IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

JIM BUTLER CHEVROLET, INC.,	)	
	)	
Plaintiff,	)	
	)	Cause No. 14SL - CC00556
v.	)	
	)	Division No. 20
DWAYNE COONEY,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISOLVE TEMPORARY RESTRAINING ORDER AND OPPOSITION TO PRELIMINARY INJUNCTION

COMES NOW Defendant Dwayne Cooney and for his reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dissolve Temporary Restraining Order and Opposition to Preliminary Injunction states:

Plaintiff has provided the court with a Memorandum in Opposition to Defendant's Motion to Dissolve the temporary restraining order entered against Mr. Cooney containing a series of case citations purporting to support its position that Mr. Cooney's speech is not constitutionally protected. Plaintiff, however, has mischaracterized Defendant's argument and offered particularly unpersuasive caselaw.

Addressing Plaintiff's points (a) and (b), Defendant did not argue that a permanent injunction can *never* issue in cases of defamation. Rather, Defendant argued that a temporary restraining order or preliminary injunction cannot be issued in this case because the First Amendment and its Missouri counterpart forbid such relief. Indeed, in some cases, in some states, a permanent injunction may issue *after a jury has determined that defamation has*

occurred. Here, there is no issue before the court concerning a permanent injunction following a jury's determination. Cases in which a court has enjoined words found to be defamatory after a trial on the merits are inconsequential at this point in the case, except to support Defendant's argument that an injunction against speech cannot issue unless and until the speech is found by a jury to be defamatory.

As for Plaintiff's point (c), again, a trial on the merits has not yet taken place. Plaintiff alleges the statements are defamatory. Defendant maintains the statements are not defamatory and, in certain instances, true. This is a factual issue that will have to be decided by a jury at a trial upon the merits of Plaintiff's defamation claim.

The caselaw cited by Plaintiff is unpersuasive and misleading. Plaintiff cites *Boemler Chevrolet Co. Inc. v. Combs*, 808 S.W.2d 875 (Mo. App. E.D. 1991) for the proposition that "trial court granted TRO and preliminary injunction enjoining defendants from, among other things, picketing with the use of signs containing defamatory statements." While the trial court in *Boemler* did issue such an injunction prohibiting picketing, that portion of the injunction reviewed by the appellate court was overturned. *Id.* at 882. The remainder of the trial court's injunction was neither contested by the defendant nor reviewed by the appellate court.

> On appeal, appellants in their two points and arguments attack that portion of the injunction which prohibits their picketing on the right-of-way of any highway. They do not contest the remainder of the trial court's order as to the award of nominal damages, **the signs**, picketing on respondent's property or the blocking of the driveways. *Id.* at 880 (emphasis supplied).

While the trial court had prohibited certain speech in its preliminary injunction, that issue was not contested by the defendant and was thus not addressed by the court of appeals. This is case is of no assistance to Plaintiff simply because it does not address the issue of prior restraint. That the trial court in *Boemler* may have made a mistake is no reason to persuade this court to do the same.

Boemler is further distinguishable in that it is a picketing case and the Courts have treated physical picketing as subject to certain restraints without offense to free speech rights. Our own case does not involve picketing. Picketing does not receive the same protection under the First Amendment as do other forms of speech.

> But while picketing is a mode of communication it is inseparably something more and different. ... Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences very different from other modes of communication. ... Picketing is not beyond the control of a state if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. *Hughes v Superior Court of California*, 399 U.S. 460, 465 (1950); see also Babbitt v United Farm Workers Nat. Union, 442 U.S. 289, 311, n. 17 (1979).

Plaintiff also cites *MB Town Center, TP v. Clayton Forsyth Foods, Inc.,* as a case in which a trial court issued a prior restraint on speech by way of injunction. 364 S.W.3d 595 (Mo. App. E.D. 2012). What Plaintiff neglects to advise the court is that the constitutional issue was

waived by the party against whom the injunction was issued. While the trial court erroneously issued a temporary restraining order restricting speech, the Court of Appeals found that it could not address the constitutional issues because they were waived by the defendant's failure to raise those at any point. *Id.* at 604. There has been no such waiver in this case.

In support of its argument that this court should find that that the facts of this case meet the heavy burden borne by one who seeks a prior restraint on speech, Plaintiff points to an unreported district court case from Indiana, *Eppley v. Iacovelli,* No. 1-09-cv-386-SEB-JMS, 2009 WL 1035265, at *5(S.D. Ind. April 17, 2009). While this case has no precedential value as an unreported opinion of a trial court, it is easily distinguishable. In *Eppley*, the Defendant was alleged to have violated several state statutes including engaging in harassing behavior, stalking and attempting to extort money from the defendant, Dr. Eppley. *Id.* The plaintiff, a former patient of Dr. Eppley, threatened to "destroy" the defendant and to inflict "irreparable" harm upon him; even making the disturbing claim that she was going to commit suicide in a dramatic fashion so as to blame Dr. Eppley. *Id.* The district court was convinced that the statements enjoined were false statements, but those statements are not set forth in detail in the order. *Id.* It is unclear to what extent, if any, the defendant argued against the preliminary injunction, filed an Answer or raised any constitutional issues. The defendant was unrepresented by counsel and eventually had summary judgment entered against her for failure to respond to that motion. *Eppley v. Iacovelli*, 1:09-CV-386-SEB-DML, 2010 WL 3282574 (S.D. Ind. Aug. 17, 2010).

Lastly, Plaintiff relies upon *Ina Profit Associates, Inc. v. Paisola,*461 F.Supp.2d 672, 679-80 (N.D. Ill. 2006), wherein the court granted a temporary restraining order prohibiting defendant from making false statements about his purported management of the plaintiff

company. Plaintiff cites this case for the proposition that the trial court order "prohibited defendants from continuing to publish false and defamatory statements regarding the plaintiff." That is a misleading summary of the case. While there were many potentially defamatory statements published by the defendant, the court stated: "I find that the **only** instance of defamation against which defendants may be enjoined at this stage of the litigation is defendants' false representation that IPA offered to settle with Paisola, and that as part of this settlement IPA agreed to pay Paisola and to allow Paisola to participate in the management of the company." *Int'l Profit Associates, Inc. v. Paisola*, 461 F. Supp. 2d 672, 679-80 (N.D. Ill. 2006) (*emphasis supplied*). The only reason for enjoining such statements was that they could lead to actual confusion such that plaintiff had no adequate remedy at law. If the public were led to believe that Paisola was actually participating in the management of the plaintiff company, that sort of misinformation arguably could not be remedied by damages awarded at a trial a year or more later. The other allegedly defamatory statements published on the internet were not, in fact, enjoined. In our case, Defendant has not made any claim that he is or has been involved in the management of Plaintiff Jim Butler Chevrolet, Inc. or any statement that could lead to confusion over the ownership or management of Jim Butler Chevrolet.

Plaintiff has cobbled together an argument with Missouri cases in which the constitutional issue was waived by the defendant in the trial or appellate proceedings, an unreported Indiana federal district court case in which the plaintiff (who apparently failed to raise any constitutional issue) was a *pro se* litigant harassing, stalking and attempting to extort the Plaintiff, as well as a northern district of Illinois case wherein the court enjoined false statements that the defendant had a share in the ownership or management of the plaintiff

corporation. None of these cases is persuasive. Plaintiff has failed to distinguish any of the cases cited by Defendant or establish any reason why Defendant's cases do not control this case.

Plaintiff has failed to demonstrate that there is any caselaw under which the temporary restraining order or preliminary injunction in this case could be justified. As set forth in this Defendant's Motion to Dissolve and Opposition to Preliminary Injunction, a temporary restraining order or preliminary injunction would be violative of both the First Amendment of the United States Constitution and Article 1, Section 8 of the Missouri Constitution.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was hand-delivered on this 4th day of March, 2014 to: Dutro E. Campbell, II and Sandra Oh, Husch Blackwell, LLP, 190 Carondelet Plaza, Clayton, Missouri 63105, Attorneys for Plaintiff.

Martin J. Buckley