

Dead Men Make Lousy Witnesses

By Charles D. Tobin

Recognizing that dead witnesses are difficult to produce – let alone cross-examine – a suburban Pittsburgh trial judge has dismissed a defamation and false light claim that the plaintiff attempted to revive after six years of inactivity. *Zotter v. North Hills News Record, et al.*, slip op., No. GD97-001775 (Pa. C. P. June 24, 2004).

While granting a lack of prosecution motion would be a no-brainer for this case in other jurisdictions, the procedure ordinarily is not so kind to Pennsylvania defendants.

Background

Following discovery and the presentation of evidence on the petition, Common Pleas Court Judge A. J. Wettick in June granted a judgment of non pros and dismissed plaintiff Carl M. Zotter's lawsuit against Gannett's former newspaper, the *North Hills News Record*. Zotter, a former police chief of Ross Township, brought the lawsuit in 1997 based on the newspaper's coverage of an agreement he had reached in a prosecution against him.

Zotter had been charged with theft by deception and unsworn falsification after he allegedly falsely claimed mileage and constable fees for personal service of subpoenas. In a township investigation, many of the witnesses said they either never received the subpoenas or received them by in the mail. Zotter was not entitled to collect fees for service by mail.

In 1996, Zotter entered into an agreement with prosecutors under the state's accelerated rehabilitative disposition program. He paid restitution, served probation, and did not receive a conviction. While the newspaper's story contained accurate details about the agreement, the headline and lead sentence reported that Zotter had agreed to "plead guilty." Zotter's lawsuit alleged this phrasing defamed him and cast him in a false light.

Plaintiff Attempts to Revive Suit After 6 Years

Shortly after the complaint was filed in 1997, the paper filed a preliminary objection by way of demurrer asking for dismissal on grounds that the publication, read in its en-

tirety, was substantially accurate and privileged. The court, however, denied the motion on procedural grounds. The newspaper filed its answer and heard nothing further from Zotter for more than six years.

In November 2003, however, Zotter filed a notice that he was ready to proceed to trial. Under local court rules, the case automatically was placed on the court's issue docket. The newspaper was given a six-month window to commence and complete discovery.

Pennsylvania's common law is hostile to lack of prosecution motions. Under the case law, the trial court cannot grant "non pros" bids unless the defense can meet its bur-

den to show that plaintiff failed to act with "reasonable promptitude," cannot show a "compelling reason" for the delay, and the defendant will suffer "actual prejudice" because of the lapse of time. Moreover, there is no automatic period of time after which the court will

presume prejudice. *Jacobs. v. Halloran*, 551 Pa. 350, 710 A.2d 1098 (1998).

Plaintiff Claimed Deliberate Delay

The newspaper's counsel took plaintiff's deposition in aid of its non pros petition. Zotter testified that he and his counsel made a deliberate decision to delay prosecuting his case. Zotter testified that he had entered, then retired from, the private security business and had not wanted the lawsuit to interfere with his new career. He also testified that the "political atmosphere" in the Pittsburgh area in the late 1990s would have prevented him from getting a fair trial.

In its non pros petition, defense counsel argued:

- Zotter's calculated delay reflected a lack of reasonable promptitude, his explanations did not constitute compelling reason, and he should not be rewarded for the strategic decision of waiting six years.
- Gannett had sold the *News Record* during the period of delay and its new owner later folded the newspaper. The defense therefore no longer had ready access to witnesses it would have consulted or called in 1997.
- Two police officers who worked for Zotter – one of whom had cooperated with investigators, the other of

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whom handled the subpoenas when they came into the police department – had died in the interim.

- The newspaper also was prejudiced because the judge who had approved Zotter's agreement with prosecutors, and who was later quoted in the newspaper as saying that Zotter “admitted he committed the offense and was admitted to ARD,” also died.

No Good Reason for Delay

Granting the newspaper's non pros motion, Judge Wettick found that plaintiff had “not offered a compelling reason for this delay.” Noting that high-profile criminal cases have been tried in the same year as the indictments were brought, he found “no merit to plaintiff's statement that he could not have received a fair trial until years after the lawsuit was filed.”

The judge also found that the deaths of the two police officers constituted actual prejudice to the defense. He noted as well that the damages claim would hinge on any impact the coverage had on Zotter's “personal, professional, and public integrity.” “Thus, were the case to proceed, a jury in 2004 or 2005 would be attempting to sort out the impact of an April 1996 newspaper article on plaintiff's reputation and on plaintiff's life”

Zotter's counsel, Irving M. Portnoy and Mark E. Milson, of Evans, Portnoy, Quinn & O'Conner in Pittsburgh, have taken the first steps toward initiating an appeal of the dismissal.

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