

VIRGINIA

IN THE FAIRFAX COUNTY CIRCUIT COURT

DIETZ DEVELOPMENT, LLC and)
CHRISTOPHER DIETZ,)
)
Plaintiffs,)
)
v.)
)
JANE PEREZ,)
)
Defendant.)

Case No. CL 2012-16249

MOTION FOR RECONSIDERATION

Defendant Jane Perez submits this memorandum of law to explain why precedents from Virginia, the Supreme Court of the United States, and the United States Court of Appeals for the Fourth Circuit as well as other federal courts forbid the entry of a preliminary injunction to protect a businessman’s reputation against the repetition of specific allegedly defamatory words that have not been determined, after complete adjudication including the opportunity to appeal, to be false and defamatory. Although this argument could be raised on appeal despite the fact that the law against prior restraint was not cited at the preliminary injunction hearing, *D’Ambrosio v. D’Ambrosio*, 45 Va. App. 323, 340, 610 S.E.2d 876, 884 (Va. App. 2005) (court of appeals reverses preliminary injunction barring defamatory statements despite failure to preserve issue, based on the “ends of justice” exception), defendant asks the Court to consider this belated submission of precedent to avoid the need for any appeal.

1. On October 31, 2012, plaintiffs filed this action alleging that reviews posted by defendant on two consumer-commentary web sites, Angie’s List and Yelp, were false and defamatory. A motion for a preliminary injunction was filed with the complaint, and the Court

took testimony from defendant Perez and from plaintiff Christopher Dietz at a preliminary injunction hearing on December 5, 2012. The Court ruled from the bench, indicating its intent to grant a portion of the requested preliminary injunction, requiring defendant to remove “any post that refers to ‘the loss of jewelry,’” to edit her reference to the outcome of the case against her in General District Court, and forbidding defendant from making any statements about the subject of missing jewelry in the future, no matter how worded.

2. This injunction was issued without Perez having had the opportunity to take discovery or to present her defense to defamation case to a jury of her peers, without any showing that the particular words being enjoined were causing irreparable injury, and without Perez having had the opportunity for an appeal.

3. “[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). A court order prohibiting publication constitutes such a prior restraint. *Alexander v. United States*, 509 U.S. 544, 550 (1993) (“Temporary restraining orders and permanent injunctions — *i.e.*, court orders that actually forbid speech activities — are classic examples of prior restraints.”)

4. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the Supreme Court held that a temporary injunction against leafleting that accused a local realtor of blockbusting and “panic peddling” was a forbidden prior restraint. “No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices . . . warrants use of the injunctive power of a court.” 402 U.S. at 419-20.

5. Following *Organization for a Better Austin*, many appellate courts have held that

preliminary injunctions based on a provisional finding that the content is defamatory are flatly forbidden as prior restraints of speech. *Lothschuetz, Carpenter*, 898 F.2d 1200, 1208-09 (6th Cir. 1990) (limiting a preliminary injunction to “statements which have been found in this and prior proceedings to be false and libelous”); *Balboa Island Village Inn v. Lemen*, 40 Cal.4th 1141, 1149-1154, 156 P.3d 339, 344-348 (Cal. 2007); *Metropolitan Opera Ass’n v. Hotel and Rest. Employees Local 100*, 239 F.3d 172, 177 (2d Cir. 2001) (preliminary injunction against picketing and statements made in labor dispute reversed where there was no prior determination of falsity); *Auburn Police Union v. Carpenter*, 8 F.3d 886 (1st Cir. 1993); *Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991).

6. The United States Court of Appeals for the Fourth Circuit has not squarely addressed this precise issue, but it **has** held that protection of a lawyer’s reputation is not a sufficient basis to issue a preliminary injunction barring repetition of a statement that he is the target of a grand jury investigation. *In re Charlotte Observer (A Div. of Knight Pub. Co. and Herald Pub. Co.)*, 921 F.2d 47, 49 (4th Cir. 1990). Strong dictum in this case, quoting from a decision of the United States Supreme Court, distinguishes between a preliminary injunction and a permanent injunction against repetition of a libel, treating the former as a prior restraint:

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law’s sanction become fully operative.

A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication “chills” speech, prior restraint “freezes” it at least for the time. *Id.*

7. No Virginia court has addressed this First Amendment issue. However, in the *D'Ambrosio* case cited above, the Virginia Court of Appeals found it unnecessary to consider the appellant's First Amendment arguments about prior restraint because it was able to reverse the injunction on the state-law ground that the availability of a damages remedy for defamation prevents the party allegedly defamed from establishing irreparable injury. 45 Va. App. at 342-343, 610 S.E.2d at 885-886. Indeed, *D'Ambrosio* implies that even a permanent injunction would not lie against a defamation, given its approving citation of the Fourth Circuit's decision in *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir.1967), which it quoted as follows:

“‘[g]enerally[,] an injunction will not issue to restrain torts, such as defamation or harassment, against the person,’ because ‘[t]here is usually an adequate remedy at law which may be pursued’).” In this regard, *D'Ambrosio* aligns Virginia with the many jurisdictions where “equity will not enjoin a libel.” *Willing v. Mazzone*, 482 Pa. 377, 381-382, 393 A.2d 1155, 1157-1168 (1978); *Moore v. City Dry Cleaners & Laundry*, 41 So. 2d 865, 873 (Fla. 1949); *Montgomery Ward & Co. v. United Retail, Wholesale & Department Store Employees*, 400 Ill. 38, 51, 79 N.E.2d 46, 53 (1948).

8. Consequently, even if, after a full and fair opportunity to develop the facts through discovery, a jury agrees with this Court's ruling, based on testimony at the preliminary injunction hearing, that defendant Perez falsely characterized the summary judgment that she won in Mr. Dietz' previous litigation against her, and that the precise way in which defendant wrote about the disappearance of her jewelry implied a false statement of fact, Virginia law would bar an injunction against repetition of those statements. But defendant also believes that she could reword her statements about the jewelry in a way that would make her opinion about

how it happened an opinion, supportable by disclosed true facts, that would be constitutionally protected opinion. *Williams v. Garraghty*, 249 Va. 224, 233, 455 S.E.2d 209, 215 (1995); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993). An injunction that categorically forbids defendant from speaking about the subject of the disappearance of her jewels, in effect prejudging the defamatory character of words that are as yet unwritten, is thus impermissible under Virginia law as well as the First Amendment.

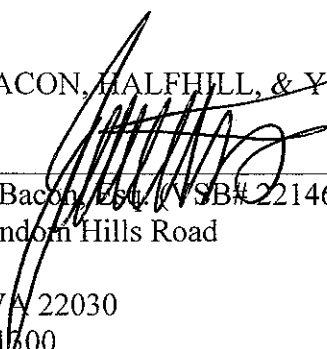
9. In addition, defendant questions whether plaintiff has demonstrated, or would be able to demonstrate, that the difference between the characterization of the summary judgment in the prior case as Defendant originally wrote it, and as the Court has rewritten that language in the proposed preliminary injunction, has caused any injury to plaintiff, no less caused irreparable injury.

WHEREFORE, Defendant asks the Court to reconsider its ruling from the bench on December 5, 2012.

Respectfully submitted,

JANE PEREZ
By counsel

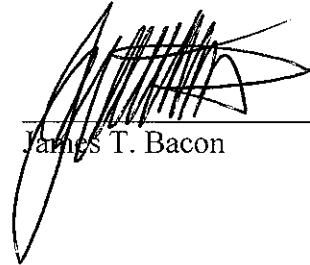
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2012, a true copy of the foregoing was mailed, first-class, postage prepaid to:

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A handwritten signature in black ink, appearing to read 'James T. Bacon', is written over a horizontal line. The signature is stylized and somewhat illegible due to the cursive and overlapping strokes.

James T. Bacon