

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PETER FANELLE and SUSAN FANELLE,	:	CIVIL ACTION
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
LOJACK CORPORATION,	:	
	:	
Defendant.	:	
	:	
	:	NO. 99-4292

Reed, S.J.

December 7, 2000

M E M O R A N D U M

On the evening of July 21, 1997, plaintiff Peter Fanelle (“Fanelle”), a self-employed buyer and seller of engine parts and transmission cores, was waiting at a garage in the East Frankford area of Philadelphia, Pennsylvania, when police descended on the site and arrested him and others during a raid targeted at a suspected car theft and “chop shop” operation. The police were led to the scene by an anti-theft device manufactured by defendant LoJack Corporation.¹ Two days later, the *Philadelphia Inquirer* newspaper ran an article about the investigation and arrests that mentioned of LoJack and the names and featured photos of the four people arrested and described as suspects, including Fanelle. At the close of a subsequent criminal trial, Fanelle was found not guilty of all charges arising out of the arrest.

The *Philadelphia Inquirer* article came to the attention of LoJack, which is in the business of assisting in the recovery of stolen automobiles and deterring auto theft through sales

¹ Days before plaintiff’s arrest, Philadelphia police followed a signal from a LoJack tracking device to a garage in East Frankford. There, they discovered the origin of the signal; a car equipped with a LoJack tracking device that recently had been reported stolen. The evidence gathered at that scene led police to conduct the raid in which plaintiff was arrested.

of its tracking device.² LoJack began including the *Inquirer* article in a package of promotional materials that it provided to car dealerships throughout Philadelphia and Northern Pennsylvania, Southern New Jersey, and Wilmington, Delaware. The package consisted of 12 stapled and photocopied pages that began with a title page bearing the words “LoJack Stolen Vehicle Police Recovery Network,” which was followed by a page of statistics about car theft and representations about the LoJack system; a copy of the *Philadelphia Inquirer* article containing Fanelle’s name and full-face, close-up photos of Fanelle and the other three suspects; a copy of a Consumers Digest “Best Buy” award certificate; a one-page vignette recounting the theft and recovery of a Lexus automobile in New Jersey; a page listing typical expenses to a car owner resulting from a car theft; a 1997 article from Business Week magazine discussing LoJack’s success rate; and four one-page “recovery story” vignettes about the theft and recovery of cars in the Philadelphia/New Jersey area and consequent arrests.³

In October 1998, Fanelle was found not guilty of all charges arising out of his July 21, 1997 arrest. (Plaintiff’s Exh. C, Verdict Report in Commonwealth v. Fanelle, Oct. 21, 1998.) The distribution of the LoJack promotional package continued until July 1999, when this action was filed.⁴

² The LoJack system operates via a small transmitter concealed on an automobile. The transmitter is remotely activated when a car is reported stolen, and it emits a signal that can be picked up by a receiver installed in a police vehicle and lead police to a stolen vehicle. According to defendant’s brief, the operation in which Fanelle was arrested was the first major chop shop bust facilitated by LoJack since it entered the local market. (Defendant’s Memorandum, at 4.)

³ Plaintiff discovered that LoJack was distributing the materials in August/September 1998, when a business associate showed the materials to him. (Plaintiff’s Exh. F, Plaintiff’s Answers to Defendant’s Interrogatories, at ¶ 5).

⁴ While the parties disagree about when the article was first used in the LoJack promotional package, it is undisputed that the *Philadelphia Inquirer* article was included in the package in 1998 and 1999.

This Court granted in part and denied in part defendant's motion to dismiss plaintiffs' claims pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure. See Fanelle v. LoJack Corp., 79 F. Supp. 2d 558 (E.D. Pa. 2000). Defendant LoJack now brings a motion for summary judgment on the remaining claims, pursuant to Rule 56 of the Federal Rules of Civil Procedure (Document No. 15). For the following reasons, the motion will be denied.

Analysis

In deciding a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, "the test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (citing Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). The facts should be reviewed in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993 (1962)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita, 475 U.S. at 586, and must produce more than a "mere scintilla" of evidence to demonstrate a genuine issue of material fact in order to avoid summary judgment. See Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

Because the parties are diverse, and the amount in controversy exceeds \$75,000, this action is properly before the Court under 28 U.S.C. § 1332. As discussed in this Court's previous memorandum opinion on the motion to dismiss, the action is governed by Pennsylvania law. See Fanelle, 79 F. Supp. 2d at 561. The task of a federal district court sitting in diversity within the Commonwealth of Pennsylvania is to apply state law as interpreted by the Supreme

Court of Pennsylvania. See Connecticut Mut. Life Ins. Co. v. Wyman, 718 F.2d 63, 65 (3d Cir. 1983). In the absence of a definitive ruling by the state's highest court, this Court must predict how the Supreme Court of Pennsylvania would rule if presented with the question. See Robertson v. Allied Signal, Inc., 914 F.2d 360, 378 (3d Cir. 1990). In so doing, the court “must consider and give due regard to the decisions of intermediate appellate courts as well as other state courts as indicia of how the state's highest court would decide a matter.” Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548, 553 n.3 (3d Cir. 1985) (citing Wyman, 718 F.2d at 65; Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1167 (3d Cir. 1981)).

1. Defamation

Defendant argues that Fanelle has produced insufficient evidence to demonstrate a genuine issue of material fact on the elements of his defamation claim. The law of defamation in Pennsylvania is governed by a statute that requires plaintiff to prove seven elements: (1) the defamatory nature of the communication; (2) publication by the defendant; (3) the application of the communication to the plaintiff; (4) a recipient’s understanding of the communication’s defamatory meaning; (5) a recipient’s understanding that the communication was intended to apply to plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion. See 42 Pa. C.S. § 8343 (a). The statute also provides three affirmative defenses to defamation claims, which defendant bears the burden of proving: (1) the truth of the defamatory communication; (2) the privileged character of the publication; or (3) that the subject matter was of public concern. See 42 Pa. C.S. § 8343 (b).

a. *Defamation-by-Implication*

Both parties concede that this is no typical defamation case involving the publication of

an allegedly defamatory statement about a plaintiff. Plaintiff does not argue that any of the individual documents in the promotional package, standing alone, was untrue or defamatory. Rather, plaintiff contends that the promotional package, taken as a whole, gives rise to a defamatory *implication*.⁵

We find ourselves in essentially uncharted territory here as far as Pennsylvania law is concerned, as the Supreme Court of Pennsylvania has not spoken on the issue of “defamation-by-implication.” However, the Superior Court of Pennsylvania has held that “the literal accuracy of separate statements will not render a communication ‘true’ where, as here, the *implication* of the communication as a whole was false.” Dunlap v. Philadelphia Newspapers, Inc., 301 Pa. Super. 475, 493, 448 A.2d 6 (1982) (emphasis).⁶

Looking beyond Pennsylvania law, it becomes clear that defamation-by-implication is not a novel theory. The venerable Professor Prosser had this to say about it:

If the defendant juxtaposes [a] series of fact so as to imply a defamatory connection between them, or [otherwise] creates a defamatory implication ... he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though particular facts are correct.

Prosser, The Law of Torts, § 116 5th ed. (Supp. 1988), cited in White, 909 F.2d at 523.

⁵ Defendant counters that the truth of the individual documents (in particular, the *Philadelphia Inquirer* article) renders the promotional package incapable of having a defamatory meaning. The “communication” at issue in this case is the entire promotional package taken “as a whole,” not the *Philadelphia Inquirer* alone. As discussed below, I conclude that a reasonable jury could find that the implication of the entire promotional package was defamatory, even if the individual documents, including the *Philadelphia Inquirer* article, were indeed accurate. See infra, text at 13.

⁶ Dunlap involved a *Philadelphia Inquirer* article about police corruption. The article, which ran under the banner headline “Wide Police Corruption Revealed,” and the sub-head “Hidden Cameras Confirm Reports of Payoff System,” described a stake-out by *Philadelphia Inquirer* reporters during which they observed and photographed a police car stop and a man on the street reaching inside the police car. The article then went on to recount the reporters’ attempts to confront the police officer believed to have been driving the car they observed earlier with photographs of his encounter with the man on the street. According to the article, the reporters’ attempts to question the officer were interrupted by a superior officer who abruptly ended the interview. The Superior Court concluded that the article gave a reasonable person the impression that the officer had received a bribe or payoff and was concealing that fact.

Numerous federal courts of appeals have recognized a cause of action where the facts of a statement are literally true, but the implication arising out of those facts is false and defamatory. See Toney v. WCCO Television, 85 F.3d 383, 387 (8th Cir. 1996) (holding that a cause of action for “defamation-by-implication” can arise when true facts are juxtaposed or omitted to give rise to a defamatory suggestion) (citations omitted); Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir. 1993) (holding that a defamation claim may arise out of false implications rather than literal facts); White v. Fraternal Order of Police, 909 F.2d 512, 518-21 (D.C. Cir. 1990) (holding that defamation by implication is a viable tort theory); see also Partington v. Bugliosi, 56 F.3d 1147, 1152 n.9 (9th Cir. 1995) (explaining defamation-by-implication) (citations omitted).

The concept of defamation-by-implication may be illustrated by an example. A local newspaper might publish an article with the following lead: “Rev. Olsen Oratoria, a married man and pastor of a large local congregation, was spotted late last evening exiting the home of one Theresa Terpsichorea, a local exotic dancer, his suit rumpled, belt undone, and shirt untucked.” Suppose that, in fact, Theresa was a Yoga instructor, and that the good reverend was one of 20 people leaving her house following Yoga class, each of them equally rumpled from the evening’s contortions which had not involved any private or nefarious acts between Olsen and Theresa. Every fact in the article may have been true, however, there is no question that the facts as presented, would leave a reasonable reader with the untrue impression that the good reverend and Theresa were engaged at least in a private liaison of questionable nature. Privilege issues aside, a jury could find such an implication to be defamatory.

Though the Supreme Court of Pennsylvania has not addressed this issue, based on the

ruling of the Superior Court of Pennsylvania in Dunlap and the numerous other court of appeals decisions discussed above, I predict that the Supreme Court of Pennsylvania would recognize a cause of action for defamation in a case where true facts are juxtaposed or facts are omitted in a way that gives rise to a defamatory implication. Furthermore, I conclude that the elements of a defamation-by-implication claim are the same as in a typical defamation claim.⁷

b. *Consideration of the Elements*

Having established the viability of plaintiff's legal theory, I now consider whether the facts of the case match up with that theory. The first statutory element of defamation in Pennsylvania is whether the communication is capable of defamatory meaning. See 42 Pa. C.S. § 8343 (a). This is a legal question to be resolved by the Court. See Redco Corp. v. CBS, Inc., 758 F.2d 970, 971 (3d Cir. 1985) (citing Corabi v. Curtis Publishing Co., 441 Pa. 432, 442, 273 A.2d 899 (1971); Restatement of Torts, § 614 (2) (1938)), cert. denied, 474 U.S. 843, 106 S. Ct. 131, (1985).

The undisputed evidence now before me shows that defendant placed an article about

⁷ Some courts have suggested that in defamation-by-implication cases, the court should demand "an especially rigorous showing where the expressed facts at true." Chapin, 993 F.2d at 1093, such as evidence that the recipient "reasonably understood" the communication "to have been intended in the defamatory sense," White, 909 F.2d at 519, or that the defamatory statement "affirmatively suggest that the author intends or endorses the inference," Chapin, 993 F.2d at 1092-93. However, under Pennsylvania's defamation statute, a plaintiff already must establish that the recipient of the communication understands the communication to be defamatory and intended to apply to the plaintiff, and thus the requirement is already incorporated into Pennsylvania defamation statute. See 42 Pa. C.S. § 8343 (a).

Arguments that even more should be required of a plaintiff in a defamation-by-implication case demand too much, because such additional requirements teeter dangerously close to requiring a showing of the actual intent of the speaker such as "actual malice," the high threshold of proof that the Supreme Court of the United States established to protect the sacred rights of publishers under the First Amendment. I do not believe such a high threshold is required or warranted in defamation-by-implication cases. An implication is no less defamatory when it is cloaked in literal truth; on the contrary, the patina of accuracy may exacerbate the harmfulness of a statement by making it more palatable and believable to the recipient. Thus, I conclude that the elements required to establish a claim for defamation-by-implication in Pennsylvania are no more and no less than those set forth in Pennsylvania's defamation statute.

plaintiff's arrest inside a promotional package advertising defendant's anti-theft tracking system. The article described the arrest of plaintiff, included his picture and name, and recounted how the LoJack system led to the recovery of 13 stolen cars that were "waiting to go under the torch." (Plaintiff's Exh. D, Thomas J. Gibbons, Jr., "Stolen car leads police to others," The Philadelphia Inquirer, July 23, 1997.) The article was immediately preceded by a page of statistics that included the following language in large print: "There is no way to fully protect your car from thieves. But there is a way to get yours back quick enough so only minimal damage may be done to your vehicle." (Plaintiff's Exh. A, "LoJack Stolen Vehicle Police Recovery Network" Promotional Package, at 2.) Thus, a reader of the materials would first read about "thieves" and LoJack's ability to protect one's car from damage, and then turn to the *Philadelphia Inquirer* article, which included a picture of Peter Fanelle and discussed the damage that was about to be done to ten cars he was suspected of stealing. The consonance between the language in the article and the language on the preceding page of statistics is clear, and I conclude that a reasonable person could believe, upon reading these documents in proximity to one another, that Fanelle and the other people pictured in the *Philadelphia Inquirer* article arrested amongst stolen vehicles were in fact "thieves."⁸

The inference is strengthened by the five vignettes that followed the article, which provided accounts of cars being stolen and the LoJack system leading to the arrest of "thief" or

⁸ A reasonable jury could find that the implication of the package of materials is that plaintiff was arrested inside a garage near confirmed, cut-up, stolen automobiles during a police raid on a hot spot of suspected stolen vehicles. The LoJack electronic system appears very credible in the article because the article reports that the police confirmed that some of the cars had been reported stolen and that Fanelle, along with the others arrested, was a likely car thief. In the context of the package, which was intended to promote the use of the LoJack system to recover stolen cars, it would be a permissible inference that LoJack believed that the use of the plaintiff's name and photo lent credibility to their claims about their product, i.e., that the LoJack system helped recover cars and at least incidentally furthered the arrest of car thieves like Peter Fanelle.

“thieves” and recovery of the cars. (Plaintiff’s Exh. A, “LoJack Stolen Vehicle Police Recovery Network” Promotional Package, at 5, 8-11.)⁹ A reasonable finder of fact could determine that, the effect of the *Philadelphia Inquirer* article, placed in the context of vignettes that each tell a similar story culminating in the arrest of the “thief,” was “reasonably calculated to,” or would “naturally engender,” an impression among those to whom it was circulated (car dealers) that Peter Fanelle was a thief. I conclude that an impression such as this certainly would “harm the reputation” of Fanelle in a way that would adversely affect others’ view of his fitness for the proper conduct of his business; to the extent it became known, being branded a car thief could hardly have been good for plaintiff’s car parts business. Therefore, I conclude that plaintiff has established a genuine issue of material fact as to the first statutory element.

There is no dispute that the promotional package was widely distributed, i.e., published; the corporate designee for Lojack estimated that the promotional package including the *Philadelphia Inquirer* article was sent out to 300 car dealerships in Philadelphia and the surrounding areas. (Plaintiff’s Exh. E, Deposition of David Brauer, Apr. 28, 2000, at 18.) Thus, the second element is satisfied. The third element also is satisfied; as discussed above, the promotional package prominently displayed the close-up head shot and name of plaintiff, and thus unmistakably applied to him.

Both the Supreme Court of Pennsylvania and the Court of Appeals for the Third Circuit have ruled that it is the trial court’s task to decide if a communication is capable of a defamatory meaning, and the jury’s role to determine whether the communication was so understood by the

⁹ I note that none of the vignettes included the identities of the “thieves,” and that the *Philadelphia Inquirer* article was the only document in the promotional package that identified anyone suspected of involvement in car theft.

recipient(s). See Redco Corp., 758 F.2d at 971 (citing Corabi, 441 Pa. at 442; Restatement of Torts, § 614 (2) (1938)); Maccord v. Christian Academy, No. 96-5479, 1998 U.S. Dist. LEXIS 19412, at *13 (E.D. Pa. Dec. 4, 1998) (citing U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 923 (3d Cir. 1990)). Thus, plaintiff need not, at this stage, produce evidence to satisfy the fourth and fifth elements, which require proof of what recipients understood upon receiving the promotional package. Those elements will be addressed at trial.¹⁰ Likewise, plaintiff need not prove the sixth element, “special harm,” because the brochure implied that he had committed a criminal offense and was therefore “slander *per se*.” See Brinich v. Jencka, Pa. Super. , 757 A.2d 388, 397 (2000) (plaintiff need not establish special harm where a communication constitutes slander *per se*, and a statement imputing a criminal offense constitutes slander *per se*); see also Restatement (Second) of Torts § 571 (“One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm ... “).

c. *Defense of Truth*

Defendant asserts the defense of truth, arguing that the *Philadelphia Inquirer* article with Fanelle's name and picture was accurate, and that the remaining material in the promotional package was truthful. At the outset, I note that the defense of truth in the defamation-by-implication setting does not prevail where a defendant merely asserts the literal truth of the facts in the statement, as defendant does here. Rather, to successfully assert a defense of truth in a

¹⁰ Even if plaintiff was required to now show that he can present such evidence at trial, I conclude that he has done so, in the form of the affidavits of Paul Pronio, William Ochrymowicz, and Joseph Tiernan, each of whom affirmed that they saw the promotional package at car dealerships and related businesses and thought, as a result, that the plaintiff was a criminal. (Plaintiff's Exh. G, Affidavits of Paul Pronio, William Ochrymowicz, and Joseph Tiernan.) Thus, I conclude that plaintiff will be able to present proof at trial from which a reasonable jury could find in plaintiff's favor on the fourth and fifth statutory elements of defamation.

case involving defamation-by-implication, the defendant must establish the truthfulness of the *implication* arising out of the literally true facts.

I have concluded that while the article in which Fanelle is named and pictured and the accompanying vignettes and statistics may well have been true and accurate in isolation, a reasonable person could find that the implication of these materials, published together and viewed as a whole, was false and defamatory to Fanelle. Defendant repeats its mantra of the truth of the *Philadelphia Inquirer* article without ever squarely addressing with fundamental question in this case, which is whether an untrue, defamatory implication arose from the promotional package *as a whole*. Defendant has produced no evidence from which a reasonable jury could infer that the implication that plaintiff was a car thief was true, and it seems unlikely that it could. All the evidence on the record supports Fanelle's contention that he was not a thief; he was found not guilty of all charges arising out of his arrest in July 1997, while, as plaintiff's counsel reports, every person arrested with him and tried was convicted.¹¹ Therefore, I conclude that defendant's assertion of the defense of truth fails as a matter of law.

Because I conclude that there are genuine issues of material fact as to the statutory elements of defamation and that the privileges asserted by defendant do not apply here, the motion of defendant for summary judgment on plaintiff's defamation claim will be denied.¹²

d. Fair Report Privilege

¹¹ Counsel for plaintiffs reports that two of the individuals pictured and named in the *Philadelphia Inquirer* article were found guilty of the charges arising out of the July 21, 1997, arrest, and the third is a fugitive.

¹² I do not reach today defendant's contention that Fanelle is not entitled to punitive damages because plaintiff has not proven actual malice. Plaintiffs have presented a colorable argument in defense of this assertion by defendant which will require the Court to consider the nuances of the evidence at trial. I will decide the legal issue at a later stage in the case.

Defendant Lojack argues that even if plaintiff has met the elements of defamation, the publication of the promotional package was privileged, and plaintiff cannot, as he is required to under the seventh statutory element, demonstrate that LoJack abused that privilege. Specifically, LoJack contends that it is protected by the “fair report” privilege, which the Restatement defines in the following manner:

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

See Restatement (Second) Torts § 611 (1977) (adopted by the Supreme Court of Pennsylvania in Curran v. Philadelphia Newspapers, Inc., 497 Pa. 163, 183, 439 A.2d 652 (1981)).

The fair report privilege is an exception to the common law rule that one who republishes a libelous communication adopts it as his own and becomes liable as if she had originated the communication. See J. Thomas McCarthy, The Rights of Publicity and Privacy § 8.67 p. 8-46 (1999). The privilege allows a publisher to repeat defamatory statements made during covered proceedings (judicial proceedings, official government actions, legislative and executive sessions, law enforcement efforts) without being liable for defamation. See id. LoJack contends that the initial publication of the *Philadelphia Inquirer* article by the newspaper was protected from a defamation suit by the fair report privilege, and that because LoJack merely republished the article in an unaltered form, LoJack, too, may invoke the same fair report privilege.

LoJack offers absolutely no support for the quantum logical leap required to maintain its assertion of the fair report privilege. The fair report privilege is “a privilege for *the press* to report accounts of official proceedings or reports even when these contain defamatory statements.” See Medico v. Time, Inc., 643 F.2d 134, 138 (3d Cir. 1981) (emphasis added);

Sciandra v. Lynett, 409 Pa. 595, 600, 187 A.2d 586, 588 (1963) (“Upon the theory that it is in the public interest that information be made available as to what takes place in public affairs, a newspaper has the privilege to report the acts of the executive or administrative officials of government.”) (emphasis added); Oweida v. Tribune-Review Pub. Co., 410 Pa. Super. 112, 118-19, 599 A.2d 230 (1991) (“To ameliorate the chilling effect on the reporting of newsworthy events occasioned by the combined effect of the republication rule and the truth defense, the law has long recognized a privilege for *the press* to publish accounts of official proceedings or reports even when these contain defamatory statements.”) (emphasis added).¹³ Defendant does not point to, and I could not find, any Pennsylvania case in which the fair report privilege was successfully asserted by a non-media defendant. LoJack may enjoy the press attention it receives, but it is not the press, and thus may not assert the fair report privilege.

Furthermore, this is not a case of a mere republication of a defamatory statement; this is a case of a truthful statement being republished in a manner and context that transforms it into a statement with defamatory meaning. The article alone is not the basis of plaintiff’s claim; it is the context in which LoJack placed the article, and the unique impression arising out of that context, that is the basis of plaintiff’s claim. Thus, I conclude that LoJack’s contention that it merely mimicked the *Philadelphia Inquirer* by republishing its article, and therefore may assert a privilege that the *Inquirer* might assert as a defendant, is without merit.

Because plaintiff has demonstrated a genuine issue of material fact as to each of the elements of defamation set forth in 42 Pa. C.S. § 8343, I conclude that Fanelle has shown that he

¹³ I also note that the illustrations in the Restatement section addressing the fair report privilege reference only newspaper publications, and the cases cited in the annotations section of the Restatement reference media cases exclusively. See Restatement (Second) Torts § 611.

can present evidence at trial from which a reasonable jury could find in his favor on the defamation claim.

e. *Public Concern*

LoJack asserts a defense under the third of Pennsylvania's statutory defenses by arguing that the matter addressed in the *Inquirer* article and the promotional package was one of public concern. LoJack contends that a defamatory statement is not actionable where the subject matter of the defamatory communication was one of public concern. I do not believe that LoJack may assert such a defense in this case.

First, the fair report privilege, as set forth in the Restatement, allows media to report on matters of "public concern," and thus, the public concern privilege asserted by LoJack appears to be addressed by the fair report privilege. Second, to the extent that LoJack is arguing generally that any person or entity publishing a defamatory statement on a matter of public concern is immune from suit, LoJack is on very thin ice.

Pennsylvania's "public concern" defense appears to have been inspired by the United States Supreme Court's First Amendment jurisprudence, which has addressed the statements of public concern in the defamation context on numerous occasions. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997 (1974), the Supreme Court held that a private person need not prove actual malice when she is defamed on a matter of public interest, but must prove actual malice to recover punitive damages. See id. at 447. Then, in a case arising out of Pennsylvania, the Court held that where a defamatory statement is on a matter of public concern, the plaintiff must prove that the statement was false when seeking to recover damages against a media defendant. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777-78, 106 S. Ct. 1558

(1986). Most recently, the Court held that statements of opinion about a private individual on matters of public concern require a showing of falsity and some level of fault, but declined to create a separate constitutional privilege for statements of opinion. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 20-21, 110 S. Ct. 2695 (1990).

Gertz makes it clear that actual malice is not required in a case in which a private individual is defamed on a matter of public concern. However, it is an open question as to whether falsity is required in such a case. All of the defendants in this line of Supreme Court cases were media defendants, and in both Hepps and Milkovich, the cases dealing with whether falsity is required to prevail in a defamation case involving statements about private individuals on matters of public concern, the Supreme Court "reserved judgment on cases involving nonmedia defendants." Milkovich, 497 U.S. at 20 n.6. Thus, I am faced with the question of whether the First Amendment requires a private-figure plaintiff to prove falsity where the alleged defamatory statement involves a non-media defendant and a matter of public concern. This appears to be an issue of first impression in this circuit, if not in this nation, as I could find no recent decisions that addressed the issue left open by Milkovich and Hepps.

The question is simplified by examining the nature of the alleged defamatory statement in this case. The statement at issue here is garden variety commercial speech. Such speech holds a "subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." Florida Bar v. Went For It, Inc., 515 U.S. 618, 623, 115 S. Ct. 2371 (1995) (quoting Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477, 109 S. Ct. 3028 (1989) (quoting Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456, 98 S. Ct. 1912 (1978))). Media reports, on the other hand,

lie at the core of the First Amendment, and thus are accorded substantial protections. See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 939, 98 S. Ct. 1535 (1978); Gertz, 418 U.S. 323, 342, 94 S. Ct. 2997 (1974); Sheppard v. Maxwell, 384 U.S. 333, 350; 86 S. Ct. 150 (1966).¹⁴ Therefore, I conclude that in defamation cases involving commercial speech by non-media defendants about private individuals, even when that speech touches on matters of public concern, the speech is not entitled to elevated levels of First Amendment protection, and therefore proof of falsity is not required.

It is clear that Fanelle is a private individual and that the subject matters of the defamatory statement here (car theft, in general, and his arrest, specifically) were of public concern. However, in publishing its promotional package, LoJack cannot possibly claim that it was engaged in anything but commercial speech. LoJack was merely hawking its wares, and any attempt to clothe its commercial speech in the mantle of news reporting is rejected by this Court. Accordingly, I conclude that the commercial speech at issue in this case receives only moderate, not enhanced, protection under the First Amendment, that the public concern defense is not available to LoJack, and that Fanelle need not prove falsity to prevail on his defamation claim.¹⁵

2. False Light

The Supreme Court of Pennsylvania has adopted the Restatement's definition of invasion

¹⁴ The Supreme Court acknowledged the elevated status of media defendants in defamation cases in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558 (1986), where it observed, "To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages *against a media defendant* for speech of public concern." Id. at 776 (emphasis added).

¹⁵ Furthermore, even if Fanelle were required to prove falsity or actual malice, I believe there is a genuine issue of material fact as to whether LoJack acted with reckless disregard, and that plaintiff has provided ample evidence from which a reasonable jury could find that the implication to which the LoJack promotion package gave rise, that he was a car thief, was in fact false. Therefore, plaintiff would prevail on this defense, regardless.

of privacy and thus adheres to the Restatement's definition of the sub-tort of invasion of privacy, false light:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977). See Vogel v. W. T. Grant Co., 458 Pa. 124, 129 n.9, 327 A.2d 133 (1974).

It can be difficult to distinguish between the tort of false light invasion of privacy and the tort of defamation. Some commentators have characterized false light as “the right to be left alone,” whereas defamation protects one’s interest in a good reputation, but the lines between them can blur. See Rodney A. Smolla, Law of Defamation, Vol. 1, § 10:10 (2nd ed. 2000). There are a few key distinctions between the two. First, false light requires only proof of the falseness of the communication; it does not require harm to reputation or any other social consequences inherent in a defamation action. Thus, where a publication is false and offensive to plaintiff but might not harm the reputation of plaintiff, plaintiff would have a cause of action for false light, but likely would not be able to proceed with a defamation claim. Second, false light requires scienter, or at least reckless disregard, whereas defamation claims not involving public figures or matters of public concern require only a showing of negligence. See Rush v. Philadelphia Newspapers, Pa. Super. , 732 A.2d 648, 654 (1999). Third, the communication must be highly offensive to a reasonable person in a false light claim, while there is no such requirement in a defamation suit. See id. Fourth, false light requires “publicity,” meaning widespread

dissemination, as opposed to mere “publication” under defamation. See Smolla, at § 10:10.

Commentators appear to agree that a false light claim presents a higher hurdle for plaintiff to surmount than a defamation claim. See Smolla, at § 10:10.

I conclude that Fanelle has produced evidence from which a reasonable jury could find that defendant LoJack widely disseminated a promotional package that gave readers the impression that he was a car thief. As discussed above, there is evidence that the impression given by the package was a false one, and that there is no question that such a false impression would be highly offensive to a reasonable person. On the basis of this evidence, I conclude that a reasonable jury could find that plaintiff has established the elements of a claim for false light invasion of privacy.

Therefore, defendant’s motion for summary judgment on plaintiff’s false light claim will be denied.

3. Appropriation of Publicity

Plaintiff also seeks recovery under another of the invasion of privacy sub-torts – appropriation of publicity – claiming that LoJack appropriated for its own use or benefit his name and likeness. See Restatement (Second) of Torts § 652C (1977). LoJack counters that plaintiff has not proved that his name and image had commercial value or that defendant’s use of his name and image diminished that value.

Appropriation is less concerned with reputation or feelings than it is a person’s property interest in their own identity. See Restatement (Second) of Torts, at § 652C cmt a. Essentially, each person has an exclusive right to their own name and likeness, and the unauthorized use of one’s identity violates that exclusive right and gives rise to an appropriation cause of action. See

id. The tort of appropriation arises most commonly in the context of the use of names and images in commercial advertisements. See id. at cmt. b.

While the Supreme Court of Pennsylvania has recognized the existence of the tort of appropriation in the invasion of privacy context, the Supreme Court has not addressed it with any specificity. See, e.g. Marks v. Bell Tel. Co., 460 Pa. 73, 86, 331 A.2d 424 (1975). Therefore, I must predict how the Supreme Court would decide this issue.

Such a prediction is not easily made, as this case finds itself in the center of a skirmish that has long simmered in the area of appropriation law over whether a non-celebrity may assert a claim for appropriation of publicity. On one side are courts that have held that only celebrities have a right of publicity, because their images have demonstrated economic worth for which advertisers typically pay in order to benefit from the association with their products. See, e.g., Pesina v. Midway Mfg. Co., 948 F. Supp. 40, 42 (N.D. Ill. 1996) (“The plaintiff ... must show that, prior to the defendant’s use, the plaintiff’s name, likeness, or persona had commercial value.”); Ali v. Playgirl, Inc., 447 F. Supp. 723, 729 (S.D.N.Y. 1978) (“[T]his right of publicity is usually asserted only if the plaintiff has achieved in some degree a celebrated status.”). On the other side are courts that have concluded that even the identities of non-celebrities have commercial value and that all individuals have a publicity right in their identities, and that non-celebrities may therefore assert an appropriation of publicity claim. See, e.g., Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974); KNB Enters. v. Matthews, 78 Cal. App. 4th 362, 373 n.12, 92 Cal. Rptr. 2d 713 (2000).

The latter perspective – that non-celebrities may bring an appropriation of publicity claim – is the majority view among courts that have considered the issue. See J. Thomas McCarthy,

The Rights of Publicity and Privacy § 4.3(c) pp. 4-14-17 (1999). I find the logic of this perspective to be persuasive. The Court of Appeals for the Ninth Circuit commented in Motschenbacher,

Generally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury suffered. However, it is quite possible that the appropriation of the identity of a celebrity may induce humiliation, embarrassment and mental distress, while the appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously valueless.

Motschenbacher, 498 F.2d at 824. Inherent in the act of a defendant using a person's name, identity, or persona in a commercially advantageous manner is the presumption that the identity has commercial value. Furthermore, distinguishing between celebrities and non-celebrities presents a daunting challenge, the least of which is how to deal with the fact that on some occasions, the communication at issue case itself may give rise to celebrity status that had not existed before. Moreover, I am convinced that the right of publicity resides in every person, not just famous and infamous individuals.

Because the majority of courts and solid reasoning favor the position that non-celebrities may bring an appropriation claim, I predict that the Supreme Court or Pennsylvania would, if confronted with this question, hold that celebrity status is not a *sine qua non* of a finding of liability in an appropriation claim.¹⁶

Despite the fact that Peter Fanelle had apparently achieved no appreciable amount of fame prior to his arrest on July 21, 1997, I conclude that he had a right of publicity regarding his name and image. Considering the manner and circumstances of the "re-publication" by LoJack, a reasonable jury could find that from a business perspective, LoJack included the *Philadelphia*

¹⁶ Of course, one's celebrity status and the effect of the communication at issue may be taken into account in ascertaining damages. See Motschenbacher, 498 F.2d at 824 (9th Cir. 1974).

Inquirer article with Fanelle's picture and name because the article offered a vivid, valuable news account of the effectiveness of the LoJack system. A jury also could infer that the names and the pictures brought a reality and a concreteness to the story that made the article a more powerful advertisement for LoJack, and, therefore, had value for LoJack. LoJack is certainly not in the shoes of the *Inquirer*, which had a right to publish an account of the very public events of the police investigation and recovery of stolen cars and the identities of the suspects. There is, then, a genuine issue of material fact as to whether Fanelle's picture and name were used to the benefit of LoJack without Fanelle's permission. Accordingly, the motion for summary judgment as to plaintiff's appropriation claim will be denied.

4. Damages for Emotional Distress

Defendant argues that plaintiff may not recover damages for emotional distress under his defamation and invasion of privacy claims. Relying on the decision of the Superior Court of Pennsylvania in Wecht v. PG Publishing Co., Pa. Super. , 725 A.2d 788 (1999), defendant argues that expert medical testimony is required to prove mental and emotional distress damages arising out of defamation and invasion of privacy claims.

Wecht involved an appeal taken from a motion to exclude evidence of emotional distress damages in a doctor's false light invasion of privacy claim arising out of a newspaper article. See id. at 789. The Court observed that while lay testimony concerning the mental and emotional distress plaintiff suffered could be sufficient in most circumstances, invasion of privacy claims demand the additional showing that the emotional damages are "of a kind that normally results from such an invasion." Id. at 792 (citing Restatement (Second) of Torts § 652H). The court held that expert testimony is required to establish the kind of emotional damages that "normally

result[.]” from an invasion of privacy because a lay witness could not make that determination on her own. See id.¹⁷

The Supreme Court of Pennsylvania has not held a plaintiff must produce expert medical testimony to recover damages for emotional and mental distress arising out of defamation and invasion of privacy claims. Wecht is not binding on this Court, and I do not find its reasoning to be persuasive. While a lay *witness* might not be able to compare a person’s mental or emotional distress to that which “normally results from” an invasion of privacy, I believe a reasonable *jury* could infer from lay testimony, without expert testimony, whether the emotional distress suffered by a person as a result of an invasion of privacy is commensurate with the level of emotional distress one would normally expect to result from such conduct.

I do not read the Restatement language relied upon by the Superior Court in Wecht to require expert testimony on emotional distress damages in all invasion of privacy or defamation cases. The Restatement comment demands no more than any other case involving emotional distress damages that requires the factfinder to make a determination about whether a person’s claimed emotional distress is warranted. Factfinders routinely make such determinations with and without the help of expert medical testimony. Inherent in that determination is a judgment as to whether the distress suffered is the kind one would reasonably expect a reasonable person to suffer under such circumstances. While expert testimony certainly is helpful in establishing damages in an area as complex as emotional and mental distress, I do not believe expert

¹⁷ I note that the Restatement comments on damages in the defamation setting include no language requiring emotional distress to be measured against that which “normally results from” such conduct. See Restatement (Second) Torts §§ 621, 623. Therefore, Wecht has absolutely no application in the defamation setting because the invasion of privacy Restatement language upon which it relies is absent in defamation.

testimony is a required to show emotional damages in these kinds of cases.

Accordingly, I predict that the Supreme Court of Pennsylvania would, if confronted with this question, conclude that expert medical testimony is not required to prove emotional distress damages in invasion of privacy and defamation cases. However, while expert medical testimony is not required in such cases, I believe the jury still may be called upon to make a discrete finding that plaintiff has proved that the claimed emotional damages are of the type that normally results from defamation or invasion of privacy.

There is deposition testimony that Peter Fanelle suffered emotional distress following the publication of the Lojack promotional package. (Defendant's Exh. H, Deposition of Peter Fanelle, Feb. 24, 2000, at 72-73.) A reasonable jury could find on the basis of that evidence that plaintiff is entitled to damages for emotional distress. Accordingly, I conclude that there remains, in this action, a genuine issue of material fact as to whether plaintiff may recover damages for emotional distress resulting from defamation or invasion of privacy.

5. Loss of Consortium

The Supreme Court of Pennsylvania relies upon the definition of loss of consortium found in Black's Law Dictionary, Cleveland v. Johns-Mansville Corp., 547 Pa. 402, 408, 690 A.2d 1146 (1997), which reads:

Consortium. Conjugal fellowship of husband and wife, and the right of each to the company, society, co-operation, affection, and aid of the other in every conjugal relation. Loss of 'consortium' consists of several elements, encompassing not only material services but such intangibles as society, guidance, companionship, and sexual relations.

Black's Law Dictionary, 309 (6th ed. 1990). A loss of consortium claim arises out of the relationship between spouses and is "grounded on the loss of a spouse's service after injury."

Sprague v. Kaplan, 392 Pa. Super. 257, 257, 572 A.2d 789 (1990). A person who suffers a loss

of consortium does not sustain a physical injury; rather experiences an injury to marital expectations. See Darr Constr. Co. v. Workmen's Compensation Appeal Bd., 552 Pa. 400, 406, 715 A.2d 1075 (Pa. 1998) (quoting Anchorstar v. Mack Trucks, Inc., 533 Pa. 177, 620 A.2d 1120 (1993)). Any action for loss of consortium is derivative, however, the viability of such a claim depends upon the substantive merit of the injured party's claims. See Schroeder v. Ear, Nose & Throat Assoc., 383 Pa. Super. 440, 443, 557 A.2d 21 (1989).¹⁸

Plaintiff Susan Fanelle testified at her deposition that as a result of the LoJack promotional package, she began to doubt the fact that her husband was innocent of the charges arising out of his July 21, 1997 arrest. (Defendant's Exh. G, Deposition of Susan Fanelle, Feb. 24, 2000, at 70-71.) She also testified that as a result of the LoJack promotional package, she and her husband argued frequently, periodically did not speak to one another, and did not engage in sexual congress for three to four months. (Id. at 92-94; Plaintiff Susan Fanelle's Answer to Defendant's Interrogatories, at 8.) There is evidence that her mental and physical health suffered, too, as a result of the events at issue here. (Id. at 48-54.)¹⁹

From this evidence, I conclude that a reasonable jury could find that Susan Fanelle suffered a loss of the services of her spouse, Peter Fanelle, as a result of LoJack's conduct. Accordingly, defendant's motion for summary judgment as to the claim of Susan Fanelle for loss of consortium will be denied.

Conclusion

¹⁸ I could find no cases requiring, as defendant contends, a physical injury to the spouse not asserting the loss of consortium claim. To the contrary, one of the cases cited by defendant, Dugan v. Bell Telephone, 876 F. Supp. 713 (W.D. Pa. 1994), holds that the injury to the other spouse may be emotional *or* physical. See id. at 728.

¹⁹ I have not concluded that Peter Fanelle's claims fails, and therefore Susan Fanelle's loss of consortium claim does not fail on derivative grounds.

Plaintiff Peter Fanelle has produced enough evidence for a reasonable jury to find that the promotional materials created and distributed by defendant LoJack carried with them a defamatory implication. There is also a genuine issue of material fact as to whether LoJack invaded the privacy of Fanelle by placing him in a false light and by appropriating his likeness for its own benefit. Finally, there remains a genuine issue of material fact on the loss of consortium claim of Susan Fanelle. Accordingly, defendant's motion for summary judgment will be denied.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PETER FANELLE and SUSAN FANELLE,	:	CIVIL ACTION
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
LOJACK CORPORATION,	:	
Defendant.	:	
	:	
	:	NO. 99-4292

O R D E R

AND NOW, this 7th day of December, 2000 upon consideration of the motion of defendant LoJack Corporation for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (Document No. 15), and the response of plaintiffs Peter Fanelle and Susan Fanelle, as well as the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, and having concluded, for the reasons set forth in the foregoing memorandum, that there remain genuine issues of material fact as to all of plaintiffs' remaining claims and that defendant is not entitled to judgment as a matter of law, **IT IS HEREBY ORDERED** that the motion of defendant is **DENIED**.

IT IS FURTHER ORDERED that the parties shall discuss settlement and plaintiffs shall provide to the Court a written report as to the status of the settlement discussions no later than Friday, January 5, 2001.

LOWELL A. REED, JR., S.J.