

RECENT DEVELOPMENTS IN MEDIA, PRIVACY, AND
DEFAMATION LAW

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A tale of privilege, prison, and politics dominated media law in 2005, when *New York Times* reporter Judith Miller was jailed for refusing to divulge the name of a confidential source. Ms. Miller told the judge, “If journalists cannot be trusted to guarantee confidentiality, then journalists cannot function and there cannot be a free press.”¹ Speaking from jail, she described her trip from the courthouse: “They put shackles on my hands and my feet. They put you in the back of this car. I passed the Capitol and all the office buildings I used to cover. And I thought, ‘My God, how did it come to this?’”²

As was true last year, reporter’s privilege is, once again, a good starting place for the 2005 survey. It begins with developments in the law of reporter’s privilege and then addresses cases involving a Texas judge with no discernible sense of humor, edicts by high-ranking government officials banning the dissemination of information to specific journalists, and access to tapes and transcripts of radio communications involving the New York City Fire Department on September 11, 2001.

I. REPORTER’S PRIVILEGE

The case involving Judith Miller began when a federal grand jury subpoenaed two reporters—Ms. Miller and *Time* magazine’s Matthew Cooper—as well as *Time* magazine for testimony and documents about a government leak of a CIA operative’s identity. The government asked the reporters to disclose the identity of confidential sources. They refused. The trial court found the reporters in contempt and they appealed, arguing that the identity of confidential sources was privileged under the First Amendment to the U.S. Constitution and federal common law.³

1. See Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

2. *Id.*

3. *In re Grand Jury Subpoena*, 397 F.3d 964, 968 (D.C. Cir. 2005), cert. denied, 125 S. Ct. 2977 (2005).

The D.C. Circuit rejected the reporters' arguments and concluded that there were "no material factual distinctions" between the facts of the case and those of *Branzburg v. Hayes*:⁴

Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury . . . regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter.⁵

Of special note is the court's discussion of the argument based on Justice Powell's separate concurrence in *Branzburg*,⁶ which called for a case-by-case analysis of reporter's privilege claims. The court observed that

whatever Justice Powell specifically intended, he joined the majority. Not only did he join the majority in name, but because of his joinder with the rest of a majority, the court reached a result that rejected First Amendment privilege not to testify before the grand jury for reporters situated precisely like those in the present case.⁷

The D.C. Circuit likewise rejected the reporters' contention of protection under a federal common law privilege.⁸ The members of the panel, however, were unable to agree on the basis for the holding under the common law.⁹ Judge Sentelle, who wrote the opinion of the court, also wrote separately that "reporters refusing to testify before grand juries as to their 'confidential sources' enjoy no common law privilege beyond the protection against harassing grand juries conducting groundless investigations that is available to all citizens."¹⁰ Judge Henderson urged the panel not to address the common law privilege issue since it was clear that the government had made a sufficient showing to overcome any privilege.¹¹

Finally, Judge Tatel wrote a dynamic separate opinion, concurring only in the judgment. He joined in "the court's rejection of appellants' First Amendment argument" under the facts of the case, although he was "uncertain that *Branzburg* offers 'no support' for a constitutional reporter privilege in the grand jury context."¹² Judge Tatel, however, concluded that there is a common law reporter's privilege, and he believed it appropriate for the court to reach that issue.¹³ He wrote that under the common law,

4. 408 U.S. 665 (1972).

5. *In re Grand Jury Subpoena*, 397 F.3d at 970.

6. Justice Powell provided the necessary fifth vote in *Branzburg* but wrote separately to express his view that the existence of a reporter's privilege rooted in the First Amendment required a case-by-case analysis.

7. *In re Grand Jury Subpoena*, 397 F.3d at 972.

8. *Id.* at 972-73.

9. *Id.* at 976-1004.

10. *Id.* at 976.

11. *Id.* at 981-82.

12. *Id.* at 987 (quoting *id.* at 970-71).

13. *Id.* at 989-90.

in cases where the subpoena seeks the source of a government leak, “the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leak’s information value.”¹⁴ In this specific case, Judge Tatel concluded that the value of the leak in this context did not outweigh the harm caused by disclosing an agent’s identity.¹⁵

Subsequently, the reporters sought review in the U.S. Supreme Court, which denied their petition for certiorari.¹⁶ *Time* elected to disclose the documents, and Cooper testified after his source—Deputy Chief of Staff Karl Rove—directly released him from his pledge of confidentiality. Miller declined to reveal the identity of her source and spent eighty-five days in jail for contempt.¹⁷ She later agreed to testify before the grand jury investigating this leak after securing what she believed was a satisfactory waiver from her source whom she identified as Lewis Libby, Chief of Staff to Vice President Cheney.¹⁸

In another case involving the government’s quest for the identity of news sources, a federal district court in New York took a very different view of *Branzburg* and the scope of the common law privilege for newsgathering. The U.S. Attorney General subpoenaed (from a third-party telephone company) the telephone records of Miller and another *New York Times* reporter “relating to time periods of twenty-three and eighteen days, respectively, during the months following September 11, 2001.”¹⁹ The government sought the records “as a part of an investigation to uncover the identity of one or more government employees who purportedly ‘leaked’ information . . . relating to the government’s plans to block the assets and search the offices of two Islamic charity organizations in the fall of 2001.”²⁰

In response, the *Times* sought a declaratory judgment that these records were “protected against compelled disclosure by the First Amendment to the U.S. Constitution, federal common law and the guidelines of the U.S. Department of Justice. . . .”²¹ The district court concluded that the phone records were protected from disclosure under the First Amendment and the common law and, therefore, granted the *Times*’s motion for summary judgment in part.²² The court held that “the Second Circuit, based on

14. *Id.* at 998.

15. *Id.* at 1002–03.

16. *In re Grand Jury Subpoena*, 125 S. Ct. 2977 (2005).

17. Liptak, *supra* note 1, at A1.

18. *Id.*

19. *N.Y. Times v. Gonzales*, 382 F. Supp. 2d 457, 464 (S.D.N.Y. Mar. 2, 2005).

20. *Id.*

21. *Id.*

22. *Id.* at 512. The district court, however, denied the portion of the *Times*’s motion for summary judgment based on the Department of Justice’s guidelines for “the issuance of subpoenas to members of the media . . . and the issuance of subpoenas for telephone records of

Branzburg has recognized a qualified First Amendment privilege, applicable in civil actions and in all phases of a criminal prosecution, that protects reporters from compelled disclosure of confidential sources.²²³ The court noted that the Second Circuit, unlike some other courts of appeal, has taken the position that Justice Powell's concurrence in *Branzburg*²⁴ "recognized some form of a qualified First Amendment privilege."²⁵ Based on this qualified privilege, the court ruled that "the party seeking disclosure must make 'a clear and specific showing that the sought information is: [1] highly material and relevant, [2] necessary or critical to the maintenance of the claim, and [3] not obtainable from other available sources.'"²⁶

In concluding that there is also a qualified common law reporter's privilege, the court relied on the framework established by *Jaffee v. Redmond*,²⁷ in which the U.S. Supreme Court set forth the process by which new privileges may be recognized under Federal Rule of Evidence 501.²⁸ As a part of its analysis, it noted that the "recognition of a qualified reporter's privilege with respect to confidential sources is consonant with the conclusions reached by forty-eight states as well as the District of Columbia. . . ."²⁹ Under this standard, the government did not make the necessary showing to overcome the qualified privilege, as it had relied on conclusory allegations that the information sought was material to its investigation³⁰ and had "not sought to demonstrate that it ha[d] exhausted all reasonable alternative sources. . . ."³¹

There were new developments in *Lee v. Department of Justice*,³² a case covered in last year's media survey.³³ In reviewing the district court's decision finding the journalists in contempt, the D.C. Circuit noted that "despite *Branzburg*, there is a reporter's privilege in civil actions, and that 'in the ordinary civil case the civil litigant's interest in disclosure should

members of the media." *Id.* at 481; *see also id.* at 484 ("It is neither the nature nor the purpose of the Guidelines to confer a legal enforceable benefit or right in any person, as they expressly acknowledge.").

23. *Id.* at 490.

24. Justice Powell's concurrence provided the necessary fifth vote. *See id.* at 485 ("In light of Justice Powell's concurring opinion, courts and commentators have differed on how to categorize the opinion of the majority written by Justice White. Some courts have taken the position that Justice White wrote for a plurality of the Court and that the scope of the *Branzburg* holding is controlled by Justice Powell's narrow concurrence.").

25. *Id.* at 486; *see also id.* at 486-90 (analyzing relevant Second Circuit cases).

26. *Id.* at 490 (citations omitted).

27. 518 U.S. 1 (1996) (recognizing a psychotherapist-patient privilege).

28. *Gonzales*, 382 F. Supp. 2d at 494-95.

29. *Id.* at 502.

30. *Id.* at 511.

31. *Id.*

32. 413 F.3d 53 (D.C. Cir. 2005).

33. *See* Patricia R. Stembridge Sprain et al., *Recent Developments in Media, Privacy, and Defamation Law*, 40 TORT TRIAL & INS. PRAC. L.J. 641, 642-43 (2005).

yield to the journalist's privilege.'"³⁴ However, this privilege can be overcome where the "information sought . . . go[es] to 'the heart of the matter'"³⁵ and the litigant has "exhaust[ed] 'every reasonable alternative source of the information.'"³⁶ Based on the facts of the case before it, the court concluded that Dr. Lee had made a sufficient showing to overcome the privilege.³⁷ Significantly, it found that the number of depositions necessary to show that all other possible sources have been exhausted "must be determined on a case-by-case basis" and that the trial court had not abused its discretion in deciding that Dr. Lee had sufficiently demonstrated exhaustion.³⁸

II. DEFAMATION

A. *Prior Restraint and Defamation*

In *Tory v. Cochran*,³⁹ famed attorney Johnnie L. Cochran Jr., played the part of plaintiff rather than advocate in the last case of his life. The trial court found that one of Cochran's former clients had engaged in unlawful defamatory activity by falsely claiming that Cochran owed him money, complaining to the local bar association, writing Cochran threatening letters demanding money, and picketing Cochran's office.⁴⁰ It issued a permanent injunction barring petitioners and their agents "from picketing, from displaying signs, placards or other written or printed material, and from orally uttering statements about [Cochran] and about Cochran's law firm in any public forum."⁴¹ Just one week after the U.S. Supreme Court heard oral argument in the case, Cochran died.⁴² The Court held that it could nevertheless decide the case because the injunction remained in effect. Cochran's death, however, did make it "unnecessary, indeed unwarranted" to explore petitioners' claim that a permanent injunction preventing all future speech about a public figure violated the First Amendment:⁴³

[W]e need only point out that the injunction, as written, has now lost its underlying rationale. Since picketing Cochran and his law offices while engaging in injunction-forbidden speech could no longer achieve the objectives that the trial court had in mind (*i.e.*, coercing Cochran to pay a "tribute" for

34. *Lee*, 413 F.3d at 58 (quoting *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981)).

35. *Id.* (quoting *Zerilli*, 656 F.2d at 713).

36. *Id.*

37. *Id.* at 60–61.

38. *Id.* at 61.

39. 125 S. Ct. 2108 (2005).

40. *Id.* at 2110.

41. *Id.* (internal quotations and citations omitted).

42. *Id.*

43. *Id.* at 2111.

desisting in this activity), the grounds for the injunction are diminished, if they have not disappeared altogether. Consequently the injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification.⁴⁴

B. *Plaintiff's Status and Determination of Actual Malice*

In a case involving the definition of actual malice, the Alabama Supreme Court ruled that the plaintiffs in a defamation suit were not entitled to discover how much the defendants earned. In *Ex parte Crawford Broadcasting Co.*,⁴⁵ a building inspector and his wife sued two talk show radio hosts who suggested that the building inspector was hindering the city's progress because of personal interests.⁴⁶ Plaintiffs subpoenaed defendants' compensation records at the radio station on the theory that they would tend to show malice.⁴⁷ Specifically, the amount paid to the talk show hosts would reveal the "the critical link between [their] self-interest and why they have a continuing need for targets they can subject to character assassination."⁴⁸ The Alabama Supreme Court rejected this argument and quashed the subpoena, stating that the amount that the defendants were paid did "not indicate whether they were concerned with the truth of their statements."⁴⁹

In *Wayment v. Clear Channel Broadcasting, Inc.*,⁵⁰ the Utah Supreme Court held that a television reporter did not qualify as a public figure for purposes of her defamation claim against her former employer, the owner of a local television station.⁵¹ The reporter gave on-air reports five days a week, appeared in special reports and a half-hour special, and participated in four public charitable events.⁵² The station promoted her reports in fifteen- and thirty-second commercials,⁵³ and the reporter had referred to herself as a "local celebrity."⁵⁴ Nevertheless, the court held that most of these examples merely showed that the reporter was performing her job and that the television station was advertising her reports to attract viewers.⁵⁵ The court stated that the defendant "provided no evidence that [the reporter] wielded any particular social or political influence. . . ."⁵⁶

44. *Id.*

45. 904 So. 2d 221 (Ala. 2004).

46. *Id.* at 223.

47. *Id.* at 224.

48. *Id.* at 225.

49. *Id.*

50. 116 P.3d 271 (Utah 2005).

51. *Id.* at 275.

52. *Id.*

53. *Id.*

54. *Id.* at 277.

55. *Id.* at 281.

56. *Id.*

Likewise, in *Mandel v. Boston Phoenix Inc.*,⁵⁷ a federal district court in Boston held that an assistant state's attorney was not a public official and denied the defendant newspaper's motion for summary judgment.⁵⁸ The court distinguished the assistant state's attorney from police officers, who had been held to be public officials:

[P]olice officers are public officials "because of the broad powers vested in police officers and the great potential for abuse of those powers, as well as police officers' high visibility within and impact on a community." . . . Prosecutors are less visible in the community than police officers, tending to work in courts and offices rather than in the community among the general public.⁵⁹

It also found that although access to the press was a "theoretical possibility" for the attorney, it was not a practical means of self-help, and the attorney did not assume the risk of diminished privacy in a traditional sense.⁶⁰

C. Criminal Defamation

In two nearly identical opinions, a federal judge upheld the Kansas criminal defamation law against vagueness and overbreadth challenges.⁶¹ The plaintiff in each case had criticized the city clerk in the local newspaper. The clerk then filed a criminal complaint charging the plaintiffs with violating the city's criminal defamation ordinance.⁶² Both plaintiffs sought declaratory and injunctive relief on grounds that the ordinance violated the state and federal constitutions.⁶³ The court distinguished the cases from *Ashton v. Kentucky*,⁶⁴ in which the U.S. Supreme Court set aside a criminal libel conviction because it was "based upon 'any writing calculated to create disturbances of the peace.'"⁶⁵ The court found that the ordinance at issue was more narrowly drawn. It called not only for a disturbance of the peace but also for a finding of actual defamation. It also limited the definition of criminal defamation by requiring that the communication must be the type "tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such persons of the benefits of public confi-

57. 322 F. Supp. 2d 39 (D. Mass. 2004).

58. *Id.* at 41.

59. *Id.* at 43 (quoting *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 287 (Mass. 2000)).

60. *Id.*

61. *Thomas v. City of Baxter Springs*, 369 F. Supp. 2d 1291 (D. Kan. 2005); *How v. City of Baxter Springs*, 369 F. Supp. 2d 1300 (D. Kan. 2005). The 2004 survey mentioned the cases. See John P. Borger et al., *Recent Developments in Media, Privacy, and Defamation Law*, 39 TORT TRIAL & INS. PRAC. L.J. 557, 566 n.68 (2004).

62. *Thomas*, 369 F. Supp. 2d at 1293-94; *How*, 369 F. Supp. 2d at 1303.

63. *Thomas*, 369 F. Supp. 2d at 1293; *How*, 369 F. Supp. 2d at 1302.

64. 384 U.S. 195 (1996).

65. *Thomas*, 369 F. Supp. 2d at 1297 (citing *Ashton*, 384 U.S. at 198-99); *How*, 369 F. Supp. 2d at 1306 (same).

dence and social acceptance; or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends.”⁶⁶ Finally, the court held that the ordinance was not overbroad because criminal charges could be brought only when the statement was false.⁶⁷

D. *Neutral Reportage Privilege*

The Pennsylvania Supreme Court dismissed the neutral reportage privilege⁶⁸ as a “radical notion” not required by the federal or state constitutions.⁶⁹ In *Norton v. Glenn*, a newspaper published comments made by a member of the borough council outside the chamber about the council president and borough mayor.⁷⁰ The article stated that the member had accused the president and mayor of being homosexuals and child molesters.⁷¹ The president and mayor then sued the reporter, newspaper, and others. The trial court granted partial summary judgment on grounds that the media defendants were entitled to the neutral reportage privilege.⁷² Pursuant to the privilege, the defendants’ subjective awareness of accuracy was irrelevant and there was no need to determine actual malice.⁷³ A jury found that the council member actually made the statements in question and therefore the media defendants were not liable.⁷⁴ On appeal, however, the Pennsylvania Supreme Court held that neither the federal nor the state constitutions required adoption of the neutral reportage doctrine⁷⁵ and that the U.S. Supreme Court provided “considerable protection” to defendants by requiring a showing of actual malice.⁷⁶ It also held that the Pennsylvania constitution’s protection of free expression was “no broader than its counterpart in the federal Constitution.”⁷⁷

E. *Substantial Truth*

In *Global Relief Foundation, Inc. v. New York Times Co.*,⁷⁸ the Global Relief Foundation (“GRF”), a charitable organization, sued several media defen-

66. *Thomas*, 369 F. Supp. 2d at 1297 (internal quotations omitted); *How*, 369 F. Supp. 2d at 1306 (same).

67. *Thomas*, 369 F. Supp. 2d at 1298; *How*, 369 F. Supp. 2d at 1307.

68. The privilege was first recognized in *Edwards v. Nat’l Audubon Society*, 556 F.2d 113 (2d Cir. 1977).

69. *Norton v. Glenn*, 860 A.2d 48, 53 (Pa. 2004), *cert. denied*, 125 S. Ct. 1700 (2005).

70. *Id.* at 50.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 51.

75. *Id.* at 58–59.

76. *Id.* at 56.

77. *Id.* at 58.

78. 390 F.3d 973 (7th Cir. 2004). The 2004 survey discussed the district court case. *Global Relief Found., Inc. v. N.Y. Times Co.*, No. 01 C 8821, 2003 WL 403135 (N.D. Ill. Feb. 19, 2003), *cited and discussed in* Borger, *supra* note 61, at 562–63.

dants after each reported on the government's post-September 11 investigation of organizations allegedly linked to terrorism.⁷⁹ After the defendants produced affidavits from sources confirming that the investigation in fact took place, the court held that the reports were substantially true and entered summary judgment in favor of the defendants.⁸⁰ On appeal, GRF argued that (1) the court erred in finding the reports substantially true and (2) the defendants should be required to demonstrate not only that they accurately reported the government's suspicions but also that GRF was actually guilty of the conduct of which it was accused.⁸¹ The Seventh Circuit rejected these arguments:

The gist or sting of each article was that the President had issued a blocking order on September 24, 2001[,] against a number of organizations suspected of providing financial assistance to terrorist groups, and the government was now contemplating adding other charities and non-governmental organizations to the list of blocked entities. Each article named GRF . . . and a few noted that GRF had appeared on a list of organizations with suspected ties to terrorism years earlier. Many of the articles included GRF's denials and none of the articles concluded that GRF was actually guilty of the conduct for which it was being investigated. The court found that the only inaccuracy was the timing of the government's official actions and that this inaccuracy did not harm GRF more than did the accurate statements.⁸²

"Once a pimp, always a pimp" was perhaps one lesson to take from *Hughes v. Hughes*,⁸³ a case that arose after *Vanity Fair* quoted motion picture producer Albert Hughes, Jr., as saying that "[o]ur dad's a pimp."⁸⁴ *USA TODAY* had also quoted Albert's brother, Allen Hughes, as saying that their father "dabbled in the pimptorial arts."⁸⁵ Their father sued for defamation, but the brothers produced evidence suggesting that their father had indeed been a pimp from 1978 to 1981, and a jury found that the statements were not defamatory.⁸⁶ On appeal, the father argued that the statement "[o]ur dad's a pimp" connoted a present fact and therefore that Albert Hughes, Jr., would have to prove that his father was a pimp when he made the statement.⁸⁷ The California Court of Appeal disagreed, stating that so long as the statement could "reasonably be understood to mean that plaintiff

79. *GRF*, 390 F.3d at 975.

80. *Id.* at 980.

81. *Id.*

82. *Id.* at 987.

83. 19 Cal. Rptr. 3d 247 (Ct. App. 2004).

84. *Id.* at 248-49.

85. *Id.* at 249.

86. *Id.*

87. *Id.*

had at one time engaged in pimping activity, it was for the jury to determine if that is how the statement should be understood.”⁸⁸

F. *Libel by Implication*

In *Stanton v. Metro Corp.*,⁸⁹ a federal district court in Boston considered the effect of a disclaimer in a libel case. The case arose after *Boston* magazine published an article about teenage sexuality and promiscuity along with a photograph of five students at a high school prom.⁹⁰ On the same page as the photograph was a disclaimer stating that the photos were “from an award-winning[,] five-year project on teen sexuality by photojournalist Dan Habib. The individuals pictured are unrelated to the people or events described in this story.”⁹¹ The plaintiff appeared in the photograph. She sued on grounds that the “juxtaposition of her photograph and the article ‘insinuated that [she] was a person engaged in the activity described in the article’ [and] the language of the caption falsely insinuated that plaintiff was part of ‘an award-winning[,] five-year project on teen sexuality’”⁹² The court was clearly troubled by the magazine’s use of the photograph, finding it unnecessary to even consider “whether the ordinary reader would make a connection between a high school prom and sexual experimentation” as the article itself made the connection.⁹³ The court added that the article suggested that the plaintiff specifically was “likely to have engaged in the specific types of sexual behavior outlined in the article.”⁹⁴

However, the court dismissed the claim on grounds that the disclaimer was effective to contradict the otherwise defamatory connection between the photograph and text.⁹⁵ Although the disclaimer was intended to be inconspicuous, the court noted that it was readable, “set off from the rest of the text,” and appeared on the first page “near the attention-grabbing headlines and lead photograph.”⁹⁶ Finally, the court held that while the wording of the caption was “unfortunate,” it was not defamatory since “a reasonable reader would conclude that the plaintiff had agreed to participate in a photographic project on teen sexuality, not that she was herself sexually promiscuous or even sexually active.”⁹⁷

88. *Id.* at 251.

89. 357 F. Supp. 2d 360 (D. Mass. 2005).

90. *Id.* at 371–72. The students in the picture were wearing tuxedos and gowns, the girls were wearing makeup, three of the teenagers were smoking, and one girl was holding a plastic cup. *Id.* at 378. These elements led the court to conclude that the photograph gave the impression “of teenagers experimenting with adult behavior.” *Id.*

91. *Id.* at 372.

92. *Id.* at 373.

93. *Id.* at 378–79.

94. *Id.*

95. *Id.* at 381.

96. *Id.*

97. *Id.* at 383.

In contrast, the Fourth Circuit found disclaimers to be insufficient to support a motion to dismiss in *Hatfill v. New York Times Co.*⁹⁸ There, a scientist sued the *New York Times* and one of its columnists for articles published about the investigation into the anthrax mailings that occurred in fall 2001.⁹⁹ The scientist, whom the columnist did not initially name, argued that the articles in question implied that he was the anthrax mailer and “thereby constituted a false factual allegation of terrorist and homicidal activity.”¹⁰⁰ Although the columnist emphasized a “genuine assumption that [the scientist] is an innocent man caught in a nightmare,”¹⁰¹ the Fourth Circuit reversed the district court and held that “the unmistakable theme” of the articles was that the FBI should investigate the scientist more intensely “because all the evidence (known to [the columnist]) pointed to him.”¹⁰² The court stated:

Just as a defendant cannot escape liability for making a false assertion of fact by prefacing that assertion with the words “in my opinion,” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990), neither can it escape liability simply by pairing a charge of wrongdoing with a statement that the subject must, of course be presumed innocent. . . .¹⁰³

The court applied Virginia law under which “[a] defamatory charge may be made expressly or by ‘inference, implication or insinuation.’”¹⁰⁴ The court also reversed the district court’s dismissal of a corollary claim for intentional infliction of emotional distress, holding that the claim could apply to news articles and was sufficiently pled by the scientist.¹⁰⁵

G. *Rhetorical Hyperbole*

The Ninth Circuit held in *Knievel v. ESPN*¹⁰⁶ that ESPN did not defame daredevil Evel Knievel when it called him a “pimp” in an online photograph gallery.¹⁰⁷ ESPN published a photograph of Knievel on its website. He was wearing a motorcycle jacket and rose-tinted sunglasses, with his arms around his wife and another woman. The caption to the photograph read, “Evel Knievel proves that you’re never too old to be a pimp.”¹⁰⁸ The Kni-

98. 416 F.3d 320 (4th Cir. 2005).

99. *Id.* at 324.

100. *Id.* at 328–29.

101. *Id.* at 327.

102. *Id.* at 333.

103. *Id.* at 333–34 (citations and footnote omitted).

104. *Id.* at 331 (quoting *Carwile v. Richmond Newspapers, Inc.*, 82 S.E.2d 588, 592 (Va. 1954)).

105. *Id.* at 336–37.

106. 393 F.3d 1068 (9th Cir. 2005).

107. *Id.* at 1078. The 2004 survey discussed the district court’s decision. *Knievel v. ESPN, Inc.*, 223 F. Supp. 2d 1173 (D. Mont. 2002), *cited and discussed in* Borger, *supra* note 61, at 565.

108. *Knievel*, 393 F.3d at 1070.

evels argued that the photograph and caption were defamatory because they accused Knievel of soliciting prostitution and implied that his wife was a prostitute.¹⁰⁹ The court disagreed, stating that the context in which a statement appears is “paramount” and can be dispositive.¹¹⁰ The court considered the web pages surrounding the photograph and caption and found the context to be “lighthearted, jocular, and intended for a youthful audience.”¹¹¹ It dismissed the claim on summary judgment, stating that “no reasonable reader would interpret the photograph of the Knievels as a serious allegation of criminal wrongdoing.”¹¹² In fact, the court said, the reference was “most likely intended as a compliment.”¹¹³

The court in *State ex rel. Diehl v. Kintz*¹¹⁴ dismissed a lawsuit filed after the defendant distributed at a public hearing a handbill, the top of which read, “STOP FRED WEBER, INC. THREE THINGS YOU CAN DO TO FIGHT THE TRASH TERRORISTS.”¹¹⁵ The corporation, which owned property where a proposed trash transfer station was to be built, claimed that the flyer was defamatory.¹¹⁶ The Missouri Court of Appeals dismissed the claim on grounds that no one who read the flyer would believe that the company was a terrorist.¹¹⁷ “Rather, the reader would recognize the language as an epithet used to voice opposition to the proposed trash transfer station.”¹¹⁸ The court stated that the word “terrorist” could not be considered in isolation; the flyer was distributed at a public hearing and asked people to write to certain government officials.¹¹⁹ “Certainly, if the flyer was factually claiming that the company kills and injures people, it would not urge the reader to merely write to the head of the St. Louis County Department of Planning.”¹²⁰

A fictional six-year-old girl raised the ire of a juvenile court judge who lost her defamation action against a newspaper in the Texas Supreme Court.¹²¹ *New Times, Inc. v. Isaacks* arose after the judge ordered a thirteen-year-old boy to juvenile detention because he wrote a Halloween story deemed to contain “terroristic threats.”¹²² The local alternative newspaper responded with a satirical article about how the same judge jailed a six-

109. *Id.*

110. *Id.* at 1075.

111. *Id.* at 1077.

112. *Id.* at 1078.

113. *Id.* at 1074.

114. 162 S.W.3d 152 (Mo. Ct. App. 2005).

115. *Id.* at 154.

116. *Id.*

117. *Id.* at 156.

118. *Id.*

119. *Id.*

120. *Id.*

121. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004).

122. *Id.* at 147–48.

year-old girl “for writing a book report about ‘cannibalism, fanaticism, and disorderly conduct’ in Maurice Sendak’s classic children’s book *Where the Wild Things Are*.”¹²³ The article included the following bogus quote from the judge: “Any implication of violence in a school situation, even if it was just contained in a first grader’s book report, is reason enough for panic and overreaction. . . . It’s time for you to grow up, young lady, and it’s time for us to stop treating kids like children.”¹²⁴

The Texas Supreme Court based its decision to grant summary judgment primarily upon an inquiry into whether the satire qualified as rhetorical hyperbole.¹²⁵ The “test is whether the publication could be reasonably understood as describing actual facts.”¹²⁶ The article contained clues sufficient to tip off a reasonable reader as to its satirical nature.¹²⁷ For example, the article had an “unorthodox headline,”¹²⁸ it asserted that the six-year-old girl was placed in ankle shackles, it fabricated quotes from the governor and several other public officials, it assigned the acronym “GOOF” to a religious group, and it “quoted” the child as saying, “Like I’m sure. It’s bad enough people think like Salinger and Twain are dangerous. But Sendak? Give me a break, for Christ’s sake. Excuse my French.”¹²⁹ The court found that the clues involved exaggeration and distortion and that “their combined effect provide[d] a signal to the reasonable reader that the piece [was] satirical.”¹³⁰

III. PRIVACY

A. *Misappropriation*

Coverage of the emergency room got more traumatic for the Discovery Channel in 2005. In *Castro v. NYT Television*,¹³¹ discussed in last year’s

123. *Id.* at 148.

124. *Id.*

125. *Id.* at 155. While the Texas Supreme Court based its decision on rhetorical hyperbole, it also addressed actual malice, holding that the satire could not “reasonably be understood as stating actual facts,” but that even if it could, the plaintiffs would have to show actual malice. *Id.* at 161. Because the author of a satire generally knows that it is false, the question is, “Did the publisher either know or have reckless disregard for whether the article could reasonably be interpreted as stating actual facts?” *Id.* at 163 (citing *Bentley v. Bunton*, 94 S.W. 3d 561, 603 (Tex. 2002)). The court held that the defendants’ affidavits—which explained that they aimed to make the article clearly satirical—negated actual malice as a matter of law. *Id.* at 164–65.

126. *Id.* at 157 (citing *Pring v. Penthouse Int’l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982)).

127. *Id.*

128. The headline was “Stop the Madness.” *Id.* at 158.

129. *Id.*

130. *Id.*

131. 851 A.2d 88 (N.J. Super. Ct. App. Div. 2004). See *Sprain et al.*, *supra* note 33, at 657–58.

survey, individuals filmed in a hospital emergency room for the television program *Trauma: Life in the E.R.* alleged invasion of privacy against media defendants. The plaintiffs' individual case collapsed when they failed to assert a commercial benefit received by defendants, a necessary element of the claim.¹³² But the case did not die.

The New Jersey court certified a statewide class of people filmed in a hospital emergency room for the television program.¹³³ In a case of first impression, the court held that the patients met the criteria for a class action. The court found that plaintiffs shared a common invasion of privacy claim arising from being filmed in the same hospital setting during a limited time period, which suggested that each had interacted with many of the same agents of the defendants. The court also found that the class members lacked the financial ability to prosecute separate actions and there would be few difficulties in managing the case.¹³⁴

In contrast to certification of the statewide class, the court deemed a national class action unmanageable given the wide geographic scope of the infractions and the multiplicity of state privacy laws. The nationwide class would have included plaintiffs from thirty-five hospitals in twenty-three states filmed over seven years. In addition, the court concluded that the plaintiffs failed to demonstrate that the out-of-state parties were subject to New Jersey jurisdiction and that national "class certification does not present insuperable obstacles."¹³⁵

Reviewing a certified question from the Eleventh Circuit in *Tyne v. Time Warner*,¹³⁶ the Florida Supreme Court held that motion pictures, which do not directly promote a product or service, lack the required "commercial purpose" necessary to impose liability under the state misappropriation statute.¹³⁷ The case arose from the motion picture *The Perfect Storm*, which was inspired by the true story of the plaintiffs' now-deceased father, a fisherman caught in a torrential sea storm. The plaintiffs brought false light¹³⁸ and misappropriation claims against Time Warner for the movie's portrayal

132. *Castro*, 851 A.2d at 98.

133. *Castro v. NYT Television*, MON-L-2743-03 (N.J. Super. Ct. June 3, 2005).

134. In nonmedia settings, Louisiana, Massachusetts, Pennsylvania, and New York have recognized class action as the preferred means to handle invasion of privacy cases. *Id.* at *13 (citing *Weld v. Glaxo Wellcome, Inc.*, 746 N.E.2d 522 (Mass. 2001); *Smith v. Wal-Mart Stores*, 870 So. 2d 531 (La. Ct. App. 2004); *Katlin v. Tremoglie*, No. 9706-2703, 1999 WL 1577980 (Pa. Com. Pl. 1999); *Caesar v. Chem. Bank*, 460 N.Y.S.2d 235 (N.Y. Sup. Ct. 1983)).

135. *Id.* at *14 (citing *Carroll v. Cellco P'ship*, 713 A.2d 509, 513 (N.J. Super. Ct. App. Div. 1998)).

136. 901 So. 2d 802 (Fla. 2005).

137. *Id.* at 810; see also FLA. STAT. ch. 540.08(1) (2005).

138. The Eleventh Circuit dismissed the false light allegation because the portrayal was not sufficiently egregious to warrant a relational right to privacy action. *Tyne v. Time Warner, Inc.*, 336 F.3d 1286, 1292 (11th Cir. 2003).

of their father as a “down-and-out sword-boat captain who was obsessed with the next big catch.”¹³⁹

Under Florida law, a misappropriation claim requires the use of another’s likeness without permission for a “commercial purpose.”¹⁴⁰ The Florida court noted that evidence of a monetary benefit does not necessarily make a publication commercial unless it also “directly promote[s] a product or service.”¹⁴¹ In addition, categorizing an expressive medium as commercial would defy the “free speech and free press guaranty”¹⁴² of the U.S. Constitution. Here, the court classified *The Perfect Storm* as artistic expression subject to First Amendment protection despite being part of the movie industry.

The cosmetic company L’Oreal found itself entangled in product packaging litigation for its use of a model’s image on the box for a hair product. The model consented to the use of her image from November 1995 to November 1996 with separate negotiations necessary for additional use. Claiming L’Oreal used her likeness beyond the agreed one-year period, the plaintiff sued for violation of the Lanham Act and her right to publicity. The Seventh Circuit in *Toney v. L’Oreal*¹⁴³ found that the Copyright Act did not preempt the plaintiff’s misappropriation claim under the Illinois Right to Publicity Act because a model’s image is not fixed in a tangible medium of expression. The court emphasized that the policy underlying the act is to protect the “very identity or persona of the plaintiff as a human being,”¹⁴⁴ which falls outside the province of the Copyright Act. On remand, plaintiff must show that L’Oreal used her image without her consent for a commercial purpose.¹⁴⁵

In *Minnifield v. Ashcraft*,¹⁴⁶ the Alabama Court of Civil Appeals reversed summary judgment on a misappropriation claim¹⁴⁷ involving publication of a photograph of the plaintiff in an advertisement in a national tattoo magazine, *Dark Skin Art*. The standard for invasion of privacy claims in Alabama is an “unwarranted appropriation of some element of [one’s] per-

139. *Id.* at 1288.

140. *Id.*

141. *Tyme*, 901 So. 2d at 810.

142. *Id.* at 809 (citing *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501–01 (1952)).

143. 405 F.3d 905 (7th Cir. 2005).

144. *Id.* at 908.

145. *Id.* (citing 765 ILL. COMP. STAT. 1075/10 (1999)).

146. 903 So. 2d 818 (Ala. Civ. App. 2004).

147. While Alabama does not recognize a right to publicity, it does provide a cause of action for misappropriation claims that allege commercial injury. The tort differs from the right of publicity because a claim can also rest upon psychological interests. The court held, “For a private person, psychological interests would likely be the main concern resulting from the appropriation of his or her likeness, even if only their family members or close friends were to recognize their likeness.” *Id.* at 821–22.

sonality for commercial use’¹⁴⁸ resulting in damage to the plaintiff. Here, the plaintiff consented to the picture of the tattoo located on her upper right breast with the understanding that Ashcraft would confine the photo to his portfolio in the tattoo parlor. Unbeknownst to plaintiff, the defendant featured her picture, showing the tattoo as well as her face, in a magazine advertisement. She claimed psychological injuries from feeling degraded by her image being included among “not tasteful” photographs.¹⁴⁹

In *Raymen v. United Senior Ass’n, Inc.*,¹⁵⁰ a federal district court in the District of Columbia held that the defendant’s political advertisement gave rise to a claim for misappropriation. The court issued a restraining order against the United Senior Association for its use of a newspaper photograph of two men kissing while awaiting nuptials in Oregon. The ad was intended to rally opposition against the American Association of Retired Persons for its support of gay marriage. The plaintiff couple sued the defendant for misappropriation, libel, false light, and intentional infliction of emotional distress. To prevail on the misappropriation claim, the plaintiffs had to show that their picture was used without their consent to advertise the defendant’s product and was not used to illustrate a “noncommercial, newsworthy article.”¹⁵¹

The defendant argued unsuccessfully that the availability of the photograph for purchase on a newspaper website—from which the defendant took it without permission—meant that a misappropriation claim was barred. But the court favored the public interest in “preventing the image and likeness of an individual from being used in a manner inconsistent with the person’s beliefs and values without their permission.”¹⁵² This interest supported the injunction. The court also held that the plaintiffs had a high likelihood of success on their claim because it was “not unreasonable to infer [that] such an incendiary advertisement” would benefit the defendant financially through contributions.¹⁵³

B. *False Light Invasion of Privacy*

In two decisions the U.S. District Court for the Eastern District of Michigan dismissed false light, defamation, and right of publicity claims brought by the brother of the 1995 Oklahoma City bombing co-conspirator Terry Nichols against filmmaker Michael Moore.¹⁵⁴ The claims were based on

148. *Id.* at 822 (citing *Hogin v. Cottingham*, 533 So. 2d 525, 530–31 (Ala. 1988)).

149. *Id.* at 821.

150. No. 05–486(RBW), 2005 WL 607916 (D.D.C. Mar. 16, 2005).

151. *Id.* at *3 (citing RESTATEMENT (SECOND) OF TORTS § 652C (1976)).

152. *Id.* at *5.

153. *Id.* at *3.

154. *Nichols v. Moore*, 334 F. Supp. 2d 944 (E.D. Mich. 2004); *Nichols v. Moore*, 396 F. Supp. 2d 783 (E.D. Mich. 2005).

statements in Moore's 2002 documentary "Bowling for Columbine" and in its 2003 release on DVD and VHS, as well as statements that Moore made on the *Oprah Winfrey Show*. The documentary described James Nichols as being arrested in connection with the bombing but ultimately being released because "the feds didn't have the goods on James."¹⁵⁵

In its first decision, the court held that the claims arising out of the *Oprah Winfrey Show* broadcast were barred by the one-year statute of limitations applicable to defamation and privacy claims.¹⁵⁶ While the complaint was served more than a year after the documentary was released in theaters, the release of the film on DVD was deemed to be a republication that reset the limitations period. To find that a republication occurred, the court considered that additional "Special Features" on the DVD substantially modified the original publication and that the DVD was intended to reach a new audience.¹⁵⁷ The added features included interviews, commentary, and a teacher's guide. Many were produced after "Bowling for Columbine" was released in theaters.

In rejecting Nichols's right of publicity claim, the court held that such claims can only arise in the context of "commercial speech" and that the film "cannot be considered a work of pure 'commercial speech' as it does much more than simply propose a commercial transaction."¹⁵⁸ In addition, because the documentary addressed an issue of important public concern—violence in the United States—the First Amendment shielded Moore against a right of publicity claim.¹⁵⁹

The court granted summary judgment for Moore on Nichols's remaining claims, including the false light claims, in a July 2005 decision.¹⁶⁰ Moore's statements were "factually and substantially true" and thus could not support a false light claim.¹⁶¹ Nichols also failed to demonstrate that Moore made any statements with actual malice—a First Amendment defense applicable to all claims against Moore.¹⁶²

In *Botts v. New York Times Co.*,¹⁶³ the Third Circuit affirmed the dismissal of a claim by three white plaintiffs, all sharing the last name Botts, for misappropriation and false light invasion of privacy. The case stemmed from an advertisement by the United Negro College Fund, which portrayed a fictional African-American man, "Larry Botts," who abused al-

155. *Nichols*, 334 F. Supp. 2d at 946.

156. *Id.* at 954.

157. *Id.* at 952–53.

158. *Id.* at 956.

159. *Id.* at 956–57.

160. *Nichols v. Moore*, 396 F. Supp. 2d 783 (E.D. Mich. 2005).

161. *Id.* at 793.

162. *Id.* at 795–96.

163. 106 Fed. Appx. 109 (3d Cir. 2004).

cohol because he could not afford college.¹⁶⁴ The three Botts plaintiffs sued the United Negro College Fund, the ad agency, and The New York Times Company, which had run the advertisement. The Third Circuit rejected the claim that the advertisement portrayed the plaintiffs in a false light as alcoholics. It found that “[n]o reasonable person could confuse” the “Larry Botts” in the ad with the three plaintiffs.¹⁶⁵ As to the misappropriation claim, the court held that fund-raising was arguably a commercial purpose, but the defendants did not appropriate the plaintiffs’ identity. Instead, “Larry Botts” was merely a “placeholder” akin to “John Doe.”¹⁶⁶ The court also affirmed dismissal of the plaintiffs’ defamation claim, finding that the ad did not communicate a false message about the plaintiffs.¹⁶⁷

C. *Intrusion*

In *Turnbull v. American Broadcasting Co.*,¹⁶⁸ a federal district court in California denied ABC’s motion for summary judgment in a case involving a hidden-camera intrusion claim.¹⁶⁹ Pretending to be an actor, a *20/20* producer attended an acting workshop to gather material for a story covering Los Angeles workshops in which actors paid to get face time with casting directors. ABC’s investigation stemmed from a determination by the California Division of Labor Standards Enforcement that this business practice violated state law prohibiting employers from exacting any payment from an applicant or employee as a condition of obtaining or continuing employment.¹⁷⁰ The claim focused on invasion of privacy from the recording rather than the airing of the video.

The court revived the test from *Sanders v. ABC*¹⁷¹ measuring privacy “with respect to the identity of the alleged intruder and the nature of the intrusion.”¹⁷² Thus, the plaintiffs had a reasonable expectation that their conversations were not being recorded by ABC, given the private location

164. *Id.* at 110.

165. *Id.*

166. *Id.* at 110–11.

167. *Id.* at 111.

168. No. CV 03–3554 SJO (FMOx), 2004 U.S. Dist. LEXIS 24351 (C.D. Cal. Aug. 19, 2004).

169. In the lawsuit, originally filed in California state court, plaintiffs asserted claims for intrusion, unlawful eavesdropping, intentional infliction of emotional distress, invasion of privacy under California’s “antipaparazzi” statute, and trespass and sought a permanent injunction against ABC’s future use of hidden cameras. *Id.* While the summary judgment motion was pending, plaintiffs voluntarily dismissed their claim for intentional infliction of emotional distress. *Id.* at *50. The court denied plaintiffs’ injunction, finding it overly broad and stating that “[t]here is a place for the lawful use of hidden cameras.” *Id.* at *54–55; see also Steve Perry and Lynn Scaduto, *ABC Prevails in Jury Trial on Hidden Cameras*, MLRC MEDIA LAW LETTER, Nov. 2004, at 11.

170. *Turnbull*, 2004 U.S. Dist. LEXIS 24351, at *9–10.

171. 978 P.2d 67, 73 (Cal. 1999).

172. *Turnbull*, 2004 U.S. Dist. LEXIS 24351, at *43 (citing *Sanders*, 978 P.2d at 73).

of the workshop and the covert nature of the recording. The court rejected ABC's First Amendment defense, holding that the First Amendment lacks relevance to intrusion cases "since its perpetration does not involve speech or other expression."¹⁷³ It noted that "the First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."¹⁷⁴ In the jury trial that followed, ABC prevailed on all claims.

In *Pitts Sales, Inc. v. King World Productions, Inc.*,¹⁷⁵ another case arising out of a news magazine's use of hidden cameras and microphones, the Southern District of Florida ruled in favor of King World Productions, Inc., distributor of *Inside Edition*, and two of the show's producers. An *Inside Edition* producer got a job in magazine subscription sales with plaintiff's company, whose agents travel the country soliciting magazine subscriptions. While employed by the company, the producer used hidden cameras and microphones to record the company's day-to-day activities.¹⁷⁶ The news report that followed examined the business practices of door-to-door magazine sales companies, including abusive treatment of sales agents, illegal drug use and underage drinking by sales agents, and deceptive sales practices.¹⁷⁷ Following the broadcast, the company sued King World for illegal interception and use of oral communications under the federal wiretap statute, civil RICO, fraud, trespass, and tortious interference with a contractual relationship.¹⁷⁸

The court held that the wiretap claims were not viable because *Inside Edition's* producer was a "party" to the conversations even though he did not speak and no one spoke to him during the conversations for which he was present.¹⁷⁹ "The fact that [the producer] wore the intercepting device on his person and that the communications intercepted had to occur relatively close to [the producer] to be picked up by his microphone persuades the Court into finding that [the producer's] presence alone rendered him a party to the conversation."¹⁸⁰ If the presence of the producer alone were

173. *Id.* at *62 (citing *Miller v. Nat'l Broad. Co.*, 232 Cal. Rptr. 668, 669 (Ct. App. 1986)).

174. *Id.* at *61.

175. 383 F. Supp. 2d 1354 (S.D. Fla. 2005). King World prevailed on summary judgment via two separate orders. The first order, concerning the wiretap claims, is published at *Pitts Sales, Inc. v. King World Prods., Inc.*, 383 F. Supp. 2d 1354 (S.D. Fla. 2005). A subsequent order granted summary judgment in favor of King World on the trespass claim. *Pitts Sales, Inc. v. King World Prods., Inc.*, No. 04-60664 (S.D. Fla. June 29, 2005).

176. *Pitts Sales*, 383 F. Supp. 2d at 1356.

177. *Id.*

178. *Id.* at 1357-58. The parties filed a stipulation for dismissal of the RICO and tortious interference claims. The trial court granted summary judgment in favor of King World on the remaining counts.

179. *Id.* at 1362.

180. *Id.* at 1361. The court contrasted this scenario with one in which the recording device is left behind to record conversations of others. See *Smith v. Wunker*, 356 F. Supp. 44, 46 (S.D. Ohio 1972), *overruled on other grounds by Boddie v. ABC*, 731 F.2d 333 (6th Cir. 1984).

not sufficient to make him a party to the conversation, then an inquiry into the extent of the producer's "participation" in the conversation would create "practical problems not envisioned by the statute."¹⁸¹

The court further held that the plaintiff could not succeed in its fraud claim. Relying heavily on *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,¹⁸² the court found that to recover for fraud, plaintiff would have to show that it hired the producer and incurred the administrative costs associated with his employment because it believed that the producer would work longer at the company than he did, and that in forming that belief, the company had reasonably relied on the producer's representations.¹⁸³ The court found that the producer made no representation concerning how long he would be at the company, and his subscription sales agreement did not specify a term.¹⁸⁴

The court found in King World's favor on the civil trespass claim as well.¹⁸⁵ Under Florida law, civil trespass is the use of the land of another without authority. While consent is usually an absolute defense to a trespass claim, the defense can be lost when the person claiming consent exceeds the purpose for which consent is given.¹⁸⁶ The court initially held that the *Inside Edition* producer did not gain access to areas of the plaintiff's business that were inaccessible to others. Company cars, hotel rooms, and conference areas were readily accessible to anyone claiming an interest in a sales position, even sales agents of competing crews.¹⁸⁷ The court further held that, as an independent contractor, the producer did not owe a duty of loyalty to the plaintiff. Therefore, unlike *Food Lion*, the trespass claim could not be based on the theory that the producer exceeded the scope of plaintiff's consent because he breached a duty of loyalty to the company.¹⁸⁸

181. *Pitts Sales*, 383 F. Supp. 2d at 1361–62.

182. 194 F.3d 505 (4th Cir. 1999).

183. *Pitts Sales*, 383 F. Supp. 2d at 1362–63.

184. *Id.* at 1363. The court also held that Pitts Sales could not recover the commissions it had paid to the producer because those commissions were due by virtue of orders submitted by the producer. They were not paid as a result of the misrepresentations that the producer made in getting hired. *Id.*

185. The court had earlier found that a genuine issue of fact existed as to whether the producer exceeded the scope of Pitts Sales's consent to entry on its property. *Id.* at 1367. Upon submission of supplemental briefs on this issue, the court issued a separate order granting final judgment to King World on the trespass claim as well. *Pitts Sales, Inc. v. King World Prods., Inc.*, No. 04–60664 (S.D. Fla. July 29, 2005).

186. *Pitts Sales*, No. 04–60664, at 4.

187. *Id.* at 6–7.

188. *Id.* In *Food Lion*, the court held that the reporters committed trespass when they entered nonpublic areas of the store because they exceeded the scope of their consent to be on Food Lion's property when they tortiously breached their duty of loyalty to the grocery store chain. 194 F.3d at 519. The reporters in *Food Lion* were employees of the store and had submitted false employment applications to obtain that employment. *Id.* at 518.

D. Publication of Private Facts

In *Doe v. Templeton*,¹⁸⁹ the Northern District of Illinois found that there could be no publication of private facts where the publisher is not aware of the facts claimed to be private and thus could not have published those facts.¹⁹⁰ The plaintiff, a seventh grade teacher, gave the defendant permission to take her photograph at a skateboarding event. The defendant then used her image in an ad publicizing a skateboarding videotape. The ad invited those who wanted to order the videotape to “Write to: I am gay in a happy way not a sexual one” at a specific address. What the defendant did not know—until the lawsuit was filed—was that the plaintiff was gay and had not disclosed that fact to her employer, colleagues, or students. The plaintiff claimed that the ad portrayed her as gay and disclosed that to the public. The court agreed that (1) the plaintiff’s sexual orientation was not a legitimate public concern and (2) disclosure could be highly offensive, both of which were required for a private facts claim.¹⁹¹ But it held that the ad did not disclose that the plaintiff was gay and that it was “undisputed that the defendant[s] could not have revealed” that she was gay.¹⁹² Accordingly, the court granted summary judgment to the defendant on the plaintiff’s invasion of privacy and intentional infliction of emotional distress claims.

IV. NEWSGATHERING¹⁹³

In *State v. Wells*,¹⁹⁴ criminal trespass issues continued to trouble an Arizona journalist. The Arizona Supreme Court upheld the criminal trespass conviction of *East Valley Tribune* reporter Byron Wells. Wells had entered the property of a former police officer on trial for murder despite a closed gate and a visible “No Trespassing” sign. The reporter had knocked on the front door of the home to seek an interview but was turned away by the officer’s wife. The reporter immediately left the property.¹⁹⁵ The trial judge found the reporter guilty of criminal trespass of the first degree in violation of an Arizona statute.¹⁹⁶ The reporter appealed on the grounds that he did not “knowingly” trespass and that in any event his conviction violated his First Amendment right to gather news.¹⁹⁷ The Arizona Supreme Court held that

189. No. 03-C-5076, 2004 WL 1882436 (N.D. Ill. Aug. 6, 2004).

190. *Id.* at *3–4.

191. *Id.* at *3.

192. *Id.*

193. See *supra* Part III.C (hidden camera intrusion cases).

194. No. LC2003000566001DT, 2004 WL 1925617 (Ariz. June 15, 2004).

195. *Id.* at *1.

196. ARIZ. REV. STAT. § 13–1504(A)(1) (2002). The section has been renumbered and now appears in ARIZ. REV. STAT. § 13–1504(A)(2) (2005).

197. *Wells*, 2004 WL 1925617, at * 2.

the fence and sign manifested a clear intent to keep intruders out, that the reporter had no license or privilege to enter the property by virtue of his status as a reporter,¹⁹⁸ and that the practical effect of the “No Trespassing” sign was to put the reporter on notice that he did not have the owners’ permission to enter the fenced yard.¹⁹⁹

Two federal district courts addressed the issue of whether administrative edicts banning high government officials from communicating orally with specific journalists violated the First Amendment.²⁰⁰ Maryland Governor Robert Ehrlich issued a directive to all executive department officials not to speak with two *Baltimore Sun* journalists. The email containing the directive explained, “The Governor’s Press Office feels that currently both are failing to objectively report on any issue dealing with the Ehrlich-Steele Administration.”²⁰¹ The two journalists and the newspaper brought suit under 42 U.S.C. § 1983, alleging that the governor’s actions were in retaliation for the exercise of their First Amendment rights. The journalists and the *Sun* sought declaratory and injunctive relief. The journalists filed affidavits attesting that, since the edict, executive officials in state government who previously spoke with them told the journalists that they were no longer able to do so. Many would not return the journalists’ phone calls.²⁰² The journalists were still promised that their public records requests would be honored. While, in one instance, a banned reporter had been excluded from an invitation-only “press briefing,” he had otherwise been given access to a larger “press conference.”²⁰³

The U.S. District Court for the District of Maryland began its analysis, not with the retaliation theory that the journalists advanced, but with the newsgathering rulings of the U.S. Supreme Court. It observed, “The Supreme Court has refused to recognize—or construct—a First Amendment right of access to all sources of information within governmental control. The right to publish news is expansive. However, the right does not carry with it the unrestrained right to gather information.”²⁰⁴ The court granted the government’s motion to dismiss and denied the preliminary injunction on the basis that “[a]s the First and Fourteenth Amendments are currently understood in this Circuit, a government may lawfully make content-based distinctions in the way it provides press access to information not available

198. The reporter also had not been invited on the property or otherwise received the owners’ permission. *Id.* at *5.

199. *Id.* at *4.

200. *Baltimore Sun Co. v. Ehrlich*, 356 F. Supp. 2d 577 (D. Md. 2005); *Youngstown Publ’g Co. v. McKelvey*, No. 4:05 CV 00625, 2005 WL 1153996 (N.D. Ohio May 16, 2005).

201. *Ehrlich*, 356 F. Supp. at 579.

202. *Id.*

203. *Id.* at 580.

204. *Id.* (citing *Houchins v. KQED*, 438 U.S. 1 (1978)).

to the public generally.²⁰⁵ The *Youngstown Business Journal* suffered a similar fate in its virtually identical claim against the city's mayor, George McKelvey.²⁰⁶ There, the newspaper and its journalists had prevailed in a state court public records battle against the mayor for documents about a municipal construction project. Following the conclusion of that lawsuit, city officials began refusing to speak to the newspaper's journalists, and the mayor sent its publisher a letter announcing a policy of refusing all comment from his administration, but pledging to abide by the state public records law.²⁰⁷ As with the *Baltimore Sun* journalists, the *Youngstown* newspaper filed a § 1983 action seeking declaratory and injunctive relief.

The Northern District of Ohio began its review of the merits from the same legal vantage point as the district court in Baltimore. While the U.S. Constitution protects the right to receive information, the First Amendment "does not guarantee the press a constitutional right of special access to information not available to the public generally."²⁰⁸ The court acknowledged that the First Amendment affords public access to criminal proceedings and, more generally, "a *limited* constitutional right to *some* government information."²⁰⁹ But this right only "applies to situations in which the press simply requests that their access to government information be 'on equal footing with the public.'"²¹⁰ The court held that ruling in the newspaper's favor here would afford "the media a special privilege of access over and above that of the general public."²¹¹ The court granted the government's motion to dismiss.²¹²

V. ACCESS TO INFORMATION

A. *Access to Court Records and Transcripts*

This has been a year of high-profile trials with inconsistent rulings on access to court records and proceedings. In April 2005, a California appellate court affirmed the trial court's orders in *People v. Jackson*, sealing a search warrant affidavit, numerous judicial records, and in camera hearings

205. *Id.* at 581. The *Baltimore Sun* has appealed the decision in its case to the Fourth Circuit.

206. *Youngstown Publ'g Co. v. McKelvey*, No. 4:05 CV 00625, 2005 WL 1153996 (N.D. Ohio May 16, 2005).

207. *Id.* at *1-2.

208. *Id.* at *3 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972)).

209. *Id.* at *4 (quoting *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002)).

210. *Id.*

211. *Id.* at *4-5 (citing *Snyder v. Ringgold*, No. 97-1358, 1998 WL 13528 (4th Cir. Jan. 15, 1998); *Baltimore Sun Co. v. Ehrlich*, 356 F. Supp. 2d 577 (D. Md. 2005); *Raycom Nat'l, Inc. v. Campbell*, 361 F. Supp. 2d 679 (N.D. Ohio 2004); *Snyder v. Ringgold*, 40 F. Supp. 2d 714 (D. Md. 1999)).

212. The *Youngstown Business Journal* has appealed the decision in its case to the Sixth Circuit.

in the criminal case against pop singer Michael Jackson.²¹³ Jackson was later acquitted on June 13, 2005, on all ten counts of a felony indictment. Throughout the trial, NBC contended that the trial court's approach of requiring every document of substance to be filed under seal violated the public's right to access to court files guaranteed by the First Amendment.²¹⁴ Because of the sensitive information involving minors, the notoriety of a celebrity defendant, and the pervasive media coverage, the trial court found that a fair trial would be "imminently threatened with substantial prejudice" without such protective measures.²¹⁵ The trial court consistently held that the defendant's right to a fair trial outweighed the right of public access to the record.²¹⁶

Although the appellate court recognized that many of the documents at issue had already been leaked to the media and were widely disseminated on the Internet, the court agreed to "disarm [its] powers of hindsight" and decide the appeal so as to establish useful precedent.²¹⁷ Reviewing the case de novo, the court applied the four-prong test adopted in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*²¹⁸ to conclude that the sealing orders of the trial court reflected "awareness of the tensions between the need to protect the accused as fully as possible and the need to restrict publication as little as possible."²¹⁹

First, the court found that the privacy of minors and the protection of Jackson from the "public dissemination of inaccurate information or inadmissible evidence" amounted to an overriding interest supporting sealing.²²⁰ Second, because of the "torrent of pretrial publicity" and "intense media scrutiny," the court stated that there was a substantial probability that the interests would be prejudiced absent the sealing.²²¹ Third, the sealing of judicial documents was narrowly tailored.²²² Although NBC contended that the trial court's categorical rule of sealing all court documents created a "presumption of secrecy," the court found that it could not devise a workable alternative.²²³ Thus, the court held that "less restrictive means" for protecting the overriding interests at stake in the case did not exist.²²⁴

213. *People v. Jackson*, 27 Cal. Rptr. 3d 596, 599 (Ct. App. 2005).

214. *Id.* at 601.

215. *Id.* at 600–01.

216. *Id.* at 599–601.

217. *Id.* at 599.

218. 980 P.2d 337 (Cal. 1999).

219. *Jackson*, 27 Cal. Rptr. 3d at 609.

220. *Id.* at 605.

221. *Id.* at 606–07.

222. *Id.* at 607.

223. *Id.*

224. *Id.*

In *Condit v. Dunne*,²²⁵ the Southern District of New York denied author Dominick Dunne's motion for a protective order barring public dissemination of a videotape transcript of his deposition in a libel suit filed against him by former California Congressman Gary Condit.²²⁶ The suit arose after Dunne made public statements directly addressing the propriety of Condit's service as a U.S. Congressman. Dunne contended that a protective order was necessary to bar the plaintiff from using the videotape to embarrass him, deprive him of a fair trial, and taint the potential jury pool. The court concluded that Dunne did not have good cause to justify a bar on the public dissemination of the videotaped deposition.²²⁷

The court first addressed the potential embarrassment that might occur if the videotaped deposition was misrepresented by the media through the use of sound bites.²²⁸ Noting that the media frenzy surrounding the case had subsided considerably, the court found that the "fact that the media may edit a tape that may or may not be released by the parties does not warrant a protective order barring all public dissemination of the videotape in this case."²²⁹ To that end, the court stated that it was unclear how the media would create such an erroneous and lasting impression about Dunne, and was unconvinced that the jury pool would be tainted if the protective order were not issued.²³⁰ Moreover, because Dunne made public statements regarding a then-sitting public official, the court found that the substantive issues in the litigation were of public concern. "By swearing to, and filing his affidavit with the Court, Dunne attempt[ed] to slay his opponent's counsel while simultaneously shielding himself with an order of protection."²³¹

B. *Access to Courtroom Proceedings and Deliberations*

In *Huminski v. Corsones*,²³² the Second Circuit established, for the first time, that an identified, single individual has a First Amendment right of access to court proceedings even if he or she is not a party and has no official connection to the case.²³³ The decision arose from a long-standing dispute that began when Huminski, a self-proclaimed "citizen reporter," was barred indefinitely from court buildings and proceedings in Rutland, Vermont, due to his protest activities there.²³⁴ Motivated by alleged security concerns,

225. 225 F.R.D. 113 (S.D.N.Y. 2004).

226. *Id.* at 114.

227. *Id.* at 120.

228. *Id.* at 118.

229. *Id.*

230. *Id.*

231. *Id.* at 119.

232. 386 F.3d 116 (2d Cir. 2004).

233. *Id.* at 121.

234. *Id.* at 122–28.

the defendants issued Huminski trespass notices that prohibited him, under threat of arrest, from entering the county building.²³⁵

The Second Circuit articulated several reasons why an identified individual's right of access to a court proceeding was consistent with the First Amendment. First, by offering protection to the press and the general public, the U.S. Supreme Court has assumed that such rights are personal and may be asserted by any excluded individual.²³⁶ Second, society cannot foster an appearance of fairness unless any member of the public is able to bear witness to what happens beyond the courtroom door.²³⁷ Third, excluding an individual reporter would carry with it the danger of allowing the government to influence the substantive content of media coverage that public events receive.²³⁸ Finally, the court stated that "the system of public justice depends on the willingness and ability of individual persons and entities to police the system by seeking access—through litigation if necessary—to courtrooms and court records that have been closed."²³⁹

C. Access Under the Freedom of Information Act

In *Evening Post Publishing Co. v. City of North Charleston*,²⁴⁰ the South Carolina Supreme Court reinforced the public's right to inspect public documents by limiting the application of a state Freedom of Information Act ("FOIA") exemption.²⁴¹ The *Post* filed a FOIA request to inspect a 911 tape recording following a convenience store shooting of an African-American man by North Charleston police officers.²⁴²

The city denied the newspaper's request, arguing that the publicity generated by the pretrial release of the tape might taint the jury pool and necessitate a change of venue.²⁴³ Under the FOIA, "[a]ny person has a right to inspect or copy any public record of a public body," unless that record is exempt from disclosure.²⁴⁴ The city cited an exemption that allows a public body to deny a request if the "premature release of the information" would cause harm to the agency.²⁴⁵ The lower courts sided with the city's contention that the release of the tape would harm the prosecution of the attackers.²⁴⁶

235. *Id.* at 126–28.

236. *Id.* at 146.

237. *Id.*

238. *Id.* at 147.

239. *Id.*

240. 611 S.E.2d 496 (S.C. 2005).

241. *Id.* at 498.

242. *Id.*

243. *Id.*

244. *Id.* at 499.

245. *Id.*

246. *Id.* at 498.

The South Carolina Supreme Court reversed, holding that the financial cost of a venue change was not the type of harm that the FOIA exemption was intended to prevent.²⁴⁷ Rather, the exemption was “intended to prevent harms such as those caused by release of a crime suspect’s name before arrest, the location of an upcoming sting operation, and other sensitive law-enforcement information.”²⁴⁸ The court also rejected the view that harm is irrefutably presumed when the subject of the FOIA request will be evidence in an upcoming criminal trial.²⁴⁹ Instead, the court said that the preferred approach would be to determine the applicability of the exemption on a case-by-case basis, which would require the city to prove particularized harm.²⁵⁰

D. *Access to Information Related to September 11, 2001, Under the Freedom of Information Act*

In *New York Times Co. v. New York Fire Department*,²⁵¹ the court ruled that the New York City Fire Department (“FDNY”) was required by the state’s Freedom of Information Law (“FOIL”) to release additional materials related to the September 11, 2001, terrorist attacks. These materials included tape recordings of radio communications and certain oral history interviews.²⁵² The court required disclosure of the dispatch calls “to the extent they consist of factual statements or instructions affecting the public, but [they had to] be redacted to eliminate nonfactual material.”²⁵³ This view was found to be consistent with the intraagency exception to the FOIL, allowing personnel with an agency to exchange candid advice and criticism without the chilling prospect of public disclosure.²⁵⁴ Also rejected was the FDNY’s assertion that the oral history interviews constituted advice being given by employees to their supervisors, which was protected from disclosure under the intraagency exemption.²⁵⁵ Rather, the court found that the FDNY intended, and the interviewees knew or should have known, that the words spoken in the interviews would become a public record.²⁵⁶ The court did hold, however, that the FDNY should have an opportunity, on remand, to call attention to specific portions of the oral histories that,

247. *Id.* at 499.

248. *Id.*

249. *Id.* at 500.

250. *Id.*

251. 829 N.E.2d 266 (N.Y. 2005).

252. As a result of the ruling, the public will now have access to most oral history interviews conducted by the department with members of the FDNY, as well as tapes and transcripts of radio communications involving FDNY personnel on September 11, 2001. *Id.* at 268.

253. 796 N.Y.2d at 307.

254. *Id.*

255. *Id.* at 308.

256. *Id.*

because of the potential for serious pain or embarrassment, may be subject to the privacy exemption.²⁵⁷

VI. INTERNET-RELATED DEVELOPMENTS

A. *Choice of Law/Internet Libel*

In late 2004, the Eighth Circuit addressed choice-of-law principles for Internet libel actions and found a strong presumption in favor of applying the law of the plaintiff's home state. In *Fuqua Homes, Inc. v. Beattie*,²⁵⁸ a modular home manufacturer located in Missouri sued the Beatties, residents of Iowa, claiming that it was libeled on the Beatties' website. After the Beatties had purchased a home manufactured by the plaintiff, they established an Internet website describing their dissatisfaction with the home and complaining about Fuqua and its business practices. They also drew attention to their website by placing an advertisement in an Iowa newspaper and by posting a sign on their van as they drove through Iowa and Missouri. Fuqua sought damages for harm to its business reputation. The district court entered a judgment as a matter of law in favor of the Beatties because Fuqua had failed to prove actual damages as Missouri law requires.²⁵⁹

On appeal, Fuqua argued that the district court should have applied Iowa law and that, if it had done so, judgment as a matter of law would have been improper because Iowa law presumes damages in actions for libel per se. The Eighth Circuit determined that the district court should have applied the forum state's conflict-of-laws rules. Under Missouri law, a court must apply the substantive law of the state with the most significant relationship to the issue presented in the case.²⁶⁰ Thus, where there is widespread dissemination of allegedly defamatory matter, the most important consideration in choosing the applicable law is the residence of the party allegedly defamed. The rationale is that the injury produced in defamation actions has its principal effect on a plaintiff's acquaintances, neighbors, and business associates in the place of his or her residence. Similarly, when a corporation brings a defamation suit, the state with the most significant relationship will ordinarily be the state of the corporation's principal place of business.²⁶¹ While the court noted that some of the conduct causing the

257. *Id.* at 309.

258. 388 F.3d 618 (8th Cir. 2004).

259. *Id.* at 621.

260. *Id.* Citing *Restatement (Second) of Conflict of Laws* § 145, the court listed four factors to be considered in determining the applicable law: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the parties' relationship is centered. *Id.*

261. *Id.* at 622.

injury occurred in Iowa where the defendants created and advertised the website, it held that the defendant's conduct had its most significant effect in Missouri where Fuqua maintains its principal place of business. Accordingly, the Eighth Circuit affirmed the decision to apply Missouri law.

B. *Electronic Communications Privacy Act*

The Second Circuit addressed the potential liability of an Internet Service Provider ("ISP") under the Electronic Communications Privacy Act ("ECPA").²⁶² In *Hall v. Earthlink Network, Inc.*,²⁶³ the plaintiff claimed that Earthlink "illegally intercepted" his email in violation of the ECPA by intentionally continuing to receive messages sent to his email address after the termination of his account.²⁶⁴

The plaintiff is a film producer who used his Earthlink email account to promote his movie by providing notices of premieres and upcoming events. Prior to the promotions, Earthlink was advised that the plaintiff's email account was the originator of mass junk email, otherwise known as spam. Earthlink immediately terminated the plaintiff's access to the email account. However, six days later, after a series of communications between Earthlink and the plaintiff, Earthlink determined that the account was not a source of spam and posted a retraction. The plaintiff claimed that Earthlink rejected his requests to turn his service back on.²⁶⁵ The plaintiff also claimed that Earthlink illegally intercepted his email by intentionally continuing to receive messages sent to his account after it was terminated. The Second Circuit rejected this argument.

Under Section 2511 (1)(a) of the ECPA, except as otherwise provided, anyone who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any . . . electronic communication" violates the ECPA. The court held that Earthlink's continued reception of emails sent to the account did not constitute an interception because it was conducted as part of Earthlink's "ordinary course of business" and ordinary use by a provider does not fall under the definition of interception.²⁶⁶ The court noted that if ISPs were not covered by the ordinary-course-of-business exception, they would constantly be intercepting communications under the ECPA because their basic services involve the "acquisition of the contents" of electronic communications and that Congress could not have intended such an "absurd" result.²⁶⁷

262. 18 U.S.C. § 2510 (2004).

263. 396 F.3d 500 (2d Cir. 2005).

264. *Id.* at 502.

265. *Id.*

266. *Id.* at 503.

267. *Id.* at 505.

C. Section 230 Immunity

The Superior Court of New Jersey provided an important interpretation of Section 230 of the Communications Decency Act (“CDA”).²⁶⁸ Section 230 states that no provider or user of an interactive computer service may be treated as the publisher or speaker of information provided by another information content provider.²⁶⁹ In *Donato v. Moldow*,²⁷⁰ the court determined that the operator of an electronic community bulletin board website was immune from liability associated with allegedly defamatory messages posted anonymously by others.²⁷¹

In *Donato*, the defendant established a local, political website known as “Eye on Emerson” in which he posted information about local government activities. The site included a discussion forum in which any user could post messages, either with attribution or anonymously.²⁷² In the forum, there were many negative messages about the plaintiffs. Some of the messages concerned the discharge of their official duties while others were personal and vile. The plaintiffs alleged that Moldow and the anonymous posters published the statements knowing that they were false and with the intent to injure and cause emotional distress. They alleged that Moldow was more than passive in his role as publisher and “actively participated in selective editing, deletion and rewriting of anonymously posted messages on the . . . website and, as such, is entirely responsible for the content of the messages.”²⁷³

The court recognized that in the context of traditional media, the publisher of defamatory statements made by others might well be exposed to liability for conduct such as Moldow’s. However, in the context of cyberspace, Congress has granted a broad immunity to providers or users of interactive computer services with the enactment of Section 230.²⁷⁴ That immunity applied to Moldow.

VII. INCITEMENT AND RELATED TORTS

In *Citizen Publishing Co. v. Miller*,²⁷⁵ the Arizona Supreme Court held that the *Tucson Citizen* could not be held liable for intentional infliction of emotional distress based on the publication of a letter to the editor about the war in Iraq. The letter read in its entirety as follows:

268. 47 U.S.C. § 230 (2004).

269. *Id.*

270. 865 A.2d 711 (N.J. 2005).

271. *Id.* at 719, 726.

272. *Id.* at 713.

273. *Id.* at 716.

274. *Id.* at 717.

275. 115 P.3d 107 (Ariz. 2005).

We can stop the murders of American soldiers in Iraq by those who seek revenge or to regain their power. Whenever there is an assassination or another atrocity we should proceed to the closest mosque and execute five of the first Muslims we encounter.

After all, this is a “Holy War” and although such a procedure is not fair or just, it might end the horror. Machiavelli was correct. In war it is more effective to be feared than loved and the end result would be a more equitable solution for both giving us a chance to build a better Iraq for the Iraqis.²⁷⁶

In immediate response to the publication of this letter, the newspaper received twenty-one letters to the editor, all of which it published.

Two readers, Aly W. Elleithee and Wali Yudeen S. Abdul Rahim, filed a complaint against both the newspaper and the author of the letter, alleging assault and intentional infliction of emotional distress. The plaintiffs also sought to certify the case as a class action on behalf of “all Islamic-Americans who live in the area covered by the circulation of the *Tucson Citizen*, including the reach of the Internet website published by the *Tucson Citizen*.”²⁷⁷

The trial court dismissed the assault claim but held that “reasonable minds could differ in determining whether the publication of the letter rose to the level of extreme and outrageous conduct” needed to establish the elements of a claim for intentional infliction of emotional distress. It also rejected the newspaper’s First Amendment argument.²⁷⁸

After the Arizona Court of Appeals declined to accept jurisdiction, the newspaper sought review in the Arizona Supreme Court.²⁷⁹ On July 1, 2005, the court unanimously reversed and dismissed the case. The court assumed *arguendo* that the plaintiffs’ complaint stated a claim for intentional infliction of emotional distress and turned to an analysis of the First Amendment issues. Noting that the letter to the editor “involve[d] a matter of undeniable public concern—the war in Iraq,” the court framed the issue as whether the letter to the editor fell within one of three limited classes of speech, which are not afforded First Amendment protection.²⁸⁰

First, the court held that the letter to the editor fell “far short of unprotected incitement” because the letter did not advocate imminent lawless action and was not likely to produce imminent lawless action.²⁸¹ Next, the

276. *Id.* at 109.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 111–12.

281. The court noted that even though the suit was filed more than a month after publication of the letter, the plaintiffs did not allege that any acts of violence had resulted from the letter or that such violence was imminent. *Id.* at 112.

court rejected the argument that the “fighting words”²⁸² doctrine should apply to remove the speech from First Amendment protection because the statements were made in a letter to the editor, not in a face-to-face confrontation with the target of the remarks. Further, the court observed, “while the letter expresses controversial ideas, it contains no personally abusive words or epithets.”²⁸³ Finally, the court determined that the letter did not constitute a “true threat” of violence. The letter “arose in the context of a discussion about a central political issue of the day,” a context in which “statements are far less likely to be true threats than statements directed purely at other individuals.”²⁸⁴ Moreover, the letters-to-the-editor section of a newspaper is “hardly a traditional medium for making threats,”²⁸⁵ and the letter was vague in identifying the ultimate targets of the violence being advocated.²⁸⁶

In *Vives v. City of New York*,²⁸⁷ the Second Circuit reversed a lower court decision invalidating a New York statute prohibiting communications made with the intent to annoy or alarm another person.²⁸⁸ In *Vives*, the plaintiff claimed that his First Amendment rights were violated when he was arrested for aggravated harassment based on his mailing of nonthreatening religious and political materials to a candidate for New York lieutenant governor and other “people of the Jewish faith.”²⁸⁹ Among the defendants were the two police officers who had arrested him. The arresting officers moved for summary judgment based on qualified immunity. The district court that found the statute was unconstitutional and denied the arresting officers’ motion for summary judgment, holding that the officers would be required to “prove at trial that their actions were reasonable under the circumstances.”²⁹⁰

On appeal, the Second Circuit determined that the arresting officers did not have fair notice of the statute’s purported unconstitutionality and therefore held that the defendants were entitled to summary judgment on the basis of qualified immunity. Because it decided the case on this basis, the court “save[d] . . . for another day” the question of the statute’s constitutionality.²⁹¹

282. “Fighting Words,” said the court, are “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” *Id.* at 113 (citing *Cohen v. California*, 403 U.S. 15 (1971)).

283. *Id.*

284. *Id.* at 115.

285. *Id.*

286. *Id.*

287. 405 F.3d 115 (2d Cir. 2004).

288. N.Y. PENAL LAW § 240.30(1) (2005) provides, in relevant part, that a person is guilty of aggravated harassment in the second degree if “with intent to harass, annoy, threaten or alarm another person, he or she . . . communicates with a person . . . in a manner likely to cause annoyance or alarm.”

289. *Vives*, 405 F.3d at 116.

290. *Vives v. City of New York*, 305 F. Supp. 2d 289 (S.D.N.Y. 2003).

291. *Vives*, 405 F.3d at 118.

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