STATE OF MICHIGAN
COURT OF APPEALS
FOURTH DISTRICT

THOMAS M. COOLEY LAW SCHOOL,

Plaintiff-Appellee,

v.

JOHN DOE 1,

Defendant-Appellant,

and

JOHN DOE 2,
JOHN DOE 3, and
JOHN DOE 4,

Defendants.

Docket No.

Ingham County Circuit Court
Case No. 11-781-CZ
HON. CLINTON CANADY III

NOTICE OF HEARING ON MOTION OF *AMICI CURIAE*

Michael P. Coakley (P34578)
Paul D. Hudson (P69844)
Miller Canfield Paddock & Stone, PLC
150 West Jefferson Avenue, Suite 2500
Detroit, Michigan 48226
(313) 963-6420
Attorneys for Plaintiff-Appellee

Paul Alan Levy (DC Bar No. 946400)
Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
Attorney for Defendant-Appellant John Doe

John T. Hermann (P52858)
Law Offices of John T. Hermann, PLC
2684 Eleven Mile Road
Berkley, Michigan 48072
(248) 591-9291
Attorney for Defendant-Appellant John Doe 1

Barbara Harvey (P25478)
1394 East Jefferson Avenue
Detroit, Michigan 48207-3104
(313) 567-4228
Attorney for Defendant-Appellant John Doe 1

Robin Luce Herrmann (P46880)
Joseph E. Richotte (P70902)
Jonathan F. Jorissen (P71067)
Jennifer A. Dukarski (P74257)
Butzel Long, *a professional corporation*
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 258-1421
Attorneys for Amici Curiae
Michigan Press Association,
Gannett Co., Inc.,
Scripps Media, Inc. (as WXYZ-TV),
The Detroit News,
The Macomb Daily, and
The Rail

NOTICE OF HEARING

The Motion for Leave to File a Brief as *Amicus Curiae* Supporting Adoption of the *Dendrite* Standard will be submitted to the Court on Tuesday, December 20, 2011, or as early thereafter as may be heard by the Court. There will be no oral argument on the motion.

Respectfully submitted,

BUTZEL LONG
a professional corporation

Date: December 2, 2011

By: _____
Robin Luce Herrmann (P46880)
Joseph E. Richotte (P70902)
Jonathan F. Jorissen (P71067)
Jennifer A. Dukarski (P74257)
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 258-1421
Attorneys for Amici Curiae
Michigan Press Association,
Gannett Co., Inc.,
Scripps Media, Inc. (as WXYZ-TV)
The Detroit News,
The Macomb Daily, and
The Rail

STATE OF MICHIGAN
COURT OF APPEALS
FOURTH DISTRICT

THOMAS M. COOLEY LAW SCHOOL,

Plaintiff-Appellee,

v.

JOHN DOE 1,

Defendant-Appellant,

and

JOHN DOE 2,
JOHN DOE 3, and
JOHN DOE 4,

Defendants.

Docket No.

Ingham County Circuit Court
Case No. 11-781-CZ
HON. CLINTON CANADY III

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* SUPPORTING ADOPTION OF THE *DENDRITE* STANDARD

Michael P. Coakley (P34578)
Paul D. Hudson (P69844)
Miller Canfield Paddock & Stone, PLC
150 West Jefferson Avenue, Suite 2500
Detroit, Michigan 48226
(313) 963-6420
Attorneys for Plaintiff-Appellee

Paul Alan Levy (DC Bar No. 946400)
Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
Attorney for Defendant-Appellant John Doe 1

John T. Hermann (P52858)
Law Offices of John T. Hermann, PC
2684 Eleven Mile Road
Berkley, Michigan 48072
(248) 591-9291
Attorney for Defendant-Appellant John Doe 1

Barbara Harvey (P25478)
1394 East Jefferson Avenue
Detroit, Michigan 48207-3104
(313) 567-4228
Attorney for Defendant-Appellant John Doe 1

Robin Luce Herrmann (P46880)
Joseph E. Richotte (P70902)
Jonathan F. Jorissen (P71067)
Jennifer A. Dukarski (P74257)
Butzel Long, *a professional corporation*
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 258-1421
Attorneys for Amici Curiae
Michigan Press Association,
Gannett Co., Inc.,
Scripps Media, Inc. (as WXYZ-TV),
The Detroit News,
The Macomb Daily, and
The Rail

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* SUPPORTING ADOPTION OF THE *DENDRITE* STANDARD

Under MCR 7.212(H)(1), the Michigan Press Association, Gannett Company, Inc., Scripps Media, Inc. (as owner and operator of WXYZ-TV in Detroit), Detroit News, Inc., *The Macomb Daily*, and *The Rail* respectfully move the Court for leave to file a brief as *amici curiae* urging the adoption of a constitutional rule to govern when trial courts can order the identity of an anonymous internet poster to be revealed. In support of their brief, *amici* state as follows:

1. *Amici* are print, broadcast, and digital media that report on issues of importance to the people of the State of Michigan and regularly interact with the public through the internet. Citizens comment on stories, relate their personal experiences, provide important context on issues of public importance, and provide leads on stories. They ask questions and raise issues that assist the press in determining which information is important to the public. Citizens also use the Internet to obtain advice and information – for example, by anonymously submitting personal medical questions or child-rearing questions to experts through websites of the press, like those of *amici*.

2. At issue in this defamation case is whether, despite a well-recognized and time-honored First Amendment right to speak anonymously, Michigan courts can order the disclosure of an anonymous internet poster's identity to facilitate a private litigant's lawsuit without any constitutional review process before the speaker is identified.

3. No Michigan appellate court has yet addressed the constitutional concerns implicated by attempts to "unmask" anonymous internet users. *Amici* seek leave to brief the Court on the importance of adopting an unmasking standard that requires plaintiffs to prove that their need for disclosure from a web host outweighs a host or anonymous Internet speaker's First Amendment rights. More specifically, *amici* urge the Court to adopt the standard articulated in *Dendrite Int'l, Inc v John Doe 3*, 342 NJ Super 134; 775 A2d 756 (2001).

4. *Amici* respectfully submit that this case is worthy of permitting an interlocutory appeal because the normal post-trial appellate process cannot adequately address the irreversible harm that would attend the disclosure of any John Doe's identity.

5. Because *amici* have an institutional interest in this case, and have not been involved in this litigation, they will be able to bring to the Court a broad and unique perspective that will assist it in appropriately and correctly deciding this matter.

For the foregoing reasons, the Court should grant this motion for leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

BUTZEL LONG
a professional corporation

Date: December 2, 2011

By: 

Robin Luce Herrmann (P46880)
Joseph E. Richotte (P70902)
Jonathan F. Jorissen (P71067)
Jennifer A. Dukarski (P74257)
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 258-1421
Attorneys for Amici Curiae
Michigan Press Association,
Gannett Co., Inc.,
Scripps Media, Inc. (as WXYZ-TV)
The Detroit News,
The Macomb Daily, and
The Rail

STATE OF MICHIGAN
COURT OF APPEALS
FOURTH DISTRICT

THOMAS M. COOLEY LAW SCHOOL,

Plaintiff-Appellee,

v.

JOHN DOE 1,

Defendant-Appellant,

and

JOHN DOE 2,
JOHN DOE 3, and
JOHN DOE 4,

Defendants.

Docket No.

Ingham County Circuit Court
Case No. 11-781-CZ
HON. CLINTON CANADY III

BRIEF OF *AMICI CURIAE* SUPPORTING ADOPTION OF THE *DENDRITE* STANDARD

Michael P. Coakley (P34578)
Paul D. Hudson (P69844)
Miller Canfield Paddock & Stone, PLC
150 West Jefferson Avenue, Suite 2500
Detroit, Michigan 48226
(313) 963-6420
Attorneys for Plaintiff-Appellee

Paul Alan Levy (DC Bar No. 946400)
Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
Attorney for Defendant-Appellant John Doe 1

John T. Hermann (P52858)
Law Offices of John T. Hermann, PC
2684 Eleven Mile Road
Berkley, Michigan 48072
(248) 591-9291
Attorney for Defendant-Appellant John Doe 1

Barbara Harvey (P25478)
1394 East Jefferson Avenue
Detroit, Michigan 48207-3104
(313) 567-4228
Attorney for Defendant-Appellant John Doe 1

Robin Luce Herrmann (P46880)
Joseph E. Richotte (P70902)
Jonathan F. Jorissen (P71067)
Jennifer A. Dukarski (P74257)
Butzel Long, *a professional corporation*
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 258-1421
Attorneys for Amici Curiae
Michigan Press Association,
Gannett Co., Inc.,
Scripps Media, Inc. (as WXYZ-TV),
The Detroit News,
The Macomb Daily, and
The Rail

BRIEF *AMICI CURIAE* SUPPORTING
ADOPTION OF THE *DENDRITE* STANDARD

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Law Review Articles

QUESTION PRESENTED

No Michigan appellate court has yet determined the appropriate standard trial courts must use when deciding whether to order the disclosure of an anonymous internet poster's identity. Should this Court adopt the widely accepted *Dendrite* standard, which carefully balances a speaker's First Amendment right to anonymous speech against a plaintiff's interest in pursuing a defamation claim?

Amici Curiae Answer: **Yes**

INTEREST OF AMICI CURIAE

Amici curiae are print, broadcast, and digital media that report on issues of importance to the people of the State of Michigan and regularly interact with the public through the Internet.

The Michigan Press Association is an organization of more than 360 print and digital Michigan newspapers dedicated to promoting First Amendment press freedom throughout the State.

Gannett Co., Inc. is a leading media and marketing-solutions company that reaches Michigan citizens through a diverse portfolio of digital, mobile, broadcast, and publishing companies and a network of hundreds of local and national media websites.

Scripps Media, Inc. owns and operates ten television stations, including ABC-affiliate WXYZ-TV based in Southfield, Michigan. Scripps Media also owns daily newspapers in 13 markets across the country and has an agreement in principle to purchase 4 additional ABC network affiliates.

The Detroit News, Inc. publishes *The Detroit News*, a print and digital newspaper that serves the residents of Southeast Michigan.

The Macomb Daily is a print and digital newspaper of general circulation that serves the residents of Macomb County, Michigan.

The Rail is an online magazine that provides analyses, perspectives, and opinions on matters affecting the residents of the Holly, Michigan area.

INTRODUCTION

This case implicates well-established First Amendment protections for anonymous and libelous statements that are of critical importance to the media and to the public as a whole. These protections discourage unfounded defamation actions. Among other things, they facilitate the early dismissal of lawsuits intended to stifle criticism of those who influence public affairs by

curtailing protracted and expensive lawsuits that not only chill speech, but may well destroy financially those who exercise their right to speak. They prevent hostile juries from punishing confrontational or unpopular speech simply because it *is* confrontational or unpopular. The protections further allow room for mistake and accidental falsehoods, recognizing that all human endeavors fall short of perfection; that those who criticize, question, and demand accountability will sometimes err in what they say; and that a rule threatening liability for any and all misstatements would foster an environment of repression, timidity, and fear. In sum, these protections preserve and advance values fundamental to the freedom of expression and, thus, to our democratic system of government.

Amici regularly interact with the public through the internet. Citizens comment on stories, relate their personal experiences, and provide important context on issues of public importance. In this manner, citizens often provide leads on stories. Citizen feedback assists the press in determining what information is important to the public. The internet medium is critical to citizens, who use it to obtain advice and information – for example, by anonymously submitting personal medical questions or child-rearing questions to experts through the websites of the press, like those of *amici*.

Anonymity fuels the process of citizen interaction. As one court has noted, "[t]he free exchange of ideas and information on the internet is driven in large part by the ability of users to communicate anonymously. If internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on [i]nternet communications and thus on basic First Amendment rights." *Doe v 2TheMart.com Inc*, 140 F Supp 2d 1088, 1093 (WD Wash, 2001).

Questions involving anonymous internet users are becoming more prevalent, but to date, no Michigan appellate court has had the opportunity to address the constitutional concerns implicated by attempts to "unmask" anonymous internet users. *Amici* write to urge the adoption of a standard that requires plaintiffs to make a threshold showing that their need for disclosure from a web host outweighs the First Amendment rights of the host or the anonymous internet speakers – more specifically, the standard articulated in *Dendrite Int'l, Inc v John Doe 3*, 342 NJ Super 134; 775 A2d 756 (2001). This kind of standard serves as an important and necessary constitutional safeguard that is consistent with Michigan courts' long history of protecting First Amendment rights and is indispensible to the free flow of information about those who govern and influence our democracy. Our freedom of speech forever deserves this Court's vigilant protection.

SUMMARY OF ANALYSIS

The First Amendment guarantees the freedom of speech. Although the First Amendment does not grant speakers immunity for false or defamatory statements, it protects them through several rules designed to narrow significantly the circumstances under which a plaintiff may successfully litigate a defamation action. For example, the United States Supreme Court has ruled that public officials cannot successfully sue for defamation without proving clearly and convincingly that the defendant intentionally lied or acted recklessly in making the challenged statements. *New York Times v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964). Likewise, where someone has taken it upon himself to become intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society, that person becomes a public figure subject to greater constitutional barriers against defamation claims. *Curtis Publishing Co v Butts*, 388 US 130; 87 S Ct 1975; 18 L Ed 2d 1094 (1967). Even completely private plaintiffs cannot win a defamation claim without proving that the challenged statements are actually false. *Gertz v Welch*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974).

Michigan courts have acknowledged even greater protections than the First Amendment to promote free speech. For example, Michigan courts favor early summary disposition in defamation cases to avoid the chilling effect on the freedom of speech and freedom of the press. They also require plaintiffs to identify the specific alleged falsity at issue in the complaint; otherwise the claim is subject to dismissal. Michigan courts have also consistently held that statements must be construed as a whole; parts of a statement cannot be severed from the whole in order to distort the meaning of the statement. Michigan courts even protect false statements if they cannot reasonably be interpreted as stating actual facts. Additionally, this Court recently held that the Fair Report Privilege protects private individuals, as well as the press. Michigan also recognizes that the category of libel *per se* merely affects the issue of whether a plaintiff must plead and prove special damages. Moreover, Michigan courts recognize that plaintiffs may be libel-proof. Given these and other state-level protections, it is exceedingly difficult for plaintiffs to prevail in a defamation action in Michigan.

Of course, before a defamation action can commence, the plaintiff must be able to identify the speaker. Where an allegedly defamatory statement was made anonymously, as is often the case with postings on the internet, courts are frequently being asked to unmask the speaker to facilitate the plaintiff's ability to sue him. Importantly, however, the First Amendment also protects anonymous speech as a category distinct from the protections afforded to defamatory speech. Like the plaintiff in this case, those complaining of alleged defamation often overlook the distinctions between – and the different protections afforded – defamatory speech and anonymous speech.

Michigan trial courts need guidance from this Court as to how they should handle requests to unmask anonymous posters. An ever-growing number of sister courts have adopted the

Dendrite standard, and it is entirely consistent with Michigan courts' application of constitutional law. *Dendrite* requires notice to the speaker, a well-pled complaint, sufficient evidence to support each element of the claim on a *prima facie* basis, and a careful balancing of the speaker's First Amendment rights against the strength of a plaintiff's case.

This Court should adopt the *Dendrite* standard. It compliments Michigan's predisposition toward summary judgment in defamation actions, and it advances the policy of Michigan courts in giving maximum protection to free speech.

ANALYSIS

I. While the First Amendment does not automatically immunize speech from defamation claims, it protects speakers by imposing heavy burdens on plaintiffs that significantly narrow the circumstances under which defamation claims can succeed.

In defamation suits, plaintiffs frequently pass over constitutional considerations, claiming for example that the First Amendment provides no protection for libel. This argument is, at best, an oversimplification. Since 1964, the United States Supreme Court and Michigan courts have developed a panoply of First Amendment protections against libel claims. A review of the development of the law is critical to understanding the importance of the issues presented in this lawsuit.

A. Before *New York Times v Sullivan*, the First Amendment did not protect false and defamatory statements.

In fact, before 1964, the United States Supreme Court described libel—along with fighting words, obscenity, and profanity—as outside the protection of the First Amendment. Thus, in *Chaplinsky v New Hampshire*, 315 US 568; 62 S Ct 766; 86 L Ed 1031 (1942), the Court dismissed such "utterances" as playing no "essential" role in "any exposition of ideas" and

as being "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572.[1]

Similarly, in *Beauharnais v Illinois*, 343 US 250; 72 S Ct 725; 96 L Ed 919 (1952), the Court addressed the constitutionality of an Illinois statute that made it a criminal offense to libel a group of individuals. The speaker was singularly unappealing: the president of a white supremacist group. The Court upheld the conviction, concluding that libelous statements are not within the purview of constitutionally protected speech. *Id.* at 256. But, in a vigorous dissent, Justice Douglas argued that the decision reflected a philosophy at war with the First Amendment, writing:

> Today a white man stands convicted for protesting in unseemly language against our decisions invalidating [racially] restrictive covenants [in real estate transactions]. Tomorrow a Negro will be hauled before a court for denouncing lynch law in heated terms.

Id. at 286.

Supreme Court decisions before *New York Times* adopted an absolutist rule: the Constitution affords no protection to false or defamatory speech, period. As with all absolutist rules, it made no room for important distinctions and nuances – for example, between speech about political figures and speech about private individuals, or between accidental falsehoods and deliberate lies. And, as Justice Douglas foretold, the rule could not be squared with the letter, history, or spirit of the First Amendment—for example, permitting (wrongly) criminal prosecution for "seditious libel" against those who criticized government officials. In *New York Times v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), the United States Supreme Court made a major course correction in the direction of constitutional jurisprudence.

---

[1] The Court would later revisit and amend its thinking with respect to each of these categories. For example, in *Cohen v California*, 403 US 15; 91 S Ct 1780; 29 L Ed 2d 284 (1971), the Court held that the First Amendment protects some uses of profane epithets.

B. In *New York Times v Sullivan* and its progeny, the Supreme Court endorsed broad and robust rules to give speech substantial breathing space.

On March 29, 1960, the New York Times published a full-page advertisement entitled "Heed Their Rising Voices," in which it stated that students engaging in non-violent civil rights demonstrations in the south had been "met by an unprecedented wave of terror." Succeeding paragraphs purported to illustrate this "wave of terror" by describing several specific events. The text concluded with an appeal for funds to support the student movement, the "struggle for the right to vote," and the legal defense of Dr. Martin Luther King, Jr. against a perjury indictment pending in Montgomery, Alabama.

Montgomery City Commissioner L.B. Sullivan filed a civil libel action against the New York Times and four African American clergymen.[2] Although the advertisement did not mention Sullivan by name, he pointed out that his duties included the supervision of the Montgomery police department and that he was therefore defamed by the descriptions of various acts of police misconduct. In particular, he cited statements claiming that truckloads of heavily armed police had surrounded the Alabama State college campus; that police had padlocked students inside the

---

[2] The plaintiff in *New York Times* argued that the statements at issue were "commercial speech" and thus not entitled to protection. *New York Times*, 376 US at 265-66. That the statements appeared in an advertisement made no difference to the Supreme Court's disposition of the case. The Court noted that the advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *Id.* at 266. The Court held: "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." *Id.* The Court reasoned that "[a]ny other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press." *Id.*

In addition, the Sixth Circuit Court of Appeals long ago held that an NLRB subpoena was an attempt to regulate commercial speech by an anonymous advertiser and was an overbroad intrusion of First Amendment rights. *See NLRB v Midland Daily News*, 151 F3d 472 (CA 6, 1998), discussed in more detail in Section II(C), *infra.*

dining hall to starve them into submission; that police had arrested Dr. King seven times; and that Dr. King's protests had been met "with intimidation and violence," including bombing his home, assaulting him, and charging him with perjury. A Montgomery jury awarded Sullivan $500,000—the full amount claimed—and the Alabama Supreme Court affirmed.

Many of the statements contained in the advertisement were indisputably false. For example, police did not padlock students in the dining hall, let alone do so with the intention of starving them into submission. Dr. King was arrested four times, not seven, and the evidence around whether an arresting officer had assaulted him was conflicting. If the categorical rule expressed in *Chaplinsky* and *Beauharnais* applied, then the First Amendment afforded no protection whatsoever to the advertisement.

The United States Supreme Court rejected such an analysis. It began by noting that none of its prior decisions had expressly "sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." *Id.* at 268. Further, the Court observed that a "mere label" of state law—in this instance, "libel"—could claim "no talismanic immunity from constitutional limitations." *Id.* at 269. Like all "other formulae for the repression of expression," libel "must be measured by standards that satisfy the First Amendment." *Id.*

After reciting precedent supporting the proposition that the First Amendment expansively protects freedom of expression on public issues, the Court then reframed the question before it:

> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of [Sullivan].

Id. at 270-271 (citations omitted). The Court found that neither falsity nor defamatory content suffices to deprive speech regarding public officials of First Amendment protections.

The Court observed that "erroneous statement is inevitable in free debate." *Id.* at 271. Accordingly, some false statements "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 272, quoting *NAACP v Button*, 371 US 415, 433; 83 S Ct 328; 9 L Ed 2d 405 (1963). The Court found defamatory content similarly non-dispositive: after all, the Court reasoned, it makes no sense to suggest that speech falls outside the scope of the First Amendment simply because it succeeds in prompting people to question the honesty, integrity, or competency of those who hold public office. "Criticism of their official conduct does not lose its constitutional protection," the Court declared, "merely because it is *effective* criticism and hence diminishes their official reputations." *New York Times*, at 273 (emphasis supplied).

"If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct," the Court reasoned, then "the combination of the two elements is no less inadequate." *Id.* at 273. "This," the Court observed, "is the lesson to be drawn from the great controversy over the Sedition Act of 1782," which rendered it a criminal offense to make false, scandalous, malicious, or defamatory statements against the government of the United States, Congress, or the President. *Id.* at 273-274. The Court observed that historical consensus has condemned the Sedition Act as a constitutional outrage. *Id.* at 276.

The Court reasoned that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *Id.* at 277. The Court noted that, in many respects, the fear of a civil damages award is more inhibiting than the possibility of prosecution under a criminal statute: the damages imposed in *New York Times*, for ex-

ample, were one hundred times greater than the fine provided by the Sedition Act; the safeguards applicable to criminal prosecutions do not apply in civil cases; and the absence of any double jeopardy limitation creates the potential for serial lawsuits and damage awards. *Id.* at 277-278. "Whether or not a newspaper can survive a succession of such judgments," the Court concluded, "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *New York Times*, at 278.

Accordingly, the Court held that the First Amendment requires "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279. Further, the Court held, a public official plaintiff must prove his or her case by "convincing clarity." *Id.* at 285-286. Absent such requirements, the Court cautioned, critics of official conduct would be deterred from voicing their views; concerned citizens would tend to make only those statements that steered far wide of the "unlawful zone"; and the "vigor" and "variety of public debate" would be dampened. *Id.* at 279.

The rule that emerged from *New York Times* set a deliberately high standard for public official libel plaintiffs to meet. In sum, the Court declared that such plaintiffs must prove clearly and convincingly that the defendant intentionally lied or acted recklessly in making the challenged statements. Proof of negligence does not suffice. And courts must conduct an independent review of the record to ensure constitutional protections are preserved. In the nearly five decades that have followed, the Supreme Court has stood by—indeed, has reiterated, reaffirmed, and reinforced—the importance and rigorous demands of this standard. As the Court has observed, "[p]lainly many deserving plaintiffs, including some intentionally subjected to injury,

will be unable to surmount the barrier of the *New York Times* test." *Gertz v Robert Welch, Inc*, 418 US 323, 342; 94 S Ct 2997; 41 L Ed 2d 789 (1974).

Three years after *New York Times*, the Supreme Court extended the constitutional privilege to defamatory criticism of "public figures" in *Curtis Publishing Co v Butts*, 388 US 130; 87 S Ct 1975; 18 L Ed 2d 1094 (1967) and its companion, *Associated Press v Walker*, 388 US 130, 162; 87 S Ct 1975; 18 L Ed 2d 1094 (1967). Interestingly, both cases involved universities. *Butts* involved the Saturday Evening Post's charge that Coach Wally Butts of the University of Georgia had conspired with Coach 'Bear' Bryant of the University of Alabama to fix a football game. *Walker* involved an erroneous Associated Press account of former Major General Edwin Walker's participation in a University of Mississippi campus riot. Because Butts was paid by a private alumni association and Walker had resigned from the Army, neither could be classified as a "public official" under *New York Times*. The Court extended the constitutional privilege announced in *New York Times* to protect defamatory criticism of nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Butts*, 388 US at 164 (Warren, C.J., concurring in result).

In *Gertz*, the Supreme Court extended constitutional protections in those cases where the plaintiff is a private individual. *Gertz*, 418 US 323. The Court held that the states could define for themselves the appropriate standard of liability for a publisher of a defamatory falsehood injurious to a private individual, "so long as they do not impose liability without fault."[3] And in *Philadelphia Newspapers, Inc v Hepps*, 475 US 767; 106 S Ct 1558; 89 L Ed 2d 783 (1986), the Court held that a

[3] *Gertz*, 418 US at 347. In addition, the *Gertz* Court held that "States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349.

private person claiming defamation based upon speech of public concern has the constitutionally imposed burden of proving falsity.

The cumulative effects of *New York Times*, its progeny, and Michigan common law, as well as Michigan law developed after *New York Times* (discussed in the next section) have resulted in a variety of requirements and standards before a plaintiff may prevail on a defamation claim.[4]

C. Consistent with *New York Times* and its progeny, Michigan courts have extended substantial protection to free expression of even defamatory statements.

For decades, this Court and the Michigan Supreme Court have vigilantly protected free expression through strict application of constitutional principles. *See, e.g., In re Chmura*, 464 Mich 58; 626 NW2d 876 (2001) (discussing *New York Times* and the actual malice standard in reversing a decision by the Judicial Tenure Commission that a sitting judge had violated the Code of Judicial Conduct by statements he made in the course of a campaign); *Rouch v Enquirer & News of Battle Creek (Rouch II)*, 440 Mich 238, 258; 487 NW2d 205 (1992) (reversing a jury verdict in a libel case, discussing the importance of independent review in such cases, and noting the concern that "juries may give short shrift to important First Amendment rights"); *Locricchio v Evening News Ass'n*, 438 Mich 84; 476 NW2d 112 (1991), *cert den*, 112 S Ct 1267 (1992). (conducting an independent review of the record and reversing a jury verdict in a libel case); *Battaglieri v Mackinac Ctr for Pub Policy*, 261 Mich App 296; 680 NW2d 915 (2004) (discussing the definition of actual malice and reversing the trial court's decision denying summary disposition in a false-light claim brought by a public figure); *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396; 538 NW2d 24 (1995) (conducting an independent review, finding in-

[4] The requirements may vary depending on the status of the parties. While the majority of cases involve media defendants, the United States Supreme Court has never clearly adopted a media/non-media distinction, nor has it rejected such a distinction. *See, e.g., Locricchio v Evening News Ass'n*, 438 Mich 84, 118, n. 27; 476 NW2d 112 (1991), *cert denied*, 112 S Ct 1267 (1992).

sufficient evidence of actual malice, and vacating a lower court judgment); and *Garvelink v The Detroit News*, 206 Mich App 604; 522 NW2d 883 (1994) (conducting an independent review of the record and reversing a trial court decision denying summary disposition to a defendant in a public official libel case).

Moreover, Michigan courts, consistent with the thrust of *Anderson v Liberty Lobby*, 477 US 242; 106 S Ct 2505; 91 L Ed 2d 202 (1986), have long recognized the important role summary disposition plays in libel cases. *See, e.g., Kevorkian v American Medical Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999) (observing that "[s]ummary disposition is an essential tool in the protection of First Amendment rights"); *Ireland v Edwards*, 230 Mich App 607, 613; 584 NW2d 632 (1998) (same); *Lins v Evening News Ass'n*, 129 Mich App 419, 425; 342 NW2d 573 (1983) (holding that "the courts in libel actions have recognized the need for affording summary relief to defendants in order to avoid the 'chilling effect' on freedom of speech and press"); and *VandenToorn v Bonner*, 129 Mich App 198, 209; 342 NW2d 297 (1983) (noting that "[s]ummary judgment is particularly appropriate at an early stage in cases where claims of libel . . . are made against publications dealing with matters of public interest and concern").[5]

An additional constitutional requirement is that the plaintiff must identify the specific alleged falsity at issue in the complaint or the claim is subject to dismissal. For example, in *Rouch II*, Justice Riley stated that: "I suggest that plaintiff's failure to allege and identify in his pleading, supplemental pleading, and answers to defendant's interrogatories, specifically which statements he considered to be materially false . . . [was a] proper ground[] for summary judgment . . . ." *Rouch II*, 440 Mich at 272 (Riley, J., concurring). *See also id.* at 273, n.2 (citations omitted); *Ledl v Quick Pik Food Stores*, 133 Mich App 583, 589-90; 349 NW2d 529 (1984). Moreover, Michigan courts

[5] *See also* Rassel, Stewart, & Niehoff, *The Michigan Law of Defamation Revisited*, 1994 Det Col L R 61, 89-90, 117 (hereafter, "Rassel").

have consistently held that the statement at issue must be construed as a whole; parts of a statement cannot be severed from the whole in order to distort the meaning of the statement.[6] The Michigan Supreme Court has also rejected attempts to soften the requirement that a libel plaintiff plead and prove a specific false statement of *fact*. *See Locricchio*, 438 Mich 131.

Michigan applies the actual malice standard in a number of circumstances. And, as recently noted by the Michigan Supreme Court in *Smith v Anonymous Joint Enterprise*, 487 Mich 102; 793 NW2d 553 (2010): "The high threshold established by the 'actual malice' standard was codified by our Legislature in MCL 600.2911(6), which provides:"

> An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

Id. at 114. This Court has also recognized that a plaintiff's claim may be subject to the actual malice standard because the plaintiff is a public figure by virtue of initiating or perpetuating a public debate:

> Having exercised his leadership on behalf of one side of this debate, and having contributed substantially to the awareness of the American people of this debate, it is now more than a little disingenuous for plaintiff to accuse those on the opposite side of this debate of defamation. Such alleged defamation is grounded here in nothing more than the fact that defendants are in disagreement with plaintiff's position: they would characterize plaintiff's conduct differently than plaintiff would characterize it. ***Where an alleged defamatory statement, occurring in the course of a public debate initiated or perpetuated by plaintiff himself, is focused precisely on a matter lying at the heart of the debate***, it is hard to understand how tort law could be im-

[6] *See Locricchio,* 438 Mich at 131 (the plaintiff "point[ed] to statements or headlines in isolation from the whole, such as the use of the word "lent" in the statement that "[s]everal investors associated with organized crime[ ] either lent or helped Locricchio and Francell raise large sums of money.") *See also Sanders v Evening News Ass'n*, 313 Mich 334; 21 NW2d 152 (1946); *Moore v Booth Publishing Co*, 216 Mich 653, 185 NW 780 (1921); *O'Connor v Evening Press Co*, 172 Mich 311; 137 NW 674 (1912).

> plicated. Indeed, ***it is hard to imagine anything that could more effectively chill legitimate public debate.***

Kevorkian, 237 Mich App at 13-14 (emphases supplied).[7]

Further, in its recent decision in *Smith,* the Michigan Supreme Court reiterated the Michigan rule that even false statements are protected if they cannot reasonably be interpreted as stating actual facts:

> The Supreme Court has additionally recognized that even a false statement may be protected from defamation claims if it cannot be reasonably interpreted as stating actual facts about an individual. *Milkovich v Lorain Journal Co*, 497 US 1, 16-17; 11 L Ed 2d 1; 110 S Ct 2695 (1990). So too has our Court of Appeals. In *Ireland v Edwards*, 230 Mich App 607, 611-612; 584 NW2d 632 (1998), an attorney representing the father in a custody dispute commented on the mother's actions and her fitness as a parent. The mother, in turn, filed a defamation claim against the attorney. The Court of Appeals concluded that many of the allegedly defamatory statements, when read or heard in context, "could not reasonably be understood as stating actual facts" about the mother and that the attorney's statements about the time the mother spent with the child amounted to "'rhetorical hyperbole.'" *Id.* at

---

[7] The matter surrounding this dispute falls squarely within the "public debate" as referenced in *Kevorkian.* Law school rankings are a prominent topic among both commentators and the general public. *See* Martha Neil, *US News Won't Recalibrate Law School Rankings Despite Word of More U of Illinois Data Errors*, ABA Journal Sept. 29, 2011 <http://www.abajournal.com/news/article/us_news_wont_recalibrate_law_school_rankings/> (accessed Nov. 20, 2011); Mark Hansen, *ABA Committee Appears Poised to Approve New Law School Disclosure Requirements*, Nov. 14, 2011 <http://www.abajournal.com/news/article/aba_committee_appears_poised_to_adopt_new_jobs_placement_standard/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email> (accessed Nov. 20, 2011); Bob Morse, *The Law School Rankings Debate Rages On*, US News & World Report, Apr. 30, 2009, <http://www.usnews.com/education/blogs/college-rankings-blog/2009/04/30/the-law-school-rankings-debate-rages-on> (accessed Nov. 20, 2011); and Posner, *Symposium: The Next Generation of Law School Rankings – Framing the Rankings Debate*, 81 Ind L J 13 (2006).

Cooley Law School's ranking in *Judging the Law Schools* is a further facet of that debate. *See* Brian Leiter's Law School Reports <http://leiterlawschool.typepad.com/leiter/2005/10/the_cooley_law_.html> (accessed Nov. 20, 2011); Elie Mystal, *Latest Cooley Law School Rankings Achieve New Heights of Intellectual Dishonesty*, Above the Law, Feb. 8, 2011 <http://abovethelaw.com/2011/02/latest-cooley-law-school-rankings-achieve-new-heights-of-intellectual-dishonesty> (accessed Nov.20, 2011); and *Harvard Number 1, Cooley Number 2. Here's How.* Feb. 4, 2011 <http://www.cooley.edu/newsevents/2011/020411_judging_the_law_schools.html> (accessed Nov. 20, 2011).

> 618-619. Thus, the Court of Appeals concluded that the statements were not actionable. *Id.* at 619.

Smith, 487 Mich at n.40. *See also Smith v Anonymous Joint Enterprise (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued Mar. 3, 2011 (Docket Nos. 275297, 275316, and 275463) (citing *Ireland* and *Milkovich*) ("All statements are not actionable; rather, to be actionable, a statement must be provable as false. A statement is provable as false if it is an objectively verifiable event, but a statement is not actionable if it is a subjective assertion.)

Similarly, relying on *Gertz*, the Sixth Circuit held that references to the plaintiff's project as a "fraud," a "phony shopping mall investment scheme," and an "alleged swindle" qualified as constitutionally protected statements of opinion. *Orr v Argus Press Co*, 586 F2d 1108 (CA 6, 1978). In *Hodgins v Times Herald*, 169 Mich App 245, 254; 425 NW2d 522 (1988), this Court, referring to *Greenbelt Coop Publishing Ass'n v Bresler*, 398 US 6, 14; 90 S Ct 1537; 26 L Ed 2d 6 (1970), noted that "[e]xaggerated language used to express opinion, such as 'blackmailer,' 'traitor' or 'crook,' does not become actionable merely because it could be taken out of context as accusing someone of a crime."[8]

All of the cases are consistent with *Milkovich v Loraine Journal Co*, 497 US 1; 110 S Ct 2695; 111 L Ed 2d 1 (1990), which reaffirmed constitutional protection for vigorous epithets and loose figurate speech, stating:

> [T]he *Bresler* . . . line of cases provide protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. ***This provides assurance that public debate will not suffer for lack of "imaginative***

[8] In *Ireland*, this Court held that referring to the plaintiff as an "unfit mother" was "necessarily subjective" and not actionable as defamation. *Ireland*, 230 Mich App at 611, 617. *See also Kevorkian*, 237 Mich App at 4, where the court affirmed dismissal of statements by defendants that plaintiff "perverts the idea of the caring and committed physician," "serves merely as a reckless instrument of death," "poses a great threat to the public," and engages in "criminal practices."

> ***expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation.***

Id. at 20. (emphasis supplied).[9]

In addition, this Court recently held that the protections of Michigan's statutory Fair Report Privilege apply to private individuals. *Smith (On Remand)* (discussing MCL 600.2911(3)). The Fair Report Privilege is one of a number of privileges applied by Michigan courts to protect First Amendment rights. Where a statement is absolutely privileged, no defamation action will lie, regardless of the fault of the defendant.[10] Where a qualified privilege applies, the plaintiff must meet high requirements to establish fault.

Further, under Michigan law, the category of libel *per se* merely affects the issue of whether a plaintiff must plead and prove special damages.[11] It does not obviate the holding of *Gertz* that a state may not impose liability without fault. *See Kevorkian*, 237 Mich App at 12-13 ("Notwith-

---

[9] In *Bresler*, the plaintiff wanted the city to buy some property and re-zone other property. The defendants' newspaper published a story referring to plaintiff's negotiating position before the city council as "blackmail." Bresler sued, contending that the story implied he had committed the criminal offense of blackmail. The Court rejected this contention, stating that no reader could have interpreted the articles to charge Bresler with committing a criminal offense: "Even the most careless reader must have perceived that ***the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.***" *Bresler*, 398 US at 13 (emphasis supplied).

Similarly, in *Hustler Magazine v Falwell*, 485 US 46, 50; 108 S Ct 876; 99 L Ed 2d 41 (1987), the Court held that the First Amendment precluded recovery for an advertisement parody alleging that a religious figure's first sexual encounter was with his mother in an outhouse because it "could not reasonably have been interpreted as stating actual facts about the public figure involved."

[10] *Domestic Linen Supply & Laundry Co v Stone*, 111 Mich App 827; 314 NW2d 773 (1981) (statements in legislative and judicial proceedings are absolutely privileged and not actionable even if spoken with actual malice); *Parks v Johnson*, 84 Mich App 162, 166; 269 NW2d 514 (1978) ("If absolute privilege applies, there can be no action for libel even if the information was false and maliciously and knowingly published").

[11] *Kevorkian*, 237 Mich App at 9. *See also* Rassel at 100-112. The *Kevorkian* court applied the "libel-proof" doctrine, yet another hurdle that libel plaintiffs must overcome.

standing plaintiff's creativity at oral argument, we decline plaintiff's invitation to hold as a matter of law that all accusations of criminal activity are automatically defamatory (thereby eliminating the need for that determination by the trial court in the first instance) . . . .)"

Finally, despite this detailed analysis of the protections Michigan courts afford to those exercising their freedom of speech, *amici* hasten to note that this is ***not*** an exhaustive list.[12] Thus, it cannot be seriously contested that this lawsuit implicates profound constitutional issues. It is also abundantly clear that for decades, Michigan courts have vigilantly protected free expression – including defamatory statements – by imposing a variety of constitutional requirements. The fact that defendants here anonymously made the statements at issue on the internet does not lessen constitutional concerns. To the contrary, it adds a second layer to the analysis and serves only to increase the importance of establishing procedural safeguards.

II. The First Amendment also provides separate – and additional – protections for anonymous speech.

A. Anonymous speech has historically received constitutional protection.

Anonymous speech is not a recent phenomenon. Indeed, we owe our current constitutional system in part to anonymous speech. Future President James Madison, future Cabinet member Alexander Hamilton, and future Chief Justice of the United States John Jay originally published the Federalist Papers under *nomes de plume*. In *Talley v California*, 362 US 60; 80 S Ct 536; 4 L Ed 2d 559 (1960), the Court recalled that England's press licensing law was enforced in the colonies largely because it was known that exposing the names of printers, writers, and distributors would curb circulation of literature critical of the government: "The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers . . . Before the Revolutionary War colonial

[12] For example, Michigan also recognizes the substantial truth doctrine.

patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names." *Id.* at 64-65.

Anonymity has been assumed for the most constructive purposes. Recognizing this, anonymous speech has long been regarded as a constitutional right:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

McIntyre v Ohio Elections Comm, 514 US 334; 115 S Ct 1511; 131 L Ed 2d 426 (1995) (citing *Talley*).

The Supreme Court has also long recognized that compelled disclosure of identities is likely to adversely affect First Amendment rights. In *NAACP v Alabama*, 357 US 449; 78 S Ct 1163; 2 L Ed 2d 1488 (1958) the state's attorney general sued NAACP for failing to meet Alabama's corporate charter qualifying statute and obtained an ex parte TRO. Before the hearing on the NAACP's motion to dissolve the TRO, the attorney general moved for the production of the NAACP's records, including the names and addresses of all its members and "agents." *Id.* at 452-53. Noting that disclosure of the identities was likely to adversely affect the members' First

Amendment right of free association, the Court concluded that the members' First Amendment rights outweighed Alabama's interest in obtaining the names. *Id.* at 461-66. *See also Bates v Little Rock,* 361 US 516; 80 S Ct 412; 4 L Ed 2d 480 (1960).

B. Anonymous speech receives the same protections on the internet.

The freedom of posting that accompanies use of the internet has prompted commentators to consider the internet the "greatest innovation in speech since the invention of the printing press."[13] With the expansion of web postings, First Amendment protections have expanded as with "the use of web pages, mail exploders and newsgroups, [anyone] can become a pamphleteer." *Reno v ACLU,* 521 US 844, 870; 117 S Ct 2329; 138 L Ed 2d 874 (1997); *Cyberspace Communications, Inc v Engler*, 55 F Supp 2d 737 (ED Mich, 1999), *aff'd* 238 F3d 420 (CA 6, 2000). As recognized by one court:

> The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.

2TheMart.com Inc, 140 F Supp 2d at 1093.

As noted above, the Supreme Court has repeatedly recognized the "freedom to publish anonymously." *McIntyre,* 514 US at 342 (citing *Talley,* 362 US at 64). The Supreme Court has also made it clear that traditional protections under First Amendment extend to speech on the internet. *McIntyre*, 514 US at 355. Internet posters are thus entitled to speak with anonymity under the First Amendment. *Buckley v American Constitutional Law Foundation*, 525 US 182, 200; 119 S Ct 636; 142 L Ed 2d 599 (1999). *See also Engler*, 55 F Supp 2d at 742 ("Anonymity of the communicant is both important and valuable to the free exchange of ideas and information

---

[13] Ku, "Open Internet Access and Freedom of Speech: A First Amendment Catch-22," 75 Tulane L R 87, 88 (2000).

on the Internet.") This ability to speak "without the burden of the other party knowing all the facts about one's identity" can "foster open communication and robust debate." *Columbia Ins Co v Seescandy.com*, 185 FRD 573, 578 (ND Cal, 1999). Conversely, revealing anonymous posters spawns the fear that "unmeritorious attempts to unmask the identities of online speakers [will] have a chilling effect" on internet speech. *2TheMart.com Inc*, 140 F Supp 2d at 1093.

Courts have struck down other regulations that would prevent or inhibit anonymous speech. For example, in *Engler*, the trial court enjoined amendments to a Michigan statute that added criminal prohibitions against using computers or the internet to disseminate sexually explicit materials to minors, on the basis, *inter alia*, that it violated "the First and Fourteenth Amendments of the United States Constitution by preventing people from communicating and accessing information anonymously." *Engler*, 55 F Supp 2d at 753. *See also Cyberspace Communications, Inc v Engler (On Remand)*, 142 F Supp 2d 827, 830 (ED Mich, 2001) (entering permanent injunction).

Importantly, courts recognize that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 754, (quoting *Elrod v Burns,* 427 US 347, 373; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (in turn citing *New York Times Co v United States,* 403 US 713; 91 S Ct 2140; 29 L Ed 2d 822 (1971))).

In addition to companies seeking to unmask those responsible for defamatory posts, misappropriation of trade secrets and related torts, others have been caught in the crossfire when ***voluntarily*** unmasking anonymous commentators. In 2010, the *Cleveland Plain Dealer* dis-

closed that certain comments on its website relating to an ongoing capital murder trial came from the sitting judge.[14] The *Plain Dealer* was sued for $50 million under various legal theories.[15]

C. Courts have developed procedural safeguards to protect the First Amendment rights of anonymous speech.

In dealing with the issue of "unmasking" persons exercising their First Amendment right to speak anonymously, courts have recognized the need to strike:

> a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

Dendrite, 342 NJ Super at 141. *See also Mobilisa, Inc v Doe*, 217 Ariz 103, 108-109; 170 P3d 712 (2007); *In re Anonymous Online Speakers v US Dist Court for the Dist of Nevada*, 2011 WL 61635 at *2 (CA 9, 2011); and *SaleHoo Group, Ltd v ABC Co*, 722 F Supp 2d 1210, 1214 (WD Wash, 2010).[16]

---

[14] Hamilton Nolan, "Can Anonymous Commentators Be Outed if They Do Something Newsworthy?" The Gawker, Apr. 10, 2010 <http://gawker.com/5512501/can-anonymous-commenters-be-outed-if-they-do-something-newsworthy> (accessed Nov. 11, 2011).

[15] The suit was later dismissed with prejudice.

[16] *Columbia Ins Co v Seescandy.com*, 185 FRD 573 (ND Cal, 1999), which also employed safeguards, did not involve defamation. Nevertheless, that court recognized that:

> With the rise of the Internet has come the ability to commit certain tortious acts, such as defamation, copyright infringement, and trademark infringement, entirely on-line. The tortfeasor can act pseudonymously or anonymously and may give fictitious or incomplete identifying information. Parties who have been injured by these acts are likely to find themselves chasing the tortfeasor from Internet Service Provider (ISP) to ISP, with little or no hope of actually discovering the identity of the tortfeasor.
>
> In such cases the traditional reluctance for permitting filings against John Doe defendants or fictitious names and the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with a forum in which they may seek redress for grievances. ***However, this need must be balanced against the legitimate and***

Courts have also specifically protected online forums, like the websites operated by *amici,* from the compelled disclosure of the identity of anonymous internet posters. *See, e.g., Dendrite, supra*; *McVicker v King,* 266 FRD 92 (WD Pa, 2010); *Independent Newspapers, Inc v Brodie*, 407 Md 415; 966 A2d 432 (2009); *Sedersten v Taylor*, 2009 WL 4802567 (WD Mo, 2009). Non-media hosts have also received this same protection. *See e.g., Solers, Inc v Doe,* 977 A2d 941, 951 (DC, 2009); *2TheMart.com Inc*, 140 F Supp 2d at 1090; *Mobilisa*, 217 Ariz 103, 111-12; and *Best Western Int'l, Inc v Doe*, 2006 WL 2091695, *5 (D Ariz, 2006).

Not surprisingly, the development of this law is of relatively recent vintage. Of the various tests employed by courts, *Dendrite* appears to have garnered the most substantial support, with no fewer than ten courts adopting the reasoning.[17] The plaintiff in *Dendrite* brought a defamation suit related to postings by anonymous defendants on an internet message board. The

---

> ***valuable right to participate in online forums anonymously or pseudonymously*** . . . People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.

Id at 578 (footnote omitted) (emphasis supplied).

[17] *Dendrite* or similar guidelines consistently have been followed by federal and state courts nationwide. *See e.g., Mobilisa*, 217 Ariz 103; *Best Western Int'l*, 2006 WL 2091695; *Krinsky v Doe 6*, 72 Cal Rptr 3d 231; 159 Cal App 4th 1154 (2008); *USA Technologies, Inc. v. Doe,* 713 F Supp 2d 901 (ND Cal, 2010); *XCentric Ventures, LLC v Arden*, 2010 WL 424444 (ND Cal, 2010); *Highfields Capital Mgmt v Doe*, 385 F Supp 2d 969, 975-76 (ND Cal, 2005); *Doe I v Individuals*, 561 F Supp 2d 249, 254-56 (D Conn, 2008); *Doe v Cahill*, 884 A2d 451, 456 (Del, 2005); *Solers, Inc.*, 977 A2d 941; *Sinclair v. TubeSockTedD,* 2009 WL 320408, at *2 (DDC, 2009); *Mortgage Specialists, Inc v Implode-Explode Heavy Industries, Inc*, 160 NH 227; 999 A2d 184 (2010); *Brodie*, 407 Md 415; *McMann v Doe*, 460 F Supp 2d 259, 268 (D Mass, 2006); *AZ v Doe*, 2010 WL 816647 (NJ Super App, 2010); *Quixtar Inc v Signature Mgmt Team, LLC*, 566 F Supp 2d 1205, 1216 (D Nev, 2008); *Cornelius v DeLuca*, 2011 WL 1629572 (D Nev, 2011); *Greenbaum v Google*, 845 NYS2d 695, 698-99 (NY App Div, 2007); *Sony Music Entertainment, Inc v Does 1-40*, 326 F Supp 2d 556 (SD NY, 2004); *Reunion Industries v Doe*, 2007 WL 1453491; 80 Pa D & C 4th 449 (Pa Ct Common Pleas, 2007); *In re Does 1-10*, 242 SW3d 805, 822-23 (Tex App, 2007); *Koch Industries, Inc v Does*, 2011 WL 1775765 (D Utah, 2011); *SaleHoo Group*, 722 F Supp 2d 1210.

plaintiff tried to compel the internet service provider to disclose the defendants' identities, and one defendant responded by filing a motion to quash. In refusing to allow the discovery, the *Dendrite* court held that a plaintiff seeking such discovery must:

(1) give notice to the defendant anonymous speaker;

(2) identify the exact statements that constitute allegedly actionable speech;

(3) establish a prima facie cause of action against the defendant based on the complaint and all information provided to the court;

(4) "produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant"; and

(5) if the plaintiff makes out a prima facie cause of action, then the court must "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 to allow the plaintiff to properly proceed."

Dendrite, 342 NJ Super 134 at 141-42.

In Michigan, there have been no appellate opinions specifically addressing the question of which internet-related standard should be applied. To simply apply liberal discovery rules, as the plaintiff here suggests, ignores important constitutional considerations. Indeed, the Sixth Circuit's decision in *NLRB v Midland Daily News*, 151 F3d 472 (CA 6, 1998) expressly recognized the need for constitutional scrutiny even under the rules of liberal discovery.

Midland Daily News involved an anonymous advertisement placed in the newspaper. Two union employees responded to the ad and attempted to learn the identity of the advertiser, but the paper refused to disclose it. After three days, the union filed an unfair labor practice

charge based on nothing more than speculation that the advertiser has interfered with and discriminated against job applicants based on union membership and activities. The NLRB, without further investigation, requested the advertiser's identity. When the paper refused, the NLRB issued an investigatory subpoena, ordering the production of all documents that would identify the advertiser. The Sixth Circuit refused to countenance such tactics:

> In the present controversy, there is no dispute that the advertisement placed by an advertiser who desired anonymity and published by Midland was lawful commercial speech. Despite that concession, the Board has insisted that its subpoena to force Midland to disclose source business information was required to develop evidence for the Union to support its speculative charges against the advertiser. ***The Board has not denied that its proposed action, pursued to benefit the Union, may discourage anonymous employment advertisements generally and thereby chill the lawful commercial speech of periodicals and employers nationwide.***
>
> ***Indeed, if this court permitted the Board to obtain the identity of Midland's advertiser, without demonstrating a reasonable basis for seeking such information, the chilling effect on the ability of every newspaper and periodical to publish lawful advertisements would clearly violate the Constitution.***

Id. at 473-75 (internal citations omitted) (emphases supplied). A primary impetus for the court's decision was that the NLRB had failed to establish a prima facie cause of action. This is the essence of the *Dendrite* standard and consistent with the United States Supreme Court's decisions in *NAACP* and *Bates,* holding that the parties seeking to "identify" the individuals failed to demonstrate a compelling need for the information.

D. The *Dendrite* standard is consistent with Michigan courts' historical protection of First Amendment rights.

This case presents an opportunity for the Court to continue its long-standing protection of First Amendment rights, including the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" reflected in the *New York Times* decision. *New York Times*, 376 US at 270. This case also presents an opportunity for the Court to

provide important and necessary guidance to the trial courts of this State, which are unsure how they are to address these issues.

Amici respectfully submit that Michigan courts should require plaintiffs to prove that their need for disclosure outweighs the First Amendment rights of the website host and the anonymous internet speaker. Moreover, *amici* submit that this Court should adopt the most widely utilized *Dendrite* standard, as it is entirely consistent with Michigan's commitment to protection of First Amendment Rights.

1. Notice to the speaker is consistent with the requirements of due process.

Dendrite's notice requirement is consistent with basic due process jurisprudence. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v Eldridge*, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976) (internal quotations and citations omitted). An anonymous speaker, ***who ordinarily has a right to remain anonymous***, has a right to be informed that a court may order his identity to be revealed and a right to meaningfully challenge such action – that is, ***before*** his identity is revealed.[18] This *Dendrite* factor, requiring pre-disclosure notice and an opportunity to challenge the disclosure, ensures procedural due process because it protects the speaker's private interests by reducing erroneous deprivations of the right to anonymity with little fiscal and administrative

[18] *Amici* acknowledge that it may be constitutionally permissible to provide substitute service in certain cases, since due process can, in appropriate cases, be satisfied by service reasonably calculated to give the would-be defendant actual notice. *Int'l Shoe Co v Washington*, 326 US 310, 320-21; 66 S Ct 154; 90 L Ed 95 (1945); MCR 2.105(I)(1); MCR 2.106(D)-(F). Importantly, however, sufficiency of service is an issue separate from whether notice is even required. Stated differently, plaintiffs cannot complain that the speaker's anonymity renders actual physical service impossible; they must take efforts reasonably calculated to reach the speaker. Indeed, the *Dendrite* court recognized this distinction and suggests that alternative service can be accomplished by posting to websites. *Dendrite*, 342 NJ Super at 141. In this case, Cooley Law School could have posted notice on John Doe 1's website. Any casual visitor to the site could reasonably conclude that he would receive actual notice there. *See* Thomas M. Cooley Law School Scam <http://thomas-cooley-law-school-scam.weebly.com/> (accessed November 11, 2011).

burdens on the courts and the would-be plaintiffs. *See Matthews*, 424 US at 335 (citing *Goldberg v. Kelly*, 397 US 254; 90 S Ct 1011; 25 L Ed 2d 287 (1970).

2. Requiring plaintiffs to identify the exact statements alleged to be defamatory is consistent with Michigan law.

Dendrite's second factor requires the plaintiff to identify the exact statements that constitute allegedly actionable speech. This mirrors Michigan law. In *Rouch II*, the Michigan Supreme Court observed that Michigan "law requires the very words of the libel to be set out in the declaration in order that the court or judge may judge whether they constitute a ground of action." *Rouch II*, 440 Mich at 272, n.2. *See also Ledl*, 133 Mich App at 589-90. It would make little sense to abridge a person's First Amendment to anonymous speech based on a plaintiffs' bald assertion of defamation, when the plaintiff's claim would fail as a matter of law without producing the allegedly defamatory words. In other words, this *Dendrite* factor does not ask plaintiffs to anything they are not already required to do in drafting a well-pled complaint. Here, the plaintiff has offered no legal support for requiring a defendant to cede their right to anonymity in order to challenge the sufficiency of a complaint or to be informed of the statements at issue in the lawsuit.

3. Requiring plaintiffs to present a *prima facie* case in their complaints is already consistent with Michigan law.

Dendrite's third factor requires plaintiffs to establish a *prima face* case and present sufficient support for each element of a claim before a person is stripped of her First Amendment right to speak anonymously. This is consistent with Michigan's pleading requirements. Again, plaintiffs would not be asked under *Dendrite* to do something they are not already required to do. Under MCR 2.116(C)(8), courts must dismiss complaints that fail to state a claim upon which relief can be granted. Requiring plaintiffs to first set forth a prima facie case conforming to the appropriate defamation standard (i.e., public official, public figure, nonpublic person, etc.) ensures that the party seeking to unmask the speaker is not abusing the judicial system, but rather

verifiably intends to advance a bona fide claim of defamation. Coupled with *Dendrite*'s notice requirement, it gives speakers a meaningful opportunity to contest the sufficiency of the complaint before their right to anonymity is abridged.

4. Requiring plaintiffs to produce evidence supporting their *prima facie* case is consistent with Michigan's policy of favoring early summary judgment in defamation actions.

Dendrite's fourth factor requires plaintiffs to present sufficient evidentiary support for each element of a claim before a person is stripped of her First Amendment right to speak anonymously. This factor is in harmony with the Michigan's policy of favoring summary disposition in libel cases. For nearly thirty years, Michigan courts have recognized the importance of terminating meritless cases before the defendant must incur expensive legal fees. *See Kevorkian*, 237 Mich App at 5; *Ireland*, 230 Mich App at 613; *Lins*, 129 Mich App at 425; and *VandenToorn*, 129 Mich App at 209 (noting that "[s]ummary judgment is particularly appropriate at an early stage in cases where claims of libel . . . are made against publications dealing with matters of public interest and concern") If it is important to guard a person's First Amendment right to free speech by protecting him from a meritless trial when his identity is known, then *a fortiori* it must be of equal importance to protect a person's right to remain anonymous absent some evidentiary proof of a meritorious claim.

5. Balancing the strength of a plaintiff's case against the right to speak anonymously is common in First Amendment cases.

Finally, the last Dendrite requirement – balancing the interests – takes into account the competing interests of the parties, a concept regularly employed in First Amendment jurisprudence. Courts presented with weak claims can protect those who, on balance, do not appear to have defamed the plaintiff. At the same time, courts presented with strong claims can unmask a speaker. This is akin to Michigan's preliminary injunction standard. Balancing the First

Amendment right to speak anonymously against the strength of the plaintiff's case takes into account (1) the harm to the individual in being unmasked; (2) the harm to society caused by the potential for chilling such speech; (3) the strength of the plaintiff's evidence supporting his *prima facie* case; and (4) whether the plaintiff needs the anonymous speaker's identity in order to properly proceed with his case. *See Addison Twp v Dept of State Police*, 220 Mich App 550, 554; 560 NW2d 67 (1996).

Here again, *Dendrite* demonstrates desirable flexibility. It can apply regardless of whether the speaker is a would-be defendant or a would-be witness. Any number of scenarios can be envisioned under which a plaintiff would wish to identify anonymous recipients or those who responded anonymously in the hope that such people may have discoverable information or could serve as witnesses. The plaintiff would have to show not only that he has a strong case under the appropriate governing standard (e.g., public official, public figure, non-public person), but also the non-party anonymous speaker's identity is necessary for the plaintiff to properly proceed with the case.

CONCLUSION

The *Dendrite* standard should be applied here to safeguard the important constitutional interests at stake in this litigation. It compliments Michigan's predisposition towards summary judgment in defamation actions, and it advances the policy of Michigan courts in giving maximum protection to free speech. *Dendrite* requires notice to the speaker, a well-pled complaint, sufficient evidence supporting each element of defamation, and a careful balancing of the speaker's First Amendment rights against the strength of a plaintiff's case. *Amici* respectfully urge the Court to adopt this standard and to remand the case to the Circuit Court for a determination in the first instance of whether Cooley Law School can satisfy it.

Respectfully submitted,

BUTZEL LONG
a professional corporation

Date: December 2, 2011

By: 

Robin Luce Herrmann (P46880)
Joseph E. Richotte (P70902)
Jonathan F. Jorissen (P71067)
Jennifer A. Dukarski (P74257)
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 258-1421
Attorneys for Amici Curiae
Michigan Press Association,
Gannett Co., Inc.,
Scripps Media, Inc. (as WXYZ-TV)
The Detroit News,
The Macomb Daily, and
The Rail

STATE OF MICHIGAN
COURT OF APPEALS
FOURTH DISTRICT

THOMAS M. COOLEY LAW SCHOOL,

Plaintiff-Appellee,

v.

JOHN DOE 1,

Defendant-Appellant,

and

JOHN DOE 2,
JOHN DOE 3, and
JOHN DOE 4,

Defendants.

Docket No.

Ingham County Circuit Court
Case No. 11-781-CZ
HON. CLINTON CANADY III

CERTIFICATE OF SERVICE

Michael P. Coakley (P34578)
Paul D. Hudson (P69844)
Miller Canfield Paddock & Stone, PLC
150 West Jefferson Avenue, Suite 2500
Detroit, Michigan 48226
(313) 963-6420
Attorneys for Plaintiff-Appellee

Paul Alan Levy (DC Bar No. 946400)
Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
Attorney for Defendant-Appellant John Doe 1

John T. Hermann (P52858)
Law Offices of John T. Hermann, PC
2684 Eleven Mile Road
Berkley, Michigan 48072
(248) 591-9291
Attorney for Defendant-Appellant John Doe 1

Barbara Harvey (P25478)
1394 East Jefferson Avenue
Detroit, Michigan 48207-3104
(313) 567-4228
Attorney for Defendant-Appellant John Doe 1

Robin Luce Herrmann (P46880)
Joseph E. Richotte (P70902)
Jonathan F. Jorissen (P71067)
Jennifer A. Dukarski (P74257)
Butzel Long, *a professional corporation*
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 258-1421
Attorneys for Amici Curiae
Michigan Press Association,
Gannett Co., Inc.,
Scripps Media, Inc. (as WXYZ-TV),
The Detroit News,
The Macomb Daily, and
The Rail

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

Lisa L. Haynes, being duly sworn, deposes and says that on the 2nd day of December 2011, she served a correct copy of **Notice of Hearing, Motion for Leave to File Brief as *Amici Curiae* Supporting Adoption of the *Dendrite* Standard and Brief *Amici Curiae* Supporting Adoption of the *Dendrite* Standard** in the above-entitled matter upon the following:

Michael P. Coakley
Miller Canfield Paddock & Stone, PLC
150 W. Jefferson Ave., Ste. 2500
Detroit, MI 48226

Paul Alan Levy
Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009

John T. Hermann
Law Offices of John T. Hermann, PC
2684 Eleven Mile Road
Berkley, MI 48073

Barbara Harvey
1394 East Jefferson Avenue
Detroit, MI 48207-3104

by enclosing said document(s) in envelopes properly addressed to the above individuals with postage fully prepaid and by depositing said envelopes in the United States mail, Detroit, Michigan.

Lisa L. Haynes

The signator is known to me and acknowledged the foregoing instrument on December 2, 2011.

Notary Public

REGINA M. ROMERO
Notary Public, State of Michigan
County of Wayne
My Commission Expires Sep. 21, 2015
Acting in the County of Wayne