

The GLG REPORT

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Introduction

It is our desire to keep our friends and clients informed of general legal principles and recent developments in the law. Toward that end, we will occasionally provide you with bulletins summarizing important legal issues. We welcome any suggestions or comments regarding these topics.

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New York Law Journal

Friday, October 2, 1998

'Post' to Face Libel Claim By Onetime Bomb Suspect

'Incremental Harm' Defense Seen Likely in New York

A Manhattan federal judge has ruled that Richard Jewell, the onetime suspect in the 1996 Atlanta Olympics bombing, can proceed with a libel suit against the *New York Post* based on the newspaper's portrayal of him as an "aberrant" person who likely did the bombing.

In a 127-page opinion issued yesterday, Southern District Judge Loretta A. Preska concluded that several of the statements contained in the *Post's* "hyperbolic" early coverage of the story were "susceptible of a defamatory meaning" and thus potentially actionable.

Although noting that some of the coverage of the bombing contained a preliminary tone, she said the allegedly unsubstantiated facts in the stories detailing Mr. Jewell's work history were reported in "more definitive and certain terms." Thus, she added, the "greater weight of this broader context points toward viewing the libelous statements as those of fact."

While her ruling in *Jewell v. NYP Holdings*, 97 Civ. 5399, applied well-settled libel principles to Mr. Jewell's claims, Judge Preska broke new ground by asserting that the "incremental harm" defense may now be available under New York defamation law.

The incremental harm doctrine measures the difference between the "harm caused by non-actionable statements when compared with the harm caused by purportedly actionable statements and dismisses the latter when the difference is incremental."

While noting that the New York Court of Appeals has not specifically adopted the doctrine, she predicted that it would since New York has "consistently chosen to provide libel defendants with greater protection than that afforded by federal law."

PRIMARY SUSPECT

The July 27, 1996 bombing in Centennial Olympic Park killed one person and injured 110. At the time, Mr. Jewell worked as a security guard in the park. Federal law enforcement sources identified him to news organizations as a suspect but he was later cleared.

Mr. Jewell claims he was defamed by the *New York Post* in one column, three articles, two photographs and one cartoon which were published in the days after the bombing.

ANNOUNCEMENTS

• On September 30th, **JIM LANGIONE** appeared before the Ossining Rotary Club as a guest lecturer for the Speakers Bureau of the New York State Trial Lawyers. Jim's discussion on "Jury Selection" was enthusiastically received.

• In August, GLG obtained the following awards:

- \$325,000 for a Queens County woman who sustained a fractured hip while attempting to board a TWA flight at JFK airport.

- \$275,000 for the surviving family of a woman who experienced a surgical complication at Long Island Jewish Hospital.

The July 31 column, written by Andrea Peyser, contained statements which described Mr. Jewell as a "failed former sheriff's deputy" and "home-grown failure" who had emerged as the "main suspect in a major act of terrorism."

The articles, which were published between July 31 and Aug 2 and were written by Kyle Smith and Robert Hardt Jr., asserted that authorities were "closing in" on Mr. Jewell, and that his history of being forced to leave previous security jobs due to being "overzealous" fit the bomber's profile.

One of the photographs at issue showed Mr. Jewell wearing a camouflage hunting jacket and holding a machine gun with the caption "Dressing the Part." The other showed someone identified as Mr. Jewell leaning against bars on a stairway.

The cartoon depicted a man sitting behind a desk with two signs on the wall behind him reading "Olympic Security" and "Now Hiring." Seated in front of the desk was a man wearing a turban, another holding a bomb and one wearing a black ski mask.

Asserting such defenses as substantial truth, republication of wire service reports, the expression of opinion, and the incremental harm doctrine, the *Post* moved to dismiss Mr. Jewell's suit in its entirety.

CLAIMS UPHELD

But maintaining that many of the statements regarding Mr. Jewell's work history were based on apparently false information and "undisclosed facts," Judge Preska denied most of the *Post's* motion.

The judge also let Mr. Jewell proceed with claims based on the photo of him wearing fatigues and holding a gun, saying that it could be viewed as suggesting he fit the profile of the bomber.

She dismissed the claims related to the second photo and cartoon.

Mr. Jewell has also filed a libel suit against the *Atlanta Journal-Constitution*, which was the first news organization to report that he was a suspect. He reached settlements with NBC and the Cable News Network.

Mr. Jewell is represented by Mark E. Goidell of Galasso, Langione & Goidell of Melville, and Wayne Grant of Wood & Grant in Atlanta.

Slade R. Metcalf and Melissa Georges of Squadron, Ellenoff, Plesent & Sheinfeld represented the *Post*.

TURN OVER FOR MORE



New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

September 2, 1998

LETTERS

To The Editor

Creativity Is Not Incivility

As a matrimonial lawyer, I am a huge believer that something must be done to obviate the "climate of incivility" in the courtroom. However, Judge Bruce Balter and Michael J. Simone's article (Aug. 25), "How Judges Can Enforce Civility By Punishing Frivolous Conduct" (*NYLJ*, page 1) is certainly not the answer. Not only is the line in the sand that separates frivolity from creative lawyering nearly indiscernible, it is the very reason why there are so few reported decisions on that issue. Today's allegedly frivolous argument is not so infrequently tomorrow's laws.

Moreover, creative lawyering is to be encouraged. For example, who would have thought that a non-biological parent could pursue custody of that child on equitable estoppel grounds? Yet, in *Maby S. v. Joseph H.* (*NYLJ*, Aug. 20), the Second Department held precisely that.

That argument, before a judge with sanctions on his or her mind, might have cost counsel thousands in such a punitive setting, instead of a father an opportunity to obtain custody.

Finally, while sanctions may be appropriate as a penalty for the attorney who appears habitually late for court, the judiciary should confine its use of sanctions to punish the legitimate wrongdoer, not an attorney "asked to try a case when the attorney familiar with the file has a scheduling conflict." A better rule would be for the Legislature to allow for an award of counsel fees in all cases, based upon the totality of circumstances, as is authorized in matrimonials under §237 of the Domestic Relations Law.

Peter J. Galasso
Garden City, N.Y.

OUR MISSION: The GLG Creed

With so many practicing attorneys and available firms, it is increasingly important to know more about what a firm holds most important.

Here is what we try to maintain daily to best serve our clients:

1. *Treat clients as our most valuable asset.*
2. *Be proactive.*
3. *Maintain an uncompromising commitment to excellence.*
4. *Begin with the end in mind.*
5. *Focus on negotiation not confrontation.*
6. *Inform client what, when and why things are happening every step of the way.*
7. *Deliver the highest quality representation at the lowest possible cost.*
8. *Inspire team spirit and integrity.*

ABOUT THE PARTNERS . . .

GALASSO, LANGIONE & GOIDELL, with offices at 600 Old Country Road, Suite 304, Garden City, New York, and 225 Old Country Road, Melville, New York was established in December, 1988. We are a litigation firm with emphasis in matters of personal injury, medical malpractice, matrimonial, commercial, employment law and criminal defense. Our office numbers are Nassau - (516) 222-6500 and Suffolk - (516) 761-7500.

PETER J. GALASSO, ESQ., a 1978 Magna Cum Laude graduate of SUNY at Albany, and a 1981 graduate of Boston University School of Law, began his legal career as an Assistant District Attorney in Bronx County and thereafter entered private practice. He has had numerous articles published by the New York Law Journal, including "Validating Hocus Pocus," "The Exclusive Occupancy Paradox," and "Whose Children Are They, Anyway?" In 1992, his article entitled "Rolling the Dice Pendente Lite" was published by the Family Law Review of the New York State Bar Association. He has been designated mentor to the Nassau County Bar Association to address member questions pertaining to Family Law matters. He recently edited Chapter 40 of the Matthew Bender, Four Volume Treatise on the Domestic Relations Law, *Property Distribution in Matrimonial Actions* and was selected as a Barrister to the New York Family Law American Inns of Court. He is a member of the New York Bar, was admitted to the New Jersey Bar and is admitted to practice in the Federal Court, as well as the U.S. Tax Court.

JAMES R. LANGIONE, ESQ., a 1978 Magna Cum Laude graduate of Fordham University and a 1981 graduate of Villanova University Law School, also began his career as an Assistant District Attorney in the Sex Crimes Unit of the Bronx County District Attorney. He then utilized his trial skills in the defense of malpractice and personal injury cases with Bower and Gardner in New York City. In 1989, the Chief Judge of the Appellate Division appointed him as an attorney panelist on medical malpractice panels pending in the Bronx. He is a member of the Speakers' Bureau of the New York State Trial Lawyers' Association and Nassau County Bar Association and has lectured on the subjects of personal injury and medical malpractice. In 1995, his article entitled "Are You Entitled to a Trial Preference in the Interest of Justice . . ." appeared in the Trial Lawyers Quarterly. He has won multiple million dollar awards on behalf of personal injury and medical malpractice victims. In 1992, he was appointed as an Arbitrator for the American Arbitration Association. He is a member of the New York and New Jersey Bars, and is admitted to practice in the Eastern and Southern Districts of the Federal Court.

MARK E. GOIDELL, ESQ., a 1978 Magna Cum Laude graduate from Washington University and a 1982 graduate from Boston University School of Law, successfully defended criminal prosecutions with the Legal Aid Society of Nassau County in Mineola, New York. He now represents both employers and employees in employment and discrimination matters, and still continues to try personal injury and criminal matters, including homicides, drug sales, and white collar crimes in the State and Federal Courts. He recently conducted a Seminar for the National Business Institute on Wage and Hour Law in New York. He is a member of the New York and Massachusetts Bars, and is admitted to practice in the Eastern and Southern Districts of the Federal Court.