

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

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| _____ | |) |
| BOSTON FIREFIGHTERS UNION, | |) |
| IAFF LOCAL 718, | |) |
| Plaintiff, | |) |
| | |) |
| v. | |) |
| | |) |
| WHDH-TV, INC., CHANNEL 7, | |) |
| Defendant. | |) |
| _____ | |) |

Appeals Court
No. **2007-J-455**

**MEMORANDUM OF LAW IN SUPPORT OF PETITION OF WHDH-TV, INC.,
CHANNEL 7 FOR INTERLOCUTORY RELIEF PURSUANT TO G.L. c. 231, § 118
(FIRST PARAGRAPH)**

In the late afternoon of Wednesday, October 3, 2007, the Suffolk Superior Court enjoined defendant WHDH-TV, Inc., Channel 7 ("WHDH-TV") from broadcasting a news story of substantial public concern regarding the deaths of two firefighters. This Order constituted an impermissible prior restraint of free speech. It was not based upon any of the extremely narrow circumstances under which such a prior restraint can be justified. The Court's stated basis for the Order—the privacy rights of the firefighters and their families—has been expressly rejected as a justifiable basis for a prior restraint. Finally, the Order was not accompanied by the required detailed findings of fact identifying a compelling interest to be served by the restraint, nor did it demonstrate that no reasonable, less restrictive alternative to the Order was available. Accordingly, the Order violated and continues to violate WHDH-TV's rights under the First Amendment of the United States Constitution (the "First Amendment") and art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments ("Article 16"). See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *George W. Prescott Publ'g Co. v. Stoughton Div. of Dist. Ct. Dept. of Trial Ct.*, 428 Mass. 309, 311 (1998). This Order

causes continuing irreparable harm to WHDH-TV and to the most fundamental principles embodied in the federal and state constitutions each minute that it remains in effect. Accordingly, WHDH-TV petitions this Court for immediate interlocutory review and reversal of the Order.

Statement of the Case

At about 1 p.m. on October 3, Plaintiff Boston Firefighters Union, IAFF Local 718 (the "Union") served WHDH-TV with a copy of a temporary restraining order the Union had obtained *ex parte* on a Complaint for Declaratory Judgment and Injunctive Relief (the "Complaint"). See Exhibit A, which includes all documents served upon WHDH-TV. The Union also included notice of a 2 p.m. hearing in Suffolk Superior Court. The Complaint alleged that the Union served as the collective bargaining representative of all firefighters in the city of Boston, including Paul J. Cahill and Warren J. Payne. Compl. ¶ 2. Messrs. Cahill and Payne perished on August 29, 2007, in a fire at a West Roxbury restaurant. The local and national media¹ widely reported the deaths, in part because Cahill and Payne were the first Boston firefighters killed in the line of duty since 1994, and in part because several other firefighters were injured in the blaze. Throughout these media reports, Messrs. Cahill and Payne were portrayed as heroes and praised for their public service.

The Union's Complaint stated that WHDH-TV obtained confidential medical information from autopsies performed on Messrs. Cahill and Payne and intended to broadcast that information. Compl. ¶ 4. The Complaint alleged that these actions violated provisions of Mass. Gen. Laws ch. 38, § 2 and 505 CMR. § 1.00. *Id.* ¶ 5. More specifically, the Complaint alleged that WHDH-TV was not authorized by Massachusetts law to access the autopsy reports, so "to

¹ A New York Times article is still readable online at <http://www.nytimes.com/2007/08/31/us/31boston.html?n=Top/News/U.S./U.S.%20States,%20Territories%20and%20Possessions/Massachusetts>

the extent that the Defendant is in possession of an autopsy report, or information obtained from an autopsy report, it was not obtained in compliance with the statutory provisions." *Id.* ¶¶ 6-9. The Complaint asserted that publication of the autopsy report information would cause immediate and irreparable harm to the reputations of the deceased firefighters and their families. *Id.* ¶ 10. It sought a temporary restraining order and a preliminary injunction enjoining and restraining WHDH-TV from broadcasting information about the autopsy reports. *Id.* ¶ 11. The Complaint was not verified. The only exhibits filed with the Complaint were death certificates for Messrs. Cahill and Payne and copies of 505 CMR 1.00 *et al.*

After learning of the *ex parte* restraining order and the 2 p.m. hearing, WHDH-TV's attorney raced to the courthouse. Counsel explained that WHDH-TV planned to broadcast a story that day about information that its reporters had received from confidential sources, not autopsy reports, about the circumstances surrounding the deaths of Messrs. Cahill and Payne. Counsel represented that nobody from WHDH-TV had even seen the autopsy reports, let alone planned to disclose what they had seen. Counsel also argued that enjoining WHDH-TV from broadcasting its story about the deaths of Messrs. Cahill and Payne would impose upon it an unconstitutional prior restraint of free speech.

Counsel for the Union argued that his client's position was supported by *Globe Newspaper Co. v. Chief Medical Examiner*, 404 Mass. 132 (1989), a case in which the Supreme Judicial Court held that autopsies conducted by a medical examiner were "medical files or information" that could be withheld from disclosure under the public records law. That case did not address the right of the media to publish autopsy information provided to it.

At the conclusion of the hearing, the Court granted the Union's request for an injunction and ordered WHDH-TV to refrain from broadcasting the information its reporters had obtained

from confidential sources about the circumstances surrounding the firefighters' deaths. The Court stated that the Order was necessary to protect the privacy rights of the deceased firefighters and their families.² WHDH-TV attempted to file an emergency appeal with the Appeals Court, but business hours had passed and the clerk's office was closed. See Exhibits C and D, describing steps taken by WHDH-TV's counsel to immediately appeal the Order. WHDH-TV filed its petition for interlocutory review as soon as the courthouse opened its doors on Thursday, October 4, 2007.

Argument

The Superior Court's Order has three primary flaws. First, it constitutes a prior restraint of speech in violation of the First Amendment and Article 16. Second, the Court had no factual support for its Order. Third, there is no privacy exception to the rule against prior restraints, and the information that WHDH-TV intended to broadcast was, as a matter of law, not private.

The principles governing this Court's analysis of the Order under the First Amendment and Article 16 are not significantly different. *George W. Prescott Publ'g Co. v. Stoughton Div. of Dist. Ct. Dept. of Trial Ct.*, 428 Mass. at 311. With regard to the former, the United States Supreme Court has long held that "any prior restraint on expression comes ... with a 'heavy presumption' against its constitutional validity." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, Circuit J.). "Where a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment." *Id.* (citations omitted). "Although the prohibition against prior restraints is by no

² Despite the fact that a number of other media outlets attended the hearing, neither the Court nor Plaintiff's counsel addressed the application of its Order to outlets other than Channel 7. Efforts by Channel 7's counsel to address this issue, and to obtain a written order for purposes of appeal, were rejected. As a result, within hours of the hearing several media outlets broadcast precisely the facts that Channel 7 was restrained from broadcasting. Having broken the story, Channel 7 was the only party prevented from broadcasting it. See Exhibit B, which includes stories containing the information, printed from Massachusetts news web sites on the evening of October 3, 2007.

means absolute, the gagging of publication has been considered acceptable only in 'exceptional cases.'" *Id.* (citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931)). Such cases "may rise only when the nation 'is at war,'" *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (the "Pentagon Papers case") (Brennan, J., concurring) (citations omitted), and even then, prior restraints are disfavored. *Id.*

"Even where questions of allegedly urgent national security or competing constitutional interests are concerned, [the Supreme Court has] imposed this 'most extraordinary remedy' only where the evil that would result from the reportage is both great and certain and cannot be measured by less intrusive measures." *CBS, Inc. v. Davis*, 510 U.S. at 1317 (internal citations omitted). Similarly, the SJC has held that "any order seeking to enjoin speech must be based on detailed findings of fact that (a) identify a compelling interest that the restraint will serve and (b) demonstrate that no reasonable, less restrictive alternative to the order is available." *George W. Prescott Publ'g Co.*, 428 Mass. at 311.

This case obviously does not concern a matter of urgent national security. No troops will be exposed to enemy fire if WHDH-TV broadcasts the information it obtained about the deaths of Messrs. Cahill and Payne. Compare *Near v. Minnesota*, 283 U.S. at 716. Moreover, the Order is not supported by any factual findings, let alone detailed findings, that either identify a compelling government interest to be served by the Order or demonstrate that no reasonable, less restrictive alternative was available. Indeed, the Union put no facts on the record, other than that Messrs. Cahill and Payne are dead.

The Union's reliance on G.L. ch. 38, § 2, and 505 CMR 100 is also misplaced. Nothing in those provisions even applies to news organizations such as WHDH-TV, let alone prohibits such organizations from publishing information that they receive from sources other than the

autopsies themselves. *Globe Newspaper Co. v. Chief Med. Examiner* is not to the contrary. In that case, the SJC held that the public records law did apply to autopsy reports. *See generally* 404 Mass. 132. The Court did not prohibit news organizations from obtaining information from autopsies or publishing the information that they received. *Id.*

Indeed, even if WHDH-TV had illegally obtained the information about Messrs. Cahill and Payne's autopsies, which it did not, the Superior Court was required to deny the Union's request for an injunction and instead should have limited the Union to its post-publication remedies. The Supreme Court precedent is unambiguous on this point. In *CBS, Inc. v. Davis*, Justice Blackmun overturned an order by a South Dakota court enjoining CBS from broadcasting video footage of a company's meat packing operations that had been obtained from an employee who had worn undercover camera equipment. *See generally* 510 U.S. at 1315-18. The company alleged that the videotaping constituted trespass, breach of a duty of loyalty, a violation of the Uniform Trade Secrets Act and other torts. *Id.* at 1316. Justice Blackmun stated that even if the videotape had been obtained through the "calculated misdeeds" of CBS, the South Dakota court was still wrong to enjoin CBS from broadcasting it, stating "[i]f CBS had breached its state law obligations, the First Amendment requires that [the company] remedy its harms through a damages proceeding rather than through suppression of protected speech." *Id.* at 1318. Similarly, in the Pentagon Papers case, the Court issued a *per curiam* opinion that the government could not bar the New York Times and Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" that had been stolen from the Pentagon. *New York Times Co.*, 403 U.S. at 714.

Finally, the Superior Court's suggestion that WHDH-TV's plan to broadcast the story about the autopsies was an invasion of privacy ignores the fact that the information was not

private. As an initial matter, the firefighters were public figures. *See Rotkiewicz v. Sadowsky*, 431 Mass. 748, 753 (2000) (holding that police officers are public figures, after observing “[t]he [government] employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.”). They were on the public payroll, and their deaths in the line of duty were a matter of substantial public concern. Moreover, the information contained in their autopsy reports ceased to be “private” as soon as it was passed along to the reporters at WHDH-TV. *See Jones v. Tabibi*, 400 Mass. 786, 801 (1987) (“[w]here the information concerning a plaintiff is already public, a defendant is not liable merely for giving further publicity to that information.”); *Peckham v. Boston Herald, Inc.*, 48 Mass. App. 282, 290 n.9 (1999) (“[i]f a newspaper lawfully obtains truthful information about a matter of public significance then [the] state ... may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”) (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989)). Even if the firefighters were not public figures involved in a matter of public concern, any right to privacy they had terminated upon their deaths. “Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a *living* individual whose privacy is invaded.” Restatement (Second) of Torts, § 652I (emphasis added).

Finally, even if the information were private, injunction of WHDH-TV's publication of the news would still constitute an impermissible prior restraint. “Mere intrusion on a person's alleged privacy interest is not by itself an adequate base on which to predicate a broad prior restraint on another's free speech.” *Nyer v. Munoz-Mendoza*, 385 Mass. 184, 188 (1982).

Conclusion

For each and all of the foregoing reasons, this Court should grant an interlocutory appeal and vacate the Order issued by the Superior Court.

WHDH-TV, INC., CHANNEL 7
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Dated: October 4, 2007

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon Paul Hynes, the attorney of record for Boston Firefighters Union, IAFF Local 718, by facsimile and by first-class mail on October 4, 2007.

Michael T Gass