

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

COPY

RUSSELL L. DOTY,)
)
 PLAINTIFF,)
)
 vs.) CAUSE NO. DV 07-022
)
 BRADLEY MOLNAR,)
)
 DEFENDANT.)

Taken at the Yellowstone County Courthouse
Billings, Montana
Wednesday, September 3, 2008

MOTION TO QUASH
Before the Honorable G. Todd Baugh
Thirteenth Judicial District Judge

A P P E A R A N C E S

FOR THE PLAINTIFF:
RUSSELL L. DOTY, pro se, P.O. Box 30457, Billings,
Montana 59107-0457.

FOR THE DEFENDANT:
JACK SANDS, ESQ., Attorney at Law, 100 North 27th St.,
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FOR THE BILLINGS GAZETTE:
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Billings, MT 59103.

1 WEDNESDAY, SEPTEMBER 3, 2008

2 THE COURT: DV 07-022 Doty versus Molnar,
3 *Gazette's* motion to quash a subpoena or something. Y'all
4 have come to some understanding and have agreed to a
5 resolution of the issues?

6 MS. SHEEHY: We haven't, Your Honor.

7 THE COURT: Okay. You can proceed.

8 MS. SHEEHY: Judge, I put a copy of the Media
9 Confidentiality Act on your tray there because I'll be
10 referring to it.

11 THE COURT: Thank you.

12 MS. SHEEHY: That's just the statute. This
13 case arises because Mr. Doty, as part of his civil
14 action, has issued a subpoena requesting that the *Gazette*
15 produce IP addresses, e-mail addresses, and other
16 identifying information about a number of anonymous
17 posters. Mr. Doty identifies these posters by their
18 on-line nicknames and asks the *Gazette* to accumulate data
19 concerning their identities.

20 I would like to present a little bit, as was
21 further explained in Mr. Prosinski's affidavit, about the
22 on-line edition.

23 (Whereupon, the reporter asked counsel to slow
24 down.)

25 MS. SHEEHY: The *Gazette* on-line edition allows

1 readers to post comments after each story and these
2 comments are anonymous. The posters can choose to have a
3 nickname or a posting name that reflects their identity,
4 or they can remain anonymous. In allowing these
5 postings, the *Gazette* asks that the posters register.
6 And in the registration, the *Gazette* obtains the IP
7 address, which I believe to be computer-specific, the
8 e-mail address, and the nickname. The *Gazette* does not
9 require and does not obtain information concerning their
10 identities.

11 The *Gazette* moves to quash this subpoena on
12 very simple grounds. The Media Confidentiality Act found
13 at 26-1-901 through 903. The Media Confidentiality Act
14 is very specific and very broad. It has a provision
15 stating extent of privilege. It says, subsection 1,
16 Without his or its consent, no person, including any
17 newspaper, magazine, press association, news agency, news
18 service, radio station, television station, or community
19 antenna television service, or any person connected with
20 or employed by any of these for the purpose of gathering,
21 writing, editing, or disseminating news, may be examined
22 as to or may be required to disclose any information
23 obtained or prepared or the source of that information in
24 any legal proceeding if the information was gathered,
25 received or processed in the course of his employment or

1 its business.

2 The *Gazette* has presented the affidavit of
3 Steve Prosinski to establish that the on-line message
4 service is indeed part of the *Gazette's* business. It's
5 an integral part of the business and a growing part of
6 the business. All the information requested in the
7 subpoena is obtained as part of this business, which is
8 the *Gazette's* business. As such, the subpoena falls
9 squarely within the broad privilege allowed by the Media
10 Confidentiality Act and the subpoena must be quashed. By
11 the terms of Act, no one from the *Gazette* may be
12 compelled to testify or to provide this information.

13 Mr. Doty claims in his briefing that the
14 *Gazette* has waived its privilege. The *Gazette* has not
15 waived its privilege, and Section 26-1-903 speaks
16 specifically to this. The privilege encompassed in the
17 Act can only be waived by knowing, voluntarily, and
18 stated waiver. Mr. Prosinski has provided information
19 for the purposes of this motion. None of the information
20 provided is responsive to the subpoena. And
21 Mr. Prosinski stated in the affidavit that he
22 specifically did not waive the privilege.

23 Mr. Doty also asserts that this privilege is
24 somehow limited to old technology. Technology that was
25 in place at the time the statute was enacted. He cites

1 no authority for this position, and I looked, I don't
2 think there is any authority. All of the privileges that
3 exist, for the most part, were put into place prior to
4 these technological advances of e-mail, on-line posting.
5 No one would claim that correspondence from an attorney
6 to a client by e-mail somehow doesn't fall within the
7 attorney/client privilege because it's new technology.
8 Same with doctor/patient privilege or any of the
9 privileges. The privilege enacted by the statute is very
10 broad and it must be read as written.

11 We've also in our briefing talked a little bit
12 about the First Amendment rights to speech and to
13 anonymous speech, in particular. We provided the Court
14 with a number of cases where the courts have held that
15 this kind of information can't be compelled by subpoena
16 and that it is protected by the First Amendment. I would
17 like to point out that while we argue that the First
18 Amendment applies here and we believe that our authority
19 makes that case, the Court doesn't need to reach that
20 issue. And, in fact, the Court should exercise
21 restraint. When a case can be decided on statutory
22 grounds, the Court should not look to the constitutional
23 issues. The case for that is *State ex rel Wilcox*, 208
24 Mont 351, 678 P2nd 209.

25 Today Mr. Doty has presented us with a case out

1 of Connecticut. The title was *Doe versus* -- I'm not sure
2 what the Defendant's name was. And that case was decided
3 so that after weighing the constitutional rights, a
4 newspaper was required to produce information. I haven't
5 had a chance to fully look at that case; however, in my
6 short review, it appears that the Court weighed
7 constitutional issues and there was no statutory
8 privilege at issue.

9 We're in a unique situation here in Montana
10 because our legislature has already done that weighing.
11 Our legislature has determined that the First Amendment
12 interests and the freedom of press interests require the
13 application of a privilege, just as the legislature has
14 made that determination with respect to communications
15 between attorneys and clients and with respect to
16 communications between doctors, counselors and other
17 professionals.

18 The -- Mr. Doty encourages this Court to weigh
19 constitutional issues. That weighing favors the *Gazette*
20 because the principles of the First Amendment are so
21 important. However, I'd encourage this Court not to
22 conduct that way. While recognizing those First
23 Amendment privileges, there is no need to go to
24 constitutional issue in this case, because the statute
25 has already done the weighing, the legislature has

1 already enacted the policy, and the policy is very broad.
2 The privilege extends to, quote, Any information obtained
3 or prepared or gathered, received or processed in the
4 course of the *Gazette's* business, unquote. I did input
5 the *Gazette* into the statute.

6 All of the information that is subpoenaed was
7 indeed obtained and gathered in the course of the
8 *Gazette's* business. This Court need look no further
9 before quashing this subpoena. Thank you.

10 THE COURT: Mr. Doty.

11 MR. DOTY: May I approach the bench, Your
12 Honor?

13 THE COURT: You may.

14 MR. DOTY: Here's some things I'll be referring
15 to. (Hands documents to the Court.)

16 Your Honor, I would like to cut to the chase
17 and address the constitutional issue first. With regard
18 to the brief filed by the *Billings Gazette*, it was said
19 by counsel that I did not deal with the *Best Western* case
20 or the *2Mart* (sic) case. Both of those cases concede the
21 right to speak anonymously is not absolute. And,
22 therefore, it would not be absolute in the case of the
23 statute that they cite, either.

24 I'll refer you to the first case that they
25 cited. Basically, on the quote, To certain classes of

1 speech, including defamatory and libelous speech, are
2 entitled to no constitutional protection. Those who
3 suffer damages as a result of tortious or other
4 actionable communications on the Internet should be able
5 to seek appropriate redress by preventing the wrongdoers
6 from being -- from hiding behind an illusory shield of
7 purported First Amendment rights.

8 Now, in order to prevail on a motion to quash,
9 courts have required various standards to show that
10 defamations existed. As the *Best Western* court laid out,
11 those have varied from a good faith basis to assert a
12 claim to pleading sufficient facts to survive a motion to
13 dismiss to a showing of *prima facie* evidence sufficient
14 to withstand a motion for summary judgment, and beyond
15 that, hurdles even more stringent. Let's take those.

16 Attached to my affidavit is *prima facie*
17 evidence of defamation and false light in the instance of
18 each person whose pseudonym I have in good faith
19 requested information on. Those attachments and my
20 affidavit provide enough evidence to withstand a motion
21 for summary judgment. I have to be able to prove the
22 elements within my control -- only the elements within my
23 control. What are the elements of those claimed? As you
24 know, a defamatory statement made by the Defendant, a
25 statement about me. It has to be published, and the

1 Defendant can lose a qualified privilege through excess
2 repetition and secondary publishers, which these people
3 are. It has to -- or at least two of them are: The
4 CutiePie and the High Plains Drifter. It has to damage
5 my reputation. And when it is *libel per se*, damages are
6 imputed. *Per se* means, in this case, defamation in my
7 job or accusations of a crime.

8 If public figure, I would also have to prove
9 falsely. And I don't know whether or not the *Gazette* is
10 including me in the public figure category, because I
11 haven't run for office for four years.

12 Also, in the public figure, you would have to
13 prove fault on the Defendant's part, which is really a
14 misnomer. That means you have to prove malice of
15 scienter. The statement was made with reckless disregard
16 for the truth, or the prospective Defendant must have
17 known that the statement was false. The statement is
18 *libel per quod* that is needed to look at intrinsic facts
19 to establish defamatory content.

20 Now, let's take a look at attachment 3, which
21 was attached to my material. And I'm assuming, Your
22 Honor, I'm not trying not to repeat what I've put in my
23 brief, because I'm assuming that the Court can read that
24 and has.

25 If you take a look at the document No. 3. The

1 statement about me -- there's a statement about me. It
2 was published. General damages are imputed because it
3 was *libel per se*. It's false? Yes. I paid 279 --
4 excuse me, \$2,927 in back dues and late fees and was
5 reinstated at the beginning of April 2007. Proof of
6 that, I've just laid on your desk, shows my admission
7 card. Malice? Certainly it was reckless disregard
8 because whoever did this -- this guy by the name of
9 Always Wondering -- did not even check on-line as two
10 people who called him to task. You'll see on page three,
11 Good Old Boy and DDW, whom I don't even know who they
12 are. They call him to task for not checking better. And
13 then he came back and continued to try to libel me and
14 even repeated false information after I had corrected him
15 in a lengthy correction found on page four and the other
16 particular things.

17 So that takes care of the first qualification
18 in the *Best Western* case to show, at least with regard to
19 this particular person that I want information on, to
20 show a *prima facie* case. The *Best Western* case can be
21 distinguished because the person seeking the subpoena
22 identifies -- identities did not allege a specific false
23 statement or other elements of the proposed lawsuit.
24 However, that was -- when that was alleged, the Court did
25 allow the identities to be revealed. And that's the

1 second case that counsel for the *Gazette* has referred to
2 that I have put on your desk, which I Shepardized and
3 found that the Court, in that particular case, went ahead
4 and did allow the identities to be revealed.

5 You'll note, I think, in the headnote ten of
6 the first *Best Western* case, there are five or six other
7 things that have to be proven. You have to have a
8 concrete showing of a *prima facie* claim, which we've just
9 discussed in this one instance. And I'll come back to
10 the others.

11 The specificity of the discovery requests. My
12 discovery request is very specific. It's not overbroad.
13 There's no claim in here that it had. The absence of the
14 alternative means to obtain the subpoenaed information.
15 In a deposition taken very recently, I asked Mr. Molnar
16 if he was Always Wondering, High Plains Drifter, and
17 CutiePie. He said he was not. I asked him whether he
18 knew who those folks were. And Mr. Sands, who's here
19 today, objected and told Mr. Molnar not to answer. So
20 I've exhausted the alternative ways of obtaining that
21 particular information.

22 And the fourth part that is required in the
23 *Best Western* case is an essential need for the subpoenaed
24 information to advance the claim. Certainly, I would
25 have to have the name of the person with regard to Always

1 Wondering because of his *libel per se*. The other two
2 people are potential witnesses in this case for reasons
3 that we'll discuss, and they are referring to libelous
4 things that would be included in the *libel pro quod*
5 category, which requires extrinsic evidence in order to
6 be able to prove the libel.

7 And with regard to the Does Defendants, whether
8 or not they have an expectation of privacy. I've
9 attached to my affidavit, attachment 4, which is some
10 things in terms of what the *Gazette* policy is with regard
11 to postings on their Internet site. I would just say
12 that one of the things is, on page one, the *Gazette*
13 encourages people to be civil. They also, on page one,
14 require all information you provide is true, accurate,
15 current, complete, and does not violate these terms of
16 service. That's a contract. I'm a third-party
17 beneficiary of that contract and the case that was first
18 cited by the *Gazette*, that the *Best Western* case,
19 indicates what happens in terms of a contract. And in
20 that particular contract case at least, the privacy was
21 overcome.

22 Now, there's some other things on the -- on the
23 *Gazette* that I've highlighted, in terms of -- but I'd
24 just refer you, also, to the last page, and they say
25 basically they -- they'll try to protect the -- or they

1 don't say "try," but they say, We believe that the
2 greater protection of personal privacy on the Web will
3 not only protect consumers, but also increase consumer
4 confidence and ultimately their participation in on-line
5 activities. The purpose of our policy is to inform you
6 about the types of information we gather when you submit
7 a comment using the talkback feature. And then up above
8 they say they're committed to protecting consumer privacy
9 on-line.

10 They don't guarantee that, however, and they
11 couldn't. Because if you take a look at the *Best Western*
12 case with regard to the one that I just sent out, the
13 subsequent *Best Western* case, you'll see in -- it's
14 towards the last, I think it's the second to the last
15 page. You'll see on page 21 about the Does Defendant,
16 and 21 isn't a reference to the case, it's just a
17 reference to what I passed out in the upper right-hand
18 corner. See, the Does Defendant expectation of privacy.
19 The *Gazette* cannot guarantee any expectation of privacy
20 because there is none. And it's been well-established by
21 the case law that's cited there.

22 Now, what's required -- what else is required
23 by these cases? One of the things that seems to be
24 required is that the potential Defendants, or the
25 potential people who are going to get their identity

1 revealed, have to be notified with regard to this. This
2 has been done in a couple of ways. It's been done with
3 posting on the Web site in this particular case, and
4 apparently in this particular case there have been some
5 things where people have always been notified. I don't
6 know whether or not the Defendant or the *Gazette* has
7 tried to notify the people. I don't know whether some of
8 these people are even in this room. And -- but they
9 would, in terms of having their right to participate,
10 have a right to -- some of them under some courts, they
11 would have a right to appear anonymously, under some
12 courts they wouldn't. I'm not contesting whether or not
13 they would have a right to appear anonymously to contest
14 whether or not their identity ought to be revealed to the
15 extent the *Billings Gazette* can do that.

16 What I'm saying is requesting this Court at
17 this particular time to go ahead and give the *Gazette*
18 time to notify the anonymous Defendant and give a chance
19 to respond or post it on their Web site or both, so that
20 they folks can respond. And if the Defendants do not
21 give notice that they're moving to quash within ten days,
22 an order should issue compelling discovery. Or in the
23 alternative, and with regard to Mr. Molnar, the
24 information that I want from him, in terms of their
25 cross-referencing the IP addresses with his particular

1 name, that's something that wouldn't be protected with
2 regard to this in any event.

3 Now, let's talk for just a minute about the
4 Shield law. Oh, before we do that, I would ask the Court
5 to also grant a motion to protect the data in the -- I'm
6 making it at this time -- to the *Billings Gazette*, to
7 protect the data that I'm requesting so that it doesn't
8 get deleted in some fashion.

9 Let's talk about the Shield law. I've
10 addressed the particular issues under the Montana Rules
11 of Civil Procedure 26, 30, 34 and 45. And basically with
12 regard to what happens when you subpoena third-parties.
13 It has to be relevant and it has to be not privileged, it
14 has to be reasonable and not unduly burdensome.

15 The first brief in this action, and the present
16 brief that were filed by the *Gazette*, there was no claim
17 involving relevancy. In the second brief, the *Gazette*
18 raises claims on burdensomeness and unreasonableness.
19 I've pointed out in an affidavit -- or excuse me, in
20 attachment 5 to my affidavit that there's a very simple
21 SQL query that can be made to obtain most of this data,
22 and they can run it once or -- queries once or twice and
23 get it. It's not burdensome. And in addition, they
24 could -- they could charge me, under the rules of the
25 court, for whatever it is that they have to do. No

1 evidence backs up their claims that it's unreasonable or
2 burdensome. I address them specifically in my affidavit
3 and in my brief.

4 Now, with regard to the Shield law
5 specifically. The reason for the Shield law, as I
6 understand it, and I go way back with the journalistic
7 community. I write myself. My mother was a journalist.
8 I've been married to a journalist. And so I understand
9 these things.

10 The reason for the Shield law is to protect
11 people who are either news gatherers, you know, like
12 reporters, or editorialists, or possibly guest
13 editorialists. They're not to protect people who come
14 on-line later on and make some kind of a comment. And it
15 was said, I think, that I would want to extend -- or that
16 my argument goes to the argument -- the distinction
17 between old and new technology. While there's a piece of
18 that, you have to make a distinction. The Court cannot
19 add a new protection because of the new technology. If
20 you go and take a look at the doctor/patient privilege
21 and the attorney/client privilege statutes that were
22 cited by counsel in her brief, you will find that there's
23 nothing in either statute that would prevent, you know,
24 attorneys giving information back and forth between
25 themselves and their clients or doctors on-line or using

1 electronic kinds of devices. It's just the way the
2 statutes happen to be written. So that that particular
3 argument is not an argument that I made, nor could it be
4 made to be extended if you adopted my position in this
5 particular case.

6 So basically, then, I think I briefed the idea
7 that the Court cannot extend the privilege to the
8 computer people. I just want to address some loose
9 wording that's been used in this proceeding and that's
10 with regard to Mr. Prosinski's -- I hope I'm pronouncing
11 that name correctly -- affidavit. He says, in part,
12 paragraph 13 -- he says in paragraph 13, and I quote, The
13 on-line story comments have become an integral and
14 necessary part of the *Gazette* business of gathering and
15 disseminating news and information. Two things: He
16 doesn't go beyond that and say that they have become a
17 necessary -- that they do gather information through
18 these things, news and information through these things,
19 as is asserted by the *Gazette*'s attorney on page five of
20 her brief, where she says, The allegation is referred by
21 Mr. Prosinski's affidavit, which states that the message
22 boards are used to gather and disseminate news and
23 information. Nor could I test him by calling him for a
24 witness here now and ask him to say, you know, whether
25 that is done generally, or whether that has been done

1 specifically with regard to High Plains Drifter, the --
2 specifically with regard to CutiePie, or specifically
3 with regard to Always Wondering, which I think is their
4 burden to have to be able to demonstrate. And they just
5 haven't demonstrated it.

6 You know, I can't completely rule out the fact
7 that some reporter might go into a blog or a comment
8 section, but -- and find something, but that's their
9 burden to show, and I don't think they've shown it in the
10 affidavit of Mr. Prosinski because of the wording that
11 he's chosen to use.

12 Now, if you take a look at what's happened on
13 the *Billings Gazette* Web site, if you go into the blogs,
14 you'll see very quickly that there are -- there are ads
15 throughout the comment section. They're in the middle of
16 them. They're on both sides of them. And what's
17 really -- you know, you can see that from this particular
18 one with the X crossed out, the one that I just happened
19 to comment on just recently. And, again, I asked the
20 *Gazette* to take my name off of this particular -- or take
21 the adverse post off of this particular one and they
22 haven't responded. They didn't do it. I have no reason
23 to know why, but it's certainly -- they've posted some
24 things that, you know, that -- that are upsetting to me,
25 frankly. And there's no way that I can seem to bring an

1 end to this.

2 Now, just in closing -- well, I guess I should
3 go through the -- the other affidavits as well, or the
4 other attachments as well, because I have to prove a
5 *prima facie* case with regard to them. Taking the
6 attachment 1 and attachment 2, CutiePie indicates that
7 I'm quite possibly the most discredited person in Montana
8 politics or legal circles. That's basically one of the
9 issues in this particular case as to what's happened to
10 my reputation as a result of all the false things that
11 were said. CutiePie goes on to say about, Goofy
12 arguments were rejected by the commissioner of political
13 practices. And then he says by -- appointed by Marc
14 Racicot and the commissioner appointed by Brian
15 Schweitzer. They weren't -- that's another false
16 statement, as you can see by the material that I placed
17 on your desk. Mr. Higgins, who made the determination,
18 was picked by Governor Judy Martz, Republican. Also
19 refuted by Attorney General Mike Grath (sic). That's
20 false. It was one of the assistant attorney generals and
21 whatnot. So basically my need for this particular
22 witness is to -- is a witness with regard to what's
23 happened to my ongoing reputation in this community.

24 With regard to attachment 2, that deals with
25 Mr. High Plains Drifter. And after I had made a blog

1 comment, he comes back and says, You didn't have
2 credibility then and you don't now. We don't care -- and
3 above that part he says, We don't care what kind of
4 propaganda you vomit. And then he makes reference
5 *libel pro quod*, How's the weather in Colorado, which is a
6 reference to the issue of whether or not I tried to hide
7 my return from Colorado; and also, Do you still live in
8 that post office box, which is a reference, again, to
9 issues in that -- in this particular case.

10 So those are things that I need to know. And
11 in addition, I have a right to test whether or not
12 Mr. Molnar is telling the truth when he says in his
13 deposition that he is not either of these people. He has
14 refused to sign a waiver, which I have placed before you;
15 three different waivers, he refused to sign them. I've
16 signed a waiver. I would sign a waiver in regard to the
17 *Gazette*, if it is requested, but I've signed a waiver for
18 the commissioner of political practices. He's not signed
19 a waiver with regard to any of those documents, so
20 there's a reason for me -- I can't get it in any other
21 way, except for the Court, to go forward with trying to
22 demonstrate whether or not we're getting a straight story
23 from Mr. Molnar or whether he's continuing to malign me
24 and make the community think that I'm a discredited
25 person because of the many things that he said that were

1 false.

2 Now, Mr. Molnar has a new campaign brochure.
3 And it -- on the front of it, it says -- I thought I had
4 it here. I guess it's over here. On the front of it,
5 Your Honor, as you can see it says, Integrity and
6 experience. And below that it says, What else is there?

7 THE COURT: It says what?

8 MR. DOTY: What else is there? Integrity and
9 experience. In this particular case, it's my integrity
10 and my experience that are on the line, and I would hope
11 that you would give me the opportunity to be able to
12 bring forth the evidence that I need in order to prove my
13 case. Thank you, Your Honor.

14 THE COURT: When it comes to defamatory
15 statements, published, is there any requirement that they
16 have any credibility?

17 MR. DOTY: That the statements have any
18 credibility? You mean, that nobody would believe them?

19 THE COURT: Yeah, I mean, who would believe
20 anything or pay any attention to anything that somebody
21 posts anonymously that if they don't have the gumption to
22 put their name behind it, who would give it any credence?

23 MR. DOTY: Well, it seems to be rampant on the
24 Internet.

25 THE COURT: Well, who pays any attention to

1 that stuff? No one.

2 MR. DOTY: I would respectfully submit that
3 that's not a criteria.

4 THE COURT: That's what I was asking about. I
5 mean, because I can't imagine that an anonymous comment
6 has any credence whatsoever. Now, if it's not required,
7 I suppose that's something else. And so if you knew the
8 identity of these folks, you could sue them, or I think
9 you believe, really, that the person is Mr. Molnar, who
10 is using a false name?

11 MR. DOTY: Yes. And with regard to two of
12 them, the CutiePie and High Plains Drifter, my ideas is
13 that they are witnesses in this particular case -- should
14 be made witnesses in this particular case with regard to
15 what they thought happened to my reputation.

16 THE COURT: Okay. Rebuttal?

17 MS. SHEEHY: Did you want to say anything,
18 Jack?

19 THE COURT: Oh, we've got another party.

20 MR. SANDS: I'm Jack Sands and I represent Brad
21 Molnar.

22 THE COURT: Right.

23 MR. SANDS: And we have not filed a brief in
24 this case because this is fundamentally an issue between
25 the *Billings Gazette* and Mr. Doty. However, I would

1 inform the Court that Mr. Doty indicated that Mr. Molnar
2 had made objections to certain questions that he asked in
3 the deposition.

4 THE COURT: I think he said you instructed
5 Molnar not to answer the question as to whether or not
6 Molnar knew who really was the true identity of High
7 Plains Drifter and CutiePie.

8 MR. SANDS: Basically, I think the --

9 THE COURT: Is that accurate or not accurate?

10 MR. SANDS: Well, I think that's what Mr. Doty
11 said --

12 THE COURT: I know that's what he said.

13 MR. SANDS: I mean, there were lots of
14 objections made in the deposition.

15 THE COURT: I get the impression that, from
16 that -- if that is what happened with that particular
17 exchange, that Mr. Molnar probably does know who High
18 Plains Drifter and CutiePie are, but he said it wasn't
19 him.

20 MR. SANDS: What our point was in the objection
21 and our point here is that none of this information is
22 remotely relevant to the case before the Court. This
23 Complaint, Mr. Doty's Second Amended Complaint, has --
24 has an allegation containing defamation, libel, and
25 slander. It has to do with the defamation, libel, and

1 slander that occurred back in 2004. There's no
2 allegation of a continuing level of conduct. There's no
3 allegation about any other people involved, except
4 Mr. Molnar. And since this --

5 THE COURT: Let me see if I follow this. His
6 Complaint complains about, alleges as having occurred,
7 slander, defamation, whatever that other one was you
8 said, that occurred in 2004?

9 MR. SANDS: Yes.

10 THE COURT: And these blogs or postings or this
11 about which he wants information is --

12 MR. SANDS: Happened long afterwards.

13 THE COURT: He's talking about things that were
14 posted in, say, 2007? 2008?

15 MR. SANDS: I understand that some of those
16 occurred then, yes.

17 THE COURT: Okay.

18 MR. SANDS: And there is no part of
19 Mr. Molnar's -- or Mr. Doty's Second Amended Complaint
20 that alleges anything with regard to libel, slander, or
21 any of the other counts occurring after 2004. And,
22 therefore, all this -- this discussion is really
23 irrelevant to the case before the Court.

24 THE COURT: Point taken.

25 MS. SHEEHY: A couple of points. Mr. Doty

1 claims that this case begins and ends at the
2 constitutional weighing. That is not what Montana law
3 says. Montana law says you reach the constitutional
4 analysis only if a statute or some other state law case
5 law doesn't resolve the issue. And in this case, the
6 privilege does resolve the issue.

7 But assuming, for the sake of argument, that
8 you do this weighing, the freedom of speech in this case
9 outweighs the right to conduct discovery in a civil case.
10 Mr. Doty has a civil case against Mr. Molnar. He's
11 deposed Mr. Molnar and he knows what Mr. Molnar has
12 identified as his statements and those that are not his
13 statements. He has not proved a *prima facie* case with
14 respect to reputation, damage, and malice. And as the
15 Court pointed out, the form of public ideas takes care of
16 this problem, because everyone recognizes this for what
17 it is. It's anonymous postings. Just as it would be if
18 someone posted something on your wall on paper.

19 But the heart of this case is actually the
20 privilege, because Mr. Doty sidesteps the fact that this
21 privilege exists. When you look at the privilege, you
22 don't do the constitutional weighing. There is no need
23 to do that. Privilege is unique to Montana. The cases
24 that we've looked at involving these constitutional
25 analyses, those cases don't deal with common law or

1 statutory privileges. And Montana's is different than
2 any of the others that I've seen. Mr. Doty attempts to
3 get out of the privilege by saying that it's limited
4 by -- limited to news gatherers, reporters, and
5 editorialists. That is not what this statute says. The
6 statute protects any employee of the business from
7 disclosing any information -- let's find it here -- any
8 information gathered, received, or processed in the
9 course of his employment or its business. It's not the
10 business of news gathering. It's the business. It is a
11 very broad privilege.

12 Moreover, this business does gather information
13 from these posts. Mr. Prosinski's affidavit states that
14 it's integral to the business of disseminating news and
15 of gathering news.

16 THE COURT: I hope they're not printing in the
17 paper that there's any credence in these blogs.

18 MS. SHEEHY: They don't print that in the
19 paper, and I think everyone judges anonymous speech in
20 the same way that you do. That anonymous speech is
21 anonymous speech. It's what it is. And there is a
22 protection that applies to that.

23 I think it's really important to realize that
24 this privilege has been applied to anonymous speech in
25 the past under old technology. I remember a case in

1 federal court where we had done an article, the *Gazette*
2 had written an article on an anonymous teen prostitute.
3 The Prosecutor got up that morning and read the paper,
4 subpoenaed the reporter and wanted information about the
5 anonymous teen prostitute and wanted the reporter to
6 testify as to what she learned from the prostitute. The
7 information that our reporter had may have been very
8 useful in prosecuting a large prostitution ring. But the
9 information was privileged, and the fact that it was
10 privileged precluded the interview of our reporter. So
11 this statute does apply to anonymous speech. It has been
12 applied to anonymous speech, whether that speech is
13 posted on a message board or contained in our newspaper
14 makes no difference, and the statute clearly does not
15 draw any distinction, but is broadly worded.

16 I guess, as to the burden, we're not claiming
17 that it's an undue burden in any one case, but I think
18 the Court can see how this could become a nightmare.
19 Every time someone wanted to know who wrote the little
20 comment, all they would have to do is pay the \$100 filing
21 fee, or whatever it is now, file a subpoena, and the
22 *Gazette* would be dealing with this situation and doing
23 this weighing and deciding if people had made their
24 *prima facie* case and going to court every other week
25 when there's a privilege in place that directly addresses

1 this situation.

2 I would like to close by commenting on the
3 nature of privilege. I think, as I listened today, the
4 real beef here is that Mr. Doty believes that the
5 privilege can't be enforced because he can't do the
6 discovery that he wants to do in a civil case. But
7 privileges, by their very nature, always impair
8 somebody's opportunity to conduct discovery. And
9 privileges are enforced for that reason. Yes, it may
10 work a hardship, but there is no weighing with a
11 privilege. You look to see if the privilege applies.

12 There are many examples of how privileges
13 preclude people. I've already given you one, which is
14 the story of Angela, who could not be deposed. There's
15 doctors that are not allowed to testify in civil cases
16 when they have information that might help prove a tort
17 case. Lawyers, obviously, often have information that
18 would help prosecutors solve crimes. They can't be
19 compelled to testify, because the privilege, by its
20 nature, does what Mr. Doty doesn't want it to do. It
21 precludes him from conducting some discovery that he
22 wants to have.

23 But this weighing has already taken place in
24 the Montana legislature. We have a specific statute.
25 There's no need to do a constitutional weighing. The

1 legislature determined that the First Amendment privilege
2 to speech outweighs the discovery privileges of both
3 prosecutors and civil litigants alike. The legislature
4 has made that determination of what benefits society, and
5 it's not within this Court's purview to go in and do a
6 constitutional weighing when the legislature has already
7 set the policy of this state.

8 The subpoenaed items are information gathered
9 in the course of the *Gazette's* business. They clearly
10 fall within this broad privilege. And the subpoena
11 should be quashed. Thank you, Judge.

12 THE COURT: Okay. I think the *Gazette* is
13 correct, Mr. Doty, the Shield law does protect that which
14 you seek to have them produce for you. And the Court
15 doesn't even get to the constitutional issue that the
16 legislature has already decided that with this statute.
17 And though technology has advanced since the time of the
18 creation of that law, it, nonetheless, is very broad and
19 it does cover the situation we have here before us today.

20 Apparently, or at least possibly, Mr. Molnar
21 may know who these folks are. You can pursue that
22 through them -- or through him. Further, apparently,
23 what you're complaining about in the pleadings is
24 something that occurred in 2004, and I'm given to
25 understand that these blogs that you seek to have the

1 *Gazette* identify the author is -- are all after that
2 point in time, so they wouldn't have any relevance, I
3 think, anyway. It is possible, I suppose, you could
4 amend your pleadings and we can go through all this
5 again, but the Shield law is going to protect them. What
6 you might do is pursue this information through
7 Mr. Molnar. And if you don't think he has answered your
8 questions, ask him some more questions. It is possible,
9 I don't know if it is likely, but at least it is
10 theoretically possible that the *Gazette* could contact
11 CutiePie and High Plains Drifter and see if they wanted
12 to be identified or would voluntarily be identified. I
13 somewhat hesitate to suggest that while the *Gazette* might
14 be willing to do something of that nature on a one-time
15 basis, they would be setting some precedent for doing
16 this for anybody that wanted to know who it was that
17 wrote this stuff. So the motion to quash has to be
18 granted. And we're adjourned.

19 (Whereupon, the proceedings duly ended.)
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CERTIFICATE

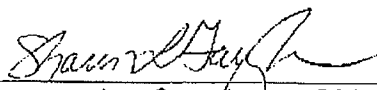
STATE OF MONTANA)
 : ss.
County of Yellowstone)

I, Sharon L. Gaughan, RDR, CRR, Official Court Reporter and Notary Public for the State of Montana, residing in Billings, Montana, do hereby certify:

That I was duly authorized to and did report the proceedings in the above-entitled cause;

I further certify that the foregoing 30 pages of this transcript represent a true and accurate transcription of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on this, the 7th day of Sept, 2008.


Sharon L. Gaughan, RDR, CRR
Official Court Reporter and
Notary Public, State of
Montana. Residing in
Billings, Montana. My
Commission expires: 4-12-10