Discovery of those Online: Using Supreme Court Rule 224 to Ascertain the Identity of Anonymous Online Posting

by Patrick M. Kinnally, Esq.

With the continued promotion of web logs (blogs), and other internet service provider venues for posting unedited commentary, an increase in the number of negative statements, not only about public figures but private ones, grows. Private citizens are fighting back.[1] This is so even in light of the Illinois Citizen Participation Act,[2] a broad and ambiguous law.[3] This legislation appears to have been designed to promote public speech about government and protect those who speak out from being sued over the content of what they utter.[4] Yet many of these postings are anonymous. And, some are blatantly defamatory and not aimed at government or public figures, but private ones.

How do you find out who these people are? A recent case from the Illinois Appellate Court, Third District, *Maxon v. Ottawa Publishing Company*[5] provides a method.

The *Ottawa Times*, a local daily newspaper, had a blog which permitted anyone to post statements in the "comments" section after each article published on its website. These comments were unedited. In order to be able to comment the person commenting had to register by utilizing a "screen name" which could be a pseudonym, obtain a password for the screen name, and provide the newspaper with an e-mail address. The newspaper did not obtain the commenter's name, address, or telephone number. Its only method of identifying the anonymous commenter was an e-mail address. It did not determine whether the e-mail account was active after the registration occurred.

In 2008, the Maxons were seeking a zoning change so they could use their house as a bed and breakfast facility. The matter was being considered by local zoning officials. The newspaper posted on its blog a statement which read: "Ottawa: Commissioners favor B & B additions and changes." Comments were received on the blog by anonymous posters. Basically, these commenters accused the Maxons of bribing public officials to get the ordinance changed in their favor.

Illinois Supreme Court Rule 224 provides that a person may file an independent action seeking discovery before a suit is filed to determine the identity of one who may be responsible for damages.[6] The purpose of the petition, which must be verified, is a narrow one--discovery of the identity of a potential defendant. Nothing more.[7] This is not a fishing expedition.

The Maxons thought they fit that definition and filed a Rule 224 petition, claiming they had been defamed by the anonymous postings and requested the newspaper provide them with the identities of the commenters. The newspaper filed a motion to dismiss,[8] which the trial court granted.

Relying on what is called the *Dendrite-Cahill* test,[9] the trial judge found that the Maxons failed to state a claim for defamation. Therefore, since no recovery of damages could be made, the petition was dismissed.

Under *Dendrite-Cahill*, the court is required to balance the First Amendment interests of those posting anonymous commentary with the reputational interests of the private citizen. And, where the private citizen cannot state a claim for defamation[10] or some other tort, then the First Amendment interests, according to the trial court in *Maxon*, predominate.

The appellate court reversed the trial judge's ruling on *de novo* review and remanded the case for disclosure of the Internet posters. In so doing, the court rejected the *Dendrite-Cahill* analysis, reasoning that sufficient examination for safeguarding both the interests of the poster and the Maxons can be addressed through motion practice. The appellate court rejected *Dendrite-Cahill's* requirements that disclosure of the anonymous poster can only be required when the party who is the object of the posting "undertakes efforts to provide notice to the anonymous commentator; and shows that his/her defamation claim against the poster would be sufficient to survive a hypothetical motion for summary judgment."

In doing so, the appellate court observed that the heightened scrutiny *Dendrite-Cahill* requires was more than satisfied by its Supreme Court Rule 224 analysis. The court stated that the Ottawa Publishing Company attempted to give some notice to all defendants and, additionally, a trial court has the discretion to permit additional notice. Next, the court concluded that under Supreme Court Rule 224 the petition must be verified and state with specificity the facts necessary to plead a cause of action for defamation. Finally, the court concluded that once the court determined that a petitioner, like the

Maxons, had pled a *prima facie* case for defamation, then the defendant commentator has no First Amendment rights to protect. The court found there was no constitutional right to defame[11] and also concluded that the anonymity of Internet utterers does not enjoy a special degree of constitutional protection from claims of defamation by private individuals.

Justice Schmidt dissented. In his view, the anonymity of Internet posters was a paramount First Amendment concern.[12] His focus was on the anonymous nature of the utterer which he opined, required special protection. Justice Schmidt observed that anonymity on the Internet allows for a diverse exchange of ideas that would not be there otherwise. Also, he endorsed the *Dendrite-Cahill* test and said the Maxons failed to state a claim for defamation because no reasonable person would ever interpret the postings to be a statement of fact.[13]

A private party's reputation is a valuable asset. Once attacked by an unknown assailant, the damage is already done, since when posted on the Internet apparently the only recourse is for the publisher to take the posting down from the site. On the other hand, the Internet provides a forum for robust discussion where an exchange of opinions can provide valuable information. Anonymity may provide some security to those who post statements which are not a violation of the law. The Third District seems to have taken a reasonable middle ground in making disclosure the right course, by enforcing a little-used Supreme Court Rule.

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[1] *See* Dan Frosch, *Venting Online, Consumers Can Find Themselves in Court*, N.Y. TIMES, June 1, 2010, *available at* http://www.cnbc.com/id/34206293/Venting_Online_Consumers_Can_Find_Themselves_in_Court.

[2] 735 ILL. COMP. STAT. 110/1 (West 2008).

[3] *See generally* Mark J. Sobczak, Comment, *SLAPPED in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, 28 N. ILL. U. L. REV. 559 (2008)).

[4] *See* Debbie L. Berman & Wade A. Thompson, *Illinois' Anti-SLAPP Statute: A Potentially Powerful New Weapon for Media Defendants*, 26 COMM. LAW. 2 (Mar. 2009)), *available at* http://www.jenner.com/files/tbl_s20Publications/RelatedDocumentsPDFs1252/2447/berman-thomson_commlaw_v26n2.pdf.

[5] No. 03-08-0805 (Ill. App. Ct. June 2, 2010).

[6] ILL. SUP. CT. R. 224 (134 Ill. 2d R. 224).

[7] *See Gajnor v. Burlington N. Ry.*, 322 Ill. App. 3d 288, 294 (5th Dist. 2001).

[8] 735 ILL. COMP. STAT. 5/2-615 (West 2008).

[9] *See Dendrite Int'l, Inc. v. Doe*, 342 N.J. 134 (2001); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

[10] *See, e.g., Solaia Tech. LLC. v. Specialty Publ'g, Inc.*, 221 Ill. 2d 588 (2006).

[11] *See Cahill*, 884 A.2d at 456.

[12] *Maxon v. Ottawa Publ'g Co.*, No. 03-08-0805, slip. op. at 18 (Ill. App. Ct. June 2, 2010) (Schmidt, J., dissenting).

[13] *Id.* at 20-21.

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