IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, *ex rel.*
THE TOLEDO BLADE CO.
541 North Superior Street
Toledo, OH 43660,

Relator,

- vs -

Case Number:

THE COURT OF COMMON PLEAS
OF HENRY COUNTY, OHIO,
660 North Perry Street, Suite 301
Napoleon, Ohio 43545,

ORIGINAL ACTION IN
PROHIBITION
(Prior Restraint on Publication)

and

THE HON. KEITH P. MUEHLFELD,
A Judge of the Court of Common Pleas,
660 North Perry Street, Suite 301
Napoleon, Ohio 43545,

Respondents.

COMPLAINT FOR AN ORIGINAL WRIT OF PROHIBITION
AND SUPPORTING AFFIDAVIT

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NEED FOR IMMEDIATE RELIEF

(1) This is an original action for a writ of prohibition to restrain the Respondent court and judge from continuing in force and/or enforcing a patently unconstitutional "gag order" that forbids Relator's publication of lawfully acquired information about a publically conducted judicial proceeding. The proceeding in question, a criminal trial, is scheduled to begin on Monday, February 1, 2010. For that reason, immediate relief is required, at a minimum by means of this Court's issuance of an alternative writ pursuant to S.Ct. Prac. R. 10.6.

JURISDICTION

(2) This is an action in prohibition to remedy an unconstitutional prior restraint on publication. This Court has jurisdiction of the present action pursuant to Article IV, Section 2(B)(1)(d) of the Constitution of Ohio and pursuant to this Court's established precedents holding that prohibition is the appropriate remedy by which to challenge the constitutionality of a court's prior restraints on media publication. *State ex rel. News Herald v. Ottawa County Ct. of Common Pleas* (1996), 77 Ohio St. 3d 40, 44.

PARTIES

(3) Relator The Toledo Blade Co. ("The Blade") is an operating division of Block Communications, Inc., a corporation organized under the laws of the State of Ohio. The Blade is principally engaged in the publication of a newspaper of general circulation. In this enterprise, The Blade employs, among others, reporters and editors who act on behalf of the The Blade and on behalf of the general public in gathering information by various means, including attendance at publically conducted judicial proceedings, as a basis for the publication of information that affects the public interest and informs the public about matters of public interest.

(4) The Respondents in this action are the Court of Common Pleas for Henry County, Ohio, and the Hon. Keith P. Muehlfeld, a duly appointed judge of the Respondent court.

RESPONDENTS' UNCONSTITUTIONAL ORDER

(5) There is now pending in the Respondent court a criminal proceeding styled as *The State of Ohio v. David E. Knepley & Jayme Schwenkmeyer*, Henry County Common Pleas case number 08-CR-0033 ("the criminal proceeding"). In that case, the State of Ohio charges the defendants with involuntary manslaughter and child endangering arising out of the death of a child. Respondent Muehlfeld has been duly assigned to preside over the trial or trials and other proceedings in the case.

Relator is not a party to the criminal proceeding and has no right of appeal from any orders entered in that proceeding.

(6) Respondent Muehfeld has previously entered an order providing for separate trials of the charges against the defendants in the criminal proceeding, scheduling the trial of Jayme Schwenkmeyer to begin on December 7, 2009, and the trial of David Knepley to begin on February 8, 2010.

(7) Before commencement of either trial, on December 4, 2009, Respondent Muehlfeld entered an Order permitting public attendance at the trial proceedings, but further providing that "any and all print or broadcast media shall be PROHIBITED from the published or broadcast reporting of [the Schwenkmeyer] trial proceedings" until the impaneling of a jury in the Knepley trial. The same Order forbade the parties to the criminal proceedings, their attorneys and representatives, and witnesses from "making any extrajudicial statements to the print or broadcast media or otherwise which would have a substantial likelihood of prejudicing the trial proceedings in this case." The Order was entered on the motion of David Knepley and without objection from the State of Ohio or Jayme Schwenkmeyer. A copy of the December 4, 2009 Order is appended to this Complaint and incorporated herein.

(8) By its terms, the Order forbids "print or broadcast media," who are not parties to the criminal proceeding, from publishing lawfully obtained public information obtained from proceedings in open court.

(9) The trial of Jayme Schwenkmeyer began on December 4, 2009, but Respondent Muehlfeld declared a mistrial for reasons unrelated to publicity or similar concerns. The Schwenkmeyer trial was thereupon re-scheduled to begin on February 1, 2010.

(10) In mid-January, 2010, Relator first learned of the existence of the Order of December 4, 2009. On January 19, 2010, Relator requested that Respondent Muehlfeld vacate or modify those

portions of the Order forbidding the media from publishing reports about the Schwenkmeyer trial proceedings. On January 26, 2010, Respondent Muehlfeld heard oral arguments on Relator's request for reconsideration of the December 4, 2009 order, and, at the conclusion of oral arguments, he issued his ruling in open court, declining to reconsider the Order of December 4, and ratifying and reaffirming it. Thus, under the Respondents' order, Relator is prohibited from reporting on the public trial of Schwenkmeyer, scheduled to begin on February 1, 2010, until a jury has been impaneled in the trial of Knepley, which will begin after the conclusion of the Schwenkmeyer trial, which will be at least one week later. Respondents have not yet entered a written order reflecting the oral ruling from the bench, but through his office Respondent Muehfeld confirmed at 3:40 pm on January 27, 2010, Respondents' intention to sign and enter the written order no later than the morning of January 28, 2010.

(11) In his oral explanation of his reaffirmation of the Order of December 4, Respondent Muehfeld stated that he believed the Order was necessary to prevent "tainting" the jury pool in the trial of David Knepley by public dissemination of information disclosed during the earlier trial of Jayme Schwenkmeyer. In the same oral statement, Respondent Muehfeld indicated that he had not considered a change of venue as an alternative because it would be too expensive for the County. He stated further that he considered the one-week delay in publishing to reflect a "narrow tailoring" of the order to mitigates its impact on the press' First Amendment rights. He stated further that in his view the applicable test for entering a prior restraint is whether the press' rights to report immediately would jeopardize the defendant's right to a fair trial." Finding that it would, Resondent Muehlfeld reaffirmed and ratified his order of December 4, 2009.

(12) Relator brings the present action in prohibition to forbid the Respondents from continuing and enforcing the Order of December 4, 2009, or the Order of January 26, 2010, or both.

THE UNCONSTITUTIONALITY OF RESPONDENTS' CONDUCT

(13) A pre-publication judicial order forbidding publication constitutes a prior restraint. In this instance, moreover, the prior restraint operates to forbid the publication of information that is already public information, disclosed in open court in the course of an open judicial proceeding. And the restraint forbids only select members of the public ("print or broadcast media") from publishing the information.

(14) Prior restraints on publication are repeatedly described as "presumptively unconstitutional" under the First Amendment to the United States Constitution, as well as under the Ohio Constitution. In fact, as this Court has noted, the United States Supreme Court has "***never*** permitted a prior restraint on pure speech." *News Herald*, *supra*, 77 Ohio St. 3d 40, 44 (emphasis added). In that case, the Court found a substantially similar order, purporting to forbid publication of information "lawfully obtained" in open court, "patently unconstitutional." *Id.* at 45.

(15) Both as a matter of constitutional mandate and under centuries-old common-law traditions, judicial proceedings are public events, open to the public.

(16) Both as a matter of constitutional mandate and under centuries-old common-law tradition, any member of the public and any member of the press is free to publish accounts of what occurs in open judicial proceedings. "What transpires in the courtroom is public property. *** Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Craig v. Harney* (1947), 331 U.S. 367, 374.

(17) To the extent that a prior restraint on speech or publication regarding open judicial proceedings is intended to protect the rights of a defendant in a criminal proceeding, even assuming that such a restraint might be hypothetically permissible, no restraint can be entered or enforced

when there is any alternative means of protecting the defendant's interests. A court is not permitted to "balance" the public's rights against the defendant's, but must "resolve the conflict by protecting both." *State ex rel. Dayton Newspapers v. Phillips* (1976), 46 Ohio St. 2d 457, 464.

(18) The reason why this Court has rejected "balancing" is well-exemplified in the Respondents' attempt here to "balance" the rights of the press and the criminal defendants. In his oral ruling, respondent Muehlfeld stated that he had "weighed the competing interests involved: the defendants' rights to a fair trial versus the right of a free press, the First Amendment rights." In doing so, Respondent Muehlfeld ruled that the interests are "different in nature," finding that the public's and the press's First Amendment rights are "derivative" and "abstract," compared to the rights of the defendants, which are "liberty interests" that are "personal" to them. This conclusion is contrary to two centuries of settled American law. And it is directly contrary to precise wording of this Court's ruling in *State ex rel Dayton Newspapers v. Phillips* (1976), 46 Ohio St. 2d 457, 492 (finding that the injury to the press's right to publish caused by a trial court's order prohibiting publication of events occurring at a public criminal trial is "direct as opposed to abstract or derivative").

(19) An order prohibiting publication of information about judicial proceedings is unconstitutional and cannot survive judicial review. In *Nebraska Press Assn v. Stuart* (1976), 427 U.S. 539, the United States Supreme Court reviewed a trial-court order in a criminal proceeding that purported to prevent the press from publishing information, including a confession and other information "strongly implicative" of the defendant" that had been publicly disclosed during pretrial proceedings in a criminal matter, on the ground that publication would prejudice the defendant's right to a fair trial. The Court unanimously reversed the order, holding squarely that "once a public hearing had been held, what transpired there could not be subject to prior restraing." 427 U.S. at

568. In *News-Herald, supra*, this Court cited *Stuart* in the course of concluding that the prior restraint at issue in *News-Herald* was "patently unconstitutional."

(20) Here, Respondents' Order of December 4, 2009, purports to protect the fair-trial rights of the defendants in the criminal proceeding, but it does so by a plain and undeniable infringement on the fundamental constitutional rights of Relator and of the public. Respondents have done so, moreover, while expressly declining to adopt readily available and time-honored means for limiting prejudicial publicity that would not infringe the rights of Relator and of the public, including the possibility of a change in venue, an alternative Respondents rejected solely because of its "cost".

(21) Respondents entered the December 4, 2009 Order without any evidence or specific findings at all, much less evidence and findings sufficient to establish that there were no alternatives to the terms of the Order and that the Order was absolutely necessary to serve a compelling public interest, nor did Respondents conduct an evidentiary hearing in response to Relator's request for reconsideration. Indeed, the Respondents' "findings" as recited in the oral statement of January 26, 2010, are not findings at all because there is no evidentiary foundation upon which they could rest.

VIOLATION OF 42 U.S.C. § 1983

(22) The conduct of Respondents constitutes a deprivation, under color of law, of rights, privileges, and immunities of Relator that are protected by the Constitution and laws of the United States, and specifically of the rights to freedom of speech and freedom of the press as guaranteed by the First Amendment to the United States Constitution and made applicable to the states by virtues of the Fourteenth Amendment to the United States Constitution.

VIOLATION OF FEDERAL AND STATE CONSTITUTIONAL, STATUTORY AND COMMON-LAW RIGHTS

(23) The conduct of Respondents deprives Relator of the freedom of speech and of the press under the First and Fourteenth Amendments to the United States Constitution, as well as of

Relator's speech and press rights under Article I, Section 11, of the Ohio Constitution, and of its constitutional, statutory, and common-law rights to attend and to report on judicial proceedings.

ENTITLEMENT TO A WRIT OF PROHIBITION

(24) Respondents' conduct constitutes a continuous and on-going interference with the above-described rights. By preventing publication of information that Relator lawfully obtained and is lawfully entitled to publish, and by substituting Respondents' editorial judgment for Relator's, Respondents are engaged in an on-going and irreparable deprivation of Relator's rights, a deprivation that is both substantial and irreparable.

(25) By issuing judicial orders that patently violate constitutional, statutory, and common-law rights, Respondents have exercised judicial power unauthorized by law and have usurped judicial power. Unless Respondents are immediately prohibited from enforcing these unconstitutional and unlawful orders, their conduct will compound the usurpation of judicial power by the enforcement or threatened enforcement of the orders. The very existence of the orders, originally issued without any notice to those, like Relator, who would be bound by them, and reaffirmed without evidence and over Relator's vigorous objections to them, exposes Relator and its agents and employees to the risk of substantial penalties, including criminal sanctions, if Relator exercises its plain constitutional right to report on matters that occur in open judicial proceedings.

(26) Relator has no plain and adequate remedy in the ordinary course of law by which to relieve the harms done by Respondents' unconstitutional order.

ATTORNEY FEES

(27) Respondents' issuance of a patently unconstitutional prior restraint against publication of public information, and Respondents' restraint of a non-party without notice and on the basis of no evidence at all, and Respondents' reaffirmation of the restraint, again without any evidence as well as in the face of the patent unconstitutionality of the orders, all constituted action clearly in

excess of Respondents' jurisdiction. The present action constitutes "a proper proceeding for redress" of Respondents' wrongful conduct within the meaning of 42 U.S.C. § 1983. Upon the conclusion of the action, therefore, Relator is entitled to an award of its reasonable attorney fees as provided in 42 U.S.C. § 1988.

(28) The present action will provide a significant public benefit in confirming and vindicating the fundamental right of the public to speak and publish freely regarding public judicial proceedings, thereby providing assurance that such proceedings will be fairly and properly conducted and assuring that the central institutions of a democratic government are responsible to the people from whom they derive their power and legitimacy. For that reason, Relator is entitled to an award of its attorney fees as a part of the final judgment in this action.

PRAYER

WHEREFORE, Relator prays:

(1) That this Court immediately issue a peremptory writ of prohibition, or at a minimum an alternative writ of prohibition, forbidding Respondents from exercising judicial power to restrain Relator from speaking or publishing information that Relator has lawfully obtained or will lawfully obtain in the course of the criminal proceeding, *The State of Ohio v. David E. Knepley & Jayme Schwenkmeyer*, Henry County Common Pleas case number 08-CR-0033.

(2) That this Court issue a final writ of prohibition forbidding Respondents from exercising judicial power to restrain Relator from speaking or publishing information lawfully obtained in the course of the trial of the criminal proceeding, and further commanding Respondents to vacate their unconstitutional and unlawful orders of December 4, 2009, and January 26, 2010.

(3) That Relator be awarded its costs and expenses, including reasonable attorney fees, incurred in the pursuit of the present action.

(4) That the Court award such other and further relief as the Court finds appropriate.

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