

ALLAN J. WEBSTER * IN THE DISTRICT COURT
Plaintiff * FOR WORCESTER COUNTY
v. * STATE OF MARYLAND
JOSEPH ALBERO * CASE NO. 0204 0001876 2007
Defendant *

* * * * *

DEFENDANT’S PRE-TRIAL MEMORANDUM

NOW COMES Defendant, by and through his attorneys, Bruce F. Bright and Ayres, Jenkins, Gordy & Almand, P.A., and, pursuant to this Honorable Court’s instruction, submits the following Memorandum regarding the issue of whether Defendant should be compelled to reveal the source of a letter posted on his web log:

1. Plaintiff contends that Mr. Albero must disclose his “source” for a letter that he posted on his web site, “Salisbury News,” specifically an anonymous letter addressed to Salisbury City Council Members. *See* Exhibit A (copy of the subject letter, as it appeared on Defendant’s web site). Mr. Albero should not, indeed cannot, be compelled to disclose such information as part of his discovery obligations in this case, for three reasons: (1) the “source” of the letter in question is not relevant in this case, and is not likely to lead to the discovery of any relevant, useful, or admissible evidence; (2) Mr. Albero may properly refuse to reveal his “source” under the statutory “news media privilege,” Md. Code, *Courts and Judicial Proceedings*, §9-112; and (3) Mr. Albero is statutorily immune from any liability for the posting of the letter under the federal “Communications Decency Act,” 47 U.S.C.A §230.

I. The “source” of the letter is neither relevant nor reasonably likely to lead to the discovery of useful, relevant, admissible, evidence.

2. The source from which Mr. Albero received a copy of the subject letter is completely irrelevant to the case, and beyond the scope of allowable discovery. The issue presented by Plaintiff’s Complaint vis-a-vis the letter is whether Mr. Albero defamed Plaintiff by posting it on the website. The posting of the letter either was defamatory conduct by Albero, for which he can be held liable, or it was not; how or from whom Mr. Albero came into possession of the letter is completely irrelevant to that question.

3. This is a defamation case brought by a “public official,” namely, Chief Webster. *See Smith v. Danielczyk*, 400 Md. 97 (2007) (holding that police officers, “from patrol officers to chiefs,” are deemed public officials for purposes of defamation cases). As a “public official” or “public figure,” Chief Webster is required to prove that: (1) Mr. Albero published a false statement of verifiable fact about Chief Webster, (2) concerning a private matter as opposed to his conduct, fitness, or role in his public capacity, and (3) exposing Chief Webster to public scorn, hatred, contempt, or ridicule. *See Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580 (1976); *General Motors Corp. v. Piskor*, 277 Md. 165 (1976), *appeal after remand*, 281 Md. 627 (1977); *Mareck v. Johns Hopkins University*, 68 Md. App. 217 (1984); *Gay v. William Hill Manor, Inc.*, 74 Md. App. 51 (1988); *Metromedia, Inc. v. Hillman*, 400 A.2d 1117, 1121 (Md. 1979).¹ Further, and

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Whether a statement is defamatory depends on how it appears to have been meant by the defendant and how it was understood by those who heard it. *See Bowie v. Evening News*, 148 Md. 569 (1925); *Embrey v. Holly*, 48 Md. App. 571 (1981), *rev’d on other grounds*, 293 Md. 128 (1982).

most importantly, Webster must prove, by evidence of clear and “convincing clarity,” that Albero acted with “actual malice” (otherwise known as “constitutional malice”), i.e., that the defamatory statement was made with actual knowledge that it was false, or with reckless disregard for the truth. *See Phillips v. Washington Magazine, Inc.*, 58 Md. App. 30 (1984); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

4. To show reckless disregard for the truth, Chief Webster must prove (by clear and convincing evidence) that Albero had “serious doubts” as to the truth of the allegedly defamatory statement(s). *St. Amant v. Thompson*, 390 U.S. 727 (1968). The Maryland Court of Appeals has alternatively defined reckless disregard for the truth, in the context of defamation, as a “high degree of awareness of . . . probable falsity.” *See Le Marc’s v. Valentin*, 709 A.2d 1222, 1227 (Md. 1998).

5. Opinions, as distinguished from factual statements, cannot form the basis for a defamation suit, “no matter how unjustifiable, derogatory, or vituperative the opinion may be.” *Hearst Corp. v. Hughes*, 297 Md. 112, 131 (1983). Likewise, mere ridicule, name-calling, and verbal abuse, however offensive, cannot be defamatory – again, the allegedly defamatory statement must be one of verifiable fact in order to be actionable.

6. Based on all of those well-settled legal principles that apply to this case, the “source” of the letter at issue is not discoverable, because such information is not likely to lead to the discovery of relevant, useful, or admissible evidence. At the Hearing before this Court on October 31, 2007, Plaintiff’s counsel repeatedly represented that Plaintiff was entitled to obtain the identity of the source of the letter because Mr. Albero has an affirmative duty to demonstrate that he made “good faith efforts” to verify the truth of the statements made in the letter. This is a

patently incorrect statement of defamation law – Albero has no duty to demonstrate that he affirmatively took steps to verify the accuracy of any of the allegedly defamatory statements; ***Plaintiff has the burden of proof*** to demonstrate defamatory conduct by Mr. Albero, including actual malice, consistent with the principles outlined above. Again, the question to be resolved is whether Albero’s re-publication of the letter was an actionable, defamatory act on his part, and from where or from whom the letter came to Albero has *no* bearing on that issue. Plaintiff suggests that the source of the letter might theoretically reveal relevant information concerning whether Plaintiff acted with actual (or constitutional) malice, i.e., whether he had knowledge of the falsity of the statements made in the letter. Apparently, their contention is that, if Albero was told by the “source” that statements in the letter were false, then he may be deemed to have acted with actual malice in subsequently posting the letter on his website. This line of argument is easily dispensed with by virtue of Mr. Albero’s Affidavit (attached hereto as Exhibit B), in which he states under oath unequivocally that neither the source who gave him a copy of the letter nor anyone else made any statements to the effect that it contained false or misleading information.

7. Notably, the letter in question does not contain any factual statements concerning Chief Webster; it merely poses certain questions, expresses certain opinions, and advances certain criticisms as to the Chief, Mayor Barrie Tilghman, and the Salisbury Police Department. *See* Exhibit A. Also, it was not written, and contains no content authored or originated, by Defendant Albero. *See* Exhibit B. As with each edition of his “Salisbury News” web log, Albero’s July 5, 2007 edition, in which he posted the subject letter, stated explicitly on the “home page” that “Salisbury News provides access to resources and other information on this Web site as a public service. . . . Salisbury News does not warrant or represent that this information is current,

complete and accurate.” See Exhibit A. Finally, as stated, the posting of the letter that is the subject of this discovery dispute occurred on July 5, 2007, *a month and a half after this case was filed by Chief Webster*. Clearly, the posting of this letter was not, indeed could not possibly have been, part of the factual basis for the filing of the lawsuit by Chief Webster (in May 2007). Accordingly, the source of the letter and, for that matter, any information that might theoretically be learned from such source, could have no conceivable bearing on Chief Webster’s case, as pled and presented in his Complaint filed on May 23, 2007.

8. To be sure, in light of his desire and willingness to deal with his critics through private civil litigation, Chief Webster’s primary intent in seeking the identity of the person who gave Mr. Albero a copy of the letter is to file a defamation claim against that person and, possibly, every other person in the “chain of custody” of the letter. Disclosing the identity of the “source” of the letter within this \$10,000.00 District Court case will not advance any legitimate discovery or other purpose, will not narrow the scope of the triable issues, will not lead to the development of any useful testimonial or other evidence, and will not promote judicial economy or substantial justice. All it will do is provide Mr. Webster with more targets for his vendetta against those who would publicly criticize or question his performance as Chief of Police. As Defendant has already pointed out, Plaintiff chose to file his claim as a \$10,000 case in District Court, and, by doing so, he subjected himself (and Defendant) to the limited discovery that is available in such a case. Chief Webster must live by his own decision to pursue this case in the manner it was filed.

II. Neither Plaintiff nor This Honorable Court may force Mr. Albero to disclose his source, which is protected under the “News Media Privilege.”

9. Even if this Honorable Court disagrees with Defendant, and rejects the arguments advanced above, Mr. Albero is nevertheless entitled to withhold the information sought by Plaintiff based on the “news media privilege” under section 9-112 of the Courts and Judicial Proceedings Article of the Maryland Code.

10. As a member of the “news media” within the meaning of section 9-112 of the Courts and Judicial Proceedings Article, Mr. Albero is entitled to assert a statutory privilege as to his sources, and may properly refuse to disclose such information to Plaintiff. *See* Md. Code, *Courts and Judicial Proceedings*, §9-112(c). Under the statute governing the “news media privilege,” a party seeking disclosure of sources from the news media must demonstrate, **by clear and convincing evidence**, that: (1) the information is relevant to a “significant legal issue” in the proceeding in question; (2) the news or information could not, with due diligence, be obtained by alternate means; and (3) there is an overriding public interest in disclosure. *See* Md. Code, *Courts and Judicial Proceedings*, §9-112(d)(1).

11. The term “news media” is defined in section 9-112 as including “journals” and “any printed, photographic, mechanical, or electronic means of disseminating news and information to the public.” Md. Code, *Courts and Judicial Proceedings*, §9-112(a). The privilege applies to “any person who is, or has been, employed by the news media in any news gathering or news disseminating capacity.” Md. Code, *Courts and Judicial Proceedings*, §9-112(b). The term “employed by” is not defined in the Code, and has not been defined by virtue of any reported judicial interpretation. As stated in his sworn Affidavit attached hereto, although he does not

receive any monetary compensation for his role, Mr. Albero is the sole operator, publisher, editor, and reporter of his web site, “Salisbury News,” through which he regularly reports and disseminates information on Salisbury current events, politics, and other news, as a public service. *See* Exhibit B.

12. Based on the foregoing, Mr. Albero clearly cannot be compelled to disclose the identity of the “source” of the letter in question. He is unquestionably a member of the “news media” within the broad meaning of the statute, and is therefore entitled to invoke the “news media privilege”; the information sought is not relevant to any “significant legal issue” in the case; Chief Webster has not made any showing of his inability to obtain the information by other means; and there is no “overriding public interest” (indeed, there is no public interest at all) to be advanced by disclosure of the “source.”

III. Under federal law, Mr. Albero has absolute statutory immunity from any liability based on his alleged re-publication on his web site of other individuals’ statements, accordingly, he cannot be held liable as a matter of law for his re-publication of the letter at issue.

13. Under the “Communications Decency Act,” 47 U.S.C.A. §230 (“Act”) (a copy of which is attached hereto as Exhibit C), “providers or users of an interactive computer service,” including operators of interactive community web sites devoted to discussion of local government activities, ***are immune from liability for defamation claims based on statements and information of third parties posted on such web sites.*** *See Donato v. Moldow*, 865 A.2d 711 (N.J.Super.A.D. 2005) (a copy of which is attached as Exhibit D). The Act defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.” 47 U.S.C.A. §230(f)(2). That definition was

recently held by a New Jersey Court to specifically include a web site called “Eye on Emerson,” which was maintained by an individual to report information about local government activities in Emerson, New Jersey, and allowed readers to interactively post messages on the web site. *See Donato v. Moldow*, 865 A.2d 711 (N.J.Super.A.D. 2005). As stated in Albero’s Affidavit (Exhibit B), he is an operator of the very same sort of web site (namely, “Salisbury News”), which is an information service or system that provides or enables computer access by multiple users to a computer server. As such, “Salisbury News” is an “interactive computer service,” and Mr. Albero is an “operator” of such service, covered by the immunity afforded by Section 230 of the Act.

14. Accordingly, Mr. Albero is entitled to absolute, statutory immunity, conferred by Congress, from any defamation claim based on statements of third parties, not authored by him, posted onto his interactive web site. Because he is statutorily immune from liability for third parties’ statements posted on his web site, Mr. Albero cannot be held liable for defamation as a matter of law based on the posting of the letter in question. Because is immune and cannot be held liable as a matter of law for the posting of the letter, the “source” of the letter is clearly beyond the scope of allowable and proper discovery.

WHEREFORE, Defendant respectfully requests that this Honorable Court deny Plaintiff’s Motion to Compel Discovery and for Sanctions, in its entirety.

AYRES, JENKINS, GORDY & ALMAND, P.A.

By: _____

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REQUEST FOR HEARING

NOW COMES Defendant, by and through his undersigned attorney, and hereby requests a hearing as to Plaintiff's Motion to Compel Discovery and for Sanctions.

Bruce F. Bright

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 27th day of November, 2007, a copy of the foregoing Defendant's Pre-Trial Memorandum, with attached Exhibits A-D, was served, via first class mail, postage prepaid, on: Jesse B. Hammock, Esq., Miles & Stockbridge, P.C., 101 Bay Street, Easton, Maryland, 21601.

Bruce F. Bright