

September Term, 2010
Case No. 70

In the Court of Appeals

of

Maryland

STEPHEN P. NORMAN

Appellant,

v.

SCOTT C. BORISON ET AL.

Respondents.

**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS, MARYLAND D.C. DELAWARE
BROADCASTERS ASSOCIATION, MARYLAND-DELAWARE-DISTRICT
OF COLUMBIA PRESS ASSOCIATION AND SOCIETY OF PROFESSIONAL
JOURNALISTS IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENTS OF THE CASE AND FACTS	1
QUESTIONS PRESENTED:	
I. Whether an individual defamation claim based on statements about a business owner’s company can satisfy the constitutional requirement of “of and concerning”	1
II. Whether an attorney who provides a fair and accurate report of information that is available to the general public and affects the public interest is privileged to do so	1
ARGUMENT:	
I. The Court of Special Appeals did not err in affirming the trial court’s ruling that Appellant lacked standing to sue for defamation	1
A. Statements about even a small corporation are not “of and concerning” an individual running that company	1
B. Public policy weighs strongly against an expansion of the “of and concerning” test that would essentially render defamation claims by a company and its owners interchangeable	2
II. Respondents were privileged to make the allegedly defamatory statements	6
The public policy underlying the fair report privilege supports its application to lawyers who provide oral statements or written republications in order to fairly and accurately pass on information that is available to the general public and affects the public interest	7
CONCLUSION.....	17
STATEMENT ON PROPORTIONALLY SPACED TYPE.....	19
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

Cases

<i>AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.</i> 903 F.2d 1000 (4th Cir. 1990).....	2
<i>Arcand v. Evening Call Publ’g Co.</i> 567 F.2d 1163 (1st Cir. 1977)	2
<i>Chesapeake Publ’g Corp. v. Williams</i> 339 Md. 285 (1995).....	15
<i>Chinwuba v. Larsen</i> 142 Md. App. 327 (2002).....	14
<i>Church of Scientology Int’l v. Time Warner, Inc.</i> 806 F. Supp. 1157 (S.D.N.Y. 1992).....	4
<i>Cox Broad. Corp. v. Cohn</i> 420 U.S. 469 (1975)	15-16
<i>Davidson v. Cao</i> 211 F. Supp. 2d 264 (D. Mass. 2002)	8
<i>Dombey v. Phoenix Newspapers, Inc.</i> 724 P.2d 562 (Ariz. 1986).....	5
<i>Drug Research Corp. v. Curtis Publ’g Co.</i> 166 N.E.2d 319 (N.Y. 1960).....	3
<i>Elm Med. Lab., Inc. v. RKO Gen., Inc.</i> 532 N.E.2d 675 (Mass. 1989)	11
<i>Fees v. Trow</i> 521 A.2d 824 (N.J. 1987).....	7
<i>Ford v. Levinson</i> 454 N.Y.S.2d 846 (N.Y. App. Div. 1982)	10
<i>Huszar v. Gross</i> 468 So.2d 512 (Fla. Dist. Ct. App. 1985)	10

<i>Miami Herald Publ'g Co. v. Tornillo</i> 418 U.S. 241 (1974)	15
<i>Mitan v. Davis</i> 243 F. Supp. 2d 719 (W.D. Ky. 2003)	16
<i>N.Y. Times Co. v. Sullivan</i> 376 U.S. 254 (1964)	2-4
<i>Norman v. Borison</i> 192 Md. App. 405 (2010).....	17
<i>Oja v. U.S. Army Corps of Eng'rs</i> 440 F.3d 1122 (9th Cir. 2006).....	16
<i>Provisional Gov't of Republic of New Afrika v. ABC, Inc.</i> 609 F. Supp. 104 (D.D.C. 1985)	2
<i>Reno v. Am. Civil Liberties Union</i> 521 U.S. 844 (1997)	17
<i>Rosenberg v. Helinski</i> 328 Md. 664 (1992).....	passim
<i>Salyer v. S. Poverty Law Ctr., Inc.</i> No. 3:09-cv-44-H, 2009 WL 1036907, at *1 (W.D. Ky. Apr. 17, 2009)	16-17
<i>Shahvar v. Superior Court</i> 25 Cal. App. 4th 653 (Cal. Ct. App. 1994)	14
<i>Snead v. Redland Aggregates Ltd.</i> 998 F.2d 1325 (5th Cir. 1993).....	5
<i>Weber v. Lancaster Newspapers, Inc.</i> 878 A.2d 63 (Pa. Super. Ct. 2005)	9
<i>Yohe v. Nugent</i> 321 F.3d 35 (1st Cir. 2003)	8

Statutes

Cal. Civ. Code § 47 (West 2011)	14
N.Y. Civ. Rights Law § 74 (McKinney 2011)	9-10

Other Authorities

50 Am. Jur. 2d <i>Libel and Slander</i> § 298.....	8-9
Am. Jur. 2d <i>Limited Liability Companies</i> § 15	6
John Emshwiller and Rebecca Smith, Reports of <i>The Wall Street Journal</i> Oct. 17, 2001 – Dec. 5, 2001, <i>available at</i> http://www.anderson.ucla.edu/documents/areas/adm/loeb/02f20.pdf	5
Restatement (Second) of Torts §§ 586, 611 (1977)	7-8, 9
Society of Professional Journalists, Code of Ethics, 1996 <i>available at</i> http://www.spj.org/pdf/ethicscode.pdf	13
Bruce A. Wessel, <i>Libel Claims Against Lawyers for Statements Made to the Press</i> 16-Fall Comms. Law. 21 (1998)	8

STATEMENTS OF THE CASE AND FACTS

Amici, whose interests in this matter are fully described in the accompanying motion seeking leave to file this brief, accept and incorporate by reference the Statements of the Case and Facts set forth by Respondents in their brief.

QUESTIONS PRESENTED

- I. **Whether an individual defamation claim based on statements about a business owner's company can satisfy the constitutional requirement of "of and concerning"**
- II. **Whether an attorney who provides a fair and accurate report of information that is available to the general public and affects the public interest is privileged to do so**

ARGUMENT

- I. **The Court of Special Appeals did not err in affirming the trial court's ruling that Appellant lacked standing to sue for defamation.**

Appellant argues that because he is the owner of a small unique company, there is, in effect, no legal distinction between him and his company such that any allegedly defamatory statement made about the company is also made about him as its owner and operator. The Court of Special Appeals correctly declined to extend the meaning of "of and concerning" to owners or shareholders when a company has allegedly been defamed and, thus, held that Appellant did not have standing to sue for defamation of his business.

A. Statements about even a small corporation are not "of and concerning" an individual running that company.

It is a long-standing requirement for any defamation claim that the plaintiff demonstrate that the allegedly defamatory statement was "of and concerning" him or her. Specifically, to actionably defame an individual, a publication must contain some special

application of the defamatory matter to the individual as distinct from his or her organization or corporation. *AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1005 (4th Cir. 1990); *Arcand v. Evening Call Publ'g Co.*, 567 F.2d 1163, 1164 (1st Cir. 1977); *see also Provisional Gov't of Republic of New Afrika v. ABC, Inc.*, 609 F. Supp. 104, 108 (D.D.C. 1985) (“Allegations of defamation by an organization and its members are not interchangeable ... [S]tatements which refer to an organization do not implicate its members.”) (emphasis added).

Applying this well-established principle, it is clear the appellate court correctly dismissed Appellant’s claim against all Respondents. Appellant was not personally injured by statements made about Sussex Title, LLC (“Sussex”). None of the statements — except those contained in the second amended federal complaint, which, as discussed below, were privileged — was “of and concerning” Appellant individually. Further, any damages awarded to Sussex would go to him individually.

B. Public policy weighs strongly against an expansion of the “of and concerning” test that would essentially render defamation claims by a company and its owners interchangeable.

The U.S. Supreme Court has made clear that whenever the gravamen of a claim is an attempt to impose liability for allegedly defamatory speech, courts must “examine for [themselves] the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment ... protect.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). This threshold determination applies equally to the constitutional requirement that the allegedly defamatory statement be “of and concerning” the plaintiff; the court must closely

scrutinize the statement at issue to determine whether the publication fairly could be read as referring to the individual plaintiff. *Id.*; see also *Drug Research Corp. v. Curtis Publ'g Co.*, 166 N.E.2d 319, 321 (N.Y. 1960) (granting motion to dismiss where publication could not fairly be read to be “of and concerning” the individual plaintiff and noting that “[t]he sufficiency of the pleading depends in part on whether the article, when fairly read, concerns the plaintiff ... [and] mention[s] the plaintiff with particularity”).

Thus, in *Sullivan*, the Court reversed a libel judgment in favor of the plaintiff, a police commissioner, based on allegedly false statements about the conduct of the Montgomery, Ala., police department. Despite the fact that the plaintiff produced witnesses who testified that they understood the references to “police” to impugn the commissioner, the Court held that the evidence was “constitutionally defective,” and the plaintiff could not meet his burden of proving that the statements at issue were “of and concerning” him. As the Court explained, “it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts in question ... Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual.” *Sullivan*, 376 U.S. at 288–89. The Court also rejected the witnesses’ testimony because it was based “not on any statements in the advertisement” identifying the plaintiff “and not on any evidence that he had in fact been ... involved” in the police conduct, “but solely on the unsupported assumption that, because of his official position, he must have been.” *Id.* at 289. This sidestepping of the “of and concerning” requirement, according to the Court, would also sidestep the prohibition against libel claims by the government by allowing an

“otherwise impersonal attack on governmental operations [to be] a libel of an official responsible for those operations.” *Id.* at 292.

The reason courts must provide such strong protection to speech is both clear and basic: Society is fundamentally shaped by the power to speak and think freely. As the *Sullivan* Court recognized, the “marketplace of ideas,” and the competition of widely various ideas in the marketplace, will eventually create a better society:

[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for “vigorous advocacy” no less than “abstract discussion.” The First Amendment, said Judge Learned Hand, “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”

Id. at 269–70.

This protection of free speech interests is particularly important where, as in this case, the challenged speech concerns matters of public interest: “Court[s] have often had occasion to note that the public interest in ensuring open and vigorous debate occasionally results in some injury to an individual as the result of a libel of his profession, political party, or sect.” *Church of Scientology Int’l v. Time Warner, Inc.*, 806 F. Supp. 1157, 1160 (S.D.N.Y. 1992). If such damages were actionable, free expression would be impaired by the threat of liability, and issues of great public importance would go unreported or, even worse, undiscovered. One of the strongest examples of the need for freedom to discuss the actions of corporations is the work of two *Wall Street Journal* reporters who in 2001 helped break reports of the scandal and subsequent demise of

Enron Corp., an energy trading company.¹ These journalists helped protect the public welfare; without the media's involvement, Enron, and numerous other companies that have been the subject of investigative reports into their financial practices, could have bilked their customers and investors of even more money before their scams were exposed.

Simply put, media organizations like *amici* must have the ability to report on businesses and their activities free of allegations that the statements imputed misconduct to and, therefore, defamed individuals within the company. The marketplace of ideas cannot achieve its goal of fostering and furthering public debate if the activities of those who gather and disseminate information about matters of great public interest, including mortgage foreclosure rescue scams, are chilled by threats of liability. Business owners who feel they have been defamed by statements about their company are not without recourse: The law recognizes that a corporation or other business entity has a business reputation that is capable of being defamed and, thus, may bring a cause of action for defamation. *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1328 (5th Cir. 1993) (applying Texas law); *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 577 (Ariz. 1986).

Free-speech considerations must lead a court to prohibit a ruling that would allow Appellant's claim to proceed. A company is a separate legal entity from its owners and

¹ All of these stories, by John Emshwiller and Rebecca Smith, are available online at <http://www.anderson.ucla.edu/documents/areas/adm/loeb/02f20.pdf> in recognition of the reporters' receipt in 2002 of UCLA's prestigious Gerald Loeb Award for Deadline or Beat Writing.

shareholders, and, as such, the owner of a company, even a small unique one, may not bring a defamation claim based on statements about the business that are not “of and concerning” its owner individually.² Such a rule is necessary to ensure a predictable limit on potential claims, thereby allowing open and vigorous debate about controversial issues to continue. Thus, *amici* urge this Court to affirm the lower courts’ dismissals of Appellant’s claims for lack of standing.

II. Respondents were privileged to make the allegedly defamatory statements.

The Court of Special Appeals held that the absolute privilege associated with litigation proceedings extended to actions by the attorneys involved in the underlying mortgage fraud lawsuit to provide comments about the complaints to a *Baltimore Sun* reporter and circulate copies of the filings to her. Moreover, the privilege was not voided, according to the court, when the lawyers posted the complaints on the Internet since that republication involved documents that were a matter of public record. Without engaging in a fact-specific discussion of which privilege applies to which statement by which Respondent, *amici* assert that the underlying policy rationale for the fair report privilege

² In fact, corporations and their owners often fight allegations that there is such unity of interest between the two that they are inseparable such that the “corporate veil” may be “pierced,” and owners’ personal assets may be reached. Am. Jur. 2d *Limited Liability Companies* § 15. This hallmark of corporate law — that principals of the corporation enjoy broad protection from being held personally responsible for the debts and liabilities of the corporation — is one of the biggest advantages of incorporating a business. *Id.* As a matter of public policy, however, owners may not abuse the protection by paradoxically arguing that the corporate veil cannot be pierced when they face liability as a defendant, yet ceases to exist when they are plaintiffs wanting to bring a cause of action on behalf of the company. This Court must recognize the unfairness inherent in allowing such individuals to have it both ways: reliance on the protection when it works to their advantage and repudiation of it when it works to their disadvantage.

mandates a finding that attorneys are privileged — regardless of how the protection is classified or categorized — to provide journalists with copies of legal filings, as well as fair and accurate summaries of and comments on the documents and other judicial actions. Extending protection to such acts is necessary to help ensure that the public’s interest in knowing what occurs at government proceedings that affect the public interest is protected.

The public policy underlying the fair report privilege supports its application to lawyers who provide oral statements or written republications in order to fairly and accurately pass on information that is available to the general public and affects the public interest.

Defamation law is grounded on the important principle that individuals generally should be free to enjoy their reputations unimpaired by false and defamatory attacks. *Fees v. Trow*, 521 A.2d 824, 827 (N.J. 1987). The common law — recognizing that the tort of defamation may compete with the “vital counter policy” that people should be permitted to communicate freely, and could chill the free exchange of ideas — identified “narrowly defined instances in which the public interest in unrestrained communication outweighs the right of redress.” *Id.* The common law classified these protected occasions as privileged communications and categorized the privileges as either absolute or qualified.

The litigation privilege provides an attorney an “absolute[] privilege[] to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.”

Restatement (Second) of Torts § 586 (1977). Relatedly, the fair report privilege provides that, “[t]he publication of defamatory matter concerning another in a report of an official action or proceeding ... is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.” *Id.* § 611.³

The underlying rationale for each privilege addresses very different policy concerns. The litigation privilege emphasizes the paramount importance of the process’ truth-finding function and recognizes that efforts to secure justice are severely undermined if participants in the judicial process are subject to potential liability for statements made in the courtroom. Bruce A. Wessel, *Libel Claims Against Lawyers for Statements Made to the Press*, 16-Fall Comms. Law. 21, 22 (1998). No similar reasoning applies to statements in the press, however, because allowing defamation suits for communications to the news media generally will not inhibit parties or their lawyers from fully investigating claims in an attempt to disclose evidence that will lead to a determination of truth and, therefore, does not interfere with the important policy rationale for the privilege. *Davidson v. Cao*, 211 F. Supp. 2d 264, 275 (D. Mass. 2002).

The fair report privilege, however, emphasizes the fact that the publisher is merely conveying to the public statements that members of the public would have heard themselves had they been present at the public meeting. 50 Am. Jur. 2d *Libel and Slander*

³ In most states, the fair report privilege is not absolute and may, like all qualified privileges, be defeated by “misconduct on the [publishers’] part, but that misconduct must amount to more than negligent, or even knowing, republication of an inaccurate official statement. To defeat the privilege, a plaintiff must either show that the publisher does not give a fair and accurate report of the official statement, or malice.” *Yohe v. Nugent*, 321 F.3d 35, 44 (1st Cir. 2003).

§ 298. That is, the purpose of the fair report privilege is to provide the media and other reporters with an unfettered right to cover what happens in the courtroom and other public proceedings — provided their reports are fair and accurate — in order to protect the public’s interest in knowing what occurs there. *Id.*

Despite this recognition of the importance of public knowledge about government actions that affect the public interest, jurisdictions are divided over the extent to which attorneys familiar with judicial proceedings are privileged to report to the public about them. Although statutory recognition of the fair report privilege exists in some jurisdictions, it remains a creation of common law in most others, and its coverage varies from state to state. For example, while many states extend the privilege to “any person who makes [a] ... report to pass on the information that is available to the general public,” Restatement (Second) of Torts § 611 cmt. c (1977), others restrict it to members of the media. *See, e.g., Weber v. Lancaster Newspapers, Inc.*, 878 A.2d 63, 72 (Pa. Super. Ct. 2005) (stating that, “[u]nder [the fair report] privilege, *media defendants* have qualified immunity from defamation liability when they report on official governmental proceedings” and noting that, “[i]n Pennsylvania, the fair report privilege protects *the press* from liability for the publication of defamatory material if the published material reports on an official action or proceeding”) (emphasis added).

Moreover, many states qualify the fair report privilege with an absence of malice, but others have drafted statutory language that provides lawyers an absolute privilege to communicate outside the courtroom about pending litigation, so long as their statements are fair and accurate reports of judicial documents or proceedings. *See, e.g., N.Y. Civ.*

Rights Law § 74 (McKinney 2011) (“A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.”), *interpreted by Ford v. Levinson*, 454 N.Y.S.2d 846, 847 (N.Y. App. Div. 1982) (comparing comments a plaintiff’s attorney made to the press about the defendant-company and its owners with the allegations in the complaint in the underlying case and finding the former comments to be absolutely privileged under Section 74 as a “fair and true report” of a judicial proceeding).

When presented with the question, the courts of other states, including this one, also may well find that a privilege extends to the extrajudicial comments of lawyers to the media. *See, e.g., Huszar v. Gross*, 468 So.2d 512, 516 (Fla. Dist. Ct. App. 1985) (“[I]n Florida there is a qualified privilege to make reports of judicial and quasi-judicial proceedings as long as they are accurate, fair and impartial. This privilege extends to protect the remarks of counsel [to a newspaper reporter] as well.”). More significantly, in a case that implicated “the limits of free speech, and the privileged status accorded to reports of events in court,” this Court extended the fair report privilege to a non-attorney expert witness who spoke on the courthouse steps about his in-court testimony in a child custody matter. *Rosenberg v. Helinski*, 328 Md. 664, 667 (1992). The Court found that the witness, a child psychologist whose testimony supported a woman’s accusation that her ex-husband had sexually abused their child, accurately and fairly reported his allegedly defamatory testimony to a television camera crew and broadcast journalist who

approached him to ask questions as he left the courthouse. *Id.* at 687. Recognizing the important policy served by the fair report privilege, the Court concluded that, “the law permits [the expert] to tell others what happened in court that day. The public’s right to know the business of its courts takes precedence in this case.” *Id.* This rationale for giving special protection to fair and accurate reports of judicial proceedings does not apply with any less force because the reporter is a lawyer. Indeed, the *Rosenberg* Court noted that although the fair report privilege usually arises in lawsuits involving media organizations, it is not limited to such defendants since “the public’s interest in obtaining reports of court matters remains the same irrespective of the reporter’s identity.” *Id.* at 680.

Along these lines, it is vitally important to *amici* that those people with information about court proceedings and other government actions that implicate matters of public concern be privileged to accurately and fairly report that information without fear of penalty. For while it is true that “the only practical way many citizens can learn of [official government actions that affect the public interest] is through a report by the news media,” *Elm Med. Lab., Inc. v. RKO Gen., Inc.*, 532 N.E.2d 675, 678 (Mass. 1989), *abrogated on other grounds by United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20 (Mass. 1990), it is equally true that oftentimes the only practical way the news media learn of these actions and obtain the documents and comments needed to effectively report on them is through information supplied by the people involved in them, including attorneys. Indeed, in the world of daily journalism, unrelenting deadline pressures exist, and reporters must regularly condense an event of which they may have become aware

just hours earlier into an impartial account of the occurrence that is placed in the appropriate context. Many times, reporters are unable to get to a courthouse to retrieve documents, much less read and comprehend all of them, in sufficient time to compose an accurate story that, in most cases, requires the synthesis of dozens, or even hundreds, of pages of complex legal reasoning into a few hundred words from which an average member of the public can ascertain the meaning of the litigation, as well as its public significance. And in light of the recent evolution in the media industry, marked most notably by news organizations' shift to online publication as a means of delivering content and attracting readers, "daily" deadlines have transformed into "hourly" ones.

Moreover, many journalists often report on judicial proceedings that affect their community but, for any of a number of reasons, occur in different locations, the geographical distance to which prohibits the reporter's live coverage of the event. Many times, these remote courts, generally state ones, do not maintain an online docket through which the journalist can access documents or ascertain the most up-to-date events in the case, or they maintain an electronic service that requires a paid subscription to access it. Although federal courts use a uniform, electronic docketing system that provides online access to court records and documents nationwide, many small, community-focused media organizations cannot afford a subscription to the service.

In light of these difficulties, media organizations like *amici* must rely on people who are intimately familiar with and willing to discuss these judicial proceedings; because of their participatory roles in the actions, lawyers almost always are the individuals with this information. In addition to depending on these attorneys for public

reports of the information via copies of litigation documents, however, reporters must also be able to rely on them for fair and accurate reports or syntheses of the allegations contained in the documents, particularly when the case involves difficult or complex legal issues. Indeed, journalists' use of lawyers as reporters of information that is available to the general public extends beyond the mere convenience that this use affords journalists to include a significant public benefit. That is, reaching out to attorneys for their oral reports of publicly available information that affects the public interest and, as such, should be publicly reported helps journalists provide "a fair and comprehensive account of events and issues," a duty they perform in their attempt "to serve the public with thoroughness and honesty."⁴

Declining to protect lawyers who provide to the news media copies of court documents or fairly and accurately report them and other litigation actions to reporters belies common sense and violates this Court's holding that judicial proceedings are public events, and " '[w]hat transpires in the court room is public property.' " *Rosenberg*, 328 Md. at 679 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975)). Indeed, if an attorney is absolutely privileged to make statements in a courtroom, and a journalist is privileged — absolutely, in many states — to report these statements, why is the same interchange not protected if it occurs on the courthouse steps or over the telephone?

⁴ Society of Professional Journalists, Code of Ethics (1996), *available at* <http://www.spj.org/pdf/ethicscode.pdf>. These aspirational and voluntary directives provide significance guidance on many ethical issues to media organizations that opt to subscribe to the code. As part of journalists' responsibility to "Seek Truth and Report It," a means to further the ends of "public enlightenment [as] the forerunner of justice and the foundation of democracy," they should "[t]est the accuracy of information from all sources" *Id.*

Moreover, the lawyer's action to provide fair and accurate reports to the press cannot serve as the basis of any injury to a plaintiff since the media could have obtained the information from the court themselves. That is, if a plaintiff's claim for damages is based on a report that appeared in the press, and that report is privileged as a fair and accurate report, the attorney's conduct did not cause any harm to the plaintiff. *Shahvar v. Superior Court*, 25 Cal. App. 4th 653, 663 n.3 (Cal. Ct. App. 1994), *superseded by* Cal. Civ. Code § 47 (West 2011) (holding absolutely privileged fair and true communications to the press about in-court activities).

Additionally, publication via “informal press contacts” that “provides absolutely no procedural safeguard that would minimize the prospect of defamatory statements” — a past rationale for refusing to extend protection to officials who provide fair and accurate reports to the press, *Chinwuba v. Larsen*, 142 Md. App. 327, 395 (2002), *rev'd on other grounds*, 377 Md. 92 (2003) — is not relevant, since the requirement of a fair and accurate report is not without meaning. That is, this Court has made clear that the privilege will not protect a reporter who illegitimately fabricated or orchestrated events to appear in a privileged forum for the improper purpose of repeating a defamatory statement publicly. *Rosenberg*, 328 Md. at 685. Because there is no evidence that Respondents acted maliciously by commencing judicial proceedings in bad faith so that they could later repeat their own defamatory statements under the aegis of privilege, there is no policy rationale undercutting extension of a privilege to lawyers who provide fair and accurate reports of judicial documents and proceedings to members of the media.

Further, the fact that portions of reports of judicial documents or proceedings are redacted or omitted does not waive their reporter's privilege. *See Chesapeake Publ'g Corp. v. Williams*, 339 Md. 285, 301–02 (1995); *see also Rosenberg*, 328 Md. at 682 (“The fair reporting privilege reaches not only comprehensive accounts of judicial proceedings, but accounts focusing more narrowly on important parts of such proceedings.”). While plaintiffs often would like reporters to include every fact that belies or contradicts allegations against them or substantiates their accusations against another, doing so is “not the reporter's obligation.” *Chesapeake Publ'g*, 339 Md. at 302. A reporter need only present a fair and accurate summary of the action — not necessarily a recitation of all facts or an inclusion of all information that might render a potential defamation plaintiff more “sympathetic.” To hold otherwise would embroil judges charged with determining the existence of a privilege in unpredictable and unworkable post-publication editing, in direct contravention of the U.S. Supreme Court's observation that:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

Moreover, the U.S. Supreme Court has noted that in judicial proceedings in which privacy interests must be protected, “the States must respond by means which avoid public documentation or other exposure of private information,” which presumably

would include redaction of certain materials. *Cox Broad. Corp.*, 420 U.S. at 496. Holding that the publication of less-than-complete reports of judicial proceedings forfeits the reporter's protection severely chills reports of judicial action for, as stated above, news reporters do not have the time or space to reproduce documents exactly as they appear in court files. And without these reports, "[t]he public's right to know the business of its courts," which this Court has deemed to be of paramount importance, is violated. *Rosenberg*, 328 Md. at 687.

It also is worth noting here that publication of a fair and accurate report on the Internet does not void its privileged status, for the majority of jurisdictions hold that "the posting of information on the web should be treated in the same manner as the publication of traditional media" *Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1130 (9th Cir. 2006); *Mitan v. Davis*, 243 F. Supp. 2d 719, 724 (W.D. Ky. 2003) ("A statement electronically located on a server which is called up when a web page is accessed, is no different from a statement on a paper page in a book lying on a shelf which is accessed by the reader when the book is opened."). Indeed, the use of the Internet to publish documents that are a matter of public concern facilitates "an otherwise preoccupied public[']s" access to important information that previously may have remained unknown due to a lack of "time, energy or inclination" to retrieve copies of the public records from the courthouse. *Rosenberg*, 328 Md. at 679. As such, the medium helps advance the important principle that the public's interest in knowing what occurs in its courtrooms and other public proceedings must take precedence. *Id.* at 687. Yet, Appellant seems to suggest that "the shear [sic] scale of the Internet[,] ... its infinite

ability to amass information and ... its ability to reach an immense and diverse audience[,]" *Salyer v. S. Poverty Law Ctr., Inc.*, No. 3:09-cv-44-H, 2009 WL 1036907, at *1, *3 (W.D. Ky. Apr. 17, 2009), somehow require a narrowing of a reporter's protection from liability for fair and accurate reports of information that is available to the general public and affects the public interest. This notion, however, seems to contravene U.S. Supreme Court jurisprudence establishing that the Internet, with its particular speech-enhancing qualities, is akin to the print, as opposed to the broadcast, medium and, thus, entitled to strong First Amendment protections:

[T]he growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.

Reno v. Am. Civil Liberties Union, 521 U.S. 844, 882, 885 (1997).

CONCLUSION

As the Court of Special Appeals noted, this Court has not weighed in on how defamation plaintiffs in this state may satisfy the constitutional requirement — imposed by the U.S. Supreme Court more than 45 years ago in its seminal defamation decision, *N.Y. Times Co. v. Sullivan* — that a statement be “of and concerning” the plaintiff. *Norman v. Borison*, 192 Md. App. 405, 421 (2010). This case presents an opportunity for the Maryland Court of Appeals to adopt a rule that a company is a separate legal entity from its owners and shareholders, and, as such, the owner of a company, even a small unique one, may not bring a defamation claim based on statements about the business that are not “of and concerning” its owner individually. Allowing Appellant's claim to

proceed threatens the free exchange of ideas in a manner this country, consistent with its recognition of the necessity of a thriving marketplace of ideas, simply cannot tolerate. Conversely, barring the claim provides more public debate, more openness and more publishing of important information about business entities. Thus, *amici* urge this Court to affirm the lower courts' dismissals of Appellant's claims for lack of standing.

Additionally, *amici* regularly rely on attorneys to act as conduits between the courtroom, and the legal insight contained therein, and the general public. Indeed, the purpose of the fair report privilege — to provide the media and other reporters with an unfettered right to cover what happens in judicial and other public proceedings so that the public's strong interest in knowing what occurs there is protected — supports its application to lawyers who provide oral statements or written republications in order to fairly and accurately pass on information that is available to the general public and affects the public interest. Without suggesting which common-law privilege applies to particular statements and acts at issue in this case, *amici* urge this Court to find that attorneys are privileged — regardless of how the protection is classified or categorized — to provide journalists with copies of legal filings, as well as fair and accurate summaries of and comments on the documents and other judicial actions.

In the event the Court sets out to define the scope of protection under the litigation or fair report privilege, *amici* respectfully ask the Court to find that journalists' fair and accurate reports are covered under the fair report privilege, even if they are not verbatim reproductions of the documents. Public affairs journalists and courts reporters are adept at combing through dense documents to tease out their most important and relevant claims.

This skill, accompanied by reporters' development of and reliance on credible sources to provide insight and context, generally produce accurate accounts that speak to the most significant aspects of the event covered and represent fair abridgements entitled to protection under the fair report privilege. Concededly, not every news report can claim to be a substantially accurate and fair abridgement of the occurrence covered. However, the important interests served by the fair report privilege outweigh a rule that the publication of less-than-complete reports of public proceedings forfeits the reporter's protection, resulting in a chill on public affairs reporting that the First Amendment cannot tolerate.

Likewise, *amici* urge the Court to hold that a fair and accurate report of public information retains its privilege even if the statements are published on the Internet. The constitutional protections afforded journalists result from the functions they perform, not the media in which they publish. In this era of modern journalism in which mainstream news organizations have turned to the Internet to deliver content and attract new readers, and nontraditional online outlets have provided information on current events of public interest, a finding that speech protections do not apply with equal force to the Internet would severely undermine the goal of the marketplace of ideas to foster free and transparent public discourse about important and controversial issues in today's society.

STATEMENT ON PROPORTIONALLY SPACED TYPE

Pursuant to Rules 8-504(a)(8) and 8-112(c), this brief was prepared with Times New Roman font, type size 13, with double spacing between lines.

Dated: January 7, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2011, two copies of brief of *Amici Curiae* The Reporters Committee for Freedom of the Press, Maryland D.C. Delaware Broadcasters Association, Maryland-Delaware-District of Columbia Press Association and Society of Professional Journalists in support of Respondents were served via first-class mail, postage pre-paid, on:

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