

# Media, Entertainment and First Amendment Newsletter, January 2017

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**PRACTICES** Media and Entertainment Litigation, Media Entertainment and Sports

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2016 proved eventful on both the political stage and in the world of media and entertainment law, and sometimes the two worlds even collided. The year saw its share of high profile media lawsuits, favorable Congressional actions, and, of course, a presidential election like none other. Here are ten stories that made an impact in 2016 and will likely continue to impact media and entertainment law for years to come.

## 1) Hulk Hogan/Gawker—The Case

In his wrestling days, Hulk Hogan entered the ring as "I am a real American" played on the speaker. While no entry music played when Hogan entered the courtroom, his case will likely change the way real Americans pursue privacy claims against online publishers. Hogan won a \$140 million jury verdict in a Florida state court following a trial in his suit against Gawker for its publication of an excerpt of a personal video. While Gawker argued that it was entitled to First Amendment protection because the tape was newsworthy, the jury decided that Hogan's privacy rights had been violated to the tune of \$115 million in compensatory damages and \$25 million in punitive damages.

## 2) Hulk Hogan/Gawker—The Financing of the Case

Making the Hogan trial even more incredible, billionaire Peter Thiel acknowledged to the *Wall Street Journal* that he financed Hogan's fight against Gawker as he considered Gawker's actions "a gross violation of privacy that deserved to win on the merits." His spokesperson told the *Wall Street Journal* that Thiel spent roughly \$10 million on Hogan's legal bills. Thiel's issues with Gawker began in 2007 when Gawker's Valleywag blog stated that Thiel was gay. By the end of the year, Gawker was out of business, having filed bankruptcy when it could not post the supersedeas bond necessary for an appeal of the judgment.

## 3) *Rolling Stone*—Defamation Trial

A jury awarded another multi-million dollar verdict, \$3 million to be precise, in former University of Virginia Associate Dean Nicole Eramo's defamation suit against *Rolling Stone* publisher Wenner Media and writer Sabrina Erderly. The federal court jury in Charlottesville, Virginia found a discredited story by *Rolling Stone* regarding Eramo's indifference to gang-rape allegations made by a UVA student cost Eramo her dream job at the school. The Court has stayed enforcement of the judgment, however, pending a hearing on Defendants' motion for judgment notwithstanding the verdict.

## 4) *Raleigh News & Observer* Loss at Trial

Not to be outdone, a Wake County, North Carolina jury returned a \$1.5 million verdict in favor of a North Carolina state police agent against the *Raleigh News & Observer* and its reporter for suffering, humiliation, lost wages and medical expenses following a three-and-a-half week trial. A day later, the jury added an additional \$7.5 million in punitive damages against the newspaper and \$75,000 in punitive damages against the reporter to the award. The agent, a forensic firearms expert with the State Bureau of Investigation, alleged that she suffered PTSD when *News & Observer* stories questioned her ballistics analysis and the independence of her opinions. The Court denied the newspaper's JNOV motion, motion for a new trial and motion for remittitur, and an appeal is expected.

## **5) KARE-TV and the *St. Cloud Times* Win at Trial**

But not all libel trials in 2016 ended in victories for the plaintiff. After an eight day trial, a jury returned a defense verdict in favor of KARE-TV and the *St. Cloud Times* in a suit filed by a suspect—later exonerated—in a murder case. When a police officer performed a welfare check on Ryan Larson, whose family reportedly believed him to be suicidal, the officer was killed. Police initially named Larson as the lone suspect in the killing, but later released him and identified another person as the killer. Larson sued KARE-TV and the *St. Cloud Times* seeking millions in damages for its reports on his arrest and investigation, but a jury found for the defendants, concluding that none of their reporting was false.

## **6) Congress Passes Consumer Review Freedom Act**

There was news in 2016 not only from the judicial branch of government, but also from the legislative. Congress took steps towards ensuring that consumers can speak freely online about services and products by passing the Consumer Review Freedom Act ("CRFA"), which forbids companies from using contractual clauses and terms of service that penalize customers for posting negative but honest reviews of their products. Former President Obama signed the bill into law in December.

## **7) FOIA Turns 50, Congress Passes FOIA improvement Act of 2016**

The federal Freedom of Information Act celebrated its 50th birthday on July 4, 2016, and Congress marked the occasion by passing improvements to the milestone law. The FOIA Improvement Act of 2016 establishes a "presumption of openness" on the part of the federal government, requires government agencies to accept emailed requests and requires government agencies to maintain their files in electronic format.

## **8) President Donald Trump Calls for Easing Libel Laws, Making Suits Against Media Easier**

And, of course, the big news of 2016 was the presidential election. In his campaign, President Donald Trump called for changes that would make it easier for plaintiffs to pursue defamation claims against news organizations. While no specifics have come forward on how this would occur, President Trump made the opening up of libel laws a consistent theme on the campaign trail, making this issue something to watch in 2017.

## **9) Scalia Dies, Seat Remains Vacant**

No matter what the President might want, any significant change in libel jurisprudence would probably require the Supreme Court to reexamine landmark cases such as *New York Times v. Sullivan*. If that happens, the Court will likely have at least one Trump-appointed justice among its

members. In February of 2016, Justice Antonin Scalia died at a hunting ranch in West Texas. Former President Obama nominated Merrick Garland, Chief Judge of the United States Court of Appeals for the D.C. Circuit, to replace Scalia, but the Republican-controlled Senate refused to act on the nomination. Scalia's seat remains vacant, and so President Trump will have an early opportunity to begin to shape the Court to come.

### **10) Mike Pence, One-Time Advocate of Federal Reporter's Privilege Statute When in Congress, Elected Vice-President of the United States**

But if the election brought a president who favors an easier path for libel plaintiffs, it also brought a vice-president once referred to by the *Columbia Journalism Review* as "journalism's best ally in the fight to protect anonymous sources." While a Congressman, Mike Pence, moved by the plight of Judith Miller and her jailing, became an aggressive advocate of a federal reporter's privilege statute. Congress never passed such a bill, but perhaps its proponents will now find a friendly ear in the Executive Branch.

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### **Sneak Peek Into the Year to Come**

Already in 2017, the Supreme Court of the United States has refused to consider former Minnesota Governor Jesse Ventura's request for a reinstatement of a \$1.8 million verdict awarded in his 2014 defamation case against the estate of "American Sniper" author Chris Kyle. The Eighth Circuit Court of Appeals threw out a majority of the verdict in June 2016 based on Ventura's attorneys referencing an insurance policy that would pay for the damages. The Eighth Circuit had held that Ventura's attorneys made a "deliberate strategic choice" to get a larger damages award "by referencing an impersonal deep-pocketed insurer" preventing, in part, Kyle's estate from receiving a fair trial. *Ventura v. Kyle*, 825 F.3d 876, 885 (8th Cir. 2016). As a result, the case could soon be headed back to a Minnesota state court for a new trial.

For more information, please contact one of the lawyers listed below.