IN THE
Supreme Court of Virginia

RECORD NO. _____

DIETZ DEVELOPMENT, LLC and CHRISTOPHER DIETZ,
Plaintiffs-Respondents,

v.

JANE PEREZ,
Defendant-Petitioner.

PETITION FOR REVIEW

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ASSIGNMENTS OF ERROR

1. The trial court contravened the First Amendment by issuing a preliminary injunction that was a prior restraint of speech.
2. The trial court violated the common law rule that "equity will not enjoin a libel."
3. The trial court erred by issuing a preliminary injunction without finding that the defendant's speech was false, that errors were negligent, or that the enjoined words alone cause irreparable injury.
4. The trial court erred by enjoining words not yet spoken.

STATEMENT OF THE CASE

On October 31, 2012, plaintiffs-respondents Dietz Development LLC and Christopher Dietz sued defendant-petitioner Jane Perez in the Circuit Court for Fairfax County, alleging that she defamed them in consumer reviews on Yelp and Angie's List, describing her disappointment with their work on her townhouse. On December 5, 2012, Christopher Dietz and Perez testified at a preliminary injunction hearing; the court refused to enjoin any statements that Perez had made about plaintiffs' work but issued a preliminary injunction requiring a revision of Perez' statements in two respects.

Perez seeks review because neither equity nor the First Amendment allows a preliminary injunction against statements whose truth or falsity has not been fully litigated, including the opportunity for appeal, and in any event when there are no findings of falsity and negligence. These are issues of first impression in this Court, but cases across the country and a ruling of the Virginia Court of Appeals show that the injunction was impermissible.

QUESTIONS PRESENTED

1. Does the First Amendment's rule against prior restraints permit a preliminary injunction to issue to protect the reputation of a business?

2. Will equity enjoin a libel, especially on a preliminary injunction basis?

3. Were the circuit court's oral findings sufficient to support a broad injunction against speech?

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Jane Perez had a bad experience with Dietz Development, which she hired to repair her townhouse. She thought that the work was done far more slowly than promised and that the quality of the work was poor (and had to be redone by other contractors at great cost); much of the agreed work was never done. Transcript of December 5 Hearing 94-112. After she fired Dietz and directed it to clear out its materials, she noticed that some of her jewelry was missing. Because the construction company had her only extra key, its workers were likely responsible. *Id.* 92-94, 114-116. Her dissatisfaction was compounded when the contractor sued her for non-payment and when, after that suit was dismissed for a failure to file a bill of particulars, *id.* 112-113; Perez Exhibit 5, he showed up at her door demanding to talk to her. *Id.* 117.

At this point, Perez posted accounts of her experiences on two forums where consumers can share their experiences with local merchants—Yelp and Angie's List. The following Yelp review is representative:

> Description of Work
> Dietz Development LLC was to perform: painting, refinish floors, electrical, plumbing and handyman work. I was instead left with damage to my home, and work that had to be redone for thousands of dollars more than originally estimated.
>
> Member Comments:
> My home was damaged; the "work" had to be re-done; and Dietz tried to sue me for "monies due" for his "work." I won the case in summary judgment (meaning that his case had no merit). Despite his claims, Dietz was/is not licensed to perform work in the state of VA. Further, he invoiced me for work not even performed, and he sued me for work not even performed. Last week (over 6 months later) he just showed up at my door and "wanted to talk to me." I said that I "didn't want to talk to him," closed the door, and called the police. (The police said that his reason was that he had a "lien on my house;" however his supposed "lien" was made null and void the day that I won the case according to the court.) This is after filing my first ever police report when I found my jewelry missing and Dietz was the only one with a key. Bottom line do not put yourself through this nightmare of a contractor.
>
> Complaint Exhibit B.

Plaintiffs responded to Perez on both forums, and Perez replied. The full set of comments, responses and rejoinders are Exhibits to the complaint.

On October 31, 2012, Dietz and his firm sued Perez in the Circuit Court for Fairfax County; their preliminary injunction motion was heard on December 5, 2012. Christopher Dietz testified first, averring in general terms that he had done all work required and that he felt he deserved to be paid; he denied having stolen defendant's jewelry. He neither testified about whether any of the workers to whom he lent the key had done so, nor provided a list of those workers or had them testify to their own innocence. Perez testified at some

length about the reasons for the dissatisfaction expressed in her reviews. The trial judge said that he was hearing too much about the truth of her statements: "[R]emember we're here for a preliminary injunction. We're not here to prove the case one way or the other . . .." Tr. 108.

Perez explained about the disappearance of her jewelry, and about her understanding, reflected in her posts, that the summary judgment in the suit for nonpayment was granted because the case had no merit; the trial judge said, "I have a problem with that. I don't think that means in the law that the case has no merit. Not only do I think so, I know so." Tr. 122. The court did not address whether Dietz's inability to present a bill of particulars, particularly combined with facts revealed in Perez' testimony, created a fair inference that the claim for nonpayment had no merit.

The trial judge ruled from the bench, saying that he would not grant a preliminary injunction about any statements about Dietz's work *Id.* 142-143. The trial judge decided that the proper inference from Perez's statements about the jewelry was "that the probable suspect is the Plaintiff in the case. The damage to him is far greater than the damage to her in furthering that particular story." *Id.* 148. The trial judge did not make any specific finding that Dietz was likely to prove lack of responsibility for taking the jewelry, or that it was unreasonable for Perez to believe that Dietz (or its workers) could have been involved in its disappearance—specifically, he made no finding

that Perez was negligent in discussing this issue. Yet, the judge said that he would enjoin any "discussion of the loss of the jewelry." *Id.* With respect to her characterization of the outcome of the suit for nonpayment, the trial judge said that Perez could say that the suit ended in her favor but that "she has to delete in all fairness that she didn't prevail on a full hearing of all of the evidence in what we would call on the merits." *Id.* A proposed order consistent with these rulings was signed on December 7, 2012.

In opposing a preliminary injunction, Perez's original trial counsel argued that the injunction would contravene her freedom of speech. A motion for reconsideration amplified this issue, explaining that a preliminary injunction against speech is a prior restraint in violation of the First Amendment. The motion for reconsideration is pending.

ARGUMENT

THE TRIAL COURT ERRED BY ISSUING A PRIOR RESTRAINT AGAINST SPEECH CLAIMED TO BE DEFAMATORY.

Although the petition for review presents issues of first impression in this Court, settled law elsewhere, including the Supreme Court of the United States, forbids preliminary injunctions to protect the reputation of a business as impermissible prior restraints. Many jurisdictions as well as the Virginia Court of Appeals hold that equity may not be invoked to enjoin a libel. The record and the proceedings below amply illustrate the reasons for those rules.

A. STANDARD OF REVIEW

The grant of a preliminary injunction is reviewed for abuse of discretion, but where, as here, the ruling rests on errors of law, review is undertaken de novo. *Glazebrook v. Board of Supervisors of Spotsylvania County*, 266 Va. 550 (2003). Moreover, because the issues in this case involve the application of the First Amendment, the Court conducts an independent review on the entire record of the case under *Bose Corporation v. Consumers Union*, 466 U.S. 485, 508-511 (1984).[1]

B. THE PRELIMINARY INJUNCTION IS A CONSTITUTIONALLY IMPERMISSIBLE PRIOR RESTRAINT.

"[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. "Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities

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[1]The explication of the First Amendment issues in the defendant's motion for reconsideration is sufficient to preserve those issues. *Majorana v. Crown Central Petroleum*, 260 Va. 521, 525 n.1 (2000) (party could preserve issue for appeal through motion for reconsideration). In any event, Virginia courts consider issues not sufficiently raised below when the "ends of justice" so require. *D'Ambrosio v. D'Ambrosio*, 45 Va. App. 323, 340 (2005). *D'Ambrosio* reversed a preliminary injunction barring defamatory statements even though the issues of prior restraint and the common law doctrine that bars the invocation of equity to enjoin a libel had never been raised in the trial court at all, based on the "ends of justice" exception.

—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993). Injunctions barring speech threaten fundamental rights more than statutes with an equivalent effect, because they "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Center*, 512 U.S. 753, 764-65 (1994).

Given the seriousness of a prior restraint, a preliminary injunction prohibiting speech is justified only when publication would "threaten an interest more fundamental than the First Amendment itself." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996). Only a "grave threat to a critical government interest or to a constitutional right" can justify restraint of publication, and even then only when the threat "cannot be militated by less intrusive measures." *Id.* at 225; see *Nebraska Press Ass'n*, 427 U.S. 539 (rejecting prior restraint issued to protect criminal defendant's Sixth Amendment right to a fair trial); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (declining to enjoin newspapers from publication despite government claim that publication could threaten national security).

A businessman's reputation does not rise to that level of importance. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). There, a lower court had temporarily enjoined leafleting that accused a local realtor of blockbusting and "panic peddling," but the Supreme Court reversed, finding 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." *Id.* at 419-420.

Thus, even in jurisdictions that allow an injunction against the repetition of a libel that has been found false and defamatory after a full trial, or in which that issue remains open, injunctions may not issue against speech that has **not** been finally determined to be false and defamatory.[2] For this reason, courts have rejected attempts to obtain preliminary injunctive relief against Internet speech.[3] Similarly, the Fourth Circuit 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*, 921 F.2d 47, 49 (4th Cir. 1990). The Fourth Circuit distinguished between preliminary relief and permanent injunctions against repetition of a libel, treating the former as a prior restraint:

> "[P]rior 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

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[2] *Lothschuetz* v. *Carpenter*, 898 F.2d 1200, 1208-09 (6th Cir. 1990); *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 Employees Local 100*, 239 F.3d 172 (2d Cir. 2001); *Auburn Police Union v. Carpenter*, 8 F.3d 886 (1st Cir. 1993); *Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991); *Cohen v. Advanced Medical Group of Ga.*, 269 Ga. 184, 496 S.E.2d 710 (Ga. 1998).

[3] *New Net v. Lavasoft*, 356 F. Supp. 2d 1071 (C.D. Cal. 2003); *Bihari v. Gross*, 119 F. Supp.2d 309, 324-327 (S.D.N.Y. 2000); *Ford Motor Co. v. Lane*, 67 F. Supp.2d 745, 749-753 (E.D. Mich. 1999).

> 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.
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> "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., quoting *Nebraska Press Ass'n*, 427 U.S. at 559.

The essence of a prior restraint is that it places specific communications under the personal censorship of a single judge, *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 468 (5th Cir. 1980), *aff'd* 452 U.S. 89 (1981), and without the full panoply of protection that the law provides against erroneous factual and legal determinations, such as the ability to probe the plaintiff's case through discovery, trial before a jury of the defendant's peers, and the opportunity for appellate review. The need for such protections is well-illustrated by the proceedings below: the trial judge reminded defendant's counsel that he would not be making a final decision about whether there had been actionable libel and directed him to move on, because "we're here for a preliminary injunction , . . . not . . . to prove the case one way or the other." Tr. 108. A preliminary record is not a sufficient basis to enjoin speech on a matter of public interest pending the resolution of this case about who was telling the truth about this company's performance of its contract.

C. THE INJUNCTION RUNS AFOUL OF THE COMMON-LAW RULE THAT "EQUITY WILL NOT ENJOIN A LIBEL."

Although no reported Virginia case has yet addressed the issue of prior restraints in a defamation case, the Court of Appeals avoided the First Amendment issue in *D'Ambrosio* by invoking the common law rule that "equity will not enjoin a libel." *D'Ambrosio v. D'Ambrosio*, 45 Va. App. 323, 340 (Va. App. 2005). There, accusatory words by one spouse against another in the course of a bitter custody battle led to issuance of an injunction; the enjoined spouse appealed on First Amendment grounds as well as Virginia law. The Court of Appeals found it unnecessary to consider the appellant's First Amendment arguments about prior restraint because it reversed 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. Indeed, *D'Ambrosio* implied that even a permanent injunction would not lie against a libel, given its approving citation of the Fourth Circuit 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. Mazzocone*, 482 Pa. 377, 381-

382, 393 A.2d 1155, 1157-1168 (1978), because post-publication damages are an adequate remedy at law.[4] As the Louisiana Supreme Court explained,

> another libel and slander suit could ensue . . . if there is no injunction and [plaintiff] reiterates her prior statements. If successful, plaintiff would again receive damages. Plaintiff would have to bear his burden of proof, . . . and defendant would have to bear her burden of proving such defenses as she might aver. Under such circumstances, the proof might change from that herein offered.
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> *Greenberg*, 254 La. at 1030-1031, 229 So.2d at 87-88.

Similarly, Dietz can recover post-publication damages if he can prove that Perez' statements about him are false and were made with actionable negligence or actual malice. Dietz's attorney has admitted that his client has an adequate remedy at law in that, if the statements remain posted, "it could end up doing more damage to Mr. Dietz. And that could mean significantly more damages Ms. Perez has to pay." Jouvenal, *2 groups to defend sued Yelp reviewer*, Washington Post, December 21, 2012, accessible at http://www.washingtonpost.com/blogs/crime-scene/post/aclu-public-citizen-to-fight-lawsuit-over-negative-yelp-review/2012/12/20/9242b430-4ab811e2-b709

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[4] *Ramos v. Madison Square Garden Corp.*, 257 A.D.2d 492, 684 N.Y.S.2d 212, 213 (N.Y. App. Div. 1999); *Greenberg v. De Salvo*, 254 La. 1019, 229 So.2d 83, 86 (La. 1969); *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). *See also Hajek v. Bill Mowbray Motors*, 647 S.W.2d 253, 255 (Tex. 1983) (Texas constitution); *Nyer v. Munoz-Mendoza*, 385 Mass. 184, 430 N.E.2d 1214, 1217 (Mass. 1982) (prior restraint).

-667035ff9029_blog.html. In the meantime, the consuming public will have less information with which to make sound decisions about the expenditure of their money. Consequently, an injunction is the wrong remedy in this case.

D. THE INJUNCTION EXTENDS TO SPEECH WHOSE DEFAMATORY CHARACTER HAS NOT BEEN ADJUDICATED, AND IS NOT SUPPORTED BY SPECIFIC FINDINGS ABOUT FALSITY, NEGLIGENCE, OR IRREPARABLE INJURY.

This injunction also warrants review because it forbids words that have not been written, no less adjudicated, and is unsupported by proper findings.

First, the trial court made no explicit finding that plaintiffs had shown even a likelihood of success on the factual question whether Perez had made a false statement of fact about either Dietz the individual or Dietz the company. Indeed, there was no factual basis for such a finding, because plaintiffs never identified the workers who had access to the key, nor produced evidence that none of them had taken the jewelry; the only testimony from plaintiffs on that point was that Christopher Dietz individually "did not steal" any jewelry. Tr. 29. Nor, even assuming that the statement was false, was there any finding that Perez negligently drew the inference that Dietz or its workers might well have been involved given the undisputed fact that they had the only extra key. Yet under Virginia law, even assuming that the implication of Dietz's responsibility was a statement of fact and not of opinion, *Lewis v. Kei*, 281 Va. 715, 725 (Va. 2011), it is the plaintiff who bears

the burden of proving both factual falsity and either actual malice or negligence in making the statement. *Id.* Dietz implicitly admitted at the preliminary injunction hearing that Perez could reasonably draw the inference that the Court found implicit in her enjoined statement—when asked how her statement about the jewelry was false, he explained that he had no way of knowing for sure that his company **was** the only one with the key. Tr. 62.

Second, although the trial judge decided as a matter of law that Perez's statement about the "meaning" of the summary judgment was erroneous, he never found that the gist of the statement—that Dietz's suit for nonpayment was lacking in merit—was false. Indeed, when a plaintiff cannot respond to an order to produce a bill of particulars, and consequently suffers dismissal of his lawsuit, it is a fair inference that the lawsuit **was** lacking in merit. Perez's detailed testimony about problems with Dietz's work further suggests that the suit for nonpayment lacked merit, and hence that even if Perez was technically wrong about the legal significance of the summary judgment, her statement was substantially true. A defamation plaintiff "may not rely on minor or irrelevant inaccuracies to state a claim for libel." *Jordan v. Kollman*, 269 Va. 569, 576 (Va. 2005). Nor did the trial court find that Perez, a layperson, was negligent in misstating the legal significance of a summary judgment for failure to provide a bill of particulars.

Even assuming that there was sufficient evidence to support a finding

of likely success in establishing libel, plaintiffs never showed any likelihood of irreparable harm in that consumers were less likely to do business with them based **solely** on the lines in Perez's reviews that were enjoined. After all, there was **no** likelihood of success in showing that the many complaints about Dietz's work were false, including the statements that their work was shoddy and late, and that a suit for nonpayment was dismissed. Customers learning those facts are unlikely to hire Dietz; indeed, if Dietz loses business, it may be because consumers don't hire a company that sues former customers. Moreover, Dietz' counsel has admitted that his clients can be compensated in damages, *supra* p. 12; thus, the injury is not irreparable. But the injunction irreparably injures Perez because the loss of First Amendment rights, even for a moment, is irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Finally, even if the court below properly enjoined the repetition of the specific words Perez used about the loss of her jewels, the injunction was overbroad in that it forbade her from making any statements, even truthful statements, about the loss of her jewelry. For example, defendant could reword her discussion of the jewelry so that statements about how it disappeared would more clearly be constitutionally-protected opinion, supportable by disclosed true facts. *Williams v. Garraghty*, 249 Va. 224, 233 (1995); *Chapin v. Knight-Ridder,* 993 F.2d 1087, 1093 (4th Cir. 1993). An injunction that categorically forbids defendant from speaking about the

disappearance of her jewels, in effect prejudging the defamatory character of words that are as yet unwritten, is impermissible under Virginia law as well as the First Amendment.

CONCLUSION

The Court should grant review and vacate the preliminary injunction.

Respectfully submitted,

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