

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Roanoke Division

HARGRAVE MILITARY ACADEMY and)
WHEELER M. BAKER, Ph.D.,)
)
Plaintiffs,)
)
v.) Civil No. 7:06-cv-00283
)
JERRY GUYLES and MELISSA GUYLES,)
)
Defendants.)
_____)

MEMORANDUM OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC. AND THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Introduction

In March 2006, Stewart Guyles was expelled from Hargrave Military Academy. Compl. ¶ 11. His parents, understandably upset, sent a letter to other parents of Hargrave students, in which they described the circumstances of their son’s expulsion, which they considered unfair, and criticized Hargrave’s leadership. Compl. Ex. E. They subsequently created a website, HargraveHasProblems.com, which contained a copy of the letter to parents, additional criticism of Hargrave, a copy of the letter, and posts from other Hargrave parents. Compl. ¶¶ 26-30.

In response, Hargrave has filed this lawsuit claiming tortious interference, conspiracy, and defamation, among other things. Hargrave sought, and obtained a Temporary Restraining Order (TRO) that enjoins the Guyles from continuing to operate their website and from contacting other Hargrave parents about their criticisms of the school. This TRO has been in effect since May 8, 2006. Hargrave’s request to convert the TRO to a preliminary injunction is set for May 17, 2006.

Hargrave's requested injunction restricts the Guyles' freedom of speech to an enormous degree. Even after a full trial on the merits, an injunction of the scope Hargrave requests would be unconstitutionally vague and overbroad. At this stage, when Hargrave has not even been put to the proof as to the truth or falsity of the Guyles' statements, such an order would be an unprecedented and unjustifiable prior restraint on speech. So alarming is this prospect that the *amici*, two organizations that advocate for First Amendment rights, take the unusual step of submitting this brief in opposition to the request for preliminary injunction.

Interest of the *Amici Curiae*

The American Civil Liberties Union of Virginia ("ACLU of Virginia") is the state affiliate of the American Civil Liberties Union and has approximately nine thousand members in the Commonwealth of Virginia. The mission of the ACLU of Virginia is to ensure that civil rights and civil liberties are properly respected and enforced within the Commonwealth. The ACLU of Virginia has been particularly active in the area of freedom of speech, and has frequently appeared before the state and federal courts of Virginia, both as direct counsel and *amicus*, in connection with free speech issues.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. The Center has as its sole mission the protection of freedom of speech and press from threats of all forms. The Center pursues that mission through research, educational programs, and intervention on behalf of the right of free expression. Since its founding in 1990, the Center has actively participated in state and federal court cases that raise important free expression issues.

Argument

I. THE REQUESTED INJUNCTION WOULD BE AN UNLAWFUL PRIOR RESTRAINT.

A “prior restraint on expression comes ... with a ‘heavy presumption’ against its constitutional validity.” *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (quoting *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968)). A court-issued preliminary injunction is a particularly dangerous form of prior restraint. “Injunctions ... carry greater risks of censorship and discriminatory application than do general ordinances.” *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 764 (1994). As the Supreme Court has explained:

[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 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.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

In recognition of these principals, “courts have long held that equity will not enjoin a libel.” *Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees And Restaurant Employees International Union*, 239 F.3d 172 (2d Cir. 2001). The Fourth Circuit has also recognized this rule. *See Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967) (“Generally an injunction will not issue to restrain torts, such as defamation or harassment, against the person. . . . There is usually an adequate remedy at law which may be pursued in seeking redress from harassment and defamation”). *See also Am. Malting Co. v. Keitel*, 209 F. 351, 354 (2d Cir.1913) (“Equity will not restrain by injunction the threatened publication of a libel, as such,

however great the injury to property may be. This is the universal rule in the United States and was formerly the rule in England.”); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir.1996) (refusing to enjoin publication of trade secrets improperly obtained in violation of a protective order, noting, “[t]he private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint.”).

The plaintiffs' claims that the Guyles' speech will injure their ability to enroll new students, or to keep those students already enrolled, does not change the analysis. In *Keefe*, a real estate broker obtained a preliminary injunction against community organizers who had distributed leaflets accusing the broker of “panic peddling” or “blockbusting” – exploiting the racial fears of white residents in order to sell houses. The Supreme Court rejected the argument that the leafleting was not protected by the First Amendment because “petitioners' purpose in distributing their literature was not to inform the public, but to ‘force’ respondent to sign a no-solicitation agreement”:

The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. . . .Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

402 U.S. at 419. The Court concluded that “[n]o 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.*

Similarly, in *Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees And Restaurant Employees International Union*, 239 F.3d 172 (2d Cir. 2001), where the court

reversed a preliminary injunction that had been granted against a union’s allegedly defamatory speech, the court did “not ascribe any particular significance to the district court's finding that the Union was motivated to coerce the Met through social pressure and the threat of social ostracism.” 239 F.3d at 177. The court acknowledged that “the Union's methods may be harassing, upsetting, or coercive, but unless we are to depart from settled First Amendment principles, they are constitutionally protected.” *Id.* at 178.

In *CBS v. Davis*, 510 U.S. 1315 (1994), Justice Blackmun, acting as Circuit Justice, stayed a preliminary injunction issued by a lower court to prevent a television network from airing footage that was allegedly unlawfully obtained at a meat packing plant. Despite the lower court’s findings that the broadcast “could result in a significant portion of the national chains refusing to purchase beef processed at [the plaintiff’s plant] and thereafter in the [plaintiff’s] plant's closure” and that “[p]ublic dissemination of [the plaintiff]’s confidential and proprietary practices and processes would likely cause irreparable injury to [the plaintiff],” Justice Blackmun found that the injunction was an unlawful prior restraint. Indeed, the injunction was so constitutionally objectionable that Justice Blackmun considered it an “extraordinary circumstance” justifying the immediate stay of a lower court order by a single Justice. 510 U.S. at 1317.

In sum, a preliminary injunction against alleged defamation, based on bare allegations of injury by the plaintiff, violates the First Amendment. The plaintiffs’ request for a preliminary injunction should therefore be denied.

II. THE REQUESTED INJUNCTION IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

A thorough reading of the letter that the Guyles’ sent to other parents and the contents of their website reveal that the vast majority of this speech is either opinion or statement of

uncontested fact. Those statements of facts with which the Hargrave takes issue form a minute portion of the speech. Hargrave nonetheless seeks to shut down the entire website and enjoin further contact between the defendants and other parents. Such an overbroad injunction would violate both the First Amendment and Rule 65(d) of the Federal Rules of Civil Procedure, which requires that injunctions be “specific in terms” and “describe in reasonable detail. . . the act or acts sought to be restrained.”

In this regard, the requested injunction is similar to the one struck down by the Fourth Circuit in *CPC Int’l, Inc. v. Skippy, Inc.*, 214 F.3d 456 (4th Cir. 2000). The case involved a protracted trademark dispute between CPC International, the maker of Skippy peanut butter, and Joan Crosby Tibbetts, whose father had created a cartoon character named “Skippy” in the 1920s. In 1986, a district court enjoined Tibbetts and her company, Skippy, Inc. from using the Skippy trademark to market food products, or to communicate in any manner that it had the right to use the Skippy trademark in that way, or that CPC did not have such a right. Some years later, Tibbetts created a website that described the dispute from her own point of view. The account was highly critical of CPC, accusing it and its predecessor companies of “pirating” the trademark using dishonest means. Following CPC’s motion to show cause why the website did not violate the 1986 order, the district court enjoined the further publication of large portions of the website.

The Fourth Circuit reversed. First, the court found that the order failed to make specific findings of fact as to why each enjoined passage violated the 1986 order. Noting that the redacted portions of the website “largely reflect Ms. Tibbetts’ opinion that CPC’s ownership is unjust and that it was made possible only through decades of ‘predatory conduct,’” the court stated that it was not clear how these passages violated the 1986 order. *Id.* at 460. “Under Rule 65(d), a proper injunction would identify specific passages and explain how they violate the

1986 order. Editorial comments about the history of Skippy and CPC that do not touch on these enjoined topics must be allowed to remain on the web site.” *Id.* at 461.

The court further found that the injunction raised serious First Amendment concerns because it was not “narrowly tailored to remedy specific violations of the 1986 order.” *Id.* “Injunctions must be narrowly tailored and should prohibit only unlawful conduct. An ‘order must be tailored as precisely as possible to the exact needs of the case.’” *Id.* (quoting *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 184 (1968)). The district court’s injunction violated this principal because it “failed to articulate any correlation between the redactions and the government’s interest in enforcing trademark law.” *Id.*

Hargrave’s proposed order here is even more egregious than that the district court order in *Skippy*. Rather than identify specific statements and explain how each is unlawful, Hargrave asks this Court to shut down an entire website, and to prohibit critical communications between the Guyles and other parents.

Indeed, even in its Complaint, Hargrave identifies only a few statements on the website it alleges to be false. Hargrave alleges that in their letter to parents, “Defendants falsely accused Baker of, among other things, ‘cover[ing] up’ the reassignment of a TAC Officer, ignoring a hazing incident and refusing to expel the perpetrator either because he had ‘a parent who has promised a nice new endowment if his son graduates and certainly Hargrave needs the money’ or because he had applied or had been accepted to a university which would ‘look good in regards to Hargrave statistics.’” Compl. ¶ 17. The Complaint further alleges that the website “makes several false statements including that Baker and Hargrave condone hazing and ‘cadet fighting in the barracks[,]’ perform sham drug tests, make decisions[,] based on financial implications rather than student well being, and conceal information from parents of prospective students to prevent

them from considering the true ‘risk versus cost’ of attending Hargrave, and characterizes them as Baker’s ‘brand of leadership.’ Compl. ¶ 29. But the complaint fails to quote any of the allegedly false statements in full, explain what in particular about the statements is false, or provide any proof of such falsehood. Similarly, the Complaint alleges that both the letter and website “recit[e] false and inflated expulsion figures,” (¶ 27), but does not state what the correct figures are.

The plaintiffs’ Motion to Show Cause, filed on May 12, 2006, demonstrates how overbroad the existing TRO and requested preliminary injunction are. The plaintiffs ask the Court to hold the Guyles in contempt for (1) stating to a newspaper: “They’re scared. Everything I’ve said on there I can verify. And to the extent (Hargrave and Baker) are trying to quell that, shame on them”; and (2) and for allegedly stating on television that their “son had never been in trouble at all,” that he had not been given “a fair shake” by Baker and Hargrave, that the dismissal process was not “fair to their son” who was “never given a chance,” that they were being “unfairly silenced,” that the “punishment doesn’t fit the crime,” and that Hargrave imposed the “wrong punishment” and “cut and run on their child.” Show Cause Mot., ¶¶ 5, 9, 10. Nearly every statement cited in the Motion to Show Cause is an expression of constitutionally protected opinion. The one statement of fact (“Everything I’ve said on there I can verify”) certainly cannot at this point be disproved by the plaintiff.¹

¹ The show cause motion also attaches posts from the website MySpace.com which they claim “prove” that the Guyles’ have made false statements about their son’s expulsion. The Court should disregard these attachments because (1) Hargrave has not proved that Stewart Guyles actually posted these statements; (2) Hargrave has not proved that the Guyles themselves were aware of any alleged drug use by their son; (3) according to Hargrave’s own Complaint, Stewart was expelled for “stealing” and not for drug use (Compl. ¶ 10), and the Guyles’ statements to that effect are therefore correct. Most importantly, however, this is not the time for the Court to be determining the truth or falsity of any statements. *See Keefe*, 402 U.S. at 418 (“It is

The situation mirrors that in *Metropolitan Opera, supra*. There, the court found a preliminary injunction to be unconstitutional because “the injunction is vague as to what the Union may say and what statements might lead to a finding of contempt of court. It puts the Union at risk of punishment for good faith efforts to advocate publicly its position.” The court went on to observe:

. . . The reality of such risk is brought home by the fact that the district court found the Union in contempt for chanting “Shame on You” and “No More Lies.” The Union has no way of determining from the text of the injunction whether other chants or statements in the future will lead to further contempt sanctions.

Similarly, the TRO, and the proposed preliminary injunction, put the defendants at risk of contempt for their attempts to tell their side of the story. The First Amendment does not permit this.

Conclusion

The plaintiffs have asked this Court to impose a prior restraint upon the defendants of unprecedented breadth. Such restraints are prohibited by the First Amendment. *Amici* therefore urge the Court to dissolve the existing TRO, and to deny the Motion for Preliminary Injunction.

elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication.”). That is for the merits.

Respectfully submitted:

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC.
THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

By:

/s/ Rebecca K. Glenberg

Rebecca K. Glenberg (VSB #44099)
American Civil Liberties Union of Virginia Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, Virginia 23220
(804) 644-8080
FAX: (804) 649-2733

J. Joshua Wheeler (VSB # 36934)
Robert M O'Neil (of counsel)
The Thomas Jefferson Center for the Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
(434)295-4784
FAX: (434) 296-3621

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2006, a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Anthony H. Monioudis, Wood Rogers PLC, 341 Main Street, Suite 302, Danville, VA 24541, and to William B. Poff, Christopher W. Stevens, and Joshua F. P. Long, Woods Rogers PLC, Wachovia Tower, Suite 1400, 10 S. Jefferson Street, PO Box 14125, Roanoke, VA 24038. I further certify that a true and accurate copy of the foregoing was sent by U.S. mail, postage prepaid, to the following non-participant in the CM/ECF System:

D. Hayden Fisher
416 W. Franklin St.
Schaffer & Cabell, P.C
Richmond, VA 23220

/s/ Rebecca K. Glenberg