APPELLATE COURT OF ILLINOIS
FIRST DISTRICT, THIRD DIVISION

LISA STONE, mother and next friend of Jed Stone, a minor,	)	No. 1-09-3386
Petitioner-Appellee,	)	
v.	)	Appeal from the Circuit Court of County, No. 09 L 56365
PADDOCK PUBLICATIONS, INC., d/b/a The Daily Herald, Inc.	)	Hon. Jeffrey Lawrence
Respondent,	)	
and	)	
JOHN DOE,	)	
Intervener-Appellant	)	

BRIEF AND ARGUMENT OF PETITIONER-APPELLEE

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Lisa Stone, Mother and Next Friend of Jed Stone, a minor

Table of Points and Authorities

Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 30 pages.

Stephen L. Tyma

Nature of the Case

This action was brought under Illinois Supreme Court Rule 224 to obtain discovery of the identity of the person or persons who posted on a web site maintained by Respondent in Discovery Paddock Publications, Inc., which is not a party to this appeal. Defamatory comments about Petitioner-Appellee Lisa Stone's fifteen year old son Jed Stone were posted in a public forum on that web site. Appellant John Doe intervened and asked the trial court to quash a subpoena to an internet service provider which would have identified him as the source of the postings. The trial judge permitted the subpoena to go forward but made it returnable to him. Appellant appeals from the trial court's order requiring disclosure of his identity under restrictive terms. No issue is presented on the pleadings.

Issues Presented for Review

1. Whether the Intervener-Appellant has shown that he is entitled to claim protection of his identity from disclosure when he posted material on a public forum which notified him that his use of the forum would not be anonymous.

2. Whether the trial court abused its discretion in permitting disclosure of the Intervener-Appellant's identity under conditions which would protect against public disclosure of his identity until the Petitioner-Appellee's next friend has prosecuted a cause of action against the Intervener-Appellant to the point where the parties are at issue.

Statement of Facts

On April 7, 2009, the Village of Buffalo Grove held a municipal election in which Lisa Stone was one of two people elected village trustee. Two days later, on April 9, 2009, well before Mrs. Stone took the oath of office as a Buffalo Grove trustee in May 2009, a person using the screen name "Hipcheck16" posted the following comment in the web log or "blog" maintained by *The Daily Herald*, a newspaper published by Paddock Publications, Inc., the respondent in discovery in this matter:

> . . .
>
> And as for you, UncleW . . .
>
> Thanks for the invitation to visit you, but I'll have to decline. Seems like you're very willing to invite a man you only know from the internet over to your house – have you done it before, or do they usually invite you to their house?
>
> Plus now that you stupidly revealed yourself, you may want to watch what you say here . . .

Appendix to Brief of Appellee ("Appendix"), Ex. A.[1] Other postings made by Hipcheck16 on the same blog indicate that the person or persons who used the designation Hipcheck16 knew that "UncleW" was the screen name used by Jed Stone, Lisa Stone's fifteen year-old

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[1] Exhibit A consists of postings to the Respondent in Discovery's blog from March 31, 2009 through April 9, 2009 , part of which is now found on the Internet at "http://www.dailyherald.com/story/?id=284378#storycomments." The last four pages of Exhibit A were used as an exhibit to a filing of Appellee in trial court which appears at R.C00131-50. The last of these four pages does not appear in the record on appeal and would have been present between R.C00146 and R.C00147. Respondent cannot determine if the page is missing because it was misplaced by the Clerk of the Circuit Court of Cook County or if the copy of the document filed with the Clerk inadvertently omitted the page in question. Appellant's and amici curiae's brief presume the page was in the record. The text of the posting was quoted *verbatim* (including date and time of publication) in Appellee's materials filed in the trial court. *See* R.C00114.

son. *See* R.C00144 (blog postings made on April 4, 2009 at 10:49 a.m. and 11:44 a.m.), R.C00146 (blog posting made on April 8, 2009 at 4:33 p.m.), R.C00148 (blog posting made on April 13, 2009 at 9:03 p.m.).

Postings on Paddock Publication's *Daily Herald* blog can only be made by persons who "sign up" or "register." *See* R.C00147, middle of page. A person wishing to "post" a comment uses a link, which then requires the person to sign in using a name given by that person, with other information. The sign-in and registration pages require that the user acknowledge Paddock Publication's privacy policy and terms of service, and a reminder of this requirement appears on each page of the blog. Appendix, Ex. B. *See* Ex. A, *passim*. The privacy policy has the following disclosures within it:

> **Personally Identifiable Information:** Personal data is collected when users voluntarily provide information to dailyherald.com, for example in registering for e-mail communications or other services, answering surveys, entering contests or sweepstakes, purchasing an archived photo, requesting vacation delivery stop, or posting an on line ad. During these activities, dailyherald.com may request information such as your name, e-mail address, residence address, phone number, date of birth, subscriber status, and credit card number (when purchasing products or services). We may also ask you for other information at other times.
>
> . . .
>
> **Anonymous and Aggregated Information:** Anonymous and aggregated information, such as which web pages users access, the number of daily visits to dailyherald.com, and anonymous responses to survey questions, is automatically collected through various methods. In the course of using dailyherald.com, we may also automatically track certain information about you. This information includes the URL that you just came from, the URL you go to next, and the Internet browser you are using. This statistical information is important to allow us to evaluate and improve the services we provide, to monitor the site's performance and to make it easier for visitors to use dailyherald.com.

Use of Cookies: The dailyherald.com site also uses "cookies" to collect information. A cookie is a small data file that most web sites write to your computer's hard drive or memory for record keeping purposes when you visit them. Cookies allow Paddock to measure activity on the various areas of the dailyherald.com site and improve your user experience, for example by remembering your passwords and viewing preferences, thus allowing you to visit various parts of dailyherald.com without re-registering.

Information That Is Not Covered by This Policy: This Privacy Policy only covers information collected at dailyherald.com, and does not cover any information collected by any other web site or off line by Paddock, its affiliates or any other company.

. . .

Information that you choose to post on a message board, forum, or chat room is also not covered by this Privacy Policy, and is not considered a confidential communication. Please keep in mind that whenever you voluntarily disclose personal information in a public area online - for example, in a Letter to the Editor or as a Guest Book entry in our Legacy.com obituary resource - that information can be collected and used by both Paddock and others. Paddock is not responsible for the disclosure or use of your name, e-mail address or other submitted information under these circumstances.

. . .

How does Paddock use and share information collected through DailyHerald.com?

Paddock's use and disclosure of information obtained through the use of dailyherald.com will comply with the terms set forth below. In all cases, we will use your information only as permitted by law.

Paddock's Use of Information: Paddock uses both the personal and aggregated and usage information we collect for multiple purposes. For example, we use this information to fulfill orders, administer information requests and provide requested services. We may use your e-mail or other address information to contact you regarding customer service issues or billing matters. Personal and aggregated information may also be used to improve the content of dailyherald.com, perform system administration activities, and to customize the content, advertising and layout of the site for each individual user.

We may also use your information to contact you regarding matters that we believe will be of interest to you. For example, we may send you e-mails regarding updates to dailyherald.com, promotions or contests being conducted through the site, and services and products offered by Paddock, our affiliates, or third parties.

Please note that we may combine the information about you that we collect at dailyherald.com with information available to us from other sources, including subscription information and information received from promotional partners or other third parties.

Disclosure of Information to Third Parties:

Affiliates and Service Providers. Paddock may share your information with our affiliated companies, including Reflejos Publications. Paddock may also disclose your information to third parties providing services on our behalf, such as web hosting companies, fulfillment houses, market research firms and business consultants. These third parties will be authorized to access and use your information only to provide services to us or on our behalf.

Unaffiliated Third Parties. Paddock may share your personally identifiable information with third parties that want to bring to your attention products, services and content that might interest you. Paddock will not, however, disclose any of your personally identifiable information to any company other than our affiliates and service providers unless we first provide you notice of such potential disclosure. If you do not want your information to be shared, you can choose not to use that particular service or, if requested, decline to have your information disclosed.

Aggregate Information. Paddock may share anonymous or aggregated user information with third parties for advertising and other purposes.

Legal Actions. Paddock may disclose user information in connection with law enforcement or governmental investigations or inquiries, to enforce compliance with the policies governing dailyherald.com and applicable laws, and to protect and enforce the intellectual property and other legal rights of Paddock and third parties.

. . .

What choices do I have about Paddock collecting, using, and sharing my information?

> It is possible for you to use much of dailyherald.com without giving us any personally identifiable information. When you do register with us or give us personally identifiable information, you will have an opportunity, at the time we collect your information, to limit e-mail communications from Paddock and from our third party partners. You can request at any time that Paddock not send future e-mails to you either by unsubscribing from the communication or by contacting us. You may also correct or update any personally identifiable information provided by contacting Paddock's Internet Department Manager by e-mail, facsimile or mail as follows:
>
> Internet Department Manager
> Paddock Publications, Inc.
> 155 E. Algonquin Road
> Arlington Heights, IL 60005
> Facsimile: (847) 427-2869
> e-mail: webmaster@dailyherald.com

Appendix, Ex. C.[2] The respondent in discovery's Terms of Service, which one must also accept as a condition precedent to gaining access to the posting mechanism for the blog, Appendix, Ex. B, contains the following provision:

> **PRIVACY**
>
> While Paddock Publications, the Daily Herald and its designees will protect your personal information according to our **privacy policy**, *you understand that through your use of the Service you are not anonymous and the User Content you submit is not private.*

Appendix, Ex. D (emphasis provided). The underlined bold text ("privacy policy") is a hyperlink to the Privacy Policy quoted above.[3] The term "User Content" is defined in the Terms of Service as ' comments, images, audio, video, suggestions or other communications

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[2] Although the Privacy Policy does not appear in the record on appeal, it appears on-line at http://my.dailyherald.com/nfo/privacy/. *See* fn. 3

[3] As is true of the Privacy Policy, the Terms of Service do not appear in the record on appeal. They can be found at on-line at http://my.dailyherald.com/nfo/tos/. *See* fn. 2.

or content you upload, transmit or otherwise submit through the Service." *Id.*

Appellee Lisa Stone, acting as next friend of her fifteen-year-old son Jed, on May 12, 2009 filed a petition under Illinois Supreme Court Rule 224 for discovery of information from respondent in discovery Paddock Publications. R.C00002-4. She filed a verified amended petition on June 11, 2009, R.C00009-11, a day before respondent in discovery Paddock Publications, Inc., the publisher of *The Daily Herald*, objected to her original petition on the ground it was not verified.[4] R.C00013-16. In its objections, Paddock Publications raised concerns about privacy issues, although it did not refer explicitly to its own Privacy Policy in doing so. *See* R.C00014, ¶5. Without citing to 735 ILCS 5/2-615(a), and without discussing standards which might apply to Rule 224 other than the verification requirement, Paddock Publications otherwise objected to the Rule 224 petition on general grounds. The trial court granted the petition for discovery on June 19, 2009, R.C00021, and Appellee transmitted interrogatories to Paddock Publications to request that it provide all information it had concerning the identity of "Hipcheck16." R.C00019-20.

Paddock Publications responded to Appellee's discovery requests with objections and with substantive answers. Appendix, Ex. E. In its answers to Appellee's interrogatories, Paddock Publications indicated that the name Hipcheck16 had been used to make thirty-two postings to its blog beginning at approximately 10:20 p.m. on March 31, 2009, that is, eight days before the Buffalo Grove municipal election, through the e-mail address

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[4] Paddock Publications, Inc., the respondent in discovery in the trial court, is not a party to this appeal. As is explained *infra*, the Appellant John Doe intervened without leave and sought to quash a subpoena issued to Comcast Communications to obtain disclosure of Appellant's identity. Appellant has assumed the title of "Respondent" in these proceedings even though there is no basis for him to have done so.

"hipcheck16@yahoo.com." Appendix, Ex. E, pg. 3. Paddock Publications's responses indicated that all of those postings had been made from the internet protocol or "IP" address 24.1.3.203, but they also made clear that Paddock Publications had no more specific information about the identity of the person or persons who used its blog under the name "Hipcheck16."[5]

Appellant then continued her investigation both privately and through the Rule 224 proceeding. She confirmed through records accessible to the public that the IP address "24.1.3.203" is controlled by Comcast Communications ("Comcast") or one of its subsidiaries for providing cable television, internet access and voice over internet protocol phone service in Buffalo Grove and the surrounding area. Petitioner then issued subpoenas duces tecum to Comcast and to Yahoo!. Appendix Exs. F and G. Yahoo!'s response indicated that the person who obtained its e-mail address "hipcheck16@yahoo.com" may have used fictitious and incomplete information to do so. Appendix Ex. H.[6] Yahoo!'s

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[5] The Court may be aware that every node in a computer network, including what is more or less the ultimate computer network, the Worldwide Web or Internet, has an IP address. A so-called URL (for "uniform resource locator") in a form such as "http:///www.xxxxx.yyy" is actually programmed to "point" to a fixed IP address of a server which acts as a host or as a gateway to a web site which uses that URL. *See, e.g.*, W. Arms, *Digital Libraries* (M.I.T. Press 2000) quoted at http://www.cs.cornell.edu/wya/DigLib/MS1999/Glossary.html. The pointing is traceable through a "whois" command through a number of different portals. *See, e.g.*, Appendix Exs. I and J, which are "whois" searches for the IP addresses involved in the present matter. In many cases, the "whois" search can also be used to determine roughly the location of networking equipment which uses a private or controlled IP address. In the present instance, the IP address "24.1.3.203" traces to a location in Buffalo Grove. Appellee has not been able to determine if the location is one used by Comcast's networking equipment or if it is a controlled IP address assigned to a Comcast subscriber.

[6] Exhibit H was not filed in the trial court. The IP address "67.173.67.19" which Yahoo!'s records show was used to originate the "hipcheck16@yahoo.com" e-mail

response also contained information to the effect that the IP address "24.1.3.203" was used as many as twenty-six times between approximately 6:30 p.m. on January 2, 2009 and 4:24 p.m. on May 6, 2009 to log into Yahoo.com, the web site through which users of Yahoo!'s free e-mail service can obtain access to their e-mail.

Both Yahoo! and Comcast invoked (Appellee maintains incorrectly, *see* § I *infra*) aspects of the Electronic Communications Privacy Act, 18 U.S.C. § 2701 *et seq.* Appellee then moved to compel Comcast's compliance with the subpoena, R.C00023-26, and the trial court granted the motion. R.C00027-28. The terms of the trial court's order permitted Comcast to notify its subscriber that Comcast had been asked to disclose the subscriber's identity. Comcast evidently gave the notification: without asking for or receiving leave to do so, Appellant John Doe intervened with a motion to quash the subpoena to Comcast and specifically identified himself as the recipient of Comcast's notice. R.C00030-37.

The trial court ultimately denied Appellant's motion to quash on September 25, 2009. Appendix, Ex. K.[7] Because Appellant Doe's motion to quash asserted constitutional protection of his anonymity, the trial court made the subpoena to Comcast returnable to the Court and permitted the parties to file cross-motions on the subject of release of Comcast's response. R.C00079.

In both his motion to quash the subpoena to Comcast and his motion opposing the release of his identity to Appellee, Appellant made three main arguments: (1) that the Rule

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address is also controlled by Comcast. Appendix, Ex. J.

[7] The order does not appear in the record on appeal, which reflects only about 75% of the filings in the trial court.

224 petition did not contain facts sufficient to survive a motion for summary judgment, (2) that the First Amendment to the United States Constitution gave him a protected right to speak anonymously, and (3) that Appellee's use of the judicial system with respect to him violated Illinois's Citizen Participation Act, 735 ILCS 110/1 *et seq.*, a provision of the Illinois Code of Civil Procedure intended to control the use of so-called "SLAPP" (for 'Strategic Lawsuits Against Public Participation') lawsuits. R.C00033-37, 52-56, 57-65, 86-109, 123-129.

In her response to Appellant's motions to quash and to oppose turnover of his identity and in her own motion to disclose the information in the trial court's possession, Appellee quoted extensively *verbatim* Hipcheck16's postings on Paddock Publication's blog and attached to her filings copies of pages from the blog. *See* R.C00041-48, 69-78, 113-122, 133-150.

On November 9, 2009, the trial court issued a Memorandum Opinion in which he denied Appellant's motion opposing turnover of Appellant's name and address and granted in part Appellee's motion to turn over that identification information. R.C00152-157. In denying Appellee full relief, the trial court indicated he would acknowledge Appellant's First Amendment anonymity concerns by imposing a protective order that would require Appellee to keep Appellant's identity secret until Appellee's next friend had initiated litigation against Appellant and the parties were at issue. The trial court entered an order to this effect on November 18, 2009 with Ill. Sup. Ct. Rule 304(a) findings. R.C00159-160. On December 18, 2009, the trial court granted a stay of his November 18, 2009 order under Ill. Sup. Ct. Rule 305(b) pending resolution of the present appeal. Appendix, Ex. L.

Argument

While amici curiae try to dress up Hipcheck16's postings by implying that they occurred in the *context* of a political campaign and were inherently political. Brief of Amici Curiae at 4-6, the posting which is at the heart of the present Rule 224 proceeding was made after the election of Buffalo Grove had been decided. This characterization gives Hipcheck16's conduct an aura of dignity to which it is not entitled. The posting about Jed Stone, whom Hipcheck16 admitted knowing to be "UncleW," was made *after* Lisa Stone was elected trustee and before she was sworn in, and it reflects Hipcheck16's disappointment in an *ad hominem* remark about one who had no stake in the election. It shows a bald intent to do nothing but injure.

I. Standard of Review

A. Violation of Appellant's Constitutional Rights.

A reviewing court must apply a *de novo* standard of review when determining whether a person's constitutional rights have been violated. *Doe A. v. Diocese of Dallas*, 234 Ill.2d 393, 407 (2009). Where a trial court's exercise of discretion relies on a conclusion of law, the court's review is *de novo*. *Maxon v. Ottawa Publishing Co.*, ___ Ill. App.3d ___, 2010 WL 2245065 (3rd Dist. June 1, 2010). *See also People v. Williams*, 188 Ill.2d 365, 369 (1999); *DiCosola v. Bowman*, 342 Ill. App. 3d 530, 534 (2003). The trial court's decision to allow for limited disclosure of John Doe's identity was in turn subject to two strictly legal concerns: (1) Appellee's Ill. Sup. Ct. Rule 224 petition should be analyzed in accord with the test used in *Dendrite International, Inc. v. Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (App. 2001) and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), and (2) the allegedly defamatory

statements may have been actionable. Since both present questions of law, the appropriate standard of review is *de novo*.

B. Applicability of Citizen Participation Act at 735 ILCS 110/1 *et. seq.*

A reviewing court reviews the lower court's construction and application of a statute under a *de novo* standard of review. *Blum v. Koster*, 235 Ill.2d. 21, 29 (2009).

II. The Trial Judge Applied the Appropriate Standard for Determining the Sufficiency of the Petition under Supreme Court Rule 224.

The present proceeding was initiated under Illinois Supreme Court Rule 224, which affords a person who has been injured the opportunity to discover the identity of one from whom recovery may be sought. *Gaynor v. Burlington Northern and Santa Fe Ry.*, 322 Ill. App.3d 288, 294 (5th Dist. 2001). "In such cases, there is a genuine need and, if the expiration of the statute of limitations is near, an urgent need to identify potential defendants so that a plaintiff is not without redress for the injury suffered." *Id.* The language of the rule limits discovery under it to the *identity* of those who may be responsible in damages.

A petition brought under Rule 224 is therefore a summary proceeding focusing on the narrow question of the identity of the potential defendant. *Kamelgard v. American College of Surgeons*, 385 Ill. App.3d 685, 686 (1st Dist. 2008); *Beale v. EdgeMark Financial Corp.*, 279 Ill. App.3d 242, 254 (1st Dist. 1996), *appeal denied* 168 Ill.2d 582; *Shutes v. Fowler*, 223 Ill. App.3d 342, 345 (4th Dist. 1991). Judicial efficiency and substantial justice require that the trial court focus on substance over compliance with technical pleading requirements. "Once the identity of such persons or entities has been ascertained, the purpose of the rule has been accomplished and the action should be dismissed." *Roth v. St.*

Elizabeth's Hosp. 241 Ill. App.3d 407, 413 (5th Dist., 1993).

A trial court exercises its discretion in granting a Rule 224 petition. *Maxon*; *Gaynor*, 322 Ill. App. 3d at 291. Rule 224 limits discovery to identity of those who may be responsible for damages. It "does not entitle petitioner to engage in a search for responsibility; once identity of responsible persons is learned, a case can be filed and either general discovery provisions or provisions authorizing full discovery of those named as respondents in discovery once lawsuit against at least one defendant is filed could be used to determine responsibility." *Maxon*.

As *Maxon* makes clear, however, the trial court must undertake a specific inquiry in exercising its discretion:

> . . . where a trial court must rule upon a petition to disclose the identity of any anonymous potential defamation defendant pursuant to Rule 224, the court must insure that the petition: (1) is verified; (2) states with particularity facts that would establish a cause of action for defamation; (3) seeks only the identity of the potential defendant and no other information necessary to establish the cause of action of defamation; and (4) is subjected to a hearing at which the court determines that the petition sufficiently states a cause of action for defamation against the unnamed potential defendant,

2010 WL 2245065 at *4. *Maxon* holds that following the above guidelines protects "all rights of the potential defendant" in an action for defamation. *Id.*

Throughout the trial court proceeding, there was no challenge to the legal sufficiency of Appellee's petition through a Section 2-615 motion assessing whether that petition alone stated sufficient facts to establish a cause of action upon which relief may be granted. *Maxon*; *Green v. Rogers*, 234 Ill.2d 488, 491 (2009); *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 91 (1996). Since constitutional protections are considered as part of the

prima facie defamation case, in considering such a motion the court must determine that the petition contains sufficient facts to establish that the allegedly defamatory statements are not constitutionally protected. *Maxon*. Subjecting a Rule 224 petition to section 2-615 scrutiny will therefore "address any constitutional concerns arising from disclosing the identity of any potential defendant." *Id.*

As the Appellant did not challenge the adequacy of the petition in the trial court under Section 2-615, neither does he do so in this appeal – his only focus is on whether the words which Hipcheck16 used on April 9, 2009 amount to defamation *per se*. Applying the *Maxon* test, therefore, this Court is only required to determine (1) whether the petition was verified; (2) whether the information it sought was limited to the identity of the potential defendant and no other information necessary to establish a cause of action for defamation; and (3) whether the petition was "subjected to a hearing at which the court determines that the petition sufficiently states a cause of action for defamation against the unnamed potential defendant."

All of the *Maxon* standards have been met. While the original petition was not verified, the amended petition was. The petition was limited to seeking the identity of the person who posted the April 9, 2009 statement, as were the subpoenas to Comcast and Yahoo!. The materials submitted by the Appellant and Appellee in connection with Doe's motion to quash the subpoena to Comcast and the cross-motions regarding the trial court's disclosure of identity information produced by Comcast put the exact language and publication information before the trial court, which conducted not one but two hearings on Doe's challenges. The first hearing was on Doe's motion to quash the subpoena to Comcast.

and the second was in connection with the cross-motions.

III. Appellant Had No Reasonable Expectation of Anonymity with Respect to His Postings on Paddock Publications's Web Site.

A. Identity Information in Electronic Communications Is Generally Not Protected from Discovery.

In the trial court, Doe attempted to argue that his identity was protected from disclosure by the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2701 *et seq.*, an argument he does not repeat in this Court. Nevertheless, the ECPA shows that the maker of the postings in question could have had no expectation that his identity would be shielded from discovery.

The ECPA imposes criminal penalties on "a person or entity providing an electronic communication service to the public" for making an impermissible disclosure of "the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). The definitions found in 18 U.S.C. § 2510 are to be used in construing and applying the ECPA. 18 U.S.C. § 2711. The term "electronic communication service" is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(13). Subject to certain exclusions not relevant here, the term "electronic communication" means "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12). Finally, the term "content . . . when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8). In 18

U.S.C. § 2702(c)(6)(C), identifying information is specifically acknowledged as separate from the "content" of electronic communications and exempted from the general prohibition against the disclosure by the "electronic communication service:"

> A provider described in subsection (a) [*i.e.*, an electronic communication service] may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))
>
> . . .
>
> (6) to any person other than a governmental entity.

18 U.S.C. § 2702(c)(6)(C).

The ECPA actually authorizes Comcast's disclosure of Doe's identity. *See Jessup-Morgan v. America Online, Inc.*, 20 F. Supp.2d 1105, 1108 (E.D. Mich. 1998) (Feikens, C.J.). Furthermore, the ECPA has no application to a request for information for identity of a subscriber which does not involve the contents of e-mails. *Id.* In *Jessup-Morgan*, an America Online ("AOL") subscriber who had been accused of sending harassing and defamatory e-mails sued AOL for breach of contract and invasion of privacy when AOL disclosed her identity in response to a subpoena obtained by a party who received the offensive e-mail. Judge Feikens gave judgment on the pleadings in favor of AOL, explicitly rejecting Jessup-Morgan's argument that AOL was prohibited from disclosing information about her identity by the ECPA.[8]

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[8] The opinion in *Jessup-Morgan* reflects citations to sections of the ECPA before the statute was substantially amended and reorganized. These amendments in no way affect the substance of the provisions as they are cited in Petitioner's arguments here. Thus, the section now known as 18 U.S.C. § 2702(c)(6)(C) was codified as 18 U.S.C. § 2703(c)(1)(C). *See* 20 F. Supp.2d at 1108. *Cf. In re Subpoena Duces Tecum to AOL, L.L.C.*, 550 F. Supp.2d 606, 611-12 (E.D. Va. 2008), where the subpoena explicitly

No aspect of the subpoena served on Comcast sought anything related to the contents of any protected communication – the communications themselves had actually been posted in a public forum maintained by Paddock Publications, so Hipcheck16 waived any right to protection of the contents. What Doe implicitly argues is that he had an expectation that Comcast would keep his identity from public disclosure, but such an expectation would have required Comcast to consent to such an arrangement. The ECPA provides that Doe could not have expected such consent.

B. Respondent in Discovery's Privacy Policy and Terms of Service Notified Appellant That His Use of Its Forum Would Not Be Anonymous.

A person making postings through the Internet can have no expectation of anonymity when the terms of service under which that person makes his or her postings provide that his or her identity may be disclosed or will not be treated as private. *Verizon Internet Services*, 257 F. Supp.2d 244, 267-68 (D.D.C. 2003), *rev'd on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003). The postings of the person or persons using Hipcheck16 as a means of identification were made under a policy which made explicit that the source and means by which postings would be made would be tracked. The policy notified that person or persons that use of the service was not anonymous and that content was not private. Paddock Publications's Privacy Policy warned users of its web site that it would track and record information about the identity of the user, the source from which the user was obtaining access to its web site, the frequency of use of its web site, and other information. The Privacy Policy also warned that restrictions on the use of personal information about users

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sought disclosure of the contents of electronic communications.

would not apply to postings on its web site. Paddock Publications's Terms of Service made specific reference to its Privacy Policy and warned that use of its blog would not be anonymous. Users of Paddock Publications's web site were required to establish "accounts" with Paddock Publications and, to establish such "accounts", they were required to acknowledge and accept the Privacy Policy and Terms of Service.

Given that whoever used the designation Hipcheck16 was warned that use of Paddock Publications's web site and blog would not be anonymous, that person (or persons) could have no reasonable expectation that identifying information would not be discovered by others or disclosed.

C. The Appellate Court Can Take Judicial Notice of Paddock Publications's Terms of Service, Privacy Policy and Sign-in Requirements.

Appellee anticipates that Appellant and amici curiae may object to references to Paddock Publications's Terms of Service and Privacy Policy and to the fact that Paddock Publications required users of its "blog" to accept and acknowledge both of these provisions as a condition precedent to use of the "blog" because they are not in the record on appeal. Paddock Publications made reference to these materials in its objections to Appellee's original petition, which was replaced. However, the materials in Exs. B, C and D in Appellee's Appendix are matters of which the Appellate Court can take judicial notice. Under Ill. Sup. Ct. Rule 366, an appellate court may take judicial notice of any matter of which a trial court may take judicial notice. *E.g.*, *People v. Alvarez-Garcia*, 395 Ill. App.3d 719 (1st Dist. 2009); *People v. Behnke*, 41 Ill. App.3d 276, 281 (5th Dist. 1976). Courts can take judicial notice of matters of common knowledge or of matters of indisputable accuracy.

Roberts v. Sisters of Saint Francis Health Services, Inc., 198 Ill. App.3d 891, 901 (1st Dist. 1990). The use of the Internet has become widespread enough that the Court can understand that hosts of web sites such as that of Paddock Publications make use of their services subject to conditions, and the URLs in Exs. B, C and D in Appellee's Appendix confirm their reliability.

IV. Appellant Is Not Entitled to First Amendment Protection of His Identity.

Doe and amici curiae seek to elevate what is at base a gutter level, below-the-belt expression of sour grapes and disappointment at the outcome of an election to protected political speech. They can do this only by distorting the context and the content of Hipcheck16's April 9, 2009 posting about Appellee's fifteen-year-old son.

Anonymity in political speech holds a cherished position in American society because it was a necessary protection for those who advocated against the tyranny of the English law of sedition – if their identity were known to authorities, the authors and publishers of the advocacy would be subjected to corporal punishment. *See Talley v. California*, 362 U.S. 60, 64-65 (1960). Anonymous speech, in and of itself, does not warrant constitutional protection – a statement does not become protected simply because it is anonymous. Anonymity is only entitled to constitutional protection if it is assumed for a constructive purpose (assessed without a concern for the validity of the statements made anonymously). *Id.* at 65. If advocates had been more concerned with the sexual proclivities of the sovereign's fifteen-year-old son than they were with the tyrannical behavior of the sovereign and his agents, it is hard to imagine how anonymity would be afforded any constitutional protection. The purpose of affording protection for anonymous speakers in political discourse is to afford

protection against persecution for expressions of unpopular political or religious beliefs or artistic works. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 194-203 (1999); *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002). No expression of a political, artistic or religious nature is contained in Hipcheck16's April 9, 2009 statement about "UncleW."

Statements uttered in what appears to be a political context are actionable if they are defamatory. *Maxon v. Ottawa Publishing Co.*, ___ Ill. App.3d ___, 2010 WL 2245065 (3rd Dist. June 1, 2010) (allegations of bribery of municipal officials and elected representatives is actionable). Illinois by statute provides that statements imputing fornication or adultery are actionable *per se*. *Bryson*. *See* 740 ILCS 145/3. There is no constitutional right to defame. *Maxon*.

Nothing in the cases cited by amici curiae supports the proposition that an anonymous speaker on the Internet enjoys a higher degree of protection from claims of defamation than does the private individual who has a cause of action against the speaker for defamation. The same issue was raised and decided in *Maxon*, where the Court held that statements made on the Internet are to be assessed by the same standards of defamation as are those made in any other medium. It is well settled that private individuals and their reputations are more deserving of protection against defamation than public officials or public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Even if Appellee is a public figure, that does not convert her fifteen-year-old son into one.

Amici curiae complain that the trial court's order requiring disclosure of Doe's

identity puts information about his identity into the hands of Appellee, who came to occupy a position of "power" and prominence through the election. However, Judge Lawrence's restrictions on Appellee's use of Doe's identity information (which may themselves be illegal prior restraint) provide a sufficient check against Appellee's misuse of the information. Oddly enough, it is amici curiae and Appellant who provide a telling piece of information in this Court: they all conflate the identity of John Doe with that of Hipcheck16 by attributing Hipcheck16's comments to Doe, a point which had not been established in any disclosure made to Appellee in the trial court. *See, e.g.*, Brief of Amici Curiae, pp. 5-6. *See also* Appellant's Brief at 6-17 *passim*. Amici curiae's arguments ignore the fact that Appellee proceeded in the trial court not in her own behalf but on behalf of her minor son. They also disregard the fact that Hipcheck16 could have chosen to limit his comments to Appellee and not expanded his vituperation to her son, whom Doe chose to be the vehicle of injury to Appellee, his mother.

Appellant and amici curiae imply that *Dendrite International, Inc. v. Doe No. 3*, 342 N.J. Super. 134 (App. 2001) and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) function as a recognition of the new and special status of the *agora* which is the Internet. They cannot be read so broadly. Each opinion, and each case which follows it, is a discussion of general principles of anonymity which is not limited to the Internet and each recognizes the use of the Internet as a form of speech like any other. Furthermore, *Maxon* rejected *Dendrite* and *Cahill* as the standard by which discovery of the identity of anonymous defamers is to be

permitted.[9] *Maxon* does not stand alone in this view. *See, e.g. Doe I v. Individuals*, 561 F. Supp.2d 249, 251-54 (D. Conn. 2008); *Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004). The standard employed by *Dendrite* and *Cahill* has a circular quality to it. While the approach used in those cases asserts summary judgment as the standard to be met as a preliminary to disclosure of the identity of an anonymous speaker, that identity may be an important datum necessary to establish intent or malice necessary to overcome a motion for summary judgment.

V. The Citizen Participation Act Does Not Apply to Appellant's Comments.

Appellant asserts that the trial court was required to apply the Illinois Citizen Participation Act , 735 ILCS 110/1 *et seq.* ("CPA"), find that his speech was immunized from suit and dismiss the petition. He argues that two considerations mandate application of the CPA. First, Doe/Hipcheck16 contends that his First Amendment rights of redress are jeopardized by Stone's Petition. Second, he says that his comments "were issued in the context of a discussion about local government."

The CPA states that it is the public policy of Illinois to encourage and safeguard the "constitutional rights of citizens and organizations to be involved and participate freely in the process of government." 735 ILCS 110/5. The CPA further provides that "information, reports, opinions, claims, arguments, and other expressions provided by citizens" are vital to ensure the effective operation of Illinois government. *Id.* The CPA requires the "laws,

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[9] *Dendrite* and *Cahill* are distinguishable on another basis. They sought discovery in the context of full-blown litigation which asserted claims of defamation. Rule 224, on the other hand, permits discovery in order for a potential plaintiff to determine whether to proceed with litigation. The trial court expressly recognized this distinction in the present case.

courts, and other agencies of this State" to "provide the utmost protection for the free exercise of [the] rights of petition, speech, association, and government participation." *Id.* The CPA must be "construed liberally to effectuate its purposes and intent fully." 735 ILCS 110/30. In applying the Act, however, a trial court must be mindful that an overbroad or imprecise determinant of the genuineness of a party's acts will chill plaintiff's' redress from the courts.[10] If potential plaintiffs cannot reasonably determine what conduct falls outside the CPA's protections, they may not assert legitimate claims, fearing the Act's immunity provisions and the attendant attorney fee exposure.

A trial court is required to dismiss claims subject to the CPA "unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or not in furtherance of acts immunized from, liability by this Act." 735 ILCS 110/20.[11] The CPA must be "construed liberally to effectuate its purposes and intent fully." 735 ILCS 110/30.

Appellee met her burden in the trial court in two ways: (1) she produced clear and convincing evidence that the Appellee's acts were in no way connected to his immunized right under the First Amendment to petition government and (2) she demonstrated that

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[10] *See SLAPPed in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act.* Mark J. Sobczak, 28 N.Ill.U.L.Rev. 559, 590 (Summer 2008).

[11] "When a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it.'" *Javierre v. Central Altagracia*, 217 U.S. 502, 508 (1910) cited with approval *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008); see also *Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37 (1948) ["the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits . . ."]; *accord*, 29 Am.Jur.2d (2008) *Evidence* § 176, p. 193. ("One who relies on an exception to a general rule or statute has the burden of proving that the case falls within that exception.")

Appellant's speech was not "genuinely aimed at procuring a favorable government action, result, or outcome." 735 ILCS 110/15.

As amply demonstrated above, Appellant's defamation enjoys no constitutional protection. Directed at a minor, his comments advanced no public policy initiative or addressed no question of public concern. The fact that the minor in question was the son of an individual who had recently been elected to local office did not render comments about his personal life "in the context of a discussion about local government."

> No authority supports the [petitioning parties's] broad proposition that anything said or written about a public figure or limited public figure in a public forum involves a public issue. Rather . . . "[a] public issue is implicated if the subject of the statement or activity underlying the claim (1) was a person or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved in a topic of widespread, public interest."

D.C. v. R.R., B207869 (Cal. App.4th. Dist. March 15, 2010) (anti-SLAPP not applicable where defendants did not demonstrate that the posted message was protected speech), citing *Jewett v. Capital One Bank*, 113 Cal. App.4th 805, 814 (Cal.App. 4th. Dist. 2003).

Nor was Appellant's posting aimed at procuring legitimate governmental action. The CPA immunizes from liability "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government" except when such act is not "*genuinely aimed at securing favorable government action, result or outcome.*" 735 ILCS 110/15 (emphasis supplied). The CPA stipulates as its goal the securing of "constitutional rights of citizens and organizations to be involved in and participate freely *in the process of government.*" 735 ILCS 110/5 (emphasis supplied).

The CPA does not delineate genuine from non-genuine efforts to petition

government. The court should therefore consider the two-prong test set forth in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993). First, a court must determine whether the activities in question are "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 60. Immunity will be granted if an "objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome." If a court finds that the petition is objectively baseless, it should then assess the subjective motivation behind the petitioning party's activity to determine whether the judicial process itself, rather than the outcome of that process, is the goal of the litigation. Id. By analogy here, Appellant sought no favorable outcome from the government. Rather, the posting lay completely outside the realm of an effort or hope to influence a favorable government outcome. Moreover, the subjective motive of the Appellant was to attack the minor child of a local official personally, not to engage in any public debate. The municipal elections for Buffalo Grove were held on April 7, 2009. Accordingly, Appellant's April 9, 2009 statement could have nothing to do with the election in question. Consequently, the CPA affords Appellant no immunity for his statements.

The CPA's Public Policy Statement shows that its framers designed it to address situations where claims had been filed "against citizens and organizations of this State as a result of their valid exercise of their constitutional right to petition, speak freely, associate freely and otherwise participate in and communicate with government." 735 ILCS 110/5. The legislation's goal was to address abuses of the judicial process where citizens and organizations involving themselves in public affairs had been intimidated, harassed and punished through what have come to be known as "Strategic Lawsuits against Public

Participation" or "SLAPPs."

As there is no relationship between his defamatory language and an actual or attempted participation in government, Appellant is not entitled to immunity under the CPA. Appellant's language is "not generally aimed at procuring a favorable government action, result or outcome," his language is not protected by the CPA.

Appellant has not shown how his defamatory and malicious remarks are designed to obtain any "favorable government action, result or outcome." Rather, his statements were directed at the minor child of an individual who was then a successful candidate for public office. The municipal elections for Buffalo Grove were held on April 7, 2009. Accordingly, that Appellant's April 9, 2009 statement could have nothing to do with the election in question. Consequently, the CPA affords Appellant no immunity for his statements.

Appellant argues this his questioning the efficacy of Stone's campaign strategy and his call for Stone to apologize and learn "something about finance before she is sworn in" requires that he be immunized from suit for defamation of Stone's son. Citing *Mills v. State of Alabama*, 384 U.S. 214, 218-19 (1966), *Buckley v. Valeo*, 424, U.S. 1, 14 (1976), and *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), Appellant advocates the need for robust and uninhibited debate on public issues. Since a citizen has a sacred constitutional right to engage in debate about the conduct of an elected official in a public forum, Appellant argues, he should enjoy the protections of the CPA.

In addition, the CPA's grant of conditional immunity for certain First Amendment activity relates only to substantive legal claims and does not relate to attempts to obtain information related to that claim, such as this Rule 224 Petition. CPA §15 limits the scope

of the statute to any type of "claim" in any proceeding that is "based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association or to otherwise participate in government."

The CPA defines the term "claim" to "include any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing alleging injury." 735 ILCS 110/10. Appellee's petition sought only information relating to the identity of "Hipcheck16" and asserts no claim for damages. Consequently, no "claim" as that term is defined in the Act has been made

Appellant's alleged defamatory statements have nothing to do with public debate. Rather, they defame a minor who plainly has no involvement with the "conduct of an elected official in a public forum."

Conclusion

The person who used the name Hipcheck16 on April 9, 2009 to make postings on Respondent in Discovery Paddock Publications, Inc.'s blog engaged in a cowardly act. Having seen a candidate he disfavored elected to public office, he vented his frustration with a vile attack on Appellee's fifteen-year-old son. No amount of rhetoric or argument can convert this vituperation into protected political speech. The posting about "UncleW" had no purpose other than to injure, and now Hipcheck16, or Doe, or however he wishes to be called, hides behind the First Amendment as if he were engaged in some noble political act. His resort to the Citizens Participation Act to turn what is in essence a discovery device into a "SLAPP" suit also misses the point. If anything, his resort to the CPA suggests an abuse of that statute to put a chilling effect on *bona fide* litigation in which probable cause to

proceed can be demonstrated easily.

Maxon teaches that there are sufficient protections in Rule 224 procedure to protect those who have legitimate claims to the protection of anonymity. Doe disregards the procedural standards set out in *Maxon* in his brief even though those standards are taken from previous Rule 224 jurisprudence . Doe made a calculated decision to limit his argument to the content and context of his speech, the latter of which is the focus as well of the amici curiae, and both Doe and amici curiae disregard in this Court the procedural considerations which they should have raised. As is shown above, all of the *Maxon* standards have been met. Appellee used a verified petition which set out the elements of publication of an injurious speech act. She limited all of her requests (in her petition and in the two subpoenas which followed) to information about the identity of the person or persons using Hipcheck16 to make postings on Respondent in Discovery Paddock Publications, Inc.'s blog. Appellee submitted to the trial court Hipcheck16's statements in the form in which they appeared on that blog in the briefing which led up to two hearings at which the trial court considered every argument raised by Doe. In his Memorandum Opinion and Order, the trial judge decided that all of the protection necessary would be further ensured by restricting the manner of Appellee's usage of Doe's identity information.

For the foregoing reasons, Appellee Lisa Stone respectfully requests that this Court affirm the trial court's granting of her Rule 224 petition, the trial court's denial of Appellant John Doe's motion to quash Appellee's subpoena to Comcast, and the trial court's order of November 18, 2009 and that the Court remand the case to the trial court for release of the information provided to the trial court *in camera* by Comcast.

LISA STONE, as next friend of Jed Stone, a minor

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