

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

1 JOHN R. LOTT, JR.,

4 Plaintiff,

5 -vs-

6 STEVEN D. LEVITT,

7 Defendant.

) Case No. 06 C 2007

) Chicago, Illinois

) July 31, 2007

) 10:21 a.m.

8 TRANSCRIPT OF PROCEEDINGS
9 BEFORE THE HONORABLE RUBEN CASTILLO

10 APPEARANCES:

11 For the Plaintiff:

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1 (Proceedings heard in open court:)

2 THE CLERK: 06 C 2007, Lott versus Levitt.

3 THE COURT: Good morning.

4 MR. SANDERS: Good morning, your Honor. David
5 Sanders for the defendants.

6 MR. FREEHLING: Good morning, Judge. Paul
7 Freehling and Mark Johnson on behalf of the plaintiff.

8 Your Honor wanted a report with respect to Count 2
9 of the complaint, and the parties have resolved their
10 differences on Count 2. There's a little I dotting and T
11 crossing to be done, exchanging of signed agreements and
12 such, but Count 2 appears to be totally concluded.

13 With regard to Count 1, we filed two motions.
14 They're not up for this morning. They are noticed up for a
15 week from tomorrow, and one is to -- for a reconsideration of
16 your Honor's dismissal of Count 1, and the other is for leave
17 to file an amended complaint.

18 THE COURT: Okay. Do you want to take those up?
19 I'm prepared to take those up.

20 MR. SANDERS: Well, I'd just like to mention, your
21 Honor, I'm not ready to address the motion for leave to amend
22 because we only got that last night, so -- and I haven't had
23 had a chance to talk --

24 THE COURT: The motion to amend is conditioned on a
25 reconsideration, isn't it, or am I wrong?

1 MR. FREEHLING: I don't think that's necessarily
2 so, your Honor, but that certainly is one possibility. I
3 think your Honor could allow us to amend -- it isn't clear
4 from the Court's order when the Court said back in January
5 that -- I'm sorry -- in March that leave to amend was allowed
6 whether your Honor meant Count 1 or Count 2 or both, and I
7 think -- I think what your Honor meant was Count 2, which was
8 the only count that was left in the case at that time.

9 THE COURT: Right.

10 MR. FREEHLING: So I think your Honor could quite
11 reasonably take up the motion for leave to amend the
12 complaint. The decision of your Honor was interlocutory,
13 still is interlocutory since there's no final judgment
14 entered in the case, so your Honor could grant leave to amend
15 the complaint without reconsidering the order that your Honor
16 entered, or your Honor could take it the other way around.

17 MR. SANDERS: First, your Honor, with the motion to
18 reconsider. The only grounds in the motion to reconsider
19 that I observed was that your Honor committed, and I'm
20 quoting, "a manifest error of law in its original decision."
21 The only error in turn is that the Court applied Illinois law
22 rather than Virginia law.

23 Our instinct here, your Honor, is we think your
24 Honor can deny the motion right now without putting us to the
25 expense of responding in writing. Very, very briefly your

1 Honor --

2 THE COURT: Go ahead.

3 MR. SANDERS: -- Harper Collins argued the choice
4 of law issue at page 10 of its brief, extensively argued the
5 choice of law. We contended that Illinois law governed the
6 Count 1 claim, that it wasn't actionable, it wasn't
7 defamatory, it wasn't actionable per se. We argued innocent
8 construction rule.

9 In footnote 5 of the response, your Honor -- I'm
10 quoting again -- Plaintiff argued that "We agree with
11 defendants that Illinois law governs the dispute." They
12 expressly agreed Illinois law governed. They never argued in
13 the substance of their brief Virginia law. They only argued
14 Illinois law. They argued the innocent construction rule
15 didn't apply to what they've alleged, but they didn't cite a
16 single Virginia case, and they never said Virginia law
17 applied.

18 This Court merely accepted the agreed choice of law
19 of the parties. Explicitly, implicitly, every way the
20 parties argued Illinois law. Now they're saying, your Honor,
21 that you committed manifest error in applying Illinois law
22 and that would result as an injustice to them.

23 The upshot of that, your Honor, is there is no
24 injustice to them. They've had a choice of counsel, and now
25 they're trying another strategy just as when we get to the

1 motion for leave to amend. It's the same thing all over
2 again. They want a do-over after we've now been litigating
3 Count 2 extensively at great expense, thinking Count 1 was
4 behind us.

5 So with that in mind, your Honor, we don't know
6 that we need to file a written response on the motion to
7 reconsider, but I think there may be more to say on the
8 motion for leave to amend.

9 THE COURT: Okay. You want to address the motion
10 to reconsider?

11 MR. FREEHLING: Mr. Johnson will address that, your
12 Honor.

13 THE COURT: Okay.

14 MR. JOHNSON: Your Honor, motions to reconsider
15 have very limited purpose, as is well known. This is
16 precisely --

17 THE COURT: What rule are you under, operating
18 under?

19 MR. JOHNSON: There is no, as best as we could tell
20 in the federal rules that would address this issue, a
21 specific rule addressing motions to reconsider. They are,
22 however, discussed frequently in -- in the case law, and
23 that's what we're proceeding under today.

24 THE COURT: So you're not proceeding under Rule 59,
25 which has a ten-day limit --

1 MR. JOHNSON: We are not, your Honor.

2 THE COURT: -- or Rule 60?

3 MR. JOHNSON: We are not, your Honor, and we
4 believe --

5 THE COURT: So you don't even know what rule you're
6 proceeding under, just a general motion to reconsider.

7 MR. JOHNSON: Your Honor, the case law discusses
8 the fact that these motions to reconsider are not
9 specifically authorized by the Federal Rules of Civil
10 Procedure, but that case law has been developed that
11 addresses the circumstances when such motions are
12 appropriate. Very limited circumstances indeed, one of which
13 is the manifest error of law.

14 We're not attempting to do a do-over here, your
15 Honor.

16 THE COURT: If there was a manifest error of law,
17 wouldn't that be evident as soon as the opinion was issued?

18 MR. JOHNSON: Yes, your Honor, that would be
19 evident, and in looking at the issue and thinking about the
20 issue further in terms of the parties' discussion of --

21 THE COURT: The opinion was issued on January 11th
22 of this year?

23 MR. JOHNSON: That's correct, your Honor.

24 THE COURT: And you filed your motion to reconsider
25 when?

1 MR. JOHNSON: We filed it last week, your Honor,
2 and under the rule --

3 THE COURT: So about seven-and-a-half months later?

4 MR. JOHNSON: That's right, your Honor. And under
5 the case law that we've uncovered, there's no discussion in
6 those cases in terms of a ten-day limit or 30-day limit or
7 specific time frame within which a motion --

8 THE COURT: So you believe there is no time frame,
9 and you can file it seven years later, seven months later,
10 seven days later.

11 MR. JOHNSON: Certainly not seven years, and I
12 think it's subject to --

13 THE COURT: You don't think I can take into
14 consideration that seven-and-a-half months have gone by since
15 this published opinion was issued?

16 MR. JOHNSON: I'm certainly not suggesting you
17 shouldn't consider that at all, your Honor. But all we're
18 trying to seize upon at this moment and while this case is
19 still before your Honor at the district court level is to
20 call out to your attention what we believe was a manifest
21 error of law, which is very important under these
22 circumstances.

23 We're not alleging --

24 THE COURT: Do you believe -- do you believe that
25 choice of law, given the footnote that Mr. Sanders quoted

1 from, was something that plaintiff agreed to?

2 MR. JOHNSON: The plaintiff certainly did not
3 intend to acquiesce to the application of Illinois law that
4 would -- that affected the outcome of this case. Illinois
5 law certainly includes --

6 THE COURT: That's a very careful answer.

7 MR. JOHNSON: Illinois law certainly includes --

8 THE COURT: I understand the answer. I'm saying
9 did you acquiesce to the application of Illinois law, given
10 that footnote?

11 MR. JOHNSON: We do not believe that the plaintiff
12 acquiesced at that time and certainly not now to the
13 application of Illinois law.

14 THE COURT: Certainly not now. I'm saying at that
15 time. Then certainly you cited Virginia law to me to apply
16 in deciding the defamation count, Count 1, right?

17 MR. JOHNSON: That is the basis of our motion.

18 THE COURT: No, did you cite Virginia law?

19 MR. JOHNSON: The plaintiff did not cite Virginia
20 law in the original pleadings and -- and court papers that
21 were submitted in connection with the --

22 THE COURT: Up until this point, you've never cited
23 Virginia law, isn't that the case?

24 MR. JOHNSON: That is correct, your Honor.

25 THE COURT: Okay.

1 MR. JOHNSON: But --

2 THE COURT: Do you believe that choice of law not
3 being jurisdictional is therefore waivable? Do you believe
4 that that's correct?

5 MR. JOHNSON: If the parties knowingly and
6 intentionally waive that, yes, I think that there is case law
7 that supports that, just as there is case law that supports
8 our coming in now to advise the Court that we do not intend
9 to and we do not now acquiesce to the --

10 THE COURT: And you don't believe that that
11 footnote by experienced counsel was a knowing and intentional
12 waiver.

13 MR. JOHNSON: Not on the -- it -- no, because it
14 was only partially. It was an indication that Illinois law
15 applied, but that should have included --

16 THE COURT: Where in the brief was it plain to me
17 that there was only a partial waiver? Where was that made
18 known to this Court?

19 Fairness to this Court, where was this made known?
20 Cite me the sentence where it says that.

21 MR. JOHNSON: The only sentence in that brief, your
22 Honor, is a sentence that Illinois law applies. We are not
23 suggesting otherwise. This includes --

24 THE COURT: So you --

25 MR. JOHNSON: This includes the subset of --

1 THE COURT: You concede that there's no language in
2 the brief where I could somehow intuitively divine that this
3 was some kind of partial waiver, right?

4 MR. JOHNSON: There -- the only language in the
5 brief, your Honor, is that footnote.

6 THE COURT: Okay.

7 MR. JOHNSON: But that was not a knowing,
8 intentional waiver by the plaintiff on an issue that is
9 outcome determinative under these circumstances, and fairness
10 would suggest --

11 THE COURT: When you say outcome determinative, no
12 one knew the outcome at the time you filed the brief. The
13 outcome wasn't known until you received the opinion.

14 MR. JOHNSON: That's correct, your Honor, and --

15 THE COURT: Then within 30 days after receiving the
16 opinion, no action is taken. Within 60 days, no action is
17 taken. Within 90 days, no action is taken, competent counsel
18 representing Mr. Lott, right?

19 MR. JOHNSON: No action was taken until we filed
20 the motion last week, your Honor, but we believe under the
21 case law, it's still timely presented to your Honor for
22 consideration.

23 THE COURT: Okay. I don't believe it's timely. I
24 think this is the most inappropriate motion to reconsider
25 I've seen in my 13 years on the bench, given the fact that

1 plaintiff concedes that there was no citation to Virginia
2 law, not even a footnote, that could have alerted this Court
3 to some type of dispute.

4 The only thing that was present was the defendant's
5 argument against the application of Virginia footnote, which
6 was met by I won't even say silence, rather acquiescence on
7 the part of the plaintiff that Illinois law could apply and
8 that nevertheless there was a valid claim under Illinois law,
9 which the plaintiff lost.

10 And once the plaintiff determined that it was
11 outcome determinative, I think in fairness to this Court, any
12 motion for reconsideration should have been filed either
13 within ten days or at the very least within 30 days. The
14 fact that it's being filed now on the eve of a trial with the
15 dismissal of Count 1 standing all the way through for
16 seven-and-a-half months just really shows, I think, some of
17 the lawyering that's going on here and some of the
18 gamesmanship I think that is unfortunately going on here of
19 which this Court, I think, is caught in between this
20 gamesmanship, and I don't think that's appropriate for a
21 district court to be caught in that situation.

22 I think choice of law is waivable. I think a
23 knowing waiver occurred. This is not a criminal case, so you
24 have competent counsel on the part of plaintiff. Parties can
25 stipulate to substantive law to be applied to their dispute.

1 That's been upheld in the 7th Circuit many times. And so, in
2 fact, the 7th Circuit has noted in a case called *Matter of*
3 *Stoker* that when the parties do not make an issue of choice
4 of law, there's no obligation on the part of the district
5 court to make an independent determination of what rule would
6 have applied if they had made an issue of that matter.

7 But I can tell you this Court was not alerted to
8 any issue as to choice of law up until this motion for
9 reconsideration. It's an unfortunate situation. So we'll
10 leave it at that. I'm going to deny the motion to
11 reconsider.

12 Let me see the motion to amend.

13 (Tendered.)

14 THE COURT: And this was filed when?

15 MR. JOHNSON: It was filed late yesterday
16 afternoon, your Honor, noticed for presentment, official
17 presentment, next Wednesday, August 8th.

18 THE COURT: Do you want to proceed next Wednesday?

19 MR. JOHNSON: We are inclined to -- your Honor's
20 pleasure, although in deference to counsel who did only
21 receive it late yesterday afternoon, we can proceed now or
22 next Wednesday.

23 MR. SANDERS: Your Honor, I think I'd like to
24 consult with Mr. Metcalf.

25 THE COURT: Okay.

1 MR. SANDERS: If we could have 14 days to respond,
2 I think that would be better. We wouldn't then need, unless
3 your Honor wanted us, to have an appearance on the August 8th
4 date. We could set a schedule now. That might be --

5 THE COURT: Well, let me just ask this: Is a
6 proposed amendment attached?

7 MR. JOHNSON: Yes, it is, your Honor.

8 MR. SANDERS: Yes.

9 THE COURT: And this is supposedly based on new
10 information?

11 MR. JOHNSON: In part, it's based on new
12 information, your Honor.

13 THE COURT: And when was this new information
14 learned by the plaintiff?

15 MR. JOHNSON: It was learned in the course of
16 discovery that has occurred largely over the past 30 days,
17 your Honor.

18 THE COURT: What are we going to do about Count 2
19 in the meantime?

20 MR. JOHNSON: Count 2 is going to be dismissed. If
21 I might just indicate for your Honor, under the parties'
22 settlement agreement, a letter was to be sent and should be
23 sent within the next few days.

24 THE COURT: Okay.

25 MR. JOHNSON: As soon as we receive a signed copy

1 of that letter from Mr. Levitt, we will then be submitting
2 with your Honor a Rule 41 stipulation to dismiss Count 2 with
3 prejudice.

4 THE COURT: Okay.

5 MR. JOHNSON: Count 2 in the amended pleading there
6 is a new count.

7 THE COURT: How do you want to proceed,
8 Mr. Sanders? 14 days?

9 MR. SANDERS: I have some visceral reaction to the
10 motions, but I don't want to take the Court's time. I think
11 we'd be better off giving you something in writing.

12 THE COURT: Okay, that's fine. I haven't seen it.
13 You know, we were here with a trial yesterday. I didn't see
14 it, so I really don't know what time it was filed. I can
15 only imagine after hours sometime yesterday.

16 MR. SANDERS: I think that's correct.

17 THE COURT: So I will give you 14 days to respond
18 to the motion to amend, and that will take us to
19 September 14th.

20 MR. SANDERS: August 14th.

21 THE COURT: Oh, I'm sorry, August 14th. I'm
22 jumping ahead. Okay. August 14th. And let's set this case
23 for status on August 16th at 9:45.

24 MR. FREEHLING: Your Honor, may the plaintiff file
25 a reply to the response of the defendant's?

1 THE COURT: I don't think we're going to need a
2 reply; but if you desire to do that, I won't prevent you from
3 doing that.

4 How soon can you do that?

5 MR. FREEHLING: Seven days after we receive the
6 response.

7 THE COURT: That would be August 21st. Then let's
8 set it for a ruling on August 23rd at 9:45.

9 MR. SANDERS: Thank you, your Honor.

10 THE COURT: Thank you. Here's your copy back. I'm
11 sure a copy is forthcoming somewhere.

12 THE COURT: Should we vacate the trial date or wait
13 until this letter is signed?

14 MR. JOHNSON: I'd be comfortable vacating it, your
15 Honor.

16 MR. SANDERS: We've already exchanged PDF
17 signatures. We're just waiting to have the ink-signed ones
18 turned over.

19 THE COURT: Given that representation, I'll vacate
20 the trial date.

21 MR. SANDERS: Thank you, your Honor.

22 THE COURT: Thank you.

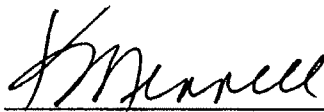
23 MR. FREEHLING: Thank you.

24 (Which were all the proceedings heard.)

25

CERTIFICATE

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.



Kathleen M. Fennell
Official Court Reporter

8-2-07

Date

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