

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS M COOLEY LAW SCHOOL,

Plaintiff-Appellee,

v

JOHN DOE 1,

Defendant-Appellant,

and

JOHN DOE 2, JOHN DOE 3, and JOHN DOE 4,

Defendants.

FOR PUBLICATION

April 4, 2013

9:00 a.m.

No. 307426

Ingham Circuit Court

LC No. 11-000781-CZ

Advance Sheets Version

Before: WHITBECK, P.J., and METER and BECKERING, JJ.

WHITBECK, P.J.

This appeal concerns the complicated interplay between First Amendment protections of the freedom of speech and the Michigan Court Rules concerning discovery. Plaintiff, Thomas M. Cooley Law School (Cooley), filed a complaint in the Ingham Circuit Court against defendant John Doe 1 (Doe 1) and others, alleging, in part, defamation arising from statements that Doe 1 made, under a pseudonym, on a website that criticized Cooley. Doe 1 moved in the trial court to (1) quash a subpoena that Cooley obtained in California seeking his identity, and (2) issue a protective order. Doe 1 now appeals by leave granted an order of the trial court denying his motion to quash the California subpoena. He argues that the First Amendment’s protections for anonymous free speech shield his identity. We reverse and remand.

I. FACTS

A. BACKGROUND FACTS

Doe 1 created an Internet website at Weebly.com, owned by California-based Weebly, Inc. (Weebly), using the pseudonym “Rockstar05.”¹ Doe 1 titled the website “THOMAS M. COOLEY LAW SCHOOL SCAM.”

¹ Though this pseudonym is gender neutral and “John Doe 1” may refer to an unknown man or woman, the parties referred to Doe 1 by the masculine gender in their briefs and oral arguments. We will also use the masculine gender.

Describing himself as a former student of Cooley, Doe 1 stated that “Cooley is without a doubt one of the three worst law schools in the United States . . . and [is] considered THE BIGGEST JOKE of all law schools amongst other law students.” In the body of the post, Doe 1 listed “multiple reasons for this,” including: (1) Cooley’s “open door” policy, (2) Cooley’s attrition rate and administrative policies, (3) “the ‘Cooley Rankings’” (4) that Cooley “IS A DIPLOMA MILL,” and (5) that Cooley’s graduates are unemployed. Doe 1 claimed that he would “elaborate and address each of these [claims] in order, backed by statistics and facts, painting a real picture of what Cooley is really like[.]”

Doe 1 arranged the body of his blog in an outline format, comprised of headings followed by external website links and Doe 1’s commentary. Doe 1’s commentary frequently included capital letters, multiple instances of incorrect punctuation, expletives, advice, misspellings, and references to pop culture. Doe 1 permitted visitors to post their own comments on the website, and frequently responded to the commentators. After April 1, 2011, however, he began to “filter” comments, noting that he would delete “any stupid or irrelevant comments or personal attacks[.]”

B. PROCEDURAL HISTORY BELOW

Cooley filed the complaint in the Ingham Circuit Court on July 14, 2011, against several John Doe defendants. Cooley’s complaint against Doe 1 alleged that he made defamatory accusations that Cooley and its representatives “are ‘criminals’ and have committed ‘fraud,’” that Cooley deceived and provided false information to attain business, and that Cooley “uses its clout to ‘prey’ on current and prospective students, stealing their tuition money to ‘become more rich.’” On July 25, 2011, Cooley petitioned the Superior Court of California, County of San Francisco, to issue a subpoena to Weebly. On August 3, 2011, the California court issued a subpoena to Weebly, ordering it to produce documents that included Doe 1’s user account information. On August 5, 2011, Doe 1 filed a motion in the Ingham Circuit Court, requesting that it quash any outstanding subpoenas to Weebly or, alternatively, issue a protective order limiting or restricting Cooley’s use or disclosure of his identifying information.

On August 9, 2011, Weebly’s chief of customer satisfaction promised Doe 1’s attorney that he would not disclose Doe 1’s identifying information until August 22, to allow him to obtain a ruling on his motion to quash. But on August 17, 2011, another Weebly employee released Doe 1’s identifying information to Cooley. On August 18, 2011, Cooley requested that Doe 1 withdraw his motion to quash on the basis that the motion was now moot; Doe 1 declined.

On August 29, 2011, Cooley filed an amended complaint that identified Doe 1 by his legal name. Doe 1 supplemented his motion to quash and moved in the trial court to strike the identifying information, arguing that Cooley violated Michigan discovery rules by using information that Doe 1 claimed was protected.

C. THE TRIAL COURT’S DECISION

In September 2011, the trial court heard arguments on Doe 1’s motion to quash. Doe 1’s counsel agreed that the motion to quash was moot because Weebly had disclosed the information, but clarified that he was “seeking this motion as an alternative, a protective order.” The trial court provisionally ruled that Weebly might have inadvertently disclosed the information for the purposes of MCR 2.302(B)(7). It struck Cooley’s amended complaint and

ordered Cooley not to initiate further discovery or disclose the information pending its final decision on the motion. On October 3, 2011, the trial court ruled that the motion to quash was not moot, reasoning that its ruling on Doe 1's motion to strike placed the parties back in the positions they occupied before Weebly disclosed the information.

On October 24, 2011, the trial court heard continued arguments on Doe 1's motion to quash. After extensive reasoning, the trial court determined that there was no Michigan law on point and examined decisions from other jurisdictions, including *Dendrite Int'l, Inc v Doe, No 3*² and *Doe No 1 v Cahill*.³ The trial court determined that, in order to adequately protect Doe 1's interests in remaining anonymous, it must balance those interests against Cooley's interests in holding Doe 1 accountable for alleged defamation.

The trial court adopted and applied the *Dendrite* analysis. Under that analysis, it ruled that Doe 1 had been notified and that Cooley had sufficiently alleged slander per se. It ruled that statements that are slanderous per se are not entitled to First Amendment protection, and thus Cooley would not have to prove actual malice. The trial court's order denied Doe 1's motion to quash, declined to grant him a protective order for "the reasons stated on the record," and allowed Cooley to use the information that it discovered from Weebly. However, the trial court stayed its ruling pending Doe 1's appeal to this Court.

On November 29, 2011, Doe 1 filed an application for leave to appeal the trial court's order, which this Court granted in an unpublished order, entered May 25, 2012 (Docket No. 307426). On July 11, 2012, Cooley moved to dismiss this appeal as moot. This Court denied Cooley's motion to dismiss in an unpublished order, entered July 20, 2012 (Docket No. 307426).

II. MOOTNESS

A. STANDARD OF REVIEW

This Court reviews de novo questions of law.⁴

B. LEGAL STANDARDS

Michigan courts exist to decide actual cases and controversies, and thus will not decide moot issues.⁵ A matter is moot if this Court's ruling "cannot for any reason have a practical

² *Dendrite Int'l, Inc v Doe, No 3*, 342 NJ Super 134; 775 A2d 756 (2001).

³ *Doe No 1 v Cahill*, 884 A2d 451 (Del, 2005).

⁴ *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

⁵ *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002).

legal effect on the existing controversy.”⁶ Even if moot, this Court may consider a legal issue that “is one of public significance that is likely to recur, yet evade judicial review.”⁷

C. APPLYING THE STANDARDS

Cooley argues that the issues presented in this appeal are moot because Weebly disclosed Doe 1’s identity to Cooley. Therefore, because Cooley cannot “unlearn” his name, Doe 1’s anonymity is destroyed. We conclude that the issues presented in this appeal are not moot because Cooley’s knowledge does not prevent this Court from granting relief that will have a practical legal effect on the controversy.

Doe 1 filed his motion to quash the subpoena and issue a protective order before Cooley learned his identity. Although Cooley filed an amended complaint with Doe 1’s true name on it, the trial court acted within 10 days to sequester all documents in the lower-court record that contain Doe 1’s name. The trial court also ruled that Doe 1’s identifying information was inadvertently disclosed for the purposes of MCR 2.302(B)(7). Cooley argues that members of the public may have accessed the trial court documents in that period, but there is no indication that this actually occurred.

Finally, Cooley contended at oral arguments that, because Doe 1 applied for membership in the State Bar of California, his anonymity was destroyed because the State Bar of California is aware of his involvement in this suit. But it was also stated at oral arguments that applications to the State Bar of California are confidential. Thus, Doe’s application alone would not reveal his identity to the public. There are simply no indications that Doe 1’s anonymity was destroyed or that this Court is unable to fashion the relief Doe 1 seeks.

Further, whether and in what fashion the identity of an anonymous Internet speaker can be discovered or protected under Michigan law is a publically significant issue concerning the First Amendment. In this age of Internet blogging, this issue is likely to reoccur. And if the disclosure of a John Doe’s name to a handful of attorneys and court officers is sufficient to render this issue moot, the issue would also be likely to evade judicial review. We conclude that we may, and should, reach the merits of the issues on appeal.

III. THE FIRST AMENDMENT AND ANONYMOUS SPEECH

A. FREEDOM OF SPEECH

The First Amendment of the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech”⁸ The Michigan Constitution provides that “[e]very person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the

⁶ *Gen Motors Corp v Dep’t of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010); *Federated Publications, Inc*, 467 Mich at 112.

⁷ *Federated Publications, Inc*, 467 Mich at 112.

⁸ US Const, Am I.

liberty of speech”⁹ The United States and Michigan Constitutions provide the same protections of the freedom of speech, and this Court does not interpret the Michigan Constitution’s protections of speech more broadly than the federal constitution’s protections.¹⁰ Thus, this Court may consider federal authority when interpreting the extent of Michigan’s protections of free speech.¹¹

The United States Supreme Court has held that the federal constitution protects speech over the Internet to the same extent as speech over other media.¹² The United States Supreme Court has also determined that “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.”¹³

B. DEFAMATORY SPEECH

But a defendant’s right to speak freely is not absolute.¹⁴ The First Amendment does not protect “certain categories of speech, including defamation[.]”¹⁵ Generally, “[a] communication is defamatory if it tends to so 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.”¹⁶

C. STANDARDS PROTECTING ANONYMOUS SPEECH IN OTHER JURISDICTIONS: *DENDRITE, CAHILL, AND OTHER STANDARDS*

To very different extents, courts in other jurisdictions have attempted to balance a defendant’s right to speak anonymously against a plaintiff’s interest in discovering the information necessary to prosecute its defamation claims.

In *Dendrite*, a New Jersey intermediate appellate court determined that, in order to adequately protect a defendant’s interests in anonymous commercial speech, it must adopt a four-part approach to limit discovery.¹⁷ The New Jersey court determined that the plaintiff must:

⁹ Const 1963, art 1, § 5.

¹⁰ *Woodland v Mich Citizens Lobby*, 423 Mich 188, 208; 378 NW2d 337 (1985); *In re Contempt of Dudzinski*, 257 Mich App 96, 100; 667 NW2d 68 (2003).

¹¹ *In re Contempt of Dudzinski*, 257 Mich App at 100.

¹² *Reno v American Civil Liberties Union*, 521 US 844, 870; 117 S Ct 2329; 138 L Ed 2d 874 (1997).

¹³ *McIntyre v Ohio Elections Comm*, 514 US 334, 342; 115 S Ct 1511; 131 L Ed 2d 426 (1995).

¹⁴ *Chaplinsky v New Hampshire*, 315 US 568, 571; 62 S Ct 766; 86 L Ed 1031 (1942).

¹⁵ *Ashcroft v Free Speech Coalition*, 535 US 234, 245-246; 122 S Ct 1389; 152 L Ed 2d 403 (2002); *Burns v Detroit (On Remand)*, 253 Mich App 608, 621; 660 NW2d 85 (2002).

¹⁶ *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992), quoting 3 Restatement Torts, 2d, § 559, p 156.

¹⁷ *Dendrite Int’l, Inc*, 342 NJ Super at 156-157.

(1) show that the defendant is a person or entity who could be sued, (2) make a good-faith effort to serve process on the defendant, (3) establish that the plaintiff's suit could withstand a motion to dismiss, and (4) establish that there is a reasonable likelihood that discovery would lead to identifying information about the defendant that would make service of process possible.¹⁸ It determined that the purpose of this approach was to prevent plaintiffs from attempting to harass, intimidate, or silence anonymous critics on the public forums of the Internet.¹⁹

Examining the New Jersey court's decision in *Dendrite*, in *Cahill*, the Delaware Supreme Court also described and adopted this standard to protect political speech.²⁰ The Delaware court concluded that, under *Dendrite*, it was necessary for a plaintiff alleging defamation to show four things before it could identify an anonymous political speaker on the Internet: (1) that the plaintiff tried to notify the defendant of the action in order to allow the defendant to defend, (2) that the plaintiff alleged the exact defamatory statements made by the anonymous poster, (3) that the plaintiff could survive a motion for summary judgment on the prima facie claim, and (4) that the balance of equities between the defendant's First Amendment rights and the strength of the prima facie case indicates that the defendant's identity should be disclosed.²¹ The Delaware court concluded that elements two and four were unnecessary because they are subsumed in that state's summary judgment standards; that is, a plaintiff would have to prove each of these elements, but a "four-part" standard was unnecessary because elements two and four were necessarily a part of element three.²²

The United States Court of Appeals for the Ninth Circuit, the only federal circuit court to consider this issue, held only that the adoption and application of the *Dendrite* or *Cahill* standards to deny a party's writ for mandamus is not clearly erroneous.²³ It recognized that "a few courts have declined to adopt a new or different standard," or have applied heightened standards only to the identification of nonparties.²⁴ It determined that "the details of fashioning the appropriate scope and procedures for disclosure of the identity of the anonymous speakers" is a matter for the district courts to determine.²⁵

Finally, an Illinois court has decided that it was not necessary to adopt additional standards in light of the procedural protections in place under Illinois court rules. In *Maxon v Ottawa Publishing Co*, the Illinois Appellate Court determined whether the plaintiff could discover the identity of blog posters.²⁶ It decided that it was not necessary to adopt the *Dendrite*

¹⁸ *Id.* at 151-152.

¹⁹ *Id.* at 156.

²⁰ *Cahill*, 884 A2d at 460.

²¹ *Id.*

²² *Id.* at 461.

²³ *In re Anonymous Online Speakers*, 661 F3d 1168, 1177 (CA 9, 2011).

²⁴ *Id.* at 1175-1176.

²⁵ *Id.* at 1177.

²⁶ *Maxon v Ottawa Publishing Co*, 402 Ill App 3d 704, 706; 929 NE2d 666 (2010).

or the *Cahill* standards because Illinois court rules required the complainant to plead defamation with particularity, and the complaint was subject to a motion that tested its legal sufficiency on the basis of the facts as pleaded.²⁷ The *Maxon* court reasoned that the *Dendrite* “hypothetical motion for summary judgment” was unnecessary because the Illinois processes were similar to the standards applied by *Dendrite* and *Cahill* and adequately protect the defendant’s interests.²⁸

IV. OVERVIEW OF MICHIGAN PROCEDURAL RULES

In Michigan, discovery is available as soon as a party commences an action.²⁹ In a civil action, a party commences the action by filing a complaint with a court.³⁰ A summons is issued that is to be served on the defendant.³¹ Generally, a summons expires 91 days after the date the complaint is filed.³² Upon the expiration of the summons, the case is deemed dismissed with regard to a defendant who has not been served, unless the defendant has submitted to the court’s jurisdiction.³³ A party may “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]”³⁴ Michigan follows a policy of open and broad discovery.³⁵

A. SUBPOENAS

A party may acquire information from another party by subpoenaing them to provide a deposition, other documents, or tangible things.³⁶ A party may petition a court in another state to issue a subpoena or equivalent process if necessary to acquire discovery for an action in Michigan.³⁷ On a motion by a party, the “court in which the action is pending” may quash or modify the subpoena, or enter a protective order.³⁸

²⁷ *Id.* at 712.

²⁸ *Id.* at 714-715.

²⁹ MCR 2.302(A)(1).

³⁰ MCR 2.101(B).

³¹ MCR 2.102(A).

³² MCR 2.102(D).

³³ MCR 2.102(E)(1).

³⁴ MCR 2.302(B)(1); see *King v Reed*, 278 Mich App 504, 517; 751 NW2d 525 (2008).

³⁵ *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

³⁶ MCR 2.305(A)(1) and (2).

³⁷ MCR 2.305(D).

³⁸ MCR 2.302(C).

B. PROTECTIVE ORDERS

Despite Michigan's broad discovery policy, a trial court should protect parties from excessive, abusive, or irrelevant discovery requests.³⁹ Thus, a party may bring a motion in a trial court for a protective order:

On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

* * *

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court[.]^[40]

A trial court may also seal court records on a motion of a party if it finds good cause to do so and there are no less restrictive means to protect the party's interests.⁴¹

C. MOTIONS FOR SUMMARY DISPOSITION

Under MCR 2.116(C)(8), a party may move for summary disposition when the opposing party has failed to state a claim on which relief can be granted. This tests the legal basis of the complaint on the pleadings alone.⁴² The trial court must accept the factual allegations in the complaint as true, and construe them in the light most favorable to the nonmoving party.⁴³ The trial court will grant the motion if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify the opposing party's right to recovery.⁴⁴

³⁹ *Cabrera v Ekema*, 265 Mich App 402, 407; 695 NW2d 78 (2005).

⁴⁰ MCR 2.302(C).

⁴¹ MCR 8.119(I)(1).

⁴² MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

⁴³ *Maiden*, 461 Mich at 119.

⁴⁴ *Id.*

The availability and application of summary disposition is important in this case because summary disposition is an essential tool to protect First Amendment rights.⁴⁵ To eventually succeed on a claim for defamation, a plaintiff must show:

(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication.^[46]

A plaintiff must also comply with constitutional requirements that depend on “the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant, and the public or private character of the speech.”⁴⁷

A plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory.⁴⁸ For a claim of libel, a plaintiff must plead “the very words of the libel . . .”⁴⁹ Because a plaintiff must include the words of the libel in the complaint, several questions of law can be resolved on the pleadings alone, including: (1) whether a statement is capable of being defamatory,⁵⁰ (2) the nature of the speaker and the level of constitutional protections afforded the statement,⁵¹ and (3) whether actual malice exists, if the level of fault the plaintiff must show is actual malice.⁵²

⁴⁵ *Tomkiewicz v Detroit News, Inc*, 246 Mich App 662, 666; 635 NW2d 36 (2001); *Ireland v Edwards*, 230 Mich App 607, 619; 584 NW2d 632 (1998).

⁴⁶ *Tomkiewicz*, 246 Mich App at 666-667; *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

⁴⁷ *Rouch*, 440 Mich at 251-252, quoting *Locricchio v Evening News Ass’n*, 438 Mich 84, 118; 476 NW2d 112 (1991).

⁴⁸ *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 52, 57; 495 NW2d 392 (1992).

⁴⁹ *Id.* at 53, quoting *De Guvera v Sure Fit Prod*, 14 Mich App 201, 206; 165 NW2d 418 (1968).

⁵⁰ See *Ireland*, 230 Mich App at 619.

⁵¹ See *New Franklin Enterprises v Sabo*, 192 Mich App 219, 221-222; 480 NW2d 326 (1991); see also *Hodgins v Times Herald Co*, 169 Mich App 245, 256-257; 425 NW2d 522 (1988).

⁵² *Ireland*, 230 Mich App at 622.

V. MICHIGAN DISCOVERY RULES ADEQUATELY PROTECT FIRST AMENDMENT INTERESTS IN ANONYMOUS SPEECH

A. STANDARD OF REVIEW

This Court reviews de novo issues of constitutional law.⁵³ Generally, this Court reviews for an abuse of discretion a trial court's decision on a motion for discovery.⁵⁴ A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes,⁵⁵ or when it makes an error of law.⁵⁶

Because this case raises First Amendment issues, we are also "obligated to independently review the entire record to ensure that the lower court's judgment 'does not constitute a forbidden intrusion of the field of free expression.'"⁵⁷

B. APPLICATION OF MICHIGAN DISCOVERY RULES TO THIS CASE

In a lengthy ruling from the bench, the trial court ruled that Michigan law does not address the situation in this case. It therefore adopted the *Dendrite* standards. Applying those standards, it determined not to quash the subpoena.

We disagree with the trial court's conclusion that Michigan law does not adequately address this situation. We conclude that Michigan's procedures for a protective order, when combined with Michigan's procedures for summary disposition, adequately protect a defendant's First Amendment interests in anonymity.

Under a properly filed motion for a protective order, a trial court may order, among other things, "that the discovery not be had" or that it "may be had only on specified terms and conditions[.]"⁵⁸ In the context of our court rules, "[g]ood cause simply means a satisfactory, sound or valid reason[.]"⁵⁹ A trial court has broad discretion to determine what constitutes "good

⁵³ *In re Contempt of Dudzinski*, 257 Mich App at 99.

⁵⁴ *Augustine*, 292 Mich App at 419.

⁵⁵ *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

⁵⁶ *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006); *In re Waters Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012).

⁵⁷ *Maldonado*, 476 Mich at 388-389, quoting *Gentile v State Bar of Nevada*, 501 US 1030, 1038; 111 S Ct 2720; 115 L Ed 2d 888 (1991) (additional quotation marks and citations omitted).

⁵⁸ MCR 2.302(C)(1) and (2).

⁵⁹ *People v Buie*, 491 Mich 294, 319; 817 NW2d 33 (2012) (quotation marks and citation omitted).

cause.”⁶⁰ A variety of sound or valid reasons may support a trial court’s decision to limit discovery, including that discovery implicates a party’s First Amendment interests.

Trial courts may use protective orders to protect witnesses’ First Amendment interests. For instance, in *Bloomfield Charter Twp v Oakland Co Clerk*, the township sought to depose persons who had signed petitions, and the trial court granted a protective order that prevented the township from deposing the signatories.⁶¹ This Court held that the trial court did not abuse its discretion when it issued the protective order.⁶² We reasoned that the signatories had a “powerful interest in participating in political speech protected by the First Amendment without fear of subsequently facing adversarial questions under oath,” and that the township’s reasons for requesting discovery were baseless.⁶³

We recognize that the Michigan Supreme Court subsequently overruled *Bloomfield Charter Twp*, though on different grounds, and thus it is not binding precedent.⁶⁴ But the case illustrates that Michigan courts have recognized that a person’s right to freedom of speech may be good cause for a trial court to issue a protective order.

Protective orders are very flexible. A trial court may tailor the scope of its protective order to protect a defendant’s First Amendment interests until summary disposition is granted. For instance, a trial court may order (1) that a plaintiff not discover a defendant’s identity, or (2) that as a condition of discovering a defendant’s identity, a plaintiff not disclose that identity until after the legal sufficiency of the complaint itself is tested.

Comparing the foreign law that the trial court adopted to existing Michigan law, we disagree with the trial court’s determination that Michigan law cannot adequately protect a defendant’s interests in anonymous speech. Under *Cahill*, which the Ninth Circuit recognized as providing the “strictest test,”⁶⁵ the plaintiff must (1) allege the exact defamatory statements, (2) show that the plaintiff made reasonable efforts to give the defendant notice of the action, (3) show that the plaintiff’s case could survive a motion for summary disposition on the prima facie case, and (4) show that the balance of equities between the defendant’s interests and its interests weighed in its favor.⁶⁶

But under Michigan law, the plaintiff must allege the exact defamatory statements. The plaintiff will have to survive an actual motion for summary disposition on its claims under MCR

⁶⁰ See *id.* at 319-320.

⁶¹ *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35; 654 NW2d 610 (2002), overruled on other grounds by *Stand Up For Democracy v Secretary of State*, 492 Mich 588 (2012).

⁶² *Bloomfield Charter Twp*, 253 Mich App at 38.

⁶³ *Id.*

⁶⁴ *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009).

⁶⁵ *In re Anonymous Online Speakers*, 661 F3d at 1177.

⁶⁶ *Cahill*, 884 A2d at 460-461.

2.116(C)(8). And the trial court may consider the weight of the defendant's First Amendment rights against the plaintiff's discovery request when determining whether to issue a protective order. Thus, the *Dendrite* and *Cahill* standards largely overlap with Michigan's combined safeguards of a protective order under MCR 2.302 and the summary disposition standards and procedures under MCR 2.116(C)(8).

To the extent that Doe 1 urges us to adopt *Dendrite* because it more adequately protects other interests or is better public policy, we decline to do so. Doe 1 argues that any less stringent standards may chill Internet criticisms because of a defendant's fear of being required to defend against a lawsuit for long enough to have the trial court dismiss it. Doe 1 also argues that the plaintiff in a defamation case may sue the defendant solely to subpoena the defendant's Internet provider for identifying information in order to acquire leverage for extra-judicial retaliation. We have already concluded that Michigan rules of civil procedure adequately protect Doe 1's constitutional interests. We decline to reach beyond what is constitutionally necessary in order to judicially create anti-cyber-SLAPP legislation.⁶⁷ Such decisions of public policy are the province of our Legislature.⁶⁸ And the writing, or rewriting, of our discovery and summary disposition rules is the province of the Michigan Supreme Court.

C. THE TRIAL COURT DID NOT PROPERLY APPLY MICHIGAN LAW

We conclude that the trial court abused its discretion, which requires reversal. A trial court by definition abuses its discretion when it inappropriately interprets and applies the law.⁶⁹ First, the trial court erroneously concluded that Michigan law does not adequately protect Doe 1's interests, and then it erroneously adopted and applied foreign law. Second, the trial court's findings and conclusions in support of its position were erroneous. Third, the trial court did not state any reason supporting its decision to deny Doe 1's alternative request for a protective order.

After adopting the *Dendrite* and *Cahill* standards as Michigan law, the trial court appears to have considered only two alternatives: (1) that the subpoena should be quashed and Cooley's case dismissed, or (2) that the subpoena should not be quashed and the case should proceed with Doe 1's name on the complaint. But Michigan law does not address only these polar opposites. Doe 1 also asked for a protective order under MCR 2.302(C). The trial court's order indicates that it denied Doe 1's requests for a protective order "for the reasons stated on the record." But the trial court did not state any reasons on the record to deny the protective order. The trial court appears not to have considered whether or to what extent to protect Doe 1's identity after it determined not to quash the subpoena. On remand, the trial court should consider whether good cause exists to support Doe 1's request for a protective order.

Next, the trial court ruled that defamatory statements per se were not entitled to First Amendment protections. The trial court was incorrect. Not all accusations of criminal activity

⁶⁷ SLAPP is an acronym for "strategic lawsuit against public participation." Black's Law Dictionary (7th ed).

⁶⁸ *Johnson v Recca*, 492 Mich 169, 196-197; 821 NW2d 520 (2012).

⁶⁹ *Giovannini*, 271 Mich App at 417; *In re Waters Drainage Dist*, 296 Mich App at 220.

are automatically defamatory.⁷⁰ To put it simply, defamation per se raises the presumption that a person's reputation has been damaged. In that instance, a plaintiff's failure to prove damages for certain charges of misconduct would not require dismissal of the suit.⁷¹ Whether a plaintiff has alleged fault—which may require the plaintiff to show actual malice or negligence, depending on the status of the speaker and the topic of the speech—concerns an element separate from whether the plaintiff has alleged defamation per se. Thus, the trial court erroneously concluded that Cooley would not have to prove fault or other elements because the statements were defamatory per se.

More importantly, this erroneous determination was central to the considerations the trial court may balance when determining whether to issue a protective order. As noted above, a trial court may consider that a party seeking a protective order has alleged that the interests he or she is asking the trial court to protect are constitutionally shielded.⁷² But the trial court need not, and should not, confuse the issues by making a premature ruling—as though on a motion for summary disposition—while considering whether to issue a protective order before the defendant has filed a motion for summary disposition. The trial court should only consider whether good cause exists to issue a protective order, and to what extent to grant relief under MCR 2.302(C).

Doe 1 urges this Court to rule that Cooley has not pleaded legally sufficient claims for defamation and tortious interference with a business relationship. We conclude that Doe 1's motion for a protective order did not present the appropriate time or place to do this. These rulings are best made in the context of a motion for summary disposition, when the trial court is testing the legal sufficiency of the complaint. The trial court's only concerns during a motion under MCR 2.302(C) should be whether the plaintiff has stated good cause for a protective order and to what extent to issue a protective order if it determines that one is warranted.

D. THE EXTREME CASE

We recognize that this opinion does not address the extreme case, a case that Doe 1 would like us to consider. The extreme case is one in which a plaintiff in a defamation case sues the defendant *solely* to subpoena the defendant's Internet provider for identifying information in order to retaliate against the defendant in some fashion outside a court action.

A simple hypothetical illustrates this situation. Assume that plaintiff XYZ company sues defendant Richard Moe who writes an anonymous blog on the Internet that is often critical of XYZ. Assume further that XYZ does not have any real expectation of damages, but suspects that Moe is employed or paid by a competitor and is suing simply to learn Moe's name in order to silence him through legal (we hasten to add) but extrajudicial means.

⁷⁰ See *Kevorkian v American Med Ass'n*, 237 Mich App 1, 12-13; 602 NW2d 233 (1999).

⁷¹ *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 727-728; 613 NW2d 378 (2000).

⁷² See *Bloomfield Charter Twp*, 253 Mich App at 38.

Under the Michigan rules, as we outlined above, XYZ could sue Moe and then immediately pursue discovery against the Internet provider (the counterpart to Weebly in this action), during the 91-day service-of-summons period provided in the court rules, to obtain Moe’s real name. But XYZ does not—and indeed could not, because it does not at that point know Moe’s name—serve Moe with process. Thus, Moe would be totally unaware of the suit against him and could not protect his name in court. He will only know of the suit and XYZ’s actions when he is “outed” through discovery, and his employer may discharge him if XYZ retaliates with an aggressive ad campaign based on Moe’s real identity and affiliation with the competitor.

It is this extreme case that both *Dendrite* and *Cahill*, through their notice provisions, address by providing some protection to persons in Moe’s situation. But, we emphasize, this is not the case before us. Here, Doe 1 knew relatively early on that Cooley had filed suit against him and was attempting to ascertain his real name through its subpoena to Weebly. And Doe 1 has been successful, at least to date, in preventing a public disclosure of his name. We therefore decline, under the well-recognized concept of judicial restraint,⁷³ to go beyond the facts that are before us in this case. We do not issue advisory opinions, nor does the Supreme Court, except in very limited circumstances not present here.⁷⁴ We believe that our legal system in Michigan is capable of responding, either retroactively through litigation or prospectively through Supreme Court rulemaking, if and when the extreme case arises.

E. COOLEY’S ALTERNATIVE GROUND FOR AFFIRMANCE

Cooley argues as alternative grounds for affirmance that a Michigan court cannot quash a subpoena issued by a California court. Cooley argues that the trial court must look to the law of the state in which the subpoena is pending to determine whether it can quash the subpoena. Under California law, Cooley therefore argues, Doe 1 should have filed his motion to quash and motion for a protective order in “the county in which discovery is to be conducted”⁷⁵ The trial court did not consider this argument, and the parties did not extensively brief this issue.

However, Cooley’s argument appears to confuse MCR 2.305(D), under which Michigan allows a party to a Michigan action to petition a foreign court to issue a subpoena to require a person to give a deposition, with MCR 2.302(C). Doe 1 petitioned in the trial court for a protective order under MCR 2.302(C), which provides that “the court *in which the action is pending* may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]”

Thus, even if the trial court did not have the power to quash the California subpoena, the trial court had the power to issue a protective order under Michigan court rules, because the action is pending in the Ingham Circuit Court. Therefore, even if we determined that the trial

⁷³ See Occam’s razor, a principle of parsimony, which may be paraphrased as providing that simpler explanations are, other things being equal, generally better than more complex ones.

⁷⁴ Const 1963, art 3, § 8; see *Citizens for Common Sense in Gov’t v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000).

⁷⁵ Cal Code Civ Proc 2029.600.

court did not have the power to quash the California subpoena issued under MCR 2.305(D), it would still be necessary for this Court to reverse and remand for the trial court to determine whether justice requires it to issue a protective order. Finally, a decision of the trial court would aid our analysis on this issue. We decline to affirm on the ground that the trial court could not quash a California subpoena.

VI. CONCLUSION

We conclude that the trial court abused its discretion when it denied Doe 1's motion for a protective order after it adopted and applied foreign law. Michigan law adequately protects Doe 1's free speech interests in this case. On remand, the trial court should determine whether it has the power to quash a California subpoena. If not, or if it declines to do so, the trial court should apply Michigan law to determine whether Doe 1 is entitled to an order protecting his identity.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Patrick M. Meter