

SCHWARTZ AND BLACKMAN
STACEY L. SCHWARTZ, ESQUIRE
I.D. No. 23353
PHILIP L. BLACKMAN, ESQUIRE
I.D. No. 23046
Two Liberty Place
50 S. 16th Street, 28th Floor
Philadelphia, PA 19102
(215)925-4451

Attorneys for defendant, FBPDPPLT

JOHN J. DOUGHERTY,
Plaintiff

v.

FBPDPLT,

Defendant

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

OCTOBER TERM, 2012
No. 3755

**DEFENDANT'S, FBPDPPLT, MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S PETITION TO COMPEL DISCLOSURE OF' DEFENDANT'S IDENTITY**

I. MATTER BEFORE THE COURT

Plaintiff's Petition to Compel Disclosure Of Defendant's Identity

II. STATEMENT OF QUESTIONS INVOLVED

Should Plaintiff's Petition to Compel Disclosure Of Defendant's Identity be denied.

Answer desired or advocated: Yes

III. FACTS

Defendant, fbpdplt, did attempt to post a comment on August 10, 2012, on Chris Brennan's blog regarding Brennan's article "Giordano versus Johnny Doc in Chick-fil-A cluster cluck". Defendant wanted to comment with regard to the controversy surrounding the statements

made by Dan Cathy, Chick-fil-A president's in opposition to same sex marriage and the subsequent comments made by Dom Giordano and John Dougherty referred to in the article. Defendant was expressing his frustration with regard to the attacks being made on Cathy and Giordano, because they were exercising their First Amendment. Defendant, never actually saw his comment on the blog, did not print out a copy and after almost seven months does not remember what the comment stated. Further no comment made by defendant was made with actual malice. In any event, even if for argument sake only, the wording submitted by plaintiff is the wording of the comment that defendant posted, said comment is not defamatory and is not defamatory *per se*.

Plaintiff has now filed a Petition to Compel Disclosure Of Defendant's Identity. This Answer and memorandum of law are filed in opposition to said Petition, and pursuant to Judge Rosalyn K. Robinson's Order of March 13, 2013. A true and correct copy of Judge Robinson's Order is attache hereto as Exhibit "1".

IV. LEGAL ARGUMENT

A. PLAINTIFF'S PETITION SHOULD BE DENIED BECAUSE HE HAS FAILED TO ATTACH AN ORIGINAL OR DUPLICATE OF THE ALLEGED BLOG WHICH HAS THE ALLEGED DEFAMATORY STATEMENT.

Plaintiff's Petition should be denied because he has failed to attach an original or duplicate of the alleged blog which has the alleged defamatory statement in it. Pennsylvania Rule of Evidence 1002 states "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, by other rules prescribed by the Supreme Court, or by statute." Under Pennsylvania Rule of

Evidence 1003, “a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original”. In the instant case, plaintiff has not submitted the original or a duplicate of the blog where the alleged defamatory statement was posted. This is significant because defendant, never actually saw his comment on the blog, did not print out a copy and after almost seven months does not remember what the comment stated. Therefore, defendant can not state that the alleged defamatory statement is the comment he made.

Therefore, it is respectfully submitted that Plaintiff’s Petition should be denied.

B. PLAINTIFF HAS FAILED TO SATISFY THE NECESSARY REQUIREMENTS TO PERMIT THE DISCLOSURE OF DEFENDANT’S IDENTIFY AS STATED IN *PILCHESKY V. GATELLI*

Plaintiff has failed to satisfy the necessary requirements to permit the disclosure of defendant’s identify as stated in *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa.Super) 2011.

In *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa.Super 2011), the Superior Court held that a Plaintiff’s Petition to Compel Disclosure of a Defendant’s Identity as in the instant case should be denied unless four requirements are met: (1) “The reviewing court must ensure that the John Doe defendant receives proper notification of a petition to disclose his identity and a reasonable opportunity to contest the petition. 12 A.3d 430,442 ; (2) “Every plaintiff who petitions the court to disclose the identity of an anonymous or pseudonymous communicator must present sufficient evidence to establish a prima facie case for all elements of a defamation claim, within the plaintiff’s control, such as would survive a motion for summary judgment”. 12 A.3d 430,442-443; (3) “A petitioner must submit an affidavit asserting that the requested information is sought

in good faith, is unavailable by other means, is directly related to the claim and is fundamentally necessary to secure relief". 12 A.3d 430,444-445 ;and (4) "the court must expressly balance the defendant's First Amendment rights against the strength of the plaintiff's prima facie case". 12 A.3d 430,445.

Plaintiff in his Petition and memorandum of law attached thereto has acknowledged that in order to state a claim for defamation under Pennsylvania law a plaintiff must prove :

- (1) The defamatory character of the communication.
- (2) Its publication by the defendant.
- (3) Its application to the plaintiff.
- (4) The understanding by the recipient of its defamatory meaning.
- (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
- (6) Special harm resulting to the plaintiff from its publication.
- (7) Abuse of a conditionally privileged occasion. 42 PaC.S.A. §8343

(See page 6, paragraph 20 of Plaintiff's Petition and page 6 of Plaintiff's Memorandum of Law).

The Superior Court of Pennsylvania in Moore v. Cobb-Nettleton, 889 A.2d 1262, 1267

(Pa. Super. 2005) restated the elements of a cause of action for defamation as follows:

"In a defamation case, a plaintiff must prove: "(1) The defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion".

Further, the Commonwealth Court of Pennsylvania in *Alston v. PW-Philadelphia Weekly*, 980 A.2d 215,220 (Pa. Cmwlth.2009) made it clear it is not until all of the elements of the cause of action for defamation are established by the plaintiff that the trial court then determines whether the challenged publication is capable of a defamatory meaning . In that regard, the Court in *Alston* stated:

“In pursuing an action for defamation against a defendant, a plaintiff must establish: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; (7) abuse of a conditionally privileged occasion. 42 Pa.C.S. § 8342. It is then left to the trial court to determine whether the challenged publication is capable of a defamatory meaning by considering whether the statement “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him”.

Plaintiff has failed to establish “special harm resulting to the plaintiff from its publication”. The “specific harm” requirement requires the plaintiff to establish a “....specific monetary or out of pocket loss as a result of the defamation”. *Cornell Companies, Inc. v. Borough of New Morgan*, 512 F. Supp. 238,271 (E.D.Pa. 2007).

Plaintiff in his Petition acknowledges that he has failed to establish “special harm”. However, he asserts that he does not have to establish “special harm” because the alleged defamatory statement constitutes libel *per se*. In that regard, plaintiff relies on the case of *Cornell Companies, Inc. v. Borough of New Morgan*, 512 F. Supp. 238 (E.D.Pa. 2007) which states: “The special harm element is eliminated, however, where the words constitute defamation *per se*. Defamation *per se* can be either “ ‘words imputing (1) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct”. 512 F. Supp. 238, 271. Plaintiff asserts that the alleged defamatory statement falls under words imputing (1) criminal offense and (4) serious sexual misconduct. It is respectfully submitted that calling someone a pedophile does not impute a criminal offense and/or serious sexual misconduct. Webster’s New Collegiate Dictionary defines a pedophile as “one affected with pedophilia. Pedophilia is defined

as “sexual perversion in which children are the preferred sexual object”. Neither definition establishes an **act or conduct** against a child that would constitute a criminal offense and/or serious sexual misconduct . Therefore, plaintiff has to establish “special” harm, which he has failed to do.

In any event, plaintiff has to establish actual damages, which he has not done. In that regard the Superior Court in *Pilchesky* stated “[h]owever, every defamation plaintiff must prove ‘actual damages’. More is required than a bald assertion that the defamatory statements harmed a plaintiff’s reputation ‘ in a social, civil, professional and political community’.”¹² A.3d 430,444.

Plaintiff’s reliance on *Morgenstern v. Fox Television Stations of Philadelphia*, 2008 WL 4792503 (E.D.Pa.) and *Linnelli v. Grattan*, 200 Pa. Dist. & Cnty. Dec LEXIS 379, *5-6 (Allegh. Cty. 2000) is misplaced. Plaintiff Dougherty was a defendant In *Morgenstern*. In *Morgenstern* the defamation claim involved a statement that Morgenstern was “conducting an online relationship with a 15-year-old girl” which was denied by Morgenstern as being false. In *Linnelli*, the Court was considering whether the defendant’s joint income tax returns should be produced for purposes of the plaintiff’s claim for punitive damages. The Court in *Linnelli* did not hold that the alleged defamatory statement in that case was defamation *per se*.

The alleged statement even if made for argument sake was not defamatory, because it constituted an opinion. As stated by the Superior Court of Pennsylvania in *Moore v. Cobb-Nettleton*, 889 A.2d 1262,1267 (Pa. Super. 2005) “...only statements of fact, not expressions of opinion can support an action in defamation”. The alleged defamatory statement even if made was defendant’s opinion and therefore was not a defamatory communication. As a result, there

could be no understanding by the recipient of its defamatory meaning, because it had no defamatory meaning.

Further, defendant has a conditional privilege to anonymously make comments, relating to current controversial issues, such as same sex marriage. As stated by the Superior Court of Pennsylvania in *Beckman v. Dunn* 419 A.2d 583, 587. (Pa.Super., 1980):

“Communications made on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause are privileged [citations omitted].

An occasion is conditionally privileged when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know.[citations omitted]

Thus, proper occasions giving rise to a conditional privilege exist when: (1) some interest of the person who publishes defamatory matter is involved; (2) some interest of the person to whom the matter is published or some other third person is involved; or (3) a recognized interest of the public is involved.”

It is also respectfully submitted that in light of the above the balancing of the equities favors the protection of defendant’s First Amendment rights over the relief requested by plaintiff.

Therefore, it is respectfully submitted that Plaintiff’s Petition to Compel Disclosure Of Defendant’s Identity be denied.

V. RELIEF REQUESTED

For all the above stated reasons, defendant respectfully requests that Plaintiff’s Petition to Compel Disclosure Of Defendant’s Identity be denied.




STACEY L. SCHWARTZ, ESQUIRE
PHILIP L. BLACKMAN, ESQUIRE
Attorneys For defendant

Date: April 15, 2013

CERTIFICATION OF SERVICE

I, Philip L. Blackman, Esquire, hereby certify that a true and correct copy of the foregoing Defendant's, fbpdplt, Answer/response in Opposition to Plaintiff's Petition to Compel Disclosure of Defendant's Identity Memorandum of Law and attachments is being served on the following person by electronic filing and fax:

Richard A. Sprague, Esquire
Sprague & Sprague
The Wellington Building, suite 400
135 South 19th Street
Philadelphia, PA 19103


Philip L. Blackman, Esquire

Dated: April 15, 2013