

Tab 10

Deposition of Gene J. Puskar

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

VALENCIA M. McCLATCHEY,)	
)	
Plaintiff,)	
)	
vs.)	
)	
THE ASSOCIATED PRESS,)	Civil Action
)	No. 05-145J
Defendant.)	

- - - -

DEPOSITION OF: GENE J. PUSKAR

- - - -

DATE: March 15, 2006
Wednesday, 9:30

LOCATION: Eckert Seamans Cherin &
Mellott
44th Floor - US Steel Tower
Pittsburgh, PA 15219

TAKEN BY: Plaintiff

REPORTED BY: Keith G. Shreckengast, RPR
Notary Public
AKF Reference No. KS93223

CERTIFIED TRANSCRIPT

1 Q. Do you know what photograph did you take of
2 Ms. McClatchey, or photographs did you take of
3 Ms. McClatchey to accompany the article by
4 Charles Sheehan?

5 A. Took a photograph of her photograph. That's
6 all I can really recall.

7 Q. Did you take any photographs of her?

8 A. You know, I can't really recall whether I did
9 or not.

10 Q. You said you took a photograph of her
11 photograph. Her photograph is the photograph
12 that's called End of Serenity with the plume of
13 smoke; is that correct?

14 A. I don't know what it's called, but it does have
15 a plume of smoke that's purported to be the
16 Flight 93 plane. Yes. That's the picture with
17 the red barn?

18 Q. Yes. Where did you take the photograph of the
19 photograph?

20 A. She was holding it for me outside the side door
21 of her house.

22 Q. She was holding what?

23 A. Her photograph.

24 Q. And you took a photograph of that photograph?

25 A. Correct.

1 Q. What did you tell her when you were taking the
2 photograph?

3 A. I don't recall. What did I tell her when I was
4 taking the photograph? I don't recall
5 specifically if I would be saying anything to
6 her when I was taking the photograph.

7 Q. So was she posing by the side door of her house
8 when you were photographing the photograph?

9 A. Posing, I don't understand what that would
10 mean. She was holding the photograph by the
11 side of her house. And I don't know that she
12 was posing, she was holding the photograph. As
13 an AP photographer, I'm not really supposed to
14 or ethically inclined to set up a picture.
15 Therefore posing a subject -- if I were to
16 photograph you, right now would be a good
17 picture, the way you are. If you were gussied
18 up and sitting behind your office desk with
19 your yellow pad in front of you, with your
20 glasses in your hand, that would be posing.
21 That's not something I'd be interested in.
22 It's not something that I do as a journalist.
23 It's kind of a documentary thing. So whether
24 she was posing is -- she wasn't posing for me.
25 We were standing outside her side door like you

1 and I would be standing outside a side door.

2 Q. How did you come to meet her at her side door
3 with the photograph?

4 A. She came to the door and greeted me, went back,
5 got her photo, came back out.

6 Q. And what did you say you were there for?

7 A. I was there to photograph her for the Charles
8 Sheehan story, whom she had already been
9 interviewed by. And she was welcoming, and
10 brought the picture out, stood there, we
11 talked. And I took a few snaps and was on my
12 way.

13 Q. Did you tell her you were going to photograph
14 her photograph and use it in the story?

15 A. Yes. She volunteered to give me one. And I
16 didn't want to be responsible for it. I said
17 here, I could do it this way, hold the picture,
18 just hold it right there. I'm assuming, having
19 said that to her, she knew I was taking a
20 picture of her picture.

21 Q. Your testimony is that you don't know that she
22 knew you were taking a picture of the picture
23 versus taking a picture of her holding the
24 picture; is that correct?

25 A. No, that's not my testimony.

1 earlier as -- I don't think it was noted as a
2 file photo. So it was -- that's an AP's
3 transmission copy, yes.

4 Q. And does the photograph in Plaintiff's Exhibit
5 4 represent the photograph that you personally
6 transmitted to the AP?

7 A. Yes, it does.

8 Q. So as you look at that photograph now, can you
9 tell me whether or not the photograph you took
10 of Ms. McClatchey's photograph was cropped or
11 altered just to show a portion of the
12 photograph?

13 A. Yes. That's not a 35 millimeter frame that's
14 represented there. So the frame that I shot
15 was a 35 millimeter frame, which would have
16 been longer. And again, I would need to see my
17 full image, full frame image, but that's not
18 it.

19 Q. That's not what?

20 A. That's not the full image that I would have
21 seen in my camera when I copied her image.

22 Q. Is that the full image you submitted to the
23 Associated Press, Plaintiff's Exhibit 4?

24 A. Uh-huh.

25 Q. So regardless of what showed up on your camera,

1 what was transmitted to the Associated Press is
2 the photograph in Plaintiff's Exhibit 4
3 correct?

4 A. Yes, it is.

5 Q. I'm going to hand you what's being marked as
6 Plaintiff's Exhibit 25. It's a copy of, color
7 copy of a photograph. It's got a title End of
8 Serenity, September 11, 2001, and in the bottom
9 right corner it's got Valencia McClatchey
10 copyright 2002, MC 00434. Do you recognize
11 this photograph?

12 A. This specific photograph, this copy of that
13 photograph?

14 Q. Yes.

15 A. No.

16 Q. Do you recognize the photograph that's in
17 Plaintiff's Exhibit 25?

18 A. I recognize the image of the cloud of smoke,
19 yes, I do.

20 Q. And is that the image that you took your
21 photograph of and submitted to the Associated
22 Press?

23 A. Yes.

24 Q. And if you look at your image in Plaintiff's
25 Exhibit 4, and you compare it to the image in

1 Plaintiff's Exhibit 25, let's start with the
2 bottom portion, it appears that all of the road
3 underneath the barn is cropped off?

4 A. Uh-huh.

5 Q. From Plaintiff's Exhibit 4; is that correct?

6 A. Uh-huh.

7 Q. It also appears that on the left side of the
8 photograph that the road and at least 1 to 2
9 inches of Plaintiff's Exhibit 25 is cropped
10 off; is that correct?

11 A. Yes.

12 Q. And if you look at the top, the top right of
13 Plaintiff's Exhibit 25 has what appears to be a
14 gutter sticking out. And if you compare the
15 top of the photograph in Plaintiff's Exhibit 25
16 to the one in Plaintiff's Exhibit 4 that you
17 submitted to the AP, it appears to also be
18 cropped off; is that correct?

19 A. Yes.

20 Q. And then if you look at the right side of
21 Plaintiff's Exhibit 25 versus the right side of
22 Plaintiff's Exhibit 4, which is the photograph
23 you submitted to the AP, it also appears to
24 have been cropped off; is that correct?

25 A. Yes.

1 Q. So the photograph you took of the photograph,
2 of Miss McClatchey's photograph, was cropped on
3 all four sides; is that correct?

4 A. No.

5 Q. Could you explain that, please?

6 A. This photograph in Exhibit 4 is not the
7 photograph I shot of Mrs. McClatchey's -- this
8 does not represent the image as it was cropped
9 when I copied her image. We're just going to
10 assume for my explanation that this picture you
11 gave me is the picture she held up.

12 Q. Yes.

13 A. I shot a picture of this picture with a 35
14 millimeter frame. This does not represent a 35
15 millimeter frame. What I shot had more
16 information than this transmitted picture. It
17 is a 35 millimeter frame, which is 1 1/2 --
18 1 3/4 x 1 1/4 deep, which probably was
19 something like that in my camera, or maybe it
20 was like that in my camera.

21 Q. If I could stop you so I can clarify, when you
22 say like that, a 35 millimeter camera would
23 have been thinner and longer; is that correct?
24 So the top and the bottom of the photograph
25 would have been cut off a little, and your

1 photograph would have been longer on the sides
2 than the one that was submitted?

3 A. If we were to look at this frame with a 35
4 millimeter dimension, you would go side to
5 side, and yes, you would have to come down
6 either on the top or up from the bottom, or a
7 little bit of top and bottom to get a 35
8 millimeter ratio. Because this is, I am
9 assuming, an 8 x 10 perspective. That's my
10 point, this --

11 Q. And by this you mean Plaintiff's Exhibit 4?

12 A. Yes. The transmitted photo in 4 is almost an
13 8 x 10 image perspective. And so my original
14 file would have had more information on it,
15 that was cropped off.

16 Q. And what happened to the information in your
17 original file prior to you transferring it to
18 the Associated Press?

19 A. Nothing, it just -- it's in the original file.

20 Q. But the file that you transferred was cropped;
21 is that correct?

22 A. Uh-huh, correct.

23 Q. The file on your computer may have been larger;
24 is that correct?

25 A. Correct.

1 objected to the AP using her photograph for
2 means other than in connection with the story?

3 A. These are -- no.

4 Q. Did Ms. McClatchey say to you you can have my
5 photograph free of charge and can transmit it
6 to all the members and subscribers of the
7 Associated Press?

8 A. By standing there holding it, knowing I was an
9 AP photographer, it's implied to me that she is
10 agreeing to what I'm doing.

11 Q. Did she say anything to you to that effect,
12 that she was granting --

13 A. I don't recall.

14 Q. So Ms. McClatchey did not specifically say
15 anything to the effect of I am granting the AP
16 permission to use my photograph; is that
17 correct?

18 A. Other than by her actions, no.

19 Q. And you said you were there to take a
20 photograph, to photograph Ms. McClatchey; is
21 that correct?

22 A. I said I was there to get pictures to go with
23 Charles' story.

24 Q. Did you get directions to her house from
25 Charles Sheehan?

1 legal conclusions. You are certainly free to
2 give your own personal view.

3 Q. I just want your understanding.

4 A. First of all there was no sign of copyright
5 when I shot the picture. So you're hammering
6 me with copying a copyrighted image. I wasn't
7 aware that I was. And I had a willing woman
8 holding her picture, telling me her story of
9 woe from the past year since this tragedy
10 happened in her backyard. We were talking,
11 heartfelt, about the tragedy, my covering it
12 for ten days, when it happened, my experience
13 at ground zero when it happened. Those are the
14 kind of things that were going on. We were
15 connecting as people. There was no
16 copyright -- there was nothing in this exchange
17 that expressed to me that she didn't know fully
18 well I was there and fully what I was doing.
19 And so I didn't know that the image was
20 copyrighted. And I was there representing the
21 AP to do something that Val McClatchey knew was
22 happening. I didn't sneak up on her. I didn't
23 do this in any way, shape or form to pull the
24 wool over her eyes. She entered into this
25 story with the Associated Press of her own

1 volition. There was no copyright on the image
2 I photographed. I had no idea that there was
3 any issue at all with this woman who was
4 standing there willingly participating in doing
5 and understanding what I was doing.

6 Q. You testified earlier that you didn't know
7 whether or not there was this copyright notice
8 on the photograph?

9 A. Huh?

10 Q. You testified earlier that you didn't know
11 whether there was this copyright notice on the
12 photograph; is that correct?

13 A. I don't know. You're right. I don't know.

14 Q. But can you give me any specifics of this
15 conversation you had with Ms. McClatchey?

16 A. Yeah, specifically she was depressed, had a
17 very tough year, that's the specifics.

18 Q. But there was nothing specifically said on your
19 part, or her part, regarding transferring
20 rights to the Associated Press in the
21 photograph; is that correct?

22 A. That is correct, there were no rights talk at
23 all.

24 Q. Did she offer you a copy of the photograph as a
25 souvenir?

1 Q. Who is Dave Tomlin?

2 A. He is an AP attorney.

3 Q. Did you speak with anyone else at the
4 Associated Press regarding this lawsuit?

5 A. No.

6 Q. If you could you turn to page 4 of Plaintiff's
7 Exhibit 9, the interrogatories, please. At the
8 top of the page it states: Gene Puskar, to
9 whom plaintiff presented the photograph at
10 issue in this matter, created a photograph of
11 that photograph, and transmitted his photograph
12 to the AP along with a caption. Is that an
13 accurate statement?

14 A. Yes.

15 Q. So it is accurate that the plaintiff presented
16 the photograph at issue in this matter to you?

17 A. Presented meaning she held it for me, I would
18 accept that interpretation of presented. As
19 opposed to giving me one?

20 Q. Right.

21 A. I don't buy that.

22 Q. And I believe your testimony earlier was that
23 you don't recall whether or not you accepted a
24 courtesy copy from Ms. McClatchey; is that
25 correct?