Appeal No. _____

In the Court of Appeals

Sixth Judicial District

Texarkana, Texas

***In re* Does 1-10, Relator**

Original Proceeding from the 62nd Judicial District Court of Lamar County, Texas; Cause No. 76357, The Honorable Scott McDowell, Judge Presiding

PETITION FOR WRIT OF MANDAMUS AND MOTION TO STAY PROCEEDINGS

ORAL ARGUMENT REQUESTED

James R. Rodgers
State Bar No. 17136300
Judy Hodgkiss
State Bar No. l17136525
Attorney for Relator
100 N. Main Street
Paris, Texas 75460-4222
Telephone: (903)784-4393
Facsimile: (903)783-0042

Identity of Parties and Counsel

The following is a list of all parties and all counsel in this matter:

Relator in this matter is Does 1-10, and is Defendant in the underlying case described below.

The attorney representing Relator is:

James R. Rodgers
Judy Hodgkiss
The Moore Law Firm, L.L.P.
100 N. Main Street
Paris, Texas 75460-4222
TEL: 903/784-4393
FAX: 903/783-1320

Respondent in this matter is the Honorable Scott McDowell, Judge of the 62nd Judicial District Court of Lamar County, Texas.

The real party in interest in this case is identified below, and is represented by counsel as indicated:

R. Wesley Tidwell
Attorney for Essent PRMC, LP
Ellis & Tidwell, LLP
101 W. Houston Street
Paris, Texas 75460
TEL: 903/785-0336
FAX: 903/785-6688

Kennedy, Covington, Lobdell & Hickman, L.L.P.
Hurst Tower, 47th Floor
214 North Tryon Street
Charlotte, North Carolina 28202
TEL: 704/331-7400
FAX: 704/331-6688

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Texas Cases **Page**

Federal Cases

Cases From Other Jurisdictions

Statutes

Statement of the Case

Essent PRMC, L.P. filed suit in the 62nd Judicial District Court of Lamar County, Texas against various so-called "John Does." The suit included an ex parte request that an internet provider, Sudden Link Communications, Inc., be ordered to reveal the identify of one of its subscribers who had formed a web site commonly known as a "blog".

Essent alleged in the lawsuit that it was being defamed on the blog. The identity of the subscriber who created the blog is anonymous. Essent requested that Sudden Link be ordered to reveal the identity of the subscriber referred to in their pleadings as John Doe No. 1. Judge Scott Scott McDowell of the 62nd District Court originally signed an ex parte order requiring Sudden Link to disclose the identity of the subscriber. Subsequently, Sudden Link and Essent entered into an agreed order that Sudden Link notify the anonymous subscriber of the order and that the subscriber would have ten days in which he could file with the District Court an opposition to the release of his identity. The anonymous subscriber thereafter pursuant to the agreed order filed a written objection to the release of the information. The court held a non-evidentiary hearing on September 7, 2007. The court on October 1, 2007 signed an order requiring Sudden Link to identify the anonymous subscriber on October 10, 2007 at 10:00 a.m. unless an order staying disclosure is entered by this Court.

Statement of Jurisdiction

This Court has jurisdiction to issue a Writ of Mandamus under Section 6 of Article V of the Texas Constitution and Section 22.221 of the Texas Government Code.

Issues Presented

1. Whether Respondent abused his discretion and erred as a matter of law by ordering Sudden Link Communications, Inc. to disclose the identity of its subscriber.
2. Whether Respondent had legal authority to order Sudden Link Communications to reveal the identity of its subscriber.
3. Whether Respondent abused his discretion under the First Amendment of the United States Constitution and under the Federal Cable Communications Act by ordering Sudden Link to disclose the identity of its subscriber.

Statement of Facts

Relator John Doe No. 1 ("Blogger") set up and administered a website located at http: //v-paris-site.blogspot.com/ (hereinafter referred to as the "blog"). The stated purpose of the blog was for a discussion as to "what it will take for our hospitals to be the best run organizations on the face of the planet." The blog included anonymous postings from others who visited the site.

On June 19, 2007 Essent PRMC, L.P., which operates a hospital in Paris, Texas filed a lawsuit against 10 John Does and requested an ex parte order from the District Court requiring Sudden Link Communications to reveal the identity of John Doe No. 1 who was identified as the subscriber of the website. (Tab A). The court, without hearing any evidence, without any verified pleadings, and without any affidavits, signed an order granting the ex parte relief and ordering Sudden Link Communications to reveal the subscriber's identity within twenty days. (Tab B). Thereafter, Essent and Sudden Link entered into an agreed order that Judge McDowell signed on

July 23, 2007. (Tab C). The agreed order required Sudden Link to notify its subscriber of Essent's pleadings and requests. The subscriber thereafter had ten days to file an opposition with the court or Sudden Link was ordered to reveal his identity. If there was opposition filed then Sudden Link was not to reveal the identity until the trial court had considered and disposed of the subscriber's challenge. The anonymous subscriber, through counsel, filed such opposition. (Tab D). The subscriber objected on procedural and substantive grounds. The subscriber cited 47 U.S.C., Section 551 (Cable Communications Act) and the First Amendment of the United States Constitution. Further, the subscriber argued that there was no Texas procedural authority for a court, without any sort of verified pleadings and without any sort of testimony, to enter such an order at this stage of the proceedings.

The court held an non-evidentiary hearing on September 7, 2007. No evidence of any kind was presented at this hearing. The court heard only arguments of counsel. Attached is the transcript from that non-evidentiary hearing (Tab E). The court, by letter dated September 14, 2007, announced its ruling. The court ordered Sudden Link to disclose the identity of its subscriber and directed Essent's attorney to prepare the order. (Fab F). Subsequent to the letter ruling Essent filed supplemental pleadings. (Tab G). The court signed an order for disclosure on October 1, 2007. (Tab H).

Argument and Authorities

Issues Presented

1. Whether Respondent abused his discretion and erred as a matter of law by ordering Sudden Link Communications, Inc. to disclose the identity of its subscriber.

2. Whether Respondent had legal authority to order Sudden Link Communications to

reveal the identity of its subscriber.

3. Whether Respondent abused his discretion under the First Amendment of the United States Constitution and under the Cable Communications Act and under the Federal Cable Communications Act by ordering Sudden Link to disclose the identity of its subscriber.

The above issues are so intertwined that they will be addressed together in this argument.

There are three underlying concepts that must be analyzed. First, the First Amendment rights of an internet subscriber, the specific statutory protection afforded subscribers pursuant to the Cable Communications Act, and Texas civil procedures as it relates to securing court orders.

To reveal the identity of an anonymous internet user any analysis must begin with 47 U.S.C. § 551 known as the Cable Communications Act. (Tab I). § 551 is identified and labeled as "Protection of subscriber privacy". The Act protects "personally identifiable information" which certainly includes identity. A cable operator may only disclose information pursuant to a court order authorizing such disclosure. The Act does not create any procedural mechanism for securing such an order. The Act simply recognizes that cable operators are shielded from liability when their release of identity information is made pursuant to a court order. It is implicit that there first must be a valid court order.

Texas Procedure

As stated above, the Cable Communications Act recognizes that cable operators must obey court orders. However, the Act does not create a procedure for securing such a court order. The Texas Legislature has not created any type of proecedure that addresses the issue of securing anonymous internet user's identity.

In this instance, Essent simply filed an original pleading, which was unverified, and secured

an ex parte court order without any type of hearing and without any type of proof being presented to the court. Thereafter, an agreed order was entered which provides for the subscriber's opposition. An opposition was filed by the subscriber and a non-evidentiary hearing was thereafter held. Relator's counsel is unaware of any procedural authority in Texas for such a process. Perhaps the Texas Legislature needs to address this situation but to date it has not seen fit to do so. There simply was no authority, however well meaning by the trial court, for the implementation of the procedure that was utilized in this matter. The internet subscriber, though not served with any citation, pursuant to the agreed order, filed an objection to disclosure. There is no rule of civil procedure or statute under Texas law which creates such a procedure. Counsel is unaware of any Texas cases that has directly addressed this point. There have been Texas cases dealing with the taking of depositions under Rule 202 of the Texas Rules of Civil Procedure but that was not the procedure utilized in this matter. See *In Re Feinberg*, No. 14-05-01108-CV, 2005 WL 3116589, which was decided on jurisdictional issues not present in this matter.

First Amendment and Cable Communications Act

As stated above, there is no procedure that the Texas Legislature or the Texas courts have sanctioned for the disclosing of this type of identity information of cable subscribers. It is certainly Relator's position that the court had no authority to enter the above-described orders. Other jurisdictions have been faced with similar issues. Regardless of the lack of procedure under Texas law there still would have to be compliance with the Cable Communications Act and adherence to the First Amendment of the United States Constitution. In cases seeking to disclose the identity of potential Doe defendants under similar circumstances, courts of other jurisdictions have applied multiple steps in determining whether disclosure should be ordered. In all of the cases from other

jurisdictions the courts have balanced the blogger's First Amendment right to anonymity against the Plaintiff's right to fairly assert its claim against a known and discernable target. *Melvin v. Doe,* 49 Pa. D&C, 4th 449 (PA Com. Pl.2000).

There has been a divergence in the courts of other jurisdictions as to the prerequisites which must be demonstrated prior to entering an order of disclosure. One list of cases has provided a four prong test as follows:

1). The Plaintiff must identify the individual with some specificity so the court can determine whether the party is truly an entity amenable to suit;

2). The Plaintiff must identify all previous steps taken to locate and identify the Defendant thereby justifying the failure to properly serve the Defendant;

3). The Plaintiff must show that the case would withstand a motion to dismiss. (The Courts have imposed this step "to prevent abuse of this extraordinary application of the discovery process and to insure that Plaintiff has standing..."; and

4). The Plaintiff must file a specific discovery request justifying the need for the information requested.

Columbia Ins. Co. v. seescondy.com, 185 F.R.D. 573 (N.D. Cal. 1999).

However, other courts have noted that the above four pronged test imposed too lenient a burden on the Plaintiff's need for disclosure. In other words, these courts have emphasized that disclosure should not be permitted if a Plaintiff fails to show that it was harmed by the pertinent messages or that the speech was actionable. Based on this reasoning, this line of authority requires the Plaintiff to:

1). undertake efforts to notify him/her of the order and provide sufficient time for

opposition to the application;

2). set forth the exact statements claimed to constitute the actionable speech; and

3). present sufficient evidence on each element of the cause of action to demonstrate a prima facie claim.

If the Plaintiff can meet the three above prerequisites, the court must then balance the Defendant's First Amendment right of anonymous free speech against not only the strength of the Plaintiff's prima facie case but also the necessity for disclosure of the Doe Defendant's identity. *Dendrite Interr., Inc. v. Doe,* No. 3,342 N. J. Super. 134, 775 A.2d 756 (App. Div. 2001).

Other courts have provided bloggers with even further safeguards against disclosure under a journalist's privilege. This issue was raised in *Apple Computer, Inc. v. Doe 1*, 2005 WL 578641 (Cal. Super. Ct. Trial Div. 2005). There Apple filed suit against various Doe defendants, alleging that bloggers were leaking trade secrets about an unreleased Apple product. Apple subpoenaed the e-mail provider seeking the identity of the bloggers. The operators of the website sought to block the subpoena on the basis of journalistic privilege and should not be required to divulge their anonymous sources of information. The trial court rejected this argument and ordered the release of the information. On appeal, the Court reversed this decision and granted a protective order. The appellate court held that the same constitutional protections generally reserved to print publications should to online "news" reporters - including amateur bloggers. The Court held that such bloggers could involve the qualified reporter's privilege under federal constitutional guarantees of a free press.

The State of Delaware addressed the First Amendment implications of the Doe cases in a case styled *Doe v. Cahill*, 884 A2d 451 (Del. 2005). There a councilman brought a "Doe" suit,

alleging that he was being defamed by an anonymous blogger. The Delaware Supreme court ordered a dismissal of the claim, finding that the pertinent statements had constituted expressions of opinion as opposed to assertions of fact. In reading this decision, the Court emphasized the *Dendrite, supra,* reasoning, and concluding that a Plaintiff's allegations must satisfy a summary judgment standard.

A federal district court in Louisiana in reviewing a similar situation held that a party requesting this type of information as to internet identity must first demonstrate a reasonable chance of prevailing in its defamation action against an anonymous author in order for a trial court to authorize piercing the anonymity of a user. *In Re Baxter*, No. 01-00026-M, 2001 WL 3486203 (W.D. La. 2001).

A recent case in the federal district court in Arizona addressed the threshold of proof before internet identity is disclosed in *Best Western International v. Doe*, No. CV-06-1537-PHX-DGC, 2006, WL 2091695 (B.Ariz.). The plaintiff filed suit against various Doe defendants alleging business defamation and revealing of trade secrets. The federal district court stated that the First Amendment principles were of paramount concern. First, the court noted that the First Amendment protects anonymous speech citing *Buckley v. American Constitutional Law Foundation*, 525 U.S. 1982, 200 (1999). Further, the First Amendment extends to the internet. *Reno v. A.C.L.U.*, 521 U.S. 844, 870 (1997). The federal district court in Arizona noted that courts have recognized the internet as a valuable forum for robust exchange and debate. *Sony Music Entertainment, Inc. v. Does 1-40*, 566 F.Supp. 2d 556, 562 (S.D.N.Y. 2004). Further, that internet anonymity facilitates the "rich, diverse, and far ranging exchange of ideas... including the First Amendment right to speak anonymously, must be carefully safeguarded. *Doe v. 2 T Mart.com, Inc.*, 140 F. Supp. 2d 1088,

1092, 1097 (W.D. Wash. 2001).

The court in *Best Western International,* supra, further noted that "civil subpoena seeking information regarding anonymous individuals raise First Amendment concerns". *Sony,* 326 F.Supp. 2d 563. The court noted that anonymity is not absolute. The court states that the First Amendment rights must be weighed against the need to address to right of redress of those harmed. In determining the standard to be utilized the court in *Best Western* reviewed the different standards used by other courts used across the nation. The court concluded that more was needed than simply establishing a prima facie case as some courts have concluded. The federal district court stated as follows:

> "The court concludes that more is needed before a defendant's First Amendment rights may be eliminated. The court must examine facts and evidence before concluding that a defendant's constitutional rights must surrender to a plaintiff's discovery needs. The summary judgment standard will insure that the court receives such facts and evidence". *Best Western International,* supra.

In the present case Judge McDowell, in his letter opinion cites cases in which he discusses prima facie standards. The court in this matter applied absolutely no standard. There was not a prima facie case established as absolutely no evidence was heard on this matter. The summary judgment standard as discussed in *Best Western* was not utilized as there was absolutely no threshold level of proof required before the court entered the complained of order.

Analyzing the reasoning that has been utilized by other courts, even assuming that there is a procedural vehicle in Texas law for securing such, it is clear that to justify the release of such identities, a Plaintiff must first demonstrate sufficient evidence of a cause of action that it could survive a motion for summary judgment, and further demonstrate that it is being substantially harmed so as to justify the infringement of the First Amendment privileges and the protections of the

Cable Communications Act. In this instance, Essent has presented absolutely no evidence of defamation and certainly has not presented any evidence demonstrating that it is suffering any harm. Essent has not even filed verified pleadings alleging harm. Such an analysis even assuming there is a procedural vehicle for securing an order, must be done so as to weigh the First Amendment rights and the right of privacy under the Cable Communications Act with the right of a plaintiff to seek legal redress.

The blogs alleged in the pleadings filed by Plaintiff are generally expressions of opinion of dissatisfaction with the operation of the hospital. Opinions are not defamatory and as such are not actionable. Finally, the Plaintiff has not demonstrated any harm. It has not demonstrated how this blog is impacting its operation in any manner. In light of its failure to show any actual harm, the constitutional right to free speech, and to a free press should not be infringed upon by the trial court. In short, it is not enough just to say you were defamed. Evidence must be presented of such defamation and of harm.

Mandamus Relief is Appropriate

Mandamus will issue to correct a clear abuse of discretion. *Liberty National Fire Ins. Co. V. Aiken*, 927 SW2d 627, 630 (Tex. 1996). A trial court has no discretion to misinterpret or misapply the law. *Walker v. Packer*, 827 SW2d 833, 842 (Tex. 1992). When a trial court commits a clear abuse of discretion in authorizing discovery that would violate First Amendment rights, mandamus relief is appropriate. *In Re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 382 (Tex. 1998).

As discussed earlier there is no Texas procedure authorizing the court to proceed in the manner it did in this case. Additionally, the court's actions were a denial of the subscriber's First

Amendment rights and were not consistent with the Cable Communications Act as described above.

Based on the foregoing argument and authorities, as applied to the facts of this case, Relator respectfully requests that the Court grant his writ of mandamus, and order the trial court to withdraw its order requiring that the subscriber's identity be revealed.

MOTION FOR STAY OF PROCEEDINGS BELOW

Relator would respectfully show the Court that disclosure of the subscriber's identity is to occur at 10:00 a.m. on October 10, 2007. If this disclosure is permitted, then harm will be done that will be irreparable. Relator respectfully requests that this Court issue its order staying all proceedings in Cause No. 76357, in the 62nd Judicial District Court of Lamar County, Texas, styled *Essent PRMC, L.P. v. John Does 1-10,* until such time as the Court has had an opportunity to address the merits of the claims stated herein.

PRAYER

Relator prays that this Court issue its order staying all proceedings in Cause No. 76357, in the 62nd Judicial District Court of Lamar County, Texas, styled *Essent PRMC, L.P. v. John Does 1-10*, until such time as the Court has had an opportunity to address the merits of the claims stated herein; and in due course issue its writ of mandamus commanding the trial court to withdraw its order of October 1, 2007, ordering that the identity of the subscriber be revealed.

Respectfully submitted,

The Moore Law Firm, L.L.P.

By: _____

James R. Rodgers
Texas Bar No. 17136300
Judy Hodgkiss
Texas Bar No. 17136525
100 N. Main Street
Paris, Texas 75460-4222
Tel. (903)784-4393
Fax. (903)783-0042
Attorney for Relator

AFFIDAVIT

THE STATE OF TEXAS §

COUNTY OF LAMAR §

BEFORE ME, the undersigned authority, personally appeared James R. Rodgers, who, upon his oath stated:

"My name is James R. Rodgers. I am over the age of eighteen years and I am competent to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

"I hereby declare under penalty of perjury that the documents attached at Tabs A - I are certified copies of those documents, with the exception that Tab E and it is the transcript from the Official Court Reporter for the non-evidentiary hearing held on September 7, 2007. I also swear that all the factual statements are true and correct.

"Further affiant sayeth not."

_____

James R. Rodgers

SIGNED under oath before me on _____, 2006.

_____

Notary Public, State of Texas

APPENDIX

A. Plaintiff's Original Petition and Ex Parte Request to Non-Party to Disclose Information

B. Order Granting Plaintiff's Motion to Non-Party to Disclose Information

C. Agreed Order Amending June 19, 2007, Order and Directing Non-Party Cebridge Acquisition, L.P. dba Sudden Link Communications to Produce Records Pursuant to the Federal Communications Act

D. Opposition letter dated August 6, 2007

E. Transcript of non-evidentiary hearing held on September 7, 2007

F. Letter ruling from the court announcing its ruling dated September 14, 2007

G. Plaintiff's First Supplemental Pleading filed September 27, 2007

H. Order Relating to the Disclosure of John Doe #1's Identity dated October 1, 2007

I. Cable Communications Act (47 U.S.C. § 551)

Certificate of Service

A copy of this notice is being filed with the appellate clerk in accordance with rule 25.1(e) of the Texas Rules of Civil Procedure. I certify that a true copy of this Petition for Writ of Mandamus was served in accordance with rule 9.5 of the Texas Rules of Appellate Procedure on each party or the attorney for such party indicated below by hand delivery, this ___ day of October, 2007..

_____

James R. Rodgers
Attorney for Relator

Scott McDowell
Lamar County Courthouse
119 North Main Street
Paris, Texas 75460

R. Wesley Tidwell
Attorney for
Ellis & Tidwell, LLP
101 W. Houston Street
Paris, Texas 75460