

**IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL DISTRICT
CUMBERLAND COUNTY ILLINOIS**

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff,)

5.)

No. 02-CF-23

PRISCILLA SCHROCK,)

Defendant.)

**MEMORANDUM IN SUPPORT OF RESPONSE TO
MOTION TO QUASH SUBPOENA BY CUMBERLAND INTERNET, INC.**

Defendant Priscilla Schrock requests that Defendant's May 24, 2002 subpoena directed to Cumberland Internet, Inc. in this case be upheld on the grounds that the disclosures requested under the subpoena are necessary to guarantee her Sixth Amendment right to a fair trial. The Defendant is entitled to disclosures which demonstrate any prejudice against her that would inhibit her constitutionally guaranteed rights. Moreover, the issue of whether this subpoena is upheld by the Court does not depend on the existence of a First Amendment right to free speech, as Cumberland Internet suggests, but rather the existence of a Fourth Amendment right to privacy in Internet subscriber information. Defendant submits that under either analysis, the Defendant is entitled to the information sought by the subpoena, and that Cumberland Internet, Inc.'s Motion to Quash should therefore be denied.

ARGUMENT

1. **THE DEFENDANT HAS A RIGHT TO A FAIR TRIAL FREE FROM PREJUDICIAL OUTSIDE INTERFERENCES.**

The Defendant's right to a fair trial, enshrined in both the Sixth Amendment to the Constitution of the United States and Article I, Section 8 of the Illinois State Constitution of 1970, is the paramount

constitutional guarantee. It is well established that trial courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences, and neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). By refusing to provide the information requested by the subpoena, Cumberland Internet frustrates the function of the judicial process.

The United States Supreme Court has always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs. Estes v. Texas 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965). The Defendant's right to a fair trial ranks higher than any other right. Press-Enterprise Co. v. Superior Court of California 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). In its Motion and accompanying Memorandum, Cumberland Internet, Inc. (hereinafter Cumberland's Memorandum) implies that its users' right to free speech is the fundamental right guaranteed under the U.S. Constitution. However, courts have consistently held that the right of free speech must give way to the right of a fair trial. . . @ Chicago Council of Lawyers v. Bauer 522 F.2d 242, 248 (7th Cir. 1975).

The subpoena that Cumberland Internet seeks to quash is vital to ensuring the Defendant's right to a fair trial for at least two reasons. First, by disclosing the identity and/or address information of certain of Cumberland Internet's users and Internet discussion board posters, the Defendant can establish that many or most of these users and posters physically reside within Cumberland County. This information has a direct bearing on the Defendant's pending motion to change place of trial (filed on

June 7, 2002). Second, by linking the identity of certain of Cumberland Internet's users and Internet discussion board posters with the statements made on Cumberland Internet's discussion board, the Defendant can establish that many of these posters are, in fact, likely witnesses at her trial. These statements expose a bias against the defendant which, if they derive from a witness at trial, are a proper subject for impeachment. Thus, the subpoena duces tecum to Cumberland Internet is at the heart of the Defendant's constitutional right to a fair trial, a right that is rendered meaningless if this Court grants Cumberland Internet's motion to quash the subpoena.

2. THE DEFENDANT IS ENTITLED TO DISCLOSURE OF EVIDENCE THAT SHOW WITNESSES HAVE A PREJUDICE AGAINST HER.

Implicit in the right to a fair trial is the defendant's right to the disclosure of evidence that will show witnesses have a bias against her. The defendant is entitled to the opportunity to reveal any hatred which a witness might have for the defendant. For example, it is proper to show the actions and conduct of witnesses as bearing on their motives. @ People v. Curtis, 123 Ill.App.2d 384, 259 N.E.2d 397 (5th Dist. 1970), citing People v. Turner 265 Ill. 594, 602, 107 N.E. 162 (Ill. 1914). The character and extent of the feeling of hostility entertained by a witness should be permitted to be shown. @ Curtis, 123 Ill.App.2d at 384, 259 N.E.2d at 397, citing People v. Strauch, 247 Ill. 220, 230, 93 N.E. 126, 131 (Ill. 1910). In order to impeach a witness for bias, it is necessary that a proper foundation be laid. @ Curtis, 123 Ill.App.2d at 388, 259 N.E.2d at 397, citing People v. Rainford, 58 Ill.App.2d 312, 208 N.E.2d 314 (1965). The bias of a witness is always relevant in discrediting a witness and affecting the weight to be given his testimony. @ People v. Friday, 232 Ill.App.3d 1047, 598 N.E.2d 302, 174 Ill.Dec. 105 (4th Dist. 1992), citing Davis v. Alaska 415 U.S. 308, 94 S.Ct. 1105,

39 L.Ed.2d 347 (1974). ¶The trial court should give the widest latitude to the defense in attempting to establish bias or motive. @ Friday, 232 Ill.App.3d at 1047, 598 N.E.2d at 302, 174 Ill.Dec at 105, citing People v. Wilkerson 87 Ill.2d 151, 429 N.E.2d 526 (1981).

In this case, and in order to lay a proper foundation for impeachment, disclosure of any actions of the witnesses that demonstrate bias against the Defendant must be allowed, including written statements made by the witness. The writings of a witness include posts that he or she makes to Internet discussion boards such as Cumberland Internet's discussion board at URL <http://discuss.rr1.net>, the same writings sought by the Defendant in its subpoena. These Internet postings are the strongest evidence of witness bias against the Defendant. The trial court should allow the disclosure of the posters' identity because disclosure is necessary for the defense to establish bias or motive of a witness.

3. THE SUBPOENA IS NARROWLY TAILORED AND LIMITS DISCLOSURES TO INFORMATION NECESSARY TO REVEAL BIAS AND PREJUDICE

The subpoena specifically requests documents that identify registered account usernames and discussion board aliases for persons who may give testimony in this case. @ Cumberland Internet argues that the subpoena is overly broad and burdensome and should be limited to individuals who are potential witnesses. (Cumberland's Memorandum, pp.17 - 19). This, in fact, is exactly the scope of the Defendant's subpoena. The individuals listed in the subpoena are only potential witnesses and have been identified as such. Since this case remains in the discovery phase, with final witness lists yet to be confirmed, it would be misleading for the Defendant to indicate the listed individuals as anything more than potential witnesses. This

limitation notwithstanding, thirty-five of the persons listed in the subpoena were specifically disclosed as potential witnesses in the State's Response to Defendant's Motion for Discovery and the Defendant's Initial Discovery Response both filed on May 14, 2002.

Cumberland Internet cites Anderson v. Hale, 2001 U.S. Dist. LEXIS 6127, for the proposition that a subpoena may be quashed if the information it seeks is not specifically stated within the body of the subpoena. (Cumberland's Memorandum, p.17). A close reading of Anderson reveals that only a portion of the subpoena in that case was quashed, and for the First Amendment associational privilege, not because of any lack of specificity. Anderson, 2001 U.S. Dist. LEXIS at 6127. The subpoena in Anderson requested, "Any information, including e-mails, activity logs, and address books, in connection with thirteen Internet accounts." Anderson, 2001 U.S. Dist. LEXIS at 6127. This broad request was specific enough for the Anderson court to uphold the subpoena not subject to First Amendment restriction. By contrast, the Defendant's subpoena to Cumberland Internet was substantially more detailed, requesting:

Documents that identify persons posting messages with aliases to the RRI Discussion Board (URL <http://discuss.rr1.net>) at certain dates and times described with specificity in Exhibit AA attached hereto, documents that provide registration information or otherwise identify persons logged into computers owned or operated by Cumberland Internet, a/k/a Arr1.net that are specified by Posting IP address in Exhibit AA attached hereto: (for example: the identity of the registered user logged on Cumberland Internet computer connection: Appm3111.rr1.net at 3/1/2002 at 3:28 p.m.), and documents that identify registered account usernames and discussion board aliases used on computer services provided by Cumberland Internet, Inc. for any of the following persons who may give testimony in this cause:

In addition, the Defendant's subpoena specifically identifies individuals for whom information is requested. Thus, the subpoena in the case at bar is more specific than that upheld in Anderson.

Even using Cumberland Internet's cited authority, its argument that the subpoena lacks specificity is without merit.

Item 3 of the Defendant's subpoena requests that Cumberland Internet produce the aliases that correspond to the individuals listed who have an account with Cumberland Internet.

In its Memorandum, Cumberland Internet states that there is no registry of message board **Ahandles@** and any account can use any **Ahandle@** at any time. However, when registering with an Internet company or a message board, a user creates a username, an alias or a **Ahandle@**. As Cumberland Internet admits in its Memorandum, these **Ahandles@** are assigned to one individual and typically more than one individual is not able to sign up for the same **Ahandle@**. (Cumberland Memorandum, p. 18). In its Motion, Cumberland Internet expresses anxiety over whether the persons registered to certain usernames, aliases or **Ahandles@** are, in fact the same people who post to its discussion board, and that, as a result, it cannot comply with the Defendant's subpoena (Cumberland's Memorandum, p.18). In making this argument, Cumberland Internet mischaracterizes, or at least misunderstands, the nature of the information sought by the Defendant in this subpoena. Tying this information together is not Cumberland Internet's responsibility under the subpoena: All that is requested is that it provide the usernames, aliases, and **Ahandles@** of persons subject to the subpoena, and the names and addresses of alias registrations tied to particular postings referenced in the subpoena. Since the defendant will have the burden of linking the creator of a message with a witness at trial, it is not unduly burdensome for Cumberland Internet to supply the information it has readily available that will enable the Defendant to do so.

In support of their argument regarding the lack of specificity of the subpoena Cumberland Internet also cites Doe v. 2TheMart.com, Inc., 140 F.Supp.2d 1088 (W.D. Wash 2001). (Cumberland's Memorandum, p. 17-18). Once again, Cumberland Internet's cited authority does not demonstrate that the Defendant's subpoena is overly broad. The court in Doe recognized a subpoena that requested the identities of users. Doe, therefore, stands for the same proposition as the case at bar in that a request for the identity of listed individuals is not too broad. Doe, 140 F.Supp.2d at 1090 (W.D. Wash 2001). Cumberland Internet argues that there is no basis to require that it identify the account information of any of the message board participants who are not potential witnesses in this case. (Cumberland's Memorandum, p. 18). However, the request for documentation identifying persons posting messages with aliases at certain dates and times (described in Exhibit AA@) may provide information regarding potential witnesses. As already stated, confirmed witnesses have yet to be identified and, by providing this information requested in the subpoena, the Defendant may be able to identify additional individuals who are witnesses at trial. Even those who are not ultimately identified as potential witnesses may have an evidentiary link to the specifically identified persons in the subpoena, due to the personal nature of an individual user's account.¹ Furthermore, the Court should note the Defendant's filing of a Motion to Change Place of Trial, and that this motion is pending. Requiring Cumberland Internet to identify senders, receivers or persons responsible for the

¹ Cumberland Internet asserts that persons other than the registered users and alias holders may access a personal account. If true, such people must have access to private information (such as the user's passwords); which would limit such access to individuals residing in the same household as a registered user, individuals in some way personally connected with the registered user, or other individuals to whom the registered user has given access to his account information. All are people who could provide a link to the registered user, and are potential witnesses.

postings identified in the exhibits to the subpoena will reveal that many of these individuals are, in fact, residents of Cumberland County. This information is crucial for the Defendant to prove the bias and prejudice of Cumberland County residents in this case, substantiating the Motion to Change Place of Trial.

**IV. DISCLOSURE OF THE INFORMATION REQUESTED BY THE DEFENDANT
WILL NOT INFRINGE UPON THE FIRST AMENDMENT RIGHTS OF THE
INTERNET POSTERS.**

Disclosure of the identity of the Internet posters is not an issue of First Amendment free speech, but an issue of the Fourth Amendment right to remain private in that speech. Furthermore, the persons sought to be identified in the Defendant's subpoena did not have a reasonable expectation that their identities would remain anonymous, notwithstanding Cumberland Internet's attempt to intercede on their behalf. Indeed, Cumberland Internet's position on the anonymity of its users is at odds with its previous, public warning to those users. In a discussion board message dated March 1, 2002, Cumberland Internet specifically warned its users that "Discussion Board postings are not anonymous." Cumberland Internet went on to inform its users that "[a] record of who is making the post is logged and is available to one person at Cumberland Internet and we are...required by law to disclose such information to comply with a criminal or civil subpoena." A true and correct copy of Cumberland Internet's March 1, 2002, notice is attached hereto as Exhibit AA. Since Cumberland Internet warned its users that their postings are not anonymous, and that it will comply with a criminal subpoena, Cumberland Internet message board posters have no claim that their identities are protected by their right to free speech.

Regardless of Cumberland Internet's previous notice to its users, the freedom of speech cases cited in its motion to quash are not relevant to the issue in this case. Contrary to Cumberland Internet's assertions, the subpoena requesting disclosure of the Internet posters' identities does not limit free speech. The issue in many of the cases cited by Cumberland Internet is the passing of a law or ordinance that limits one's ability to speak freely. See Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), Reno v. American Civil Liberties Union, 521 U.S. 182 (1997), McIntyre v. Ohio Elections Commission, 514 U.S.334 (1995), Talley v. California, 362 U.S. 60 (1960), ACLU v. Johnson, 4 F.Supp.2d 1029 (Dist. of New Mex., 1998), American Civil Liberties Union of Georgia v. Miller, 977 F.Supp. 1228 (N.Dist. of Geo., 1997). The language in these cases is inapplicable, because in the case at bar, at issue is not a law or ordinance hindering an individual's right to speak freely. Other authorities cited by Cumberland Internet are ones in which individuals sought disclosure of an identity to bring legal action against that person. See New York Times Co. v. Sullivan, 376 U.S. 254 (disclosure sought to sue for libel), Anderson v. Hale, 2001 U.S. Dist. LEXIS 6127 (N.Dist. of Ill., 2001)(disclosure sought to sue for personal injury), Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573 (N.Dist. of Cal., 1999)(disclosure sought to sue for trademark infringement), Dendrite International, Inc. v. John Does, 342 N.J. Super. 134 (2001)(disclosure sought to sue for defamation). The purpose of Defendant's subpoena is not to stop anyone from expressing his or her views or bring legal action against the message board posters. The purpose, instead, is to obtain evidence that persons likely to testify at her trial are biased against her and to substantiate her Motion to Change Place of trial by establishing that there is strong prejudice among Cumberland County residents against her.

The real concern raised by Cumberland Internet's Motion is not the poster's First Amendment Right to publicize his or her ideas in a public forum, but his or her ability to remain anonymous in publicizing those ideas. This question of privacy is a Fourth Amendment issue. A person must have a reasonable expectation of privacy in the matter searched in order to challenge a search under the Fourth Amendment. @ Guest v. Leis, 225 F.3d 325 (6th Cir., 2001) (Internet case dealing with the issue of privacy). To have a reasonable expectation of privacy on the Internet, two conditions must be met: (1) the data must not be knowingly exposed to others, and (2) the Internet service provider's ability to access the data must not constitute a disclosure. @ United States v. Hambrick, 255 F.3d 656 (4th Cir., 2000). The case at hand is factually similar to Hambrick. In Hambrick, the plaintiffs filed a class action suit on behalf of subscribers whose information was disclosed pursuant to a search. The court said that subscribers had no reasonable expectation of privacy because they knowingly exposed their name and contact information to MindSpring Internet service and its employees, and because MindSpring employees maintained access to these records in the normal course of business. Similarly, Cumberland's subscribers knowingly exposed their identity and contact information to Cumberland Internet when they subscribed. Cumberland employees have access to the records that match screen names with subscribers. The Cumberland message posters have no reasonable expectation of privacy in their subscriber information or their message board names linked to that information. When Cumberland subscribers entered into the Internet agreement, they knowingly revealed all information connected to their particular IP address. See United States v. Kennedy, 81 F.Supp.2d 1103 (Dist. of Kans., 2000) (holding that subscribers have no reasonable expectation of privacy in information

connected with their IP addresses). The anonymous posters do not have a right to remain private in their speech when an expectation of privacy in their identifying information never existed.

Cumberland Internet relies heavily on Doe v. 2Themart.com, 140 F.Supp.2d 1088 (W.Dist. of Wash., 2001) for its argument to quash the Defendant's warrant. This case sets forth a four-factor test to determine if non-party disclosure of an anonymous person is appropriate. Cumberland's memorandum in support of its motion to quash attempts to apply this test to the facts of this case, however Doe case can be distinguished from the case at hand. Doe deals with the disclosure of twenty-three anonymous message board posters to prove that these posters may have affected a company's market situation. The anonymous posters in Doe are not witnesses in the case, as they may be in the case before this Court. Doe provides no indication whether the four-factor test applied in that case should be applied to posters who are already potential witnesses and who have a vital role in the trial. Even assuming the Doe four-factor test applies to anyone who is not a party, and this Court accepts Doe as persuasive, Cumberland Internet's attempt to tie the analysis in Doe to this case is not.

The steps of the Doe test for disclosure of non-party identifying information are that: (1) the subpoena must have been issued in good faith and for a proper purpose; (2) the information sought relates to a core claim or defense; (3) the identifying information is directly and materially relevant to that claim or defense; and (4) the information is sufficient to establish or to disprove that claim or defense is unavailable from any other source. Cumberland Internet's basis for objecting to this subpoena fails on all four counts.

1. The Subpoena Must Have Been Issued In Good Faith And For a Proper Purpose.

The purpose of the Defendant's subpoena is to obtain information showing that certain

potential witnesses in the case have made statements showing their bias against the Defendant. As stated earlier, the Defendant is entitled to disclosure of this type of information, so this is not an improper purpose. If the information is necessary for a legitimate purpose, it cannot be said that the subpoena was in bad faith; therefore, whether the subpoena was issued in good faith requires no further analysis. Cumberland Internet admits that the defendant's goals for issuing the subpoena were legitimate, yet it also argues that the effect of the subpoena is abhorrent to First Amendment principles. Cumberland's Memorandum, 13. Assuming the First Amendment is an issue, the supposed effect of the subpoena is not relevant to this factor. It merely requires that the subpoena was for a "proper purpose" and "issued in good faith," as is the subpoena in the case at bar.

2. The Information Sought Relates To A Core Claim or Defense

Cumberland Internet's argument that identifying the authors of certain "Anonymous" public statements will have no direct bearing on Defendant's guilt or innocence, is clearly flawed. It is well established that witnesses play a vital role in the outcome of a trial, and to argue that statements by one or more potential witnesses which show bias have no relation to a core claim or defense is inaccurate. Any statements made by a witness made showing bias toward a party directly relates to the credibility of that witness. Cumberland Internet also argues that providing the requested information would not identify with certainty the person who made the posting. (Cumberland's Memorandum, p. 14). This argument is without merit. The Defendant is not asking the Cumberland Internet to verify that a particular person wrote a particular message on its message board; the Defendant's subpoena only asks Cumberland Internet to release the identity of registered users with those usernames and aliases listed therein and vice-versa. Whether there is a match between the two is not Cumberland Internet's

concern: Any writing, not just a semi-anonymous Internet posting, is subject to potential disclaimer by the author, with or without Cumberland Internet's weighing in on the subject. Instead, it is an issue for the trier of fact to determine whether such a disclaimer, if it is made by a witness upon cross examination by Defendant, is credible. No legitimate reason exists to quash a subpoena merely because the information requested may not provide definite certainty.

3. The Identifying Information Is Directly And Materially Relevant To That Claim or Defense.

Disclosing the identity of the anonymous posters is directly and materially related to Defendant's defense. Cumberland Internet argues that unless the Defendant can show how the bias and credibility of witnesses are central to her defense, message board posters' First Amendment rights should not be compromised. (Cumberland's Memorandum, pp. 15-16). As already discussed, no basis exists for any First Amendment issue in this case; however assuming that this Court found a First Amendment issue applied here, it is obvious that the bias and credibility of witnesses are crucial to the Defendant's defense. If a witness is biased, and the Defendant does not have the tools to expose that bias to the trier of fact, the Defendant's fundamental right to a fair trial is denied.

4. The Information Is Sufficient To Establish Or To Disprove That The Claim Or Defense Is Unavailable From Any Other Source.

Cumberland Internet argues that Defendant may obtain her goal of establishing bias through other sources, such as examining witnesses at trial regarding statements that they have made in the community or through introducing testimony of others who have heard oral statements by the witnesses. (Cumberland's Memorandum, p.16). Besides being purely speculative, this argument is

flawed in that there is no evidence to suggest that other sources of bias would be as accurate or more accurate than the actual writings of a witness. Indeed, establishing bias through written statements as a matter of trial persuasion and tactics is logically far more effective than attempting to establish bias through witnesses' prior oral statements. The potential witnesses who may be posting may have made comments about the Defendant in public, but there is no proof that there are unbiased witnesses whose testimony would be reliable in court to verify or deny these statements. The Defendant should not be required to canvas the citizens of Cumberland County and its surrounding communities in an attempt to obtain the same information that is readily available from Cumberland Internet. The identification of the message board posters is the most accurate, direct, source of witness statements that can establish the bias at trial. This information also serves as the most compelling reason to change the Defendant's place of trial.

Notwithstanding the Defendant's objection to using the Doe court's analysis in this matter, it is ironic that if the Court accepts Cumberland Internet's assertions and applies the Doe test to determine whether the subpoena should be upheld, the facts of this case make it clear that the Defendant is entitled to disclosure of the identities of the posters under the Doe court's analysis.

CONCLUSION

The right to remain anonymous is not absolute. @ Doe v. 2themart.com, 140 F.Supp.2d 1088 (W.Dist. of Wash., 2001). If, for example, one enters a chat room and posts anonymously, attempting to solicit sex with a minor, the poster does not have a right to be anonymous. People v. Ruppenthal, 2002 Ill. App. LEXIS 410 (1st Dist., 2002), People v. Patterson, 314 Ill. App. 3d 962 (2nd Dist., 2000). The courts commonly recognize that one's right to remain anonymous has limits. These limits

are not automatic infringement on one's rights. Such is the case with the posters to Cumberland Internet's discussion board. The Internet is a public forum, not a confessional. Cumberland Internet is not the attorney for its users nor is it their doctor. This is not a situation where, as Cumberland Internet suggests, a public official is trying to punish citizens for criticizing her. Rather, the situation at hand consists of an individual defendant exercising her fundamental rights in an effort to obtain a fair trial. If there is any liberty at stake here, it is that belonging to Priscilla Schrock, whose right to a fair trial outweighs whatever right Cumberland Internet claims to prevent her from receiving one.

Respectfully Submitted,

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