

**TESTIMONY ON HB 491**

GOOD AFTERNOON MR. CHAIRMAN, [MR. VICE-CHAIRMAN] AND MEMBERS OF THE COMMITTEE.

MY NAME IS JIM ASTRACHAN AND I AM COUNSEL TO THE BROADCASTERS WHO ASK YOUR COMMITTEE FOR THIS BILL. I HAVE PRACTICED LAW FOR 33 YEARS, TEACH UNFAIR COMPETITION AT THE UNIVERSITY OF MARYLAND LAW SCHOOL AND HAVE TAUGHT MASS COMMUNICATION LAW AT THE UNIVERSITY OF BALTIMORE LAW SCHOOL.

THE GOAL OF HB 491 IS TO GRANT IMMUNITY FROM LIABILITY TO BROADCASTERS WHO MAKE A MISTAKE WHEN BROADCASTING AN AMBER ALERT IF THE MISTAKE DOES NOT RESULT FROM:

- WILLFUL OR WONTON MIDCONDUCT;
- GROSS NEGLIGENCE; OR
- INTENTIONAL TORTIOUS CONDUCT.

THERE ARE APPROXIMATELY 121 GRANTS OF IMMUNITY IN THE MARYLAND STATUTES RANGING FROM IMMUNIZATION OF GOOD SAMARITAN DOCTORS TO RETAILERS WHO ALLOW CUSTOMERS TO USE THEIR BATHROOMS. THERE ARE 41 GRANTS RELATED TO PUBLIC HEALTH AND SAFETY. THE COMMON THREAD IN EACH PUBLIC HEALTH AND SAFETY GRANT OF IMMUNITY IS THAT:

- IMMUNIZED SERVICES ARE PROVIDED FOR NO FEE;
- THERE IS AN ABSENCE OF GROSS NEGLIGENCE, WONTON OR WILLFUL CONDUCT OR INTENTIONAL TORTIOUS ACTIVITY; AND
- THE CONDUCT IS ENGAGED IN FOR THE PUBLIC GOOD.

IN OTHER WORDS, THE CONDUCT IS UNINTENTIONAL, NO MONEY PASSES HANDS AND THE GRANT IS INTENDED TO INDUCE A VOLUNTARY ACTION.

EACH GRANT ADVANCES THE PUBLIC'S INTEREST AT THE EXPENSE OF AN INDIVIDUAL'S RIGHT TO SUE.

AMBER WAS CREATED IN 1996 IN RESPONSE TO THE ABDUCTION AND MURDER OF 9 YEAR OLD AMBER HARRINGTON. ONLY THE MARYLAND STATE

POLICE CAN AUTHORIZE AN AMBER ALERT, WHICH IS A VOLUNTARY PARTNERSHIP BETWEEN STATE POLICE AND THE INDIVIDUAL RADIO AND TV STATION WHO MUST AGREE TO BROADCAST THE ALERT AND MUST OFTEN TRANSCRIBE THE ALERT FOR BROADCAST.

FAST ACTION IS CRITICAL WHEN GETTING AMBER ON THE AIR. THE JUSTICE DEPARTMENT HAS REPORTED THAT IF AN ABDUCTED CHILD IS NOT FOUND IN THE FIRST 2 HOURS, CHANCES FAVOR THE CHILD'S DEATH. TIME IS OF THE ESSENCE WHEN BROADCASTING AN AMBER ALERT. URGENCY CREATES ERRORS.

A BROADCASTER WHO MAKES AN ERROR IS SUBJECTED TO A LAWSUIT FOR DEFAMATION, AS WORDS FALSELY IMPUTING A CRIME ARE ACTIONABLE. AN EMPLOYEE WHO MISTAKENLY TRANSCRIBES A NAME, MAY SUBJECT HIS OR HER EMPLOYER TO A SUIT FOR DEFAMATION.

NEWS REPORTS ARE PROTECTED TO A VERY LIMITED EXTENT BY WHAT IS CALLED "THE FAIR REPORTING PRIVILEGE". TO BE IMMUNIZED, A REPORT OF NEWS MUST BE "FAIR, ACCURATE AND MADE WITHOUT MALICE." SOME COURTS HAVE MODIFIED THIS TO MEAN "SUBSTANTIALLY FAIR AND

ACCURATE”, THUS ALLOWING SOME ABRIDGEMENT OF THE REPORT AS LONG AS THE SENSE IS NOT CHANGED.

THERE ARE NO REPORTED CASES IN MARYLAND THAT DEFINE “SUBSTANTIALLY FAIR AND ACCURATE”. ROSENBERG v. HELINSKI, 328 MD 664, MAY BE THE CLOSEST WHERE THE COURT OF APPEALS CITED TO THE RESTATEMENT WHEN IT HELD FAIR AND ACCURATE TO BE AN,

“ACCURATE AND COMPLETE, OR A FAIR ABRIDGMENT, OF THE OCCURRENCE REPORTED.”

THIS PROVIDES NO GUIDANCE FOR OUR PURPOSES TODAY OTHER THAN TO SAY THAT IF [1.] THE STATE POLICE GET THE NAME WRONG AND A BROADCASTER REPEATS IT EXACTLY, THE BROADCASTER IS NOT LIABLE FOR DEFAMATION, AND [2.] THAT A REPORT NEED NOT BE REPORTED VERBATIM.

TO MAKE MATTERS WORSE, IN BATSON v. SHIFLET, 325 MD 684, THE COURT OF APPEALS HELD THAT WHETHER A STATEMENT IS FAIR AND ACCURATE IS A QUESTION OF FACT FOR THE JURY, THUS SUBJECTING THE SPEAKER TO THE COST AND RISK OF TRIAL. IT FOLLOWS THAT A PERSON MAY BE WISE NOT TO SPEAK.

WHY? BECAUSE AS FAR AS I CAN TELL, THE PRIVILEGE HAS ONLY BEEN HELD TO APPLY TO REPORTING OF PUBLIC OR LEGAL PROCEEDINGS. WHETHER AMBER REPORTS FIT THESE CATEGORIES REMAINS TO BE SEEN. WORSE, PROFESSOR PROSSER, IN HIS TREATISE ON TORTS, REPORTS THAT THE FAIR REPORTING PRIVILEGE DOES NOT COVER FALSE STATEMENTS OF FACT OR MISTAKES IN THE NAMES OF PARTIES.

FOR THESE REASONS 14 STATES HAVE ENACTED LEGISLATION TO PROTECT BROADCASTERS WHO ACT TO PROTECT OUR CHILDREN. WE ASK MARYLAND TO DO THE SAME.

WE RECOGNIZE THAT WE ARE ASKING YOU TO IMMUNIZE SOME NEGLIGENT ACTIONS; HOWEVER, WE BELIEVE THAT THERE IS A BALANCING OF THE PUBLIC'S INTEREST VERSUS THE INDIVIDUAL'S RIGHTS – RIGHTS THAT OFTEN MUST GIVE WAY TO THE PUBLIC'S INTEREST AS DEMONSTRATED BY OTHER GRANTS OF IMMUNITY.

THANK YOU.