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

JOHN R. LOTT, JR., Plaintiff, -vs- STEVEN D. LEVITT, Defendant.	Case No. 06 C 2007 Chicago, Illinois June 14, 2007 9:49 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUBEN CASTILLO

APPEARANCES:

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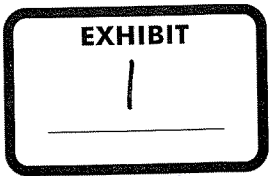

APPEARANCES: (Continued)

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(Proceedings heard in open court:)

THE CLERK: 06 C 2007, Lott versus Levitt.

THE COURT: Good morning.

MR. METCALF: Good morning your Honor.

MR. MARCUS: Good morning, your Honor.

Stephen Marcus, counsel for the plaintiff. I'm also here with Mr. Freehling, who's entered his appearance this morning as local counsel for the plaintiff.

THE COURT: Okay.

MR. FREEHLING: Good morning.

MR. METCALF: Good morning, your Honor, Slade Metcalf of Hogan & Hartson LLP in New York City, along with David Sanders of Jenner & Block, here on behalf of defendant Steven Levitt.

MR. MELTON: And, your Honor, Bruce Melton, associate general counsel at the University of Chicago. We're not a party to the case. We've been responding to discovery.

THE COURT: Okay. First of all, is there a protective order in this case, just a general one?

MR. MARCUS: No, your Honor.

THE COURT: That's because one cannot be agreed upon, is that it?

MR. MARCUS: We attempted to work one out, your Honor, but we were unable to reach an agreement and, hence,

we filed a motion for protective order.

THE COURT: Okay. The plaintiff's protective order, the corrected motion is going to be denied. It's much too broad. I cannot seal all the documents in a publicly filed civil lawsuit. It runs contrary to well established 7th Circuit law.

Now, having said that and seeing counsel for the University of Chicago here, I do think that there are certain things, such as the university's concern that could be considered confidential on an appropriate basis; but it has to be done on sort of a deposition-by-deposition, document-by-document type of analysis, and normally that is governed by a protective order in the case that is agreed upon by parties, subject to the final and full approval of the Court, and that is the way I would like to proceed.

So if you cannot agree on one as to what would be deemed confidential on an appropriate basis, I would suggest that plaintiff submit Version A and defendants submit Version B, and I will then compare apple to apple and decide.

MR. METCALF: Your Honor, if I may, I think on the issue that the University of Chicago has raised, both Mr. Marcus and I are in agreement that we would both like to have access to the information as to the identity of the particular referees involved in this single so-called Special Issue of Journal of Law and Economics.

Mr. Melton has taken the position that it should not be disclosed as set forth in his motion, and the documents, by and large, that have been produced to us have been redacted insofar as the identity of those referees are concerned.

We have not -- we just received Mr. Melton's papers a couple days ago. We haven't had an opportunity to respond to them in writing, which we will do so promptly. Certainly I will, and I assume Mr. Marcus will as well.

MR. MARCUS: Yes.

THE COURT: Okay. Well, I will tell you right now that just based on what I've seen, this is appropriate to keep confidential just among the parties to this litigation.

I think this is a process that the university has invested a great deal in; and, accordingly, I would be of a mindset to keep this confidential.

MR. METCALF: Your Honor, I think that Mr. Marcus and I have not approached that issue. I think in my own -- from my own sense, a typical kind of protective order with even attorneys' eyes only --

THE COURT: Right.

MR. METCALF: -- for the identity of the referees would be something we would be comfortable with. I'm not sure Mr. Melton would be comfortable with that.

MR. MARCUS: Yes, your Honor. Sounds like

Mr. Metcalf and I are in agreement on that point. We proposed to Mr. Melton precisely that kind of order, essentially an attorneys' eyes only protective order, but that, I think for institutional reasons on the part of the university, which Mr. Melton can speak to, was not acceptable.

MR. MELTON: That's right, your Honor. The Journal of Law and Economics, like virtually all of the other economic journals at the university that is involved in publishing, has a very confidential referee process; and given that the plaintiff is an economist and the defendant is an economist, we're very uncomfortable releasing any of the referee identities even to counsel.

You know, our sense was that this is a fundamental way of doing business at these journals, and so we did object to that.

THE COURT: Okay. I'll overrule that objection. I will tell you, I have to rely on counsel who take oaths to abide by our rules and to follow the rules; and in this sense, where we have a contemplated release subject to attorneys' eyes only, given the issues in this case, the issue remaining in this case as to Count 2, I don't see how I get around not disclosing this to the attorneys subject to not releasing it any further, given who the parties are.

Have any depositions occurred in this case?

MR. MARCUS: Yes, your Honor.

MR. METCALF: Yes, your Honor.

THE COURT: Okay.

MR. METCALF: We've been very diligent pursuant to your instructions.

THE COURT: Okay.

MR. METCALF: In fact, we've completed four depositions already, including the plaintiff and the sole, shall I say, recipient of the e-mail, and we have now outside today along with Mr. Melton tentatively scheduled seven additional depositions. That should do it.

THE COURT: Okay. So let me go back to the University of Chicago so that the record is clear.

The motion for protective order is granted only to the extent that I'll prevent disclosure of peer referee identities to anyone other than the attorneys of record in this case who hereby agree not to disclose it to their clients.

MR. MARCUS: Yes, your Honor.

MR. MELTON: Your Honor, another little wrinkle on that, and I put it in the motion. There were a few redaction errors in the duplicating process, and I apologize for that. The information was shared with the clients because they got the documents from the university.

So all I would ask is that those clients, to the

extent they have any information about referees through that mistake, that they keep that confidential because there are a few, and we'd like to correct it so that, you know, obviously --

THE COURT: I'll let you correct it.

MR. MELTON: Thank you. And the other issue that I think we won't have a problem with is, we can do it on a case-by-case basis, is maintaining again the confidentiality of certain editors' comments back and forth. There are a number of comments that the editors do; and, again, it's a very confidential process.

I have no problem, with the Court's guidance, that the attorneys should be able to see it. And on that one the clients can see it, too, we've shown that. I just don't want it disclosed outside the litigation. That's the only concern. Editor-to-editor comments about a certain economist's transcript or manuscript, for example, for publication, so I think that shouldn't be an issue to work out, and I think --

THE COURT: Attorneys agree?

MR. MARCUS: Yes, sir.

MR. METCALF: I think so, your Honor. The one thing that I do think we need, not take your Honor's time, but need to discuss is the question of how we can use the attorneys' eyes only information for productive purpose in

the case.

If Mr. Marcus and I are the only people who know the identity of the referee, it really doesn't matter, it doesn't move the ball forward. I think both of us have a specific purpose as to why we need the identity of those people. In order to do that, we need some kind of ability to give some reference to how those people fit in with other people involved in the Special Issue of the Journal. That's my position, that certain referees were selected for this Special Issue who had all previously participated in the precise conference symposium that was the basis for the Special Issue. That's -- that's our view.

And in order to be able to solidify that particular theory, we're going to need to bounce that information, I think, off other people.

Now, I don't want to take your Honor's time with that. I think we need to discuss that, and we may have to come back to you on that issue.

THE COURT: Well, let me just make clear, it's attorneys' eyes only, and any use that potentially exceeds that needs to be approved by the Court.

MR. METCALF: Very well.

THE COURT: So you would have to come back to me.

But, you know, the point that you've raised, I think a stipulation could be agreed without disclosing the

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

6-22-07
Date

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

JOHN R. LOTT, JR., Plaintiff, -vs- STEVEN D. LEVITT, Defendant.	Case No. 06 C 2007 Chicago, Illinois July 31, 2007 10:21 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUBEN CASTILLO

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EXHIBIT
2

(Proceedings heard in open court:)

THE CLERK: 06 C 2007, Lott versus Levitt.

THE COURT: Good morning.

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

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

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

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

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

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

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

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

THE COURT: Right.

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

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

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

Honor --

THE COURT: Go ahead.

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

MR. JOHNSON: We are not, your Honor.

THE COURT: -- or Rule 60?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We're not alleging --

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

from, was something that plaintiff agreed to?

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

THE COURT: That's a very careful answer.

MR. JOHNSON: Illinois law certainly includes --

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

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

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

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

THE COURT: No, did you cite Virginia law?

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

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

MR. JOHNSON: That is correct, your Honor.

THE COURT: Okay.

MR. JOHNSON: But --

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

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

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

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

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

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

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

THE COURT: So you --

MR. JOHNSON: This includes the subset of --

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

Let me see the motion to amend.

(Tendered.)

THE COURT: And this was filed when?

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

THE COURT: Do you want to proceed next Wednesday?

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

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

THE COURT: Okay.

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

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

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

MR. SANDERS: Yes.

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

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

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

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

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

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

THE COURT: Okay.

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

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

THE COURT: Okay.

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

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

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

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

MR. SANDERS: I think that's correct.

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

MR. SANDERS: August 14th.

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

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

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

How soon can you do that?

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

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

MR. SANDERS: Thank you, your Honor.

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

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

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

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

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

MR. SANDERS: Thank you, your Honor.

THE COURT: Thank you.

MR. FREEHLING: Thank you.

(Which were all the proceedings heard.)

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

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

JOHN R. LOTT, JR., Plaintiff, -vs- STEVEN D. LEVITT, Defendant.	Case No. 06 C 2007 Chicago, Illinois August 23, 2007 10:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUBEN CASTILLO

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EXHIBIT
3

(Proceedings heard in open court:)

THE CLERK: 06 C 2007, Lott versus Levitt.

THE COURT: Good morning.

MR. FREEHLING: Good morning, your Honor. Paul Freehling on behalf of the plaintiff.

MR. SANDERS: Good morning, your Honor. David Sanders on behalf of the defendants.

THE COURT: Well, since I was assigned this case, all I've tried to do is move it along, and today I'm going to bring it to an end before me.

I'm issuing an order giving both of you copies denying the motion to amend the complaint, and what we're going to do is issue or enter an amended judgment so that you can appeal also the denial of the motion to amend, and the reasons are all stated out in the order in writing.

Thank you.

MR. SANDERS: Thank you, your Honor.

MR. FREEHLING: Thank you, your Honor.

(Which were all the proceedings heard.)

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

8-24-07
Date