UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, an Illinois non-profit corporation, and Danny Lee Shelton, individually, Plaintiffs	C.A. No. 07-40098-FDS
vs.	
Gailon Arthur Joy and Robert Pickle Defendants	

SUPPLEMENTAL MEMORANDUM OF DEFENDANT ROBERT PICKLE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PERMANENT IMPOUNDMENT

INTRODUCTION

Plaintiffs begin their "Responsive Memorandum" with Plaintiffs' initial memorandum in support of impoundment set forth Defendants' pattern and practice of using every possible medium, including court documents, to impugn, directly through defamatory statements and indirectly through innuendo and speculative commentary, Plaintiffs' reputations and conduct." Given that the initial memorandum was filed ex parte and Defendants had not filed anything in court to that point against the Plaintiffs, there were no court documents which could satisfy the statement. The "Responsive Memorandum" is already disingenuous in its first sentence. There is no pattern and practice and there are no defamatory statements, if only because the truth of the statements are an absolute defense, and the Defendant Gailon Arthur Joy, whose conduct is complained of, has done nothing more than to continue his journalism of over twenty years, which has gone from printed form to electronic publication. Defendant Joy, furthermore, has done his due diligence to verify his information sources including

document authenticity. The Plaintiff Danny Lee Shelton is a public figure particularly in the Seventh-Day Adventist community which Defendant Joy directs his publications toward. The Plaintiffs have not alleged that the defendants have committed malicious libel. The suggestion that the defendants have committed defamation per se by accusing Plaintiff Shelton of committing a crime comes without an indication of which crime may have been committed or which crime and where the accusation is. The facts contained in the publications may sum up to a true bill, or they may constitute an ecclesiastical crime within the tenets of the Seventh-Day Adventist church, but it is more to the point that they are unpleasant to the plaintiffs to have published - as unpleasant as they are to their general readership if not more so. It is that unpleasantness, and the conclusion that the plaintiffs would profit from the absence of their publication, that has really led the plaintiffs to bring this action.

Unlike the plaintiffs' contention, their initial ex parte motion cited limited authority, namely only Ravnikar v. Bogojavlensky, 438 Mass. 627 (2003). Their references to case law came in their first oral argument in support of their motion and in their supplemental pleading. The defendants supplied cases which were much more to the point, being primarily rulings by the United States Supreme Court, and covered the points for the Court to consider, especially considering the vagueness of the issues raised by the plaintiffs,, but given the more substantial citations now supplied the defendants must respond to their new contentions.

This document was prepared with coordination to both defendants but Defendant Joy has now decided to enter his appearance pro se. It is therefore filed on behalf of Defendant Robert Pickle but its preparation and presentation bears significant part of the prior representation of Defendant Joy by the same attorney.

Plaintiffs contend "Defendants have attempted to mislead this Court by misciting case authority." While the accusation is distasteful, defendants' first response was straightforward and covered the issues with reference to compelling authority. The defendants are unfortunately put to prove this

statement of the plaintiffs to be so much nonsense by, in too-typical fashion, explaining the issues that have long been settled in detail that is as excessive as it is simplistic.

DISCUSSION OF APPLICABLE LAW

The Plaintiffs Offer the wrong analysis to the Court. To generalize, the subject of impoundment in civil cases is a matter still covered by common law, although the right of the public to inspect court documents predates the Constitution itself and any deviation from the general rule will be analyzed by a reviewing court for abuse of judicial discretion, but at a higher level of scrutiny than usual.

The cases offered include criminal matters, to which Constitutional protections are accorded the defendant, and issues which are controlled, in derogation of common law, by statutes. The plaintiffs fail to advise this Court which principle was behind which decision.

In the absence of a statutory privilege, the cases cited by the plaintiffs uniformly hold that the case file is a matter for public knowledge, as the following recitation shows:

IN RE PROVIDENCE JOURNAL, 293 F.3d 1 (1st Cir. 2002)

Plaintiffs correctly inform the Court, by quotation, that "Although the Supreme Court has not established whether the constitutional right of access attaches to civil cases in general, the common law right of access extends to judicial records in civil proceedings." In re Providence Journal Company, 293 F.3d 1, 13 n. 5 (1st Cir. 2002). However, the analysis borrows liberally from the decisions in cases regarding the rights of criminal defendants,and the dicta thereon, without distinguishing which ground the respective courts were discussing.

The Providence Journal case itself related to the records and exhibits of the criminal trial of former Providence Mayor Buddy Cianci, so all comments relating to civil cases are dicta.

That footnote 5 is not quoted in full, however. In full, it reads: Although the Supreme Court has not established whether the constitutional right of access attaches to civil cases in general, the common-law right of access extends to judicial records in civil proceedings. Standard Fin. Mgmt., 830 F.2d at

408 & n. 4. As said, that right encompasses legal memoranda. Because none of the respondent's rationales for rendering legal memoranda presumptively nonpublic rise to the level of a compelling reason sufficient to justify the nondisclosure of those documents, our invalidation of the District of Rhode Island's blanket nonfiling policy vis-a-vis legal memoranda applies in civil as well as criminal proceedings.

Thus, in dicta, the First Circuit indicates that a "blanket nonfiling policy" will not be upheld. The case context makes clear that the 'nonfiling policy' was the clerk's practice of transmitting legal memoranda to the judge without placing them in the case file, where the filing of the document depended on the discretion of the judge.

The reason the policy was invalidated was the interference with the rights and interest of the public in inspecting court documents.

IN RE GITTO GLOBAL CORP., 422 F.3d 1 (1st Cir. 2005),

Similarly, this case does not involve the same basis, as it stems from an appeal from the Bankruptcy Court to the district court regarding the interpretation of 11 U.S.C. sect. 107 (a) and (b). In this case the matter at hand is the interpretation of the statutes in question, not the application of common law principles and public policy. However, the Gitto case does discuss defamation based on common law principles, as the appellants there were seeking to have the material sought to be impounded labeled 'scandalous' or 'defamatory' and the application to a regularized definition was required. These common law principles have been incorporated into Massachusetts jurisprudence. Santana v. Registrars of Voters of Worcester, 398 Mass. 862.

NIXON V. WARNER COMMUNICATIONS, INC., 435 U.S. 589, 597 (1978)

After the trial of the Watergate conspirators, reporters sought access to copy certain tapes which had been introduced in evidence. However, it was held that "the press has no right to information about a trial superior to that of the general public", and the general public had not been restricted from either

the trial or in receiving transcripts representing the contents of the tapes. Furthermore, there was a means of public access to the tape recordings, namely the Presidential Recordings and Materials Preservation Act, and the presence of statutory guidance as to the means of access to the recordings "tips the scales in favor of denying release".

REQUEST OF WILLIAM H. CASWELL, 18 R.I. 835, 836 (1893)

A member of the press requested a copy of the complete case file from a particular, and recent, divorce case. The clerk of court, Mr. Caswell, found reason to request instructions of the Court. The holding in this case was that "no one has a right to examine or obtain copies of public records from mere curiosity or for the purpose of creating public scandal".

It was further noted "By statutes of the United States, (see act of Aug. 12, 1848, 9 U.S. Stat. cap. 166, p. 292) and also of several of the states, the necessity of interest has been done away with, and any person may examine public records and take memoranda therefrom. In re Chambers, 44 Fed. Rep. 786; State v. Rachac, 37 Minn. 372; Hanson v. Eichstaedt, 69 Wis. 538; Lum v. McCarty, 39N.J.L. 287; Newton v. Fisher, 98 N.C. 20. As there is no statute in this state, however, regulating this matter, the common law rule above stated, in so far as it is applicable here, is doubtless in force." Id. at 835-836.

COX BROADCASTING CORP. V. COHN, 420 U.S. 469(1975)

Unlike the excessive attempts to distinguish this case from the issues before this Court, the holding very simply stands for the principle that where information already appears on the public record, a Court may not sanction the use of the information obtained from court records for further publication.

As mentioned, the identity of a rape/murder victim was not 'disclosed' pending trial. However, the appellant reporter learned the name by examining the indictments in the courtroom and reported the name by broadcast over the following two days. It was held that the First Amendment, applied to the states, protected even the publication of this name, as it was information stemming from the public

disclosure of court records.

BOSTON HERALD, INC. V. CONNOLLY, 321 F.3d 174 (1st Cir. 2003)

A defendant applied for government funding to assist with his legal defense. It was held that although there was no specific statutory provision protecting the financial affidavits from public disclosure, the administrative guide indicated there was an expectation of privacy and the documents themselves were not essentially judicial in character. It does not appear to be mentioned but they have no bearing on the guilt or innocence on the offense charged. As such the documents were allowed to remain under seal for at least the duration of the case.

UNITED STATES V. SAMPSON, 297 F.Supp.2d 342 (D. Mass. 2003).

The Court received an initial request for photographs and videotapes depicting the victims of a carjacking and murder. By the time of the hearing, only those recordings played for the jury were at issue.

The district court held that the request for copies of all visual evidence was overbroad, citing Nixon v. Warner Communications and In Re Providence Journal, but went further, still citing In Re Providence Journal at 9-10, 16-17, and found that there was a strong presumption that any materials which the jury viewed during trial, such as video recordings, carried a common law right of public access. The analysis cited Nixon v. Warner Communications, Inc. 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 412-413 (1st Cir. 1987) ending with "It follows, then, that the common-law right of access extends to 'materials on which a court relies in determining the litigants' substantive rights." Anderson v Cryovac, Inc. 805 F.2d 1, 13 (1st Cir. 1986).

After weighing the interests of the public in the recordings presented to the jury, the court allowed them to be copied immediately after their introduction into evidence, and set up a reasonable means whereby one of the news media offered to make duplicate copies if there were too many

requests for the Clerk's office to handle.

OKLAHOMA PUBLISHING CO. V. DISTRICT COURT IN AND FOR OKLAHOMA COUNTY, 430 U.S. 308 (1977)

Here, the Supreme Court held that an order prospectively barring the publication of the name or photograph of an eleven-year-old boy charged with a crime was unconstitutional because the name had been stated in open court and the photograph taken before the date of the order, the arraignment on juvenile charges. The "order abridges the freedom of the press in violation of the First and Fourteenth Amendments."

TAYLOR V. SWARTWOUT, 445 F.Supp.2d 98, 102 (D. Mass. 2006)

This case, incorrectly labeled as Taylor v. Swartout in the plaintiffs' Supplementary Brief, analyzed Massachusetts defamation law. It also incorrectly attributes the 'litigation privilege' to the case of Sriberg v. Raymond, 370 Mass. 105, 109 (1976), which involved a statement made by an attorney pendent to litigation. The holding was that the litigation privilege could be lost, which does not accurately follow the companion case's ruling in the First Circuit, which held that the publication to persons not connected with or interested in the litigation was outside the litigation privilege.

SRIBERG V. RAYMOND, 370 Mass. 105, 109 (1976)).

SRIBERG V. RAYMOND, 544 F.2d 15 (1st. Cir. 1976)

An alleged defamation made by an attorney expressing his opinion of a plaintiff's conduct was held absolutely privileged against claims of defamation.

The First Circuit, which has certified the question, found that the status of the recipient of the communication was the lodestar test, and if the communication went a recipient who was not connected with the litigation then the litigation privilege did not apply.

However, while sending a copy of the alleged defamation to an escrow agent constituted sending it to a person not connected with the litigation on first blush, the contents of the letter were such as to

put the escrow agent on notice that the plaintiff thought he could be liable, and indeed, a lawsuit for breach of fiduciary duty was filed against the escrow agent, making it clear that the entire communication was within the litigation privilege.

DOE V. NUTTER, MCCLENNAN & FISH, 41 Mass. App. Ct. 137, 140 (1996)

This case affirmed the absolute privilege of communications by an attorney, in this case responding to the threat of legal action (an M.G.L. c. 93A demand letter) with his own threats of action

FTC V. STANDARD FINANCIAL MANAGEMENT, 830 F.2d 404,410 (1st Cir. 1987).

The United States District Court for the District of Massachusetts ordered the unsealing of sworn personal financial statements submitted to the Federal Trade Commmission because the district court judge had relied on them in making his decision, and they were, therefore, judicial documents within the common-law doctrine permitting the public to have open access to court documents and proceedings.

OTTAWAY NEWSPAPERS INC. V. APPEALS COURT, 372 Mass. 539

Finally, in Ottaway Newspapers Inc. v. Appeals Court, 372 Mass. 539, an impoundment order was upheld because of a statutory construction, not on the basis of any common law principles and most certainly not because of any issues of defamation. The Commissioner of Banks may seek to remove bank officers and administrators in an administrative proceeding which is private according to the relevant statutes, and in particular G. L. c. 167, §§ 2 and 5. The bank in question sought to enjoin the administrative proceeding and none of the judges involved had any trouble reasoning by analogy that the information which was to be kept from the public by statute in the administrative proceeding should not also be kept impounded in the judicial proceeding. Another application of this was found in In Re Knoxville News-Sentinel Co., Inc., 723 F.2d 470 (6th Cir. 1983), a case cited in FTC v. Standard Financial Management, supra, where bank records were ordered returned to the bank's counsel as they were required by act of Congress to be kept confidential as customer records in the normal course of

business.

DEFAMATION AND DEFAMATION PER SE

The Commonwealth of Massachusetts recognizes defamation per se as actionable without allegations of actual damages, Sanatana v. Registrars of Voters of Worcester, 398 Mass. 862, and refers to the United States Supreme Court for authority, namely the decision in Carey v. Piphus, 435 U.S. 247, 263 (1978). This decision emphasized the need to prove actual damages in order to be awarded a judgment, and the plaintiffs have alleged a quantifiable but, due to the vagueness of their affidavits and exhibits, unverifiable, economic loss. They have not alleged anything for which money damages would not be adequate compensation, however, and in such a case injunctive relief is inappropriate.

As mentioned in the initial Opposition to the Motion for Impoundment, Tory v. Cochran, 544 U.S. 734, 125 S.Ct. 2108 (2005) found that prior restraint on defamation is de jure unconstitutional prior restraint on the First Amendment exercise of free speech.

The defendants remain uncertain just which crimes they might have accused plaintiff Danny Lee Shelton of, bandied about by his counsel in leading to the conclusion that defamation per se has occurred, but it is not an essential element of the count.

ARGUMENT

I. THE CORRECT PRINCIPLE FOR REVIEW IS BASED ON COMMON LAW.

The Plaintiffs cite many case, but as mentioned above do not distinguish the three bases they are decided upon. They mention that only the common-law analysis applies to the proceedings of a civil case but then they do not mention when the cases being cited applied that analysis.or a different one. In the criminal context, a reviewing court will employ de novo review because the issue is of Constitutional interpretation, for instance. Many of the cases cited by the plaintiffs also rest on statutory provisions in derogation of the common law, and this important distinction is not mentioned. These have been mentioned above.

It is only the common law analysis which is on point for this case. Defendant Pickle does hereby notify that the First, Tenth and Fourteenth Amendments do apply in this civil context as well as the criminal cases. Especially here where the plaintiffs have already published notice that the lawsuit was filed, the public has an inherent interest in the proceedings. The rights of the public predate the Constitution, as the cases cited have noted, and the Constitution protects those rights as one of the people. Amendment X.

In the context of criminal cases, Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) is the stem case to consider. As it turns out, it turned on the existence of an act of Congress for the public access to the tape recordings in question, id. at 603, which supplanted any need to apply a common-law standard, although the Constitutionally-protected interests of the public in court proceedings and documents was acknowledged. Nixon in turn distinguishes Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), discussed above, as inapplicable. The public right to be present in the courtroom and to view the exhibits was not violated in the Nixon case.

Other cases decided primarily on the basis of the rights of a criminal defendant to a fair trial as balanced against the First Amendment rights of the public include In Re Providence Journal, 293 F.3d 1 (1st Cir. 2002), Boston Herald, Inc. v. Connolly, 321 F.3d 174 (1st Cir. 2003), United States v. Sampson, 297 F.Supp.2d 342 (D. Mass. 2003), Oklahoma Publishing Co. v. District Court In and For Oklahoma County, 430 U.S. 308 (1977).

Once a law has been enacted, of course, it amends the common law to the extent that it conflicts with it. Thus, in Ottaway Newspapers v. Appeals Court, 372 Mass. 539 (1977), when a bank sought to quash administrative proceedings, only to be declared insolvent a few days later, it was the statutes, namely Mass. G. L. c. 167 § 2 and Mass. G. L. c. 167 § 5, that led to the inescapable conclusion that the bank records, containing third party information that would have been privileged and confidential in the administrative proceeding, must not be publicized merely because judicial review was sought of

them, as the legislature had already set out the rule.

Similarly, In Re Gitto Global Corp, 422 F.3d 1 (1st Cir. 2005) revolved around the interpretation of a section of the Bankruptcy Code and not the common-law right of the public to access of court files. Not just the debtor in Gitto but apparently 25 individuals of the 120 mentioned in the Examiner's report sought to have the material labeled scandalous or defamatory and thus sealed under 11 U.S.C § 107(a) and (b).

The holding in the Gitto case is useful for its discussion of defamation which applies to this proceeding. For instance, it was mentioned "[i]n most cases, a party filing a motion for protection under § 107(b) (2) will only be able to show that the material at issue is *potentially* untrue. [Emphasis in original.] However, given the relative ease of showing potential untruthfulness, such a showing, standing alone, cannot be enough to trigger the exception." 422 F.3d at 11. The court indicated that a party may seek protection based on a showing of potential untruthfulness, but to actually obtain protection, an additional showing must be made.

The "additional showing" in Gitto was that information would have to be, besides potentially untrue, either irrelevant or included for improper ends. The First Circuit also indicated that, per the definition of defamation, the material at issue could be shown to harm the reputation of the interested person in the eyes of a reasonalble person.

The problem with all of this discussion is that the plaintiffs are seeking to have this case file sealed so they can continue with their own frolic of saying what they choose to the Court, what they choose to their constituency, and what they choose to their employees without the members of the public ever finding out what they plaintiffs actually are saying and doing. This is utterly contrary to the nature of the Court as a public forum.

II. THE PLAINTIFFS ARE PUBLIC FIGURES.

As public figures, and indeed as a public charity in the case of Three Angels Broadcasting

Network, there is clearly a public interest in the conduct of the plaintiffs and, while there may be less of an interest in what happens in a Massachusetts court than an Illinois court, the donors to the public charity and the viewers of the public media figure have no less the right to know. If the case remains sealed, their strong interest and right to know will both be frustrated.

The case itself is one of defamation per se, as plaintiffs' counsel has informed this Court repeatedly. That is to say, actual damages need be proven only to determine the amount of recovery, but the case is essentially one where a plaintiff, after annoyance at reading an allegedly defamatory statement, may have a cause of action in order to prove libel or defamation. It is the personal annoyance of the plaintiff that fuels this case. The request that this case be sealed is intended to keep this vexatious behavior from the public view, when potentially the display of the truth would lead to fewer contributions to the evangelism enterprise

III. THE PLAINTIFFS ASK THIS COURT TO INDULGE IN PRIOR RESTRAINT.

A decree amounting to prior restraint of free speech, even of defamation, was ruled unconstitutional in Tory v. Cochran, 544 U.S. 734, 125 S.Ct. 2108 (2005). The defendants, and in particular Defendant Joy, have good reason to publish the documents he has in the manner he has. For over 20 years Defendant Joy has published the A.U. Reporter, covering the Atlantic Union of the Seventh-Day Adventist Church. He has no personal interest in Plaintiff Danny Lee Shelton but does have a continuing interest in the governance of his church. The church itself has this continuing concern as well.

IV. THE PLAINTIFFS SEEK TO MAINTAIN AN UNEQUAL PLAYING FIELD

The plaintiff Danny Lee Shelton announced on or about April 16, 2007, that he had filed suit against two unnamed individuals. He also indicated that an unnamed donor had contributed post-tax dollars to ensure that the legal fees of the plaintiffs would be covered.

In contrast, the defendants, neither of whom is even remotely wealthy, have solicited donations to

cover their own legal expenses and thus far those donations have scarcely covered even the day the Complaint was served.

Please refer to Exhibit A, which indicates it was copied by Google on April 23, 2007. This is apparently an excerpt of a longer online interview with Plaintiff Shelton. The current response to the same page address is given in Exhibit B. It is unknown why the attempt to retrieve the page directly results in a message saying that access is denied.

The Plaintiffs portray this case as a reservoir of libelious statements when those contents have been inserted into the record by them. Moreover, the Defendants have taken care to verify their sources and the truthfulness of the information they publish on their website - and they have by no means published all materials even when they were probably true.

V. PLAINTIFFS HAVE NO EXPECTATION OF PRIVACY

Plaintiff 3ABN is a public charity and maintains itself as a publisher of printed, broadcast, cable and online materials. Plaintiff Danny Lee Shelton is a public figure who appears on public media and makes appeals of the public for donation. They have no expectation of privacy here.

The plaintiffs have deliberately filed with this court materials which they then cynically insist should be kept confidential. The very act of filing this case and those materials constitutes a waiver of any expectation of privacy, even couched as it is with the declaration that they seek to not have those materials be made public.

The plaintiffs announced to the world that they had filed suit and then, most inconsistently, have sought to have this court keep the proceedings secret. The announcement is no longer visible on the forum it was posted to. Defendants are on information that the plaintiffs have misinformed their employees and said that it was the defendants who filed suit. This court and its decisions should be based on truth and not the deliberate slanting of facts by media experts. Open proceedings are essential.

Defendants have the benefit of counsel who can advise them both on the intellectual property issues of the case and also on the reasonable drawbacks of defamatory remarks. Indeed, plaintiffs have not brought any further instances of defamation, after the service of the Complaint, to the attention of this Court.

VI. OBJECTION TO AFFIDAVITS AND EXHIBITS

Plaintiffs have already shown their bad faith by submitting redacted exhibits without permission of the Court. They have excised any identifying information that would allow the Defendants to discover whether the documents are genuine or not. They have also failed to submit the second of the two Affidavits to which they refer to the Defendants, and as such the Defendants contend the Court should not consider either of the Affidavits, which are supported by writings whose authenticity is impossible to verify.

VII. AUTOMATIC IMPOUNDMENT IS UNWARRANTED

Local Rule 7.2 provides for a mechanism to submit documents under seal. The plaintiffs essentially ask that the defendants be ordered to frame all submissions to conform with Local Rule 7.2.

Otherwise, the plaintiffs are requesting something very bizarre, that this case, ostensibly brought to protect their reputation in the public eye, must be kept out of the public eye - when it has already been announced to their public. This just does not make sense.

Indeed, the case was brought for harassment of the allies of Plaintiff Shelton's ex-wife just as her divorce case is going to demand as much preparation as possible.

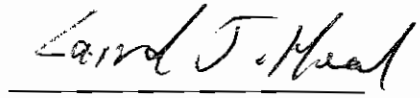
VIII CONCLUSION.

The analysis of the impoundment issue rests on the common law, and the cases which have alternative bases have been distinguished above. The failure of the plaintiffs to supply this delineation is as much as cynical.

The order sealing the case should be lifted, and the regular means for submitting documents

under seal, namely to mark them Confidential and submit redacted copies for the public file, with accompanying motion, should be sufficient for the remainder of the case.

RESPECTFULLY SUBMITTED this 11th Day of June 2007,
for the defendant Robert Pickle.



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