ARIZONA COURT OF APPEALS

DIVISION TWO

TIFFANY BREDFELDT AND PHILIP BREDFELDT,	)	No. 2-CA-CV-2016-0198
Plaintiffs/Appellees,	)	Pima County Superior Court No. C20131650
vs.	)	
TODD GREENE,	)	
Defendant/Appellant.	)	

APPELLEE'S ANSWERING BRIEF

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STATEMENT OF THE CASE

¶1 Appellant Todd Greene has been a menace to Appellees dating to at least 2006 when Appellee Dr. Tiffany Bredfedlt was forced to obtain an injunction against harassment against Appellant. R. 3. In 2013, Appellees sought and obtained a permanent injunction against Appellant enjoining him from certain actions related to his use of his blog to injure Appellees. R. 38.

¶2 In 2016, Appellees sought to enforce the injunction by way of contempt sanctions. R. 69. Then, for the first time, Appellant moved to dissolve the injunction as violative of his right to free speech. R. 98. The trial court properly denied the motion, finding that while it had authority to modify or vacate the injunction based on changed circumstances, changes in the law, or exigencies, none existed. R. 115. Appellant timely filed his notice of appeal. R. 119.

STATEMENT OF FACTS

¶3 On March 27, 2013, Appellant Todd Greene had become such a nuisance to Appellees, Dr. Tiffany Bredfeldt and her husband Philip Bredfeldt, that Appellees filed a civil complaint against Appellant in Pima County Superior Court requesting an injunction against harassment. R. 3; R. 4. Appellees alleged that Dr. Bredfeldt had a prior injunction against Appellant and that in the time between its expiration and March 27, 2013, Appellant had continued his pattern of harassment and caused Dr. Bredfeldt emotional distress. R. 3.

¶4 In their complaint and amended complaint, Appellees listed the individuals contacted by Appellant in his ongoing harassment of them. R. 3; R. 33. That list of individuals included the Inspector General of the United States Department of Health and Human Services, the Presbyterian Church of America, Dr. Bredfedlt's employer, Appellees' family members, professional colleagues, former professors, and a litany of others. *Id*.

¶5 The trial court conducted a hearing on May 20, 2013. RT May 20, 2013. At that hearing, the court took testimony from Michael Honeycutt, Dr. Bredfeldt's boss, Jennifer Terpstra, Dr. Bredfeldt's friend, Dr. Bredfeldt herself, and Appellant. *Id*. After hearing testimony and taking evidence, the trial court granted Appellees' request for an injunction and issued an order enjoining Appellant not from using the internet or from posting to his blog, but rather from using his blog to harass, defame,

or otherwise invade the privacy of Appellees. R. 38. If the injunction itself seems broad or sweeping, it is that way only because Appellant's previous conduct was so horrifyingly broad and sweeping in its reaches and depths.

¶6 In response to the original order, Appellant indicated by his conduct that he was capable of compliance, by ceasing publications and removing the offensive content from his blog as ordered. R. 57. On September 9, 2013 the trial court *sua sponte* converted the May 20, 2013 injunction to a permanent injunction. R. 60. Appellant filed a notice of appeal but ultimately opted against completing an appeal of the September 9, 2013 order. R. 62.

¶7 By March 2016, Appellant had restarted his tortious, harassing, and defamatory conduct. Appellees filed a post-judgment request for contempt sanctions. R. 69. During the proceedings on the request for contempt sanctions, counsel for Appellant filed a motion to dissolve the injunction. R. 98. After having the issue fully briefed, and after hearing argument on the matter, the trial court denied the motion to dissolve. R. 106; R. 115.

ISSUES PRESENTED

1. Was the trial court correct in upholding a validly issued permanent injunction when Appellant moved to dissolve it three years after its issuance with no intervening change in circumstances or law or other exigencies?
2. Does res judicata and collateral estoppel prevent Appellant from raising these issues for the first time now?
3. Was the trial court correct in concluding that the speech prohibited by the injunction is unprotected speech pursuant to well established case law?

ARGUMENT

A. The Trial Court Was Correct in Holding That No Changed Circumstances, Exigencies, or Changes in the Law Existed That Would Have Given it Authority to Modify or Dissolve the Injunction.

¶8 Rule 65 of the Arizona Rules of Civil Procedure permits a party to "file a motion to dissolve or modify a *preliminary* injunction…" Ariz.R.Civ.P. 65(a)(3) (emphasis added). There is no similar procedure for dissolving a permanent injunction.

¶9 Trial courts possess equitable authority to modify a permanent injunction in cases where "subsequent changed circumstances [make] its application [] no longer applicable." *State ex rel. Corbin v. Portland Cement Ass'n*, 142 Ariz. 421, 425, 690 P.2d 140, 144, (App. 1984). Trial courts similarly may modify or vacate "as exigencies arising since its rendition may require" *Id*. (quoting *Lowe v. Prospect Hill Cemetery Ass'n*, 75 Neb. 85, 106 N.W. 429, 108 N.W. 978 (1905)).

¶10 In 2013, when the trial court contemplated issuing the original injunction in this matter it held a hearing that it termed an order to show cause hearing. At that hearing, numerous witnesses testified and Appellant had an opportunity to cross examine those witnesses as well as to put on evidence and testimony as he saw fit. Following that hearing, the trial court issued an injunction. Subsequently the trial court converted the preliminary injunction into a permanent injunction.

¶11 While Appellant filed a notice of appeal (timely or untimely) on November 8, 2013, Appellant failed to act on his appeal or otherwise pursue it. As such, the Court's order of September 9, 2013 is and was final.

¶12 Since September 9, 2013 there have been no substantive changes to the First Amendment or to First Amendment jurisprudence that render the permanent injunction issued by the trial court in need of modification or dissolution. To the contrary, courts around the country have begun to appreciate the serious power the internet has with respect to harassment. By way of example, a New York Supreme Court judge found that a defendant violated an order of protection by tagging an individual on Facebook – effectively contacting them via the internet.

¶13 Since the issuance of the original injunction and then its conversion by the trial court into a permanent injunction the only thing that has changed is Appellant's conduct. At first, Appellant followed the trial court's directives, vis a vis the injunction. However, over time, Appellant began to flout the court's order and resumed his tortious conduct. Appellees acted by way of asking the trial court to find that Appellant was in contempt. As the trial court noted, this does not amount to the changed circumstances contemplated by *Portland Cement*.

¶14 Because Appellant has cited no changes to the law, no changes to the facts, or no exigencies that exist that would support dissolving the permanent

injunction ordered on September 9, 2013, the trial court ruled correctly in denying Appellant's Motion to Dissolve.

B. Even if the Trial Court Did Have Grounds to Consider a Motion to Dissolve, Both Res Judicata and Collateral Estoppel Would Have Obliged the Trial Court to Deny the Motion

¶15 "There is no question that…a decree of a court of equity is res judicata as to the circumstances which existed at the time of the making of the decree." *Portland Cement*, 141 Ariz. at 425. The circumstances that existed at the time of the issuance of the original injunction were that Appellant Greene had harassed Appellees online for years. Appellant had posted defamatory statements about Appellees to his blog, characterized Appellees in a false light, and ultimately invaded Appellees' privacy. The trial court, back in May 2013, heard testimony and took evidence as to these issues. In issuing the original injunction the trial court specifically ruled that Appellant's speech was not protected by the First Amendment. *See* May 20, 2013 injunction, pg. 3, ¶¶2-3.

¶16 Because res judicata applies, Appellant should no longer be permitted to litigate the issue of whether his conduct amounts to protected speech under the First Amendment. Had he wanted to do so, the proper avenue and vehicle would have been by means of an appeal from the trial court's order of May 20, 2013 or the conversion of that injunction into a permanent injunction in September 2013. Appellant took no meaningful action in response to either order.

¶17 "Collateral estoppel, or issue preclusion, binds a party to a decision on an issue litigated in a previous lawsuit if the following factors are satisfied: (1) the issue was actually litigated in the previous proceeding; (2) the parties had a full and fair opportunity and motive to litigate the issue; (3) a valid and final decision on the merits was entered; (4) resolution of the issue was essential to the decision; and (5) there is a common identity of parties." *Campbell v. SZL Properties, Ltd.*, 204 Ariz. 221, 223 ¶9, 62 P.3d 966, 968 (App. 2003); *Garcia v. Gen Motors Corp.*, 195 Ariz. 510, 514, ¶9, 90 P.2d 1069, 1073 (App. 1999). Offensive use of collateral estoppel requires the existence of all five elements. All five are present here.

i. Issue Actually Litigated

¶18 This matter was litigated before the trial court in May 2013. Then, the trial court took testimony from Appellee's boss/employer, a friend of Appellee, Appellee Dr. Bredfeldt, and Appellant. Appellant was allowed to call witnesses and testified on his own behalf. Both parties raised issues relevant to whether Appellant's speech was protected by the First Amendment as well as whether Appellees were public figures.

ii. The Parties Had a Full and Fair Opportunity and Motive to Litigate the Issue

¶19 During the May 20, 2013 hearing, Appellant appeared before this Court for an order to show cause hearing. At issue were the questions of whether Appellees were public figures, whether Appellant defamed Appellees, whether he portrayed

them in a false light, and whether he invaded their privacy. The hearing was set for the explicit purpose of determining whether the trial court had the legal authority to enjoin Appellant from further blog posts and contacts related to Appellee Dr. Bredfeldt and her family. Put bluntly, Appellant had every motive to argue the issues at hand.

¶20 Moreover, the trial court gave him every opportunity to be heard. At the hearing, Appellant was permitted to cross-examine every witness Appellees called, including Appellee Dr. Bredfeldt. Appellant was permitted to call witnesses on his own behalf and offer evidence he believed was relevant and admissible. Lastly, Appellant was permitted to make argument to the court. In sum, Appellant had a full and fair opportunity to be heard.

iii. A Valid and Final Decision on the Merits Was Entered

¶21 The May 20, 2013 order of Judge Cornelio was valid and it was final. To date, there has been no contention otherwise. When Judge Cornelio, by minute entry/order, converted the May 2013 injunction into a permanent injunction on September 9, 2013, that was also a valid, final decision on the merits.

¶22 In these rulings, the trial court made several findings. Chief among them were that Appellee Dr. Bredfeldt and her family were not public figures, that the statements made by Appellant were defamatory, and that those same statements

invaded Appellees' privacy. At no point since has Appellant challenged these findings or the trial court's order.

iv. Resolution of the Issue Essential to the Decision

¶23 The trial court could not have entered an order on the order to show cause back in May 2013 had it not made the findings referenced above. These issues itself were at the heard of Appellees' requested order.

v. The Parties are Identical

¶24 The parties to this action are identical to the parties at the hearing in May 2013, the order issued thereafter, and the subsequent permanent injunction issued September 9, 2013.

¶25 Between 2006 and 2013, Appellant was engaged in continuous conduct intended to harass and otherwise injure Appellees. His conduct was tortious. Appellees sought one of the two remedies available at law: injunctive relief. When Appellees' initial injunction expired in 2007, Appellant returned to his old ways. By 2013, Appellant's behavior was so abhorrent and injurious that Appellees returned to the courts, at great expense, and attempted to put an end to the matter.

¶26 To that end, the parties litigated these issues. The parties presented testimony and evidence that established that Appellant was posting defamatory information about Appellees on his blog. The parties presented testimony and evidence that proved Appellant was displaying Appellees in a false light. The parties

presented testimony and evidence that established that Appellees were not public figures.

¶27 Had Appellant wanted to appeal these decisions and the trial court's 2013 actions, he could have done so in 2013. He opted against that. The only reason Appellant was even before the trial court again on this matter is because Appellees were forced to enforce the injunction after Appellant repeatedly violated it in late 2015 and early 2016. Violating the injunction cannot serve as a reasonable basis to re-litigate the issues central to its original issuance.

C. The Trial Court Correctly Found that the Injunction Did Not Violate Appellant's First Amendment Rights

¶28 Appellant's First Amendment argument here is surrounded by sound legal principles and case law. However, the speech enjoined by the trial court by way of the permanent injunction is speech that lacks constitutional protection.

¶29 The trial court took great care to explain the ways in which it was construing the 2013 injunction to Appellant's 2016 objections. First, there was never a pre-existing relationship between the parties that might suggest the speech was on public matters. *See Snyder v. Phelps*, 562 U.S. 443, 455 (2011). As such, ordering that Appellant refrain from making contact, direct or derivative with Appellees, their family members, employers, colleagues, etc. was intent solely on ensuring that Appellant stop harassing Appellees. As this Court is aware, and has held previously, harassing speech and harassing conduct is not protected by the Constitution and may

be punished or otherwise enjoined. *See State v. Brown*, 207 Ariz. 234, ¶8, 85 P.3d 109, 112 (App. 2004).

¶30 Additionally, as the trial court noted, the injunction does not prohibit Appellant from contacting public officials over matters of public concern. In that manner, the court correctly concluded that the injunction is narrowly tailored in a manner to prevent continuous personal and harmful harassment.

¶31 There exists "no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007 (1974). "[F]alse light invasion of privacy…require[s that a plaintiff] show that the defendant knowingly or recklessly gave publicity to a matter that places the plaintiff in a false light that a reasonable person would find highly offensive." *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 340, 783 P.2d 781, 786 (1989). A plaintiff "must prove that the defendant published with knowledge of the falsity or reckless disregard for the truth." *Id*. This is a high standard of proof, and understandably so, because the First Amendment is generally protective of speech. However, even considering such a high standard, the trial court here found that "the [Appellant] is an angry young man trying to get back at someone who caused him harm in 2006, and as a result is…purposefully characterizing the plaintiff in a false and vicious light…and [Appellant's] conduct invade's [sic] the plaintiff's privacy. R. 38.

¶32 The law is plain as day that courts may enjoin speech that has judicially determined to be defamatory. *See Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 349 (Cal. 2007). Additionally, "Courts have held that if past conduct has already been adjudicated illegal, tortious, or otherwise lacking in constitutional protection, then future conduct constitutionally may be enjoined." *Childs v. Ballou*, 148 A.3d 291, 297 (Me. 2016).

¶33 The trial court was clear in its ruling: Appellant is not prohibited from speaking. Nor is he prohibited from blogging. However, Appellant has been and will continue to be enjoined from tortious behavior as it relates to Appellees. This action is constitutional. In no way does it infringe upon Appellant's rights to maintain a blog and have unfiltered and genuine discussions of issues near and dear to his heart. As per the injunction, false, defamatory, and other legally unprotected speech is not permitted. In that way the court's order is narrowly tailored and does not run afoul of the First Amendment.

CONCLUSION

¶34 For the foregoing reasons, Appellees respectfully request that the Court affirm the trial court's ruling denying Appellant's motion to dissolve.

RESPECTFULLY SUBMITTED this 5th day of July, 2017

By /s/ Christopher L. Scileppi
Christopher L. Scileppi
Attorney for Appellees

CERTIFICATE OF COMPLIANCE

State of ARIZONA)
) ss.
County of Pima)

I, **Christopher L. Scileppi, Esq.**, pursuant to Rule 14(b) of the Arizona Rules of Civil Procedure certify that the Appellee's Answering Brief, filed herein on July 3, 2017 uses proportionally spaced type of 14 points or more, is double spaced using Times New Roman, and contains 2,716 words.

RESPECTFULLY SUBMITTED this 5th day of July, 2017

By /s/ Christopher L. Scileppi
Christopher L. Scileppi
Attorney for Appellees

CERTIFICATE OF SERVICE

State of ARIZONA)
) ss.
County of Pima)

I, **Christopher L. Scileppi, Esq.**, certify that I represent Appellees in this matter and that on the 5th day of July 2017 I caused to be delivered/mailed the following:

APPELLEE'S ANSWERING BRIEF

That the original of the foregoing was electronically filed with:

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That copies were delivered/mailed to:

Hon. Richard Gordon	Mr. Kristine Alger, Esq.
Superior Court Judge	Assistant Legal Defender
Pima County Superior Court	Pima County Legal Defender's Office

By /s/ Christopher L. Scileppi
Christopher L. Scileppi
Attorney for Appellees