

IN RE: § IN THE DISTRICT COURT OF
§
JIMMIE P. COKINOS, § JEFFERSON COUNTY, TEXAS
§
Petitioner. § 60th JUDICIAL DISTRICT

PETITIONER'S RESPONSE TO MOTION TO QUASH

COMES NOW, JIMMIE P. COKINOS, Petitioner, and submits the following response to the *Motion to Quash* filed on behalf of the anonymous person/entity identified as "Recall_Carl01."

**THIS IS A CASE ABOUT ANONYMOUS
DEFAMATION MADE WITH ACTUAL MALICE**

Petitioner has spent his life serving his country and community with honor.

During the period leading up to the March 2004 primary, there was little disagreement that Ford Park and the Palms Golf Course were experiencing financial problems. Editorial, *Ford Park Issues Require Decisive Action by County*, Beaumont Enterprise, March 10, 2004, Page A10.

In the year preceding the primary, the issue of county expenditures for Ford Park and the Palms Golf Course were a matter of public concern. Gallaspy, *Commissioner's Contest Attracts Another Hopeful*, Beaumont Enterprise, December 3, 2003, Page A15; Editorial, *County Needs Commissioners With Fresh Ideas*, Beaumont Enterprise, February 26, 2004, Page A12; Editorial, *Ford Park Issues Require Decisive Action by County*, Beaumont Enterprise, March 10, 2004, Page A10.

The issue of Ford Park was seen as a decisive matter in the outcome of the primary. Stone, *Arnold Drive Our Cokinos*, Beaumont Enterprise, March 10, 2004, Page A1 ("One

Jefferson County Commissioner was unseated in Tuesday's primary election and another will face a runoff in the wake of criticism surrounding Ford Park")

In addition to the honest debate, another theme was lurking beneath the surface: corruption.

The creation of a County Budget Office was referred to the District Attorney. Gallaspy, *Commissioners revisit Business of Budget Office*, Beaumont Enterprise, November 13, 2002, Page A7. It didn't seem to matter that the investigation had cleared Mr. Cokinos and the other commissioners. Editorial, *Public Officials Must Perform in Open Manner*, Beaumont Enterprise, November 9, 2003, Page B1. The issue was certainly linked in the public mind to Ford Park and its financial difficulties. *Id.* ("With the county in its first budget crisis in years and controversy simmering over Ford Park, everything that happens in the commissioners court should be out in the open – and out there early").

Recall_Carl seized on the innuendo behind the criminal investigation to anonymously argue that Mr. Cokinos and the other commissioners had corruptly mismanaged the money spent on Ford Park and the Palms Golf Course. The postings attached to the original *Order Concerning Verified Petition to Investigate Potential Claim or Suit* allege that Mr. Cokinos was little more than a puppet of Carl Griffith; that \$80M had been spent on a project (Ford Park) that was not complete; that money had been spent on the Palms Golf Course when the County had no interest in the property; and, that Mr. Cokinos was afraid to meet with the voters to explain what had happened to the \$83M ("Commissioners Jimmie P. Cokinos and Waymon Hallmark are scare and afraid to answer the hard questions! I'm sorry they're scare to answer any question"). In short, the totality of the statements conveys the (false) impression that literally millions of dollars in public funds have been diverted without explanation.

The statements were not made in a vacuum. They were published to fuel a whisper campaign that money had been corruptly misdirected by the commissioners.

The existence of this anonymous campaign was acknowledged and rejected by the mainstream press. Editorial, *Ford Park Issues Require Decisive Action by County*, Beaumont Enterprise, March 10, 2004, Page A10 (“Detractors’ claims notwithstanding, no one could have anticipated the events that have made Ford Park an uphill struggle” - “With no evidence to the contrary, officials believed they were acting in the county’s best interests when they decided to build it”).

As a politician, Mr. Cokinos does not claim that he owned the position of trust given him by the voters over the many years he served as a county commissioner; however, he is entitled to his good name and reputation.

Despite achieving his stated objective of removing Mr. Cokinos from office, the poison seed planted by Recall_Carl continues to tarnish Mr. Cokinos’ good name and reputation. Gallaspy, *County Employees Aim to Protect Jobs From Cuts*, Beaumont Enterprise, September 4, 2004, Page A1 (“we want to know where our money went”)

A statement attributing criminal or corrupt conduct to a public official in the performance of his official duties is defamatory. *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 817 (Tex. 1976); *Monitor Patriot Company v. Roy*, 401 U.S 265, 273-74, 277 (1971).

If the statements made by Recall_Carl may have a defamatory meaning, the question of whether they were defamatory is one for the jury. *Turner v. KTRK TV*, 38 S.W.3d 103, 114 (Tex. 2000).

As relevant here, actual malice will be shown if it can be shown that Recall_Carl made the statements attributed to him when he knew or strongly suspected that his statements

could present a false and defamatory impression of events. *Turner*, 38 S.W.3d, 120. The knowledge possessed by Recall_Carl when he made the statements attributed to him are highly dependent on his identity; that is, without knowing who he/she is, a plaintiff cannot explore the evidence necessary to sustain his burden of proof with respect to the actual malice element.

Bentley v. Bunton, 94 S.W.3d 561, 600-01 (Tex. 2002); *Harte-Hanks Comm., Inc. v.*

Connaughton, 491 U.S. 657, 688 (1989).

PETITIONER IS ENTITLED TO LEARN THE IDENTITY OF HIS ACCUSER

In a desperate attempt to avoid liability for defamation, "Recall_Carl" has submitted a memorandum of authorities that does little to assist the court in evaluating the merits of his motion to quash.

Behind a fog of endless (and often irrelevant) string citations, even the memorandum submitted by "Recall_Carl" cannot avoid certain basic truths:

1. The First Amendment to the United States Constitution does not afford blanket protection for defamatory speech.

2. For fifty years a public official has been permitted to bring a defamation action against a nonmedia defendant for making a defamatory statement concerning a public issue, if the public official can show, among other things, that the nonmedia defendant made the false statement with actual malice. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Cutis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (actual malice standard adopted in *Sullivan* extended to actions brought by public figures).

3. The First Amendment does not protect anonymous defamatory statements made with actual malice. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 344-52 (1995) ("we agree with Ohio's submission that this interest carries special weight during election

campaigns when false statements, if credited, may have serious adverse consequences for the public at large"); *Doe v. State*, 112 S.W.3d 532, 536 (Tex. Crim. App. 2003) (statute may be constitutionally infirm because its prohibition against anonymous publications designed to influence elections is not limited to statements that are "false, misleading, fraudulent, or libelous").

4. The Internet is not a magic place that confers immunity for anonymous defamatory statements made with actual malice.

5. If, as is the case here, a public official has been defamed by an anonymous speaker, his right to discover the identity of the speaker may be subject to certain conditions: namely, (1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information? *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980).

**RECALL_CARL IS SEEKING TO DELAY AN INVESTIGATORY
TOOL PROVIDED BY TEXAS LAW**

Rule 202 of the Texas Rules of Civil Procedure has long provided Texas litigants with a means to investigate whether or not to burden the system with a lawsuit. While Petitioner has clearly identified the false statements at issue, a petition under Rule 202 is not formal litigation to which Recall_Carl is a party. *Texas v. Real Parties in Interest*, 259 S.W.3d 387, 394 (5th Cir. 2001).

Indeed, this court has no way of knowing that the person acting as Recall_Carl in this proceeding is actually the same person who authored the statements at issue. TRCP 28.

The statute of limitations for a defamation action is running.

The identity of Recall_Carl is necessary for Petitioner both to meet his burden of proof if he brings a defamation action and to evaluate whether he should bring such an action.

The only means to determine the identity of Recall_Carl is by resort to his IP account. At the request of the holder of the account, Recall_Carl was given advance warning of the request for his identity.

The use of defamatory statements in a political campaign both undermines the integrity of the electoral process (a compelling state interest recognized by the Supreme Court in *McIntyre*) and the right of a public official to sue for damage to his good name recognized by the Supreme Court in *Sullivan*.

RELIEF REQUESTED

The Motion to Quash should be denied and the deponent should be compelled to forthwith provide the relevant information its possession.

Respectfully submitted,

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Certificate of Service

I certify that a true copy of the foregoing was sent by fax to all counsel of record on December 31, 2004.

Tom N. Kiehnhoff