STATE OF MICHIGAN

IN THE COURT OF APPEALS

FAZLUL SARKAR,

Plaintiff–Appellant,

vs.

JOHN and/or JANE DOE(S),

Defendants,

PUBPEER, LLC,

Appellee.
_____/

COA Case No. 326667

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

FAZLUL SARKAR,

Plaintiff–Appellee,

vs.

JOHN and/or JANE DOE(S),

Defendants,

PUBPEER, LLC,

Appellant.
_____/

COA Case No. 326691

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

APPELLANT PUBPEER'S REPLY BRIEF IN CASE NO. 326691

ORAL ARGUMENT REQUESTED

January 19, 2016

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Introduction

The First Amendment right to speak anonymously is threatened by the circuit court order from which PubPeer, LLC appeals. That order requires PubPeer—which operates a website devoted to anonymous, post-publication peer review—to identify one of the anonymous scientists on its site.[1] It is unconstitutional because, as virtually all courts to have considered the question (including this one) have recognized, unmasking an anonymous speaker violates the First Amendment unless the plaintiff who seeks the identifying information can, at a minimum, state a valid claim for relief. And the plaintiff in this case, Dr. Fazlul Sarkar, cannot state a valid claim for relief.

Only if the Court disagrees with this assessment must it resolve a second question: whether a plaintiff who has adequately pleaded claims for relief must substantiate those claims with evidence before unmasking is permitted. Although both of this Court's prior cases on the unmasking of anonymous defendants mentioned that question in dicta, neither case presented an opportunity to resolve it (in *Cooley* because the defendant had already been unmasked, and in *Ghanam* because the plaintiff's claims did not satisfy even the lower threshold). If this Court reaches that question, it should adopt the nearly unanimous view that defamation plaintiffs must substantiate their claims with evidence before unmasking anonymous speakers.

This case exemplifies the importance of anonymous speech. Many scientists whose work has been reviewed on PubPeer's website have responded with a defense of their research or a course-correction of their work. Dr. Sarkar has chosen a different path: attacking the anonymity that PubPeer provides—and that the Constitution guarantees—and thereby threatening the

[1] The sole basis for that order was the comment in paragraph 40(c) of the complaint. Accordingly, all other statements in the complaint are outside the scope of this appeal. They are, of course, addressed in Dr. Sarkar's appeal and PubPeer's opposition to it in Case No. 326667.

vitality of scientific discourse. PubPeer respectfully urges this Court to preserve the well-established anonymous speech rights of its users, and the integrity of the scientific discourse they have engaged in, by reversing the trial court's unmasking order and dismissing the claims in Dr. Sarkar's complaint to the extent they are based on paragraph 40(c) of the complaint.

Argument

This case is squarely governed by *Ghanam v Does*, in which this Court held that unmasking the anonymous defendants would be unconstitutional because the defamation claims against them were "facially deficient." 303 Mich App 522, 543; 845 NW2d 128 (2014). As explained in PubPeer's opening brief, PubPeer Br 15–23, Dr. Sarkar's claims are facially deficient for multiple independent reasons: none of the statements upon which the claims are based is capable of defamatory meaning; those statements are legally privileged; and now, moreover, any defamation claim based on those statements is time-barred. The circuit court's unmasking order must therefore be reversed.

Dr. Sarkar's brief hardly mentions the merits of his claims. Instead, Dr. Sarkar fixates on issues that, for the most part, have no relevance to this appeal. PubPeer responds as follows:

***First*, the merits of Dr. Sarkar's claims must be assessed *before* unmasking is warranted.** Dr. Sarkar argues that because a lone defendant has appeared in this action, it was premature, under *Cooley*, to consider the sufficiency of the claims in determining whether to issue an unmasking order. Pl Br 7–8. It is undisputed, however, that the anonymous defendant responsible for the one comment at issue in this appeal has not appeared. Thus, even if *Cooley* stood for the proposition that considering the sufficiency of the claims against a *participating* defendant is premature at the unmasking stage (and it does not, see PubPeer Opp'n Br 12–14), that proposition is entirely irrelevant here. *Ghanam* holds that when, as here, the anonymous

defendant whose allegedly defamatory statement is in question has not appeared, the sufficiency of the claims against that defendant must be determined *before* he or she is unmasked. 303 Mich App at 530, 541, 543.

The rule could not be otherwise. As a matter of constitutional necessity, defamation law requires the First Amendment rights of defendants to be balanced against the interests of plaintiffs in seeking redress for reputational harm. See, e.g., *Rouch v Enquirer & News of Battle Creek Mich*, 440 Mich 238, 242–43; 487 NW2d 205 (1992). If there is no viable claim to relief, there is no basis for intruding on free-speech rights, and doing so would be unconstitutional. Not surprisingly, then, there is no case—not even *Cooley*—that supports Dr. Sarkar's paradoxical position that courts should unmask *first* and ask constitutional questions later, only after a defendant's right to speak anonymously has been irretrievably lost. See *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 266; 833 NW2d 331 (2013) (holding that the "combined safeguards of a protective order under MCR 2.302 and the summary disposition standards and procedures under MCR 2.116(C)(8)" are necessary to protect anonymous speech rights). To the contrary, every court to have considered the question has required, at a minimum, some assessment of the merits of the plaintiff's case *before* unmasking is permitted.

It is no comfort to the anonymous defendant in this case that a protective order could prevent disclosure of his or her identity to people other than Dr. Sarkar. That is so because the primary purpose of the right to anonymity is to allow anonymous critics to remain nameless to the subjects of their criticism.[2] Dr. Sarkar's claim to the contrary—that a protective order limiting the disclosure to himself would suffice—is based on a misreading of *Cooley*. That case

[2] In "John Doe" defamation cases, remaining anonymous *to the plaintiff* is the most crucial component of the First Amendment interest at stake. See, e.g., *Doe v Cahill*, 884 A2d 451, 461 (Del, 2005) (noting that the core concern in "John Doe" defamation actions is the risk that they be misused by plaintiffs to harass anonymous speakers by unmasking them).

involved a defendant who was participating in the lawsuit, and whose identity was already known to the plaintiff. 300 Mich App at 252–53. Given that the only remaining threat to the defendant's anonymity was disclosure to third parties, a protective order preventing such disclosure pending consideration of that defendant's motion for summary disposition was sufficient. *Id.* at 266. Not so in this appeal, where (a) the defendant is not participating, and (b) Dr. Sarkar does not know his or her identity.

***Second*, unmasking is unwarranted because Dr. Sarkar's claims are facially deficient.** PubPeer Br 14–29. Dr. Sarkar does not fully address the multiple overlapping reasons why that is so, and the few arguments he does make are unavailing.

1. The time bar: Dr. Sarkar claims PubPeer's "statute of limitations argument is a red herring," Pl Br 9, but he does not explain why. The comment in paragraph 40(c) of the complaint was made on June 18, 2014, and the email to which it refers is dated November 10, 2013. Thus, none of these statements can now supply the basis for a timely defamation claim. See MCL 600.5805(9) (one-year limitations period for defamation); *Hawkins v Justin*, 109 Mich App 743, 746; 311 NW2d 465 (1981) (claim accrues from date of publication); see also *Thomas v Process Equip Corp*, 154 Mich App 78, 84; 397 NW2d 224 (1986) (no tolling for filing of "John Doe" complaint); *Meyer v Hubbell*, 117 Mich App 699, 704–05; 324 NW2d 139 (1982) (ancillary torts based on speech cannot be used to circumvent time bar for defamation).

2. The lack of defamatory content: PubPeer's opening brief explains why the comment in paragraph 40(c) of the complaint is, at most, an expression of concern over possible anomalies in Dr. Sarkar's papers and a suggestion that further investigation is warranted, and therefore incapable of defamatory meaning as a matter of law. PubPeer Br 18–23. Dr. Sarkar's retort is that it is "preposterous" to characterize the comment this way because the comment would be

defamatory if it concerned an investigation of a lawyer into theft of client funds. Pl Br 9. This analogy misses the point. Nothing in paragraph 40(c) accuses Dr. Sarkar of research misconduct; the commenter merely conveys the contents of a letter that neither confirms nor denies that Dr. Sarkar is being investigated by Wayne State University. The commenter may agree that investigation is warranted, but even an express statement to that effect would not be defamatory. See *Ghanam*, 303 Mich App at 548 (finding statement, "maybe I need to call the investigators?" to be "not defamatory as a matter of law"); *Jones v Schaeffer*, 122 Mich App 301, 305; 332 NW2d 423 (1982) ("'I am here to investigate' . . . does not rise to the level of defamation."). If, instead, the PubPeer commenter had relayed a letter that neither confirmed nor denied the investigation of a lawyer for theft of client funds, the same reasoning would obtain: it would not amount to an accusation of theft, and it would not amount to actionable defamation.

To be sure, in relaying that prior PubPeer comments had been reported to Wayne State, the commenter responsible for paragraph 40(c) may be implying agreement with those prior comments. But that is not defamatory, either. Those comments observe that images in Dr. Sarkar's research papers appear similar; PubPeer's opening brief explains why the observation of visual similarity is a non-actionable expression of opinion. PubPeer Br 21–22. It is true, as Dr. Sarkar claims, that "even opinion or innuendo can be defamatory," Pl Br 9, but only when the speaker "implies that there are undisclosed facts on which the opinion is based," *Orr v Argus-Press Co*, 586 F2d 1108, 1115 (CA 6, 1978). The opinion expressed in paragraph 40(c) does not imply any false facts, and it is based entirely on the public comments of other PubPeer users and the published work of Dr. Sarkar. It is therefore incapable of defamatory meaning.

3. The privilege for fair and true reports: Although Dr. Sarkar fails to mention this issue, PubPeer notes that, as explained in its opening brief, PubPeer Br 23, the comment in paragraph 40(c) recounts an apparently accurate statement sent by Wayne State in response to an

inquiry, and the privilege for fair and true reports is therefore yet another independent reason why Dr. Sarkar has failed to state a claim.[3]

***Third*, the "Clare Francis" email is not a basis for unmasking PubPeer's anonymous commenter.** Dr. Sarkar has retreated from his initial position that the "Clare Francis" email supplies a basis for a viable defamation claim. See Pl Br 1 (arguing that "email chain between 'Clare Francis' and Wayne State University" cannot be considered); *id.* at 9 ("It is that public accusation of research misconduct that is allegedly defamatory [i.e., the PubPeer comment in paragraph 40(c)], *not the private email to Wayne State some months earlier* . . . ." (emphasis added)). For multiple other reasons, PubPeer agrees that it would be improper to unmask PubPeer's commenter based on the "Clare Francis" email: the email was not pleaded; it never appeared on PubPeer's website; it is not defamatory; it is privileged; and any claim based on the statements it contains is now time-barred. PubPeer Br 15, 24–29.

***Fourth*, Dr. Sarkar's ancillary claims are derivative of his defamation claim, and therefore cannot supply an independent basis for unmasking.** Dr. Sarkar argues that "PubPeer errs by treating this case as one for defamation, without regard to other tortious conduct." Pl Br 2; see also *id.* at 9 (arguing that the other tort claims would survive a motion for summary disposition). For the reasons explained in PubPeer's opening brief, PubPeer Br 29–30, n.24, and its brief in Case No. 326667, PubPeer Opp'n Br 29–31, that is, however, precisely how this case should be treated. It is black-letter law that ancillary torts based on the same conduct as

[3] All of these flaws in Dr. Sarkar's claims present questions of law, not fact. See *Ghanam*, 303 Mich App at 544 ("Whether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide."); *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999) ("W]hether the claim is time-barred [i]s a matter of law."); *Stablein v Schuster*, 183 Mich App 477, 480; 455 NW2d 315 (1990) ("The initial determination of whether a privilege exists is one of law for the court."). There is therefore no merit to Dr. Sarkar's repeated suggestion that this case would come out in his favor if the pleadings were construed in the light most favorable to him. See Pl Br 8.

a defamation claim—that is, speech—cannot survive when the defamation claim fails. See *Hustler Magazine, Inc v Falwell*, 485 US 46, 56; 108 S Ct 876; 99 L Ed 2d 41 (1988); *Ireland v Edwards*, 230 Mich App 607, 624–25; 584 NW2d 632 (1998).

Dr. Sarkar's specific arguments in support of his false-light and intentional-interference-with-a-business-relationship claims do nothing to refute this conclusion.[4]

1. False light: Dr. Sarkar argues that the anonymous PubPeer commenter "invade[d his] privacy" by posting to PubPeer the Wayne State official's statement declining to confirm or deny that an investigation was underway at the university. Pl Br 9. But this allegedly false speech is precisely the conduct that supports his defamation claim. See Ex 1 at 24 (Compl ¶ 93) (alleging, in support of the defamation claim, that "Defendant(s) . . . made certain public statements to third parties that were false, including . . . those detailed in [among other places, paragraph 40(c)] . . . ."). Thus, if it is constitutionally protected speech, as PubPeer has shown, it may not form the basis of liability, whether as defamation or otherwise.

2. Intentional interference with business relations: Dr. Sarkar argues that the publication of a flyer "concerning the forged Senatorial inquiry . . . more than adequately support[s his claim for] intentional interference with business relations." Pl Br 9. Although this is outside the scope of the current appeal—which concerns only paragraph 40(c) of the complaint—PubPeer notes that this, too, is conduct alleged in support of the defamation claim: the publication of allegedly defamatory speech. See Ex 1 at 24 (Compl ¶ 93) (citing the flyer among "public statements to third parties that were false" in support of the defamation claim).

***Finally*, although this case can and should be resolved on the basis of the pleadings, material outside the complaint may be relevant for two reasons.** Dr. Sarkar objects to

[4] Dr. Sarkar does not mention his claims for intentional infliction of emotional distress and intentional interference with a business expectancy in his brief on this appeal. PubPeer specifically addresses those claims in its brief in Case No. 326667. PubPeer Opp'n Br 29–30.

PubPeer's "multiple pleas" for this Court to consider evidence outside the pleadings, arguing that the scope of this Court's analysis is constrained by "the standards of MCR 2.116(C)(8)." Pl Br 1. PubPeer agrees in part: the legal sufficiency of defamation claims must be assessed on the basis of the pleadings alone, and because Dr. Sarkar's pleadings are plainly inadequate, the circuit court's unmasking order must be reversed. See *Ghanam*, 303 Mich App at 543. There are, however, two caveats.

1. The "Clare Francis" email may be considered in determining whether Dr. Sarkar should be permitted to amend the complaint. Defamation complaints that do not specifically plead the alleged libel are facially inadequate. *Cooley*, 300 Mich App at 262. As a general matter, plaintiffs may cure this defect by amending their pleadings. To conserve judicial resources in unmasking cases, however, this Court has, after determining that unmasking is unwarranted, reviewed un-pleaded statements to determine whether amendment would be futile. See *Ghanam*, 303 Mich App at 543–50 (holding that the un-pleaded statements at issue were not defamatory as a matter of law and that amendment would therefore be futile). Here, as in *Ghanam*, amending to include the un-pleaded statements at issue (i.e., the "Clare Francis" email) would be futile. That is so for multiple reasons: (1) the email is not capable of defamatory meaning, PubPeer Br 24–26; (2) it is privileged, *id.* at 26–28; and (3) any claim based on it would be time barred, *id.* at 15.

2. If this Court finds the pleadings legally adequate, it should require Dr. Sarkar to substantiate his claims with evidence. Dr. Sarkar's final contention is that the circuit court committed "plain error [by] requir[ing] production of documentary evidence, including consideration of Dr. Krueger's affidavit." Pl Br 8. This claim is factually and legally incorrect.

It is factually incorrect because there is no indication that the circuit court considered material outside the complaint. See, e.g., Ex 5 at 35 (Mar 5 Hr'g Tr 35) (court noting that the question is whether "the Complaint isn't inadequately pled").

It is legally incorrect because it would not have been wrong for the circuit court to have done so. If this Court agrees that Dr. Sarkar's pleadings are deficient, *Ghanam* is indistinguishable from this case and requires that the unmasking order be reversed. See 303 Mich App at 543. If not, the Court faces the question of whether a trial court must require a defamation plaintiff to substantiate his or her allegations with evidence before permitting a defendant to be unmasked. That question was not resolved by either *Cooley* or *Ghanam*, PubPeer Br 30–32, but the vast majority of other jurisdictions to have addressed it have said "yes." Without such a requirement, defamation plaintiffs could successfully overcome the right to anonymity through artfully pleaded complaints, even if they had no realistic chance of prevailing. *Id.* at 33–34. This case exemplifies that risk: evidence produced by PubPeer strongly suggests that the anomalies discovered by PubPeer's commenters were, indeed, anomalies, and were concerning enough to warrant further investigation. See Ex 2B at 3–4 (Krueger Aff ¶ 7). To the extent any of the anonymous defendants' statements in this case are provably false (and they are not), the only evidence that could prove them false is the original data from Dr. Sarkar's experiments, which Dr. Sarkar has not offered. To permit unmasking without some inquiry into this (lack of) evidence would run afoul of the paramount constitutional principle in defamation cases: that the relevant interests be balanced in order to protect lawful speech. Thus, contrary to Dr. Sarkar's contention, evidentiary substantiation is required, and evidence outside the pleadings must be considered, before unmasking.

The integrity of scientific debate depends on the Court's vindication of the First

Amendment rights of the scientists on PubPeer's website by either finding Dr. Sarkar's pleadings deficient or remanding for the circuit court to determine whether Dr. Sarkar can make out a prima facie case, and whether the balance of interests in this case favors unmasking. See, e.g., *Dendrite Int'l, Inc v Doe No 3*, 342 NJ Super 134, 141, 155; 775 A2d 756 (NJ App, 2001).

Conclusion

The circuit court's March 26, 2015 order denying in part PubPeer's motion to quash should be reversed, and the Court should remand with instructions to dismiss the claims in the complaint to the extent they are based on paragraph 40(c) of the complaint.

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Respectfully submitted,

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