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### Summary of Seres v. Lerner, 120 Nev. Adv. Op. 95

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***Seres v. Lerner*, 120 Nev. Adv. Op. 95, 102 P.3d 91 (Dec. 2004)<sup>1</sup>**

**CONSTITUTIONAL LAW—FIRST AMENDMENT**

**Summary**

The sister of a manslaughter victim, on her mother’s behalf, brought an action against the felon, who wrote a book regarding the killing of the victim, seeking to recover the felon’s book proceeds under the Nevada “Son of Sam” law. The district court found the applicable Nevada statute to be unconstitutional and dismissed the plaintiff’s action. Plaintiff appealed.

**Disposition/Outcome<sup>2</sup>**

The Nevada Supreme Court held that NRS 217.007, Nevada’s “Son of Sam” law (1) constituted State action for purposes of the First Amendment; (2) was a content-based restriction on speech; and (3) was unconstitutionally over inclusive under the First Amendment. The court held that NRS 217.007 thus violated the First Amendment of the United State’s Constitution, and affirmed the lower court’s decision.

**Factual and Procedural History**

In 1998, defendant was convicted of manslaughter for the death of Mark Slavin. While in prison, defendant wrote a book entitled, “You Got Nothing Coming, Notes from a Prison Fish,” which was published in 1999. The book detailed defendant’s imprisonment and contained descriptions of the events surrounding the killing of Mr. Slavin.

Plaintiff, Mr. Slavin’s sister, sued defendant on behalf of her mother after expiration of the statute of limitations for bringing a wrongful death action. Plaintiff sought recovery of defendant’s book proceeds, imposition of a constructive trust, and an accounting.

The district court granted defendant’s motion to dismiss plaintiff’s NRS 217.007 action under *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*,<sup>3</sup> and plaintiff timely appealed.

**Discussion**

**Standard of review**

First Amendment jurisprudence dictates that legislatively created content-based restrictions on speech satisfy strict scrutiny review under which any such measure must address a compelling state interest and be narrowly tailored to achieve that interest.<sup>4</sup> Overinclusive content-based measures fail this level of scrutiny.

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<sup>1</sup> By Sally L. Galati

<sup>2</sup> Before the court en banc; Justice Douglas did not participate in this decision.

<sup>3</sup> *Simon & Schuster, Inc., v. Members of New York State Crime Victims Board*, 5502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

<sup>4</sup> *Id.* at 110, 112 S.Ct. 501.

## Historical perspectives

New York enacted the first Son of Sam law in 1977, in response to the possibility that David Berkowitz, a serial killer known as the Son of Sam, might sell the publication rights to his memoirs. The law was intended to ensure that money received by criminals in connection with published storytelling about their criminal activities be made available to compensate victims.<sup>5</sup> Following New York's lead, the federal government and a majority of states have enacted similar Son of Sam statutes.

In *Simon & Schuster*, the United States Supreme Court voided New York's Son of Sam law as inconsistent with the First Amendment. The Court determined the measure was content-based, because "[i]t single[d] out income derived from expressive activity for a burden the State place[d] on no other income, and it [was] directed only at works with a specified content."<sup>6</sup> The Court found the statute to be significantly overinclusive, because it applied to the entire proceeds from works regardless of subject, as long as they expressed the author's thoughts or recollections about his crime, regardless of how little of the works were mentioned, and regardless of the purpose of the work itself.<sup>7</sup> Additionally, the Court found the statute to be overinclusive because it could affect works by persons never prosecuted or convicted, if the author included an admission in the published work.<sup>8</sup>

## Nevada's Son of Sam statute

The Nevada Legislature first enacted a Son of Sam law in 1981, which it modified in 1993 to comply with the *Simon & Schuster* decision.<sup>9</sup> The revision was designed to "extend [] the statute of limitations for a victim of a felony with respect to money or property gained by the offender as a result of notoriety."<sup>10</sup> The revisions also eliminated the previous state-administered fund feature of the old legislation, similar to that which proved problematic in *Simon & Schuster*.

## The district court's ruling

The district court found a First Amendment violation despite its determination that NRS 217.007, a content-based restriction on speech, addressed compelling state interests in reimbursing crime victims and prohibiting profiteering from criminal activity. Following the strict scrutiny approach taken in *Simon & Schuster*, the court observed that the statute was overinclusive because it would allow recovery of proceeds from a book that is ninety percent about religious matters and ten percent about the felony. The court concluded that the statute, while achieving the compelling state interest of preventing a felon from profiting by commission of a felony, did so by chilling the incentive to create expressive works with little or no relationship to the exploitation of criminal misdeed. Thus, the court found that NRS 217.007 did not survive the strict scrutiny analysis.

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<sup>5</sup> *Id.* at 109, 112 S.Ct. 501.

<sup>6</sup> *Id.* at 116, 112 S.Ct. 501

<sup>7</sup> *Id.* at 121-22, 112 S.Ct. 501.

<sup>8</sup> *Id.* at 121, 112 S.Ct. 501

<sup>9</sup> See NEV. REV. STAT. 217.265 (repealed in 1993 and replaced by NEV. REV. STAT. 217.007).

<sup>10</sup> Nev. Legis. Counsel Bureau, Research Div., 67<sup>th</sup> Leg., Summary of Legislation 2 (Nev. 1993).

## State action

The Nevada Supreme Court has recognized that the First Amendment only applies to the abridgment of the right of free speech by the federal or state government, and that to apply to the states, the infringement must involve state action.<sup>11</sup> The court then concluded that judicial enforcement of state legislation involves state action restricting speech implicating the First Amendment. NRS 217.007 legislatively created a cause of action that contemplates enforcement under the state's levy and execution statutes. Thus, while NRS 217.007 eliminated state confiscation and administration of funds that marked Nevada's first Son of Sam legislation, the measure still implicated state action for First Amendment purposes.<sup>12</sup>

## Content-based restriction

As stated in *Simon & Schuster*, “[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.”<sup>13</sup> If the proposed expression's contents must be reviewed in order to determine whether the statute applies, then the statute is a content-based restriction on speech.<sup>14</sup> The *Simon & Schuster* Court concluded the New York Son of Sam law was content-based because it “single[d] out income derived from expressive activity for a burden the State place[d] on no other income, and it [was] directed only at works with a specified content.”<sup>15</sup>

In line with *Simon & Schuster*, the Nevada court concluded that, to the extent NRS 217.007 allows the filing of claims after the expiration of statutes of limitation for wrongful death and other tort claims, it is a content-based statute. This is so because the Nevada statute explicitly and exclusively applies to income received from speech concerning the crime committed, and it places a direct financial burden only on speech with a specified and particular content (reference to the felony itself). Because NRS 217.007 is a content-based restriction on speech, it must pass a strict scrutiny level of review.

## Strict scrutiny/overinclusiveness

The court agreed that Nevada has compelling interests in the compensation of crime victims and in the prevention of direct profiteering from criminal misconduct. As a consequence, the court next considered whether the statute was tailored narrowly to meet these compelling interests.

Two aspects of NRS 217.007 give rise to a strict scrutiny analysis under *Simon & Schuster*: first, that the victim's ability to recover the proceeds from “any contribution to any material that is based upon or substantially related to the felony,”<sup>16</sup> and second, that potential defendants in NRS 217.007 actions need not have been convicted for the crime against the victim.

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<sup>11</sup> *S.O.C., Inc., v. Mirage Casino-Hotel*, 117 Nev. 403, 410, 23 P.3d 243, 247 (2001).

<sup>12</sup> *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

<sup>13</sup> *Simon & Schuster*, 502 U.S. at 115.

<sup>14</sup> *In re Opinion of the Justices to the Senate*, 764 N.E.2d 343, 348 (Mass. 2002)

<sup>15</sup> *Simon & Schuster*, 502 U.S. at 116.

<sup>16</sup> NEV. REV. STAT. 217.007(1) (2004).

First, NRS 217.007 provides for recovery of proceeds from “any contribution to any material that is based upon or substantially related to the felony,” giving rise to the potential application to works only partially or tangentially related to the crime committed. So although NRS 217.007 does not restrict a felon from engaging in whatever speech or expression he desires, it penalizes that speech based upon its discrete content by seizing all proceeds, regardless of the extent to which the work relates to the crime against the victim. The court determined that the breadth of this coverage violated *Simon & Schuster*.

Second, the provision does not restrict the realm of possible defendants to convicted felons. The statute contains no conviction qualifier, subjecting any person who admits to having committed a crime to having the entire proceeds of his work seized and made available to all the author’s creditors.

The court held that the statute is overinclusive.

### **NRS 217.007 and the tort statute of limitations**

The attorney general argued that NRS 217.007 simply extends the statute of limitations otherwise applicable to tort claims with a limitation on damages, and thus creates no new or separate cause of action. The Nevada Supreme Court disagreed, stating that to the extent a victim may bring a traditional cause of action for personal injury, property loss or wrongful death within the applicable statute of limitations for such matters, Nevada levy and execution laws concerning the felon’s misconduct provide for execution against proceeds from publications, along with any other nonexempt assets. Accordingly, to the extent that a claimant would file suit under NRS 217.007 before expiration of the statutes of limitations cited within it, subject to the single exception noted previously, the provision is a nullity for First Amendment purposes.

However, to the extent that NRS 217.007 operates after expiration of a particular limitation period, it creates a separate cause of action that limits victims to recovery of a felon’s publication proceeds. First, the statutory cause of action arises upon the felon’s entitlement to proceeds from published material, not the actual harm inflicted upon the victim. Second, awards under this statute would not be restricted in any way by the law of damages governing traditional causes of action in tort. Entitlement to proceeds stimulates the viability of the new cause of action; thus, NRS 217.007 does not renew or revive a wrongful death claim otherwise barred by the statutes of limitation recited within it. The court concluded that this new cause of action expands upon traditional content-based remedies that exist separate and apart from NRS 217.007.

### **Conclusion**

The Nevada Supreme Court concluded that NRS 217.007 is a content-based restriction on speech, the validity of which is subject to *Simon & Schuster*’s strict scrutiny analysis. Although the measure addresses compelling state interests in compensating victims and prevention of criminal profiteering, it suffers from overinclusiveness because it regulates more speech than is necessary to serve the state’s interest. Clearly, NRS 217.007 allows recovery of proceeds from works that include expression both related and unrelated to the crime, imposing a disincentive to engage in public discourse and nonexploitative discussion of it. The court therefore held that NRS 217.007 violates the First Amendment of the United States Constitution.