ILLINOIS APPELLATE COURT FOR THE
THIRD DISTRICT
No. 03-08-0805

DONALD MAXON JANET MAXON Petitioner-Appellants,	) Appeal from the Thirteenth Judicial) Circuit, LaSalle County) Case # 2008-MR-125
	) Honorable Eugene P. Daugherity) Presiding
vs.	)
	) Notice of Appeal Date: October 6, 2008
OTTAWA PUBLISHING COMPANY, a Delaware Limited Liability Company Respondent-Appellee.	) Date of Order(s) Appealed from:) October 2, 2008

BRIEF OF DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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BRIEF OF DEFENDANT-APPELLANT

COMES NOW the Petitioner-Appellants, DONALD MAXON and JANET MAXON, in the above-entitled matter and submits herewith its brief and argument.

POINTS AND AUTHORITIES

II. The Trial Court erred in finding that as a matter of law that the statements published on Respondent-Appellee's Internet Message Board ("Blog") were non actionable defamation. 14

NATURE OF THE ACTION

This action was brought pursuant to Illinois Supreme Court Rule 224 by Petitioner-Appellant's, DONALD MAXON and JANET MAXON (hereinafter collectively "Maxon" or "Maxons") to obtain identification of the person(s) responsible for posting defamatory material about said party on Respondent-Appellee's, OTTAWA PUBLISHING COMPANY (hereinafter "Ottawa Publishing"), internet message board (hereinafter referred to as "Blog"). Upon Motion by Ottawa Publishing the Trial Court, applying a Motion for Summary Judgment standard, dismissed Maxons' Petition ruling that the statements in question were not actionable defamation. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court erred in applying a "Motion for Summary Judgment Standard" in its ruling on Ottawa Publishing's Motion to Dismiss.

2. Whether the Trial Court erred in its ruling that as a matter of law that the statements published on Ottawa Publishing's "Blog" were non actionable defamation.

JURISDICTION

This appeal is taken as of right, pursuant to Illinois Supreme Court Rules 301 and 304 from an Order entered on October 2, 2008 granting Respondent-Appellee's Motion to Dismiss Petitioner-Appellant's "AMENDED PETITION FOR DISCOVERY BEFORE

SUIT TO IDENTIFY RESPONSIBLE PERSONS AND ENTITIES PURSUANT TO ILLINOIS SUPREME COURT RULE 224." (CL1. C-69)

The Notice of Appeal required under Illinois Supreme Court Rule 303 (a) & (b) was timely filed on October 6, 2008. (CL1. C-70)

STATUTE/SUPREME COURT RULE INVLOVED

Illinois Supreme Court Rule 224

STATEMENT OF FACTS

On March 20, 2008 an article appeared on Ottawa Publishing's Blog entitled "Commissioners favor B&B additions, change". (SCL2. SR10) On said date, in response or comment to said article, person(s) identified as "Mary1955 from Ottawa" posted the following *per se* defamatory statement(s):

"Posted by **Mary1955** from **Ottawa** at 11:27AM on Thursday, 3/20/08

Money under the table ????????????" (SCL2. SR11).

Later that evening person(s) identified as "FabFive from Ottawa" posted the following defamatory statement(s), specifically identifying the Maxons, in response or comment to the article:

"Posted by **FabFive** from **Ottawa** at 8:50PM on Thursday, 3/20/08

Way to pass the buck Plan Commission!! You have dragged this garbage out for over a YEAR now and despite having the majority tell you to NOT change the ordinance you suggest the exact opposite! How dare you! How dare you waste the time of the

townspeople who have attended EVERY single one of these meetings to speak out against any changes!! But hey, you don't have the final word so just pass the buck and waste even MORE TIME. How much is Don and Janet from another Planet paying you for your betrayal???? Must be a pretty penny to rollover and play dead for that holy roller...IF this gets anywhere NEAR being passed in favor for the Maxon CULT, you can bet your BRIBED BEHINDS there will be a mass exodus of homeowners from this town...who will you tax then if noone lives here?" (SCL2. SR12)

On April 15, 2008, an article appeared on Ottawa Publishing's Blog entitled "Precedent will be set by changing B&B Ordinance!" (SCL2. SR14). On April 17, 2008, in response or comment to that article, person(s) again identified as "FabFive from Ottawa" posted the following *per se* defamatory statement(s), again specifically identifying the Maxons:

"Posted by **FabFive** from **ottawa** at 9:55PM on Thursday, 4/17/08

Here's another tidbit to consider folks, Ann brought up how it is possible that the Maxon's would take the B&B and turn it into some non for profit church business..Well as it is the Maxon's plans for the addition were to include a LARGE meeting room...Now since when did a B&B require a meeting room?

The Maxon's haven't played this straight from the day they filed it. The OPC has not played it straight from any of the meetings regarding this. The plan should never had been pushed to the Town Council when several members of the OPC were not even present to vote on it in the new terms that the BRIBED members had created...And now noone wants to get caught actually voting on it. This has become a hot potato and the music is about to stop. So who gets burned? The MANY people who have spoken out

AGAINST these changes, or the FEW individulas who are behind it?" (SCL2. SR22 to SR23). (Note: errors are in the original Blog comments)

Thereafter the Maxons filed their "PETITION FOR DISCOVERY BEFORE SUIT TO IDENTIFY RESPONSIBLE PERSONS AND ENTITIES PURSUANT TO ILLINOIS SUPREME COURT RULE 224" seeking the true identity of the person(s) who posted the *Per Se* defamatory statements. (CL1. C9). At initial hearing on the matter the Maxons were granted leave to file an Amended Petition setting forth fully the statements and context in which they were made. (CL1. C64 and RP1. pp. 26-29). Said Amended Petition was filed on September 8, 2008 (CL1. C66); followed by Ottawa Publishing's "MOTION TO DISMISS AMENDED PETITION FOR DISCOVERY BEFORE SUIT TO IDENTIFY RESPONSIBLE PERSONS AND ENTITIES PURSUANT TO ILLINOIS SUPREME COURT RULE 224" (SCL1. SR3); the Maxons' Response to said Motion (SCL1. SR37); and, ruling on October 2, 2008. (CL1. C-69, C71 & RP2 p. 24)

STANDARD OF REVIEW

The standard of review on a dismissal by the Trial Court pursuant to a Motion brought under 735 ILCS 5/2-615 is *de novo*. *Green v. Rogers* 384 Ill.App.3d 946, 954-955, 895 N.E.2d 647, 65, 324 Ill.Dec. 152, 162 (2nd Dist., 2008).

A Motion to Dismiss wherein the question of whether defamatory language is rendered nondefamatory under the "innocent construction rule is properly considered under 735 ILCS 5/2-619. *Cartwright v. Garrison* 113 Ill.App.3d 536, 540, 447 N.E.2d 446, 448, 69 Ill.Dec. 229, 231 (2nd Dist., 1983). And, the standard of review on a dismissal by the

Trial Court pursuant to a Motion brought under 735 ILCS 5/2-619 is *de novo. Krilich v. American Nat. Bank and Trust Co. of Chicago* 334 Ill.App.3d 563, 569, 778 N.E.2d 1153, 1160, 268 Ill.Dec. 531, 538 (2nd Dist., 2002)

ARGUMENT

I The Trial Court erred in applying a Motion for Summary Judgment Standard in granting Respondent-Appellee's Motion to Dismiss.

Though not specifically stated, a review of the record illustrates that at least in part Ottawa Publishing's pleadings and the Trial Court's decision were based under 735 ILCS 5/2-615 principles. The standard of review on a dismissal by a Trial Court pursuant to 735 ILCS 5/2-615 is *de novo. Green v. Rogers* 384 Ill.App.3d 946, 954-955, 895 N.E.2d 647, 65, 324 Ill.Dec. 152, 162 (2nd Dist., 2008).

Illinois Supreme Court Rule 224(a)(i) provides that a "person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery." Further, under (a)(ii) that the action shall be initiated by the filing of a verified petition "and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery. The order allowing the petition will limit discovery to the identification of responsible persons and entities and where a deposition is sought will specify the name and address of each person to be examined, if known, or, if unknown, information sufficient to identify each person and the time and place of the deposition."

Rule 224's use is appropriate in situations where plaintiff 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, 750 N.E.2d 307, 312, 255 Ill.Dec. 726, 731 (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, 607 N.E.2d 1356, 1360, 180 Ill.Dec. 843, 847 (5th Dist., 1993)

In this case, the Maxons filed their "Rule 224" petition on June 9, 2008 meeting the requirements of Rule 224 (1)(a)(i) & (ii). (CL1. C3-6, C9-12). Maxon noticed the matter for hearing on August 29, 2008. (CL1. C7). Maxons caused summons to be issued and served pursuant to Rule 224 (2). (CL1, C25) Rule 224 does not require more, nor has any Illinois Case been identified requiring more of a Rule 224 Petitioner seeking the identity of person(s) who defamed them on an Internet Message Board or "Blog".

Given an issue of the technical requisites of the Petition, the Maxons were granted on their oral Motion to file an Amended Petition. (RP1 p.p. 27-30). Said Amended Petition was filed containing an excess of that required by Rule 224. (CL1. C66-68, SCL2 SR3-34).

In this case, as no Illinois case on point was found seeking discovery of an anonymous blogger's identity from a publisher/internet service provider, the Trial Court sought guidance from other jurisdictions. (RP2 p. 13). As recognized by the United States District Court, D. Nevada, and cited by Ottawa Publishing, "where 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, LLC* 566 F.Supp.2d 1205, 1214, 2008 WL 2721265, 7 (D.Nev.) (D.Nev., 2008).

In *Quixtar*, among the issues presented was the compulsion of a deponent to disclose the identity of anonymous internet authors and whether or not the deponent actually had standing to object to the disclosure based on the purported rights of the anonymous third parties. *Quixtar* at 1211. After review of various "tests" from other jurisdictions, the Court essentially adopted the so called "*Dendrite*" test (*Dendrite Intern., Inc. v. Doe No. 3* 342 N.J.Super. 134, 140, 775 A.2d 756, 760 (N.J.Super.A.D., 2001) as modified or shortened *Doe v. Cahill* 884 A.2d 451 (Del.Supr., 2005). *Quixtar* at 1216. In applying the so called test the Court found that Plaintiff had not undertaken efforts to notify the anonymous Poster(s) that their identity would be sought and remanded the matter as to the disclosure issue to afford reasonable opportunity to notify the Poster(s) so they could

object; to make a findings that any objecting party actually has standing to do so; and, to thereafter apply the test/standard enunciated by *Cahill*. *Quixtar* at 1216.

However, in *Doe I v. Individuals* 561 F.Supp.2d 249, 257 (D.Conn.,2008), Plaintiffs' issued a subpoena seeking disclosure of information relating to the identity of an anonymous Poster from what is now known as "AT & T Internet Services" *Doe I v. Individuals* at 250. In that case, the Poster had posted numerous messages on the message board in question stating of Plaintiffs numerous things, including but not limited to, such as that she (Plaintiff "Doe II") had a sexually transmitted disease, abused heroin and that he "hope[s] she gets raped and dies". *Id.* at 251. In that case, AT&T sent notice, (similarly as Ottawa Publishing did in this case) notifying the Poster, identified as "John Doe 21" that a subpoena had been issued and his identity was sought. Thereafter "John Doe 21" filed his Motion to Quash and proceed anonymously. *Id.* at 252.

The *Doe I* Court, noting some of the cases cited by Ottawa Publishing as to anonymity, stated "that the 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). After review of the "tests" that have been proffered other cases the Court, in reviewing the Motion to Quash, found the standard whereby a plaintiff must show their claims could withstand a motion for summary judgment to be "both potentially confusing and also difficult for a plaintiff to satisfy when she has been unable to conduct any discovery at this juncture. Indeed, it would be impossible to meet this standard for any cause of action which required evidence within the control of the defendant". *Doe I v. Individuals* at 255 -256. The

Court went on to adopt a standard requiring "a plaintiff make a concrete showing as to each element of a prima facie case against the defendant"... *Id* at 256. Under such a standard "[w]hen there is a factual and legal basis for believing [actionable speech] has occurred, the writer's message will not be protected by the First Amendment." *Id* at 256 (*citing Krinsky v. Doe 6,* 72 Cal.Rptr.3d 231 at 245). That "such a standard strikes the most appropriate balance between the First Amendment rights of the defendant and the interest in the plaintiffs [in] pursuing their claims, ensuring that the plaintiff "is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism." *Id.*

"To state a defamation claim, a plaintiff must present facts that a defendant made a false statement about a plaintiff, [that] the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages" *Green v. Rogers* 384 Ill.App.3d 946, 955, 895 N.E.2d 647, 657, 324 Ill.Dec. 152, 162 (Ill.App. 2 Dist.,2008) Words that impute the commission of a criminal offense are considered actionable *per se* and give rise to a cause of action for defamation without a showing of special damages. *Bryson v. News America Publications, Inc.* 174 Ill.2d 77, 88, 672 N.E.2d 1207, 1214-1215, 220 Ill.Dec. 195, 202 - 203 (Ill.,1996). "[S]tatements that are defamatory *per se* "are thought to be so obviously and materially harmful to the plaintiff that injury to [his] reputation may be presumed *Green v. Rogers* 955, 657-658 & 162 – 163.

In this case, as it "strikes the most appropriate balance between the First Amendment rights of the defendant and the interest in the plaintiffs" the Trial Court should have adopted and applied the test in *Doe I v. Individuals* ("*Doe I*" test). As more extensively discussed below, and similar to *Doe I*, this case involves *Per Se* defamation. In *Doe I* the

internet posting stated that Plaintiff had among other things had a sexually transmitted disease, and in our case that Maxons committed Bribery (a Class 2 Felony-720 ILCS 5/33-1). It is further undisputed that the statements were published, unprivileged, identifying the Maxons by name, read by third persons and are damaging to Maxons reputation and standing in the community.

Moreover, under the *Quixtar/Dendrite/Cahill* Motion for Summary Judgment test, while not required under 224 to give or post notice to the offender, as pointed out by the Court, Ottawa Publishing took it upon themselves (as did AT&T in *Doe I*) to do so satisfying the initial burden. (RP2 p.15). In making that finding, the inquiry should have ended there. The bloggers were afforded their opportunity to appear (anonymously, of course), establish their standing to object and object to the disclosure of their identity. In fact one of the bloggers, "Birdie1", actually did appear to contest the initial Petition. (CL1. C18). Under *Quixtar/Dendrite/Cahill*, the inquiry should have ended there and an Order to produce pursuant to Maxons Petition(s) should have been entered. On a remand, should the Court so agree, if the anonymous blogger in this case (FabFive) chooses to stand behind his/hers/their allegations the Trial Court should review the Maxons request to disclose his/hers/their identity upon a showing of his/hers/their standing to object applying the *Doe I* case set forth above.

II. The Trial Court erred in finding that as a matter of law that the statements published on Respondent-Appellee's Internet Message Board ("Blog") were non actionable defamation.

"A motion to dismiss is properly treated under section 48(1)(i) of the Civil Practice Act [*now 735 ILCS 5/2-619*] when the ground for dismissal is that the claim is barred "by

other affirmative matter avoiding the legal effect of or defeating the claim or demand [*now 735 ILCS 5/2-619(9)*]...In a defamation action, the question whether the allegedly defamatory language is rendered nondefamatory by the innocent-construction rule is properly considered under section 48(1)(i)." *Cartwright v. Garrison* 113 Ill.App.3d 536, 540, 447 N.E.2d 446, 448, 69 Ill.Dec. 229, 231 (2nd Dist., 1983). "Whether the innocent-construction rule requires dismissal is initially a question of law to be resolved by the trial court and depends on examination of the allegedly defamatory statement and of the context in which it appears."*Id.* The standard of review on a dismissal by the Trial Court pursuant 735 ILCS 5/2-619 is *de novo. Krilich v. American Nat. Bank and Trust Co. of Chicago* 334 Ill.App.3d 563, 569, 778 N.E.2d 1153, 1160, 268 Ill.Dec. 531, 538 (2nd Dist., 2002)

As stated above, no Illinois case has been cited dealing specifically with pre-trial Petition for Discovery under Illinois Supreme Court Rule 224 upon a media entity for the identity of persons publishing defamatory statements on an Internet Message Board, a/k/a a "Blog". However, there are cases dealing with defamation appearing in printed form. In *Bryson v. News America Publications, Inc.* the Court considered an article appearing in Defendant's magazine wherein Plaintiff was identified as a "slut". *Bryson v. News America Publications, Inc.* 174 Ill.2d 77, 85, 672 N.E.2d 1207, 1213, 220 Ill.Dec. 195, 201 (Ill., 1996). In addition to its determination that those word(s) imputed Plaintiff was "unchaste", thereby being defamation *per se*, the Court went on to review the statement under the "innocent construction rule". *Bryson* 90, 1215 & 204. Under that "rule" even "if a statement falls into one of the recognized categories of words that are

actionable *per se,* it will not be found actionable *per se* if it is reasonably capable of an innocent construction" *Bryson* 90, 1215 & 204. The so called "innocent construction rule" requires courts to consider a written or oral statement in context, giving the words, and their implications, their natural and obvious meaning. *Id.* If, so construed, a statement "may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff, it cannot be actionable *per se.*"...(*Citations omitted*)...Only *reasonable* innocent constructions will remove an allegedly defamatory statement from the *per se* category. *Bryson* 90, 1215 & 204.

Courts must give the allegedly defamatory words their natural and obvious meaning and interpret the allegedly defamatory words as they appeared to have been used and according to the idea they were intended to convey to the reasonable reader. *Bryson* at 93, 1217 & 2052. "When a defamatory meaning was clearly intended and conveyed, [the] court will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense in order to hold them nonlibellous under the innocent construction rule" *Id.* The rule does not require courts to "strain to find an unnatural but possibly innocent meaning for words where the defamatory meaning is far more reasonable...[n]or does it require this court to espouse a naïveté unwarranted under the circumstances" *Id.*

In this case, Ottawa Publishing's Motion to Dismiss and the Court's decision appear to be primarily based 735 ILCS 5/2-619 in that statements at issue are alleged to be not actionable (i.e. that all Maxons have pled are "non-actionable" defamatory statements).

As in *Bryson*, the statements in question clearly fall into one of the recognized categories of *Per se* defamation (i.e. " words that impute the commission of a criminal offense" *Bryson* at 88, 1214 & 202). They clearly identify the Maxons by name and impute the commission of a crime (bribery); which, under 720 ILCS 5/33-1 is a class 2 Felony. While the Trial Court found a person has the right to speak anonymously and that right is protected by the First Amendment (RP2 p.13), "the 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). Furthermore, as agreed by the Trial Court, the right is not an unlimited right allowing one to engage in slanderous or libelous statement. (R. RP2 p. 13). Moreover, even where a statement may be presented as "apparent opinion or rhetorical hyperbole (as advanced by Ottawa Publishing), a statement may constitute actionable defamation" *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.* 227 Ill.2d 381, 397, 882 N.E.2d 1011, 1021, 317 Ill.Dec. 855, 865 (Ill., 2008). (Clothier Plaintiff action against Defendant Clothier and Newspaper publisher for alleged defamation in an advertisement.)

The statements in this case were made in comment to an article on March 20, 2008 and an article/comment on April 15, 2008, as a result of the Maxons participation in a discussion before the planning commission which was seeking to amend the Bed & Breakfast ordinance in the City of Ottawa. The comments specifically identified the Maxons. The March 20th comment from "FabFive" specifically names the Maxons as paying off the planning commission and leads one to believe that the "dragged this garbage out for over a YEAR now" is connected to the Maxons. The April 17th

comment from FabFive, just to make sure the reader is clear as to who FabFive is accusing, makes note of the Maxons' previous efforts to establish a Bed & Breakfast ("Well as it is the Maxon's plans for the addition were to include a LARGE meeting room"(SCL2, SR33)) and implies that Maxons bribed the Planning Commission. The words "Bribed: and "paying you off for your betrayal" are not capable of "innocent construction". They allege the commission of a Class 2 felony. The truth or falsity of the allegations is objectively verifiable. The context in which they were made is in response to an article and commentary. (SCL2. SR10 & SR14). And, the article/commentary (context) ***NEVER*** names or makes reference to the Maxons. Yet FabFive clearly took the opportunity, well outside the "rhetorical hyperbole" or "spirited discussion" of Bed & Breakfast issues to intentionally inflict a ***verbal assault*** upon the Maxons imputing as fact that Maxons committed a crime.

This position is supported by the decision in *Moriarty v. Greene* 315 Ill.App.3d 225, 732 N.E.2d 730, 247 Ill.Dec. 675 (1st Dist., 2000). In that case the Court reviewed allegations of defamation as to a number of statements appearing in a series of columns by one Bob Greene. *Id.* Specifically, one statement at issue imputing a lack of ability in Plaintiff was the following: "(2) Plaintiff "has readily admitted that she sees her job as doing whatever the natural parents instruct her to do." Bob Greene, *Have You Ever Promised a Kid ...,* Chi. Trib., May 21, 1995 (Tempo Section), at 1;" *Moriarty* at 229, 736 & 681.

While the Court held statements appearing in other articles/columns (the thrust of which being that a parent was not acting in a minor's best interests), also referring to Plaintiff [a psychologist], were just the "opinion" of the journalist and were not actionable, it held that "a construction that plaintiff will ignore her professional obligations [defamation *per se*] to her child-client in favor of the wishes of the child's parent is more probable" and remanded for a jury to decide. *Moriarty* at 233, 739 & 684. In our case the allegations, in two separate Blogs, claiming being that of the commission of a crime is *per se* defamation. Taken as a whole, it is an assertion of fact that is readily determinable as to whether it in fact was done.

CONCLUSION

WHEREFORE, Petitioner-Appellants, DONALD and JANET MAXON pray this Court should adopt the standard as set forth in *Doe I v. Individuals* as guidance for the Trial Courts in Illinois when confronted with a petition brought under Illinois Supreme Court Rule 224 to discover the identity of persons posting defamatory material on an Internet Service provider's website; find that the defamatory statements made in this case are actionable defamation; and remand this matter to the Trial Court with direction to enter an Order commanding Respondent-Appellee, OTTAWA PUBLISHING COMPANY, to disclose the information sought in the Amended Petition brought under Illinois Supreme Court Rule 224

Respectfully Submitted
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