In the Supreme Court of Illinois

Case #: 118000

Bill Hadley,

Plaintiff/Appellee,

vs.

Subscriber Doe a/k/a Fuboy,
whose legal name is unknown,

Defendant/Appellant.

On Appeal from the Appellate Court Second District
2-13-0489

There heard on
Appeal From the Circuit Court of Stephenson County

Circuit Court No.: 12 L 24

Trial Judge: Hon. David L. Jeffrey

Appellant's Opening Brief

Oral Argument Requested

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Points and Authorities

Rules and Statutes Involved

Illinois Supreme Court Rule 224

Rule 224. Discovery Before Suit to Identify Responsible Persons and Entities.
(pertinent provisions)

(a) Procedure.

(1) *Petition.*

(i) A person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery.

(ii) The action for discovery shall be initiated by the filing of a verified petition in the circuit court of the county in which the action or proceeding might be brought or in which one or more of the persons or entities from whom discovery is sought resides. The petition shall be brought in the name of the petitioner and shall name as respondents the persons or entities from whom discovery is sought and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery. The order allowing the petition will limit discovery to the

identification of responsible persons and entities and where a deposition is sought will specify the name and address of each person to be examined, if known, or, if unknown, information sufficient to identify each person and the time and place of the deposition. . . .

735 ILCS 5/2-615 Motions with respect to pleadings

§ 2-615. Motions with respect to pleadings. (a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.

(b) If a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.

(c) Upon motions based upon defects in pleadings, substantial defects in prior pleadings may be considered.

(d) After rulings on motions, the court may enter appropriate orders either to permit or require pleading over or amending or to terminate the litigation in whole or in part.

(e) Any party may seasonably move for judgment on the pleadings.

Nature of Action

This is an appeal from the Second District’s decision affirming the trial court's

determination that pursuant to Illinois Supreme Court Rule 224, Comcast Cable

Company must disclose to the Plaintiff, Bill Hadley the identity of a Comcast subscriber

who was assigned the I.P. address from which an allegedly defamatory comment about

Plaintiff was posted to a site on the Internet.

Issues Presented for Review

Whether Plaintiffs original complaint was a nullity under the common law of Illinois.

Whether Rule 224 was properly invoked by the Plaintiff in this case.

Whether Plaintiff has articulated an actionable defamation claim which would entitle him to relief under Rule 224.

Whether prior to seeking relief under Rule 224, the statute of limitations applicable to any defamation claim Plaintiff hopes to assert expired.

Whether the expiration of an applicable statute of limitations prevents a party from seeking relief under Rule 224.

Whether the trial court erred in granting Plaintiff relief pursuant to Rule 224.

Jurisdiction

This Court has jurisdiction of this matter pursuant to Illinois Supreme Court Rule 303 because of the final and appealable nature of the relief granted pursuant to Supreme Court Rule 224 and also because of the trial court's finding pursuant to Supreme Court Rule 304(b) that his decision pursuant to Rule 224 was final and appealable and that there is no just reason to delay the appeal of his decision. This Court also has jurisdiction by virtue of Appellant's timely filing of a Notice of Appeal.

Statement of Facts

On January 10, 2012 Plaintiff Bill Hadley filed a defamation suit in the 15th Judicial Circuit, Stephenson County, against Gatehouse Media, the parent company of the Freeport Journal Standard. *See Affidavit in support of service by Publication at C 0017-0018.* [1] The suit was based on an anonymous comment posted in relation to a December 28, 2011 story in the online version of the Journal Standard about Mr. Hadley's decision to seek election to a seat on the Stephenson County Board that he had previously held. At the time, the online version of the Journal Standard allowed visitors to post comments about stories while identifying themselves by pseudonyms. The story about Mr. Hadley generated four comments which together with the story were reproduced and attached to Hadley's complaint as Exhibit A. *A 61-63*

The first comment was posted by someone using the screen name "runnerwannabe". From his reading of the article, runnerwannabe came away saying about Bill Hadley "this guy is on to something . . . good luck to him." The second comment was posted by someone using the name "Fuboy". Fuboy said "Hadley is a Sandusky waiting to be exposed. Check out the view he has of Empire from his front door." *See generally Complaint, C 0002.* The third comment also came from Fuboy. This time Fuboy said "Anybody know the tale of Hadley's suicide attempt? Its kinda 'It's a Wonderful Life' with Pottersville wining [sic] out. We can just be happy that Stephenson County is fortunate enough to have *this guy* want to be of service again". The fourth comment

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[1] References to specific pages of the common law record throughout this brief are preceded by the letter "*C*". References to pages in the transcripts of the various hearings, are preceded by the word *"Transcripts"* and references to pages in the Appendix are preceded by the letter *"A"*.

included in Plaintiff's Exhibit A came from someone using the name “Dadbug”. After commenting on the County Board generally, Dadbug said of Hadley: “Hadley seems like a viable candidate to me. Just the kind of guy to study the issues, make a decision and stick by that decision. In retrospect he appears to [be] one of the few on the board that did this.”

Plaintiff's defamation complaint is based on Fuboy's first comment. In his complaint, Plaintiff asserted that the "Sandusky" comment amounted to defamation *per se*, because as Plaintiff interpreted it, the comment accused Plaintiff of a crime. Although the complaint contains no other reference to Sandusky, Plaintiff’s theory is that the comment was a reference to Jerry Sandusky, the disgraced Penn State football coach whose story was developing in the news for a few weeks around the time of the article about Plaintiff. The crime that Plaintiff believes the comment accused him of was an unspecified variety of sexual abuse of minors similar to the crimes that Mr. Sandusky had at that time only been accused of committing. To Plaintiff, support for that interpretation is provided by the reference to “Empire” which Plaintiff considers a reference to the Empire Elementary School in Freeport even though the complaint makes no allegation to that effect. *C 0050.*

The complaint against Gatehouse alleged that the comment was motivated by malice and that Plaintiff's reputation and standing within the community had been damaged by the comment in such a way that people no longer wanted to be associated with him. He claimed damages in excess of $50000.00. *C 0066-0069.*

Gatehouse removed the case to federal court. After the case arrived in federal court, Plaintiff obtained permission to issue a subpoena to Comcast Cable Company (Comcast), seeking the identity of the Comcast subscriber who had been assigned the I.P. address

from which the allegedly defamatory comment had allegedly been transmitted to the Journal Standard's web site. An I.P. address is essentially a portal to the internet provided to a subscriber by an Internet service provider (ISP) like Comcast. Comcast notified the subscriber assigned to that address about the subpoena, advising the subscriber that unless the Subscriber filed an objection with the court, the subpoena would be honored. The Subscriber (Appellant here) filed a motion to quash the subpoena based largely on the First Amendment's protection of anonymous speech. That motion was filed under the name "Subscriber Doe". Although the motion was fully briefed by both sides, Gatehouse succeeded in having the complaint dismissed for failure to state a claim before a decision was rendered on the motion to quash. *See, Response to Motion to Quash, C 0045*

After the federal dismissal, Plaintiff's attorney initially attempted to revive the case in state court hoping to continue to use the case as a means of trying to obtain the identity of the Subscriber who he assumed was Fuboy. *Id.* When that effort was rejected by the lower court, Plaintiff filed a new lawsuit based on the same complaint but this time naming as the defendant “Subscriber Doe, a.k.a. Fuboy, whose legal name is unknown “. *C 0002.* With the new lawsuit on file, Plaintiff issued another subpoena to Comcast who in turn notified the Subscriber again about the subpoena and the need to file objections with the court. *C 0023.* The Subscriber filed another motion to quash. This time, however, in addition to the First Amendment arguments that had been offered in support of the federal motion to quash, the Subscriber argued that since Plaintiff's new complaint had not named a real person as the defendant, the complaint was a nullity under the common law of Illinois and thus incapable of conferring onto the case the “pending” status that is needed to authorize the issuance of a subpoena. *Memorandum in support of*

Motion to Quash. C 0091.

Although the motion to quash the state subpoena was also fully briefed and argued, the lower court never explicitly decided the motion in the context of only the Plaintiff's complaint against “Subscriber Doe a/k/a Fuboy”. Instead the court decided that the appropriate procedural mechanism for Plaintiff's efforts to learn the identity of the Comcast Subscriber was Supreme Court Rule 224. The court came to that conclusion after the Subscriber had mentioned the rule in response to an inquiry from the court about how Plaintiff could go about learning the Subscriber's identity. *C 0207*. The lower court concluded that the best way for Plaintiff to bring Rule 224 into play in this case was for the Plaintiff to amend his complaint by adding a count based on Rule 224. *C 0211-0218*. Having reached that conclusion, the court directed Plaintiff to amend his complaint accordingly. *Id.* Plaintiff complied with the Judge's directive. *C 0219.*

The Subscriber opposed Plaintiff's attempt to invoke Rule 224 on a number of grounds. *C 0227-0241.* On a technical basis, the Subscriber argued that the amended complaint failed to comply with the various pleading requirements established by Rule 224. In the Subscriber's view, however, the issue of greatest consequence to Plaintiff's Rule 224 ambitions had to do with the fact that by the time Plaintiff got around to filing his Rule 224 amendment, the one year statute of limitations had run out on the defamation case he hopes to assert because if his original complaint against Subscriber Doe, a.k.a. Fuboy was a nullity it did not toll the limitations period. Since the purpose of Rule 224 is to enable a party to learn the identity of someone against whom that party may have a viable claim, the Subscriber argued that the expiration of the limitations period for the only claim the Plaintiff seeks to pursue precludes him from seeking the

only relief that Rule 224 offers. Subscriber also renewed the First Amendment arguments that had been made in support of the motion to quash. *Id.*

Having decided that Rule 224 was the "appropriate" vehicle for Plaintiff to learn the identity of the Comcast Subscriber, the lower court then proceeded to decide that Plaintiff is entitled to relief under Rule 224. *Memorandum Opinion and Order, C 0266, and Appendix at A 37.* In reaching that conclusion the court did not address the nullity issue, the statute of limitations problem or any of the other arguments urged or significant pleading deficiencies noted by the Subscriber. *Id.* In the court's view, Plaintiff's complaint stated a viable defamation *per se* claim in part if not entirely because it would have been "obvious to any reasonable person" reading Fuboy's comment in late December, 2011 or early January, 2012, that the reference to Sandusky was a reference to "the Penn State coach convicted of being a sexual abuser of young boys". *Id. at C 0269, Appendix at A 40.*

On appeal, the Second District affirmed. As for whether Plaintiff had adequately alleged a defamation *per se* claim, the Second District found that the news coverage related to the Sandusky story was so pervasive that anyone who read the comment would have concluded that Fuboy was accusing Bill Hadley of being a pedophile. *Appendix at A 13 ¶27.* As for whether the comment enjoyed any privilege under the First Amendment, the court found that the statement had no innocent interpretation (*Appendix at A 15 ¶34)* and was a statement of fact rather than opinion. *Appendix at A 25 ¶53.* As for what the Second District described as Subscriber's alternate argument concerning the complaint being a nullity and the related statute of limitations argument, the Second District found reason to reject those arguments in the concurring opinion of Justice Karmeier in this

Court's decision in *Santiago v. E.W. Bliss Co*., 2012 IL 111792 (Ill., 2012). *Appendix at A 26-27 ¶56-58.*

Standard of Review

Because the lower courts' decisions turned on an application of section 735 ILCS 5/2-615 (2-615) to the allegations of the complaint Plaintiff hopes to assert against Fuboy, the *de novo* standard of review applicable to section 2-615 motions would appear to be the appropriate standard of review. *Board of Directors of Bloomfield Club Recreation Ass'n v. The Hoffman Group, Inc.*, 186 Ill.2d 419, 424, 238 Ill.Dec. 608, 712 N.E.2d 330 (IL 1999). Under the *de novo* standard of review, this Court performs the same analysis as the lower courts should have performed and gives no deference to their conclusions or specific rationale. *Bank of America National Ass'n v. Bassman FBT, L.L.C.*, 2012 IL App (2d) 110729, ¶ 3, 366 Ill.Dec. 936, 981 N.E.2d 1 (Ill. App. 2nd Dist. 2012).

Argument.

I.

The trial court and the Second District erred in deciding that Plaintiff's complaint was not a nullity under the common law of Illinois.

Since at least 1894, the courts of Illinois have uniformly held that a complaint that uses a fictitious name in an attempt to assert a claim against a defendant whose legal identity is unknown by a Plaintiff is void ab initio and a nullity. *Goodkind v. Bartlett*, 153 Ill. 419, 423 (IL 1894), *Ohio Millers Mutual Insurance Co. v. Inter-Insurance Exchange of the Illinois Automobile Club*, 367 Ill. 44, 54 (IL 1937), *Hailey v. Interstate Machinery Co*., 121 Ill.App.3d 237, 238, 76 Ill.Dec. 709, 459 N.E.2d 346.(Ill. App. 3d Dist, 1984), *Theodorakakis v. Kogut*, 194 Ill.App.3d 586, 589, 141 Ill.Dec. 268, 551 N.E.2d 261(Ill. App. 1st Dist. 1990) and *Bogseth v. Emanual*,166 Ill.2d 507,514, 655 N.E.2d 888, 211 Ill.Dec. 505 (IL 1995). When done intentionally, the maneuver typically has as its objective the use of discovery mechanisms that are conferred upon a Plaintiff by a "pending case". *See generally, Hailey, supra*. As was done in this case, a Plaintiff will use a subpoena in the hopes of learning the identity of his real defendant from someone likely to know it. It is a tactic that has never been approved by this Court for reasons that would not appear to depend upon whether the fictitious name employed by the Plaintiff had been first used by the unknown defendant (e.g. Fuboy) or a fictitious name chosen by a Plaintiff (e.g. Defendant John Doe). In either event, the name fails to identify anyone who can be served with process and thus subjected to the jurisdiction of the court. It is for that reason that a complaint like the current one, which conspicuously concedes that the legal identity of whoever it is that Plaintiff wants to sue is unknown to Plaintiff, have always been perceived as nullities by this Court and the other courts cited above. The reason is

that nullities are incapable of invoking the subject matter jurisdiction of the courts where such complaints have been filed. As nullities, such complaints are legally incapable of tolling any statute of limitation applicable to the claim a Plaintiff is seeking to assert.

The Second District attempts to distinguish what Plaintiff has done here from cases where a Plaintiff has simply sued a "John Doe" to serve as a placeholder until Plaintiff learns the identity of the real person he wants to sue and substitutes that person into the case. According to the Second District the difference between that scenario and what Plaintiff was trying to do by naming "Subscriber Doe a/k/a Fuboy" as the defendant is that:

> "Fuboy is a real person. He has hired an attorney and has mounted a defense to the Rule 224 petition. He is not a legal fiction. It makes sense that a suit brought against a real person (who is participating in proceedings) but brought against a fictitious name would not be a nullity."

Appendix at A 27 ¶58.

In reality, of course, any case which identifies a defendant by anything other than the defendant's legal name is filed in the hopes of learning the identity of the real person who the Plaintiff wants to sue. In the *Hailey* case, the plaintiff did exactly what the Plaintiff did here. He sued two fictitious "Does" who had a role in the manufacture of the machine that caused his injury and then used the subpoena power gained from the suit to obtain from his employer the real names of the defendants he wanted to sue. Here that goal was complicated for Plaintiff by the fact that more than one real person could use the name Fuboy to anonymously post comments on the Internet. That being the case, the better identification of the particular Fuboy Plaintiff wants to sue would have been to describe him or her as "the person who posted a comment about Plaintiff using the name

Fuboy". Unfortunately for Plaintiff, however, a description of a defendant in lieu of an actual legal name has never been accepted in Illinois. For example in *Goodkind v. Bartlett*, 153 Ill. 419 (1894), a case cited by the Second District for the proposition that a default judgment may be entered against an improperly named defendant who nonetheless accepts service, this Court was asked to decide whether a judgment against a man named Hummer was binding on his wife when in the caption of the relevant complaint the husband was identified by his complete legal name and his wife was identified immediately thereafter as simply "_____ Hummer, his wife". In ruling that the judgment against the wife was a nullity, this court reasoned that "to allow legal proceedings against parties by mere descriptions or fictitious names would be simply absurd and grossly illogical." *Id*. at 423.

The simple fact of this case is that "Fuboy" is every bit as much of a fictitious place holding name as John Doe has been in other cases where the practice has been rejected. For example, in the *Bogseth* case John Doe was used until the real doctor responsible for the *Bogseth* plaintiff's injuries could be properly named as a defendant. Were it not for the fact that "Fuboy" is similarly nothing more than a fictitious place holding description of the person Plaintiff wants to sue, Plaintiff would now have already served the person everyone knows as Fuboy. Instead he has issued a subpoena to Comcast to learn the identity of a particular Comcast Subscriber who may or may not have posted the comment in question and who may or may not know who did. Because it is that Subscriber who has retained an attorney and is resisting Plaintiff's effort to learn the Subscriber's identity, the Second District's assumption that "Fuboy" is participating in this case lacks any basis in the record of this case. Such an unsubstantiated assumption

provides little justification for the Second District's disregard of the settled common law of this State which clearly holds that lawsuits against defendants whose legal identity is unknown are void ab initio and nullities.

This court has made clear over the years that any change in the rules concerning the use of fictitious names in litigation needs to come from the general assembly. *Bogseth*, 166 IL 2d at 53. Neither the Plaintiff nor the trial court offered a statutory basis for Plaintiff's suit against a defendant "whose name is unknown". The Second District similarly offered no statutory language as a validation of its approval of the complaint here in issue, nor could it point to an opinion of this Court approving the tactic. For that reason, the Second District's approval of a complaint against an unknown defendant lacks any support in any controlling precedent of this Court. Because the Second District's opinion provides no persuasive argument for abandoning that precedent but rather mistakenly assumes that this Court has already done so, the Subscriber would respectfully urge this Court to reverse the Second District and the trial court and enter an order dismissing the complaint with prejudice.

II.
The decision of the trial court as affirmed and expanded by the Second District is in conflict with the clear meaning of Supreme Court Rule 224.

The singular and obvious purpose of this Court's Rule 224 is to enable someone in Plaintiff's position to learn the identity of whoever he wants to sue before the expiration of a governing statute of limitations. *Gaynor v. Burlington Northern and Santa Fe Railway*, 750 N.E.2d 307, 312 (Ill. App. 5th Dist. 2001). Any doubt that could have existed for the trial court or the Second District with regard to whether a complaint against a defendant whose "legal name is unknown" is a nullity under the common law of

Illinois ought to have been eliminated by the introduction Rule 224 to this controversy. Rather than accept the obvious, however, each court attempted to salvage the flawed vehicle Plaintiff chose for his quest with tortured legal rationales finding little support in the language and purpose of Rule 224.

To that task, the trial court devoted the least effort. Essentially the trial court ordered the Plaintiff to add a Rule 224 count to a complaint that the court, for reasons not explained, apparently deemed incapable of supporting the subpoena that Plaintiff had issued to Comcast. The court then proceeded to grant Plaintiff the relief authorized by the Rule. The trial court did not address the nullity issue nor any question raised by the Subscriber with regard to whether Plaintiff's new count had been plead in a way that satisfied the requirements of Rule 224 or was otherwise compromised by the one year statute of limitations that governs defamation claims. *Memorandum Opinion and Order, C 0266, and Appendix at A 40.* In the end, the trial court declared the pleading he had orchestrated a "hybrid" the propriety of which was a question he thought best decided by an appellate court pursuant to either Supreme Court Rule 301 or 304(b). See *Transcript of Hearing on Motion to reconsider Appendix at A 53.*

Both the majority of the Second District and Justice Birkett in dissent, acknowledge that as drafted by this Court, Rule 224 envisions an independent action the singular purpose of which is to learn the identity of a defendant who may then be properly named in a separate and distinct action. Because the trial court's hybrid was clearly something different, Justice Birkett correctly observed that it was not supported by the language of Rule 224. *Appendix at A 33 ¶77*. The majority of the court took a different view, noting that "in the abstract, there is nothing wrong with two claims being set forth in a single

complaint (think of a two-count complaint with one claim for defamation and one claim for intentional infliction of emotional distress)". *Appendix at A 30 ¶67.* While there may be nothing wrong with that thought "in the abstract", in practice, as illustrated by what happened in this case, the approach produced a kind of procedural chaos that a simple rule like Rule 224 is perfectly designed to avoid.

The problem for Plaintiff started when his case against GateHouse media was dismissed in federal court for failure to state a claim. With that dismissal, Plaintiff lost the only Defendant he had properly identified for his claim and in turn the jurisdictional premise needed to issue subpoenas in an effort to learn the identity of "Fuboy". With the case being relegated to State court, it was incumbent upon Plaintiff to discover and then employ Rule 224. Had he done that, the issues that would have been posed to the trial court would have been limited to whether Plaintiff had sufficient reason to believe that the Comcast Subscriber whose identity he is seeking was in fact Fuboy and if so, whether the defamation claim Plaintiff wants to assert has been articulated in such a way that Plaintiff's interests in vindicating any damage allegedly done to his reputation by the Sandusky comment outweigh Fuboy's First Amendment privilege to comment anonymously about candidates for public office.

Subscriber's motion to quash the state court subpoena Plaintiff had issued to Comcast put those issues in play and certainly alerted Plaintiff and the trial court to the arguments against the validity of a lawsuit filed against a defendant whose legal name is unknown. *See generally Memorandum in Support of Motion to Quash C-0091*. Plaintiff rejected those arguments out of hand, however, choosing to defend the approach he had taken and arguing that either the Subscriber lacked standing to participate in the case or

alternatively, had submitted to the jurisdiction of the court by filing what Plaintiff considered a motion to dismiss. *Plaintiff Memorandum in Response C-0108*. This last contention was based on the motion to dismiss analysis of Plaintiff's complaint that Subscriber had offered in support of his motion in accordance with the holdings in the *Stone v. Paddock Publications, Inc*., 961 N.E.2d 380, 356 Ill.Dec. 284, 39 Media L. Rep. 2697 (Ill. App 1st 2011) and *Maxon v. Ottawa Publishing Co.*, 402 Ill.App.3d 704, 929 N.E.2d 666 (Ill. App. 3rd Dist. 2010).

Although the motion had been fully briefed and argued, the trial court didn't rule on the arguments of Plaintiff or Subscriber but rather recommended to Plaintiff that he amend his complaint by adding a Rule 224 count. *Order granting Plaintiff Leave to Amend C-0210*. That was a mistake. If, as appears to be the case, the trial court believed that Rule 224 was better suited to Plaintiff's objectives than the approach Plaintiff had chosen, the clear application of *Bogseth* to Plaintiff's complaint would have justified the trial court in summarily dismissing Plaintiff's complaint without the need of an extended briefing schedule, argument or the creation of "hybrid" procedures. If the court wanted to steer Plaintiff toward Rule 224 at that point, he could made the suggestion in his order of dismissal or privately shared the thought with Plaintiff's counsel. Plaintiff would have then had the choice of appealing the dismissal or properly invoking Rule 224 in a new and independent action.

The trial court's "hybrid" solution created more issues than it resolved. In that regard, the only way the "hybrid" can be rationally construed in a manner that is consistent with both *Bogseth* and the language of Rule 224 is to view the "hybrid" as replacing the original complaint with a new and independent action taking the form of a two count

Rule 224 petition. The first count defines the claim Plaintiff wants to assert in the event he learns the identity of an appropriate defendant pursuant to the Rule 224 relief he seeks in the second count of the complaint. This construction of the “hybrid” avoids the *Bogseth* nullity concerns by abandoning the original complaint as a filed cause of action but retaining its substance as an exhibit being offered in support of the claim for relief being sought in the second count for which Comcast serves as a properly named respondent. This construction also avoids any concerns about whether the "independent action" language of Rule 224 precludes invocation of the rule by way of a count within a complaint against someone whose identity will not be known until relief is granted pursuant to Rule 224. What this approach does not do for Plaintiff, however, is eliminate concerns about whether the one year statute of limitations that governs defamation claims is an obstacle to his professed interest in holding whoever Fuboy may be accountable for whatever injury he may have suffered as a consequence of a comment that may not have been taken seriously by anyone.

The failure of any plaintiff to learn the identity of someone he wants to sue within the time allowed by the statute of limitations that governs the claim he wants to assert is typically fatal to a plaintiff's litigious ambitions. As a general rule, when the plaintiff is an adult and not under any disability, the time allowed by a statute of limitations begins to run on the date when he knows or should know that he has suffered an injury for which someone else could arguably be held liable. In Plaintiff's case there can be no doubt that he knew he may have a defamation claim against Fuboy on January 10, 2012, the date when he filed his suit against GateHouse on the basis the Sandusky comment. Nearly seven months later, after his GateHouse case had been dismissed in federal court, he filed

his second suit based on the comment, this time against “Subscriber Doe, a/k/a Fuboy, whose legal name is unknown". That was on August 7, 2012. On January 24, 2013, more than a year after he filed the GateHouse complaint, Plaintiff filed his "hybrid" complaint.

The impact of the one year statute on Plaintiff's efforts is rather obvious. If the complaint naming Fuboy as a defendant is a nullity, the statute of limitations expired on his claim on January 10, 2013. *First Robinson Sav. & Loan v. Ledo Const. Co., Inc.*, 569 N.E.2d 304, 210 Ill.App.3d 889, 155 Ill.Dec. 304 (Ill.App. 5 Dist., 1991)(A nullity does not toll statute of limitations). If Plaintiff's amended complaint asserting the Rule 224 claim constitutes an abandonment of the original complaint by virtue of Rule 224's mandate of an independent action and only an independent action, then regardless of whether the abandoned complaint was a nullity, the Rule 224 petition does not relate back to the filing of that complaint. Under that construction, Plaintiff is not entitled to relief under the Rule because the statute of limitations has run on the only claim that provides him reason to seek the identity of Fuboy pursuant to Rule 224.

The principal way in which the Second District, including Justice Birkett, attempted to get around the problems created by how Plaintiff's chosen approach in this case interacts with the relevant statute of limitations was to rule that Plaintiffs complaint naming Fuboy as a defendant was not a nullity. *Appendix at A 26-27 ¶56-5.* As already discussed, however, that conclusion by the Second District finds little support in the settled precedent of this state concerning lawsuits against defendants whose legal identity is unknown.

Another suggestion by the Second District for why Plaintiff's claim might not be extinguished by the relevant statute of limitations is based upon the court's mistaken

belief that Plaintiff's complaint against GateHouse was dismissed for want of jurisdiction by the federal district court to which GateHouse had removed the case. If Plaintiff's case had been dismissed for want of jurisdiction by the federal court, then Plaintiff would have had a year from the date of that dismissal to re-file the case against GateHouse in state court pursuant to 735 ILCS 5/13-217 (West 2012). The fact of the matter is, however, that by dismissing the complaint against GateHouse pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, the federal district court exercised jurisdiction over the complaint and dismissed it against the only defendant Plaintiff had named in that case. *See Judge Kapala's Minute Order denying reconsideration of dismissal, Appendix at A 64*. That reality about what transpired in federal court eliminates 13-217 as a provision capable of extending the statute of limitations for the claim Plaintiff wants to pursue. So too does the fact that the Rule 224 petition that Plaintiff's claim has become has no defendant in common with the GateHouse complaint and is seeking a different variety of relief than was the case with the GateHouse claim.

All of the foregoing issues related to Plaintiff's attempt to comply with the trial court's suggestion that he invoke Rule 224 arise from what the Second District charitably described as the "obvious irregularities in Hadley's Rule 224 petition". Subscriber submits that for the reasons just discussed, the Second District erred in its struggle to affirm the trial court's role in and indulgence of those "obvious irregularities".

III.
Plaintiffs Rule 224 Count fails to allege any facts that would permit the conclusion that the Comcast Subscriber whose identity Plaintiff seeks is in fact Fuboy.

Rule 224 as drafted by this Court and as it has hitherto been interpreted by the lower courts, authorizes the compulsory disclosure of someone's identity but only when a Rule 224 petitioner can demonstrate to the satisfaction of a court that the person whose identity he seeks is in fact someone against whom the petitioner can assert a viable claim. In the case of a party claiming to have been defamed by an anonymous comment posted on the Internet, Rule 224 has recently been used with greater frequency to learn the identity of the person assigned the I.P. address through which the defamatory comments were transmitted to the Internet. *See e.g. Stone v. Paddock, supra*. The problem with that approach, however, is that multiple people can connect to the Internet through a single I.P. Address. In the workplace or in the home, everyone who connects to the Internet probably gets there through the same I.P. Address. When unsecured wireless networks are added to the mix of how people get connected to the Internet, there is really no limit to how many people can connect to the Internet though a single I.P. Address and can do so without the knowledge or consent of the individual who has been assigned the I.P. Address through a subscription with an Internet Service Provider (ISP). *See Guava LLC v. Comcast Cable Commc'ns, LLC, 2014 IL App (5th) 130091 (Ill. App., 2014) at ¶ 64*. That reality about I.P. Addresses and our networked society makes the identity of someone who has been assigned a particular I.P. address something that ought not be disclosed under Rule 224 in the context of defamation case based on an anonymous comment unless the petitioner can offer the court some rather persuasive factual assurance that the Subscriber whose identity will be disclosed is in fact also the defamer.

The purpose of Rule 224 is to identify Defendants as opposed to needlessly intruding upon the privacy of people who may or may not know the identity of Defendants.

In the final analysis, Plaintiff has nothing more than a hunch that the Comcast Subscriber whose identity he seeks is in fact Fuboy. His petition offers nothing in the way of facts that would permit the trial judge, the Second District or this Court to reasonably conclude that Plaintiff is working with anything other than a wholly unsubstantiated hunch. The language of Rule 224 would suggest that more is needed to grant the extraordinary and intrusive remedy envisioned by the rule. Such was the conclusion of the Fifth District in *Guava LLC.* Subscriber urges this Court should reach the same conclusion.

IV.
Plaintiff's pleading fails to articulate a defamation claim capable of overcoming the protection historically accorded to anonymous speech by the First Amendment

With a heritage that includes the Federalist Papers[2], anonymous speech enjoys a sanctified station in the political discourse of the United States. It is also well established that anonymous speech is protected by the First Amendment. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 200, 119 S.Ct. 636, 646, 142 L.Ed.2d 599, 614–15 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357, 115 S.Ct. 1511, 1524, 131 L.Ed.2d 426, 446 (1995); *Talley v. California*, 362 U.S. 60, 65, 80 S.Ct. 536, 539, 4 L.Ed.2d 559, 563 (1960); *Crue v. Aiken*, 137 F.Supp.2d 1076, 1089

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[2] The 85 essays advocating the adoption of the Constitution that have become known as the Federalist Papers were all authored under the pseudonym “Publius” in honor of Roman consul Publius Valerius Publicola. James Madison is credited with authoring 26 of those essays. He is also commonly credited with authoring the First Amendment as well as the rest of the original Constitution and the Bill of Rights.

(C.D.Ill.2001); *Watchtower Bible & Tract Soc'y of New York v. Village of Stratton,* 536 U.S. 150, 166–67, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002). "The right to speak anonymously extends to speech via the Internet." *See, e.g., Doe v. 2TheMart.com Inc.,* 140 F.Supp.2d 1088, 1092–93 (W.D.Wash.2001) ("Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."); *see generally Reno v. ACLU,* 521 U.S. 844, 853, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). The United States Supreme Court in *McIntyre* stated, "[A]n 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." *McIntyre,* 514 U.S. at 342, 115 S.Ct. at 1516, 131 L.Ed.2d at 436.

In deciding how best to balance the substantial First Amendment interests of an anonymous speaker against the interests of those who claim injury from the speech, all courts considering the question have rejected the notion that simply because someone is offended by anonymous statements, he has a right to know the identity of who made the statement. To punch through the shield that the First Amendment presumptively attaches to the identity of anonymous speakers, a party claiming to have been injured by an anonymous statement must demonstrate that he has a substantial and viable claim. *U.S.A. Technologies, Inc. v. John Doe,* 713 F.Supp.2d 901(N.D. Cal. 2010), *Highfields Capital Mgmt. v. Doe,* 385 F.Supp.2d 969, 974–76 (N.D.Cal.2005). *Dendrite Int'l v. Doe No. 3,* 342 N.J.Super. 134, 775 A.2d 756, 761 (N.J.App.2001).

In Illinois, courts have employed Rule 224 for that purpose. See e.g. *Stone v. Paddock Publications, Inc*. 093386, 961 N.E.2d 380, 356 Ill.Dec. 284, 39 Media L. Rep. 2697 (IL App 1st 2011), *Maxon v. Ottawa Publishing Co.,* 402 Ill.App.3d 704, 929 N.E.2d

666, 341 Ill.Dec. 12, 38 Media L. Rep. 1953 (Ill. App. 3rd 2010). Specifically these courts have held that in order to obtain the identity of a suspected defamer pursuant to a Rule 224 petition, the petitioner must demonstrate that he can state a defamation claim capable of surviving a 735 ILCS 5/2-615 (2-615) motion to dismiss. Because Illinois is a fact-pleading state, this approach necessarily means that Plaintiff must demonstrate that he can credibly allege facts which if true would establish each element of a defamation claim.

The need to clearly demonstrate the merits of a defamation claim before authorizing an intrusion upon First Amendment anonymity interests is particularly compelling in a case such as this one where a political candidate is using a defamation claim in the hopes of obtaining the identity of an apparent opponent to his candidacy. When speech touches on matters of the qualifications of candidates for public office, the discussion of governmental or political affairs or the discussion of political campaigns, such speech has been described as being at the "core" or "essence" of what the First Amendment guarantees. *See McIntyre,* 514 U.S. at 346–47, 115 S.Ct. 1511. Any invocation of governmental authority that could discourage such speech should accordingly be subject to "exacting scrutiny," and upheld only where it is "narrowly tailored to serve an overriding state interest." *Id.* at 347, 115 S.Ct. 1511. Were that not the case, a well-funded candidate or one having the benefit of a supportive attorney willing to donate his time, could file claims of dubious merit motivated only by an interest in harassing, intimidating and ultimately silencing critics whose concern about such retribution factored into their decision to speak anonymously.

The possibility that such concerns may be at play in this case cannot be lightly

dismissed. Plaintiff is a Stephenson County Republican. During the course of this litigation, Plaintiff's attorney has served as the Chairman of the Stephenson County Republican Party. The first manifestation of this lawsuit was filed less than two weeks after the Sandusky comment briefly appeared in connection with the online version of the story about Plaintiff's candidacy. That was well in advance of the primary and at a time when there could not have been any realistic certainty about what, if any impact the comment would have on Plaintiff's reputation and in turn his candidacy. Given those circumstances, the suspicion that Plaintiff's lawsuit has been motivated by a desire to identify and silence a political adversary can hardly be considered unreasonable. To the extent that the complaint can be so perceived, the perception ought to fortify the First Amendment protections surrounding the identity of Fuboy in a way making it more difficult for Plaintiff to overcome than would be the case if all he had to do is satisfy the Rule 224 requirements for learning the identity of a putative defendant. Indeed, similar concerns gave rise to the First Amendment requirement that public figures must allege and prove malice as an element of a defamation claim. *Costello v. Capital Cities Communications, Inc.*,125 Ill.2d 402, 418–19, 126 Ill.Dec. 919, 532 N.E.2d 790 (1988), citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)(If the plaintiffs are public figures or officials, the First Amendment precludes them from obtaining redress in a defamation action unless they can prove that the allegedly defamatory statements were made with actual malice). There is no similar requirement imposed on private individuals.

Be that as it may, when analyzed under the standards of 2-615, Plaintiff's complaint comes up short in terms of sufficiently pleading an actionable defamation *per se* claim

under the defamation laws of Illinois.

A.
Plaintiffs statement of his defamation *per se* claim is deficient as a matter of law.

In order to prove a valid defamation *per se* claim on the basis of the allegations he hopes to assert against Fuboy, Plaintiff must show that on or about December 28, 2011, the statement "Hadley is a Sandusky waiting to be exposed. Check out the view he has of Empire from his front door" carried the defamatory meaning he assigns to it (i.e. the commission of a crime) and that any reader thereof would have readily discerned that meaning without the benefit of extrinsic facts. See e.g. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill.2d 1, 10, 180 Ill.Dec. 307, 607 N.E.2d 201 (1992)("Statements are considered defamatory *per se* when the defamatory character of the statement is apparent on its face; that is, when the words used are so obviously and materially harmful to the plaintiff that injury to his reputation may be presumed."). Since it is obviously not now a crime nor was it a crime in December, 2011 for anyone to have the surname "Sandusky", it is just as obvious that whatever defamatory meaning the Plaintiff thinks afflicted the name Sandusky in December, 2011, must come from an external set of facts that are not incorporated into Plaintiff's statement of the claim he hopes to assert in the event he ultimately learns Fuboy's identity. For that reason, the defamation *per se* claim that Plaintiff hopes to assert would not survive a 2-615 motion.

For the lower courts, that flaw in the Plaintiff's description of his defamation *per se* claim was of little concern. To the trial court, the obvious meaning of the statement was that Fuboy was comparing the Plaintiff to Jerry Sandusky who the court then described as "the Penn State coach convicted of being a sexual abuser of young boys . . ." The

problem with that finding is that at the time Fuboy posted the comment, i.e. sometime between December 28, 2011 and January 10, 2012, Jerry Sandusky had only been charged with sexual abuse of minor children. His conviction didn't come until several months later on June 22, 2012. So whatever the trial court thought was the “obvious” meaning of the statement at the time it briefly appeared on the Internet, it could not, as a matter of law and fact, be a reference to a convicted felon.

That obvious mistake on the part of the trial court was of little concern to the Second District. Essentially the Second District took judicial notice not only of the news coverage about the Sandusky scandal in the weeks leading up to Fuboy’s comment but also of how much the general public in Freeport knew about the scandal as a consequence of that coverage. On this point, the Second District observed that “It is natural and obvious that calling someone "a Sandusky" while the scandal dominated the national news showed an intent to convey the idea that the "Sandusky" had engaged in yet-to-be discovered sexual acts with children.” *Appendix at A 13, ¶27*. With regard to the fact that Jerry Sandusky had yet to be convicted of anything at the time the comment was made the Second District said:

> “The words, "Hadley is a Sandusky waiting to be exposed," conveyed the same idea whether Sandusky had been convicted or not. Although Sandusky had not yet been convicted, numerous boys, now grown, were beginning to testify to the abuse they had allegedly suffered. The public was aware that Sandusky was, at that point, associated with the sexual abuse of many young boys.”

Appendix at A 14, ¶30.

The rather obvious flaw with the Second District's analysis is that it is based upon factual determinations made by the Second District with regard to facts that were neither alleged nor established at the trial level. Plaintiff’s complaint contains no allegation with

respect to the news coverage about Jerry Sandusky around the time of Fuboy's comment. In fact, Plaintiff's complaint makes no mention of Jerry Sandusky at all. The only reference in the complaint to the name Sandusky comes from the quote of Fuboy's comment. While it may be true that the statement was intended to be a reference to Jerry Sandusky, giving the word "Sandusky" a meaning derived from a general awareness of what may or may not have been communicated in news stories about Jerry Sandusky does not transform this statement into one that communicates the sort of "precise and particular" meaning that is required for a comment to sustain a defamation *per se* claim. As this Court observed in *Green v. Rogers*, 917 N.E.2d 450, 234 Ill.2d 478, 334 Ill.Dec. 624 (Ill., 2009), the allegations offered in support of a defamation *per se* claim must be held to a higher standard of precision and particularity because if properly pled, a defamation *per se* claim relieves a Plaintiff of the burden of proving actual damages. *Id at* 917 N.E. 2nd 461.

The task of infusing Fuboy's comment with a "precise and particular" meaning based on a recollection of nearly three year old news stories raises more questions than it answers about all that the statement might have meant at the time it appeared. For example, did all news sources that would have been available to and relied upon by anyone who might have seen the comment devote the same amount of attention to the story and report it with the same details? Would describing someone as a Sandusky convey to someone familiar with the Sandusky story that the person so described had in fact had sexual relations with underage boys and only underage boys or could the term apply to an adult male who had sexual relations with underage girls? Would the term include someone who might only fantasize about either scenario but has not fulfilled the

fantasy in a way exposing the person to criminal liability? Would the answer to these questions depend on how Pennsylvania statutes defined the crime with which Sandusky was charged or would it depend upon what the news coverage of the scandal communicated about the elements of the crime? If the crime with which Sandusky was charged did not constitute a crime in Illinois, could calling someone in Illinois a Sandusky impute the commission of a crime. And finally, how does the presumption of innocence factor into what if anything a reasonable reader of Fuboy's comment could have considered to be the precise and particular meaning that Fuboy was trying to convey?

All but the last of the foregoing questions illustrate as a matter of conjecture some of the shortcomings of trying to perceive Fuboy's comment as conveying a precise and particular meaning. As was the case with the allegations at issue in the *Green* case, the ambiguities these questions expose about what could be entailed in being a Sandusky, would make it impossible for Fuboy to formulate a defense to the claim.

As for how the presumption of innocence that attended Jerry Sandusky at the time of the comment should be factored into all of this, there is some guidance to be found in the defamation jurisprudence of Illinois. In that regard, it has been held that suggesting that someone has only been charged with or arrested with respect to a particular crime is not an accusation of criminality sufficient to sustain a defamation *per se* claim. *See e.g. Trembois v. Standard Ry. Equipment Manufacturing Co*., 337 Ill. App. 35, 84 N.E.2d 862 (Ill.App 1st Dist. 1949)(Statement suggesting that someone had been arrested or charged with rape did not support a defamation *per se* claim because being arrested and charged is not proof of rape). See also, *Adams v. Sussman & Hertzberg, Ltd*., 292 Ill.App.3d 30, 225

Ill.Dec. 944, 684 N.E.2d 935 (Ill. App. 1st Dist. 1997) (Words that do not clearly and definitively refer to a specific offense that is indictable and punishable by death or imprisonment do not support a defamation *per se* claim based on allegedly false accusation of criminal behavior). Because the suggestion of criminality that can be inferred from the description of someone by reference to the name of a different person who has only been arrested or charged with an offense is even more tenuous, the statement at issue here simply cannot sustain a defamation *per se* claim under the rationale of the foregoing cases.

Since a "precise and particular" and commonly understood defamatory meaning at the time of a statement's uttering is essential to validly stating a defamation *per se* claim, the lower courts clearly erred in finding that Plaintiff's statement of his defamation *per se* claim would survive a properly analyzed motion to dismiss under 2-615.

B.
Plaintiff's description of the claim he hopes to assert fails to satisfy the legal requirements for a defamation *per quod* claim.

Under the defamation law of Illinois, a statement whose defamatory character can only be derived from extrinsic facts is known as defamation *per quod*. A party asserting a defamation *per quod* claim must allege and prove the extrinsic facts that in his opinion imbue the statement with its allegedly defamatory meaning. See e.g. *Homerin v. Mid–Illinois Newspapers*, 245 Ill.App.3d 402, 185 Ill.Dec. 362, 614 N.E.2d 496.(Ill. App. 1993)(Per quod statements are not defamatory on their face and require extrinsic facts or innuendo to explain their defamatory meaning). Such a party must also allege with particularity, special damages, i.e. damage to his reputation as a consequence of the

defamation which has resulted in actual pecuniary loss. *Rosner v. Field Enterprises, Inc.* 205 Ill.App.3d 769, 151 Ill.Dec. 154, 564 N.E.2d 131 (Ill. App. 1st Dist. 1990), appeal denied (1991), 137 Ill.2d 672, 156 Ill.Dec. 569, 571 N.E.2d 156.

As already noted, Plaintiff's complaint does not allege any of the extrinsic facts which in Plaintiff's view infused the word "Sandusky" with a defamatory meaning on or about December 28, 2011. He also fails to describe in any way other than conclusory terms how the comment was motivated by malice or how his reputation has been damaged in any way resulting in him suffering any pecuniary losses. Those shortcomings in how he describes his claim are fatal to Plaintiff's claim being considered one that could survive a 2-615 motion if either the Plaintiff or the lower courts had chosen to alternatively characterize it as a defamation *per quod* claim.

The trial court's holding concerning what he erroneously perceived as the "obvious" meaning of the statement and the Second District's interpretation of the news at the time of the comment eliminated any need for either court to consider whether Plaintiff's description of his claim would survive a 2-615 motion if it were analyzed as a defamation *per quod* claim. As the foregoing analysis demonstrates, however, it is impossible to perceive Plaintiff's description of his claim as a valid defamation *per quod* claim capable overcoming a 2-615 challenge.

C.
The Second District's analysis of whether Fuboy's comment ought to enjoy First Amendment protection is fundamentally flawed.

The question of whether a given statement gives rise to an actionable defamation claim ultimately turns on whether the statement can be considered speech enjoying

protection under the First Amendment. Contrary to what Plaintiff contends and what the Second District seems to have endorsed, statements which can be considered defamatory *per se*, are still eligible for First Amendment protection. The scope of protection provided by the First Amendment does not depend upon how the common law of each state chooses to define the tort of defamation. *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). For that reason, in order for any defamation claim to be actionable, it must first be determined that the statement in issue is in fact defamatory and if so, a court must then determine whether the statement enjoys protection under the First Amendment. In Illinois, a statement will enjoy protection under the First Amendment if it is reasonably amenable to an innocent, non-defamatory interpretation, or if the statement cannot be reasonably interpreted as a statement of fact capable of being proven true or false. *Kolegas v. Heftel Broadcasting Corp.* 154 Ill.2d 1, 10 180 Ill.Dec. 307, 607 N.E.2d 201 (Ill.1992). Both the trial court and the Second District resolved both of these First Amendment questions in favor of Plaintiff's claim being actionable. Because the Second District devoted the most discussion to these issues, Subscriber will focus on that court's analysis.

i.

In concluding that the Sandusky comment could not be given an innocent meaning, the Second District erred in failing to consider the political context created for the comment by the article about Plaintiff Hadley and the other comments posted in response to that article.

Something essentially overlooked by the Second District in its effort to imagine an innocent interpretation for Fuboy's comment about Plaintiff Hadley is that the comment came in apparent response to not only a non-critical article about Hadley's decision to seek election to a seat on the Stephenson County Board he had previously held but also in

response to the comment of another anonymous poster who appeared to be impressed with Hadley on the basis of what he had learned in the article. In politics, favorable comments or depictions of a candidate have a way of attracting disparaging comments or depictions from opponents of that candidate. In forums where people are permitted to comment anonymously, that simple reality about politics and the debate over political candidates that is at the epicenter of what the First Amendment endeavors to protect can give rise to outrageous suggestions and accusations that probably would not be made if the identity of the author had to be disclosed. Those who participate in the back and forth of anonymous political debate on the Internet take such outrageous commentary with a grain of salt and may even see in it meanings unlikely to be discerned by someone with little or no experience in such forums.

In this case, the article about Plaintiff talked about how he had been on the County Board between 2002 and 2008 and quoted him with regard to what he perceived to be the issues confronting the Board. Because he apparently had no opposition for the seat he was seeking, no points of view contrary to his were mentioned in the story. *See generally Plaintiff's Complaint Exhibit A. Appendix at A-61-63.*

It is safe to assume that anyone who had been following the Stephenson County Board over the years and local politics generally would have been familiar with Mr. Hadley. He has been involved in Republican politics in Freeport for decades. Anyone familiar with Republican politics in Freeport would also know that when Hadley lost his seat on the County Board in the close election mentioned in the article, it was the result of County Board related infighting within the Republican Party in Stephenson County. Chances are that someone taking an interest in the article would be aware of that

background. That would not appear to be the case with “runnerwannabe”, the first person who posted a comment about the article. He said simply “this guy is on to something . . . good luck to him.” Taken at face value, this comment could suggest that the first bit of information runnerwannabe had ever encountered about “this guy” Bill Hadley was what he learned from the article. The comment would further suggest that solely on the basis of that information, Hadley had gained a supporter in runnerwannabe.

Someone familiar with Hadley’s background and opposed to his candidacy might find it difficult to resist offering a point of view contrary to the sentiment expressed by runnerwannabe. On the one hand, such an opponent might think that if runnerwannabe really had no idea who Hadley was before reading about him in this article, it would be a good idea for him and other similarly uninformed citizens to do a little more homework before declaring that “this guy” is on to something. On the other hand, if runnerwannabe was really a supporter of Hadley, the comment would border on deception. In either event an opponent of Hadley could be tempted to express his contempt for runnerwannabe’s apparent naivety by suggesting that there may be more to Hadley than was being communicated in the article. In late December, 2011, there was probably no one in America who was being shown to be something different from what people thought more than Jerry Sandusky. He was the scandal de jure, and like so many before him and like so many who are yet to come, he had cultivated a public persona that was at odds with who he was in private. In the context provided by the article and runnerwanabe’s comment, Fuboy’s invocation of Sandusky can be reasonably viewed as a response to the seemingly minimally informed comment of runnerwannabe and as such it can be reasonably interpreted as the equivalent of Fuboy saying to runnerwannabe “For all you know, this

guy is a Sandusky waiting to be exposed."

The Second District never entertained the possibility that the comment could be so interpreted because the court only considered the comment in isolation, giving it a meaning derived exclusively from how the court chose to define each word used in the comment. For any word that might otherwise be considered ambiguous, the Second District resorted to its novel brand of judicial notice whereby the word "Sandusky" took on a meaning derived from the court's recollection of what the news had reported about Jerry Sandusky's crimes, and the word "Empire" as it relates to what Fuboy said Hadley could see from his front door was deemed by the court to be a reference to an elementary school in Freeport. Neither one of those definitions finds factual support in any allegation, evidence or stipulation presented to either the trial court or the Second District.

For the Second District, the reference to what it understood Empire to mean conveyed an undisclosed and sinister suggestion on the part of Fuboy to the effect that Hadley had been preying upon children attending the Empire Elementary school and had done so without being detected by anyone except the intrepid Fuboy. That implicit suggestion made it impossible for the court to then conceive any innocent interpretation for the comment. What also seems to have been impossible for the court to imagine is that the Empire comment was meant as a sarcastic absurdity intended to discourage readers from taking the Sandusky comparison seriously. In this regard, it seems rather safe to say that if all that Fuboy had as support for Hadley being a Sandusky-like pedophile was the fact that Hadley could see an elementary school from his home; few would be likely to think that Fuboy had a serious reason to think Hadley was sexually

abusing children. The use of Empire in that fashion also served to cryptically mock runnerwannabe's endorsement of Hadley on the basis of the limited information about him that could have been gleaned from the article. In other words, for runnerwannabe to think "this guy" Hadley was on to something simply because of what he read in the article makes about as much sense as thinking Hadley is a pedophile just because he has a view of an elementary school from the front door of his home.

Any doubt about whether Fuboy was bringing a healthy dose of cryptic sarcasm to his commentary about Plaintiff Hadley ought to be eliminated by a consideration of Fuboy's second comment about Hadley. That comment was posted after the Sandusky comment and before anyone else posted any comment about either the article or the preceding comments. Rather than add any enlightening detail to his Sandusky bombshell, Fuboy moved on to another topic. Fuboy's second comment read as follows: "Anybody know the tale of Hadley's suicide attempt? It is kinda 'It's a Wonderful Life' with Pottersville wining [sic] out. We can just be happy that Stephenson County is fortunate enough to have *this guy* want to be of service again". (emphasis added). *C-0007, Appendix at A-62.* Whatever this comment might mean, it is impossible to interpret it as corroboration of the Sandusky crack or as a sincere endorsement of "this guy" Bill Hadley. Fuboy's echoing of runnerwannabe's use of "this guy" in reference to Mr. Hadley, also rather clearly suggests that Fuboy was responding to runnerwannabe.

Because the Second District never factored runnerwannabe's comment or Fuboy's second comment into its interpretation of the Sandusky comment, the court failed to take into account the entire context in which the Sandusky comment appeared. That was something they were required to do pursuant to this Court's precedent concerning the

innocent construction rule. *Tuite v. Corbitt,* 866 N.E.2d 114, 224 Ill.2d 490, 310 Ill.Dec. 303 (Ill., 2006). Given the extent to which the Second District seemed to resolve all doubts in favor of finding Plaintiff's claim actionable, the full context may not have made a difference to the court. In Subscriber's view, however, to the extent Fuboy's comments can be viewed as a response to runnerwannabe, Fuboy's comments must be viewed as a vulgar effort to provoke a discussion about a candidate for public office. The approach may have been crude, but when the context for a comment is political debate, Subscriber submits the First Amendment recommends that doubts be resolved in favor the offensive comment. *See e.g. FCC v. Pacifica Foundation,* 438 U.S. 726, 745-746, 98 S.Ct. 3026, 3038 57 L.Ed.2d 1073 (1978)(". . .[i]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas").

For the Second District, the political context of Fuboy's comment didn't seem to factor into their analysis in any meaningful way. Most notably, the court fails to acknowledge that a political candidate such as Plaintiff is required to allege and establish malice as an element of a defamation claim arising from his activities as a public figure. The court similarly failed to recognize that the principal cases it offered in support of ordering the disclosure of an anonymous poster's identity were cases where the Plaintiff was a private individual as opposed to a political candidate or public figure. In that regard, the *Maxon* case, which the Second District quoted extensively with apparent approval, was a case brought by a private individual who claimed to have been falsely accused of bribery. In support of its decision to grant relief under Rule 224 the *Maxon*

court cited *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) for the proposition that "private individuals and their reputations are more deserving of protection against defamation than public officials or public figures". *Maxon*, 929 N.E.2d at 675. In *Stone v. Paddock*, *supra* the other notable Illinois case involving an attempt to learn the identity of anonymous internet commentators, the allegedly defamatory comments were directed at the child of a candidate in the context of colorful criticisms of the child's parent. The *Stone* court denied Rule 224 relief to the would-be defamation Plaintiff in that case.

In support of its conclusion that Fuboy's Sandusky comment could not be excused as First Amendment protected figurative speech uttered in a casual forum, the Second District cited *In re Application of Cohen,* 887 N.Y.S.2d 424 (N.Y. Sup. Ct. 2009), and *Doe I v. Individuals,* 561 F. Supp. 2d 249 (D. Conn. 2008). Once again these cases do not involve public figures. The Plaintiff in *Cohen* was a model. The Plaintiffs in *Doe I* were law students. The obvious thing that distinguishes Mr. Hadley's situation from the Plaintiffs in those cases is that Mr. Hadley has voluntarily entered into the political arena and in doing so fully appreciates that bad things are going to be said and suggested about him. For that reason the law imposes upon him a greater burden when it comes to piercing the veil of protection afforded by the First Amendment to both the identity of people choosing to comment about candidates anonymously and to what they have to say. By ignoring the political nature of the full context in which the Sandusky comment appeared, the Second District's innocent interpretation analysis did nothing more than pay lip service to such protections.

ii.
The Second District's conclusion that the Sandusky comment is a factual assertion and thus not protected by the First Amendment is based on an interpretation of the comment unlikely to be shared by whoever may have seen the comment at the time it was posted.

As mentioned earlier, the Second District seemed to go out of its way to resolve every doubt about Plaintiff's claim in favor of the claim. A good example is the court's suggestion that Fuboy's apparent knowledge of Plaintiff's address would, for the average reader of anonymous comments posted online, lend credibility to the Sandusky accusation. *Appendix at A 22, ¶47.* In making that suggestion the court failed to take into account that in a town the size of Freeport, the address of someone who has been active in politics for a number of years is likely to be more widely known than would be the address of someone not similarly engaged in public life. That, together the fact that as a former County Board member Mr. Hadley's address had been published on the County Clerk's website as a matter of public record makes Fuboy's apparent knowledge of Plaintiff's address less sinister than the Second District seemed to think it was.

A more semantic illustration of the Second District's determination to resolve every question in favor of Plaintiff's claim is provided by the court's effort to determine whether the Sandusky comment should be considered a "pure opinion" which is not actionable or a "mixed opinion" which is actionable. On this point and in reliance upon the Restatement of Torts, the Second District described the difference between the two types of opinions as follows:

> A "pure opinion" is an opinion in form and context that is based on (true) disclosed facts. . . A "mixed opinion" is an opinion in form and context that appears to have been based on (defamatory or untrue) facts that have not been stated.

Appendix at A 22-23, ¶48. The court then proceeded to conclude that the Sandusky comment was a mixed opinion primarily because of the "waiting to be exposed" phrase used in the comment. According to the Second District, the phrase "implies the existence of undisclosed facts" upon which Fuboy bases his apparent opinion that Hadley has child molestation in common with Jerrry Sandusky. *Id*..

In reaching this conclusion, the Second District rather conspicuously ignores the "view of Empire" language in the comment that had earlier weighed in favor of the court's conclusion that Fuboy had transformed Sandusky into a synonym for pedophile. Adding that language back into the comment and subjecting the whole comment to the "pure opinion", "mixed opinion" analysis endeavored by the Second District leaves a little less to the imagination in terms of the basis for Fuboy's claim. In that regard if one accepts the Second District's unsubstantiated findings that at the time of Fuboy's statement, "Sandusky" was a synonym for pedophile and "Empire" was code for an elementary school, then the comment can essentially be read as Fuboy saying "Hadley is a pedophile who will eventually be exposed as such. I know this because from his front door he can see an elementary school." When so construed, the singular fact upon which Fuboy is apparently basing his opinion that Hadley is a pedophile, i.e. the view Hadley has of an elementary school from his front door, is disclosed to the reader and serves as a measure for the validity of the opinion expressed.

According to the Restatement of Torts as quoted by the Second District, "an opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how

derogatory it is." *Restatement (Second) of Torts § 566, n.c (1977).* As explained by the Second District, the reasoning for this rule is that when presented with the facts upon which an opinion is based, "readers will understand that they are getting the author's interpretation of those facts and are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts." *Appendix at A 22-23, ¶48.*

It is, of course, understandable that the Second District would not perceive the view of Empire School as something Fuboy was offering as support for his thoughts about Mr. Hadley's Sanduskiness. It is admittedly an absurd premise for the opinion. On the other hand, if the point of mentioning the view was to transform the entire comment into an absurdity unlikely to be taken seriously by any reasonable reader, then Subscriber submits that the comment enjoys First Amendment protection because it cannot be viewed as asserting actual facts about Plaintiff.

V.
A candidate for public office who seeks to assert a defamation claim against someone who has anonymously commented about the candidate on the Internet should not be able to judicially compel the disclosure of the commenter's identity unless he can demonstrate to the satisfaction of a court, that he has suffered actual damages as a direct and proximate result of an allegedly defamatory comment.

The common practice in defamation cases is for the Plaintiff to assert a defamation *per se* claim, where damages need not be plead or proven, and a defamation *per quod* claim where special damages must be alleged. Plaintiff has not followed that practice with his case and in all likelihood the reason is that Plaintiff realizes that he has not suffered the special damages required for a valid defamation *per quod* claim. On this score, it is a matter of public record known by the trial court and certainly available to this Court that Mr. Hadley won his primary election and his general election for a seat on

the County Board. After taking that seat his fellow board members chose him to be their Chairman. Such electoral success would be truly surprising if, as Plaintiff alleges in his complaint, the statements of Fuboy lowered Plaintiff's "reputation in the eyes of others in the community and deterred those individuals from associating with him".

The possibility exists, of course, that other than his electoral success, Mr. Hadley's life has been a living hell as a consequence of Fuboy having on one and only one occasion ambiguously compared him to Jerry Sandusky in a remote corner of the Internet. It may be that he has been shunned by everyone who didn't vote for him. A more likely possibility, however, is that not many people saw Fuboy's comment and few if any of those who did see the comment, changed their opinion of Hadley. What gives that possibility the edge in terms of being a probability is that even though any site on the Internet theoretically has the potential of attracting millions of visitors, an extremely small percentage actually do. Most of the millions of sites that are available on the Internet attract few visitors other than those responsible for their creation and maintenance.

On the day when the Hadley article first appeared in the online version of the Journal Standard and in the days thereafter, it was one of dozens of articles discussing topics ranging from sports to politics to recipes. As illustrated by the fact that the article only attracted four comments by the time Plaintiff copied it for use in support of his complaint, and two of those comments came from Fuboy, there is little reason to think that Mr. Hadley's decision to run for a seat on the County Board was a story that went viral among the online community. Perhaps the most telling thing about how little interest there was in the story or Fuboy's comment is the comment posted after Fuboy's second

comment by someone using the name “Dadbug”. Dadbug made no mention at all of Fuboy’s Sandusky comparison. One would assume that if the word Sandusky had the “obvious” and presumptively reputation destroying meaning ascribed to it by Plaintiff, the trial court and the Second District, it would have provoked some sort of reaction from “Dadbug”. Since it earned no response at all, perhaps the lower courts have misjudged the power of anonymous comments on the Internet and how they are construed by members of the typical audience for such commentary.

That is not surprising given the relatively brief history that the courts have had with the Internet. Prior to the emergence of the Internet as the dominant communication medium in this country, courts had few occasions to consider the merits of defamation claims based on comments that were published anonymously. A search of cases decided prior to 1985 in which some variation of the word “defamation” appears in the same paragraph as “anonymous” doesn’t return many cases. In those where the principal issue of the case arose from an anonymous statement that was deemed defamatory, the statement was typically either broadcast without verification by a radio or television station or circulated by printed letter or flyer among people familiar with the target of the comment. The situation where a newspaper would publish anonymous commentary about stories appearing in the paper simply did not exist back then and certainly not if the editors of the newspaper had reason to believe the commentary had any prospect of being considered defamatory.

As this case demonstrates, the Internet has changed that. These days there are thousands of forums online that tolerate and even promote anonymous and wholly unregulated commentary about anything that anyone wants to write about. If the online

version of the local newspaper doesn't allow readers to post comments anonymously about stories or people in the news, there is usually another blog available that will and if not, it just doesn't take much to create your own forum online. Getting one's opinion out where it can be seen by others doesn't come with much of an inhibiting price tag these days.

In this new communication environment, the effort to apply defamation rules shaped by the communication media of a bygone era can transform judges into debate monitors to an extent that does not square well with the First Amendment's interest in promoting an unregulated market place of ideas. The Second District's reaction to Fuboy's comment illustrates the problem. The court never entertained the possibility that a reasonable reader of the comment could have considered it nonsense for the very reason that it was anonymous and outrageous and just another silly example of the kind of over the top give and take that goes on with anonymous political chats online. In the opinions of the Second District, a prototypical reasonable reader of the comment would assume the existence of undisclosed facts that Fuboy was choosing not to share with the online audience or, apparently, the Freeport Police. Although such an interpretation may find some support in the enigmatic language employed by Fuboy, the ultimate weakness of the Second District's interpretation is that it assumes that reasonable readers would attach more credibility to an anonymous comment than common sense and experience would recommend to a truly reasonable reader.

An approach to these cases that would remove from the realm of speculation the question of whether readers of an anonymous comment attributed to it the defamatory meaning claimed by a plaintiff, would be one that requires a plaintiff to allege facts

which if proven would clearly demonstrate that the plaintiff had in fact suffered actual damages as a result of the comment. To some extent that is what the 2-615 analysis employed in the *Stone* and *Maxon* cases was intended to do with respect to deciding whether the identity of an anonymous commentator should be disclosed pursuant to Rule 224. In the present case, however, the 2-615 analysis of both the trial court and the Second District began and ended with the determination that the comment could be considered defamation *per se*. With that determination, the lower courts relieved Plaintiff of any obligation to allege or prove damages which for him is fortunate because it does not appear that he has suffered any injury other than an ungratified desire to know who made the comment.

The collateral damage to a valid 2-615 analysis that was done by the lower courts' defamation *per se* determination extends to every other allegation in Plaintiffs complaint which both courts wholly ignored. In that regard, the only thing resembling a fact that Plaintiff has alleged in his complaint is the quote of Fuboy's Sandusky comment. Every allegation of the complaint related to any other element of his claim is merely a conclusory recitation of the element unaccompanied by any facts which if proven would establish the element. The allegation of such facts is, of course, required by the fact pleading standards of Illinois. For that reason conclusory complaints like this one have traditionally not fared well when put to the test of a 2-615 motion. See e.g. *Anderson v. Vanden Dorpel*, 172 Ill.2d 399, 667 N.E.2d 1296, 217 Ill.Dec. 720 (Ill., 1996)(In opposing a motion for dismissal under section 2-615 of the Code of Civil Procedure, a plaintiff cannot rely simply on mere conclusions of law or fact unsupported by specific factual allegations). The First Amendment's historic interest in anonymous commentary

provides ample reason to enhance that standard when it comes to the facts that need to be alleged and proven by candidates for public office who employ a defamation claim to learn the identity of an anonymous critic.

To that end, it is important to recognize that the First Amendment's protection of anonymous speech would be meaningless if all that a candidate for public office needed to do in order for a court to order the disclosure of an anonymous critic's identity is to allege that the critic once posted an online comment about the candidate that could be interpreted as defamation *per se*. Such an approach clearly sacrifices any genuine First Amendment protection for anonymous speech without imposing a counterbalancing burden on the candidate for whom allegations of nefarious wrongdoing are an occupational hazard. It would permit a candidate to invoke the power of a court to identify a critic even when the comment in question had no impact on the candidate's reputation or election. *Cf. Maag v. Illinois Coalition for Jobs*, 858 N.E.2d 967, 306 Ill.Dec. 909, 368 Ill.App.3d 844 (Ill. App. 5th Dist. 2006)(Plaintiff candidate could not support a defamation *per quod* claim without alleging that some voters had changed their opinion of him on the basis of allegedly defamatory flyer). Since the candidate would have no obligation to pursue the litigation after discovering the critic's identity, he could simply abandon his lawsuit in favor of seeking compensatory retribution by some other means. For the courts to become a tool in achieving such an objective is clearly repugnant to the First Amendment and contrary to the public policy of this State as enunciated in the Citizen Participation Act, 735 ILCS 110/5 (West 2008).

A better approach would be to eliminate any presumption of damages when a candidate seeks the identity of an anonymous critic in relation to an allegedly defamatory

comment. Requiring a candidate to allege and demonstrate actual damages when seeking the identity of an anonymous Internet critic would advance the First Amendment's interest in protecting anonymous speech without imposing anything close to an unreasonable burden on a candidate whose reputation has truly been injured by the comment. It would also reserve the limited resources of the courts for cases where an injury has actually been caused by a defamatory comment rather than merely presumed on the basis of a judicial interpretation of a comment that may not have been noticed or given the same meaning by anyone other than the unshaken friends and supporters of the candidate.

Conclusion

For all of the foregoing reasons, the Subscriber respectfully urges this court to reverse the decision of the Second District and enter an order dismissing Plaintiff's complaint and denying him relief under Rule 224.

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Certificate of Compliance with Ill. Sup. Ct. Rules 341(a) and (b).

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding th*e* pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 46 pages.

Certificate of Mailing/Service

I further certify that at or before 5:00 p.m. on October 29, 2014, I caused this brief to be filed electronically with the Clerk of the Supreme Court at:

Clerk of the Illinois Supreme Court
Supreme Court Building
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Springfield, IL 62701

On the same date, I mailed three copies of this brief to:
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JOURNALSTANDARD.com

Hadley returns to county politics

Candidate stresses fiscal responsibility

By Travis Morse
The Journal-Standard
Posted Dec 28, 2011 @ 02:28 PM
Last update Dec 29, 2011 @ 02:25 PM

Freeport, Ill. — Former Stephenson County Board member Bill Hadley said he is alarmed at the direction the county is taking with its budget and Mill Race Crossing, and that more accountability and fiscal responsibility is needed to put the county back on track.

"Just watching some of the County Board meetings made my blood pressure rise," Hadley said Wednesday. "We're pushing the debt off way down the road to our children and grandchildren. This is not being fiscally responsible."

Hadley is one of two Republican candidates running for County Board District E in the 2012 general election. These two candidates are vying for two open board seats, which means their races are uncontested at this point for both the primary and general elections. Even so, a Democratic candidate may still be caucused onto the ballot for the general election, which would make it a contested race.

Hadley served on the County Board from 2002 to 2008, when he lost his seat in a close election race. While on the board, Hadley was deployed twice with the Wisconsin National Guard, once stateside and the other time overseas to Iraq.

After 30 years with the Illinois Department of Corrections, Hadley retired from his job as a correctional officer on Nov. 30. With his retirement, Hadley said he will now have more time to devote to serving on the County Board once again.

"It seemed like a good time to get back in because I could devote a lot more time to representing all the taxpayers of Stephenson County," Hadley said.

One of the most troubling aspects of observing the County Board from the sidelines has been seeing the board's willingness to extend its debt, Hadley said. The board recently approved a plan to refinance the $5.5 million Mill Race Crossing loan over a 20-year period.

"This means the $6 million will not be paid off until the year 2032," Hadley said, adding that he was the only board member to vote against issuing the Mill Race bonds back in 2006. "Some said if you did not pass the $6 million bond, you were against economic development in the county. But that's not true. At the time of the vote, we had three existing industrial parks, two in the Freeport area and one in the Lena area."

Cutting Salaries

While Hadley was deployed to Iraq in 2005, he said the County Board approved a measure to raise the salaries of the board chairman, the committee chairmen, and board members. Hadley said he objects to these salary increases, and will push for them to be reduced if he is elected.

"When I was on the board, I was getting $50 per meeting," Hadley said. "In the year 2012, board members will be getting $95 per meeting. One thing I would like to do if elected is to cut these salaries for the County Board chairman, the committee chairmen, and board members. Then we can show the public that we can cut our own salaries."

Hadley said he's also concerned about an alleged lack of accountability and transparency on the part of county leadership. He added that it seems like the leadership is still trying to "rush sensitive issues" through the process without thinking them through.

Public Safety

Another key issue for Hadley is making sure that the County Sheriff's Office has enough road deputies and correctional officers to provide for public safety. If the jail bond were paid off in 2013, as was originally planned before it was extended in 2007, additional revenue would be available to replenish the sheriff's staff, Hadley said.

"I believe the sheriff has been doing a good job with his budget, but he's sure been getting hammered with cuts," Hadley said.

NIDA Funding

Hadley also objects to the county allocating $100,000 a year to fund the Northwest Illinois Development Alliance (NIDA). He said the county should only fund NIDA when the agency brings in new business to the area.

"I have nothing against NIDA, but NIDA should be on a commission," Hadley said. "If they bring us somebody, we pay them for their services."

All in all, Hadley said he hopes voters will elect him to the board so that he can stand up for area taxpayers.

"While I was on the board, I was always fiscally responsible to the taxpayers of Stephenson County," Hadley said. "And there are areas of the budget that can be cut without hurting staffing."

EXHIBIT A

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John Kester, the other Republican candidate running for District E, was unavailable for comment.

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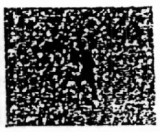
Man Discusses Attempted Cliff-Side Rescue of Dog

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this guy is on to something....good luck to him.

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Hadley is a Sandusky waiting to be exposed. Check out the view he has of Empire from his front door.

Fuboy
2 days ago
Report Abuse
You must be logged in to report abuse.

[Report Abuse]

Anybody know the tale of Hadley's suicide attempt? It is kinda 'Its a Wonderful Life' with Pottersville wining out. We can just be happy that Stephenson County is fortunate enough to have this guy want to be of 'service' again?

Dadbug

Boxes and Arrows were not in original Exhibit

0007

1 day ago
Report Abuse
You must be logged in to report abuse.

Report Abuse

Hadley sure sounds better than fly boy Blum who snookered Stephenson County taxpayers into payng for Mill Race.

Remember, Blum and his supporteers borrowed $6,000,000 by getting Sacia to introduce legislation to allow county boards to borrow without getting taxpayer approval. Spent $2,000,000 for site preparation for what? No sewer or water at Mill Race and no chance of getting the millions needed to provide sewer and water. No business has located at Mill Race either which shows how stupid that idea was.

How cfan anyone support any County Board candidate that supports Mill Race and NIDA?

Hadley seems like a viable candidate to me. Just the kind of guy to study the issues, make a decision, and stick by that decision. In retrospect he appears to one of the few on the board that did this.
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