

## Connecticut Court Issues Media-Friendly Decisions on Fair Report Privilege and Retraction Statute

By Victor A. Bolden

Within the span of one month, the *New Haven Register* (the "Register") prevailed in two libel cases. The two decisions, *Mackowski and Alfano v. New Haven Register*, Superior Court, judicial district of New Haven, Docket No. CV 99-0430252 S, (September 27, 2002) (Arnold, J.), and *Fred Dellacamera v. New Haven Register*, Superior Court, judicial district of New Haven, Docket No. CV 00-0436560, (October 28, 2002) (Arnold, J.), written by the same judge, granted summary judgment to the newspaper under Connecticut's common-law and its retraction statute.

Both decisions add to Connecticut law on libel in two critical ways. First, both cases clarify the reach of Connecticut's retraction statute and define it as limiting significantly any monetary recovery when no written retraction is requested by the plaintiff. Second, both rulings extend the common-law privilege of fair reporting in Connecticut to include articles based on the contents of arrest reports, as other jurisdictions have done.

### *Mackowski v. The Register: Recanted Charges*

The *Mackowski* case arose out of an article published in the *Register* reporting on the arrest of Jeffrey C. Mackowski and David Alfano for the alleged kidnapping, assault and drug-related crimes. Mackowski and Alfano were arrested on the basis of a statement that, the alleged victim, Felicity Fries gave to the Connecticut State Police, in which she claimed, *inter alia*, that she had been "forced" into a car, "held" her against her will, and "hit" several times. She also stated that she feared for her life.

The day after the arrest, the *Register* published an article detailing Fries' allegations to the State Police. However, after the arrest, Ms. Fries, who knew both of the purported assailants, recanted her story. As a consequence, the charges that had been based on her allegations were dismissed though the drug-related charges were not dismissed.

The *Register* ran a follow-up story covering the dismissal of these charges. Mackowski and Alfano nevertheless sued the *Register*, alleging that "[a]ny statement made in the paper regarding any violent acts or any acts carried out against Felicity Fries were false."

Plaintiffs claimed that, if the *Register* had exercised rea-

sonable care prior to publishing its article, then it would have known that the victim's statements were untrue and defamatory per se. They also argued that the defendant "should know that the statement would cause the plaintiffs emotional distress which could lead to physical injury." Plaintiffs argued that the paper had an obligation to contact the plaintiffs or take additional steps to verify the accuracy of Fries' statements before publishing them. The *Register* moved for summary judgment on two grounds: (1) Connecticut's retraction statute, Conn. Gen. Stat. § 52-237; and (2) the "fair report privilege." The trial court ruled in favor of the *Register* on both grounds.

### *Retraction Statute*

Connecticut's retraction statute, Conn. Gen. Stat. § 52-237 provides in pertinent part that:

"[U]nless plaintiff proves either malice in fact or that the defendant, after having been requested by him in writing to retract the libelous charge, in as public a manner as that in which it was made, failed to do so within a reasonable time, he shall recover nothing but such actual damages as he may have specially alleged and proved."

The plaintiffs conceded that they had not sought a retraction in writing and thus, were not entitled to recover from the *New Haven Register* unless they pled and proved special damages or that defendants published the article with "malice in fact." The Court held that plaintiffs failed to satisfy either requirement.

Plaintiffs had no special damages, according to the Court, because special damages under Connecticut's statute requires "actual pecuniary losses", "legally caused" by the defendant's actions, and not simply "general harm to reputation, injured feelings or mental anguish." "Actual pecuniary losses" are economic losses. The Court rejected plaintiffs argument that the fee paid to a bail bondsman after the plaintiffs' arrest satisfied the statute's requirements. The publication of the article *after* the plaintiff was arrested could not and did not "legally cause" him to hire a bail bondsman.

The Court also held that plaintiffs could not prove

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“malice-in-fact” under the statute, which the Court equated with “actual malice,” under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny. In fact, however, plaintiffs conceded that the article was based on law enforcement sources and that the references in the article relating to “violent acts” against the victim were contained in a State Police report. Moreover, the *New Haven Register* published its article prior to the dismissal of criminal charges against either plaintiff. As a result, the Court concluded that the

“plaintiffs have not submitted any evidence that would establish the defendant’s subjective knowledge or awareness that the victim’s statements to the police authorities were false at the time [the *New Haven Register*] published its newspaper article.”

Alternatively, the Court recognized that the *Register* was entitled to protection under Connecticut’s “fair report privilege.” As an article on the arrest and “contents” of an arrest report, the Court held that the *Register’s* article on the plaintiffs fell within the scope of the fair report privilege.

Plaintiffs, however, argued that Connecticut had not adopted the fair report privilege as a part of its common law. The Court rightly disagreed, noting that there was ample precedent for applying the privilege in this case, relying on a Second Circuit decision, *Miller v. News Syndicate Co.*, 445 F.2d 356 (2d Cir. 1971), which had affirmed a district court decision recognizing the fair report privilege as part of Connecticut’s common-law.

Accordingly, the Court dismissed in its entirety plaintiffs’ action against the *New Haven Register*.

### ***Dellacamera v. New Haven Register***

The second case, *Dellacamera*, arose out of a brief two-sentence article published in the *Register’s* police blotter section. The article reported on the arrest of plaintiff Fred Dellacamera for breach of peace and public indecency, who was described in the article as having been arrested for “masturbating” in his car. Plaintiff did not deny that he was arrested on a warrant charging breach of peace and public indecency and that the basis for the arrest was his exposing himself in public. However, plaintiff sued the *Register* for

libel, as well as false light invasion of privacy and negligent infliction of emotional distress, because the arrest warrant affidavit did not describe him as “masturbating” when arrested. The Court summarily dismissed all of plaintiff’s claims.

Applying the fair reporting privilege, the Court held that the *Register* article fairly and accurately reported on the circumstances surrounding the plaintiff’s arrest. As plaintiff conceded, the affidavit in support of the arrest warrant stated that plaintiff was seen “sitting in the driver’s seat [of his car] with his penis exposed . . . [and] fully erect as he was holding it in one hand.” The Court therefore held that “a verbatim recitation of the relevant language of the arrest warrant affidavit would not have had a different effect on the reader than the language actually used in the article.” Moreover,

**“A verbatim recitation of the relevant language of the arrest warrant affidavit would not have had a different effect on the reader than the language actually used in the article.”**

plaintiff never sought a written retraction from the *Register* and under Connecticut’s retraction statute the plaintiff neither had special damages nor any evidence of malice-in-fact. As in *Mackowski*, the Court rejected the plaintiff’s argument that the attorneys fees he expended in defending against

the criminal charges constituted special damages under the statute since the *Register* article was not the “legal cause” of the plaintiff’s criminal arrest. Moreover, the use of the term “masturbation” instead of the precise language of the affidavit from the arrest warrant could not create a factual dispute as to whether the *Register* acted with malice. Indeed, the Court found no distinction between the language in the affidavit and the definition of masturbation provided in the most recent edition of Webster’s Dictionary, much less any evidence that the *Register* knew that its article was false or acted with reckless disregard as to its truth.

The Court also summarily dismissed the false light invasion of privacy and negligent infliction of emotional distress claims. Since these claims merely incorporated by reference the allegations of the libel claim, these claims were entirely derivative of the libel claim. Under Connecticut law, these derivative claims had to suffer the same fate as the libel claim: summary dismissal.

John Williams, New Haven, represented plaintiffs in both cases

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