COMMITTEE REPORT

MOTION TO STAY DISCOVERY PENDING RESOLUTION OF A DISPOSITIVE MOTION

Prepared by the Pre-Trial Committee
Defense Counsel Section
Media Law Resource Center

DEFENSE COUNSEL ONLY

DECEMBER 2008

Media Law Resource Center, Inc.
520 Eighth Avenue, North Tower, 20th Floor
New York, New York 10018
(212) 337-0200
www.medialaw.org

MOTION TO STAY DISCOVERY PENDING RESOLUTION OF A DISPOSITIVE MOTION

Katie Burrus, Craig Zieminski, Lisa Helem, Daniel Kelly, Marc Fuller, Michael Raiff, Robert Cavalier, Richard Goehler, Jeffrey Hunt, David Reymann, and Breanne Fors

I. INTRODUCTION

Federal and state rules of civil procedure give trial courts the power to limit discovery in order to "protect a party or person from . . . undue burden or expense . . . ."[1] Similarly, the Supreme Court has held that trial courts have the power to stay discovery in order to promote the efficient use of resources and prevent litigants from incurring unnecessary expense.[2] According to the Fifth and Sixth Circuits, trial courts have "broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."[3] Several circuits have held that a stay in discovery is particularly appropriate "where claims may be dismissed 'based on legal determinations that could not have been altered by any further discovery.'"[4] Additionally, a stay is appropriate when it serves the interests of judicial economy and efficiency.[5]

---

[1] FED. R. CIV. P. 26(c). See, e.g., CAL CIV. PROC. CODE § 2019.030 (authorizing court to issue protective order if discovery sought is unduly burdensome or expensive); TEX. R. CIV. P. 192.6(b) (authorizing court to limit discovery "[t]o protect the movant from undue burden [or] unnecessary expense . . . .).

[2] Landis v. North American Co., 299 U.S. 248, 254-55 (1938) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

[3] Hahn v. Star Bank, 190 F.3d 708, 719 (6th Cir. 1999); Petrus v. Bowen, 833 F.2d 581 (5th Cir. 1987); *see also* Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 436 (5th Cir. 1990) (finding that a stay of discovery may be appropriate where the disposition of a motion to dismiss "might preclude the need for discovery altogether thus saving time and expense").

[4] Gettings v. Building Laborers Local 310, 349 F.3d 300, 304 (6th Cir. 2003) (quoting Muzquiz v. W.A. Foote Memorial Hosp., Inc., 70 F.3d 422, 430 (6th Cir. 1995)); see also Moore v. Busby, 92 Fed. Appx. 699, 702 (10th Cir. 2004) (holding that district court properly stayed discovery until deciding dispositive motion); Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997) ("neither the parties nor the court have any need for discovery before the court rules on [a purely legal] motion"); Petrus, 833 F.2d at 582 (finding that the district court properly deferred discovery while deciding the motion where the party seeking discovery could not learn anything through discovery that could affect the resolution of a dispositive motion); Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 (2nd Cir. 1983) ("summary judgment should not be granted while the party opposing judgment timely

Although media law opinions do not contain such explicit statements of law, these principles have been implicitly followed. For example, the Supreme Court, in Herbert v. Lando, held that although members of the press are not entitled to an evidentiary privilege in defamation actions, "judges should not hesitate to exercise appropriate control over the discovery process," and "should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'"[6]

This paper discusses judicial decisions in which media parties have attempted to stay discovery during the pendency of potentially dispositive motions.

II. DISCUSSION

A. The First Amendment Provides Some Support for Media Defendants Seeking to Avoid Discovery

While notions of judicial economy are typically cited in support of staying discovery pending a dispositive motion, the First Amendment provides an additional rationale for media defendants. In non-discovery contexts, courts often consider the "chilling effect on speech" that might result from a particular holding,[7] acknowledging that the "free flow of information" is a

---

seeks discovery of potentially favorable information."); Wood v. McEwen, 644 F.2d 797, 801 (9th Cir. 1981) ("A district court may limit discovery 'for good cause' . . . and may continue to stay discovery when it is convinced that the plaintiff will be unable to state a claim for relief."); Scroggins v. Air Cargo, 534 F.2d 1124, 1133 (5th Cir. 1976) ("On these facts, we see no possible abuse of discretion in the order staying general discovery until the court could determine whether the case would be resolved at the summary judgment stage. Of course, the situation would be quite different if plaintiff had been denied discovery which related to the summary judgment motion, but plaintiff has failed to persuade us that such was the case."); Brennan v. Local Union No. 639, Int'l Bhd. of Teamsters, 494 F.2d 1092, 1100 (D.C. Cir. 1974) (affirming postponement of discovery until after adjudication of summary judgment motion).

5 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3866 (3d ed. 1998 & Supp. 2004).

6 441 U.S. 153, 177 (1979) (quoting FED. R. CIV. P. 26(c)).

7 See, e.g., Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988) ("a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value."); U.S. v. LaRouche Campaign, 841 F.2d 1176, 1181 (1st Cir. 1988)

hallmark value of the First Amendment.[8] Justice Powell applied these principles to discovery in his concurring opinion in Herbert v. Lando, stating that "when a discovery demand arguably impinges on First Amendment rights a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated."[9] He suggested that, in certain cases, "it might be appropriate for the district court to delay enforcing a discovery demand, in the hope that the resolution of issues through summary judgment or other developments in discovery might reduce the need for the material demanded."[10] Analyzing Herbert v. Lando, one commentator noted that while the Court rejected the opportunity to create a broad evidentiary privilege for the press, "[n]o Justice disputed that courts should supervise discovery procedure to accommodate [F]irst [A]mendment concerns."[11]

The D.C. Circuit, citing Powell's Herbert v. Lando concurrence and noting "the potential threat to [F]irst [A]mendment freedoms," recommended that "discovery be limited initially to the extent feasible to those questions that may sustain summary judgment."[12] Without special

---

("disclosure of such confidential material would clearly jeopardize the ability of journalists and the media to gather information and, therefore, have a chilling effect on speech").

[8] Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993) (recognizing "society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public").

[9] 441 U.S. at 179 (Powell, J., concurring).

[10] Id. at 180 n. 4 (Powell, J., concurring).

[11] Scott M. Matheson, Jr., Procedure in Public Person Defamation Cases: The Impact of the First Amendment, 66 TEX. L. REV. 215, 256 (1987); see also Susan Gilles, Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation, 58 OHIO ST. L.J. 1753, 1801 (1998) (arguing that courts should "take into account the special First Amendment concern of [sic] over burdening the press" by, among other suggestions, delaying discovery until necessary); Conrad Shumanide et. al, Discovery: Libel Litigation, 523 PLI/Pat 19 (1998) ("In Herbert v. Lando . . . the Supreme Court laid the groundwork for allowing libel defendants to limit discovery in light of the First Amendment concerns implicit in an action against a media defendant."); Supreme Court, 1978 Term—Discovery from Media Defendants in Public Figure Defamation Actions, 93 Harv. L. Rev. 149, 158-59 (1979) (hereinafter "Discovery") ("Each of Herbert's five opinions evidences the Justices' common concern that unchecked discovery has contributed to harassment of parties, protracted depositions, and mushrooming litigation costs. Ironically, they also mirror the Justices' marked disagreement over district judges' ability to protect first amendment interests adequately through existing discovery rules.").

[12] McBride v. Merrell Dow and Pharmaceuticals Inc., 717 F.2d 1460, 1467 (D.C. Cir. 1983) (citing Lando, 441 U.S. at 179 (Powell, J., concurring)); see also McBride v. Merrell Dow and Pharmaceuticals, Inc., 800 F.2d

considerations for media defendants in libel suits, the court reasoned, "debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open . . . ."[13]

B. Factors Considered In Determining Whether To Stay Discovery

1. Whether the Jurisdiction Has An Anti-SLAPP Statute

Over the past twenty years, anti-SLAPP[14] statutes have developed as a procedural tool to prevent the threat of litigation from chilling the exercise of free speech.[15] Recognizing that the quick and inexpensive resolution of lawsuits lessen the deterrent effects of litigation,[16] anti-SLAPP statutes typically provide for an expedited motion to dismiss (or "motion to strike") and allow for the recovery of attorneys' fees.[17]

The breadth of protection provided by these statutes varies significantly from state to state. California is considered to provide the broadest protection, exempting from liability the exercise of free speech "in connection with a public issue. . . ."[18] This language is quite broad in comparison to many other anti-SLAPP statutes, which only protect free speech regarding government bodies. For instance, Minnesota's statute protects "speech or lawful conduct that is

---

1208, 1214 (D.C. Cir. 1986) ("it would be entirely appropriate for the district court to limit discovery initially to the potentially dispositive issue of falsity").

13 McBride, 717 F.2d at 1467 (quoting Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967)); see also Discovery, supra note 11, at 158 (arguing that "[f]ear of editorial conversation discovery may deter reporters from recording recollections or confiding doubts to colleagues, and thus hinder effective news reporting.").

14 SLAPP is an acronym for Strategic Litigation Against Public Participation.

15 Hartzler, Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant, 41 VAL. U. L. REV. 1235, 1239 (2007).

16 Id. at 1240 ("A plaintiff bringing a SLAPP suit is not necessarily interested in winning the case. Rather, SLAPP suits are used to deter or to punish a party for exercising its political rights by forcing that party to waste time and resources defending its petitioning activity in court. Claims that frequently appear in SLAPP litigation include defamation, libel, invasion of privacy, abuse of process, malicious prosecution, conspiracy, and tortious interference with contract or business relationships.").

17 Id. at 1242.

18 CAL CIV. PROC. CODE § 425.16(b)(1) (2008).

genuinely aimed in whole or in part at procuring favorable government action. . . . ."[19]

Many anti-SLAPP statutes also include a provision staying discovery during the pendency of the special motion to dismiss, although the level of protection afforded varies by state. Anti-SLAPP statutes include an unqualified stay of discovery in Arkansas,[20] Hawaii,[21] Maryland,[22] Missouri,[23] and Pennsylvania.[24] The anti-SLAPP statutes of Indiana[25] and Illinois[26] permit discovery to be stayed, but include an exception for discovery relevant to the special motion to dismiss. The court must stay discovery—but ***may*** order it for good cause—during the pendency of anti-SLAPP motions in California,[27] Georgia,[28] Louisiana,[29] Maine,[30] Massachusetts,[31] Minnesota,[32] Oregon,[33] and Rhode Island.[34] Utah's anti-SLAPP statute is broad, but provides significant discretion to the trial court, ordering that "all discovery shall be

---

19 MINN. STAT. §§ 554.01-6, 554.03 (2008).

20 ARK. CODE. ANN. 16-63-507(a)(1) (2008).

21 HAW. REV. STAT. § 634F-2(3) (2008).

22 MD. CODE. ANN. CTS. & JUD. PROC. §5-807(d) (2008).

23 MO. REV. STAT. § 537.528 (2007).

24 27 PA. STAT. ANN. §8303 (2008).

25 IND. CODE § 34-7-7-6 (2008).

26 735 ILL. COMP. STAT. 110⁄20(b) (2008).

27 CAL CIV. PROC. CODE § 425.16(g) (2008).

28 GA. CODE ANN. § 9-11-11.1(d) (2008). For a case applying the discovery provision to a media defendant, see Davis v. Emmis Pub. Corp., 536 S.E.2d 809 (Ga. Ct. App. 2000) (trial court did not err in denying discovery where date of magazine's publication could be determined without additional discovery).

29 LA. CODE CIV. PROC. ANN. art. 971D (2008); see also Aymond v. Dupree, 928 So.2d 721, 731-32 (La. Ct. App. 2006) (interpreting statute to give trial judge full discretion in deciding whether to allow discovery while motion is pending).

30 ME. REV. STAT. ANN. tit. 14, § 556 (2008).

31 MASS. GEN. LAWS ANN. ch. 231, § 59H (2008).

32 MINN. STAT. § 554.02-2(1) (2008).

33 OR. REV. STAT. § 31.152(2) (2007).

34 R.I. GEN. LAWS § 9-33-2(2)(b) (2008).

stayed pending resolution of the motion unless the court orders otherwise."[35] Finally, some anti-SLAPP statutes are silent on the issue of discovery, including those of Arizona,[36] Delaware,[37] Florida,[38] Nebraska,[39] Nevada,[40] New Mexico,[41] New York,[42] Oklahoma,[43] Tennessee,[44] and Washington.[45]

Where the anti-SLAPP statute stays discovery but allows it for "good cause," such as in California, courts focus on the relevance and necessity of the requested discovery to the resolution of the special motion to dismiss.[46] As noted in Carver v. Bonds, "[a] request for discovery in opposition to an anti-SLAPP motion should be determined with reference to the issues raised in the motion."[47]

Increasingly, California courts have adopted a pro-defendant interpretation of "good cause" based on the principle that granting discovery contradicts the purpose of the anti-SLAPP statute by permitting the very burden the statute was intended to prevent.[48] For instance, in Paterno v. Superior Court, the California Court of Appeals vacated a discovery order, holding

---

35 UTAH CODE § 78B-6-1404(1)(a) (2008).

36 ARIZ. REV. STAT. ANN. § 12-751 (2008).

37 DEL. CODE ANN. tit. 10, §§ 8136 to 8138 (2008).

38 FLA. STAT. § 768.295 (2008).

39 NEB. REV. STAT. ANN. §§ 25-21,241 to 246 (2008).

40 NEV. REV. STAT. ANN. § 41.650 (2008).

41 N.M. STAT. §§ 38-2-9.1 to 2 (2008).

42 N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2008).

43 OKLA. STAT. tit. 12 § 1443.1 (2008).

44 TENN. CODE ANN. §§ 4-21-1001 to 1004 (2008).

45 WASH. REV. CODE ANN. §§ 4.24.500-520 (2008).

46 Compare Paterno v. Superior Court, 78 Cal. Rptr. 3d 244, 250-254 (Cal. Ct. App. 2008) to Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 44 Cal. Rptr. 2d 46, 54 (Cal. Ct. App. 1995).

47 37 Cal. Rptr. 3d 480, 505 (Cal. Ct. App. 2005) (denying each of plaintiff's discovery requests after determining that the anti-SLAPP motion could be resolved without the information sought).

48 78 Cal. Rptr. 3d at 257 ("Forcing [defendant] to submit to discovery in the absence of good cause jeopardizes the protections afforded by the anti-SLAPP statute against harassing litigation.").

that plaintiffs "cannot show good cause for discovery on the question of actual malice without making a prima facie showing that the defendant's published statements contain provably false factual assertions."[49] The Paterno appellate court also admonished the trial court for permitting discovery where plaintiffs had not established that the information was not available from another source.[50]

The applicability of anti-SLAPP discovery stay provisions in federal courts is uncertain. In Metabolife Intern., Inc. v. Wornick, the federal district court required the plaintiff to respond to SLAPP motions without discovery.[51] The Ninth Circuit reversed, holding that "[b]ecause the discovery-limiting aspects of § 425.16(f) and (g) collide with the discovery-allowing aspects of Rule 56, these aspects of subsections (f) and (g) cannot apply in federal court."[52] It remanded the case for discovery of information "in the defendants' exclusive control [that] may be highly probative to [plaintiff's] burden of showing falsity."[53] Later district court decisions have rejected the conclusion that California's anti-SLAPP discovery stay inherently conflicts with Rule 56,[54] arguing instead that the Metabolife district court merely erred in failing to find "good cause."[55]

---

[49] Id. at 250; see also Garment Workers Center v. Superior Court, 12 Cal.Rptr.3d 506, 510 (Cal. Ct. App. 2004) ("Even if it looks as if the defendant's actual malice may be an issue in the case, if it appears from the SLAPP motion there are significant issues as to falsity or publication—issues which the plaintiff should be able to establish without discovery—the court should consider resolving those issues before permitting what may otherwise turn out to be unnecessary, expensive and burdensome discovery proceedings."); Sipple v. Foundation for National Progress, 83 Cal. Rptr. 2d 677, 690 (Cal. Ct. App. 1999) (denying plaintiff's request for discovery related to the allegedly libelous article where suit could be dismissed on truthfulness grounds).

[50] 78 Cal. Rptr. 3d at 252 n. 4 (stating that plaintiff's failure to show that information sought was unavailable from another source "required denial of [its] motion").

[51] 264 F.3d 832, 837-38 (9th Cir. 2001).

[52] Id. at 846 (quoting Rogers v. Home Shopping Network, Inc., 57 F.Supp.2d 973, 982 (C.D. Cal. 1999)).

[53] Id. at 847.

[54] See New.Net, Inc. v. Lavasoft, Inc., 356 F.Supp.2d 1090, 1101-02 (C.D. Cal. 2004) ("this Court sees no inherent 'direct collision' between the expedited procedure contemplated in the anti-SLAPP statute, and the provisions of Rule 56.")

[55] Price v. Stossel, No. 2:08-cv-03936-RGK-FFM, at 9-12 (C.D. Cal. Sept. 24, 2008).

2. Whether The Court Can Resolve The Dispositive Motion On The Present Record

A primary factor affecting whether a court will stay discovery is whether the motion at issue can be resolved on the current record. If the moving party can show that a dispositive motion can be decided without additional evidence, courts will often stay further discovery while that motion is pending. Several cases make this principle clear.

- In White v. Fraternal Order of Police, the D.C. Circuit Court of Appeals held that "the district court did not err by staying discovery prior to issuing the summary judgment rulings [where] the record is adequate to determine whether the standards for the grant of summary judgment are met."[56] Although malice was at issue in White, the plaintiff had argued that there was already enough evidence in the record to create a factual question on the issue of malice.[57]

- In Mullens v. New York Times Co., the court declined to allow additional discovery before ruling on a motion for summary judgment because the truthfulness of the allegedly libelous article could be readily determined from the record.[58] The court noted that any additional discovery would pertain only to the defendants' privilege defense and would be irrelevant to the issue on which the court granted summary judgment—*i.e.*, its determination of the substantial truth of the allegedly defamatory article.[59]

---

56 909 F.2d 512, 517 (D.C. Cir. 1990).

57 Id. (granting summary judgment for newspaper where "[t]he Post merely reported true facts from which a reader might infer that [plaintiff] used drugs," and finding "no evidence in the text of the articles to suggest that it would be reasonable for a reader to conclude that the Post intended the defamatory inference").

58 No. 3-95-CV-0368-R, 1996 WL 787413, at *5 n.22 (N.D. Tex. July 30, 1996).

59 Id.

- In Lawton v. Georgia Television Co., a defendant moved for summary judgment on the grounds of a statutory privilege protecting the fair reporting of government reports. The court stayed discovery, finding that no discovery was required where the only issue was whether an official government record was fairly and accurately reported by defendants, a question the court could resolve, as a matter of law, "solely upon examination and comparison" of the document at issue with the allegedly libelous broadcast.[60]

- In Steinbuch v. Cutler, an order staying discovery was upheld as to a defendant whose motion to dismiss could be determined based on the record, but the stay was reversed as to the defendant for whom the record was insufficient to decide the motion.[61]

3. Whether Actual Malice Is At Issue

Courts are less likely to resolve dispositive motions without discovery in cases requiring a finding of actual malice, which requires more evidence than the simple determination that an allegedly defamatory statement was true.[62] As one court has noted, media defendants "will be prone to assert their good-faith belief in the truth of their publication," and as such, "if the

---

[60] 1994 WL 538892 at *5.

[61] 518 F.3d 580, 588-90 (8th Cir. 2008) (affirming dismissal for Disney but remanding the dismissal "against Hyperion for an opportunity for tailored discovery to elicit whether its contacts with Arkansas were so continuous and systematic as to warrant general personal jurisdiction over the publisher").

[62] Cf. Lawton v. Georgia Television Co., Nos. E-12269, E-12270, 1994 WL 538892, at *5 (Ga. Super. Ct. May 5, 1994) (finding that no discovery was required where the only issue was whether an official government record was fairly and accurately reported by defendants, a question the court could resolve "solely upon examination and comparison" of the document at issue with the defendants' broadcast).

plaintiff were denied discovery[,] it would make it difficult to prove knowing or reckless falsehood."[63]

In Herbert v. Lando, a defamation case brought by a public figure, the United States Supreme Court considered whether the First and Fourteenth Amendments should be construed to provide additional protection to the press in defamation actions, such that defamation plaintiffs would be "barred from inquiring into the editorial processes of those responsible for the publication."[64] The Supreme Court held that the Constitution afforded no such evidentiary privilege, which would substantially interfere with the ability of a defamation plaintiff to establish "malice" as required by New York Times.[65]

Lower courts have interpreted Herbert v. Lando as requiring some amount of discovery into the editorial, decision-making processes employed by publishers for defamation plaintiffs who are required to prove malice. For example, in Griffin v. Delta Democrat Times Publishing Co., the court found that the trial court erred when it granted the newspaper's motion for summary judgment before the plaintiff had the benefit of "full discovery" into "the subjective, editorial, decision-making process as contemplated by Herbert v. Lando."[66]

In another defamation case brought by a public figure and a limited purpose public figure, the court found that summary judgment was improper where plaintiffs are required to prove malice, but are afforded no discovery.[67] In reversing the trial court's grant of summary judgment on the ground that evidence of actual malice was lacking, the Ohio Court of Appeals

---

63 Griffin v. Delta Democrat Times Publ'g Co., 815 So.2d 1246, 1250-51 (Miss. Ct. App. 2002).

64 441 U.S. at 155.

65 Id. at 175.

66 815 So.2d 1246, 1250-51 (Miss. Ct. App. 2002) (noting that media defendants "will be prone to assert their good-faith belief in the truth of their publication," and as such, "if the plaintiff were denied discovery[,] it would make it difficult to prove knowing or reckless falsehood. . . .").

67 Scaccia v. Dayton Newspapers, Inc., 867 N.E.2d 874, 878-79 (Oh. Ct. App. 2007).

noted that "[o]ne cannot weigh evidence most strongly in favor of one opposing a motion for summary judgment when there is a dearth of evidence available in the first place."[68]

Similarly, in St. Surin v. Virgin Islands Daily News, the Third Circuit reversed summary judgment in a defamation action brought by a public-figure plaintiff.[69] Although the court found that there was a genuine issue of material fact on the present record, it held that the trial court erred in ruling on the defendant's motion for summary judgment without addressing the plaintiff's request for further discovery.[70] The Third Circuit noted that the plaintiff's "proposed discovery seems likely to produce evidence that would have materially affected the merits of the Daily News' pending motion for summary judgment."[71]

4. Whether The Parties Have Had A Sufficient Opportunity To Conduct Discovery

Where a summary judgment non-movant asks for a continuance to conduct additional discovery before the court rules on the dispositive motion, the court may consider whether the non-movant has had a sufficient opportunity for discovery. For example, in Secord v. Cockburn, a defamation plaintiff's request for further discovery was denied and the court proceeded to rule on the defendant book publisher's motion for summary judgment, where "[t]he plaintiff . . . had an unrestricted year and a half in which to pursue discovery in the instant case."[72] In this same vein, filing a dispositive motion prior to ***any*** discovery may—at least in cases where outside

---

[68] Id. at 879 (quoting Tucker v. Webb Corp., 447 N.E.2d 100 (1983)). Ohio has a similar Rule 56(f) in its Code of Civil Procedure. See also OHIO CIV. R. 56(f).

[69] 21 F.3d 1309, 1318 (3rd Cir. 1994).

[70] Id. at 1315, 1318.

[71] Id. at 1315.

[72] Secord v. Cockburn, 747 F.Supp. 779, 786 (D.D.C. 1990).

evidence is necessary to resolve the motion—reduce the chances that a media defendant will prevail on summary judgment.[73]

C. Burdens And Procedure In Moving For A Stay

Media defendants moving for a stay of discovery typically—unless an anti-SLAPP statute provides otherwise—have the burden of establishing that discovery is unnecessary.[74] Plaintiffs moving for a continuance of a summary judgment motion due to lack of discovery, on the other hand, carry the burden of establishing that additional facts are necessary to resolve the summary judgment motion.[75] As set forth above, in the anti-SLAPP context, the stay can be automatic and mandatory.

A motion to stay discovery is typically submitted contemporaneously with the corresponding dispositive motion. Where anti-SLAPP statutes are inapplicable and the jurisdiction has no relevant case law, defendants seeking a stay of discovery should emphasize Federal Rule of Civil Procedure 26, which gives trial courts broad discretion in limiting the scope of discovery, or its state counterpart.[76] American Jurisprudence and other secondary

---

[73] See AirTran Airlines, Inc. v. Plain Dealing Publ'g Co., 66 F. Supp. 2d 1355, 1360 n.2 (N.D. Ga. 1999) (denying motion for summary judgment and noting that "[b]ecause defendant filed its motion for summary judgment and its motion to stay discovery on the day that the discovery period commenced in this case, there has been virtually no discovery").

[74] See Price v. Viking Press, Inc., 115 F.R.D. 40, 41 (D. Minn 1987) (denying defendants' motion to stay discovery while dispositive motions were pending, where "defendants have made no particularized showing as to why discovery should be stayed, alleging only generalized objections about burdens on First Amendment activities"); see also Flakt v. Nat'l Union Fire Ins. Co., 731 A.2d 811, 815 (Del. 1999) ("The party seeking the stay, however, carries the burden of justifying the elimination of important procedural devices available to most litigants.").

[75] Scaccia, 867 N.E.2d at 878 ("The party seeking additional time must do more than merely assert generally the need for additional discovery. There must be a factual basis stated and reasons given why the party cannot present facts essential to its opposition to the motion.") (citations omitted).

[76] See FED. R. CIV. P. 26(b)(2)(c)(iii) (providing that the court can limit discovery if it determines that "the burden of expense of the proposed discovery outweighs its likely benefit"); 26(c)(1) (providing for protective orders from discovery in certain instances).

sources have published templates for motions and orders to stay discovery pending rulings on dispositive motions.[77]

III. CONCLUSION

Whether relying on basic principles of civil procedure or a specific anti-SLAPP discovery stay provision, media litigants hoping to prevent discovery should carefully consider whether the record is sufficiently developed to resolve the dispositive motion. Motions for summary judgment that are filed before the plaintiff has had an adequate opportunity to conduct discovery—especially when malice is at issue—may be denied as premature. If the issue is a narrow one and does not involve extraneous evidence, however, summary judgment may be appropriate. Although litigants are unlikely to prevent discovery that is beneficial in resolving a dispositive motion, media defendants have an excellent chance of staying any discovery that is not relevant to the pending motion and that will become extraneous if the motion is granted.

Katie Burrus, Craig Zieminski, Lisa Helem (fall 2009), Marc Fuller, and Daniel Kelly are associates at Vinson & Elkins L.L.P. in Dallas, Texas.

Michael Raiff is Co-Chair of the Pre-Trial Committee and a partner at Vinson & Elkins L.L.P. in Dallas, Texas.

Robert Cavalier is an attorney with Lucas and Cavalier, LLC in Philadelphia, Pennsylvania.
Richard Goehler is an attorney with Frost Brown Todd LLC in Cincinnati, Ohio.

Jeffrey Hunt, Breanne Fors, and David Reymann are attorneys with Parr Brown Gee & Loveless in Salt Lake City, Utah.

---

[77] AM. JUR. *Pl. & Pr. Forms Depositions and Discovery* § 520.10 (motion); AM. JUR. *Pl. & Pr. Forms Depositions and Discovery* § 529.10 (order).