Attorney No. 45901

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

LISA STONE, mother and next friend of Jed Stone, a minor,	)	
Petitioner,	)	No. 09 L 5636
v.	)	Calendar D
PADDOCK PUBLICATIONS, INC., d/b/a/ The DailyHerald, Inc.	)	Hon. Jeffrey Lawrence
Respondent.	)	

PETITIONER'S RESPONSE TO JOHN DOE'S MOTION IN OPPOSITION TO TURNOVER OF IDENTITY

Petitioner Lisa Stone, as mother and next friend of Jed Stone, a minor, through her attorneys, hereby responds in opposition to John Doe's Motion in Opposition to Turnover of his Identity ("Motion") and, in opposing the Motion, represents as follows:

1. The present proceeding was initiated under Ill. Sup. Ct. Rule 224. Rule 224 is to be used in situations where a person is injured and does not know the identity of one from whom recovery may be sought. *Gaynor v. Burlington Northern and Santa Fe Ry.* 322 Ill. App.3d 288, 294 (5th Dist., 2001). "In such cases, there is a genuine need and, if the expiration of the statute of limitations is near, an urgent need to identify potential defendants so that a plaintiff is not without redress for the injury suffered" *Id.* "The language of the rule clearly limits discovery under it to the *identity* of those who may be responsible in damages. Once the identity of such persons or entities has been ascertained, the purpose of the rule has been accomplished and the action should be dismissed." *Roth v. St. Elizabeth's Hosp.* 241 Ill. App.3d 407, 413 (5th Dist., 1993).

2. Doe's motion is made with respect to a subpoena duces tecum which Petitioner

served on Comcast Cable Communications, L.L.C. ("Comcast") and which the Court on October 9, 2009 ordered be made returnable to the Court. Doe asks the Court to deny Petitioner access to information about the identity of the person or persons using the designation "Hipcheck 16" who posted defamatory and injurious statements about Petitioner's minor son on a weblog or "blog" maintained by the Respondent from IP address 24.1.3.203.

3. In the first paragraph of his Motion, Doe maintains that Petitioner "has refused to reveal the allegedly defamatory comment despite requests from counsel for John Doe." Even if this were true, it does not provide a basis for contending that Doe does not know what statements could be the subject of Petitioner's Rule 224 request. The statements were posted using an IP address assigned to a modem, router, personal computer or computer network which Doe controls or has access to. Furthermore, Petitioner revealed an example of the injurious statements in ¶ 14 of her own Motion to Disclose Comcast's Response to Subpoena, where she demonstrated that the person using the name "Hipcheck16" on April 9, 2009 at 10:53 a.m. posted on Respondent's public forum the following as public comment:

> . . .
>
> 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 . . .

Petitioner also attached to her Motion to Disclose a copy of the actual posting from Respondent's website. Petitioner has met what Doe claims is the "heightened" pleading standard required in defamation actions under *Green v. Rogers*, ___ Ill.2d ____, 2009 WL 3063399 (Sept. 24, 2009),

even though *Green* holds that the "heightened" standard is applicable only to claims for defamation *per se*:

> Although a complaint for defamation *per se* need not set forth the allegedly defamatory words *in haec verba*, the substance of the statement must be pled with sufficient precision and particularity so as to permit initial judicial review of its defamatory content. Precision and particularity are also necessary so that the defendant may properly formulate an answer and identify any potential affirmative defenses.

2009 WL 3063399, *7. On the page cited by Doe, Motion pp. 7-8, *Green* actually holds that this "heightened" level of particularity in pleading is not required for claims for defamation *per quod*. 2009 WL 3063399, *9. In her Motion to Disclose Doe's identity to her, Petitioner has set forth the defamation *in haec verba*, so she has met the *Green* standard for pleading defamation *per se*.

4. The disclosure to Petitioner of the identity of such person is required, as that individual is a potential defendant for remarks made publicly and directed to Petitioner's next friend. Those remarks are defamatory of Petitioner's next friend and maliciously cast him in a false light as a child who solicits and engages in sex with male pederasts.

5. In opposing the release of his identity, Doe asserts that the Court should deny Petitioner's request to turn over the identity on two grounds. First, Doe contends that Petitioner has not established, by clear and convincing evidence, that Doe's comments on the weblog were not immunized by the Illinois Citizen Participation Act, 735 ILCS 110/1 *et seq.* ("CPA"). Second, Doe argues that this Court must determine that all the elements of an action for defamation have been pleaded in this Rule 224 proceeding prior to the turning over of Doe's identity. As shown in paragraph 3 above, Petitioner has established all of the elements of her next friend's causes of action.

6. Doe's reliance on the CPA is inappropriate, as the statute is not concerned with

speech of the type which Doe posted on Respondent's blog on April 9, 2009. The CPA immunizes from liability "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government" except when such act is not *"genuinely aimed at securing favorable government action, result or outcome*." 735 ILCS 110/15 (emphasis supplied). The CPA stipulates as its goal the securing of "constitutional rights of citizens and organizations to be involved in and participate freely *in the process of government*." 735 ILCS 110/5 (emphasis supplied). The CPA attempts to "protect and encourage public participation in government to the maximum extent permitted by law." The CPA's Public Policy Statement shows that its framers designed it to address situations where claims had been filed "against citizens and organizations of this State as a result of their valid exercise of their constitutional right to petition, speak freely, associate freely and otherwise participate in and communicate *with government*." 735 ILCS 110/5 (emphasis supplied). The stated goal of the legislation is to address abuses of the judicial process where citizens and organizations involving themselves in public affairs had been intimidated, harassed and punished through what have come to be known as "Strategic Lawsuits against Public Participation" or "SLAPPs."

7. As there is no relationship between his defamation and an actual or attempted participation in government, Doe is not entitled to immunity under the CPA. Doe's language is "not generally aimed at procuring a favorable government action, result or outcome," his language is not protected by the CPA. Moreover, Doe has things completely backwards: the burden on him is an affirmative one to show that his speech is immunized by the CPA because it involves his communication with or participation in a unit of government. This he cannot do, as the speech in question was not directed to any government.

8. Doe has not shown how his malicious defamation is designed to obtain any "favorable government action, result or outcome." Rather, his statements were directed at the minor child of an individual who was then a successful candidate for public office. The Court can take judicial notice of the fact that the municipal elections for Buffalo Grove were held on April 7, 2009, that Petitioner was elected a trustee of Buffalo Grove in that election but did not take office until the following month, and that Doe's April 9, 2009 statement has nothing to do with the election in question. Consequently, the CPA affords Doe no immunity for his statements.

9. Moreover, the CPA's grant of conditional immunity for certain First Amendment activity relates only to substantive legal claims and does not relate to attempts to obtain information related to that claim, such as this Rule 224 Petition. CPA §15 limits the scope of the statute to any type of "claim" in any proceeding that 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." The CPA defines the term "claim" to "include any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing alleging injury." 735 ILCS 110/10. The instant petition seeks only information relating to the identity of "Hipcheck 16" and asserts no claim for damages. Consequently, no "claim" as that term is defined in the Act has been made.

10. Doe also asserts that Petitioner must demonstrate that Doe's comments are not protected speech prior to his identity being turned over. Citing *Dendrite Int'l, Inc. v. Doe No. 3*, 342 N.J. Super. 134 (2001), Doe argues "this Court should require [Petitioner] to allege with specificity the allegedly actionable comment, along with the context in which the comment was made, before John Doe's identity is revealed." As noted in paragraph 3 and elsewhere above, Petitioner has set

forth actual language imputing promiscuous sexual conduct to her minor son. The location, date and time of publication of the language has been set forth. These are the standards which *Dendrite* held must be met in order to permit discovery of the identity of one making anonymous statements. *Id.* at 141.

11. While *Dendrite* concluded that the plaintiff there failed to prove the alleged defamatory statements caused any harm, here the Court can see that Petitioner's next friend has a cause of action for defamation.

12. Doe's reliance on *Dendrite* is misplaced. In *Dendrite*, a corporation filed suit against Doe defendants and alleged it had been harmed by comments made anonymously by these Doe defendants about administrative actions taken by its president and other officers. The *Dendrite* court acknowledged that anonymity is not a protection against claims based on statements anonymously made:

> 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. The tort feasor can act pseudonymously 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 and 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 redress for grievances. However, this need must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. *People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law.*

Id. at 150-51, quoting *Columbia Ins. Co., v. Seescandy.Com,* 185 F.R.D. 573, 578 (N.D. Cal.1999) (emphasis supplied). Any other result would mean that statements which would otherwise be

actionable are rendered immune from action for having been made under the cloak of anonymity. *Dendrite* thus acknowledges that statements made anonymously are still actionable – it simply found that the statements made in that case would not survive a motion to dismiss.

13. Petitioner appreciates the need for a balance between the rights of her minor son and the right of anonymous expression. The Supreme Court has recognized that the right to speak anonymously is protected under the First Amendment to the United States Constitution. *Buckley v. Am.Constitutional Law Found.*, 525 U.S. 182 (1999) (invalidating a Colorado statute that required initiative petition circulators to wear identification badges); *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995) (overturning an Ohio law that prohibited the distribution of campaign literature that did not contain the name and address of the person issuing the literature); and *Talley v. California*, 362 U.S. 60 (1960) (invalidating a California statute prohibiting the distribution of any handbill that did not contain the name and address of the person issuing the literature). However, the Supreme Court has also held that the First Amendment does not protect false, defamatory speech. *Gertz v. Robert Welch. Inc.*, 418 U.S. 323, 340 (1974) ("[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake"); *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) ("[I]mportant social values which underlie the law of defamation" The Supreme Court has also recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation"). *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

14. Doe's reliance on *People v. White*, 116 Ill.2d 171 (1987) is misplaced. In *White*, the Illinois Supreme Court struck down as constitutionally infirm a provision in the Illinois Election Code which prohibited distribution of political literature which does not contain the names and addresses of persons publishing and distributing the literature. In so doing, *White* recognized the

right to be anonymous in political discourse, but it did not address the issue of whether that right extends to immunize statements which are defamatory or otherwise injurious. Doe seems to argue that the right to anonymity is not only absolute but immunizing as well, and his own authority shows the contrary.

15. "[W]here speakers remain anonymous there is also a great potential for irresponsible, malicious, and harmful communication, and the lack of accountability that anonymity affords is anything but an unqualified good. This is particularly true where the speed and power of internet technology makes it difficult for the truth to 'catch up' to the lie. ... Anonymity thus presents benefits, risks, and problems. To the extent that Courts take on the task of protecting it, balancing is inevitable" *Quixtar Inc. v. Signature Management Team, L.L.C.*, 566 F.Supp.2d 1205, 1214 (D. Nev. 2008). "[T]he right to speak anonymously, on the internet or otherwise, is not absolute and does not protect speech that otherwise would be unprotected". *Doe I v. Individuals*, 561 F.Supp.2d 249, 254 (D. Conn., 2008) (Motion to quash subpoena to internet service provider seeking identity of individual posting material on blog denied after party issuing subpoena made a *prima facie* showing that the posted material was actionable).

16. Doe's assertions to the contrary notwithstanding, the right of free speech provided for in Art. 1, §4 of the Illinois Constitution of 1970 is not a shield against liability for defamation. "The constitutional guarantees of freedom of speech do not include the right to slander and libel without incurring civil or criminal liability." *Welch v. Chicago Tribune*, 34 Ill. App.3d 1046, 1055 (1st Dist. 1975).

17. Hipcheck's, or Doe's, statements are libelous *per se*, as they claim that Petitioner's next friend regularly engaged in criminal sexual conduct.

18. Illinois law recognizes four invasion of privacy torts: (1) intrusion upon seclusion of another; (2) appropriation of a name or likeness of another; (3) publication given to private life; and (4) publicity placing another person in false light. *Lovgren v. Citizens First National Bank of Princeton*, 126 Ill.2d 411, 416 (1989), citing *Restatement (Second) of Torts* §§ 652B, 652C, 652D, 652E (1977). The third and fourth of these are applicable to acts of speech. Thus, even if the posting in question is not defamatory *per se*, if the statement is true, it still can be actionable as a publication of information which is inherently private, and if it is not true, it may be actionable for putting Petitioner's next friend in a false light.

19. The statements in question are not protected political speech. The statements were not uttered in a context which consisted otherwise of political discourse. The statements were made two days *after* an election had been concluded, they were made to and about a person who was not even eligible to vote, let alone act as a candidate, and they do not concern the election at all – they concern the supposed sexual tendencies exhibited by a minor.

For the foregoing reasons and for those described in Petitioner's Motion to Disclose Comcast's Response to Subpoena, Petitioner Lisa Stone respectfully requests that the Court deny John Doe's Motion in Opposition to Turnover of his Identity, that the Court release to Petitioner the information provided to the Court by Comcast in response to her subpoena, and that the Court grant Petitioner such other relief as it deems to be just and equitable under the circumstances.

Dated: October 27, 2009

LISA STONE, as mother and next friend of Jed Stone, a minor

By: _____
One of her attorneys

Tyma O'Connor, P.C.
Attorneys for Petitioner
105 W. Madison Street, Suite 2200
Chicago, Illinois 60602
(312) 372-3920
Attorney No. 45901

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