IN THE COURT OF APPEALS OF MARYLAND

September Term 2008

No. 63

INDEPENDENT NEWSPAPERS, INC.,

Appellant,

v.

ZEBULON J. BRODIE,

Appellee.

On Appeal from the Circuit Court for Queen Anne's County
(Honorable Thomas G. Ross, Judge)

REPLY BRIEF OF APPELLANT

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A. This Court Should Adopt the Consensus Standard for the Identification of Anonymous Internet Speakers Who Are Sued for Their Speech.

In its opening brief, appellant Independent Newspapers, Inc. urged the Court to balance the right to speak online anonymously against the right of a party that is truly injured by tortious speech to secure judicial redress by following the broad consensus developed among the many state appellate and federal district courts that have addressed the question. As we showed, those courts require a multi-part showing by the plaintiff that includes at the very least (1) notice to the Does and an opportunity to respond, (2) furnishing the entire allegedly tortious statement, (3) pleading a valid cause of action based on each such statement, (4) supplying evidence supporting a prima facie case on each element of that cause of action, and, in many states, (5) balancing the First Amendment against other interests at stake. We explained why courts in other states had adopted that standard (with or without the fifth element), and argued that plaintiff Brodie had not come close to meeting that standard on the current record.

Brodie's brief never comes to grips with the arguments in our opening brief. He rejects the consensus standard, but never explains why he believes that courts across the country have come to the wrong conclusion. He does suggest that no real balancing is needed in cases like this one because defamatory speech, and particularly speech that is supposedly defamatory per se, is not protected by the First Amendment. Brodie Br. 2, 3, 6. However, this argument only begs the question, because in this case there is no proof that the Doe defendants were engaged in unprotected speech by making false and defamatory statements with actual malice. At most, Brodie has only **alleged** that the defendants' speech

was false and defamatory; and, as we argued in our first brief and further show below, even Brodie's pleadings are wanting. Moreover, our opening brief argued, at 29, that although statements denigrating a plaintiff's fitness for professional or business duties may be defamatory per se, statements about a single instance in an individual's conduct of his business are **not** defamatory per se; Brodie never meets this argument, but simply assumes it away.

The very purpose of the balancing test is to separate those cases in which the defamation is only claimed from those in which the plaintiff has a realistic chance of prevailing because all the elements of a defamation claim have been properly pleaded and the plaintiff has prima facie evidence in support of his claims. Brodie never argues that it is unfair to plaintiffs to require such a showing before a speaker loses his right to remain anonymous, and never explains why he failed to offer any such evidence here.

Instead of discussing the wealth of state appellate and federal district court decisions that have enunciated the consensus standard, Brodie repeats the argument in his brief below, mentioning four cases — *Sony,*[1] *Seescandy,*[2] *AOL,*[3] and *Dendrite*[4] — and then offers what

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[1]*Sony Music v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004)

[2]*Columbia Ins. Co. v. Seescandy*, 185 F.R.D. 573 (N.D. Cal. 1999).

[3]*In re Subpoena Duces Tecum to America Online*, 52 Va. Cir. 26 (2000), *rev'd on other grounds sub nom. AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001)

[4]*Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001).

he calls a "hybrid *Sony/Dendrite* approach" that requires neither notice, nor the entire actionable statement, nor the presentation of any evidence to support the plaintiff's claim, nor the fifth and final balancing step. Calling this one-part standard a hybrid of *Dendrite* and *Sony* is most peculiar. Both *Dendrite* and *Sony* required that notice be given to the Does. Both required the plaintiff to enumerate the entire allegedly actionable statement(s). Both *Dendrite* and *Sony* required the plaintiffs in those cases to present evidence – the *Sony* court allowed discovery because it deemed the plaintiffs' affidavits and exhibits sufficient to show copyright infringement, while *Dendrite* denied discovery because that plaintiff's evidence was insufficient to show damages from defamation. In the circumstances, it is not clear how Brodie's standard could be a hybrid of those two decisions. Indeed, the *Seescandy* court also considered evidence (of actual confusion) in deciding the plaintiff there could proceed to identify the Doe defendants accused of trademark infringement, and the *AOL* court said discovery should be allowed "when the court is satisfied by the pleadings **or evidence** supplied to that court." 52 Va. Cir. at 37.[5] It is indeed strange to derive a standard that excuses the plaintiff from supplying any evidence of defamation after discussing four cases that **all** provide for the presentation of evidence. Brodie never explains why a plaintiff in his position who claims that false statements have been made about his business cannot present

[5] After *AOL* was decided, Virginia adopted a statute requiring notice, thirty days to respond, attachment of the entire communication alleged to be unlawful, and a concrete showing both of the "legitimate, good faith basis" for the legal claim that is said to support discovery, and that the speaker's identity is centrally needed to advance the claim. Virginia Code §§ 8.01-407.1(A).

evidence showing falsity and damages to his business.

Similarly, *Dendrite* expressly included a balancing standard, and *Sony* implied one, in that its decision rested on the proposition that offering recordings allegedly copyrighted by others for download implicated the freedom of speech under the First Amendment, even if that speech had minimal value (and thus, impliedly, the right to engage in that activity anonymously could be overcome through a lesser showing of need). 326 F. Supp.2d at 564. Yet Brodie never explains why the principles of equity do not demand a balancing stage before he achieves equitable relief – an order to a newspaper to identify anonymous users of its web site who made statements in a community forum.

Brodie does take specific issue with one aspect of the national consensus standard – he argues against the adoption of any requirement of notice to the Doe defendants, quoting the decision below that

> it would be disingenuous and exceed all bounds of equity to inform a plaintiff that his right to seek redress is barred because he has not done something never before required of a similarly situated person, i.e., posting information to the Defendants Doe that he is seeking their identifying information.
>
> Brodie Br. 9-10.

In fact, however, it is the denial of notice before relief is granted in favor of the plaintiff and against the defendants that would be unprecedented – indeed, notice and an opportunity to defend is a fundamental requirement of constitutional due process. *Jones v. Flowers*, 547 U.S. 220 (2006). Although mail or personal delivery is the most common method of providing notice that a lawsuit has been filed, there is ample precedent for posting where

there is concern that mail notice may be ineffective, such as when action is being taken against real property and notice is posted on the door of the property, *id.* at 235, or when action is being taken against personal property and notice is published in the newspapers. In the Internet context, posting on the Internet message board where the allegedly actionable speech occurred is often the most effective way of reaching the anonymous defendants, and the Court is urged to follow the *Dendrite* example by requiring posting in addition to any other means that are likely to be effective.

In sum, Brodie offers the Court no reasons why it should not adopt the five-step *Dendrite* balancing standard for which Independent Newspapers argued in its opening brief. At a minimum, the order under appeal should be reversed and so that the trial court can review the record for compliance with that standard.

B. The Order Allowing Discovery of the Doe Speakers' Identity Should be Reversed and the Case Remanded with Instructions to Dismiss in Whole or in Part.

Because Brodie did not offer any evidence in support of his defamation claims, adoption of the consensus standard would require, at a minimum, reversal of the order allowing discovery and a remand to permit Brodie to introduce such evidence. However, as we argue in this section of the brief, even broader relief should be granted by this Court, because Brodie has not met the other elements of the national consensus standard, or even of Brodie's own profferred standard. The extent of the relief granted depends on which of the following arguments the Court accepts.

1. We argued in our opening brief, at 22-23, that Brodie had not met the second part

of the *Dendrite* test because he did not introduce the complete thread of comments that included the allegedly defamatory comments, and the materials introduced left it ambiguous whether the statement about the "dirty and unsanitary" status of the Dunkin' Donuts restaurant was made by RockyRaccoonMD, as Brodie originally contended below, Record Extract E60, or by CorsicaRiver, as Brodie seems to assume in his appellate brief, at 13.[6] This is a potentially crucial point because, as discussed below, although CorsicaRiver was identified as a Doe defendant in the complaint, E09, Brodie has never made RockyRaccoonMD a party defendant, and the statute of limitations has expired. On remand, the court below should require Brodie to produce the complete discussion thread; if Brodie cannot show that CorsicaRiver was responsible for the statement, he will be unable to proceed further with his claim based on that statement. Brodie has not contested this argument in his brief.

2. We argued in our opening brief that Brodie had not pleaded viable claims against the Doe defendants, for three separate reasons:

(1) his claims are about statements that are hyperbolic opinions and not verifiable statements of fact;

(2) the statements about the Dunkin' Donuts merely address how it was on a single occasion, so that under the "single instance" rule Brodie must

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[6]In his Statement of Facts, at 1-2, Brodie apparently accepts the accuracy of the Statement of Facts in our opening brief, which said that it was not clear whether this allegedly actionable statement had been made by RockyRaccoonMD or by CorsicaRiver.

allege and prove special damages, which he has not done; and

(3) Brodie has never alleged **any** cause of action against "Suze" or "RockyRaccoonMD," and the statute of limitations has expired, so outright reversal of the discovery order is appropriate insofar as the order authorizes discovery to identify those two defendants.

Brodie takes issue with only the first of these three points; the others stand uncontested, and hence, at a minimum, the Court should order reversal and remand to permit Brodie to plead and present evidence of special damages so long as he can establish that it was CorsicaRiver and not RockyRaccoonMD who was responsible for the statement about "dirty and unsanitary" conditions at the Dunkin' Donuts.

3. We argued in our opening brief that neither of the allegedly actionable statements represented anything more than nonactionable opinion. Because Brodie's reasons for treating the statements as defamatory statements of fact are not persuasive, the Court should order outright reversal and remand with instructions to dismiss the complaint against all the Does. Brodie's principal argument for not treating the statements as matters of opinion is a passage that he quotes from the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-18 (1990), that a speaker cannot transform a defamatory statement of fact into a protected statement of opinion simply by prefacing the libel with the words "in my opinion." Brodie Br. at 11-12. But Independent Newspapers does not rely on any such evasion; indeed neither of the allegedly actionable statements includes the words "in my

opinion." We argued in our opening brief that the statements should be regarded as opinion because of their hyperbolic character, because of the use of a "smiley," which tends to imply that an opinionated statement is being made, and because the speakers made clear that they were not reporting on a verifiable fact – the objective character of the Dunkin' Donuts – but on the non-verifiable comparison of how the Dunkin' Donuts compared to other facilities that those speakers had seen. We also relied on decisions from neighboring states holding that reviews of restaurants tend to be treated as opinion and not fact. Brodie does not take issue with these additional reasons for reversing the order allowing discovery.

CONCLUSION

The order denying Independent Newspaper's Motion to Quash and for Protective Order should be reversed, and the motion should be granted in its entirety. In the alternative, the order should be vacated and the case should be remanded with instructions that Brodie be allowed to replead and to present evidence to the trial court in accordance with the reasoning of the Court's opinion.

Respectfully submitted,

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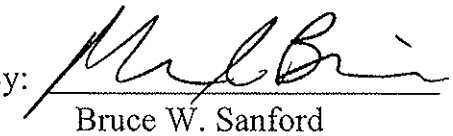
By: 

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