

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

_____)
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.

