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Court of Appeals of Michigan.

THOMAS M. COOLEY LAW SCHOOL, Plaintiff–Appellee,
v.
JOHN DOE 1, Defendant–Appellant,
and
John Doe 2, John Doe 3, and John Doe 4, Defendants.

Docket No. 307426. | April 4, 2013.

Ingham Circuit Court; LC No. 11–000781–CZ.

Before: WHITBECK, P.J., and METER and BECKERING, JJ.

Opinion

WHITBECK, P.J.

This appeal concerns the complicated interplay between First Amendment protections of the freedom of speech and the Michigan Court Rules concerning discovery. Plaintiff Thomas M. Cooley Law School (Cooley) filed a complaint in Ingham County against Defendant John Doe 1 (Doe 1) alleging defamation arising from statements that Doe 1 made on a website that, under a pseudonym, criticized Cooley. Doe 1 moved the trial court to (1) quash a subpoena that Cooley obtained in California seeking his identity, and (2) issue a protective order. Doe 1 now appeals as on leave granted an order of the court denying his motion to quash the California subpoena. He argues that the First Amendment's protections for anonymous free speech shield his identity. We reverse and remand.

I. FACTS

A. BACKGROUND FACTS

Doe 1 created an internet website at Weebly.com, owned by California-based Weebly Inc. (Weebly), using the pseudonym "Rockstar05."[1] Doe 1 titled the website "THOMAS M. COOLEY LAW SCHOOL SCAM."

[1] Though this pseudonym is gender neutral and "John Doe 1" may refer to an unknown man or woman, the parties referred to Doe 1 by the masculine gender in their briefs and oral arguments. We will also use the masculine gender.

Describing himself as a former student of Cooley, Doe 1 stated that "Cooley is without a doubt one of the three worst law schools in the United States ... and [is] considered THE BIGGEST JOKE of all law schools amongst other law students." In the body of the post, Doe 1 listed as "multiple reasons for this," including: (1) Cooley's "open door" policy; (2) Cooley's attrition rate and administrative policies; (3) "the 'Cooley Rankings' "; (4) that Cooley "IS A DIPLOMA MILL"; and (5) that Cooley graduates are unemployed. Doe 1 claimed that he would "elaborate and address each of these [claims] in order, backed by statistics and facts, painting a real picture of what Cooley is really like[.]"

Doe 1 arranged the body of his blog in an outline format, comprised of headings followed by external website links and Doe 1's commentary. Doe 1's commentary frequently included capitol letters, multiple instances of incorrect punctuation, expletives, advice, misspellings, and pop culture references. Doe 1 permitted visitors to post their own comments on the website, and frequently responded to the commentators. After April 1, 2011, however, he began to "filter" comments, noting that he would delete "any stupid or irrelevant comments or personal attacks[.]"

B. PROCEDURAL HISTORY BELOW

Cooley filed the complaint in Ingham County on July 14, 2011, against several defendants. Cooley's complaint against Doe 1 alleged that he made defamatory accusations that Cooley and its representatives "are 'criminals' and have committed 'fraud,' " that Cooley deceived and provided false information to attain their business, and that Cooley "uses its clout to 'prey' on current and prospective students, stealing their tuition

money to 'become more rich.' " On July 25, 2011, Cooley petitioned the San Francisco County Superior Court of California to subpoena Weebly. On August 3, 2011, the California court issued a subpoena to Weebly, ordering it to produce documents that included Doe 1's user account information. On August 5, 2011, Doe 1 filed a motion in the trial court in Ingham County, requesting that it quash any outstanding subpoenas to Weebly or, alternatively, issue a protective order limiting or restricting Cooley's use or disclosure of his identifying information.

On August 9, 2011, Weebly's Chief of Customer Satisfaction promised Doe 1's attorney that he would not disclose Doe 1's identifying information until August 22, to allow him to obtain a ruling on his motion to quash. But on August 17, 2011, another Weebly employee released Doe 1's identifying information to Cooley. On August 18, 2011, Cooley requested that Doe 1 withdraw his motion to quash on the basis that the motion was now moot; Doe 1 declined.

On August 29, 2011, Cooley filed an amended complaint that identified Doe 1 by his legal name. Doe 1 supplemented his motion to quash and moved the trial court to strike the identifying information, arguing that Cooley violated Michigan discovery rules by using information that Doe 1 claimed was protected.

C. THE TRIAL COURT'S DECISION

In September 2011, the trial court heard arguments on Doe 1's motion to quash. Doe 1's counsel agreed that the motion to quash was moot because Weebly disclosed the information, but clarified that he was "seeking this motion as an alternative, a protective order." The trial court provisionally ruled that Weebly might have inadvertently disclosed the information under MCR 2.302(B)(7). It struck Cooley's first amendment complaint and ordered Cooley not to initiate further discovery or disclose the information, pending its final decision on the motion. On October 3, 2011, the trial court ruled that the motion to quash was not moot, reasoning that its ruling on Doe 1's motion to strike placed the parties back in the positions they occupied before Weebly disclosed the information.

On October 24, 2011, the trial court heard continued arguments on Doe 1's motion to quash. After extensive reasoning, the trial court determined that there was no Michigan law on point and looked to decisions from other jurisdictions, in ***Dendrite***[2] and *Cahill*.[3] The trial court determined that, in order to adequately protect Doe 1's interests in remaining **anonymous**, it must balance those interests against Cooley's interests in holding Doe 1 accountable for defamation.

[2] *Dendrite Int'l., Inc. v. Doe No. 3*, 342 NJ Super 134; 775 A.2d 756 (2001).

[3] *Doe No. 1 v. Cahill*, 884 A.2d 451 (Del, 2005).

The trial court adopted and applied the *Dendrite* analysis. Under that analysis, it ruled that Doe 1 was notified and Cooley sufficiently alleged slander per se. It ruled that per se slanderous statements are not entitled to First Amendment protection, and thus Cooley would not have to prove actual malice. The trial court's order denied Doe 1's motion to quash and declined to grant him a protective order, for "the reasons stated on the record," and allowed Cooley to use the information that it discovered from Weebly. However, the trial court stayed its ruling pending Doe 1's appeal to this Court.

On November 29, 2011, Doe 1 filed an application for leave to appeal the trial court's order, which this Court granted. On July 11, 2012, Cooley moved to dismiss this appeal as moot. On July 20, 2012, this Court denied Cooley's motion to dismiss.

II. MOOTNESS

A. STANDARD OF REVIEW

This Court reviews de novo questions of law.[4]

[4] *People v. Sierb*, 456 Mich. 519, 522; 581 NW2d 219 (1998).

B. LEGAL STANDARDS

Michigan courts exist to decide actual cases and controversies, and thus will not decide moot issues.[5] A matter is moot if this Court's ruling "cannot for any reason have a practical legal effect on the existing controversy."[6] Even if moot as a practical matter, this Court may consider a legal issue that "is one of public significance that is likely to recur, yet evade judicial review."[7]

5 *Federated Publications, Inc. v. City of Lansing,* 467 Mich. 98, 112; 649 NW2d 383 (2002).

6 *General Motors Corp. v. Dep't. of Treasury,* 290 Mich.App 355, 386; 803 NW2d 698 (2010); *Federated Publications, Inc.,* 467 Mich. at 112.

7 *Id.*

C. APPLYING THE STANDARDS

Cooley argues that the issues presented in this appeal are moot because Weebly disclosed Doe 1's identity to Cooley. Therefore, because Cooley cannot "unlearn" his name, Doe 1's anonymity is destroyed. We conclude that the issues presented in this appeal are not moot because Cooley's knowledge does not prevent this Court from granting relief that will have a practical legal effect on the controversy.

Doe 1 filed his motion to quash the subpoena and issue a protective order before Cooley learned his identity. Although Cooley filed an amended complaint with Doe 1's true name on it, the trial court acted within ten days to sequester all documents in the lower court record that contain Doe 1's name. The trial court also ruled that Doe 1's identifying information was inadvertently disclosed under MCR 2.302(B)(7). Cooley argues that members of the public may have accessed the trial court documents in that period, but there is no indication that this actually occurred.

Finally, Cooley contended at oral arguments that, because Doe 1 applied for membership in the California State Bar, his anonymity was destroyed since the California Bar is aware of his involvement in this suit. But it was also stated at oral arguments that applications to the California Bar are confidential. Thus, Doe's application alone would not reveal his identity to the public. There are simply no indications that Doe 1's anonymity was destroyed or that this Court is unable to fashion the relief Doe 1 seeks.

Further, whether and in what fashion the identity of an anonymous internet speaker can be discovered or protected under Michigan law is a publically significant issue concerning the First Amendment. In this age of internet blogging, this issue is likely to reoccur. And if the disclosure of a Doe's name to a handful of attorneys and court officers is sufficient to render this issue moot, the issue would also be likely to evade judicial review. We conclude that we may, and should, reach the merits of the issues on appeal.

III. THE FIRST AMENDMENT AND ANONYMOUS SPEECH

A. FREEDOM OF SPEECH

The First Amendment of the United States constitution provides that "Congress shall make no law ... abridging the freedom of speech...."[8] The Michigan Constitution provides that "[e]very person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech...."[9] The United States and Michigan Constitutions provide the same protections of the freedom of speech, and this Court does not interpret the Michigan Constitution's protections of speech more broadly than the federal constitution's protections.[10] Thus, this Court may consider federal authority when interpreting the extent of Michigan's protections of free speech.[11]

8 U.S. Const., Am. I.

9 Const.1963, art 1, § 5.

[10] *Woodland v. Mich. Citizens Lobby*, 423 Mich. 188, 208; 378 NW2d 337 (1985); *In re Dudzinski Contempt*, 257 Mich.App 96, 100; 667 NW2d 68 (2003).

[11] *Id.*

The United States Supreme Court has held that the federal constitution protects speech over the internet to the same extent as speech over other mediums.[12] The United States Supreme Court has also determined that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[13]

[12] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870; 117 S Ct 2329; 138 L.Ed.2d 874 (1997).

[13] *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 342; 115 S Ct 1511; 131 L.Ed.2d 426 (1995).

B. DEFAMATORY SPEECH

But a defendant's right to speak freely is not absolute.[14] The First Amendment does not protect "certain categories of speech, including defamation [.]"[15] Generally, "[a] communication is defamatory if it tends to so harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[16]

[14] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571; 62 S Ct 766; 86 L Ed 1031 (1942).

[15] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245–246; 122 S Ct 1389; 152 L.Ed.2d 403 (2002); *Burns v. City of Detroit (On Remand)*, 253 Mich.App 608, 621; 660 NW2d 85 (2002).

[16] *Rouch v. Enquirer & News*, 440 Mich. 238, 251; 487 NW2d 205 (1992), quoting 3 Restatement Torts, 2d, § 559, p. 156.

C. STANDARDS PROTECTING ANONYMOUS SPEECH IN OTHER JURISDICTIONS: *DENDRITE*, *CAHILL*, AND OTHER STANDARDS

Courts in other jurisdictions have attempted to balance a defendant's rights to speak anonymously against a plaintiff's interests in discovering the information necessary to prosecute its defamation claims to very different extents.

In ***Dendrite***, a New Jersey intermediate appellate court determined that, in order to adequately protect a defendant's interests in **anonymous** commercial speech, it must adopt a four-part approach to limit discovery.[17] The New Jersey court determined that the plaintiff must: (1) show that the defendant is a person or entity who could be sued, (2) make a good-faith effort to serve process on the defendant, (3) establish that plaintiff's suit could withstand a motion to dismiss, and (4) establish that there is a reasonable likelihood that discovery would lead to identifying information about the defendant that would make service of process possible.[18] It determined that the purpose of this approach was to prevent plaintiffs from attempting to harass, intimidate, or silence **anonymous** critics on the public forums of the internet.[19]

[17] *Dendrite Int'l., Inc.*, 342 NJ Super at 156–157.

[18] *Id.* at 151–152.

[19] *Id.* at 156.

Looking to the New Jersey court's decision in ***Dendrite***, in *Cahill*, a Delaware intermediate appellate court also adopted and described this standard to protect political speech.[20] The Delaware court concluded that, under ***Dendrite***, it was necessary for a defamation plaintiff to show four things before it could identify an **anonymous** political speaker on the internet: (1) that the

plaintiff tried to notify the defendant of the action in order to allow the defendant to defend; (2) that the defamation plaintiff alleged the exact defamatory statements made by the **anonymous** poster; (3) that the defamation plaintiff could survive a motion for summary judgment on the prima facie claim; and (4) that the balance of equities between the defendant's First Amendment rights and the strength of the prima facie case indicates that the defendant's identity should be disclosed.[21] The Delaware court concluded that elements two and four were unnecessary because they are subsumed in that state's summary judgment standards; that is, a plaintiff would have to prove each of these elements, but a "four-part" standard was unnecessary because elements two and four were necessarily a part of element three.[22]

20 *Cahill*, 884 A.2d at 454, 460.

21 *Id.* at 460.

22 *Id.* at 461.

The Ninth Circuit Court of Appeals, the only federal circuit court to consider this issue, held only that the adoption and application of the ***Dendrite*** or *Cahill* standard to deny a party's writ for mandamus is not clearly erroneous.[23] It recognized that "a few courts have declined to adopt new or different standards," or have applied heightened standards only to the identification of nonparties.[24] It determined that "the details of fashioning the appropriate scope and procedures for disclosure of the identity of **anonymous** speakers" is a matter for district courts to determine.[25]

23 *In re Anonymous Online Speakers*, 661 F3d 1168, 1177 (CA 9, 2011).

24 *Id.* at 1175–1176.

25 *Id.* at 1177.

Finally, an Illinois court has decided that it was not necessary to adopt additional standards in light of the procedural protections in place under Illinois court rules. In *Maxon v. Ottawa Publishing Co.*, the Illinois Appellate Court determined whether the plaintiff could discover the identity of blog posters.[26] It decided that it was not necessary to adopt *Dendrite* or *Cahill* standards because Illinois court rules required the complainant to plead defamation with particularity, and it was subject to a motion that tested its legal sufficiency on the basis of the facts as pleaded.[27] The *Maxon* court reasoned that the *Dendrite* "hypothetical motion for summary judgment" was unnecessary because the Illinois processes were similar to the standards applied by *Dendrite* and *Cahill*, and adequately protect the defendant's interests.[28]

26 *Maxon v. Ottawa Publishing Co.*, 929 N.E.2d 666, 370–371 (Ill App, 2010).

27 *Id.* at 674.

28 *Id.* at 676.

IV. OVERVIEW OF MICHIGAN PROCEDURAL RULES

In Michigan, discovery is available as soon as a party commences an action.[29] In a civil action, the party commences the action by filing a complaint with a court.[30] A summons is issued which is to be served on the defendant(s).[31] Generally, a summons expires 91 days after the date the complaint is filed.[32] Upon the expiration of the summons, the case is deemed dismissed as to a defendant who has not been served, unless the defendant has submitted to the court's jurisdiction.[33] A party may "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]"[34] Michigan follows a policy of open and broad discovery.[35]

29 MCR 2.302(A)(1).

30 MCR 2.101(B).

31 *Id.*

32 MCR 2.102(D).

33 MCR 2.102(E)(1).

34 MCR 2.302(B)(1); see *King v. Reed*, 278 Mich.App 504, 517; 751 NW2d 525 (2008).

35 *Augustine v. Allstate Ins. Co.*, 292 Mich.App 408, 419; 807 NW2d 77 (2011).

A. SUBPOENAS

A party may acquire information from another party by subpoenaing them for a deposition, other documents, or tangible things.[36] The party may petition a court in another state to issue a subpoena or equivalent process if necessary to acquire discovery for an action in Michigan.[37] On a motion from a party, the "court in which the action is pending" may quash or modify the subpoena, or enter a protective order.[38]

36 MCR 2.305(A)(1), (2).

37 MCR 2.305(D).

38 MCR 2.302(C).

B. PROTECTIVE ORDERS

Despite Michigan's broad discovery policy, the trial court should protect parties from excessive, abusive, or irrelevant discovery requests.[39] Thus, a party may move the trial court for a protective order:

39 *Cabrera v. Ekema*, 265 Mich.App 402, 407; 695 NW2d 78 (2005).

> On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
>
> (1) that the discovery not be had;
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> * * *
>
> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> (5) that discovery be conducted with no one present except persons designated by the court; ... [40]

40 MCR 2.302(C).

The trial court may also seal court records on a motion of the party if it finds good cause to do so and there are no less restrictive means to protect the party's interests.[41]

41 MCR 8.119(I)(1).

C. MOTIONS FOR SUMMARY DISPOSITION

Under MCR 2.116(C)(8), a party may move for summary disposition when the opposing party has failed to state a claim on which relief can be granted. This tests the legal basis of the complaint on the pleadings alone.[42] The trial court must accept the factual allegations in the complaint as true, and

construe them in the light most favorable to the nonmoving party.[43] The trial court will grant the motion if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify the party's right to recovery.[44]

42 MCR 2.116(G)(5); *Maiden v. Rozwood,* 461 Mich. 109, 119; 597 NW2d 817 (1999).

43 *Id.*

44 *Id.*

The availability and application of summary disposition is important in this case because summary disposition is an essential tool to protect First Amendment rights.[45] To eventually succeed on a claim for defamation, the plaintiff must show:

45 *Tomkiewicz v. The Detroit News, Inc.,* 246 Mich.App 662, 666; 635 NW2d 36 (2001); *Ireland v. Edwards,* 230 Mich.App 607, 619; 584 NW2d 632 (1998).

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication.[46]

46 *Tomkiewicz,* 246 Mich.App at 666–667; *Mitan v. Campbell,* 474 Mich. 21, 24; 706 NW2d 420 (2005).

The plaintiff must also comply with constitutional requirements that depend on "the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant, and the public or private character of the speech."[47]

47 *Rouch v. Enquirer & News,* 440 Mich. at 251–252; *Locricchio v. Evening News Ass'n.,* 438 Mich. 84, 118; 476 NW2d 112 (1991).

A plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language which the plaintiff alleges to be defamatory.[48] For a claim of libel, the plaintiff must plead "*the very words of the libel.*"[49] Because the plaintiff must include the words of the libel in the complaint, several questions of law can be resolved on the pleadings alone, including: (1) whether a statement is capable of being defamatory;[50] (2) the nature of the speaker and the level of Constitutional protections on the statement;[51] and (3) whether actual malice exists, if the level of fault the plaintiff must show is actual malice.[52]

48 *Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.,* 197 Mich.App 48, 52, 57; 495 NW2d 392 (1992).

49 *Id.* at 53 (emphasis in the original), quoting *De Guvera v. Sure Fit Products,* 14 Mich.App 201, 206; 165 NW2d 418 (1968).

50 See *Ireland,* 230 Mich.App at 619.

51 See *New Franklin Enterprises v. Sabo,* 192 Mich.App 219, 221–222; 480 NW2d 326 (1991); see also *Hodgins v. The Times Herald Co.,* 169 Mich.App 245, 256–257; 425 NW2d 522 (1988).

52 *Ireland,* 230 Mich.App at 622.

V. MICHIGAN DISCOVERY RULES ADEQUATELY PROTECT FIRST AMENDMENT INTERESTS IN ANONYMOUS SPEECH

A. STANDARD OF REVIEW

This Court reviews de novo issues of constitutional law.[53] Generally, this Court reviews for an abuse of discretion the trial court's decision on a discovery motion.[54] The trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes,[55] or when it makes an error of law.[56]

[53] *In re Dudzinski Contempt*, 257 Mich.App at 99.

[54] *Augustine*, 292 Mich.App at 419.

[55] *People v. Babcock*, 469 Mich. 247, 269; 666 NW2d 231 (2003); *Maldonado v. Ford Motor Co.*, 476 Mich. 372, 388; 719 NW2d 809 (2006).

[56] *People v. Giovannini*, 271 Mich.App 409, 417; 722 NW2d 237 (2006); *In re Waters Drainage Dist.*, 296 Mich.App 214, 220; 818 NW2d 478 (2012).

Because this case raises First Amendment issues, we are also "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.' "[57]

[57] *Maldonado*, 476 Mich. at 388–389, quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1038; 111 S Ct 2720; 115 L.Ed.2d 888 (1991).

B. APPLICATION OF MICHIGAN DISCOVERY RULES TO THIS CASE

In a lengthy ruling from the bench, the trial court ruled that Michigan law does not address the situation in this case. It therefore adopted the *Dendrite* standards. Applying those standards, it determined not to quash the subpoena.

We disagree with the trial court's conclusion that Michigan law does not adequately address this situation. We conclude that Michigan procedures for a protective order, when combined with Michigan procedures for summary disposition, adequately protect a defendant's First Amendment interests in anonymity.

Under a properly filed motion for a protective order, the trial court may order, among other things, "that the discovery not be had" or that it "may be had only on specified terms and conditions [.]"[58] In the context of our court rules, "[g]ood cause simply means satisfactory, sound or valid reason [.]"[59] The trial court has broad discretion to determine what constitutes "good cause."[60] A variety of sound or valid reasons may support the trial court's decision to limit discovery, including that discovery implicates a party's First Amendment interests.

[58] MCR 2.302(C)(1), (2).

[59] *People v. Buie*, 491 Mich. 294, 319; 817 NW2d 33 (2012) (internal quotations omitted).

[60] See *Id.* at 319–320.

Trial courts may use protective orders to protect witnesses' First Amendment interests. For instance, in *Bloomfield Charter Twp.*, the township sought to depose persons who had signed petitions, and the trial court granted a protective order that prevented the township from deposing the signatories.[61] This Court held that the trial court did not abuse its discretion when it issued the protective order.[62] We reasoned that the signatories had a "powerful interest in participating in political speech protected by the First Amendment without fear of subsequently facing adversarial questions under oath," and the township's reasons for requesting discovery were baseless.[63]

[61] *Bloomfield Charter Twp. v. Oakland Co. Clerk*, 253 Mich.App 1, 35; 654 NW2d 610 (2002), overruled by *Stand Up For Democracy v. Secretary of State*, 492 Mich. 588; 822 NW2d 159 (2012).

[62] *Id.* at 38.

[63] *Id.* at 38.

We recognize that the Michigan Supreme Court subsequently overruled *Bloomfield Charter Twp.*, though on different grounds, and thus it is not binding precedent.[64] But the case illustrates that Michigan courts have recognized that a person's right to freedom of speech may be good cause for a trial court to issue a protective order.

[64] *Kidder v. Ptacin*, 284 Mich.App 166, 170; 771 NW2d 806 (2009).

Protective orders are very flexible. The trial court may tailor the scope of its protective order to protect the defendant's First Amendment interests until summary disposition. For instance, the trial court may order (1) that a plaintiff not discover the defendant's identity, or (2) that as a condition of discovering the plaintiff's identity, the defendant not disclose that identity until after the legal sufficiency of the complaint itself is tested.

Comparing the foreign law that the trial court adopted to existing Michigan law, we disagree with the trial court's determination that Michigan law cannot adequately protect the defendant's interests in anonymous speech. Under *Cahill*, which the Ninth Circuit recognized is the "strictest test,"[65] the plaintiff must (1) allege the exact defamatory statements, (2) show that the defendant had notice of the action, (3) show it could survive a motion for summary judgment on the prima facie case, and (4) show the balance of equities between the defendant's interests and its interests weighed in its favor.[66]

[65] *In re Anonymous Online Speakers*, 661 F3d at 1177.

[66] *Cahill*, 884 A.2d at 460–461.

But under Michigan law, the plaintiff must allege the exact defamatory statements. The plaintiff will have to survive an actual motion for summary disposition on its claims under MCR 2.116(C)(8). And the trial court may consider the weight of the defendant's First Amendment rights against the plaintiff's discovery request when determining whether to issue a protective order. Thus, the *Dendrite* and *Cahill* standards largely overlap with Michigan's combined safeguards of a protective order under MCR 2.302 and the summary disposition standards and procedures under MCR 2.116(C)(8).

To the extent that Doe 1 urges us to adopt *Dendrite* because it more adequately protects other interests or is better public policy, we decline to do so. Doe 1 argues that any less stringent standards may chill internet criticisms because of the fear of being required to defend against a lawsuit for long enough to have the trial court dismiss it. Doe 1 also argues that the plaintiff in a defamation case may sue the defendant solely to subpoena the defendant's internet provider for identifying information in order to acquire leverage for extra-judicial retaliation. We have concluded that Michigan rules of civil procedure adequately protect Doe 1's constitutional interests. We decline to reach beyond what is constitutionally necessary to judicially create anti-cyber-SLAPP legislation. Such decisions of public policy are the province of our Legislature.[67] And the writing, or rewriting, of our discovery and summary disposition rules is the province of the Michigan Supreme Court.

[67] *Johnson v. Recca*, 492 Mich. 169, 196–197; 821 NW2d 520 (2012).

C. THE TRIAL COURT DID NOT PROPERLY APPLY MICHIGAN LAW

We conclude that the trial court abused its discretion, which requires reversal. The trial court by definition abuses its discretion when it inappropriately interprets and applies the law.[68] First, that the trial court erroneously concluded that Michigan law does not adequately protect Doe 1's interests, and then erroneously adopted and applied foreign law. Second, the trial court's findings and conclusions in support of its position were erroneous. Third, the trial court did not state any reason supporting its decision to deny Doe 1's alternative request for a protective order.

[68] *Giovannini*, 271 Mich.App at 417; *In re Waters Drainage Dist.*, 296 Mich.App at 220.

After adopting the *Dendrite* and *Cahill* standards as Michigan law, the trial court appears to only have considered two dichotomies: (1) that the subpoena should be quashed, and Cooley's case dismissed; or (2) that the subpoena could not be quashed, and the case could proceed with Doe 1's name on the complaint. But Michigan law does not deal only in these polar opposites. Doe 1 also asked for a protective order under MCR 2.302(C). The trial court's order indicates that it denied Doe 1's requests for a protective order "for the reasons stated on the record." But the trial court did not state any reasons on the record to deny the

protective order. The trial court appears not to have considered whether or to what extent to protect Doe 1's identity after it determined not to quash the subpoena. On remand, the trial court should consider whether good cause exists to support Doe 1's request for a protective order.

Next, the trial court ruled that per se defamatory statements were not entitled to First Amendment protections. The trial court was incorrect. Not all accusations of criminal activity are automatically defamatory.[69] Defamation per se is simply the presumption that a person's reputation has been damaged. In that instance, a plaintiff's failure to prove damages for certain charges of misconduct would not require dismissal of their suit.[70] Whether a plaintiff has alleged fault—which may require the plaintiff to show actual malice or negligence, depending on the status of the speaker and the topic of the speech—is a separate element from whether the plaintiff has alleged defamation per se. Thus, the trial court erroneously concluded that Cooley would not have to prove fault or other elements because the statements were per se defamatory.

[69] See *Kevorkian v. American Medical Ass'n.*, 237 Mich.App 1, 12–13; 602 NW2d 233 (1999).

[70] *Burden v. Elias Brothers Big Boy Restaurants*, 240 Mich.App 723, 727–728; 613 NW2d 378 (2000).

More importantly, this erroneous determination was central to the considerations the trial court may balance when determining whether to issue a protective order. As noted above, the trial court may consider that the party seeking the protective order has alleged that the interests he or she is asking the trial court to protect are constitutionally shielded.[71] But the trial court need not, and should not, confuse the issues by making a premature ruling—as though on a motion for summary disposition—while considering whether to issue a protective order before the defendant has filed such a motion for summary disposition. The trial court should only consider whether good cause exists to issue a protective order, and to what extent to grant relief under MCR 2.302(C).

[71] See *Bloomfield Charter Twp.*, 253 Mich.App at 38.

Doe 1 urges this Court to rule that Cooley has not pleaded legally sufficient claims for defamation and tortious interference with a business relationship. We conclude that the defendant's motion for a protective order is not the time or place to do this. These rulings are best made in the context of a motion for summary disposition, when the trial court is testing the legal sufficiency of the complaint. The trial court's only concerns during a motion under MCR 2.302(C) should be whether the plaintiff has stated good cause for a protective order and to what extent to issue a protective order if it determines that one is warranted.

D. THE EXTREME CASE

We recognize that this opinion does not address the extreme case, a case that Doe 1 would like us to consider. The extreme case is one in which a plaintiff in a defamation case sues the defendant *solely* to subpoena the defendant's internet provider for identifying information, in order to retaliate against the plaintiff in some fashion outside a court action.

A simple hypothetical illustrates this situation. Assume that plaintiff XYZ company sues defendant Richard Moe who writes an anonymous blog on the internet that is often critical of XYZ. Assume further that XYZ does not have any real expectation of damages, but suspects that Moe is employed or paid by a competitor and is suing simply to learn Moe's name in order to silence him through legal (we hasten to add) but extra-judicial means.

Under the Michigan rules, as we outlined above, XYZ could sue Moe and then immediately pursue discovery against the internet provider (the counterpart to Weebly in this action), during the 91 day service-of-summons provision in the court rules, to obtain Moe's real name. But XYZ does not—and indeed could not, as it does not at that point know Moe's name—serve Moe with process. Thus, Moe would be totally unaware of the suit against him and could not protect his name in court. He will only know of the suit and XYZ's actions when he is "outed" through discovery, and his employer may discharge him when XYZ retaliates with an aggressive ad campaign based on Moe's real identity and affiliation with the competitor.

It is this extreme case that both *Dendrite* and *Cahill*, through their notice provisions, address by providing some protection to persons in Moe's situation. But, we emphasize, this is not the case before us. Here, Doe 1 knew relatively early on that Cooley had filed suit against him and was attempting to ascertain his real name through its subpoena to Weebly. And Doe 1 was successful, at least to date, in preventing a public disclosure of that name. We therefore decline, under the well-recognized concept of judicial restraint,[72] to go beyond the facts that are before us in this case. We do not issue advisory opinions, nor does the Supreme Court, except in very limited circumstances not present here.[73] We believe that our legal system in Michigan is capable of responding, either retroactively through litigation or prospectively through Supreme Court rule-making, if and when the extreme case arises.

[72] See *Occam's Razor* and the Principle of Parsimony: Simpler explanations are, other things being equal, generally better than more complex ones.

[73] Const 1963, art 3, § 8; see *Citizens for Common Sense in Gov't. v. Attorney General*, 243 Mich.App 43, 55; 620 NW2d 546 (2000).

E. COOLEY'S ALTERNATIVE GROUND FOR AFFIRMANCE

Cooley argues as alternative grounds for affirmance that a Michigan court cannot quash a California subpoena. Cooley argues that the trial court must look to the law of the state in which the subpoena is pending to determine whether it can quash the subpoena. Under California law, Cooley therefore argues, Doe 1 should have filed its motion to quash and motion for a protective order in "the county in which discovery is to be conducted."[74] The trial court did not consider this argument, and the parties do not extensively brief this issue.

[74] Cal Code Civ Proc § 2029.600.

However, Cooley's argument appears to confuse MCR 2.305(D), under which Michigan allows foreign courts to issue subpoenas pursuant to Michigan actions, with MCR 2.302(C). Doe 1 petitioned the trial court for a protective order under MCR 2.302(C), which provides that "the court *in which the action is pending* may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]"

Thus, even if the trial court did not have the power to quash the California subpoena, the trial court has the power to issue a protective order under Michigan court rules, because the action is pending in Ingham Circuit Court. Therefore, even if we determined that the trial court did not have the power to quash the California subpoena issued under MCR 2.305(D), it would still be necessary for this Court to reverse and remand for the trial court to determine whether justice requires it to issue a protective order. Finally, a decision of the trial court would aid our analysis on this issue. We decline to affirm on the grounds that the trial court could not quash a California subpoena.

VI. CONCLUSION

We conclude that the trial court abused its discretion when it denied Doe 1's motion for a protective order after it adopted and applied foreign law. Michigan law adequately protects Doe 1's free speech interests in this case. On remand, the trial court should determine whether it has the power to quash a California subpoena. If not, or if it declines to do so, the trial court should apply Michigan law to determine whether Doe 1 is entitled to an order protecting his identity.

Reversed and remanded. We do not retain jurisdiction.

BECKERING, J. (concurring in part and dissenting in part).

With the advent of the Internet and the accompanying easy, rapid, and global exchange of information and opinions, new legal issues have come to the forefront. This case presents one of those new legal issues and involves a matter of first impression in Michigan. How do we balance a defendant's First Amendment right to speak anonymously and a plaintiff's right to learn an anonymous defendant's identity in order to seek

redress for the defendant's alleged defamatory statements? In this case, plaintiff Thomas M. Cooley Law School (Cooley) alleges that defendant John Doe 1 (Doe 1), a former Cooley student, defamed it in his weblog post titled "Thomas M. Cooley Law School Scam." Cooley sued Doe 1 for defamation and tortious interference. It then obtained a subpoena from a California court that ordered Weebly, Inc. (Weebly), the website host for Doe 1's weblog, to produce documents that included Doe 1's user account information. Doe 1 learned that he had been sued after reading about Cooley's lawsuit in the media. He moved the trial court to quash the subpoena or, in the alternative, to issue a protective order limiting or restricting Cooley's use of any information obtained pursuant to the subpoena. Unfortunately, before the trial court resolved the motion to quash, and through no apparent fault of either party, Weebly disclosed Doe 1's user account information to Cooley. Cooley now knows Doe 1's identity.

I agree with my colleagues in the majority that the only remedy available to Doe 1, because his identity is known to Cooley, is a protective order and that the trial court, on remand, must evaluate the necessity of a protective order. As noted by the majority, and contrary to Cooley's argument, Cooley's knowledge of Doe 1's identity does not render Doe 1's appeal moot. It is possible to fashion a remedy, a protective order, if merited, that will have a practical legal effect on the controversy.[1] A protective order can prevent Doe 1's identity from being disclosed to others. I also agree with the majority that we may, and should, review the issue whether Michigan law adequately protects the respective rights of plaintiffs and defendants in the complicated interplay between the First Amendment right of anonymous free speech and a person's right to know the identity of his or her defamer. The issue is a matter "of public significance that is likely to recur, yet evade judicial review."[2]

[1] *Gen. Motors Corp. v. Dep't. of Treasury*, 290 Mich.App 355, 386; 803 NW2d 698 (2010).

[2] *Id.*

Where I diverge from the majority is in its conclusion that Michigan law adequately protects a defendant's right to **anonymous** free speech except for the "extreme" case. Because an **anonymous** defendant cannot undertake any efforts to protect against disclosure of his or her identity until the defendant learns about the lawsuit—which may well be too late given that discovery is available to a plaintiff as soon as the action is commenced—we, like numerous appeal courts in other jurisdictions, must adopt a formal procedure that balances the rights of plaintiffs and defendants. The majority of jurisdictions that have addressed this issue have adopted either the ***Dendrite***[3] or *Cahill*[4] standard. These standards require, in part, that a plaintiff alleging defamation present the trial court with prima facie evidence on the elements of its defamation claim before it is allowed to discover the **anonymous** defendant's identity. I would adopt a modified version of the ***Dendrite*** standard.

[3] *Doe No. 1 v. Cahill*, 884 A.2d 451 (Del, 2005).

[4] *Dendrite Int'l., Inc. v. Doe, No. 3*, 342 NJ Super 134; 775 A.2d 756 (2001).

I. THE FIRST AMENDMENT AND DEFAMATION

A. THE RIGHT TO FREE SPEECH

The First Amendment of the United States Constitution provides: "Congress shall make no law ... abridging the freedom of speech...."[5] "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press."[6] Because the right to free speech under the Michigan Constitution is coterminous with the right to free speech under the First Amendment, this Court may use federal authority to interpret Michigan's guarantee of free speech.[7]

[5] US Const, Am 1. The First Amendment is applicable to the states under the Fourteenth Amendment. *Schneider v. New Jersey*, 308 U.S. 147, 160; 60 S Ct 146; 84 L Ed 155 (1939).

[6] Const 1963, art 1, § 5.

[7] *In re Contempt of Dudzinski*, 257 Mich.App 96, 100; 667 NW2d 68 (2003).

The right to free speech includes the right to speak anonymously.[8] Numerous reasons exist for why a person may chose to speak anonymously. "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."[9] Whatever the person's reason to speak anonymously, "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."[10] The right to free speech extends to speech on the Internet.[11]

[8] *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 342; 115 S Ct 1511; 131 L.Ed.2d 426 (1995).

[9] *Id.* at 341–342.

[10] *Id.* at 342.

[11] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870; 117 S Ct 2329; 138 L.Ed.2d 874 (1997) (stating that case law from the United States Supreme Court "provide[s] no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].").

B. DEFAMATION

However, "the right of free speech is not absolute at all times and under all circumstances."[12] It provides no protection to defamatory statements.[13] A statement "is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[14]

[12] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571; 62 S Ct 766; 86 L.Ed.2d 1031 (1942).

[13] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245–246; 122 S Ct 1389; 152 L.Ed.2d 403 (2002); *Beauharnais v. Illinois*, 343 U.S. 250, 266; 72 S Ct 725; 96 L Ed 919 (1952) (stating that "[l]ibelous utterances" are not within the scope of constitutionally protected speech).

[14] *Smith v. Anonymous Joint Enterprise*, 487 Mich. 102, 113; 793 NW2d 533 (2010) (quotation omitted).

The elements of a defamation claim are the following:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.[15]

[15] *Mitan v. Campbell*, 474 Mich. 21, 24; 706 NW2d 420 (2005).

In addition, if the plaintiff is a public official or a public figure, the plaintiff must prove that the alleged defamatory statement was made with actual malice, i.e., that the statement was made with knowledge of its falsity or with reckless disregard of whether the statement was false.[16]

[16] *Garvelink v. Detroit News*, 206 Mich.App 604, 608; 522 NW2d 883 (1994).

C. BALANCING THE EQUITIES AND RIGHTS OF THE PARTIES: THE *CAHILL*

AND *DENDRITE* STANDARDS

Although this Court has never addressed the relationship between a defendant's right to speak anonymously and a plaintiff's right to learn an **anonymous** defendant's identity, numerous courts in other jurisdictions have addressed this issue. As mentioned, Doe 1 requests that this Court adopt the standard articulated in either ***Dendrite*** or *Cahill*.

In ***Dendrite***, a New Jersey intermediate court was called on to determine the standard trial courts were to use in evaluating applications to discover the identity of **anonymous** users of Internet message boards.[17] It adopted a four-part test for trial courts to apply when a plaintiff seeks the disclosure of an **anonymous** defendant's identity.[18] First, the plaintiff must undertake efforts to notify the **anonymous** defendant and then withhold action to afford the defendant a reasonable opportunity to oppose the discovery request.[19] According to the court, the notification efforts should include placing a message regarding the discovery request on the Internet message board on which the alleged defamatory statement was posted.[20] Second, the plaintiff must identify the exact statements that it claims were defamatory.[21] Third, the trial court must review the complaint and all the information provided by the plaintiff and determine whether the plaintiff has set forth a prima facie case against the **anonymous** defendant.[22] The plaintiff must not only be able to withstand a motion to dismiss for failure to state a claim; it must also present the trial court with prima facie evidence sufficient to support each element of its cause of action.[23] Fourth, if the plaintiff has presented a prima facie case, the trial court must balance the **anonymous** defendant's First Amendment rights against the strength of the plaintiff's prima facie case and the necessity of disclosure of the defendant's identity to allow the plaintiff to proceed.[24]

17 *Dendrite Int'l., Inc.*, 342 NJ Super at 140.

18 *Id.* at 141.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 142.

In *Cahill*, the Delaware Supreme Court was called on to adopt a standard for trial courts to apply when a defamation plaintiff seeks to discover the identity of an anonymous defendant.[25] The court was concerned about adopting a standard that was too low and would chill persons from exercising their right to speak:

25 *Cahill*, 884 A.2d at 457.

> The possibility of losing anonymity in a future lawsuit could intimidate anonymous persons into self-censoring their comments or simply not commenting at all. A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker "may subject that speaker to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes." Plaintiffs can often initially plead sufficient facts to meet the good faith test applied by the [trial c]ourt, even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision. After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.

> Indeed, there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics. As one commentator has noted, "the sudden surge in John Doe Suits stems from the fact that many defamation actions are not really about money." "The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him." This "sue first, ask questions later" approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked.[26]

26 *Id.* at 457 (alterations omitted).

The Delaware Supreme Court concluded that application of a summary judgment standard, which requires a plaintiff to present evidence sufficient to create a genuine issue of material fact, sufficiently balanced a defendant's right to speak anonymously with a plaintiff's right to protect its reputation.[27] Accordingly, following the New Jersey intermediate court in ***Dendrite***, the Delaware Supreme Court held that, before a defamation plaintiff may discover an **anonymous** defendant's identity, the plaintiff must support its defamation claim with evidence sufficient to defeat a summary judgment motion.[28] The court, however, did not adopt the complete four-part ***Dendrite*** standard. It only retained the first and third prongs, holding that a defamation plaintiff (1) must make reasonable efforts to notify the **anonymous** defendant and then withhold action to afford the defendant an opportunity to oppose the discovery request and (2) must satisfy a summary judgment standard.[29] According to the court, the notification prong imposed very little burden on a defamation plaintiff while giving an **anonymous** defendant the opportunity to respond.[30] When a party's First Amendment rights were implicated, the court disfavored ex parte discovery requests that afforded a plaintiff the important relief, and sometimes the only desired relief, of unmasking the defendant.[31] In regard to the plaintiff's burden to satisfy a summary judgment standard, the court explained that a plaintiff was only required to produce evidence on the elements of a defamation claim that were in its control.[32] It explained that because proof of actual malice might be impossible without knowing the defendant's identity, a public figure plaintiff was not required to present proof of actual malice.[33] According to the court, the second and fourth prongs of the ***Dendrite*** standard were unnecessary.[34] It explained that a plaintiff, to survive summary judgment, will quote the alleged defamatory statements in the complaint.[35] It also explained that the summary judgment standard, itself, was the balancing test of a defendant's First Amendment rights and the strength of the plaintiff's defamation claim.[36]

27 *Id.* at 460, 463.

28 *Id.* at 457, 460, 463.

29 *Id.* at 460–461.

30 *Id.* at 461.

31 *Id.* at 457, 461.

32 *Id.* at 464.

33 *Id.*

34 *Id.* at 461.

35 *Id.*

36 *Id.*

Numerous appellate courts have adopted either the *Dendrite* or *Cahill* standard or some form of one of the two standards.[37]

37 See *Mobilisa, Inc. v. Doe 1*, 217 Ariz 103, 111–112; 170 P3d 712 (Ariz App, 2007) (adopting the *Cahill* standard but stating that a balancing test remains necessary); *Krinsky v.*

Doe 6, 159 Cal App 4th 1154, 1171–1172; 72 Cal Rptr 3d 231 (2008) (stating that it agrees with the courts that have required the plaintiff to make a prima facie showing of the elements of defamation); *Solers, Inc. v. Doe*, 977 A.2d 941, 954–956 (DC, 2009) (adopting a test that "closely resembles" the *Cahill* standard); *In re Indiana Newspapers Inc.*, 963 N.E.2d 534, 552 (Ind App, 2012) (adopting the ***Dendrite*** standard but only requiring the plaintiff to produce evidence to support the elements of the claim that are not dependent on the **anonymous** defendant's identity); *Indep. Newspapers, Inc. v. Brodie*, 407 Md 415, 454–456; 966 A.2d 432 (2009) (adopting the ***Dendrite*** standard); *Mortgage Specialists, Inc. v. Implode–Explode Heavy Indus., Inc.*, 160 NH 227, 239; 999 A.2d 184 (2010) (adopting the ***Dendrite*** standard); *Pilchesky v. Gatelli*, 12 A3d 430, 442–446 (Pa Super, 2011) (adopting a "modified version" of the ***Dendrite*** and *Cahill* standards); *In re Does 1–10*, 242 SW3d 805, 821–823 (Tex App, 2007) (adopting the *Cahill* standard).

II. THE NEED FOR ADOPTION OF A STANDARD IN MICHIGAN

The majority concludes that the procedures for a protective order, when combined with the procedures for summary disposition, will be sufficient in nearly every case to adequately protect a defendant's right to speak anonymously. I respectfully disagree.

When presented with a "motion by a party or by the person from whom discovery is sought" a trial court may issue a protective order.[38] However, an anonymous defendant can only request a protective order and ask that the plaintiff be prohibited from unmasking his or her identity or that, as a condition of discovering his or her identity, the plaintiff not disclose his or her identity to third parties, if the defendant knows of the plaintiff's defamation lawsuit and discovery request. There is no guarantee that an anonymous defendant will learn of the plaintiff's lawsuit and its attempt to discover his or her identity in time to request a protective order. Parties may obtain discovery as soon as an action is commenced,[39] and an action is commenced when a complaint is filed.[40] Although a plaintiff may not take the deposition of a person or send a request for production to a nonparty without leave of the trial court until the defendant "has had a reasonable time to obtain an attorney," the court may grant leave to conduct the discovery without notice having been granted to the defendant.[41]

38 MCR 2.302(C).

39 MCR 2.302(A)(1).

40 MCR 2.101(B).

41 MCR 2.306(A)(1); MCR 2.307(A)(1); MCR 2.310(D)(1).

In the present case, Doe 1 did not receive notice from Cooley of the defamation lawsuit or of the subpoena that it obtained directing Weebly to produce his user account information. According to Doe 1, he learned of the defamation lawsuit because Cooley issued a press release after it filed suit. Had Doe 1 not learned of the defamation lawsuit through the media, which caused him to hire an attorney who moved to quash Cooley's subpoena, Cooley could have discovered and publicized Doe 1's identity before Doe 1 even learned that he had been sued for defamation. In my view, the court rules do not preclude such an outcome in a future case.

In my opinion, because the court rules do not guarantee that an anonymous defendant will have an opportunity to protect his or her identity before a defamation plaintiff engages in discovery to learn the defendant's identity, this Court must adopt a standard that will protect a defendant's right to speak anonymously. I acknowledge the majority's concern that it is the province of the Legislature to enact an anti-SLAPP statute[42] and that it is the province of the Michigan Supreme Court to write, or rewrite, the court rules regarding discovery and summary disposition. However, in the absence of action by the Legislature or the Supreme Court, I see nothing wrong with this Court adopting a standard, which, itself or a similar one, has been adopted by numerous appellate courts across the country, to protect the First Amendment right to speak anonymously. Although this right is not absolute,[43] it "would be of little practical value if there was no concomitant right to remain

anonymous after the speech is concluded."[44] Failure by this Court to adopt a standard that protects the constitutional right to speak anonymously could intimidate persons into self-censoring their comments or not speaking at all.[45]

42 SLAPP is an acronym for "strategic lawsuit against public participation." Black's Law Dictionary (7th ed).

43 *Chaplinsky*, 315 U.S. at 571.

44 *In re Does 1–10*, 242 SW3d at 820.

45 See *Cahill*, 884 A.2d at 457.

III. A MODIFIED *DENDRITE* STANDARD

I agree with the courts in *Dendrite* and *Cahill* that a standard requiring the plaintiff to present prima facie evidence to create a genuine issue of material fact on the elements of its defamation claim is one that strikes an appropriate balance between a plaintiff's right to sue for defamation and a defendant's right to speak anonymously. To be clear, I do not wish to prohibit any plaintiff from pursuing redress to which he or she is entitled for having been defamed. As noted above, the right to free speech is not absolute; it does not protect defamatory statements. "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right...."[46] However, the interests of both plaintiffs and defendants must be considered, and a defendant should be given an opportunity to protect his or her right to anonymity before it is too late. I would adopt a modified *Dendrite* standard to afford defendants this opportunity.

46 Const 1963, art 1, § 5.

The first requirement of the ***Dendrite*** standard, which is also part of the *Cahill* standard, is that the plaintiff must undertake reasonable efforts to notify the **anonymous** defendant that his or her identity is, or will be, the subject of a discovery request.[47] I would adopt this requirement. "A court should not consider impacting a speaker's First Amendment rights without affording the speaker an opportunity to respond to the discovery request."[48] Thus, at a minimum, the plaintiff should attempt to notify the **anonymous** defendant through the same medium used by the defendant to post the alleged defamatory statement. For example, if the **anonymous** defendant posted the statement on a message board, the plaintiff should post a message notifying the defendant of the impending discovery request on the same message board.[49] Then, after making reasonable efforts, the plaintiff must withhold action to allow the defendant an opportunity to oppose the discovery request.[50]

47 *Id.* at 460–461; *Dendrite Int'l., Inc.*, 342 NJ Super at 141.

48 *Mobilisa, Inc.*, 217 Ariz at 110.

49 *Id.* at 110–111; *Cahill*, 884 A.2d at 461; *Dendrite Int'l., Inc.*, 342 NJ Super at 141.

50 *Cahill*, 884 A.2d at 461; *Dendrite Int'l., Inc.*, 342 NJ Super at 141.

The second requirement of the *Dendrite* standard is that the plaintiff set forth the exact statements by the defendant that it claims were defamatory.[51] I would not adopt this requirement because it is unnecessary. Michigan case law requires that alleged defamatory statements be specifically pleaded in the complaint.[52]

51 *Dendrite Int'l. Inc.*, 342 NJ Super at 141.

52 See *Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.*, 197 Mich.App 48, 53–54; 495 NW2d 392 (1992); *Gonyea v. Motor Parts Fed. Credit Union*, 192 Mich.App 74, 77; 480 NW2d 297 (1991).

The third requirement of the *Dendrite* standard, which is also part of the *Cahill* standard, is that the plaintiff must present the trial court with prima facie evidence sufficient to support each element of its cause of action.[53] Michigan is a notice-pleading

state.[54] Therefore, a complaint need only "set forth 'allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.' "[55] A court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted.[56] In deciding such a motion, a court must accept the factual allegations as true and view them in the light most favorable to the nonmoving party.[57] A motion under MCR 2.116(C)(8) may only be granted if no factual development could possibly justify recovery.[58] I acknowledge that claims of defamation must be specifically pleaded, including the defamatory words, the connection between the plaintiff and the defamatory words, and the publication of the defamatory words.[59] However, because of the relative ease to plead a claim that survives a motion for summary disposition under MCR 2.116(C)(8), I do not believe that subjecting a defamation plaintiff's complaint to an MCR 2.116(C)(8) standard, in order to determine whether the plaintiff is entitled to discover the defendant's identity, provides sufficient protection to a defendant's First Amendment right to speak anonymously.

53 *Dendrite Int'l., Inc.*, 342 NJ Super at 141; *Cahill*, 884 A.2d at 460–461, 463.

54 *Johnson v. QFD, Inc.*, 292 Mich.App 359, 368; 807 NW2d 719 (2011).

55 *Id.*, quoting MCR 2.111(B)(1) (alteration omitted).

56 *Dalley v. Dykema Gossett PLLC*, 287 Mich.App 296, 304; 788 NW2d 679 (2010).

57 *Johnson v. Pastoriza*, 491 Mich. 417, 435; 818 NW2d 279 (2012).

58 *Id.*

59 *Gonyea*, 192 Mich.App at 77.

I agree with the courts in ***Dendrite*** and *Cahill* that requiring the plaintiff to produce prima facie evidence sufficient to support each element of its cause of action more appropriately protects an **anonymous** defendant's First Amendment rights. "Requiring the [plaintiff] to satisfy this step furthers the goal of compelling identification of **anonymous** internet speakers only as a means to redress legitimate misuses of speech rather than as a means to retaliate against or chill legitimate uses of speech."[60] Essentially, a plaintiff must produce factual support on its defamation claim to withstand a summary disposition motion under MCR 2.116(C)(10). Summary disposition is proper under MCR 2.116(C)(10) when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[61] Because the plaintiff must produce the evidence before it learns the defendant's identity, I agree with the court in *Cahill* that the plaintiff should not be required to produce evidence on any element that is dependent on the defendant's identity, such as the defendant's fault in publishing the statement.[62] Requiring the plaintiff to present evidence on the elements of the claim that are not dependent on the defendant's identity, such as the alleged defamatory statement, publication, falsity, and harm (if necessary) will not, in my estimation, be overly burdensome. The elements can generally be established either through production of the alleged defamatory statement or through the plaintiff's affidavit.

60 *Mobilisa, Inc.*, 217 Ariz at 111.

61 *Alpha Capital Mgt., Inc. v. Rentenbach*, 287 Mich.App 589, 599; 792 NW2d 344 (2010).

62 *Cahill*, 884 A.2d at 464; see also *Mobilisa, Inc.*, 217 Ariz at 111.

The fourth requirement of the *Dendrite* standard is that the court must balance the defendant's First Amendment rights against the strength of the plaintiff's case and the necessity for disclosure of the defendant's identity to allow the plaintiff to proceed.[63] Unlike the court in *Cahill*,[64] I would not dispose of this requirement. In my view, the balancing test serves as a safety mechanism. It permits a trial court to consider and balance all the

circumstances and any idiosyncrasies in the case.

63 *Dendrite Int'l., Inc.*, 342 NJ Super at 142.

64 *Cahill*, 884 A.2d at 461.

I clarify that a plaintiff, by satisfying this modified ***Dendrite*** standard, would only be entitled to discover the **anonymous** defendant's identity. After the plaintiff has learned the defendant's identity, the case must proceed along the normal channels of civil procedure, including discovery, case evaluation, summary disposition motions, and, possibly, trial. A plaintiff's satisfaction of the modified ***Dendrite*** standard does not necessarily mean that the real purpose of the plaintiff's lawsuit was not to unmask the defendant and then engage in extrajudicial self-help remedies. Much less does a plaintiff's satisfaction of the modified ***Dendrite*** standard establish that the plaintiff will ultimately prevail on its defamation claim. Accordingly, even after a trial court permits the plaintiff to engage in discovery to learn the **anonymous** defendant's identity, the court retains discretion to enter any protective orders that it deems necessary to protect the defendant's First Amendment rights.[65]

65 MCR 2.302(C).

I do not believe that this Court has to create any new proceedings in order for a trial court to apply the modified ***Dendrite*** standard to a defamation plaintiff's discovery request to learn the identity of an **anonymous** defendant. Michigan follows an open, broad discovery policy,[66] and discovery is available on any matter, not privileged, that is relevant to the subject matter of the action.[67] There are two relevant and important limitations on a party's right to discovery. First, despite the broad scope of discovery, the court rules acknowledge the wisdom of placing limits on discovery.[68] MCR 2.302(C) provides:

66 *Augustine v. Allstate Ins. Co.*, 292 Mich.App 408, 419; 807 NW2d 77 (2011).

67 MCR 2.302(B)(1).

68 *Alberto v. Toyota Motor Corp.*, 289 Mich.App 328, 336; 796 NW2d 490 (2010).

> On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
>
> (1) that the discovery not be had;
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> (5) that discovery be conducted with no one present except persons designated by the court[.]

"Good cause simply means a satisfactory, sound or valid reason[.]"[69] Protective orders may be used to protect First Amendment rights.[70] Second, as already indicated, although parties may engage in discovery after an action is commenced,[71] and an action is commenced by the filing of a complaint,[72] a plaintiff may need to obtain leave of court to engage in discovery.[73]

69 *People v. Buie*, 491 Mich. 294, 319; 817 NW2d 33 (2012) (quotation omitted).

70 See *Bloomfield Charter Twp. v. Oakland Co. Clerk*, 253 Mich.App 1, 38; 654 NW2d 610 (2002), overruled on other grounds *Stand Up For Democracy v. Secretary of State*, 492 Mich. 588; 822 NW2d 159 (2012).

71 MCR 2.302(A)(1).

72 MCR 2.101(B).

[73] MCR 2.306(A)(1).

The court rules provide two methods from which a party can obtain discovery from a nonparty: (1) deposition and (2) request for production. A party may depose "a person, including a party," either on oral examination or on written questions,[74] and a deposition may be for the sole purpose of the production of documents or other tangible items for inspection and copying.[75] A party desiring to take the deposition of a person must give written notice to every other party to the action.[76] The notice must name the person to be deposed and, for a deposition on oral examination, the notice must state the time and place for the deposition.[77] A party may request a "nonparty" to produce and permit the party to inspect and test or sample tangible things.[78] A copy of the request must be served on the other parties.[79]

[74] MCR 2.306; MCR 2.307.

[75] MCR 2.305(A)(3).

[76] MCR 2.306(B)(1); MCR 2.307(A)(2).

[77] MCR 2.306(B)(1); MCR 2.307(A)(2).

[78] MCR 2.310(B)(2).

[79] MCR 2.310(D)(2).

After an action has been commenced, a party generally does not need to obtain leave of court to depose a person.[80] However, "leave of court, granted with or without notice *must* be obtained ... if the plaintiff seeks to take a deposition before the defendant has had a reasonable time to obtain an attorney."[81] A reasonable time has elapsed if:

[80] MCR 2.306(A)(1); MCR 2.307(A)(1).

[81] MCR 2.306(A)(1) (emphasis added).

> (a) the defendant has filed an answer;
>
> (b) the defendant's attorney has filed an appearance;
>
> (c) the defendant has served notice of the taking of a deposition or has taken other action seeking discovery;
>
> (d) the defendant has filed a motion under MCR 2.116; or
>
> (e) 28 days have expired after service of the summons and complaint on a defendant or after service made under MCR 2.106.[82]

[82] *Id.*

The term "must" indicates a mandatory requirement.[83] Similarly, a party may submit a request for production of documents to a nonparty "at any time, except that leave of the court is required if the plaintiff seeks to serve a request before the occurrence of one of the events stated in MCR 2.306(A)(1)."[84]

[83] *Vyletel–Rivard v. Rivard*, 286 Mich.App 13, 25; 777 NW2d 722 (2009).

[84] MCR 2.310(D)(1).

Presumably, because the plaintiff has sued an **anonymous** defendant and because the plaintiff wants to learn the defendant's identity, the defendant has not yet been served with process. Accordingly, unless the defendant learned of the plaintiff's lawsuit and took one of the actions listed in MCR 2.306(A)(1)(a)-(d), the plaintiff must obtain leave of court to engage in discovery with a nonparty to learn the defendant's identity. At this point, presented with a motion for leave to conduct discovery, the trial court can apply the modified ***Dendrite*** standard. The trial court should only grant the plaintiff permission to engage in discovery to learn the defendant's identity if the plaintiff has made reasonable efforts to notify the defendant and, having withheld action to allow the

defendant an opportunity to oppose the discovery request, has submitted evidence sufficient to withstand summary disposition, on a prima facie basis, under MCR 2.116(C)(10). In addition, the trial court must determine that the strength of the plaintiff's case and the necessity of discovery the defendant's identity outweigh the defendant's right to speak anonymously. If MCR 2.306 is not applicable, either because the defendant was served with process or because the defendant took one of the actions listed in MCR 2.306(A)(1)(a)-(d), the plaintiff can serve the required discovery notice on the defendant and the defendant can move for a protective order, specifically asking that the discovery not be had.[85] At this point, presented with a motion for a protective order, the trial court can apply the modified ***Dendrite*** standard. Because the defendant already received notice of the requested discovery, the trial court should grant the requested protective order unless the plaintiff has produced sufficient evidence supporting each element of its cause of action on a prima facie basis, and the balancing test weighs in favor of the plaintiff.

[85] MCR 2.302(C)(1).

I do not believe that Michigan law adequately protects a defendant's First Amendment right to speak anonymously when his or her identity is sought in a defamation action. Consequently, I would adopt a modified ***Dendrite*** standard to strike the appropriate balance between an **anonymous** defendant's First Amendment rights and a plaintiff's right to learn the defendant's identity in order to seek redress for alleged defamatory statements. Under this standard, a defamation plaintiff may engage in discovery to learn an **anonymous** defendant's identity only after (1) the plaintiff has made reasonable attempts to notify the defendant and then has given the defendant a reasonable opportunity to defend against the discovery request, (2) the plaintiff has presented the trial court with prima facie evidence sufficient to support each element of its cause of action, other than the elements dependent on the defendant's identity, and (3) the strength of the plaintiff's prima facie case and the necessity of disclosure of the defendant's identity outweighs the defendant's right to speak anonymously. However, because Cooley has already learned Doe 1's identity, I concur with the majority that remand is necessary to determine whether Doe 1 is entitled to a protective order to prevent further destruction of his anonymity.

IV. CONCLUSION