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Court backs website on free speech

By ASHLEY SMITH Staff Writer

The state's highest court on Thursday extended the traditional media's right to protect anonymous sources to the world of Internet bloggers and journalists.

In a First Amendment case that had big implications for the future of online journalism, the New Hampshire Supreme Court said freedom of the press is a fundamental right that extends beyond newspapers and periodicals to any kind of publication that serves as a vehicle for information and opinion.

For the first time, New Hampshire's high court set a precedent for deciding whether websites can be forced to release the identity of online commenters. It instructed lower courts to weigh the media's right to protect sources more heavily than the plaintiff's concerns in lawsuits over defamatory comments made online. Similar precedents have been set in other states.

The complex case centers around a mortgage industry watchdog website, Mortgage Lender Implode-O-Meter, created in late 2006 or early 2007 to monitor the collapse of the national housing industry.

In the fall of 2008, the site posted a story about a New Hampshire company, The Mortgage Specialists Inc., which was being investigated by banking officials for a number of alleged violations, including forging signatures, destroying documents and unfair or deceptive business practices.

Along with the story, Implode-O-Meter staff posted a confidential financial document that MSI had prepared for the New Hampshire Banking Department, which had been provided to the site by an unnamed source. Some time later, a writer using the pseudonym "Brianbattersby" posted a comment on the site accusing MSI President Michael Gill of fraud.

MSI asked the site's publisher, Implode-Explode Heavy Industries, to take down the document and comment, which it did. But the publisher refused to identify the commenter or the person who leaked the chart. It also refused to promise that it wouldn't repost the chart in the future.

MSI eventually sued and won. A Rockingham County Superior Court judge ordered the publisher to reveal its anonymous sources to the company and not to post confidential documents in the future. The website appealed that decision to the state's Supreme Court, which heard oral arguments Nov. 4.

In the ruling handed down Thursday, the Supreme Court threw out Judge Kenneth McHugh's findings and instructed the lower court to reconsider the case, this time treating Implode-O-Meter as a traditional news source and balancing the laws governing a reporter's right to protect anonymous sources with MSI's claim that the statements were harmful and defamatory.

The high court agreed with Implode-Explode's argument that McHugh erred in failing to balance Battersby's First Amendment rights with the Mortgage Specialists' need to discover his identity. It

also rejected McHugh's decision to restrict Implode-Explode from publishing similar material in the future.

In a blog posting Thursday, Implode-Explode called the decision "a resounding ruling for free speech." The website also reposted the anonymous comment regarding MSI president Michael Gill. It reads:

"This guy is no stranger to REGULATORY ACTIONS. He was caught for FRAUD back in 2002 FOR SIGNING BORROWERS NAMES and bought his way out. He just paid 700,000 FRAUD FINE IN NH AND MA FOR SIGNING BORROWERS NAMES AGAIN ON 20 LOANS. He isn't really even the owner. He is listed as president of the company but the shares are in his wife's name. He is NOT ELIGIBLE for a brokers license in NH. OH MAN WHAT WAS THE NH BANKING DEPT. THINKING?"

Lawyer Jeremy Eggleton, of Orr & Reno in Concord, who represented Implode-Explode, called the ruling "great news." The high court's test for determining whether an anonymous source must be revealed is favorable to the media because it places the burden of proof on the person or entity filing suit, he said.

The Supreme Court's ruling first requires the plaintiff to prove the statements were harmful, then requires the court to balance that harm with the defendant's First Amendment rights.

"The test, we believe, is very favorable to the free press," while also recognizing there are times when it is appropriate to release the identity of an anonymous source, Eggleton said.

Lawyer Alex Walker, president of Devine Millimet, who represented MSI, said he is pleased to see the court adopt a set of standards for addressing lawsuits involving anonymous comments online.

"New Hampshire was in uncharted waters before that, " he said.

Walker said he is confident MSI will prevail under the new standards, eventually learning the names of the anonymous sources.

The anonymous online commenter, interviewed by The Telegraph on Thursday, was not quite so optimistic about the ruling. Despite the court placing the burden of proof on MSI, Brianbattersby said he doesn't believe the decision is in his favor.

"They've sent (the case) back to a lower court that already established that they're not going to uphold the rights of the Constitution," he said, speaking on the condition of anonymity. "Anyone who cherishes freedom should be concerned about this decision."

It's unclear whether McHugh will preside over the case when it returns to Superior Court.

Brianbattersby said he questions whether this case will prevent people who have knowledge of a Ponzi scheme or some other type of illegal activity from coming forward as an anonymous source.

"My faith in the system, I'm questioning it," he said.

During the Nov. 4 arguments before the Supreme Court, Eggleton argued the case has potential broad, negative implications for the New Hampshire media, threatening not only the media's right to keep online commenters anonymous, but, more importantly, the right to protect the identity of anonymous sources and to publish confidential documents.

Walker argued Implode-O-Meter is not a protected member of the media because it does not do original reporting. Even if it were, sometimes a court orders a traditional media outlet to reveal its source when it's proven to be essential to a case and there's no other way to get the information, he said.

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