

STATE OF MICHIGAN  
COURT OF APPEALS  
FOURTH DISTRICT

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THOMAS M. COOLEY LAW SCHOOL,  
Plaintiff-Appellee,

Docket No. 307426

vs.

JOHN DOE 1, unknown individual,  
Defendant-Appellant,

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

and

JOHN DOE 2, JOHN DOE 3, and  
JOHN DOE 4, unknown individuals,  
Defendants.

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**REPLY BRIEF ON APPEAL FOR APPELLANT JOHN DOE 1**

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In his opening brief, defendant-appellant John Doe argued that Michigan should adopt the consensus standard under the First Amendment, adopted by every state appellate court that has reached the question as well as by many federal courts, under which a plaintiff that seeks to identify an anonymous Internet speaker for the purpose of pursuing litigation against him must give the defendant fair notice and an opportunity to defend his anonymity, and must show that it has valid legal claims supported by sufficient evidence to show a prima facie case of illegality. If the Court agrees with that legal standard, Doe demonstrated that the Court should reverse the decision below, and remand the case to give plaintiff-appellee Thomas Cooley Law School the opportunity to make that legal and evidentiary showing. Doe also argued that Michigan should embrace the additional part of the test, followed by a majority of jurisdictions that have decided the First Amendment question, under which courts apply equitable balancing, much like a court deciding a preliminary injunction motion, in which the degree to which special considerations affecting the strength of the aggrieved plaintiff's or anonymous defendant's interests affect the sufficiency of the showing that has to be made to overcome the defendant's right of anonymous speech. Finally, Doe showed that, if the Court adopts the express balancing stage, this part of the analysis also favors his right to remain anonymous, subject again to the showing that plaintiff is able to make on remand.

Most of plaintiff's arguments were anticipated in Doe's opening brief. This reply brief responds to the remaining points, which that Cooley had not previously raised.

**1. The Appeal Rests on Arguments About Questions of Law That Are Reviewed De Novo, as a Matter of Both Michigan Law and the First Amendment.**

Cooley argues that, because Doe appealed from the ruling on a discovery motion, the decision below is reviewed only for abuse of discretion. Cooley Br. 23. But when a discretionary ruling rests on an error of law, that error of law is itself an abuse of discretion, and review of those preliminary legal questions is de novo. *People v Gursky*, 486 Mich 596, 606 (2010); *Michigan Dep't of Transp.*

*v. Frankenlust Lutheran Congreg.*, 269 Mich App 570, 575 (2006); *Davis v. City of Detroit Fin. Rev. Team*, — NW 2d —, 2012 WL 1836854 (Mich App 2012). Indeed, the case Cooley cites for application of the abuse of discretion standard says the same. *Augustine v. Allstate Ins. Co.*, 292 Mich App 408, 419 (2011). Review of the trial court’s application of the relevant legal standards to the record in this case is also de novo because the discovery ruling below affects the First Amendment right to speak anonymously. “Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold . . .” *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 511 (1984); *Rouch v. Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 253-258 (1992).

Doe’s appeal bristles with issues of law – whether Michigan should adopt the standard of *Dendrite v Doe*, 775 A2d 756 (NJ App 2001), whether specific allegedly defamatory words are actionable fact or non-actionable opinion, whether Cooley is a public figure, whether actual malice has been pleaded, whether the Thelen affidavit sets forth evidence supporting a prima facie case. These are legal issues reviewed de novo. *E.g.*, *Bufalino v. Detroit Magazine*, 433 Mich. 766, 774 (Mich. 1989). A trial judge’s application of the final, balancing stage of *Dendrite* would be discretionary, but the trial court here did not conduct such a balancing. In short, the key issues in this case are all subject to de novo review.

**2. The Court Should Adopt *Dendrite* or *Cahill* as Michigan’s Standard for Subpoenas to Identify Anonymous Defendants.**

Citing an appellate decision from Illinois as a basis, Cooley urges the court to reject the national consensus standard for adjudicating subpoenas to identify anonymous Internet speakers because, it says, Michigan law provides adequate protection against baseless defamation claims. Cooley Br. 40-46, citing *Maxon v Ottawa Pub. Co.*, 929 NE2d 666 (Ill App 2010). Cooley’s

argument sidesteps several reasons why *Maxon* does not support its defense of the order below.

First, although Michigan requires the specific defamatory words to be spelled out in the complaint, Illinois law as expounded in *Maxon* requires detailed fact pleading in the petition for prelitigation discovery with respect to all issues—a petition that “states with particularity facts that would establish a cause of action for defamation.” 929 NE2d at 673. Nor does Michigan generally require that the factual basis for holding alleged conduct tortious be verified. *Maxon* decided that it was unnecessary to apply *Dendrite*’s First Amendment requirements when discovery would breach anonymity only because Illinois law already required these conditions, similar to the *Doe v Cahill*, 884 A2d 451 (Del 2005) test, before any order to provide identifying information could be granted. “If a trial court considers a Rule 224 petition in accordance with these guidelines, we are convinced that all rights of the potential defendant are protected. . . . *Dendrite* and *Cahill* add nothing to the protections provided by our previous analysis of [Illinois law.]” 929 NE2d at 673, 675.<sup>1</sup>

Cooley points to various provisions in Michigan law that supposedly provide equivalent protections for anonymous defendants, but what Cooley never shows is that defendants can employ these protections to retain their First Amendment right to speak anonymously. As in every state, formerly anonymous defendants can seek sanctions against lawyers who sign pleadings without an adequate legal basis; formerly anonymous defendants can move to dismiss on the face of the pleadings or for a more definite statement, and even for summary adjudication. But no state treats those protections as a reason not to require showings to support discovery to identify anonymous Internet speakers. The Illinois court rule on which *Maxon* relied to protect the Doe’s rights requires plaintiffs to meet these legal and evidentiary standards before the court can grant **any** pre-litigation

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<sup>1</sup>In *Arista Records v Doe 3*, 604 F3d 110, 123 (2d Cir. 2010), cited by Cooley (Br. 46), there was also an affidavit showing a prima facie case of copyright infringement by the Doe downloader.

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identification petition. Michigan's state-law protections, by contrast, can be invoked only after the defendant has been identified. Thus, unless this Court adopts *Dendrite* or *Cahill*, Michigan's rules afford no protection for the First Amendment right to speak anonymously comparable to Illinois'.

Moreover, the fact that Doe could use these protective measures once he is identified and served with process, forcing Cooley to meet legal and evidentiary standards at an early stage of the litigation, raises the question of why Cooley deems it unfair that a plaintiff be required to meet these standards before learning the defendant's identity. Indeed, as Doe's opening brief shows, plaintiffs with valid claims frequently succeed in enforcing subpoenas to identify anonymous defendants.

Cooley says brusquely that Michigan should not follow the same rule as all the other states that have addressed the question because the rule is "bad law, plain and simple," Cooley Br. at 43, but it never grapples with the arguments of policy and precedent in Doe's opening brief, which explains **why** all these other states have taken this approach — (1) that an order to identify an anonymous speaker is a form of relief that chills free speech, takes away a defendant's constitutional right to speak anonymously, and enables plaintiffs to take extra-judicial actions; (2) that the First Amendment demands a compelling state interest before free speech rights are taken away; (3) that relief should not be granted in the absence of evidence; and (4) that it is not difficult for a plaintiff with a valid claim for defamation or other tort or similar claim based on the defendant's wrongful speech to make out the prima facie showing, and meet the balancing test, that the other states require.

Cooley criticizes *Dendrite*'s balancing stage as being "nebulous," and for permitting denial of relief on a possibly meritorious claim, even if the plaintiff can present a bare minimum of evidence sufficient to make out a prima facie case. But as with respect to the four basic parts of the *Cahill* test, Cooley ignores the policy reasons set forth in Doe's opening brief, explaining why courts



in other jurisdictions have adopted *Dendrite*'s balancing stage: It enables courts to adapt the basic four prongs of *Cahill* test to multiple, richly varied circumstances in which the plaintiff's interest in proceeding is particularly strong or weak, or the anonymous defendant's interest is especially strong or weak, depending on the claims pleaded and the facts shown in the record.

If a denial of discovery based on the *Dendrite* balancing stage meant that the case would be dismissed, so that the plaintiff could never prevail on its claims against the defendants, Cooley's criticism might have more force. However, the denial of discovery based on the insufficient strength of plaintiff's showing is not the end of the litigation; the plaintiff can try to come back with a more compelling showing, as Cooley might attempt to do in this very case with respect to the individual statements by Doe that are addressed to matters of fact and not hyperbole or rhetoric.<sup>2</sup>

The *Dendrite* standard is no more nebulous than the balancing test for a preliminary injunction. Proper consideration of requests for emergency relief at the outset of a case requires an exercise of equitable discretion, reviewable for abuse of discretion. Similarly, as courts have begun to consider whether plaintiffs have made an adequate showing to warrant denial of the right to speak anonymously, they have found a similar basis for an exercise of equitable discretion.

**3. Cooley Has Made Neither an Adequate Legal Showing Nor an Adequate Evidentiary Showing to Warrant Doe's Identification.**

Cooley argues that the decision below should be affirmed on the alternate ground that Cooley met the requirements of *Cahill* by pleading a facially adequate claim for defamation and producing

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<sup>2</sup>For example, in *Art of Living Foundation v Does 1-10*, 2011 WL 5444622 (ND Cal Nov. 9, 2011), the court balanced parties' interests, considering the real possibility of retaliation against the Doe defendants by an international religious cult that used copyright law as an excuse for suing a former member who posted a pseudo-religious text to illustrate his arguments about the cult, and recognizing that denial of identification would not end the litigation. Eventually, the court granted summary judgment dismissing the copyright claim. 2012 WL 1565281 (ND Cal May 1, 2012).

evidence in support of its defamation claims through the affidavit of its dean, James Thelen. Doe's opening brief anticipated such contentions, based on what Cooley had argued below, and nothing in Cooley's principal brief in this Court makes them any stronger.

Doe's principal brief analyzed specific words that Cooley's complaint alleged were defamatory, and showed that they were either hyperbolic opinion rather than fact, or non-defamatory fact or, in any event, that there was no evidence they were false and, indeed, good reason to believe they were true. Cooley apparently acknowledges the authority that calling someone a "criminal" or a "fraud" based on disclosed facts is non-actionable opinion, but argues that Doe's blog is different because it uses the terms several times, instead of containing "stray" accusations. Cooley Br. 35. But as the ACLU of Michigan effectively argues as amicus curiae, the very fact that Doe's blog uses such terms repeatedly, in capital letters and with multiple exclamation marks, as in many sentences quoted in Cooley's appellate brief, is a contextual factor that gives his blog the air of a "nonsensical, grammatically incorrect, and rather bizarre rant that, even where it claims truth, would not be considered factually truthful by an objectively reasonable reader." ACLU Br. 11.

To be sure, a number of specific factual statements are mixed into the hyperbole. Doe's opening brief showed that none of the factual statements specifically alleged in the complaint were actionable, and Cooley apparently concedes the point. Instead, in this Court for the first time, Cooley identifies other excerpts from the blog as **also** being false and defamatory. Cooley Br. 2, 9-11, 30-32. It is ironic that, after arguing that Michigan's requirement of pleading precise defamatory words adequately protects Doe defendants' First Amendment right to speak anonymously, Cooley defends the ruling below by citing a whole new set of allegedly defamatory statements that were never alleged in the complaint and, indeed, cited only in a response brief on appeal to which a reply brief

meeting the ten-page limit can never respond. Had they been pleaded below, Doe had enough pages available within the fifty-page limit to address each of them in his opening brief.

But like the statements alleged in the complaint, the allegedly false statements cited in Cooley's brief do not form a basis for a valid defamation claim, for various reasons. Several statements on which Cooley now relies are contained only in comments that other Internet users posted on his blog, but federal law grants Doe a statutory immunity from being sued for "information provided by another information content provider," even if Doe made a conscious decision to allow that content to be included in his blog. 47 USC § 230; *Batzel v Smith*, 333 F3d 1018 (9th Cir 2003). Michigan has not yet addressed section 230 in a reported opinion, but the federal and state courts are unanimous in this broad application of section 230. *Fair Housing Council v Roommates.com*, 521 F3d 1157 (9th Cir 2008) (*en banc*).

The remaining comments are a mixture of opinion, non-defamatory facts, and statements that, although they contain factual matter that can be proved true or false, still do not form an alternate basis for affirmance because Cooley never pleaded that they were false, never pleaded that they were stated with actual malice, and never produced evidence of falsity. Some of the statements, even if defamatory, would not be defamatory per se, and so would require a showing of harm.

For example, Cooley's brief complains that Doe "falsely stated" that: "Cooley is probably single handedly accounting for 50% of Michigan's lawyer production....leading to the flooded market in what is already an ECONOMICALLY DECIMATED state to begin with." Br. 32. The reference to Michigan's economic hardships is likely true, however painful Doe's reminder surely is. It is not clear whether Cooley is denying that the graduates from its four separate Michigan campuses comprise 50% of all law graduates in the state. The statistic is a fact whose accuracy could be

proved true or false, but even if false it is not defamatory. Whether law schools generally, and Michigan law schools in particular, are “flood[ing the] market” is a matter of opinion that is under heavy discussion in the profession as well as in the public sphere; Doe’s having taken an implicit position in that public controversy, despite his negative spin, is no basis for a defamation claim.

Cooley also argues that the Thelen affidavit sufficiently proves its prima facie case to warrant denying Doe his First Amendment right to speak anonymously, Br. 48-49, but it cites the language of his affidavit out of context. Mr. Thelen did show that Doe made the statements claimed to be false and defamatory, by authenticating a printout of the blog post, but he never averred that any statements on Doe’s blog are false. He averred only that “Cooley alleges that . . . Defendants published false and defamatory statements,” ¶ 3, and that he “informed . . . Weebly, Inc. that Defendants had posted defamatory statements concerning Cooley.” ¶ 5. This hearsay is not evidence that the statements about which Cooley complains are false. It does not even specify which statements are false, not to speak of stating “with particularity” in what way they are false. As an example of the sort of detailed averments that other courts have accepted as providing sufficiently specific evidence of falsity, the Addendum to this brief includes the affidavit provided by the plaintiff in *Alvis Coatings v Does*, 2004 WL 2904405 (WDNC Dec. 2, 2004) (cited in Doe’s opening brief, at 10). In that affidavit, the head of the company identified several sentences on which his company’s defamation claim was based, and enumerated the true facts that made each of the statements false. It would not have been difficult for Cooley to make a similar showing in the court below, if there were sufficient evidentiary basis for doing so. If the Court reverses the ruling below and remands for further proceedings, Cooley will have another opportunity to amend its complaint and submit evidence to try to make out a prima facie case.

**4. The Trial Court Properly Ruled That the Identifying Information That Weebly Disclosed to Cooley Was Within the Protection of MCR 2.302(B)(7).**

Cooley repeats the argument it made in support of its motion to dismiss this appeal as moot, that the trial court erred in ruling that Weebly's disclosure of electronic information identifying Doe was properly subject to the "claw back" provision. The trial court has limited Cooley's ability to use that information publicly, even after its rejection of the motion to quash, and Cooley did not file a timely appeal from any of the Court's rulings on the subject. Although Cooley correctly points out (Br. 39 n.21) that the trial court's ruling will not be final until judgment in the case, and that Cooley could appeal from such a final judgment, those observations do not justify its effort to raise the issue in this court without a timely appeal.<sup>3</sup>

In any event, Cooley's argument (Br. 39) that Michigan Court Rule 2.302(B)(7) is limited to information protected by the attorney-client privilege and work-product doctrine is wrong, even though that was the most important concern that led to its adoption. Cooley acknowledges that the Michigan rule was modeled on Federal Rule of Civil Procedure 26(b)(5), *id.*, and the only case it cites about the meaning of the rule is a federal district court decision that does not **limit** the rule to attorney-client privileged disclosures. *Id.* In fact, several federal courts have applied the analogous federal rule to other privileges, including privileges that protect against the identification of otherwise anonymous speakers. *Lee v AFT-Yakima*, 2011 WL 2181808, at \*11 (ED Wash June 3, 2011); *Kraft Foods Global v Dairilean, Inc.*, 2011 WL 1557881, at \*5 (ND Ill Apr. 25, 2011); *In re Fannie Mae Securities Litigation*, 552 F3d 814, 824 (DC Cir 2009); *Coleman v Schwarzenegger*, 2008 WL 2237046, at \*3 (ED Cal May 29, 2008); *Coleman v Schwarzenegger*, 2008 WL 1749474,

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<sup>3</sup> In response to Cooley's motion to strike the appeal as moot, filed shortly before Doe's appellate brief, Docket Item 17, Doe explained why the appeal is not moot, Docket Item 23, and the Court denied that motion. Docket Item 30. The arguments are not repeated here.

at \*3 (ED Cal April 14, 2008); *Ponca Tribe of Indians of Oklahoma v Continental Carbon Co.*, 2008 WL 1732947, at \*4 (WD Okla Apr. 10, 2008).<sup>4</sup>

### CONCLUSION

The order denying John Doe 1's motion to quash should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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September 19, 2012

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<sup>4</sup> Although the trial judge properly ruled that the disclosure by a Weebly employee who did not know that a motion to quash had been filed and that the company had promised to defer release so that the court could rule, was "inadvertent disclosure," the text of the rule does not require that the disclosure have been "inadvertent"; that word appears only in the rule's title. Titles do not affect a statute's meaning unless the text contains an ambiguity that requires interpretation. *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. R.*, 331 US 519, 528-29 (1947). There is no such ambiguity in the language of the rule. Moreover, as companies increasingly store data in the "cloud" instead of their own computers, application of Rule 2.302(B)(7) to cover ISP disclosures while motions to quash are pending is needed to prevent unintended waivers of privilege of all kinds.

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# ADDENDUM



IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

ALVIS COATINGS, INC.,

Plaintiff,

v.

JOHN DOES ONE THROUGH TEN,

Defendants.

Civil Action No. 3:04-CV-374-H

DECLARATION OF CRAIG HARTMAN

The undersigned declares and says:

1. I, Craig Hartman, am the Chief Operating Officer for Plaintiff Alvis, Inc. ("Alvis"). I have been employed by Alvis since April 2001. I am over eighteen (18) years of age and am competent to provide this Declaration. I have personal knowledge of the matters set forth below and give this Declaration in support of the *Response of Alvis Coatings, Inc. to Motion to Quash Subpoena*.

2. I am familiar with the statements made on www.bobvila.com that are attributable to IP address 68.62.45.214. Many of the statements made by the author of these messages are false. These statements have caused financial harm to Alvis as well as reputational harm, and they have caused harm to the goodwill of Alvis and its valuable trademarks and service marks, including the ALVIS SPRAY ON SIDING® mark.

3. I have reviewed Post Number 215268. It is false that Alvis sells a product that is a privately labeled Durox product. It is false that Alvis sells Durox's "Siding in a

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Can" product. It is false that the ALVIS SPRAY ON SIDING® exterior coating product is an ordinary paint product.

4. To the contrary, the premier product of Alvis, ALVIS SPRAY ON SIDING®, is privately manufactured for Alvis by a company other than Duron, and cannot be bought over the counter or by "consumers everywhere." The ALVIS SPRAY ON SIDING® product comes with a limited, transferable lifetime warranty. The ALVIS SPRAY ON SIDING® product is not ordinary paint, but rather is a thick coating with a high solids content including a high content of polymers and resins.

5. I have reviewed Post Number 210945. It is false that Alvis buys and labels a product made by Duron.

6. I am familiar with Post Number 209918. It is false that the Alvis' exterior coating product is "purchased from an unnamed Fla. paint manufacturer." Alvis also never has added or has had anyone add additives to its products to manipulate or change test results.

7. I am familiar with Post Number 185841. It is false that Alvis is a slimy company. It is false that Alvis is giving its products, employees and others associated with Alvis Spray on Siding exterior coating products a "bad name." Alvis is a company engaged in the business of distributing, and authorizing others to use, distribute and apply coating products used in commercial, residential and industrial applications. Alvis cares about its reputation and the quality of its products and services. Alvis products are distributed through independently owned dealers who market, sell and install such products including, *inter alia*, ALVIS SPRAY ON SIDING® permanent coating

products, to their customers in their territories. The Alvis dealer network now makes Alvis products available in approximately 75 markets in 29 states throughout the nation.

8. I am familiar with Post Number 204527. While I will not comment on the statements made about the alleged dealers and/or former dealers, I can say that those statements are outright false or contain elements of falsities to the extent I am familiar with the facts. I most certainly can say that it is false that a top sales executive of Alvis disappeared with a "boat-load" of company funds. I also am outraged that the author of this posting accused me of being a "criminal." I never have been charged with or convicted of any crime.

9. I am familiar with Post Number 204812. It is false that Alvis "signed up" jobs of any kind. Alvis is a company in the business of selling products to its authorized dealers. The sale of applications of those products to consumers is the sole responsibility of those authorized dealers.

10. Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted this 8<sup>th</sup> day of November, 2004.

  
\_\_\_\_\_  
Craig Harman,  
Chief Operating Officer  
Alvis, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of September, 2012, a copy of the foregoing brief was filed with the court's electronic filing system, which will automatically serve it on counsel for plaintiff-appellee as follows:

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