IN THE INDIANA COURT OF APPEALS

Appellate Court Cause: 49A02-1103-PL-00234

IN RE INDIANA NEWSPAPER INC., d/b/a THE INDIANAPOLIS STAR,	)	
Appellant-Non-Party,	)	
JEFFREY M. MILLER, CYNTHIA S. MILLER,	)	
Appellees-Plaintiffs,	)	Appeal from Marion Superior Court No. 14
v.	)	Honorable S.K. Reid
JUNIOR ACHIEVEMENT OF CENTRAL INDIANA, INC., JENNIFER BURK, Individually and in her Official Capacity; CENTRAL INDIANA COMMUNITY FOUNDATION, INC.; BRIAN PAYNE, Individually and in his Official Capacity	)	Trial Court Cause No. 49D14-1003-PL-014761
Appellees-Defendants.	)	

MEMORANDUM OF PUBLIC CITIZEN, INC., AS AMICUS CURIAE, IN SUPPORT OF INDIANAPOLIS STAR'S OPPOSITION TO THE MOTION TO DISMISS THE APPEAL

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This appeal involves an issue of first impression in Indiana that has been addressed consistently by state appellate courts across the country: what procedures apply, and what showings are required, when a plaintiff asserts a claim for defamation or some other tort based on anonymous online speech and seeks to identify the anonymous speaker? Based on the well-accepted First Amendment right to speak anonymously, and recognizing that First Amendment rights cannot be infringed without a compelling state interest, courts generally hold that anonymous would-be defendants must be notified of the threat to their First Amendment right to speak anonymously, and would-be plaintiffs must make both a legal and an evidentiary showing of merit before government power may be deployed to identify anonymous critics. In state after state, courts have also routinely allowed immediate appeal from trial court orders denying motions to quash or granting motions to compel such information, because the right to speak anonymously is permanently lost once an order of identification is obeyed. Dismissal of such an appeal would be particularly unfair to the anonymous speaker whose First Amendment rights are at stake, but who is not yet before the Court. Accordingly, Public Citizen urges the Court not to dismiss this appeal, but to set it for briefing and argument on the merits.

INTEREST OF AMICUS CURIAE

Public Citizen, Inc., is a public interest organization based in Washington, D.C. It has more than 225,000 members and supporters, about 2700 of them in Indiana. Since its founding in 1971, Public Citizen has encouraged public participation in civic affairs, and has brought and defended numerous cases involving the First Amendment rights of citizens who participate in civic affairs public debates. *See* http://www.citizen.org/litigation/briefs/internet.htm. In particular, Public Citizen has represented Doe defendants or Internet forum hosts or appeared as amicus curiae in

many cases involving subpoenas seeking to identify the authors of anonymous Internet messages.[1]

STATEMENT

This case arose out of a financial crisis experienced by certain projects arranged by defendant-appellee Junior Achievement ("JA"), a charitable organization of which plaintiff Jeffrey Miller was formerly the CEO. In the wake of the crisis, and its impact on several JA projects, controversy erupted between the current and former leadership of JA, which was reported in several articles in the Indianapolis Star (the "Star") and the Indianapolis Business Journal (the "IBJ"). Over a period of three weeks, from March 20 to April 6, 2010, members of the public posted anonymous comments to these stories. *See* Complaint ¶¶ 74-90. Some of the posts argued that Miller bore responsibility for the problems because he had established projects as separate entities and then appointed himself to lead the new entities, resulting in a needless drain on JA's resources. For example, identical comments on March 19 and 20 objected to the "misuse (for their own personal gain)" of charitable funds by the "former CEO [Miller] and finally fired VP"; these comments said the misuse was "at the very least an embarrassment to the dedicated staff . . . and most likely a criminal act," *id.* ¶¶ 74, 90, and called for an audit. Another comment (on April 6) stated, "These guys are crooks (Jeff Miller, Victor George and other parties) and have been robbing from our community using kids as there [sic] hook. I hope they go to jail." *Id.* ¶ 85.

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[1] The reported cases include *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. Ct. 2011); *Salehoo v. Doe*, 722 F.Supp.2d 1210 (W.D. Wash. 2010); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010); *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *Sinclair v. TubeSockTedD*, 596 F.Supp.2d 128 (D.D.C 2009); *Mobilisa v. Doe,* 170 P.3d 712 (Ariz. Ct. App. 2007); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (N.Y. Sup. 2007); *Doe v. Cahill,* 884 A.2d 451 (Del. 2005); *Sony Music Entertainment v. Does 1-40*, 326 F.Supp. 2d 556 (S.D.N.Y. 2004); *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003); *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). *See also Fitch v. Doe*, 869 A.2d 722 (Me. 2005) (addressing only the jurisdictional issue, but finding First Amendment issues were waived).

On April 3, 2010, an anonymous Internet user calling herself "DownWithTheColts" posted the following comment: "This is not JA's responsibility. They need to look at the FORMER president of JA and others on the ELEF board. The 'missing' money can be found in their bank accounts." Second Amended Complaint ¶ 87.[2] This is the statement at issue in this appeal.

Claiming that various statements both by Miller's successors at JA and by the anonymous commenters on the various news stories defamed him and damaged his reputation, and hurt a consulting business that Miller had formed with his wife, plaintiff Cheryl Miller, the Millers served subpoenas on the Star and IBJ seeking identifying information about the commenters. Both the Star and the IBJ objected to the subpoenas, citing the Indiana Shield Law as well as the qualified First Amendment privilege to speak anonymously, and opposed the Millers' ensuing motion to compel. The Millers' submissions in support of compelling discovery did not include any evidence, not even by their own affidavits, to establish falsity, and made no mention of any provision of any notice to the Does that they had served subpoenas, either by posting their own comments to the stories, nor by asking the Court to order publications to send notice to whatever email addresses had been used by the posters who commented on the two web sites.

Rather than undertaking these simple steps, which are demanded by state and federal courts throughout the country, the Millers argue that no showings were required. The trial court agreed, ordering both publications to identify their users. The IBJ complied with the order, but the Star filed this appeal, arguing that the order below is a final judgment as to it. Plaintiffs-appellees have moved to dismiss the appeal, contending that it is interlocutory and can be maintained only by permission, and that it is so insubstantial that it should be dismissed on the merits. Public Citizen addresses

[2] Female gender pronouns are used to refer to the Doe defendant in this case without meaning to imply the actual gender of the person involved.

these two issues in reverse order, because although the issue of jurisdiction must always be resolved first, an understanding of the very significant issue of first impression that is presented here is critical in addressing why the Court has appellate jurisdiction.

ARGUMENT

I. The Appeal Involves an Issue of First Impression in Indiana, but State Appellate Courts Elsewhere Consistently Hold That Plaintiffs Must Produce More Than the Millers Did Here to Be Entitled to Identify Anonymous Critics.

Plaintiffs wrongly argue that the appeal is so plainly lacking in merit that it should be dismissed without full briefing and plenary consideration. Plaintiffs contend that defamation is outside the protection of the First Amendment, and that because the speech at issue on this appeal is so plainly defamation, the Court need not consider whether there are sound reasons to withhold the power of a court order to compel the Star to identify the anonymous critic. But courts in other states, facing precisely the same argument, have understood that the argument is fundamentally unsound and, indeed, is circular. Plaintiffs have not shown the Doe defendant here defamed them — at this point, it is only an allegation, and the issue in a case like this is what showing a plaintiff should have to make before an anonymous critic is stripped of that anonymity by an exercise of government power.

Courts in other states that have addressed this question have been guided by the following considerations. First, a subpoena compelling the disclosure of identifying information is state action, like any other injunction or indeed an award of damages that is based on allegedly defamatory speech, and hence is subject to First Amendment scrutiny. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Organization for a Better Austin v. Keefe*, 402 US 415 (1971). And the right to speak anonymously is firmly protected by the First Amendment: "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and

of dissent." *McIntyre v. Ohio Elections Comm.,* 514 U.S. 334, 356 (1995). Because "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment," *id.* at 342, that right cannot be taken away without a compelling state interest. So the question is, does the fact that a plaintiff has filed a lawsuit over a particular piece of speech create a compelling government interest in taking away the anonymity?

Moreover, much of the speech in the public forum in today's world is online. Because of the way the Internet works, almost everything that we do online — particularly visiting web sites and posting comments there — is likely to be tracked by the servers on which the web sites are maintained. Therefore, as courts have recognized, if the rule were that anybody who wanted to know the identity of the speaker could get that information, just for the price of filing a lawsuit and sending out a subpoena, speech would be greatly chilled. *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.").

There have been a number of cases in which plaintiffs — and their lawyers, when the cases are not filed pro se — have filed cases and sought subpoenas without having a genuine intention of pursuing a defamation case to judgment, but instead because they hope to learn who the critics are and then take care of the matter out of court. At the same time, sometimes speakers take advantage of their apparent ability to speak without the possibility of attribution because they think they can escape the entirely proper legal consequences of improper speech. The challenge for courts is to find a standard that neither makes it too easy nor too hard to identify anonymous speakers. Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak

anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Doe v. Cahill*, 884 A.2d at 457. But setting the bar too high will make it impossible for plaintiffs with perfectly valid claims for defamation and other torts to identify their defendants and proceed with their cases.

The Millers' motion to dismiss is predicated on the assumption that requiring them to follow any procedures and to make **any** showing will make anonymous speakers immune from identification and immune from liability, but that argument has not persuaded any of the other state appellate courts that have considered this issue.

The leading decision on this subject, *Dendrite v. Doe*, 775 A.2d 756, established a five-part standard that has provided the following model, which has been followed or adapted throughout the country:

> **1. Give Notice:** Courts require the plaintiff (and sometimes the Internet Service Provider) to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.
>
> **2. Require Specificity:** Courts require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights.
>
> **3. Ensure Facial Validity:** Courts review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.
>
> **4. Require An Evidentiary Showing:** Courts require the plaintiff to produce evidence supporting each element of its claims.
>
> **5. Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.
>
> *Id.* at 760-61.

Courts in many states have accepted all five parts of this test;[3] in other states, courts have followed only the first four parts of the test, omitting the balancing stage.[4] Public Citizen urges the Court to follow *Dendrite* in its entirety, including the explicit equitable balancing stage. Under either approach, however, plaintiffs have not satisfied the test because they failed to comply with either part one, giving notice, or the fourth part, providing evidence in support of their claims.[5]

In this case, assuming that DownWithTheColts has made false statements of fact about Jeffrey Miller, Miller can supply an affidavit or other evidence of the actual facts. And there is no reason why Miller cannot wait for a response from DownWithTheColts pursuant to court-ordered notice. Applying these tests will not prevent the Millers from proceeding with their lawsuit, if it has merit.

II. The Court Should Exercise Appellate Jurisdiction.

The Millers argue that the appeal is an impermissible interlocutory appeal that has been undertaken without jurisdiction. Public Citizen agrees with the Star's argument that, because it is a non-party that will play no further part in the case, the appeal is a final judgment as against the Star

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[3] *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. Ct. 2011); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184, 192 (N.H. 2010); *Independent Newspapers v. Brodie*, 966 A.2d 432, 456-457 (Md. 2009); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Ct. 2007).

[4] *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Krinsky v. Doe 6*, 72 Cal.Rptr.3d 231 (Cal.App. Ct. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex. Ct. App. 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

[5] Plaintiffs argue that applying this test will effectively immunize anonymous speakers by depriving defamation victims of any recourse, Dism. Mem. 2, 3, 13-14, but that argument is demonstrably false — many Doe defendants are identified after the *Dendrite* test is applied. Indeed, two of the four Does in the *Dendrite* case were identified, and the plaintiff in a companion case, *Immunomedics v. Doe,* 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001), heard by the same panel of judges, was also able to meet the standard. Similarly, Does were identified following the submission of evidence in such cases as *Does v. Individuals whose true names are unknown*, 2008 WL 2428206 (D. Conn. June 13, 2008), and *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004)

and hence is appealable for that reason. Indeed, as the Star points out, once the Star complies with the order to produce the Doe's identifying information, waiting for the end of the case would leave it nothing to appeal because the order to supply identifying information will be moot.

Moreover, if the Court agrees with the Millers that the Star could and should have sought leave to appeal from the trial court, the Court should consider the issue of appellate jurisdiction in light of the fact that the order affects the First Amendment rights of the Doe, a party who was not before the trial court because plaintiffs declined to take the steps required by the *Dendrite* standard to ensure that the Doe was notified of the effort to compel her identification. In this regard, appellate courts in other states have consistently permitted appellate review of orders compelling third parties to identify anonymous Internet speakers who posted comments on forums that they provided. Several courts have squarely addressed the issue of appellate jurisdiction in the course of accepting review. *Fitch v. Doe*, 869 A.2d at 725 (Me. 2005); *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003). Several other courts have accepted such appeals without discussion of jurisdiction. *E.g., Independent Newspapers v. Brodie*, 966 A.2d at 456-457 (Md. 2009); *Krinsky v. Doe 6*, 72 Cal.Rptr.3d 231 (Cal. App. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex.App. - Texarkana 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Immunomedics v. Doe,* 342 N. J. Super. 160, 775 A.2d 773 (N.J. Super. 2001).

As the Maine Supreme Court noted, "disclosure of Doe's identity will strip Doe of anonymity, making a later appeal moot." *Fitch v. Doe*, 869 A.2d at 725. *See also Melvin v. Doe*, *supra*, 836 A.2d at 50 ("once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure"). Thus, said the Pennsylvania Supreme Court, "the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, . . . that . . . falls within the class

of rights that are too important to be denied review." *Id.*

Indiana courts have previously accepted appeals by publishers or broadcasters from orders enforcing subpoenas that presented serious First Amendment issues. *In re WTHR-TV*, 693 N.E.2d 1 (Ind. 1998); *In re. Subpoena Duces Tecum to Stearns*, 489 N.E.2d 146 (Ind. Ct. App. 1986). In light of the significant First Amendment issues presented by the order below, the Court should hold that it has jurisdiction and proceed to hear this appeal.

CONCLUSION

The motion to dismiss the appeal should be denied.

Respectfully submitted,

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April 25, 2011

VERIFICATION

Pursuant to Ind. Appellate Rule 34(F), I declare under the penalties for perjury that the facts in the foregoing Response to Verified Motion to Dismiss Notice of Appeal For Lack of Appellate Jurisdiction are true and correct.

_____

Steven M. Badger

WORD COUNT CERTIFICATE

I verify that this Memorandum of Public Citizen as Amicus Curiae contains fewer than 4200 words.

_____
Steven Badger (No. 16354-49)

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing response has been served this 25th day of April, 2011, by depositing a copy of the same in the United States Mail, first-class postage prepaid, and properly addressed to the following counsel of record:

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