

IN THE CIRCUIT OF ST. LOUIS COUNTY
STATE OF MISSOURI

JIM BUTLER CHEVROLET, Inc.)
)
Plaintiff,)
)
v.)
)
DWAYNE COONEY)
)
Defendant.)

Cause No.: 14SL-CC00556

Division No.: 20

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**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION
TO DISSOLVE TEMPORARY RESTRAINING ORDER AND
OPPOSITION TO PRELIMINARY INJUNCTION**

Plaintiff Jim Butler Chevrolet, Inc. ("JBC") respectfully submits its Opposition to Defendant's Motion to Dissolve Temporary Restraining Order and Opposition to Preliminary Injunction as follows:

I. INTRODUCTION

JBC acknowledges that in order to obtain a preliminary injunction for its defamation claim, there is a presumption of constitutional invalidity that must be overcome. However, contrary to the argument set forth in Defendant's Motion to Dissolve Temporary Restraining Order and Opposition to Preliminary Injunction ("Defendant's Motion"), there is no *per se* prohibition against preliminary injunctions in defamation cases. Given the nature of Defendant Dwayne Cooney's ("Defendant") demonstrably false and defamatory video at issue in this matter, granting a preliminary injunction in JBC's favor will not violate the principles of the First Amendment.

The Court should grant Plaintiff's request for a preliminary injunction and deny Defendant's Motion for three reasons:

(a) Defendant's Motion relies upon the flawed premise that preliminary injunctions or temporary restraining orders cannot be issued over claims of defamation.

(b) Likewise, contrary to Defendant's argument that the Missouri Constitution and the Missouri Supreme Court have pronounced that **all** injunctions in **all** defamation cases are per se unconstitutional, Missouri appears to follow what some legal scholars call "the modern rule," finding no inherent conflict between free speech and injunctions aimed at defamation.

(c) Lastly, Defendant's defamatory statements are entitled to only limited protection, if any at all, under the First Amendment, have no constitutional value and do not materially advance society's interest in uninhibited and robust debate on public issues. It is this very type of false and demonstrably defamatory statement of fact that at least some courts have deemed properly enjoined—even at the preliminary injunction stage.

II. ARGUMENT

A. **Injunctions In Defamation Cases Are Not Per Se Unconstitutional.**

The U.S. Supreme Court "has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976). Defendant's Motion mischaracterizes the holding in *Organization for a Better Austin v Keefe*, 402 U.S. 415, 419 (1971). In *Keefe*, the Supreme Court did not rule that a preliminary injunction or temporary restraining order can never issue over claims of defamation. Rather, the Court noted "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Id* at 419 (citations omitted).

Plaintiffs in defamation cases have, in fact, successfully overcome this presumption and have been granted preliminary injunctive relief. In *Int'l Profit Associates, Inc. v. Paisola*, 461 F.Supp.2d 672, 679-80 (N.D. Ill. 2006), the court granted a temporary restraining order prohibiting defendants from continuing to publish false and defamatory statements regarding the plaintiff. The court noted, "it does not violate the principles of the First Amendment to enjoin defendants from continuing to include certain information on their website that is, on the record before the Court, demonstrably false and defamatory." *Id.* The court further found that the TRO prohibiting the defendants from continuing to publish the false statements was "not against the public interest" and that "any incidental harm to defendants in prohibiting further publication would be far outweighed by the damage to [plaintiff]." *Id.* at 680.

Likewise, in *Eppley v. Iacovelli*, No. 1-09-cv-386-SEB-JMS, 2009 WL 1035265, at *5 (S.D. Ind. April 17, 2009), the court granted plaintiff's motion for preliminary injunction in a defamation case, where the defendant made numerous intentionally misleading statements against the plaintiff. The court recognized the "lesser First Amendment protection afforded statements like those made by [defendant]," and noted that when the speech enjoined is of lesser constitutional value because it is false and defamatory, and the injunction operates to address specifically that speech, the injunction passes constitutional muster under the First Amendment. *Id.* Accordingly, the court held the First Amendment did not diminish the plaintiff's likelihood of success on the merits of his claims and did not preclude equitable relief in the form of a preliminary injunction.

B. False and Defamatory Speech May Be Enjoined Under Missouri Law.

As Defendant notes, the Missouri Supreme has also suggested that an injunction aimed at defamatory speech can be proper after a finding of defamation. *Flint v. Hutchinson Smoke Burner Co.*, 19 S.W. 804 (Mo. 1894); *Wolf v. Harris*, 267 Mo. 405 (Mo. 1916). This places Missouri in line with other jurisdictions, such as Ohio, Georgia, Minnesota, California, Kentucky, the Ninth Circuit, the Fifth Circuit and the Sixth Circuit, that follow what some legal scholars call “the modern rule.” See *O’Brien v. Univ. Cmty. Tenants Union*, 327 N.E.2d 753, 755 (Ohio, 1975); *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62 (Ga. 1975); *Advanced Training Sys. Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984); *Balboa Island Village Inn v. Lemen*, 156 P.3d 339, 348 (Cal. 2007); *Hill v. Petrotrech Res. Corp.*, 325 S.W.3d 302, 309 (Ky. 2010); *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1238 (9th Cir. 1997); *Brown v. Petrolite Corp.*, 965 F.2d 38, 51 (5th Cir. 1992); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206 1208-09 (6th Cir. 1990). Jurisdictions that follow the modern rule find no inherent conflict between injunctions aimed at defamation and free speech.

There is no Missouri appellate court ruling prohibiting preliminary injunctions aimed at defamatory statements. Accordingly, Missouri trial courts have granted preliminary injunctions in defamation cases. See *MB Town Center, LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d 595 (Mo. App. E.D. 2012)(noting trial court granted TRO and preliminary injunction in case where defendant defamed plaintiff in notice of asbestos contamination to St. Louis County Recorder of Deeds and affirming permanent injunction precluding publication of challenged statements); *Boemler Chevrolet Co., Inc. v. Combs*, 808 S.W.2d 875, (Mo. App. E.D. 1991)(trial court granted TRO and preliminary injunction enjoining

defendants from, among other things, picketing with the use of signs containing defamatory statements).

C. Defendant's Calculated Attempt to Damage JBC's Business Reputation Must be Enjoined.

Defendant is engaged in an on-going effort to intentionally harm JBC's business reputation. In addition to posting his defamatory video on YouTube, Defendant and others believed to be in concert with Defendant, began spreading the defamatory video on various other forms of social media, including Facebook, Reddit and Twitter before and after Defendant was served with the Petition and Motion for Temporary Restraining Order in this case. Moreover, Defendant filed a Complaint with the Better Business Bureau, replete with false statements which, collectively, defamed JBC including, but not limited to, the following:

- (a) Defendant first brought his car to JBC for service on February 4, 2014 (a blatantly false statement obviously offered to conceal the fact that Defendant delivered his car to JBC days earlier and authorized the work he knew JBC performed on his vehicle the previous day, February 3, 2014);
- (b) Defendant was charged \$683, but was offered a discount to \$600 only after complaining to JBC (the total, prior to any discount, was \$668 and was discounted to \$600 in a voicemail, before anyone from JBC ever spoke to Defendant about the charges for servicing his vehicle); and
- (c) JBC performed only 45 minutes of labor on Defendant's vehicle, but charged him for 5.5 hours for labor (Defendant was advised that he was being charged

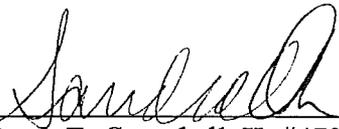
for 4.5 hours of labor, which was ultimately discounted 20%--he was never charged for 5.5 hours of labor).

Defendant's conduct is similar to the intentional "smear campaign" that the court in *Eppley* held was not entitled to First Amendment protection and warranted preliminary injunctive relief. *See Eppley*, 2009 WL 1035265 at *5. If Defendant's conduct is not immediately enjoined, JBC will suffer irreparable harm for which it has no adequate remedy at law. Moreover, an injunction prohibiting Defendant from continuing his campaign of false and misleading statements is in the public interest.

Accordingly, the Court should deny Defendant's Motion and grant Plaintiff's request for preliminary injunctive relief.

Respectfully submitted,

HUSCH BLACKWELL LLP

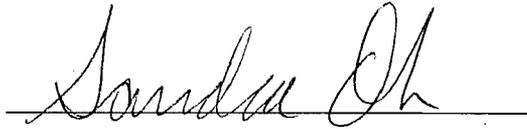
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served on this 3rd day of March, 2014, via hand-delivery to:

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A handwritten signature in cursive script, appearing to read "Sandra Jh", is written over a horizontal line.