

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

TRIAL COURT OF THE
COMMONWEALTH
SUPERIOR COURT DEPARTMENT
DOCKET NO. 06-3595-F

<p>STEVEN C. FUSTOLO Plaintiff</p> <p>v.</p> <p>FREDDA HOLLANDER, PHILLIP D. ORLANDELLA Defendants</p>
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AFFIDAVIT OF DANIEL KENNEDY

1. I am Daniel Kennedy, and I submit this Affidavit on behalf of Fredda Hollander.
2. A copy of my curriculum vitae is attached to the Affidavit.
3. Journalism in the popular imagination is supposed to be "objective" — that is, journalists are expected to give us a fair, even-handed, dispassionate account of the news, regardless of what their personal feelings might be. This ideology is so ingrained in the public consciousness that news organizations proclaim their adherence to it as part of their corporate identities. Thus the *New York Times* tells us that it publishes "All the News That's Fit to Print," and the Fox News Channel announces on a regular basis that its product is "Fair and Balanced."

4. But though objectivity is one model for journalism, it is not the only model, or even the most well-established. The rise of objectivity can be traced to the latter part of the 19th century, when big-city newspaper publishers banished partisanship in an attempt to build the mass audiences desired by advertisers. Today the managers of major metropolitan newspapers and large television broadcast operations continue to honor the goal of objectivity, in part because they believe that's the best way to serve the public, but also because their business depends on bringing in as many readers and viewers as possible.

5. There is another journalistic tradition, though, whose roots extend much farther back in American history, and whose ethos continues to thrive today — that of journalism as a form of community activism. From the case of John Peter Zenger's *New-York Weekly Journal* in the 1730s, which dealt a blow to the notion of seditious libel, to the revolutionary journalism of the *Boston Gazette* and the *Massachusetts Spy* in the 1770s; from the investigative muckrakers of the early 20th century to the alternative press, independent local newspapers, and bloggers of the present day, such advocacy journalism is aimed at goading citizens to take a particular action with respect to the government, or at persuading the government to do (or not do) something. At the very least, such journalism often leads to more thorough investigation or scrutiny.

6. Accordingly, aggressive reporting on local issues such as land development should clearly be evaluated for its fit with the type of activity protected by the anti-SLAPP statute, especially when those issues are controversial and likely to attract intense neighborhood interest.

7. If a newspaper reporter knows ahead of time that he or she may be sued merely for engaging in tough-minded, truthful (even if opinionated) journalism, then important stories that serve the public interest will not be told. This fear of being sued could very well intimidate a reporter from conveying the opinions of others as well. This would have a chilling effect on the ability of journalists to do their jobs. And it would harm members of the public by denying them the information and perspectives that they need in order to understand the larger forces that are shaping their communities and, when appropriate, to take action.

8. In reading the affidavit of Fredda Hollander filed in this matter, I was struck by the inseparability of her journalism from her community activism. Ms. Hollander makes it clear that she became a journalist for the *Regional Review* because she was a community activist, and that, indeed, she saw journalism as an extension of her political involvement. She says in her affidavit that she decided to accept an offer to work as a paid journalist because "if I were to report for the *Review*, local politicians and governmental officials would be more inclined to take my phone calls and to listen to my opinions." In other words, Ms. Hollander, by her own account, became a journalist in order to become more effective at her avocation of petitioning the government, and of urging residents of the North End to petition the government as well.

9. Truth is an absolute defense in any libel suit. And, I understand, that a public official or public figure who sues a news organization for libel must show that any defamatory statements made about him were made with "actual malice" — that is, with knowing falsity, or with reckless disregard as to whether those statements were true or false. Many observers believe that these standards give the press all the protection it needs, and, with regard to the "actual malice" standard, perhaps more than it deserves.

10. Yet anyone who has worked at a small, independent newspaper knows that having the truth on one's side is cold comfort if an angry, deep-pocketed member of the community decides to use the legal system in order to engage in a campaign of harassment. The role of the anti-SLAPP law is enormously important to journalists.

As the former *New York Times* reporter Judith Miller has written, the aim of a person who files a SLAPP suit is "not at winning in court, but at intimidating into silence a group or a publication raising issues of public concern" (*City Journal*, Fall 2007, pp. 6-8). Libel suits, even frivolous ones, drain time and resources from a small newspaper and can even put it out of business.

11. Early in my career, I worked as a reporter for the *Daily Times Chronicle* of Woburn, Mass. I once reported and wrote a story, based entirely on publicly available court documents, about a surgeon who was being sued for malpractice because, the plaintiff claimed, he had removed the wrong kidney. The paper's lawyer killed the story. When I protested that my reporting was both true and based on libel-proof sources, and that we would surely win if we were sued, the lawyer replied, "My job isn't to win lawsuits. It's to prevent them."

12. It is basic to journalism that a community newspaper reporter should be able to go about covering matters of neighborhood concern, and to do so in an opinionated manner aimed at goading both the government and the public to take action, or to scrutinize some matter more closely, without the paper's owner having to fear that he will be compelled to defend against a groundless lawsuit aimed at silencing him or even putting him out of business.

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13. Though in theory it seems right that the anti-SLAPP law should, in appropriate circumstances, apply equally to the *Boston Globe* and to Ms. Hollander, it is nevertheless the case that Ms. Hollander, and the public she serves, need it more. Advocacy journalists such as Ms. Hollander, working at the local level, cover important neighborhood issues that are rarely mentioned by major news organizations such as the *Globe*, the *Boston Herald*, or the city's television and radio stations. Certainly those large news organizations do not cover such issues in the depth and with the familiarity that a community journalist brings to the task. Operating on a shoestring, unable to afford the high-priced law firms that represent big media, the independent publishers whose newspapers cover important neighborhood issues live in fear of being destroyed if they are sued.

14. Petitioning is the heart of what feisty, opinionated, truth-telling journalists like Ms. Hollander do. Making it clear that the anti-SLAPP law protects their vitally important work would be good for journalism and good for democracy.

Signed Under the Pains and
Penalties of Perjury


Daniel Kennedy

Dated: August 5, 2008

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