IN THE MICHIGAN COURT OF APPEALS

FAZLUL SARKAR,

Plaintiff-Appellant,

vs.

JOHN and/or JANE DOE(S),

Defendant(s)-Appellee(s),

and

PUBPEER LLC,

Non-party Appellee.
_____/

Wayne Co. Circuit Court
Case No. 14-013099-CZ
Hon. Sheila Ann Gibson

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APPLICATION FOR LEAVE TO APPEAL

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Statement of Jurisdiction

This is an interlocutory appeal from the trial court's order granting a non-party, PubPeer's, motion to quash a subpoena entered on March 9, 2015. This court has jurisdiction pursuant to MCR 7.203 (B) (1).

Questions Presented

I. Whether the lower court erred when it granted a non-party, PubPeer's, motion to quash, where the court also erroneously:

A. Permitted the non-party to argue standards for summary disposition under MCR 2.116 (C) (8);

B. Considered two affidavits in purporting to consider the non-party's motion under MCR 2.116 (C) (8), which only permits examination of the pleadings;

C. Required the plaintiff to produce actual documentary evidence in purporting to consider the non-party's motion under MCR 2.116 (C) (8), which only permits examination of the pleadings;

D. Made factual inferences against the plaintiff;

E. Required a higher pleading standard for defamation that required by law;

F. Did not separately consider the standards of the plaintiff's other four causes of action besides defamation;

G. Used the wrong standard in examining the motion under MCR 2.116 (C) (8) rather than considering it as a motion for protective order under MCR 2.302.

PLAINTIFF-APPELLANT SAYS "YES"

NON-PARTY PUBPEER WOULD SAY "NO"

Statement re Interlocutory Appeal

Dr. Sarkar has already faced substantial harm. He has lost two tenured jobs at public universities due to the tortious conduct of the anonymous defendant(s). He has a right under law to file suit and hold defendant(s) accountable. Towards that end, he served a discovery subpoena on the non-party PubPeer. By the time PubPeer's motion to quash the subpoena was heard and decided, it was exactly five months after he filed his case (October 9, 2014 – March 9, 2015). He is still no closer to learning the identity of the anonymous defendant(s).

His summonses (which were extended 60 days by order of March 23, 2015) are now set to expire May 18, 2015. Unless he is granted relief from the Court of Appeals, he may never be able to learn the identity of defendant(s), serve his summons(es) on time, and maintain compliance with the statute of limitations.

Introduction

Dr. Fazlul Sarkar filed a lawsuit, alleging tortious conduct that is destroying his life and career. He does not know who is responsible. He sought a discovery subpoena on a non-party website, to help him learn the identity of the defendants. The lower court quashed the subpoena, and Dr. Sarkar appeals.[1]

Dr. Sarkar is a prominent cancer researcher at Wayne State University. He has an enemy hiding behind the anonymity afforded by the internet. So far, this unknown person[2] has been quite successful, sabotaging an excellent job that Dr. Sarkar had secured - a tenured position at the University of Mississippi - by falsely accusing him of research misconduct. Not finished, this anonymous defendant widely distributed fraudulent documents that Dr. Sarkar was subject of a U.S. Senate investigation. Shortly afterwards, Dr. Sarkar lost his tenure at Wayne State. Now, after 35 years as an expert in his field, Dr. Sarkar faces unemployment in a few short months.

Seeking to hold the anonymous person accountable, Dr. Sarkar filed a five-count complaint in this court against "John and/or Jane Does." In order to find out the identity of this person, Dr. Sarkar subpoenaed PubPeer, an anonymously-held website for anonymous posters. Ostensibly, PubPeer is for dispassioned discussion of scientific research. In reality, like far too much of the anonymous internet world, it is a place for complaining, grinding axes, and making accusations.

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[1] On March 9, 2015, the lower court quashed the subpoena as to all but one anonymous comment. That is the order appealed from. On March 26, 2015, the lower court denied the motion to quash as to the remaining comment, and it is anticipated that PubPeer will file for interlocutory appeal as to that order. It is logical that the two appeals should be consolidated and heard together.

[2] Hereafter, for consistency, defendant shall be referred to in the male singular. This is because one "John Doe" defendant appeared in the lower court, and to this point, there is no definite evidence of more than one defendant.

PubPeer responded by filing a motion to quash the subpoena. They position themselves as champions of free speech, not a forum for destroyers of a man's career. They frame their motion to try and fool this court into thinking this case is only about whether scientific blots look alike, and that persons using their website should be allowed to say so.

But that argument misleads the court. The case is about blatantly false accusations of "scientific misconduct" that are a death sentence in the field of scientific research, where grants dry up and jobs go away at the first whisper of such charges. It is about sending these false accusations to a University 762 miles south for the sole purpose of disrupting Dr. Sarkar's new job. It is whether a person can make up a Senate investigation out of whole cloth, widely distribute forged flyers throughout Wayne State University, and watch Dr. Sarkar's tenured position there go away two weeks later. It is about whether a person can violate federal law and breach the confidentiality of Wayne State's inquiries and investigations, which were likely instigated in the first place by Dr. Sarkar's relentless, anonymous enemy.

PubPeer's motion also rests on a false premise. Cloaked in the First Amendment, PubPeer avoids serious discussion of the defendant's horrific conduct and instead suggests this case is only about the similarity of blots.[3] They further suggest that plaintiff's lawsuit seeks to chill honest academic debate. They do this for a reason: they want to distract the court from the tortious conduct at issue.

Plaintiff, as a scientist and an academic, does not dispute the obvious proposition that open and honest debate about scientific articles is not only non-defamatory but absolutely essential. But this case is not about the First Amendment. These are not employees criticizing their government

[3] See, e.g. defendant's brief below at p. 21, "… Dr. Sarkar's central claim, which is that certain commenters defamed him by noting similarities between images …" Even a cursory review of plaintiff's complaint contradicts that blatantly misleading statement.

employers; they are not researchers engaging in good faith discussions; they are not dissidents railing against the tyranny of the majority. They are people who intentionally acted to try and destroy Dr. Sarkar's career, with false accusations of research misconduct, and other torts relating to malicious interference with employment and breaches of confidentiality.

Even PubPeer's terms of service recognize the distinction between commenting on blot similarity and accusations of research misconduct, imploring posters to refrain from the latter in order to minimize legal risk.

The process of learning defendant's identity is clearly set forth in the controlling case, *Thomas M. Cooley Law School v. Doe*, 300 Mich App 245 (2013). The legal standard for testing Dr. Sarkar's complaint is well established in the court rules and prevailing law, and is not heightened simply because defendant hides his identity.

Ultimately, this court must decide whether a man whose life has been turned upside-down by these reprehensible and tortious acts is even allowed to pursue his lawsuit, or whether he shall be stopped in his tracks by the order granting PubPeer's motion to quash. All Dr. Sarkar asks is to be able to have his claims tested fair and square in a court of law. He is willing to agree to the terms of a protective order regarding the anonymous poster's identity while he pursues his suit. While he may not win in the end, justice demands he be allowed to proceed. The order granting PubPeer's motion should be overturned.

Facts

Plaintiff's October 9, 2014 complaint lays out in 124 detailed paragraphs the allegations forming the basis of its five counts. Dr. Sarkar is a widely-published scientist who has published more than 533 papers (complaint, ¶ 57). His research focuses on cancer prevention and therapy, including work that has led to the discovery of the role of chemopreventive agents in sensitization of cancer cells (reversal of drug resistance) to conventional therapeutics (chemo-radio-therapy) (complaint, ¶ 80). His research has been continuously funded by the National Cancer Institute, the National Institute of Health, and the Department of Defense (complaint, ¶ 12).

PubPeer is a website that allows users to comment anonymously on any publication in a scientific journal. It defines itself as "an online community that uses the publication of scientific results as an opening for fruitful discussion among scientists" (complaint, ¶ 23). The website is run by anonymous people, with the URL registration maintained by a proxy (complaint, ¶ 24). The terms of service explicitly instruct users: "First, PLEASE don't accuse any authors of misconduct on PubPeer" (complaint, ¶ 26). The website also states that: "The site will not tolerate any comments about the scientists themselves" (complaint, ¶ 30).

Despite these admonitions, PubPeer allowed a series of comments by one person, or a small group of people coordinating their statements, which defame Dr. Sarkar and accuse him of research misconduct. They accuse him of falsifying data and appear to orchestrate a movement, to cost Dr. Sarkar a job at the University of Mississippi, and to notify Wayne State of alleged research misconduct. These anonymous posters did not merely question conclusions in Dr. Sarkar's work or find errors. They went well beyond that, to challenge his motives and imply that he had engaged in "research misconduct."

Those are not mere words. As detailed in plaintiff's complaint, research misconduct is an extremely serious charge to level against a scientist, often fatal to one's career (complaint, ¶¶ 33-36). One infamous accusation resulted in suicide despite the scientist's formal exoneration (http://aeon.co/magazine/philosophy/are-retraction-wars-a-sign-that-science-is-broken/). Given the gravity of such an accusation, the federal government has created clear regulatory guidelines for what is and is not research misconduct (complaint, ¶ 31). They include:

> ... fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.
>
> (a) Fabrication is making up data or results and recording or reporting them.
>
> (b) Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.
>
> (c) Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.
>
> (d) Research misconduct does not include honest error or differences of opinion.

Id. (quoting 42 C.F.R. § 93.103 (2005)). Research misconduct must be "committed intentionally, knowingly, or recklessly." 42 C.F.R. § 93.104 (2005).

The defendant in this case is not content to follow this confidential, regulated scheme. Intent on destroying Dr. Sarkar, he widely distributed a screen shot from PubPeer showing the search results and disclosing the number of comments generated from each research article listed on the page. Effectively, defendant manufactured that there were widespread concerns about Dr. Sarkar's research and then used this supposed concern to sabotage his job with the University of Mississippi. He even went so far as to manufacture that there was a Senate investigation, led by Senator Charles Grassley (complaint, ¶ 70-73). This immediately preceded Dr. Sarkar losing tenure at WSU. As such, defendant has worked anonymously and tirelessly to defame Dr. Sarkar, and maliciously deprive him of economic opportunities.

Dr. Sarkar has brought claims for defamation, intentional or tortious interference (two counts, one for Mississippi and one for Wayne State), false light invasion of privacy, and intentional infliction of emotional distress. These claims are clearly cognizable under Michigan law, and to allow defendant to hide behind their anonymity would actually serve as a blow to First Amendment rights, as they would allow the stifling of scientific research through the risk that innocent mistakes lead to claims of "research misconduct" and the potential loss of livelihood.

Argument

In granting PubPeer's motion to quash, the court made plain legal errors that were outcome determinative. These must be corrected for justice to prevail.

A. It Was Error to Allow a Non-Party to Argue Standards for Summary Disposition

The court made a plain legal error when it allowed a non-party, PubPeer, to argue a motion for summary disposition - or more precisely, the standards for such a motion - and to consider that argument in granting their motion to quash. Specifically, the court's error was in applying the standards of *Ghanam v. Does*, 303 Mich App 522 (2014), rather than *Thomas M. Cooley Law School v. Doe*, 300 Mich App 245 (2013), because in this case, a defendant has appeared.

Normally, a non-party is not allowed to file a motion for summary disposition. Only a party may file. MCR 2.116 (B) states that "A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule." *Ghanam* provides a limited exception, allowing a non-party to argue (C) (8) standards if there is no actual party to make the argument. That exception does not apply here, because in the lower court, a defendant had already appeared, filed a motion for summary disposition, and scheduled its motion to be heard. The attorney for that defendant even addressed this court at oral argument on March 5. Thus there is no need – and indeed, *Cooley* prohibits – the non-party from arguing the standards of MCR 2.116 (C) (8).

Ghanam allows a non-party to argue that the complaint is deficient under MCR 2.116 (C) (8) on the theory that if there is no defendant to raise the motion, the non-party may do it instead. That court reasoned, "... there is no evidence that any of the anonymous defendants were aware of the pending matter or involved in any aspect of the legal proceedings. Therefore, the instant case is distinguishable from *Cooley*." [*Ghanam* at 530]

The court went on to distinguish the cases: "... in *Cooley*, the court rules were adequate to protect the anonymous defendant only because he was aware of and involved in the lawsuit." See Id. at 252, 270. As the partial dissent in *Cooley* noted, "[A]n anonymous defendant cannot undertake any efforts to protect against disclosure of his or her identity until the defendant learns about the lawsuit--which may well be too late . . . ." Id. at 274 (BECKERING, J., concurring in part and dissenting in part). In the present case, no defendant was notified of the lawsuit and no defendant had been involved with any of the proceedings, which means that there was no one to move for summary disposition under MCR 2.116(C)(8)." [*Ghanam,* Id. at 539-540]

If there is no defendant, the court must apply *Ghanam* and "analyze the complaint under MCR 2.116(C)(8) to ensure that the plaintiff has stated a claim on which relief can be granted." [*Ghanam,* Id. at 530] But if there ***is*** a defendant to argue for summary disposition, then a non-party may ***not*** argue the summary disposition standards. In short, *Ghanam* applies if there is no defendant able to argue a motion for summary disposition,[4] and *Cooley* applies if there is a defendant, because in such a case, it is not necessary for a non-party to assert a party's rights.

[4] Illustrating this proposition is what actually happened in the lower court. John Doe 1 filed and noticed a motion for summary disposition to be heard, but withdrew the motion after the court granted PubPeer's motion to quash. There is absolutely no reason to have a non-party argue a party's motion for summary disposition under the guise of a protective order.

In *Cooley,* the unknown defendant purported to be a former student who created a website at Weebly.com that criticized the law school. Cooley filed suit and then subpoenaed Weebly.com for identifying information. Defendant moved to quash the subpoena. The Court of Appeals rejected application of the burdensome showing required by some courts, such as New Jersey state court in *Dendrite Int'l, Inc. v. Doe,* 342 NJ Super 134; 775 A.2d 756 (NJ App, 2001) holding instead that "Michigan's procedures for a protective order, when combined with Michigan's procedures for summary disposition, adequately protect a defendant's First Amendment interests in anonymity." 300 Mich. App at 264.

The court went on to say, "[T]he trial court need not, and should not, confuse the issues by making a premature ruling—as though on a motion for summary disposition—while considering whether to issue a protective order before the defendant has filed a motion for summary disposition." Id. at 269. The court went on to explain: "Doe 1 urges this Court to rule that Cooley has not pleaded legally sufficient claims for defamation and tortious interference with a business relationship. **We conclude that Doe 1's motion for a protective order did not present the appropriate time or place to do this.** These rulings are best made in the context of a motion for summary disposition, when the trial court is testing the legal sufficiency of the complaint. The trial court's only concerns during a motion under MCR 2.302(C) should be whether the plaintiff has stated good cause for a protective order and to what extent to issue a protective order if it determines that one is warranted." [*Cooley,* Id. at 269; emphasis added]

Subsequently, in *Ghanam v. Does,* 303 Mich. App. 522, 530 (2014), the court acknowledged that *Cooley* applied in the context where "any of the anonymous were aware of the pending matter or involved in any aspect of the legal proceedings." But, even in such instances where (unlike here) the defendant does not know about the case, there is only a slightly elevated

standard: *Ghanam* requires only that "plaintiff is first required to make reasonable efforts to notify the defendant of the lawsuit" and the court must "analyze the complaint under MCR 2.116(c)(8) to ensure that the plaintiff has stated a claim on which relief can be granted." *Id*.

Nonetheless, this case is governed by *Cooley*. As an initial matter, at least one defendant in this case has appeared in the case. Furthermore, it is likely that any person who uses PubPeer would be aware of this dispute. PubPeer has posted correspondence from the undersigned counsel, and the lawsuit has been fully discussed by PubPeer's editors and numerous anonymous commenters (*https://pubpeer.com/topics/1/3F5792FF283A624FB48E773CAAD150#fb24568*). The lawsuit has also been covered throughout the international scientific journal community, including Nature (*http://www.nature.com/news/peer-review-website-vows-to-fight-scientist-s-subpoena-1.16356*), the Scientist (*http://www.the-scientist.com/?articles.view/articleNo/41070/title/PubPeer--Pathologist-Threatening-to-Sue-Users/*), Science (*http://news.sciencemag.org/scientific-community/2014/12/defamation-case-pubpeer-moves-quash-subpoena-unmask-anonymous)*, Wired (*http://www.wired.com/2014/12/pubpeer-fights-for-anonymity/?utm_source=twitterfeed&utm_medium=twitter*), and many others. In addition, there is prominent coverage on a website called www.retractionwatch.com, whose related postings are all specifically referenced on PubPeer (*https://pubpeer.com/topics/1/3F5792FF283A624FB48E773CAAD150#fb14544*). These articles have garnered hundreds of comments and catalyzed significant debate on these issues. Given the likely small number of involved people who may be defendants in this action and the repeated focus that PubPeer and other sites have made on the issue, it is nearly certain that everyone who may be a potential defendant has been well aware of the lawsuit for some time.

As such, the approach in *Cooley* should apply, which acknowledges that any defendant's interest in privacy can be protected by an appropriate protective order. In *Cooley*, by the time of the decision on the motion to quash, the plaintiff had actually learned the defendant's identity. The Court considered how to protect the defendant's First Amendment rights and determined that a fact-based protective order inquiry was instructive. The Court specifically rejected exactly the claim that PubPeer is making in this case, that the court should impose a judicially-created anti-cyber-SLAPP legislation or to rewrite discovery and summary disposition rules. 300 Mich. App. at 267. PubPeer does not make any argument under *Michigan* law that suggests that this situation could not be dealt with through the basic protections of a protective order.

In summary, there are two controlling precedential cases where a plaintiff seeks the identity of anonymous defendants. *Ghanam* applies if there are no known defendants; *Cooley* applies if there is a known defendant. Accordingly, it was plain legal error for this court to rely on *Ghanam* and allow the non-party to argue the summary disposition standards, because in this case, there is a known defendant with the ability (and a pending motion) to do that very thing.

Moreover, this plain error affected the outcome, because s the transcript will indicate, the court indicated that the court relied upon PubPeer's counsel's attack on the sufficiency of the pleadings under MCR 2.116 (C) (8) in mostly granting their motion.

Because the court permitted this attack on the pleadings by a non-party, the following sections are presented to demonstrate that the court also palpably erred in the way it applied that legal standard, because it considered affidavits and made factual inferences against the plaintiff.

B. It Was Error to Consider Dr. Krueger's Affidavit and the Other Affidavit Attached to PubPeer's Motion to Quash

The court's error in considering the (C) (8) factors was compounded when it considered the affidavit of Dr. Krueger (opining about Dr. Sarkar's research) attached to PubPeer's motion. Even assuming *arguendo* that the court were permitted to consider (C) (8) factors on the motion to quash, MCR 2.116 does not permit reference to affidavits in determining a (C) (8) motion by its plain language: "Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9)." This additional error ensured that any reliance on *Ghanam* was not harmless.

There are countless cases going back decades that affirm this hard rule, including:

"Summary judgment motion for failure to state claim on which relief can be granted tests complaint's legal sufficiency on pleadings alone." *Long v Chelsea Community Hosp.* 219 Mich App 578 (1996), *Vogh v American International Rent-A-Car, Inc*. 134 Mich App 362 (1984).

"A motion for summary disposition under MCR 2.116(C) (8) tests the legal basis of the claim and is granted if the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery; it is examined on the pleadings alone, absent considerations of supporting affidavits, depositions, admissions, or other documentary evidence, and all factual allegations contained in the complaint must be accepted as true." *Dolan v Continental Airlines/Continental Express* 454 Mich 373 (1997).

As argued above, because there was an appearing defendant, PubPeer was not permitted under *Cooley* to argue the standards of MCR 2.116 (C) (8). The error was exacerbated by PubPeer's submission of two affidavits in support of their motion. They may not submit them, and this court may not consider them. Specifically, their expert's affidavit must be completely disregarded, and it is not harmless, because its focus was that the anonymous commenters' statements were substantially true and not defamatory – an argument the lower court considered.

C. It Was Error to Make Factual Inferences against the Plaintiff

Furthermore, clear precedent requires that all factual allegations and the inferences to be drawn from them are to be taken in the light most favorable to the non-moving party and taken as true. However, the court's remarks at oral argument repeatedly assumed an interpretation of the pleadings favorable to the defendant. That is improper when considering the pleadings alone. In evaluating a motion for summary judgment for failure to state a claim, "all factual allegations are taken to be true along with any reasonable inferences or conclusions which can be drawn from the facts alleged." *Schenk v Mercury Marine Div., Lowe Industries* 155 Mich App 20 (1986).

"A court must accept as true all well-pled factual allegations as well as any conclusions which can reasonably be drawn therefrom and grant the motion only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Marley v Huron Valley Men's Facility Warden* 165 Mich App 78 (1987), *Hankins v Elro Corp.* 149 Mich App 22 (1986), *Dzierwa v Michigan Oil Co.* 152 Mich App 281 (1986).

The pleadings shall be construed "most favorably to the nonmoving party." *Blair v Checker Cab Co*. 219 Mich App 667 (1996).

As argued in the first section, because there was an appearing defendant, PubPeer was not permitted under *Cooley* to even argue the standards of MCR 2.116 (C) (8). The error was compounded by the court's interpretation of all of Dr. Sarkar's factual allegations, and the inferences therefrom, in a light favorable to PubPeer.

D. It Was Error to Require a Higher Pleading Standard for Defamation Than Required By Law

The above section demonstrated that in general, factual allegations and the inferences to be drawn from them are to be taken as true for purposes of analyzing the pleadings under a (C) (8) motion. It is especially true in defamation actions, where any genuine issue as to material facts

would act to prevent the court from discounting the pleadings and allow the claim to go to the factfinder, in this case the jury, if the words were capable in law of a defamatory meaning. *Robbins v Evening News Asso*. 373 Mich 589 (1964). In its response to PubPeer's motion to quash, plaintiff cited several cases as to why his complaint satisfied the pleadings standards of MCR 2.116 (C) (8) (see, e.g., p. 13-14), especially *Smith v. Anonymous Joint Enter.*, 487 Mich 102, 128-9 (2010) ("a court must consider all the words … analyzed in their proper context;" and that the court must look beyond what is said to what is "implied"). Plaintiff also cited *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 18 (1990) to the effect that opinion may be defamatory, and *Loricchio v. Evening News Ass'n*, 438 Mich. 84, 123 n.32 (1991) supporting defamation by innuendo "without a direct showing of false statements." [Also see *Royal Palace Homes, Inc. v Channel 7 of Detroit, Inc*. 197 Mich App 48 (1992).

This court erred by focusing on the words alone, and determining truth or falsity as a matter of law. The Supreme Court has "consistently viewed the determination of truth or falsity in defamation cases as a purely factual question which should generally be left to the jury." *Ireland v. Edwards*, 230 Mich App 607, 621-622 (1998); also see *Steadman v Lapensohn*, 408 Mich 50, 53-54 (1980); *Cochrane v Wittbold*, 359 Mich 402, 408 (1960).

E. It Was Error to Require the Production of Evidence

PubPeer argued, and the court agreed, that plaintiff was required to produce evidence at this stage, to wit: the document that suggested Dr. Sarkar was under U.S. Senate inquiry. The transcript will indicate that after the court directed plaintiff produce this document, a copy was handed over on the record to the attorneys for PubPeer. For the same reasons set forth above, that any analysis under MCR 2.116 (C) (8) must be based on the pleadings alone, this was plain error.

F. It Was Error to Not Separately Consider the Standards of Plaintiff's Other Four Causes of Action

As for Dr. Sarkar's other four claims, PubPeer's motion to quash spent all of four sentences on them, and incorrectly cited the law. They argued that the other torts rise and fall with the defamation claims, but that is only if the torts are based on the same statements. *Ireland*, 230 Mich App at 624-5. Here all the torts rest on different conduct. The intentional interference with business expectancy (University of Mississippi) rested on the malicious sending of documents to three different administrators at that institution with the intent to cause them to terminate their job offer to Dr. Sarkar, which was successful. The intentional interference with business relationship claim rests on the faking of a senate inquiry to get Wayne State to terminate that job, and succeeded in having them remove tenure. The invasion of privacy claim was based on disclosure of alleged and heavily regulated investigatory proceedings that are required by law to be confidential. The intentional infliction of emotional distress tort was based on this entire pattern of conduct, single-mindedly designed to ruin Dr. Sarkar's career, life's work, reputation, grants, and prospects.

All of these torts have different standards; they are cited in plaintiff's response to PubPeer's motion to quash. Neither PubPeer nor the court addressed the elements of any of these torts. It was error to determine that independent torts based on *different* conduct than the defamatory statements standing alone were determined by analysis of the defamation claims.

G. It Was Error to Not Consider PubPeer's Motion under MCR 2.302 for Protective Orders

As *Cooley* mandates, when a defendant has appeared, the court is to treat a motion by a non-party, regarding a request for information, as one for a protective order under MCR 2.302. This court erred by not considering it under that standard.

MCR 2.302 states in relevant part:

> (C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
>
> (1) that the discovery not be had;
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; …
>
> (5) that discovery be conducted with no one present except persons designated by the court; …
>
> (8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

However, in its remarks, this court did not consider any of these factors. This court made what the *Cooley* court held was plain error: considering that it had only two choices, to either quash the subpoena, or not. *Cooley* stressed that this court must consider alternatives in between these "polar opposites." *Cooley* at 267-268.

Cooley also said a court **may** balance the interests concerning a protective order, and "may consider that a party seeking a protective order has alleged that the interests he or she is asking the trial court to protect are constitutionally shielded." *Cooley* at 269. But the court made it clear that in balancing the interests, the trial court cannot consider the sufficiency of the pleadings. Put another way, what a nonparty can't get in the front door – evaluation of the claims under MCR 2.116 (C) (8) - it can't get in the back door either: "We conclude that Doe 1's motion for protective order did not present the appropriate time or place" to consider the "legal[] sufficiency [of the] claims for defamation and tortious interference with a business relationship. … The court's only concerns during a motion under MCR 2.302 should be whether the plaintiff has stated good cause for protective order and to what extent to issue a protective order if it determines that one is

warranted." Id. In other words, this court could have considered PubPeer's and their users First Amendment rights in general – but not in the context of analyzing the pleadings.

This court did not balance these factors. Had it properly done so, the court should have considered the following in mitigating against protection for PubPeer, including:

(1) That Pub Peer did not follow its own guidelines in publishing the comments;

(2) That they removed scores of comments after Dr. Sarkar's counsel's initial demand letter;

(3) That the person or persons they are protecting has published allegations that there is a confidential investigation, a factor that the court in *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070 (Ill. App. Ct. 1st Dist. 2013) found to be determinative in denying privilege to the commenter;

(4) That the anonymous persons made up a US Senate inquiry out of whole cloth.

Given the great harm Dr. Sarkar has suffered, the strong public policy that such injured persons should have access to the courts to pursue their claims, and the wrongdoing by both PubPeer and the anonymous defendants, there was no cause to grant the most drastic remedy in PubPeer's favor: a motion to quash the subpoena in all but one respect. The court abused its discretion by not balancing the factors as required by *Cooley* and fashioning a more limited protective order, that would have safeguarded the anonymity of defendants for public consumption, while allowing plaintiff to fairly test his claims going forward.[5]

[5] This was what the court did correctly in denying PubPeer's motion to quash regarding the comments in paragraph 40 (c) of plaintiff's complaint, and permitting disclosure under the terms of a protective order [court's order of March 30, 2015, and subject to the anticipated interlocutory appeal of PubPeer.

Conclusion

Plaintiff is sympathetic to the spirit of the arguments made by PubPeer. Anonymous commenters can be valuable and should not be silenced by more powerful forces who use the legal system to learn identities and then retaliate against the commenters. Likewise, academic dispute, even when anonymous, is certainly valuable. However, despite PubPeer's best efforts to make this case one of academic freedom, it is not. This case is about holding accountable those who would anonymously try to destroy Dr. Sarkar's career through intentional efforts to paint him as an unethical researcher engaged in research misconduct. Defendants were not seeking the "truth," they deliberately engaged in conduct designed specifically to harm Dr. Sarkar, even though Dr. Sarkar has never been found to engage in research misconduct and actually has an error rate less than that of other cancer researchers. In reality, the accusations of research misconduct are analogous to accusing someone of commission of a crime, and amount to defamation *per se*.

Dr. Sarkar has stated clear claims for tortious conduct, including defamation, that should go forward. His request for discovery to PubPeer should have been granted, with an appropriate protective order, analyzed under *Cooley* and the Michigan Court Rules. Even assuming *arguendo* that *Ghanam's* stricter standards apply, plaintiff made a sufficient claim to go forward. Accordingly, PubPeer's motion to quash was wrongly granted.

Relief Requested

W H E R E F O R E plaintiff requests this honorable court reverse the lower court's March 9, 2015 order to quash and remand for further proceedings, permiting the subpoena to be issued on appropriate conditions in a protective order.

Respectfully submitted,
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