IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

RICHARD KAPLAN AND LEONARD TOLLEY,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 50 2004 CA 011046
	)	
ELAINE PRENTICE,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This action was filed to suppress an Internet web site created by defendant Elaine Prentice to warn the public about the treatment that she received from several Florida dentists and about the manner in which the Florida Department of Health and its hired expert mishandled her complaint about those dentists. On November 24, 2004, plaintiffs Richard Kaplan and Leonard Tolley filed this action for a temporary injunction compelling Prentice to take down her entire web site on the ground that it contains "confidential matters that relate to the Florida Department of Health's review of Defendant's complaint," allegedly in violation of Section 456.073(10), Fla. Stat. Plaintiffs later amended their complaint to limit their claim to the part of the web site that discusses the Health Department. Because Section 456.073(10) does not forbid Florida citizens from complaining publicly either about their dentists or about the state agency's failures, because plaintiffs lack standing to protect the Health Department from criticism, because it is well settled that the First Amendment and the rule against prior restraints would forbid the law from being applied that way, and because the web site itself, which may be considered because its contents are alleged in the complaint, does not disclose information of the sort protected by Section 456.073(10), the motion for judgment on the pleadings should be granted.

STATEMENT OF THE CASE

A. Facts.

Defendant Elaine Prentice, a resident of North Palm Beach, employed the services of Richard Kaplan and Leonard Tolley (plaintiffs here) and other dentists to perform extensive dental procedures. She was dissatisfied both with their work and with the way in which she felt she had been induced to undergo the procedures in question. She complained to the Florida Department of Health, which assigned an expert to examine her and, ultimately, determined that no further proceedings against her dentists were appropriate. Prentice disagreed with this assessment and felt that the expert, who told her to "get some mental counseling . . . and get on with [her] life," had behaved unprofessionally. She explained these objections in detailed letters to the Department and its counsel.

Prentice then decided to create a web site to describe her travails, not only with the dentists about whom she had complained, but with the Health Department's procedures as well. She registered the domain name www.dentalfraudinflorida.com, and posted her information there. On her home page, a copy of which is attached as Exhibit A, appear several links to the internal web pages of her site, including one entitled "My Personal Dental Tragedy," which recounts her experience in detail; one entitled "Before and After Xrays," a page that shows Xrays of her mouth; and one link for each of the four dentists whose treatment she found unsatisfactory, connecting to pages setting forth correspondence, bills and dental records reflecting her involvement with each dentist. Additional sections of the web site solicit public comment and set forth the comments that Prentice has received from other dentists and from members of the public.

In addition, the web site contains the link and web page at issue in this case. The link, which

reads, "Florida Department of Health - MQA: What are they and how effective are they?", leads to a web page located at www.dentalfraudinflorida.com/HD.htm, a copy of which is attached as Exhibit B. The Health Department section of the web site contains open letters to the Department's expert, the Department and its counsel, and offers an opportunity to respond on her web site. The section then sets forth the letters she had sent to the Department explaining why she felt the Department's handling of her complaint was inadequate and improper, as well as the Department's letters in response. One such letter, from Assistant General Counsel Bunton, explained that he was unable to provide further explanation of the Board's decision because "Under Section 456.073, Florida Statutes, all matters pertaining to Probable Cause Panel activities are considered privileged and exempt from the Public Records Law and the Sunshine Law," unless this privilege were waived by the dentists involved. Amended Complaint, Exhibit A.

Among other matters, Prentice compared her situation to other cases in which the Department had imposed discipline, as reflected in Board minutes that she included in her web site. The web site does not, however, contain either her actual complaint about her dentists, or the Board's ruling on that complaint.

B. Proceedings to Date.

This proceeding began on November 24, 2004, when plaintiffs filed this action styled as a "Complaint for Temporary Injunctive Relief." The complaint alleged that Prentice's web site, www.dentalfraudinflorida.com, "is comprised of confidential matters that relate to the Florida Department of Health's review of Defendant's complaint, ¶¶ 5-6, and that, consequently, Prentice had violated Section 456.073(10), Fla. Stat., by publishing the information on the Internet. The complaint asserted that Prentice "does not have the right nor should she be permitted to publish **any**

of the materials on the Internet **relating to her complaint** with [sic] the Florida Department of Health or the contents thereof." *Id.* (emphasis added). The complaint set forth the purported purpose of the statute, cited several cases interpreting it, ¶ 7, prayed for a temporary injunction against the operation of Prentice's entire web site, ¶¶ 9, 13, and further requested issuance of the injunction without any notice to Prentice. ¶ 10.

In response to the Complaint, Prentice consulted with undersigned counsel, who promptly called plaintiffs' counsel to explain that the complaint was without any basis in fact or law, both because the statute restricts only the Department of Health's disclosure of information, without preventing individual citizens from complaining about their dentists, and because the statute would violate the First Amendment if it did restrict citizens' free speech. Counsel also explained that, even under plaintiffs' theory, the complaint improperly sought an injunction against the entire web site, when only one page of the site discussed the Department of Health's investigation. Plaintiffs' counsel responded to this courtesy call by telling defendant's counsel to "bring it on," and claiming that the Florida Department of Health was going to join the request for a preliminary injunction. However, plaintiffs' counsel promised to provide notice of any hearing seeking issuance of an injunction. *See* Exhibit C, attached.

On January 10, 2005, plaintiffs amended their complaint to limit the scope of the injunction sought to "any and all language or documents reporting on the Florida Department of Health Board of Dentistry matters which Plaintiffs contend are confidential." ¶ 10. Prentice answered the complaint on January 20, 2005, and filed a Motion for Judgment on the Pleadings on April 15, 2005. Despite the fact that their complaint alleges severe and irreparable injury, plaintiffs have yet to file a motion for a preliminary injunction, or to set a hearing on such a request. Prentice has now set a

hearing on her own motion for judgment on the pleadings.

ARGUMENT

PLAINTIFFS' COMPLAINT PATENTLY FAILS TO STATE A CLAIM.

1. The Statute Does Not Limit Disclosure by Complainants.

The statute at issue, section 456.073(10), provides in pertinent part as follows:

> (10) The complaint and all information obtained pursuant to the investigation by the department are confidential and exempt from s. 119.07(1) until 10 days after probable cause has been found to exist by the probable cause panel or by the department, or until the regulated professional or subject of the investigation waives his or her privilege of confidentiality, whichever occurs first. Upon completion of the investigation and a recommendation by the department to find probable cause, and pursuant to a written request by the subject or the subject's attorney, the department shall provide the subject an opportunity to inspect the investigative file or, at the subject's expense, forward to the subject a copy of the investigative file. Notwithstanding s. 456.057, the subject may inspect or receive a copy of any expert witness report or patient record connected with the investigation if the subject agrees in writing to maintain the confidentiality of any information received under this subsection until 10 days after probable cause is found and to maintain the confidentiality of patient records pursuant to s. 456.057.

It is apparent from the text of this statute that it does not regulate the right of the person making the complaint to say anything. All of the tools of statutory construction support that reading of the statute, and none supports plaintiffs' contention that the statute bars any portion of Prentice's web site. Indeed, given the serious constitutional questions that would be raised if the statute were construed in the manner propounded by plaintiffs in their complaint, the Court should adopt a construction of the statute that would make it unnecessary to consider these constitutional problems.

The first sentence of the provision provides that the Department must not disclose either the complaint or the investigative file, exempting such information from Section § 119.07(1), Fla. Stat., the Public Records Law. The third sentence of the statute gives the subject of the investigation the

right to see the investigative file, so long as "the subject" agrees to keep that information confidential. But nothing in the statute limits the right of the patient, referred to throughout the statute as the "complainant," to repeat publicly her complaints about the health professional or, indeed, to criticize the state agency. Moreover, the sentence limiting the right of the "subject" to disclose information would be mere surplusage if the first sentence meant, as plaintiffs contend, that anybody other than the Department was required to keep the complaint and investigative file confidential.

Second, a comparison of the language of section 456.073(10) with other Florida laws governing the confidentiality of public proceedings shows that this statute does not restrict Prentice's right to speak about her complaint. Where Florida statutes (all of them struck down as unconstitutional) have purported to limit the rights of citizens to disclose publicly their complaints or statements in official proceedings, the statutes have expressly applied to disclosures by the complainant or participant in the proceeding. For example, Section 112.317(6), Fla. Stat., struck down in *Doe v. Gonzales*, 723 F. Supp. 690 (S.D. Fla. 1988), provided "Any person who willfully discloses, or permits to be disclosed, his intention to file a complaint [with the State Ethics Commission] . . . shall be guilty of a misdemeanor." Similarly, Section 112.533(3), Fla. Stat., struck down in *Hickox v. Tyre*, Case No. 87-8327-Civ-Zloch (S.D. Fla. 1987), provided "Any person who willfully discloses, or permits to be disclosed, his intention to file a complaint [against a police officer], the existence or contents of a complaint which has been filed with an agency, or any document, action, or proceeding in connection with a confidential internal investigation. . . herein is guilty of a misdemeanor." Another section of that same statute, § 112.533(4), Fla. Stat., struck down earlier this year in *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005), similarly extended its

prohibitions to "the complainants," and expressly forbade such persons to "disclose[] any information." Along the same lines, Rule 3-7.1 of the Rules regulating the Florida Bar, struck down in *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla.1990), provided that "All of such matters . . . shall be confidential to all parties participating [in bar disciplinary proceedings] or having knowledge thereof except as otherwise provided in these rules. All persons shall be admonished by the agency before whom they appear to observe the confidential nature of such proceedings." Moreover, persons who filed complaints were warned that they would be held in contempt of court if they violated that rule. *Id.* at 983. And, Section 905.27, Fla. Stat., struck down in *Butterworth v. Smith*, 494 U.S. 624 (1990), provided, "[A]ny other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury . . .."

The very explicit manner in which these statutes applied their prohibitions to members of the public who filed complaints or otherwise participated in the proceeding makes clear that when the Legislature wants to limit the public, it knows how to say so. When the Legislature does not explicitly limit all citizens, as in section 456.073(10), the statute should not be construed to apply that broadly.

Indeed, it appears that the Department of Health agrees with defendant's construction of the statute, and not with plaintiffs' construction. In the letter to Prentice from the Department's Assistant General Counsel that is attached to the Complaint as Exhibit B, the Department explained that the statute simply exempts its records from the Public Records and Sunshine Laws. Accordingly the Department has not taken action to intervene in this case to support plaintiffs' request for

injunctive relief, as plaintiffs' counsel claimed it would do.[1]

2. Prentice's Web Site Does Not Contain Information Whose Disclosure Is Limited By the Statute.

Even if section 456.073(10) were construed to prohibit complainants as well as the Department from making disclosures, Prentice's web site does not include the information that is covered by the statute.[2] The Amended Complaint asserts that the statute forbids disclosure of any information "relating to the complaint," ¶ 6, or "Florida Department of Health Board of Dentistry matters," ¶¶ 8, 9, 12, but the statute is not nearly so broad. It restricts access only to the complaint itself, and "all information obtained pursuant to the investigation by the department." § 456.073(10) The Department of Health page of Prentice's web site, which is attached this memorandum as Exhibit B, does not contain either Prentice's actual complaint to the Department, or any of the information about plaintiffs or other dentists that was obtained by the Department pursuant to its investigation of Prentice's complaint. Indeed, as Exhibit A to the Complaint makes clear, the Department refused to give Prentice information it had obtained pursuant to its investigation – hence

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[1]The Department is aware of Prentice's web site. Its representative advised defendant's counsel that the Department does not believe the site violates the law, and that the Department has no plans to intervene in this case.

[2] We have found no Florida cases on point, but in federal cases review of the site is permissible on a motion for judgment on the pleadings either because the web site both is alleged in the complaint, and is central to plaintiffs' cause of action, *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005); *Horsely v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002), and because it appears on the Internet and hence is subject to judicial notice. *Bryant v. Avado Brands*, 187 F.3d 1271, 1280-1281 (11th Cir, 1999). See *Cairns v. Franklin Mint Co.*, 107 F. Supp.2d 1212, 1216 (C.D. Cal. 2000) (taking judicial notice of material on web sites); *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co.*, 61 F. Supp. 2d 1058, 1066 (N.D. Cal. 1999) (same); *Elliott Associates LP v. Banco de la Nacion*, 194 F.R.D. 116, 121 (S.D.N.Y. 2000) (same). Such review is particularly appropriate here because it would enable the Court to avoid reaching the serious constitutional issues that this case could otherwise present.

she was in no position to disclose such information on her web site. Instead, the section contains Prentice's **complaints about the investigation and its inadequacies**, as well as the Department's explanation that it was unable to give Prentice the information that it had obtained during the investigation.

At the most, Prentice's web site may contain some of the same information that she provided to the Health Department, but as the Supreme Court held in *Butterworth v, Smith*, 494 U.S. 624 (1990), a citizen may not be forbidden from revealing her **own** testimony to a state body, not to speak of barring her from voicing criticisms simply because they were also presented to state investigators. The Court should not construe a Florida statute in a manner that would run afoul of this well-established First Amendment doctrine.

3. Plaintiffs Lack Standing to Sue to Suppress Prentice's Criticism of Others.

Moreover, it is questionable whether plaintiffs have standing to complain about this part of the web site. The purpose of the section of the web site that plaintiffs seek to enjoin is to describe Prentice's opinions about the inadequate public regulation of the dental profession. Although this section contains some discussion of the two plaintiffs (*see* pages 8-9, 18, 20, 30 and 32 of Exhibit B), this discussion of plaintiffs appears in a letter from Prentice asking the Department to revoke its finding of no probable cause to support her complaint. Those same criticisms appear, in greater detail, in other parts of the web site that plaintiffs are not asking the Court to enjoin. If anyone is attacked by this section of the web site it is the Department's staff and its retained expert, Dr. Ferris; yet those persons have not sued to silence criticism on Prentice's web site. Plaintiffs have standing to sue only on claims that affect their own rights, *i.e.*, "a legally cognizable interest which would be affected by the outcome of the litigation." *Weiss v. Johansen*, 898 So.2d 1009, 1011 (Fla. 4th

DCA.2005); *Nedeau v. Gallagher*, 851 So.2d 214, 215-216 (Fla. 1st DCA 2003). Although other parts of the web site directly criticize plaintiffs, plaintiffs are not complaining about those other sections of the web site and are not seeking to shut them down. Plaintiffs do not have standing to seek an injunction whose only effect would be to eliminate criticism of other persons.

4. If the Statute Were Construed to Bar Prentice's Web Site, It Would Be Unconstitutional.

Finally, even if the Legislature enacted a law that forbade citizens from reporting their personal experiences, the law would be unconstitutional. As discussed above, at pages 6-7, several Florida statutes that bar disclosures by complainants have been held unconstitutional. Similar statutes have been struck down in other states as well. *See Doe v. Doe,* 127 S.W.3d 728 (Tenn. 2004); *Petition of Brooks*, 678 A.2d 140 (N.H.1996). Moreover, the First Amendment fully applies to Internet communications, *Reno v. ACLU*, 521 U.S. 844 (1997), and consumer "gripe" sites about businesses have been held protected against injunctions in many different cases. *See, e.g., Bosley v. Kremer*, 403 F.3d 672 (9th Cir. 2005); *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002 (9th Cir. 2004); *TMI v. Maxwell*, 368 F.3d 433 (5th Cir. 2004); *Taubman v. WebFeats*, 319 F.3d 770 (6th Cir. 2003); *CPC Intern. v. Skippy Inc*., 214 F.3d 456 (4th Cir. 2000). The patent unconstitutionality of the statute if construed as plaintiffs argue is yet another reason why the statute should not be read to apply that way. Moreover, the application of state rules of law to limit speech, even in the context of a civil lawsuit, is "state action" that must comply with the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). This is particularly when the action prays for an injunction against speech. *Organization for a Better Austin v. Keefe*, 402 US 415, 418 (1971).

Finally, the prayer for a preliminary or temporary injunction against speech seeks a prior restraint, which is the most offensive sort of regulation under First Amendment law. Any temporary injunction against speech, which must necessarily be issued based only on a preliminary determination of the rightness of a plaintiff's allegations, is per se a prior restraint. *Rogers & Ford Const. Corp. v. Carlandia Corp.*, 626 So.2d 1350, 1352 (Fla.1993); *Republican Party of Florida v. Florida Elections Com'n*, 658 So.2d 653, 657 (Fla. 1st DCA 1995); *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001). A prior restraint can be justified only by the most compelling of government interests, such as paramount and immediate threats to the national security. *New York Times Co. v. United States*, 403 U.S. 713 (1971). The interest of a businessman or professional in avoiding criticism never justifies a prior restraint. *Organization for a Better Austin v. Keefe*, 402 US 415, 419 (1971) ("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.") Surely, two dentists' interest in protecting a state regulatory body from criticism in connection with its handling of a complaint against those dentists does not rise to the level of government interest that would be required to support the issuance of a temporary injunction against such criticism. Yet such an injunction is the **only** relief that is sought in this case. Defendant's motion for judgment on the pleadings should be granted because the relief sought, as well as the underlying cause of action, are so plainly improper.

CONCLUSION

Defendant's motion for judgment on the pleadings should be granted.

Respectfully submitted,

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July 18, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 18th day of July, 2005, I caused a true and correct copy of the foregoing to be furnished to counsel for plaintiffs by UPS Second Day Air, as follows:

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