

PLAINTIFFS' EXHIBIT 18
To Plaintiffs' Motion Under Rule 11
Against Defendants And Their Counsel
Civ. No. 03-2006 (EGS/JMF)

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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PEOPLE FOR THE ETHICAL :

TREATMENT OF ANIMALS, INC., :

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Plaintiff, :

:

vs. :

:

KENNETH FELD, et al. :

:

Defendants. :

:

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At Law No. 204452
At Law No. 220181

Fairfax, Virginia

Friday, July 30, 2004

The proceedings commenced at 2:52 p.m.

BEFORE:

THE HONORABLE DAVID T. STITT.

1 who made the communication. We cited the Energy
2 Conservation vs. Heliodyne case in which the facts
3 were concerning negative publicity about the party who
4 is the subject of the communication.

5 The late service issue, Your Honor,
6 Mr. Hirschkop spent considerable time on. It's not a
7 central feature of our counterclaim --

8 THE COURT: I was going to ask you that.
9 You're not maintaining that the mere filing of the
10 motion for judgment constituted abuse of process, are
11 you?

12 MR. BORDEN: No, Your Honor. Donohoe is
13 clear that there must be --

14 THE COURT: It is.

15 MR. BORDEN: -- an act subsequent to the
16 issuance of process.

17 THE COURT: It couldn't be clearer on that.

18 And you're not maintaining that whatever the
19 delay was in service, assuming there was a delay,
20 you're not arguing that that was abuse of process,
21 right?

22 MR. BORDEN: No, Your Honor, we're not.

1 THE COURT: So basically what you're hanging
2 it on is the fact that they put it on the web site
3 after they filed it?

4 MR. BORDEN: Correct, Your Honor.

5 THE COURT: All right.

6 MR. BORDEN: The delay in service was pled
7 beyond our obligations under the rules. We pled that
8 as evidence that there was an ulterior motive, the
9 fact that service wasn't effected immediately.

10 THE COURT: Well, I'm glad you're not
11 pursuing that, though, because, I mean, Virginia law
12 gives them a year to serve, and I don't see how on
13 earth you could say something that was done within
14 that is a problem.

15 MR. BORDEN: Correct, Your Honor. That is
16 not the basis of the claim. It is of -- ultimately
17 will be for the fact finder to decide I think what
18 inference, if any, to give to that fact. But we've
19 also pled that nothing else was done in the case for
20 over a year and Mr. Feld was nonsuited on the day of
21 the demurrer, as I mentioned, and those also are
22 evidentiary details that support our allegation that

1 THE COURT: Thank you, Mr. Hirschkop.

2 As Mr. Borden said, I think the standard is
3 from Donohoe, the existence of an ulterior purpose and
4 an act in the use of the process not proper in the
5 regular prosecution of the proceedings.

6 And I'm glad we've gotten past arguing about
7 whether the filing of the motion itself or the alleged
8 delay in service provide the basis for this, because I
9 don't believe they could.

10 So basically we're down to the web site.

11 And as Mr. Hirschkop said, for openers you've got a
12 huge First Amendment issue lurking there. It is
13 something that in this day and age is commonly done,
14 putting pleadings on the web after they're filed.

15 But Donohoe really requires for abuse of
16 process, it says the distinctive nature of malicious
17 abuse of process lies in the perversion of regularly
18 issued process to accomplish some ulterior purpose for
19 which the procedure was not intended.

20 And Virginia cases have talked about -- an
21 abuse of process isn't, I think it's fair to say, a
22 particularly favored cause of action. It's kind of

1 exceptional, and it's treated as an exceptional cause
2 of action. It's got pretty high standards.

3 And basically as I understand the Virginia
4 cases, even if you have a bad intention by, you know,
5 filing something and tracking it to its logical
6 conclusion, there's got to be something more than
7 that. And they talk about maybe it being used as a
8 whip to force the payment of an alleged
9 indebtedness -- that was Mullins -- or as a means of
10 extortion, and that's Glidewell. I just do not think
11 that this, as it's currently pled, alleges any kind of
12 behavior that reaches that level.

13 With putting it on the web site, you know,
14 that certainly puts it there, but that's not
15 specifically directed at Feld. Certainly he's the
16 subject of it, but it's not something that's done to
17 force him to do something as a means of extortion or
18 whatever.

19 And Mr. Borden is also correct that some of
20 the cases -- there isn't a lot of Virginia authority
21 on this, but the El Greco case from the Eastern
22 District of New York I thought was instructive, and

1 that talks about the existence of publicity
2 surrounding the filing of a lawsuit cannot constitute
3 grounds for an abuse of process claim. It said that
4 embarrassment in business resulting to the parties
5 being sued is not beyond the area of legitimate use of
6 process and that an action for abuse of process must
7 basically include some kind of element of extortion.
8 There's just nothing in this pleading that rises to
9 that level.

10 The Glidewell case also says proof of
11 indirect motive will not alone sustain the action.
12 And even if, as Mr. Borden said, the purpose of it was
13 fundraising, that would be an indirect motive again
14 not directed specifically at Feld.

15 As it's pled -- and I understand the
16 granting of a demurrer in the Commonwealth is a risky
17 proposition, but I just don't see the elements of this
18 cause of action here at this point. So the demurrer
19 is going to be sustained, and I believe that I'm
20 required whenever I sustain a demurrer for the first
21 time to allow leave to amend. If counsel would like
22 to take that opportunity, you'll have 21 days to do