UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WAYNE ANDERSON	*	**CIVIL ACTION**
JENNIFER ANDERSON	*	
	*	
VERSUS	*	**NO. 2:16-cv-13733**
	*	
JERRY LARPENTER	*	**JUDGE**
	*	
	*	**MAGISTRATE**

MOTION FOR PRELIMINARY INJUCTION

Plaintiffs Wayne and Jennifer Anderson, move the Court for a preliminary injunction in the above-entitled cause enjoining the Defendant, Sheriff Jerry Larpenter, their agents, servants, employees and attorneys, and those persons in active concert or participation with them from proceeding with the criminal investigation of the criminal defamation complaint that is the subject of the search warrant issued, and by operation, return the property seized to the Plaintiffs.

The grounds in support of this motion are found in the supporting Memorandum of Law.

Unless restrained Defendants will suffer continued irreparable harm.

Immediate and irreparable injury, loss, and damage will result to the Plaintiffs by reason of the threatened action of the Defendants, as more particularly appears in the Complaint filed in this action and the attached exhibits. The Plaintiffs have no adequate remedy at law.

If this preliminary injunction is granted, the injury, if any, to Defendants, if final judgment is in their favor, will be inconsiderable.

Dated: August 12th, 2016.

RESPECTFULLY SUBMITTED,

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MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

NOW INTO COURT, through undersigned counsel, Plaintiffs Wayne and Jennifer Anderson respectfully submits this memorandum in support of motion for injunctive relief.

I. RELIEF REQUESTED AND APPLICABLE STANDARD

This Court has jurisdiction pursuant to 28 U. S. C., Sections 1331, 1343, 2201, 2202; 42 U. S. C., Sections 1983, 1988; and the First, Fourth, and Fourteenth Amendments to the United States Constitution and Rule 65 of the Federal Rules of Civil Procedure. Departure from the Younger abstention doctrine is proper, as the actions taken by the State were in bad faith, and the purpose of such an action was to harass the Plaintiffs.

This Court should immediately issue a temporary restraining order preventing Sheriff Jerry Larpenter, and any of their authorized employees from proceeding with the criminal investigation of the criminal defamation complaint that is the subject of the search warrant issued. Pursuing the criminal investigation would create an irreparable injury along with the humiliation, embarrassment, and message to other citizens that exercising constitutionally

protected speech could result in criminal prosecution, and violations of their 4th amendment rights. Plaintiffs' civil rights complaint derives from criminal proceedings brought against them for expressions of protected speech. This restraining order serves the public interest by restraining curtailment of protected speech and upholding the protections granted by the 4th amendment.

District court's exercise of discretion in issuing a preliminary injunction is guided by four factors: (1) whether plaintiff will have an adequate remedy at law or will be irreparably harmed if injunction does not issue; (2) whether threatened injury to plaintiff outweighs threatened harm the injunction may inflict on defendant; (3) whether plaintiff has at least a reasonable likelihood of success on the merits; and (4) whether granting of preliminary injunction will disserve public interest; likelihood of success factor serves as a threshold requirement and if such factor is unsatisfied and if plaintiff has not shown irreparable injury, court need go no further in denying preliminary injunction. O'Connor v. Board of Ed. of School Dist. No. 23, C.A.7 (Ill.) 1981, 645 F.2d 578, certiorari denied 102 S.Ct. 641, 454 U.S. 1084, 70 L.Ed.2d 619, on remand 545 F.Supp. 376.

The factors for determining whether prosecution was brought in bad faith or to harass, to trigger a departure from the Younger abstention doctrine include: (1) whether it was frivolous or undertaken with no objective hope of success; (2) whether it was motivated by the defendant's suspect class, or in retaliation for the exercise of constitutional rights; and (3) whether it was conducted in a manner to harass or to constitute an abuse of prosecutorial discretion, typically through unjustified and oppressive use of multiple prosecutions). Phelps v. Hamilton, 59 F.3d 1058, 1064-65 (10th Cir. 1995).

II. PLAINTIFFS WILL BE IRREPARABLY HARMED IF INJUNCTION DOES NOT ISSUE

Plaintiff Wayne Anderson has suffered irreparable injury, as he cannot work details, which account for a large portion of his income. Further, both Plaintiffs have and are suffering injury to their reputation in the community as a result of the actions taken by the Sheriff.

III. INJURY THREATENED TO PLAINTIFF OUTWEIGHS THE LACK OF INJURY TO DEFENDANTS IF TEMPORARY RESTRAINING ORDER IS ISSUED

The injury threatened to the plaintiffs, that being the loss of income provided by working security details, the curtailment of their 1st and 4th amendment rights, and their being subjected to embarrassment and loss of reputation in the community, outweighs any perceived injury to the Sheriff, if there be any at all.

IV. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS OF HIS CASE

The speech subject to the complaint of criminal defamation is protected speech. Anthony Alford is a public official. Further, the speech which he complains of as defamatory involves a matter of public concern. As such, Mr. Alford would have to prove actual malice, which he cannot, as the speech in question was true.

Given that Mr. Alford is a public official, the speech complained of is a matter of public concern, and the speech complained of is in fact true, the Plaintiff is entitled to injunctive and declaratory relief.

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. U.S. Const. amend. I.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws… The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. U.S. Const. amend. XIV.

LSA-R.S. 14:47 is unconstitutional insofar as it punishes public expression about public officials. State v. Defley, 395 So. 2d 759, 761 (La. 1981) citing; State v. Snyder, 277 So.2d 660 (La.1973); Garrison v. State of Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

"On the dates the article complained of appeared in the defendant newspapers, plaintiff was a member of the Louisiana Board of Highways,[2] and thus a public official." Johnson v. Capital City Press, Inc., 346 So. 2d 819, 821 (La. Ct. App.), writ denied sub nom. Johnson v. Capitol City Press, Inc., 350 So. 2d 677 (La. 1977)

[2]Members of the Louisiana Board of Highways are appointed by the governor, and the board has general control, management, supervision, and direction of the State Department of Highways. Art. 6, s 19.1, La.Const. (1921). Id.

A public official is one that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees. State v. Defley, 395 So. 2d 759, 761 (La. 1981) citing; Rosenblatt v. Baer, 383 U.S. 75 at 86, 86 S.Ct. 669 at 676, 15 L.Ed.2d 597 at 606 (1966). See, for example, Basarich v. Rodeghero, 24 Ill.App.3d 889, 321 N.E.2d 739 (1974) and Kapiloff v. Dunn, 27 Md.App. 514, 343 A.2d 251 (1975), U.S. cert. denied 426 U.S. 907, 96 S.Ct. 2228, 48 L.Ed.2d 832.

"We held in New York Times that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. The reasons which led us so to hold in New York Times, 376 U.S., at 279—280, 84 S.Ct. at 724—726, apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since 'erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive',' 376 U.S., at 271—272, 84 S.Ct. at 721, only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" Garrison v. State of La., 379 U.S. 64, 74–75, 85 S. Ct. 209, 215–16, 13 L. Ed. 2d 125 (1964) citing; New York Times Co. v. Sullivan, 376 U.S., at 270, 84 S.Ct., at 721.

"Applying the principles of the New York Times case, we hold that the Louisiana statute, as authoritatively interpreted by the Supreme Court of Louisiana, incorporates constitutionally invalid standards in the context of criticism of the official conduct of public officials. For, contrary to the New York Times rule, which absolutely prohibits punishment of truthful criticism, the statute directs punishment for true statements made with 'actual malice,' see LSA-R.S. 14:48; State v. Cox, 246 La. 748, 756, 167 So.2d 352, 355 (1964), handed down after the New York Times decision; Bennett, The Louisiana Criminal Code, 5 La.L.Rev. 6, 34 (1942). And 'actual malice' is defined in the decisions below to mean 'hatred, ill will or enmity or a wanton desire to injure.' 244 La., at 851, 154 So.2d at 423. The statute is also unconstitutional as interpreted to cover false statements against public officials. The New York Times standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false. But the Louisiana statute punishes false statements without regard to that test if made with ill-will; even if ill-will is not established, a false statement concerning public officials can be punished if not made in the reasonable belief of its truth." Garrison v. State of La., 379 U.S. 64, 77–78, 85 S. Ct. 209, 217, 13 L. Ed. 2d 125 (1964)

"'The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct

unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' In 1967, the United States Supreme Court extended the constitutional privilege to publications concerning public figures. Thus, those who thrust themselves into the public limelight have no redress for defamation without proof of actual malice." See Curtis Publishing Co. v. Butts (Associated Press v. Walker), 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967); Walker v. Associated Press, 251 La. 772, 206 So.2d 489 (1968).

"In 1971, the United States Supreme Court handed down its decision in Rosenbloom v. Metromedia, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), extending the constitutional privilege to publications about a private individual's involvement in an event or issue of wide public interest, though the individual is neither a public official nor a public figure." State v. Snyder, 277 So. 2d 660, 664 (La. 1972), writ denied, 294 So. 2d 543 (La. 1974), and rev'd, 304 So. 2d 334 (La. 1974).

"The *New York Times* "actual malice" standard applies in civil and criminal cases when the discussion concerns public affairs. The *New York Times* standard also has been applied in the civil context in situations in which public figures, as distinguished from public officials, complain of defamation. No justification exists to preclude application of this standard to criminal prosecutions initiated by public figures claiming to have been defamed. Application of the standard in criminal prosecutions initiated by public figures is wholly consistent with the rule established by *Garrison.* Under the "actual malice" standard of *New York Times,* no criminal liability for libel may be imposed in connection with the discussion of public affairs unless the publisher of a falsehood knows it was false at the time it was published or had a reckless disregard of whether it was false or true." Fitts v. Kolb, 779 F. Supp. 1502, 1515 (D.S.C. 1991).

The action by the State has no objective hope of success, due to the unconstitutionality of its application of the criminal defamation statute. The action by the State was in retaliation for the exercise of constitutional rights. The action by the State was taken to harass the Andersons for a purported exercise of protected speech.

V. RESTRAINING PUBLIC SERVANTS FROM CRIMINALLY INVESTIGATING PROTECTED SPEECH SERVES THE PUBLIC INTEREST

It is reasonable to infer that defendants will continue to engage in conduct that attempts to criminalize protected speech. A restraining order is proper and in the public's interest because it prevents further curtailment of protected speech, and by operation, the curtailment of the rights of citizens protecting them from unreasonable searches and seizures pursuant to their exercise of protected speech.

VI. CONCLUSION

A preliminary injunction should issue because:

1.) Plaintiffs will suffer irreparably harmed if injunction does not issue;

2) Threatened injury to Plaintiffs outweighs threatened harm the injunction may inflict on Defendant;

3) Plaintiff has at least a reasonable likelihood of success on the merits; and

4) Granting of a temporary restraining order will serve public interest.

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