

**IN THE DISTRICT COURT OF TULSA COUNTY  
STATE OF OKLAHOMA**

CHRISTOPHER BARNETT,  
Plaintiff,  
v.  
TULSA COMMUNITY COLLEGE,  
Defendant,

CV-2017-832

**DISTRICT COURT  
FILED**  
MAR 14 2018  
DON NEWBERRY, Court Clerk  
STATE OF OKLA. TULSA COUNTY

**PLAINTIFF'S RESPONSE TO THE AMENDED MOTION TO STRIKE FILED  
BY TCC**

COMES NOW, the Plaintiff, Christopher Barnett, (Plaintiff) and hereby submits his response to the amended motion to strike filed by TCC on February 26<sup>th</sup> 2018. In support, Plaintiff alleges as follows:

**INTRODUCTION**

1. Plaintiff filed a special motion to strike under the OCPA.
2. TCC asserts that discovery requests are not a "legal action." This ignores the liberal construction of the OCPA, the policy of the OCPA and the fact that few actions in a civil case can be more chilling than discovery. Thus, it is a legal action. Further, TCC filed a legal pleading which is also within the definition of legal action. Defendant filed an objection to the motion to strike and affirmatively requested the right to engage in discovery as somehow part of a process. See Defendants Response to Motion to Strike filed January 30<sup>th</sup> 2018.
3. Defendant's discovery requests and attempt to conduct discovery are unlawful. The requests seek social media postings of Plaintiff and journals and documents within the purview of free speech. Notably, in a related

civil case that Plaintiff is a party to, the federal Magistrate specifically found that the postings of Plaintiff are protected speech. See Transcripts of hearing had on February 22<sup>nd</sup> 2018, attached as Exhibit 1.

**DEFENDANT'S DISCOVERY REQUESTS, SCHEDULING ORDER AND DESIRE TO CONDUCT DISCOVERY WITH A SCHEDULING ORDER CONSTITUTES LEGAL ACTION UNDER THE OCPA**

In the instant case, the scheduling order and the issuance of discovery violate Defendant's rights under the Oklahoma Citizens Participation Act (OCPA), 12 O.S. §§1430-1440.

The OCPA became effective November 1<sup>st</sup> 2014. See ANAGNOST v. TOMECEK 2017 OK 7, ¶ 8, 390 P.3d 707. The purpose of the OCPA "is to encourage and safeguard the constitutional rights of persons to 'petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law...'" Id. To effectuate the purpose of the OCPA, a party can file a special motion to dismiss a legal action if the legal action relates or is in response to free speech. Id., n. 8. The term legal action is defined very broadly. Id., at ¶ 9, & n. 10. The OCPA, like most other states', are drafted to counter what are "known as 'strategic lawsuits against public participation' or "SLAPP suits." STEIDLEY v. COMMUNITY NEWSPAPER HOLDINGS, INC. 2016 OK CIV APP 63, ¶ 13, 383 P.3d 780. Under the OCPA, once a special motion is filed, the action is suspended until a ruling on the special motion. Anagnost, ¶ 13 & 16.

Under the OCPA, 12 O.S. §1431(6) provides:

'Legal action' means a lawsuit, cause of action, petition, complaint, cross-claim, counterclaim or any other judicial pleading or filing that requests legal or equitable relief;

12 O.S. Supp. §1432(B) provides: Except as provided by subsection C of this section, on the motion of a party filed pursuant to Section 3 of this act, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to or is in response to the party's exercise of:

1. The right of free speech;
2. The right to petition; or
3. The right of association.

Thus, by the plain terms of the OCPA, a party can file to stop the legal action. Plaintiff as a party can file a special motion under the OCPA.

The chief evil to be eradicated under the OCPA is to protect citizens from being chilled "from exercising their rights to petition the government by fear of the costs and burdens of the resulting litigation; and to limit the use of litigation being used "to discourage the exercise of first amendment rights." Steidley, ¶ 13 [citing Metabolic Research, Inc. v. Ferrell, 693 F.3d 795, 799-800 (9th Cir. 2012)]. As is clear from the definition of legal action, the OCPA is not limited for use by Defendants only. Id. n. 14. (noting that targets of SLAPP often arise as cross-claims and counterclaims and that "The OCPA also recognizes the different forms of SLAPP and have included such within the broad definition of legal action"). To this end, legal action is defined broadly as: "a lawsuit, cause of action, petition, complaint, cross-claim, counterclaim, or any other judicial pleading or filing that requests legal or equitable relief." See STEIDLEY v. SINGER, 2017 OK 8, 389 P.3d 1117, n. 4; 12 O.S. §1431(6). Twenty eight states have similar statutes to Oklahoma and Texas' appears to be almost

verbatim. See COMMUNITY NEWSPAPER HOLDINGS, INC 2016 OK CIV APP 63, ¶¶ 18-23.

Under the broad definition of legal action, courts have held it applies to litigation conduct. In Serafine v. Blunt, the Texas Court held that under the definition of legal action, pleadings asking for relief fall within the Texas Act. See Blunt, Case No. 03-12-00726-CV, Concurring Opinion of Judge Triana pp. 10-11 attached to Defendant's special motion to strike. Similarly, in FREISLEBEN v. VAN RIPER, Case G042825, Majority Opinion at p. 5 (Cal. App. 2011), attached to Defendant's special motion, the Court held that it applied to litigation conduct. Thus, the OCPA applies to litigation activity as such is within the broad definition of legal action. Here, the discovery aimed at Plaintiff, including requesting social medial posts, journals and the like, in response to submitting an ORA request to a state agency violates Plaintiff's rights under the OCPA and should be dismissed or stricken.

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**CERTIFICATE OF MAILING**

This is to certify that a correct copy of the above document has been sent via mail this 14<sup>th</sup> day of March to:

Jeb Joseph  
Desiree Singer  
Attorneys for Defendant

S/Brendan M. McHugh

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

CHRISTOPHER BARNETT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. 18-CV-64-TCK-FHM
	)	
(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.	)	

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:

MS. KELSIE M. SULLIVAN  
Richards and Connors  
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Tulsa, OK 74103

MR. JOHN DAVID LACKEY  
Paul & Lackey PC  
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Suite 400  
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EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

3

1 PROCEEDINGS:

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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

EXHIBIT 1

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

EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

6

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,

EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

7

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

EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

8

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

EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

9

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

EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

11

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



EXHIBIT 1

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

EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

13

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

EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

14

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

EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

15

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

EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

16

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

EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

17

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 Construction. 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

EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

19

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



EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

20

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

EXHIBIT 1

Barnett v Hall, et. al. (02-26-2018 Motion Hearing)

21

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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