

VIRGINIA SUPREME COURT ISSUES DECISION
ON DEFAMATION AND INVASION OF PRIVACY

Competition between local television stations for viewers during so-called ratings “sweeps” periods has escalated in recent years as these traditional media outlets fight for increasingly scarce advertising dollars. Because the ratings for “sweeps” periods – which occur each November, February and May – are the basis for future advertising rates for programming, stations seek to boost viewership during these periods so they can charge more for advertising. To achieve this end, they have taken to reporting highly sensational news stories during “sweeps” periods. This growing reliance on the sensational to augment audience share carries a risk for broadcasters. The scope of this risk was clarified in *WJLA-TV v. Levin*, a case decided by the Supreme Court of Virginia on June 7, 2002.

Dr. Stephen M. Levin, an orthopedist in Northern Virginia, was the subject of a complaint filed with the Virginia Board of Medicine by a small number of his female patients. The patients challenged the appropriateness of Dr. Levin’s use of intra-vaginal manipulation to treat a condition known as “piriformis syndrome,” in which the piriformis muscle in the buttock irritates the sciatic nerve. Several months after the Board dismissed the complaint against Dr. Levin, one of the complaining patients contacted WJLA-TV (Channel 7), which broadcasts to the Washington Metropolitan Area.

WJLA initiated an under-cover investigation of Dr. Levin, which culminated in a broadcast report on the allegations against him during the November 1997 “sweeps” period. To generate viewer interest in this report, the station put out print, radio and television advertisements that variously made references to an unnamed “Dirty Doc” or “X-Rated Doctor” who had committed “sexual assault against his female patients” and an “intimate violation of women.”

WJLA's report recounted the allegations against Dr. Levin, and disclosed that the Virginia Board of Medicine had dismissed the complaints against him for insufficient evidence. It also, however, stated that Dr. Loren M. Fishman, whom it characterized as having "literally [written] the book on piriformis syndrome," had never heard of "vaginal manipulation" as a treatment for the syndrome, despite Dr. Fishman's prior retraction of his statements to the station about Dr. Levin's treatment.

In response to this report and the advertisements promoting it, Dr. Levin sued WJLA in Virginia Circuit Court. Following a lengthy trial, a Fairfax County jury awarded Dr. Levin \$2 million in compensatory and presumed damages for defamation and \$575,000.00 in compensatory damages for invasion of privacy. WJLA appealed the jury's verdict.

The Supreme Court of Virginia, in an opinion written by Justice Lawrence L. Koontz, Jr., unanimously upheld the jury's defamation verdict, but overturned its verdict on invasion of privacy.

In reviewing the jury's defamation verdict in favor of Dr. Levin, the Court, joining the New York Court of Appeals, held that "statements or publications by the same defendant regarding one specific subject or event and made over a relatively short period of time, some of which clearly identify the plaintiff and others which do not, may be considered together for the purpose of establishing that the plaintiff was the person 'of or concerning' whom the alleged defamatory statements were made," adding that "[t]his is so even where the publication identifying the plaintiff is made subsequent to those that do not identify him." In reaching this result, the Court indicated that plaintiffs may be able to aggregate individual statements that are not defamatory in isolation to prove a single act of defamation.

Additionally, in reviewing the jury's damages awarded to Dr. Levin for defamation, the Court observed that in defamation cases "there is no rule of law fixing the measure of damages, nor can it be reached by any process of computation," and reiterated its longstanding rule "that the verdict of the jury will not be set aside unless it is so grossly excessive (or inadequate) as to indicate that the jury in rendering it were actuated by prejudice, passion or corruption, or that they have been misled by some mistaken view of the merits of the case." This hands-off attitude toward defamation damage verdicts would appear to bode well for plaintiffs, in that it would seem to reduce the possibility of an award – including a very large one such as Dr. Levin received – being overturned on appeal.

Lastly on the defamation front, the Supreme Court took a broad view of the evidence available to prove defamation damages. *WJLA* argued that the damages award for defamation improperly included the diminution in the value of Dr. Levin's medical practice, in violation of Virginia's rule that a defamation plaintiff cannot recover for losses sustained by the corporation he or she controls. The Court disagreed, holding that the "evidence did not relate to an injury that was *exclusive* to the incorporated medical practice." (Emphasis added.) In doing so, the Court suggested that a defamation plaintiff may rely on evidence relating to himself and his corporation jointly – and not simply with evidence relating solely to himself – to show damages. The larger evidentiary arsenal resulting from this decision would seem to enable defamation plaintiffs to seek and prove greater damages.

Through these rulings, the Virginia Supreme Court in *WJLA* appeared to recast defamation as a more plaintiff-friendly cause of action. Yet, the Court at the same time defined the tort of invasion of privacy in terms seemingly favorable to media defendants.

First, the Virginia Court noted that, while the common law recognizes four torts of invasion of privacy – (1) unreasonable intrusion upon the plaintiff’s seclusion, or solitude or into private affairs; (2) public disclosure of true, embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) misappropriation of the plaintiff’s name or likeness for commercial purposes – the General Assembly’s codification of only the fourth tort “excluded the remaining three as actionable torts in Virginia.”

Second, the Court adopted New York’s rule that “the right of privacy does not extend to reports of newsworthy events or matters of public interest.” “So long as there is a real relationship between the use of a person’s name or image and the [news] report, and the report is not merely an advertisement in disguise, there is no misappropriation,” it declared. Applying this rule, the Court overturned the jury’s finding that WJLA had misappropriated Dr. Levin’s likeness by broadcasting an image of Dr. Levin obtained using a hidden video camera. “It is a newsworthy event and a matter of public interest when a physician is accused by his patients of sexually assaulting them,” it concluded.

To summarize, the Virginia Supreme Court in *WJLA* narrowed the common law tort of invasion of privacy, while, at the same time, it broadened the scope of defamation.