No. 09-3386

IN THE APPELLATE COURT OF ILLINOIS
FIRST APPELLATE DISTRICT

LISA STONE, as mother and next friend of Jed Stone, Petitioner-Appellee, v. PADDOCK PUBLICATIONS, INC., Respondent, and JOHN DOE, Respondent-Appellant.	Appeal from Cook County Circuit Court Circuit Case No: 09 L 5636 Trial Judge: Jeffery Lawrence Date of Notice of Appeal: December 7, 2009 Date of Final Order: November 18, 2009

BRIEF OF RESPONDENT-APPELLANT JOHN DOE

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ORAL AGRUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

Respondent John Doe ("Doe") has appealed Judge Jeffrey Lawrence's order providing for the turnover of Doe's identity to petitioner Lisa Stone ("Stone"), as mother and next friend of Jed Stone ("Jed"), pursuant to Stone's Illinois Supreme Court Rule 224 Petition for Discovery ("Petition") and subpoenas issued thereunder. (A-103) The Petition sought disclosure from Respondent Paddock Publications, Inc., d/b/a The Daily Herald, Inc. ("Daily Herald"), of Doe's identity as a result of anonymous comments made by Doe under the pseudonym "Hipcheck 16" during an exchange with a poster using the pseudonym "UncleW" on a Paddock maintained Internet comment board. (A-35 to A-38) Stone alleges that Doe's comments defamed Jed. (A-1)

Because anonymous speech is constitutionally protected, Judge Lawrence was required, but failed, to ensure that Stone's allegations relative to Doe's comments were viable and sufficient to warrant the disclosure of Doe's identity to Stone. Doe argues on appeal, in part, that the circuit court erred by failing to determine whether Stone's identified claims could survive a motion for summary judgment before ordering the disclosure of Doe's identity to Stone.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court erred by ordering the disclosure of an anonymous Internet commenter's identity to petitioner.

2. Whether the circuit court erred by failing to apply any standard to test the sufficiency of petitioner's identified claims before ordering the disclosure of an anonymous Internet commenter's identity to petitioner.

3. Whether the circuit court erred by ordering the disclosure of an anonymous Internet commenter's identity to petitioner without requiring petitioner to demonstrate that petitioner's identified claims could survive a motion for summary judgment.

4. Whether the circuit court erred by ordering the disclosure of an anonymous Internet commenter's identity to petitioner without balancing the interests in favor of and against disclosure.

5. Whether the circuit court erred by determining that the Illinois Citizen Participation Act at 735 ILCS 110/1 *et. seq.* does not apply to a S. Ct. R. 224 proceeding.

JURISDICTION

This appeal is taken as of right, pursuant to S. Ct. R. 301 and 303, from an Order entered on November 18, 2009, ordering the disclosure of documents containing Doe's identity and address to Stone. (A-103) The Notice of Appeal was filed pursuant to Supreme Court Rule 303 on December 7, 2009. (A-105)

RULES AND STATUTE INVOLVED

Illinois Supreme Court Rule 224 and the Illinois Citizen Participation Act at 735 ILCS 110/1 *et seq.*

STATEMENT OF FACTS

On April 9, 2009, Doe posted the following comment, using the pseudonym "Hipcheck 16", on an Internet comment board under a Daily Herald website article regarding an election of the Village of Buffalo Grove trustees:

> Thanks for the invitation to visit you, but I'll have to decline. Seems like you're very willing to invite a man you only know from the internet over to your house – have you done it before, or do they usually invite you to their house?
>
> ***
>
> Plus now that you stupidly revealed yourself, you may want to watch what you say here . . .

(A-38) Doe's comment was posted in response to a comment on the same Internet comment board by a poster using the pseudonym "UncleW." (A-35 to A-38)

On May 12, 2009, Stone filed the Petition seeking to discover the identity of "Hipcheck16", known as Doe in this proceeding. (A-1) On June 11, 2009, Stone filed an Amended Petition for Discovery identical to the original Petition, but attaching Stone's verification of the allegations. (A-3) The Petition alleged that Stone was entitled to discover the identity of Hipcheck16 because Hipcheck16's April 9, 2009 comments on the Daily Herald website defamed her son Jed. (A-3)

On June 19, 2009, the circuit court granted Stone leave to issue interrogatories and document requests limited to discovering information "necessary to identify the poster named in the Amended Petition." (A-6) On July 15, 2009, Stone filed a Motion to Compel Compliance with Subpoena ("Motion to Compel"). (A-7) The Motion to Compel sought an order directing Comcast Cable ("Comcast") to produce documents responsive to Stone's July 14, 2009 subpoena seeking production of documents sufficient to identify the subscriber associated with the IP address

24.1.3.203. (A.-7; A-18) The Motion to Compel asserted that the IP address was that of the poster of the comments alluded to in Stone's Petition. (A-7)

On July 21, 2009, the circuit court ordered Comcast to respond to subpoena, but conditioned that response on Comcast's provision of notice of the subpoena to the subscribers to the subject IP address. (A-11) The July 21, 2009 Order also provided the subscribers 14 days from the date of Comcast's notice to file an objection to the subpoena. (A-11) After receiving notice of the subpoena from Comcast, Doe intervened in the proceeding by filing a Motion to Quash Subpoena on August 5, 2009. (A-14) On September 25, 2009, the circuit court denied Doe's Motion to Quash Subpoena and ordered Comcast to produce the subscriber's identity *in camera.* (A-19)

On October 9, 2009, Doe filed a Motion in Opposition to Turnover of Identity and Stone filed a Motion to Disclose Comcast's Response to Subpoena. (A-20) On October 9, 2009, Stone filed Petitioner's Motion to Disclose Comcast's Response to Subpoena. (A-29) On October 23, 2009, Doe filed a Response to Petitioner's Motion to Disclose Comcast's Response to Subpoena. (A-39) On October 28, 2009, Stone filed Petitioner's Response to John Doe's Motion in Opposition to Turnover of Identity. (A-63) On November 4, 2009, Doe filed a Reply in Support of Motion in Opposition to Turnover of Identity and Stone filed Petitioner's Reply in Support of Motion to Disclose Comcast's Response to Subpoena. (A-73; A-78)

On November 9, 2009, the circuit court denied, in part, Doe's Motion in Opposition to Turnover of Identity and granted, in part, Stone's Motion to Disclose Comcast's Response to Subpoena by ordering the disclosure of John Doe's identity to

Stone pursuant to a protective order. (A-97) On November 18, 2009, the circuit court entered an order providing for disclosure of Doe's identity to Stone and her agents on December 18, 2009, but prohibiting disclosure of the identity to third parties. (A-103) Doe filed a motion to stay the turnover of his identity pending appeal on November 16, 2009, which was granted by the circuit court's order of December 18, 2009. (Doe's Motion for Stay Pending Appeal and for Supreme Court Rule 304(a) Finding is omitted from the Record on Appeal for reasons unknown to Doe's counsel, but the grant of the stay pending appeal is not at issue on this appeal.) Doe filed a Notice of Appeal on December 7, 2009. (A-105)

ARGUMENT

I. Introduction

This appeal involves important and unresolved constitutional questions regarding the ability to use Illinois courts to unmask anonymous online speakers in violation of their First Amendment rights. Under the facts before the circuit court, disclosure of Doe's identity was ordered after Stone filed a Petition and briefing arguing that Doe's comments defamed her son, but which failed to sufficiently allege one viable cause of action against Doe. Implementation of the circuit court's disclosure order would result in an egregious violation of Doe's First Amendment rights because the comments identified by Stone were so innocuous that her claims may not be taken seriously by any reasonable reader of the comments. If the reasoning of the circuit court is adopted in Illinois, anonymous online speakers will be stripped of an established First Amendment protection without requiring parties seeking disclosure of an anonymous speaker's identity to establish the merit of their claims. This would open the door to the use of Illinois courts as forums for the public shaming and intimidation of anonymous political speakers. Because the First Amendment protects the speech at issue here, Doe respectfully requests that this Court reverse the circuit court's order requiring the disclosure of Doe's identity to Stone.

II. Standard of Review

A. Violation of Doe's Constitutional Rights

A reviewing court must apply a *de novo* standard of review when determining whether a person's constitutional rights have been violated. *Doe A. v. Diocese of Dallas,* 234 Ill.2d 393, 407 (2009).

B. Applicability of Citizen Participation Act at 735 ILCS 110/1 *et. seq.*

A reviewing court reviews the lower court's construction and application of a statute under a *de novo* standard of review. *Blum v. Koster*, 235 Ill.2d. 21, 29 (2009).

III. The Law of Obtaining the Identity of an Anonymous Speaker

The advent of electronic communications has required courts to apply long-standing constitutional principles to new technologies and communications media. With particular relevance to this case, courts have been required to apply First Amendment principles to situations where a plaintiff seeks to discover information that would identify an anonymous online speaker. Courts have long recognized that the First Amendment of the United States Constitution protects anonymous speech and these same principles have been applied to electronic communications. In *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), the Supreme Court of Delaware issued the first opinion from a state supreme court to address this specific issue. In doing so, it adopted a summary judgment standard as the most effective means of balancing the interests of all parties.

A. Protection Of Anonymous Speech

The First Amendment protects the right to speak anonymously. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 200 (1999); *Talley v. California*, 362 U.S. 60, 65 (1960). The Supreme Court has stated that "[a]nonymity is a shield from the tyranny of the majority," that "exemplifies the purpose" of the First Amendment: "to protect unpopular individuals from retaliation ... at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (holding that 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"). Consequently, courts must "be vigilant ... [and] guard against undue hindrances to political conversations and the exchange of ideas." *Buckley*, 525 U.S. at 192. This vigilant review "must be undertaken and analyzed on a case-by-case basis," where the court's "guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. A.D. 2001).

B. Privileged Speech Applied To Anonymous Electronic Communications

The principles protecting anonymous speech have been extended to the Internet and electronic communications. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is "no basis for qualifying the level of First Amendment protection that should be applied to" the Internet). Because the First Amendment protects the right to speak anonymously and this right extends to electronic communications, *any* discovery device seeking anonymous speakers' names and addresses is subject to a qualified privilege. Consequently, courts must consider this qualified privilege before authorizing discovery in such cases. *See Sony Music Entertainment v. Does,* 326 F.Supp.2d 556, 565 (S.D.N.Y. 2004) ("Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns."). In so doing, the courts addressing these issues have made efforts to balance the interests of the anonymous speakers against the plaintiff's or petitioner's need for the subpoenaed information. *See, e.g.*, *Mobilisa, Inc. v. Doe,* 170 P.3d 712, 720 (Ariz. Ct. App. 2007); *Cahill*, 884 A.2d 451; *Lassa v. Rongstad*, 718 N.W.2d 673 (Wisc. 2006), *reh'g denied*, 724 N.W.2d 207, *cert. denied*, 127 S. Ct.

2251; *Doe v. 2theMart.com*, 140 F.Supp.2d 1088 (W.D. Wash. 2001); *Dendrite*, 775 A.2d at 771; *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal.1999).

As these courts have recognized, an inherent problem arises in such cases because, at the outset of litigation, plaintiffs typically rely upon mere allegations of wrongdoing. However, a privilege is generally not overcome by mere allegations. Indeed, a serious chilling effect on anonymous speech would result if Internet speakers knew they could be identified by persons who merely allege wrongdoing, without necessarily having any intention of carrying through with actual litigation. *See, e.g., Seescandy.com*, 185 F.R.D. at 578 ("People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity."); *see also 2theMart.com*, 140 F.Supp.2d at 1093 ("If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment Rights. Therefore, discovery requests seeking to identify anonymous Internet users must be subject to careful scrutiny by the courts.")

Consequently, courts have employed standards and imposed strict requirements upon plaintiffs that must be met prior to authorizing the discovery of information identifying anonymous speakers. *See, e.g., Mobilisa, Inc.,* 170 P.3d at 720; *Cahill*, 884 A.2d at 460-461; *2theMart.com*, 140 F.Supp.2d 1088; *Dendrite*, 775 A.2d at 771; *Seescandy.com*, 185 F.R.D. at 578.

C. Emergence Of The Cahill Standard

In October 2005, the Delaware Supreme Court addressed the issue of what standard should be applied to determine when the disclosure of an anonymous speaker's identity could be obtained through discovery. In so doing, it thoroughly analyzed the various standards employed by other courts in similar circumstances. The *Cahill* court concluded that the most effective standard would be a synthesized version of the standard adopted in *Dendrite Int'l, Inc. v. Doe No. 3,* 775 A.2d 756, 760-61 (N.J. Super. A.D. 2001).

Essentially, the standard employed by *Cahill* requires the Plaintiff seeking discovery of an anonymous speaker's identity to: (a) "undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for an order of disclosure, and to withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the application" and (b) demonstrate that it would survive a summary judgment motion. *Cahill*, 884 A.2d at 460-461. With respect to the notification requirement, the Court held that:

> The notification provision imposes very little burden on a [] 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. As to the summary judgment requirement, the Court concluded that requiring a plaintiff to demonstrate it would survive a summary judgment provides the most effective balance between a plaintiff's rights and those of the defendant anonymous speaker. *Id.* The *Cahill* opinion represented the first state supreme court opinion to address these issues.

D. The Mobilisa Standard

In 2007, the Arizona Court of Appeals held that the summary judgment standard was the correct approach, but also required a party seeking information about an anonymous speaker to demonstrate that the "balance of the parties' competing interests favors disclosure."[1] *Mobilisa, Inc.*, 170 P.3d at 720. Thus, under the *Mobilisa* standard, a party seeking disclosure of information about an anonymous (or pseudonymous) individual must (a) provide notice to the anonymous individual and an opportunity to respond; (b) demonstrate that it would survive summary judgment; and (c) demonstrate that a balance of all interests would weigh in favor of disclosure. *Id.* This Court should adopt the *Mobilisa* standard.

Clearly, a standard must be adopted by which a trial court can determine whether the identity of an anonymous speaker should be disclosed in discovery. The standard should be applied consistently *regardless of the discovery method used to obtain such identity*. As each of the courts in *Mobilisa*, *Cahill*, and *Dendrite* recognized, a summary judgment standard best protects the constitutional interests involved. That being said, this court should adopt the *Mobilisa* standard. It synthesizes the elements of the other standards and provides the most effective means to balance the interests of all involved. As such, this Court should require the petitioner to demonstrate that she would survive a motion for summary judgment as to at least one of her identified claims.

IV. Stone Does Not Meet the Summary Judgment Standard

After applying the proper standard to the claims identified by the Petitioner, it

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[1] In essence, the *Mobilisa* court reinstated an element of the *Dendrite* standard that *Cahill* had omitted.

becomes clear that the petitioner could not survive summary judgment and that the Circuit Court erred in ordering disclosure of the anonymous speaker's identity.[2] Indeed, Petitioner has failed to show any actionable claim for defamation *per se*, defamation *per quod*, or false light. Consequently, she would not survive a motion for summary judgment on any of these claims.

A. Summary Judgment Standard

Summary judgment is proper when the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, reveal there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill.2d 307, 315, 290 Ill.Dec. 218, 821 N.E.2d 269 (2004).

In the context of determining whether an anonymous speaker's identity should be disclosed, the *Mobilisa* standard requires that a plaintiff or petitioner demonstrate that she would survive summary judgment. *Mobilisa, Inc.*, 170 P.3d at 720. Where there are multiple claims, she would only need to demonstrate this with respect to one claim directed toward the anonymous speaker. For, she would only need one claim against the anonymous speaker to proceed past summary judgment. That being said, an anonymous speaker need only demonstrate that the plaintiff or petitioner could not succeed as to *at least one element for each claim*. For, unless the plaintiff or petitioner can succeed as to all elements of a particular claim, the claim cannot survive.

B. Stone Failed to Establish Defamation *Per Se*

[2] With respect to the Mobilisa notice requirement, the Petitioner did not provide proper notice to John Doe. That being said, John Doe obviously received notice in that he opposed the Petition and disclosure of his identity and has filed this appeal.

Stone failed to establish that a claim for defamation *per* se against Doe would survive a motion for summary judgment. Moreover, Stone failed to allege facts in support of a claim for defamation *per se* that would survive a motion to dismiss. Supreme Court Rule 224 permits pre-suit discovery "for the sole purpose of ascertaining the identity of one who may be responsible in damages... ." Doe cannot be "responsible in damages" under S. Ct. R. 224 because Stone failed to offer allegations in the circuit court proceeding that state a cause of action for defamation *per se*.

In order to sufficiently allege a cause of action for defamation *per se,* the statement about the plaintiff must fall into one of the following categories:

> (1) statements imputing the commission of a crime; (2) statements imputing infection with a loathsome communicable disease; (3) statements imputing an inability to perform or want of integrity in performing employment duties; (4) statements imputing a lack of ability or that otherwise prejudice a person in his business or profession; and (5) statements imputing adultery or fornication.

Tuite v. Corbitt, 224 Ill.2d 490, 501 (2006). Additionally, a claim for defamation *per se*, like common law fraud, must be set forth with a "heightened level of precision and particularity." *Green v. Rogers*, 234 Ill.2d 478, 495 (Ill. 2009). A statement capable of an innocent construction may not be defamatory *per se*. *Id.* at 500. Stone's Reply in Support of Motion to Disclose Comcast's Response to Subpoena argued that Doe's comments were defamatory *per se* because they fell under the first and fifth categories of defamation *per se*. (A-84)

1. *Doe's Comments Do Not Relate to the Commission of Crime*

Stone erroneously argued that the comment, "[s]eems like you're very willing to invite a man you only know from the internet over to your house – have you done it before, or do they usually invite you to their house?", imputes UncleW's violation of 720

ILCS 5/12-16(d) and 720 ILCS 5/11-6.5(a)(1)(ii). (A-84) Under 720 ILCS 5/12-16(d), an "accused" commits aggravated criminal sexual abuse if the accused "commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was at least 5 years older than the victim." Under 720 ILCS 5/11-6.5, "a person commits indecent solicitation of an adult if the person ... arranges for a person 17 years of age or older to commit an act of ... sexual penetration ... [or] sexual conduct" with a person under the age of 17.

However, Stone failed to identify comments by Doe that even touch on the subject of sex, much less comments describing solicitation of adults for sex, "sexual penetration" or "sexual conduct." Nor, do Doe's comments describe UncleW's age or anyone else's age. Finally, Stone's argument ignores the fact that UncleW would not be the perpetrator of a crime, but the victim of the crime, if he is in fact under 17 years of age. Accordingly, Doe's comments did not impute the commission of an act in violation of either 720 ILCS 5/12-16(d) or 720 ILCS 5/11-6.5.

2. *Doe's Comments Do Not Relate to Fornication*

Because Doe's comments have nothing to do with sex, they cannot impute fornication. Thus, the fifth category of defamation *per se* is inapplicable as well.

3. *The Innocent Construction Rule Bars Defamation Per Se Liability*

Regardless of the category of defamation *per se* relied upon by Stone, Doe cannot be liable because Doe's comments can be innocently construed. *Tuite v. Corbitt*, 224 Ill.2d 490, 502. "[A] statement 'reasonably' capable of a nondefamatory interpretation, given its verbal or literary context, should be so interpreted. There is no balancing of reasonable constructions * * *." *Green* at

500 *quoting Mittelman v. Witous*, 135 Ill.2d 220, 232 (1989) *abrogated on separate grounds*. Whether a statement is capable of innocent construction is a question of law for the court. *Tuite* at 509.

Stone's strained interpretation of Doe's comments does not transform her allegations into a viable claim for defamation *per se*. Defamation *per se* cannot be established when the claimant relies upon innuendo. *Dombrowski v. Shore Galleries, Inc.*, 59 Ill.App.3d 237, 239 (1st Dist. 1978). Because Doe's comments do not refer to sexual conduct, Stone's charge of defamation *per se is* entirely a creature of the innuendo injected by Stone herself. Doe's comments are capable of an innocent construction and, as a result, cannot be defamatory *per se*.

C. Stone Failed to Establish Defamation *Per Quod*

Stone also argued that Doe's comments were actionable as defamation *per quod*. (A-85) However, a statement cannot serve as the basis for liability for defamation *per quod* unless extrinsic circumstances are plead that explain why the statement demonstrates injurious meaning. *Thomas v. Fuerst*, 345 Ill.App.3d 929, 934 (1st Dist. 2004). Stone failed to identify facts extrinsic to Doe's comments demonstrating injurious meaning. Accordingly, Doe cannot be liable for defamation *per quod*.

Moreover, Stone failed to allege that Jed suffered special damages, which is required before a statement is actionable as defamation *per quod*. *Moriarty v. Greene*, 325 Ill.App.3d 225, 236 (1st Dist. 2000); *see also Zucker v. The Chicago Tribune Company*, 2004 WL 3312757, *5 (Ill. App. 1st Dist. 2004)(in a defamation *per quod* action, special damages must be plead with particularity and "general allegations of

damage to health or reputation, economic loss, or emotional distress, are insufficient to plead special damages.") Because Stone failed to identify special damages, Doe's liability for defamation *per quod* cannot be established.

D. The First Amendment Bars Defamation Actions Not Based Upon the Assertion of Facts

In *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, the Illinois Supreme Court held that the First Amendment "prohibits defamation actions based on loose, figurative language that no reasonable personal would believe presented facts." 227 Ill.2d 381, 397 (2008). If a statement does not state an actual fact, it is protected by the First Amendment and is not actionable as defamation. *Id.* at 398. Determining whether a statement states an actual fact requires a court to apply the following criteria: "(1) whether the statement has a precise and readily understood meaning, (2) whether the statement is verifiable, and (3) whether the statement's literary or social context signals it has factual content." *Id.* The Illinois Supreme Court did not reverse the First District Appellate Court's application of the above criteria to private party publications about another private party. *Id.* at 400.

Analyzing Doe's comments under the first criterion, a reader would have to strain considerably to construe them as having the meaning argued by Stone. Doe's comments do not express a factual assertion about UncleW. Nor do they mention UncleW's name, UncleW's age, or sexual conduct engaged in by UncleW. Instead, Stone injects innuendo into Doe's comments that a casual reader of the statement would have no reason to infer from the words themselves. Thus, the comments do not have a "precise or readily understood meaning" and fail to meet the first *Imperial Apparel* criterion. *Id.*

The second *Imperial Apparel* criterion also demonstrates that the comments are not factual, because they are not verifiable. *Id.* Doe's comments are merely an observation and a question directed at the screen name "UncleW." Stone did not argue that Doe ever provided an answer to the question that resulted in injury to UncleW. Nor did Stone explain how one could verify purported facts published about a screen name in a web forum. Accordingly, the comments do not pass muster under the second *Imperial Apparel* criterion.

Finally, Doe's comments do not satisfy the third *Imperial Apparel* criterion because nobody would reasonably believe that posters anonymously sparring on a newspaper web forum were conveying factual content. Ensuring that a statement conveys a factual assertion protects against a chilling effect on "imaginative expression" and "rhetorical hyperbole" which adds to public debate. *Milkovich v. Lorraine Journal Co.*, 497 U.S. 1, 20 (1990). In deciding whether a statement is factual, the court must consider the circumstances in which the statement was made, especially where the statement "was made in public debate ... or other circumstances in which an audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole." *Lewis v. Time Inc.*, 710 F.2d 549, 553 (9th Cir. 1983); *see also Underwager v. Channel 9 Australia*, 69 F.3d 361, 366-367 (9th Cir. 1995)(comments made in the context of heated debate would be viewed as spirited critique and audience would expect emphatic language on both sides.)

Here, because the statements were made on an Internet bulletin board, a strong presumption applies that the statements are not factual. *Global Telemedia Int'l Inc. v. Doe*, 132 F.Supp.2d 1261, 1267 (C.D. Cal. 2001); *see also Rocker Mgmt. v. John Does*,

2003 WL 22149380, *2-*3 (N.D. Cal. 2003)(holding that "vague" and "hyperbolic" statements posted in an internet chat room are not defamatory); *see also SPX Corp. v. Doe*, 253 F.Supp.2d 974, 980-81 (N.D. Ohio 2003)(holding that "imprecise" or "figurative" statements weigh against a finding of defamation). Because Doe's comments were mere rhetorical hyperbole, they fail to meet the test under *Imperial Apparel* and are not actionable under the First Amendment.

E. In Order to be Actionable, Speech Must Relate to an Identifiable Person

In order to be actionable for defamation, there must be damage to the plaintiff in the "eyes of others." *Voris v. Street & Smith Publications*, 330 Ill.App.409, 412 (1st Dist. 1947). The *Voris* court held that an allegedly libelous article about an individual referred to only as "Snapper Charlie" was not actionable because nobody was alleged to have understood who the subject of the article was. *Id.* at 413. The *Voris* opinion explained why the failure to reference the plaintiff's name was fatal to the claim:

> It is not enough to constitute libel that plaintiff knew that he was the subject of the article, or that defendants knew of whom they were writing. It should appear upon the face of the complaint that persons other than these must have reasonably understood that the article was written of and concerning the plaintiff, and that the so-called libelous expression related to him. An averment of fact extrinsic to the article, and essential to an identification of the article with the person complaining, cannot be embodied in an innuendo. The office of an innuendo is to deduce inferences from premises already stated, not to state the premises themselves. *Id.*

Stone failed to cite one instance in which Doe stated UncleW's name. Stone's argument assumes that the readers of the Daily Herald comment board knew how many children Stone has, what their names are, and which of Stone's children posts under the screen name "UncleW." Stone's argument also assumes that readers of Internet comment boards accept at face value that anonymous posters offering hints at their identity are who

they claim to be. Because readers of Doe's purported defamatory comments do not identify UncleW, the comments cannot be defamatory as a matter of law.

F. Stone Failed to Establish False Light Invasion of Privacy

Stone failed to offer alleged facts establishing an action for false light invasion of privacy. False light invasion of privacy exists where the defendant (1) "gives publicity to a matter concerning another that placed the other person before the public in a false light"; (2) the false light "would be highly offensive to a reasonable person"; and (3) the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Zucker* at *5.

The second element of the false light analysis relating to highly offensive publicity is met "when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity." *Id.* The second element is not met by the allegation of "false facts that offend a hypersensitive individual... ." *Id.*

Stone failed to establish the first element of false light because she did not allege the publication of facts about her son, Jed. Rather, she alleged the publication of an exchange between "Hipcheck16" and "UncleW." (A-89 to A-95) Moreover, she failed to meet the first element because Doe's comments do not assert a factual matter that can be deemed false.

Next, no reasonable person would interpret Doe's comments as highly offensive. No crude or derogatory language was used by Doe. An innuendo laden interpretation of Doe's comments does not transform them into language highly offensive to a reasonable person. Stone's overreliance on innuendo establishes her hypersensitivity, which takes

the comments out of the realm of false light liability. Additionally, Stone made no allegation about Doe's knowledge or his reckless disregard of the truth.

Moreover, a claim for false light invasion of privacy must allege special damages. *Zucker* at *6. No special damages were alleged by Stone. For each of these reasons, Stone failed to establish false light invasion of privacy.

V. The Citizen Participation Act Applies and Immunizes Doe's Comments

Because Doe's First Amendment rights are jeopardized by Stone's Petition, and because his comments were issued in the context of a discussion about local government, the circuit court was required to apply the Illinois Citizen Participation Act at 735 ILCS 110/1 *et seq.* ("CPA"). The CPA immunizes acts in furtherance of constitutional rights of speech and association, regardless of intent or purpose, where such acts are genuinely aimed at achieving "government action, result or outcome." 735 ILCS 110/15.

Stone's Petition requested Doe's identity in connection with his comments posted in a forum used for the exchange of political speech and political ideas. In the same post complained of by Stone, Doe questioned the efficacy of Stone's campaign strategy and called for Stone to apologize and learn "something about finance before she is sworn in." (A-38)

The CPA applies to any "motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." 735 ILCS 110/15. Because the CPA broadly defines a claim within its scope as any "lawsuit, cause of action, claim, cross-claim,

counterclaim, or other judicial pleading or filing alleging injury", Stone's Petition was subject to the CPA.

Under the CPA, Stone was required to establish, by clear and convincing evidence, that Doe's comments were not immunized by the Act. The CPA states that it is the public policy of Illinois to encourage and safeguard the "constitutional rights of citizens and organizations to be involved and participate freely in the process of government." 735 ILCS 110/5. The CPA further provides that "information, reports, opinions, claims, arguments, and other expressions provided by citizens" are vital to ensure the effective operation of Illinois government. *Id.* The CPA requires the "laws, courts, and other agencies of this State" to "provide the utmost protection for the free exercise of [the] rights of petition, speech, association, and government participation." *Id.*

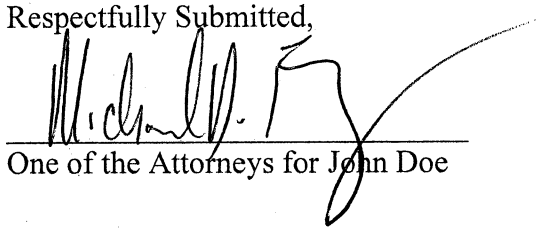
A court is required to dismiss claims subject to the CPA "unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or not in furtherance of acts immunized from, liability by this Act." 735 ILCS 110/20. The CPA must be "construed liberally to effectuate its purposes and intent fully." 735 ILCS 110/30.

Stone failed to offer clear and convincing facts showing that Doe was not immune under the CPA. 735 ILCS 110/20. Because Doe's comments were made furtherance of his political ideas and the expression of his ideas relative to government action, they were immunized under the CPA.

CONCLUSION

The First Amendment requires Illinois courts to protect the anonymity of speakers where a claimant seeking to unmask the speaker fails to establish any basis for the speaker's liability. In order to implement this protection here, Stone should be required to establish that she has a claim that would survive a motion for summary judgment, under the standard explained in *Mobilisa, Inc. v. Doe*. 170 P.3d 712, 720 (Ariz. Ct. App. 2007). Absent the application of any standard, Doe's First Amendment protections will be violated and anonymous political speech will suffer a significant chilling effect in Illinois. Accordingly, Doe respectfully requests that this Court reverse the November 16, 2009 order requiring the disclosure of his identity to Stone.

Respectfully Submitted,



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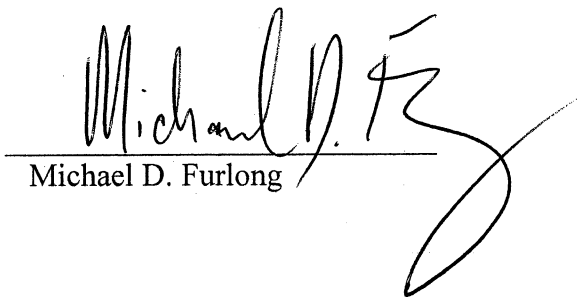
CERTIFICATION

Michael D. Furlong certifies that he is one of the attorneys for the Respondent-Appellant herein. Michael D. Furlong further certifies that the brief of the Respondent-Appellant conforms to the requirements of Rules 341(a) and (b) of the Illinois Supreme Court Rules. Michael D. Furlong further certifies that the length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is less than 50 pages.



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SUPREME COURT RULE 373 CERTIFICATE OF MAILING

I, Michael D. Furlong, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certify that on March 15, 2010, the foregoing Respondent-Appellant John Doe's Brief was filed by placing said nine copies of Brief in the U. S. Mail from Waukegan, Illinois, with proper postage prepaid, to the address set forth below and that said address was set forth on the envelope used for mailing the Brief(s) for filing:

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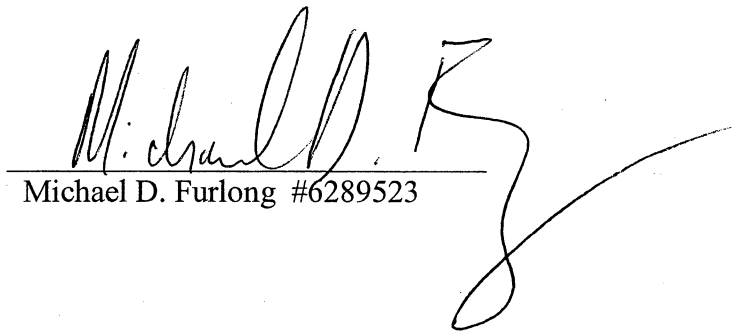

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