**IN THE MICHIGAN COURT OF APPEALS**

**Consolidated Cases:**

FAZLUL SARKAR,

Plaintiff-Appellant,

vs.

JOHN and/or JANE DOE(S),

Defendant(s)-Appellee(s),

and

PUBPEER LLC,

Non-party Appellee.
_____/

COA Case No. 326667

Wayne Co. Circuit Court
Case No. 14-013099-CZ
Hon. Sheila Ann Gibson


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FAZLUL SARKAR,

Plaintiff-Appellee,

vs.

JOHN and/or JANE DOE(S),

Defendant(s)-Appellee(s),

and

PUBPEER LLC,

Non-party Appellant.
_____/

COA Case No. 326691

Wayne Co. Circuit Court
Case No. 14-013099-CZ
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**DR. SARKAR'S REPLY BRIEF ON APPEAL (in DOCKET NO. 326691)**

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## Introduction

PubPeer's brief on appeal is flawed because its aim is to have this Court to disregard its precedents, and disregard the Michigan Court Rules. It also misleads the Court.

**First, regarding the disregarding of precedents**. There are two distinguishable cases for analyzing claims against anonymous defendants. *Thomas M. Cooley Law School v. Doe*, 300 Mich App 245 (2013) applies if a defendant has appeared in the action; *Ghanam v. Does*, 303 Mich App 522 (2014) applies when no defendant has appeared. In this case, since a defendant, "John Doe 1," not only filed an appearance and a dispositive motion, but was also heard to argue in the lower court, the standards of *Cooley* govern.[1]

Yet PubPeer asks this Court to disregard both *Cooley* and *Ghanam* and apply standards from other jurisdictions that require the production of evidence at the pleading stage. (See, e.g., PubPeer's brief at pp. 13 and 30). Dr. Sarkar's counter-argument is set forth in greater detail below.

**Second, regarding the disregarding of the Michigan Court Rules.** *Cooley* holds that subpoenas directed at non-parties (such as PubPeer), where a defendant has appeared, are to be analyzed under MCR 2.302 for protective orders, rather than MCR 2.116 for summary disposition. But even if MCR 2.116 applied, under *Ghanam*, the pleadings would be examined on their face under 2.116 (C) (8) and other evidence may not be considered. Yet PubPeer makes multiple pleas for this court to do just that, citing to Dr. Krueger's affidavit and an email chain between a "Clare Francis" and Wayne State University. *There is no law in Michigan that permits a court to examine extrinsic evidence when applying the standards of MCR 2.116 (C) (8).*

[1] In addition, as Dr. Sarkar's brief demonstrated, this case has garnered international media attention in the scientific community. There is no meaningful argument that any defendant is unaware of this action.

**Third, PubPeer misleads this court.** PubPeer's brief focuses on defamation, only acknowledging with a dismissive footnote that Dr. Sarkar has made other claims for tortious interference with business relationship (that cost him his tenure with Wayne State), tortious interference with business expectancy (that resulted in the withdrawal of a tenured job offer at the University of Mississippi), false light invasion of privacy, and intentional infliction of emotional distress. This case could stand on its own even if defamation were not raised as a claim, given that the anonymous defendants have cost Dr. Sarkar two tenured positions with two universities.

More seriously, PubPeer *chooses not even to discuss* the most damning piece of evidence against the anonymous defendants: that someone manufactured a fake U.S. Senate investigation against Dr. Sarkar out of whole cloth, and widely distributed a forged document to that effect throughout Dr. Sarkar's department at Wayne State University (complaint, ¶¶ 69-76). Presumably, PubPeer believes that a plaintiff should have no recourse against such an anonymous scoundrel.

**PubPeer's errors, summarized.** (1) PubPeer errs by treating this case as one for defamation, without regard to other tortious conduct. (2) PubPeer errs in denying *Cooley* as binding precedent even though a defendant has appeared in this action. (3) Pub Peer errs by arguing that Dr. Sarkar's complaint should be dismissed for failure to produce actual, documentary evidence at the pleading stage. (4) PubPeer also errs by simultaneously directing this court to review outside evidence such as its expert affidavit, despite Michigan Court Rules and case law to the contrary. (5) PubPeer errs by insisting that all facts and inferences be resolved in PubPeer's favor.[2] (6) Finally, PubPeer erroneously insists on reframing Dr. Sarkar's argument to disregard his non-defamation claims and the inexcusable forgery of a U.S. Senate investigation.

[2] See, for example, PubPeer's brief at p. 16, "The comment in paragraph 40(c) of the Complaint is not capable of defamatory meaning."

Through all this, it must be borne in mind that PubPeer is not even a party – just a holder of discoverable information. It is merely seeking to block a discovery subpoena.

**Factual Summary**

Anonymous person(s) are out to destroy the career of Dr. Fazlul Sarkar, a prominent cancer researcher. He filed a highly detailed, 28-page, 124-count lawsuit against John and/or Jane Doe(s) (which PubPeer bizarrely calls a "bare-bones" pleading, p. 33). Dr. Sarkar does not know who is responsible for the tortious conduct. He sought a discovery subpoena on a non-party website ("PubPeer"), to help him learn the identity of the defendants. The lower court quashed the subpoena, except as to the identity of the person in paragraph 40 (c), and PubPeer appealed.

Paragraph 40 (c) of Dr. Sarkar's complaint is set forth below. It is a quote from a longer a discussion on www.pubpeer.com, at first concerning Dr. Sarkar s papers, and then expanding into more general discussion of Dr. Sarkar's research.)

> 40. At and commencing from *"Down-regulation of Notch-1 contributes to cell growth inhibition and apoptosis in pancreatic cancer cells"* **[**https://pubpeer.com/publications/16546962]
>
> c. Then an unregistered user (likely the same one, given the context) reveals that s/he is either a person at Wayne State University who made a formal complaint against Dr. Sarkar, or is otherwise privy to the a person who did so:
>
> **Unregistered Submission:**
> (June 18th, 2014 4:51pm UTC)
>
> Has anybody reported this to the institute?

**Unregistered Submission:**

(June 18th, 2014 5:43pm UTC)

Yes, in September and October 2013 the president of Wayne State University was informed several times.

The Secretary to the Board of Governors, who is also Senior Executive Assistant to the President Wayne State University, wrote back on the 11th of November 2013:

"Thank you for your e-mail, which I have forwarded to the appropriate individual within Wayne State University. As you are aware, scientific misconduct investigations are by their nature confidential, and Wayne would not be able to comment on whether an inquiry into your allegations is under way, or if so, what its status might be.

"Thank you for bringing this matter to our attention."

At the March 5, 2015 hearing, the lower court quashed the subpoena for all but the above-quoted paragraph 40 (c). (Exhibits 5 and 6 to PubPeer's brief on appeal). At one point, Dr. Sarkar's counsel explained why he should be permitted to try and seek the identity of the speaker of this particular statement. He argued:

> MR. ROUMEL: ... Your Honor's asking about connecting the dots. And we know that this submission is a person who posted on the site saying, Yes, I reported to Wayne State. And I think this person says several times, they were informed several times in September and October of 2013. That would indicate that this poster has some intimate connection with Wayne State. Then we get to this forged senatorial document. This was handed out in people's mailboxes in Dr. Sarkar's department at Wayne State very widely also indicate that this person [is] connected with Wayne State. ...
>
> THE COURT: But that has no bearing on PubPeer.
>
> MR. ROUMEL: I'm not holding them liable. I just want information from them. What this is is a discovery motion, Your Honor. (Exh 5, Id., p. 27)

The court eventually agreed that it would order an in-camera inspection of the IP address and/or other identifying information in PubPeer's possession, concerning the person who posted the quotes from paragraph 40 (c). The court reasoned:

> THE COURT: That's why I said that we would do it in camera, and then the Court will make its determination on the record whether or not it's going to be released. ...
>
> THE COURT: Okay. Listen, listen, and I can connect the dots. If it so happens that this IP address comes from Wayne State University, Bullseye. Do you see what I'm saying? If that's Wayne State University, then he can start narrowing it down through whatever he does on that end. So I think that's a valid claim.
>
> If that, the IP address of whoever this is can be traced back to Wayne State University, he's got some ammunition. Because the fact of the matter is, you know, people, people try to hide behind this type of thing. You know, justifiably, there's the First Amendment, right and they can except when it comes to a point in time when you're hurting someone else. (Exh 5, Id., p. 30-31)

The court set a new hearing for March 19, 2015 to consider whether the order to quash should be extended to paragraph 40 (c). (The transcript of that hearing is Exh 8 to PubPeer's brief on appeal). The matter was extensively re-argued, but the court reiterated its order for an in-camera inspection of the identifying information in PubPeer's possession concerning the person who posted on www.pubpeer.com the quotes from paragraph 40 (c) of Plaintiff's complaint.

> THE COURT: You indicated that it's the Court's duty to look at it, and the Judge interprets the language to determine whether or not there is, it's defamatory. And what the Court does do is take the evidence in the light most favorable to the non-moving party.
>
> And there could be an inference drawn that there is an attempt to defame Dr. Sarkar by putting this information out there because of the person from Wayne in writing back say if you understand that scientific misconduct investigation by their nature are confidential, but yet and still, this individual publishes the information that they got from Wayne State University alluding to the fact that there was something that was inappropriate in Dr. Sarkar's studies, whatever. And we subsequently know at this point in time that Dr. Sarkar had multiple job opportunities that were sort of squelched as a result of a series of events. And this was one those in the chain of the series of events. ...
>
> THE COURT: But for Mr. Roumel making the request is to be able to further his discovery in the case in chief which this is just one aspect of. And really taking the evidence

> in light most favorable to the non-moving party, the Court feels that there is the inference can be drawn, a reasonable person, like I say, I'm a judicial person, an attorney, and the fact remains if you're looking at layperson's, their level of understanding of a subject matter would be at a lower level.
>
> So the Court finds that there would be a reasonable inference, not a legal, even from a legal perspective, the Court sees that from a reasonable inference, there could be an inference, a reasonable reason that there could be a reasonable inference that there was -- I don't want to say inference again, but there could be an inference that this was of a nature to attempt to defame Dr. Sarkar. So taking evidence in the light most favorable to the non-moving party, the Court finds that this, based upon the three criteria that were set forth by Ms. -- that this could be a situation that deemed inflammatory nature. That being said the Court would order that, not that, that the information be released to Mr. Roumel. And the Court will further note that there will be a protective order put in place.

An order was entered adopting the court's order. (Exh 9, order of March 26, 2015). That order is the basis of PubPeer's cross-appeal. For the reasons set forth below, the court reached the correct result, but perhaps for the wrong reasons. In short, the lower court made erroneous references to standards for summary disposition under MCR 2.116 (C) (8) rather than as one for a protective order under MCR 2.302, as *Cooley* would dictate; but the error was harmless, because even under the more stringent test in *Ghanam,* the ruling was correct.

## Argument

The process of learning defendant's identity is clearly set forth in the controlling case, *Thomas M. Cooley Law School v. Doe*, 300 Mich App 245 (2013). The legal standard for testing Dr. Sarkar's complaint is well established in Michigan court rules and prevailing law, and is not heightened simply because defendant hides his identity and seeks First Amendment protection.

### A. Because a Defendant Appeared, *Cooley* – not *Ghanam* - Applies

As noted in Dr. Sarkar's primary brief, there are two Michigan cases that apply where there is an attempt to obtain discoverable information from a non-party, such as PubPeer.

*Ghanam v. Does*, 303 Mich App 522 (2014) is a narrow exception to the general rule that a non-party may not attack the sufficiency of the pleadings. *Ghanam* applies where there is no one in court to advocate for the position of the anonymous defendant. In such a case, the courts allow the non-party to "stand in" for the anonymous defendant and essentially argue the sufficiency of the pleadings under MCR 2.116 (C) (8), to ensure that the plaintiff has stated a claim on which relief can be granted." [*Ghanam,* Id. at 530]

However, in this case, a defendant has appeared. William Burdett, the attorney for John Doe 1, has filed pleadings and argued on the record at the March 5, 2015 hearing. Moreover, this case has garnered international attention in the scientific community, engendering hundreds of comments on various internet sites, including being prominently featured on PubPeer's own web site – where PubPeer is asking for donations to its legal team. (https://pubpeer.com/topics/1/3f5792ff283a624fb48e773caad150)

Because a defendant has appeared, and other potential parties are likely aware of the action, the standards that govern this case are derived from *Thomas M. Cooley Law School v. Doe*, 300 Mich App 245 (2013).

In *Cooley*¸ the Court of Appeals rejected application of the very standards from other jurisdictions that are precisely the same, heightened ones that PubPeer is now urging this Court to apply – namely, production of documentary evidence (but without the Plaintiff being allowed to conduct discovery). The Court in *Cooley* clarified that discovery rules concerning protective orders are adequate to protect anonymous defendants. (300 Mich. App at 264) The Court cautioned that a lower court should not conflate standards of summary disposition with those of protective orders (as the lower court seems to have done here). The Court noted, "[T]he 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'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." [*Cooley*, Id. at 269]

Subsequently, in *Ghanam*, Id. at 530, the court faced a situation where the anonymous defendants did not know about the lawsuit. Even then, the court set only a slightly elevated legal standard – not nearly rising to the level that PubPeer urges. *Ghanam* requires only that "plaintiff ... make reasonable efforts to notify the defendant of the lawsuit" and then for the court to "analyze the complaint under MCR 2.116 (C) (8) to ensure that the plaintiff has stated a claim on which relief can be granted." *Id*. Note this does **not** require – or even permit – reference to evidence outside the pleadings.

The reasoning behind a protective order analysis is to balance the respective rights of the parties: First Amendment rights of potential defendants, and a plaintiff's right to discovery. It also preserves the right of appearing defendants, such as John Doe 1 in this case, to file motions for summary disposition if they choose (and Doe 1 did file one in this case, which was not decided). But even under *Ghanam's* slightly elevated standard, Dr. Sarkar's detailed pleadings, taken in the light most favorable to him as the court rules require, more than adequately plead his five claims.[3] Here, even just focusing on paragraph 40 (c) of Dr. Sarkar's complaint, as the lower court noted, an inference could be drawn that the writer was accusing him of research misconduct.

[3] As argued in Dr. Sarkar's primary brief, it was plain error for the court to require production of documentary evidence, including consideration of Dr. Krueger's affidavit, even to the extent it court rely on MCR 2.116 (C) (8). As that subrule states, "Only the pleadings may be considered when the motion is based on subrule (C) (8) or (9)."

Moreover, PubPeer's argument that the paragraph 40 (c) statements are "not capable of defamatory meaning" is contrary to the body of cases, especially at pp. 12-13 of Dr. Sarkar's primary brief, that the pleading standard permits the inference that even opinion or innuendo can be defamatory - without a showing of false statements.

In addition, the well-pled statements concerning the forged Senatorial inquiry, distributed to Dr. Sarkar's colleagues at Wayne State, more than adequately support intentional interference with business relations. PubPeer's argument that the claim fails without the document itself being in evidence is unavailing, where the document was quoted in the pleadings. (Complaint, especially at ¶ 70) See *Pursell v. Wolverine-Pentronix, Inc*., 44 Mich App 416, 421 (1973), quoting 11 Callaghan's Michigan Pleading & Practice (2d ed), § 78.09, pp 256-257, holding that:

> "The essentials of a cause of action for libel or slander must be stated in the complaint, including allegations as to the particular defamatory words complained of, the connection of the defamatory words with the plaintiff where such words are not clear or are ambiguous, and the publication of the alleged defamatory words."

The court further stated that in the case of libel, a pleader need only "show where the alleged libels were published or their contents." [*Pursell*, Id. at 421, internal cites omitted]

PubPeer's defense that 40 (c) is only "an expression of concern" is preposterous. Substituting verbiage, it is as if the person had written of hypothetical Attorney Jones, "Thank you for your e-mail, which I have forwarded to the State Bar Ethics Committee. As you are aware, allegations of the theft of client funds are by their nature confidential, and we would not be able to comment on whether an inquiry into your allegations is under way, or if so, what its status might be."

Moreover, 40 (c) also invades privacy, as the poster has violated the confidentiality of research misconduct proceedings required by federal law by publicly disclosing the allegations. It is that public accusation of research misconduct that is allegedly defamatory, not the private email to Wayne State some months earlier; thus the statute of limitations argument is a red herring.

More importantly, as the lower court correctly recognized – that poster may have knowledge of other tortious conduct occurring at Wayne State – "connecting the dots" as it were – including the forged Senatorial investigation. It is only discovery, after all, and an appropriate protective order could be fashioned to protect the parties' respective rights.

## Summary and Conclusion

PubPeer's brief errs in multiple ways, but chiefly because it argues for standards that go well beyond Michigan court rules and precedent. Because there is a known defendant who appeared in this case – and even filed a motion for summary disposition - *Thomas M. Cooley Law School v. Doe*, 300 Mich App 245 (2013) applies. Regarding paragraph 40 (c), the court ultimately and appropriately balanced the rights of the parties as one for a protective order under MCR 2.302, per *Cooley*. This was notwithstanding certain statements that indicated the lower court may have conflated the correct standard with one of summary disposition. Nonetheless, the lower court reached the correct result, and should be affirmed.

## Relief Requested

***W H E R E F O R E*** plaintiff requests this honorable court uphold the March 26, 2015 order denying the motion to quash with regard to paragraph 40 (c) of the complaint, and remand for further proceedings, permitting the subpoena to be issued on appropriate conditions in a protective order.

Respectfully submitted,

NACHT, ROUMEL, & SALVATORE, P.C.

*/s/ Nicholas Roumel*

Nicholas Roumel
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December 27, 2015

**PROOF OF SERVICE**
**FOR DR. SARKAR'S REPLY BRIEF ON APPEAL**

On December 27, 2015, I efiled Dr. Sarkar's Reply Brief, consisting of a cover page, table of contents, index of authorities, and body, along with a separate copy of this proof of service, via the court's electronic filing system on all parties.

Respectfully submitted,
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Dated: December 27, 2015

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