

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION

RUSSELL J. HARLAN and )  
MALGORZATA-NATASZA CIMOSZEWICZ, )

Plaintiffs, )

v. )

WPROST, AGENCJA WYDAWNICZO- )  
REKLAMOWA "WPROST" SP. Z O.O., )  
MAREK KROL, FIJOR PUBLISHING, )  
JAN M. FIJOR, MACIEJ RYBINSKI, )  
and LOWELL INTERNATIONAL CO., )

Defendants. )

No. 06 L 4317

3298  
3004

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02 OCT 30 PM 4:00  
CIRCUIT COURT OF COOK COUNTY  
LAW DIVISION  
CLERK



**REPLY**

NOW COMES the Defendant, LOWELL INTERNATIONAL COMPANY ("Lowell"), by and through its attorneys, KRALOVEC & MARQUARD, CHARTERED, and for its Reply to Plaintiff's Response to the Defendant's Motion for Summary Judgment, states as follows:

**INTRODUCTION**

Plaintiffs brought this action to recover damages for defamation in connection with three separate articles that appeared in Wprost magazine, a Polish language weekly magazine distributed by Lowell.<sup>1</sup> In order to recover against Lowell as a distributor of defamatory material published by a third party, Plaintiffs must establish that Lowell knew or should have known of the defamatory content of the material when published. Plaintiffs acknowledge that this is the standard of liability that applies to Lowell in this

<sup>1</sup> Co-defendants in this litigation are the authors of the articles and the owner and publisher of Wprost. An Order of Default has been entered against all Co-defendants for failure to appear and answer.

matter, but deny that there is no genuine issue of material fact as to whether or not Lowell knew or should have known of the defamatory content of each article when published. With regard thereto Plaintiffs contend as follows: 1) that Lowell was put on notice of the defamatory content of the articles through the Complaint it filed against Lowell on September 8, 2005 in Federal District Court in South Carolina; 2) Lowell has ties to the Polish community in Chicago and its President, Conrad Lowell, is knowledgeable about Polish politics; 3) that the alleged false statements were highly publicized in Chicago and elsewhere; and, 4) Lowell had reason to know Wprost was not a reputable company. Plaintiffs' contentions are not supported by the facts or the law. They are based upon a distortion of the deposition testimony from which Plaintiffs arrive at speculative conclusions having nothing whatsoever to do with what Lowell knew or should have known at the time the articles in question were published.

### **THE SOUTH CAROLINA LAWSUIT**

On September 8, 2005, one week after the first article appeared in Wprost Plaintiffs brought suit in South Carolina regarding the contents of the August 30, 2005 article. Plaintiffs argue that the minute they filed their Complaint in South Carolina, Lowell obtained knowledge of the content of that pleading and, therefore, knew or should have known that the August 30, 2005 article contained defamatory material. Plaintiffs cite no legal authority to support this argument with which they advance a rule of law that dispenses with the legal requirement of service of Summons and Complaint which is a component of due process of law. The mere filing of the Complaint on September 8,

2005 did not provide the Defendant either actual or constructive knowledge of anything. For Plaintiffs to suggest otherwise is patently absurd and offensive to traditional notions of fair play and justice.

Compounding the absurdity of Plaintiffs' argument is their knowledge that Lowell did not receive a copy of the Complaint until September 26, 2005, eight days after the third article was published. Plaintiffs' South Carolina counsel forwarded a copy of the Complaint to Lowell on September 16, 2005 via Certified Mail, Return Receipt Requested. Attached hereto as Exhibit "A" is a copy of Plaintiffs' counsel's letter of September 16, 2005. The letter was received by Lowell on September 26, 2005 as evidenced by the executed return receipt. Attached hereto as Exhibit "B" is a copy of the executed return receipt which the Defendant acquired from Plaintiffs' counsel. These documents, which Plaintiffs' counsel possessed when he responded to the Motion for Summary Judgment, establish that Lowell did not receive a copy of the Complaint until 8 days after the last article in question was published.

Plaintiffs have come forward with no evidence to establish that Lowell received a copy of the Complaint prior to September 26, 2005. Because the only evidence in the record establishes that the Complaint was not received by Lowell until after all three articles had been published, it could not have provided Lowell actual or constructive knowledge of the allegedly defamatory nature of the articles at the time each article was published. Plaintiffs' argument that Lowell knew or should have known of the defamatory content of the articles the day the Complaint was filed in South Carolina must fail.

## LOWELL'S TIES TO THE POLISH AMERICAN COMMUNITY

Plaintiffs contend that Lowell targets the Polish American community in Chicago for sale of the products it imports from Poland and that Mr. Lowell was familiar with Mr. Cimoszewicz as well as the Polish presidential election of 2005 and, therefore, Lowell knew or should have known of the defamatory content of the subject articles. This contention is illogical and is based upon a mischaracterization of Mr. Lowell's testimony.

On page 8 of Conrad Lowell's deposition, the following questions and answers appear:

Q. Since you do commute or not commute, but go to Poland with some degree of regularity, did you know anything about the 2005 presidential election in Poland?

A. I probably heard about it, but I do not pay attention to politics. I am a businessman. So if the question is what was with the politics, I do not know. If you ask me who was running, I do not know. I did not know.

Q. Are you familiar with Mr. Cimoszewicz?

A. I have heard this name from the television maybe, but that's all I know about him. I know as much about him as about Mr. Bush, no more, no less.

Q. Were you aware of the issues which were pending in the 2005 Polish presidential election?

A. No.

Q. Have you ever made any political contributions to candidates for political office in Poland?

A. No.

This testimony does not, as Plaintiffs contend, establish that Mr. Lowell was familiar with the Polish presidential election as it was occurring in 2005. He specifically denied knowing what the issues were in that election. Nor did he know who was running. His testimony regarding Mr. Cimoszewicz clearly indicates that he may have heard his name

mentioned on television, but he knew no more about Mr. Cimoszewicz than he does about President Bush. Based upon Mr. Lowell's testimony that he does not pay attention to politics, the only reasonable inference that arises is that he knows very little about either man. Plaintiffs' mischaracterization of Mr. Lowell's testimony is a futile attempt to avoid the inevitable conclusion that Lowell International neither knew nor had reason to know of the defamatory content of the subject articles.

The fact that the Wprost, a Polish language magazine, is sold to Americans that read and understand Polish has no bearing on Lowell's knowledge of the defamatory content of the subject articles. This argument suffers from the same infirmity as the argument that Lowell was charged with knowledge of the allegations of the South Carolina Complaint the day it was filed, i.e. it is built on a false premise. A distributor of a magazine does not obtain knowledge of its content from the mere act of selling it. Nor does the act of selling Wprost give rise to the inference that Lowell should have known of the content of the articles in question. The sale of Wprost and knowledge of the content of any issue sold are not connected.

#### **THE PUBLICITY PURPORTEDLY AFFORDED THE FALSE STATEMENTS**

The claim that the highly publicized nature of the false statements provided Lowell International knowledge of the defamatory content of the articles must be rejected because Ms. Harlan's testimony about the media furor surrounding the articles in question is vague and speculative. She did not define this furor. She provided no specifics with regard to it. She testified that she was contacted by numerous friends,

acquaintances and family members about the accusations in the articles; however, there is no evidence that these individuals heard about the accusations from radio or television broadcasts, as opposed to reading the articles, themselves. Their telephone calls and e-mails have no bearing upon the existence of a media furor. Ms. Harlan's testimony that there was a media furor over the articles is an opinion with no basis in fact. Even if the articles were discussed on Polish language radio and television that does not establish that anyone at Lowell heard those broadcasts. Plaintiffs' testimony regarding the media furor cannot overcome Mr. Lowell's testimony that he never read the articles in question and did not have knowledge of the accusations contained therein when the articles were published.

#### **WPROST'S REPUTATION**

As noted in the Motion for Summary Judgment, §581 of the Restatement (Second) of Torts (1979) illustrates the standard of liability to be applied to news dealers or distributors such as Lowell International. Subsection 1 provides an example as to how one might prove constructive knowledge of a defamatory article. For instance, a distributor offering for sale a particular magazine that notoriously prints scandalous items may do so at the risk of liability for defamation should an article prove to be defamatory. It is a magazine's reputation for printing scandalous articles that provides the distributor with notice that articles appearing in that magazine may be defamatory.

In this matter, Ms. Harlan has offered testimony that Wprost is a respectable magazine that is comparable to Time and Newsweek. Her testimony was confirmed by Conrad Lowell. Time and Newsweek do not have a reputation for printing scandalous

items, nor does Wprost. In a desperate attempt to avoid the consequences of Ms. Harlan's testimony, Plaintiffs contend that, because Wprost did not comply with the exclusive distributorship agreement, Lowell had reason to know Wprost was untrustworthy giving rise to the inference that Lowell should have known of the allegedly defamatory content of the articles at issue. Plaintiffs seek to make a connection where none exists. Business disputes are not uncommon. The business dispute between Wprost and Lowell which was amicably resolved has nothing to do with whether or not Wprost had a reputation for printing scandalous items; therefore it cannot create an issue of fact as to whether or not Lowell had constructive knowledge that any of the articles were defamatory.

#### SUMMARY

Plaintiffs have come forward with no evidence to establish that Lowell knew or had reason to know that any of the articles in question were defamatory when they were published. The Complaint filed on September 6, 2005 in South Carolina was not received by Lowell until September 26, 2005 and, therefore, could not form a basis for Lowell's actual or constructive knowledge that any of the articles in question were allegedly defamatory. Lowell's business relationship with the Polish community and the alleged media attention given the articles following their publication cannot overcome Mr. Lowell's testimony that he did not know of the allegedly defamatory content of the articles when they were published. Wprost maintains a good reputation for the integrity of the articles appearing in its magazine, as confirmed by Ms. Harlan, herself. There is

no evidence in the record to establish that Lowell knew or had reason to believe that the articles in question were defamatory when they were published; therefore, summary judgment for Lowell is warranted.

KRALOVEC & MARQUARD, CHTD.

By: \_\_\_\_\_



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