

IN THE MICHIGAN COURT OF APPEALS

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

Hon. Sheila Ann Gibson

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**PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

Table of Contents

Index of Authorities	ii
Statement of Jurisdiction	iii
Questions Presented	iv
Introduction	1
A. Nature of the Action	1
B. Character of Pleadings and Proceedings	3
C. Dates of Important Instruments and Events	5
D. Rulings and Order of the Trial Court	6
E. Verdict and Judgment	6
F. Substance of Proof	6
Statement of Facts	6
Argument	8
Summary and Conclusion	15
Relief Requested	16
Certificate of Service	17

Index of Authorities

<i>Thomas M. Cooley Law School v. Doe</i> , 300 Mich App 245 (2013)	<i>passim</i>
<i>Ghanam v. Does</i> , 303 Mich App 522 (2014)	<i>passim</i>
42 C.F.R. § 93.103 (2005)	7
42 C.F.R. § 93.104 (2005)	7
MCR 2.116(C)(8)	<i>passim</i>
MCR 2.302(C)	14, 15

Statement of Jurisdiction

This is an interlocutory appeal from the trial court's order denying, in part, a non-party, PubPeer's, motion to quash a subpoena entered on March 9, 2015. This court has jurisdiction pursuant to MCR 7.203 (B) (1).

Questions Presented

- I. Whether the lower court erred when it denied, in part, a non-party, PubPeer's, motion to quash.

PLAINTIFF-APPELLANT SAYS "NO"

NON-PARTY PUBPEER WOULD SAY "YES"

REQUIRED SECTIONS

A. Nature of the Action

This case is not about free speech. It is about tortious conduct that is destroying a man's life and career.

Dr. Fazlul Sarkar, a prominent cancer researcher at Wayne State University, has an enemy hiding behind the anonymity afforded by the internet. So far, this unknown person¹ has been quite successful, sabotaging an excellent job that Dr. Sarkar had secured - a tenured position at the University of Mississippi - by falsely accusing him of research misconduct. Not finished, this anonymous defendant widely distributed fraudulent documents that Dr. Sarkar was subject of a U.S. Senate investigation. Shortly afterwards, Dr. Sarkar lost his tenure at Wayne State. Now, after 35 years as an expert in his field, Dr. Sarkar faces unemployment in a few short months.

Seeking to hold the anonymous person accountable, Dr. Sarkar filed a five-count complaint in the trial court against "John and/or Jane Does." In order to find out the identity of this person, Dr. Sarkar subpoenaed PubPeer, an anonymously-held website for anonymous posters. Ostensibly, PubPeer is for dispassioned discussion of scientific research. In reality, like far too much of the anonymous internet world, it is a place for complaining, grinding axes, and making accusations.

PubPeer responded by filing a motion to quash the subpoena. They position themselves as champions of free speech, not a forum for destroyers of a man's career. Their position is misleading for two reasons.

¹ Hereafter, for consistency, defendant shall be referred to in the male singular. This is because one "John Doe" defendant has appeared in this action, filing a separate motion to dismiss to be heard at a later date, and to this point, there is no definite evidence of more than one defendant.

First, they frame their legal argument to try and fool this court into thinking this case is only about whether scientific blots look alike, and that persons using their website should be allowed to say so under principles of free speech. Second, they claim, without legal basis, that the First Amendment extends greater protection to anonymous persons.

These arguments mislead the court. The case is about blatantly false accusations of “scientific misconduct” that are a death sentence in the field of scientific research, where grants dry up and jobs go away at the first whisper of such charges. It is about sending these false accusations to a university 762 miles south for the sole purpose of disrupting Dr. Sarkar’s new job. It is about whether a person can make up a Senate investigation out of whole cloth, widely distribute forged flyers throughout Wayne State University, and watch Dr. Sarkar’s tenured position there vanish two weeks later. It is about whether a person can violate federal law and breach the confidentiality of Wayne State’s inquiries and investigations, which were likely instigated in the first place by Dr. Sarkar’s relentless, anonymous enemy.

Plaintiff, as a scientist and an academic, does not dispute the obvious proposition that open and honest debate about scientific articles is not only non-defamatory but absolutely essential. But this case is not about the First Amendment. Defendant is not employees criticizing their government employers; they are not researchers engaging in good faith discussions; they are not dissidents railing against the tyranny of the majority. They are people who intentionally acted to try and destroy Dr. Sarkar’s career, with false accusations of research misconduct, and other torts relating to malicious interference with employment and breaches of confidentiality.

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

Ultimately, this court must decide whether a man whose life has been turned upside down by these reprehensible and tortious acts is even allowed to pursue his lawsuit, or whether he shall be stopped in his tracks by affirmance of an order granting PubPeer's motion to quash. All Dr. Sarkar asks is to be able to have his claims tested fair and square in a court of law. He has always been willing to agree to the terms of a protective order regarding the anonymous poster's identity while he pursues his suit. While he may not win in the end, justice demands he be allowed to proceed.

B. Character of Pleadings and Proceedings

The pleadings and proceedings germane to this appeal are as follows:

Dr. Sarkar filed a detailed, 124 paragraph complaint against "John and/or Jane Doe(s)" in Wayne County Circuit Court. He raised five counts:

(1) Defamation, based upon false accusations of research misconduct, a violation of federal law that is false.

(2) Intentional interference with business expectancy rested on the malicious sending of documents to three different administrators at the University of Mississippi with the intent to cause them to terminate their job offer to Dr. Sarkar, which was successful, even after Dr. Sarkar had given notice at Wayne State University and bought a house in Oxford, Mississippi.

(3) The intentional interference with business relationship claim rests on the faking of a senate inquiry to get Wayne State to terminate that job, and succeeded in having them remove tenure.

(4) The invasion of privacy claim was based on disclosure of alleged and heavily regulated investigatory proceedings that are required by law to be confidential.

(5) The intentional infliction of emotional distress tort was based on this entire pattern of conduct, single-mindedly designed to ruin Dr. Sarkar's career, life's work, reputation, grants, and prospects.

Four days later, he served a subpoena on the non-party web site, PubPeer, for information to identify the persons posting about Dr. Sarkar, who might either be defendants or have discoverable information about the other torts, such as the identity of the persons who sabotaged Dr. Sarkar's tenured jobs. PubPeer responded with a motion to quash. The court granted that motion except in one aspect, ordering PubPeer to turn over identifying information relating to one particular comment.

Both Plaintiff and PubPeer filed respective interlocutory appeals from the court's "split" decision. While Dr. Sarkar disagrees with PubPeer's position, he agrees that this court should consider the appeals together and agree to hear this matter to give clear direction to the trial court.

C. Dates of Important Instruments and Events

Dr. Sarkar's complaint was filed October 9, 2014.

He served his subpoena on PubPeer on October 13, 2014. PubPeer responded with a motion to quash, largely resting on First Amendment grounds.

After a series of various delays and extensions, PubPeer's motion was heard on March 5, 2015 and (in an order dated March 9, 2015) granted in all but one aspect.²

The court scheduled further arguments concerning allegations in paragraph 40 (c) of the complaint. That hearing was held on March 19, 2015, and in an order dated March 26, the court denied PubPeer's motion to quash on that one paragraph.

What that meant is that PubPeer was ordered to turn over to the plaintiff, subject to a suitable protective order, the identifying information for the anonymous poster described in one particular subparagraph of the complaint – 40 (c).

Dr. Sarkar filed for interlocutory appeal on March 30, 2015, concerning the March 9 order quashing discovery of the identity of the persons posting most of the statements. PubPeer filed the instant appeal of the March 26 order on March 31, 2015.

The trial court heard PubPeer's motion to stay proceedings on April 16, 2015, and granted that motion in an order dated April 20.

² Dr. Sarkar filed a motion for reconsideration of that decision on March 11, 2015, supplementing that motion with new evidence on April 10, 2015. That motion was never addressed by the trial court.

Curiously, an appearance was filed on December 11, 2014 by an attorney purporting to represent someone calling himself "A John Doe Defendant," even without being served. This defendant's *appearance*, with no apparent legal justification, claimed to accept responsibility for only some of the conduct in Dr. Sarkar's complaint. He filed a motion for summary disposition based upon the conduct he anonymously admitted to, but withdrew it on the record on March 19, 2015, citing the court's March 9 order.

D. Rulings and Order of the Trial Court

See above.

E. Verdict and Judgment

Not applicable.

F. Substance of Proof

See facts and argument below.

STATEMENT OF FACTS

Plaintiff's October 9, 2014 complaint lays out in 124 detailed paragraphs the allegations forming the basis of its five counts. Dr. Sarkar is a widely-published scientist who has published more than 533 papers (complaint, ¶ 57). His research focuses on cancer prevention and therapy, including work that has led to the discovery of the role of chemopreventive agents in sensitization of cancer cells (reversal of drug resistance) to conventional therapeutics (chemo-radio-therapy) (complaint, ¶ 80). His research has been continuously funded by the National Cancer Institute, the National Institute of Health, and the Department of Defense (complaint, ¶ 12).

PubPeer is a website that allows users to comment anonymously on any publication in a scientific journal. It defines itself as "an online community that uses the publication of scientific results as an opening for fruitful discussion among scientists" (complaint, ¶ 23). The website is run by anonymous people, with the URL registration maintained by a proxy (complaint, ¶ 24). The terms of service explicitly instruct users: "First, PLEASE don't accuse any authors of misconduct on PubPeer" (complaint, ¶ 26). The website also states that: "The site will not tolerate any comments about the scientists themselves" (complaint, ¶ 30).

Despite these admonitions, PubPeer allowed a series of comments by one person, or a small group of people coordinating their statements, which defame Dr. Sarkar and accuse him of research misconduct. They accuse him of falsifying data and appear to orchestrate a movement, to cost Dr. Sarkar a job at the University of Mississippi, and to notify Wayne State of alleged research misconduct. These anonymous posters did not merely question conclusions in Dr. Sarkar's work or find errors. They went well beyond that, to challenge his motives and imply that he had engaged in "research misconduct."

Those are not mere words. As detailed in plaintiff's complaint, research misconduct is an extremely serious charge to level against a scientist, often fatal to one's career (complaint, ¶¶ 33-36). One infamous accusation resulted in suicide despite the scientist's formal exoneration (<http://aeon.co/magazine/philosophy/are-retraction-wars-a-sign-that-science-is-broken/>). Given the gravity of such an accusation, the federal government has created clear regulatory guidelines for what is and is not research misconduct (complaint, ¶ 31). They include:

... fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.

- (a) Fabrication is making up data or results and recording or reporting them.
- (b) Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.
- (c) Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.
- (d) Research misconduct does not include honest error or differences of opinion.

Id. (quoting 42 C.F.R. § 93.103 (2005)). Research misconduct must be "committed intentionally, knowingly, or recklessly." 42 C.F.R. § 93.104 (2005).

The defendant in this case is not content to follow this confidential, regulated scheme. Intent on destroying Dr. Sarkar, he widely distributed a screen shot from PubPeer showing the search results and disclosing the number of comments generated from each research article listed on the page. Effectively, defendant manufactured that there were widespread concerns about Dr. Sarkar's research and then used this supposed concern to sabotage his job with the University of Mississippi. He even went so far as to manufacture that there was a Senate investigation, led by Senator Charles Grassley (complaint, ¶ 70-73). This immediately preceded Dr. Sarkar losing tenure at WSU. As such, defendant has worked anonymously and tirelessly to defame Dr. Sarkar, and maliciously deprive him of economic opportunities.

Dr. Sarkar brought claims for defamation, intentional or tortious interference (two counts, one for Mississippi and one for Wayne State), false light invasion of privacy, and intentional infliction of emotional distress. These claims are clearly cognizable under Michigan law, and to allow defendant to hide behind their anonymity would actually serve as a blow to First Amendment rights, as they would allow the stifling of scientific research through the risk that innocent mistakes lead to claims of "research misconduct" and the potential loss of livelihood.

ARGUMENT

In quashing Dr. Sarkar's subpoena seeking identifying information for all but one comment, the court erred. That is the subject of Dr. Sarkar's own application for leave to file interlocutory appeal, and will not be recounted here. However, the court took a different approach when denying PubPeer's motion regarding paragraph 40 (c), and made the correct decision - although perhaps for the wrong reasons.

Paragraph 40 (c) of plaintiff's complaint reads as follows:

40 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."

The statement before the court was actually the second one (i.e. the reply to the first inquiry). The statement, and all reasonable inferences to be drawn from it, indicate that the person posting has great familiarity with Wayne State University (WSU) administration, to wit:

- The president of WSU was "informed several times"
- The Secretary to the Board of Governors is also the Senior Executive Assistant to the president

- The person posting apparently claims to have details of scientific research misconduct, because the nature of the response apparently acknowledges a claim of scientific misconduct.

The statement is also evidence that research misconduct was alleged by the person emailing, and when posted on PubPeer, is a clear indication that person is alleging that Dr. Sarkar committed research misconduct – which is a public accusation at the very heart of Dr. Sarkar’s case (and contrary to PubPeer’s denials that such an accusation was never made on their web site). In oral argument on March 19, 2015, the court indicated that Wayne State’s emailed response, posted on PubPeer’s website, could support an inference that the poster was accusing Dr. Sarkar of research misconduct, and denied the motion to quash pending entry of a protective order.

Tellingly, when the entire email chain was later subpoenaed from Wayne State University (after the March 19 hearing), it revealed that the poster behind paragraph 40 (c) was in fact not only accusing Dr. Sarkar of research misconduct, but was well aware that a sizeable number of anonymous postings on PubPeer about Dr. Sarkar were accusing him of research misconduct. As such, the court’s instinct was entirely correct. The person who posted Wayne State’s response on PubPeer initiated that response with the following email, sent on November 10, 2013:

“Dear Secretary to the board of governors, Wayne State University, Julie Miller:

“I am writing to you about **multiple scientific concerns** about the published work of **Fazlul H Sarkar** which have been aired on Pubpeer.

“You can find the entries on Pubpeer here: ...

“Many of the entries mention things which amount to what many think of as **scientific misconduct...**” [emphasis in original; entire email attached]³

This email is hugely significant.

Most importantly, it completely contradicts the multiple assertions made by PubPeer in its written and oral arguments to the lower court (and to this court) that “the comments Dr. Sarkar complains of are not capable of defamatory meaning ...” [PubPeer’s motion to quash, p. 12]. Specifically, concerning paragraph 40 (c) (the email chain reproduced above), PubPeer argued:

“... Dr. Sarkar has attempted to twist the meaning of this PubPeer comment into a charge of ‘research misconduct.’ ... That’s not what the comment says or even implies. ... Moreover, Dr. Sarkar is wrong in arguing that Wayne State’s use of the phrase ‘scientific misconduct investigation’ suggests that the PubPeer commenter accused him of misconduct.” [PubPeer’s supplemental brief, pp. 4-5]

Simply put, PubPeer is dead wrong. They have argued repeatedly that there is no way any of the pleaded statements are capable of defamatory meaning – i.e., accusing Dr. Sarkar of intentional research misconduct. On the contrary – even the anonymous poster and emailer was astute enough to know that “Many of the entries mention things which amount to what many think of as **scientific misconduct...**” This supports Dr. Sarkar’s argument all along that in the scientific community, people reading on PubPeer would be

³ The email is signed “Clare Francis.” This is almost certainly a pseudonym for someone who is apparently somewhat notorious for making accusations against various scientists of research misconduct. See, for example, <http://www.elsevier.com/connect/its-not-that-clare-francis-is-a-pseudonym-its-that-the-pseudonym-is-clare-francis>. It is apparent that “Clare Francis” is one of the anonymous defendants whose identity is necessary so that Dr. Sarkar’s complaint may move forward. It should be noted that the subpoena response from WSU does not include the IP address of “Clare Francis,” and that information is still needed from PubPeer pursuant to the court’s order denying the motion to quash that is subject of the instant appeal.

fully aware that he was being accused of intentional research misconduct - a serious charge and accusation of illegal acts - rather than simply stating their opinion that certain images resembled each other.

If this anonymous defendant who emailed WSU was aware that the posts on PubPeer could be read as accusations of scientific misconduct, then it completely destroys PubPeer's arguments that none of the statements on PubPeer were capable of defamatory meaning.

The tricky part is that the lower court reached the right result, but for the wrong reasons, because under the circumstances presented to the court, where a defendant had appeared, the non-party PubPeer was not permitted to base its motion on the standards of MCR 2.116 (C) (8), failure to state a claim upon which relief can be granted.

The court should not have allowed a non-party, PubPeer, to argue a motion for summary disposition – or more precisely, the standards for such a motion – and to consider that argument in granting their motion to quash. Specifically, the court's error was in applying the standards of *Ghanam v. Does*, 303 Mich App 522 (2014), rather than *Thomas M. Cooley Law School v. Doe*, 300 Mich App 245 (2013), because in this case, a defendant has appeared.

Normally, a non-party is not allowed to file a motion for summary disposition. Only a party may file. MCR 2.116 (B) states that “A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule.”

Ghanam provides a limited exception. It allows a non-party to argue that the complaint is deficient under MCR 2.116 (C) (8) **only if** there is no defendant who is able to make a motion for summary disposition, on the theory that if there is no defendant to

raise the motion, the non-party may do it instead. That court held: “In the instant case, however, there is no evidence that any of the anonymous defendants were aware of the pending matter or involved in any aspect of the legal proceedings. Therefore, the instant case is distinguishable from *Cooley*.” [*Ghanam* at 530]

The court went on to clarify: “But in *Cooley*, the court rules were adequate to protect the anonymous defendant only because he was aware of and involved in the lawsuit. See *Id.* at 252, 270. As the partial dissent in *Cooley* noted, “[A]n anonymous defendant cannot undertake any efforts to protect against disclosure of his or her identity until the defendant learns about the lawsuit--which may well be too late” *Id.* at 274 (BECKERING, J., concurring in part and dissenting in part). In the present case, no defendant was notified of the lawsuit and no defendant had been involved with any of the proceedings, which means that there was no one to move for summary disposition under MCR 2.116(C)(8).” [*Ghanam, Id.* at 539-540]

If there is no defendant, the court must apply *Ghanam* and “analyze the complaint 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] But if there *is* a defendant to argue for summary disposition, then a non-party may *not* argue the summary disposition standards. In short, *Ghanam* applies if there is no defendant able to argue a motion for summary disposition, and *Cooley* applies if there is a defendant.

Here, a defendant had appeared, filed a motion for summary disposition, and appeared at all hearings, even addressing the lower court at oral argument. Thus there is no need – and indeed, *Cooley* prohibits – the non-party PubPeer from arguing the standards of MCR 2.116 (C) (8). *Cooley* held:

“[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.” *Id.* at 269. The court went on to explain: “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.” [*Cooley*, *Id.* at 269; emphasis added]

In summary, there are two controlling precedential cases where a plaintiff seeks the identity of anonymous defendants. *Ghanam* applies if there are no known defendants; *Cooley* applies if there is a known defendant. Accordingly, it was error for the court to rely on *Ghanam* and allow the non-party to argue the summary disposition standards, because in this case, there is a known defendant with the ability (and his own pending motion) to do that very thing.

Fortunately, in this particular instance regarding paragraph 40 (c), the error did not affect the outcome. The court reached the correct result to consider PubPeer's interests in requiring the disclosure, under the terms of an appropriate protective order under MCR 2.302, per *Cooley*.

SUMMARY AND CONCLUSION

The lower court reached the correct result regarding its order denying PubPeer's motion to quash concerning paragraph 40 (c) of the complaint. The complete email chain obtained afterwards from Wayne State confirmed that the inference drawn by the court was correct.

Nonetheless, the court's consideration of the motion under MCR 2.116 (C) (8) was incorrect. Reliance on the *Ghanam* standards is not applicable where a defendant has appeared. The court should have instead analyzed the motion under the *Cooley* case and to balance the interests of the party, and permit the subpoena under the terms of a protective order under MCR 2.302.

Given that both Dr. Sarkar and PubPeer have filed motions for interlocutory appeal, and the trial court has stayed proceedings, plaintiff does not oppose PubPeer's application for leave to appeal. It makes sense to consolidate the appeals for consideration and decision.

Plaintiff agrees with PubPeer that the First Amendment issues raised in this case are important, but there should be no heightened standard for free speech for anonymous persons; nor should the First Amendment protect against clearly tortious conduct, where Dr. Sarkar has sufficiently pled defamation, intentional interference with business expectancy and relationship, invasion of privacy, and intentional infliction of emotional distress.

Ultimately, this court should allow appropriate disclosure from PubPeer so that Dr. Sarkar may pursue his claims in the trial court.

RELIEF REQUESTED

W H E R E F O R E Dr. Fazlul Sarkar respectfully requests that the court consolidate PubPeer's application for leave to appeal with his own, and consider them together, ultimately deciding the appeals in Dr. Sarkar's favor, and permit production of the identifying information from PubPeer on appropriate conditions so that Dr. Sarkar's lawsuit may proceed.

Respectfully submitted,

NACHT, ROUMEL, SALVATORE,
BLANCHARD & WALKER, P.C.

s/Nicholas Roumel

Nicholas Roumel
Attorney for Plaintiff

April 21, 2015

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon all parties to the above cause to each of the attorneys/parties of record herein by regular mail on the 21th Day of April, 2015.

/s/ Nicholas Roumel

Nicholas Roumel