

BY TELECOPIER: 614-221-4012

April 8, 2003

Charles R. Saxbe, Esquire
Chester, Willcox & Saxbe
Suite 1000
65 E. State Street
Columbus, Ohio 43215

Re: *Violette v. P.A. Days*
No. 01-CV-1254

Dear Mr. Saxbe:

Eric Willison, an attorney who formerly represented Bob Dalton in a lawsuit brought against him by Ricart Automotive regarding his web site, has told me that you have been threatening to file a motion to hold Dalton in contempt of an order that you obtained placing three pages of a deposition under seal. Your contention, I am told, is that Dalton's inclusion of those three pages on his web site is a violation of the order that Judge Sargus entered on March 27, 2003, placing those three pages under seal. I note that the electronic docket identifies one of your associates, Ms. Morrison, as being Ricart's counsel in this case, and does not show you as being one of the lawyers in the case; nor am I involved in the case at this point. However, Dalton consulted me because I was also one of his lawyers in the earlier case, and so I have been trying to reach you to try to avoid the filing of the threatened contempt motion. In sum, we do not believe that your motion can succeed on the merits, and I question whether the motion is in your client's interest.

As we see it, Dalton has done nothing wrong. Acting pro se, he did file a motion in this case asking that the deposition be available publicly. The Magistrate Judge ruled on February 12, 2003, that the deposition would be public, and stated that although objections could be filed, the order was of immediate force and effect unless a stay was granted. After Dalton received the order, he obtained a copy of the deposition from the Clerk, and the deposition has been publicly posted on his web site ever since. <http://www.columbusconsumer.com/finkdepo.pdf>.

After Dalton obtained the deposition, Ricart moved for partial reconsideration of the ruling on the public character of the deposition. So far as the docket reflects, no effort was made to obtain a stay of the order allowing access to case materials. Moreover, Ricart did not inform Dalton that this motion was being filed, perhaps because Dalton was not a party to the case. Had Dalton been notified of this motion, he would have explained why the public should not be denied the opportunity to learn the information set forth in the deposition. It would obviously have been a violation of due process for Ricart to have sought direct judicial relief affecting Dalton's interests without notifying him of its efforts. Although service of this motion for reconsideration may not

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have not strictly required, because, after all, Dalton was not a party to this case, it would certainly have been prudent for your associate Ms. Morrison to have served the motion on Dalton given that she was seeking reconsideration of a ruling that responded in part to a pro se motion by Dalton. Moreover, by taking Dalton out of the loop on this motion, Ms. Morrison lost any chance to argue that he was bound by the subsequent ruling.

The Court granted Ms. Morrison's motion on March 27, 2003. The order states simply, "Pages 41-43 of Mr. Fink's deposition shall be sealed." No copy of this order was sent to Dalton, again, presumably, because Dalton is not a party to the case. Nor, indeed, does this portion of the order direct Dalton to do or not do anything. It is simply a direction to the Clerk to maintain a certain document under seal. Obviously, if the order were intended to apply to Dalton, a copy would have been sent to Dalton.

Given Ricart's failure to take any steps to ensure the non-publication of the deposition while its motion for reconsideration was pending, the entire deposition has entered the public domain. Dalton has been in contact with members of the press who have the entire deposition. Wholly apart from whether sealing was justified, therefore, any effort to require Dalton to maintain the confidentiality of a deposition that he has already published would be moot. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996). Moreover, the decision in *Bankers Trust* makes clear that any attempt to enjoin Dalton from publishing a deposition transcript that he obtained from the public files in the courthouse would be a prior restraint forbidden by the First Amendment. *See also County Sec. Agency v. Ohio Dept. of Commerce*, 296 F.3d 477 (6th Cir. 2002); *Ford Motor Co. v. Lane*, 67 F.Supp.2d 745 (E.D.Mich.1999).

Wholly apart from whether your threatened motion could be granted, I question whether it is in your client's interest to file it. The natural result of your filing a motion to suppress this information would be to stimulate press interest in the deposition. Moreover, one of the issues in the motion would be whether your associate Ms. Morrison, who is apparently in charge of the case for Ricart, carelessly failed to take the necessary steps to maintain the confidentiality of the deposition transcript while its motion for reconsideration was being prepared for filing and was being considered by the Court, and also failed to serve Dalton with her motion for reconsideration. I cannot imagine that such litigation would be in anybody's interest.

Sincerely yours,

Paul Alan Levy

cc: Geoffrey J. Moul, Esquire