UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND (PROVIDENCE)

ALBERT L. GRAY, Administrator of the Estate of Derek J. Gray, and on behalf of JANI L. GRAY-MCGILL, minor child of the decedent, Derek J. Gray, et al.,	§	Civil Action No. 04-CV-312-L
Plaintiffs,	§	
v.	§	Judge: Ronald R. Lagueux
JEFFREY DERDERIAN, et al.,	§	
Defendants.	§	

LIN TELEVISION CORPORATION D/B/A WPRI-TV'S REPLY TO PLAINTIFFS' OPPOSITION TO LIN'S PARTIAL MOTION TO DISMISS

TO THE HONORABLE COURT:

LIN Television Corporation d/b/a WPRI-TV (hereinafter "WPRI" or "Defendant") has filed a partial motion to dismiss under Rule 12(b)(6) F.R.C.P. with supporting memorandum ("The Motion"), and Plaintiffs have filed an opposition and supporting memorandum ("Opposition"). WPRI respectfully files this reply.

I.
Introduction

Plaintiffs concede that WPRI had no duty to immediately broadcast a news report about the hazardous conditions at the nightclub which were allegedly known by its reporter (Jeffrey Derderian). This proposition, the Plaintiffs say, "is neither in dispute nor germane to Plaintiffs' complaint." (Opposition at 2). Instead the Plaintiffs craft a supposed duty more limited in scope, but which is truly a distinction without a difference. Plaintiffs now say WPRI was under a more limited duty to publish the information about the hazardous conditions to the "owners, operators and patrons" of the club. (Opposition at 3).

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The reporter, under this theory, had a duty to inform the owners of the club, who, according to the Complaint, already knew about the hazards (Complaint at 69-71), as well as the patrons. Plaintiffs do not explain how the patrons were to be informed if, as Plaintiffs concede, WPRI had no duty to publish a news report.

Logically under Plaintiffs' theory, the reporter was required to seize the stage and make an announcement or else go patron to patron and publish the information about the hazards he purportedly knew. Not surprisingly, the Plaintiffs do not cite a single case on point from any jurisdiction for this novel proposition, nor do they even discuss the First Amendment implications any such "reporter's duty" would create. As we stated in our original memorandum, a state law--whether common or statutory--which imposes a duty on journalists to immediately publish reports to an audience (whether the general viewing public or the more limited audience Plaintiffs suggest) would be unconstitutional under the United States and Rhode Island constitutions. Put another way, WPRI comes to court with "a strong presumption in [its] favor." *DeFilippo v. National Broadcasting Co., Inc.*, 446 A.2d 1036, 1039 (R.I. 1982).

DeFilippo was a case where plaintiffs alleged that defendant broadcaster negligently failed to adequately warn and inform plaintiffs' son of a dangerous stunt shown on television. The Supreme Court of Rhode Island held that the First Amendment barred plaintiffs' suit. In so holding, the court noted that, "[T]o permit recovery 'would create a chilling effect on the first amendment rights of others . . . .'" *Id.* at 1038. Plaintiffs apparently concede the implications of the holding in *DeFilippo*, since the case is not addressed anywhere in Plaintiffs' Opposition. *DeFilippo* decides this case. It expressly holds that a failure to warn theory against a media defendant is meritless as a matter of law.

In *Brandt v. Weather Channel, Inc.*, 42 F.Supp.2d 1344 (S.D. Fla. 1999), a case in which plaintiff claimed The Weather Channel was negligent for failing to warn her late husband (a boater) about a coming storm, the court granted the Weather Channel's 12(b)(6) Motion to Dismiss noting that, "It is clear that to impose such a duty would be to chill the well established first amendment rights of the broadcasters." *Id.* at 1346. The court went on to say, "It is well established that mass media broadcasters . . . owe no duty to the general public who may view their broadcasts . . . ." *Id.* at 1346. Plaintiffs' proposed claim against WPRI, in which they claim a warning (a form of speech) from Derderian was required, is analogous to plaintiff's dismissed claim in *Weather Channel* and should be dismissed here as a matter of law. Plaintiffs' Opposition does not discuss the *Weather Channel* case.

II.
Having Ignored On Point And Binding First Amendment Jurisprudence, Plaintiffs Cite No Relevant Authority To Support Their Duty Argument

We assume all the facts in Plaintiffs' complaint as true as required by law and thus assume for the purposes of this motion only that the reporter was at the nightclub in the course and scope of his employment with WPRI working on a news story about building safety. We further assume, as the Plaintiffs allege, that the reporter, in his fourth day of work at WPRI, had gathered sufficient information to know that there were hazardous conditions at the nightclub.

Plaintiffs claim that two industry Codes of Conduct (Society of Professional Journalists and Television News Directors Association), as well as the LIN Television Code of Business Conduct, attached to Plaintiffs' Opposition,[1] support their theory. As we understand their argument, Plaintiffs claim that the reporter had a conflict in acting as both a reporter and a subject of his investigation, and that because of this conflict he didn't do his job for WPRI

[1] A Rule 12(b)(6) Motion is to be decided on the pleadings and not extraneous material which should generally be excluded. WPRI discusses these attachments without waiving its objection to their inclusion. *McElheny v. Trans National Travel, Inc.*, 165 F.Supp.2d 190, 194 (D.R.I. 2001).

properly, that is, "investigating, analyzing and ultimately publishing newsworthy information." (Opposition at 4). Plaintiffs go on to criticize WPRI for even assigning Derderian to the story because of its ethics guidelines designed to avoid a situation that "placed him in a conflict of interest."

There are several obvious flaws in this argument. First, if the reporter was not performing his job aggressively enough, that is an employment issue with his employer. It creates no duty to third parties. Moreover, nowhere in the two industry codes or in the LIN Television Code does it suggest that a reporter must publish known information at any particular time. It is quite the contrary. The essence of editorial control is deciding when and how to publish newsworthy information. That extends not only to the ultimate act of publication (*see Weather Channel*), but how a news investigation proceeds. It is often the case that the subjects of an investigation are confronted with allegations only after significant news gathering activity has taken place. Premature disclosure of potentially defamatory material is discouraged by the Codes of Conduct, which the Rhode Island Supreme Court has noted. The Court said: "A responsible news medium scrutinizes; it does not unjustly or irresponsibly incite a wildfire of insinuation." *In re Access To Certain Records*, 637 A.2d 1063, 1067 (R.I. 1994). Quoting the SPJ Code of Ethics, the Court noted, "So-called news communications from private sources should not be published or broadcast without substantiation of their claims to news values." *Id.* at n. 1.

The second defect in Plaintiffs' theory is their claim that the reporter never should have been assigned because of an alleged conflict. That again raises an employment issue -- it does not create a duty to speak and to immediately report the results of an investigation. Following

this argument to its end -- the reporter would have been in no position to report if he had not been assigned to the story.

The cases Plaintiffs cite in their Memorandum Of Law In Support Of Their Opposition To WPRI's Partial Motion To Dismiss are not on point and do not help their position. For example, they cite *Liu v. Striuli*, 36 F.Supp.2d 452, 466-467 (D.R.I. 1999), a case where this Court granted summary judgment in favor of defendant on a negligent supervision claim stating, "[T]his Court would have to expand beyond all reason the duty owed by the [defendant]." Plaintiffs' sole purpose in citing *Liu* was to extract a quote which stated the foreseeability element of duty without regard to the holding or facts of the case. (Opposition at 5). *Liu* supports the Defendant here.

McElheny v. Trans National Travel, Inc., 165 F.Supp.2d 190, 203 (D.R.I. 2001) is cited by Plaintiffs, arguing that "special circumstances under which a duty may arise are directly related to the foreseeability of harm to a person within a zone of danger." (Opposition at 6). *McElheny* is no help to Plaintiffs because it involved a specific, distinguishable fact scenario dealing with a tour participant's negligence claim against a tour operator.

Finally, *First Catholic Slovak Union Of United States And Canada v. Buckeye Union Insurance Co.*, 499 N.E.2d 1303, 1305 (Ohio App. 8 Dist., 1986), also cited by Plaintiffs, is an Ohio appellate opinion that discusses, in part, agency law principles in the context of a business transaction between an insured and an insurance agency, facts that make it distinguishable from this case.

III.
Conclusion

No case recognizes the duty sought to be imposed by Plaintiffs, and the First Amendment and Rhode Island Constitution flatly prohibit it. WPRI's motion should be granted.

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CERTIFICATE OF SERVICE

This is to certify that on this 15th day of October, 2004, a true and correct copy of LIN Television Corporation d/b/a WPRI-TV's Reply to Plaintiffs' Opposition to LIN's Partial Motion to Dismiss was served via Certified Mail, Returned Receipt Requested, upon:

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