STATE OF MICHIGAN
IN THE COURT OF APPEALS

FAZLUL SARKAR,

Plaintiff–Appellee,

vs.

JOHN and/or JANE DOE(S),

Defendant(s),

PUBPEER, LLC,

Appellant.
_____/

COA Case No. 326691

Wayne County Circuit Court
Case No. 14-013099-CZ (Gibson, J.)

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PUBPEER'S REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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I. Introduction.

PubPeer's application for leave to appeal established three key propositions: (1) that this Court's precedents prohibit the unmasking of anonymous speakers if the complaint against them is legally inadequate, (2) that none of the comments made by PubPeer's commenters on its website—including the comment reproduced in paragraph 40(c) of the complaint—accused Dr. Sarkar of research misconduct, and (3) that the First Amendment does not permit Dr. Sarkar to unmask lawful speech (the comment in paragraph 40(c)) in his pursuit of allegedly unlawful speech (the email whose text he has now partially produced for the first time).

For these reasons, the email that Dr. Sarkar has obtained from Wayne State University is essentially irrelevant to this dispute.[1] The text of the email was not posted on PubPeer's site. Therefore, whether or not that email is defamatory, it provides no basis to unmask the lawful speech made on PubPeer's site. Dr. Sarkar's efforts to learn the identity of the sender of that email can and must be made without infringing upon the constitutional right of PubPeer's commenters to remain anonymous. (The standard way to identify the sender of an email is to request his or her identifying information from the email provider, which is, in this case, Google. Dr. Sarkar does not appear to have attempted to do so.)

Even if the email—which appears to have been sent by "Clare Francis," a well-known anonymous whistleblower in the sciences[2]—were legally capable of supporting the unmasking of a comment made in a separate forum, it would not suffice in this case for two reasons. First, the email is simply not defamatory. Like many of the comments on PubPeer's site, it highlights

[1] The email referred to in Dr. Sarkar's answer to PubPeer's leave application was made part of the trial court record on April 10, 2015 and is attached hereto as Exhibit A.

[2] See, e.g., Grens, *What to Do About "Clare Francis,"* The Scientist (Sept 14, 2013) <http://www.the-scientist.com/?articles.view/articleNo/37482/title/What-to-Do-About--Clare-Francis-/> (accessed May 4, 2015).

anomalies in the images used in Dr. Sarkar's papers, but pointing out those anomalies and calling for an investigation of them is not defamatory as a matter of law. Nor is the email actionable for observing that others seem to believe the anomalies warrant investigation. Indeed, Dr. Krueger, the expert PubPeer hired to analyze the irregularities, said the same thing in stating that, were he still at the U.S. Office of Research Integrity, he would have recommended an investigation of Dr. Sarkar's research based on "the demonstrable credibility of the numerous issues identified" on PubPeer's site. See PubPeer Appl Ex D at 35 (Krueger Aff ¶ 86).

Second, and independently, Clare Francis's email to Wayne State University is privileged under Michigan law and thus is not actionable. It constitutes a communication by a scientist with an interest in the reliability of a peer's research to the institution legally responsible for investigating any concerns with the research. As such, it is legally protected under Michigan's "shared interest" privilege.

For these reasons and those explained more fully below, the Court should grant PubPeer's application for leave to appeal and reverse the order of the circuit court requiring PubPeer to disclose the identifying information of its commenter.[3]

II. Argument

a. The circuit court correctly understood this Court's precedent to require it to test the legal sufficiency of Dr. Sarkar's complaint *before* unmasking.

Dr. Sarkar's central contention in opposing PubPeer's application is that the circuit court should not have evaluated his claims pursuant to the standards set out in MCR 2.116(C)(8) prior to ordering unmasking. See Pl Br 12–14. This argument simply misunderstands this Court's decisions in *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245; 833 NW2d 331 (2013)

[3] At the time PubPeer filed its leave application, its motion for a stay pending appeal was awaiting a hearing before the circuit court. The circuit court subsequently granted PubPeer's motion and has stayed all proceedings pending resolution of this appeal. See Exhibit B.

and *Ghanam v Does*, 303 Mich App 522; 845 NW2d 128 (2014). Those cases involved different circumstances, and so they arrived at slightly different factual conclusions, but the legal principle they articulated is clear: courts must review the sufficiency of a defamation plaintiff's allegations *before* unmasking. See PubPeer Appl 14–15; see also PubPeer Answer to Sarkar Appl for Leave 9–15 (COA Case No. 326667). The primary difference between the two cases is that *Cooley* contemplated that a participating defendant would initiate that review, whereas *Ghanam* mandated that trial courts do so upon their own initiative, or upon the motion of a subpoeaned third party, when the defendant has not appeared to do so. Here, the Doe defendant responsible for the comment at issue in paragraph 40(c) has not appeared, and so the circuit court correctly determined that *Ghanam* required it to test the sufficiency of Dr. Sarkar's complaint on the court's own initiative or upon PubPeer's request.

Dr. Sarkar attempts to distinguish *Ghanam* by pointing out that a single Doe defendant is participating in these proceedings. See Pl Br 13–14. That fact is all but irrelevant. At most, it may have provided the circuit court a basis to defer resolution of PubPeer's motion to quash with respect to *that Doe defendant's* comments, until the court resolved his or her motion for summary disposition. But that defendant's participation provided no basis to unmask any of the *other* commenters on PubPeer's site who are, as in *Ghanam*, not participating in this litigation and whose right to anonymity is not represented by the single participating defendant. Those commenters' protection comes, if at all, from application of *Ghanam* to test the sufficiency of the complaint's allegations against them.

In any event, *Cooley* itself recognized that the First Amendment requires consideration of a motion for summary disposition prior to unmasking. See 300 Mich App at 264 ("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."). Indeed, it is difficult to understand what legitimate interest a defamation plaintiff could possibly have in piercing a speaker's constitutional right to remain anonymous unless the plaintiff could demonstrate, at the very least, that the speech at issue is legally capable of defamatory meaning.

Dr. Sarkar's misunderstanding of *Cooley*—as permitting unmasking subject only to a protective order—stems from his failure to appreciate the significance of the single most important fact in that case: that the plaintiff in *Cooley* already knew the identity of the defendant. *Id.* at 254. Because the defendant had already been unmasked, the only remedy available to him was a protective order limiting *further* disclosure of his identity. *Id.* at 252. But *Cooley* made clear—and, if there were any doubt about it, *Ghanam* made even clearer—that when a defamation plaintiff is seeking to unmask an anonymous defendant whose identity he does not already know, the First Amendment requires that courts first assure themselves that the allegations against that defendant are legally adequate. See *Ghanam*, 303 Mich App at 140 ("The [*Cooley*] Court explained that a deficient claim can be dismissed *before any discovery is accomplished* because in order to survive a motion for summary disposition under MCR 2.116(C)(8), a defamation claim must be pleaded 'with specificity by identifying the exact language that the plaintiff alleges to be defamatory.'" (emphasis added)).

b. Dr. Sarkar has not shown that any comment on PubPeer's site is defamatory.

In his answer, see Pl Br 11–1, Dr. Sarkar relies on an email that "Clare Francis" sent to Wayne State University to argue that PubPeer has been "dead wrong" in asserting "that 'the comments Dr. Sarkar complains of are not capable of defamatory meaning.'" But Dr. Sarkar has yet to demonstrate that any comment *on PubPeer's site* is capable of a defamatory meaning.

As PubPeer's application for leave to appeal made clear, not a single comment posted by PubPeer's commenters accused Dr. Sarkar of "research misconduct"—by word or by

implication.[4] The comments are subjective opinion, rhetorical hyperbole, or simply not defamatory. See, e.g., PubPeer Answer to Sarkar Appl for Leave 21–25 (COA Case No. 326667); PubPeer Appl Ex B at 12–20 (Mot to Quash). The vast majority of the comments point out scientific concerns with images used in Dr. Sarkar's papers. *Id.* Ex B at 13–15 (Mot to Quash). There is nothing defamatory about those statements, but even if there were, Dr. Sarkar has conceded that the concerns raised are legitimate,[5] and a prominent expert in the forensic analysis of scientific images has confirmed as much. See *id.* Ex D at 34 (Krueger Aff ¶ 84) ("[T]he evidence in support of the conclusion that the images are not authentic is exceptionally strong.").

Additionally, the comment in paragraph 40(c) is not capable of defamatory meaning because, as PubPeer explained, the first portion of it does nothing more than subjectively opine that further investigation of Dr. Sarkar's images is warranted, and because the second portion is legally privileged as a fair report of an email response from a public university. *Id.* at 18–23. Dr. Sarkar's answer does not respond to either of these points.

Accordingly, Dr. Sarkar has not demonstrated that any of the PubPeer comments are defamatory. Clare Francis's email does not change that fact.

c. Even if it were defamatory, Clare Francis's email to WSU would not support unmasking PubPeer's commenter.

As PubPeer explained in its application, a statement by a person in one forum (e.g., an email) cannot form the basis for unmasking a lawful comment made in an entirely different forum (e.g., a website posting). See *id.* 25–27. Clare Francis's email, even if defamatory, would

[4] See PubPeer Appl 2. See also PubPeer Appl Ex C (Jollymore Aff) for the full text and context of all of the statements Dr. Sarkar complains of.

[5] See Pl Br 2 ("they frame their legal argument to try and fool this court into thinking this case is only about whether scientific blots look alike"); PubPeer Appl Ex E at 9 (Pl Resp to Mot to Quash) ("This case, however, is not about blots.").

at most support unmasking the sender of that email—not PubPeer's commenter. A contrary rule would create an exception to the constitutional right to anonymity that would swallow the rule. For example, imagine two different magazines publish unattributed reviews of the same restaurant. The first includes a provably false assertion of fact—for example, that the restaurant had "served spoiled milk." The second simply opines that the restaurant's food "is bland." It would defeat the First Amendment's protection of anonymity to permit a defamation plaintiff to unmask the second reviewer, whose statement is not capable of defamatory meaning, on the theory that the same person also authored the "spoiled milk" review. In that hypothetical case, as here, the plaintiff may, at most, seek to unmask the comment that is actually capable of defamatory meaning. In short, Dr. Sarkar may not unmask PubPeer's commenter to pursue his claims against Clare Francis.[6]

d. Even if Clare Francis's email could legally justify the unmasking of PubPeer's commenter, the email is not defamatory.

Even if Dr. Sarkar were correct as a legal matter that Clare Francis's email could support his request to unmask PubPeer's commenter, the email would not do so as a factual matter because it is not defamatory. Clare Francis's email to Wayne State contains no freestanding factual allegations about Dr. Sarkar. It merely refers university officials to a link containing the comments already posted on PubPeer's site.[7] Dr. Sarkar nonetheless argues that the following two sentences in the email are capable of defamatory meaning:

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

[6] As explained below, Dr. Sarkar cannot make the preliminary showing of merit necessary to justify the unmasking of Clare Francis based on the email sent to WSU. But even if he could, his proper recourse would be to attempt to learn Clare Francis's true identity based on his or her email address—in other words, from Google—not from PubPeer.

[7] The full email is attached as Exhibit A.

2. "Many of the entries mention things which amount to what many think of as **scientific misconduct**."

Pl Br 10–11 (emphasis original).

The first sentence is clearly not defamatory because expressions of concern are not the same as allegations of provably false and defamatory facts. See PubPeer Appl Ex J 8–9 (PubPeer Supp Br) (citing cases holding that expressions of concern are not defamatory). Scientific progress relies on scientists documenting their concerns with the work of their peers; the threat of liability for expressing concerns with a peer's published work would be devastating to scientific inquiry. For this very reason, courts have been loath to encumber scientific debate with judicial scrutiny. See *id.* at 29 (citing cases). This Court should treat Clare Francis's scientific observations with the same restraint.

The second sentence is similarly incapable of defamatory meaning because it merely draws a conclusion about what people are likely to think about the previously aired, undisputed facts regarding image similarities in Dr. Sarkar's work. See *Fisher v Detroit Free Press, Inc*, 158 Mich App 409, 413; 404 NW2d 765 (1987) ("a statement of opinion is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion"). The only facts alleged or implied by Clare Francis's email are those non-defamatory facts about image similarities in Dr. Sarkar's publications—facts which had already been posted on PubPeer's site. The email does not defame Dr. Sarkar by stating what conclusions she or others might draw based on those facts.

In any event, Clare Francis's concern regarding scientific misconduct is fully supported by the observations in Dr. Krueger's affidavit. See PubPeer Appl Ex D at 3 (Krueger Aff ¶ 86) ("Had I been presented with these images while still at ORI, I would have recommended that ORI refer the images to the host institution where the research was conducted for [a research

misconduct] investigation. Based on my experience at ORI, and given the demonstrable credibility of the numerous issues identified by PubPeer, I believe it very likely that ORI would have made such a referral in this case."). Read in the context of the rest of the email, then, Clare Francis's statements amount to little more than a request for an investigation that Dr. Krueger himself would have recommended: an institutional inquiry into the irregularities in Dr. Sarkar's papers that had been identified by anonymous commenters on PubPeer's site.

Dr. Sarkar argues that the language of Clare Francis's email supports his theory that all of the PubPeer comments are tantamount to accusations of intentional research misconduct. See Pl Br 11–12. This argument reflects a basic misunderstanding of how libel law works. People who read certain *facts* about irregularities in scientific papers will inevitably come to their own conclusions about whether it is more likely than not that those irregularities were the result of inadvertence as opposed to intentional misconduct. But only the statement of a verifiably false *fact* can give rise to a defamation claim. Neither the PubPeer comments nor Clare Francis's email states or implies any verifiably false facts concerning Dr. Sarkar's conduct. They note the image irregularities in his papers, express scientific concern about those irregularities, and call for an investigation.

Dr. Sarkar has failed to show that Clare Francis's email is capable of defamatory meaning. Accordingly, he may not rely on the email to learn Clare Francis's real identity, let alone that of PubPeer's commenter.

e. In any event, Clare Francis's email is legally privileged under Michigan's qualified "shared interest" privilege, and Dr. Sarkar has not made any showing to overcome that privilege.

In Michigan, only unprivileged communications may provide the basis for a defamation action. See *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010)

(stating elements). Clare Francis's email to Wayne State University cannot be grounds for such an action because it is subject to the following protection:

> A qualified privilege extends to all communications made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty and embraces a duty not a legal one but of a moral or social character of imperfect obligation.

Timmis v Bennett, 352 Mich 355, 368; 89 NW2d 748, 754 (1958). Once this privilege attaches to a statement, it may be overcome "only by showing that the statement was made with actual malice or with knowledge of its falsity or reckless disregard of the truth." *Meisner & Assocs, PC v Stamper & Co*, No. 280190, 2009 WL 211900, at *3 (Mich Ct App, Jan 29, 2009) (internal citation omitted).

The email between Clare Francis and Wayne State University is privileged because the two have a shared interest in Dr. Sarkar's research. Clare Francis's interest in Dr. Sarkar's publications, which are a matter of public concern (see PubPeer Appl 17–18), stems from being a fellow scientist invested in the rigorous review of scientific theories. Because Wayne State University "serves an important societal purpose" in producing viable medical research, "it is right in the interests of society that [Clare Francis] should tell third persons certain facts, which he [or she] in good faith proceeds to do." See *Schuitmaker v Krieger*, No. 233944, 2003 WL 1950238, at *6 (Mich Ct App, Apr 24, 2003) ("[counseling ethics board] had a moral and social obligation to hear complaints about a member counselor that could impact the lives of others, and defendant had a similar corresponding obligation in revealing possible improper conduct to [ethics board] in order to protect others from the same conduct"); *Nuyen v Slater*, 372 Mich 654, 660; 127 NW2d 369 (1964) ("As a private citizen interested in the proper administration of the local county health department," defendant was qualifiedly privileged to submit complaint to the health department about private conduct of a nurse). Wayne State University, for its part, has a

federally mandated duty to investigate any reported scientific concerns with its researchers' work product. See 42 CFR 93.300(b). Due to Clare Francis's concerns, and Wayne State's duty to investigate them, the email is subject to the qualified privilege. See *Chandok v Klessig*, 632 F3d 803 (CA 2, 2011) (applying qualified privilege to statements made by director of a medical laboratory about postdoctoral fellow's alleged scientific research misconduct).

Dr. Sarkar cannot overcome this privilege because he has not pleaded any facts that indicate Clare Francis acted recklessly. "Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation." *Grebner v Runyon*, 132 Mich App 327, 333; 347 NW2d 741 (1984). As a result, the email is protected speech that cannot be the basis for civil liability.

III. Conclusion.

For these reasons, this Court should grant leave to appeal and reverse the circuit court's order denying, in part, PubPeer's motion to quash.

Respectfully submitted,

/s/ Daniel S. Korobkin

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