STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Talbot, P.J., and Wilder and Stephens, JJ.)

GUS GHANAM,

Plaintiff/Appellant,

vs.

Supreme Court Docket No.
Court of Appeals Docket No. 312201
Macomb Circuit Court
Case No. 2012-001739-CZ

JOHN DOES,

Defendants,

and

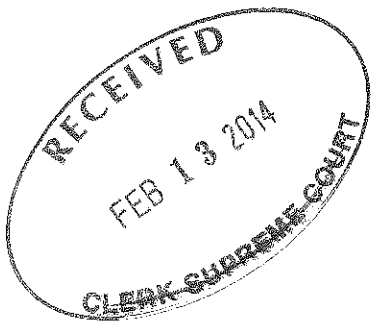
JOSEPH MUNEM,

Defendant / Appellee.

PLAINTIFF / APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

NOTICE OF HEARING

PROOF OF SERVICE



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STATEMENT OF ORDER BEING APPEALED

Plaintiff, Gus Ghanam, appeals the published decision of the Court of Appeals, which reversed the trial court's interlocutory, pre-trial discovery order requiring "Third-Party" Intervener,[1] Joseph Munem (hereafter Mr. Munem, unless otherwise indicated) to be deposed or answer written questions in Plaintiff's defamation claim against unidentified defendants (the John Doe defendants). **ATTACHMENT A**, *Ghanam v. John Does*, ___ Mich. App. ___ (2013) (COA Docket # 312201) (Talbot, P.J., and Wilder and Stephens, JJ) (Judge Stephens wrote a separate concurrence).

This Court may exercise jurisdiction over this case pursuant to MICH CONST 1963 ART VI, § 4; MCL 600.212; MCL 600.215(3); MCR 7.301(A)(2) and (7); and MCR 7.302(C)(2)(b) and (4)(a).

[1] Mr. Munem was not a party to this defamation lawsuit. He has not been sued by Plaintiff and he has not been added as a defendant. He intervened by way of his objection and motion for a protective order after the trial court entered an order requiring him to be deposed or answer written questions under oath as a fact witness. See MCR 2.302; MCR 2.305; MCR 2.306; and MCR 2.307.

QUESTIONS PRESENTED

I. Whether Mr. Munem, a private individual, has standing to claim a right to anonymity on behalf of the John Doe defendants in Plaintiff's defamation suit against them for comments they made on an internet forum (the Forum), where Mr. Munem was not a named party; where Mr. Munem asserted no personal protectable right for himself and enjoyed no privity with the John Doe defendants (he is not suspected of having made any of the "anonymous" posts and he was not the owner of the website that hosted the Forum); and where the John Doe defendants waived their rights to anonymity when they signed a waiver and disclosure to join and post on the Forum?

Plaintiff / Appellant Answers: No. Michigan follows a policy of open and broad discovery.[2] The Michigan Court Rules allow parties to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party.[3] This includes the existence, description, nature, custody, condition, and location of electronically stored information and the identity and location of persons having knowledge with respect thereto.[4]

In this case Mr. Munem is required to abide by the court's discovery order. He has no privileges or confidences to rely on between himself and the John Doe defendants. Although

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[2] *Thomas M. Cooley Law School v. Doe 1*, 300 Mich. App. 245, 260 (2013), citing *Augustine v. Allstate Ins. Co.*, 292 Mich. App. 408, 419 (2011).

[3] MCR 2.302 (general rules governing discovery); MCR 2.305 (subpoena power for taking of depositions); MCR 2.306 (deposition on oral examination); MCR 2.307 (deposition on written questions).

[4] *Id.*

some courts have recognized that where a third-party entity, such as a newspaper, is subpoenaed to reveal the identity of an anonymous commenter who has used that third-party as a forum for his or her anonymous speech, the third party has "standing to contest the subpoena under the principle of *jus tertii*",[5] standing of private entities to assert the principle has not been widely accepted, has not been applied to this situation in Michigan, and as a general rule it is not recognized here.[6] Mr. Munem as a mere fact witness is not in privity with the John Doe defendants.

II. Whether the Court of Appeals erred in ignoring the "abuse of discretion" standard claiming the First Amendment protections of the John Doe defendants allowed for a *de novo* review of the entire record where the John Doe defendants waived any such right to anonymity and consented to disclosure of their identities, and where the request for the protective order came from Mr. Munem, who did not have standing, nor any First Amendment protections, and certainly none to assert on behalf of the John Doe defendants?

Plaintiff / Appellant Answers: Yes. The Court of Appeals ignored the abuse of discretion standard applicable to a trial court's decision on a discovery motion on the basis that the anonymity of the John Doe defendants was a First Amendment right that allowed the Court to review the question of Mr. Munem's motion for a protective order under a *de novo* standard of review.[7] This was error. To sign on to the Forum and post comments thereon, the John Doe

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[5] The right of a third party. BLACK'S LAW DICTIONARY (6th ed.), p. 864. See *In Re Indiana Newspapers*, 963 N.E.2d 534, 549 (2012).

[6] *People v. Rocha*, 110 Mich. App. 1, 16-17 (1981) (stating "[a]s a general rule, one may not claim standing to vindicate the constitutional rights of some third party"), citing *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

[7] **ATTACHMENT A**, Slip. Op. at 5.

defendants explicitly waived their right to anonymity.[8] They acknowledged their identities could be subject to disclosure. They agreed to remain responsible for their comments. And, they agreed to indemnify and hold harmless the owners of the Forum. Therefore, the "amplified" First Amendment interests of the John Doe defendants to *remain* anonymous simply did not exist as justification to disregard the "abuse of discretion" standard.

The trial court was addressing a discovery motion like any other, involving a quintessentially discretionary judgment call that turned on the specific facts, and the reasonableness or unreasonableness of Plaintiff's request to depose a fact witness. The trial court thoroughly analyzed the applicable law and applied it to the facts.[9] The trial court properly noted Mr. Munem had no standing to thwart discovery of the John Doe defendants' identities. The trial court also recognized the John Doe defendants had waived any right to remain anonymous. Finally, the trial court appreciated that Plaintiff, as a public official, had to provide the added element of "actual malice" to his defamation claim.[10]

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[8] **ATTACHMENT B** (the statement users agreed to abide by when they posted comments on the Forum).

[9] The transcripts of the hearings on Mr. Munem's motion and the motion for reconsideration of the trial court's denial thereof are included as **ATTACHMENT C**, Tr. I (08/27/2012) and **ATTACHMENT D**, Tr. II (09/10/2012).

[10] See *Smith v. Anonymous Joint Enterprise*, 487 Mich. 102, 114-115 (2010) (adopting the "actual malice" standard applicable to defamation claims brought by public officials and noting the "clear and convincing" evidentiary standard applies and the claimant must show that the person making the statement did so knowing it was false or with reckless disregard for whether or not it was false).

Since "actual malice" is "subjective" in nature, it is necessary to ascertain the motive, intent and knowledge on the part of the individual making the defamatory statements.[11] The only way to do this is to know his or her identity.

III. Whether the Court of Appeals applied the wrong legal standard holding it was necessary for Plaintiff to prove *all elements* of a cause of action for defamation of a public official where "actual malice" is a subjective element that depends on the state of mind of the John Doe defendants, which can only be gleaned from knowledge of their identity and their intentions in posting the statements?

Plaintiff / Appellant Answers: Yes. While acknowledging there is a "split" of authority in defamation cases in which the plaintiff seeks the identity of an anonymous internet poster, those cases that hold a plaintiff has to provide *prima facie* evidence to support only those elements that are not dependent on the commenter's identity; elements that are "within the plaintiff's control", is, absent any change in legislation or court rule, the correct approach.[12] In the instant case, notwithstanding that the John Doe defendants voluntary waived their anonymity by acknowledging this before they were allowed to post comments on the Forum, the Court of Appeals erred in adopting the most stringent test, which does not account for the fact that a claimant cannot satisfy all the elements of the *prima facie* case, because he or she will never be able to prove "actual malice" without knowing the identity of the defendants.

The "standard" adopted by the Court of Appeals places the impossible burden on the public official claimant alleging defamation because proof of "actual malice" is impossible to

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[11] *Id.*

[12] *See, e.g., In re Indiana Newspapers, Inc, supra* at 552.

show without identifying the commenter and determining his or her intent and motive.[13] The panel's "debate" about whether the statements and the various symbols (emoticons) used by the John Doe defendants were "rhetorical hyperbole" was misplaced. Where defamatory statements are based on assertions of underlying objective facts the issue of hyperbole is irrelevant.[14] The statements at issue were based on actual objective facts about circumstances involving Plaintiff's employment and duties as a public official. An audit had revealed a discrepancy in the inventory of public property. The John Doe defendants accused Plaintiff of misappropriating or stealing public property based on these actual objective facts.[15]

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[13] *Id.*

[14] *Doe v. Cahill*, 884 A.2d 451, 467 (Del. 2005).

[15] *Id.*

BACKGROUND

A. Factual Background of Defamatory Statements

Plaintiff, Gus Ghanam (hereafter Plaintiff, unless otherwise specified) is the assistant superintendent of public works for the City of Warren. "Anonymous" posters on the Warren Forum website at www.warrenforum.net (hereafter the Forum), implied that Plaintiff was responsible for a shortfall in a large quantity (3,647 tons) of road salt from the city's storage facilities after an audit for the fiscal year ending in 2011 revealed the inventory discrepancy.[16] The posters also implicated Plaintiff in a scheme to profit from the sale of "new" tires from the city's newly purchased garbage trucks.[17]

From January 20, 2012 through February 2, 2012, statements were posted and published in Macomb County and elsewhere, stating that Plaintiff was involved in hiding the city's road salt and selling it, and for selling new tires from newly purchased city garbage trucks, all for personal gain and profit. The statements that formed the basis of the underlying lawsuit are restated in chronicle order of posting date on the Forum:

1. January 20, 2012, from user name "northend": I wouldn't be surprised if the salt is close to the city Hall and the storage area for the city. IMO the salt is around the sports complex on Van Dyke, just south of 14 mile, where Gus hangs out and drinks most days, or at least the days I am there hitting golf balls. Hmmm maybe I need to call the investigator? (Exhibit B, attached to Plaintiff's answer to Mr. Munem's motion for a protective order, dated August 23, 2012).

2. January 23, 2012, from user name "yogi": The pizza box maker sold it! Him and Gus probably split the money. (Exhibit C, attached to Plaintiff's answer to Mr. Munem's motion for a protective order, dated August 23, 2012).

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[16] **ATTACHMENT A**, Slip. Op. at 2 and n. 1.

[17] *Id.* at 2-3.

3. January 28, 2012, from user name "hatersusers": They were only getting more garbage trucks because Gus needs more tires to sell to get money for his pockets. (Exhibit D attached to Plaintiff's answer to Mr. Munem's motion for a protective order, dated August 23, 2012).

4. February 2, 2012, from user name "pstigerfan": "Oh wait, his buddies Gus and Dick run the department, and in turn make money off it (selling tires, selling road salt, etc. If we didn't have a sanitation department with new trucks (and old tires), then Gus would have to take tires off other vehicles in other departments in order to make his money.[18]

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Users signing onto the Forum were required to agree to a statement as a condition of using the forum. That statement provided, in pertinent part, as follows:

> You agree, through your use of this forum, that ***you will not post any material which is false, defamatory, inaccurate, abusive,*** vulgar, hateful, harassing, obscene, profane, sexually oriented, threatening, invasive of a person's privacy, adult material, or otherwise in violation of any International or United States Federal law.
>
> ***
>
> You remain solely responsible for the content of your posted messages. Furthermore, you agree to indemnify and hold harmless the owners of this forum and related websites to the forum, its staff and its subsidiaries. ***The owners of this forum also reserve the right to reveal your identity (or other related information contained on this service) in the event of a formal complaint or legal action, arising from any situation caused by your use of this forum.***
>
> Please note that with each post, your IP address is recorded, in the event that you need to be banned from this forum or your ISP contacted. This will only happen in the event of a major violation of this agreement.[19]
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> ***

[18] (Exhibit E, attached to Plaintiff's answer to Mr. Munem's motion for a protective order, dated August 23, 2012).

[19] **ATTACHMENT B** (emphasis added).

B. Trial Court Proceedings

Plaintiff filed a complaint on April 18, 2012, designating the posters as John Does (the John Doe defendants, unless otherwise specified), and asserting that yet to be identified persons or entities had defamed Plaintiff based on written postings, appearing on the Forum, which were published in the City of Warren, in Macomb County. (Plaintiff's Complaint, April 18, 2012). Plaintiff alleged the statements accused him of criminal acts and fraudulent conduct in the course of his employment as the deputy superintendent of public works for the City of Warren.

Proceeding in the ordinary course of discovery, Plaintiff sought identification of the owners of the Forum's website, in order to obtain information reasonably calculated to assist in discovering the identity of persons or entities who posted the defamatory statements, i.e., the John Doe defendants. Plaintiff filed a petition for an *ex parte* order pursuant to MCR 2.306 (deposition on oral examination) and MCR 2.313 (failure to provide or permit discovery; sanctions) concerning Mr. Munem, whom Plaintiff believed to be affiliated with the website's owner. (Plaintiff's Petition for an *ex parte* order permitting deposition upon written questions, oral examination, or both, of Joseph Munem, dated July 11, 2012; Affidavit of Gus Ghanam in support of order permitting the deposition of Joseph Munem upon written questions and/or oral examination, June 12, 2012). The supporting affidavit and petition detailed unsuccessful efforts undertaken to identify the owner of the Forum's website and further detailed that based on previous contact between Plaintiff and Mr. Munem, the latter was acting on behalf of the website's purported owner in negotiating potential terms of the website's sale. This was the basis stated for Plaintiff to believe Mr. Munem would have knowledge of the identity of the website's owner.

Pursuant to MCR 2.302(A)(1) (availability of discovery), MCR 2.306(A)(1) (when deposition may be taken), and MCR 2.307(A)(2) (serving written questions), the trial court entered an *ex parte* order permitting depositions upon written questions and oral examination, or both, of Joseph Munem. (Order Permitting Deposition and Oral Examination, June 11, 2012).

Unsuccessful and reasonable efforts to schedule Mr. Munem's deposition ended with the August 20, 2012 filing by Mr. Munem's counsel of a motion for a protective order. Plaintiff filed an answer and brief with exhibits, setting forth the postings being claimed as defamatory. The trial court entertained oral argument on August 27, 2012. At the hearing on Mr. Munem's motion for a protective order, the trial court articulated the issues at hand:

> Well let's just get to the crux of [Mr. Munem's] objections. Mr Munem isn't the person [Plaintiff is] seeking to sue. Mr Munem has...access to knowledge which would give them the opportunity to see if they meet the *Smith [v. Joint Anonymous Enterprise,*[20]] case. So he's a predicate to the whole process. And Mr. Munem has no basis for denying...that discovery, that I can find.
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> Mr. Munem is not the court. Mr. Munem is a private citizen. Mr. Munem is trying to...was trying to act according to the pleadings, as a salesman for whoever owns this website. So...he's not even the second party in line.
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> I understand the protections and I strongly believe that, and if [Plaintiff], through his attorney, cannot show those, they're not entitled to recover. But they are entitled, under the cases cited by Plaintiff, to have the opportunity to see whether there has been malicious libelous speech against him that would be compensable under our statutes and our case law. And I'm trying to understand what Mr. Munem's position is that he would be not required to answer questions which could lead to discoverable and admissible evidence.

[20] 487 Mich. 102 (2010).

I mean that's what...discovery is all about, is whether it will lead to something that will be admissible, and that's how you get to the trial, by getting admissible evidence, or not getting any, and then they throw the case out.

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And so, what Mr. Munem is doing is obstructing that process, like he's the Supreme Court of the United States, and he is not. He's a person who actually was brokering the sale of a private entity. And all we're saying...is tell us who you were working for. That's not protecting speech. That's not even affecting speech.[21]

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The following exchange then occurred between the trial court and Mr. Munem's counsel:

Mr. Munem: It certainly would have the chilling effect...[o]f speech, if posters on the Warren forum could be subject to...

Trial Court: Well, let's stop at that section.... [T]he Warren forum requires them to waive their rights to privacy.[22]

Mr. Munem: Well, it says certainly that it can be subject to a...subpoena or some sort of a lawsuit....

Trial Court: And here we are, discovery in litigation.[23]

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On the issue of waiver, the trial court continued:

> Well, let me ask you a question. Let's go back to this waiver of privacy. They waived their right to privacy by going on the site. They had to check a box apparently that said we understand

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[21] **ATTACHMENT C**, Tr. I, pp. 6-7.

[22] See **ATTACHMENT B**.

[23] **ATTACHMENT C**, p. 7.

something goes to court on this may have to give up our names. Where's your chilling right?

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Well, the point is they've waived the right. They've waived the right to privacy. Did they waive it...?[24]

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The trial court also questioned the standing of Mr. Munem to step in as a party and assert the ostensible first amendment rights of the John Doe defendants in several places during the hearing on his motion:

Trial Court: Well, are you going to defend it then? Are you going to be the one that [Plaintiff] comes into court and says here's what my case is, Judge, and he gets on the stand and he testifies and he brings three or four witnesses? Who's going to cross-examine him?

Mr. Munem: I'll cross-examine him on behalf of Mr. Munem.

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Trial Court: You're not a defendant. You can't do that. I can't let you in to cross-examine him. I can't let you into the case because you're not a defendant unless Mr. Munem is admitting he owns the site and he's the one who did it.

He is not trying to sue Mr. Munem. He's not trying to sue Warren forum. He's trying to find out who the people were that he alleges defamed him. We're not even there yet. So you wouldn't even be entitled to come in and defend case, would you?[25]

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[24] *Id.*, pp. 9-10.

[25] *Id.*, pp. 10-11.

The trial court denied Mr. Munem's motion, concluding:

> Well, I'm of the opinion that this lawsuit alleges certain things that, if proven, are compensable. If proven. They have to be proven.
>
> The second step is in litigation we have a whole process that involves discovery and many aspects of it and, indeed, liberal discovery in Michigan. I believe also, from looking at the cases that you both cited, that the trend on this, as well as in any of the other areas of law, is more towards transparency, not hiding things in this country. The more we hide, the less we have democracy, the less we have freedom, the less we have opportunity for people to succeed and to move forward. It would be a terrible thing on both sides to stop speech, but it would also say to people don't ever take a public job because on anonymous forums they can lie about whether you are a thief or not and accuse you of crimes and things of outrageous behavior. The both those things have to be weighed, one against the other.
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> We are at the discovery phase of this matter and, as I said, I believe the trend is to open things up. The ownership with forums, the knowledge of the ownership of the forum and the names of the posters doesn't subject them to any liability whatsoever of any sort. Simply, they are part of the process for the courts to determine whether there is an appropriate cause of action involved in the matter. And so, I believe that the factors that have to be shown are laid out, as you both stated in the Michigan Supreme Court case of *Smith [v. Joint Anonymous Enterprise*,[26]]. Discovery here is clearly intended to lead to admissible evidence or the ability to obtain admissible evidence and is, therefore, acceptable at this stage of the process. So Mr. Munem will be subject to plaintiff's discovery methods. Thank you.[27]

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Based on the above findings and reasoning, the trial court entered an order denying Mr. Munem's motion for a protective order on August 27, 2012. On September 4, 2012, Mr. Munem

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[26] 487 Mich. 102 (2010).

[27] **ATTACHMENT C**, pp. 17-18.

filed an Application for Leave to Appeal the interlocutory order of the trial court in the Court of Appeals, and a motion for a stay of proceedings in the trial court.

Additional briefing was submitted in support of and against the motion for a stay. A hearing was held in the trial court on September 10, 2014.[28] The trial court denied Mr. Munem's motion. Addressing Plaintiff's arguments regarding a lack of standing on the part of Mr. Munem to assert the ostensible first amendment rights of the John Doe defendants, and the fact they had waived those rights in exchange for being able to post comments on the Forum, the trial court stated the following on the record:

> [Mr. Munem] brought...this motion. I listened...and I have paid close attention to try to read this and try to see your argument through your eyes.... I still have a grave difficulty. The first amendment is important to all of us. It's one of the things that makes our nation strong. And so, my fear of impinging on that is great. So I'm very careful, I hope, when I look at it. But, in this case, what I understand is happening is that Mr. Ghanam is seeking to depose Mr. Munem who said he was acting as a broker to sell the site to some person, seeking to find out who the name of the owner of the site, not even yet the persons who may or may not have posted.
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> If the owner of the site wishes, after Mr. Munem is deposed, to stand up and say, you know, this is why those releases aren't good, this is why those agreements to allow disclosure aren't good, because I own the site, then we get closer to the issue of the first amendment. But Mr. Munem's only participation in this is an economic activity of brokering the sale of an entity.
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> I don't see any infringement of the first amendment in this aspect of the case. That doesn't mean if it goes further I might not change my mind. But, at this point, it is someone who has no relationship whatsoever other than that he offered to broker the sale of this entity.

[28] **ATTACHMENT D**, Tr. II (09/10/2012).

> So let's find out who the entity, who the person is. And if that person then wants to stand up and raise some arguments, let's hear those arguments. Maybe they will be more valid because they have more of an interest and can explain to us what his or her or their interpretation of these agreements by these posters, that they weren't worried or that they allowed their names to be disclosed if they had to be in court settings. They're the ones that said sign the agreement, not Mr. Munem.[29]

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C. Proceedings in the Court of Appeals

On October 31, 2012, the Court of Appeals granted Mr. Munem's Application for Leave to Appeal. The Court subsequently granted Plaintiff's motion for an expedited appeal. Briefing was completed and oral argument held on January 8, 2013.

The Court of Appeals issued a published opinion January 2, 2014. The Court reversed the trial court's decision to allow discovery with respect to Mr. Munem "for the purposes of identifying the anonymous defendants."[30] The Court of Appeals then directed the trial court "to enter judgment in favor of [the John Doe defendants]", having adjudicated the case on the merits.[31]

Regarding the first of these holdings, the Court ruled that the trial court erred in denying Mr. Munem's motion for a protective order.[32] While recognizing the proper "abuse of discretion" standard of review concerning a trial court's ruling on a discovery motion, the Court of Appeals dispensed with this standard "due to the importance of protecting the right to freedom of expression under the First Amendment, in cases where public officials or public figures sue

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[29] **ATTACHMENT D**, pp. 8-10.

[30] **ATTACHMENT A**, Slip. Op. at 16.

[31] *Id.*

[32] *Id.* at 11.

for defamation."[33] Concluding the case fell under this latter circumstance, the Court then stated it "must conduct an independent review of the record and 'analyze the alleged defamatory statements at issue and their surrounding circumstances to determine whether those statements are protected under the First Amendment.'"[34]

Based on this standard of review, the Court held "when a plaintiff seeks disclosure of the identity of an anonymous defendant who is not aware of the pending defamation lawsuit, plaintiff is first required to make reasonable efforts to notify the defendant of the lawsuit, and, in addition, the trial court is required to analyze the complaint under MCR 2.116(C)(8) to ensure that the claim is meritorious."[35]

Applying this newly formulated standard, the Court of Appeals reversed the trial court's ruling denying Munem's request for a protective order and held the John Doe defendants were entitled to judgment because the alleged defamatory statements were not defamatory as a matter of law.[36]

With respect to this latter holding, the Court noted to succeed on a defamation claim, the public official or public figure had to prove both that the statements were false and that they were made with "actual malice".[37] "'Actual malice' does not require a showing of ill will, but instead 'exists when the defendant knowingly makes a false statement or makes a false statement

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[33] *Id.* at 5.

[34] *Id.*, citing *Smith v. Anonymous Joint Enterprise*, 487 Mich. 102, 111-112 (2010).

[35] *Id.*

[36] *Id.*

[37] *Id.* at 5-6, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964) and *Smith, supra* at 114-115.

in reckless disregard of the truth.'"[38] The Court noted the statutory codification of this standard by MCL 600.2911(6), which provides:

> An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

The Court then noted that whether "the statements are defamatory" and whether "the evidence presented is sufficient to show actual malice on the part of the defendant present questions of law to be decided by the courts.[39] The Court concluded where the public official plaintiff cannot show actual malice by clear and convincing evidence, the defendant is entitled to summary disposition of the defamation claim.[40] The Court recognized "[t]he right to anonymous expression over the Internet does not extend to defamatory speech, which is not protected by the First Amendment."[41]

Having dispensed with the "abuse of discretion" standard applicable to the trial court's ruling on the discovery motion and having articulated that it could conduct its own independent review to determine "as a matter of law" whether Plaintiff could meet the legal standards required to prove his defamation claim, the Court then addressed what it saw as the crucial issue in this case.

> [T]here is an entire spectrum of "standards" that courts could use when they are faced with a public figure plaintiff seeking to identify an anonymous defendant who has posted allegedly

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[38] *Id.* at 6, citing *Smith, supra* at 114.

[39] *Id.*, citing *Smith, supra.*

[40] *Id.*, citing *Ireland v. Edwards*, 230 Mich. App. 607, 622-623 (1998).

[41] *Id.* at 7, citing *SaleHoo Group, Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1215 (W.D. Wash. 2010).

> defamatory material regarding the plaintiff. These standards, ranging from least stringent to most stringent, include a good-faith basis to assert a claim, pleading sufficient facts to survive a motion to dismiss, showing of *prima facie* evidence sufficient to withstand a motion for summary disposition, and "hurdles even more stringent."[42]

The Court concluded among the standards developed to address defamation claims against anonymous defendants, the Court of Appeals in *Thomas M. Cooley Law School v. Doe 1*,[43] concluded that the procedures found in MCR 2.302(C) (governing protective orders sought during discovery) "coupled with the procedures for summary disposition under MCR 2.116(C)(8) adequately protect a defendant's First Amendment interests in anonymity."[44]

The Court explained that in *Cooley*, the Court of Appeals held a deficient claim could be dismissed before any discovery is accomplished because in order to survive a motion for summary disposition under MCR 2.116(C)(8), a defamation claim must be pled "with specificity by identifying the exact language which the plaintiff alleges to be defamatory."[45] The Court in that case further stated that protective orders are extremely flexible, noting that "[a] trial court may tailor the scope of its protective order to protect a defendant's First Amendment interests until summary disposition is granted. For instance, a trial court may order (1) that a plaintiff not discover a defendant's identity, or (2) that as a condition of discovering a defendant's identity, a

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[42] *Id.*, citing *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005).

[43] 300 Mich. App. 245 (2013).

[44] *Id.* at 9.

[45] *Id.*, citing *Cooley*, *supra* at 262 and *Tomkiewicz v. Detroit News, Inc.*, 246 Mich. App. 662, 666 (2001).

plaintiff not disclose that identity until after the legal sufficiency of the complaint itself is tested."[46]

The Court of Appeals noted that the *Cooley* court concluded that the protections afforded by the Michigan Court Rules and MCR 2.116(C)(8) overlapped with the test enunciated in *Doe v. Cahill.*[47] However, the Court of Appeals noted the procedures adopted by the *Cooley* court were adequate to protect the anonymous defendant only because he was aware of and involved in the lawsuit.[48] In cases such as the instant one, the Court of Appeals reasoned, like the dissenting Judge Beckering in the *Cooley* case, that "an anonymous defendant cannot undertake any efforts to protect against disclosure of his or her identity until the defendant learns about the lawsuit – which may well be too late . . . .".[49]

The Court of Appeal noted in the present case, no defendant was notified of the lawsuit and no defendant had been involved with any of the proceedings, which means that there was no one to move for summary disposition under MCR 2.116(C)(8). "Thus, one of the two protections that *Cooley* relied upon [was] conspicuously absent." The Court of Appeals reasoned that when defendants are not aware of and not involved with a lawsuit, any protection to be afforded through the entry of a protective order under MCR 2.302(C) is *contingent* upon a non-party, e.g., the Internet service provider, asserting the defendants' First Amendment rights.

The Court of Appeals concluded that application of the *Cooley* protection scheme in the instant case, containing circumstances which *Cooley* declined to address, was inadequate to

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[46] *Id.*, quoting *Cooley*, *supra* at 265.

[47] *Id.*, citing *Cahill*, *supra* at 457.

[48] *Id.* at 9-10, citing *Cooley, supra* at 252, 270.

[49] *Id.* at 10, citing *Cooley*, *supra* at 274 (Beckering, J., concurring in part and dissenting in part).

protect the constitutional rights of an anonymous defendant who is unaware of pending litigation.

The Court of Appeals concluded:

> [W]hen an anonymous defendant in a defamation suit is not shown to be aware of or involved with the lawsuit, some showing by the plaintiff and review by the trial court are required in order to balance the plaintiff's right to pursue a meritorious defamation claim against an anonymous critic's First Amendment rights. Although we agree with the dissent in *Cooley* that it would have been preferable to also adopt the *Dendrite*[50]*/Cahill* standard requiring a plaintiff to further produce evidence sufficient to survive a motion under MCR 2.116(C)(10), we nevertheless are bound by this Court's conclusion in *Cooley* that MCR 2.302(C) and MCR 2.116(C)(8) alone are sufficient to protect and balance a participating defendant's First Amendment rights. Therefore, we invite the Legislature or the Supreme Court to consider anew this important question.
>
> Having concluded that we must apply the *Cooley* standards in this case, we reiterate, as *Cooley* itself acknowledged, that *Cooley* does not address a circumstance, such as is presented in the instant case, in which anonymous defendants are unaware of the pending lawsuit. Accordingly, given the specific facts of this case, we find it necessary to impose two additional requirements in an effort to balance the plaintiff's right to pursue a meritorious defamation claim against an anonymous critic's First Amendment rights.
>
> First, we hold that the notice requirement of *Dendrite/Cahill* is properly applicable here: a plaintiff must have made reasonable efforts to provide the anonymous commenter with reasonable notice that he is the subject of a subpoena or motion seeking disclosure of his identity. That means that at a minimum, if possible, the plaintiff must post a message notifying the anonymous defendant on the same ISP[51] message board or other forum where the alleged defamatory message appeared. See *Cahill*, 884 A2d at 460-461; *Dendrite*, [775 A.2d at 760].
>
> Second, plaintiff's claims must be evaluated by a court so that a determination is made as to whether the claims are sufficient to survive a motion for summary disposition under MCR 2.116(C)(8).

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[50] *Dendrite Int'l Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

[51] ISP is an abbreviation for "internet service provider".

> This evaluation is to be performed even if there is no pending motion for summary disposition before the court. The *Cooley* Court explained that summary disposition was a vital tool to protect defendants:
>
> > Because a plaintiff must include the words of the libel in the complaint, several questions of law can be resolved on the pleadings alone, including: (1) whether a statement is capable of being defamatory, (2) the nature of the speaker and the level of constitutional protections afforded the statement, and (3) whether actual malice exists, if the level of fault the plaintiff must show is actual malice.[52] [*Cooley*, 300 Mich App at 263 (citations omitted).]
>
> MCR 2.116(I)(1) authorizes a court to perform this sua sponte review. *Wilson v King*, 298 Mich App 378, 381 n 4; 827 NW2d 203 (2012). The imposition of these two additional requirements on a plaintiff when a defendant is not aware of the pending lawsuit will operate to ensure that the protections described in *Cooley* have meaningful effect.[53]

Applying this newly developed "standard" to the facts, the Court of Appeals ruled Plaintiff made no effort to notify the John Doe defendants.[54] The Court then analyzed the alleged defamatory statements anew. The Court then engages in several pages of discussion concerning whether the statements were "rhetorical hyperbole" or "imaginative expression".

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[52] In this footnote, the Court stated:

> Although whether actual malice exists is a question of law, *Ireland v. Edwards*, 230 Mich. App. 607, 619 (1998), the statement that the question can be answered on the pleadings alone is not accurate in the context of anonymous defendants because actual malice is "a subjective inquiry concentrating on the knowledge of a defendant at the time of a publication," which likely is not ascertainable if the defendant is not known. *Battaglieri v. Mackinac Ctr. for Public Policy*, 261 Mich. App. 296, 305 (2004).

[53] **ATTACHMENT A**, Slip Op. at 10-11.

[54] *Id.* at 11.

After reducing the statements to hyperbole and opinion, the Court concluded that the statements were not defamatory.[55]

A separate concurring opinion was issued by Judge Stevens.[56] While providing no reason for agreeing with the majority's reversal of the trial court's decision, Judge Stevens disagreed with the requirement adopted by the majority that proof of actual malice be required by a public figure plaintiff prior to the identity of a defendant. Judge Stevens would have adopted the standard in the *Cahill*, which would not have required Plaintiff to plead facts in support of the element of actual malice in order to ascertain the identity of the person or persons who authored the defamatory statements.

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[55] *Id.* at 13-16.

[56] *Id.* at 1-2 (Stephens, J., concurring).

STATEMENT OF GROUNDS FOR APPEAL

This case raises issues of significant public interest and involves legal principles of major significance to the state's jurisprudence.[57] This Court has not articulated the principles that would be applicable in a defamation suit in which the identity of the defendants is truly anonymous.

When is it appropriate through discovery to force a third party to reveal the identity of an unknown or anonymous defendant?

At first glance, it may appear this case presents the Court with an opportunity to address this novel issue at the forefront of debate about the balance between the liberty of speech on the internet and the right of a person to defend their character and integrity from attacks on the other.

There is one aspect of this case that Plaintiff agrees with. The issue of the scope of litigation discovery directed to third parties in light of defamation claims against ostensibly[58] "anonymous" internet posters is one that this Court has not squarely addressed.[59] And, at least

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[57] MCR 7.302(B)(2) and (3).

[58] Counsel for Plaintiff uses this qualifier because there really has been *no discussion* by the Court of Appeals, despite Plaintiff's trial counsel's persistence and the trial court's acknowledgment that the John Doe defendants in this case acknowledged their consent to reveal their identities in the very event that someone sought them to pursue potentially defamatory statements. Thus, the true "anonymity" (or at least any requirement to protect same) of these particular John Doe defendants is questionable, at best, in the instant case.

[59] **ATTACHMENT A**, Slip Op. at 4-5. See also *Thomas M. Cooley Law School v. Doe 1*, 300 Mich. App. 245 (2013) (holding, contrary to the panel in this case, that the Michigan Court Rules addressing discovery adequately protect anonymous defendants' first amendment rights to free speech in defamation suits in which the defendants seek to remain anonymous and refusing to adopt "Anti-SLAPP" legislation as such is a matter of policy reserved to the Legislature.

the Court of Appeals has noted the right to remain anonymous must be balanced by the right to pursue a valid cause of action for defamation.[60]

There are several "tests" that have been discussed.[61] They range from the fairly lax "good faith"[62] test to the most stringent known generally as the "*Dendrite* standard" for the New Jersey Superior Court case that adopted it, requiring the plaintiff to prove each element of a *prima facie* case *before* disclosure is allowed.[63]

The two generally prevailing tests, the "*Dendrite* standard" and the *Cahill* standard[64] both require a plaintiff to provide some proof of his or her defamation claim before the anonymous speaker is revealed. With no guidance from this Court and no evident pronouncement on this policy issue from the Michigan Legislature[65] the Court of Appeals now currently finds itself somewhere in the middle.[66] To this extent, the decision in the case *sub judice* adopting the most

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[60] *Id.* See also *Cooley*, *supra*.

[61] See, e.g., *Solers, Inc. v. Doe*, 977 A.2d 941, 950-954 (D.C. 2009).

[62] *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26 (2000), rev'd on other grounds by *America Online, Inc. v. Anonymous Publicly Traded Co*, 261 Va. 350 (2001).

[63] *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Sup. Ct. App. Div. 2001).

[64] *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

[65] See *Cooley*, *supra* at 282-283 (Beckering, J., concurring in part and dissenting in part) (noting the majority's concern that it is the province of the Legislature to create "anti-SLAPP" legislation and disagreeing with the principle holding of the majority that the Michigan Court rules already provide adequate protections of anonymous defendants by requiring the trial court to determine whether good cause exists for issuance of a protective order under MCR 2.302, and to address the preliminary merits of a complaint under MCR 2.116(C)(8)). "SLAPP" stands for "strategic lawsuit against public participation". *Cooley Law School*, *supra* at 282 and n. 42. See also Kathleen L. Daerr-Bannon, *Cause of Action: Bringing and Defending Anti-SLAPP Motion to Strike or Dismiss*, 22 Causes of Action 2d 317 (2003).

[66] Contrast the Court of Appeals opinion in this case, which apparently adopts the *Dendrite* standard, with its opinion in *Cooley Law School v. Doe 1*, *supra*, which finds the current court rules sufficient to address the situation absent guidance from this Court or the Legislature.

stringent of the prevailing standards conflicts with the decision of the Court of Appeals in *Thomas M. Cooley Law School v. Doe 1*, 300 Mich. App. 245 (2013).[67] Although finding the principle question moot because the identity of the "anonymous" defendant had been revealed before the ultimate issue could be decided, there the Court of Appeals ruled that the Michigan Court Rules in conjunction with the summary disposition standard applicable to a complaint in MCR 2.116(C)(8) adequately protected the anonymity of litigants. Here, the Court of Appeals adds "two additional requirements in an effort to balance the plaintiff's right to pursue a meritorious defamation claim against an anonymous critic's First Amendment rights": (1) the requirement that plaintiff make reasonable efforts to notify the anonymous commenter that he is the subject of a subpoena or motion seeking disclosure of his identity; and the requirement that a plaintiff's claims "be evaluated by a court so that a determination is made as to whether the claims are sufficient to survive a motion for summary disposition under MCR 2.116(C)(8).[68]

Although the Court of Appeals (1) indicated *Cooley* had been correctly decided, it went on to impose additional requirements given the circumstances of this case (where the anonymous defendants were unaware of the pending lawsuit); and (2) it nonetheless urged the Legislature or this Court to consider this important question. Plaintiff agrees this Court should address this issue, but asserts it should not adopt the Court of Appeals test, primarily because it places an impossible burden on a plaintiff to prove his case – that the *prima facie* elements of a defamation claim be proved in order to proceed with the suit and identify and seek redress from the defendants who have made the defamatory statements.

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[67] MCR 7.302(B)(5) (stating one of the grounds for appeal to this Court is that the decision "conflicts with another decision of the Court of Appeals").

[68] **ATTACHMENT A**, Slip Op. at 10-11.

The approach that a court takes in the various cases is also tempered by the nature of the case. In disputes alleging such causes of action as trademark or copyright infringement, for example, courts are addressing the commercial business interests of the plaintiff.[69] In cases alleging causes of action for defamation, courts are "weighing" the right of a public official (or a private person)[70] to protect his reputation from actionable defamation and malicious gossip against free speech protected under the First Amendment[71] and the Michigan Constitution.[72] In short, the "interests" at stake, and those which must be "balanced", according to whatever the adopted test may be, also vary depending on the nature of the dispute between the litigants.

However, it is Plaintiff's position first and foremost that this case does not raise the issue in such relief. This is primarily because the John Doe defendants explicitly waived their right to anonymity by agreeing to a statement when they signed on to make written postings on the forum that allegedly defamed Plaintiff.[73]

Secondly, Mr. Munem is not a named defendant in this litigation. His identity is known. He has asserted no direct right or privilege in the disclosure of the information that is being sought from him. Thus, it is questionable that given the John Doe defendants' express waiver and Mr. Munem's position as a mere fact witness, whether Mr. Munem has any standing

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[69] See, e.g., *Sony Music Entertainment, Inc. et al. v. Does 1-40*, 326 F.Supp.2d 556 (S.D. N.Y. 2004) (third party internet service provider (ISP) was required to disclose identity of anonymous users who had used the service providers website to download and distribute copyrighted songs from the internet).

[70] See, e.g., *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456-57 (2009) and *In re Indiana Newspapers, Inc.*, 963 N.E.2d 534, 548 (2012).

[71] US Const. amend. I.

[72] MICH. CONST. 1963 ART I, § 5. See also *Smith v. Joint Anonymous Enterprise*, 487 Mich. 102 (2010).

[73] See **ATTACHMENT B.**

whatsoever to seek the protection he does from the courts, which, after all, is just a protection of the identity of the John Doe defendants who expressly acknowledged their identity could be revealed. While both the waiver by the John Doe defendants and the curious position of Mr. Munem in relation to this lawsuit was raised numerous times in the trial court, and then, in the Court of Appeals, neither Mr. Munem's counsel nor the Court of Appeals seem to have acknowledged these facts. Indeed, it is as if the Court of Appeals completely ignored this reality to create the significant issue that Mr. Munem's counsel presented in his appeal.

Third, the Court of Appeals, in its haste to address the legal issue, ignored these two salient facts (the waiver of the John Doe defendants and the fact that Mr. Munem was merely a fact witness from whom discovery was being sought) to conclude that the interest of the John Doe defendants in their right to liberty of speech was sufficient to overlook the standard of review applicable to the trial court's ruling on a discovery motion: abuse of discretion.[74] That is a high standard to overcome. The trial court's decision in this case was not "outside the range of reasonable and principled outcomes."[75]

Four, having dispensed with these seemingly insurmountable hurdles, the Court of Appeals then committed legal error in its substantive analysis of the case. A conclusion that was inevitable in light of the fact that the Court of Appeals chose to ignore the above mentioned facts that made this case not one that is about protecting those truly seeking to exercise the constitutionally protected liberty of anonymous speech.

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[74] *Truel v. City of Dearborn*, 291 Mich. App. 125, 131 (2010).

[75] *Saffian v. Simmons*, 477 Mich. 8, 12 (2007).

In response to Mr. Munem's motion counsel for Plaintiff stated: "Neither utilization of the internet or reliance upon anonymity creates a special status exempting potential defendants from culpability for defamation." Article I, § 5 of the Michigan Constitution provides:

> Every person may freely speak, write, express and publish views on all subjects, *being responsible for the abuse of such right*; and no law shall be enacted to restrain or abridge the liberty of speech."[76]

Although this provision has been held to protect speech from *government* infringement,[77] it addresses each of the competing issues between Plaintiff and the John Doe defendants in this case. Michigan citizens enjoy the full scope of the liberty of speech, but remain responsible for abusing this right.[78] Defamatory statements, whether or not they are posted "anonymously", are not subject to an absolute protection.[79] Indeed, the John Doe defendants in this case *acknowledged* at least their tacit consent to this constitutional provision by expressly waiving their right to anonymity and by acknowledging that their identity may be revealed for the very purpose Plaintiff seeks to identify them.[80]

As this Court has stated, "[t]he phrase 'being responsible for the *abuse of such right*' indicates that the drafters foresaw situations in which certain types of speech would not fall

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[76] MICH CONST 1963 ART I, § 5 (emphasis added).

[77] See generally *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 203-205, 212(1985) (the constitutionally guaranteed individual rights restrict governmental conduct and provide protection from government infringement, i.e., state action and stating "[i]f the citizens of Michigan wish their constitution, in addition to serving as a shield against the actions of the state, to be used as a sword by individuals against individuals, there is a means by which this can be done and citing MICH CONST 1963, ART XII, § 2 (amendment by petition and vote)

[78] *Thomas M. Cooley Law School v. Doe 1*, 300 Mich. App. 245, 255-257 (2013), citing MICH CONST ART I, § 5.

[79] *Id.* at 256, citing *Chaplinski v. New Hampshire*, 315 U.S. 568, 571 (1942).

[80] See **ATTACHMENT B**, (agreement acknowledged by those posting on the Forum).

within the protection guaranteed by the provision."[81] Defamation, even claims brought by public officials, is a recognized cause of action in the state of Michigan.[82] And it is precisely such an abuse of the right of liberty of speech that is curtailed by the requirement in the constitutional provisions that citizens exercise the right *responsibly*.[83]

The balance between a person's rights to have those that accuse him of a crime stand up in a public forum and answer where defamatory statements are made, and the right of people to express themselves freely is of great public concern. However, in this case, the "anonymous" John Doe defendants acknowledged, when they undertook to comment in the Forum about Plaintiff and to implicate him in alleged criminal conduct, that they were surrendering their right to anonymity. As the trial court intimated at the hearing on Mr. Munem's motion for a protective order, this case was hijacked by him, a proposed deponent, who is not even a party to this litigation, objecting to the disclosure of any information about the ownership of the website that hosts the Forum, and regarding the identity of the John Doe defendants, who had already voluntarily surrendered their right to any anonymity.

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[81] *People v. Neumayer*, 405 Mich. 341, 364-65 (1979).

[82] *Smith, supra.*

[83] *Id.*

ARGUMENT AND ANALYSIS

I. MR. MUNEM HAD NO STANDING TO ASSERT THE JOHN DOE DEFENDANTS' RIGHTS TO LIBERTY OF SPEECH – HE WAS NOT THE OWNER OF THE WEBSITE, HE HAD SHARED NO PRIVILEGED RELATIONSHIP WITH THE JOHN DOE DEFENDANTS, AND HE HAD NO DIRECT RIGHT THAT HE COULD ASSERT ON THEIR BEHALF

A. Standard of Review

Plaintiff and the trial court questioned Mr. Munem's standing to seek a protective order and assert the ostensible right of the John Doe defendants to remain anonymous.[84] Whether a party has standing is a question of law that this Court will consider *de novo*.[85]

B. Analysis

In his brief before the Court of Appeals, Mr. Munem's counsel stated he filed a motion for a protective order on behalf of Mr. Munem "because anonymous comments on the Warren Forum about [Plaintiff]...are speech protected by the First Amendment."[86] Mr. Munem had no standing to assert the John Doe defendants' rights in this case. To establish standing, a party must have suffered an injury in fact, defined as an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.[87] Second, there must be a causal connection between the injury and the conduct complained of – "the injury has to be fairly...traceable to the challenged action..., and not...the result [of] the

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[84] **ATTACHMENT C**, Tr. I, pp. 6-7.

[85] *Coldsprings Township v. Kalkaska County Zoning Bd. of Appeals*, 279 Mich. App. 25, 28 (2008).

[86] Mr. Munem's Appeal Brief, filed 11/28/2012, p. 2.

[87] *Coldsprings Township*, *supra* at 28.

independent action of some third party not before the court." Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[88]

Here, Mr. Munem's position in this litigation does not satisfy any of these conditions. He is a disinterested third party who is being subpoenaed to reveal information he is believed to have concerning the website's owner. He will suffer no injury as a mere fact witness if he is deposed. He is not suspected of having posted any of the "anonymous" statements. And, he is in no privity with the John Doe defendants to assert any right on their behalf

Mr. Munem is attempting to assert *jus* tertii standing; the kind that a newspaper or publisher might assert to protect an anonymous contributor or a source that gives the newspaper or one of its reporters information. In the instant case, Mr. Munem has no *jus tertii* standing. He is not a proper party to assert any privilege vis-à-vis the John Doe defendants – here he is merely a lay or fact witness. He does not have standing to step in on behalf of the John Doe defendants because he has no rights to assert on their behalf. He is not the owner of the Forum, nor is he believed to have posted comments on the Forum. The focus of standing is not on whether the issue asserted is justiciable, but whether the litigant is the proper party to assert adjudication of that issue.[89]

Although some courts have recognized that where a third-party entity, such as a newspaper, is subpoenaed to reveal the identity of an anonymous commenter who has used that third-party as a forum for his anonymous speech, the third party has "standing to contest the subpoena under the principle of *jus tertii*",[90] standing of private entities (such as Mr. Munem as a

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[88] *Id.*

[89] *Allstate Ins. Co. v. Hayes*, 442 Mich. 56, 68 (1993).

[90] See *In Re Indiana Newspapers*, *supra* at 549.

mere fact witness) to assert the principle has not been widely accepted, has not been applied to this situation in Michigan, and as a general rule it is not recognized here.[91]

Michigan follows a policy of open and broad discovery.[92] The Michigan Court Rules allow parties to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. This includes electronically stored information and the identity and location of persons having knowledge with respect thereto.[93] In this case Mr. Munem is required to abide by the court's discovery order. Mr. Munem can rely on no privileges or confidences between himself and the John Doe defendants. Nor can he assert *jus tertii* standing on their behalf.[94]

The trial court noted Mr. Munem had no standing to step in and become a litigant asserting the constitutional rights of the John Doe defendants.[95] The trial court stated:

> You're not a defendant. You can't do that. I can't let you in to cross-examine him. I can't let you into the case because you're not a defendant unless Mr. Munem is admitting he owns the site and he's the one who did it.
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> ***
>
> So you wouldn't even be entitled to come in and defend case, would you?[96]

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[91] *People v. Rocha*, 110 Mich. App. 1, 16-17 (1981) (stating "[a]s a general rule, one may not claim standing to vindicate the constitutional rights of some third party"), citing *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

[92] *Thomas M. Cooley Law School v. Doe 1*, 300 Mich. App. 245, 260 (2013), citing *Augustine v. Allstate Ins. Co.*, 292 Mich. App. 408, 419 (2011).

[93] MCR 2.302 (general rules governing discovery); MCR 2.305 (subpoena power for taking of depositions); MCR 2.306 (deposition on oral examination); MCL 2.307 (deposition on written questions).

[94] The right of a third party. BLACK'S LAW DICTIONARY (6th ed.), p. 864.

[95] **ATTACHMENT C**, Tr. I, pp. 6-7

II. THE COURT OF APPEALS ERRED IN IGNORING THE "ABUSE OF DISCRETION" STANDARD APPLICABLE TO THE TRIAL COURT'S DECISION ON A DISCOVERY MOTION – CLAIMING THE FIRST AMENDMENT PROTECTIONS OF THE JOHN DOE DEFENDANTS ALLOWED FOR *DE NOVO* REVIEW OF THE ENTIRE RECORD WHERE THE JOHN DOE DEFENDANTS WAIVED ANY SUCH RIGHT TO ANONYMITY AND CONSENTED TO DISCLOSURE OF THEIR IDENTITIES, AND WHERE THE REQUEST FOR THE PROTECTIVE ORDER CAME FROM MR. MUNEM, WHO DID NOT HAVE STANDING, NOR ANY FIRST AMENDMENT PROTECTIONS, AND CERTAINLY NONE TO ASSERT ON BEHALF OF THE JOHN DOE DEFENDANTS

A. Standard of Review

While acknowledging that a trial court's decision on whether to compel discovery is reviewed under the "abuse of discretion" standard, the Court of Appeals reasoned that it must conduct "an independent review of the record" because of the "importance of protecting the right to freedom of expression under the First Amendment...."[97] Whether a lower court applied the proper standard of review is a question of law that is subject to *de novo* review on appeal.[98]

B. Analysis

Because Mr. Munem had no *jus tertii* standing, and the Court of Appeals nowhere indicated what position he held vis-à-vis the John Doe defendants to assert their interests, and because the John Doe defendants waived their right to anonymity, the Court of Appeals had no basis to dispense with the "abuse of discretion" standard of review.

The Court of Appeals based its decision to review the entire record on the need to protect the first amendment rights of the John Doe defendants. In addition to failing to articulate how

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[96] *Id.*, pp. 10-11.

[97] **ATTACHMENT A**, Slip Op. at 5.

[98] *Natural Resources Defense Council v. Dep't of Environmental Quality*, 300 Mich. App. 79, 87-88 (2013).

Mr. Munem had any standing to assert the rights of the John Doe defendants, the Court of Appeals never addressed Plaintiff's argument, which the trial court expressly agreed with, that the John Doe defendants in this case had waived their right to anonymity. Given this express waiver, the Court of Appeals *had no basis* to ignore the ordinary abuse of discretion standard applicable to a trial court's ruling on discovery motions.

The John Doe defendants agreed not to post false, defamatory, and inaccurate information on the Forum.[99] The John Doe defendants also acknowledged that "the owners…reserve[d] the right to reveal" their "identity (or other related information contained on this service) in the event of a formal complaint or legal action, arising from any situation caused by your use of this forum."[100] When the trial court brought this to the attention of Mr. Munem's counsel, he responded, "it says certainly that it can be subject to a…subpoena or some sort of a lawsuit"; to which the trial court responded: "[a]nd here we are, discovery in litigation."[101]

Despite the Court of Appeals decision to completely ignore this fact, it is worth exploring the concept of waiver, especially in light of the personal responsibility every citizen in Michigan has to exercise the liberty of speech *responsibly*.[102] Here, the John Doe defendants consented and acknowledged they may be subject to the precise discovery procedures contemplated in a lawsuit seeking to impose liability upon them for alleged defamatory statements. A "waiver" is the voluntary relinquishment of a known right, defined further as "abandonment—express or

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[99] **ATTACHMENT B.**

[100] *Id.*

[101] **ATTACHMENT C**, P. 7.

[102] MICH. CONST. ART I, § 5.

implied—of a legal right or advantage".[103] The party alleged to have waived a right must have had both knowledge of the existing right and the intention of foregoing it. In order to ascertain whether a waiver exists, a court must determine if a reasonable person would have understood that he or she was waiving the interest in question.[104]

The right in the instant case that the John Doe defendants waived is their right of anonymity, not their liberty of speech. As to the right to anonymity, the Forum explicitly stated to those who wished to comment that they agreed to surrender that right in the event of litigation alleging defamation.[105] Plaintiff raised this argument during the hearings on Mr. Munem's motion for a protective order, and the trial court acknowledged that the waiver was valid. Mr. Munem's counsel had no answer for this point. The Court of Appeals ignored it. This was error.

Notwithstanding Mr. Munem's lack of standing, since the John Doe defendants explicitly waived their right to anonymity, the Court of Appeals could not ignore the substantive standard of review "abuse of discretion", because there existed no countervailing first amendment rights to anonymity to balance. Thus, the Court of Appeals had no justification to go beyond the trial court's discretion and review the entire record.

If it had truly reviewed the entire record, it would have made more of the John Doe defendants' waiver. The trial court discussed the issue of waiver and raised it several times during the initial hearing and on Mr. Munem's motion for a protective order.[106]

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[103] *Id.*

[104] *Sweebe v. Sweebe*, 474 Mich. 151, 157 (2005).

[105] **ATTACHMENT B.**

[106] **ATTACHMENT C**, Tr. I, pp. 6-7 and 9-11.

The Court of Appeals also stated that the trial court "did not consider or acknowledge the First Amendment aspects involved and instead merely relied on the open and liberal discovery rules of Michigan." The Court of Appeals apparently pointed this out to justify its review of the entire record. Yet, this assertion is patently untrue. In multiple places the trial court acknowledged the first amendment interests, the right to remain anonymous under the appropriate circumstances, and the burden on Plaintiff to prove his case against the John Doe defendants.[107]

With the lack of any true standing on the part of Mr. Munem to assert the John Doe defendants rights and the absence of any privilege between him and the John Doe defendants, and given the constitutional responsibility to exercise the liberty of speech responsibly in the Michigan Constitution and the John Doe defendants express waiver of their right to remain anonymous when making statements on the Forum, the Court of Appeals had no right to ignore the "abuse of discretion" standard. Applying that proper standard, the trial court's decision to allow the deposition of Mr. Munem was not an abuse of discretion and should not have been reversed by the Court of Appeals.

[107] **ATTACHMENT C**, Tr. I, pp. 6-7 and 17-18; ATTACHMENT D, Tr. II., pp. 8-10.

III. THE COURT OF APPEALS APPLIED THE WRONG LEGAL STANDARD HOLDING IT WAS NECESSARY FOR PLAINTIFF TO PROVE *ALL ELEMENTS* OF A CAUSE OF ACTION FOR DEFAMATION OF A PUBLIC OFFICIAL WHERE "ACTUAL MALICE" IS A SUBJECTIVE ELEMENT THAT DEPENDS ON THE STATE OF MIND OF THE JOHN DOE DEFENDANTS, WHICH CAN ONLY BE GLEANED FROM KNOWLEDGE OF THEIR IDENTITY AND THEIR INTENTIONS IN POSTING THE STATEMENTS

A. Standard of Review

The Court of Appeals applied ruled as a matter of law that Plaintiff had failed to state a claim for defamation. The inquiry into whether evidence in a defamation case is sufficient to support a finding of actual malice presents a question of law, which this Court will review *de novo*.[108]

B. Analysis

The Court of Appeals substituted its own vision of "public policy" by "regulating" the forum of public debate and free speech when it overruled the trial court's ruling on Mr. Munem's motion for a protective order. Without tying the actual objective facts surrounding the incidents in question to the implications in the statement as noted as being the difference between "rhetorical hyperbole" and defamatory speech, the Court of Appeals reduced each of the statements to absurdity without this important context.

The Court did not deal with the primary issue resulting from its ruling. If a public official must prove "actual malice" by clear and convincing evidence, and that can only be shown by ascertaining the "state of mind" of the defendant, i.e., that he or she made the statement with knowledge that it was false or with reckless disregard of whether or not it was false,[109] *Smith*; MCL 600.2911(6), how can a public official or public figure *ever* succeed on a defamation claim

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[108] *Smith, supra* at 111.

[109] *Smith, supra*; MCL 600.2911(6).

if the trial court must assess the legal viability of the claim only on the basis of the complaint under MCR 2.116(C)(8)?

The key to proving a defamation claim brought by a public official or public figure is to be able to show "intentional false" publication or reckless disregard on the part of the publisher as to whether the statement was true or false. Here, the Court of Appeals takes that inquiry completely out of the hands of the trial court and establishes an onerous, indeed insurmountable, burden on a Plaintiff because the subjective state of mind of the publisher will never be able to be ascertained. A three-judge panel of the Court of Appeals, or a trial court, will be the ultimate arbiter of determining whether or not an "anonymous" defendant had the requisite state of mind. This is an untenable result.

The case law relied on by the Court of Appeals is not a helpful guide. For one thing, *Dendrite* dealt with an international company seeking the identity of an individual who posted comments about the company on a bulletin board operated by the internet service provider (ISP) "Yahoo!" It was not a public official or public figure in a defamation action on the basis of statements he or she committed crimes and other potentially unlawful acts. It was a lawsuit of a commercial nature.

Cahill,[110] on the other hand, did deal with alleged defamatory statements against a public official, a city councilman, and his wife. Only two postings were addressed by the Supreme Court. Much more serious statements made by other defendants, mostly directed towards the plaintiff's wife, were not the subject of the Supreme Court's decision.[111] The two postings that did survive implied the plaintiff was paranoid and suffering from mental deterioration. The court

[110] 884 A.2d 451 (Del. 2005).

[111] The Superior Court's decision is reported at 879 A.2d 943 (2005).

noted these were opinions. The court further noted they did not "imply any assertions of underlying objective facts."[112].

In the case *sub judice* the Court of Appeals did not consider the statements made under this standard, but rather took them out of context of the factual circumstances and analyzed them in a vacuum. When viewed in this light they were reduced to absurd statements merely by the Court of Appeals ability to characterize them as such without reference to the underlying objective facts. If this is the standard applicable to anonymous internet speech there will never be a case in which such statements are actionable. This reasoning creates an impenetrable insulation for anyone who chooses to assume anonymity and post outrageous and defamatory statements against public officials.

If the panel would have properly regarded the statements in light of the underlying objective facts and truly in light of Plaintiff's complaint – his claim that he was defamed because these statements criminally implicated him in a discrepancy in public property inventory that had been revealed by an audit – the case would have been allowed to go forward. The audit was public knowledge and had made the rounds in the local news. Hence, the statements that were made about Plaintiff were referencing these underlying objective facts. Accusations of misappropriation were also lodged against Plaintiff based on the fact that the City replaced new tires on its garbage trucks with older ones because new tires can damage the mechanical integrity of new garbage trucks, which are run at slow operational speeds due to the nature of their function. Again, objective underlying facts served as the basis for the defamatory statements made against Plaintiff.

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[112] *Cahill, supra* at 467.

Thus, in the proper context, as noted by the court in *Cahill*, if statements that might otherwise be hyperbole, opinion, or rhetoric are tethered to underlying objective facts, the statements may not be so characterized. Here, the Court of Appeals appears not to have appreciated this distinction.

CONCLUSION AND RELIEF REQUESTED

Contrary to what Mr. Munem has argued in this case, Plaintiff does not face an "insurmountable" burden to prove his case. Indeed, he must prove those elements that every public official alleging defamation must prove in the state of Michigan. His burden is no greater.

However, the obstacle that has unjustifiably blocked his ability to meet this burden *is* "insurmountable" if the Court of Appeals' decision stands in this case. Mr. Munem has demonstrated no standing to assert the rights of the John Doe defendants. The John Doe defendants acknowledged their constitutional duty to be responsible for exercising their liberty of speech and waived their right to anonymity.[113] They should be held to the standard to which they consented.

In light of these two predicate factors, the Court of Appeals acted by judicial fiat in ignoring the ordinary "abuse of discretion" standard applicable when reviewing a trial court's decision on an ordinary discovery motion. Finally, the Court of Appeals established the most stringent standard making it impossible under Michigan law for any public official to prove a defamation claim against ostensibly anonymous internet commentary.

[113] MICH CONST 1963 ART I, § 5; See also **ATTACHMENT B**.

WHEREFORE, Plaintiff urges this Court to peremptorily reverse the Court of Appeals decision and reinstate the trial court's order to depose Mr. Munem. In the alternative, Plaintiff requests that this Court grant his Application for Leave to Appeal.

Respectfully submitted,

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Dated: February 13, 2014

ATTACHMENT A

STATE OF MICHIGAN

COURT OF APPEALS

GUS GHANAM,

Plaintiff-Appellee,

V

JOHN DOES,

Defendants,

and

JOSEPH MUNEM,

Appellant.

FOR PUBLICATION
January 2, 2014
9:05 a.m.

No. 312201
Macomb Circuit Court
LC No. 2012-001739-CZ

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

WILDER, J.

Appellant Joseph Munem appeals by leave granted from the circuit court's order denying his motion for a protective order barring discovery. Plaintiff seeks to depose Munem to discover the identities of persons who allegedly made defamatory statements about him on an Internet message board. Munem seeks to keep the identities of those people anonymous. We reverse and remand for the trial court to enter judgment in favor of defendants.

I.

Plaintiff is the deputy superintendent of the department of public works for the City of Warren. He filed a complaint alleging a single count of defamation per se against several unknown "John Doe" defendants. According to the complaint, defendants posted false and malicious statements about plaintiff on an Internet message board called The Warren Forum. Defendants posted these messages anonymously under fictitious user names. Plaintiff's complaint did not provide the specific text of those statements but alleged that they "prejudiced and caused harm to the plaintiff in his reputation and office and held plaintiff up to disgrace, ridicule, and contempt." Plaintiff alleged that the statements were false, not privileged, and "were made with the knowledge that they were false or with reckless disregard for their falsity." Plaintiff maintains that the anonymous messages accused him of being involved in the disappearance and theft of approximately 3,647 tons of road salt from city storage facilities and

of stealing and selling tires off of city garbage trucks. Plaintiff finally presented a verbatim text of the alleged defamatory messages in his response to Munem's motion for a protective order. The complained-of messages were posted to The Warren Forum message board in January and February of 2012 by people using the pseudonyms "northend," "yogi," "hatersrlosers," and "pstigerfan."

The first set of comments was in regard to reports that 3,647 tons of rock salt was missing from the city's storage dome and that nobody could account for how it disappeared. The unaccounted-for 3,647 tons of road salt was reported in the local news media.[1] The comments were replies to a topic titled, "Where did our road salt go?" and included the following complained-of remarks:[2]

Post by "northend":

> I wouldn't be surprised if the salt is close to city hall and the storage area for the city. IMO[3]the salt is somewhere around the sports complex on Van Dyke, just south of 14 mile, where Gus hangs out and drinks most days, or at least the days I am in there hitting golf balls. Hmm maybe I need to call the investigators?

Post by "yogi":

> the pizza box maker sold it! him an Gus probably split the money.

The second set of comments were replies to an initial posting titled "MORE sanitation trucks? Yep.", which concerned the city's decision to buy additional new garbage trucks. The city's decision to buy additional new garbage trucks was controversial and reported in the local news media because it came after the city denied other city departments' requests for new equipment.

Post by "hatersrlosers":

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[1] The audit that brought the salt shortage to light was part of the yearly audit conducted for the city. The audit was for the fiscal year ending June 30, 2011, and the report was issued on December 16, 2011. In the report, the auditor noted that there was a discrepancy of 3,647 tons of salt ($178,725 value) between the inventory and the city's records. The report also made recommendations for the city to implement so that it could "minimize the misappropriation of the inventory" in the future. <http://www.cityofwarren.org/images/stories/city-council/agenda/January%2010,%202012%20epacket.pdf> (accessed May 1, 2013), pp 426-428.

[2] The remarks are quoted verbatim with all spelling and grammatical errors.

[3] The Internet is rife with shorthand acronyms and symbols to represent longer words or phrases. IMO means "in my opinion." <www.netlingo.com/acronyms.php> (accessed May 1, 2013).

> They are only getting more garbage trucks because Gus needs more tires to sell to get more money for his pockets :P[4]

Post by pstigerfan:

> Since Warren is the only community in Macomb County to have city employees pick up trash, then [Mayor] Fouts must have a better idea of what is going on compared to the other communities. Oh wait, his buddies Gus and Dick run the department, and in turn make money off of it (selling tires, selling road salt, etc). If we didn't have a Sanitation Department with new trucks (and old tires), then Gus would have to take the tires off of other vehicles in other departments in order to make his money.

Plaintiff filed a petition for an ex parte order to depose Munem, a former city employee, to determine the identity of the anonymous John Does who left the allegedly defamatory messages on The Warren Forum. Based on past conversations with Munem, plaintiff believed that Munem was affiliated with the website. The circuit court granted plaintiff's petition and issued an order permitting plaintiff to depose Munem "for the purpose of identifying ownership of the Warren Forum and bloggers on the Warren Forum website who have made entries relating to plaintiff Gus Ghanam."

Munem then moved for a protective order against his deposition, arguing that the First Amendment protected a critic's right to anonymously comment about the actions of a public official and that the identities of the anonymous writers were subject to a qualified privilege. Munem argued that before plaintiff could seek to compel the identification of the anonymous posters, he must produce sufficient evidence supporting each element of a cause of action for defamation against a public figure. The circuit court did not consider or acknowledge the First Amendment aspects involved and instead merely relied on the open and liberal discovery rules of Michigan. The trial court provided the following explanation from the bench:

> Well, I'm of the opinion that this lawsuit alleges certain things that, if proven, are compensable. If proven. They have to be proven.
>
> The second step is in litigation we have a whole process that involves discovery and many aspects of it and, indeed, liberal discovery in Michigan. I believe also, from looking at the cases that you both cited, that the trend on this, as well as in any of the other areas of law, is more towards transparency, not

[4] The colon followed by capital P appears in the original and is an "emoticon." An "emoticon" is "a group of keyboard characters . . . that typically represents a facial expression or suggests an attitude or emotion and that is used especially in computerized communications . . . ." <www.merriam-webster.com/dictionary/emoticon> (accessed May 1, 2013). A ":P" emoticon represents a sideways face with a tongue sticking out, which means "joke, sarcasm or disgusting." <www.urbandictionary.com/define.php?term=emoticon> (accessed May 1, 2013).

hiding things in this country. The more we hide, the less we have democracy, the less we have freedom, the less we have opportunity for people to succeed and to move forward. It would be a terrible thing on both sides to stop speech, but it would also say to people don't ever take a public job because on anonymous forums they can lie about whether you are a thief or not and accuse you of crimes and things of outrageous behavior. So both those things have to be weighed, one against the other.

We are at the discovery phase in this matter and, as I said, I believe the trend is to open things up. The ownership with forums, the knowledge of the ownership of the forum and the names of the posters doesn't subject them to any liability whatsoever of any sort. Simply, they are a part of the process for the courts to determine whether there is an appropriate cause of action involved in the matter. And so, I believe that the factors that have to be shown are laid out, as you both stated in the Michigan Supreme Court case of *Smith* [*v Anonymous Joint Enterprise*, 487 Mich 102; 793 NW2d 533 (2010)]. Discovery here is clearly intended to lead to admissible evidence or the ability to obtain admissible evidence and is, therefore, acceptable at this stage of the process. So Mr. Munem will be subject to plaintiff's discovery methods. Thank you.

II.

Munem raises three main arguments on appeal. First, he argues that Michigan courts must require some showing of merit to the defamation action before the court will allow a plaintiff to conduct discovery regarding the identity of an anonymous critic. Munem urges this Court to adopt the standards articulated in *Dendrite Int'l, Inc v Doe No 3*, 342 NJ Super 134; 775 A2d 756 (NJ App, 2001). Second, Munem argues that since plaintiff made no showing that complied with *Dendrite*, he should be barred from using discovery methods to obtain the identity of the anonymous defendants. Third, Munem argues that the complained-of statements on The Warren Forum are nothing more than rhetorical hyperbole that cannot form the basis for a defamation action.

We agree with Munem that discovery attempts by public officials seeking the identity of anonymous Internet critics raise First Amendment concerns about the use of defamation actions to identify current critics and discourage others from exercising their rights to free speech. In *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 267; 833 NW2d 331 (2013), another panel of this Court held that the Michigan rules of civil procedure adequately protect an anonymous defendant who is aware of and involved in a pending defamation lawsuit. The *Cooley* Court further declined to address what it described as the extreme case, one in which the plaintiff in a defamation case sues the defendant solely to subpoena the defendant's Internet provider for identifying information in order to retaliate against prospective anonymous defendants in some fashion outside a court action. *Id.* at 269-271. While acknowledging that *Dendrite* and *Doe v Cahill*, 884 A2d 451, 457 (Del, 2005), offered protection to anonymous defendants in this category that the Michigan rules of civil procedure do not, the *Cooley* Court declined to adopt the *Dendrite* or any other similar standard because it was not necessary under the facts of that case. See *Cooley*, 300 Mich App at 270 (declining to extend its holding "beyond the facts" that were before the Court, which included the facts that the anonymous defendant

knew "relatively early on" that there was a pending defamation lawsuit and that, through his actions, he had been successful in preventing a public disclosure of his name).

In the instant case, however, there is no evidence that any of the anonymous defendants were aware of the pending matter or involved in any aspect of the legal proceedings. Therefore, the instant case is distinguishable from *Cooley*, and while its analysis is applicable here, *Cooley's* holding is not controlling of the outcome in this case. We hold, therefore, that when a plaintiff seeks disclosure of the identity of an anonymous defendant who is not aware of the pending defamation lawsuit, plaintiff is first required to make reasonable efforts to notify the defendant of the lawsuit, and, in addition, the trial court is required to analyze the complaint under MCR 2.116(C)(8) to ensure that the claim is meritorious. Applying these requirements to the facts in the instant case, we reverse the trial court's ruling denying Munem's request for a protective order and further hold that defendants are entitled to judgment because the alleged defamatory statements cannot be defamatory as a matter of law.

A.

A trial court's decision on whether to compel discovery is ordinarily reviewed for an abuse of discretion. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). However, due to the importance of protecting the right to freedom of expression under the First Amendment, in cases where public officials or public figures sue for defamation, courts must conduct an independent review of the record and "analyze the alleged defamatory statements at issue and their surrounding circumstances to determine whether those statements are protected under the First Amendment." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 111-112; 793 NW2d 533 (2010).

The First Amendment provides strong protections to those who use their freedom of speech to criticize public officials over public issues. "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine, Inc v Falwell*, 485 US 46, 51; 108 S Ct 876; 99 L Ed 2d 41 (1988). The United States Supreme Court explained,

> The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office . . . . "[O]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks[.]" "The candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." [*Id.* at 51 (citations and some brackets omitted).]

Given the need to protect "uninhibited, robust, and wide-open debate," the law recognizes that freedom of expression requires "breathing space," which "is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability." *Id.* at 52. And the requisite level of culpability a public official plaintiff

must prove is that the false statements were made "with actual malice." *New York Times Co v Sullivan*, 376 US 254, 279-280; 84 S Ct 710; 11 L Ed 2d 686 (1964); *Smith*, 487 Mich at 114-115. "Actual malice" does not require a showing of ill will, but instead "exists when the defendant knowingly makes a false statement or makes a false statement in reckless disregard of the truth." *Smith*, 487 Mich at 114, citing *New York Times*, 376 US at 280. Similarly, reckless disregard does not mean that the speaker merely failed to act with reasonably prudent conduct, but instead requires "sufficient evidence to justify a conclusion that the defendant made the allegedly defamatory publication with a 'high degree of awareness' of the publication's probable falsity, or that the defendant 'entertained serious doubts as to the truth' of the publication made." *Smith*, 487 Mich at 116 (citations omitted). This requirement is codified in Michigan by MCL 600.2911(6):

> An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

Without the actual malice requirement, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times*, 376 US at 279. Whether the statements are defamatory and whether the evidence presented is sufficient to show actual malice on the part of the defendant present questions of law to be decided by the courts. *Smith*, 487 Mich at 111. When the public official plaintiff cannot show actual malice by clear and convincing evidence, the defendant is entitled to summary disposition of the defamation claim. *Ireland v Edwards*, 230 Mich App 607, 622-623; 584 NW2d 632 (1998).

Further, the United States Supreme Court has recognized that a writer's First Amendment right to freedom of speech includes the right to publish and distribute writings while remaining anonymous. *McIntyre v Ohio Elections Comm'n*, 514 US 334, 342; 115 S Ct 1511; 131 L Ed 2d 426 (1995); *Talley v California*, 362 US 60, 64-65; 80 S Ct 536; 4 L Ed 2d 559 (1960).

> [T]he interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment. [*McIntyre*, 514 US at 342.]

Due to the interest in protecting freedom of expression, "there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified." *Talley*, 362 US at 65. This right to speak anonymously applies to those expressing views on the Internet. *SaleHoo Group, Ltd v ABC Co*, 722 F Supp 2d 1210, 1213 (WD Wash, 2010). "'Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas,' and individuals 'who have committed no wrongdoing should be free to participate in online forums without fear that their identity will be exposed under the authority of the court.'" *Id.* at 1213-

1214, quoting *Doe v 2TheMart.com Inc*, 140 F Supp 2d 1088, 1092 (WD Wash, 2001). However, the right to anonymous speech is not absolute; the First Amendment protects the right to speak rather than the right to remain anonymous or to avoid the consequences of one's statements. *Doe v Reed*, ___ US ___; 130 S Ct 2811, 2831 n 4; 177 L Ed 2d 493 (2010). The right to anonymous expression over the Internet does not extend to defamatory speech, which is not protected by the First Amendment. *SaleHoo Group*, 722 F Supp 2d at 1215.

B.

In order to balance these competing interests, there is an entire spectrum of "standards" that courts could use when they are faced with a public figure plaintiff seeking to identify an anonymous defendant who has posted allegedly defamatory material regarding the plaintiff. These standards, ranging from least stringent to most stringent, include a good-faith basis to assert a claim, pleading sufficient facts to survive a motion to dismiss, showing of prima facie evidence sufficient to withstand a motion for summary disposition, and "hurdles even more stringent." *Cahill*, 884 A2d at 457.

Munem urges this Court to adopt the approach from *Dendrite*, where the court required, *inter alia*, a plaintiff to show evidence sufficient to withstand "summary judgment" before forcing the identification of anonymous posters. In *Dendrite*, the plaintiff similarly sued the anonymous defendants for postings on an Internet message board. The plaintiff sought to compel the Internet service provider (ISP) to disclose the defendants' identities, and the defendants moved to bar the discovery. The court noted that it needed a procedure to ensure that plaintiffs "do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." *Dendrite*, 342 NJ Super at 156.

The *Dendrite* court held that a plaintiff seeking the identity of an anonymous Internet critic in a defamation action must meet four requirements. First, he must undertake efforts to notify the anonymous posters that they are the subject of a subpoena or other legal proceedings to reveal their identities and give them a reasonable opportunity to respond. "These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user at the ISP's pertinent message board." *Id.* at 141. Second, the plaintiff must identify the exact statements made by each anonymous poster that plaintiff alleges constitutes defamation. *Id.* Third, the plaintiff's complaint must set forth a prima facie cause of action, i.e., the complaint must be able to withstand a motion to dismiss for failure to state a claim upon which relief can be granted. *Id.* Fourth, the plaintiff must produce sufficient evidence supporting each element of its cause of action on a prima facie basis before the court may order disclosure of the identity of the unknown defendant. *Id.* Once the plaintiff has met these requirements, then "the court must balance the defendant's First Amendment right of anonymous speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." *Id.* at 142.

The Delaware Supreme Court in *Doe v Cahill*, 884 A2d 451, 457 (Del, 2005), addressed this same issue. Consistent with *Dendrite*, *Cahill* also rejected the idea that a plaintiff must merely allege a good-faith cause of action for defamation before seeking to identify an unknown defendant. The *Cahill* court explained that such a standard is too lenient because "even silly or

trivial libel claims can easily survive" this threshold test. Instead, the *Cahill* court adopted a modified version of the *Dendrite* test, where a "summary judgment" standard is the appropriate standard to use.

The *Cahill* court adopted *Dendrite's* notice provision, holding that "to the extent reasonably practicable under the circumstances, the plaintiff must undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for order of disclosure." *Id.* at 460. Furthermore, if the case arises from anonymous statements on the Internet, the plaintiff must post a message notifying the anonymous defendant of the plaintiff's discovery request on the same ISP message board where the complained-of message appeared. *Id.* at 461. The *Cahill* court explained,

> The notification provision imposes very little burden on a defamation plaintiff while at the same time giving an anonymous defendant the opportunity to respond. When First Amendment interests are at stake we disfavor *ex parte* discovery requests that afford the plaintiff the important form of relief that comes from unmasking an anonymous defendant. [*Id.*]

But the *Cahill* court determined that *Dendrite's* requirement that a plaintiff provide the exact defamatory statements was subsumed in its summary judgment standard and, therefore, unnecessary. *Id.* Additionally, it found that the balancing requirement was also unnecessary because "[t]he summary judgment test is itself the balance." *Id.*

Cahill further found that a plaintiff must present sufficient evidence to satisfy a "summary judgment" standard, showing genuine issues of material fact, before obtaining the identity of an anonymous informant. *Id.* at 457, 462-463. However, *Cahill* rejected the idea that a plaintiff should be required to produce evidence of *all* elements of a defamation claim as required by *Dendrite*. *Id.* at 464. *Cahill* noted that while public officials ultimately must prove that the defamatory statements were made with actual malice in order to prevail on their claim, presenting evidence showing that element would be unduly burdensome, if not impossible, without knowing the true identity of the defendant. *Id.* Accordingly, *Cahill* held that the public figure plaintiff must only plead and prove facts with regard to elements of the claim that are *within his control*, leaving proof of actual malice until after the defendant is identified and further discovery conducted. *Id.* at 463, 464. The *Cahill* court reasoned,

> [U]nder the summary judgment standard, scrutiny is likely to reveal a silly or trivial claim, but a plaintiff with a legitimate claim should be able to obtain the identity of an anonymous defendant and proceed with his lawsuit. . . . [T]rial judges will then still provide a potentially wronged plaintiff with an adequate means of protecting his reputation thereby assuring that our courts remain open to afford redress of injury to reputation caused by the person responsible for abuse of the right to free speech. [*Id.* at 464.]

Courts from other jurisdictions that have addressed these issues have mainly followed *Dendrite*, *Cahill*, or a modified version of those standards. Some have adopted the *Dendrite* test. See, e.g., *Mortgage Specialists, Inc v Implode-Explode Heavy Indus, Inc*, 160 NH 227; 999 A2d 184 (2010). Some adopted the *Cahill* standard. See, e.g., *Solers v Doe*, 977 A2d 941 (DC App,

2009); *In re Does 1-10*, 242 SW3d 805 (Tex App, 2007); *Krinsky v Doe 6*, 72 Cal Rptr 3d 231; 159 Cal App 4th 1154 (2008). And some jurisdictions have applied a modified version of the *Cahill* standard with the balancing test from *Dendrite*. See, e.g., *Pilchesky v Gatelli*, 12 A3d 430 (Pa Super, 2011); *Independent Newspapers v Brodie*, 407 Md 415; 966 A2d 432 (2009); *Mobilisa Inc v Doe*, 217 Ariz 103; 170 P3d 712 (Ariz App, 2007). Further, one court applied the *Cahill* test but found that the *Dendrite* balancing test should be applied when consideration of the *Cahill* factors did not lead to a clear outcome. See *SaleHoo Group Ltd*, 722 F Supp 2d at 1213.

But in *Maxon v Ottawa Publ'g Co*, 402 Ill App 704; 929 NE2d 666 (2010), the Illinois Court of Appeals rejected both the *Dendrite* and *Cahill* tests for public official plaintiffs seeking the identities of anonymous Internet critics who allegedly defamed them. While noting that certain types of anonymous speech are constitutionally protected, *id.* at 712, the court found no need to apply the tests of *Dendrite* or *Cahill* since the applicable Illinois court rule required that the petition for discovery of anonymous defendants be verified and state with particularity facts that would establish a cause of action for defamation, *id.* at 714-715. Notably, the court concluded that its court rules effectively required plaintiff to allege and swear to specific facts stating a prima facie case for defamation. *Id.* at 715. Thus, even *Maxon*, while expressly rejecting *Dendrite* and *Cahill*, nonetheless de facto approved the same summary judgment standard.

As we previously noted, this Court in *Cooley* declined to adopt any additional standards and held, similar to the Illinois court, that Michigan's rules of civil procedure adequately protect an anonymous defendant in a defamation case. The *Cooley* Court concluded that the procedures found in MCR 2.302(C) regarding protective orders coupled with the procedures for summary disposition under MCR 2.116(C)(8) adequately protect a defendant's First Amendment interests in anonymity. *Cooley*, 300 Mich App at 264. The Court explained that a deficient claim can be dismissed before any discovery is accomplished because in order to survive a motion for summary disposition under MCR 2.116(C)(8), a defamation claim must be pled "with specificity by identifying the exact language which the plaintiff alleges to be defamatory." *Id.* at 262; see also *Tomkiewicz v Detroit News, Inc*, 246 Mich App 662, 666; 635 NW2d 36 (2001) (noting "that summary disposition is an essential tool in the protection of First Amendment rights").

The *Cooley* Court further stated that protective orders are extremely flexible, noting that

> [a] trial court may tailor the scope of its protective order to protect a defendant's First Amendment interests until summary disposition is granted. For instance, a trial court may order (1) that a plaintiff not discover a defendant's identity, or (2) that as a condition of discovering a defendant's identity, a plaintiff not disclose that identity until after the legal sufficiency of the complaint itself is tested. [*Cooley*, 300 Mich App at 265.]

The Court therefore concluded that the standard enunciated in *Cahill* overlaps greatly with the protections afforded through MCR 2.302(C) and MCR 2.116(C)(8). *Id.* at 266. But in *Cooley*, the above procedures were adequate to protect the anonymous defendant only because he was aware of and involved in the lawsuit. See *id* at 252, 270. As the partial dissent in *Cooley* noted, "[A]n anonymous defendant cannot undertake any efforts to protect against disclosure of

his or her identity until the defendant learns about the lawsuit – which may well be too late . . . ." *Id.* at 274 (Beckering, J., concurring in part and dissenting in part).

In the present case, no defendant was notified of the lawsuit and no defendant had been involved with any of the proceedings, which means that there was no one to move for summary disposition under MCR 2.116(C)(8). Thus, one of the two protections that *Cooley* relied upon is conspicuously absent.[5] Further, when defendants are not aware of and not involved with a lawsuit, any protection to be afforded through the entry of a protective order under MCR 2.302(C) is *contingent* upon a non-party, e.g., the Internet service provider, asserting the defendants' First Amendment rights. Thus, application of the *Cooley* protection scheme in the instant case, containing circumstances which *Cooley* declined to address, appears inadequate to protect the constitutional rights of an anonymous defendant who is unaware of pending litigation.

Therefore, we conclude that when an anonymous defendant in a defamation suit is not shown to be aware of or involved with the lawsuit, some showing by the plaintiff and review by the trial court are required in order to balance the plaintiff's right to pursue a meritorious defamation claim against an anonymous critic's First Amendment rights. Although we agree with the dissent in *Cooley* that it would have been preferable to also adopt the *Dendrite/Cahill* standard requiring a plaintiff to further produce evidence sufficient to survive a motion under MCR 2.116(C)(10), we nevertheless are bound by this Court's conclusion in *Cooley* that MCR 2.302(C) and MCR 2.116(C)(8) alone are sufficient to protect and balance a participating defendant's First Amendment rights. Therefore, we invite the Legislature or the Supreme Court to consider anew this important question.[6]

Having concluded that we must apply the *Cooley* standards in this case, we reiterate, as *Cooley* itself acknowledged, that *Cooley* does not address a circumstance, such as is presented in the instant case, in which anonymous defendants are unaware of the pending lawsuit. Accordingly, given the specific facts of this case, we find it necessary to impose two additional requirements in an effort to balance the plaintiff's right to pursue a meritorious defamation claim against an anonymous critic's First Amendment rights.

First, we hold that the notice requirement of *Dendrite/Cahill* is properly applicable here: a plaintiff must have made reasonable efforts to provide the anonymous commenter with reasonable notice that he is the subject of a subpoena or motion seeking disclosure of his identity. That means that at a minimum, if possible, the plaintiff must post a message notifying

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[5] Similar to the age-old question of whether a tree falling in the woods makes a sound if no one is there to hear it, one might also ask, if no truly interested party is present to invoke the protections available under MCR 2.116(C)(8), do the protections really exist?"

[6] We recognize that *Cooley* was limited to its narrow set of facts, and therefore, it is possible for us to distinguish *Cooley* and adopt the more stringent *Dendrite* standard for application here and in similar circumstances. We decline, however, to adopt a second standard of law in this complex and emerging area of jurisprudence in an effort to avoid creating unnecessary confusion and inconsistency.

the anonymous defendant on the same ISP message board or other forum where the alleged defamatory message appeared. See *Cahill*, 884 A2d at 460-461; *Dendrite*, 342 NJ at 141.

Second, plaintiff's claims must be evaluated by a court so that a determination is made as to whether the claims are sufficient to survive a motion for summary disposition under MCR 2.116(C)(8). This evaluation is to be performed even if there is no pending motion for summary disposition before the court. The *Cooley* Court explained that summary disposition was a vital tool to protect defendants:

> Because a plaintiff must include the words of the libel in the complaint, several questions of law can be resolved on the pleadings alone, including: (1) whether a statement is capable of being defamatory, (2) the nature of the speaker and the level of constitutional protections afforded the statement, and (3) whether actual malice exists, if the level of fault the plaintiff must show is actual malice.[7] [*Cooley*, 300 Mich App at 263 (citations omitted).]

MCR 2.116(I)(1) authorizes a court to perform this sua sponte review. *Wilson v King*, 298 Mich App 378, 381 n 4; 827 NW2d 203 (2012).

The imposition of these two additional requirements on a plaintiff when a defendant is not aware of the pending lawsuit will operate to ensure that the protections described in *Cooley* have meaningful effect.

III.

A.

Under the first of the additional requirements we apply here, a plaintiff seeking the identity of an anonymous Internet critic who is unaware of the pending defamation suit must make reasonable efforts to notify the anonymous posters of the legal proceedings seeking to uncover their identities in order to give them a reasonable opportunity to respond. While plaintiff, here, made efforts to *discern the identities* of the anonymous defendants, his affidavits and pleadings do not show that he made any effort to *notify* the anonymous defendants of the pending action, either through The Warren Forum Internet site or other means. Since plaintiff did not show that he had made reasonable attempts to inform the anonymous defendants of his efforts to discover their identities, he has not met the first requirement. Therefore, on this basis alone, the trial court erred in not granting Munem's motion seeking the protective order.

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[7] Although whether actual malice exists is a question of law, *Ireland*, 230 Mich App at 619, the statement that the question can be answered on the pleadings alone is not accurate in the context of anonymous defendants because actual malice is "a subjective inquiry concentrating on the knowledge of a defendant at the time of a publication," which likely is not ascertainable if the defendant is not known. *Battaglieri v Mackinac Ctr For Pub Policy*, 261 Mich App 296, 305; 680 NW2d 915 (2004).

B.

Further, plaintiff's claims are facially deficient and cannot survive a motion for summary disposition under MCR 2.116(C)(8). As noted earlier, "[a] plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory." *Cooley*, 300 Mich App at 262. Here, the alleged defamatory statements were not identified in plaintiff's complaint. Instead, plaintiff only (and for the first time) cited the alleged defamatory statements in his response to Munem's motion for a protective order. Thus, defendants were entitled to summary disposition under MCR 2.116(C)(8), and it was improper to permit discovery of Munem.

C.

MCR 2.116(I)(5) requires that if summary disposition is appropriate under MCR 2.116(C)(8), as is the case here, plaintiffs shall be given the opportunity to amend their pleadings, unless the amendment would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). Thus, even though plaintiff's complaint is patently deficient by virtue of his failure to cite to the actual complained-of statements in the complaint, we will analyze the alleged defamatory statements to determine whether allowing plaintiff to amend the complaint to contain the contents of these statements would be futile.

In Michigan, the four basic elements of a defamation claim are as follows:

> "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." [*Smith*, 487 Mich at 113, quoting *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).]

As noted earlier, the First Amendment demands that, related to a defendant's "fault," if the plaintiff is a public official or public figure, then he must prove by clear and convincing evidence that the defendant made the statement with actual malice. *Ireland*, 230 Mich App at 622.

When determining whether statements made against public officials amount to unprotected defamation, appellate courts must make an independent examination of the whole record to ensure against forbidden intrusions into the field of free expression. *Smith*, 487 Mich at 112 n 16; *Ireland*, 230 Mich App at 613; *Northland Wheels Roller Skating Ctr v Detroit Free Press*, 213 Mich App 317, 322; 539 NW2d 774 (1995). Courts must examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection. *New York Times*, 376 US at 285; *Northland Wheels*, 213 Mich App at 322. Whether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide. *Ireland*, 230 Mich App 619.

"In general, our society accords greater weight to the value of free speech than to its misuse." *McIntyre*, 514 US at 357. "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable 'self-censorship.'" *New York Times*, 376 US at 279. "Under

such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.* "[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 269. "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about the clearer perception and livelier impression of truth, produced by its collision with error." *Id.* at 297 n 19 (quotation marks omitted).

To be considered defamatory, statements must assert facts that are "provable as false." *Milkovich v Lorain Journal Co*, 497 US 1, 20; 110 S Ct 2695; 111 L Ed 2d 1 (1990). Even statements couched in terms of opinion may often imply an assertion of objective fact and, thus, can be defamatory. *Id.* at 19; *Smith*, 487 Mich at 128. "The dispositive question . . . is whether a reasonable fact-finder could conclude that the statement implies a defamatory meaning." *Smith*, 487 Mich at 128.

Accusations of criminal activity are considered "defamation per se" under the law and so do not require proof of damage to the plaintiff's reputation. *Tomkiewicz*, 246 Mich App at 667 n 2; *Burden v Elias Bros*, 240 Mich App 723, 728-729; 613 NW2d 378 (2000). However, not all statements that can be literally read as accusations of a crime or misconduct should be considered assertions of fact. The First Amendment protects statements that cannot be interpreted as stating actual facts about an individual from serving as the basis for a defamation action or similar claim under state law. *Milkovich*, 497 US at 20; *Falwell*, 485 US at 50, 53-55; *Ireland*, 230 Mich App 617. Such statements include the usual "rhetorical hyperbole" and "imaginative expression" often found in satires, parodies, and cartoons. *Falwell*, 485 US at 53-54; *Ireland*, 230 Mich App at 617-618. This is true even where the statements are designed to be highly offensive to the person criticized, and even if, when read literally, the statements can be interpreted as accusations of criminal activity. Terms such as "blackmailer," "traitor," "crook," "steal," and "criminal activities" must be read in context to determine whether they are merely exaggerations typically used in public commentary. *Greenbelt Co-op Publ'g Ass'n v Besler*, 398 US 6, 14; 90 S Ct 1537; 26 L Ed 2d 6 (1970); *Kevorkian v Am Med Ass'n*, 237 Mich App 1, 7-8; 602 NW2d 233 (1999). Casual use of such terms "is the language of the rough-and-tumble world of politics. It is core political speech. It is consumed by an often skeptical and wary electorate" and is not seriously regarded as asserting factual truth. *In re Chmura*, 462 Mich 58, 82; 626 NW2d 876 (2001). If a reasonable reader would understand such words as merely "rhetorical hyperbole" meant to express strong disapproval rather than an accusation of a crime or actual misconduct, they cannot be regarded as defamatory. *Greenbelt*, 398 US at 14; *Ireland*, 230 Mich App at 618-619.

The context and forum in which statements appear also affect whether a reasonable reader would interpret them as asserting provable facts. Courts that have considered the matter have concluded that Internet message boards and similar communications are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact. See *Summit Bank v Rogers*, 206 Cal App 4th 669, 696-698; 142 Cal Rptr 3d 40 (Cal App, 2012); *Sandals Resorts Int'l Ltd v Google, Inc*, 925 NYS2d 407, 415-416; 86 AD3d 32 (NY App, 2011); *Obsidian Financial Group v Cox*, 812 F Supp 2d 1220, 1223-1224 (D Oregon, 2011); *Cahill*, 884 A2d at 465. "[A]ny reader familiar with the culture of . . . most electronic

bulletin boards . . . would know that board culture encourages discussion participants to play fast and loose with facts. . . . Indeed, the very fact that most of the posters remain anonymous, or pseudonymous, is a cue to discount their statements accordingly." *Summit Bank*, 206 Cal App 4th at 696-697 (quotation marks and some brackets omitted).

> Ranked in terms of reliability, there is a spectrum of sources on the internet. For example, chat rooms and blogs are generally not as reliable as the *Wall Street Journal Online.* Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, *they are not a source of facts or data upon which a reasonable person would rely.* [*Cahill*, 884 A2d at 465 (emphasis added, footnote omitted).]

The complained-of statements were posted on The Warren Forum and were in response to two events that were covered by the local news media: (1) the discovery that 3,647 tons of road salt was "missing" or "misappropriat[ed]" from the city's supplies and (2) the city's decision to purchase new garbage trucks over objections that they were not really needed.

Two statements were responses to the topic entitled, "Where did our road salt go?" The first allegedly defamatory statement was posted by someone using the pseudonym "northend" and provided,

> I wouldn't be surprised if the salt is close to city hall and the storage area for the city. IMO the salt is somewhere around the sports complex on Van Dyke, just south of 14 Mile, where Gus hangs out and drinks most days, or at least the days I am in there hitting golf balls. Hmm maybe I need to call the investigators?

The above message cannot be construed as asserting as a fact that plaintiff stole or was involved in the theft of the salt. Nowhere does "northend" state that plaintiff was involved with the salt's disappearance, only that the salt may be near a sports complex where plaintiff purportedly spends time. Thus, this statement is not defamatory as a matter of law.

In the same discussion thread, user "yogi" stated,

> the pizza box maker sold it! him an Gus probably split the money.

This appears to be someone's attempt at a joke. A reasonable reader would not take the above comment literally. First, the introduction of a "pizza box maker" seems to be a non sequitur, which itself suggests a humorous intent. Second, the use of the exclamation point also connotes a humorous intent.[8] Finally, the use of the word "probably" makes the purported asserted fact

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[8] In ordinary writing, exclamation marks "'should not be used . . . to signal the humorous intent of a comment whose humour might otherwise go unrecognized.'" <www.answers.com/topic/exclamation-point> (accessed May 1, 2013), quoting Allen, ed, *Pocket Fowler's Modern English Usage* (New York: Oxford University Press, 2008). But as noted earlier, Internet message boards are an extremely informal medium for communication where formalities are rarely followed. See *Cahill*, 884 A2d at 465; *ComputerXpress, Inc v*

hardly provable. Thus, when read in context, a reasonable reader would understand such words as being merely "rhetorical hyperbole" and cannot be regarded as defamatory.

The second set of comments were replies to an initial posting titled "MORE sanitation trucks? Yep.", which concerned the city's decision to buy additional new garbage trucks. The third allegedly defamatory statement was posted by "hatersrlosers" in this thread and stated,

> They are only getting more garbage trucks because Gus needs more tires to sell to get more money for his pockets :P

This statement on its face cannot be taken seriously as asserting a fact. The use of the ":P" emoticon makes it patently clear that the user was making a joke. As noted earlier, a ":P" emoticon is used to represent a face with its tongue sticking out to denote a joke or sarcasm. Thus, a reasonable reader could not view the statement as defamatory.

Later in this discussion regarding the garbage trucks, "pstigerfan" posted the following:

> Since Warren is the only community in Macomb County to have city employees pick up trash, then [Mayor] Fouts must have a better idea of what is going on compared to the other communities. Oh wait, his buddies Gus and Dick run the department, and in turn make money off of it (selling tires, selling road salt, etc). If we didn't have a Sanitation Department with new trucks (and old tires), then Gus would have to take the tires off of other vehicles in other departments in order to make his money.

Again, a reasonable reader would not take the above statement literally. The tone of the entire statement is rich in sarcasm and humor. The writer obviously does not think that Mayor Fouts has a "better idea" of how to run Warren compared with how other community leaders run their communities. And the vision of plaintiff sneaking into other departments to steal tires off of other city vehicles is so absurd that the vision of it is comical. Thus, when viewed in context, the entire statement cannot be deemed to be an assertion of a provable fact, and it is not defamatory.

In sum, plaintiff maintains that all of the statements constitute actionable statements of fact that accuse him of stealing public property. Review of these statements in context leads us to conclude that they cannot be regarded as assertions of fact but, instead, are only acerbic critical comments directed at plaintiff based on facts that were already public knowledge, namely the apparent "misappropriation" of a large amount of rock salt and the controversial purchase of additional garbage trucks. The joking, hostile, and sarcastic manner of the comments, the use of an emoticon showing someone sticking their tongue out, and the far-fetched suggestion that

Jackson, 93 Cal App 4th 993, 1011-1013; 113 Cal Rptr 2d 625 (2001). In fact, the use of exclamation points in electronic communication is rampant and now gives a literal meaning to F. Scott Fitzgerald's quote, "An exclamation point is like laughing at your own joke." See Christopher Muther, *The Overuse of Exclamation Points!*, Boston Globe, April 26, 2012, <http://www.bostonglobe.com/lifestyle/style/2012/04/25/how-mail-and-texting-have-driven-people-overuse-exclamation-points-confessions-serial-exclamation-pointer/bSKe7sq0TEZLHcq1bq5A7M/story.html> (accessed January 14, 2013).

plaintiff somehow hid over 3,600 tons of salt near the city sports complex all indicate that these comments were made facetiously and with the intent to ridicule, criticize, and denigrate plaintiff rather than to assert knowledge of actual facts. Examination of the statements and the circumstances under which they were made show them to be mere expressions of "rhetorical hyperbole" and not defamatory as a matter of law. Therefore, allowing plaintiff to amend his complaint would be futile.

We reverse the trial court's decision to allow discovery of Munem for the purposes of identifying the anonymous defendants, and we remand for the trial court to enter judgment in favor of defendants. Munem, as the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot

STATE OF MICHIGAN

COURT OF APPEALS

GUS GHANAM,

Plaintiff-Appellee,

v

JOHN DOES,

Defendants,

and

JOSEPH MUNEM,

Appellant.

FOR PUBLICATION
January 2, 2014

No. 312201
Macomb Circuit Court
LC No. 2012-001739-CZ

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

STEPHENS, J. (*concurring*).

I concur with my colleagues that this matter should be reversed and remanded to the trial court for entry of a judgment in favor of defendants. I write separately to address with specificity my belief that Michigan should adopt the analysis of the Delaware Supreme Court in *Doe v Cahill*, 884 A2d 451, 457, 464 (Del, 2005), where it noted that while a public figure plaintiff needs to prove actual malice to prevail on a claim of defamation, that proving such malice at the stage where the identity of defendant is unknown is unduly burdensome. *Id.* at 457, 462-463. Thus, the plaintiff need not plead facts in support of the element of actual malice in order to ascertain the identity of the person or persons who authored the defamatory statements.

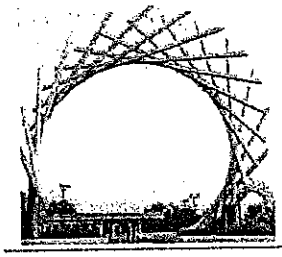
The reasoning of the *Cahill* court is compelling that,

> under the summary judgment standard, scrutiny is likely to reveal a silly or trivial claim, but a plaintiff with a legitimate claim should be able to obtain the identity of an anonymous defendant and proceed with his lawsuit. . . . [T]rial judges will then still provide a potentially wronged plaintiff with an adequate means of protecting his reputation thereby assuring that our courts remain open to afford redress of injury to reputation caused by the person responsible for abuse of the right to free speech. [*Id.* at 464.]

I understand that there is a significant split of opinion among other jurisdictions on this issue. As the majority has noted many jurisdictions have followed some blend of *Dendrite or Cahill* with some taking the *Dendrite* approach on actual malice and others adopting the *Cahill* standard. I urge that Michigan follow the analysis and reasoning in *Cahill* given the extreme difficulty of proving the malice of those cloaked in anonymity.

/s/ Cynthia Diane Stephens

ATTACHMENT B



The Warren Forum

www.warrenforum.net

About government, business, schools and community in Warren, Mic

"Politicians in this city live in fear of this Web site and it affects what th

"Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom... the First Amendment." Justice Stevens, McINTYRE v. OHIO ELECTIONS (COMM'N) - 1995

September 24, 2012, 08:58:17 AM

Welcome, **Guest**. Please login or register.

Forever | Login

Login with username, password and session length

News: ***"Politicians in this city live in fear of this Web site and it affects what they do."***

Search

HOME | HELP | LOGIN | REGISTER

Register - Required Information

Choose username:
Used only for identification by SMF.

Email:
This must be a valid email address.

☐ Hide email address from public?

Choose password:

Verify password:

Visual verification:
Type the letters shown in the picture

Listen to the letters | Request another image

What year is it?:

Are you a robot?:

Leave this question blank:

What state is Warren located in?:

What is the mayor's last name?:

☐ **I am at least 13 years old.**

You agree, through your use of this forum, that you will not post any material which is false, defamatory, inaccurate, abusive, vulgar, hateful, harassing, obscene, profane, sexually oriented, threatening, invasive of a person's privacy, adult material, or otherwise in violation of any International or United States Federal law. You also agree not to post any copyrighted material unless you own the copyright or you have written consent from the owner of the copyrighted material. Spam, flooding, advertisements, chain letters, pyramid schemes, and solicitations are also forbidden on this forum.

Note that it is impossible for the staff or the owners of this forum to confirm the validity of posts. Please remember that we do not actively monitor the posted messages, and as such, are not responsible for the content contained within. We do not warrant the accuracy, completeness, or usefulness of any information presented. The posted messages express the views of the author, and not necessarily the views of this forum, its staff, its subsidiaries, or this forum's owner. Anyone who feels that a posted message is objectionable is encouraged to notify an administrator or moderator of this forum immediately. The staff and the owner of this forum reserve the right to remove objectionable content, within a reasonable time frame, if they determine that removal is necessary. This is a manual process, however, please realize that they may not be able to remove or edit particular messages immediately. This policy applies to member profile information as well.

You remain solely responsible for the content of your posted messages. Furthermore, you agree to indemnify and hold harmless the owners of this forum, any related websites to this forum, its staff, and its subsidiaries. The owners of this forum also reserve the right to reveal your identity (or any other related information collected on this service) in the event of a formal complaint or legal action arising from any situation caused by your use of this forum.

You have the ability, as you register, to choose your username. We advise that you keep the name appropriate. With this user account you are about to register, you agree to never give your password out to another person except an administrator, for your protection and for validity reasons. You also agree to NEVER use another person's account for any reason. We also HIGHLY recommend you use a complex and unique password for your account, to prevent account theft.

After you register and login to this forum, you will be able to fill out a detailed profile. It is your responsibility to present clean and accurate information. Any information the forum owner or staff determines to be inaccurate or vulgar in nature will be removed, with or without prior notice. Appropriate sanctions may be applicable.

Please note that with each post, your IP address is recorded, in the event that you need to be banned from this forum or your ISP contacted. This will only happen in the event of a major violation of this agreement.

Also note that the software places a cookie, a text file containing bits of information (such as your username and password), in your browser's cache. This is ONLY used to keep you logged in/out. The software does not collect or send any other form of information to your computer.

☐ **I Agree**

ATTACHMENT C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

GUS CHANAM,

Plaintiff,

vs. Case No.: 2012-1739-CZ

JOHN DOES,

Defendant.

_____/

MOTION HEARING,

BEFORE THE HONORABLE JOHN C. FOSTER

Mount Clemens, Michigan - Monday, August 27, 2012

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I N D E X

WITNESS/PROCEEDINGS:	PAGE
None Offered	

E X H I B I T S

NUMBER	IDENTIFICATION	PAGE
None Offered		

Monday, August 27, 2012

Mt. Clemens, Michigan

At about 8:17 a.m.

(REPORTER'S NOTE: "Inaudible" means a word or words were not heard well enough to be able to discern a proper interpretation wither because of shuffling of papers, or the speaker did not talk loud enough, or was notpicked up by the microphones.)

COURT CLERK: Ghanam versus John Does.

THE COURT: Give me a moment here to get things up and running.

All right. For the record, gentlemen.

MR. DOLAN: May it please the Court, your Honor, appearing on behalf of the plaintiff and the responding party to the motion, Jack Dolan.

MR. BURDETT: Good morning, your Honor. Bill Burdett on behalf of the third-party, Mr. Munem.

THE COURT: It's your motion.

MR. BURDETT: Thank you, your Honor.

Your Honor, this is a motion that seeks to protect anonymous speech about a public official. Mr. Ghanam's response did concede two important things; first of all, that there was no contest that he is a

public official and is held to a higher standard of review for stating a claim for defamation. He puts himself out there in the public. He's going to be criticized because of his actions, and the court -- and I certainly will admit that the standards set out in the Smith case that was cited by plaintiff are the applicable standards here in terms of determining whether or not actual malice was achieved.

In a little bit I'll discuss how that case is substantially distinguished from this case.

THE COURT: Well, let's just get to the crux of his objections. Mr. Munem isn't the person he's seeking to sue. Mr. Munem has -- apparently, has access to knowledge which would give them the opportunity to see if they meet the Smith case. So he's a predicate to the whole process. And Mr. Munem has no basis for denying this motion, for that discovery, that I can find. I'm asking you, tell me where Munem has something to hide.

MR. BURDETT: Well, if Mr. Munem is the person with that information, Mr. Munem is interested in protecting the anonymous rights of --

THE COURT: Mr. Munem is not the court. Mr. Munem is a private citizen. Mr. Munem is trying to -- was trying to act according to the pleadings, as a

salesman for who ever owns this website. So he doesn't -- he's not even the second party in line.

I understand the protections and I strongly believe that, and if Mr. Ghanam, through his attorney, cannot show those, they're not entitled to recover. But they are entitled, under the cases cited by plaintiff, to have the opportunity to see whether there has been malicious libelous speech against him that would be compensable under our statutes and our case law. And I'm trying to understand what Mr. Munem's position is that he would be not required to answer questions which could lead to discoverable and admissible evidence.

I mean that's what, that's what discovery is all about, is whether it will lead to something that will be admissible, and that's how you get to the trial, by getting admissible evidence, or not getting any, and then they throw the case out.

MR. BURDETT: We understand that, your Honor. Mr. Munem's position is that we have to take into consideration the nature of this speech, that it is taking place in the Warren forum, and the argument that we cite forth, that was unresponded to by plaintiff, is that this is sort of a rhetorical hyperbole, is the language that was used by the courts, that this is something that a viewer of the Warrenforum.net would say

this doesn't have the same level of credibility as the report, for example, in the Smith case.

So the Smith case had the -- there was, one, no question about who the defendants were. The Court of -- the Michigan Supreme Court indicated that on page 108, and, two, they distributed what appeared to be an official report from Leelanau County or I believe the township supervisor regarding the plaintiff. And it was a falsified report and the concern there was --

THE COURT: But that was right at the --

MR. BURDETT: -- this appeared --

THE COURT: That was at the crux of the issue of whether there were compensable damages available. That wasn't at the discovery stage of just let's find out who really did this, let's find out who said this, let's find out how we get to that point.

Mr. Ghanam is not even yet aware of who it is he's trying to sue.

MR. BURDETT: Right, and the point --

THE COURT: And so, what Mr. Munem is doing is obstructing that process, like he is the Supreme Court of the United States, and he is not. He's a person who actually was brokering the sale of a private entity. And all we're saying to him, I think, through the discovery that I've read and the pleadings, is tell us

who you were working for.

That's not protecting speech. That's not even affecting speech.

MR. BURDETT: It certainly would have the chilling effect, your Honor, and our argument is --

THE COURT: On what?

MR. BURDETT: Of speech, if posters on the Warren forum could be subject to --

THE COURT: Well, let's stop at that section.

Apparently, unless I'm wrong, the Warren forum requires them to waive their right to privacy.

MR. BURDETT: Well, it says certainly that it can be subject to a, you know, if there's a subpoena or some sort of a lawsuit --

THE COURT: And here we are, discovery in litigation.

MR. BURDETT: Certainly. And the question would be have they met the standards to present a legitimate case. And that's even what their case law cites, your Honor.

THE COURT: Whoa, whoa, whoa, whoa. What standard? What standard?

MR. BURDETT: The cites, for example, in the Dendary (ph) case, that they rely heavily upon, that case indicates that the plaintiff must produce

sufficient evidence supporting each element of his cause of action before we even get to the question of balancing the first amendment --

THE COURT: Against whom?

MR. BURDETT: -- and a right of anonymity.

THE COURT: Who must they present that against?

MR. BURDETT: Well, they need to --

THE COURT: The defendant, the defendant.

MR. BURDETT: -- provide the basis for that.

THE COURT: The defendant. They have to provide it against the defendant. But if you stop them from finding out who the litigant should be, then they have no chance. Our system of justice then says, you know what, Foster, you can go out and you can slander and libel anybody you want as long as you do it through three Internet sites across the country who hide your ownership and you use some other party to try to broker everything for you. So, now, you can do anything you want to anybody because it will never be able to get to court because we'll go in and say hey, they haven't proved it yet.

MR. BURDETT: That's certainly not, not our argument, your Honor.

THE COURT: But it is your argument.

MR. BURDETT: Your Honor, if I might, I would respectfully disagree with that because even their own case law that they cited, you know, for example, the Pachelski (ph) case supported the anonymity, reversing the trial court and assertion of it by saying that there was not a sufficient showing to then disclose the anonymous posters on line.

Only the Doe case actually said yes, we're going to disclose this, which was about a private citizen who had substantially horrible things said about them in terms of like this woman appreciated to be raped by her father, had a heroin addiction.

THE COURT: So now we should be first deciding whether they were horrible things or just, you know, so-so things.

MR. BURDETT: The standard set forth in the cases cited by plaintiff indicate that we first must evaluate whether or not it is a sufficient defamation claim before we start revealing the nature of the posters or even getting close to it, because once that horse is out of the barn it can't be put back in. And that would have the chilling effect here, is that we are saying that there is not a way to stop this --

THE COURT: Well, let me ask you a question. Let's go back to this waiver of privacy. They waived

their right to privacy by going on the site. They had to check a box apparently that said we understand if something goes to court on this we may have to give up our names. Where's your chilling right?

MR. BURDETT: Well, certainly, it hasn't happened in the past where these names are being disclosed.

THE COURT: What hasn't happened? Well, the point is they've waived the right. They've waived the right to privacy. Didn't they waive it on your website?

MR. BURDETT: I don't think so.

THE COURT: Well, what's the checked box that says we waive the right to privacy? What's the -- what did I misread on that.

MR. BURDETT: Well, I would suggest, your Honor, that that is within the rights or within the boundaries of controlling case law that says if Mr. Ghanam presents a prima facie case where he provides evidence of his damages, evidence that this isn't rhetorical hyperbole, then we get to the question of whether or not we're going to reveal the anonymous nature of the --

THE COURT: Well, are you going to defend it then? Are you going to be the one that Mr. Ghanam comes into court and says here's what my case is, judge, and

he gets on the stand and he testifies and he brings three or four witnesses? Who's going to cross-examine him?

MR. BURDETT: I'll cross-examine him on behalf of Mr. Munem.

THE COURT: You're not even a client.

MR. BURDETT: That's correct. I don't represent --

THE COURT: You're not a defendant. You can't do that. I can't let you in to cross-examine him. I can't let you into the case because you're not a defendant unless Mr. Munem is admitting he owns the site and he's the one who did it.

He's not trying to sue Mr. Munem. He's not trying to sue Warren forum. He's trying to find out who the people were that he alleges defamed him. We're not even there yet. So you wouldn't even be entitled to come in and defend the case, would you?

MR. BURDETT: Your Honor, there hasn't been any showing, though.

THE COURT: So I can go to trial on this case right now, he can put on his proofs and he wins by default because there's no defendant.

MR. BURDETT: Well, your Honor, respectfully, he would have to prove that people consider the Warren

forum as an authoritative site, similar to the Stuart report that was in the Smith case, that it isn't something that amounts to this rhetorical hyperbole. He has to establish, overcome that barrier before he gets to the point where it says, we say we're going to reveal anonymous posters on line about public officials.

THE COURT: You still haven't gone past why their waiver isn't valid.

MR. BURDETT: I would --

THE COURT: I suppose what you're saying now, on behalf of Mr. Munem, is that the waiver is not a valid waiver. And so, now, in the future, if Mr. Munem were to walk in here on behalf of the owners and say we want to disclose these names, I'd have to say no, you've already been in a prior action, your pleadings are to be admitted that you don't believe it's a valid waiver.

Are you saying it's not a valid waiver?

MR. BURDETT: What I'm saying is that it would be a waiver of that -- if we go through the steps set forth in the Dendary case cited by plaintiff --

THE COURT: Did it say that in their waiver? Did it say that on a lawsuit you have to go through all the steps that are necessary for the kind of litigation that's underlying this for us to disclose it? It just says I waive my right. It's pretty straight, a pretty

clear waiver. I wasn't if, if, if, if.

MR. BURDETT: Your Honor, the position is that if, you know, you are an anonymous poster the assumption is that you have at least a certain protection. Otherwise, anyone could file any lawsuit and simply say we get this information to try and intimidate speech.

THE COURT: That might be the case. It's not to intimidate speech. It's just to find out who's saying the things about me that they're saying. You know, that's basically what it is.

MR. BURDETT: And certainly, your Honor, that's what the King of England tried. That's why we have the First Amendment. That's why the federalist papers were published under --

THE COURT: And that's why we have New York Times versus Sullivan and all those other cases to protect it. But in certain circumstances it is available. All we're trying to do is find out who it was. Sullivan, everybody knew who he was, you know.

MR. BURDETT: Correct, your Honor, because Sullivan published --

THE COURT: Right.

MR. BURDETT: Or the New York Times published it under the New York Times.

THE COURT: Exactly. So, here we go.

MR. BURDETT: This is the anonymous speech that we seek to protect, and that's what Mr. Munem is interested in asserting, is that he doesn't want to be the person to disclose this because he doesn't believe that Mr. Ghanam has satisfied the requisite elements --

THE COURT: But when did Mr. Munem become the supreme court or even the district court or the circuit court to make that determination? I didn't even know he had a law degree.

MR. BURDETT: Your Honor, that's the reason why he's hired me and retained me to come here and argue that.

THE COURT: You said Mr. Munem didn't want to do it, not that you don't want to do it.

MR. BURDETT: No, it's -- we are arguing that so that you can make a decision on it.

THE COURT: You're arguing it. Okay. All right. Mr. Dolan.

MR. DOLAN: Your Honor, I think the Court has addressed adequately the issues. I'll just, again, for the record, sort of quote from one of the decisions that I think really hits the nail on the head. It says: With the rise of the Internet has come the ability to commit certain tortious acts such as defamation, copyright infringement and trademark infringement

entirely on line. Tort feasors can act pseudo anonymously or anonymously and may give fictitious or incomplete identifying information. Parties who have been injured by these acts are likely to find themselves chasing the tort feasor from Internet service provider, ISP to ISP with little or no hope of actually discovering the identity of the tort feasor. In such cases the traditional reluctance for permitting filings against John Doe defendants or fictitious names in the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with a forum in which they may seek or address grievances.

Essentially, your Honor, you've hit the nail right on the head. Here, what's occurred, in fact, has been a prima facie occurrence involving defamation. Mr. Ghanam has been accused of a criminal act. This is not a situation where there's simply expressions of opinion. Statements were made that he, both with tires and with salt, that he took public property and disposed of it and received money as gain from disposing of that public property.

Now, counsel, if he wants, can try to characterize it as hyperbole, but these, in a sense, these, in essence, are facts. Now, for us to really

fully understand this, and I think what's important what the Smith case stated, is that the New York Times element, the actual malice, is a subjective element. And the only way we can get a subjective element proven is to get to the person who made the statement. When we finally discover the parties who made these statements and take their depositions, it may be that they will freely admit all of the elements of actual malice. Until we have that opportunity, we don't know the full depth and breadth of this whole set of circumstances. And the notion that simply because these were anonymous statements first, and secondly, because they involve the Internet, that there is some new and additional level of protection just isn't -- doesn't hold water.

The cases that he cites, for example, the one case he sites on the subject of anonymity that involved a situation where a local unit of government had passed an ordinance that required pamphleters to register before they could distribute pamphlets. That's a situation where the government, by its action, is requiring disclosure before any sort of anonymous action can be taken.

Here, this is a person what admittedly is a public figure who's been defamed. Requiring that information be disclosed relating to that defamation is

a completely different set of circumstances. And as the Court has already addressed, Michigan has extremely broad discovery rules that right within the court rule refer to allowing the discovery of the identity, the identity of individuals involved, whether through utilizing actual relevant evidence or evidence that may lead to relevant evidence. So, in particular, or under the standard of discovery in Michigan, based on the absence of any constitutional protection in the area of defamation, we request that the Court deny the motion.

THE COURT: Well, I'm of the opinion that this lawsuit alleges certain things that, if proven, are compensable. If proven. They have to be proven.

The second step is in litigation we have a whole process that involves discovery and many aspects of it and, indeed, liberal discovery in Michigan. I believe also, from looking at the cases that you both cited, that the trend on this, as well as in any of the other areas of law, is more towards transparency, not hiding things in this country. The more we hide, the less we have democracy, the less we have freedom, the less we have opportunity for people to succeed and to move forward. It would be a terrible thing on both sides to stop speech, but it would also say to people don't ever take a public job because on anonymous forums

they can lie about whether you are a thief or not and accuse you of crimes and things of outrageous behavior. So both those things have to be weighed, one against the other.

We are at the discovery phase in this matter and, as I said, I believe the trend is to open things up. The ownership with forums, the knowledge of the ownership of the forum and the names of the posters doesn't subject them to any liability whatsoever of any sort. Simply, they are a part of the process for the courts to determine whether there is an appropriate cause of action involved in the matter. And so, I believe that the factors that have to be shown are laid out, as you both stated in the Michigan Supreme Court case of Smith. Discovery here is clearly intended to lead to admissible evidence or the ability to obtain admissible evidence and is, therefore, acceptable at this stage of the process. So Mr. Munem will be subject to plaintiff's discovery methods. Thank you.

MR. DOLAN: Counsel, could I arrange through your office the taking of this deposition.

MR. BURDETT: You certainly can call me.

MR. DOLAN: Thank you.

(At about 8:34 a.m., Proceedings Concluded).

State of Michigan)
County of Macomb)

CERTIFICATE OF REPORTER

I, Elaine M. Maki, Certified Shorthand Reporter for the Circuit Court for the County of Macomb, do hereby certify that the foregoing pages one through 19, inclusive, comprise a true and correct transcript of the proceedings had in the matter of GHANAM vs. DOES, Case No. 2012-1739-CZ, before the Honorable John C. Foster, held on Monday, August 27, 2012.

I further certify that I am not responsible for the accuracy of any copies of this transcript not made under my direction or control.

If this transcript does not contain an original signature, it is not a certified transcript.

/s/ *Elaine M. Maki*

Elaine M. Maki, CSR, RPR
Certified Shorthand Reporter
Registered Professional Reporter

Mount Clemens, Michigan
November 27, 2012

ATTACHMENT D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

GUS GHANAM,

Plaintiff,

vs. Case No.: 2012-1739-CZ

JOHN DOES,

Defendant.

_____/

MOTION HEARING,

BEFORE THE HONORABLE JOHN C. FOSTER

Mount Clemens, Michigan - Monday, September 10, 2012

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I N D E X

WITNESS/PROCEEDINGS:	PAGE
None Offered	

E X H I B I T S

NUMBER	IDENTIFICATION	PAGE
None Offered		

Monday, September 10, 2012

Mt. Clemens, Michigan

At about 8:09 a.m.

(REPORTER'S NOTE: "Inaudible" means a word or words were not heard well enough to be able to discern a proper interpretation wither because of shuffling of papers, or the speaker did not talk loud enough, or was notpicked up by the microphones.)

COURT CLERK: Ghanam versus Does.

THE COURT: For the record, gentlemen.

MR. DOLAN: May it please the Court, your Honor, appearing on behalf of plaintiff, John Dolan.

MR. BURDETT: Good morning, your Honor, on behalf of third-party, Joseph Munem, Bill Burdett.

Your Honor, this is my motion to stay discovery pending the application for Leave to Appeal that we filed with the Court of appeals. I think a lot of the points were laid out in my brief so I won't repeat those. I simply want to address a couple of the points in plaintiff's brief simply. Simply, a lot of the focus that's in the cases that they cite, especially with regard to rhetorical hyperbole, don't involve public officials like Mr. Ghanam. This is an instance

where we don't want to reveal who they are because we can't put that horse back in the barn and we believe that Mr. Ghanam would, you know, there's a possibility with public officials to be able to take some sort of action that we couldn't otherwise identify.

MR. DOLAN: Your Honor, the Court, I think, has already enumerated the reasons for its prior ruling, which apply also with respect to the stay.

First of all, we have absolutely no interest that's been disclosed on the record yet by Mr. Munem that indicates that he's got the proper credentials to bring this lawsuit and carry it forward. There are standing requirements, of course, for initiating litigation, and in this instance he's bringing forth arguments without even identifying what, if any, relationship he has to these issues.

He's simply a person who we want to depose at this time. He, himself, has divulged absolutely no evidence on this record and for the Court to establish that he's got any ability to properly carry this lawsuit forward.

Secondly, as the Court pointed out previously, there really is no confidentiality issue in this matter. The confidentiality in this matter is completely within the control of the person and/or persons who operate

this website. A form was signed by the -- a form is signed by persons who utilize the website that indicate that in the instance of a formal complaint or in the instance of litigation that their identities may be disclosed. Importantly, though, beyond that, there's nothing within this forum that indicates that there may be other circumstances where their names are disclosed as well.

There's no promise of confidentiality when you utilize this forum. There's no -- this is far different than, for example, the situation of an anonymous confidential source for a newspaper reporter. In that situation there's so-to-speak a quid pro quo in the sense that the reporter gains the information on the promise of confidentiality. Here, nothing like that exists. There's absolutely nothing to indicate that the names won't at some particular time be disclosed. There is no confidentiality. The issue of disclosure rests solely within the persons who operate the website.

Third, the words do impute a crime. They definitely concern the employment of Mr. Ghanam, who, as has been represented, is the assistant superintendent of public works in the City of Warren. They relate to his employment and they accuse him of a crime. They say that he's involved in the disappearance of the salt,

that he may know the whereabouts of the salt, and finally, and more importantly, they say that he specifically profited from the sale of the city's salt.

These are defamation. This is all defamation, per se. It's accusation of a crime and it's impugning his employment.

With regard to the notion here that somehow the genie can't be put back in the bottle, that's a specious argument because, as we all know, when persons utilize websites they have the ability to create user names. All that would happen here is that particular user name that's associated with this individual will be disclosed. There's nothing to prevent someone from creating a new user name and coming back and using it and, once again, establish anonymity under a different user name.

The further suggestion that somehow there's going to be harm to the person who's name is disclosed through means other than litigation itself is completely unfounded. There's been not one shred of evidence, no affidavit, no statement of fact indicating the nature of the harm, who would perpetrate that harm and the circumstances understand which it may occur. So there's, again, simply no facts or evidence supporting the -- just the argument itself that's been made by

counsel.

Importantly, from our side of the fence, however, your Honor, we've only got a one-year statute. These statements were made at the end of January and very beginning of February of 2012. Additionally, as we pointed out in our brief, the cause of action occurs when the harm is done, when the published statement is made. We only have one year within which to successfully initiate our action and that period is actually shortened with regard to us having the opportunity to fully present damages because there's a statute that requires us, if we want to have damages resulting from a per se claim, to demand a retraction. That statute says that we have to make the demand for retraction, get it served and allow a reasonable period of time to respond. So our period of time is actually far shorter than one year and, accordingly, we're in a situation where if a stay is granted it does severely restrict us with regard to our ability to successfully initiate the litigation in the first place.

THE COURT: Anything else?

MR. BURDETT: Your Honor, I would simply respond with regard to the standing argument that Mr. Munem is certainly vigorously arguing this and that the fundamental tenant of the first amendment, especially

when it comes to anonymous speech, we don't know who these posters are. Mr. Munem is vigorously defending this because he is the person who would be spending the time in deposition, possibly disclosing information about who we don't know at this point. But, also, I would point out that the relation back statutes would allow, you know, this action was filed in April and the relation this could relate back to any time, you know, when they identify these individuals the statute of limitations would be related back to the date of filing. So we're not up against a statute of limitations issue here.

THE COURT: You know, you brought this action and I've been -- you brought the action, but you brought this motion. I listened, was it last week or two weeks ago, and I have paid close attention to try to read this and try to see your argument through your eyes or your client's eyes. I still have a grave difficulty. The first amendment is important to all of us. It's one of the things that makes our nation strong. And so, my fear of impinging on that is great. So I'm very careful, I hope, when I look at it. But, in this case, what I understand is happening is that Mr. Ghanam is seeking to depose Mr. Munem who said he was acting as a broker to sell the site to some person, seeking to find

out the name of the owner of the site, not even yet the persons who may or may not have posted.

If the owner of the site wishes, after Mr. Munem is deposed, to stand up and say, you know, this is why those releases aren't good, this is why those agreements to allow disclosure aren't good, because I own the site, then we get closer to the issue of the first amendment. But Mr. Munem's only participation in this is an economic activity of brokering the sale of an entity. On top of it, it's an entity that uses the public air waives through the cable television system. Those waives were sold by the communities, given by the communities and given by the government for people to make use of in the best interest of the community and the best interest of society. For them, for him to say he's going to make economic benefit for himself out of it, but not disclose who the entity is, even goes further to my concern about where we're headed if I don't require him to do so. I don't see any infringement of the first amendment in this aspect of the case. That doesn't mean if it goes further I might not change my mind. But, at this point, it is someone who has no relationship whatsoever other than that he offered to broker the sale of this entity.

So let's find out who the entity, who the

person is. And if that person then wants to stand up and raise some arguments, let's hear those arguments. Maybe they will be more valid because they have more of an interest and can explain to us what his or her or their or its interpretation of these agreements by these posters, that they weren't worried or that they allowed their names to be disclosed if they had to be in court settings. They're the ones that said sign the agreement, not Mr. Munem.

So I am going to deny the stay at this time.

MR. DOLAN: Thank you, your Honor.

(At about 8:19 a.m., Proceedings Concluded).

* * *

State of Michigan)
County of Macomb)

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I, Elaine M. Maki, Certified Shorthand Reporter for the Circuit Court for the County of Macomb, do hereby certify that the foregoing pages one through 11, inclusive, comprise a true and correct transcript of the digitally recorded proceedings had in the matter of GHANAM vs. DOES, Case No. 2012-1739-CZ, before the Honorable John C. Foster, held on Monday, September 10, 2012.

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If this transcript does not contain an original signature, it is not a certified transcript.

/s/ *Elaine M. Maki*

Elaine M. Maki, CSR, RPR
Certified Shorthand Reporter
Registered Professional Reporter

Mount Clemens, Michigan
November 28, 2012