

2014 PA Super 96

KUWAIT & GULF LINK TRANSPORT
COMPANY, KGL LOGISTICS, AND KGL
TRANSPORTATION COMPANY KSCC,

IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

JOHN DOE (A.K.A. SCOTT WILSON),
AGILITY PUBLIC WAREHOUSING
COMPANY K.S.C. (A.K.A. AGILITY, F/K/A
THE PUBLIC WAREHOUSING COMPANY),
AGILITY DGS LOGISTICS SERVICES
COMPANY K.S.C.C. (F.K.A. PWC
LOGISTIC SERVICES COMPANY
K.S.C.C.), PWC TRANSPORT COMPANY
W.L.L., AGILITY DGS HOLDINGS, INC.
(F.K.A. AGILITY DEFENSE &
GOVERNMENT SERVICES, INC.), AGILITY
DEFENSE & GOVERNMENT SERVICES,
INC. (F.K.A. TAOS INDUSTRIES, INC.)
AGILITY INTERNATIONAL, INC.,

APPEAL OF: AGILITY DGS HOLDINGS,
INC., AGILITY DEFENSE GOVERNMENT
SERVICES, INC., AND AGILITY
INTERNATIONAL, INC.

No. 1059 MDA 2013

Appeal from the Order May 21, 2013
in the Court of Common Pleas of Cumberland County
Civil Division at No.: 2012-1820

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COMPANY, KGL LOGISTICS, AND KGL
TRANSPORTATION COMPANY KSCC,

IN THE SUPERIOR COURT OF
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v.

JOHN DOE (A.K.A. SCOTT WILSON),
AGILITY PUBLIC WAREHOUSING
COMPANY K.S.C., AGILITY DGS
LOGISTICS SERVICES COMPANY
K.S.C.C., PWC TRANSPORT COMPANY
W.L.L., AGILITY DGS HOLDINGS, INC.,
AGILITY DEFENSE AND GOVERNMENT
SERVICES, INC. AND AGILITY
INTERNATIONAL, INC.,

APPEAL OF: AGILITY PUBLIC
WAREHOUSING COMPANY K.S.C.,
AGILITY DGS LOGISTICS SERVICES
COMPANY K.S.C.C., AND PWC
TRANSPORT COMPANY W.L.L.

No. 1066 MDA 2013

Appeal from the Order May 21, 2013
in the Court of Common Pleas of Cumberland County
Civil Division at No.: 2012-1820

BEFORE: DONOHUE, J., STABILE, J., and PLATT, J.*

DISSENTING OPINION BY PLATT, J.:

FILED MAY 06, 2014

I respectfully dissent. The learned Majority concludes that the two emails at issue constitute political speech. I do not agree. I would affirm the trial court's order to compel discovery.

First, there is a substantial question whether the emails are protected public speech at all. They were private communications to a contract administrator concededly written by Appellant's employee(s) within the

* Retired Senior Judge assigned to the Superior Court.

scope of employment, under a false name, alleging that a contract winning competitor had illegal ties with Iranian entities, in violation of a statute. The emails suggest that Appellee be barred from receiving government contracts. Appellant would have been the direct beneficiary of the debarment of its competitor.

These emails do not advocate social or political change. They do not support or oppose any political candidate or office holder. They do not address official conduct of anyone acting in a public capacity. They do not support or oppose a policy position or disclose governmental misfeasance. At best, they report the statutory non-compliance of a commercial competitor. At worst, they present defamatory forged reports for private gain. The incidental fact that the private lawsuit between these two commercial competitors involves cross allegations over the violation of a statute is too attenuated a link to elevate the emails in dispute to protected political speech. This is not the stuff of the Federalist Papers, or even the Pentagon Papers. It is more akin to *Gimbels versus Macy's*.

I note that if Appellee's claim that the emails (and the supporting documentation) were false is itself accurate, there is no constitutional issue. ***See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.***, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); ***see also Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York,***

447 U.S. 557 (1980)¹ (“For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading.”). *Id.* at 566.²

This is a commercial dispute, not a political speech case. It may not even be a commercial speech case. In any event, the trial court’s discovery order was proper. Accordingly, I respectfully dissent.

¹ *See Central Hudson, supra* for the United States Supreme Court’s four part analysis to determine if commercial speech is constitutionally protected. *Id.* at 566.

² Moreover, under federal constitutional jurisprudence, there is a substantial question whether foreign nationals outside the jurisdiction of the United States can claim First Amendment rights. *See DKT Memorial Fund Ltd. v. Agency for Intern. Development*, 887 F.2d 275, 284, 281 U.S.App.D.C. 47, 56 (C.A.D.C. 1989) (citing cases). Here, while Appellants oppose disclosure of the identity of the employee(s) posing as “Steve Wilson,” they have not claimed the writers are American citizens, and the conceded reality that the emails originated in Kuwait lends probability to the opposite conclusion.