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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHRISTOPHER BARNETT,)
)
Plaintiff,)
)
vs.)
)
(1) HALL, ESTILL, HARDWICK,)
GABLE, GOLDEN & NELSON, P.C.,)
(2) J. PATRICK CREMIN,)
(3) JOHNATHAN L. ROGERS, AND)
(4) UNIVERSITY OF TULSA, A)
PRIVATE UNIVERSITY,)
)
Defendants.)

CASE NO. 18-CV-64-TCK-FHM

TRANSCRIPT OF RECORDED PROCEEDINGS
FEBRUARY 26, 2018
BEFORE THE HONORABLE JUDGE FRANK H. McCARTHY,
MAGISTRATE JUDGE PRESIDING

MOTION HEARING

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A P P E A R A N C E S

FOR THE PLAINTIFF:

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FOR THE DEFENDANTS:

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Paul & Lackey PC
9 E. Fourth Street
Suite 400
Tulsa, OK 74103

1 PROCEEDINGS:

2 -----

3 **THE DEPUTY COURT CLERK:** This is case 18-CV-64-TCK-
4 FHM, Christopher Barnett vs. Hall, Estill, Hardwick, Gable,
5 Golden & Nelson, P.C., et al.

6 Counsel, please enter your appearances.

7 **MR. McHUGH:** Brendan McHugh, attorney for Christopher
8 Barnett.

9 **MS. JIM:** Dana Jim, co-counsel for Christopher
10 Barnett.

11 **MR. LACKEY:** John David Lackey on behalf of the
12 University of Tulsa, Judge.

13 **MS. SULLIVAN:** Kelsie Sullivan for Hall Estill, Pat
14 Cremin and Johnathan Rogers.

15 **THE COURT:** All right. We've got a motion for a
16 protective order, which is our document number 14, filed by TU.
17 15 was a -- our docket 15 was a motion for an emergency
18 hearing; we're having a hearing, so that's granted. We've also
19 got two motions filed by the plaintiff, 23 and 25. I'm going
20 to try to take those up also, but we'll start with TU's motion
21 for protective order.

22 **MR. LACKEY:** Judge, if --

23 **THE COURT:** If you'll please use the lectern.

24 **MR. LACKEY:** Yes, sir.

25 Good morning. May it please the court.

1 The University of Tulsa has filed what it styles as a
2 motion for protective order asking this court to enforce
3 conduct that is expected not only by this court generally but
4 by specific order of the district judge assigned to the case,
5 Judge Terence Kern. We have filed a motion, we have provided
6 some support and evidentiary exhibits detailing the need based
7 on what Mr. McHugh in his response to that motion agrees is
8 abhorrent, uncivil, inappropriate conduct by the plaintiff.

9 We are less than a month into a litigation, there has been
10 a motion to dismiss, a legal basis saying that the pleadings
11 just don't contain sufficient facts to hold the University of
12 Tulsa responsible, even assuming the facts of the matter. And
13 we have been -- and I say "we" because not only has plaintiff
14 attacked the University of Tulsa, its administrators and staff,
15 he has attacked specifically counsel for TU, apparently only on
16 the basis that I've entered an appearance for the University of
17 Tulsa.

18 It is inappropriate, it is against the court's rules that
19 have been published on the court's website, and the University
20 of Tulsa is merely seeking an order that would memorialize that
21 plaintiff and his counsel and, for that matter, the University
22 of Tulsa and its counsel, and Hall Estill, Mr. Rogers,
23 Mr. Cremin, and its counsel are required to abide by the rules
24 that have been promulgated in this court.

25 So I have replied, provided additional conduct that

1 occurred. I have, for the court, additional conduct that has
2 occurred even over the weekend, calling Judge Kern's wife a
3 whore, saying that Pat Cremin molested his son before his son
4 died, calling me a child molester. This is just not behavior
5 that this court can tolerate.

6 I would point out that in his response, Mr. Barnett agrees
7 to a limited order that he will not speak defamingly about
8 counsel for the parties, but yet within hours of filing that
9 response we have a course of conduct that's outlined in the
10 reply and as I've just indicated to the court that has occurred
11 over this weekend since the court set its order for hearing
12 today.

13 I don't believe that this request is a request that goes
14 down the prior-restraint analysis, but I'm certainly prepared
15 and able to provide the court with the prejudice that occurs if
16 the court believes this is a prior-restraint issue under the
17 cases that have been cited by plaintiff in his response.

18 **THE COURT:** Let's start with the authority that you
19 cite as the basis for your motion.

20 **MR. LACKEY:** Yes, sir.

21 **THE COURT:** You cite three things: Federal Rules of
22 Civil Procedure 83, --

23 **MR. LACKEY:** Yes, sir.

24 **THE COURT:** -- and that simply allows the district
25 courts to enact local rules. You then cite 83.7 of our local

1 rules. Tell me what, in 83.7, you say would support the order
2 that you're requesting.

3 **MR. LACKEY:** Within 83.7 itself -- and I don't have it
4 in front of me, and I apologize, I do have it -- but it refers
5 to conduct before the court. I believe, and certainly the
6 court is more aware of its own local rule than counsel, that it
7 refers to the conduct of counsel itself.

8 **THE COURT:** I think you've read it correctly. It's a
9 rule that directs counsel how they are to behave when they're
10 in court.

11 **MR. LACKEY:** Yes, sir.

12 **THE COURT:** So, how does that support an order to a
13 party as to how they are to behave when they're not in court?

14 **MR. LACKEY:** Your Honor, what I would suggest is that
15 the University of Tulsa is seeking an order based on the
16 conduct thus far that enforces Rule 83.7 moving forward as to
17 both counsel and the parties.

18 **THE COURT:** But what I'm trying to get to -- I
19 understand you say that -- but what in Rule 83.7 do you point
20 to that would give the court any authority to tell a party what
21 they can and cannot do outside of the courtroom, --

22 **MR. LACKEY:** And, Your Honor, my res- --

23 **THE COURT:** -- and the pleadings filed with the court,
24 obviously.

25 **MR. LACKEY:** Certainly. My response, Your Honor,

1 would be that the order that we're seeking is not specific just
2 to plaintiff, it also includes plaintiff's counsel.

3 **THE COURT:** Well, let's focus on plaintiff for a
4 minute.

5 **MR. LACKEY:** Then with regard to plaintiff, --

6 **THE COURT:** How would I have --

7 **MR. LACKEY:** -- I would agree that 83.- -- I
8 apologize, I cut you off.

9 **THE COURT:** Go ahead.

10 **MR. LACKEY:** I would agree that 83.7 does not
11 explicitly identify plaintiff or parties as a subject to Rule
12 83.7, and at that point we would rely on the inherent authority
13 of the court.

14 **THE COURT:** Okay. Would you also agree that Judge
15 Kern's, what he styles "Civil Trial Rules," would not cover the
16 conduct of a party outside the courtroom?

17 **MR. LACKEY:** I don't know that I would agree with
18 that, Judge.

19 **THE COURT:** What in Judge Kern's Civil Trial Rules do
20 you point to that would give the court authority to direct a
21 party not to do something outside the courtroom?

22 **MR. LACKEY:** The first paragraph of Judge Kern's trial
23 rules published on this court's website states, and I quote,
24 and I apologize if I start going too fast, "Professionalism,
25 courtesy, decorum and common sense shall dictate all behavior

1 in this court. The parties and attorneys will be held to the
2 highest standard of professional conduct, personal and
3 professional courtesy, and deportment throughout all
4 proceedings conducted in this court."

5 **THE COURT:** "Conducted in this court." Both sentences
6 you read include the phrase "in this court."

7 **MR. LACKEY:** Yes, sir.

8 **THE COURT:** So how does that give the court authority
9 to tell a party what they can and cannot do outside the
10 courtroom?

11 **MR. LACKEY:** Your Honor, the court, I believe, is
12 parsing the sentence by saying "in this court" as specifically
13 within the confines of the courtroom. It is all proceedings
14 which is the litigation itself that certainly -- well, and I
15 don't want to speak for Judge Kern -- but it is my reading of
16 that rule that all parties and attorneys are held to the
17 highest standards of conduct within the course of the
18 litigation. That is my interpretation of that rule, whether it
19 is before you as we stand here today or whether it is as I walk
20 out the door and talk about this case while it is still in
21 active litigation.

22 **THE COURT:** You've said that you don't believe that
23 what you're asking is a prior restraint.

24 **MR. LACKEY:** Yes, sir.

25 **THE COURT:** Tell me how telling a party what they can

1 and cannot say in the future is not a prior restraint.

2 **MR. LACKEY:** And if I was vague, I apologize. I am
3 suggesting to the court that it is not a prior restraint under
4 the line of cases cited by Mr. Barnett in his response. If the
5 court were to --

6 **THE COURT:** Well, let's put the cases aside for just a
7 second because we'll get to those.

8 **MR. LACKEY:** Sure.

9 **THE COURT:** But how is it not a prior restraint to ask
10 for an order that would tell somebody what they can and cannot
11 say tomorrow? I mean, it's prior --

12 **MR. LACKEY:** Uh-huh.

13 **THE COURT:** -- and it's restraining them. So how is
14 that not a prior restraint?

15 **MR. LACKEY:** I confess that under that definition of
16 "prior restraint," it is, Judge, a prior restraint. I do
17 not --

18 **THE COURT:** Is there another --

19 **MR. LACKEY:** -- believe it is --

20 **THE COURT:** Is there another definition that I should
21 be looking at?

22 **MR. LACKEY:** I believe that the prior-restraint case
23 law cited by plaintiff is of a different nature than what we
24 have before you today.

25 **THE COURT:** How is it different?

1 **MR. LACKEY:** Mr. Barnett is not -- and if you see in
2 the respon- -- I'm sorry -- in the motion and in the reply, the
3 university and Hall Estill and Mr. Rogers and Mr. Cremin are
4 not asking for a prior restraint of the plaintiff's ability to
5 speak about the case itself. That is not a request that has
6 been made. It is merely to uphold and abide by the standards
7 that this court expects of both its parties and its litigant
8 attorneys and, therefore, it is not asking for Mr. Barnett not
9 to talk about whether he thinks he has a good case, a bad case,
10 specific evidence in the case about his claims of civil rights
11 violations.

12 Asking the court to enforce decorum is not asking the court
13 to preclude him from speaking in the future about his case, and
14 that would be the distinction I would make.

15 **THE COURT:** So it's -- he can talk about the case as
16 long as he talks about it in a way that's satisfactory to you
17 and to the court?

18 **MR. LACKEY:** I guess, in a general sense, yes, but I
19 don't know that satisfactory to me has much of an application;
20 I would agree that it's satisfactory to the court.

21 And as TU pointed out, and I've said now twice, I'm not
22 asking for the court to enter an order that he's not allowed to
23 go to the press. I'm not asking for an order that he's not
24 allowed to talk about the merits of his case. I'm not asking
25 for an order that precludes Mr. Barnett from commenting

1 generally on the parties themselves. What I'm asking is I
2 think that this court -- and certainly there are cases even
3 cited by Mr. Barnett and his counsel that suggest that you have
4 the inherent authority to prevent a circus. You have the
5 inherent authority to prevent chaos in your court. Mr. Barnett
6 is -- appears to be making a sham of this court by what he says
7 about counsel and the court and the parties and what he
8 believes his rights are regardless of the impact that it has.

9 **THE COURT:** Anything else, sir?

10 **MR. LACKEY:** Again, I am prepared to argue that
11 prior-restraint factors, if the court wants to go down that
12 path with me, specifically about prejudice to the university,
13 and I think Ms. Sullivan even has some argument about that with
14 regard to her clients, but the cases cited by -- and if you'd
15 like to move to that at a different point, I can, or I can
16 allow other people to speak. However you would like to
17 proceed.

18 **THE COURT:** Whatever -- I'm happy to hear whatever you
19 think supports your position.

20 **MR. LACKEY:** Well, let me briefly talk then about the
21 prior-restraint speech that they talk about. We have a couple
22 of issues, that the court under the -- there is no specific
23 Tenth Circuit case that outlines this issue, and so, looking
24 around at other cases, we have *Chambers v. NASCO*, it's a United
25 States Supreme Court case from 1991, 501 U.S. 32. It talks

1 about the inherent authority of the court to control the
2 parties' conduct. It specifically says, "Courts of justice are
3 universally acknowledged to be vested by their very creation
4 with power to impose silence, respect, and decorum in their
5 presence and submission to their lawful mandates." And that's
6 at page 43 of that opinion.

7 **THE COURT:** But how does that help you? That's "in
8 their presence," in the court's presence, certainly I can stop
9 people from disrupting this court proceeding.

10 **MR. LACKEY:** The court goes on, Your Honor, to say,
11 "This power reaches both conduct before the court and that
12 beyond the court's confines, for the underlying concern that
13 gave rise to the power was not merely the disruption of court
14 proceedings. Rather, it was disobedience to the orders of the
15 judiciary, rather of which -- of which whether such
16 disobedience interfered with the conduct of trial."

17 **THE COURT:** Certainly if I issued an order they have
18 to obey it, but that doesn't say -- how does that give me
19 authority to issue the order?

20 **MR. LACKEY:** The power to impose silence, respect, and
21 decorum, reaches both conduct before the court and that beyond
22 the court's confines.

23 **THE COURT:** Do you have -- because we've looked --

24 **MR. LACKEY:** That is at page 44 of that.

25 **THE COURT:** Do you have a case where any court has

1 imposed this type of prior restraint on a litigant and had that
2 order upheld? We can't find one.

3 **MR. LACKEY:** In *Marceaux v. Lafayette*, a case cited by
4 plaintiff, a Fifth Circuit case out of 2013, the court in that
5 case -- the Fifth Circuit appeals court reversed, in part, a
6 total gag order imposed by the district court on a website, and
7 it is about as close as I can find a case because it is current
8 in regards to electronic communications. The court in that
9 case did not say that a prior restraint, a gag order, whatever
10 Mr. Barnett or the court wants to call it, was inappropriate.
11 In fact, what it --

12 **THE COURT:** Well, I think the Supreme Court has used
13 prior restraint. I mean, that's not something I'm making up.

14 **MR. LACKEY:** I'm not suggesting that the court is
15 using it as a pejorative term. Mr. Barnett has called it a gag
16 order is the reason that I'm defining it in two different ways.

17 But in *Marceaux*, what the court said was that the court
18 also fashioned other remedies with regard to speech other than
19 the website, and it took a very narrow and nuanced approach.
20 In fact, it said at 731 F.3d 488, "The district court
21 faithfully and carefully addressed numerous precedence
22 surrounding the use of gag orders and applied a careful and a
23 nuanced approach in much of the challenged order." It was only
24 the website that was being challenged by the litigants in that
25 appeal where the court blanketly said, "You may not have a

1 website during the course of this litigation." Again, that is
2 not what the university is saying. We are saying the court
3 should, if you go down the prior-restraint analysis, take a
4 nuanced and careful approach to what kind of conduct is
5 protected and is not protected and move forward with an order
6 that protects both sides to this litigation, as it is allowed
7 to defend itself properly, as they're allowed to prosecute it
8 properly.

9 What I would suggest is if you were to read *Marceaux*, and
10 again, it is not Supreme Court, but that's as close in our
11 modern age as I can find, and it's cited by plaintiffs to
12 suggest that a blanket gag order is not acceptable, and TU does
13 not disagree with that, that's not what we're asking for.

14 They say in that same case -- I'm sorry -- in *Seattle Times*
15 *vs. Rhinehart*, which is a Supreme Court case from 1984,
16 "Although litigants do not surrender their First Amendment
17 rights at the courthouse door, those rights may be subordinated
18 to other interests that arise in the context of both civil
19 trial and criminal trials."

20 In that same case, they say, "Considerable discretion is
21 vested in district courts in insuring fair trials, avoiding a
22 circus atmosphere or chaos that can be occasioned by unfettered
23 aggression on the part of one or both sides in litigation."

24 The substantial likelihood of prejudice test is what's been
25 applied in the *Marceaux* case, the Fifth Circuit case. Again, I

1 cannot find, and I'm sure the court has looked, you've
2 indicated as such, a Tenth Circuit case that's specifically on
3 point with this same issue. But the substantial likelihood of
4 prejudice test applies to Your Honor, that the University of
5 Tulsa, and we can -- if you need evidence on the matter, we're
6 prepared to provide evidence as officers of the court.

7 I have not entered additional lawyers because of the
8 harassment and threats and inappropriate conduct that has been
9 directed at me for merely filing an entry and filing a motion
10 to dismiss. I don't have additional people here to help me
11 today. I don't have additional people that are able to go to
12 depositions or appear in front of the court on matters as we
13 proceed through this litigation. I don't have a client here
14 because of the conduct that Mr. Barnett exhibits towards those
15 people who appear at a court hearing when he is also present.
16 I'm going to spend more of my client's money today by having to
17 go back and explain to them what you did rather than them being
18 allowed to sit here for themselves and hear it. They're not
19 allowed to sit at the tab- -- well, they feel concerned about
20 their ability to sit here at the table and assist me even
21 during the hearing, Judge.

22 I don't have another case where I feel like I cannot defend
23 a client the way that has occurred in this case, and all I am
24 asking the court for is protection so that I can, and the
25 University of Tulsa has a right to, defend itself as it moves

1 forward without the fear of, because somebody is sitting at a
2 table, becoming subject to harassment, ridicule, threats,
3 whatever, this court or other persons want to deem those
4 languages as.

5 But with all due respect, filing -- I don't know
6 Mr. Barnett, and he's called me a child molester because I
7 entered an appearance for the University of Tulsa. If that's
8 not conduct that the court has a right to control during the
9 course of this litigation, it makes a mockery of the court's
10 rules to suggest otherwise.

11 Thank you.

12 **THE COURT:** Thank you, sir.

13 Does Hall Estill have something they wanted to add?

14 **MS. SULLIVAN:** Yes, Your Honor, a few brief comments,
15 if I may.

16 May I?

17 Your Honor pointed out during Mr. Lackey's arguments
18 regarding disrupting court proceedings. Court proceedings are
19 not only defined of what's in the interior of this courtroom,
20 court proceedings are also depositions, they're also
21 meet-and-confers. There's a litany of other items outside this
22 courtroom.

23 The inherent power of the courtroom exists for the mere
24 fact to fill in the gaps in the [inaudible]. That's one of the
25 reasons Judge Kern has the rules on the civil trial court rules

1 is to fill in the holes. It does list parties.

2 Disrupting court proceedings would definitely include the
3 right to a fair defense. As Mr. Lackey pointed out, the
4 clients are not able to be here in order to fully participate
5 in their defense. The judicial shopping by the pattern of
6 conduct of attacking judicial officials results in judicial
7 shopping, which most definitely disrupts court proceedings.

8 The attorneys that have entered appearances on behalf of
9 TU, which include my clients in prior cases, are now being
10 attacked with the different website. Mr. Richards, who has --
11 in my firm has entered an appearance and filed -- filed
12 responses that are pleadings that are regular court judicial --
13 or is now being called, if the court begs my lang- -- begs my
14 language, I'm sorry -- but "cunt Phil Richards." These things
15 discourage counsel, they discourage judges, they disrupt the
16 court proceedings. And as the judge pointed out, you do have
17 the power to prevent disruptions of court proceedings. And the
18 enforcement of these rules that already exist would assist in
19 the -- in putting a guideline on what to disrupt the court
20 proceedings. We're not asking for a complete silence, we're
21 not asking for [inaudible] of litigation, but we are asking for
22 the discontinuation of judicial shopping, the discontinuation
23 of the interference with the right to a full defense, the
24 interference to the right to fully defend the party.

25 As he pointed out, we have limited people. I've had to

1 enter my appearance. Mr. Richards is at trial, and now I will
2 be subject to the same things, which is not fair to my client,
3 it's not fair to the judicial system, and it's not fair to the
4 judiciary. So that's -- I just wanted to add my comments
5 to you and to hear any of your questions.

6 **THE COURT:** Thank you.

7 Counsel?

8 **MR. McHUGH:** Yes. Thank you, Your Honor.

9 Judge, as I pointed out in some of the pleadings, I don't
10 approve of some of these comments. It would make my job easier
11 if these statements weren't made by my client, because we're
12 here today dealing with something that really, quite frankly,
13 has nothing to do with the merits of the case, but I also took
14 an oath to uphold the Constitution and I believe strongly in
15 upholding the Constitution. My client has a constitutional
16 right to freedom of speech regardless of who it offends. I
17 mean, there's speech every day that I hear that offends me.
18 And the courts have drawn the line at prior restraints and
19 they've indicated a person asking for a prior restraint carries
20 a heavy burden. It's because of issues like this, because what
21 is and what isn't offensive, if we get into this area that it's
22 offensive and so we're going to ban it, then logistically it
23 doesn't stop. That's why Mr. Cohen had his right to do that,
24 that's why the Nazis had the right in the skinhead case, that's
25 why the KKK has the right to speech in the case -- in the

1 R.A.V. case vs. *Saint Paul*. All of those instances are far
2 more offensive, at least to me and probably to most people,
3 than my client's conduct, and those have all been deemed by the
4 court to be constitutionally protected.

5 If there's a showing of prejudice at some point in time,
6 the court can deal with that. That's what happened in the
7 *Morrow* case out of the Fifth Circuit. If we're close to a jury
8 trial and there's evidence that a lot of people have been
9 viewing this, there's some type of harm, but it's just
10 speculation at this point. They're saying that, "It's harmful
11 because my client's not here." Their client's not here because
12 they chose not to be here. Anything my client would have said
13 within this court to them, I'm sure, would have and could have
14 been dealt with by this court. So they're choosing not to be
15 here.

16 They use the term "threats" extremely loosely, and I would
17 argue, ironically, since they have asserted they're the victims
18 of defamation, but saying that my client has made a threat is
19 defamatory because "threat" is a legal term of art. If there
20 is a threat, you call the police and there are steps to be
21 taken. But just saying somebody made a threat, that's a pretty
22 heavy accusation to accuse somebody of making a threat. So
23 they've used that term. And again, that's something -- if
24 there was a threat, there's the police, there's law enfor- --
25 there's all kind of things that can be done if there's a

1 threat.

2 You also have to consider the speech in its context. My
3 client, right on his website, he says, "I say offensive things
4 to draw attention to the corruption of Tulsa University."
5 Again, I'm not saying that it's appropriate, but his whole
6 purpose of doing it is, according to his website, to inform the
7 public of the corruption of Tulsa University, and he engages in
8 satire. So I would argue that the statements he's making
9 aren't even factual assertions. They would be his own personal
10 opinion.

11 The other thing is the legal system affords a remedy. If
12 it's severe enough, they could file a slander lawsuit, they can
13 file a defamation lawsuit, they can file a malicious
14 interference with a contract lawsuit. And in that lawsuit, as
15 I pointed out, my client would be entitled to raise whatever
16 affirmative defenses he would have. He also would be entitled
17 to have a jury trial. By asking for the protective order,
18 we're bypassing all of that because it's deemed offensive.

19 The other thing I would argue is I don't even think the
20 parties -- I know that it's been filed on behalf of the
21 parties, but the people complaining about it is Mr. Lackey, the
22 attorney for TU, Richards and Connor, the attorney for Hall
23 Estill. So, if there's any harm, the harm's not even on the
24 parties, it's on the attorneys that are representing the
25 parties, and that's not what the -- what the legal system is

1 for.

2 And in this particular case, there's a heavy burden in
3 order to restrain my client. It has not been met. There's not
4 been any facts or evidence that there's been prejudice other
5 than there's been statements that are made that they don't like
6 the statements and they deem the statements offensive, and
7 that's not enough to issue a prior restraint. And I understand
8 the court's equitable powers, but I don't think anybody's made
9 the argument that the Constitution overrides any court rule. I
10 mean, that's obvious. The court rule, if it conflicts with the
11 Constitution, The Constitution has to prevail.

12 Anything that happens in a deposition, in a court
13 proceeding, in a pleading, if there's a court proceeding in the
14 hallway, any type of harmful conduct, that all falls within the
15 court's powers and that can be dealt with as it occurs. But
16 issuing an order this far in advance when my client has a
17 public website, when he has a copyright on that, when he posts
18 stuff on it on a daily basis, I think would run afoul of
19 constitutional rights and would be damaging. This is something
20 that can be raised at any point in time. Again, as we get
21 closer to trial, the court can issue an appropriate order.

22 If there's any type of evidence that potential jurors have
23 been looking at -- I don't even know who looks at this website.
24 I mean, they haven't even presented any evidence that it's been
25 looked at by people other than them spending their time and

1 their clients' money looking on his website and his Facebook.
2 It's not something that's put in the Tulsa World or a
3 periodical or something that the public has access to. It's
4 even something that can be asked during voir dire, so there may
5 not even be an issue to the jury.

6 So I would argue that the Constitution in the area of the
7 First Amendment is extremely strong and it's that way for a
8 reason. And this type of speech, again while not appropriate,
9 and it is inflammatory, but the fighting words doctrine went
10 out the window in the 1930s. There's no basis to suppress his
11 speech at this point in time. So we would argue that the
12 motions -- the protective order be denied.

13 Does this court want me to address my motion for protective
14 order in the OCPA?

15 **THE COURT:** No.

16 **MR. McHUGH:** Okay. Thank you, Judge.

17 **THE COURT:** Anything else, Mr. Lackey?

18 **MR. LACKEY:** Judge, just very briefly.

19 I would point out that Mr. McHugh, counsel, admits that the
20 conduct engaged in by plaintiff may be restricted, and he just
21 suggests we need to wait until it's close to trial, and I would
22 argue that prejudice to the client and prejudice in the ability
23 to prepare for trial and through the litigation process is
24 apparent on its face. And as plaintiff's counsel admits, that
25 this same conduct may be will actionable in the future, I think

1 it -- I had a hard time reconciling how if the same conduct may
2 be a problem as we get close to trial, it's not a problem now.

3 **THE COURT:** Well, the difference is -- obviously, the
4 difference is that there is authority of the court. If the
5 court were presented with substantial evidence that it would be
6 impossible to impanel a jury in this matter, then certainly the
7 court can take steps in that balance between a fair trial and
8 someone's speech rights. That hasn't even been alleged by TU,
9 that their right to impanel a fair and impartial jury is
10 somehow being impaired by this situation. I don't even know
11 where Mr. McHugh got into that; you didn't raise that, you
12 didn't make that claim.

13 **MR. LACKEY:** No, Your Honor. The prejudice that we're
14 alleging begins the moment we entered appearances; the fact
15 that lawyers cannot --

16 **THE COURT:** The prejudice is --

17 **MR. LACKEY:** -- enter appearances on behalf of a
18 client because of fear for harassment, intimidation by
19 plaintiff for what appears to be trial strategy. The plaintiff
20 has undertaken a concerted effort to post the home photographs
21 next to pictures of him holding guns of counsel for TU, of the
22 litigants themselves, the parties, Mr. Cremin, Mr. Rogers,
23 witnesses and administrators at the University of Tulsa in an
24 effort to intimidate and harass. That is a specific prejudice
25 as they try and defend what has been claimed to be civil rights

1 violations against them by Mr. Barnett.

2 It is apparent on its face that it is an attempt to harass
3 and intimidate, to prevent the University of Tulsa and to
4 prevent the other parties from defending themselves
5 appropriately. We are not worried about trial; we're worried
6 about an entry of appearance. We're worried about our ability
7 to show up to a hearing before this court and have the kinds of
8 resources that the University of Tulsa has a right to expect as
9 it defends itself against these comments, as it defends itself
10 against a motion for protective order filed by Mr. McHugh or a
11 motion to strike filed by plaintiff's counsel. We can't get
12 anywhere close to trial because the prejudice has already
13 occurred. We're not talking about speculative prejudice at
14 trial. We're talking about not just a high likelihood of
15 prejudice moving forward.

16 **THE COURT:** The prejudice that you're alleging --

17 **MR. LACKEY:** Yes, sir.

18 **THE COURT:** -- is that TU is unable to defend itself.

19 **MR. LACKEY:** In the manner in which it needs to defend
20 itself against seven counts.

21 **THE COURT:** But you're here defending them.

22 **MR. LACKEY:** And, Your Honor, you are, as the court is
23 well aware, there are two separate civil rights 1983 actions
24 and they carry attorney's fees. There are five supplemental
25 jurisdiction state law claims before this court. I agree that

1 the University of Tulsa has a lawyer involved, and, with all
2 due respect, I think I'm pretty good, but that is not the same
3 as its ability to enter the appearance of other persons in
4 what, at least according to plaintiff's complaint, is a very
5 complex set of conspiracies and circumstances.

6 Mr. Barnett agrees in his response to an order. He just
7 doesn't want it to be as broad as the order requested by the
8 university. He has agreed not to make the comments that he has
9 subsequently continued to make about counsel for the parties.
10 The question for the court is, by agreement, that's the
11 baseline, and we're talking about should it be more than that
12 or not.

13 **THE COURT:** That's not the baseline. The court hasn't
14 decided to enter such an order, --

15 **MR. LACKEY:** I --

16 **THE COURT:** -- whether you agree to it or not.

17 **MR. LACKEY:** Well, certainly the court can disregard
18 the agreement of counsel if it so chooses.

19 I would proffer to the court that the exhibits in support
20 of the motion for protective order, the reply for protective
21 order, and the comments made over the weekend by plaintiff
22 about the court and about counsel for the court are designed
23 specifically to shop for forums and to harass and intimidate
24 both the parties themselves and counsel for those parties. It
25 precludes the parties from defending itself properly, and

1 that's the order that we're asking, is protection from that
2 conduct.

3 **THE COURT:** Thank you, sir.

4 Anything else, counsel?

5 **MS. SULLIVAN:** I just have one brief comment. I won't
6 add any additional argument about the points already raised.
7 But counsel for plaintiff mentioned that it was just a website
8 and just Facebook. That's not how the Internet actually works.
9 We have algorithms regarding Google search engines, we have
10 Facebook. It's a public setting which will grab in from other
11 areas of the Internet. It's not limited to the areas that are
12 maintained by plaintiff. He has -- Facebook itself will
13 explain the algorithms on the Q and A sections where names will
14 be pulled from that Facebook and show up in other areas. So
15 it's not limited just to those two items, it actually has a
16 much wider reach, which we would say does also harm and
17 prejudice.

18 **THE COURT:** Based upon a very thorough review of your
19 papers, the court's conclusion -- in consideration of your
20 arguments, the court concludes that the request that's being
21 made by TU is, in fact, a form of a request for a prior
22 restraint, that you're trying to get an order from the court
23 that would preclude future expression by the plaintiff, and the
24 court hasn't been able to find any legal authority that would
25 support such a prior restraint in this case.

1 The court's rules on conduct in the courtroom are
2 reasonable and appropriate time and place restrictions on
3 speech, and they are certainly enforceable and will be
4 enforced. They'll be enforced not only in the court but in the
5 filings with the court, they'll be enforced at depositions,
6 they'll be enforced at settlement conferences if there's one in
7 the case. All of those proceedings are properly controlled by
8 the court. But the court was unable to find any Supreme Court
9 authority that would permit the type of prior restraint that
10 the motion of TU is asking for in this case. Therefore, TU's
11 motion for protective order, our docket number 14, is going to
12 be denied.

13 In saying that, Mr. Lackey, I am not in any way diminishing
14 your -- or dismissing your very real concerns about the manner
15 in which this communication is being conducted. It's
16 unpleasant, it's outrageous, it may be actionable, but if
17 that's the road you want to go down, that's the road you need
18 to go down in order to remedy that situation. So the motion
19 will be denied.

20 With that ruling, it seems to the court that your motions
21 23 and 25 are essentially moot. Do you disagree with that,
22 Mr. McHugh?

23 **MR. McHUGH:** No, Your Honor; I would agree with that.

24 **THE COURT:** All right. We'll show 23 and 25 as being
25 moot.

1 Anything else from the movant, Mr. Lackey?

2 **MR. LACKEY:** May I have just one second, Your Honor?

3 **THE COURT:** Certainly.

4 **MR. LACKEY:** Nothing further on behalf of the
5 university.

6 **THE COURT:** Mr. McHugh, anything further from your
7 side?

8 **MR. McHUGH:** No, Your Honor.

9 **THE COURT:** All right. We'll be adjourned.

10 **THE DEPUTY COURT CLERK:** All rise.

11 (PROCEEDINGS CLOSED)

12 **REPORTER'S CERTIFICATION**

13 WHILE NOT PRESENT TO STENOGRAPHICALLY REPORT THE FOREGOING
14 PROCEEDINGS, I CERTIFY THAT IT WAS TRANSCRIBED TO THE BEST OF
15 MY ABILITY FROM A DIGITAL AUDIO RECORDING.

16 CERTIFIED: s/Greg Bloxom
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