

## **THE LAW SUIT IS DEAD, BUT THE CONFLICT LIVES ON: “Reflections on the dissembling of a Judge’s words”**

In a recent release, The Containment Technologies Group, Inc., implied that the recent dismissal of its ill-conceived Defamation claim was based on a mere legal technicality.

### **Containment Technologies Group Announces Results of Legal Action**

INDIANAPOLIS, April 16 /PRNewswire/ — Containment Technologies Group, Inc. received a ruling from a federal judge in a lawsuit against The American Society of Health-System Pharmacists, Gregory F. Peters, Marghi R. McKeon and William T. Weiss relating to an article entitled Potential For Airborne Contamination in Turbulent and Unidirectional-Airflow Compounding Aseptic Isolators, which was published in the March 15, 2007 issue of the American Journal of Health-System Pharmacy.

The court ruled that, under Indiana law, defamation actions based on speech about matters of public concern require proof of “actual malice” – either knowledge of actual falsity or reckless indifference to truth or falsity. The court acknowledged that “whether or not Peters did legitimate work, ASHP is protected under an actual malice standard...” The court ruled in favor of the defendants based on the Indiana Anti-SLAPP statute and concluded that individuals are free to express opinion under the First Amendment right of free speech. The court also noted that “Bad but honest science is not actionable as defamation” and “for purposes of summary judgment, however, the court must assume that the methods and conclusions were flawed...”

Containment Technologies Group, Inc., filed the lawsuit on June 22, 2007, is disappointed in the ruling, and is reviewing its options, which include appealing the decision to the 7<sup>th</sup> Circuit Court of Appeals.

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With skillful insinuation and parsed excerpts from the judgment of Chief Federal Judge David F. Hamilton, CTG conveyed that its attempt to avoid legitimate criticism was brought to an end by a reluctant Jurist applying a legal subterfuge. For those who are inclined to read the entire judgment, they will learn that CTG did not suffer a loss based on any such petty legality: The lawsuit was an unmitigated fiasco, aptly discredited by Justice Hamilton’s well-reasoned judgment.

Though couched and supported by fundamental (and not trivial) legal principles, CTG failed for all the right reasons: The study was sound; The Defendant’s publication was not motivated by malice; CTG could not demonstrate a single false statement by Defendants;

and the lawsuit clearly threatened to restrict legitimate scientific enquiry and debate on a matter of public significance: the questionable safety of CTG's MIC-4 Turbulent-Airflow Compounding Aseptic Isolator design.

**“No rational fact finder could decide in favor of CTG [sic].”**

For summary judgment to be granted, the Court needed to conclude that “no rational fact finder could decide in favor of the non-moving party (CTG).” The Court was obliged to, and did, “view all the evidence in the record in the light most favorable to CTG [sic]”.

By parsing portions of the Judge's statements in its FindLaw release, CTG hinted that the Court inferred bad science or flawed methods and conclusions by Defendants. In fact, the opposite was true: The Court emphasized that the fundamental legal pre-condition for a summary judgment required the Court to essentially theorize all factual issues in CTG's favor. However, this was not a true factual conclusion, but only a legal process. For Summary Judgment to be granted, the Court needed to conclude that “no rational fact finder could decide in favor of the non-moving party (CTG).” p. 18. Therefore, the Court was obliged to “view all the evidence in the record in the light most favorable to CTG [sic]”.

The Court fulfilled this pre-condition, but did not arrive at the factual conclusion implied by CTG in its release. To the contrary: The Court theorized that even *if* the publication was based on “bad, but honest science”, it still would not be actionable as defamation. CTG reported this observation as though the Court inferred bad science by the Defendants. However, in its press release, CTG neglected to inform the public of the Court's significant caveat that it was “not suggesting the science was actually bad or that the conclusions were false.” The Court's speculation regarding bad science was only that-speculation. And it was speculation that was necessary due to the legal standard that worked to Plaintiff's (CTGs) advantage.

It was in spite of Defendants' legal handicap that the Court had to assess whether Summary Judgment was appropriate on the basis of CTG's best assertions: Justice Hamilton concluded that CTG not only did not, but *could not* demonstrate that the criticisms of its product were false, unfair, or maliciously published by Defendants.

While CTG implied that Defendants' science may have been bad, Justice Hamilton attempted to ensure that no reasonable onlooker would come to that erroneous conclusion and added the following:

**“The Court is not suggesting the science was actually bad or that the conclusions were false.”**

CTG's attack claimed that Defendants' assessment of the product was unfair. However that criticism was easily dismissed by the Judge. It was apparent that Defendants' study was systematically based on realistic, scientifically-sound testing protocols derived from actual sterile compounding challenges, relevant tests encompassing those challenges, and reasonable conclusions drawn from the test results. The study was extensively reviewed

and positively recommended for publication by four expert peer-reviewers, and by the Director, Division of Manufacturing and Product Quality, US Food and Drug Administration (FDA). Three co-workers at Mayo Clinic supported the publication, and the article was published in a widely read journal with no negative feedback. None of the fundamental validity of the study is acknowledged in CTG's press release.

But CTG's criticism of the study reached a new and laughable level of absurdity in the factual context of its claim that Defendants' failed to follow appropriate protocols. The absurdity was in the fact that CTG refused to provide those protocols. With perfect circularity CTG, after having refused to provide its unit or protocols for evaluation, claimed that the study was invalid because of Defendants' failure to use the CTG protocols. His Honor was justifiably amazed by the argument, and exclaimed,

**"...Containment Tech refused to provide those protocols to the authors!"  
"It could not first refuse to provide the protocols and then sue because the  
researchers did not use them"...**

But that wasn't all. CTG was given an opportunity to review and contest Defendants' study results prior to publication: CTG declined. Again, Justice Hamilton noted the duplicity in CTG's subsequent litigation:

**"Even more damaging to Containment Tech's claim is the authors' attempt to receive  
feedback after the initial draft was accepted for publication."**

CTG refused to even review the article or highlight the alleged deficiencies that it later tried to condemn in this litigation.

Justice Hamilton avoided the dangerous result of CTG's argument that would have been to:

**"... give parties with a financial interest a stranglehold on scientific study."**

CTG further attempted to undermine Defendants success by implying that Indiana's Anti-SLAPP statute provided some form of technical escape from the otherwise normal consequences of the publication. Judge Hamilton decried that disguised assertion, stating:

**"Substantively, the Act does not replace the Indiana common law of defamation but  
provides simply that the (defendants) must establish  
that the (alleged defamatory statement) was lawful."**

In other words, to the extent that the statute altered existing common law, it placed an *additional* legal burden on Defendants. When the defendants meet that standard, the Anti-SLAPP statute rewards the victorious parties in an unjustified defamation suit with some financial relief in the form of attorney's fees. The result of the Anti-SLAPP statute was to protect "against attempts to silence speakers through unjustified defamation suits." This was clearly such a suit.

Perhaps more important was the Court's reminder that we have a shared interest in robust discussion and open debate; Debate that should take place without the specter of expensive and frivolous litigation. As Justice Hamilton aptly stated:

**“Quite simply, this battle should take place in the pages of the ASHP journal and similar publications, not in a court.”**

This leads to the *real* question regarding CTG: Why was CTG intent on undermining the study and pursuing litigation, rather than participating in an open dialogue? It is a dialogue protected by law because it protects our shared interest in public examination and robust dialogue. That dialogue includes conflicting opinion and sometimes painful criticism. CTG's lawsuit threatened to diminish our right *and responsibility* to openly discuss and objectively and scientifically assess the design of CTG's medical device. That right is fundamental to the pursuit of excellence in the care of our patients.

The torturous progress of this litigation should not be undermined by the covert and misleading insinuations by CTG. The factual truth is that CTG had no credible basis to claim that we, the Defendants, had defamed the quality of its product. In the tradition of our responsibility, it is long past time for CTG to address the issues raised by the study, rather than minimize and evade legitimate criticism of its questionable product.