IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
NO. 3-08-0805

DONALD MAXON and JANET MAXON, Petitioners-Appellants, v. OTTAWA PUBLISHING CO., LLC, Respondent-Appellee.	)	Appeal from the Thirteenth Judicial Circuit, LaSalle County Case No. 2008-MR-125 The Honorable Eugene P. Daugherity Presiding Date of Order Appealed From: October 2, 2008

BRIEF OF RESPONDENT-APPELLEE OTTAWA PUBLISHING COMPANY, LLC

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION[1]

Plaintiffs-Appellees (the "Maxons") have appealed Judge Eugene Daugherity's order dismissing their Amended Petition For Discovery Before Suit To Identify Responsible Persons And Entities Pursuant To Illinois Supreme Court Rule 224 And Jury Demand ("Amended Petition"). (A.90) The Amended Petition sought disclosure from Respondent-Appellee Ottawa Publishing Company, LLC ("Ottawa Publishing") of identifying information about anonymous Internet commenters whom the Maxons' alleged defamed them. (A.13-45)

Contrary to the Maxons' assertion that there is no issue raised on the pleadings, the crux of this case of apparent first impression in Illinois is whether the circuit court was correct in applying a modified summary-judgment standard in pre-suit discovery actions seeking the unmasking of anonymous Internet commenters. Because anonymous speech is a Constitutional right, Judge Daugherity applied a heightened standard to the Maxons' Amended Petition, held that the Maxons' claim was not viable under this standard, and as a result, dismissed the Amended Petition.

[1] Citations to portions of the Record contained in the Appendix are cited as "A.____".

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court properly held that a petitioner must demonstrate in an Ill. S. Ct. R. 224 petition for pre-suit discovery that a future defamation action could survive a hypothetical motion for summary judgment on elements within a petitioner's control before a court will order disclosure of information leading to the identification of anonymous Internet commenters?

2. Whether, having determined that a heightened standard should apply to Ill. S. Ct. R. 224 pre-suit discovery actions seeking disclosure of anonymous Internet commenters, the circuit court was correct in holding that the Maxons' petition was deficient under that standard, and therefore properly dismissed?

JURISDICTION

The jurisdictional statement filed by the Maxons is correct.

RULE INVOLVED

The rule involved is Ill. S. Ct. R. 224 ("Rule 224"), as correctly stated by the Maxons.

STATEMENT OF FACTS

Like many media outlets, Ottawa Publishing publishes articles both in its 6-day-a-week print newspaper, *The Times*, as well as online on a Web site, *www.mywebtimes.com* ("*mywebtimes").* (A.66 at ¶1) Internet readers may anonymously publish comments on articles posted at *mywebtimes* after they register online, a process which requires them to establish a "screenname," password and to provide Ottawa Publishing with a valid e-mail address. (A.66-67 at ¶ 3) Ottawa Publishing does not require nor retain additional information – such as a name, address, or telephone number – from the registered participants (hereinafter referred to as "Internet commenters"), nor verify the e-mail address continues to remain valid after the account is activated. (A.67 at ¶ 4)

On March 20, 2008, Ottawa Publishing published an article on *mywebtimes* titled "OTTAWA: Commissioners favor B&B additions, changes". (A.21) The subject of the article, which generally reported on the Ottawa Planning Commission's consideration of a proposed ordinance to allow bed and breakfast ("B&B") establishments to operate in residential areas, precipitated numerous comments by readers.[2] (*Id.* at A.21-23) One Internet commenter with the screenname of "Mary1955" posted:

> Money under the table????????????

"FabFive From Ottawa" ("FabFive") later posted:

> 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

[2] The article did not mention either Donald or Janet Maxon. (A.21)

> 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?

(A.22-23) (emphasis and typographical errors in original).

On April 15, 2008, Ottawa Publishing published a letter to the editor at *mywebtimes* about the proposed B&B ordinance titled "Precedent will be set by changing B&B ordinance!".[3] (A.25) Again, readers published numerous comments online about the issue. (A.25-45). On April 17, 2008, FabFive posted:

> 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 individuals who are behind it?

(A.33-34, A44) (emphasis and typographical errors in original).

"birdie1" posted that same day:

> FabFive:
> The bribe has continued since you were last on!!

(A44)

On June 9, 2008, the Maxons filed a Petition For Discovery Before Suit To Identify Responsible Persons And Entities Pursuant To Illinois Supreme Court Rule 224

[3] This letter did not mention either Donald or Janet Maxon. (A.25)

("Petition"), seeking, *inter alia,* an order requiring Ottawa Publishing to disclose the "name, address, phone number, email address or other account information used to establish their Blog 'identity', the password used for access to the Blog, or other identifying information" from FabFive and birdie1. (A.9-12) The Petition did not identify the purportedly defamatory comments or indicate that the Maxons had made any effort to notify the Internet commenters that they were seeking their identity. (*Id.*) On August 28, 2008, Ottawa Publishing filed a motion opposing the Petition. (A.54-79) Ottawa Publishing attached to the motion the Affidavit of John Newby, *The Times'* publisher, which stated that he had sent an e-mail to the e-mail addresses he had on file for FabFive and birdie1 to notify them of the Petition. (A.67 at ¶ 5) As a result of this notice, birdie1 retained an attorney who was granted leave to intervene, and she was allowed to appear under a fictitious name.[4] (C64-65) After a hearing on August 29, 2008, the circuit court granted the Maxons' oral motion for leave to amend their Petition to identify the purportedly defamatory statements. (*Id.*)

On September 8, 2008, the Maxons filed an Amended Petition setting forth the allegedly defamatory statements made by FabFive From Ottawa and Mary1955[5] in Count I, and reiterating their request for an order requiring Ottawa Publishing to disclose identifying information as to these commenters. (A.13-15) In Count II of the Amended Petition, the Maxons alleged a defamation claim against Susan Wren, whom they evidently had come to believe was birdie1.[6] (A.16-17) Ottawa Publishing filed a motion to dismiss the Amended Petition on September 22, 2008, which incorporated its previous opposition motion. (A.46-82)

[4] FabFive never appeared by counsel.

[5] On October 2, 2008, the trial court granted the Maxons' oral motion to withdraw their allegations as to Mary1955. (A.90)

[6] Judge Daugherity ordered that the defamation claim against Susan Wren be severed from the Rule 224 action on October 2, 2008. (A.90)

The Maxons filed a response brief on September 30, 2008. (A.83-89) Following oral argument, Judge Daugherity dismissed the Amended Petition. (A90) In doing so, he adopted a heightened standard as set forth in *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. 2001), which requires that a petitioner seeking disclosure of an anonymous Internet commenter must show that:

1. The anonymous poster has been notified of the potential claim so that they have the opportunity to appear;

2. The petitioners have set forth the exact statements that have been purportedly made by the anonymous person;

3. The allegations meet a *prima facie* standard to be able to withstand a motion for summary judgment brought by one of the potential defendants, as to elements that are within the petitioners' control.[7]

The circuit court must then balance the rights of the petitioner not to be defamed against the First Amendment rights of the anonymous person. *Id.* at 141-42, 157-58. (A.96-97) Applying that standard, Judge Daugherity held that the Maxons had not satisfied the third prong of the test because, as a matter of law, the statements were nonactionable opinion. (A103-104) He therefore dismissed the Amended Petition. (A.90, A.105)

The Maxons thereafter timely filed this appeal. (A91)

[7] *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005), identified the third prong of the *Dendrite* test as a "summary judgment" standard, although it was not specifically labeled as such in *Dendrite*.

ARGUMENT

I. Introduction

This case is one of apparent first impression in Illinois and involves important issues of First Amendment rights and free speech protections. Requests to identify anonymous users of the Internet present some of the most difficult issues courts face in the privacy area. 2 Andrew B. Serwin, *Information Security and Privacy* § 26:26 (2008) (*citing Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001)). The circuit court properly recognized that when petitioner seeks to expose an anonymous Internet commenter via a Rule 224 petition for pre-suit discovery, a court must balance the rights of the petitioner not to be defamed against the putative defamation defendant's Constitutional right to engage in anonymous speech. In order to ensure that granting the Maxons' request did not violate FabFive's Constitutional rights, Judge Daugherity adopted an appropriate "summary judgment" standard, and ultimately held as a matter of law that the allegedly defamatory statements were "screed," "conjecture and surmise," and were therefore protected, nonactionable opinion because no reasonable reader would presume that FabFive was stating actual, objectively verifiable facts. (A.103-105)

Illinois has a strong reputation for protecting free speech, and these protections should extend to anonymous Internet commenters. This Court should affirm the circuit court's dismissal because: 1) the summary judgment standard is the most appropriate standard with which a court can balance the competing interests which exist when a petitioner seeks disclosure of an anonymous Internet commenter, and 2) the judge did not abuse his discretion in determining that the Maxons would not be able to withstand a motion for summary judgment because the statements were protected opinion and thus not defamatory as a matter of law.

II. Standard of Review

A reviewing court must determine whether a circuit court properly granted or denied a Rule 224 petition under an abuse-of-discretion standard. *Kamelgard v. Am. Coll. of Surgeons,* 385 Ill. App. 3d 675, 684 (1st Dist. 2008); *Gaynor v. Burlington N. & Santa Fe Ry.,* 322 Ill. App. 3d 288, 289 (5th Dist. 2001). This is consistent with the standard that a reviewing court applies to circuit court decisions limiting other types of discovery. *See People v. Williams,* 209 Ill. 2d 227, 234 (2004) (holding that court did not abuse its discretion when it denied defendant's request for disclosure of names and addresses of unidentified jurors).

The Maxons contend that the standard of review should be *de novo* because the Court appeared to apply a standard similar to how one would review a motion to dismiss a defamation action pursuant to 735 ILCS 5/2-615 or 619. (Maxon Br. at 8-9) While Judge Daugherity may have exceeded the scope of inquiry that is normally undertaken on a Rule 224 petition because of the Constitutional implications inherent in the relief sought by the Amended Petition, he never stated that he was applying Section 2-615 or 2-619 standards to his ruling, and therefore a *de novo* standard is not applicable. Furthermore, it was certainly within his discretion to carefully analyze the issue and establish a standard to determine who rightly "may be responsible in damages" for purposes of pre-suit discovery seeking the unmasking of anonymous

Internet commenters. *See* Rule 224. (A.108) This Court should therefore apply an abuse-of-discretion standard as is generally applicable to review of discovery petitions.[8]

III. The Circuit Court Was Correct In Applying A Heightened Standard To A Rule 224 Petition Seeking Disclosure Of Anonymous Internet Commenters

A. Anonymous Speech Is Protected Under The U.S. And Illinois Constitutions

The circuit court here recognized, as has every other court that has ruled on this issue, that the First Amendment of the United States Constitution protects a person's right to speak anonymously. (A.94) *Mobilisa, Inc. v. Doe,* 170 P.3d 712, 717 (Ariz. Ct. App. 2007) (citing *Buckley v. Am. Constitutional Law Found.,* 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 341-51, 357 (1995); *Talley v. California,* 362 U.S. 60, 64-65 (1960)). This fundamental right has existed since the early days of this nation. *See McIntyre,* 514 U.S. at 343, n.6 (citing the tradition of anonymity in American political advocacy, beginning with the *Federalist Papers* and the pre-Revolutionary War English pamphleteer, Junius). The State of Illinois likewise recognizes this right: In 1987, the Illinois Supreme Court struck down a provision of the Election Code that required the name and address of a distributor to be printed on certain political pamphlets. *People v. White*, 116 Ill. 2d 171 (1987). In doing so, the Supreme Court affirmed the Circuit Court of White County's order that held the statute unconstitutional not only under the First Amendment, but also Section 4 of Illinois Constitution, which states in part: "All persons may speak, write and publish freely, being responsible for the abuse of that liberty." *Id.* at 173; Ill. Const. Art. I, Sec. 4 (1970).

[8] The only somewhat similar appellate case that Ottawa Publishing could locate involving a Rule 224 petition seeking disclosure of an unknown individual in connection with a potential defamation action was *Cukier v. Am. Med. Ass'n.*, 259 Ill. App. 3d 159 (1st Dist. 1994). In that case, the First District upheld the dismissal of a Rule 224 petition based on the reporter's privilege, codified at 735 ILCS 5/8-901 *et. seq.* The First District did not explicitly specify what standard of review it applied. Ottawa Publishing cited this case in its opposition motion to the Maxons' original Petition. (A.57-59)

First Amendment protections fully extend to speech on the Internet. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997). However, as Ottawa Publishing certainly recognizes and understands, the First Amendment does not protect defamatory speech in any forum. *Cahill*, 884 A.2d at 456 (citing *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942)). Therefore, when a court is faced with determining whose rights should prevail, it "must adopt a standard that appropriately balances one person's right to speak anonymously against another person's right to protect his reputation." *Id.*

B. The Summary Judgment Standard Provides The Most Reliable Guide To Courts And Parties

The summary judgment standard that the circuit court applied places the burden on a petitioner to demonstrate that the purported underlying defamation claim could successfully withstand a defendant's motion for summary judgment. This standard, which has been adopted in several jurisdictions, requires that a court mandate a media respondent to disclose identifying information it possesses about the anonymous commenter only if the petitioner's claim has a chance of ultimate success. This standard is the correct one because an individual has a Constitutional right to speak anonymously. *See* Section III-A, *supra.* Ensuring that a petitioner can maintain a defamation case as a matter of law before ordering disclosure of identifying information of anonymous Internet commenters sufficiently balances one's right to speak anonymously against another's right not to be defamed.

The parties did not locate any Illinois precedent that provides guidance to a court when a discovery petition seeks to unmask an anonymous Internet commenter for purposes of bringing a defamation claim against the anonymous speaker. The circuit court therefore was reasonable to consider how courts in other jurisdictions balance the competing interests. *See Owens v. Dep't of Human Rights*, 356 Ill. App. 3d 46, 54 (1st Dist. 2005) (appellate court looks

to other jurisdictions for guidance if no case is directly on point). Some cases – like the case at bar – involve pre-suit discovery, and other cases involve subpoenas in ongoing litigation and subsequent motions to quash or for protective orders. Nearly every court in which this issue has arisen has established at least *some* special standard to measure a petitioner's rights to protect his or her reputation against an anonymous Internet commenter's First Amendment rights. *But see Klehr Harrison Harvey Bransburg & Eller LLP v. JPA Dev. Inc.,* 2006 WL 37020 at 9 (Pa. Com. Pl. 2006) (state's civil procedure system inherently balances the rights of an anonymous defendant against the plaintiff's right for information so no special standard required).

Courts in other jurisdictions have devised at least three tests to help them complete this difficult task. The first "good faith" approach compels disclosure of an anonymous speaker if such evidence is required for the case and the petitioner has a "legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where the suit was filed." *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, 2000 WL 1210372 at 8 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds*, 542 S.E.2d 377 (Va. 2001). However, Judge Daugherity properly held that a good-faith standard sets the bar too low and "leaves the person who's protected by the First Amendment completely and totally exposed at the discretion of somebody bringing a lawsuit." (A.94) This approach offers "no practical, reliable way to determine the plaintiff's good faith and leav[es] the speaker with little protection." *Quixtar v. Signature Mgmt. Team*, 566 F. Supp. 2d 1205, 1211 (citing *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1167 (6th Dist. 2008)).

The second approach requires the court to evaluate the plaintiff's need to identify the speaker, and requires that the plaintiff's allegations of illegality be able to withstand a motion to dismiss. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999). *See*

also Lassa v. Rongstad, 718 N.W.2d 673, 687 (Wis. 2006) (adopting motion to dismiss standard in case involving non-Internet anonymous defendant). However, the circuit court rightly noted that this approach may result in inconsistent results, especially when more than one jurisdiction is involved. (A.94-95)

The third approach, which the circuit court adopted, requires a plaintiff to submit evidence sufficient to overcome a limited motion for summary judgment attacking the actionability of the allegedly defamatory statements. *Quixtar*, 566 F. Supp. 2d at 1212 (citing *Cahill*, 884 A.2d at 460, which applied a modified test as set forth in *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. App. Div. 2001)). A summary judgment standard – or a closely similar standard which requires the petitioner to show a *prima facie* defamation claim while also requiring a court to balance the strength of the *prima facie* case against a defendant's Constitutional rights, has also been adopted by courts in Arizona (*Mobilisa, Inc*, 170 P.3d 712), Maryland (*Indep. Newspapers, Inc. v. Brodie*, -- A.2d --, 2009 WL 484956 at 19-20 (Md. Feb. 27, 2009)), New York (*Ottinger v. Doe*, Docket No. 08-03892 (N.Y. Sup. Ct. July 8, 2008)), and Texas (*In re Does 1-10*, 242 S.W.3d 805, 821 (Tex. App. 2007)). The frequently-cited *Dendrite* test, as summarized in *Cahill*, requires a plaintiff to:

> 1. 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;
>
> 2. Set forth the exact statements purportedly made by the anonymous poster that the plaintiff alleges constitute defamatory speech; and
>
> 3. Satisfy the *prima facie* or summary judgment standard.

Only after these factors are satisfied shall a court then balance the defendant's First Amendment right of anonymous free speech against the strength of the *prima facie* case

presented and the necessity for the disclosure of the anonymous defendant's identity in determining whether to allow the plaintiff to properly proceed. *Cahill,* 884 A.2d at 460. *Cahill* modified this test to collapse the second and fourth *Dendrite* requirements into the summary judgment analysis in the third element. *Id.* at 461. However, Judge Daugherity determined that the more detailed four-prong standard was appropriate and applied it to the Amended Petition. (A.95-96)

1. The Petitioner Or Respondent Must Attempt To Contact The Anonymous Internet Commenter

The requirement of notification to the poster, coupled with an opportunity to defend, is generally accepted in First Amendment cases. *Brodie,* -- A.2d --, 2009 WL 484956 at 32. The circuit court noted that it frequently may be more efficient for the respondent to provide notice to the anonymous Internet commenters. (A.96) Ottawa Publishing did in fact do that in this case.[9] The key to this requirement is ensuring that one of the parties makes an effort to inform the potential defendant(s) of the pending action so that they may have the opportunity to be represented at a hearing on the petition. The Maxons appear to be arguing for the first time on appeal that Ottawa Publishing should have merely notified the putative defendants and then, if they did not appear, simply turned over their names rather than advocating on their behalf. (Maxon Br. at 14) First, by not preserving this issue by raising it in the circuit court, the Maxons have waived it. *Sadler v. Creekmur,* 354 Ill. App. 3d 1029, 1036 (3rd Dist. 2005). In any case, Ottawa Publishing has standing to raise any positions it deemed necessary by virtue of being a named respondent in the circuit court.

[9] Ottawa Publishing sent a message to FabFive using the email address that he or she provided during the account registration process to inform him or her of the Rule 224 petition and the hearing date. (A.67 at ¶ 5, A.69)

2. A Pre-Suit Discovery Petition Must Precisely Identify The Defamatory Statements

The second step is also critical: The petitioner must inform the court and the respondent of the exact nature of the allegedly defamatory content so that both the court, the respondent, and the anonymous speaker know what words are at issue. *Dendrite,* 775 A.2d at 760. If a petitioner cannot identify the statements with specificity, the anonymous Internet commenter should not be exposed. In fact, the original Petition in this case did not identify any of the allegedly defamatory statements made by FabFive or birdie1. (A.9-12) The rationale for requiring identification of the allegedly defamatory statements became evident in this case when, in their Amended Petition, the Maxons attached nearly 25 pages of comments from *mywebtimes*, which were published months earlier and therefore no longer easily accessible. (*See* A.21-45) The list of comments included several by FabFive and birdie1 that were *not* the basis of the Maxons' Amended Petition. (*See id.*)

3. The Court Must Determine Whether The Petitioner Could Survive A Hypothetical Motion For Summary Judgment

The important third step requires a court to evaluate whether the potential plaintiff meets other required elements to survive a motion for summary judgment on a libel claim before requiring disclosure of an anonymous speaker. *See Cahill,* 881 A.2d at 462-63. To prove a defamation claim in Illinois, the evidence must show that a defendant made a false statement concerning the plaintiff, that there was an unprivileged publication of the defamatory statement to a third party by the defendant, and that the plaintiff suffered damages as a result. *Madison v. Frazier,* 539 F.3d 646, 653 (7th Cir. 2008) (applying Illinois law). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue of fact and the movant is entitled to judgment as a matter of law. *Id.* at 652 (holding that summary judgment in favor of defendant

was warranted because the alleged defamatory words could be innocently construed, were nonactionable opinion, and were not made with actual malice). As the *Mobilisa* court stated in adopting the summary judgment test, requiring the requesting party to demonstrate that it would survive a motion for summary judgment on all of the elements in that party's control (*i.e.* all elements not dependent on knowing the identity of the speaker), "furthers the goal of compelling identification of anonymous speakers only as a means to redress legitimate misuses of speech rather than as a means to retaliate against or chill legitimate uses of speech." *Mobilisa,* 170 P.3d at 720.

Statements that impute commission of a crime are defamatory *per se,* which means that injury to a plaintiff's reputation is presumed, and therefore the plaintiff does not have to plead nor prove actual damages. *Seith v. Chicago Sun-Times, Inc.*, 371 Ill. App. 3d 124, 134 (1st Dist. 2007). However, whether the statement is defamatory *per se* has no bearing on whether it is actionable because, in Illinois, whether allegedly defamatory words are protected by the First Amendment is a matter of law for the court to decide in the first instance. *Hopewell v. Vitullo,* 299 Ill. App. 3d 513, 517-18 (1st Dist. 1998). A statement will receive First Amendment protection only if it cannot be reasonably interpreted as stating actual facts about the plaintiff. *Id.* at 518. (*See* Section IV, *infra,* for discussion on how Illinois courts determine whether a statement reasonably presents or implies the existence of facts about the plaintiff so as to constitute protected speech under the First Amendment.) Thus, a statement that does not appear to state actual facts about a plaintiff is nonactionable as a matter of law, and would not state a *prima facie* defamation claim or survive a hypothetical motion for summary judgment.

The Maxons argue, again for the first time on appeal, that this Court should adopt a *prima facie* standard requiring a petitioner to only make a *prima facie* showing as to each

element of the tort of defamation. *See Doe I and Doe II v. Individuals*, 561 F. Supp. 2d 249, 256 (D. Conn. 2008). The *Doe I* court held that requiring a plaintiff to show that her claims might withstand a motion for summary judgment is "potentially confusing and difficult for a plaintiff to satisfy when she has been unable to conduct any discovery at this juncture." *Id.* at 255-56. That assertion just does not ring true. While that argument is also unavailing for the Maxons due to reasons stated in Section III-C *infra*, Judge Daugherity, following the guidance of other well-reasoned opinions, noted that a plaintiff must only introduce evidence creating a genuine issue of material fact (i.e. a *prima facie* case) for all elements of a defamation claim *within the plaintiff's control*. *Cahill*, 884 A.2d at 463 (emphasis in original). (A.97) Typically in anonymous speech cases, the only element not known is the identity of the putative defendant, which is largely irrelevant for determining whether a plaintiff has stated a claim. However, if a petitioner shows that there are general issues of material fact as to additional elements, the petition for discovery should be granted. *Id.* at 464 (recognizing that a public figure is not likely to be able to show proof of actual malice at this early stage of litigation and therefore not requiring a *prima facie* showing on that element). This standard "is likely to reveal a silly or trivial claim, but a plaintiff with a legitimate claim should be able to obtain the identity of an anonymous defendant and proceed with his lawsuit." *Id.* at 464. It also does not appear under a *prima facie* standard as articulated by the *Doe I* court that a judge would have the opportunity to determine as a matter of law whether the statement may be innocently construed or is protected opinion before requiring disclosure if all that a petitioner had to do was make a *prima facie* case on each element of a defamation claim. *Doe I*, 561 F. Supp. 2d at 256. As stated earlier, a statement that otherwise may be defamatory *per se* is nonactionable as a matter of law if it is protected speech under the First Amendment. *Hopewell*, 299 Ill. App. 3d 513.

4. The Court Must Balance The Parties' Rights

Finally, the fourth step, which requires a court to weigh a petitioner's right not to be defamed against an Internet commenter's right to anonymous speech if they make the requisite showing in the third step, is critical because even if it appears that a petitioner could survive a motion for summary judgment, a court is in the best position to balance the competing interests and determine as a matter of law whether the disclosure should be made. Once an anonymous Internet commenter's identity is known, it cannot be reversed. *See Mobilisa*, 170 P.3d at 721 (discussing the need for this balancing step and holding that an unmasked anonymous speaker cannot later obtain relief from the order should the party seeking the speaker's identity not prevail on the merits of the lawsuit).

C. The Maxons Appear To Concede That There Is A Need For A Heightened Standard When Seeking Disclosure Of An Anonymous Internet Commenter

On one hand, the Maxons' contended both in the circuit court and in their brief that "Rule 224 does not require more, nor has any Illinois Case been identified requiring more" of a petitioner seeking identification of an anonymous Internet commenter. On the other hand, the Maxons' requested – and indeed were granted – leave to amend their initial Petition to identify the defamatory statements that allegedly were at issue, something that is not mandated by the plain language of the rule or any Illinois court case identified by either party. (C64-65) Thus, at the outset of the case, they conceded that at least *some* extra information is necessary when a Rule 224 petition seeks identifying information of an anonymous Internet commenter. Moreover, the Maxons later state that "the Trial Court should have adopted and applied the test" adopted in *Doe I*, 561 F. Supp. 2d 249, which is a slightly less stringent *prima facie* standard than the circuit court used here. That assertion essentially concedes that the circuit court was

correct in adopting a heightened standard, and that at a minimum it should be the *prima facie* standard.

IV. The Circuit Court Was Correct In Holding That The Maxons' Would Not Be Able To Withstand A Motion For Summary Judgment Filed By A Potential Defendant

Even though a statement may fit into a defamation *per se* category, such a circumstance, standing alone, has no bearing on whether a statement is actionable because certain factors may render defamatory statements non-actionable as a matter of law. *Madison,* 539 F.3d at 653 (citing *Hopewell*, 299 Ill. App. 3d at 513). If a defendant's statements are capable of an innocent, non-defamatory construction, a plaintiff cannot maintain an action for defamation *per se. Id.* (internal citations omitted). The First Amendment also affords protection from liability to a speaker expressing an opinion that does not misstate actual facts. *Id.* The circuit court properly held that FabFive's statements fell in the latter category of protected speech.

A defamatory statement is constitutionally protected only if it cannot be reasonably interpreted as stating actual fact. *Hopewell,* 299 Ill. App. 3d at 518. To separate fact from opinion, courts consider three factors: 1) whether the statement is objectively verifiable as true or false, 2) whether the statement has a precise and readily understood meaning, and 3) whether the statement's literary or social context signals that it has factual content. *Id.* at 518-19. Here, the court exercised its discretion in determining that FabFive's comment was protected opinion because it was "screed," and, in the court's view after viewing the entire litany of comments about the Ottawa Planning Commission actions, "an exploration of his subjective viewpoint, his interpretation of events, his theory of why the result occurred, his conjecture and surmise, and he does not claim in these two blogs to have objectively verifiable facts." (A.104-105, *citing Moriarty v. Green,* 315 Ill. App. 3d 225, 235 (1st Dist. 2000))

The Maxons' hone in on the fact that one of the many alleged defamatory statements in that case was in fact actionable (several were not), but the First District's rationale for not dismissing that allegation was because it fell within the first factor of the opinion analysis: It was capable of being proven true or false. *Moriarty*, 315 Ill. App. 3d at 233. Ottawa Publishing already conceded and the circuit court agreed that whether or not the Maxons did in fact bribe the Ottawa Planning Commission could be a verifiable fact. (A.100) Instead, Judge Daugherity examined the third element of the opinion analysis here – the literary and social context of the statements – and held that the statement was nonactionable opinion. (A.103-104) The Maxons do not cite any case law that refutes this point or shows that the judge abused his discretion in so determining it.

The Maxons also inexplicably spend a great deal of time discussing the standard of review for dismissal of a defamation action based on the innocent construction rule and *Bryson v. News Am. Pubs., Inc.*, 174 Ill. 2d 77, 85 (1996), which discussed the application of the innocent construction rule.[10] (A.15-16) However, the circuit court specifically held that the statements did not fall within innocent construction protections. (A.99 ("I think that on the issue of whether or not that statement is of and concerning the Petitioners, that it's pretty apparent to me and obvious that it is. And that it cannot be innocently construed or constructed as anything but referring to the Petitioners in this case. So from the standpoint of whether or not that statement then would receive protection under the innocent construction rule, I find that it does not.")) Thus, to the extent that the Maxons are attempting to argue that the circuit court

[10] A motion to dismiss based on innocent construction is not generally brought under Section 2-619 unless it invokes matters outside the four corners of the pleadings, contrary to the Maxons' assertions in their brief. (Maxon Br. at 8, 15) Rather, a motion to dismiss attacking the sufficiency of the pleading and invoking the innocent construction rule – as would be the case here if this were an actual defamation action and not a Rule 224 petition – would be brought pursuant to Section 2-615. *See Seith*, 371 Ill. App. 3d at 133.

improperly applied the innocent construction rule, their argument is futile because the circuit court already determined innocent construction did not apply.

CONCLUSION

Judge Daugherity did not abuse his discretion when he applied a four-part "summary judgment" standard to determine whether a Rule 224 petitioner may or may not obtain information leading to the disclosure of the identity of an anonymous Internet commenter. This standard requires the following:

> 1. A petitioner (or respondent if more efficient) must undertake efforts to notify the anonymous Internet commenter that he or she is the subject of an action seeking his or her identification;
>
> 2. A petitioner should set forth the exact statements purportedly made by the anonymous poster that the plaintiff alleges constitute defamatory speech;
>
> 3. A petitioner should show that a defamation action can survive a future motion for summary judgment brought by the putative defendant; and
>
> 4. A court should then balance the Internet commenter's First Amendment right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the disclosure of the anonymous Internet commenter's identity in determining whether to allow the plaintiff to properly proceed.

The Court also did not abuse his discretion when he determined as a matter of law that the Maxons could not meet the third element of the test because the statement was protected opinion.

For these reasons, the circuit court's order dismissing the Amended Petition should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). 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 21 pages.

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CERTIFICATE OF SERVICE

I, Katherine E. Licup, an attorney, certify that three true and correct copies of the foregoing BRIEF OF RESPONDENT-APPELLEE OTTAWA PUBLISHING COMPANY, LLC were served via U.S. mail, first class postage prepaid, on March 24, 2009, to the following attorneys:

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