not say what was fact or "fiction." And Woodard was a serious journalist-lawyer who would *never* have suggested to anyone that his non-fiction work was "made up." So, the "fiction" ploy was offered up by plaintiff's counsel and her expert, neither of whom could have known that either.

To make things harder for the fictionalization gambit, Woodard and later Corbello had sent out numerous letters to publishers touting the Autobiography as "true" fact – revealing the "true story" of the *Four Seasons*. The letters to publishers listed a number of stories that were "true" and not revealed before.

The list of "true facts" included, for example, the story of two mob guys who faked a shooting in Frankie's car to extort money from him. This was one of the "true" events that the Woodard had uncovered in his work with DeVito.

Remarkably, the fake shooting story was not even Tommy's story. It happened to Frankie, not Tommy. Tommy only knew about it because Frankie told him about it. Tommy then told Woodard; Woodard wrote it into the Autobiography and now Frankie, according to plaintiff . . . had to pay her to tell his own story. It was the same thing with many of the other alleged similarities. That was the remarkable injustice of the case.

Most of the alleged similarities were the stories behind the creation of the *Four Season's* key hits. Most of these were actually Bob's stories. Bob wrote the band's main songs. Tommy wrote none. To use Marshall Brickman's phrase, the band members had "dined out on these stories" for years. Plaintiff now claimed to own them.

Walk Like a Man – as Opposed to what, a Woman? Plaintiff also laid claim to the story about the creation of the song, *Walk Like a Man*. In 1963, Bob Gaudio arrived at the Stea-Phillips studio in NYC with his newly written song that the band was to work on. Bob told them it was called, *Walk Like a Man*. That title presented a real problem for four young Italian-American working-class guys from Belleville, New Jersey: How do you sing "walk like a man" in ***falsetto***, without your audience laughing at you. It could prove embarrassing. Tommy saw this immediately and asked Bob, "Walk like a Man – as opposed to what, a woman?" Bob defended his song and its title. He said it was an "anthem" for any boy who is "wrapped around the little finger of a girl." That was the song at issue; that was the dispute; that was where it happened and that is what was said. But, Plaintiff said the dialogue and the surrounding event was hers.

In the Autobiography, Tommy describes it as just their friendly ragging on Bob. It all ends well and the song is a success. And everyone has a laugh over it. The dispute has a different role in the Play. In *Jersey Boys* it is the first fissure in the relationship between Tommy and Frankie. Frankie sides with Bob in this dispute. They take the risk and the song is a success. This is the beginning of the 50/50 alliance between Frankie and Bob as Frankie shifts away from Tommy and towards Bob. The story is the band's story. Told often. The word "anthem" is a word that Bob testified was a musical word that he, Bob, would use to defend his song. Not one Tommy would use. And the phrase "wrapped around the finger of a girl" is, apart from being a bigtime unprotectable cliché, was a phrase Bob got from his Dad. But, significantly, it happened at the Stea-Phillips studio in 1963. And even if Bob had not testified to its having happened, it was reported as fact so it could be used as fact.

The 9th Circuit noted that the event and the substance of the dispute were not contested. The Court viewed the matter this way:

"Whether the dialogue accurately represents what was actually said does not change our analysis. The dialogue is held out by the Work as an historically accurate depiction of a real conversation. The asserted facts do not become protectable by copyright even if, as Corbello now claims, all or part of the dialogue is made up." [*Corbello* at 31.]

Big Girls Don't Cry: Another example of a Bob story that plaintiff claimed to own and which went to trial was the story behind the creation of the song *Big Girls Don't Cry.* Bob Crewe, the band's gifted producer, had been up late one night watching a western by John Payne on *The Late Night Movie*. In the movie, Payne slaps Rhonda Fleming across the face and says, "What d'ya think 'a that?" She doesn't flinch, but looks at him cooly and says, "Big girls don't cry." The band drew the name of their song from that line. Woodard had 17 notebooks full of articles and clippings about the *Four Seasons* on which he based his own research. The Big Girls story was reported in one of the articles that Woodard had photocopied into his research

notebooks. The clipping reported an interview of Bob in which Bob tells that story. The 9th Circuit took note of that in its September 8 decision.

Not Saleable: No publishers were interested in the Autobiography – either before *Jersey Boys* or after *Jersey Boys* opened on Broadway in 2005. So, the Autobiography was never published. Plaintiff in a letter admitted that the work was "not saleable" unless it were updated to include "more conflict" . . . like the Play and perhaps, some "music" . . . like the Play. When DeVito declined plaintiff's request that he update and revise the Autobiography, the litigation began, first in Texas and then landing in Nevada where the show had been playing in Las Vegas and where Tommy resided.

The Defendants included, Frankie Valli and Bob Gaudio, who were the owner/producers of the Show; the writers, Marshall Brickman and Rick Elice; the Director, Des McAnuff; the Production company, Dodger Theatricals, Ltd. and its principal, Michael David, and a number of associated entities and limited partnerships that produced and created *Jersey Boys.*

Tommy DeVito was separately represented. He settled before trial. He had different issues as a co-author of the Autobiography. (DeVito passed away on September 21 at age 92 of Covid-19.)

Had the motion to dismiss been made in a California or NY district court, the case would likely have ended there. Copyright law is not rocket science. But repeated district court experience with copyright cases makes a difference. Our judge was thoughtful but cautious. A Shakespeare reader, he recognized the "thin" protection due historical works, but ruled in the 12(b)6 motion that the Complaint identified the allegedly infringing work and the infringed work. That was sufficient. Hence we had notice. Motion denied. The discovery train left the station. And, the copyright issue was never addressed again until years later.

Copyright law is not rocket science. But repeated district court experience with copyright cases makes a difference.

When lengthy discovery concluded, the District Court initially granted our MSJ on the basis of a Life Story Rights Release that Frankie and Bob, the producers, had with Tommy DeVito. The Court declined to address the Copyright MSJ that we also made. He observed that he had decided the case in our favor on the basis of the Release and that he did not have to reach the copyright issue. The 9th Circuit reversed the Release MSJ. The Circuit seemed to be struggling to undo a problem it felt it had with its ruling in *SyberSound v. UAV Corp*., 517 F.3d. 1137 (9th Cir. 2008) – a ruling that the District Judge had relied on. On the appeal, we asked the Circuit to take up the copyrightability issue, something that was within their power to do. But, they too declined to do that. Still, Judge Sack of the 2nd Circuit, sitting by designation, offered in his concurrence that the District Court should on remand take up the copyright issue in the first instance, as that might "end the matter altogether."

Back at *nisi prius*, we dusted off and renewed the old copyright MSJ. The Court knocked out 90 of the 96 alleged similarities. But allowed six to go to trial. Later, twelve were allowed in. These largely related to the stories behind the key *Four Seasons* hits. While still insisting that

none of these could be protected by copyright law, we then leveled a Fair Use MSJ at the remaining six. We noted that they were all different and used to very different effects. Tommy's Autobiography paints Frankie as the bad guy and Tommy as the straight shooter; while the *Jersey Boys* presents Frankie as the hero and Tommy as the exaggerating braggart who caused the band's break up by getting them in debt to the mob. The Fair Use motion was denied and we turned to preparing for a 3-4 week trial in Reno beginning just before Halloween 2016. The Trump election was in the middle of the first full week of trial.

At trial, when Plaintiff finished her case, we moved for a Directed Verdict. The Court dropped Frankie and Bob from the case and said that in his view we had shown Fair Use. If we renewed our motion at the close of our case, he would dismiss the case on that ground. I renewed the motion at the close of our case. The Judge crisply and ably applied the Fair Use factors and discussed why each of them had been met.

We broke for lunch. But on returning, the Court was concerned that if reversed on Fair Use, we would have to come back to Reno for another 3-4 weeks of trial. If the Jury did not come to a verdict in line with his ruling, he said, he would have to deal with that then. It thus went to the Jury. They went for plaintiff and as best we could tell from speaking with some of them after the verdict, they seemed to feel that the DeVito character was owned by the Plaintiff. Hence the 10% of profits: Roughly each of the four acts focused on a different band member. Act One focused on Tommy. So, if you factor in music as worth *something* along with the acting and production values, you've got your 10%. They may have thought that they were doing us a favor. Perhaps it was a kind of compromise. The Jury's apparent thought about the protectability of an historical personality, ran directly against the Circuit's ruling in *Benay v. Warner Bros. Ent., Inc.,* 607 F.3d 620 at 627 (9th Cir. 2010). See Corbello at 15, citing *Benay* ("A character based on a historical figure is not protected for copyright purposes.")

But that is what they seemed to feel. The Court granted our JMOL/JNOV motion dismissing the case on the Fair Use grounds. Plaintiff appealed.

We argued the appeal in June 2019 in Anchorage, Alaska. I split our argument time with Dan Mayeda. (Arguments are usually better and more effective in stereo.) It was amazing to see the sun set at 11:00pm.

Why Alaska? No one in the case had anything to do with Alaska, including the Panel who were all Californians. But that was the slot we were offered and we took it.

At argument, Judge Berzon focused on the central issue of whether any of the alleged similarities were *protected at all.* She did not think that there was any need to address the Fair Use issue that the district court had relied on. In her view and in her decision the alleged similarities simply were not protected. She observed in her ruling and at argument that the District Judge, though he relied on Fair Use, had himself questioned whether the alleged similarities were protected at all. In his JMOL ruling he actually discarded most of them as unprotected and for several he left that issue open, inviting the Circuit to revisit that question.

In *advance of argument* we received an order, a note to counsel, directing us all to be prepared to focus on that issue in particular. Judge Berzon pointedly stuck with that issue at argument and did so too in her decision that was joined unanimously by Judges Tashima and Fletcher.

Judge Tashima asked plaintiff's counsel one question: "Did the Work present itself as fact?" Plaintiff's counsel acknowledged that it did.

Judge Fletcher questioned whether some of the accounts came from the Autobiography. Our response was that it should not matter where it "came" from, if it was not protected. We argued, "If something is asserted as fact, then it can be used as fact."

The Circuit's decision to rename the "*copyright estoppel*" doctrine as the "*asserted truths*" doctrine was a good and clarifying choice by the panel. The word "estoppel" does carry with it a kind of detrimental reliance connotation which is not in line with "the core concerns [and policy] of copyright law." *Corbello* at 21. There certainly was all that present in our case: Plaintiff's "fictionalization" claim in the face of repeated and assertive claims to "true fact" in all their letter pitches to publishers and in the Autobiography itself was both hypocritical and disingenuous. The connotation of "estoppel" can muddle the issue.

The reality is that those who research history rely on both published and unpublished works. To allow what is presented as fact to be called fiction after the fact is at odds with what the study, process and writing of history is all about. The 9th Circuit's decision recognizes that and is a lucid review of copyright basics.

To allow what is presented as fact to be called fiction after the fact is at odds with what the study, process and writing of history is all about. The 9th Circuit's decision recognizes that and is a lucid review of copyright basics.

Judge Berzon's decision is well built, clean and elegant. It anticipates any effort to reargue and it addresses and knocks down the potential arguments in advance. Plaintiff has just filed a petition for rehearing. The rules do not permit us to respond, unless asked to do so by the Court. There is no basis for a rehearing. No doubt plaintiff's counsel will go for Cert. These will have little to no chance of going anywhere.

One nice thing about Judge Berzon's decision is that it is particularly well written, focusing on copyright fundamentals and moving through all the classic cases on the issue. (*Hoehling v. Universal City Studios,* 618 F.2d 972 (2nd Cir. 1980) (a theory about the cause of the Hindenburg explosion)*; Narell v. Freeman,* 872 F.2d 907 (9th Cir 1989)*; Benay v. Warner Bros.* 607 F.3d 620 (9th Cir.2010)*; Houts v. Universal City Studios,* 603 F.Supp 26 (CDCA 1965*), Nash v. CBS, Inc.,* 899 F.2d 1537 (7th Cir. 1990) ("a theory that John Dillinger was not killed by law enforcement instead retired to the West Coast")*, Crane v. Poetic Products Ltd.,* 593 F.Supp 2d 585 (SDNY), aff'd, 351 F. App'x 516 (2d Cir. 2009) (purported dialogue about the death of Pope John Paul even though the author "could not possibly have been present to the experience."), among many others, and finally *1 Nimmer on Copyright 2:11 (*"Given an express representation that the work is factual, the case law indicates that the author will be estopped from claiming fictionalization, even if most readers would not believe the representation.")

So *Corbello v. Valli* is really a very teachable decision, great for copyright law classes. Plaintiff can try to take it to the Supreme Court, but I am going to take it to class.

My firm, Miller Korzenik Sommers Rayman LLP and Dan Mayeda of Leopold Petrich & Smith (now Ballard Spar) acted for all the Jersey Boys defendants, with wise counsel always from Lou Petrich, the Dean of 9th Circuit copyright law if not of the U.S. Our Nevada counsel were Maximiliano Couvillier and Todd Kennedy of Kennedy & Couvillier initially working with Sam Lionel. In a case that has lasted 13 years, many participated. Terence Keegan and Zach Press worked on the latest appeal and the JMOL motion. Loralee Sundra and Abigail Jones worked on the case with the Leopold Petrich firm. Itai Maytal, now with Springer, did much work in the discovery battles. And the superb writer and clear-headed legal mind Mona Houck worked on multiple motions and through the trial during most of the long duration of the case. When the Motion to Dismiss was denied back in 2008, Mona told me, "You know, I am only going to work on this case for 10 years, and not more" . . . She held true to that promise and in 2018 began teaching at Washington & Lee Law School.

Media Coalition Intervenes in George Floyd Prosecutions, Obtains Broad Access to Body-Worn Camera Evidence

By Emmy Parsons

By now, we are all familiar with the tragic May 25, 2020 encounter between Minneapolis Police Department (MPD) officers and George Floyd, which ended when MPD officer Derek Chauvin held his knee on Floyd's neck for approximately eight minutes and Floyd died. Now, four MPD officers are facing criminal charges for their involvement in Floyd's death.

Over the summer, a coalition of media and non-profit organizations intervened in the cases and secured better public access to the proceedings.

Case Background

Several days after Floyd's death, the Minnesota Attorney General's Office took over prosecution of the officers and filed amended complaints in the Hennepin County District Court charging Chauvin with second-degree murder and two lesser charges, and charging three other officers with two counts each of aiding and abetting in Floyd's death.

Over the summer, a coalition of media and non-profit organizations intervened in the cases and secured better public access to the proceedings.

Trial for the defendants is tentatively anticipated to begin in March 2021, though the court is considering several motions, including motions to dismiss filed on behalf of each defendant, motions to change venue filed on behalf of each defendant, and a motion from the State to combine the four trials.

Court Decisions Limiting Press and Public Right of Access

In June, the Court made two decisions that limited the press' and public's right of access to the proceedings, including:

Permitting only in-person, by-appointment viewing of body-worn camera footage filed publicly with the court

On July 7, 2020, one of the defendant officers, Thomas K. Lane, filed a motion to dismiss the charges against him. He attached as exhibits to his public motion copies of body-worn camera ("BWC") videos and corresponding transcripts from two officers on the scene. Members of the press immediately sought access to the BWC footage, but they were told by court staff that the footage would be made available at some future, unspecified date for viewing only and that no recording or copying of the footage would be permitted. Several days later, the court set up an online reservation system whereby members of the press and public who wished to view the

videos could schedule an appointment at the court to view the videos on one of the court's computer terminals.

Gagging all participants and their agents from providing any information or documents to the press or the public "related" to the prosecutions

A few days later, in response to what the court said was "two or more attorneys representing parties" speaking to the press, the court *sua sponte* entered a gag order, prohibiting the parties, their attorneys, and any "employees, agents, or independent contractors" from disclosing directly or indirectly to the press or the public any "information, opinions, strategies, plans or potential evidence that relate" the prosecutions on the basis that "pretrial publicity in this case by the attorneys involved would increase the risk of tainting a potential jury pool and will impair all parties' right to a fair trial."

The Coalition Intervenes

In response to these actions by the court, a coalition of thirteen media and public interest organizations filed motions challenging each order, first seeking the ability to copy and disseminate (not just view) the BWC footage, and second asking the court to vacate its existing gag order and put in place a more narrowly tailored order only upon a proper showing. To briefly summarize the Coalition's arguments:

The Press and Public Have a Presumptive Right of Access to Criminal Proceedings and Documents

In each of its motions, the Coalition argued that the press and the public have a presumptive right of access to criminal court proceedings and records under the common law, the court's rules and the First Amendment.

As the U.S. Supreme Court stated, "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed." *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984); *see also Gannett Co. v. DePasquale*, 443 U.S. 368, 429 ("Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." (Blackmun, J., concurring in part and dissenting in part).

A Transcript is No Substitute for BWC Footage

With respect to the court's limits on the BWC footage, the Coalition explained that although a written transcript shows what a person *said*, it cannot capture what someone *did*. And in these cases, where the alleged lack of criminal *conduct* is central to the defendants' motions to dismiss, seeing what each officer did or did not do is especially important. *See, e.g.*, *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) ("Though the transcripts of the videotapes have already provided the public with an opportunity to know what words were spoken, there

remains a legitimate and important interest in affording members of the public their own opportunity to see and hear evidence that records the activities of [government officials].") (citation omitted).

The Court's Gag Order is an Invalid Restraint on Speech

The Coalition argued that although Minnesota recognizes the right of courts to impose gage orders, the right is not absolute, and "prior restraints on publication" are disfavored. *See Nw. Public'ns, Inc. v. Anderson*, 259 N.W.2d 254, 257 (Minn. 1977); *Minneapolis Star & Tribune Co. v. Lee*, 353 N.W.2d 213 (Minn. Ct. App. 1984).

A gag order may only be entered if it is necessary to ensure a fair trial, is narrowly tailored, and is based on an articulated, specific harm. *See Geske v. Marcolina*, 642 N.W.2d 62, 69-10 (Minn Ct. App. 2002); *Austin Daily Herald v. Mork*, 507 N.W.2d 854, 957 (Minn. Ct. App. 1993). In this case, however, the gag order was not narrowly tailored as to either the persons or the topics it covered. The Coalition was especially concerned that it theoretically gagged every employee of the State of Minnesota and every employee of four law firms and companies whose attorneys are providing pro bono assistance to the prosecution from speaking to the press about any issue "relating" to the prosecutions. The Coalition believed that the court could address its concerns about potential harms through *voir dire* of prospective jury members, instructions to the seated jury, and a change of venue for the trials.

The Floyd case highlights the "tension between two fundamental rights" in high-profile proceedings: defendants' right to a fair trial, and the press' and public's right to attend criminal trials.

Concerns about a Fair Trial Are Not Served by Selectively Releasing Information

Finally, the Coalition stressed that the public already had access to much information, including videos of Floyd's arrest and death from bystanders, the transcripts that the court authorized to be released, and narrative descriptions of the BWC footage itself provided by those who were actually able to schedule an appointment with the court and watch the videos. (At the time the Coalition's motion was pending, *The Daily Mail* also published a leaked excerpt from the BWC footage, apparently captured during an appointment to view the footage at the court.)

The Coalition argued that, to the extent the court was concerned about preserving a fair trial for the defendants, selectively disclosing information, by limiting access to the BWC footage and gagging trial participants and their representatives, did not serve that interest.

The Court's Response

The court reversed both decisions, finding that the Coalition had standing to intervene and that the press and the public the right to copy and disseminate the BWC footage. Without addressing the media coalition's arguments on the prior restraint issue, the Court also lifted the gag order.

In an opinion granting the Coalition's motion regarding the BWC videos, the court said: the Floyd case highlights the "tension between two fundamental rights" in high-profile proceedings: defendants' right to a fair trial, and the press' and public's right to attend criminal trials. Slip. Op. at 4.

The court recognized "the multitude of societally-important, deeply-felt, and highly-contentious issues involving social and public policy, community safety, law enforcement conduct, tactics, and techniques, and civil rights . . . unleashed" by Floyd's death. *Id*. at 6. At the same time, the court made clear that the defendants' have a right "to a fair trial, before an objective and impartial jury, applying the evidence that will be presented in open court during a trial governed by the rules of evidence to the laws applicable to the crimes with which they are charged." *Id*. In that respect, the court noted its "affirmative constitutional duty . . . to safeguard a criminal defendant's due process rights." *Gannet*, 443 U.S. at 378.

The court, however, agreed with the Coalition that "secrecy in connection with public aspects of criminal case proceedings serves no useful purpose." *Id*. at 8-9. Although it declined to reach the question of whether the First Amendment provides a right of access, it found that under the common law and the court's rules, the press and the public have a right of access to the BWC videos. Accordingly, the court allowed the press and the public to obtain copies of the BWC that they could publicly disseminate.

Subsequent Developments

On September 11, the court held an omnibus hearing regarding various motions filed by the parties. Prior to the hearing, the court agreed to a press pooling arrangement that included press representatives from local and national outlets, as well as print, television and radio. The court also provided an overflow room for credentialed members of the media that was separate, and in addition to, overflow rooms for the Floyd family and members of the public.

There also remain some outstanding questions about access going forward, including:

The defendants each filed a motion for a change of venue. For now the court has taken those under advisement. It agreed to send jury questionnaires to a prospective pool of jurors, review those answers, and then determine whether a change of venue is necessary;

The impact of Covid-19 on the proceedings remains to be seen. The court is currently adhering to social distancing guidelines, which, given the tremendous interest in these prosecutions, could make it difficult for all members of the press and the public who wish to attend the trial able to attend; and

Under Minnesota Court Rule 4.02(d), in a criminal trial prior to a guilty plea or entry of a verdict, both parties must consent to video and audio recording of the proceedings. Currently the defendants support allowing cameras in the courtroom, but the Attorney General's Office opposes cameras.

Emmy Parsons is an associate with Ballard Spahr LLP. Emmy represents the media coalition in this matter with Leita Walker, also of Ballard Spahr LLP. Coalition members include American Public Media Group (which owns Minnesota Public Radio); The Associated Press; Cable News Network, Inc.; CBS Broadcasting Inc. (on behalf of WCCO-TV); Court TV Media LLC; Dow Jones & Company (which publishes The Wall Street Journal); Fox/UTV Holdings, LLC (which owns KSMP-TV; Hubbard Broadcasting, Inc. (on behalf of its broadcast stations, KSTP-TV, WDIO-DT, KAAL, KOB, WNYT, WHEC-TV and WTOP-FM); Minnesota Coalition on Government Information; The New York Times Company; The Silha Center for the Study of Media Ethics and Law; TEGNA Inc. (which owns KARE-TV); and Star Tribune Media Company LLC.

Open Records Law Privacy Exception Doesn't Shield Public Employee Misconduct Even If It's 'Embarrassing'

By Jeremy S. Rogers and Amye Bensenhaver

"The taxpayers paid for this report. They have a right to review it in full." Concluding with these simple words, Judge Phillip Shepherd (Franklin Circuit Court, Frankfort, KY) put an end to a prosecutor's two-year-long effort to hide the details of an investigation into allegations of sexual harassment by a high-ranking jail official. In his September 2 opinion, Shepherd overturned a 2019 Kentucky Attorney General Open Records Act decision that could have allowed local prosecutors in Kentucky to use their offices to cloak a wide variety of local government business in secrecy under the guise of their role as prosecutors.

In Kentucky, county attorneys are elected to four-year terms, and they serve dual civil and criminal roles. They advise and represent county government agencies in civil matters, and they function as criminal prosecutors in most misdemeanor cases and in some felony proceedings.

"The taxpayers paid for this report. They have a right to review it in full."

In 1992, Kentucky added an exemption to its Open Records Act shielding prosecutors' criminal investigation files from public scrutiny. Codified at KRS 61.878 (1)(h) alongside a similar exemption for law enforcement records, the prosecutor exemption is far more powerful. Unlike the exemption applying to police records, the exemption for prosecutors' files lasts forever. Prosecutors may keep their documents secret after final completion of all prosecution, after all appeals are exhausted, and even after completion of a criminal defendant's sentence in the case. In further contrast to the exemption for police records, prosecutors are not required to demonstrate any potential harm or other reason to justify nondisclosure. If it is in a prosecutor's file, it is exempt from disclosure. Period.

The absolute nature of Kentucky's prosecutor exemption makes it a powerful tool that can be used to insulate a prosecutor from scrutiny by the electorate. As former Acting Solicitor General of the United States Neal Katyal once said, "The more independence you give a prosecutor, the less you make that prosecutor accountable to the public."

As recent high-profile events in Kentucky have shown, prosecutors not only have considerable discretion over what, if any, criminal charges to pursue, but they also wield tremendous power over what information to make public. Kentucky's Open Records Act allows a prosecutor to use the exemption as both sword and shield. The Kentucky Supreme Court put it this way: "the statutory mandate that prosecutorial files be and remain totally exempt accords the prosecutor an unlimited discretion to deny disclosure, but it does not preclude him or her from allowing it." *Lawson v. Office of the AG*, 415 S.W.3d 59, 69 (Ky. 2013). Thus, Kentucky prosecutors have

virtually unbridled control over what information is made public versus what information remains secret. This includes cases in which prosecutors investigate officials within the criminal justice system.

This particular case began in May 2018 when several jail employees made internal complaints of sexual harassment by the chief deputy jailer in Franklin County – home to Kentucky's capital city, Frankfort. The elected jailer suspended the deputy and asked a Lexington law firm to investigate. The law firm sent the jailer an engagement agreement, but the county attorney intervened and caused a new engagement agreement to be addressed to himself instead of to the jailer. The agreement, which was not made public until much later, specified that the firm was retained "to conduct an investigation of employment matters," that its services would be provided to the jail, and that the jail would pay for the services. There was no indication why the county attorney was involved. One logical explanation for the county attorney's interjection into the matter was to manufacture a way to shield the investigation from public scrutiny.

The firm delivered its investigation report in June, and the deputy announced his retirement two days later. Frankfort is a small town, with only 50,000 people living in the entire county. Word of the sexual harassment investigation and deputy's departure quickly reached the local newspaper, *The State Journal*. Editor Chanda Veno requested a copy of the investigation report under Kentucky's Open Records Act. The county attorney declined, relying on exemptions for certain types of preliminary documents, claiming the report constituted "attorney-client work product," and citing the prosecutor exemption for "records or information compiled and maintained by county attorneys … pertaining to criminal investigations or criminal litigation."

Here, the county attorney's reliance on the prosecutor exemption was notable for several reasons. First, it hinted at the possibility of an exceptionally rare occurrence: criminal charges against a senior jail official in connection with workplace sexual harassment allegations. Second, it suggested the county attorney engaged in an unprecedented prosecutorial move: outsourcing criminal investigation responsibilities to a private law firm rather than a law enforcement agency. Third, it meant the public may *never* learn the contents of the sexual harassment investigation.

The State Journal was skeptical of the county attorney's claim. It appealed the decision to Kentucky's Attorney General, who by statute is authorized to issue quick administrative decisions under the Open Records Act. In such appeals, the public agency is required to carry to burden of proof to justify withholding government records. To carry his burden, the county attorney provided a heavily redacted copy of the investigation report. Among other things, the redacted version stated, "The purpose of this report is to set forth in summary fashion the findings and conclusions of our investigation involving the Franklin County Regional Jail (FCRJ) into … [*redacted*] … Chief Deputy … [*redacted*]." The county attorney represented to the Attorney General that the redacted report proved it was a record of the "county attorney … pertaining to criminal investigations or potential criminal litigation."

The Attorney General issued Open Records Decision 19-ORD-152 on July 31, 2019. He accepted the county attorney's representation that the report was part of a criminal investigation and held the exemption for prosecutors' files was dispositive. Consequently, the Attorney General declined to address the other exemptions the county attorney had cited to justify nondisclosure.

The State Journal's publisher Steve Stewart recognized the dangerous precedent created by the Attorney General's decision. Kentucky has 120 counties, each with its own elected county attorney and other county government agencies. The Attorney General's decision opened the door for county attorneys across the Commonwealth to keep a wide array of county government documents secret simply by claiming they pertain to criminal investigations. *The State Journal* decided to appeal to Franklin Circuit Court.

The State Journal's decision to retain counsel and appeal proved to be decisive in this case. Remarkably, when the matter came to court, the county attorney altogether abandoned the prosecutor exemption, despite the fact that it was the sole basis of the Attorney General's decision on appeal. The county attorney raised a new argument that releasing the unredacted investigation report would constitute an unwarranted invasion of personal privacy because it would identify witnesses in the sexual harassment investigation.

After reviewing the unredacted investigation report *in camera,* Judge Shepherd rejected all of the county attorney's arguments. He quickly disposed of the prosecutor exemption, holding, "By its own terms, the report is dealing with a human resources matter, not a criminal investigation."

Judge Shepherd also rejected the privacy argument, noting the report "concerns the conduct of public employees in a government facility, performing public duties" and that it did not identify the complaining parties or witnesses by name. He acknowledged that identification of witnesses remained possible and that the nature of the sexual harassment could be embarrassing. However, he grounded the decision in the Open Records Act's statutory policy, "that free and open examination of public records is in the public interest … even though such examination may cause inconvenience or embarrassment to public officials or others." KRS 61.871.

Judge Shepherd also held there is a substantial public interest in disclosure of the investigation report outweighing any minimal privacy interests. "[T]hrough disclosure of complaints and investigation materials, the public can discern whether county agencies—funded by taxpayer dollars—are efficiently and effectively investigating and addressing employee misconduct. This provides insight into the behavior of government employees, as well as the efficiency and productivity of our public workplaces. Perhaps more importantly, it ensures that investigations are handled competently and without favoritism."

Jeremy Rogers is a partner at Dinsmore & Shohl in Louisville, KY. Amye Bensenhaver is a co-founder of the Kentucky Open Government Coalition and former Kentucky assistant attorney general.

Journalists File Section 1983 Lawsuits Over Police Misconduct

By Matt Topic

Section 1983 of the Civil Rights Act provides for suits against government officials who violate civil rights under color of law. Across the country we have seen police officers engage in brutality during protests in response to the murder of George Floyd, police oppression of Black people, and systemic racism. Journalists have not been immune to this brutality, and appear often to have been deliberate targets of it. That's not surprising: police unions have given their unwavering support to a president who has repeatedly declared the press to be the enemy of the people.

We recently filed two Section 1983 suits against the Chicago Police Department on behalf of local journalists. By way of background, this is a police force with a deep history of violent misconduct. After the Laquan McDonald murder by officer Jason Van Dyke and its subsequent cover-up, both of which were revealed by Rahm Emanuel's eventual release of the shooting video in response to a court order in a Freedom of Information Act suit, a "Police Accountability Task Force" was commissioned to study and report on CPD. It described a "long, sad history of death, false imprisonment, physical and verbal abuse and general discontent about police actions in neighborhoods of color," giving "validity to the widely held belief the police have no regard for the sanctity of life when it comes to people of color."

The Justice Department investigated and found that CPD "engages in a pattern or practice of using force, including deadly force, in violation of the Fourth Amendment of the Constitution." In response, CPD recently elected a police union president who had been stripped of his police powers and who racked up more misconduct allegations than 96% of the department.

Our first suit was brought on behalf of a journalist reporting for an online hyper-local news organization at the May 30, 2020 protests in Chicago, Jonathan Ballew. Mr. Ballew was wearing a yellow press badge and CPD press credentials while repeatedly announcing himself as a member of the press. As CPD dispersed protestors from Trump Tower, an officer in full military gear began spraying members of the crowd who were in the process of retreating with pepper spray, including Mr. Ballew, who was complying with all police instructions and posed no threat to anyone. A video is available at: https://twitter.com/JCB_Journo/status/1266898345945169922.

Our second suit was for a freelance journalist, Colin Boyle, who was covering July 17, 2020 protests at a Christopher Columbus statue. Mr. Boyle was wearing a press badge and a red helmet with "PRESS" on both sides. As Mr. Boyle was leaving for the day, he crossed paths with a CPD officer who made a comment that was difficult to decipher but included profanity. Mr. Boyle asked the officer to repeat what he said and whether there was a problem, and in response, the officer, who was wearing no mask despite rampant COVID-19 infections at CPD,

a directive that officers wear them, and a mayoral threat of discipline for officers who refused to comply, got directly in Mr. Boyle's face and asked him, "Do you want a problem?"

After some further exchange, in which Mr. Boyle posed no threat, the officer followed him, grabbed him, and dragged him to the sidewalk while shoving him. Mr. Boyle yelled out for help from one of the other officers nearby, which was met with, "Yeah, you're gonna need help." Mr. Boyle was eventually allowed to leave.

These cases involve a number of civil rights claims. Both suits bring claims for excessive force. There was simply no need to use force against either journalist and doing so was objectively unreasonable. Both suits also allege First Amendment violations, both for interfering with the gathering of the news and retaliation through the use of force that we allege was because our clients were known to be members of the press. In the Boyle case, we also added claims for a seizure under the Fourth Amendment based on the unjustified restraint on Mr. Boyle's freedom of movement; assault and battery based not only on the grabbing and shoving, but also for failing to wear a mask while yelling loudly in Mr. Boyle's face at close range; and claims against the City for failing to supervise the officer, who had a long history of misconduct allegations and cost the City over $800,000 in prior misconduct settlements. Both suits are in their early stages.

Both suits also allege First Amendment violations, both for interfering with the gathering of the news and retaliation through the use of force.

To be sure, other journalists have suffered far more violent attacks, to say nothing of the force asserted against protestors, but we are confident that these are clear civil rights violations and believe that even lesser violations by the police need to be challenged and recognized as the threat to press freedoms and a free society that they are.

We know that journalists don't like to "be the story," but these kinds of attacks on journalists should not be tolerated. And unless our community stands up to them, they are sure to continue as officers become more emboldened and feel an even greater sense of impunity. We fight subpoenas asking for sources, we fight for open court proceedings, and we fight for government records. Physical attacks on journalists covering protests are every bit as much of a threat to newsgathering, and our firm is happy to take these cases on contingency, taking not a dollar from newsroom or legal budgets.

Matt Topic leads the FOIA and media law practice at Loevy & Loevy, one of the largest and most active civil rights firms in the country. He litigated the FOIA case resulting in release of the Laquan McDonald shooting video.

Ten Questions to a Media Lawyer: Catherine Robb

Catherine Robb is counsel in the Business Litigation Practice Group in the Austin office of Haynes and Boone.

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

Robb after being sworn into the US Supreme Court Bar, where her father, former Virginia Sen. Chuck Robb, introduced her.

I sort of fell into it. I clerked for a federal judge in Midland, Texas right after law school and ended up meeting David Donaldson on one of my many flights between Midland and Austin that year. After chatting for a bit, he invited me to send him my resume. I was tentatively planning to move back to the East Coast (where I grew up) after my clerkship, and considering working for the US Attorney's Office in DC, but thought that if I did stay for a while in Austin (where I had a wonderful grandmother with whom I treasured spending time), doing First Amendment and media law sounded like a really interesting idea. So, after my clerkship, I went to work at George and Donaldson—with Jim George and David Donaldson—and started doing media law – as well as business litigation and whatever else they handed me to do. I soon realized how much I enjoyed the media work. Laura Prather had recently left George and Donaldson, so I kept seeing her name on pleadings and other papers, but did not know her at the time.

A few years later, Laura and I got to know each other through various community involvements (and a heated bidding war at a silent auction!) and we became friends and, eventually, realized that we would really enjoy working together. Laura did all the heavy lifting to figure out how to make it work and, after an infamous (in our minds) happy hour at the Star Bar, we made it happen. So, while David Donaldson (and Jim George) got me started, I owe a tremendous debt to Laura for putting her faith in me and taking it to a whole new level.

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

Favorite: I get to work with really wonderful people—our "Team" at the office, our clients, and other members of the media bar—the sort of people I would want in my life even if we

Robb, right, and Laura Prather at the Texas Film Hall of Fame, "many years ago (before we started practicing together). I think it was the night we went head to head at a silent auction bidding war that was the start of a great friendship."

didn't work together. And I really enjoy the variety of our cases and work. It feels like I learn something new about, and for, just about everything we do—from digging in deep on some aspect of a government agency (because it is part of an investigative report that is the subject of litigation) to the quirks of, and lack of rules of procedure in, a JP court (where we have recently, inexplicably, had a few matters). And, of course, it is gratifying to feel like you are fighting for something that matters.

Least favorite is billing. Right up (or down) there is uncivil opposing counsel or opposing parties.

How has quarantine affected your work and routines?

I am fortunate in that I don't have too many distractions at home, so working there (which I have been doing since mid-March) has probably been easier on me than on a lot of people. Other than leaf blowers that appear to set up camp right outside my window at all hours, and internet that decides to conk out at inopportune times, it has not been too bad. One big disruption has been that I sit on a ball or use my stand-up desk at my office. I don't have either at my home office, so I am sitting a lot more and doing so much less comfortably. I am not good at sitting still, so that has been a real challenge.

I am pretty active and do quite a few running races, triathlons, and other races every year. With everything shut down (including, for a while, the trail where I run) and races

cancelled, and my boxing gym closed, I have had to work a little harder to stay active. I used to always work out (usually run) first thing in the morning and then start my work day, but now everything blends together more—meaning I may not get a work out in until later in the day or I may suddenly find myself on a video call in my running clothes (with my hair still in pigtails).

Highest profile or most memorable case?

It was not at all a high profile case, and not the most memorable (or even memorable for any of the regular reasons), but it was nonetheless a really memorable one for me—largely because it cemented my interest in First Amendment work and because it made me realize that maybe I was suited to be a lawyer after all.

Early in my career, I represented two gentlemen who were sued for defamation by their gun club for speaking out about safety concerns at the gun club and in its operations. For their speech raising these concerns, they were kicked out of the gun club and then sued. I think my clients and I probably had differing viewpoints on quite a few issues, but they were delightful and we all agreed that their decision to speak out on their safety concerns was the right thing to do. Their gun club did not agree.

To say that things were acrimonious between the men and their now-former gun club would be an understatement. I spent a good bit of time talking to my clients and to opposing counsel trying to get them all to understand that everyone's interests would be better served if we could try to put aside the hard feelings and instead work on identifying what everyone needed to resolve the matter. It was not always easy. As we were heading into a deposition one day, and being mindful of how much the two sides hated each other, it occurred to me that I was likely the only person in the deposition who was not "packing heat." Before we walked in, I pulled my clients aside and told them that I felt pretty confident that I would be the only person in the room not carrying, that I knew how much the parties disliked each other and how heated the discussion between them had been in the past (even despite my best efforts) and that, if things got heated during the deposition, I expected them to protect me. The two gentlemen knew that I was not a gun owner and did not entirely understand the nuances of the gun or gun club culture or (prior to the case) of the specific safety concerns they had raised. But, they also knew that I believed in their right to raise their concerns and appreciated that they had done so, especially because their concerns went beyond the confines of the gun club (literally—think, among other concerns, inadequate berms and bullets potentially entering the freeway). Without either denying or confirming whether I was likely to be the only unarmed person in the room, they assured me that I was their primary concern and that, whatever else happened, they had my back! I knew they did, but more importantly, we ultimately ended up resolving the matter without any shots being fired and with everyone satisfied with the result (and with a safer gun club).

It's almost a cliché for lawyers to tell others not to go to law school. What do you think?

I say go for it. I was one of those weird people (so say my friends and my uncle, who was law school professor) who loved law school. But, I do think it makes sense to take a year off and better determine if it is really for you before devoting the time and resources to law school. Of course, you never know until you try, but I think there is a lot to be said for waiting a year or two.

What's your home office set-up?

I have set up my "home office" in my Tv/Game room in my garage apartment, which I call the Regal Beagle. (Yes, that one!) Since I can't currently have people over for Game Night or to watch movies, it has worked fairly well. My computer, monitor, other desk necessities, and lots of papers have taken over what used to be a fun room with lots of odd artwork and music and film posters and memorabilia. Now, we all peaceably co-exist. And, my cardboard deer head on one wall often makes an appearance in Zoom meetings, which elicits many questions. (I actually have a Dr. Seuss creature on my wall at my "real office" so it seems appropriate to be working with a new "friend" to keep me company during the work day.) I have my tri bike set up on my Wahoo Kickr and some other exercise equipment in here, so I can take a break to stretch or get some exercise, which is nice. I still do not have a comfortable chair at my desk.

I have a little porch off of the Beagle, which has been great for getting some fresh air during the day when I can't stray too far from my computer. I can take my laptop out there and work (although, because of the traffic, it is too loud to do calls or meetings).

What's a book, show, song, movie, podcast or activity that's been keeping you entertained?

Virtual Austin City Limits tapings/shows. We have just started filming new episodes (livestreamed without an audience) and have been replaying old episodes with the artists chatting online during the show. I watch them outside on my porch and, while not as good as the real thing, the drinks are free and there is no line for the bathroom! Otherwise, I've

read lots of books (I usually have one fiction and one non-fiction book going) and watched lots of new shows. I finally watched The Marvelous Mrs. Maisel and Schitt$ Creek (and now understand the hype). And, one of my favorite activities that has kept me sane and joyful and entertained has been my weekly Margarita Walk with Laura Prather. We fill our Yetis with margaritas and walk around the neighborhood. We have to stay cool and hydrated, so yes we drink the margaritas while we walk. We frequently invite a friend to join us, so it is great way for Laura and I to get to see each other during the WFH era, and also to see friends and clients.

Dr. Seuss creature on the wall at Robb's Haynes and Boone office. "It is officially called The Blue Green Abelard, but my mother and I nicknamed her Heloise Abelard."

I am also listening to more podcasts than pre-quarantine, so have added a few to the mix. One of my favorite new ones has been "The Way of Love with Bishop Michael Curry." He is the Bishop of the Episcopal Church and is just so lovely, and loving. (If you aren't familiar with him, he is the one who did the sermon/homily at Megan and Harry's wedding.) Even if you are not Episcopalian, or even religious, his interviews and talks and sermons are so full of hope and love and understanding and they are a wonderful reminder that there are good things and good people everywhere. They have been a perfect pick me up for these uncertain times.

What's a typical weekday lunch?

During quarantine, I often use lunch as an excuse to get outside and get in a short walk mid-day. I frequently walk to one of my many neighborhood taco joints or other restaurants and pick up a bite to eat—tacos, a salad, or a power bowl of some sort—which I (sigh) bring back to the Beagle and eat at my computer. The truth is that it is not that different from my pre-quarantine routine, it is just a slightly different neighborhood. I am trying to make sure my neighborhood restaurants will still be around once we get back to normal, so that is my excuse for eating out (and eating too much) during the pandemic.

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

Since I assume that I want to keep my most important client, I try heartily to get out of singing anything! I have a terrible voice and zero musicality. If forced to sing, probably The Gambler, only because it was the first song I learned all of the word to (years ago), and I generally know the tune. About the only time I have willingly sung in front of someone was during my Bar trip after law school, driving up the Australian coast with a good law

school friend. We had no music in our rental car, so we took turns singing to each other—and together. I sang outlaw country to him, he sang Frank Sinatra and Dean Martin to me, and together we sang show tunes!

Where's the first place you'd like to go when the quarantine is lifted?

Maybe not the first place—and not until I have a lot more confidence in our situation—but I had a trip to Russia planned for May of 2020 that was (understandably) cancelled. I have always wanted to go there, so I hope to reschedule at some point. I have always been fascinated by the history and literature (and politics), so am hoping to eventually get that trip back on the calendar. Otherwise, probably one of the many places I was supposed to visit this year for a race—maybe the California wine country, the Smoky Mountains, Lake Powell, Oregon (Hood to Coast), or one of the other places that was scrubbed from my travel schedule in 2020. And, I am very close to my family, so I miss getting to travel with them and can't wait to do so again soon.

I am also missing live music and seeing movies at the theater, so I look forward to being able to go do those things again, especially an Austin City Limits taping.