

IN THE JEFFERSON COUNTY CIRCUIT COURT
DIVISION FOUR

Ken Herndon)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 08-CI-010253
)	
UNKNOWN DEFENDANTS)	JUDGE CHARLES L. CUNNINGHAM
)	
Defendants.)	

PLAINTIFF'S NOTICE OF DISMISSAL WITHOUT PREJUDICE TO RE-FILE

Plaintiff, Kenneth Herndon ("Herndon"), by and through counsel and pursuant to CR 41.01(1), gives notice of the voluntary dismissal of this action without prejudice to re-file the same if or when additional evidence arises tending to more specifically identify the individual(s) causing the harm alleged in the Complaint. The reasons for Herndon's voluntary dismissal of this action are as follows:

I.

FACTUAL BACKGROUND

This action arises from the distribution of a sinister and libelous political attack card. The citizens of the 6th Jefferson County Metro Council District received the card on May 17, 2008. This date was the weekend immediately prior to the May 20, 2008, primary election [see Herndon Aff. at ¶ 4]. The card depicted a cropped head-shot of Herndon placed on the body of a shirtless male, who was chained at the groin to two other men provocatively kissing each other at an alleged gay pride parade [see attached Holtzman Depo. Exh. 3]. In addition, the card contained several lines of derogatory text about Herndon and his Campaign Manager, Jeff Noble ("Noble") [*id.*]. The card purportedly came from the "Citizens

for Family and Moral Values.” [i.d.]. Research into the existence of this alleged organization revealed that no such organization has a legal or otherwise known existence.

Once informed of the card on May 17, 2008, Herndon immediately attempted to determine the person or persons responsible for the card’s creation and distribution. Herndon formed an investigative team, which spent approximately one year probing into the situation to discover the facts.

The following account chronicles Herndon’s findings from the investigation and his discovery efforts. While there are compelling factual inferences that can be drawn from the information gathered during the investigation and discovery, it remains that the investigation did not ultimately produce conclusive evidence specifically identifying the individual(s) responsible for the creation and dissemination of the attack card. As a result, Herndon has elected to voluntarily dismiss this action without prejudice to re-file it.

A. BEFORE ATTACK CARD MAILED, KING TRIED TO GET HERNDON TO QUIT THE RACE

Herndon filed his Letter of Intent to run for the 6th District Metro Council seat on June 30, 2007, and immediately named Noble his Campaign Manager [Herndon Aff. at ¶ 1].¹ On July 9, 2007, Herndon sent a letter to then Council President Jim King (“King”) and to then Democratic Caucus Chair Rick Blackwell (“Blackwell”) informing them of the filing of his intent to run for the 6th District seat [Herndon Aff. at ¶ 2]. Herndon did not request or seek an endorsement from either councilman; rather, the letters were sent as a political courtesy to the two highest ranked democrats on the Council [i.d. at . ¶ 1].

On July 13, 2007, Councilman King sent an email to Rob Holtzman, his Legislative Aide [see attached Exh. 2 to Holtzman Depo.]. The email instructed Holtzman to set up a meeting between King and Herndon’s Campaign Manager, Noble. According to the email,

¹ Months prior, Herndon approached incumbent 6th District Councilman George Unsel about whether Unsel was planning on running for the seat in the 2008 primary. According to Herndon, Unsel indicated that he was not going to run for election due to health issues. As a result, Herndon decided to run for the seat [Herndon Aff. at ¶ 1].

King wanted Noble to assist the Unseld re-election campaign [*id.*], and King indicated he would compensate Noble for his work [*id.*].

Sometime between July 14 and July 17, 2007, during a walk around the apartment complex park where they both lived at the time, Denise Bentley, former Louisville Alderman and, at the time, Unseld's Campaign Manager, saw a "Ken Herndon, Democrat for Metro Council" bumper sticker on Noble's truck [Exh. A to Herndon Aff. at p. 1]. According to Noble, Bentley commented, "I thought you would remain neutral." [*id.*]. Noble explained that Herndon was a longtime friend, that Noble had participated in each of Herndon's prior campaigns, and that Noble intended to actively and publicly support Herndon [*id.*]. Bentley responded, "George [Unseld] will not like that. You'll probably be getting a call." [*id.*].

According to Noble, within twenty-four hours of that conversation, he received a call **not** from Unseld, but from King, who said, "Ken could not win and should get out of the race." [*id.*]. Further, King stated he wanted to meet with Herndon and that "if George drops dead" after being re-elected, King would guarantee that Herndon would get the appointment to take the 6th District seat [[*id.*].

At some point in early December 2007, Herndon received a call from Trish Williford ("Williford"), King's Executive Assistant at King Southern Bank. [Herndon Aff. at ¶ 2]. Williford informed Herndon that King wanted to meet with him [*id.*]. Noble had previously warned Herndon that King wanted to meet with him to discuss his exiting the 6th District race [*id.*]. In light of this warning, Herndon told Williford that he would be willing to meet King to discuss any subject except his exiting the race [*id.*]. Williford then asked whether Herndon would take a phone call from King [*id.*]. Herndon responded that if the intended subject matter of the phone conversation would be Herndon exiting the race, there would be no need for the call. [*id.*]. Afterward, Herndon did not hear from Williford or King concerning a date certain for either a meeting or phone call [*id.*].

Sometime between December 1 and December 15, 2007, and after Williford's call to Herndon, Noble was walking across the crosswalk at 6th Street and Congress Alley toward City Hall [Exh. A to Herndon Aff. at p. 1]. King was in his car and waited for Noble to approach [id.]. When Noble got to King, King complained that, "Ken won't meet with me. Nobody has ever refused to meet with me."² [id.]. King asked Noble to do something about Herndon's refusal and then hastily drove off [id.]. Herndon and King never met or spoke prior to the May 2008 primary election.

On April 23, 2008, at a Katie King for Judge fundraiser held at the Granville Inn on 3rd Street, King and Noble had a long conversation about a number of topics, one of which being the Herndon – Unseld 6th District Metro Council primary election, which was only 27 days away [id.]. When the conversation turned to the race, King asked Noble to go outside with him to discuss the race [id.]. Once outside, King told Noble – who was still Herndon's campaign manager – that "[Herndon] cant win, he's going to lose 65/35.³ You know where [Herndon] is right now and you need to call him and tell him to get out of the race". [id.]. According to Noble, he told King that Herndon would not get out of the race and that the Herndon campaign planned on winning [id.]. At that point, King left the conversation and drove away [id.].

On April 28, 2008, which was 22 days before the primary election, King sent a letter to Herndon's employer [see attached Exh. 1 to Holtzman Depo.]. The letter was on Metro Council letterhead and addressed to the then President of the Louisville Downtown Management District ("LDMD"), Dan Kelleher ("Kelleher") [id.]. The letter from King questioned the legitimacy of Herndon's run for the 6th District seat while being employed by the LDMD [id.]. Though the LDMD is not a metro government agency, it receives some funding from the

² Herndon was willing to meet with King "about any subject in the world" – just not about his exiting the 6th District race [Herndon Aff. at ¶ 2].

³ In fact, Herndon came within 112 votes of winning the 6th District race [id. at ¶ 1].

metro government. The letter alluded to Metro's funding of the LDMD, mentioned the fact that the Metro Council must approve the LDMD's budget, and the letter contained a specific reminder that King, at the time, was the President of the Metro Council [*id.*]. In addition, the letter insinuated that it was imprudent for the LDMD to permit Herndon to run for office, despite the fact that Matt Conway ("Conway"), who at that time was King's Chief of Staff, had informed King in April 2008 "that all the legal research pointed to the conclusion that Ken Herndon could run for Metro Council." [Conway Aff. at ¶ 2, 3]. According to Conway, King became upset over the legal findings [*id.*].

King's letter to Herndon's employer was copied to Unseld, Mayor Jerry Abramson, and Herndon [see Exh. 1 to Holtzman Depo.]. Despite the tacit pressure, the LDMD did not suggest nor did it ask Herndon to exit the 6th District race. Conway ended his association with King's Metro Council office in June 2008 [Conway Aff. at ¶ 2].

B. ATTACK CARD IN KING'S POSSESSION BEFORE MAILED TO 6TH DISTRICT CITIZENS.

During the course of the investigation and discovery, information was obtained indicating that King was in possession of the attack card prior to it being mailed to the citizens of the 6th District.

In late December 2008 and early January 2009, Herndon met several times with Conway, who informed Herndon that he saw the attack card in King's Metro Council President's office seven to 14 days before it was mailed to the citizens of the 6th District on May 17, 2008 [Herndon Aff. at ¶ 7]. According to Herndon, Conway stated that at some point prior to May 17 and while still in King's employment, he went to King's office to retrieve material for a meeting [*id.*]. When Conway entered King's Metro Council office, he saw the attack card laying next to a stack of Katie King for Judge campaign cards [*id.*]. Conway only saw the side of the attack card that depicted Herndon in the false light of being at a gay pride parade chained to two men caught in a salacious kiss [Conway Aff. at ¶ 5]. According

to Conway, he assumed the card was merely a photo of Herndon at a gay event [*id.*].

Conway told Herndon that he neither picked up the card nor did he see any of the text on the opposite side of the card [Herndon Aff. at ¶ 8; Conway Aff. at ¶ 5].

C. BENTLEY AND SANDERS SEEN LOADING BOXES IN CAR DAYS BEFORE CARD HITS

On Wednesday, May 14, 2008 – three days prior to the attack card arriving in 6th District citizens’ mailboxes – Bentley was seen at her apartment along with Donna Sanders, Unseld’s Legislative Aide,⁴ loading boxes into Sanders’ car [Keith Dickerson Aff. at ¶ 2]. During her deposition, Sanders testified that she was at Bentley’s apartment days prior to the distribution of the attack card, but Sanders stated that the two were loading black plastic bags of clothes into her car, not boxes [Sanders Depo. at 32:10 – 32:30; 33:35 – 33:45].

D. HOMOPHOBIC ATTACK CARD HITS 6TH DISTRICT HOUSEHOLDS

On May 17, 2008, the attack card hit of 6th District households. An estimated 3000 to 4000 residents woke up to find the card in their mailbox. The attack card was hand labeled and hand stamped with first class postage (thereby assuring its arrival the day after mailing) [see Exh. 3 to Holtzman Depo.]. Each card came in an envelope that was addressed to “The XXXXXX Family” and had no return address [*id.*]. The card’s address labeling configuration was exactly the same as the Unseld campaign’s prior mailers, where the mailer was addressed to “The XXXXXX Family.” [Herndon Aff. at ¶ 4].

The Unseld campaign’s financial report indicates it spent \$3685 on postage on May 13, 2008, the single largest expenditure of the campaign that just happened to occur a mere seven days before the primary election [See Arnold Shaikun Depo at 9:51 – 10:16; Exh. 13 attached to Shaikun Depo.; Exh. 7 to Sanders Depo.]. During her deposition, Bentley claimed that the \$3685 in postage paid for the campaign’s regular 3rd class postage mailers.⁵

⁴ Sanders Depo at 9:14 – 10:40.

⁵ Because of its lower cost, third class postage mailings generally take much longer to arrive at its intended address than first class mail [McKissic Depo. at 12:45 – 14:20].