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Discovery of those online: Using Supreme Court Rule 224 to ascertain the identity of anonymous online posters

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With the continued promotion of Web logs (blogs) and other Internet venues for posting unedited commentary, an increase in the number of negative statements not only about public figures but private ones, grows. Private citizens are fighting back. ("Venting Online: Consumers Can Land in Court" (*N.Y. Times*, Vol. CLIX, No. 55058, June 1, 2010).

This is so even in light of the Illinois Citizen Participation Act (735 ILCS 110/1 *et seq).*, a broad and ambiguous law ("SLAPPED in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act," Sobczak, 28 N.Ill U.L.Rev. 559 (2008)). This legislation appears to have been designed to promote public speech about government and protect those who speak out from being sued over the content of what they utter. Perhaps such a law may have force for criticism in public venues but it was never intended to promote defamation. (See, Berman and Thompson, "Illinois Anti-SLAPP Statue: A Potentially Powerful New Weapon for Media Defendants," Communications Lawyer, Vol. 26. No. 2 (2009). Yet many of these postings are anonymous. And some are blatantly defamatory and not aimed at government or public figures, but private ones.

How do you find out who these people posting critical commentary are? A recent case from the Third District Appellate Court, *Maxon v. Ottawa Publishing Co.*, 402 Ill.App.3d 704, 929 N.E.2d 666 (3rd Dist. 2010), provides a method.

The *Ottawa Times*, a local daily newspaper in Ottawa, IL, had a blog which permitted anyone to post comments in the "Comments" section after each article published on its Web site. These were unedited. In order to post a comment, the person commenting had to register by utilizing a screen name, which could be a pseudonym, obtain a password for the screen name, and provide Ottawa with an e-mail address. Ottawa did not obtain the commenter's name, address or telephone number. Its only method identifying the anonymous commenter was an e-mail address. It did not determine whether the e-mail account was active after the registration occurred.

The Maxons in 2008 were seeking a zoning change so they could use their house as a bed and breakfast facility. Local zoning officials were considering the matter. Ottawa posted on its blog a statement which said, "Ottawa: Commissioners favor B & B additions and changes." Comments were received on the blog by anonymous posters, basically accusing the Maxons of bribing public officials to get the ordinance changed in their favor, a serious charge.

Supreme Court Rule 224 provides that a person may file an independent action seeking discovery before a suit is filed to determine the identity of one who may be responsible in damages. A similar but slightly different version of that procedure appears in our Code of Civil Procedure, 735 ILCS 5-2/402. The purpose of the petition, which must be verified, is a narrow one: discovery of the identity of a potential defendant. Nothing more. (See, *Gaynor v. Burlington Northern and Santa Fe Railway*, 322 Ill.App.3d 288, 294, 750 N.E.2d 307 (5th Dist. 2001)). This is not a fishing expedition.

The Maxons thought they fit that definition and filed a Rule 224 petition, claiming they had been defamed by the anonymous postings and requested the Ottawa provide them with the identities of the commenters. Ottawa filed a section 2-615 (735 ILCS 2-615) motion to dismiss, which the trial court granted.

Relying on what is called the *Dendrite-Cahill* test (*Dendrite International, Inc. v. Doe No. 3,* 342 N.J.Super. 134, 775 A.2d 756 (2001) ("*Dendrite*") and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) ("*Cahill*")), the trial judge found the Maxons failed to state a claim for defamation and, since no recovery in damages could be made, it dismissed the petition.

Under *Dendrite-Cahill*, the court is required to balance the First Amendment interests of those posting commentary anonymously with the reputational interests of the private citizen. And, where the private citizen cannot state a claim for defamation (*e.g.*, *Solaia Technology LLC. v. Speciality Publishing, Inc.*, 221 Ill. 2d 588 (2006)) or some other tort, then, according to the trial court in *Maxon*, the First Amendment interests predominated.

Applying a *de novo* review, the appellate court in *Maxon* reversed the trial judge's ruling and remanded the case for disclosure of the internet poster. In so doing, the court refused to adopt the *Dendrite-Cahill* analysis, reasoning that sufficient examination for safeguarding both the interests of the poster and the Maxons can be addressed through motion practice. The appellate court rejected *Dendrie-Cahill's* holding that disclosure of the anonymous poster can only be required where the party who is the object of the posting, "undertakes efforts to provide notice to the anonymous commentator; and shows that his/her defamation claim against the poster would be sufficient to survive a hypothetical motion for summary judgment."

In doing so, the appellate court observed that the heightened scrutiny *Dendrite-Cahill* requires was more than satisfied by its Supreme Court Rule 224 analysis. The court stated that Ottawa attempted to give some notice to all defendants, and that a trial court has the discretion to permit additional notice.

Next, the *Maxon* court concluded that, under Supreme Court Rule 224, the petition must be verified and state with specificity the facts necessary to plead a cause of action for defamation. Finally, the Court concluded that, once the trial court determined that a petitioner, like the Maxons, had pled a *prima facie* case for defamation, then the defendant commentator has no first amendment rights to protect. The court found there was no constitutional right to defame (see, *Cahill* at 950), and also concluded that the anonymity of internet commenters do not enjoy a special degree of constitutional protection from claims of defamation by private individuals.

Justice Schmidt dissented. In his view, the anonymity of internet posters was a paramount First Amendment concern. His focus was on the anonymous nature of the poster, which he opined required special protection. Justice Schmidt observed that anonymity on the internet allows for a diverse exchange of ideas that would not be there otherwise. Also, he endorsed the *Dendrite-Cahill* test and said the Maxons failed to state a claim for defamation because no reasonable person would ever interpret the postings to be a statement of fact.

Another district of the appellate court, although arguably utilizing *Maxon*'s analysis in connection with Supreme Court Rule 224, came up with a different result in the world of anonymous online commentary. *Stone v. Paddock Publications*, (2011 IL App (1st) 093,386, 2011 WL 5838672 (1st Dist. 2011) ("*Stone*").

Lisa Stone, as mother and next friend of her son, Jed, filed an unverified petition for discovery against Paddock Publications, d/b/a the Daily Herald. In it, she claimed an anonymous online posting by Hipcheck16 allegedly defamed Jed. The posting related an election in which Ms. Stone was a candidate for trustee in the Village of Buffalo Grove. The trial court ordered the Internet service provider, a non-party who was responding to a subpoena, to turn over to the plaintiff "the identity of Hipcheck16." A John Doe who appeared obtained a stay of the trial court's order, which the appellate court reversed.

The *Stone* opinion agreed with *Maxon*'s analysis and held that a petition for discovery must be verified, allege with particularity the basis for the defamation claims, seek the identity of the defendant for the claim, not the substance for such a cause of action, and requires a hearing where the trial court determines that the verified petition states a cause of action for defamation. (*Stone*, ¶ 17).

The *Stone* court, however, indicated that, unless a Supreme Court Rule 224 petition meets such requirements, it is the trial court's responsibility to dismiss the petition after the hearing which determines the factual sufficiency of the defamation claim. The court based its conclusion on the fact that if the verified petition does not establish sufficient facts to establish a cause of action, then the purpose of the petition, namely to engage in necessary discovery, is not warranted. Illinois Supreme Court Rule 224(a)(1)(i)(a). It analogized its analysis to a motion to dismiss for legal sufficiency, (735 ILCS 5/2-615) at least in the defamation context. The Court, citing *Maxon*, concluded the plaintiff is required to plead facts to establish the alleged defamatory statements are constitutionally protected free speech. (¶ 21).

The majority opinion of the *Stone* court announced a different standard of review, at least in defamation cases regarding discovery petitions. The majority in *Stone* indicated the standard is not *de novo*. Frankly, it is not clear what the standard of review is, but it appears to be more than *de novo*. The latter standard is not employed in *Stone,* as indicated in the concurring opinion. Justice Salone's concurrence states the proper standard in Section 224 petitions is that "Petitioner need only establish probable cause to establish the requisite reason the proposed discovery is necessary. ..." (¶ 47).

Justice Salone concluded the majority's approach places an undue burden on petitioners who have meritorious claims. (¶ 52). Comparing it to the respondents in discovery provision of the Code of Civil Procedure, 735 ILCS 5/2-402, Justice Salone concluded that if a trial court concludes there is probable cause for the action, then a respondent may be added as a party. (*Id).*

The court concluded that Stone was unable to do so because her petition and amendment failed to allege the defamatory statements. Also, the court held the words were subject to an innocent construction. *Green v. Rogers*, 234 Ill.2d 478, 495, 917 N.E.2d 450 (2009). The statements communicated by Hipcheck16 to Stone's minor son said (¶ 29):

> 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?

The *Stone* court concluded these allegedly libelous comments had no precise meaning either as defamation *per se* or *per quod.* (¶¶ 30-32). The majority opinion also observed (¶ 34):

> Encouraging those easily offended by online commentary to sue to find the name of their "tormenters" would surely lead to unnecessary litigation and would also have a chilling effect on the many citizens who choose to post anonymously on the countless comment boards for newspapers, magazines, websites and other information portals. Putting publishers and website hosts in the position of being a "cyber-nanny" is a noxious concept that offends our country's long history of protecting anonymous speech.

This language seems overdone where a person's reputation is implicated. A private party's reputation is a valuable asset. Once attacked by an unknown assailant, the damage is already done, since when posted on the internet apparently the only recourse is for the publisher to take the posting down from the site. On the other hand, the internet provides a forum for robust discussion where an exchange of opinions can provide valuable information. Anonymity may provide some security to those who post statements that are not a violation of the law. The Third District seems to have taken a reasonable middle ground in making disclosure the right course, by enforcing a little-used Supreme Court Rule.

Part of the problem is a Federal law called the Communication Decency Act, 47 U.S.C. 230(c). This Act preempts state laws that seek to hold a provider of interactive computer service liable for content authored by a third party. 47 U.S.C. 230(e)(3). (See, *Chicago Lawyer's Committee for Civil Rights Under Law v. Craig's List, Inc.*, 519 F.3d 666, 670-671 (7th Cir. 2008).

This Act seems in direct contravention of the Illinois constitutional privilege that accords an Illinois citizen with a right of individual dignity. (*Cf. Bartlett v. Fonorow*, 343 Ill.App.3d 1184, 1196, 799 N.E.2d 916 (2nd Dist. 2003), and *Barnes v. Yahoo! Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). It seems odd that an interactive site can provide a forum for defamation that an Illinois constitutional guarantee protects. Providing a forum for libelous statements clearly gives that commenter a sense of legitimacy as to the content stated.

In Illinois, unlike federal constitutional jurisprudence, citizens have a right to individual dignity and, accordingly, communications that portray criminality, depravity, hatred, abuse or hostility toward another person or persons are condemned. (Illinois Constitution, Bill of Rights, Sec. 20). Accordingly, reliance on U.S. Supreme Court precedent to insure First Amendment discussion, as the *Stone* Court pronounced, seems misplaced, too. The standard of review the *Stone* court announced is not consonant with *Maxon.*

Perhaps the Illinois Supreme Court can give trial courts and practitioners some guidance as to what this individual dignity right actually denotes in a society that places a premium on instantaneous communication and commentary. ■