MARYLAND COURT OF SPECIAL APPEALS

September Term 2014

No. 1480

DOUGLAS ANTHES,

Defendant-Appellant,

v.

DONALD J. CALLENDER and CONVERGENCE MANAGEMENT ASSOC., LLC d/b/a CONVERGENCE CARIBBEAN, LTD.,

Plaintiffs-Appellees.

On Appeal from the Circuit Court for Calvert County
(Honorable Marjorie L. Clagett, Administrative Judge)

OPENING BRIEF FOR DEFENDANT-APPELLANT DOUGLAS ANTHES

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MISCELLANEOUS

In this appeal, a dissatisfied customer who criticized a company for bamboozling him in connection with certain efforts to secure private financing appeals from an order purporting to hold him in civil contempt of a temporary restraining oder ("TRO") that had expired six months earlier. The TRO was a patently invalid prior restraint, based on an ex parte motion that was obtained without any notice, in a lawsuit not even served on the defendant until six weeks later, and in flagrant violation of the First Amendment because it forbade the consumer from posting any "defamatory" statements about the plaintiffs. The Supreme Court of the United States has squarely held both that such preliminary injunctions violate the First Amendment and that, absent extraordinary circumstances, an injunction cannot be issued against speech without prior notice and an opportunity to be heard. Apart from the fact that the TRO was itself constitutionally invalid, the contempt sanctions imposed in this case sought to punish the customer for past violations of the **expired** TRO, rather to coerce future compliance, and hence were criminal in nature rather than civil. Thus, the court below imposed sanctions in violation of both the Maryland Rules and the constitutional requirements for criminal contempt proceedings. Consequently, the contempt sanctions should be reversed.

QUESTIONS PRESENTED

1. May a court grant a temporary restraining order against allegedly defamatory statements that have not been found to be false and defamatory by a trier of fact following a full trial on the merits?

2. May a court grant a temporary restraining order against allegedly defamatory

statements without notice and an opportunity to be heard?

3. In proceedings for constructive civil contempt, may a court impose a fine for past violations of a court order without according the defendant the constitutionally required protections for criminal contempt proceedings?

STATEMENT

This appeal arises from a lawsuit over criticisms published by defendant Douglas Anthes about plaintiff "Convergex Management Association d/b/a Convergex Caribbean" (Convergex), a company that purports to help people arrange private capital financing for proposed business ventures. Anthes had an idea for a new entertainment business and made arrangements with Convergex to obtain assistance in locating investors, but he quickly grew disillusioned with Convergex's service and posted some public complaints about the manner in which plaintiffs (Convergex and its principal, Donald Callender) purported to perform their part of the bargain. The gist of the complaints, which appear in the Record Extract at pages 25-29, was that plaintiffs were operating a scheme that had cost him tens of thousands of dollars without producing any investments—he would pay a finding fee to one company, which would refer him to another company, which would charge an additional fee, and so forth. Anthes posted his accounts of these events, calling it a scam, on such sites as Ripoff Report, Complaints Now, Yahoo, and Reviews Talk.

On October 15, 2015, Robert Damalouji, plaintiffs' counsel, sent a cease-and-desist letter to Anthes, asserting he had made some false statements on the Ripoff Report web site

about plaintiffs Convergex and Donald J. Callender, Convergex's managing partner, and that he had violated as well a non-disclosure provision of the contract between the parties. Mr. Damalouji demanded removal of the statements and threatened litigation. E30-E31. Plaintiffs did not put anything in the record indicating whether or not the letter was delivered by the post office. And, in fact, the postal service's online tracking system, which can be accessed even today, shows that the letter was **not** delivered, but rather was returned to the sender on November 14, 2013. Although this date came two days after this action was filed, the publicly-accessible tracking system shows as well that on November 11, 2013, the demand letter was on its way back to Maryland from Arizona.[1]

On November 12, 2013, plaintiffs filed this action in the Circuit Court for Calvert County against both Anthes and his company, Dreamers Entertainment Club LLC. E10-E24. The complaint alleged that plaintiffs' agreement with Anthes never guaranteed that they would find him a source of financing who would invest in his business, and that Anthes' postings about them on the Ripoff Report, Complaints Now and Reviews Talk web sites contained such false statements as that plaintiffs' business services were "scams" or "ripoffs" and that plaintiffs were not properly registered to do business. Plaintiffs also alleged that

[1] The tracking number is in the record at page 34; the URL for the tracking result is https://tools.usps.com/go/TrackConfirmAction?qtc__tLabels1=70122210000126093422 (visited February 26, 2015). The Court can take judicial notice of this fact. *120 W. Fayette St., LLLP v. Mayor of Baltimore*, 426 Md. 14, 21 n.5, 43 A.3d 355, 359 n.5 (2012) (taking judicial notice of information from a web site); *Exxon Mobil Corp. v. Ford*, 204 Md. App. 1, 178 n.30, 40 A.3d 514, 618 n.30 (2012) (same) (concurring and dissenting opinion).

the postings violated the non-disclosure agreement. The complaint contains four counts: Count I for a temporary restraining order and preliminary and permanent relief, seeking to restrain allegedly false, misleading and defamatory statements; Count II for defamation, seeking an award of damages; Count III for invasion of privacy / false light, seeking an award of damages; and Count IV for breach of contract, seeking damages. The complaint was verified by plaintiff Callender, signing for himself and the entity plaintiff, but only "to the best of my knowledge, information and belief." The complaint attached as exhibits the agreements between the parties, the allegedly actionable posting, and Mr. Damalouji's demand letter. The docket does not reflect either that any memorandum of law was filed in support of a proposed temporary restraining order, or that any statement explained why it was not possible to provide notice to Anthes or to give him an opportunity to be heard before an order was entered against him.

On November 15, 2013, the Honorable E. Gregory Wells signed a temporary restraining order. E32-E36. The docket does not recite the filing of any proposed order by plaintiffs, but from inspection of the document that Judge Wells signed, it appears his order may have been prepared by plaintiffs themselves, in that the document cites various cases in an order resolving a motion filed only days before, contains blanks that were filled in by hand, and, indeed, recites (falsely) that "counsel for all parties hav[e] been heard." The order granted emergency relief occasioned by "statements . . . that are knowingly false" even though there was no evidence about Anthes' knowledge. The injunction commanded

"defendants" to remove "all postings, headers and publications . . . . under Defendant Anthes' own name and under the moniker 'huggie'," as well as "all false and defamatory statements regarding the Plaintiffs, and any other statements specifically intended to cause Plaintiffs ridicule, contempt, hatred and harm"; it also enjoined defendants from "posting any further false and defamatory statements . . . regarding the Plaintiffs, and any other statements . . . specifically intended to cause Plaintiffs ridicule, contempt, hatred and harm." A stamp on the document indicates that the order was entered on the docket on November 19, 2013, and lists one address of Anthes. E36. By its terms, the order was set to expire thirty-five days later, on December 20, 2013.[2]

On the afternoon of December 18, 2013, plaintiffs filed a motion to extend the TRO, which was set to expire on December 20, asserting without any evidentiary support that plaintiffs were "attempting to have Defendants served with the Verified Complaint . . . including a copy of the Temporary Restraining Order executed by Honorable Judge Wells." E40-E43. The motion recited a hearsay statement, that a process serving company in Arizona had provided "information [indicating] that Defendants are evading service," but also claimed that "Anthes, after receipt of the Court's order . . . has posted additional defamatory

[2]Despite the absence of any evidence that defendant Dreamers Entertainment Club LLC had any involvement in the allegedly defamatory postings, the TRO extended to that entity as well as to Anthes. The contempt motion also sought sanctions against that defendant, even though there was no evidence about whether **it** had violated the TRO. Because the sanctions order runs only against Anthes personally, this appeal was taken only by Anthes, and this brief does not mention the LLC further.

postings about plaintiffs." There is no indication in the record that plaintiffs made any effort to notify defendants that a motion to extend the TRO was being filed, or provided the trial court with any evidence that defendants could not be given an opportunity to participate in a hearing on the motion to extend the TRO. Nor was the motion verified; hence there was no admissible evidence presented to the court to support the assertions in the motion. Nevertheless, on December 18, 2013, the same day that plaintiffs filed their motion, Judge Wells signed an order extending the TRO. E53-E54. Again, the form of the order suggests that it was a proposed order submitted by plaintiffs with the blanks filled in by Judge Wells; indeed, its pages are numbered 6 and 7, which follow the last page number (5) of the ex parte motion. The order was set to expire thirty-five days later.

Also on December 18, 2013, the docket reflects that the Court received a letter-motion from Anthes dated December 12. E38-E39. The letter stated, and Anthes' affidavit later confirmed on personal knowledge, that it was not until December 10, 2013, that Anthes learned that this action had been filed against him, and even then, the only document he received was the TRO itself, not the complaint or any of the supporting material. E89 ¶ 10, E93. The motion questioned "how there was justification in issuing a temporary order," and asserted further (E38),

> postings that are posted are within my first amendment rights. I did not post anything that did not happen between me and Convergex Caribbean Ltd. I am not posting false information; I am posting experiences I had with this company and Mr. Callender, which is in my 1st amendment right.

The letter characterized itself as a motion to continue, but applying the rule that filings by pro

se litigants are to be liberally construed, *Simms v. Shearin*, 221 Md. App. 460, 480, 109 A.3d 1215 (2015), the document should properly have been understood to object to any injunction against his speech. Yet the trial judge displayed none of the alacrity with which he gave the plaintiffs the TRO and TRO extension that they requested. Indeed, the record does not reflect that the judge took any action, even setting a hearing, in response to Anthes' motion.

On January 10, 2014, plaintiffs filed an unverified motion (E62-E66) to hold "defendants" in contempt on the ground that the enjoined statements were still online, even though Anthes had actual knowledge of the TRO since December 10, 2013, and, according to the motion, "Defendants have . . . on information and belief wilfuly failed to remove the defamatory statements . . .." E65, ¶ 10. In fact, the assertion about defendants' wilful disobedience of the TRO was incorrect. Anthes' affidavit reflects that, having learned about the TRO, he sought advice of counsel and learned that there were serious First Amendment objections to the TRO. E91 ¶ 25. Anthes indicated that he had initially believed that he was not bound by the order until he had a chance to be heard by the court. However, it was not until December 31, 2013, that he finally received the complaint in this case, identifying for the first time the specific postings about which plaintiffs were complaining, *id.* ¶ 28; the mailing also included a letter from plaintiffs' counsel, warning Anthes that, unless he took prompt action to secure the removal of his postings from the Internet, plaintiffs would seek a contempt finding against him. *Id.* ¶ 29, E67-E68. At that point Anthes finally retained counsel, E91 ¶ 30, and promptly asked the hosts of his review to remove the posting (the

record reflected that this first occurred by email on January 3, 2014). E91-92 ¶ 31. Anthes learned from Ripoff Report that it would not remove his postings. E92 ¶ 32. In fact, Ripoff Report is notorious for its steadfast refusal to remove postings, even if requested by the poster, *Franco v. Cronfel*, 311 S.W.3d 600, 603 (Tex. App. 2010), and even if there is an injunction against the poster. *Blockowicz v. Williams*, 630 F.3d 563, 565 (7th Cir. 2010). Ripoff Report loudly proclaims this policy on its home page, but states as well that it has an arbitration program through which a business can seek to have reports redacted to have false **portions** of reports removed; Ripoff Report explains that, therefore, filing lawsuits to get consumer complaints removed is fruitless. http://www.ripoffreport.com/ (visited on February 26, 2015); http://www.ripoffreport.com/ConsumersSayThankYou/WantToSueRipoffReport.aspx (visited on February 26, 2015).

On January 15, 2014, defendants removed the case to federal court. In that court, the motion for a further extension of the temporary restraining order was denied by United States District Judge Deborah Chasanow at a hearing held on January 28, 2014. However, on April 18, Judge Chasanow granted plaintiffs' motion to remand the case to the Circuit Court of Calvert County. The motion for contempt was heard on July 22, 2014, E94-E120, but no testimony was presented at the hearing; hence, the only testimony on the motion for contempt that was attested based on personal knowledge was the affidavit of Douglas Anthes. E87-E93.

On August 12, 2014, Circuit Court Administrative Judge Marjorie Claggett ruled that

Anthes had been in contempt of the November 15, 2013 TRO, as extended, by violating it from December 10, 2013, when Anthes first learned of the order, until January 3, 2014, when Anthes first took steps to try to get his postings removed from three web sites. E121-E125. The court decided that the sanctions would consist of a fine of $100 per day for each day from December 10 to January 3, for a total of $2,400 to be paid into the Court Registry. The court's ruling made clear that it was only addressing past conduct, and was not seeking to coerce future compliance with the TRO, which had, in any event, expired:

> The Defendants actions or, more accurately, inaction, during the active period of the TRO is what this court addresses today. [The fact that defendant took steps to comply on January 3] does not excuse his complete disregard of the TRO in the prior twenty-four days.
>
> It is of vital interest for this court to ensure that its orders are diligently obeyed. Here, the Defendant admitted that he took no action to comply with the TRO until January 3 . . .. Defendant's dismissive nature toward this court's Order supports a finding of contempt . . ..
>
> E124.

The contempt order did not, however, contain a purge clause as required by Maryland Rule 15-207(d)(2).

The notice of appeal was filed on August 26, 2014.

SUMMARY OF ARGUMENT

There are three main reasons why the contempt finding and sanctions in this case should be overturned. First, when a punishment is imposed for past contumacious conduct, the contempt is generally criminal contempt, which may only be imposed using procedures

that follow the Maryland Rules and protect the constitutional due process rights of the accused contemnor. A daily fine may only be imposed through **civil** contempt procedure to coerce future compliance with the court's orders. Because the contempt sanctions in this case were imposed only for conduct that had ended before the motion for contempt was filed, and indeed after the TRO had long since expired, the contempt found by the court below was plainly criminal, and should be reversed because Anthes was not accorded the proper procedural protections.

Second, although the general rule is that an injunction must be obeyed until it is overturned, there is an exception for orders that are transparently invalid. In those cases, an appeal of the contempt sanction may also raise the invalidity of the underlying injunction. Here, the underlying restraining order was transparently invalid.

Third, the restraining order was a prior restraint: it forbade future speech without a final determination after full litigation that the statements were false and otherwise actionable. And prior restraints are categorically forbidden in defamation cases: as the Supreme Court held nearly 45 years ago, "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Moreover, because Maryland is one of the many states where "equity will not enjoin a libel," even a permanent injunction would have been forbidden by state law. And procedurally, under *Carroll v. President & Commissioners*

of Princess Anne, 393 U.S. 175 (1968), the First Amendment bars the issuance of injunctions against speech through ex parte proceedings unless a detailed showing has been made both of the efforts to give notice to the defendant and of the reasons why it was impossible to give notice before an order needed to be issued. There was no such showing in this case and, indeed, the lack of adversarial process led to the issuance of an order that violated the First Amendment and was unsupported by admissible evidence of a valid claim for defamation.

These are all errors of law, reviewed de novo.

I. THE CONTEMPT SANCTIONS SHOULD BE REVERSED UNDER THE CONSTITUTION AND THE MARYLAND RULES BECAUSE THEY CONSTITUTE CRIMINAL CONTEMPT BUT WERE IMPOSED WITHOUT THE REQUIRED SAFEGUARDS.

The contempt sanctions should be overturned because under the Maryland Rules and a century-old line of Supreme Court cases, they fall on the criminal side of the dividing line between civil and criminal contempt. Hence the sanctions could not be imposed without according Anthes the protections that are accorded to criminal defendants, including the right to counsel and the right not to be convicted without proof beyond a reasonable doubt.

Title 15, Chapter 200 of the Maryland Rules distinguishes between "direct" contempt that is committed in court, and all other contempt which is "constructive." Because Anthes' allegedly contemptuous conduct occurred outside of court, it falls into the category of "constructive." Rules 15-205 and 15-206 distinguish between constructive criminal contempt, which may only be pursued in a separate proceeding brought by a prosecutor, and constructive civil contempt, which can be brought by parties in an ongoing action. Clearly,

the motion brought by the plaintiffs as part of their own lawsuit was for constructive civil contempt.

"[T]he intended purpose of [civil contempt] proceedings is remedial—intended to benefit the other party to the action by compelling the defendant to obey the court order . . .." *Lynch v. Lynch*, 342 Md. 509, 519, 677 A.2d 584, 589 (1996). In making a finding of civil contempt, a court must issue a written order that "specif[ies] . . . how the contempt may be purged." Maryland Rule 15-207(d)(2); *see also* Lynch, 342 Md. at 520, 677 A.2d at 589-590.

The rules governing contempt sanctions have been also been enunciated by an unbroken line of Supreme Court decisions from *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911), through *Mineworkers v. Bagwell*, 512 U.S. 821, 831 (1994) and *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011). The leading modern case is *Bagwell*, in which the Supreme Court overturned a contempt fine that had been imposed by the Virginia courts on a union for its non-compliance with an injunction barring certain strike-related activities. The Court held that only civil contempt may be imposed without criminal-level protections, and that the distinction between criminal contempt and civil contempt depends on the purpose of the contempt sanctions and the character of the relief. 512 U.S. at 827. If the sanctions only protect the party that obtained the injunction, either by compensating the party for damages caused by violation of the injunction, or by coercing the contemnor to comply with

the injunction going forward, then the contempt is properly treated as civil. *Id.* at 827–829.[3] A contempt sanction can be treated as coercive, and thus civil, if "the contemnor is able to purge the contempt . . . by committing an affirmative act." *Id.*; *see also Jones v. State,* 351 Md. at 277-279 (to qualify as a civil contempt sanction, the order imposing it must include a "purge clause" that enables the contemnor to escape the penalty by complying with the injunction). But if the contempt sanctions are imposed only for punitive purposes, "criminal contempt sanctions are entitled to full criminal process." *Bagwell*, 512 U.S. at 833.

The contempt sanctions here were plainly criminal rather than civil. By the time the contempt hearing was held, the TRO had long since expired, six months earlier on January 22, 2014; the violation of the TRO was nearly **seven** months in the past. Indeed, considering that the court below determined that the period of non-compliance had ended on January 3, 2014, Anthes' disobedience to the injunction had ended a full week before the motion for contempt was filed. Moreover, the court's opinion below makes clear that the $100 per day fine was intended as punishment that would both uphold the court's own dignity and discourage defendants in future cases from violating the court's orders. E124. Furthermore, in contravention of Maryland Rule 15-207(d), the court failed to specify in its order how the contempt finding could be purged. It was, therefore, a criminal contempt that should be reversed for that reason alone.

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[3]There is one exception to this treatment of punishments for past contempts as criminal: a court may treat as civil certain "petty' direct contempts," a category largely reserved for forms of misconduct in the courtroom. *Bagwell*, 512 U.S. at 832-833.

II. THE CONTEMPT SANCTIONS SHOULD BE REVERSED BECAUSE THE RESTRAINING ORDER WAS TRANSPARENTLY INVALID.

In most cases, an injunction must be obeyed unless or until it is either stayed or overturned, and it is not a defense to a later charge of contempt that the entry of the injunction was unwise or inappropriate. But there are narrow classes of cases in which the invalidity of an injunction may be raised in an appeal from the subsequent contempt sanctions. One example is in discovery proceedings, where the denial of a privilege claim is ordinarily unappealable because it is an interlocutory order, but if the person whose privilege claim was denied subjects himself to a contempt ruling, that determination is appealable, and the contempt appeal provides the vehicle whereby the underlying privilege claim can be tested. *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 111 (2009). That exception can apply here because, when a TRO is entered before the defendant has filed an answer, the TRO is unappealable. Another exception is even more plainly applicable: an appeal from a contempt citation based on an injunction against speech can raise the invalidity of the injunction if the injunction itself is transparently invalid. The Supreme Court of the United States recognized this exception in dictum in *Walker v. Birmingham*, 388 U.S. 307, 315 (1967), noting that the contempt of an order barring a demonstration was proper because "that state court had . . . jurisdiction over the petitioners and over the subject matter of the controversy [a]nd this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." *Id.* at 315. Federal and state appellate courts have applied both exceptions in a number of cases.

For example, the transparent invalidity of prior restraints on publication has often been held to be a valid defense to contempt sanctions imposed for violating those prior restraints. *Wood v. Goodson*, 253 Ark. 196, 485 S.W.2d 213, 217 (Ark. 1972); *State ex rel. Superior Court v. Sperry*, 79 Wash.2d 69, 483 P.2d 608, 611 (Wash. 1971). *See also Cooper v. Rockford Newspapers*, 50 Ill. App.3d 250, 365 N.E.2d 746, 748-749 (Ill. App. 1977) (appeal allowed to raise invalidity of order; order upheld but contempt reversed). In other cases, improper injunctions against picketing and similar speech in the labor context have been overturned through appeals from the resulting contempt citations. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 420 F.2d 72,73 (D.C. Cir. 1969); *In re Berry*, 68 Cal. 2d 137, 436 P.2d 273, 281 (1968). *See also Hyde Const. Co. v. Koehring Co.*, 388 F.2d 501, 510-511 (10th Cir. 1968). *See also U.S. Steel Corp. v. Mine Workers*, 519 F.2d 1236, 1249 (5th Cir. 1975) (contempt overturned because court lacked jurisdiction to issue injunction).

Courts have also overturned contempt sanctions where the underlying order was imposed pursuant to plainly improper procedures. In *Ashcroft v. Conoco*, 218 F.3d 288, 302-303 (4th Cir. 2000), the court entered a sealing order without following the procedures that the Fourth Circuit had previously imposed on all trial courts under its authority, then held a reporter and a newspaper in contempt for opening an envelope that contained a sealed document, reading it, and then reporting on its contents. The Fourth Circuit overturned the contempt because, even if the sealing order might otherwise have been proper, its manner of

adoption was procedurally flawed, hence the contempt sanctions could not be sustained.

In making this argument, Anthes recognizes that the Maryland Court of Appeals refused to allow public employees who violated a no-strike injunction compelling them to return to work to raise arguments about "abuse of the injunctive process" as a ground for invalidating the contempt finding. *Harford Cnty. Educ. Ass'n v. Bd. of Ed. of Harford Cnty.*, 281 Md. 574, 585-86, 380 A.2d 1041, 1048 (1977). But the *Harford County* case did not involve an injunction against pure speech, and it did not take note of the Supreme Court's decision in *Walker v. Birmingham*, not to speak of the later decisions cited above. Nor was *Harford County* a case in which the contemnors argued, as Anthes argues below, that the injunction was transparently invalid. Because there was no argument in that case that the injunction was "transparently invalid," the Court of Appeals did not have occasion to pass on that exception.

Harford County also rested, in part, on the fact that the teachers could have appealed the restraining order, but as a practical matter that option was not available to Anthes, a pro se Arizona resident who had received the TRO but had none of the underlying papers. A precondition for appellate review of a TRO is that the defendant must have filed his answer to the complaint, Maryland Code Cts. & Jud. Proc. § 12-303(3)(i). Because Anthes did not have the complaint in hand until December 31, E91 ¶ 28, after the original TRO had expired and eleven days into the effective period of the extended TRO, compliance with that precondition for an appeal was impossible. Nor was an appeal practicable for a pro se party

located in Arizona. Indeed, as soon as Anthes secured private counsel, he brought himself into compliance with the TRO by **trying** to get his comments removed. By contrast, the defendants in *Harford County* were not only represented by counsel throughout the controversy, but the injunction was not truly ex parte because the opinion reflects that the TRO in that case was issued after the chancellor had met with counsel for both the plaintiff school board **and** the union's counsel. 281 Md. at 577-578.

As explained in the remainder of this brief, the TRO for whose violation Anthes has been held in contempt was patently invalid on substantive as well as procedural grounds.

A. The TRO Against Defamation Was Transparently Precluded by Both The First Amendment's Rule Against Prior Restraints and by Principles of Equity Under Maryland Law.

1. The TRO Was an Invalid 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. *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("Temporary restraining orders and permanent injunctions — *i.e.*, court orders that actually forbid speech activities — are classic examples of prior restraints."). *See also Baltimore Sun Co. v. State*, 340 Md. 437, 447-48, 667 A.2d 166, 171 (1995) (treating trial court order against publication as prior restraint); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (same); *State v. Cottman Transmission Sys.*, 75 Md. App. 647, 659, 542

A.2d 859, 864 (1988) (same). Indeed, injunctions prohibiting speech pose an even greater threat to fundamental rights than do statutes that have an equivalent effect, because injunctions "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). *See also In re Providence Journal Co.*, 820 F.2d 1342, 1352 (1st Cir. 1986) (holding a temporary restraining order prohibiting publication of a newspaper until a hearing could be held several days later to be a "transparently invalid prior restraint on pure speech").

Because of 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, 225 (6th Cir. 1996). In *Procter & Gamble*, the district court entered successive injunctions that prohibited publication of a magazine for a total of three weeks. *Id.* at 221. The Sixth Circuit held the injunctions to be unconstitutional prior restraints, concluding that "[e]ven a temporary restraint on pure speech is improper absent the most compelling circumstances." *Id.* (internal quotation omitted). As the court noted, 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 [mitigated] by less intrusive measures." *Id.* at 225 (quoting *CBS v. Davis*, 510 U.S. 1315, 1318 (1994)); *see Nebraska Press Ass'n*, 427 U.S. 539 (rejecting a prior restraint issued to guarantee a 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 the government's claim that publication could threaten national security).

Plaintiffs' claims of defamation and injury to reputation cannot justify a prior restraint on speech because "private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint." *Procter & Gamble*, 78 F.3d at 226-27. As the Supreme Court held in *Organization for a Better Austin v. Keefe*, 402 U.S. at 419-20, "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."

Even in jurisdictions that allow an injunction against the repetition of a libel that has been found false and defamatory after a full trial (an issue discussed in Part II(A)(2), below), injunctions may not issue against speech that has **not** been thus finally determined. *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208-09 (6th Cir. 1990) (limiting a preliminary injunction to "statements which have been found in this and prior proceedings to be false and libelous") (concurring and dissenting opinion of Wellford, J.); *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. HERE Local 100*, 239 F.3d 172 (2d Cir. 2001) (preliminary injunction against picketing and statements made in labor dispute reversed where there was no prior determination of falsity); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993); *Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991). For this reason, courts have also rejected

attempts to obtain preliminary injunctive relief against Internet criticism. *New Net v. Lavasoft*, 356 F. Supp. 2d 1071 (C.D. Cal. 2003) (holding that a preliminary injunction is improper when there has been no prior adjudication of falsity); *Bihari v. Gross*, 119 F. Supp.2d 309, 324-327 (S.D.N.Y. 2000) (holding that the First Amendment prohibited a preliminary injunction against an allegedly defamatory website criticizing a home design company); *Ford Motor Co. v. Lane*, 67 F. Supp.2d 745, 749-753 (E.D. Mich. 1999) (holding that a preliminary injunction prohibiting publication of a web site alleged to divulge trade secrets would be an unconstitutional prior restraint on speech).[4]

In sum, the TRO was transparently invalid as an impermissible prior restraint forbidden by the First Amendment.

2. The TRO Was Transparently Invalid Under State Law.

Not only did TRO plainly violate the First Amendment, it was also invalid because Maryland is one of many states that follows the traditional rule that "equity will not enjoin a libel" or, in the words of the Fourth Circuit, "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." *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1972). The Maryland Court of Appeals has

[4]The TRO went even further afield when it ordered defendants' not to express "any other defamatory matter," an impermissibly vague injunction that placed Anthes in the position of guessing, on pain of contempt, whether he was forbidden to make other statements critical of plaintiffs that had never been alleged to be false.

repeatedly followed this rule, *Warren House Co. v. Handwerger*, 240 Md. 177, 178-179, 213 A.2d 574 (Md. 1965); *Prucha v. Weiss*, 233 Md. 479, 484, 197 A.2d 253, 256 (Md. 1964), as have many other jurisdictions. *D'Ambrosio v. D'Ambrosio*, 45 Va. App. 323, 340, 610 S.E.2d 876 (Va. App. 2005); *Ramos v. Madison Square Garden Corp.*, 257 A.D.2d 492, 684 N.Y.S.2d 212, 213 (N.Y. App. Div. 1999); *Willing v. Mazzocone*, 482 Pa. 377, 393 A.2d 1155, 1157-1168 (1978); *Greenberg v. De Salvo*, 254 La. 1019, 229 So.2d 83, 86 (La. 1969).

Moreover, the showing that plaintiffs made in support of their requested restraining order was grossly inadequate. There was no admissible evidence that Anthes made any false factual statements or that any false factual statements were causing legally significant injury; much of what Anthes said consisted of non-actionable expressions of opinion. No affidavits were presented in support of the TRO, and although the complaint was verified, it was verified only "to the best of [the] knowledge, information and belief" of plaintiff Callender. An affidavit made on information and belief is not sufficient to support or oppose a motion for summary judgment, *County Comm'rs of Caroline Cnty. v. J. Roland Dashiell & Sons,* 358 Md. 83, 103, 747 A.2d 600 (2000). The Maryland Court of Appeals has overturned a preliminary injunction because it was based on an "information and belief" averment that "is at best merely a conclusion of the plaintiff based on information the source of which is not disclosed." *City of Baltimore v. Dobler*, 140 Md. 634, 118 A. 168, 170 (1922). *See also Allstate Ins. Co. v. Warns*, 2012 WL 681792 (D. Md. Feb. 29, 2012) (preliminary injunctions should not be granted "where the moving party substantiates his side of a factual dispute on

information and belief"), quoting *Marshall Durbin Forms v. National Farmers Org.*, 446 F.2d 353, 357 (5th Cir. 1971).

B. The TRO Was Transparently Invalid Because It Was Obtained by Constitutionally Flawed Procedures.

The final reason why the contempt sanctions should be overturned is that they were obtained ex parte, without any notice to Anthes or opportunity for Anthes to appear to defend his interests, in flagrant violation of the First Amendment. The Supreme Court has held, in an appeal from a restraining order issued by a different Maryland circuit court, that a "restraining order . . . issued ex parte, without formal or informal notice to the [defendants] or any effort to advise them of the proceeding, cannot be sustained." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968). Although the trial court faulted Anthes on the ground that he could have applied to have the restraining order lifted on two days' notice as provided by Maryland Rule 15-503(f), the Supreme Court rejected this ground for defending the decision of the Maryland Court of Appeals in the *Princess Anne* case: "this procedural right does not overcome the infirmity in the absence of a showing of justification for the ex parte nature of the proceedings." 393 U.S. at 184.

The ex parte order was also issued in plain violation of Maryland Rule 1-351, which forbids the issuance of any ex parte order unless "the moving party has certified in writing that all parties who will be affected have been given notice of the time and place of presentation of the application to the court or that specified efforts commensurate with the circumstances have been made to give notice." The record does not reflect that any such

certification has been made, nor could plaintiffs' counsel have so certified considering that counsel should have been aware, on the day that he filed the verified complaint, that his cease-and-desist letter had not been successfully delivered to the address that he had used for mailing to Anthes. And if counsel brought the proposed TRO to court for the trial judge's signature on the date that it was signed, November 15, 2013, he must have known that the letter had been returned to his office the day before. Nor did the trial court make any findings, even in the proposed order that appears to have been written for its benefit by the plaintiffs, about why it was impractical to give notice before issuing an extraordinary prior restraint against pure speech, as required by Maryland Rule 15-504(b): "A temporary restraining order may granted without written or oral notice only if the applicant or the applicant's attorney certifies to the court in writing, and the court finds, that specified efforts commensurate with the circumstances have been made to give notice."

In sum, the TRO for whose violation Anthes was held in contempt was transparently invalid on procedural as well as substantive grounds; the contempt order should be reversed for that reason as well.

CONCLUSION

The order holding Anthes in contempt and ordering him to pay a fine to the Court and an attorney fee to counsel for plaintiffs should be reversed.

Respectfully submitted,

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April 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of April, 2015, I caused two copies of the foregoing brief to be served by first-class mail, postage prepaid, on the following:

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CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The **First Amendment to the United States Constitution** provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 12-303(3)(i) of the Maryland Code provides:

A party may appeal from any of the following interlocutory orders entered by a circuit court in a civil case:
* * *
(3) An order:

(i) Granting or dissolving an injunction, but if the appeal is from an order granting an injunction, only if the appellant has first filed his answer in the cause;

Maryland Rule 15-205 provides, in pertinent part

(a) Separate action. A proceeding for constructive criminal contempt shall be docketed as a separate criminal action. It shall not be included in any action in which the alleged contempt occurred.

(b) Who may institute.

(1) The court may initiate a proceeding for constructive criminal contempt by filing an order directing the issuance of a summons or warrant pursuant to Rule 4-212.
(2) The State's Attorney may initiate a proceeding for constructive criminal contempt committed against a trial court sitting within the county in which the State's Attorney holds office by filing a petition with that court.

Maryland Rule 15-206 provides, in pertinent part

(a) Where filed. A proceeding for constructive civil contempt shall be included in the action in which the alleged contempt occurred.

(b) Who may initiate.

(1) The court may initiate a proceeding for constructive civil contempt by filing an

order complying with the requirements of section (c) of this Rule.
(2) Any party to an action in which an alleged contempt occurred and, upon request by the court, the Attorney General, may initiate a proceeding for constructive civil contempt by filing a petition with the court against which the contempt was allegedly committed.

Maryland Rule 15-207(d)(2) provides:

(2) Order. When a court or jury makes a finding of contempt, the court shall issue a written order that specifies the sanction imposed for the contempt. In the case of a civil contempt, the order shall specify how the contempt may be purged. In the case of a criminal contempt, if the sanction is incarceration, the order shall specify a determinate term and any condition under which the sanction may be suspended, modified, revoked, or terminated.

Maryland Rule 15-503 provides:

(a) Generally. Except as otherwise provided in this Rule, a court may not issue a temporary restraining order or preliminary injunction unless a bond has been filed. The bond shall be in an amount approved by the court for the payment of any damages to which a party enjoined may be entitled as a result of the injunction.

Maryland Rule 504(b) provides, in pertinent part:

(b) Without notice. A temporary restraining order may be granted without written or oral notice only if the applicant or the applicant's attorney certifies to the court in writing, and the court finds, that specified efforts commensurate with the circumstances have been made to give notice. Before ruling, the judge may communicate informally with other parties and any other person against whom the order is sought or their attorneys.
* * *
(c) Waiver. On request, the court may dispense with the requirement of surety or other security for a bond if it is satisfied that (1) the person is unable to provide surety or other security for the bond, (2) substantial injustice would result if an injunction did not issue, and (3) the case is one of extraordinary hardship. The request shall be supported by an affidavit or testimony under oath stating the grounds for entitlement to the waiver.