

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE :  
PREVENTION OF CRUELTY TO :  
ANIMALS, et al., :  
 :  
 :  
 Plaintiffs, :  
 :  
 :  
 v. :  
 :  
 :  
 RINGLING BROS. AND BARNUM & :  
 BAILEY CIRCUS, et al., :  
 :  
 :  
 Defendants. :  
 :  
 \_\_\_\_\_ :

Case No. 03-2006 (EGS/JMF)

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION UNDER RULE 11

**EXHIBIT 100**

COPY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

----- -x  
:
:
PEOPLE FOR THE ETHICAL TREATMENT :
OF ANIMALS, :
:
Plaintiff, :
:
vs. : At Law No. 220181
:
KENNETH FELD, et al., :
:
Defendants. :
:
----- -x

Fairfax, Virginia  
Friday, October 8, 2004

The hearing commenced at 10:15 a.m.

BEFORE:

THE HONORABLE DAVID T. STITT

APPEARANCES:

PHILIP J. HIRSCHKOP, ESQ., Hirschkop & Associates, PC,  
108 North Columbus Street, Alexandria, Virginia  
22314-3013, counsel for the plaintiff.

GEORGE A. BORDEN, ESQ., and JOSEPH G. PETROSINELLI,  
ESQ., William & Connolly, LLP, 725 - 12th Street,  
Northwest, Washington, D.C. 20005 and  
WILLIAM B. PORTER, ESQ., Blankingship & Keith, PC,  
4020 University Drive, Suite 300, Fairfax, Virginia  
22030, counsel for the defendants.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

P R O C E E D I N G S

(The court reporter was sworn.)

THE COURT: Mr. Hirschkop, this is here on your demurrer.

MR. HIRSCHKOP: Yes. I admit they have added nothing in the amended counterclaim that they didn't have in the prior counterclaim based on your ruling.

Historically, PETA filed suit to recover documents. The suit was before Judge Ney. You can take judicial cognizance of that suit pending in this court.

Documents were produced. We know that because in this case and in case 204 they filed a bill of particulars. We listed all the documents. They refer to the bill of particulars, I think, in their original demurrer.

When we saw they had stolen documents, we moved to amend the case before Judge Ney. He says, No, you only sued for a plevin here -- or a detinue, I guess -- and you'll have to file another lawsuit; so we filed another suit. These things were done in the ordinary course of developing events.

We found out about the events because PAWS had filed a lawsuit. And the PAWS suit was attached to our

1 complaint before Judge Ney; so, again, it's part of the  
2 record before Your Honor.

3 Then the suit in 220 has survived the demurrer  
4 already, and the allegations that survived the demurrer are  
5 the same allegations in 204, your Honor. So there's  
6 nothing in here that was done out of the ordinary course of  
7 events to pursue the relief asked for in case 204.

8 They allege in their demurrer and their -- I'm  
9 sorry. They allege in their counterclaim and in their  
10 motion or opposition to our demurrer that we sued Feld to  
11 harass.

12 Well, but that's just a summary conclusion by  
13 them. There are no facts to support that. We have, in  
14 fact, sued Feld, Froemming, Smith, and Kaplan.  
15 Mr. Froemming -- we sued the people who we found out had  
16 been involved. We now know of many more people.

17 They said we included inflammatory allegations.  
18 Well, I guess if you sue a doctor for committing  
19 malpractice, that's an inflammatory allegation. It  
20 wouldn't give rise to a counterclaim or of abuse of process  
21 every time.

22 And they have never specified, which they are

1 charged to do, which allegations are inflammatory. We  
2 raised that in original demurrer. When you gave them leave  
3 to amend, they could have put whatever allegations there so  
4 we could contest them here. They chose not to do so. They  
5 chose to remain silent on that.

6 They claim we put it on the Web site. You've  
7 already ruled on that. That's not uncommon to do nowadays,  
8 particularly when a corporation gets sued, in our  
9 situation, a 501(c)(3) charitable organization.

10 They say we took no steps to prosecute. That's  
11 been argued before you before; you had that before. But,  
12 indeed, it's totally false. Just the file will show we  
13 tried serving Mr. Feld; we served under the Secretary of  
14 the Commonwealth. They moved to quash the service. This  
15 is all within the first three months. And then we served  
16 him again under the Secretary of the Commonwealth.

17 In their opposition on page 3, they say they set  
18 forth their theory. And that's exactly that's all that's  
19 before you. It's just a theory with no supporting  
20 allegations.

21 It is no different Your Honor than what's  
22 constantly ruled on in this Court when someone sues for

1 punitive damages and they say that the person they're suing  
2 acted with malice, but give no basic allegations to support  
3 the conclusion that they were driving 30 miles over the  
4 speed limit and they were drunk and they were weaving.

5 Nothing in here, just their conclusion that PETA  
6 did it for improper motive, which as you ruled previously  
7 and correctly, is not a basis for malicious for malicious  
8 prosecution. You can have a bad motive.

9 Every time you sue someone -- well, not every  
10 time -- but the overwhelming number of times, you don't  
11 like them. You don't sue people because you're really in  
12 love with them.

13 The law in this Commonwealth in Donohue  
14 (phonetic). Your Honor quoted it last time. It requires  
15 some form of extortion --

16 THE COURT: That's what I told them they needed  
17 to add. And what it seems to me that they have added to  
18 try to meet that is the allegation that basically the  
19 ulterior motive in filing the pleading was to make them  
20 stop using elephants or stop using animals; in other words,  
21 it was to achieve a goal that you really could not have  
22 achieved through litigation.

1 MR. HIRSCHKOP: Yes.

2 THE COURT: That's what I told them to do. It  
3 seems to me that they've added that.

4 MR. HIRSCHKOP: They've added the conclusory  
5 allegation with absolutely no underlying facts pled.

6 It's the same as I said minute ago: When you  
7 plead malice, you've got to plead a st of facts which  
8 the -- Courts routinely strike punitive and malice  
9 allegations. And they're bound by that.

10 They do quote cases, and their cases are  
11 fascinating. The board of education case where they issued  
12 87 subpoenas, wouldn't stagger the subpoenas. And on the  
13 face of it the Court said it was an abuse of that process.  
14 They said that process requires a process to compel an  
15 activity. It's because the traditional abuse of process is  
16 one that's to compel an activity or prohibit an activity.

17 There's the Koontz (phonetic) case, where a  
18 constable seized property to get someone to pay rent;  
19 threatened they wouldn't get their property unless they  
20 paid rent; never sold the property, which is the only thing  
21 you could do with it. The Court found he didn't act under  
22 the law properly and then returned the property when the

1 rent wouldn't get paid.

2 All their cases have specific underlying  
3 allegations. What you open is a floodgate here if don't  
4 grant this demurrer that at any time someone gets sued,  
5 they can make an allegation, "I think it was done for  
6 wrongful purposes."

7 There has to be something that you said before in  
8 the underlying motion, the prior motion, that they have to  
9 show it was somehow directed at Mr. Feld and some action  
10 was taken. There has to be some effort to coerce, not just  
11 "they believe".

12 There was nothing done with the process itself  
13 that was wrong. It requires a wrongful use of the process.  
14 We filed the lawsuit, and we've pursued the lawsuit.

15 Putting in it on the Web site is not a wrongful  
16 use of a process. If I was to print the process on toilet  
17 paper and then use in the manner that toilet paper is used,  
18 it certainly would be the nicest use of the process; but  
19 they couldn't sue me for abuse of process.

20 And, Your Honor, they must have allegations to  
21 support their conclusory statements.

22 Thank you.



1 THE COURT: Thank you, Mr. Hirschkop.

2 MR. BORDEN: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. BORDEN: Contrary to Mr. Hirschkop's  
5 assertions --

6 THE COURT: Remind of your name, counsel.

7 MR. BORDEN: I'm George Borden, Your Honor.

8 THE COURT: All right.

9 MR. BORDEN: -- we have, indeed, added  
10 significant new allegations to the counterclaim, Your  
11 Honor, that are specifically aimed at addressing the  
12 Court's ruling on the initial demurrer.

13 And as the Court has observed, we have now  
14 alleged conduct akin to extortion; namely, that PETA had  
15 the ulterior motive of obtaining some benefit other than  
16 that which it could have obtained through successfully  
17 pressing its claims. And we specifically identified that  
18 benefit it hoped to obtain as the elimination of elephants  
19 from the circus.

20 We have, therefore, met the two-part test from  
21 Donohue. We have alleged the ulterior purpose, and we have  
22 alleged acts taken subsequent to the issuance of process in

1 order to accomplish that ulterior motive; namely, the  
2 posting of the motion for judgment to the Web site and the  
3 use of that Web site to solicit action and fund-raising.

4 And we have added now the allegation that that  
5 fund-raising was specifically aimed at raising funds that  
6 would be used to specifically target Mr. Feld and the  
7 circus to accomplish the political goal of eliminating  
8 animals from the circus.

9 So we have made changes to or additions of at  
10 least six items in the amended counterclaim. In paragraph  
11 9 we have added language to make clear that the improper  
12 purpose of attracting publicity and fund-raising was  
13 specifically aimed at Mr. Feld.

14 We have add paragraph 10 which evidences through  
15 counsel's own statements that PETA is truly interested in  
16 elephants and not in trade secrets.

17 We have added language in paragraph 12 where in  
18 the initial counterclaim we alleged only that the public --  
19 that the solicitation was for PETA's causes. Now we have  
20 specifically alleged that it was to support its anti-circus  
21 campaign that was specifically aimed at Mr. Feld and at  
22 Ringling Bros.

1           We have added to paragraph 20 also allegations  
2 that the ulterior purpose was specifically aimed at  
3 Mr. Feld and the companies with which he's affiliated. And  
4 we have also, again, expanded the reference to PETA's  
5 causes and made specific that the efforts were to harass  
6 the circus and were designed to advance PETA's political  
7 agenda of eliminating animals from the circus.

8           We have similarly amended paragraph 22.

9           And we have added paragraph 23 which states most  
10 clearly the extortion -- the extortion claim, which we  
11 believe the Court had highlighted in its earlier ruling.

12           Mr. Hirschkop mentioned malicious prosecution in  
13 his argument. This is not a claim for malicious  
14 prosecution. It's a claim for abuse of process. And it is  
15 not the suit itself that we are highlighting. It is  
16 consistent with *Donohue*; it's the issues taken after  
17 issuance of process that constitute the tort.

18           The key, Your Honor, is that we have alleged that  
19 PETA was motivated by a goal of accomplishing something it  
20 could not obtain through successfully pressing its claims.  
21 We specifically identified that, and we have set forth  
22 steps that PETA took subsequent to the issuance of process

1 to accomplish that goal.

2 Thank you.

3 THE COURT: Thank you.

4 Mr. Hirschkop.

5 MR. HIRSCHKOP: Your Honor, the very cases they  
6 cite and the law, as you quoted last time, motivation is  
7 not part of abuse of process. It has to be an act under  
8 Donohue in furtherance of an extortion attempt.

9 As you pointed out last time, Your Honor, there  
10 was no effort directed at Mr. Feld. They attach -- so you  
11 have it before you -- the Web site itself. There's nothing  
12 in that attachment that's extortion at all. There's  
13 nothing threatening. --

14 In the cases they cite, the one case -- I think  
15 the Cardy (phonetic) case out of First Circuit, there were  
16 direct phone calls from the plaintiff to the defendant  
17 that, "I know I'm not the going to win; I've brought suits.  
18 I know I'm not going to win; I'm doing it to get someone  
19 fired."

20 There's not one threat here. There's nothing  
21 directed at Mr. Feld. If you look at the Web site, there's  
22 nothing directed at Mr. Feld. You ruled the last time that

1 putting something on a Web site itself can't be abuse of  
2 process unless some other act was taken. I think it was  
3 the Cardy case. And there's one other case that they cited  
4 before where there were constant phone calls.

5 They cited a Nevada case where press clippings  
6 were sent in advance to the defendant that said, "If you  
7 don't pay us a lot of money, we're going to go get press."  
8 They filed a complaint with the Nevada bar in advance.

9 In this there's nothing, there's not one  
10 allegation to support their conclusory statement. PETA  
11 never threatened them, never said, "We're going to sue to  
12 get the elephants out of the circus."

13 And, lastly, Your Honor, the quoting of me -- and  
14 that was grossly misquoted. We put that in our brief.  
15 They took one sentence totally out of context. There's no  
16 question that there was a dispute between PETA and Ringling  
17 about getting large animals out of the circus because  
18 they're horribly and brutally treated.

19 Then Ringling and Feld and his whole bunch broke  
20 into offices, stole documents, committed wire-tappings, and  
21 all sorts of things, which is what gave rise to this  
22 lawsuit.

1           And that's all I said before, and that's all I  
2 repeat now. It's the dispute about the animals that give  
3 rise to the conspiracy that cause them to do what they and  
4 it's did not justified. But there are no allegations in  
5 this complaint similar to just saying they believe we did  
6 it with malice. It's their conclusions; and conclusory  
7 allegations are just a theory. That's all it is.

8           Thank you.

9           THE COURT: Thank you, Mr. Hirschkop.

10           And, as usual, the backdrop is that demurrers are  
11 not favored by the appellate courts of the Commonwealth,  
12 for that matter neither are the claims of abuse of process.

13           But when I sustained the demurrer the first time,  
14 I said what I thought needed to be added to get past a  
15 demurrer. And in the amended counterclaim paragraphs 20,  
16 21, 22, 23, and 24, I think, have alleged enough to get  
17 past a demurrer. And, again, that's not a rule on how to  
18 bar.

19           I agree with what Mr. Hirschkop said. I don't  
20 think just the posting of something on a Web site is  
21 enough. Not only do you have First Amendment problems,  
22 there are other problems with that. But what they're

1 alleged in the amended counterclaim is that the reason PETA  
2 did that -- and this is additional act -- was to stop the  
3 use of animals in the circuit and that being something they  
4 couldn't legitimately achieve through the suit.

5 For those reasons the demurrer to Feld's amended  
6 counterclaim will be overruled.

7 Do either of the you have an order which you can  
8 conform?

9 MR. PORTER: Yes, sir.

10 THE COURT: All right.

11 (At 10:29 a.m. the proceedings in the above-  
12 entitled matter were concluded.)

13

14

15

16

17

18

19

20

21

22

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

CERTIFICATE OF REPORTER

I, Malynda D. Whiteley, do hereby certify that the foregoing proceedings were taken by me in stenotype and thereafter reduced to typewriting under my supervision; that said proceedings are a true record of the testimony given by said witnesses; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and further, that I am not a relative or employee of any counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Given my hand this 18th day of October, 2004.

  
\_\_\_\_\_  
Malynda D. Whiteley  
Registered Professional Reporter