**STATE OF MICHIGAN**
**IN THE COURT OF APPEALS**

GUS GHANAM,

Appellee,

v.

JOHN DOES,

Defendants.

Case No. 312201

Macomb County Circuit Court
Case No. 2012-1739-CZ

_____/

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**THIRD-PARTY/APPELLANT JOSEPH MUNEM'S REPLY BRIEF ON APPEAL**

*****ORAL ARGUMENT REQUESTED*****

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## I. INTRODUCTION

Ghanam adopts a dangerous proposition in his Brief on Appeal. Ghanam suggests that we should be skeptical of any person posting on a website that allows speakers to hide their identity. (Ghanam Br. at 6.) Ghanam appears to suggest that the Court should distrust the owner of the Warren Forum and its posters because they prefer anonymous speech about long-term politicians and public servants with the ability to use the power of the state to retaliate against the speakers. Ghanam's suggestion runs contrary to the long-standing tradition of anonymous speech criticizing governmental leadership. From the very beginnings of this Country, anonymous speech has been encouraged and celebrated (rather than chastised and derided as Mr. Ghanam implies).

Relying on this long-standing tradition in his opening brief, Mr. Munem argued that Michigan should adopt the consensus First Amendment standard governing a plaintiff seeking to identify an anonymous online speaker. Every state and federal court that has considered revelation of online anonymous speakers has adopted at least some standard for reviewing a plaintiff's case ***prior*** to allowing discovery into the identity of the speaker. The need for a standard is apparent: without testing a plaintiff's defamation claim, a defamation plaintiff could easily trump an internet poster's right to anonymity with the issuance of a single subpoena. For this reason, Mr. Munem suggests that this Court should adopt a *Cahill* or *Dendrite* style standard for evaluating the claims of Ghanam.

The lower court made no analysis whatsoever of Ghanam's claims, and it simply directed Mr. Munem to participate in a deposition to identify the owners of and speakers on the Warren Forum website. Despite its length, Ghanam's Brief does not suggest an alternative standard – it simply asks this Court to interpret the First Amendment rights of anonymous online speakers at

the boundaries of the Michigan Court Rules – asserting that the onus should be on the speaker to seek a protective order rather than the prospective plaintiff. Running contrary to established Supreme Court precedent, Ghanam even asserts that anonymous online posters have a lower expectation of privacy than in other forums. (Ghanam Br. at 15.)

As discussed below, Ghanam's position does not pass muster under the First Amendment. In fact, his claims fail because the speech at issue is rhetorical hyperbole that would never be considered truthful in the context in which it was posted. For these reasons, and all those set forth in Mr. Munem's Brief on Appeal, Mr. Munem respectfully requests that this Court: (1) adopt the *Dendrite* standards for evaluating cases involving anonymous, on-line speech; (2) reverse the Macomb County Circuit Court's August 27, 2012 Order Denying Third-Party Joseph Munem's Motion for Protective Order; and (3) hold that Ghanam's complaint fails because the statements alleged are not sufficient to support a public figure's claim of defamation.

## II. THIS APPEAL SHOULD BE REVIEWED DE NOVO

Ghanam argues that this Court should review the lower court's ruling on an abuse of discretion standard. (Ghanam Br. at 7.) While this standard is generally applied in discovery disputes, where fundamental First Amendment questions are presented, this Court does not apply a deferential standard. 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. *See People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010); *Michigan Dep't of Transp v Frankenlust Lutheran Congreg*, 269 Mich App 570, 575; 711 NW2d 453 (2006); *Davis v. City of Detroit Fin Rev Team*, No. 309218, 2012 Mich App Lexis 987 (May 21, 2012). 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 US 485, 511 (1984); *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 253-58; 487 NW2d 205 (1992).

The cases cited by Ghanam do not alter this burden to review legal issues de novo. Ghanam cites *Maldonado v Ford Motor Co*, 476 Mich 372; 719 NW2d 809 (2006) for the proposition that this Court should apply an abuse of discretion standard, giving broad deference to the lower court. In *Maldonado*, however, the Michigan Supreme Court expressly stated that "in cases raising First Amendment issues, an appellate court is obligated to ***independently review the entire record*** to ensure that the lower court's judgment does not constitute a forbidden intrusion of the field of free expression." *Id* at 388-89. The *Maldonado* court did not qualify that quote, as Ghanam would have this Court, by saying that the independent review should be deferential. Moreover, in *Smith v Anonymous Joint Enterprise*, 487 Mich 102; 793 NW2d 533 (2010), the Supreme Court only indicated that the reviewing court's "independent review" should not challenge "[c]redibility determinations made by the finder of fact . . . ." unless they are found to be "clearly erroneous." The standard articulated in *Smith* is inapplicable to this case. Here, no credibility assessment has been made. In fact, Ghanam has never denied that the specific statements made on the Warren Forum are untrue.

The only issue presented to this Court is the legal question regarding the process the lower court should employ to determine whether to reveal potentially identifying information regarding someone who has posted online anonymously. As discussed *infra*, Mr. Munem believes this Court should articulate a standard that would require Ghanam to actually present proofs regarding the merits of his case *before* potentially identifying information is released

regarding the ownership of the Warren Forum and the identities of the various online posters. In performing this purely legal review, this Court is not constrained to defer to the lower court – the independent review must ensure that constitutional rights are protected. In Ghanam's proposed system, they are not.

## III. THE COURT SHOULD ADOPT *DENDRITE* OR *CAHILL* AS MICHIGAN'S STANDARD FOR SUBPOENAS TO IDENTIFY ANONYMOUS DEFENDANTS

Ghanam bases his opposition to the adoption of a *Dendrite* or *Cahill* standard on the erroneous premise that anonymous online speakers have a lower expectation of privacy. (Ghanam Br. at 14.) Ghanam provides this Court with no legal support for his assertion that online speakers have a lower expectation of privacy. (Ghanam Br. at 15.) In fact, Ghanam could never provide any support for his misguided assertion because this argument has been clearly resolved to the contrary by the Supreme Court, which held that the right to engage in anonymous speech should extent fully to communications made through the medium of the Internet. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (explaining that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."). Ghanam's argument, based on a faulty premise, leads to a faulty conclusion that would never protect the First Amendment rights of online speakers.

For example, Ghanam argues that any notice requirement of a lawsuit should be done away with unless "the owner of the forum can readily be identified." (Ghanam Br. at 16.) Ghanam provides no legal support for this proposition, and it fails as a matter of fact. Ghanam believes that the notice requirement in *Dendrite* is too onerous, which defies credulity given that anyone can post to the Warren Forum, including Ghanam. Apparently, Ghanam would prefer to secretly obtain this information without providing an anonymous speaker the opportunity to challenge the basis of the lawsuit.

Not satisfied with eliminating a notice requirement for defamation lawsuits, Ghanam seeks to further denigrate First Amendment rights by asking the Court to view the facts of a defamation case in a light most favorable to the plaintiff. Ghanam does not discuss the contours of such a standard, but its application is apparent in Ghanam's pleadings to date. Initially, Ghanam never identified the statements he was challenging in his Complaint. The lower court issued the order directing Mr. Munem to be deposed without ***any*** record of the challenged statements. Only after Mr. Munem filed his Motion for Protective Order, Ghanam identified the statements. Even with the statements identified, Ghanam has never, by affidavit or sworn testimony, claimed the statements were untrue. The record upon which Ghanam would have this Court give him the benefit of the doubt is hollow without any substance whatsoever. Ghanam's proposed standard, therefore, is no standard at all.

Ghanam discusses numerous cases at length, and ultimately dismisses the *Dendrite* standard, but Ghanam never addresses the arguments of policy and precedent set forth in Mr. Munem's opening brief explaining why all these other states have adopted some form of the *Dendrite* or *Cahill* standards. Namely, an order to identify an anonymous speaker is a form of relief that chills free speech, taking away a defendant's constitutional right to speak anonymously and allowing a plaintiff to take extra-judicial actions; the First Amendment demands a compelling state interest before free speech rights are taken away; relief should not be granted in the absence of evidence; and 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 other states require. Applying these longstanding standards, it is clear that Ghanam's Complaint should be thoroughly reviewed before the lower court allows any attempts at identifying the anonymous online speakers at issue.

## IV. THE STATEMENTS AT ISSUE ARE NON-DEFAMATORY RHETORICAL HYPERBOLE

In order to support his claim that the statements at issue are not rhetorical hyperbole, Ghanam principally relies on *Hodgins v Times Herald*, 169 Mich App 245; 425 NW2d 522 (1988). That case, however, does not address the argument made by Mr. Munem. In his Brief on Appeal, Mr. Munem argues that the context in which statements are made is important. In *Hodgins*, the Court was faced with a letter in a newspaper, which imparted a higher degree of believability to the statements in the letter. *Hodgins* does not address the situation here: an online, informal forum filled with grammatically incorrect, fundamentally flawed speech. Mr. Munem's argument, which neither Ghanam Brief nor the *Hodgins* decision addresses, is that no one would consider the statements on the Warren Forum to be truthful. Anonymous posters are venting their spleen without any support or degree of truthfulness, and the cases cited by Mr. Munem uniformly support the notion that the speech here should be disregarded as inactionable hyperbole. *See Obsidian Fin Group, LLC v Cox*, 812 F Supp 2d 1220, 1223 (D Ore, 2011)[1]; *Too Much Media, LLC v Hale*, 206 NJ 209, 234-35; 20 A3d 364, 378-79 (2011); *Sandals Resorts Int'l, Ltd v Google, Inc*, 925 NYS2d 407, 415-16, 86 A3d 32, 43-44 (NY App Div, 2011); *Summit Bank v Rogers*, 206 Cal App 4th 669, 697 (2012); *Global Telemedia Int'l, Inc v John Doe 1*, 132 F Supp 2d 1261, 1267 (CD Cal, 2001).

The Sixth Circuit case cited by Ghanam supports the conclusion that the context of the speech is critically important. In *Jolliff v NLRB*, 513 F.3d 600 (CA 6, 2008), the Sixth Circuit

[1] In attempting to distinguish the *Obsidian* case, Ghanam argues that the message board in question was clearly critical of the plaintiff, "creating an expectation that critical comments would be received." (Ghanam Br. at 18.) Little question exists that the Warren Forum creates "an expectation that critical comments would be received." At the top of the Warren Forum website, the website notes that it is "About government business, schools and community in Warren, Michigan." The website continues to note that "Politicians in this city live in fear of this Web site and it affects what they do." It is difficult to imagine a set of statements that would more create an expectation for critical commentary.

distinguished the statements in the letter at issue from the "leaflets, pamphlets or organizing slogans" used by the unions. *Id* at 613. The Court noted that the "context of the statement also suggests that the statement was meant to be taken literally." *Id.* In this case, there is no similar context. The statements at issue here, anonymously placed on a blog filled with informal language, colloquialisms, and downright nonsensical statements, could never be intended to be taken literally. Instead, the context and tenor of the statements reveal that they are nothing more than protected rhetorical hyperbole.

## V. CONCLUSION

WHEREFORE, Third-Party/Appellant Joseph Munem respectfully requests that this Court: (1) adopt the *Dendrite* standards for evaluating cases involving anonymous, on-line speech; (2) reverse the Macomb County Circuit Court's August 27, 2012 Order Denying Third-Party Joseph Munem's Motion for Protective Order; and (3) hold that Ghanam's complaint fails because the statements alleged are not sufficient to support a public figure's claim of defamation.

Respectfully submitted,

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**Proof of Service**

I, H. William Burdett, Jr., certify that on December 17, 2012, I filed Joseph Munem's Reply Brief on Appeal with the Court's electronic filing system which will serve a copy of the same on all counsel of record. I further certify that I served a courtesy copy of this paper by electronic mail upon:

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