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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

Eldon Byrd, et al.,

Plaintiffs,

v.

James Randi, et al.,

Defendants.

Case No. MJG-89-636

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANTS  
MONTCALM PUBLISHING CORPORATION, TZ PUBLICATIONS,  
AND STANLEY WIATER FOR SUMMARY JUDGMENT

INTRODUCTION

In this suit, which primarily involves allegations of libel, plaintiffs Eldon and Judith Byrd claim that they are entitled to damages in the amount of over \$30 million for the publication in Rod Serling's The Twilight Zone Magazine ("Twilight Zone") of statements made by defendant James Randi concerning Mr. Byrd. Defendants Montcalm Publishing Corporation and TZ Publications, the publishers of Twilight Zone, and defendant Stanley Wiater, a free-lance writer hired by Twilight Zone to interview Randi and prepare a transcript of the interview for publication, (collectively, "the Montcalm defendants") move for summary judgment in their favor on all claims made against them by the plaintiffs.

This suit should never have been brought and should not now be allowed to continue. As an initial matter, the most powerful and derogatory of the statements that Randi made about

Mr. Byrd is substantially, if not literally, true. Moreover, Mr. Byrd is "libel-proof": his past conduct has left him with no good name to protect and therefore has deprived him of any ability to recover damages for loss of reputation. Finally, Mr. Byrd cannot possibly show that the Montcalm defendants acted with "actual malice," which is the constitutionally required standard of liability applicable in this action.

The courts long have recognized the dangers that libel suits pose to a free and vigorous press. Libel judgments constitute an obvious threat to fundamental First Amendment freedoms. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Libel judgments are not, however, the only danger to free expression; the very pendency of libel suits may chill First Amendment rights and stifle protected debate. See, e.g., Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 838 F.2d 1287, 1303 (D.C. Cir.) (noting the "expensive if not crippling" cost of defending libel litigation), cert. denied, \_\_\_ U.S. \_\_\_, 109 S. Ct. 75 (1988); Anderson v. Stanco Sports Library, Inc., 542 F.2d 638, 641 (4th Cir. 1976). For this reason, methods of summary disposition have assumed special importance in libel cases. See Anderson v. Stanco Sports Library, Inc., 542 F.2d at 641. Summary judgment in favor of the Montcalm defendants is appropriate in this case: the instant suit is just the kind of libel action that should never be submitted to a jury.

## STATEMENT OF FACTS<sup>1/</sup>

### I. THE UNDERLYING CONTROVERSY

The genesis of this suit goes back to the early 1970's, when Mr. Byrd, Mr. Randi, and others became involved in a heated controversy respecting the authenticity of so-called paranormal phenomena, including psychic powers. Much of this debate focused on the apparently extraordinary abilities of a young Israeli named Uri Geller. Geller burst into American consciousness in 1973, when he gave numerous demonstrations across the country of his purported psychic powers. Geller appeared in countless lecture halls and television studios, where his most notable and most frequently performed feat was to bend metal objects without the apparent application of physical force. See Exhibit 1, U. Geller, My Story 255-58, 262-63 (1975) (hereinafter "Exh. 1, My Story at \_\_\_").<sup>2/</sup> As Geller criss-crossed the country, attracting wave upon wave of media attention, a number of persons, many of them scientists and magicians, entered into a serious debate about his abilities. On one level, the debate was simply about

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<sup>1/</sup> To the best of undersigned counsel's knowledge, all facts set forth herein are currently undisputed.

<sup>2/</sup> All of the materials used to support this Memorandum appear in an accompanying Appendix of Exhibits. The exhibit numbers used to refer to these materials in the Memorandum are the numbers at which the materials appear in the Appendix. Almost all of the materials used herein were introduced as exhibits and properly authenticated at one of the depositions taken in this case. (Some of the materials used herein are affidavits, deposition testimony, and answers to interrogatories.) The Index to the Appendix of Exhibits identifies the depositions at which such materials were introduced.

this charismatic figure: was Uri Geller "for real" or was he nothing more than a fine (but unprofessed) magician? The debate also, however, had a deeper significance: it concerned the existence of paranormal and psychic phenomena generally and the validity of any claims of "special" human powers. See Exhibit 2, U. Geller & G. Playfair, The Geller Effect 18-21 (1986) (hereinafter "Exh. 2, The Geller Effect at \_\_\_"); Exhibit 3, The Geller Papers vii-x, 313-17 (C. Panati ed. 1976) (hereinafter "Exh. 3, The Geller Papers at \_\_\_").

The debate that Geller's emergence prompted rarely achieved politeness. Geller himself stated that "something approaching an all-out war was on between those who accepted the new forces and those who rejected them completely." Exh. 1, My Story at 70. He characterized one salvo in that war as a "vicious [attack], filled with outright falsehoods and innuendoes." Id. at 256. Eldon Byrd also took exception to the tone of the discussion. In responding to an article by the mathematician Martin Gardner concerning Byrd's own participation in the debate,<sup>3/</sup> Byrd lamented "that there are those . . . who are vigorously pursuing a course of action similar to the Salem witch-hunts to try to convince people that the Uri Gellers of the world and their friends should be drowned." Exhibit 4, Letter

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<sup>3/</sup> Byrd's participation in the debate and the article by Gardner, which concerned one noteworthy aspect of Byrd's participation, will be discussed infra at pp. 6-14. Gardner, like Randi, is an influential member of defendant Committee for the Scientific Investigation of Claims of the Paranormal (CSICOP).

from Eldon Byrd, The Humanist, Sept.-Oct. 1977, at 54 (hereinafter, "Exh. 4, Byrd letter to The Humanist"). In language that could hardly be thought to soften the strident tenor of the debate, Byrd then accused Gardner of "narrow thinking" and deliberate falsification. Id. Geller, for his part, opted to charge several of his critics with irreligion and communism. See Exh. 2, The Geller Effect at 184-85, 214.

This vitriolic debate has continued unabated to the present. Although Geller himself has retreated periodically from public view since the late 1970's, he reappears (sometimes accompanied by Eldon Byrd) at regular intervals.<sup>5/</sup> Participants in the debate continued in the 1980's to write and speak about both Geller's purported powers and paranormal phenomena generally. See, e.g., Exh. 2, The Geller Effect; Exhibit 5, Byrd, "Experiments with Uri Geller," Frontiers of Science, Mar.-Apr. 1981 at 18 (hereinafter "Exh. 5, 'Experiments' at \_\_\_"); Exhibit 6, Palm Beach Post (Associated Press dispatch), Apr. 4, 1987. Metal-bending parties, workshops, and demonstrations became in the late 1980's a kind of minor fad. See, e.g., Exhibit 7, The Washington Post, Aug. 9, 1986, at D1 (hereinafter, "Exh. 7, The Washington Post"); Exhibit 8, The Montgomery County Sentinel, Oct. 23, 1986, at 17 (hereinafter, "Exh. 8, The Montgomery County Sentinel"). Most recently, the controversy

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<sup>5/</sup> As noted infra at pp. 11-12, Geller and Byrd made public appearances together in 1983 and 1986. Geller also published The Geller Effect, see Exh. 2, in 1986, which contains frequent references to Byrd.

over Geller's powers and other purported paranormal phenomena has penetrated the halls of government, as congressmen, CIA officials, and Soviet arms negotiators have approached and conferred with Geller to discover whether he might be of use to them. See Exhibit 9, New York Post, Apr. 30, 1987, at 20; Exhibit 10, Star, Jan. 10, 1989, at 22 (hereinafter "Exh. 10, Star"); Exhibit 11, The Washington Post, May 4, 1987, at C3. This far-reaching and continuing controversy forms the backdrop against which the interview published in Twilight Zone must be viewed;<sup>5/</sup> Eldon Byrd's own role in that controversy likewise provides part of the context for the statements made in the interview.

## II. ELDON BYRD'S ROLE IN THE CONTROVERSY

Eldon Byrd made his first foray into the controversy about Geller and paranormal phenomena in October 1973, when he asked Geller to participate in an experiment involving an unusual alloy called nitinol. See Exhibit 12, Deposition of Eldon A. Byrd at 110-11 (hereinafter "Exh. 12, E. Byrd Dep. at \_\_\_").<sup>6/</sup> At that time, Byrd was working as a physical scientist at the Naval Surface Weapons Center (formerly called the Naval Ordnance

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<sup>5/</sup> In deposition testimony, Byrd described the controversy as follows: "[T]he controversial fire keeps building on both sides, one claiming yes and one claiming no, and so it keeps it -- keeps the fire going for the public, I guess." Exhibit 12, Deposition of Eldon A. Byrd at 143-44.

<sup>6/</sup> In his deposition testimony, Byrd stated that this and other contacts with Geller constituted "scientifically conducted observations," rather than "experiments." Exh. 12, E. Byrd Dep. at 104-05. For ease of reference only, this Memorandum will use the word "experiment."

Laboratory). See Exhibit 13, Resume of Eldon Byrd at 1. Nitinol had been developed at the Weapons Center and was not generally available to the public. See Exh. 3, The Geller Papers at 67-68. The primary characteristic of the alloy is that it has a "memory" for the shape in which it was formed at the time of manufacture: whenever a nitinol wire is heated (or cooled) to the temperature used during its manufacture, it will revert to its original shape, regardless of the extent to which it has been distorted, bent, or otherwise changed in the interim. See Exh. 12, E. Byrd Dep. at 113-14. In the October 1973 experiment, and in another more rigorously controlled experiment conducted with Geller a year later, Byrd attempted to discover whether Geller could alter the memory of nitinol wires. Byrd concluded that Geller was able to do so merely by gently rubbing the wires between his fingers. See id. at 115-16. In Byrd's view, there was virtually no possibility of fraud on Geller's part, nor was there any scientific explanation for the change Geller had wrought in the nitinol wires. See Exh. 3, The Geller Papers at 72-73.

Byrd wrote a paper on these experiments, which was published in 1976 in a collection of essays concerning Geller's powers entitled The Geller Papers. See Exh. 3. As noted by the editor, Byrd's paper appeared with the official approval of the Naval Surface Weapons Center. See id. at 73. The paper was the first work concerning paranormal phenomena to be released with the approval of any branch of the Department of Defense. See

Exh. 12, E. Byrd Dep. at 158; Exh. 3, The Geller Papers at 73;  
Exh. 2, The Geller Effect at 19.<sup>7/</sup>

Byrd's experimentation and his subsequent paper received widespread publicity as a highly significant contribution to the debate over paranormal phenomena. An article by Martin Gardner stated:

Among the twenty-two papers assembled in [The Geller Papers], one stands high above all the others. This is Panati's [the editor's] own opinion. Over and over again on radio and TV talk-shows, he has said that the most important chapter in his book is Eldon Byrd's paper, "Uri Geller's Influence on the Metal Alloy Nitinol." This also is the opinion of almost every review of the book I have seen. D. Scott Rogo's review in Psychic (September 1976) is typical: . . . Rogo writes, "a few papers are included which offer, to my mind, the best evidence so far published supporting Geller's claims. These contributions do stand in striking contrast to the general run of the accounts. One of these papers is Eldon Byrd's."

Exhibit 14, Gardner, "Geller, Gulls, and Nitinol," The Humanist, May-June 1977, at 24 (hereinafter "Exh. 14, 'Geller, Gulls and Nitinol' at \_\_\_"). Gardner's article, based partly on a year-long correspondence with Byrd, proceeded to level a blistering attack on Byrd's nitinol experiments. See id. at 25-32.<sup>8/</sup>

<sup>7/</sup> Byrd explained at his deposition that the Public Affairs Office at the Naval Surface Weapons Center later published a "White Paper" explaining the circumstances surrounding the decision to approve Byrd's paper for publication. Byrd said that he believed the White Paper was issued in response to concerns raised by Martin Gardner, a principal critic of Byrd's work. See Exh. 12, E. Byrd dep. at 225-28.

<sup>8/</sup> It was in response to this article that Byrd wrote a letter to The Humanist, accusing Gardner of being a narrow-minded and dishonest witch-hunter. See supra at p. 4-5; Exh. 4, Byrd letter to The Humanist. Gardner wrote a short reply to this letter, noting once again that Byrd's "paper is the  
(continued...)

These experiments, and the paper based upon them, were criticized, praised, or otherwise discussed in numerous other articles and books relating to paranormal phenomena published throughout the 1970's and 1980's. See, e.g., Exhibit 15, Mysteries of the Unknown: Mind Over Matter 30-32 (1988); Exhibit 16, T. Hines, Pseudoscience and the Paranormal 92 (1988); Exhibit 17, B. Gittleson, Intangible Evidence 194 (1987); Exhibit 18, Skeptic's Handbook of Parapsychology 216, 573 (P. Kurtz, ed. 1985) (Byrd's paper "is one of the most persistently quoted proofs of Geller's paranormal powers" and "has been cited by parapsychologists as a decisive verification of the 'Geller effect.'"); Exhibit 19, J. Hasted, The Metal-Benders 38 (1981) (hereinafter "Exh. 19, The Metal-Benders at \_\_") ("Also in the category of validation by proof of paranormal structural change are the experiments of Eldon Byrd . . . ."); Exhibit 20, C. Wilson, Mysteries 445 (1980); Exh. 1, My Story at 261-62; Exh. 2, The Geller Effect at 19, 239 ("Byrd was in fact the first scientist to publish a positive report on Geller's laboratory PK [psychokinesis] . . . ."). The National Enquirer, a tabloid with a weekly circulation of millions, ran a full length article describing the nitinol experiments and quoting Byrd extensively. See Exhibit 21, National Enquirer. And Uri Geller used a quotation from Byrd's paper in a full-page advertisement

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<sup>8/</sup>(...continued)

strongest argument in Panati's book for the genuineness of Geller's powers," but concluding that Byrd was one of "Uri's casualties." See Exh. 4.

published in the entertainment newspaper Variety to promote his first volume of autobiography. See Exh. 14, "Geller, Gulls, and Nitinol" at 25; Exh. 12, E. Byrd Dep. at 125-26.

The nitinol experiments established Byrd as one of the leading scientists working in the field of paranormal phenomena.<sup>9/</sup> Professor John Hasted, himself a noted participant in the debate over paranormal phenomena, listed Byrd as one of the six foremost scientists in the nation doing research in this field. See Exh. 19, The Metal-Benders at 27.<sup>10/</sup> When the Star, a weekly publication with a circulation of several million, needed an expert to comment on the validity of an experiment it had devised for Geller, it turned to Byrd for an opinion. See Exhibit 22, Star, May 12, 1981.<sup>11/</sup> Byrd attended the two principal international conferences for persons devoted to serious but sympathetic study of paranormal phenomena. See Exh. 12, E. Byrd dep. at 139-141, 218.<sup>12/</sup> Meanwhile, scientists in

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<sup>9/</sup> Byrd noted during his deposition that he was one of the first scientists to "observe [Geller] in a scientific way." Exh. 12, Byrd dep. at 138.

<sup>10/</sup> In deposition testimony, Byrd indicated that he knew all five of the other American scientists listed by Hasted, and that he had close professional and/or personal relationships with several of them. Byrd also said that he knew several of the foreign scientists whom Hasted mentioned. See Exh. 12, E Byrd. dep. at 215-17.

<sup>11/</sup> Byrd noted during his deposition that he had criticized the manner in which the Star set up the experiment. Byrd said that from a "scientific point of view" the experiment was deficient. Exh. 12, E. Byrd dep. at 233-37.

<sup>12/</sup> The first conference was held in Tarreytown, New York in 1973, the year of Byrd's first nitinol experiments. The  
(continued...)

other nations used Byrd's work with nitinol as the basis for further research and investigation. See Exh. 12, E. Byrd dep. at 112, 219-20.

Byrd's association with Geller and with the controversy over paranormal phenomena continued well beyond the nitinol experiments. By 1981, Byrd had become a close personal friend of Geller, and in that year Byrd wrote "a personal account of my experiences with Uri Geller over eight years, both as a subject of scientific work and as a friend." Exh. 5, "Experiments" at 18. Two years later, Byrd accompanied Geller to Japan, where both of them took part in the making of a television show about Geller's abilities. Geller applied his powers to a running computer tape and eventually succeeded in stopping the tape. See Exh. 12, E. Byrd dep. at 161-64.<sup>13/</sup> Byrd discussed the computer experiment, as well as demonstrating the properties of nitinol for a portion of the show focusing on the famous nitinol

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<sup>12/</sup>(...continued)

second conference met in Iceland four years later. Byrd was asked to give a paper at the latter conference, but declined to do so. See Exh. 12, E. Byrd dep. at 139-41, 218-21.

<sup>13/</sup> Byrd described this experiment during his deposition. According to Byrd, Geller tried for six hours to stop the tape with no success. Byrd then attempted to send the following message to Geller telepathically: "Uri, if you can do telepathy, get this: I'm getting tired. Do it. Get it over with and let's get the heck out of here." At that point, Geller changed his modus operandi, turning his back on the computer tape and focusing instead on a television screen on which the tape was projecting an image. Byrd told Geller that he could not possibly affect the tape by staring at the screen. Seconds later, the computer tape halted. See Exh. 12, E. Byrd dep. at 161-65; see also Exh. 2, The Geller Effect at 112-115.

experiments. See id. at 165-66, 183; Exh. 2, The Geller Effect at 114-15. The television show eventually aired throughout Japan. See Exh. 12, E. Byrd dep. at 164. While in that country, Geller and Byrd gave a joint press conference, as well as a joint interview to a Pacific Stars and Stripes reporter. See id. at 166; Exhibit 23, Pacific Stars and Stripes, April 3, 1983 (hereinafter "Exh. 23, Pacific Stars and Stripes"). During the press conference and interview, Byrd described other feats he had seen Geller perform and theorized as to why some persons refused to credit Geller's psychic powers. See Exh. 12, E. Byrd dep. at 168-71; Exh. 23, Pacific Stars and Stripes.

Byrd returned to television to discuss paranormal phenomena in 1986, although this time without the company of Geller. Byrd appeared opposite Michael Edwards, a magician allied with James Randi, in a debate relating to metal-bending. See Exh. 12, E. Byrd dep. at 246-49. The nationally syndicated show also included a videotape of Byrd conducting a metal-bending party. See id. at 249-50. The next year, Byrd met Geller in Paris to participate in another television show about Geller's powers. See id. at 245. On that show, Byrd commented on what he thought of Geller as a person. See id. at 246.

During the 1980's, Byrd taught himself to bend metal and devised a method for teaching others. See Exh. 2, The Geller Effect at 19, 181-82. Byrd has conducted four metal-bending workshops and approximately 10 metal-bending parties. See Exh. 12, E. Byrd dep. at 148, 196. The Washington Post and at least

one other newspaper have reported on these sessions. See Exh. 7, The Washington Post; Exh. 8, The Montgomery County Sentinel. As shown in those articles and in deposition testimony, Byrd essentially has developed a personal theory of the phenomenon of metal bending. See Exh. 7, The Washington Post; Exh. 8, The Montgomery County Sentinel; Exh. 12, E. Byrd dep. at 150-55, 160-61, 195-96.

Byrd has even become involved in the efforts of U.S. government officials to explore the possible uses of paranormal phenomena. According to Byrd's deposition testimony, the CIA utilized Byrd as an asset to keep track of Geller, whenever the latter dropped out of sight. See Exh. 12, E. Byrd dep. at 263-64, 267-68, 275.<sup>14/</sup> Moreover, on one occasion, Byrd contacted the CIA at Geller's request to find out whether the CIA would be interested in working with Geller. See id. at 264. Byrd also has met with Rep. Charlie Rose, who founded the Congressional Clearinghouse on the Future, a group interested in the potential uses of paranormal phenomena for military and intelligence work. See id. at 277-79; Exh. 10, Star. In this respect, as in all

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<sup>14/</sup> At his deposition, Byrd refused to give the name of the former CIA official who had told him that the CIA was using him to keep track of Geller. Byrd stated that he did not know whether this information was classified or otherwise privileged in some manner. See Exh. 12, E. Byrd dep. at 271-72. Byrd also said at his deposition that he had knowledge of a so-called black budget for governmental investigation of paranormal phenomena, but refused to provide any details about this subject on the ground that such information was classified. See id. at 272-74.

others, Eldon Byrd has made himself a key participant in the controversy over psychic powers.

### III. ELDON BYRD'S CRIMINAL BACKGROUND

Had Eldon Byrd devoted his energies solely to the study of paranormal phenomena, the statements challenged in this suit would never have been made. Byrd, however, had another and more illicit passion: he was consumed by lust for young girls.

Byrd's sexual peculiarities first came to the attention of law enforcement officers in 1983. A postal inspector named Ron Meesig had placed an advertisement (under the fictitious name of "Jeff Stewart") in a newsletter published by Susan's Video, a company that acted as a nationwide clearinghouse for the trading and distribution of all kinds of pornography. See Exhibit 24, Deposition of Robert Northrop at 48-51, 57-58 (hereinafter "Exh. 24, Northrop dep. at \_\_\_"). The advertisement made reference to "young stuff," a codeword for child pornography that is known and used by persons who collect or trade pornographic materials. See id. at 54.<sup>15/</sup> In response to this advertisement, Meesig received a letter from Eldon Byrd, which read in full: "Me too! I like young stuff. Have some for trading (VHS made from movies) -- do you have anything for trade?" See Exhibit 25; Exh. 24, Northrop dep. at 56-58. Because Byrd resided in Maryland, Meesig (who was based in Ohio) referred the letter to the chief postal inspector for the eastern region, noting in a cover letter that "Mr. Byrd

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<sup>15/</sup> Another very frequently used codeword for child pornography is "Lolita." See Exh. 24, Northrop dep. at 54.

expresses interest in child pornography." See Exhibit 26; Exh. 24, Northrop dep. at 59. Eventually, the letter found its way to Inspector Robert Northrop, a postal inspector located in Washington, D.C.<sup>16/</sup>

Upon receipt of the letter, Northrop sent Byrd a form letter from "Candy's Love Club" and an attached questionnaire. See Exhibit 27; Exh. 24, Northrop dep. at 63-64. Candy's Love Club was an undercover operation run by the postal inspection service to locate people who were using the mails to distribute child pornography. See Exh. 24, Northrop dep. at 62-63, 66-69. The survey was designed to ascertain whether the recipient had a primary interest in child pornography (as opposed to other kinds of pornography) and whether he used the mails to obtain such materials. See id.

The survey Byrd filled out and returned gave a clear indication of his preferences. As among 17 different kinds of pornography listed, Byrd stated that the material he most preferred was "Teenage Sex (13-16) - Heterosexual." See Exh. 27. Byrd's second choice was "Pre-Teen sex - Heterosexual." See id. Byrd also stated that he usually purchased materials by mail, that he collected pornography (rather than disposing of it within

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<sup>16/</sup> Northrop has served as a postal inspector for approximately 15 years. For more than six of those years, he worked exclusively in the area of child pornography and child molestation. He has extensive special training in this area and has handled close to 100 cases of child pornography and child molestation. He has been qualified as an expert with respect to such matters in several federal cases. See Exh. 24, Northrop dep. at 14-20.

a year of purchase), and that he believed the best age range to have a first sexual experience was between 9 and 15. See id.; see also Exh. 24, Northrop dep. at 69-77.

Some months later, Inspector Northrop, using the name "Al Lazzola," sent Byrd a letter expressing an interest in "youth culture" and particularly in children aged 11 to 14. See Exh. 24, Northrop dep. at 82-83. Byrd responded to that letter as follows:

Received your letter about "youth culture." I am not sure who referred me to you as I have been very discreet -- hence some trepidation on my part. I am not interested in young boys, but have always been fascinated by girls in the 12-14-16 age group. Probably because of their physical perfection -- in [illegible] time of life, etc. However, I have had experience with only one, and we lived together from the time she was 14 until she was 24. We even got married when she was 19, but it didn't work out.

I would be interested in obtaining some good video, if you have any. Mine are copies of copies of copies and will not reproduce well.

What do you have in mind?

Exhibit 28. Northrop, in turn, sent another letter to Byrd, in which Northrop expressed interest in the kinds of materials attractive to Byrd. See Exh. 24, Northrop dep. at 94-97. Less than a month later, Byrd responded:

Thanks for your letter. I may have a video I put together from 8mm Lolitas (before they became taboo) you would find enjoyable. Also, I have some 35mm photos of my "lolita"; however, I had a woman and her daughter living with me last year and one of them took all my "art" shots, leaving me with only the "porn." As you can imagine, I am reluctant to part for a moment with them. However, we might make some kind of arrangement.

I can copy ½" VHS video.

Let's get together some time and talk.

Exhibit 29. After two more letters from "Lazzola," Byrd replied on a postcard: "Let's get together!" Exhibit 30; see Exh. 24, Northrop dep. at 102-07. Byrd suggested that they meet at lunch and asked Lazzola to call him at work to set up an appointment. See Exh. 30; Exh 24, Northrop dep. at 106-07.

At this point, Northrop referred the case to Investigator Bill Whildin of the Fairfax County Police Department. See Exh. 24, Northrop dep. at 116-17.<sup>17/</sup> After reviewing the materials Northrop and Byrd had exchanged, Whildin (using the name "Al Lazzola") called Byrd to set up a time and place to meet to exchange child pornography. See Exhibit 31, Deposition of William H. Whildin at 41-43 (hereinafter "Exh. 31, Whildin dep. at \_\_\_").<sup>18/</sup> The two decided to meet on October 2,

<sup>17/</sup> Northrop explained at his deposition that whenever a person with whom he was corresponding insisted on a face-to-face meeting to exchange child pornography, he would refer the matter to a local police officer. See Exh. 24, Northrop dep. at 86-88, 114-18. In addition, he would refer a case to local police when he had some reason to believe that the person involved "had access to children, or was abusing children or [was] sexually involved with children." Id. at 88. Northrop testified that he referred the Byrd case to Whildin for both of these reasons. See id. at 118. When asked why he thought Byrd might be involved sexually with a child, Northrop responded: "Well, because he is talking about real experiences with this 14-year-old girl, and she is gone, she is out of his life. So who fills the void[?]" Id. at 100.

<sup>18/</sup> Whildin, like Northrop, has extensive training and experience in handling child pornography and child molestation cases and has been qualified as an expert in the field in federal court. See Exh. 31, Whildin dep. at 11-13, 16-17, 85-89. Whildin testified that he reviewed the  
(continued...)

1986, in the parking lot of a Howard Johnson's on Route 1. See id. at 44.

At the meeting, Byrd gave to Whildin ten xeroxed pages from a mail-order catalogue featuring child pornography. See id. at 45-46. Each of these pages included numerous pictures of extremely young girls engaging in graphic sexual acts. See id. at 46-47.<sup>18/</sup> Byrd also showed Whildin a set of 35-millimeter slides of a teenage girl, explaining that he had made the slides when the girl (named "June") was 17 and 18 years old and that he had other slides, as well as a video movie, featuring her. See

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<sup>18/</sup>(...continued)

correspondence to "give me an idea of really what Eldon Byrd is like." Id. at 29. Whildin concluded from the letters "that this man was a collector and . . . that he had a true desire for young girls." Id. at 33-34. Whildin also noted that the "8mm Lolitas" referred to in one of Byrd's letters were "extremely hardcore graphic" child pornography, depicting sexual acts including penetration of and "ejaculation on little girls." Id. at 27.

<sup>19/</sup> Because of an ongoing dispute with the Fairfax County Police Department as to whether it may release this pornography for purposes of this litigation, undersigned counsel is currently unable to provide this Court with copies of the child pornography that Byrd gave to Whildin. See Exh. 31, Whildin dep. at 7-8. The Fairfax Police, however, did allow Whildin to take this pornography with him to his deposition. At the deposition, Whildin described the pornography as follows: "[The photographs] show[] [very young children] in all different sexual acts. Here is one . . . where a girl, probably four years old is committing oral sodomy on an erect penis and it says, 'Liza, 10 years old, and her father.' There are others showing vaginal intercourse, cunnilingus, oral sodomy, lesbianism, and all of these with . . . young girls . . . ." Id. at 46-47.

id. at 49-51.<sup>20/</sup> Investigator Whildin testified that Byrd was "stimulated" and "real excited" throughout the conversation and that he gave the impression of desiring and wanting to have sex with young girls. Id. at 47-48, 90-91, 102-03. When Byrd mentioned to Whildin that he had a 10-year old daughter living at his home, Whildin arrested Byrd for possessing with intent to distribute sexually explicit items involving children. See id. at 60-61, 93-94.<sup>21/</sup> Whildin made notes of the meeting shortly thereafter, while still at the scene of the arrest. See Exhibit 32; Exh. 31, Whildin dep. at 95-96.

Immediately following the arrest, Byrd made an oral statement to Whildin, the substance of which Whildin also noted down soon afterward. See Exhibit 33; Exh. 31, Whildin dep. at 52, 96-97. Byrd told Whildin that the girl featured in the slides was the same girl to whom he had referred in his letters.

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<sup>20/</sup> Whildin testified that some, although not all, of the slides are "quite graphic." Exh. 31, Whildin dep. at 54. He stated: "[T]he graphic ones are a spread-open vaginal area. One of them appears to even have some seminal fluid in the vaginal area. The others are -- again, the graphic ones are shots of the vaginal area with a device that holds open the vaginal area." Id.

<sup>21/</sup> Whildin testified that he did not know at the beginning of the meeting whether he would arrest Byrd immediately or try to use him to build a larger case. See Exh. 31, Whildin dep. at 60. Whildin decided to make the arrest when Byrd mentioned that he had a 10-year-old daughter who lived at his home. See id. at 60-61. Whildin testified: "Well, if a guy is sitting there stimulated over material of young, little girls, then he says to me that he has a young little girl at home, I'm very concerned about that. It's like somebody being at a candystore and -- how do you not touch the little girl next to you if that is what turns you on?" Id. at 61.

See Exh. 31, Whildin dep. at 49. Byrd said that he had met this girl when she was 9, become sexually involved with her when she was 12, and begun to live with her when she was 14. See id. at 50-52, 101-02. Byrd also said at this time that he sometimes had a real drive for child pornography and that he had tried to order child pornography from overseas, but that most of these materials had been seized by the U.S. Customs Service. See Exh. 33; Exh. 31, Whildin dep. at 52-53.

Later that evening, police officers from Prince George's County Police Department, led by Corporal Thomas Gross, searched Byrd's home pursuant to a warrant. See Exh. 34, Deposition of Thomas S. Gross at 25 (hereinafter "Exh. 34, Gross dep. at \_\_").<sup>22/</sup> While the search was proceeding, officers from Gross's unit took numerous photographs of the house, see Exhibit 35, and prepared an inventory list of items seized, see Exhibit 36. As these documents show, the search uncovered enormous amounts of hardcore pornography, including large quantities of child pornography, as well as numerous sexual devices. See also Exhibit 37, Deposition of Judith Leah Byrd at 55, 238, 243, 247-48, 262-63, 268, 274-77 (hereinafter "Exh. 37, J. Byrd dep. at

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<sup>22/</sup> Like Northrop and Whildin, Gross has extensive experience in the field of investigating child pornography and child abuse. He has served for six years in the Domestic Investigations Unit of the Prince George's County Police Department, which has responsibility for all child pornography and child molestation cases. He has received extensive specialized training in this field and has handled numerous cases involving these crimes. See Exh. 34, Gross dep. at 12-17.

\_\_\_"); Exh. 34, Gross dep. at 39-42, 44-45, 54-55, 64-65.<sup>23/</sup> At their depositions, Northrop and Gross testified that these materials would have cost Mr. Byrd up to \$10,000 to acquire. See Exh. 34, Gross dep. at 47; Exh. 24, Northrop dep. at 139.

In addition to discovering a vast amount of pornographic material in the Byrd home, Corporal Gross found evidence that Mr. Byrd was a nationwide distributor of hardcore pornography, including hardcore child pornography. See Exh. 34, Gross dep. at 88, 181-82. Gross seized approximately 40 letters sent to Byrd from persons all over the country responding to various offers Byrd had made to sell pornography. See Exhibit 38; Exh. 34, Gross dep. at 73-74, 85-89, 94-98, 101-13.<sup>24/</sup> Many

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<sup>23/</sup> Corporal Gross testified that Eldon Byrd's collection of pornography was by far the largest he had ever seen in a private home. See Exh. 34, Gross dep. at 97. Inspector Northrop recalled that the Prince George's County Police officers had to get a truck to carry everything away, noting that "they hauled a lot of stuff that night." Exh. 24, Northrop dep. at 135. The search took 11 hours, from 9:00 p.m. on October 2 to 8:00 a.m. the following day. See Exh. 34, Gross dep. at 36.

<sup>24/</sup> The 40 letters seized constituted a "sampling" of the letters discovered in the house. See Exh. 34, Gross dep. at 95. Many of the letters were from members of SEXYG, a "special interest group" of MENSA, the high-IQ society. See id. at 83. Byrd served as a subgroup chairman or contact point of SEXYG and operated a SEXYG service called "Film Swap." Id. at 81, 84; Exhibit 39, SEXYG Newsletter. Other letters to Byrd were from persons involved in the Susan's Video network. See Exh. 34, Gross dep. at 91. Gross found two of the advertisements Byrd used to sell pornography, see Exhibit 40, one in Byrd's real name and the other in the name of William R. Bonifant. See Exh. 34, Gross dep. at 74-77, 133-35. The name "Bonifant" was a fake name Byrd employed for a number of purposes. Byrd initially began to use the name when, after declaring bankruptcy in 1982, he found he could not easily cash checks or obtain credit. See (continued...)

of these letters were responses to advertisements Byrd had placed to sell child pornography. See Exh. 34, Gross dep. at 85-88, 94, 98, 101-111, 113.<sup>25/</sup>

Byrd eventually entered a plea of guilty to the offense of distributing pornography. See Exhibit 41, Court Records. He received a sentence of 12 months in the county jail, which was suspended in its entirety conditioned on his good behavior, his completion of one year's active probation, and his completion of a program of psychological counseling. See id. Byrd also paid a fine of \$500. See id.

When asked at his deposition for the age of the youngest person with whom he had had sexual intercourse, Byrd took the Fifth Amendment. See Exh. 12, E. Byrd dep. at 297, 306-07. When asked for the age of the youngest person with whom he had obtained sexual gratification, Byrd also asserted his Fifth Amendment privilege. See id. at 307.

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<sup>24/</sup>(...continued)

Exh. 12, E. Byrd dep. at 8-9. Byrd held a social security number (his second), a driver's license (his second), a bank account (his second), and numerous credit cards in the name of William R. Bonifant. See id. at 9-22. Byrd did not disclose his real identity or credit history to the affected bank, credit card companies, or governmental agencies. See id. at 19-21. As noted, Byrd also used the name "Bonifant" to distribute pornography.

<sup>25/</sup> Following the search of Byrd's home, Tim Herlihy of the Naval Investigative Service conducted a search of Byrd's workplace at the Naval Surface Weapons Center. Herlihy found more slides of June, as well as several mail-order catalogues offering pornographic materials. Among these catalogues was the child pornography catalogue from which the materials given to Whildin had been copied. See Exh. 24, Northrop dep. at 158-59; Exh. 34, Gross dep. at 147; Exh. 31, Whildin dep. at 97-98.

#### IV. THE TWILIGHT ZONE ARTICLE

Sometime prior to October 1987, Tappan King, the editor-in-chief of Twilight Zone, asked freelance reporter Stanley Wiater to interview James Randi and prepare a transcript of the interview for publication. See Exhibit 42, Affidavit of Tappan King at ¶¶ 1, 2 (hereinafter "Exh. 42, King aff. at ¶ \_\_\_"); Exhibit 43, Affidavit of Stanley S. Wiater at ¶¶ 1, 2 (hereinafter "Exh. 43, Wiater aff. at ¶ \_\_\_"). King wanted to publish an interview with Randi as part of Twilight Zone's continuing coverage of the debate over paranormal phenomena. See Exh. 42, King aff. at ¶ 3. King knew this subject to be of great interest to the public, and Twilight Zone already had published many articles and interviews on this topic. See id. King believed that publishing Randi's views, including his opinions of persons on the opposing side of the controversy, would enhance public appreciation of the debate over paranormal and psychic phenomena. See id. at ¶ 4.

Wiater interviewed Randi by telephone in October 1987 for just over an hour. See Exh. 43, Wiater aff. at ¶ 3. Wiater prepared a transcript of the audiotape of the interview, made some minor grammatical and syntactical corrections, and edited it for length and clarity. See id. at ¶ 4. Wiater submitted the transcript to King in December 1987. See id. King may have reordered some of the questions and answers, reworded some questions, or made grammatical corrections in some responses. See Exh. 42, King aff. at ¶ 6. Neither Wiater nor King made any

substantive changes in Randi's responses: with such inconsequential changes as have been noted, the statements ascribed to Randi in the published interview were the statements actually made by Randi. See id.; Exh. 43, Wiater aff. at ¶ 4.

A transcript of the interview, along with several introductory paragraphs, written by Wiater and edited by King, appeared in the June 1988 issue of Twilight Zone under the title "Truth's Bodyguard." See Exh. 43, Wiater aff. at ¶ 5. The interview focused on Randi's opinions concerning paranormal phenomena and the leading figures who believed in such phenomena. See Exhibit 44, "Truth's Bodyguard," Rod Serling's The Twilight Zone Magazine, June 1988, at 32 (hereinafter "Exh. 44, 'Truth's Bodyguard'"). In one portion of the published interview, Randi made the statements challenged in this lawsuit: "Eldon Byrd was the one -- along with Geller -- who launched a blackmail campaign against me and accused me of being a child molester. Byrd is now in prison in Washington, D.C. -- for child-molesting -- and is going to be there for the next six years." Id. at 35.<sup>26/</sup>

At all times prior to publication of the interview, Wiater and King believed, based on Randi's reputation for integrity, that Randi was a reliable person and that everything he said in the interview was true. See Exh. 42, King aff. at ¶

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<sup>26/</sup> In a letter to the editor published in the October 1988 issue of Twilight Zone, Randi stated: "Byrd is not now 'in prison in Washington, D.C.' as stated. He is free on probation following his trial and admission of guilt." Exhibit 45, Letter to the Editor, Rod Serling's The Twilight Zone Magazine, Oct. 1988, at 95.

9; Exh. 43, Wiater aff. at ¶ 7. Neither Wiater nor King (nor anyone else associated with Twilight Zone) had knowledge of the falsity of any statement, or doubt as to the truth of any statement, relating to Eldon Byrd in the published interview. See Exh. 42, King aff. at ¶ 10; Exh. 43, Wiater aff. at ¶ 8. Wiater and King have never met Eldon Byrd and bear him no personal animosity or ill will. See Exh. 42, King aff. at ¶ 11; Exh. 43, Wiater aff. at ¶ 9.

#### V. THE COMPLAINT

On March 3, 1989, plaintiffs Eldon and Judith Byrd filed the Complaint in this case. Although the Complaint has ten counts, only five of the counts refer or otherwise relate to the Montcalm defendants.<sup>27/</sup> Count I of the Complaint alleges that the Montcalm defendants libeled Eldon Byrd by publishing the statement that he launched a blackmail campaign against Randi.<sup>28/</sup> Count II of the Complaint alleges that this same statement invaded the privacy of Eldon Byrd by placing him in a false

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<sup>27/</sup> Counts V through VIII of the Complaint allege slander and invasion of privacy in connection with a speech Randi allegedly made on May 17, 1988. None of the Montcalm defendants had anything to do with this speech. Count X of the Complaint seeks injunctive relief against Randi on the ground that he has defamed and invaded the privacy of the plaintiffs on more than one occasion. The attorney for the plaintiffs confirmed during Judith Byrd's deposition that this count is directed to Randi alone, and not to any of the Montcalm defendants. See Exh. 37, J. Byrd dep. at 29-30.

<sup>28/</sup> The text of the Complaint makes clear that all of the counts involving the Montcalm defendants except Count IX are brought by Eldon Byrd alone. Judith Byrd confirmed during her deposition testimony that she is a party only to Count IX of the Complaint. See Exh. 37, J. Byrd dep. at 28-29.

light. Count III of the Complaint charges that the Montcalm defendants libeled Eldon Byrd by publishing the statement that he was in prison for child molesting. Count IV of the Complaint charges that this statement invaded the privacy of Eldon Byrd by placing him in a false light. Finally, Count IX of the Complaint alleges that the Montcalm defendants have injured the marital relationship of Eldon and Judith Byrd as a result of the wrongs alleged in the previous counts.<sup>29/</sup> The Complaint requests aggregate damages in the amount of \$30,500,000 for the wrongs alleged in these five counts.<sup>30/</sup>

#### ARGUMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith" if a case presents "no genuine issue as to any material fact." As the Supreme Court has made clear, this rule requires a court to ask whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby.

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<sup>29/</sup> Each of the five counts described in the text is brought against all three of the Montcalm defendants -- Montcalm Publishing Corporation, TZ Publications, and Stanley Wiater. TZ Publications is merely a division of Montcalm Publishing Corporation; it has no separate or independent legal existence. See Exhibit 46, Defendant TZ Publications' Answers to First Set of Plaintiff Judith Byrd's Interrogatories, at 1. Accordingly, TZ Publications should be dismissed as a party to this suit.

<sup>30/</sup> Counts I and II each pray for damages of \$5,000,000. Counts III and IV each pray for damages of \$10,000,000. Count IX requests damages of \$500,000. In the counts of the Complaint not involving the Montcalm defendants, the plaintiffs request an additional \$8,500,000 and injunctive relief.

Inc., 477 U.S. 242, 248 (1986). If the evidence is "so one-sided" that a reasonable jury would have to find in favor of the movant, a grant of summary judgment is appropriate. Id. at 252.

The proper and timely entry of summary judgment is especially important in libel cases. See Anderson v. Stanco Sports Library, Inc., 542 F.2d 638, 641 (4th Cir. 1976). As the Stanco Court recognized, "prolonging a meritless [libel] case through trial could result in further chilling of First Amendment rights." Id. (granting summary judgment on the ground that the allegedly libelous statements were substantially true). For this reason, courts must take extra care to ensure that spurious libel claims never reach a jury. See id.; Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967).

Summary judgment is appropriate here for three independent reasons. First, the evidence shows that the most disparaging statement made about Byrd in the published interview is substantially true. Second, the evidence demonstrates that Byrd is a libel-proof plaintiff: he cannot succeed in an action for damage to reputation because his prior conduct has left him with no good reputation to protect. Third, the evidence shows that the Montcalm defendants acted without actual malice, which is the constitutionally required standard of liability in this case. Accordingly, this Court should dismiss the plaintiffs' claims against the Montcalm defendants.



I. THE STATEMENT CONCERNING CHILD MOLESTATION IS SUBSTANTIALLY TRUE

As a matter of both state law and federal constitutional law, a plaintiff in a libel or false-light invasion of privacy case bears the burden of proving the falsity of a challenged statement. Some 15 years ago, the highest court of Maryland established the rule that in any libel case -- even one of "purely private defamation" -- "the burden of proving falsity rests upon the plaintiff." General Motors Corp. v. Piskor, 277 Md. 165, 352 A.2d 810, 815 (Md. 1976); see Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 350 A.2d 688 (Md. 1975). The same state-law requirement applies to false-light invasion of privacy claims. See Phillips v. Washington Magazine, Inc., 58 Md. App. 30, 472 A.2d 98, 101 & n.1 (Md. Ct. Spec. App.), cert. denied, 300 Md. 89, 475 A.2d 1201 (1984). More important, the United States Supreme Court made clear in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768, 777 (1986), that the federal Constitution requires that a libel plaintiff -- whether a public figure or a private figure -- bear the burden of proving falsity, at least in cases in which a media defendant publishes speech of public concern.<sup>31/</sup> When this constitutional

<sup>31/</sup> The Montcalm defendants are media defendants, and the speech here is of public concern. Although the Supreme Court has not explicated in detail the distinction between speech of "public concern" and speech of "purely private concern," the only speech the Court ever has held to be of "purely private concern" in the context of a libel case is speech "solely in the individual interest of the speaker and its specific business audience" and "solely motivated by the desire for profit." Dun & Bradstreet, Inc. v. Greenmoss Builders,

(continued...)

requirement applies -- as it does in this case -- "a court should err on the side of nonactionability" when "the question of truth or falsity is a close one." Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 838 F.2d 1287, 1292 (D.C. Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 109 S. Ct. 75 (1988). ✓

A plaintiff does not satisfy his burden of proving falsity by showing that the challenged statement is not literally true. Under Maryland law, if the statement is substantially -- even if not literally -- true, the plaintiff's claim cannot succeed. See Seymour v. A.S. Abell Co., 557 F. Supp. 951 (D. Md. 1983); Piracci v. Hearst Corp., 263 F. Supp. 511 (D. Md. 1966), aff'd, 371 F.2d 1016 (4th Cir. 1967); Maryland Civil Pattern Jury Instructions 273-74 (2d ed. 1984). A statement is substantially true when its "gist" or "sting" is true -- i.e., when the statement as published would not have an appreciably different effect on the average reader than would the literal truth. See, e.g., W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts 842 (5th ed. 1984); R. Sack, Libel, Slander, and Related Problems 137 (1980). Moreover, in making determinations of substantial truth, courts have proven very

<sup>31/</sup>(...continued)

Inc., 472 U.S. 749, 759, 762 (1985). The interview at issue here concerned a heated public controversy, see supra at pp. 3-6, and therefore cannot be labeled of "purely private concern." Cf. The Florida Star v. B.J.F., \_\_\_ U.S. \_\_\_, 109 S. Ct. 2603, 2611 (1989) (noting that article as a whole, rather than particular statement challenged, is determinative of whether speech is of public significance).

willing to overlook errors in terminology relating to criminal charges and other legal proceedings.<sup>32/</sup>

The "gist" or "sting" of Randi's remarks was that Eldon Byrd is a child molester. It was the charge that Byrd had molested a child -- and not, for example, the statement that Byrd was serving time for this offense<sup>33/</sup> -- that gave the remarks their essential bite. In order to determine whether Randi's comments were substantially true, this Court must ask whether the literal truth about Byrd would have conveyed an appreciably different message. If the literal truth would have supported the allegation that Byrd is a child molester, as the average reader understands that term, then Randi's remarks were substantially true.

The undisputed facts show that Byrd indeed molested a child. In his first letter to Northrop, Byrd stated that he had "had experience" with a girl in the "12-14-16 age group" -- an age range in which girls "fascinated" him "because of their

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<sup>32/</sup> See, e.g., Piracci v. Hearst Corp., 263 F. Supp. 511 (D. Md. 1966), aff'd, 371 F.2d 1016 (4th Cir. 1967) (statement that juvenile was arrested for a crime was substantially true when in fact he had been arrested for delinquency); Bill Partin Jewelry, Inc. v. Smith, 467 So. 2d 188 (La. Ct. App. 1985) (statement that plaintiff had been charged with participating in a burglary was substantially true although he had been accused only of receiving burglarized property); Sivulich v. Howard Publications, Inc., 126 Ill. App. 3d 129, 466 N.E.2d 1218 (Ill. App. Ct. 1984) (statement that plaintiff was "charged" with robbery was substantially true even though he actually had been civilly sued for that offense).

<sup>33/</sup> Randi acknowledged his error with respect to Byrd's sentence in a letter published in Twilight Zone in October 1988. See supra note 26.

physical perfection" -- and that he had lived with her "from the time she was 14." Exh. 28. In his second letter to Northrop, Byrd again referred to this girl, noting that he had taken pornographic photographs of "my 'lolita.'" Exh. 29. After his arrest, Byrd told Whildin that he had met this girl when she was 9, become sexually involved with her when she was 12, and begun to live with her when she was 14. See Exh. 12, E. Byrd dep. at 49-52, 101-02; Exh. 33. When specifically asked at his deposition for the age of the youngest person with whom he had had sexual intercourse, Byrd claimed his Fifth Amendment privilege not to respond. See Exh. 12, E. Byrd dep. at 297, 306-07.<sup>34/</sup> In a civil case, this assertion allows a jury to draw an adverse inference. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1975). All of this evidence establishes that as an adult, Byrd had a sexual relationship with a child. Any average person would understand this kind of relationship to be child molestation.<sup>35/</sup>

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<sup>34/</sup> Byrd's assertion of his Fifth Amendment privilege with respect to questions going to the heart of this case itself gives the Court authority to dismiss his Complaint. See, e.g., Mount Vernon Savings and Loan Ass'n v. Partridge Assocs., 679 F. Supp. 522, 529 (D. Md. 1987) ("[I]t is well established that it is proper to dismiss the claim of a plaintiff who exercises his privilege against self-incrimination to refuse to answer questions related to the issues involved in the litigation which he has instituted."); Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084 (5th Cir. 1979); Lyons v. Johnson, 415 F.2d 540 (9th Cir. 1969), cert. denied, 397 U.S. 1027 (1970); Stop and Shop Cos., Inc. v. Interstate Cigar Co., 110 F.R.D. 105 (D. Mass. 1986).

<sup>35/</sup> Of course, the legal definition of child molestation -- and the meaning police officers give to this term -- is no different. The following colloquy occurred during  
(continued...)

These facts alone thus show that the gist of Randi's statement was correct.

Moreover, other undisputed facts in this case add yet further detail to the portrait of Eldon Byrd as child molester. Byrd was deeply involved in the "industry" of child pornography -- an industry that, by its very nature, exploits, abuses, and molests children. Child pornography is child molestation.<sup>35/</sup> Undisputed facts prove that Eldon Byrd bought, imported, collected, traded, and sold this pornography on a grand scale. See supra pp. 14-22 & accompanying notes. These activities are what drive the entire industry of child pornography forward. See Exh. 24, Northrop dep. at 297. In addition, undisputed facts

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<sup>35/</sup>(...continued)

Investigator Whildin's deposition:

Q: Child molesting is having sex with a minor, isn't that right?

A: That's right.

Q: Which you do know that he's guilty of that because he told you that, didn't he.

A: Yes.

Exh. 31, Whildin dep. at 173-74.

<sup>36/</sup> Inspector Northrop testified at his deposition: "Child pornography is child molestation. . . . You cannot create child pornography without molesting a child, and child pornography is, in fact, an everlasting document of that child's abuse." Exh. 24, Northrop dep. at 31. See also Exh. 31, Whildin dep. at 13-14. Nor does it take a policeman to understand this concept. Eldon Byrd's own wife, the co-plaintiff in this case, testified that she believed that the production of child pornography was a "terrible exploitation of children." Exh. 37, J. Byrd dep. at 246, 291.

indicate that Eldon Byrd himself manufactured child pornography when he took the photographs of his "Lolita." See supra pp. 16-19 & note 20.<sup>37/</sup> Byrd's extensive involvement in these various aspects of the child pornography industry provide additional (if merely cumulative) support for the charge that Byrd was a child molester.<sup>38/</sup> This Court therefore should hold that Randi's published comments were substantially true.<sup>39/</sup>

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<sup>37/</sup> Most of the slides Byrd showed to Whildin at their meeting are undated, but Byrd told Whildin that the slides were taken when the subject was 17 and 18. See supra p. 18; Exh. 32. Although it is technically possible that all of the slides that were pornographic in nature were taken when the subject was 18, Byrd's second letter to "Al Lazzola" indicates that Byrd had taken photographs of a minor. See Exh. 29; Exh. 24, Northrop dep. at 188-89, 255-56. Moreover, Northrop pointed out that Byrd clearly was reproducing child pornography -- for example, by copying materials or by converting 8 millimeter film to VHS. See Exh. 24, Northrop dep. at 251. Northrop testified that in his mind the reproduction of child pornography is equivalent to the original production of it. See id. at 34, 251.

<sup>38/</sup> Even assuming Byrd's deep involvement in the child pornography industry does not itself rise to the level of child molestation -- an assumption the Montcalm defendants would dispute -- his extraordinary interest in child pornography is probative evidence that he in fact sexually molested children. Whildin testified: "[I]f someone has . . . a desire to view child pornography, there is some sort of arousal there. And if the arousal is from the photograph, then the best thing to have is the child itself. . . . From all of our experience, we've seen that people who abuse children collect child pornography. So they tend to run hand in hand." Exh. 31, Whildin dep. at 16; see id. at 161-62. Gross also testified to the high correlation between people who collect child pornography and people who sexually abuse children themselves. See Exh. 34, Gross dep. at 14, 181. See also Exh. 24, Northrop dep. at 34-35.

<sup>39/</sup> The preceding "substantial truth" argument relates only to Randi's comments about child molesting, and not to his comments about blackmail. The Montcalm defendants believe that the remarks about blackmail are substantially true, but  
(continued...)

## II. ELDON BYRD IS A LIBEL-PROOF PLAINTIFF

In recent decades, courts have developed and used the libel-proof plaintiff doctrine to dismiss libel suits brought by plaintiffs whose reputations or prior conduct is so bad that they are unlikely, even in the event of a finding of liability, to recover anything other than nominal damages. See, e.g., Cardillo v. Doubleday & Co., Inc., 518 F.2d 638, 639-40 (2d Cir. 1975). The libel-proof plaintiff doctrine rests on the recognition that libel litigation, by its very nature, poses risks to First Amendment freedoms. See, e.g., id. at 639; Simmons Ford, Inc. v. Consumers Union, 516 F. Supp. 742, 750-51 (S.D.N.Y. 1981) (Weinfeld, J.). In the usual case, libel suits are allowed to proceed because of the legitimate state interest in compensating individuals for injury to reputation. See Gertz v. Robert Welch,

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<sup>39/</sup>(...continued)

recognize that there is currently a genuine issue of fact as to this point. Nonetheless, if this Court dismisses Counts III and IV on the ground of substantial truth, the Court also should dismiss Counts I and II for the reasons expressed in Simmons Ford, Inc. v. Consumers Union, 516 F. Supp. 742 (S.D.N.Y. 1981). In that case, Judge Weinfeld set forth one branch of the "libel-proof plaintiff doctrine," the other branch of which will be discussed fully in the next section. Judge Weinfeld reasoned that when one statement in an article harms a plaintiff's reputation far less than another statement in the same article, a libel suit based only on the former statement should not be allowed to proceed. That reasoning is fully applicable in this case, where as a practical matter, the comment relating to blackmail must have been rendered insubstantial by the far more "hurtful" comment relating to child molesting. In any event, the arguments set forth in Parts II and III of this Memorandum apply to all of Byrd's libel and invasion of privacy claims, regardless of whether they relate to the statement about child molesting or the statement about blackmail.

Inc., 418 U.S. 323, 341 (1974). When, however, no such interest exists, because a plaintiff's prior conduct and reputation precludes the possibility of real compensation, the libel suit should be dismissed. See, e.g., Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 928 (C.D. Cal. 1982); Sharon v. Time, Inc., 575 F. Supp. 1162, 1168 (S.D.N.Y. 1983) (dictum); Note, The Libel-Proof Plaintiff Doctrine, 98 Harv. L. Rev. 1909, 1916-18 (1985).<sup>40/</sup>

Courts have applied the libel-proof plaintiff in a variety of circumstances. In Cardillo v. Doubleday & Co., Inc., 539 F.2d at 640, for example, the Second Circuit approved the dismissal of the libel claim of a person previously convicted of numerous criminal offenses, even though he denied committing the particular crimes with which he had been charged in the challenged publication. The Court stated that given the plaintiff's prior criminal record, "we cannot envisage any jury awarding, or court sustaining, an award under any circumstances for more than a few cents' damages, even if [the plaintiff] were

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<sup>40/</sup> No court has considered the application of the libel-proof plaintiff doctrine to a false-light invasion of privacy claim, but reason and logic compel the conclusion that the doctrine should be available in false light cases. False light claims protect exactly the same interest as libel claims: the plaintiff's interest in reputation. See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573 (1977). Further, false light claims pose no less of a risk to First Amendment freedoms than do libel claims. See Time, Inc. v. Hill, 385 U.S. 374 (1967) (requiring proof of actual malice in false light cases). Thus, a false light claim, like a libel claim, should be dismissed, given the First Amendment interests at stake, when the plaintiff's prior conduct and reputation is so bad that he could not recover significant damages.

to prevail on the difficult legal issues with which he would be faced." Id.

Similarly, in Wynberg v. National Enquirer, Inc., 564 F. Supp. at 928-29, a district court dismissed the claim of the plaintiff, a former beau of Elizabeth Taylor, that he had been libeled by an article accusing him of taking money improperly from Ms. Taylor. Relying on the plaintiff's prior "conspicuously anti-social" and criminal behavior, the court concluded that the plaintiff's "reputation for his treatment of women and his general reputation for integrity, truth, honesty, and fair dealing in personal and business matters is bad." Id. at 928. And in Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 303-04 (2d Cir. 1986), cert. denied; 479 U.S. 1091 (1987), the Second Circuit held that the plaintiff was libel-proof with respect to any accusation of adultery (even one that was false) because his general reputation as an adulterer had been amply established. The Court stated that "the claim should be dismissed so the costs of defending against the claim of libel, which can themselves impair vigorous freedom of expression, will be avoided." Id. at 303. See also Logan v. District of Columbia, 447 F. Supp. 1328 (D.D.C. 1978); Ray v. Time, Inc., 452 F. Supp. 618 (W.D. Tenn. 1976), aff'd, 582 F.2d 1280 (6th Cir. 1978); Urbano v. Sondern, 41 F.R.D. 355 (D. Conn.), aff'd, 370 F.2d 13 (2d Cir. 1966), cert. denied, 386 U.S. 1034 (1967).<sup>41/</sup>

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<sup>41/</sup> Simmons Ford, Inc. v. Consumers Union, supra, initiated the development of what has become known as a separate branch of (continued...)

The libel-proof plaintiff doctrine could have been invented expressly for this case. As in Cardillo, no jury would grant, nor any court sustain, an award of more than a few cents' damages to Eldon Byrd, even were he to succeed in making a case that a technical libel had occurred. The undisputed evidence shows that as an adult, Byrd had a long-term sexual relationship with a young girl. The undisputed evidence shows that Byrd bought, collected, traded, sold, and manufactured the most repulsive kind of child pornography. The undisputed evidence, in short, establishes the kind of conduct that strips a person of any good name. Given his prior conduct, the statements published in Twilight Zone could not have caused Byrd reputational harm. In these circumstances, a court should dismiss a libel suit at the outset, in light of the First Amendment interests at stake. These constitutional values cannot but take precedence over Eldon Byrd's non-existent interest in "protecting" his already sullied reputation.

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<sup>41/</sup>(...continued)

the libel-proof plaintiff doctrine. See supra note 39. The Simmons Ford branch of the doctrine "measures the incremental harm inflicted by the challenged statements beyond the harm imposed by the rest of the publication." Herbert v. Lando, 781 F.2d 298 (2nd Cir.), cert. denied, 476 U.S. 1182 (1986). By contrast, the cases cited in this section measure the harm inflicted by the challenged statements given the plaintiff's prior bad conduct and reputation. In either case, if the harm is of such a kind that a recovery of anything other than nominal damages is unlikely, the suit is dismissed.

III. ELDON BYRD CANNOT SHOW THAT THE MONTCALM DEFENDANTS ACTED WITH ACTUAL MALICE, WHICH IS THE CONSTITUTIONALLY REQUIRED STANDARD OF LIABILITY IN THIS CASE

Because libel suits and false-light invasion of privacy suits inevitably implicate First Amendment freedoms, the Supreme Court has established strict rules governing the standards of liability to be used in such actions. In a libel suit, the appropriate standard of liability turns on whether the plaintiff is a public or a private figure. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-47 (1974). If the plaintiff is a public figure -- either with respect to all public controversies or with respect to the particular public controversy giving rise to the alleged defamation -- he must prove that the defendant made or published the challenged statement with "actual malice" (*i.e.*, with knowledge that the statement was false or with reckless disregard of whether it was true or false). See id. at 342-45. If the plaintiff is a private figure, the constitutionally-based actual malice standard does not apply, and the appropriate standard of liability is found by looking to state law. See id. at 347.<sup>42/</sup>

When a claim is for false-light invasion of privacy, the rules are somewhat different. The status of the plaintiff as a public figure or a private figure becomes irrelevant in this

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<sup>42/</sup> A state may not impose liability without fault, but is otherwise free to establish the standard of liability it deems appropriate. See Gertz v. Robert Welch, Inc., 418 U.S. at 347. In Maryland, the standard of liability applicable to private-figure defamation actions is a negligence standard. See Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 350 A.2d 688 (Md. 1976).

context. The actual malice standard applies regardless of the plaintiff's status, so long as the publication concerns a matter of public interest. See Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967); see also Ryan v. Brooks, 634 F.2d 726, 733 n.8 (1980).<sup>43/</sup>

In this part of their Memorandum, the Montcalm defendants will first demonstrate that Eldon Byrd is a "limited-purpose public figure" -- i.e., a public figure with respect to the particular controversy giving rise to the alleged defamation. This aspect of the defendants' argument is critical to disposition of the libel claims in the Complaint, although not to the false-light invasion of privacy claims, which are governed by the actual malice standard regardless of whether Byrd is a public figure.<sup>44/</sup> The Montcalm defendants will then show that Byrd cannot possibly prove that they acted with actual malice in

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<sup>43/</sup> Moreover, the award of punitive damages in defamation cases turns on a standard identical to the standard used to determine liability in false-light invasion of privacy cases. With respect to punitive damages in a libel case, the plaintiff's status as a public figure or a private figure is irrelevant. Regardless of this status, a plaintiff may not obtain punitive damages in a libel case absent a showing of actual malice, so long as the subject of the publication is a matter of public concern. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985).

<sup>44/</sup> The publication in this case concerned a matter of public interest, as shown supra at note 31. Thus, regardless of whether Byrd is a public figure, he must show actual malice to obtain a judgment in his favor on the false light claims in the Complaint. Similarly, regardless of whether Byrd is a public figure, he must show actual malice to recover punitive damages on his defamation claims.

publishing the alleged defamation. For this reason, all of Byrd's libel and invasion of privacy claims must be dismissed.

A. Eldon Byrd Is A Limited-Purpose Public Figure

In Gertz v. Robert Welch, Inc., the Supreme Court ruled that some libel plaintiffs are limited-purpose public figures -- persons who participate in a public controversy in such a way as to become public figures for purposes of statements arising out of that controversy. See 418 U.S. at 345, 352.<sup>45/</sup> Whether a libel plaintiff is such a limited-purpose public figure is to be determined "by looking to the nature and extent of [his] participation in the particular controversy giving rise to the defamation." Id. at 352. If the individual has participated in a significant way in the controversy giving rise to the defamation -- if he "voluntarily [has] inject[ed] himself" into that controversy or otherwise has attempted "to influence the resolution of the issues involved" in the controversy -- then the court is to treat him as a public figure in the libel litigation. See id. at 345, 351. The determination of whether the plaintiff has participated in such a manner in the controversy giving rise to the defamation is a matter of law, to be decided by the court. See Rosenblatt v. Baer, 383 U.S. 75, 88 (1966).

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<sup>45/</sup> The Supreme Court also recognized in Gertz that some, rather rare, litigants are public figures for all purposes, by virtue of their general fame, notoriety, and influence. See 418 U.S. at 345, 352. The Montcalm defendants do not contend that Eldon Byrd is such a general-purpose public figure.

The United States Court of Appeals for the Fourth Circuit gave guidance as to the proper application of these principles in Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666 (4th Cir. 1982), cert. denied, 460 U.S. 1024 (1983). The defendants in Fitzgerald had published an article concerning the use of dolphins for military purposes. See id. at 668. The article included a reference to the plaintiff, which suggested that he had committed acts of espionage. See id. at 670. The Fourth Circuit held that the plaintiff was required to show actual malice on the part of the defendants, because he was a public figure with respect to the controversy discussed in the article -- i.e., the use of dolphins for military work. See id. at 668. The Court supported its holding by noting that the plaintiff had researched the military application of dolphin technology, that he had published several articles and brochures on this subject, and that he had granted interviews on the subject to reporters from Newsday and "60 Minutes." See id. at 669. The Court concluded that these actions rendered the plaintiff a public figure with respect to the topic of the publication. See id. at 670.

Fitzgerald compels the conclusion that Eldon Byrd is a public figure for purposes of this libel litigation. The controversy discussed in Twilight Zone, which gave rise to the alleged defamation, concerned the authenticity of paranormal and psychic phenomena. See Exh. 44, "Truth's Bodyguard." Byrd participated actively in this controversy for many years. See

generally supra pp. 6-14 and accompanying notes. Byrd conducted significant research in the area: his nitinol experiments provoked extensive commentary and criticism and received widespread publicity. See supra pp. 7-11, accompanying notes, and exhibits cited therein. The experiments were discussed in numerous scholarly and popular books, and in periodicals as diverse as The Humanist and the National Enquirer. See supra pp. 8-9 and exhibits cited therein.<sup>46/</sup> Byrd also published articles respecting paranormal phenomena, of both a scientific and a personal nature. See supra pp. 7, 11, note 8 and exhibits cited therein. He attended conferences, appeared on at least three television shows, and granted interviews to reporters from The Washington Post, the Star, and several other newspapers. See supra pp. 10-12 and exhibits cited therein.

Byrd's research and writings -- and, no doubt, the publicity and comment they engendered -- established him as one of the leading scientists working in the field of paranormal phenomena. See supra p. 10-11, accompanying notes, and exhibits cited therein. If the plaintiff in Fitzgerald was a public figure with respect to any article concerning the debate over dolphin technology, surely Eldon Byrd is a public figure with respect to an article, like the interview published in Twilight Zone, concerning the controversy over paranormal phenomena. Byrd voluntarily thrust himself into this controversy in an attempt to

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<sup>46/</sup> The experiments also formed the basis of further research and investigation of paranormal phenomena. See supra p. 10-11 and exhibit cited therein.

influence its outcome;<sup>47/</sup> for this reason, the actual malice standard of liability is applicable in this libel action.

**B. The Montcalm Defendants Did Not Act With Actual Malice**

The actual malice standard requires a plaintiff to prove by clear and convincing evidence that the defendants published the challenged statements with actual malice -- i.e., with knowledge that they were false or with reckless disregard of whether they were true or false. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 285-86 (1964); see also Gertz v. Robert Welch, Inc., 418 U.S. at 342. In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the Supreme Court made clear that the dismissal of a libel claim on summary judgment is appropriate when the plaintiff has failed to adduce sufficient evidence of actual malice. The Anderson Court held that summary judgment must be granted when a plaintiff has failed to come forward with proof that would allow a reasonable jury to find by clear and convincing evidence that the defendants acted with actual malice. See id. at 257.

To show that a defendant acted with actual malice, the plaintiff must demonstrate either that the defendant knew the publication was false or that the defendant "in fact entertained

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<sup>47/</sup> Although this Memorandum has attempted to summarize the nature and extent of Byrd's participation in the controversy over paranormal phenomena, the Court may wish to review the relevant portions of Byrd's deposition testimony, which lead to an even greater appreciation of Byrd's role. Byrd's testimony demonstrates the kind of intimacy with the issues and people involved in the controversy that only an active participant could possess. See Exh. 12, E. Byrd dep. at 80-171, 182-280.

serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added). As the Supreme Court has stated, "reckless conduct is not measured by whether a reasonably prudent person would have published, or would have investigated before publishing." Id.<sup>48/</sup> Thus, the Court held in New York Times v. Sullivan that the newspaper had not acted with actual malice in publishing an advertisement, even though the paper's employees had failed to check the accuracy of the copy against news stories in the paper's own files. See 376 U.S. at 287-88. Similarly, the Court held in St. Amant v. Thompson that the defendant had not acted with actual malice in quoting another person's defamatory statements, even though (1) he had no personal knowledge of the truth of those statements, (2) he had no knowledge of the original speaker's reputation, and

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<sup>48/</sup> Like the phrase "actual malice," the term "reckless disregard" is a term of art in the First Amendment context which is easily misunderstood. As defined by the Supreme Court in St. Amant and Garrison v. Louisiana, 379 U.S. 64, 74 (1964), quoted infra, "reckless disregard" has nothing to do with conventional tort standards of "recklessness" or gross negligence. Rather, as the cases make plain, "reckless disregard" means actual and serious subjective doubt about the truth of what is being published, which is not the same as proof that a reasonable journalist should have doubted the truth of what was being published. Recently, the Supreme Court defined "actual malice" without using the word "reckless" at all:

The burden of proving "actual malice" requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.

Bose v. Consumers Union of United States, Inc., 466 U.S. 485, 511 n.30 (1984).

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(3) he had not attempted in any way to verify the information. See 390 U.S. at 730. As these cases make clear, actual malice is worlds removed from negligence or poor journalistic practice. To establish actual malice, the plaintiff must show that the publisher acted with knowledge of falsity or with a "high degree of awareness of . . . probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964); see also Ryan v. Brooks, 634 F.2d at 730-734.

The plaintiffs in this case have not and cannot adduce any facts that would allow a reasonable jury to find by clear and convincing evidence that the Montcalm defendants acted with actual malice. Both Stanley Wiater, who conducted the interview of James Randi, and Tappan King, who served as the primary editor, have stated in affidavits that they neither knew the challenged statements were false nor entertained any doubts as to the truth of those statements. See Exh. 43, Wiater aff. at ¶ 8; Exh. 42, King aff. at ¶ 10. There is not a scintilla of evidence to the contrary.<sup>49/</sup> The challenged statements did not conflict with any knowledge possessed by Wiater or King (or by any other person associated with Twilight Zone), nor were the statements obviously untrue. In these circumstances, the plaintiffs cannot possibly prove that the Montcalm defendants acted with actual

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<sup>49/</sup> Indeed, the Complaint in this case does not even attempt to plead facts to support the claim that the Montcalm defendants acted with actual malice.

malice. Accordingly, all of the plaintiffs' claims must be dismissed.<sup>50/</sup>

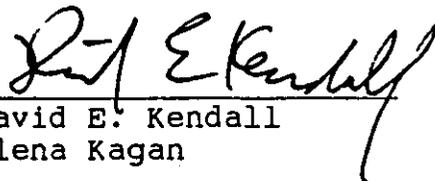
CONCLUSION

For the foregoing reasons, this Court should dismiss the plaintiffs' claims against the Montcalm defendants.

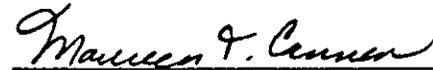
Respectfully submitted,

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<sup>50/</sup> The plaintiffs' claim for loss of consortium is a derivative claim, entirely dependent on the validity of at least one other claim in the Complaint. See Deems v. Western Md. Ry. Co., 247 Md. 95, 231 A.2d 514 (Md. 1966). If the Montcalm defendants have not directly wronged Eldon Byrd by publication of the challenged statements, then they have not indirectly wronged the marital unit. Accordingly, if the libel and false-light invasion of privacy claims against the Montcalm defendants are dismissed for failure to adduce evidence of actual malice -- or for any of the other reasons offered in this Memorandum -- the plaintiffs' loss of consortium claim against the Montcalm defendants also must be dismissed.