

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

RONALD FITCH,
PLAINTIFF-APPELLEE

V.

JOHN OR JANE DOE #1,
DEFENDANT-APPELLANT

BRIEF OF PLAINTIFF- APPELLEE FITCH

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STATEMENT OF THE CASE

Plaintiff Ronald Fitch has alleged in a civil complaint a variety of tort theories for harassment and identity theft by John or Jane Doe #1, hence Doe (Count I Violation of Privacy, App.0010, Count II Misapplication of Identity App.0011, Count III False Public Light App 0011, Count IV Negligent Infliction of Emotional Distress App 0011, Count V Intentional infliction of Emotional Distress App.0012 and VI Fraud App 0012). The allegations stem from a long series of harassments incidents culminating in a scheme executed on Christmas Eve 2003 involving identity theft and misapplication of Plaintiff Appellee's name.

Appellants allege that Doe, inter alia, set up a fraudulent email account under Appellee's name and sent out information which was meant to be harmful to Fitch and which caused harm. The Christmas card tort was sent to a series of persons all of whom were members of a Community Association on Great Diamond Island, Maine. The cartoon, falsely attributed to Plaintiff, depicted Plaintiff and his wife in ways calculated to embarrass, belittle and hurt. Appellee alleges that the identity theft and email were part of continuing pattern of harassment done with actual malice.

Plaintiff has filed a Complaint in Cumberland County Superior Court. No service of process has occurred. Plaintiff requested Court Subpoena of the Time Warner Records and they are now held in camera in a sealed envelope in the Superior Court's file.

The Documents in the Time-Warner File contain the name of the owner of the false email account along with other information relating to the fraud such as applications, filled forms and the contract agreement between Time-Warner and Doe.

That Contract has not been provided to the Plaintiff.

Upon application to the Court for an Order respecting the existent Time-Warner file, Time- Warner chose not to object to the turn over but requested prior notice be provided to the owner of the fraudulent file so that they were able to object.

Doe did Appear through counsel and said they were the owner of the account in question and that the source of the fraudulent email was that account.

Doe objected to the disclosure of the Time -Warner file and the Court issued a briefing schedule .The Court had already issued orders as to Discovery deadlines , designation of expert's and other procedural matters .

On May 12, 2004 the Superior Court denied the Doe's requested protection of identity finding, inter alia, that Doe had waived non-disclosure in the Time-Warner agreement. That agreement had been provided as a form agreement to the Superior Court. and had not been objected to. The Time-Warner form was from the relevant time period and provided for turnover of information by Time-Warner when subject to litigation, subpoena or Court Order. The Superior Court determined that the Doe waiver was complete. Order May 13, 2004 p.2.App 0005.

Doe did not object to the subscriber agreement provided by Time-Warner through Fitch. Doe did not file a rebuttal brief, move to strike, and move to reconsider or offer an alternative to the provided Time-Warner agreement. Even after the filing of this Appeal and during the request for stay and even as the actual document sits in the Superior Court's file, Doe does not offer an alternative nor even a fact based denial of the language

from which the Superior Court determined waiver. See Doe Brief p.8-10.

The Superior Court determined that because Fitch could not have the actual agreement and that the tendered agreement, without rebuttal, was sufficient to establish waiver and the non application of 47 U.S.C. Sec. 551.May 13, 2004 Order p.2 fn2. Disclosure was proper. The Superior Court determined that because Fitch could not have the actual agreement and that the tendered agreement, without rebuttal, was sufficient to establish waiver and the non application of 47 U.S.C. Sec. 551.May 13, 2004 Order p.2 fn2. Disclosure was proper.

This action for identity theft is based upon the misappropriation of the identity of Fitch by Doe who has created a fraudulent email account and who sent an email under the name and apparent identity of Fitch which was designed to cause harm . Doe created a fictitious account through Time Warner Cable's internet access system and has falsely identified itself as Fitch to the Diamond Cove Association Board of Directors and to Time-Warner.

ISSUES ON APPEAL

- I. DID DOE WAIVE?
- II. DOES 47 U.S.C. SEC. 551 PROHIBIT DISCLOSURE?
- III. DOES MAINE SUBPEONA POWER and 551 PERMIT DISCLOSURES?

SUMMARY OF ARGUMENT

Doe set up a fraudulent email account using Fitch's name and address. That false email account was made to harass Fitch as part of an ongoing Diamond Cove neighborhood Association dispute. Fraudulent registration documents were electronically sent to and through Time-Warner. The purpose of the fraud was to

cause reputational and emotional injury to Fitch.

Doe has not filed an appearance in the Superior Court .Doe has not answered the Complaint. . Doe has not moved to Dismiss under 12(b) (6). Doe has not moved for Summary Judgment. Doe has not moved for judgment on the pleadings. Doe has not availed itself of interrogatories, Deposition or other means of discovery. Doe has not itself provided any contracts, affidavits or sworn averments about signing the Time-Warner contract. Doe did not explain how it chose that provider as against any other. Doe, having substantial opportunity to deny sending the material, has failed to do so. Doe did not ask the Court to reconsider its disclosure Order once the impounded file was tendered to the Court. Doe did not ask the court to examine the documents In Camera. Appellee argues that Doe waived objection to the disclosure and further that disclosure is proper both under Federal and State law.

I. ARGUMENT Doe #1 Waived

A... The Superior Court's Finding

The Superior Court has made a finding of fact that the standard subscriber agreement between Doe and Time-Warner included the specific contract language found in the May 3, 2004 Order. This language created a waiver by the subscriber Doe. This waiver eliminates the necessity of any further analysis of 47 USC sec. 551.

B. Appellate Review of this fact

In reviewing the finding of the Superior Court on the interpretation of a contract provision as it relates to the issues of Discovery the Law Court reviews for Clear Error. "We will uphold the Trial Court's factual findings unless they are clearly erroneous, and "[T] he Trial Judge's finding stand unless they clearly cannot be correct because there is no competent evidence to support them." *Stickney v. City of Saco*, 2001 Me. 69, par. 13,

770 A2d 592, quoting *Sturtevant v. Town of Winthrop*, 199n Me. 84, Para 5.

3. Interlocutory Review not proper

Here the interlocutory nature of the appeal renders the analysis even more tilted in favor of Fitch as the review of routine Discovery Orders is not appropriate. Because Doe has not shown how its injury by disclosure is any different from that of disclosure of sensitive medical records or family issues which occur in many routine cases, no review at all should occur. See *Austin, o/b/o Serenity Soiett v. Universal Cheerleaders Association*, 2002 Me 174 Para 8, 9. Moreover, Doe presumes that it is somehow entitled to protection of the identity when there should be no expectation of privacy in fraud, identity theft and harassment.

C. The Subscriber Agreement Permits Disclosure

1. SUFFICIENCY OF COURTS FINDINGS

The Superior Court in its May 13, 2004 Order Determined that the Time-Warner Agreement authorized disclosure of the identity of a subscriber under the facts of this case. Order P.3. The Court directly addressed the basis of its finding that plaintiff made an adequate showing that the subscriber agreement in question was the proper one. Order App. 0005. See Order p.2, Ap.0005. See especially Fn 2. (Ap. 0005) where the Court explains how it determined the document was adequate:

“Although Fitch has not tendered the specific subscriber agreement between the subscriber and Time Warner to the Court, he cannot be expected to do so where he does not have any access to that agreement and will not have such access unless the court grants his application.”

Appellant Doe now attacks the sufficiency of the record to establish the terms of the agreement. First; the Agreement was before the Court as part of the Motion in opposition to non disclosure. Doe did not object to it nor offer an alternative. That acquiescence should be a waiver. Second, even now, while the Agreement sits in the Court's Impounded File, Doe does not say it is any different. Third, Doe had other mechanisms such as Dismissal under 12(b)(6), Judgment on the pleadings and Summary Judgment which were not used to require proof and test the adequacy of Fitch case. Doe cannot now say requirements to overcome those motions were not met by Fitch.

2. THE AGREEMENT PLAINLY WAIVES

The Time Warner Cable and affiliated ISPS Subscriber of Privacy Notice which is the contract between Time Warner and Doe spells out the agreement as to the disclosure of identity when Time Warner is likely to be involved in a subpoena process.

The Time Warner Agreement by which a disclosure is allowed is in Section II and Section III. Section II of the Time Warner Agreement and affiliated ISPS Subscriber Privacy Notice reads as follows:

Personally identifiable information that Operator maintains related to its subscribers will be disclosed to Operator without the prior written or electric consent of the subscribers only if: (1) it is necessary to render, or conduct a legitimate business related to, the services that are provided to you; (2) such disclosure is required by law or legal process as described below; or (3) for mailing lists as described below.

The types of persons to whom information about you may be disclosed by Operator in the course of providing cable service to you include the employees of Operator and its related legal entities, agents, repair and installations subcontractors, sales representatives, accountants, billing and collection services and credit report agencies, consumer and marketing research firms, and authorized representatives of governmental bodies. Also upon reasonable

request, personally identifiable information is disclosed to persons or entities with an equity interest in legal entities related to Operator when they have a legal right to inspect our books and records.

In addition to any disclosures permitted in the first paragraph of this Section II, our Affiliated ISPS may also disclose pursuant to the consent you granted in your subscription agreement, the personally identifiable information described in Section I in connection with the provision of services to you, in order to fulfill transactions that request, to personalize your online experience, to comply with criminal or civil legal process (including as described in Section III of this Notice), and is otherwise necessary in the ordinary course of their business. For example, our affiliated ISPS may disclose your personally identifiable information routinely to their employees, agents and contractors to maintain, market, provide, and audit your ISPS service.

Thus, under the terms of the user agreement disclosure of identifying data can take place because the information is not protected upon Court Order. Part III of the Agreement on Disclosure states:

Federal Law requires Operator to disclose personally identifiable information to a governmental entity or other third party pursuant to a court order. If the court order is sought by a governmental entity, the Cable Act requires that the subscriber, you, be afforded the opportunity to contest in court, any claims made in support of the court order sought. At such a proceeding, the Cable Act requires the governmental entity to offer clear and convincing evidence that the subject of the information is reasonably expected of engaging in criminal activity and that the information sought would be material evidence in the case.

In addition, pursuant to an administrative subpoena, state welfare agencies may obtain the names and addresses of individuals as they appear in the subscriber records of cable companies with respect to those who owe, or who are owed welfare support. Such information may be obtained without a court order and does not require that a subscriber be given notice and of the opportunity to contest the disclosure....

In addition, under ECPA the government may require Operator or your ISP to disclose subscriber record information (but not the content of communications) pursuant to a warrant, court order or subpoena without any notice to you and without your

consent.

If you subscribe to an ISP service, a private party may use a subpoena under the copyright act to obtain information about you to maintain a copyright infringement suit against the poster of online material, without any notice to you. Additionally, our Affiliated ISPs may release information about you to comply with valid legal process such as a subpoena or court order, or as required by law.

In your subscription agreement, you have agreed that Operator and our Affiliated ISPs may also disclose any information in its possession to protect its rights, property and/or operations, or where circumstances suggest that individual or public safety is in peril.

(App 0050)

3. THE CONTRACT IS ENFORCEABLE

In its Order the Court finds that "Time Warner has not appeared and does not contest disclosure." Order p.2 App.0005 .Doe now objects that the contract was improperly one of adhesion and void for public policy. Doe cites cases which discuss general principles of adhesion contract law. First, Doe has not properly raised any of this before .Such an argument not raised to the Superior Court should not now be a basis to set aside the Court's Order; Second, they offer no evidence of how Doe chose Time-Warner as part of the fraudulent scheme and no evidence about Doe's ability to negotiate with Time-Warner or any other available INSP they argue merely that since they have hidden their identity Fitch cannot prove how the contract was made; Third, Doe's use of fraud in inducing Time-Warner to act voids their protection because of unclean hands. Indeed Doe has tried to create a contract of adhesion to Time Warner by having them be forced into litigation because of Does tortuous acts; Fourth, the Court did make a factual determination of the lack of adhesion when analyzing the agreement, viz: "In the Court's view, this constitutes notice to subscribers that they have consented to disclosure by Time Warner in the ordinary course of business of the subscribers' identifying information in response to civil legal process."(Fn 3 omitted).Fifth, under the operating realities of

INSP's such a waiver provision would be essential to the terms of the agreement else the INSP's would be forced to litigate in thousands of Courts in thousands of jurisdictions both domestic and foreign. Given the nature of long-arm jurisdiction and the realities of the use of the internet for unlimited kinds of harassment, a contract that prevents disclosure without Court Order but acquiesces to such a Court Order eliminates the need to hire local counsel and defend thousands of harassment cases in thousands of jurisdictions. Thus an essential component of the agreement is this disclosure provision. Time-Warner did not create a license for Doe to commit torts with impunity. Sixth, the plain terms of the contract govern unless clearly beyond public policy. *L&A United Grocers, Inc. v. Safeguard Ins. Co.*, 460 A2d 587, 590 (Me.1983).

Argument II: 47 U.S.C. 551 DOES NOT PROHIBIT DISCLOSURE

Plaintiff does not seek any confidential information protected by Section 551. Only the non-protected identity of the source of the defamatory email, the fraudulent documents used to create the e-mail and the related aspects of the e-mail are sought. No disclosure of the content of any item held by the service provider is to be disclosed.

The defendants, John or Jane Doe # 1, have no expectation of privacy in a Tort of Intentional Infliction of Emotional Distress, Fraud and other civil wrongs . Their claimed basis to prohibit the disclosure lies in 47 USC Section 551 in which Congress regulated the collection and dissemination of information by cable system and internet service providers.

While the defendant primarily focuses on sub-section (h) the relevant portion of section 551 (c) (2) permits a cable operator to disclose information about a subscriber when that disclosure is:

(A) necessary to conduct the legitimate business activity related to cable service to the subscriber, or (B) subject to sub-section (h) of this section, made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed; or (C) a disclosure of the names and addresses of subscribers to any cable service or other services, if -

(i) A 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 - (1) extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator, or (2) the nature of any transaction made by the subscriber over the cable system of the cable operator.

Under the analysis of Section 551 (c)(2)(c) disclosure is permitted where prior opportunity to object has occurred and where the disclosure does not reveal directly or indirectly the extent of any viewing or the nature of any transaction. Thus, the language of Section 551 indicates a cable operator may disclose such information if the disclosure is of the names and addresses of the subscribers to any cable service or other services if the cable operator has provided the opportunity to prohibit or limit such disclosure and the disclosure does not reveal the prohibited information .

This is consistent with traditional notions of power of subpoena and power of discovery in a civil action. Moreover, the fact that the Time Warner Cable and Affiliated Privacy Notice required waiver of the privacy requirements in modification further bespeaks of the ability of the disclosure to take place.

Under a reasonable construct of the application the disclosure by Time Warner is necessary by Time Warner to prevent its own litigation or involvement in subpoena process and/or potential direct liability if joined in the underlying Tort action. Because the underlying Tort action would involve representation in Maine by Time Warner in defense of the action it involves a significant potential monetary issue for Time Warner

affecting business and its business practices. Under the circumstances the disclosure of the personal identifiable information is clearly necessary under Section 551 (c)(2)(a) because it is "necessary to render, or conduct a legitimate business activity related to, a cable service or other service provided by the cable operator to the provider." Thus, in Section 551 (c) (2) (a) the statute specifically allows Time Warner to disclose the information in order to protect its own interest and avoid litigation. This makes perfect sense under the circumstances where prior notice is required such that if the issue is one of harassment, one of sensitivity or one of some other issue involving lack of adequate process or lack of adequate substance in the complaint the court could issue a protective order modifying, limiting or excluding the disclosure. Under the instant action here, however, it is in Time Warner's interest not to litigate the matter and simply to pass the issue on to the subscriber. That having been done, the subscriber then has no statutory protection for the false information provided because it reveals only the name and identity of the subscriber not the extent of any viewing, nor the nature of any transaction.

This Court can examine the helpful analysis of a sister court in this same area. La Societe Metro Cash & Carry France v Time Warner Cable, 36 CLR170 (Tobin, J) (CV030197400S December 2, 2003). This Connecticut case stands for the proposition that normal discovery is specifically permitted to overcome the protection from subscriber privacy limitations as found in Section 551. Justice Tobin, in the Metro Cash & Carry case, cites the Connecticut Supreme Court decision of Journal Publishing Company v Hartford Courant Co., 261 CT 66, 804 A.2d 856 (2002). Thus, the Court in Metro Cash & Carry determined that if this Court concludes that the application of the Journal standards is appropriate to protect both the interest of the parties seeking discovery as well as those seeking anonymity over the internet. Id Case No. CV

30197400S (Superior Court Connecticut December 2, 2003):

Fitch provided the Superior Court with an extensive analysis of 551 and the Court concluded "There is absolutely no indication that Congress was seeking to prevent disclosure of persons who are alleged to have committed a form of identity theft by sending emails under false names." Order p. 3.(Ap 0006).

The analysis offered and accepted by the Superior court is consistent with other courts who have examined this issue.. See for example *America On Line, Inc. v. Anonymous Public Traded Company*, 542 S.E. 2d 377 (VA 2001); *In Re Subpoena Duces Decum to America On Line, Inc.*, 200 WL 1210372 (Circuit Court VA) January 31, 2000). See also *John Doe v. 2 Themart.com Inc.*, 140 F.Supp 2d 1088 (DC Wash, Ap 26 2001). Also *La Societe Metro Cash & Carry France v. Time Warner Cable*, 36 CLR 170 (Tobin, J.)Case No CV 30197400s (Superior Court Conn December 2, 2003).

47 USC Section 551 is a Federal Act designed to facilitate the protection of confidentiality in email associations and also to protect the provider of internet access with a means of appropriately disseminating information which may otherwise be confidential. The creation of an email account in a general sense is a confidential action but under circumstances in which fraud, identity theft or misapplication of identity occurs 47 USC Section 551 provides a means by which the internet service provider can disclose the information without fear of an invasion of privacy suit.

III. DISCLOSURE IS PERMITTED UNDER FEDERAL AND STATE LAW

A. MAINE SUBPOENA AUTHORITY

14 M.R.S.A. Section 704-A is Maine Long-Arm Jurisdiction Statute. In relevant part (1) it states:

Persons subject to jurisdiction

1. **Declaration of purpose.** It is declared, as a matter of legislative determination, that the public interest demands that the State provide its citizens with an effective means of redress against nonresident persons who, through certain significant minimal contacts with this State, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting increased interaction between persons of the State and persons of other states.

This section, to insure maximum protection to citizens of this State, shall be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States Constitution, 14th amendment.

In 704-A (2) the scope of the court's authority over persons doing business in this state provides jurisdiction over both the subject matter and the individual defendants. Foye v Consolidated Bailing Mach. Co., 229 A.2d 196 (ME. 1907).

B. The Subpoenaed Document

Time Warner, Inc. has been asked to turn over the identity of the subscriber location from which the false account was created and the documents relating to the creation and use of the false account.

The subpoena power under Rule 34 (C) of the Maine Rules of Civil Procedure governs the application to the third parties. The Rule explicitly provides Rule 45 Subpoena Power. Rule 45 (d)(1) requires "a person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business..."

A subpoenaed party may seek a protective order under M.R.Civ.P. 26 (c). Time Warner has made no such request for a protective order despite their ability to do so.

C. THE DOCUMENTS SHOULD BE TURNED OVER

Since there is jurisdiction and since the scope of the request is material, it is within Time Warner's obligation to turn over the files and information requested.

Moreover, 47 USC Section 558 permits local and state agencies to enforce the provisions of the act which is expressly not inconsistent with state laws of libel and slander. The act states as follows:

Nothing in this Title shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or any other channel obtained under Section 612 or under similar arrangements unless the program involves obscene material.

See in accord America On Line, Inc. v Nam Tai Electronics, Inc., Record No. 012761 (VA. Superior. Court November 1, 2002). See also John Doe v 2 Themart.com, Inc., 140 F. Supp.2d 1088 (DC Wash., April 26, 2001) "The party seeking the information must demonstrate, by a clear showing on the record, that four requirements are met: (1) The subpoena seeking the information was issued in good faith and not for any improper purpose, (2) The information sought relates to a core claim or defense, (3) The identifying information is directly and materially relevant to the claim or defense, and (4) Information sufficient to establish or disprove the claim or defense is unavailable from any other source." See also In Re Subpoena Duces Decum to America On Line, Inc. 2000 WL 1210372 (Circuit Court VA, January 31, 2000), reversed on other grounds, sub. nom., America On Line, Inc. v Anonymous Public Traded Company, 542 S.E. 2d 377 (VA 2001) requiring AOL to respond to a subpoena Duces Decum when the court is satisfied by the pleadings or evidence supplied to it that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of (actionable tort conduct)...and the subpoenaed identity information is centrally needed to advance the claim."

47 USC Section 512 (h) allows disclosure of subscriber information when evidence of criminal activity are provided and in which a governmental agency issues a subpoena. Defendants maintain that the 512 (h) aspect applies only to law enforcement officers and not to the public. . As Time Warner has indicated, virtually 1/3 of its activity relating to disclosure of subscriber identity involves private complainants under 512 (h) subpoena requests. The practice of Time Warner Cable Office in Virginia is to require a subpoena be issued from a court prior to the disclosure of the information. It has no relation to the law enforcement aspect of the statute. This is consistent with the reading as described above that the 512 (h) merely requires that the court issue the subpoena and provide an opportunity for a pre-disclosure hearing.

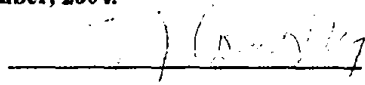
Under 47 USC 512 (h) a broad category of private parties are allowed to avail themselves of the power of the Federal Court to compel ISPs to divulge private information relating to subscribers. So under Section 512 (h) any copyright holder (or an identity holder) is permitted to compel disclosure of subscriber information based upon an allegation of copyright infringement. A use of subpoenas need not be confined to the enforcement of copyright by mainstream companies such as recording companies or recording studios but to anyplace where the issue is identity misappropriation.

By its plain terms 512 (h) does not provide advance notice to the internet users nor provides any redress for improper disclosure. Moreover, there is no judicial oversight whatsoever under 512 (h) applications. Thus here where the subpoena is issued directly under the Court's authority of M.R.Civ.P. 26 (g)(7) the Court's authority to issue subpoenas or order disclosure is the action of a governmental authority, because the power comes from the Court.

CONCLUSION

The Interlocutory Appeal should be Denied and the information sought by the Plaintiff-Appellee should be provided with costs assessed and any further relief the Court believes appropriate.

Dated at Portland, Maine this 26th day of September, 2004.

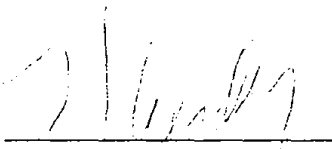


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