UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, Administrator of the Est. of DEREK GRAY and on behalf of JANI L. GRAY-MCGILL, minor child of Decedent Derek Gray, et al. Plaintiffs, v. JEFFREY DERDERIAN, et al. Defendants.	CIVIL ACTION NO.: 04-CV-312-L Judge: Ronald R. Lagueux

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF ITS OPPOSITION TO WPRI'S PARTIAL MOTION TO DISMISS

TO THE HONORABLE COURT:

Plaintiffs Albert L. Gray, et al. (hereinafter Plaintiffs) file this memorandum of law in support of their opposition to WPRI's Partial Motion to Dismiss plaintiffs' negligence claims against it, as follows:

I. INTRODUCTION

In the hours and moments that preceded the fatal fire of February 20, 2003, defendant Jeffrey Derderian ("Derderian") was both the owner/operator of The Station nightclub and an investigative reporter employed by, and on the business of, WPRI.[1] Plaintiffs allege that Derderian, as of that evening, was armed with special knowledge: as a club owner he knew that his club was unsafe, overcrowded, provided inadequate egress, that it violated building code, that pyrotechnics were about to be ignited and that The Station was filled with polyurethane foam; as an investigative reporter he was

[1] Complaint, ¶¶ 273-276.

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aware of at least some of the hazards of polyurethane foam.[2] Plaintiffs allege that as a result of this knowledge, and in these special circumstances, Derderian, as agent for both The Station nightclub and WPRI, had a duty to act to prevent the predictable tragedy which ensued, and that his failure to do so binds both The Station (Derco) and WPRI.

Defendant WPRI's Partial Motion to Dismiss, which asks for dismissal of the negligence claims against WPRI as employer of Derderian, fundamentally misstates plaintiffs' allegations and, having done so, attempts to interpose First Amendment defenses where none are applicable.

For the reasons stated herein, WPRI's Partial Motion to Dismiss should be denied.

II. WPRI PERSISTENTLY MISCHARACTERIZES THE NEGLIGENCE ALLEGATIONS OF PLAINTIFFS' COMPLAINT AGAINST IT.

WPRI's first ground for dismissal asserts that there is "no duty for a television station to immediately broadcast hazardous conditions which one of its reporters has allegedly learned in the course of his news gathering activities...",[3] a proposition which is neither in dispute nor germane to plaintiffs' complaint.

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[2] Affidavit of Patrick T. Jones ("Jones Affidavit") which is incorporated by reference in this memorandum, attaching transcript of Channel 7 investigative report "Burning Beds" by Jeffrey Derderian, 2/18/01. (Jones Affidavit at Tab 1).

[3] WPRI's Motion to Dismiss, p. 2. This misstatement is repeated in WPRI's brief at page 5, point 4, which asserts that plaintiffs premise their claims on WPRI's failure to report a newsworthy story prior to the fire. WPRI's persistent and repetitive mischaracterization of plaintiffs' claims of Derderian's duty, and therefore WPRI's, underlies its entire brief. See, WPRI's brief at page 6, ¶1 (...duty of a news organization to immediately report unsafe conditions...); also Id., at point (2) which rhetorically and derisively asks if WPRI had "...a duty to break into its network programming to report the developing crowd?"; also at WPRI's brief page 8, point (5) which again asks "is it foreseeable that the plaintiffs would be injured, resulting from WPRI's failure to immediately run a news story about the developing crowd and other allegedly hazardous conditions when there is no allegation that the plaintiffs were watching Channel 12 that night." Rather than watching television, the club patrons, 100 of whom died, were in Derderian's presence, in his club, which had been selected by Derderian and WPRI as part of an investigative report on club safety because it was "convenient" and as a "good example" of a venue that met safety codes.

WPRI, in its Memorandum of Law in Support of its Partial Motion to Dismiss ("defendant's brief"), incorrectly asserts that plaintiffs bring forward the "unprecedented assertion that WPRI had a duty to broadcast a news report, "before the fire."[4] Nowhere in plaintiffs' complaint does such an assertion exist. What plaintiffs do assert is that Jeffrey Derderian, knowing of hazardous conditions at The Station prior to the fire, including its substantial overcrowding, its lack of adequate and lawful egress, the presence of polyurethane foam, and the impending use of pyrotechnics, in an environment where patrons would potentially be intoxicated, should have acted, at a minimum to bring these hazards to the attention of the owners, operators and patrons of the club. Complaint, ¶¶ 277 and 278.[5]

Plaintiffs intend, through discovery, to establish that Jeffrey Derderian as of February 20, 2003, was known as an investigative reporter who would be expected to confront the subject of his inquiry. [See, e.g., *The Providence Journal* February 25, 2003, "TV Coverage Ethics at Issue as Reporter Becomes the Story," Andy Smith. (Jones Affidavit at Tab 3)]. Plaintiffs intend to prove that Derderian, with Butler's assistance, was preparing a story on safety in public buildings, which was scheduled to

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See, Boston Globe, February 22, 2003, Mark Jurkowitz, "WPRI Reporter's Link to Club Stirs Ethical Questions" (Jones Affidavit at ¶Tab 2).

[4] WPRI's Memorandum of Law, page 2, ¶3.

[5] To the extent that other Defendants in this action may argue the inconsistency of Jeffrey Derderian's knowledge with other theories asserted by Plaintiffs, Plaintiffs deny such inconsistency. Moreover, Federal Rule of Civil Procedure 8(e) (2) clearly allows inconsistent pleadings with discovery and, eventually, the trier of fact, resolving any inconsistencies. ("A party may also state as many separate claims or defenses as the party has regardless of consistency...") Fed.R.Civ.P. 8(e) (2). Under Rule 8(e) (2) a party may include inconsistent allegations in a pleading's statement of facts and the court cannot construe a plaintiff's claim as an admission against another alternative or inconsistent claim. Wright & Miller, Federal Practice and Procedure Civil 3rd §1283; Henry v. Daytop Village, Inc., 42 F.3d 89 (2d Cir. 1994); Molsbergen v. U.S.., 757 F.2d 1016 (9th Cir. 1985). Such inconsistency may implicate entirely different defendants. Fedorchak v. Montgomery Ward, 18 F.R.D. 1 (D.Pa. 1955); Fowler v. Baker, 32 F.Supp. 783 (D.Pa. 1940).

air the week of the fire, and generated in the wake of the then recent Chicago nightclub tragedy. Id. (Jones Affidavit at Tab 3).

Investigative reporting, which consists of investigating, analyzing, and ultimately publishing newsworthy information requires that journalists be "honest, fair and courageous in gathering, reporting and interpreting information." *Code of Ethics of the Society of Professional Journalists*, (Jones Affidavit at Tab 4).

Consistent with this code, Derderian, as a WPRI employee, was required by his employer's ethics guidelines to avoid a situation that placed him in a conflict of interest, defined as "when an employee has a direct or indirect financial or other interests which might influence the **employee's judgment on behalf of the company**" (emphasis supplied). [*LIN TV Corporation Code of Business Conduct and Ethics* (Jones Affidavit at Tab 5)]. Plaintiffs intend to prove that Derderian failed to comply with this mandatory policy, promulgated by his ultimate employer, and that his employers failed to adhere to the same standards.

The inherent conflict presented by Derderian/WPRI's investigation of the nightclub restricted Derderian from taking action to prevent the tragedy which ensued. "News organizations should protect the integrity of coverage against any potential conflict of interest arising from station owners' commercial or other interests". [*Radio-Television News Directors Association and Foundation Guidelines for Balancing Business Pressures and Journalism Values* (Jones Affidavit at Tab 6)]. The tragedy that occurred was a foreseeable consequence of the failure of Derderian, as a WPRI investigative reporter, to adhere to the principles embodied in this standard, which must

apply with equal force to conflicts arising from the investigative reporter's commercial interests.

Plaintiffs' claim does not assert a television station's duty to broadcast an event[6], but is premised on an employer's responsibility, in these circumstances, for the failure of its employee/reporter acting as a dual agent, to take action, if only to speak out, to save lives which he knows, or should know, are in imminent danger.

III. PLAINTIFFS' CLAIM THAT JEFFREY DERDERIAN BREACHED A DUTY HE OWED TO THEM, CAUSING INJURIES AND DEATH, STATES AN ACTIONABLE CLAIM OF NEGLIGENCE.

This Court has noted that "where the risk of injury to a party is reasonably foreseeable, the law will impose a duty upon the defendant to take reasonable steps to avoid that injury; in short, the potential risk is the measuring stick for the scope of the duty." (Internal citations omitted) Liu v. Striuli, 36 F.Supp.2d 452, 466-467 (D.R.I. 1999). While the existence of a duty is a question of law for the Court, whether a duty exists may often depend on the resolution of predicate facts. It is the function of the jury to determine the existence of those predicate facts. "[T]he Court should not arrogate to itself the function of determining such facts under the guise of deciding what legal duty (if any) is owed to the plaintiff..." Kuzniar v. Keach, 709 A.2d 1050, 1056 (R.I. 1998).

The Rhode Island Supreme Court has struggled with the "difficulty of crafting a workable test to determine whether a duty exists in a particular case." Ferreira v. Strack, 636 A.2d 682, 685 (R.I. 1994) (Ferreira I). The Court "has avoided 'definitively commit[ing] itself to [a specific]... analytical approach' and has instead adapted an *ad*

[6] Having created the in terrorum phantom that plaintiffs' complaint attempts to make law which would result in "creating an overbroad new legal duty with ominous implications for constitutionally protected activity with the accompanying prospect of ruinous liability for one of Rhode Island's most vibrant and respected voices" (defendant's brief page 8,¶4), WPRI proceeds to knock down, on Constitutional grounds, the straw man it has propped up.

hoc approach of considering all relevant factors" *Id*. (quoting D'Ambra v. U.S., 114 R.I. at 649, 650-52, 338 A.2d at 527, 528.

> "the determination of whether a duty exists is a legal issue for the Court to decide. In the making of this determination no clear cut formula...exists. Rather, [u]nder our ad hoc approach we consider all relevant factors, including the relationship of the parties, the scope and burden of the obligation to be imposed upon the defendant, public policy considerations and notions of fairness. Finally, as this Court has frequently noted, [t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension..." (citations and internal quotation marks omitted; emphasis in original) Hennessey v. Pyne, 694 A.2d 691, 697 (R.I. 1997).

Plaintiffs assert that Jeffrey Derderian's knowledge of the dangers posed by flammable polyurethane foam, and his knowledge of the ubiquitous presence of that foam at The Station, the impending pyrotechnics and the other unsafe conditions at The Station, imposed upon him the duty to take action. He knew or should have known that plaintiffs were potentially in grave danger. In short, plaintiffs assert that Derderian acted unreasonably given these special circumstances, and the immense risk of harm.

The special circumstances under which a duty may arise are directly related to the foreseeability of harm to a person within a zone of danger. This Court has articulated this principle in defining the limits of the duty of a tour operator to its customers, stating "in the absence of special circumstances indicating that additional measures are necessary, a tour operator fulfills its obligation with respect to the safety and security of a tour participant by conducting a minimal investigation of the hotel accommodations included in its tour packages" McElheny v. Transnational Travel, Inc., 165 F.Supp.2d 190, 203 (D.R.I. 2001) (emphasis supplied).

Plaintiffs assert that Jeffrey Derderian had detailed knowledge of the foreseeable risk, and the immense harm to life if the risk materialized, facts which constitute the special circumstances which mandated that he take action. Put simply, Jeffrey Derderian was required to act as a reasonably prudent person would have under the circumstances. Plaintiffs claim that he failed to do so, and that WPRI is bound by his negligence.

IV. JEFFREY DERDERIAN WAS A DUAL AGENT WHOSE KNOWLEDGE WAS IMPUTED TO BOTH PRINCIPALS.

There is no way to separate what Jeffrey Derderian as owner knew from what Jeffrey Derderian as investigative reporter knew.

As a general rule, when a person acts as agent for two principals, the dual agent's knowledge is imputed to both: "notice to or knowledge of a dual agent is imputed to both principals just as if the agent represented one principal alone." 3 Am Jur 2d Agency §283 *see*, Imputation of Knowledge of Agent Acting for Both Parties to Transaction 4 ALR 3rd 224 (1965); *see also*, First Catholic Slovak Union of the United States and Canada v. Buckeye Union Insurance Company, 27 Ohio App. 3rd 169, 170, 499 N.E.2d 1303, 1305 (1986).

WPRI cannot, as a matter of law, escape liability for Derderian's actions as a dual agent. WPRI, in violation of sound journalistic protocols governing conflict of interests of its reporters, improperly permitted Derderian to "investigate" his own nightclub for its benefit in preparing a news story, insensitive to the conflict of interest, and cannot disclaim liability for his negligent actions.

V. WPRI IS LIABLE FOR JEFFREY DERDERIAN'S ACTIONS UNDER ESTABLISHED AGENCY PRINCIPLES.

"The doctrine of respondeat superior holds a principal liable for the torts of his or her agents that are committed in the course of their employment or within the scope of their authority" Fraioli v. Lemcke, 328 F.Supp. 2d 250, 270, 2004 WL 1739484, *15 (D.R.I. 2004) (Lagueux, J.). There must be proof that "the employee was acting in furtherance of his or her employer's business at the time that the harm occurred." Brotko v. United States, 727 F.Supp. 78, 81 (D.R.I. 1989) (Lagueux, J.). Plaintiffs have asserted that Derderian was acting for WPRI[7] on the evening of February 20, 2003 and should be permitted to discover facts salient to this claim.

Jeffrey Derderian's performance as a investigative reporter on February 20, 2003, was severely inhibited by his personal conflict of interest, in violation of common journalistic protocols and guidelines, a violation countenanced by WPRI. He had sufficient information about the dangers of the conditions then existent at The Station that he should be expected to have warned the operator of the club, or the patrons, of the danger to be avoided. He could not serve two masters, failed to act, and caused incalculable harm. WPRI, who consented to and benefited from this ethical breach, cannot complain of any unfairness in being bound by Derderian's actions.

VI. PLAINTIFFS ARE ENTITLED TO DISCOVER RELEVANT FACTORS WHICH WILL DEFINE JEFFREY DERDERIAN'S DUTY AND WPRI'S LIABILITY FOR HIS ACTIONS.

[7] The Defendant, LIN Television Corporation, states in its motion that TVL Broadcasting, Inc., not it, is WPRI's owner. It appears that formal ownership is in TVL Broadcasting of Rhode Island, LLC, a Delaware corporation, whose sole member and owner is TVL Broadcasting, Inc., which is a wholly owned subsidiary of defendant, LIN Television Corporation, which is wholly owned by LIN TV Corp. (Jones Affidavit at Tab 7).

Plaintiffs are entitled to discovery from Jeffrey Derderian, WPRI, and others, to establish the material assertions of their complaint:[8] that Derderian was employed by WPRI, and acting within the scope of his employment in directing a WPRI cameraman to film the interior of The Station on February 20, 2003; that WPRI knew of Derderian's ownership of The Station; that Derderian was investigating and preparing a report on nightclub safety; that Derderian knew of at least some of the hazards of flammable polyurethane foam; that Derderian had unique, inside, nonpublic knowledge of the hazards to be faced by patrons of The Station on February 20, 2003, including its overcrowding, its building code violations, its use of polyurethane foam, and the impending ignition of pyrotechnics;[9] that Derderian could have easily acted to warn patrons, the club's managers, or others of the hazards he knew of; that Derderian as an aggressive investigative reporter had a reputation of such action in circumstances where he was not burdened by a conflict; that WPRI authorized his presence, and the presence of Brian Butler, at The Station for purposes of investigative news gathering; and that Derderian and Butler failed to act reasonably and prudently to avoid catastrophic harm to the patrons of The Station.

Plaintiffs ask this Court to deny WPRI's Partial Motion to Dismiss, and to permit discovery.

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[8] At the time the State Court miscellaneous Petitions were removed to this Court, in August, 2003, and all discovery was stayed by order of this Court, plaintiffs had already served a document subpoena on LIN TV, with Judge Gibney's approval. A copy of that subpoena is attached hereto. (Jones Affidavit at Tab 8).

[9] Discovery of communication between Butler and Derderian, and WPRI and Derderian, may reveal evidence permitting the conclusion that Derderian allowed a pyrotechnic display and instructed that it be filmed to further both his (WPRI's) story on club safety and the commercial fortunes of his club.

CERTIFICATION

I hereby certify that on the 30th day of September, 2004, I served a true copy of the within document via first class mail, postage prepaid to the following parties:

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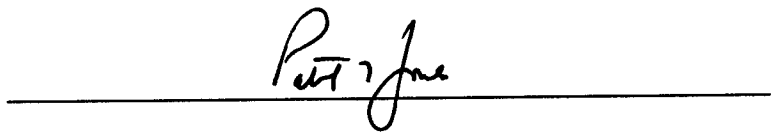
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