

Tab 2

Deposition of James R. Gerberich

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE WESTERN DISTRICT OF PENNSYLVANIA
4 Civil Action No. 05-145J

5 ----- x
6 VALENCIA M. McCLATCHEY,

7 Plaintiff,

8 vs.

9 THE ASSOCIATED PRESS,

10 Defendant.
11 ----- x

12
13
14 DEPOSITION OF: JAMES R. GERBERICH

15 January 19, 2006, 9:10 a.m.
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1 Q. You think that's plausible?

2 A. I do think that's plausible.

3 Q. You think it's plausible for a woman
4 who is financially strapped, had a history of
5 selling the image to news outlets, has been donating
6 money to the foundation for the children affected by
7 the terrorist attacks, to give the right, to give to
8 all of The Associated Press news outlet members and
9 subscribers unrestricted use to use the photograph
10 for no compensation?

11 MR. PENCHINA: Objection. Asked
12 and answered.

13 MR. HALL: That's fine. First
14 I've asked.

15 A. I believe it's very plausible that that
16 may have taken place. From reading the article from
17 the beginning to the end, yes, I think so.

18 Q. Do you think it's plausible that Ms.
19 McClatchey would sell or license her photograph to
20 news outlets for a fee prior to The Associated Press
21 showing up and subsequent to The Associated Press
22 leaving, but in the one instance with The Associated
23 Press not charge a fee for the distribution of her
24 photograph to the majority of the news outlets in

Tab 3

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 going to Ms. McClatchey's house?

2 A. No, I discussed where she lived and why I was
3 going there, which is not what his -- I have
4 not seen his article to this day.

5 Q. But if you're discussing why you were going
6 there, what was that discussion?

7 A. Woman shot a picture in her backyard of Flight
8 93 crashing.

9 Q. That was the extent of it?

10 A. Yes.

11 Q. And so you went to her house to get the
12 picture; is that correct?

13 A. Yes.

14 Q. And you went to the house to get the picture
15 for the AP; is that correct?

16 A. That's correct.

17 Q. Did you offer Ms. McClatchey any money for the
18 picture?

19 A. No.

20 Q. Did you tell Ms. McClatchey that you would
21 transmit the picture to the AP and then in turn
22 transmit it to all the members and subscribers
23 of the AP?

24 A. I did not tell her that.

25 Q. Did you ask Ms. McClatchey whether or not she

1 time did you tell Ms. McClatchey the extent to
2 which the Associated Press would use her
3 photograph?

4 A. I can't recall.

5 - - - -

6 (There was a brief pause in the proceedings.)

7 - - - -

8 BY MR. HALL:

9 Q. Where did you stay when you were covering the
10 one year anniversary?

11 A. The Holiday Inn at the Somerset exit, in
12 Somerset.

13 Q. At what point in time did you determine that it
14 would -- your best course of action was to take
15 a photograph of her photograph?

16 A. Probably made that decision after discussing
17 with her -- well, not discussing with her. On
18 the spot.

19 Q. So you were sent there to photograph her?

20 A. I was sent there -- I was sent there to
21 cover -- to cover all the bases that needed to
22 be covered photographically for Charles' story.
23 And the specifics of what I shoot are left up
24 to me. Whatever I discern from talking to
25 Charles, from the little I knew about the

Tab 4

Deposition of Charles Sheehan

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

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

DEPOSITION OF CHARLES SHEEHAN

MARCH 9, 2006 - 2:00 P.M.

The deposition of CHARLES SHEEHAN, taken pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions, taken before Jerry Satterlee, a Certified Shorthand Reporter duly qualified in the State of Illinois, at 181 West Madison Street, Suite 4500, Chicago, Illinios.

1 Q. You mentioned two articles that you
2 wrote for the AP in '99 and 2000. Was that -- or
3 that you were compensated for outside of a salary.
4 Correct?

5 A. Yeah. I think it was 2000. Around
6 that time.

7 Q. Do you remember what the amount of
8 compensation was?

9 A. No.

10 Q. Can you give me an approximation?

11 A. Several hundred dollars.

12 Q. Do you recall specifically who Ms.
13 McClatchey told you she sold the "End of Serenity"
14 photograph to?

15 A. No. Other than what she had told me
16 and I included in the article.

17 Q. I believe you mentioned you hadn't
18 seen the photograph before you met her, is that
19 correct?

20 A. Correct.

21 Q. Did you see it anywhere after you met
22 her?

23 A. I did search for the image after I
24 had returned from Shanksville to the Pittsburgh

1 bureau.

2 Q. Where did you search for the image at?

3 A. Online in the internet.

4 Q. Did you find it anywhere?

5 A. I did.

6 Q. Do you remember where it was at?

7 A. I don't remember the site.

8 Q. Do you remember what type of web site
9 it was?

10 A. No. If I remember correctly, I
11 searched for articles about the crash that day
12 and then searched images.

13 Q. Was the photograph associated with an
14 article?

15 A. No.

16 Q. And you don't remember what type of
17 web site it was on?

18 A. No.

19 Q. Was it a news web site?

20 MR. BERRY: Objection.

21 BY THE WITNESS:

22 A. I searched for several keywords on
23 the Shanksville Flight 93 and then searched the
24 images tab, and the images that appeared were

1 unassociated with any news web site. They were
2 just freestanding images.

3 BY MS. SZPONDOWSKI:

4 Q. Do you remember what search engine you
5 used?

6 A. I don't.

7 Q. Do you remember if it was Google or
8 Yahoo?

9 A. I don't remember.

10 Q. Which search engine did you normally
11 use?

12 A. I use -- This year, this past year, I
13 have used Google.

14 Q. What did you use before Google?
15 Generally?

16 A. Alta --

17 Q. Alta Vista?

18 A. Alta Vista. Netscape. A number of
19 different search engines.

20 Q. Was McClatchey one of your keywords?

21 A. No.

22 Q. Why did you search for the photograph
23 on the internet after you met her?

24 A. Curiosity.

1 Q. What were you looking for?

2 A. The image itself.

3 Q. Any reason why?

4 A. Curiosity.

5 Q. What do you mean by curiosity?

6 A. I hadn't seen -- I had seen one image
7 of the incident and looked at it a couple days
8 later to see if I remembered correctly.

9 Q. But she did show you the photograph
10 when you met her, correct?

11 A. Yes.

12 Q. The notes that you took in your
13 notebook, do you recall if you used pen or pencil?

14 A. I used a pen.

15 Q. How many years have you been writing
16 articles for newspapers and news organizations?

17 A. Fifteen years.

18 Q. And in those fifteen years, how often
19 has a notebook with your notes in it been
20 destroyed?

21 A. Three times that I can remember.

22 Four times.

23 Q. Let's talk about those four times.

24 Can you describe for me how they were destroyed,

Tab 5

Deposition of Valencia M. McClatchey

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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: VALENCIA M. McCLATCHEY

DATE: March 14, 2006
Tuesday, 9:30

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

TAKEN BY: Defendant

REPORTED BY: Keith G. Shreckengast, RPR
Notary Public
AKF Reference No. KS93222

ORIGINAL

1 losing, being in bankruptcy at the time. And
2 how the area in general has changed. How we're
3 all reacting to being thrown into the
4 spotlight.

5 Q. Did you understand that Mr. Sheehan would be
6 writing something for publication by the AP
7 based on your conversations with him?

8 A. Yes, I did understand that.

9 Q. Did you have any further conversations with
10 Mr. Sheehan beyond those that we already
11 discussed?

12 A. No.

13 Q. Did you have any conversations with any other
14 representative of the Associated Press?

15 A. The only other representative of the Associated
16 Press would have been the photographer who was
17 present and took a photo of me holding the
18 photo in my living room.

19 Q. Where you say the photographer was present, the
20 photographer was present when Mr. Sheehan came
21 to your house?

22 A. Yes, he was.

23 Q. Do you have an absolute recollection of
24 Mr. Sheehan and the photographer being present
25 together at your house?

1 A. Yes, I do.

2 Q. Why did you or what did you understand the
3 photographer to be doing and why was he
4 present?

5 A. He was taking a photo of me holding my photo,
6 and the camera that I took the photo with, I
7 was sitting on my sofa, in relation to the
8 article.

9 Q. Are you familiar with the complaint in this
10 action?

11 A. Can you explain what you mean?

12 Q. Sure, you are the plaintiff in a case against
13 the Associated Press.

14 A. Yes, I am.

15 Q. Is that correct?

16 A. That is correct.

17 Q. And as plaintiff, are you aware that a document
18 called a complaint was filed to initiate the
19 action?

20 A. I understand that.

21 Q. And are you aware that there were attachments
22 to the complaint when it was filed, and those
23 attachments included some pictures and certain
24 other things, do you recall that?

25 A. I'm not sure what you mean.

1 MR. PENCHINA: This is the complaint,
2 counsel. I'm not going to mark this as an
3 exhibit. I'm just going to show it to her for
4 references.

5 BY MR. PENCHINA:

6 Q. Do you, Ms. McClatchey, recognize the complaint
7 that was filed?

8 A. May I take a look?

9 Q. Sure. And for the record, I'm not going to be
10 asking you any questions about the pleadings, I
11 just wanted to know if this is familiar, and in
12 particular if you can turn to the attachments,
13 one of the attachments to this is a newspaper
14 article. Do you recall that newspaper article
15 being attached to the complaint?

16 A. Yes, this is the photo, the article that I had
17 agreed to.

18 Q. So attached to the complaint is an article, and
19 I think you said that this is the article that
20 you agreed to?

21 A. This is the article that I had agreed to. This
22 particular --

23 Q. And by agreed to meaning this is what Charles
24 Sheehan had interviewed you for?

25 A. Yes, this is the one.

1 Q. Is that picture the one that appears attached
2 to the complaint as part of this article the
3 photo of you holding your photo that you
4 testified about before?

5 A. This is my personal copy of the photo, yes.

6 MS. SZPONDOWSKI: Just for the
7 record, we're talking about Exhibit C to the
8 complaint.

9 MR. PENCHINA: Correct, thank you.

10 BY MR. PENCHINA:

11 Q. Exhibit C attached to the complaint contains
12 this photo, and just to be clear, you testified
13 that the AP photographer took a picture of you
14 sitting on the couch holding the photo?

15 A. Yes.

16 Q. Is this that picture?

17 A. This is that picture.

18 Q. Did any other photographers besides those
19 affiliated with AP come to your house to take
20 your picture holding the photo?

21 A. Yes.

22 Q. Which other photographers came to your house to
23 take your picture holding the photo?

24 A. Those photographers related to the news
25 stations, KDKA, WTAE-TV, Fox, WJAC-TV.

1 Q. So in each of those instances a photographer
2 came out and took a picture of you holding the
3 photo?

4 A. Yes.

5 Q. Did any of the photographers come out and not
6 take a picture of you holding the photo?

7 A. They took photos of me outside, with the same
8 background and so forth.

9 Q. Did any of the photographers take a photo of
10 just the photo?

11 A. Not that I am aware of, no.

12 Q. With all of those photographers coming out and
13 taking your picture holding the photo, is there
14 any chance that you have confused some of them
15 for each other?

16 A. I don't believe so.

17 Q. And just to ask this one more time, you're
18 certain that the AP photographer came out with
19 the AP reporter and came into your house to
20 take the photo that was attached to the
21 complaint?

22 A. Yes, I am certain.

23 Q. Did an AP representative ever contact you
24 following the three occasions on which you
25 conversed with Mr. Sheehan?

1 copyright 2003?

2 A. Yes.

3 Q. Do you currently have, or have you had during
4 the pendency of this lawsuit any copies of a
5 printout which would have a 2003 date in the
6 copyright notice?

7 A. At this time no, I don't.

8 Q. What about during anytime since the lawsuit has
9 been filed?

10 A. Most likely not.

11 Q. What about any printouts with a 2004 or 2005
12 copyright notice?

13 A. I currently do not have any printouts, because
14 I have given them out or sold them.

15 Q. When was the last time that you had a 2004 or
16 2005 dated copyright notice printout in your
17 possession?

18 A. I could not answer an exact date.

19 Q. Approximately in the last year would you have
20 still had some of those around?

21 A. I would not have had any 2004s left in 2005. I
22 have begun to just print out as needed, so I
23 don't have a backup. I don't keep a large
24 inventory.

25 Q. Has the typeface or the font that appears in

1 Q. But as we sit here, you don't remember whether
2 it ran in September, October, November?

3 A. No. It would be in the records.

4 Q. I'm actually not sure that it is. I believe
5 these were the only records, Exhibit 11 and 12
6 are the only records that relate to U.S. News.
7 Do you remember having --

8 A. There should be a physical copy of the
9 magazine.

10 Q. Do you, in your collection, have copies of all
11 of the instances in which you've licensed the
12 photo?

13 A. Most of them. Some have not sent me.

14 Q. But you do have one for U.S. News?

15 A. Yes, I do believe I do.

16 MR. PENCHINA: Counsel, it may be
17 there, I just don't recall, so I --

18 MS. SZPONDOWSKI: I don't recall
19 either. But we'll double check.

20 BY MR. PENCHINA:

21 Q. Ms. McClatchey, would you please look at the
22 document the reporter has marked as Exhibit 13,
23 which is a single page with production number
24 MC 66. And when you've had a chance, please
25 tell me if Exhibit 13 is familiar to you.

1 A. Yes, it is familiar.

2 Q. What is Exhibit 13?

3 A. I was looking to find out, I had looked in my
4 pursuit of seeing unauthorized use of my photo,
5 that a Paul Thompson had done a timeline on a
6 website, and he did not have my permission to
7 use the photo. It was used, and I wanted to
8 know where, why, and have it removed.

9 Q. Was it removed?

10 A. Yes, it was. To my knowledge it was removed.

11 Q. Exhibit 13 appears to be conveying your consent
12 to use the photo in the timeline.

13 A. If they would have asked prior to, and
14 explained to me, I would not have a problem
15 with that, if they had asked prior to. If they
16 wanted to discuss it, I would have no problems
17 using it for an educational purpose.

18 Q. But look at the text of the message that you
19 sent that appears on the top half of Exhibit
20 13. Two lines up from your name the text says:
21 This can be used as record that I fully consent
22 to its use in the timeline of events. Does
23 that indicate to you that at least at the time
24 that Exhibit 13 was created you were giving
25 consent?

1 A. I had given them consent at that time, once we
2 had discussed, you know -- because I had not
3 recalled Mr. Thompson, giving him permission.
4 And when I found that it was still online, I
5 had contacted to find out, you know, where --
6 how he had, why he put it on there without my
7 consent.

8 Q. And previously you testified that after you
9 contacted them, the photo came down from that
10 site; is that correct?

11 A. They had said they were going to take it down.
12 I did not follow up at this time unfortunately.

13 Q. But didn't you tell them that they could leave
14 it up?

15 A. I told them if they wished to, they could leave
16 it up. I don't know, it may be on, it may be
17 off. I have not checked lately.

18 Q. And whether it's on or off, do you know what
19 your definitive response to them was, and by
20 that I mean did you tell them to take it down
21 or did you tell them they could leave it up?

22 A. If they were not making a profit from it, and
23 it was solely for education, they could leave
24 it up.

25 Q. And that's what you indicated to them?

1 A. That's what I believe I indicated to them.

2 Q. Going back to Exhibit 13, in the first
3 paragraph of your message you indicate that it
4 has been used without my permission lately.

5 A. Uh-huh.

6 Q. What specifically were you referring to?

7 A. That was right after the discovery of AOL
8 earlier that month, a couple weeks prior to,
9 that it was on AOL without my knowledge or
10 consent. And I was going through, looking to
11 see who had my permission to use it and who
12 didn't. I had spoken with a Paul Thompson. He
13 was discussing doing a timeline, but nothing
14 had been discussed as to using the photo at the
15 time.

16 Q. As of August 19th, 2003, which is the date that
17 appears in Exhibit 13, in addition to AOL, what
18 other unauthorized uses of the photo were you
19 aware of?

20 A. That was AOL, and this was one of the first
21 ones that I had come across.

22 Q. So --

23 A. This was the early stages of my investigating.

24 Q. And following up in your later stages of
25 investigating, who, in addition to AOL and the

1 A. It appears to be so.

2 Q. Are the attachments the attachments that you
3 received?

4 A. I did not receive the attachments. I had
5 copies of them myself.

6 Q. Is the third page of Exhibit 22 the use in AOL,
7 or on AOL that you had noticed and were upset
8 about?

9 A. Yes, it is. It appears to be.

10 Q. Is the last page of Exhibit 22 a copy of your
11 photograph?

12 A. Yes, it is.

13 Q. If you look along the portion of the border
14 that appears directly above the smoke on the
15 photograph, do you see a notation that says
16 September 11, 1600 x 1200, et cetera?

17 A. Yes, that's my tag.

18 Q. What does that notation mean?

19 A. That was on -- printed from my computer from my
20 JPG, from my camera, from the file.

21 Q. Does that notation appear everytime you print a
22 copy?

23 A. Not since my new program, no.

24 Q. When was your new program first used?

25 A. In 2005, 2004, I'm not sure of the exact time.

1 Q. Were all of the printouts that you created
2 prior to 2004 or '5, whenever you started the
3 new program, did all of those printouts have
4 this notation?

5 A. Yes, they did.

6 Q. In the top left-hand corner of the picture that
7 is Exhibit 22 is the notation End of Serenity,
8 September 11, 2001. Do you see that?

9 A. Yes, I do.

10 Q. Is that the title of the photograph?

11 A. End of Serenity, yes, it is.

12 Q. And how, while using the old system prior to
13 2004, or whenever you got the new system, how
14 was that title affixed to the picture?

15 A. The title affixed to the picture in the same
16 way, I printed it out on the photo paper prior
17 to sending it back through the printer with the
18 photo.

19 Q. There does not appear to be a copyright notice
20 on this last page of Exhibit 22. Is there?

21 A. The copyright has been cut off at the bottom.

22 Q. Where would the copyright notice have appeared?

23 A. It would have been -- there should be a road
24 and a piece of grass, which is the front
25 portion of my yard. That is where I attach the

1 Q. Did the folks producing the Windsor Park
2 Stories come to your house to film the video
3 that they did?

4 A. No, we met at a church in Shanksville. It was
5 filmed in the church in Shanksville.

6 Q. Was it filmed entirely in the church in
7 Shanksville?

8 A. Yes.

9 Q. There are some scenes in the video that appear
10 to have been filmed in an office. Do you
11 recall them visiting your office?

12 A. Yes, they did come to my office and took
13 photos.

14 Q. Was that your home office or your work office?

15 A. That was when I was working at Coldwell Banker
16 Rita Halverson. They have been to my home, but
17 the actual film that was taken was taken in the
18 church.

19 Q. Did you provide copies of the photo that was
20 used in connection with Windsor Park Stories?

21 A. Yes, I did.

22 Q. The seventh page in of Exhibit 29, and the
23 eighth page in, which are difficult to see, I
24 will grant you, appear to depict a copy of your
25 photo coming out of a printer. Do you see

1 that?

2 A. That is at my home, yes.

3 Q. Is that something that they filmed?

4 A. Yes.

5 Q. And is that your printer shown particularly on
6 I guess it's the ninth page, where you can
7 slightly make out an HP logo?

8 A. It appears to be mine, yes.

9 Q. Did you provide the folks making the Windsor
10 Park Stories both a hard copy printout and a
11 JPG?

12 A. I provided them a JPG. This was done purely
13 for, you know, the photo use, as far as in the
14 story. They did not get the hard copy. I was
15 just printing out photos. They just wanted to
16 see how -- that I actually do print them out at
17 my home.

18 Q. If you turn to the sixth page of Exhibit 29, in
19 the upper left-hand corner of the screen you
20 can barely make it out, but does that look like
21 the title to you?

22 A. I had put a Flight 93, when we were doing our
23 photos. I identified it as being Flight 93.

24 Q. So was this a hard copy?

25 A. This was a hard copy at one time.