Docket
Return to Candace
C/M # 31968-1

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

DOE, Plaintiff, vs. Individuals, whose true names are unknown, using the following pseudonyms: TS, RONALD, KRIS, and BILL, Defendants.	No. CV 0803 0693 PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM WEBHOSTS *ORAL ARGUMENT REQUESTED*

REQUEST FOR ORAL ARGUMENT AND COURT REPORTING SERVICES

Plaintiff Doe requests oral argument for this motion, and requests official court reporting services. Plaintiff estimates that the time required for oral argument will be 30 minutes.

MOTION

Plaintiff DOE ("Plaintiff") hereby moves the Court pursuant to ORCP 55 for an order requiring *The Portland Mercury*, the *Willamette Week*, *The World*, and PedalTown Media Inc. (collectively the "Webhosts") to produce documents in response to Plaintiff's *Subpoena Duces Tecum*, a copy of which is attached to the Declaration of Daniel H. Skerritt in Support of Plaintiff's Motion to Compel Production of Documents. Webhosts are not a party to the suit and is protected from liability under federal law. *See*, Communications Decency Act, 47 USC § 230. However, Webhosts hold crucial evidence which cannot be obtained by any other means and without which the Plaintiff is left with no redress under the law.

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CERTIFICATE OF UTCR 5.010 COMPLIANCE

The undersigned certifies that he conferred with counsel for the Webhosts who were represented by counsel concerning the issues in dispute and was unable to reach an agreement.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Nature of this Action.

This is a defamation case against individuals, whose true names are unknown, using the following pseudonyms: TS, RONALD, KRIS, and BILL (collectively "Defendants"). Plaintiff contends he has been the subject of defamatory "blogs" posted on web-sites by Defendants. Defendants used the anonymity of internet blogs to defame Plaintiff by falsely and maliciously attributing to Plaintiff characteristics that are intended to demean and embarrass him and which hold him in a false light. Anonymity affords Defendants refuge from suit, and stalls the Plaintiff from even beginning to find redress under the law.

B. Factual Background

Webhosts have failed to produce responsive documents providing identity of the bloggers.

On April 24, 2008, Plaintiff served a subpoena directed to the records custodian of the Webhosts, each individually, to produce documents with this Court. Exh. A. Plaintiff mailed the subpoenas on the same day.

None of the webhosts has produced any responsive documents. Additionally, no objections have been filed with this Court.

C. Dispute over Document Production by Webhosts

Webhosts dispute their duty to produce documents on three grounds: (1) the Communications Decency Act ("CDA"), 47 USC § 230, (2) the Oregon Shield Law (the "Shield Law"), ORS 44.520, and (3) the reporter's privilege under the First Amendment.

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None of the three objections is well taken.

The CDA immunity provisions are not at issue here, because Webhosts are not defendants. Section 230 of the CDA is an immunity from liability as a publisher, not an immunity as to discovery. Here, Plaintiff merely seeks the production of evidence that would allow him to hold a third party accountable for that third party's defamatory statements.

The Shield Law and reporter's privilege do not apply. The Shield Law only protects the news media's ability to gather news. Webhosts only interaction with the bloggers and their comments were their websites. Hosting a web-site is not specific to any newsgathering function. Moreover, the reporter's privilege is qualified. When there is a more compelling need for disclosure than for the reporter's privilege, the information must be disclosed. Plaintiff's need for disclosure must be more compelling because he cannot begin to find redress under the law without the identities of the anonymous authors. Therefore, the Shield Law and reporter's privilege are qualified and do not protect the requested documents.

1. The CDA's immunity provisions have no application to the discovery of the requested documents.

a. The CDA does not apply because Webhosts are not defendants.

The CDA immunity provisions are not at issue here because Webhosts are not defendants. Section 230 of the CDA is an immunity from liability as a publisher of a third party's comments. The CDA by its "plain language" creates a federal immunity for internet service providers for information "originating with a third-party user of the service." *Zeran v. America Online, Inc.*, 129 F3d 327, 330 (4th Cir 1997). Here, Plaintiff merely seeks the production of evidence that would allow him to hold a third party accountable for that third party's defamatory statements.

b. The CDA's immunity provisions do not apply to discovery.

The CDA immunity provisions do not prevent the publisher of a third-party's comments from disclosing that third party's identity. As discussed in section (a), *supra*, the

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CDA is an immunity from liability as a publisher of a third party's comments. The Court in *Zeran* tempers its ruling by stating that, despite its holding, the "original culpable party [who] posts defamatory messages" would not escape accountability. *Id.* The only reading allowing the disclosure of the "original culpable" party's identity, while maintaining the immunities the CDA provides to service providers and publishers, is one that permits discovery. Any other reading would provide blanket immunity to persons who recklessly and knowingly defame others in the vast and permanent space of the internet.

Therefore, the CDA is irrelevant because its immunity provisions do not prevent discovery of the requested documents.

2. The Shield Law only protects the media's ability to gather news.

a. The Shield Law only protects certain types of information, like a reporter's work product, informants, or confidential sources.

ORS 44.520(1) provides in part:

> "No person connected with, employed by or engaged in any medium of communication to the public shall be required by a legislative, executive or judicial officer or body, or any other authority having power to compel testimony or the production of evidence, to disclose, by subpoena or otherwise:
>
> "(a) The source of any published or unpublished information obtained by the person in the course of gathering, receiving or processing information for any medium of communication to the public; or
>
> "(b) Any unpublished information obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public."

The Shield Law's protections are limited, not absolute. The Court of Appeals, for example, excluded from the protections of the Shield law a reporter's personal observations of events that took place in public and that did not relate to work product, informants or confidential sources. *State of Oregon v. Pelham*, 136 Or App 336, 344 (1995). The Shield Law is not absolute, but only allows the media to assert that "certain types of information are privileged." *Id.* Like personal observations, the collection of Defendants true

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identity is not specific to Webhosts work as a news organization.

Even if the collection of Defendants' true identities is not exactly akin to personal observations, it is still not protected. The Court in *Pelham* sets out what "information obtained" in the statute means in terms of "newsgathering." *Pelham*, 136 Or App at 344. It sets out three examples of what constitutes newsgathering – work product, informants, and confidential sources. Defendants are not a confidential source or informant – they wrote independently of Webhosts[1]. The collection of Defendants' true identity cannot be a reporter's work product because any interactive website can collect identifying information about its users. The use of an interactive website and collection of information about its users is not unique to the news media. Therefore, the requested documents, like personal observations, are not protected by the Shield Law because they are not information obtained as part of the media's ability to gather news.

b. The Shield Law has a narrow scope of protecting the media's ability to gather news.

The Shield Law protects the media's ability to gather news. Oregon cases examining the Shield Law typically involve the protection of the media from disclosing sources or unpublished information obtained in the course of gathering news. The case law is rich with examples. For example, in *State ex rel. Meyers v. Howell* the defendant subpoenaed the *Oregonian* for unpublished photographs taken by a reporter on assignment at a political demonstration. 86 Or App 570, 575 (1987). Another example is in *Brown v. Gatti*, where the plaintiff sought an *Oregonian* reporter's notes and testimony concerning an interview with the defendant. *Brown v. Gatti*, 95 Or 695 (2004) (reversed on other grounds, 341 Or 452 (2006)). In both *Howell* and *Gatti* the information was protected from compelled production. Therefore, at the very least the facts of the case law on the Shield Law develop a body of law which protects the media's ability to gather news.

[1] This is in fact the foundation for immunity under the CDA.

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Compelling the production of the Defendants' identity does not encroach on the media's ability to gather news. The Shield Law becomes overly broad if it protects every piece of information a news organization interacts with. It would be akin to an attorney invoking the attorney-client privilege after a third party's defamatory comments were posted on its web-site. Worst of all, such a reading places protection of the media over the right of a putative victim to find redress under the law.

c. Other jurisdictions with similar statutes also only protect the media's ability to gather news.

Other jurisdictions interpreting similar media shield laws also reached this conclusion. For example, the California and Oregon shield Laws share numerous similarities. They both protect the production of the "source of any information" obtained while a part of a news organization. California Constitution, Article I, sec. 2(b). They both also protect the disclosure of "unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." *Id.*

Mere association with the news media does not make the defamatory comments newsgathering. For example, in a California Court of Appeal case, the Court found the Shield Law did not protect the disclosure of the anonymous authors of a paid advertisement published in the newspaper. *Ranchero v. Publications v. Superior Court*, 68 Cal App 4th 1538, 1546 (1999) (publisher failed to show that the information it sought to protect was obtained while engaged in activities related to newsgathering). In *Ranchero* the court held that the publisher could not claim the Shield Law's protections where there was no evidence the publisher had done anything more than sell space on its pages to the anonymous originators of a defamatory publication.

Webhosts had less interaction with the defamatory comments than *Ranchero* publications had with its unprotected defamatory ad. Webhosts did nothing more than host a web-site. The web-site server automatically processed the comments. Webhosts simply had

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no interaction with the comments or the anonymous author. Therefore, if selling ad space is insufficient interaction with the newsgathering process to be protected under California law, then hosting a web-site should also be insufficient interaction to be protected under Oregon's Shield Law. Therefore, the Shield Law does not prevent the production of the requested documents.

3. The reporter's privilege does not prevent discovery of the author of defamatory comments when the information cannot be obtained by any other means.

a. The reporter's privilege is qualified, not absolute.

Webhosts' interest in protecting the anonymous blogger's identity is subordinate to the more compelling need of the Plaintiff in seeking redress under the law. The Supreme Court held that the right of a reporter to conceal his source was subordinate to the more compelling requirement that a grand jury be able to secure factual data relating to its investigation of a serious crime. *Branzburg v. Hayes*, 408 US 665 (1972). The Ninth Circuit applied the *Branzburg* holding to non-grand jury cases. *Farr v. Pitchess*, 522 F2d 464 (9th Cir 1975). The *Farr* Court held *Branzburg* to require a balancing of the need for disclosure against the First Amendment privilege, weighed in light of the surrounding facts to determine "where lies the paramount interest." *Farr*, 522 F2d at 468.

Plaintiff needs the identity of the blogger in order to begin to find redress under the law. Plaintiff's remedy under the law and the true identities of the Defendants cannot be ascertained without these subpoenas. The defamatory comments are still posted on Webhosts' websites. Therefore, Plaintiff is effectively left without recourse against the authors of comments which may last in perpetuity.

Webhosts assert the First Amendment privilege to protect an anonymous writer completely unaffiliated with the newspapers. The privilege is being used to shield the author of defamatory and harmful comments. The comments do not serve any news function for the public. If there is any First Amendment issue in this case, then it is for the

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Defendants to raise. Therefore, the paramount interest lies with the right of a putative victim to discover the identity of the anonymous blogger in order to find redress under the law.

b. The First Amendment does not protect defamatory speech.

Limitations on defamatory speech do not raise any constitutional problems. The First Amendment does not offer an absolute protection of free speech "at all times and under all circumstances." *Beaucharnais v. People of State of Ill.*, 343 US 250, 255-56 (1952). Defamation stands among the traditional limitations placed on freedom of speech. *Id.* The Supreme Court permitted restrictions on free speech in areas which are "of such light social value as a step to truth that any benefit that may be derived from there is clearly outweighed by the social interest in order and morality." *Chaplinksy v. State of New Hampshire*, 315 US 568, 572 (1942). Defendants' defamatory statements do not serve any social value, but work to demean and embarrass the Plaintiff. Society is served by speech that is free and responsible, not speech that is reckless and unaccountable. Therefore, even if the Plaintiff's right to a remedy under the law was subordinate to the reporter's privilege, the comments are defamatory and as such do not raise any constitutional problem.

c. The First Amendment does not prevent discovery of information when it can be obtained by no other means.

The First Amendment's protections prevent imposing liability but do not inhibit the discovery process. Webhosts are not defendants nor are they the author of the remarks. Instead, Webhosts holds crucial information which cannot be obtained by other means. Therefore, even if a reporter's privilege was recognized by this Court despite the reasons discussed in sections (a) and (b), *supra*, it would only prevent Plaintiff from holding Webhosts liable for the defamatory comments. It would not, however, prevent Webhosts from disclosing the requested documents. Therefore, the reporter's privilege does not prevent the production of the requested documents.

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CONCLUSION

For the reasons set forth above, Plaintiff's motion to compel should be granted.

In addition, pursuant to ORCP 46A(4), Webhosts should be compelled to pay Plaintiff's reasonable costs and fees incurred herein.

DATED this 28th day of July, 2008.

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