

IN THE SUPREME COURT OF IOWA

Seafarers International Union, )  
Atlantic, Gulf, Lakes and Inland )  
Waters District/NMU, AFL-CIO, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Robert E. Swanson, )  
 )  
Defendant. )  
 )  
 )  
\_\_\_\_\_ )

No. \_\_\_\_\_

District Court No. CV-29627

**BRIEF IN SUPPORT OF  
APPLICATION FOR  
PERMISSION TO APPEAL  
GRANT OF TEMPORARY  
INJUNCTION**

On November 21, 2003, the Iowa District Court for Clinton County granted Plaintiff, Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District/NMU, AFL-CIO’s (SIU) motion for a temporary injunction and barred Defendant Robert E. Swanson from “use of the Internet or any other form of communication to refer to the Paul McAndrew Law Firm, its employees, officers, or members.” *Ruling on Motion for Temporary Injunction* at 10 [hereinafter *Ruling*]. Because the injunction is an unconstitutional prior restraint on speech, granted on behalf of an entity that is not a party to this lawsuit, Defendant seeks permission to take an interlocutory appeal of this ruling.

**I. PROCEEDINGS TO DATE**

This proceeding arises from a complaint seeking money damages from Defendant Robert Swanson, based on allegedly libelous statements that Mr. Swanson made about the SIU’s leadership on his website, [www.seajustice.org](http://www.seajustice.org). Plaintiff moved the district court for a temporary injunction that would prevent Mr. Swanson from operating his website or making statements about the SIU or its officers or members. Although the

complaint made no allegations about statements directed at the SIU's law firm, plaintiffs also sought injunctive relief barring Defendant from making statements about the Paul McAndrew Law Firm or its employees.

In support of the temporary injunction, Plaintiff argued that Defendant's statements about the SIU and the Paul McAndrew Law Firm constituted defamation per se. The district court correctly held that SIU's president, who submitted the only affidavit in support of the injunction on behalf of the SIU, was a public figure for purposes of union controversies. *Ruling* at 7. Therefore, the court continued, the SIU would have to demonstrate actual malice as defined in *New York Times v. Sullivan*, 376 U.S. 254 (1964), to succeed in its defamation action. Because the court found that the union was unlikely to prevail under this standard, it denied the injunction with respect to the SIU.

However, the court did grant a temporary injunction on behalf of the Paul McAndrew Law Firm and its employees, without having made any findings about the truth or falsity of Defendant's statements or having addressed whether Defendant made any actionable statements of fact about the firm. In fact, the court never specified what statements were being enjoined. Instead, the court issued a broadly-worded injunction, a copy of which is attached as Exhibit A, which prospectively enjoins Mr. Swanson from referring to the firm in any manner. Mr. Swanson subsequently complied with the injunction and removed all references to the law firm from his website.

On December 12, 2003, Defendant moved for a stay of the injunction, or alternatively for reconsideration, pending this petition for permission to appeal. In support of the stay, Defendant noted that, in addition to imposing a prior restraint on

behalf of a non-party to the lawsuit, the district court failed to consider the likelihood of success in the underlying lawsuit according to appropriate free speech principles articulated by the U.S. Supreme Court.

## **II. GROUNDS TO GRANT AN INTERLOCUTORY APPEAL**

Iowa Rule of Appellate Procedure 6.2 states that an interlocutory appeal “may be granted . . . on finding that such ruling or decision involves substantial rights and will materially affect the final decision, and that a determination of its correctness before trial on the merits will better serve the interests of justice.”

Prior decisions of this court have made it clear that interlocutory appeals are the appropriate vehicle through which to redress improperly granted or denied temporary injunctions. *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178 (Iowa 2001); *Wolf v. Lutheran Mut. Life Ins. Co.*, 236 Iowa 334 (Iowa 1947). Furthermore, all three considerations governing grants of interlocutory appeals heavily favor allowing an appeal in this case. First, because the temporary injunction at issue here imposes a prior restraint on protected speech, there are few cases that involve more substantial rights, especially because Defendant will have no remedy for the harm he suffers while the injunction is in place. Second, the great public interest in free speech and debate also favors immediate review, as does the fact that the Paul McAndrew Law Firm is not a party to this case. Finally, an interlocutory appeal would offer this Court the chance to correct some apparent misperceptions regarding the free speech principles that are at the heart of this case and that will “materially affect the final decision.”

### **A. The Temporary Injunction Violates Substantial Rights.**

Few rights are more dear to our system of democratic governance than free speech. It is difficult to understate the degree of impairment that a prior restraint works on this right. Therefore, both the United States and Iowa Constitutions preclude courts from imposing prior restraints, which “impose[] a gag on the right to publish as opposed to a sanction imposed after publication because of the content of what is published,” except in the most extreme circumstances. *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493, 498 (Iowa 1976) (stating that temporary injunctions should be “the last resort of the court” and striking down restrictive order entered to promote fair trial); *Kleman v. Charles City Police Dep’t*, 313 N.W.2d 90, 96 (Iowa 1985); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (any prior restraint bears a “heavy presumption” of invalidity). The Supreme Court has articulated the reason for this restraint:

[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. . . . 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. 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).

As the Supreme Court noted in the above quotation, Defendant has no redress for the injury being wrought by the temporary injunction; there is no remedy that will compensate Defendant for a missed opportunity to speak. *See also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.”); *Iowa Right to Life*

*Comm. v. Williams*, 187 F.3d 963, 970 (8<sup>th</sup> Cir. 1999) (quoting *Elrod*). This irreparable injury is in sharp contrast to the entirely compensable harm alleged by Plaintiff in support of the injunction. Successful defamation plaintiffs regularly prove and receive money damages. For this reason, “absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases.” *Metropolitan Opera Ass’n, Inc. v. Local 100*, 239 F.3d 172 (2<sup>nd</sup> Cir. 2001) (“[C]ourts have long held that equity will not enjoin a libel.”).

Furthermore, the extraordinary circumstances that might merit a prior restraint are not present in this case. The only harm proffered by the Paul McAndrew Law Firm in support of the temporary injunction was the threat to its professional reputation, a harm that the U.S. Supreme Court has recognized is insufficient to justify such a prior restraint. In *Organization for a Better Austin*, the Court struck down an injunction that prohibited Austin residents from distributing literature that was highly critical of a particular real estate broker. 402 U.S. 415. The Court stated 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.* at 419.

Even if a limited temporary injunction were justified under the circumstances here, this Court should grant an interlocutory appeal to require the district court to make adequate factual findings and to correct the scope of the injunction. Before a court may issue an injunction, it must first demonstrate the justification for the use of such a harsh remedy. For example, in *Max 100 LC*, this Court overturned a temporary injunction because the district court had failed to make any findings on “the equitable factors that comprise a decision to grant or deny a temporary injunction.” 621 N.W.2d at 183. Further, the U.S. Supreme Court has suggested that factual findings are required before a

government body may take action that infringes First Amendment rights. *See, e.g., Press Enterprise v. Superior Court*, 478 U.S. 1, 13-14 (1986); *Rosenblatt v. Baer*, 383 U.S. 75, 82 n.6 (1966); *see also U.S. v. Noriega*, 917 F.2d 1543, 1549 (11<sup>th</sup> Cir. 1990).

Factual findings are also necessary because courts must tailor prior restraints as narrowly as possible to address the “pin-pointed objective” at issue. *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183 (1968). Not only must the court show that it has considered alternative measures that might achieve this specific goal, but, more fundamentally, the court cannot arrive at the “pin-pointed objective” in a factual vacuum. *See Des Moines Register & Tribune Co.*, 248 N.W.2d at 500 (striking down injunction in part because “alternatives existed which were not adequately considered.”).

However, in this case, the district court made only the most general findings that Defendant’s statements “about counsel’s competency would affect his business and profession, and deprive him of public confidence,” and it never articulated the specific objective of the injunction. *Ruling* at 8-9. The court never found that any statements were false, or even that they were made negligently (not to speak of finding actual malice). Then, the court issued the broadest possible injunction, preventing plaintiff from referring to the law firm or its employees at all, in any medium. Thus, not only were the findings supporting the injunction insufficient in light of the severity of the remedy, but the issued order failed to track even the very general harm identified by the court. Rather, under the present order, Defendant is not even permitted to refer to the Paul McAndrew Law Firm in a *positive* light or to provide a neutral, fact-based account of the goings-on in his case.

**B. An Interlocutory Appeal Would Serve the Interests of Justice.**

The Texas Court of Appeals has aptly noted that “[f]ree speech rights are the heart of our democratic system and involve not only the right of the individual to speak freely, but also the citizenry’s interest in public discourse.” *Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101 (Tex. App. 3<sup>rd</sup> Dist. 2003). Through his website, from which he receives no profit, Defendant is providing a forum for members of the SIU to freely express their experiences with the union’s leadership and to discuss ideas to improve the union. This fostering of debate on a matter of great importance, at least to the union’s membership, is a public good.

Furthermore, the interests of judicial clarity and efficiency are implicated in the decision to issue an injunction on behalf of a non-party to the case. Acting pro se at the trial level, Mr. Swanson was forced to resist the temporary injunction against both the named party in the case and that party’s lawyer, who had entered the case in this new role for the first time. In fact, the Paul McAndrew Law Firm never sought to participate in the case through any recognized channel, while seeking relief that held no likely benefit for its client. Instead, the firm effectively circumvented Iowa Rule of Civil Procedure 1.201, which states that “[e]very action must be prosecuted in the name of the real party in interest,” leading to unfair results and judicial confusion.

Moreover, Defendant has suffered an injustice because the court below did not, and probably could not, conduct any weighing of the factors affecting the issuance of a temporary injunction. These factors simply cannot be applied when a non-litigant is seeking an injunction. For example, it is impossible to show a likelihood of success on the merits when the entity seeking the injunction is not seeking any permanent relief. *See*

*Max 100 L.C.*, 621 N.W.2d at 181 (when granting temporary injunction, courts must find likelihood of success on the merits). Instead, the court below issued the injunction on behalf of the law firm after making a short statement about the defamation standard that would apply to the law firm (without noting that the firm is not actually suing Defendant for defamation), and noting that statements questioning the firm’s competency “would affect [counsel’s] business and profession.” *Ruling* at 8-9. These statements constituted the sum total of the district court’s consideration of the merits of the injunction on behalf of the law firm. This error is compounded because Defendant’s constitutional rights were at stake; since the injunction imposes a prior restraint on speech, Defendant deserved a more careful weighing of the temporary injunction factors, not a nearly non-existent one.

**C. An Interlocutory Appeal Would Materially Affect the Final Decision.**

A further reason to grant an interlocutory appeal lies in the district court’s failure to apply the appropriate substantive law to the claim that Defendant’s statements about the Paul McAndrew Law Firm were defamatory. A directive from this Court regarding the proper substantive legal standards will help eliminate the need for lengthy appeals and reconsiderations following the conclusion of the trial on the merits.

The district court seemed to accept Plaintiff’s contentions both that Defendant’s statements about the Paul McAndrew Law Firm constituted defamation per se, and that the firm and its employees are not public figures. Accordingly, the Court seemed to agree that Plaintiff should not be required to prove malice, falsity, or damages. *Ruling* at 8. However, this finding was error.

Since the district court treated the law firm’s motion for an injunction as part of the SIU’s case against Defendant, which arose out of a labor dispute, the district court

should have applied the principles articulated in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966). In *Linn*, the Court found that labor disputes are typically heated affairs, and that participants themselves ought to be able to filter out the extreme rhetoric often used by both sides, without judicial intervention. *Id.*, 383 U.S. at 58. Accordingly, as a matter of statutory interpretation rather than constitutional law, the Court decided that, unless defamatory statements are made with actual malice and are shown to have caused actual damage, state-law defamation claims predicated on those statements are preempted by the National Labor Relations Act. Following *Linn*, courts have recognized the same qualified privilege in non-NLRA cases, requiring application of *New York Times* standards to defamation claims in the union context. *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 281 (1974); *Batson v. Shiflett*, 602 A.2d 1191, 1208 (Md. 1992); *Henderson v. Teamsters Local 313*, 90 Wash.2d 666, 670 (1978). Thus, when this Court evaluates Plaintiff's claims, which arise from a union controversy, it must apply the *New York Times* actual malice standard. *Lynn*, 383 U.S. at 65. If the district court had followed this directive, it could not have issued the injunction, since it did not find that Defendant acted with actual malice when it refused to issue an injunction to the plaintiff itself. *Ruling* at 8.

Furthermore, in *Milkovich v. Lorain Journal Co.*, the Supreme Court confirmed that, at least as applied to media defendants, no liability can be imposed for statements that cannot be proven true or false. 497 U.S. 1, 20 (1990). Nearly all courts that have subsequently addressed the issue have found that the same protection extends to non-media defendants. *See, e.g. Mercer v. City of Cedar Rapids*, 308 F.3d 840, 849 (8<sup>th</sup> Cir. 2002); *McClure v. American Family Mut. Ins. Co.*, 223 F.3d 845, 853 (8<sup>th</sup> Cir. 2000);

*Rubenstein v. Manhattan & Bronx Surface Operating Auth.*, 1997 WL 833456, 5 (E.D.N.Y. 1997).

The statements upon which the district court predicated the injunction are just this kind of hyperbole or opinion, and therefore they cannot form the basis for the injunction. For example, accusations of incompetence or frivolity that Defendant levied against the Paul McAndrew law firm would be understood by readers to be Defendant's opinion, spoken in the heat of highly contested litigation. Similarly, Defendant's statement of his intention to report the Paul McAndrew Law Firm to Iowa State Bar Association cannot be defamatory, since statements of intention cannot be proven false under the principles expressed in *Milkovich*. Furthermore, if such statements could be deemed defamatory, then so could a public statement of plans to file a lawsuit. Finally, simply by speculating about the terms on which a lawyer left the employ of a law firm, Defendant did not hold out that he had any special basis of knowledge. Rather, he conjectured a possible scenario, affirmatively indicating that he could only guess at what happened by stating that the associate was "leaving (fired?)" the firm.

### **III. CONCLUSION**

For the foregoing reasons, this Court should grant an interlocutory appeal of the district court's November 21, 2003 grant of a temporary injunction.

Respectfully submitted,

---

Catherine K. Levine  
3110 SW 29th Street  
Des Moines, Iowa 50321  
Voice: 515-244-4813  
Fax: 515-244-4813 \*51  
[catlevine@mchsi.com](mailto:catlevine@mchsi.com)

---

Charlotte J. Garden  
Paul Alan Levy  
Public Citizen Litigation Group  
1600 – 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20009  
202-588-1000

Attorneys for Petitioner