

COMMONWEALTH OF KENTUCKY
MADISON CIRCUIT COURT
DIVISION II
CASE NO. 08-CI-1296

KYMBERLY CLEM

PLAINTIFF

v.

NOTICE - MOTION - ORDER

AN UNKNOWN PERSON

DEFENDANT

NOTICE

Please take notice that Newspaper Holdings, Inc., a non-party recipient of a subpoena duces tecum in the above-styled case, by counsel, at 9:30 a.m. on Thursday, April 16, 2009, or as soon thereafter as counsel may be heard, will make the following motion and tender the attached order.

MOTION TO QUASH SUBPOENA

Newspaper Holdings, Inc. ("NHI"), a non-party to whom a subpoena has been directed in the above action, moves to quash the subpoena. The bases for this motion are (1) that the information sought is protected by the privilege against revealing the source of news reporters' information and (2) that the disclosure of the information sought would violate the First Amendment to the United States Constitution by infringing the right of individuals to speak anonymously in the public forum of the Internet and by chilling speech about public issues.

In support of its motion, NHI states the following.

Factual Background

Plaintiff Kymberly Clem ("Clem") filed this action on August 25, 2008 against "An Unknown Person" who had posted a comment on an Internet Web page forum

associated with the on-line edition of the Richmond Register. The posting appeared August 13, 2008. It concerned an episode in which Clem was escorted from the Richmond Mall on August 9, 2008. The posting was a response to an on-line Richmond Register news story dated August 12, 2008 which reported that Clem was escorted from the mall because the dress she was wearing at the time was short. The story appeared under the headline, "You can buy it at the mall, but you can't wear it there." The on-line posting on August 13 claimed that Clem exposed herself at the mall to a woman with two children. The anonymous poster used the on-line name of "l2bme." Clem alleges in this action that this posting was defamatory.

The comment was posted on a forum operated by Infopop Corp. and owned by Groupee Inc. At the newspaper's request, the anonymous posting was removed from the Web forum and "l2bme" was banned from the forum because the posting violated the Web site's terms of service.

Counsel for NHI on March 24, 2009 accepted service of a subpoena duces tecum that had been issued to "Newspaper Holdings, Inc" upon the request of counsel for Clem. NHI owns the Richmond Register. The subpoena commands production by 2 p.m. on April 15, 2009 of "[a]ny and all identifying information, contact information, source computer information, I.P. address, e-mail address, or any other information associated with the long-in I.D. 'l2bme' who placed a post on the Richmond Register/CNHI website August 13, 2008 in reference to the news story 'You can buy it at the mall, but you can't wear it there.'"

A court may quash a subpoena for production of documentary evidence "if it is unreasonable and oppressive." CR 45.02.

Argument

1. **Kentucky's reporter's privilege prevents disclosure of the identity of sources of published information.**

The information sought by the subpoena is protected by Kentucky's privilege against disclosure of sources of information published by news organizations. That privilege is created by statute, which provides that

[n]o person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.

KRS 421.100.

The subpoena in fact seeks the source of information that was procured or obtained and published on a Web site associated with a newspaper, the Richmond Register. The sole purpose of the subpoena in this action is to identify the source of information. The sole purpose of the privilege is to protect against disclosure of a source of information. These facts bring the anonymous poster squarely within the privilege against disclosure created by KRS 421.100.

The United States Supreme Court has recognized that "liberty of the press is the right of the lonely pamphleteer just as much as the large, metropolitan publisher." *Branzburg v. Hayes*, 408 U.S. 665, 703-03 (1972). Thus, "l2bme" enjoys the benefit of the privilege.

The subject matter of the "l2bme" Internet posting clearly pertained to matters of public concern. How people dress and society's treatment of people because of how

they dress is an issue of considerable public interest. Localities enact ordinances and states enact statutes attempting to set out the limits of how people may dress in public and what parts of the body people may and may not expose. Public and quasi-public places, such as shopping malls, sometimes evict people because of their dress. Clem herself implicitly acknowledged the public nature of the issue by discussing it at some length with the Richmond Register reporter who wrote the August 12, 2008 story. Clem was quoted prominently in that story, asserting that she had been discriminated against by actions of the Richmond Mall relating to her dress.

The posting at issue attributed to the anonymous "l2bme" concerns an issue of fact. If the posting is factually accurate, Clem's defamation claim against "An Unknown Person" dissolves. "In this state, truth is a complete defense to an action for libel ..." *Bell v. Courier-Journal & Louisville Times Co.*, 402 S.W. 2d 84, 87 (Ky. 1966).

Therefore, the subpoena seeks the source of factual information published about an issue of public concern. The identity of "l2bme" is protected by KRS 421.100.

2. The First Amendment protects the right of "l2bme" to speak anonymously on the Internet.

The right to speak anonymously is protected by the First Amendment. "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority." *McIntyre v. Ohio Elections Comm.*, 514 U.S.334, 357 (1995). See also *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150 (2002); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999); *Talley v. California*, 362 U.S. 60 (1960).

Courts also treat the Internet as an important public forum because of its accessibility, and have held that the rights of speech are fully applicable to Internet speech. There is "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]." *Reno v. ACLU*, 521 U.S. 844 (1997). "[T]he constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded." *Doe v. 2themart.com Inc.*, 140 F.Supp.2d 1088, 1097 (W.D. Wash. 2001).

Courts have recognized that they should proceed cautiously when asked to "unmask the identities of anonymous critics." *John Doe No. 1 v. Cahill*, 884 A.2d 451, 457 (Del. 2005). In *Cahill*, the Delaware Supreme Court stated that it may have been the first state Supreme Court to consider an attempt to compel disclosure of an Internet user's identity from a third party in a defamation action. *Id.* The court observed that depriving Internet speakers of the right to speak anonymously "will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked." *Id.*

The Delaware court held that before disclosure is compelled, a defamation plaintiff must do more than state a "good faith" basis or a case capable of surviving a motion to dismiss. "Instead, we hold that a defamation plaintiff must satisfy a 'summary judgment' standard before obtaining the identity of an anonymous defendant." *Id.*

No Kentucky appellate court has addressed the question of the circumstances under which production of the identity of an anonymous Internet poster by a non-party may be compelled in a defamation action.

However, the Texas Court of Appeals applied the *Cahill* "summary judgment" standard in *In re Does 1-10*, 242 S.W.3d 805 (Tex. Ct. App. 2007). "The Court must examine facts and evidence before concluding that a defendant's constitutional rights must surrender to a plaintiff's discovery needs. The summary judgment standard will ensure that the Court receives such facts and evidence." 242 S.W.3d at 822.

Additionally, the Court of Appeals of Maryland, that state's highest court, held that a trial court abused its discretion when it ordered the identification of five anonymous participants on an Internet forum commissioned by a newspaper. *Independent Newspapers, Inc. v. Brodie*, 2009 WL 484956 (Md. 2009) (attached as Exhibit A.). It adopted a five-part test for trial courts when they are "confronted with a defamation action in which anonymous speakers or pseudonyms are involved." *Id.* at 20. The test requires the trial court, in its final step, to "balance the anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity, prior to ordering disclosure." *Id.*

Clearly, courts recognize the importance of protecting the First Amendment rights of anonymous Internet speakers against attempts to compel disclosure of their identities through devices such as the subpoena issued in this case.

Conclusion

The Internet poster, "l2bme," spoke about a public concern on a forum where his speech and his anonymity are protected both by the privilege created by KRS 421.100

and by the First Amendment. For these reasons, the subpoena is unreasonable and oppressive. NHI moves that the subpoena duces tecum therefore be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Notice-Motion-Order was mailed by regular First Class U.S. Mail on this 2nd day of April, 2009 to:

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Woman to sue anonymous online poster

By Lorie Love

Register Assistant Editor

August 15, 2008 10:33 pm

— The Richmond woman who allegedly was kicked out of Richmond Mall for wearing a dress that mall officials said actually was a shirt now claims she is the victim of a malicious online poster.

Richmond attorney Wesley Browne said Friday that a poster on a forum associated with the Richmond Register Web site “planted a false story” on Aug. 13 stating that Kymberly Clem was kicked out of the mall for intentionally exposing herself to a woman with two children.

Browne called the online poster “malicious” and said the online post was “fictitious.”

Clem claims she was kicked out of Richmond Mall last weekend after being approached by a security guard who “made me turn all the way around while he stared me up and down,” she said.

The 20-year-old Eastern Kentucky University student said she was wearing a dress she had purchased at the mall on the previous day.

She had only been at the mall for about 10 minutes when the guard approached her, Clem said.

“The only thing he said was that other people didn’t like the way I looked, so he wanted me to leave,” Clem said.

The guard also told Clem several women had complained because their husbands were staring at her, she said.

Mall officials claim the item of the clothing in question actually was a shirt. Mall manager Vicki Strunk said the clothing was purchased at DEB in the mall, and a DEB employee said Tuesday the clothing Clem was wearing was a shirt.

Strunk said any mall patron who wears a top but no bottom is subject to be escorted off the premises.

The incident has garnered media attention from across the nation and the online forum in question has had numerous posts about it. Most of the posters share their opinion about whether appropriate action was taken. Some debate what kinds of clothing should be allowed in public places.

“The individual responsible for the fabricated story provided no personal information,” Browne said in a press release. “The poster’s account was set up the same day the false story was posted. The individual had not posted on the Web site before the false story was posted, and has not since.”

On Friday, Browne requested that the Richmond Register have the post removed. After reviewing it and consulting with the paper’s attorney, the post was removed Friday afternoon.

“The user was banned from our forum and the post and references to it were removed because the user violated the terms of service agreement for using the forum,” said Jim Todd, editor of the Richmond Register. “By signing up to use the forum, the user agreed not to use the site to harass other participants or knowingly display any false, defamatory, abusive, obscene, threatening, racially offensive, sexually explicit or illegal material.”

While it is associated with the paper’s Web site, the forum is owned by Groupee Inc., a Web service operated by Infopop Corp.

Browne said he has contacted Groupee to try to find out the identity of the anonymous poster.

“People think they can make these posts anonymously, but there is always a means of finding out,”

Browne said. “Once we learn the identity of the malicious coward who posted this fabrication, we will file suit, and we will proceed without mercy. People are entitled to their opinions, we understand and

respect that, but creating lies to hurt someone who is already so vulnerable is not only disgusting, it is a violation of law.”

Browne said Clem has received interview requests from the CBS Early Show, the Tyra Banks Show, Dr. Phil, Inside Edition, the Fox News Channel and dozens of radio stations nationwide. She has not agreed to give any further interviews, the attorney said.

Lorie Love can be reached at 624-6690 or llove@richmondregister.com.

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