

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

COPY

1	RUSSELL L. DOTY,)	
2)	
3)	
4	PLAINTIFF,)	
5)	
6	vs.)	CAUSE NO. DV 07-022
7	BRADLEY MOLNAR,)	
8)	
9	DEFENDANT.)	

Taken at the Yellowstone County Courthouse
Billings, Montana
Wednesday, September 3, 2008

MOTION TO QUASH
Before the Honorable G. Todd Baugh
Thirteenth Judicial District Judge

A P P E A R A N C E S

FOR THE PLAINTIFF:
RUSSELL L. DOTY, pro se, P.O. Box 30457, Billings,
Montana 59107-0457.

FOR THE DEFENDANT:
JACK SANDS, ESQ., Attorney at Law, 100 North 27th St.,
Suite 250, Billings, Montana 59101.

FOR THE BILLINGS GAZETTE:
MARTHA SHEEHY, ESQ., Sheehy Law Firm, P.O. Box 584,
Billings, MT 59103.

1 WEDNESDAY, SEPTEMBER 3, 2008

2 THE COURT: DV 07-022 Doty versus Molnar,
3 *Gazette's* motion to quash a subpoena or something. Y'all
4 have come to some understanding and have agreed to a
5 resolution of the issues?

6 MS. SHEEHY: We haven't, Your Honor.

7 THE COURT: Okay. You can proceed.

8 MS. SHEEHY: Judge, I put a copy of the Media
9 Confidentiality Act on your tray there because I'll be
10 referring to it.

11 THE COURT: Thank you.

12 MS. SHEEHY: That's just the statute. This
13 case arises because Mr. Doty, as part of his civil
14 action, has issued a subpoena requesting that the *Gazette*
15 produce IP addresses, e-mail addresses, and other
16 identifying information about a number of anonymous
17 posters. Mr. Doty identifies these posters by their
18 on-line nicknames and asks the *Gazette* to accumulate data
19 concerning their identities.

20 I would like to present a little bit, as was
21 further explained in Mr. Prosinski's affidavit, about the
22 on-line edition.

23 (Whereupon, the reporter asked counsel to slow
24 down.)

25 MS. SHEEHY: The *Gazette* on-line edition allows

1 readers to post comments after each story and these
2 comments are anonymous. The posters can choose to have a
3 nickname or a posting name that reflects their identity,
4 or they can remain anonymous. In allowing these
5 postings, the *Gazette* asks that the posters register.
6 And in the registration, the *Gazette* obtains the IP
7 address, which I believe to be computer-specific, the
8 e-mail address, and the nickname. The *Gazette* does not
9 require and does not obtain information concerning their
10 identities.

11 The *Gazette* moves to quash this subpoena on
12 very simple grounds. The Media Confidentiality Act found
13 at 26-1-901 through 903. The Media Confidentiality Act
14 is very specific and very broad. It has a provision
15 stating extent of privilege. It says, subsection 1,
16 Without his or its consent, no person, including any
17 newspaper, magazine, press association, news agency, news
18 service, radio station, television station, or community
19 antenna television service, or any person connected with
20 or employed by any of these for the purpose of gathering,
21 writing, editing, or disseminating news, may be examined
22 as to or may be required to disclose any information
23 obtained or prepared or the source of that information in
24 any legal proceeding if the information was gathered,
25 received or processed in the course of his employment or

1 its business.

2 The *Gazette* has presented the affidavit of
3 Steve Prosinski to establish that the on-line message
4 service is indeed part of the *Gazette's* business. It's
5 an integral part of the business and a growing part of
6 the business. All the information requested in the
7 subpoena is obtained as part of this business, which is
8 the *Gazette's* business. As such, the subpoena falls
9 squarely within the broad privilege allowed by the Media
10 Confidentiality Act and the subpoena must be quashed. By
11 the terms of Act, no one from the *Gazette* may be
12 compelled to testify or to provide this information.

13 Mr. Doty claims in his briefing that the
14 *Gazette* has waived its privilege. The *Gazette* has not
15 waived its privilege, and Section 26-1-903 speaks
16 specifically to this. The privilege encompassed in the
17 Act can only be waived by knowing, voluntarily, and
18 stated waiver. Mr. Prosinski has provided information
19 for the purposes of this motion. None of the information
20 provided is responsive to the subpoena. And
21 Mr. Prosinski stated in the affidavit that he
22 specifically did not waive the privilege.

23 Mr. Doty also asserts that this privilege is
24 somehow limited to old technology. Technology that was
25 in place at the time the statute was enacted. He cites

1 no authority for this position, and I looked, I don't
2 think there is any authority. All of the privileges that
3 exist, for the most part, were put into place prior to
4 these technological advances of e-mail, on-line posting.
5 No one would claim that correspondence from an attorney
6 to a client by e-mail somehow doesn't fall within the
7 attorney/client privilege because it's new technology.
8 Same with doctor/patient privilege or any of the
9 privileges. The privilege enacted by the statute is very
10 broad and it must be read as written.

11 We've also in our briefing talked a little bit
12 about the First Amendment rights to speech and to
13 anonymous speech, in particular. We provided the Court
14 with a number of cases where the courts have held that
15 this kind of information can't be compelled by subpoena
16 and that it is protected by the First Amendment. I would
17 like to point out that while we argue that the First
18 Amendment applies here and we believe that our authority
19 makes that case, the Court doesn't need to reach that
20 issue. And, in fact, the Court should exercise
21 restraint. When a case can be decided on statutory
22 grounds, the Court should not look to the constitutional
23 issues. The case for that is *State ex rel Wilcox*, 208
24 *Mont* 351, 678 P2nd 209.

25 Today Mr. Doty has presented us with a case out

1 of Connecticut. The title was *Doe versus* -- I'm not sure
2 what the Defendant's name was. And that case was decided
3 so that after weighing the constitutional rights, a
4 newspaper was required to produce information. I haven't
5 had a chance to fully look at that case; however, in my
6 short review, it appears that the Court weighed
7 constitutional issues and there was no statutory
8 privilege at issue.

9 We're in a unique situation here in Montana
10 because our legislature has already done that weighing.
11 Our legislature has determined that the First Amendment
12 interests and the freedom of press interests require the
13 application of a privilege, just as the legislature has
14 made that determination with respect to communications
15 between attorneys and clients and with respect to
16 communications between doctors, counselors and other
17 professionals.

18 The -- Mr. Doty encourages this Court to weigh
19 constitutional issues. That weighing favors the *Gazette*
20 because the principles of the First Amendment are so
21 important. However, I'd encourage this Court not to
22 conduct that way. While recognizing those First
23 Amendment privileges, there is no need to go to
24 constitutional issue in this case, because the statute
25 has already done the weighing, the legislature has

1 already enacted the policy, and the policy is very broad.
2 The privilege extends to, quote, Any information obtained
3 or prepared or gathered, received or processed in the
4 course of the *Gazette's* business, unquote. I did input
5 the *Gazette* into the statute.

6 All of the information that is subpoenaed was
7 indeed obtained and gathered in the course of the
8 *Gazette's* business. This Court need look no further
9 before quashing this subpoena. Thank you.

10 THE COURT: Mr. Doty.

11 MR. DOTY: May I approach the bench, Your
12 Honor?

13 THE COURT: You may.

14 MR. DOTY: Here's some things I'll be referring
15 to. (Hands documents to the Court.)

16 Your Honor, I would like to cut to the chase
17 and address the constitutional issue first. With regard
18 to the brief filed by the *Billings Gazette*, it was said
19 by counsel that I did not deal with the *Best Western* case
20 or the *2Mart* (sic) case. Both of those cases concede the
21 right to speak anonymously is not absolute. And,
22 therefore, it would not be absolute in the case of the
23 statute that they cite, either.

24 I'll refer you to the first case that they
25 cited. Basically, on the quote, To certain classes of

1 speech, including defamatory and libelous speech, are
2 entitled to no constitutional protection. Those who
3 suffer damages as a result of tortious or other
4 actionable communications on the Internet should be able
5 to seek appropriate redress by preventing the wrongdoers
6 from being -- from hiding behind an illusory shield of
7 purported First Amendment rights.

8 Now, in order to prevail on a motion to quash,
9 courts have required various standards to show that
10 defamations existed. As the *Best Western* court laid out,
11 those have varied from a good faith basis to assert a
12 claim to pleading sufficient facts to survive a motion to
13 dismiss to a showing of *prima facie* evidence sufficient
14 to withstand a motion for summary judgment, and beyond
15 that, hurdles even more stringent. Let's take those.

16 Attached to my affidavit is *prima facie*
17 evidence of defamation and false light in the instance of
18 each person whose pseudonym I have in good faith
19 requested information on. Those attachments and my
20 affidavit provide enough evidence to withstand a motion
21 for summary judgment. I have to be able to prove the
22 elements within my control -- only the elements within my
23 control. What are the elements of those claimed? As you
24 know, a defamatory statement made by the Defendant, a
25 statement about me. It has to be published, and the

1 Defendant can lose a qualified privilege through excess
2 repetition and secondary publishers, which these people
3 are. It has to -- or at least two of them are: The
4 CutiePie and the High Plains Drifter. It has to damage
5 my reputation. And when it is *libel per se*, damages are
6 imputed. *Per se* means, in this case, defamation in my
7 job or accusations of a crime.

8 If public figure, I would also have to prove
9 falsely. And I don't know whether or not the *Gazette* is
10 including me in the public figure category, because I
11 haven't run for office for four years.

12 Also, in the public figure, you would have to
13 prove fault on the Defendant's part, which is really a
14 misnomer. That means you have to prove malice of
15 scienter. The statement was made with reckless disregard
16 for the truth, or the prospective Defendant must have
17 known that the statement was false. The statement is
18 *libel per quod* that is needed to look at intrinsic facts
19 to establish defamatory content.

20 Now, let's take a look at attachment 3, which
21 was attached to my material. And I'm assuming, Your
22 Honor, I'm not trying not to repeat what I've put in my
23 brief, because I'm assuming that the Court can read that
24 and has.

25 If you take a look at the document No. 3. The

1 statement about me -- there's a statement about me. It
2 was published. General damages are imputed because it
3 was *libel per se*. It's false? Yes. I paid 279 --
4 excuse me, \$2,927 in back dues and late fees and was
5 reinstated at the beginning of April 2007. Proof of
6 that, I've just laid on your desk, shows my admission
7 card. Malice? Certainly it was reckless disregard
8 because whoever did this -- this guy by the name of
9 Always Wondering -- did not even check on-line as two
10 people who called him to task. You'll see on page three,
11 Good Old Boy and DDW, whom I don't even know who they
12 are. They call him to task for not checking better. And
13 then he came back and continued to try to libel me and
14 even repeated false information after I had corrected him
15 in a lengthy correction found on page four and the other
16 particular things.

17 So that takes care of the first qualification
18 in the *Best Western* case to show, at least with regard to
19 this particular person that I want information on, to
20 show a *prima facie* case. The *Best Western* case can be
21 distinguished because the person seeking the subpoena
22 identifies -- identities did not allege a specific false
23 statement or other elements of the proposed lawsuit.
24 However, that was -- when that was alleged, the Court did
25 allow the identities to be revealed. And that's the

1 second case that counsel for the *Gazette* has referred to
2 that I have put on your desk, which I Shepardized and
3 found that the Court, in that particular case, went ahead
4 and did allow the identities to be revealed.

5 You'll note, I think, in the headnote ten of
6 the first *Best Western* case, there are five or six other
7 things that have to be proven. You have to have a
8 concrete showing of a *prima facie* claim, which we've just
9 discussed in this one instance. And I'll come back to
10 the others.

11 The specificity of the discovery requests. My
12 discovery request is very specific. It's not overbroad.
13 There's no claim in here that it had. The absence of the
14 alternative means to obtain the subpoenaed information.
15 In a deposition taken very recently, I asked Mr. Molnar
16 if he was Always Wondering, High Plains Drifter, and
17 CutiePie. He said he was not. I asked him whether he
18 knew who those folks were. And Mr. Sands, who's here
19 today, objected and told Mr. Molnar not to answer. So
20 I've exhausted the alternative ways of obtaining that
21 particular information.

22 And the fourth part that is required in the
23 *Best Western* case is an essential need for the subpoenaed
24 information to advance the claim. Certainly, I would
25 have to have the name of the person with regard to Always

1 Wondering because of his *libel per se*. The other two
2 people are potential witnesses in this case for reasons
3 that we'll discuss, and they are referring to libelous
4 things that would be included in the *libel pro quod*
5 category, which requires extrinsic evidence in order to
6 be able to prove the libel.

7 And with regard to the Does Defendants, whether
8 or not they have an expectation of privacy. I've
9 attached to my affidavit, attachment 4, which is some
10 things in terms of what the *Gazette* policy is with regard
11 to postings on their Internet site. I would just say
12 that one of the things is, on page one, the *Gazette*
13 encourages people to be civil. They also, on page one,
14 require all information you provide is true, accurate,
15 current, complete, and does not violate these terms of
16 service. That's a contract. I'm a third-party
17 beneficiary of that contract and the case that was first
18 cited by the *Gazette*, that the *Best Western* case,
19 indicates what happens in terms of a contract. And in
20 that particular contract case at least, the privacy was
21 overcome.

22 Now, there's some other things on the -- on the
23 *Gazette* that I've highlighted, in terms of -- but I'd
24 just refer you, also, to the last page, and they say
25 basically they -- they'll try to protect the -- or they