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

REPLY BRIEF 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 two websites, www.operationkleinwatch.blogspot.com and www.sametheeagleusa.blogspot.com. Petitioners, PRK Enterprises, Inc. and Klein Investments, Inc., filed a Rule 202 Petition in the 172nd District Court, 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. Petitioners filed a motion to set aside these objections, and at the hearing the Relators did not show or otherwise make an appearance. 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, and pursuant to the motion of Relators, the Ninth Court recently dismissed the Appeal. Relators also sought mandamus relief and emergency stay in the Ninth Circuit, and the Ninth Circuit denied both the motion for emergency stay and for mandamus relief.

At no time has 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, and Rule 202 does not prohibit parties from entering into voluntary, informal discovery.

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 liable the Real Parties In Interest. For the reasons expressed therein, none of the content of the Relators in these websites is constitutionally protected. As such, the Real Parties in Interest filed a Rule 202 Petition against Google, Inc., 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 as the Court considered and overruled any objections. After the documents were produced, Google agreed that it would present an appropriate person for deposition, if necessary. Voluntary agreement, there was no need for there to be a hearing on Klein'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 as required by Rule 202.4(a) or (b).

Relators are correct that Klein and Google entered into a Rule 11 agreement on October 1, 2009, in formal 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, Klein filed a Motion to Compel, demonstrating clearly that the speech at issue is not constitutionally protected speech. The Court held a hearing on the Relators' Motion to Quash on January 15, 2010, but the Relators voluntary did not attend the hearing, since there only purpose was trying to delay the production of information leading to the identity. As such, neither Google nor the Relators ever filed any opposition. Due to the fact that the matter was uncontested, 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, and Rule 202 does not prohibit parties from entering into voluntary, informal discovery.

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, so long as 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; (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 refuse to show, *because their sole purpose is to delay and use the legal process to delay the production of the clearly non-constitutionally protected speech as much as possible*. Since Relators wholly failed to show or file any responsive pleadings whatsoever, 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. Indeed, Relators expect the trial court to become an advocate and advocate Relators' position, even in the absence of Relators advocating their own position.

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 the litigant if the litigant refuses to advocate its position at the trial court level. In short, since the matters were unopposed by Relators, Relators have lost their ability to complain regarding the judicial process or ruling of the trial court. Further, even if this Court were to conclude that Rule 202 prohibits parties from voluntarily 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' constitutional 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, org. 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 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. 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 were clearly defamatory and not protected under the First Amendment.

I. Limitation on the freedom of speech

While the First Amendment 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, is 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).

II. 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 problem. 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 weak 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. Petitioner urges the Court to adopt this well-articulated formulation, because 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 Petitioners; falsely represent that judgments have been taken against the Petitioners and/or Mr. Klein individually; falsely identify a bankruptcy proceeding; identify lawsuits that do not involve Petitioners and/or Mr. Klein individually; and are rife with other defamatory contents.

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 anonymous blogger has maliciously published a photograph that he 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. Assuming 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.).

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.

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 26th day of May, 2010.

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