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SUPERIOR COURT OF THE STATE OF ARIZONA

COUNTY OF MARICOPA

ALVIN HOGUE, et al., Plaintiffs, v. MARK GOUDEAU, et al., Defendants.	**NO. CV2010-092705** NO. CV2010-099221 NO. CV2012-095374 NO. CV2012-095372 NO. CV2012-095373 (CASES CONSOLIDATED) **CITY DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR RESTRAINING ORDER** (Assigned to the Honorable Arthur Anderson)

Plaintiffs do not dispute that this court has inherent authority to restrain the parties and their attorneys from speaking to the press and disseminating prejudicial information. They also acknowledge that the applicable standard is whether the pretrial publicity has a "reasonable likelihood of prejudice" to the defendant's right to a fair trial. Plaintiffs argue, however, that the City Defendants cannot show a reasonable likelihood of prejudice because the media coverage has not been "extensive." Plaintiffs' contention is not based in fact or law. To insure a fair and impartial trial, the Court should grant the City Defendants' request for a restraining order.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PLAINTIFFS' COUNSEL'S STATEMENTS TO THE MEDIA ARE EXTENSIVE AND HIGHLY PREJUDICIAL.

Plaintiffs attempt to minimalize the statements and disseminated information as "one referenced news story from Channel 15 news and the minor news stories from marginal media sources." But the uncontested facts show that the publicity is much more extensive. Plaintiffs do not deny that their counsel has: (1) made extrajudicial statements to the media discussing the evidence, (2) given video and radio interviews that discussed the facts of the case beyond what was pleaded in the Complaints or Amended Complaints; (3) spoken about the evidence and the issues in a manner that can easily be construed as misleading and prejudicial; (4) commented on inadmissible evidence, including expert testimony about legal conclusions and witnesses that were not disclosed, and (5) aggressively disseminated this information to a wide audience through various platforms, including websites, Wordpress blog, Twitter, Tumblr, Pintrest, and his YouTube account, and his own personal IPhone app.

Additionally, the information that Plaintiffs' counsel has disseminated to the media includes documents that were obtained through discovery, such as notes and analyses of DNA testing, laboratory worksheets, and e-mail communications. This information could only have come from Plaintiffs, as demonstrated by the Bates number at the bottom of the e-mail documents available for download at Freedomsphoenix.com, a website affiliated with Plaintiffs' counsel. *See* http://www.freedomsphoenix.com/Article /074263-2010-08-23-marc-victor-puts-phoenix-police-on-trial.htm. Plaintiffs' counsel has also made prejudicial remarks about inadmissible evidence, such as opinions from Plaintiffs' DNA expert on legal conclusions and ultimate issues of liability. *See* Ariz.R.Sup.Ct. 42 E.R. 3.6(a), cmt. 5 (stating that evidence the attorney reasonably knows will be inadmissible are more likely than not to have a material prejudicial effect). Such remarks are improper and beyond First Amendment scrutiny. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (holding that an order prohibiting dissemination of

discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny.").

Moreover, Plaintiffs' counsel does not deny that he will continue speaking to the press, even after counsel has asked him to stop out of concern that it would prejudice potential jurors. Under these circumstances, the Court should find that the City Defendants will be prejudiced unless a retraining order is granted.

II. THE RIGHT TO A FAIR TRIAL IS FUNDAMENTAL IN BOTH CIVIL AND CRIMINAL ACTIONS.

Plaintiffs argue that the cases the City Defendants rely upon, *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991); *Sheppard v. Maxwell,* 384 U.S. 333 (1966); and *In re Dow Jones & Co. v. Simon,* 842 F.2d 603 (2nd Cir. 1988), do not apply because they involve criminal defendants, whereas this is a civil action, so "the stakes are substantially lower and the facts much less sensationalized than in a criminal trial." Although most court decisions have addressed the conflict between freedom of speech and a criminal defendant's Sixth Amendment right to a trial "by an impartial jury," the federal and State Constitutions likewise protect a *civil* litigant's right to a fair jury trial. *See* U.S. Const. amend. VII and XIV.; Ariz. Const. art. II, § 23. This right to a fair trial is also embodied in the Arizona Rules of Civil Procedure. *See* Ariz. R. Civ. P. 1 ("These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action."). Contrary to Plaintiffs' assertions, the litigant's freedom of speech must also give way to the right to a fair trial in civil cases. *See, e.,g. Latiolais v. Whitley,* 93 F.3d 205, 207 (5th Cir.1996) ("It is well established ... that "[t]here is a constitutional right to a fair trial in a civil case.") (quoting *Lemons v. Skidmore,* 985 F.2d 354, 357 (7th Cir.1993)); *Bailey v. Systems Innovation, Inc.,* 852 F.2d 93, 97 (3d Cir.1988) ("conflict between freedom of speech and the right to a fair trial is no less troubling in the non-criminal context."); *cf. United States v. Brown,* 218 F.3d 415, 424 (2000) (the litigants' First Amendment "rights may be subordinated to other interests that arise in the context of both civil and criminal trials") (internal quotations omitted).

Plaintiffs also incorrectly contend that sensationalism is not a concern simply because this is a civil action. The underlying facts of this case belie their claim. Plaintiffs' lawsuits arise from the City Defendant's alleged negligence in investigating a series of horrific crimes that gripped the community and that received a frenzy of media attention when they occurred. Consequently, the risk of sensationalism in the media was already high. Plaintiffs' counsel's active engagement with the media has only inflamed that attention, making it more likely that his communications will prejudice the City Defendants' right to a fair trial before an impartial jury.

III. THE TRIAL COURT HAS THE AUTHORITY TO RESTRAIN THE PARTIES AND ATTORNEYS FROM COMMENTING ON THE EVIDENCE AND SUBJECT MATTER.

As noted above, Plaintiffs do not challenge the trial court's authority to prohibit the parties and their attorneys from speaking to the press if it is reasonably likely to prejudice the City Defendants. Instead, Plaintiffs attempt to avoid the Court's authority by distinguishing the cases that recognize that authority.

A. The Court Has the Authority to Control the Statements of Trial Participants to the Press under *Sheppard v. Maxwell.*

First, Plaintiffs contend that the City Defendants "grossly" misinterpret *Sheppard* because that case involved a "carnival atmosphere" directly before trial, whereas the media coverage in this case has been less extensive. *Sheppard*, however, does not hold that the court may restrain trial participants' statements to the media only when the court loses control of its courtroom to the media. Indeed, the Supreme Court has recognized that "*Sheppard* . . . rather plainly indicate[d] that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976), and the cases which preceded it." *Gentile*, 501 U.S. at 1074. *Sheppard* thus supports the City Defendants' argument that the court has authority to restrain the parties and attorneys from speaking to the media about certain matters that are reasonably likely to prejudice to their right to a fair and impartial trial.

B. The Court has the Authority Under *Gentile v. State Bar of Nevada* to Proscribe Plaintiffs' counsel's Extrajudicial Statements to the Press.

Under *Gentile*, Plaintiffs' counsel has a professional obligation to refrain from making extrajudicial statements to the media that he knew or reasonably should have known will have a "substantial likelihood of materially prejudicing" the proceedings. Plaintiffs also incorrectly argue that this case is distinguishable. 501 U.S. at 1075.

In *Gentile*, the Court considered a challenge to a Nevada Supreme Court rule prohibiting any attorney from making extrajudicial comments to the media that the attorney knew or should have known would "have a substantial likelihood of materially prejudicing an adjudicative proceeding." 501 U.S. at 1033. An attorney who was disciplined under the rule brought the challenge. The Supreme Court observed that the "speech of those participating before the courts could be limited" and that *Sheppard* established "a less demanding standard than that established for regulation of the press." *Id.* at 1074. The court thus found that the rule was constitutionally sufficient to justify proscribing attorneys' extrajudicial comments to the press. *See id.* at 1075.

The court held, however, that the Nevada Supreme Court did not correctly apply the rule when disciplining that attorney because the remarks were "innocuous." *Id.* Specifically, the court found that the remarks were made in response to adverse statements by the other party to the media or that had "already been published in one form or another, obviating any potential for prejudice." *Id.* at 1046, 1057. The court also found that the attorney refused to comment further on the evidence, including the polygraph tests, witness confessions, and evidence from searches or test results. *Id.* at 1046-47.

The Arizona Supreme Court has likewise adopted a rule that proscribes extrajudicial statements to the media "that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing" the proceedings. *See* Ariz.R.Sup.Ct. 42 E.R. 3.6(a) (2003). The Comment to this rule explains that the expected testimony of a witness or evidence that the attorney knows will be inadmissible are "more likely than not to have a

material prejudicial effect on a proceeding," particularly in a civil matter triable to the jury. *Id.* at cmt. 5. Under *Gentile,* Arizona's rule is constitutionally sufficient to proscribe Plaintiffs' counsel's extrajudicial statements to the press.

But unlike the lawyer in *Gentile*, Plaintiffs' counsel has made statements to the media that are far from "innocuous." Plaintiffs' counsel was not merely commenting on information that had already been published through other sources. Rather, he was the source of the prejudicial remarks and improperly disseminated information about the DNA testing and other documentary evidence that could only have been obtained through the discovery process. He also made inappropriate remarks regarding inadmissible evidence, including the DNA expert's opinions on ultimate issues of liability and conclusions of law. *Webb v. Omni Block, Inc.*, 215 Ariz. 349, 355, 166 P.3d 140, 146 (App. 2007); *Nationwide Transp. Fin. V. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008). Such statements are "more likely than not" prejudicial under the Arizona rule. Under these circumstances, Plaintiffs' counsel's extrajudicial statements to the media present a substantial likelihood of materially prejudicing the City Defendants' right to a fair trial. Therefore, the Arizona rule permits the court to prohibit him from making such statements to the press.

C. <u>The "Reasonable Likelihood of Prejudice" Standard Applies.</u>

Finally, Plaintiffs challenge the City Defendants' reliance on *Dow Jones*, which holds that the court may prohibit litigants from making statements to the press that are likely to prejudice the defendant's right to a fair trial. 842 F.2d at 610. Plaintiffs do not dispute that this is the standard that the Court should apply. Plaintiffs instead argue that *Dow Jones* is distinguishable because (1) it involved continuous leaks of grand jury information to the media, and (2) the court considered less restrictive alternatives before imposing the order. Plaintiffs merely point to factual differences without meaningful distinction.

In *Dow Jones,* the trial court issued a gag order restraining the parties and attorneys from speaking to the media "based upon the sensational public nature of the case

and the leaks of grand jury information," which presented a substantial likelihood that the defendants might be deprived of a fair trial. *Id.* at 611. The media challenged the order, claiming that it constituted a prior restraint upon its First Amendment rights. *Id.* at 608. The appellate court rejected this argument, finding that the gag order was not directed at the media, but at the trial participants instead. *Id.* It held that this distinction was important because the lesser standard of "reasonably likelihood of prejudice" applied to restraints on the trial participants' speech. *Id.* at 610. It affirmed the gag order, stating:

> The problem begins not with the publishing of news by a free press, but with a hemorrhage of small leaks of secret grand jury information released to the media. *This leads directly to prosecutor and defense counsel inciting trial by the press. It is altogether fitting that the solution should restrict those at the source of the problem: counsel who serve as officers of the court, a body which has a duty to insure that the accused receives an impartial trial. A focus on the source of potentially prejudicial statements rather than the publisher of such statements has been endorsed by the courts and also by committees that addressed specifically the fair trial-free press issu*e.

Id. at 612. The appellate court further found that the trial court properly considered whether there were less restrictive remedies available to protect the defendant's rights to a fair trial. *Id.* at 611 (noting that the remedies to consider depend on the particular case, but may include change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors) (citing *Sheppard*, 384 U.S. at 358).

Here, the media's publication of news is also not at issue. Like the attorneys in *Dow*, the source of the problem here is Plaintiffs' counsel, who has effectively "leaked" information to the media about DNA-testing and other documentary evidence obtained through discovery. Although Plaintiffs assert that alternative remedies are available, they have not identified what those alternatives are. At this pre-trial stage, there are no jurors to sequester. Change of venue is not an option because Plaintiffs' counsel has widely disseminated the information across the internet and even made evidence available for download. Moreover, Plaintiffs' counsel does not intend to stop. Unless he is ordered to immediately cease and remove all the materials from the numerous platforms on which he has published statements, postponement would not be effective at this point. The only

conceivable option is a searching voir dire. But the Supreme Court has recognized that such a remedy is costly and need not be used where, as here, the attorney had an obligation to avoid making the extrajudicial statements to the press that he knew or should have known would be likely to prejudice the defendants. *See Gentile*, 501 U.S. at 1075.[1] As in *Dow*, the only effective recourse available here is therefore, the use of a restraining order. 842 F.2d at 612.

IV. CONCLUSION.

Plaintiffs' counsel's statements to the media on the nature of the evidence, the strength of his case and the dissemination of inadmissible testimony and evidence obtained through the discovery process are highly prejudicial. The City Defendants respectfully request a restraining order to protect its right to a fair trial.

DATED this 23rd day of September, 2013.

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[1] The Supreme Court explained:

> Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner. The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.

Gentile, 501 U.S. at 1075.

ORIGINAL of the foregoing electronically filed this 23rd day of September, 2013.

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