Part III

Recent Libel Law Developments

Have you heard about the latest large judgments against publishers?

By Lawrence Savell

Truth. Several recent cases have reaffirmed the principle that the defense of truth is generally available even if the report contains inconsequential false aspects, as long as the "gist" of the article is accurate. The United States Supreme Court on February 18 denied certiorari in *Campbell v. Quad City Times*, where the court below had ruled that the newspaper's erroneous report was inconsequential, and had granted summary judgment in favor of the newspaper. The report in question stated that the plaintiff was imprisoned and fined, when he had actually only been imprisoned.

Similarly, in *Mullens v. The New York Times Co.*, the U.S. District Court for the Northern District of Texas ruled that a newspaper article about the FBI's investigation into bank fraud did not defame plaintiff, since the overall "gist" of the article accurately summarized the investigation and the plaintiff's alleged involvement. The article had mentioned that the plaintiff securities broker responsible for the accounts in question was being investigated for possible criminal involvement. In granting the newspaper's motion for summary judgment, the court noted: "It is not the function of the court to serve as a senior editor to determine if the reporting is absolutely, literally true, [as] substantial truth is sufficient."

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Likewise, in *Stilts v. Globe International Inc.*, the Sixth Circuit Court of Appeals affirmed the dismissal of a libel action against a tabloid newspaper and writer where the "gist" of the article, that a controversy existed between the plaintiff manager and singers (The Judds) regarding their business affairs, was substantially true.

"Fair Reports" Privilege

Several recent cases have addressed the "fair reports privilege," which protects fair and accurate reports of judicial, legislative or executive proceedings and records. In *Blomberg v. Cox Enterprises Inc.*, the Georgia State Court ruled that newspaper articles reporting allegations against the plaintiff former baseball player's career-consulting business were protected by that state's fair reports privilege. It noted that "Georgia law provides a 'fair report' privilege that shields 'fair and honest' reports of the proceedings of legislative and judicial bodies from liability, even if the reported allegations are false and defamatory." It further observed that "[t]he substantial accuracy required for a fair report means that the fair report must have the same 'gist' as the proceedings reported."

Similarly, in *Hayes v. Newspapers of New Hampshire Inc.*, the New Hampshire Supreme Court explained the privilege's rationale: "The privilege recognizes that (1) the public has a right to know of official government actions that affect the public interest, (2) the only practical way many citizens can learn of these actions is through a report by the news media, and (3) the only way news outlets would be willing to make such a report is if they are free from liability, provided that their report was fair and accurate." It applies to "[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern . . . if the report is accurate and complete or a fair abridgement of the occurrence reported." The burden of proof is on the publisher: "A defendant who asserts the fair report privilege bears the burden of establishing its applicability . . . ." The court observed that verbatim recitation was not required: "A report need not track or duplicate official statements to qualify for the privilege; rather, it 'need give only a rough-and-ready

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summary that [i]s substantially correct.'"

The level of permissible inaccuracy will depend on the facts. In *Young v. The Morning Journal*, the omission of the subject's middle initial undermined the privilege.

The Ohio Supreme Court there ruled that a newspaper article stating that an attorney had been cited for contempt, but which excluded the involved attorney's middle initial, and which inaccurately reported the town the involved attorney was from, was not protected by Ohio's fair reports privilege, since the article was not a fair and accurate report of an official record, and the inaccuracies could be considered misleading to an ordinary reader.

"Opinion"

Courts continue to wrestle with the concept of non-actionable "opinion." The United States Supreme Court on March 24 in *Millus v. Newsday, Inc.* let stand a New York Court of Appeals decision holding that a newspaper's statement in an editorial that a political candidate "admits that he doesn't expect to win and is relieved by the prospect" is a protected statement of opinion. The New York court had ruled that, when viewed within the context of the entire editorial, a reasonable reader would conclude that the statement was one of opinion rather than fact: "Apart from the appearance of the statement on the editorial page of *Newsday*, surrounded by other opinion pieces, the tenor of the editorial (which included an assertion that plaintiff 'hasn't a clue about government') alerted the reader that the piece contained expressions of opinion. Moreover, defendants did not quote plaintiff but chose instead to use the word 'admits,' which in context indicates that some interpretation of defendant's words occurred."

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Similarly, in *Gillis v. Landmark Communications Inc.*, the Virginia Circuit Court ruled that statements in a newspaper editorial about the plaintiff president of NAACP's public appearance before a city council concerning voting place location, that attributed a "racist attitude" to him, were protected statements of opinion. "[The editor's] statements were published on the editorial page of *The Sun*, clearly a forum wherein opinions are expressed, and indeed encouraged .... The context in which the statements were made — that is, in a newspaper editorial commenting on a public figure's comments made before a public body on an issue of public concern — is one where an analysis of [the plaintiff]'s actions is traditionally accepted and indeed perhaps expected, given the well-established lively nature of discourse in the editorial section of *The Sun*." The court further noted that "the words described a state of mind or viewpoint which simply are not susceptible to verification, and as such can no more reasonably be proved false than proved true."

In *Worldnet Software Co. v. Gannett Co.*, the Ohio Court of Common Pleas ruled that a statement in a newspaper column that the plaintiff online publisher operated a "work-at-home scheme" that is "probably a scam" was not defamatory, since the statement was a protected statement of opinion. "In determining whether speech is protected opinion, a court must consider the totality of the circumstances.... Specifically, the court should consider: the specific language used, whether the statement is verifiable, the general context of the statement and finally, the broader context in which the statement appeared." Here, the author "used the term 'probably' to qualify his assessment. This suggests that the statement is an opinion, rather than a readily ascertainable fact. Further, the term 'scam' lacks a precise meaning; its use here also suggests editorializing." The court also focused on the context: the column was located in an area of the newspaper dedicated to expressions of opinion, and the style of article and its language was consistent with that.

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Damages

On March 20, the publishing world was rocked by the $222.7 million libel jury verdict rendered in *MMAR Group Inc. v. Dow Jones & Co.* in the United States District Court for the Southern District of Texas. The case was brought by a Houston investment firm against the publisher of *The Wall Street Journal*, based on statements about MMAR contained in an October 21, 1993 article written by staff reporter Laura Jereski. After a two-week trial, the jury awarded MMAR (which went out of business in 1993 shortly after the article

was published) $22.7 million in compensatory damages and $200 million in punitive damages. In determining the punitive damages, the jury found there was clear and convincing evidence that Dow Jones and Jereski published the article knowing it was false or with at least a high degree of awareness of its probable falsity. This huge award was nearly four times larger than any previous libel trial verdict. Although on May 23 the judge set aside the enormous punitive damage award, he let stand the $22.7 award in actual damages. Dow Jones is reportedly appealing.

Such extreme verdicts clearly have enormous implications for the press, as the risks of such penalties can have a severe "chilling" effect. They also may make media companies rethink the amount of insurance they carry (Dow Jones publicly stated it "only" had $45 million of coverage for that case). The Dow Jones verdict comes on the heels of several other recent major adverse judgments, including the December 1996 $10 million federal jury verdict for the plaintiff in *BankAtlantic Financial Corp. v. ABC Inc.*, where a bank and its CEO prevailed on libel and false light invasion of privacy claims, based on a 1991 "20/20" broadcast critical of the bank's securities transactions.

Statistics

Statistics on 1996 media libel and privacy cases released on February 7 by the Libel Defense Resource Center reflect the growing concerns. For the media, 1996 represented a year when the success rate at trial was low and the level of total damages was high. Damages awarded in 1996 libel and privacy cases against media defendants averaged almost $3 million. The median jury trial award was $2,380,000 — the highest ever recorded by the LDRC. Half of the damage awards (and 55% of jury awards) exceeded $1 million. This was the highest percentage of million-dollar awards in any period since the LDRC began collecting and publishing this data in 1980. Such increases reflect the re-emergence of punitive damages as a significant factor in the total damages awarded, now accounting for over 60% of the total dollars awarded.

Fourteen media trials were held in 1996, up slightly from the record low of 1994-1995 (12.5 trials per year). The overall defense success rate of 28.6% was the lowest reported for any period to date. The jury trial defense success rate was only 25% (an increase from 23.8% in 1994-1995, but less than the 44.1% in 1992-1993 and 32.4% in 1990-1991).

In terms of post-trial motions, trial courts in the 1990s have less frequently granted defendants' post-verdict motions than in the 1980s. On the up side, trial courts have granted defendants new trials more often than before. In terms of appeals, more judgments now are being settled or not appealed. Where media defendants appeal, judgments are disturbed in only 23.6% of the time in the 1990s, as opposed to the 61.8% rate in the 1980s (it did reach 37.5% in 1994-1995)

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