

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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4 PEOPLE FOR THE ETHICAL :
TREATMENT OF ANIMALS, INC., :

5 Plaintiff, :

6 vs. :

7 KENNETH FELD, et al. :

8 Defendants. :

9 - - - - - x

At Law No. 204452
At Law No. 220181

10

11 Fairfax, Virginia

12 Friday, July 30, 2004

13 The proceedings commenced at 2:52 p.m.

14 BEFORE:

15 THE HONORABLE DAVID T. STITT.

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EVELYN SCOTT (703) 568-1665

1 APPEARANCES:

2 PHILIP J. HIRSCHKOP, ESQ., and MARIANNE R.
3 MERRITT, ESQ., Hirschkop & Associates,
4 108 North Columbus Street, Alexandria,
5 Virginia 22314, counsel for the
6 plaintiff.

7 JOHN A. C. KEITH, ESQ., and WILLIAM B.
8 PORTER, ESQ., Blankingship & Keith, P.C.,
9 4020 University Drive, Suite 300,
10 Fairfax, Virginia 22030, counsel for
11 Kenneth Feld.

12 LISA ZEILER JOINER, ESQ., Fulbright &
13 Jaworski, L.L.P., 801 Pennsylvania
14 Avenue, N.W, Washington, D.C 20004,
15 counsel for Feld Entertainment, Inc.,
16 and Sells-Floto, Inc.

17 GEORGE A. BORDEN, ESQ., and MATTHEW V.
18 JOHNSON, ESQ., Williams & Connolly, 725
19 Twelfth Street, N.W., Washington, D.C
20 20005-5901, counsel for Kenneth Feld.

21 BRUCE W. HENRY, ESQ., Henry & O'Donnell,
22 P.C., 4103 Chain Bridge Road, Suite 100,
Fairfax, Virginia 22030, counsel for
Defendant Smith.

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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 there was an ulterior motive; that the motive for
2 filing was not actually to press the claims. That's
3 the significance of that.

4 Mr. Hirschkop mentioned briefly an argument
5 that Mr. Feld doesn't have standing because some of
6 the allegations in the motion for judgment were about
7 the Ringling companies rather than about him
8 personally. But he was the one who was sued, he was
9 the one who incurred damages as a result of that, he
10 was the one who had to defend that suit which was
11 brought for an improper purpose and without intent to
12 prosecute it, and thus he has standing to assert abuse
13 of process.

14 It doesn't matter about whom PETA hoped to
15 get publicity for as the ulterior motive for its suit.
16 What matters is it had an ulterior motive, it filed
17 suit against Mr. Feld, he had to defend against that
18 case until he was nonsuited, he suffered harm, he has
19 standing, and he can raise abuse of process.

20 Your Honor, unless there are further
21 questions, I think that should suffice.

22 THE COURT: Thank you, Mr. Borden.

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1 Mr. Hirschkop, any response?

2 MR. HIRSCHKOP: Very brief. Your Honor, he
3 confuses two matters. Mr. Feld defending is the
4 lawsuit that was filed. There was no abuse in the
5 filing of that lawsuit. It was filed down in the
6 clerks' office and nothing was done wrong.

7 In the Fitzgerald case that he cites they
8 sued for abuse of process, alleged the defendant
9 wrongfully used the fact of the indictment as a way to
10 get him fired. They used the process against the
11 defendant in some way after the filing.

12 Your Honor, I don't mean to be too facetious
13 about it, but if I took the complaint and I had it
14 printed out on toilet paper and then I used it as one
15 user's toilet paper, that would not be an abuse of
16 process. You can do whatever you want with a
17 complaint afterwards, whether it's posted on a web
18 site or what. It doesn't reflect back to Feld.

19 If I took the complaint and I went to Feld's
20 employer and said, look, we've sued him, you've now
21 got to fire him, that might be an abuse of process.
22 That didn't happen.

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1 It was filed in the ordinary course of
2 business. It was not then after, by putting it on a
3 web site, directed at Feld.

4 The Farrell case had a bunch of stuff in it.
5 And interestingly enough, the Abbott case he cites,
6 the Nevada case, that was there was a letter to a
7 local newspaper announcing the lawsuit, they filed a
8 formal grievance against the person with the Nevada
9 State Bar, and then they sent newspaper clippings to
10 the defendant regarding the stigma of defending
11 racketeering charges. They used that process to
12 threaten and coerce.

13 And indeed, the Donohoe case talks about it
14 has to rise to a level of extortion as a, quote,
15 whipped to force payment of an alleged indebtedness.

16 There was no misuse of the process here. It
17 raises enormous First Amendment implications,
18 Your Honor, to say the mere filing on a web site can
19 be an abuse of process. It can't unless you somehow
20 do something other with it directed to the defendant
21 to get an unfair advantage.

22 Thank you, Your Honor.

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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

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1 so, and Mr. Hirschkop will have 21 days after that to
2 file responsive pleadings.

3 All right. That takes us to --

4 MR. HIRSCHKOP: Motion for a protective
5 order is the other one in this case, Your Honor.

6 THE COURT: All right. Well, let's talk
7 about the motion for a protective order. And what you
8 were saying, as I understood it, Mr. Hirschkop, if I
9 rule on some of these different categories and
10 information, you think you and Mr. Keith can make some
11 progress in terms of sorting out the --

12 MR. HIRSCHKOP: We exchanged correspondence
13 about meeting. Our schedules didn't permit even
14 before today. But as I said, I would be happy to sit
15 down with him and see what we can resolve.

16 THE COURT: All right. You can go ahead and
17 argue your motion for a protective order.

18 MR. HIRSCHKOP: Your Honor, the protective
19 order puts me in the same position they were in when
20 we issued subpoenas a year ago and they claimed the
21 subpoenas were grossly over broad. And indeed, it's
22 kind of irony that we're here arguing because contrary