No. 10-0366

IN THE SUPREME COURT OF TEXAS

IN RE

JOHN DOES 1 AND 2,

RELATORS

From the Ninth Court of Appeals,
Beaumont, Texas No. 09-10-00051-CV

Trial Court Cause No. E-184,784

BRIEF ON THE MERITS TO PETITION FOR WRIT OF MANDAMUS BY REAL PARTIES IN INTEREST

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Statement of the Case

The Relators defame Philip R. Klein and his family in three websites, www.operationkleinwatch.blogspot.com, www.sametheeagleusa.blogspot.com and www.notthisonetoojacques.blogspot.com. See Debtors' Tab 6. Petitioners, PRK Enterprises, Inc. and Klein Investments, Inc., filed a Rule 202 Petition in the 172nd District Court to investigate potential causes of action against Google and two of the blogspots identified in the Petition. In response to which, Google, Inc., voluntarily agreed to produced documents and entered into a Rule 11 agreement, which provided for possible depositions after first an agreed-upon production of documents pursuant to a Subpoena. In response to the agreed-upon Subpoena under Rule 11, Relators filed a Motion to Quash and for Protection. Real Parties In Interest filed a motion to set aside these objections, and at the hearing the Relators did not show or otherwise make an appearance. [1]The Honorable Judge Floyd granted the Motion to Strike the Objections to the Subpoena Duces Tecum on January 29, 2010. At this time, Google, Inc., has not produced any documents.

Relators filed an Appeal to the Ninth Circuit Court of Appeals in Beaumont, Texas. Then pursuant to the motion by Relators, the Ninth Court dismissed the Appeal. Relators also sought mandamus relief and emergency stay in the Ninth Circuit, and the Ninth

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[1] Relators complain about lack of service, but formal service could not occur since the posters are still anonymous, and also Google is required by federal law to notify the posters to the blogs' when there is an attempt to discuss their identities. Since Relators appeared and filed their objections to the Subpoena, the issue of service is irrelevant.

Circuit denied both the motion for emergency stay and for mandamus relief.

At no time have Relators ever asserted that the Trial Judge made a clear and prejudicial error of law that would prejudice any rights of Relators. As such, mandamus relief is wholly inappropriate. *Johnson v. Fourth Court of Appeals,* 700 S.W.2d, 916, 917 (Tex. 1985).

Issues for Review

Reply Issue No. 1

The trial court did not disregard the procedures of Rule 202 and did not order the parties to rely upon a Rule 11 agreement and a Subpoena. This was voluntarily done by the parties. Rule 202 does not prohibit parties from entering into voluntary, informal discovery. Further, Relators have no standing to complain about the discovery procedure agreed-upon by Google and Real Parties In Interest.

Reply Issue No. 2

The Honorable Judge Floyd's Order was not state action depriving Relators of their First Amendment rights to anonymous speech. The website and Relators' contents are clearly defamatory per se, and neither their identities nor the content of the blogs are protected under the First Amendment.

Statement of Jurisdiction

Real Parties In Interest would show there is no jurisdiction for mandamus relief, since Relators do not show any clear and prejudicial error of law that effects any substantive rights

of Relators.

Statement of Facts

The Real Parties In Interest adopt as in fully set forth herein their Petitioner's Response to Respondents' Motion to Quash Subpoena, and Motion to Compel (Attached as Exhibit "I" to Relators' Petition for Writ of Mandamus). In short, the Relators operate three websites which engage in no constitutionally protected speech, but instead anonymously defame and libel the Real Parties In Interest. For the reasons discussed infra, none of the content of the Relators in their websites is constitutionally protected. As such, the Real Parties in Interest filed a Rule 202 Petition against Google, Inc., to investigate potential claims and to obtain the identity of these defamers.

At the request of Google, Inc., the parties voluntarily entered into a Rule 11 agreement, by which Google requested Klein to issue a Subpoena, and Google stated that it would produce the responsive documents after the Court considered and overruled any objections. Google informed Relators of the status of the proceedings, and Relators filed motions to quash. After documents are produced, Google agreed that it would present an appropriate person for deposition, if necessary. Since there was a voluntary agreement regarding discovery, there was no need for there to be a hearing on Real Party In Interest's petition, under Rules 202.3 and 202.4. Such a hearing is only necessary in a contested situation; as such, there is no need for an order allowing a pre-suit deposition under Rule 202.4(a) or (b).

Relators are correct that Klein and Google entered into a Rule 11 agreement on October 1, 2009, for informal discovery. On September 29, 2009, Klein served a Subpoena for Google seeking identifying information for the Relators. The Relators obviously had notice of this, because: (1) Google provided notice to the Relators as required under the federal law; and (2) the Relators filed objections to the Subpoena. **At no time did the Relators show up in Court or otherwise make any appearance before the Court.**

In response to the objections filed by Relators, Real Parties In Interest filed a Motion to Compel, demonstrating the speech at issue is not constitutionally protected. The Court held a hearing on the Relators' Motion to Quash on January 15, 2010, but the Relators did not attend the hearing; since their only purpose was to delay the production of information leading to their identity. As such, neither Google nor the Relators filed any opposition. The Court entered the appropriate Order on January 29, 2010 overruling the objections filed by Relators, and implicit in such overruling is finding that the defamatory speech is clearly not constitutionally protected.

Next, Relators sought to delay this matter further by filing a Motion for Emergency Stay and a Petition for Writ of Mandamus, raising only one issue - - whether parties can enter into voluntary discovery after a Rule 202 Petition is filed.

Argument and Authorities

Reply Issue No. 1 (Restated)

The trial court did not disregard the procedures of Rule 202 and did not order the parties to rely upon a Rule 11 agreement and a Subpoena. This was voluntarily done by the parties. Rule 202 does not prohibit parties from entering into voluntary, informal discovery. Further, Relators have no standing to complain about the discovery procedure agreed-upon by Google and Real Parties In Interest.

1. Mandamus is not an available remedy to Relators.

Mandamus is an available remedy when a trial court abuses its discretion as a matter of law, if there is no adequate remedy by appeal (*Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985). There is no mandamus remedy here because: (1) the trial court did not abuse its discretion by committing a clear and prejudicial error of law (*i.e.*, the judge did not order the parties to utilize a Rule 11 agreement and Subpoena); (2) the trial court did not fail to apply the law; and (3) the trial court did not act without reference to any guiding rules or principles. Here, the Real Parties In Interest filed a Motion to Compel and Motion to Strike Objections filed by Relators to the voluntarily agreed to Subpoena Duces Tecum entered into between Google and the Real Parties in Interest. The Relators admit that they had notice of the hearing, yet they refused to show, *because their purpose is to delay the production of their identities.* Since Relators failed to show or file any responsive pleadings, there is no basis to argue that

the trial court abused its discretion; that the trial court failed to apply the law; or that the trial court acted without reference to any guiding rules or principles. Further, as briefed *infra*, Relators' identities are not constitutionally protected.

A trial judge must be impartial to all parties, and it is absurd to argue that the trial court's job should be to step in the shoes of Relators if they refuse to advocate their position at the trial court level. In short, since the matters were unopposed by Relators, Relators have waived their ability to complain. Further, even if this Court were to conclude that Rule 202 prohibits parties from engaging in other forms of voluntary discovery; such a finding is not subject to mandamus because the parties agreed-upon Subpoena does not adversely effect Relators' substantive rights.

2. Rule 202 does not prevent parties from entering into voluntary, informal discovery.

Relators correctly point out that there are cases stating that mandamus can be granted when the trial court **orders a form of discovery** under Rule 202 other than a deposition. *See, E.G., In Re: Akzo Nobel Chemical Co.*, 24 S.W.3d 919, 920 (Tex. App. - - Beaumont, 2000, orig. proceeding). Relators cite to no cases, however, which would prohibit the parties in a Rule 202 proceeding to agree to an informal discovery tactic that would reduce the costs of both parties.

Here, there was a voluntary Rule 11 agreement which provided that Google would agree to produce information sought in the agreed upon Subpoena Duces Tecum, after: (1)

Google provided required notice to Relators; and (2) the trial court considered any objections filed by Relators. Google provided notice to Relators, they filed objections but they did not contest the enforceability of these objections in open Court. Moreover, the Rule 11 agreement entered into between the Real Parties in Interest and Google, clearly reflects that the parties can take a deposition if necessary, after the informal discovery is completed.

3. Relators have no standing to complain about the Rule 11 agreement and Subpoena, which were agreed upon between Google and the Real Parties In Interest.

Relators have no standing to complain about the Rule 11 agreement and Subpoena which were agreed upon between Google and the Real Parties In Interest. The discovery procedure in this matter concerns only the procedural rights of Google and the Real Parties In Interest. Neither of these parties complain about this voluntary discovery procedure. Relators complain, but their procedural rights were not harmed or prejudiced in any way by the agreement between the Real Parties In Interest and Google. If Google had not agreed to the Rule 11 and the Subpoena, Google certainly could have requested that the Real Parties In Interest follow the strict procedures of Rule 202 and seek a court order for a deposition. Google voluntarily waived these procedural rights, and instead Google and the Real Parties In Interest adopted a voluntary framework that would be more efficient. Since Relators were not a part of this discovery agreement, Relators have no standing to complain about the procedure utilized by Google and the Real Parties In Interest. Further, this procedure did not harm or prejudice the rights of Relators, because: (1) they timely filed their objections to the

Subpoena; and (2) they both appealed and filed for mandamus relief in the Ninth Circuit Court of Appeals and in this Honorable Court.

Reply Issue No. 2 (Restated)

The Honorable Judge Floyd's Order was not state action depriving Relators of their First Amendment rights to anonymous speech. The website and Relators' contents are clearly defamatory per se, and neither their identities nor the content of the blogs are protected under the First Amendment.

1. Mr. Philip Klein is not a public figure.

Relators assume falsely that Mr. Philip Klein, individually, and the owner of PRK Enterprises, Inc., and Klein Investments, Inc., is a public figure. In considering the constitutional issues, if any, this Court should be aware that Mr. Klein is not a "public figure" as that term is defined by the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344, 94 S.Ct. 2997, 3009 (1974).

Mr. Klein is a private investigator and a professional bodyguard, as well as a part-time fireman. He holds no public office, he is not a politician, he has not run for office and his only exposure in the media have been for short spots on CNN, Fox News, Dateline NBC, and some local stations regarding specific cases that he has investigated; as well as some local talk radio appearances at 6:30 a.m. for three minutes each. Mr. Klein has drawn the ire of powerful plaintiff attorneys in Southeast Texas, because Mr. Klein was active in the tort reform movement and was a spokesperson for Citizens Against Lawsuit Abuse. At no time has Mr. Klein satisfied the standards for a public figure for purposes of constitutional

analysis. In short, Mr. Klein and his companies have never sought nor obtained a role of special prominence in the affairs of society. *Id*. at 3009.

2. Limitation on the freedom of speech

While the First Amendment generally protects anonymous speech (See *Buckley v. Am. Constitutional Law Found*, 525 U.S. 182, 199-200, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999), there are limitations on the protections allowed by the First Amendment.

The First Amendment is not intended to protect unconditionally all forms of expression. Particularly, libel and defamation are not constitutionally protected. *See Beauharnais v. Illinois*, 343 U.S. 250, 266, 72 S.Ct. 725, 96 L.Ed. 919 (1952) (libelous statements are outside the realm of constitutionally protected speech). Forms of expression, such as the right to speak anonymously, are therefore not absolute. "Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights." *In re Subpoena Duces Tecum to America On-Line, Inc.*, No. 40570, 2000 WL1210372, at *5 (Va.Cir.Ct. Jan. 31, 2000). The courts must balance the right to communicate anonymously with the right to hold accountable those who engage in communications that are not protected by the First Amendment. Thus, although the right to speak anonymously "would be of little practical value if … there was no concomitant right to remain anonymous" in the face of a civil action subpoena, a civil litigant

has an interest in asserting his or her rights through the litigation process against an anonymous tortfeasor. *Polito v. AOL Time Warner, Inc.*, No. 03CV3218, 2004 WL 3768897, 2004 Pa. Dist. & Cnty. Dec. LEXIS 340 (Pa. D. & C. Jan. 28, 2004). In other words, an anonymous speaker who freely defames an individual will be held responsible by facing civil responsibility for their acts. *McMann v. Doe*, 460 F.Supp.2d 259, 263 (D.Mass.2006).

3. The Standard to Follow – Quantum of Proof Required

A. Just a Mere Allegation of Libel is Sufficient

There are no direct cases on point in Texas; however, this is not the first court to be confronted with this issue. There have been different formulations that have decided this issue, ranging from placing an extremely light burden (indeed, virtually no burden at all) on the plaintiff to tender proof of its allegations that would survive a summary judgment, or even more stringent requirements. One case holds that the mere allegation of libel is sufficient. *Alvis Coatings, Inc. v. John Does One Through Ten*, No. 3:04CV374-H, 2004 WL 2904405, 2004 U.S. Dist. LEXIS 30099 (W.D.N.C. Dec.2, 2004). Similarly, other cases have articulated requirements that require no more than allegations made in good faith, with some evidence to support the allegations. *See Polito*, 2004 Pa. Dist & Cnty. Dec. LEXIS 340. The First Amendment does not protect individuals from freely defaming others, while concealing their identities.

Mr. Klein is the victim of anonymous malicious and continuous defamation, which as a matter of law is not protected by the First Amendment. The blogger's position is

unwarranted by the law and their identities should be revealed in order for Mr. Klein to pursue a defamation suit against them. The websites at issue contain false information on legal proceedings that do not involve either Mr. Klein individually or the Real Parties In Interest; falsely represent that judgments have been taken against the Real Parties In Interest and/or Mr. Klein individually; falsely identify a bankruptcy proceeding that does not exist; identify lawsuits that do not involve Real Parties In Interest and/or Mr. Klein individually; accuse Mr. Klein of engaging in sex with an animal; and contain other defamatory contents. In short, these websites are nothing worse than vehicles for publishing malicious lies, and offer no constitutionally protected opinions.

A statement is defamatory per se if it unambiguously and falsely imputes a crime or criminal conduct to the complaining party. *Fiber Systems Intern., v. Roehrs*, 470 F.3d 1150 (5th Cir. 2006); *Cecil v. Frost*, 14 S.W.3d 414 (Tex.App.Houston [14th Dist.] 2000). The Relators have maliciously published a photograph that was altered to make it appear that Mr. Klein has engaged in sexual intercourse with an animal. These false accusations are completely atrocious and constitutes defamation per se. Mr. Klein's friends, family, clients, prospective clients, the community and anyone who views the anonymous bloggers' publications, have been led to believe that Mr. Klein engages in such criminal activities. This is not the type of speech intended to be protected by the Framers of the Constitution. The imputation of a crime, such as engaging in sexual intercourse with an animal, is sufficient evidence that is necessary to pierce the First Amendment's shield.

B. Sufficient Evidence to Defeat a Summary Judgment Motion

In the alternative, if this Court does not adopt the articulated requirements as set forth above, Petitioner prays for this Court to adopt the formulations set out in *Doe v. Cahill*, 884 A.2d 451 (Del.2005). The Court in *Cahill* described the test in these words: "Before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process, he must support his defamation claim with facts sufficient to defeat a summary judgment motion." 884 A.2d at 460. This standard does not require a plaintiff to prove its case as a matter of undisputed fact, but instead to produce evidence sufficient to establish the plaintiff's prima facie case:

> [T]o obtain discovery of an anonymous defendant's identity under the summary judgment standard, a defamation plaintiff must submit sufficient evidence to establish a prima facie case for each essential element of the claim in question. In other words, the defamation plaintiff, as the party bearing the burden of proof at trial, must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim within plaintiff's control. Id. at 465 (quotations and citations omitted, emphasis in original). The emphasized "within plaintiff's control" recognize that a plaintiff at an early stage of the litigation may not possess information about the role played by particular defendant or other evidence that normally would be obtained through discovery. But a plaintiff must produce such evidence as it has to establish a prima facie case of its claims asserted in its complaint. *Best Western Int'l, Inc. v. John DOE, et al.*, 2006 WL 2091695, at *5; *Cahill* at 465.

The purpose of the summary judgment procedure is to summarily terminate litigation when it appears that only a question of law is involved and there is no genuine issue of material fact. *See Gaines v. Hamman*, 163 Tex. 618, 358 S.W.2d 557, 563 (Tex.1962). A movant for summary judgment must demonstrate that there is no genuine issue of material fact and that

it is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a(c); *Nixon v. Mr. Property Management Co., Inc*., 690 S.W.2d 546, 548 (Tex.1985). Once this showing is made, the burden shifts and the opponent must show there are genuine issues of fact requiring a trial. *See Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex.App.-San Antonio 1998, pet. denied). Opponents to a properly established motion for summary judgment may not rest upon their denial in their pleadings, nor may they rest upon assertions unsupported by facts in evidence. *See City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671 (Tex.1979). *Fontenot v. Columbia Health Care Corp.* 1999 WL 652007, 1 (Tex.App.-Beaumont) (Tex.App.-Beaumont,1999).

Mr. Klein maintains neither himself nor his business are public figures. Even if one assumes arguendo that he is a public figure for purposes of this briefing, he can establish public figure defamation by demonstrating: (1) the defendant published a factual statement; (2) that was capable of defamatory meaning; (3) concerning the plaintiff; and (4) while acting with actual malice if the plaintiff is a public figure. *See WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998); *Provencio v. Paradigm Media, Inc*. 44 S.W.3d 677, 680-81 (Tex.App.- El Paso 2001, no pet.). It is impossible for Relators to allege Mr. Klein engages in sexual acts with an animal without having actual malice.

The facts set forth above clearly demonstrate that Mr. Klein, even in the unlikely event he is considered a public figure, can demonstrate actual malice on the part of the bloggers. The representation made that he is engaging in sexual acts with animals, the blogger's false

court judgments, false bankruptcies, false litigation procedures; cutting and pasting his voice to create totally false statements that are ascribed to him; and all the other hateful and vicious comments, clearly demonstrate actual malice.

In short, Relators' speech at issue is not protected by the United States Constitution First Amendment. It is filthy defamation, and therefore Petitioners request that this Court deny Relators' requested mandamus relief.

C. Real Parties In Interest have satisfied the standards for discovery of the Relators' identities relied upon by Relators in their mandamus petition.

Relators cite to *U. S. v. Caporale*, 806 F.2d 1487 (11th Cir. 1986); and *Miller v. Trans American Press*, 621 F.2d 721, 726 (5th Cir. 1980), for a three part test regarding the Real Parties In Interests' right to determine the identity of Relators. The first part is whether the issue on which discovery is sought is not only relevant, but goes to the heart of the plaintiff's case. Clearly, this standard is met. The Real Parties In Interest seek to sue Relators for defamation per se and libel, and Real Parties In Interest must know the identities of Relators in order to do this. The second prong of the test, that the disclosure of the identity of the anonymous speaker is necessary because the party seeking disclosure is likely to prevail on all other issues in this case, is also satisfied for the reasons set forth above. The communications at issue are not constitutionally protected, and they are nothing more than defamation with no constitutionally protected content. Further, since Mr. Klein and the Real Parties In Interest are private figures, there is no argument that the websites' contents are constitutionally protected. The third prong, the parties seeking disclosure has exhausted all

other means, has also been satisfied in this case. The Real Parties In Interest are utilizing the only procedure available to determine Relators' identities.

For these reasons, even if this Court relies upon the standards espoused by Relators, the Real Parties In Interest are entitled to prevail and therefore this Court should deny Relators' requested mandamus relief.

Conclusion

For the reasons set forth above, Real Parties in Interest request that this Court deny Relators' Petition for Writ of Mandamus.

WHEREFORE, PREMISES CONSIDERED, the Real Parties in Interest, PRK Enterprises, Inc. and Klein Investments, Inc., pray that this Court deny Relators' Petition for Writ of Mandamus, and that Real Parties in Interest be granted such other and further relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing document has been provided to all counsel of record, via facsimile on this 21st day of July, 2010.

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