STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW COURT DOCKET NO. CUM-04-295

RONALD FITCH

Plaintiff-Appellee

v.

JOHN OR JANE DOE #1

Defendant-Appellant

On Appeal From An Order Of The
Cumberland County Superior Court

BRIEF OF DEFENDANT-APPELLANT

Counsel for Defendant-Appellant:

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STATEMENT OF THE CASE

Procedural History

On February 4, 2004, Ronald Fitch ("Fitch") commenced an action against John or Jane Doe #1 ("Doe"), by filing a Complaint captioned *Ronald Fitch v. John or Jane Doe #1*, Superior Court Civil Action Docket No. CV-04-78, in the Cumberland County Superior Court (the "Complaint"). The Complaint alleges that Doe misappropriated the identity of Fitch by setting up an e-mail account using Fitch's name and then sending out an e-mail using that account. (App. pp. 8, 9). Contemporaneously with the filing of the Complaint, Fitch also filed a *Motion Seeking Disclosure of Service Provider Information* seeking to compel Time Warner Cable Co., Inc. ("Time Warner") to disclose the identity of the subscriber or owner of the e-mail account from which the e-mail at issue was sent (the "Time Warner Motion"). (App. p. 22). On March 23, 2004, the Cumberland County Superior Court (the "Superior Court") issued an Order requiring Fitch to serve a copy of the Time Warner Motion, along with a copy of the March 23rd Order, on Time Warner and further providing that the Superior Court would conduct a hearing on the Time Warner Motion on April 9, 2004. (App. p. 1). Time Warner subsequently advised Doe of the Time Warner Motion and counsel for Doe appeared at the April 9th hearing and objected to the Time Warner Motion. (App. p. 1)[1] The hearing on April 9th was non-testimonial, and consisted solely of arguments of counsel and questions from the Bench. Moreover, no exhibits were introduced, and no affidavits or other sworn materials were proffered. Per the Order of the Superior Court issued from the Bench at the April 9th

[1] At the April 9, 2004 hearing, the Superior Court permitted counsel for Doe to enter his appearance on behalf of Doe, without disclosing Doe's actual identity, and to argue Doe's position with respect to the Time Warner Motion.

hearing, Doe filed a brief in support of Doe's opposition to the Time Warner Motion on April 20, 2004, and Fitch filed a brief in support of the Time Warner Motion on April 26, 2004. (App. pp. 2, 25 and 28).

On May 13, 2004, the Superior Court entered an Order compelling Time Warner to disclose the identity of its subscriber (the "May 13th Order"). (App. pp. 2, 4)

On May 18, 2004, five days after the Superior Court issued the May 13th Order, Doe timely filed a Notice of Appeal pursuant to M.R.App.P. 2(b)(3) (the "Notice of Appeal").

Subsequent to the filing of the Notice of Appeal, the Superior Court ordered that the parties file briefs with the Superior Court addressing the issue of whether the effect of the May 13th Order was stayed pending this Appeal. (App. p. 3). On June 10, 2004, Doe filed *Defendant's Memorandum of Law Regarding Continuing Jurisdiction*. (App. p. 3). On June 21, 2004, Fitch filed *Plaintiff's Objection to Defendants Request for Stay and Incorporated Memorandum of Law*. (App. p. 3).

On June 23, 2004, the Superior Court issued an Order holding that the May 13th Order was a discovery order, the effect of which was not stayed pending appeal, but imposing a temporary stay until July 6, 2004, to allow Doe to file a motion for stay with this Court, with such temporary stay to remain in effect pending determination of any such stay motion filed in this Court. (App. p. 3). The June 23rd Order also required Doe to obtain documents from Time Warner that would be produced pursuant to the Time Warner Motion and to file those documents under seal with the Superior Court. (App. p. 3).

On July 6, 2004, Doe filed with this Court *Defendant-Appellant's Motion for Stay Pending Appeal Pursuant to M.R. App. P. 10 (c) and Incorporated Memorandum of Law* (the "Stay Motion"). (App. p. 3). On the same date, Doe filed with the Superior Court, in a separate, sealed envelope, the disclosure from Time Warner required by the May 13th Order and the June 23rd Order. (App. p. 3). On July 16, 2004, Fitch filed *Plaintiff/Appellee Fitch's Objection to Stay Pending Appeal and Incorporated Memorandum of Law*.

On July 19, 2004, this Court granted the Stay Motion. By virtue thereof, the disclosure from Time Warner remains under seal with the Superior Court.

Factual Background

On or about December 24, 2003, an e-mail was sent to various members of the Board of Directors of Great Diamond Island (the "E-Mail"). (App. p. 14). The E-Mail indicated that it was sent from: "Ronald Fitch <fitchisland@hotmail.com>" (App. p. 14). The E-Mail is entitled "Happy Holidays" and reads as follows:

"One and all

"Thank you all for the continued good work.

"Ron"

The E-Mail concludes with a cartoon drawing that does not make reference to Fitch at all. (App. p. 14). Fitch alleges that he has suffered damages as a result of the dissemination of the E-Mail all as more particularly set forth in the Complaint. (App. p. 8).

Fitch has alleged that he is not aware of the origin of the E-Mail and, therefore, he requested that Time Warner disclose the subscriber of the e-mail account from which the E-Mail was sent. (App. p. 22). Time Warner, citing 47 U.S.C. § 551, refused to disclose any information about any of its subscribers absent a final court order compelling it to do so. (App. p. 23).

ISSUES ON APPEAL

The following issues are presented on appeal to this Court:

1. Whether 47 U.S.C. § 551 prohibits disclosure by Time Warner of the identity of the e-mail account from which the E-mail was sent, under the circumstances of this case;

2. Whether the Superior Court erred in ordering such disclosure by Time Warner;

3. Whether the Superior Court abused its discretion in ordering such disclosure by Time Warner.

SUMMARY OF ARGUMENT

In order to protect the Constitutional privacy rights of cable subscribers, Congress enacted 47 U.S.C. § 551 (c) which provides in no uncertain terms that: "A cable operator *shall not* disclose personally identifiable information concerning any subscriber…" (*emphasis added*). There are a limited number of exceptions to the general rule. Most are entirely inapplicable to this case, however, one of them, consent, 47 U.S.C. § 551 (c)(1), was the basis upon which the Court ordered Time Warner to disclose subscriber information. It is abundantly clear, however, that (a) there was no record upon which the Superior Court could have found any "consent" and (b) the only information arguably (although improperly) before the Superior Court did not support the conclusion that Doe had consented to disclosure. As such, the consent exception could not apply, and any order requiring Time Warner to disclose personally identifiable information, such as Doe's name, would violate 47 U.S.C. § 551.

The Superior Court, however, without any factual record, i.e. without any affidavits, testimony, exhibits, offers of proof, or any other purported record, reasoned that Doe had somehow consented to disclosure by signing a subscription agreement. In making this critical "finding of fact", the Superior Court relied entirely upon Fitch's unsworn representation (made by counsel for Fitch in a pleading) of what is contained in Time Warner's "standard" subscriber agreement, and Fitch's, again, unsworn assertion that Doe signed Time Warner's standard subscription agreement. Not only was there no evidence of what the standard agreement in fact was, nor any evidence as to whether Doe had, in fact, signed such a subscriber agreement, the Superior Court gave little or no consideration to what the language submitted by Fitch actually said. To make matters worse, Doe was afforded no opportunity to respond to Fitch's assertion that Doe had consented to disclosure. In fact, when one looks at the plain language of what Fitch submitted, it is clear that even if Doe had signed a subscription agreement such a fact would not amount to consent to disclosure of Doe's identity under the circumstances presented by this case.

ARGUMENT

47 U.S.C. § 551 PROHIBITS DISCLOSURE OF PERSONALLY IDENTIFIABLE INFORMATION

The title of the relevant statute, 47 U.S.C. § 551, is telling: it is named "Protection of Subscriber Privacy." The legislative history of the Act makes it clear that Congress intended to afford special protection to cable subscribers because "Cable systems… have

an enormous capacity to collect and store personally identifiable information about each cable subscriber. Subscriber records from interactive systems can reveal details about bank transactions, shopping habits, political contributions, viewing habits and other significant personal decisions." *See* H.R. Rep. 98-934, 98th Cong., 2nd sess. (1984) at pp. 30, 4666-4667. Congress recognized that protecting the privacy of cable subscribers is necessary to safeguard First, Fourth and Fifth Amendment rights. *Id.* Other utilities, such as telephone service, whose services do not, by their very nature, involve access to highly personal information do not raise these same issues; hence, the Act is unique to cable providers. In order to protect the Constitutional rights of cable subscribers, Congress enacted 47 U.S.C. § 551 (c) which provides in no uncertain terms that absent prior written or electronic consent, "A cable operator *shall not* disclose personally identifiable information concerning any subscriber…" (*emphasis added*). The only exceptions to the general prohibition set forth in Section 551 (c) are clearly outlined in 47 U.S.C. § 551(c)(2) and (h).

As is more particularly set out below, there was no basis upon which the Superior Court could have properly concluded that Doe consented to disclosure of personally identifiable information to Fitch and none of the exceptions in §551(c)(2) are applicable. The Superior Court abused its discretion in making findings of fact based on the record before it and the Superior Court was simply wrong as a matter of law in concluding that disclosure could be ordered.

A. It Was Improper for the Superior Court to Conclude that Doe Consented to Disclosure

The Superior Court concluded in the May 13th Order that Doe had previously consented to disclosure of personally identifiable information and that, therefore,

disclosure was permissible pursuant to 47 U.S.C. § 551 (c)(1). As is more particularly set forth, below, however, the Superior Court had no basis to reach that conclusion.

1. There is No Record Establishing that Doe Has Consented to Disclosure of Personally Identifiable Information.

The Superior Court based the May 13th Order on its unverified *assumption* that (1) Doe had signed Time Warner's "standard" form of subscription agreement, and that (2) the language in the "standard" form of subscription agreement was sufficient to constitute "consent" within the meaning of 47 U.S.C. § 551(c)(1). There is simply no record that supports the assumptions reached by the Superior Court.

Succinctly put, there was no evidence whatsoever before the Superior Court, and no evidence that would justify the conclusion set forth in the May 13th Order that Doe had signed Time Warner's "standard" form of subscription agreement. Furthermore, there was no evidence to suggest that execution of Time Warner's "standard" form of subscription agreement rises to the level of "consent" required by 47 U.S.C. § 551(c)(1).

In the May 13th Order, the Superior Court purports to quote from Time Warner's "standard" subscriber agreement. (App. p. 5). In point of fact, however, Time Warner's "standard" subscriber agreement was never submitted to the Superior Court by way of a proffer or sworn testimony. In reality, what the Superior Court quotes from is not even a subscriber agreement; it is "Time Warner Cable and Affiliated ISPS Subscriber Privacy Notice" (the "Privacy Notice"). The Court did not receive the Privacy Notice into evidence, the Privacy Notice came from counsel for Fitch, as an attachment to counsel's memorandum of law (App. p. 37), with no opportunity for Doe to review it, assess its authenticity, cross-examine anyone about it, or present any rebuttal evidence. If anyone had attempted to actually put the Privacy Notice into evidence, it would have been

clearly inadmissible as hearsay since it was not authenticated and it was offered to prove the truth of the matters contained therein.

Even, however, had the Privacy Notice been admissible, it would still not be sufficient evidence of consent by Doe. The Privacy Notice provides, in relevant part, as follows:

> [Our] affiliated ISPs may also disclose, pursuant to the consent you granted in your Subscription Agreement, the personally identifiable information described in Section 1 in connection with the provision of services to you in order to fulfill transactions you request, to personalize your online experience, to comply with criminal or civil legal process…, and as otherwise necessary in the ordinary course of their businesses.
>
> App. p. 5
>
> (emphasis supplied by Superior Court).

First, one must note that there is absolutely nothing that gives any indication as to what the scope of the consent contained in the "standard" form of subscription agreement might be. Second, the portion of the Privacy Notice that the Superior Court highlighted merely indicates that a subscriber has consented to disclosure to "…comply with criminal or civil legal process…" There is no indication as to whether this was intended to be a blanket consent anytime that Time Warner received any kind of a subpoena or whether it was intended to provide notice to a subscriber that if all applicable laws (including 47 U.S.C. § 551) are complied with, there will be disclosure. The former interpretation is not supported by the language of the Privacy Notice or, in fact, by the actions of Time Warner (who clearly felt that it did not have sufficient consent to disclose). The latter interpretation brings us full circle back to the statute at the heart of this matter. Third, whatever this Privacy Notice means, there is nothing in the record to suggest that Doe

received this Privacy Notice or that Doe signed a "standard" form of subscription agreement.

The Superior Court concluded in the May 13th Order that the above quoted language "…constitutes notice to subscribers that they have consented to disclosure by Time Warner in the ordinary course of its business of the subscribers' identifying information in response to civil legal process." App. p. 5. While Doe concedes that the Privacy Notice does provide notice of privacy rights of some interpretation to anyone that receives it, it was entirely improper for the Superior Court to conclude that the Privacy Notice, submitted as an attachment to a memorandum, without authentication or opportunity for examination, constitutes competent evidence that Doe consented to disclosure of his personally identifiable information to Fitch under these circumstances.

Perhaps most telling is that it appears that not even Time Warner believed that Doe had consented to disclosure. Time Warner refused to make the requested disclosure absent an appropriate, final court order referencing 47 U.S.C. § 551. App. p. 23. If Time Warner's own documents constituted consent by Doe to disclosure, why would Time Warner have refused to make disclosure? The only answer to that question is that the neither the Privacy Notice nor Time Warner's "standard" form of subscription agreement (assuming such a creature exists) constitute blanket consent to <u>all</u> disclosure of <u>all</u> personally identifiable information to <u>all</u> that ask for it. To surmise that Time Warner has crafted boilerplate language that is sufficient to essentially vitiate the protections of 47 U.S.C. § 551(c)(1) is an impermissible judicial leap of faith.

2. Consent to Disclosure in a Contract of Adhesion is Not Enforceable

Even if one were to assume, *arguendo*, that the Superior Court had sufficient evidence before it to conclude that Doe had signed Time Warner's "standard" form of subscription agreement and that such an agreement contained language purporting to grant consent to disclosure of personally identifiable information to anyone under any circumstances, such "consent" would still not satisfy the requirements of 47 U.S.C. § 551(c)(1).

As set forth above, Congress enacted the "Protection of Subscriber Privacy" laws to protect the Constitutional rights of cable subscribers and to prevent the unauthorized disclosure of personally identifiable information. Clearly, Congress determined that it was important for cable subscribers to have some input as to whether personally identifiable information is disclosed.

As the May 13th Order itself points out, any consent that Doe allegedly gave was by, perhaps, signing Time Warner's "standard subscriber agreement." App. p. 5. This Court can take judicial notice of the fact that such a "standard" form of agreement would be, assuming it exists, a text book example of a contract of adhesion[2]. Provisions in a pre-printed form contract that cannot be negotiated must be viewed with a higher degree of scrutiny. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 600, 111 S. Ct. 1522, 1530-1531(1991), Stevens, J., dissenting ("…courts traditionally have reviewed with heightened scrutiny the terms of contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power.").

[2] Black's Law Dictionary, 5th Ed., 1979, defines "adhesion contract" as follows:

> Standardized contract form offered to consumers of goods and services on essentially "take it or leave it" basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form of contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms. [citations omitted]

Id. at 38.

A waiver of constitutional rights must be "voluntarily, intelligently, and knowingly made…" Fuentes v. Shevan, 407 U.S. 67, 95, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972) and a consent provision in a contract of adhesion must give adequate notice as to what is being agreed to. Hunt v. Superior Court, 81 Ca. App. 4th 901, 908 97 Cal. Rptr. 2d 215, 219 (2000). There was no evidence before the Superior Court to suggest that if Doe had consented, such consent was knowingly made and voluntary.

In the Fuentes case the Supreme Court was faced with the issue of whether consumers had waived constitutional protections by signing conditional sales contracts that contained language indicating that the seller could take back the merchandise in the event of default. In holding that the language at issue did not amount to a waiver, the Supreme Court noted as follows:

> There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.
>
> Id.

Justice Stewart went on to note that the language in the contracts at issue did not amount to a waiver but was merely "…a statement of the seller's right to repossession upon occurrence of certain events." Id. at 96.

Thus, even if one were to accept the Superior Court's assumption that Doe did, in fact, sign Time Warner's "standard" form of subscription agreement, based on the

Fuentes case in order to conclude that Doe had consented to disclosure, Fitch would have to establish all of the following:

- That Doe and Time Warner were equal in bargaining power
- That Doe was afforded an opportunity to negotiate the terms of the subscriber agreement
- That Doe could have obtained cable service without signing the subscription agreement
- That the "consent" was more than a mere recitation of Time Warner's legal obligation to disclose if required to do so by an appropriate order of a court of competent jurisdiction or if permitted to do so by applicable law
- That Doe understood that by signing the subscription agreement he was waiving his Constitutional privacy rights.

One is hard pressed to imagine circumstances under which Fitch could succeed in making the required showing. Fitch's job would be made even more difficult by the reality that even Time Warner did not believe that Doe had waived privacy rights. Without these showings, however, this Court cannot, and should not, conclude that Doe consented to disclosure to Fitch and it was reversible error for the Superior Court to reach that conclusion.

Further, even if one were to assume that Time Warner's "standard" form of subscription agreement is not a contract of adhesion, in order for the consent provision to be valid, there must have been a meeting of the minds; Doe must have known and understood that he was consenting to disclosure of personally identifiable information. Vernon Associates v. Brown, 2000 WL 675622 (Conn. Super. 2000). There has been no

showing that Doe knew and understood that execution of a "standard" form of subscription agreement would mean a waiver of his rights to privacy (and of course, there was no evidence that he signed the subscription agreement in the first place).

B. The Exceptions To Disclosure Set Forth in 47 U.S.C. § 551(c)(2) Are Not Applicable

Having established that there is no evidence to suggest that Doe did, in fact, provide prior written consent to disclosure of personally identifiable information to Fitch, the analysis must now focus on whether any of the exceptions in 47 U.S.C. § 551(c)(2) are applicable.

Under Section 551(c)(2), a cable operator may not disclose identifiable information about a subscriber unless such disclosure is (A) necessary to conduct a legitimate business activity related to cable service to the subscriber, (B) authorized by a court order that meets the conditions of Section 551(c)(h), (C) made to another cable service or other service if certain requirements are satisfied, or (D) to a government entity. *See* 47 U.S.C. § 551(c)(2).

1. Disclosure is Not Necessary for Time Warner to Conduct Legitimate Business Activity Related to Cable Service to the Subscriber

The first exception to the general prohibition against disclosure of personal information by a cable operator is set forth in 47 U.S.C. § 551(c)(2)(A) which provides as follows:

> (2) A cable operator may disclose such information if the disclosure is--
>
> > (A) necessary to render, or conduct, a legitimate business activity related to, a cable service or other service provided by the cable operator to the subscriber.

While there have been many assertions and assumptions bandied about in this case by Fitch, there has not been any contention, nor could there be, that disclosure is necessary in order for Time Warner to continue to provide cable service to Doe. Disclosure of Doe's identity to Fitch is not necessary to any legitimate business activity that Time Warner may be conducting. Fitch is seeking to gain this information solely for the purpose of pursuing what he believes to be certain civil claims.[3] Indeed, Time Warner is not claiming this to be the case, which should put an end to this inquiry.

2. Disclosure Is Not To A Governmental Entity

The second exception to the general prohibition against disclosure is found in 47 U.S.C. § 551(c)(2)(B) and §551 (h) which, when read together, permit disclosure to a governmental entity pursuant to a court order in connection with alleged criminal activity.

In this case, there is no governmental entity that has requested disclosure of Doe's identity and there is no allegation by any such entity of any criminal activity. As such, disclosure is not permitted pursuant to 47 U.S.C. § 551 (c)(2)(B) and §551(h).

3. Fitch is Not a Cable Service or Other Service

Disclosure of the names and addresses of subscribers is permitted if the disclosure is made to any cable service or other service if,

(i) the cable operator has provided the subscriber the opportunity to prohibit or limit such disclosure, and

(ii) the disclosure does not reveal, directly or indirectly, the --

(I) extent of any viewing or other use by the subscriber of a cable service or other service provided by a cable operator, or

[3] At this juncture in this case, Doe has not yet had an opportunity to address the merits of the claims contained in the Complaint. Suffice it to say that Doe has serious questions about the viability of the complaint.

(II) the nature of any transaction made by the subscriber over the cable system of the cable operator.

47 U.S.C. § 551(c)(2)(C)

Fitch has not even contended that he is a cable service or other service which means that the requirements for this section have not met been met.

4. 47 U.S.C. § 551(c)(2)(D) Is Not Applicable

The fourth, and final, exception to the general prohibition against disclosure is found in 47 U.S.C. § 551(c)(2)(D) which, again, allows disclosure to governmental entities as authorized under Chapters 119, 121 or 206 if Title 18 of the United States Code. Since Fitch is clearly not a governmental entity of any kind, analysis of this section need not go any further; it does not provide a basis to order disclosure.

CONCLUSION

As is established above, the Superior Court could not have properly concluded, based on the record before it and in the absence of any evidence at all, that Doe consented to disclosure of his identity by Time Warner to Fitch. Likewise, it is clear that none of the exceptions to the general prohibition against disclosure of personally identifiable information apply. Accordingly, there can be little doubt but that the Superior Court erred in issuing the May 13th Order and that, in fact, the Superior Court abused its discretion when it did so.

Congress has made it absolutely clear that it considers the names and addresses of subscribers to be personally identifiable information protected by the provisions of 47 U.S.C. § 551 (c). One need only look as far as 47 U.S.C. § 551(c)(2)(C) to reach that conclusion. While the Superior Court may not agree with, or understand, Congress' reasoning in enacting this statute, there is no doubt that Congress has, in fact, made a

distinction between an internet user who uses cable services and one who does not. Congress has determined that in order to protect information about "significant personal decisions" personally identifiable information about cable subscribers must be protected. The law is neither ambiguous nor unconstitutional. As such, even if the effect is, as the Superior Court put it, to "immunize the identity of subscribers from the reach of a civil subpoena under the circumstances presented by this case," (App. p. 6), the law must be upheld.

The Protection of Subscriber Privacy statute makes it clear that personally identifiable information, including the name and address of a subscriber, cannot be disclosed by a cable operator, such as Time Warner, unless the subscriber has consented or one of the enumerated exceptions applies. It is equally clear that Doe has not consented to disclosure and that none of the statutory exceptions apply. Consequently, the Superior Court erred in holding that Doe consented to disclosure and its decision should be reversed. If, however, there remains in the collective mind of this Court an open question as to whether Doe has consented to disclosure, at the very least, this matter should be remanded to the Superior Court so that admissible and appropriate evidence can be submitted so as to resolve any lingering questions of fact.

DATED at Portland, Maine this ___ day of August, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that I have made due service of the foregoing Brief of Defendant-Appellant, by delivering two copies therefore this date to:

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