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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCY
CASE NO. 2015-SC-000408
COURT OF APPEALS CASE NO. 2015-CA-000221-OA

JOHN DOE NO. 1 and
JOHN DOE NO. 2

APPELLANTS

VS: ON APPEAL FROM PIKE CIRCUIT COURT
HON. EDDY COLEMAN, JUDGE
ACTION NO. 13-CI-1145

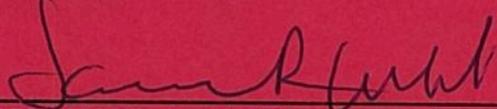
HONORABLE EDDY COLEMAN, JUDGE,
PIKE CIRCUIT COURT

APPELLEES

AND

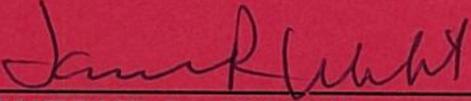
WILLIAM HICKMAN, III

BRIEF FOR APPELLANTS


LAWRENCE R. WEBSTER
P.O. DRAWER 712
PIKEVILLE, KENTUCKY 41502
606 437-4029
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief for Appellant was duly mailed, postage prepaid, to: Clerk, Supreme Court of Kentucky, Room 209, State Capitol, 700 Capital Avenue, Frankfort, Kentucky 40601-3488; Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Richard A. Getty and the Hon. Danielle H. Brown, The Getty Law Group, PLLC, 1900 Lexington Financial Center, 250 West Main Street, Lexington, Kentucky 40507; Hon. Eddy Coleman, Judge, Pike County Judicial Center, 175 Main Street, Pikeville, Kentucky 41501. This the 20 day of August, 2015.


LAWRENCE R. WEBSTER

INTRODUCTION

This is an appeal as a matter of right from an Order denying a Petition For Writ of Prohibition, the second one having been brought in this case, the first having been granted, brought by two anonymous individuals who posted statements on a social media website related to public matters.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellants believe that an oral argument is essential in this case. The issues herein are, by and large, all matters which have not been brought before this Court before. Oral argument would amplify the arguments made herein.

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STATEMENT OF THE CASE

The Court of Appeals, No. 2014-CA-000293-0A, rendered June 20, 2014 (Appendix 1) granted a Petition For Writ of Prohibition to prohibit the enforcement of an Order requiring the disclosure of the identities in a defamation lawsuit of the current Appellants, John Doe No. 1 and John Doe No. 2. The Court of Appeals Decision recited the pertinent facts:

Real Party In Interest, William Hickman, III, has served as Chair of the Pike County Airport Board of Directors since 2009. Municipal airport boards serve a governmental function and are composed of members appointed by the local mayor pursuant to statute. [with citation] On October 18, 2013, Hickman filed a Complaint in the Pike Circuit Court against several anonymous users of the website, Topix, for posting allegedly defamatory statements. Transcripts of the numerous statements at issue accompanied the complaint. The complaint alleged that the anonymous defendants recklessly "published and thereby perpetuated substantial errors and omissions that wrongfully and erroneously imputed fraud, dishonesty, criminal activity and conduct incompatible with his business, trade, profession and office..." and caused damage to Hickman's reputation. Following the filing of the complaint, Hickman issued subpoenas to two internet providers seeking the identities and addresses of John Doe No. 1 and John Doe No. 2. John Doe No. 2 filed a motion to quash the subpoena requiring the disclosure of their identities. The trial court denied the motion. This petition for writ of prohibition followed.

The Court of Appeals granted the Writ of Prohibition, firmly establishing constitutional protection for anonymous speech on the Internet directed at public officials (Appendix 1, pages 3,5) and acknowledged that "pure opinion" is absolutely privileged and not actionable, "pure opinion" being defined as when the commentator states the facts upon which the opinion is based or

when both parties to the communication know or assume the exclusive facts on which the comment is clearly based, distinguished from "mixed opinion," being when a derogatory opinion expressed in the material being sued on must have been based on undisclosed defamatory facts.

The Court of Appeals, faced with a matter of first impression as to how to strike the balance between the First Amendment right to anonymous speech and the right to those harmed by anonymous speech to seek legal regress, chose what has been called the "Dendrite" test, with modification based upon *Dendrite Int'l, Inc., v. Doe No. 3*, 775A 2d 756 (N.J. Supp., Ct., App., Div., 2001) as modified by *Doe v. Cahill*, 884A 2d 451 (Del., Supp., Ct., 2005) and sent this case back to the lower court with the proviso that before the plaintiff below could compel disclosure of the identity of John Doe No. 1 and No. 2 he must:

(1) Undertake reasonable efforts to notify the anonymous defendant that he is the subject of a subpoena or application for an order of disclosure and must withhold action in order to allow the anonymous defendant an opportunity to respond; and

(2) Set forth a prima facie case for defamation under the summary judgment standard as set forth in Justice Keller's concurring opinion in *Welch v. American Publishing Co., of Ky.*, 3 S.W.3d 724, 731 (Ky., 1999) to the extent those elements are under his control.

Saying that a public figure plaintiff could not, without discovering the identity of the persons who made the statements, prove, prior to the disclosure of their identity that those persons acted 'with knowledge that [the statements were] false or with

reckless regard of whether [they were] false or not' the Court only required the plaintiff to "plead and prove facts with regard to the first two elements to compel disclosure of the speaker's identity." Court of Appeals Decision, (Appendix 1, pages 6,7,8).

The case then went back to Circuit Court whereupon the plaintiffs below sought to satisfy the requirement that he prove a prima facie case by filing an affidavit (Appendix 3) which contained fourteen pages of individual Topix posts. Instead of addressing any of these posts individually his Affidavit incorrectly characterized them to say that he "has joined in a pre-planned conspiracy to violate Federal and State Statutes to illegally take property and money from the Pikeville/Pike County Airport Board for personal gain and for the personal gain of other individuals." He said "this is not true and is totally baseless." None of the posts accused Hickman of taking property or money for himself or others. The plaintiff went on in his affidavit to state that the Topix posts "further state that the Plaintiff is dishonest, a thief, an embezzler and otherwise a criminal. These allegations were not true and are totally baseless." (See Appendix 3). None of the posts were specifically addressed but in his Affidavit the Plaintiff below went on to declare that in a cosmic sweep that "all of the statements are not true and facially defamatory" and that those statements wrongfully and erroneously alleged imputed fraud, dishonesty, criminal activity and other conduct incompatible with his profession as a lawyer and a member and chair of the Pikeville/Pike County Airport Board. His

affidavit further states that audits confirmed that no accounting crimes have occurred regarding airport funds.

The affidavit, at no place refutes any of the facts stated within the posts upon which the poster relied for his opinions.

Further, notably absent from the affidavit was any indication that Hickman had been damaged either generally or specially, that anyone had read those postings and believed any part of them or understood them to be anything more than the opinions of persons critical of the operations of the airport board. (Hickman's Motion and Affidavit are Appendix 3.)

That Motion was strongly opposed on grounds that the language does not contain facially defamatory statements, that there was inadequate proof in the record that the statements said to be defamatory are false, that there is no proof in the record that actual damage was caused and that the Complaint continued to fail to state a cause of action.

The court ordered the parties to file proposed orders in accordance with their position and when the Plaintiff below filed his proposed order it contained, in its scope, relief that had never been requested nor argued before, namely it required counsel for the anonymous Defendants to disclose their identity. The Court of Appeals dismissed the argument against that order by saying that there was no indication that the Petitioners (now Appellants) raised this issue before the trial court. That simply is incorrect. The proposed order submitted by the Defendants below

(Appellants now) (Appendix 4) addressed that issue by proposing an Order that said:

The Plaintiff in this case seeks to require the attorney for the Defendants to reveal their identity which violates F.C.R. 3.130(1.6) which prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent. Although that section permits a lawyer to reveal the identity of his client by court order the comments to that rule indicate that a lawyer must consult with his client about appealing that decision.

The Court signed without modification or analysis the Plaintiff's (Appellee here) proposed order and granted the Motion to Serve Subpoenas and ordered counsel to disclose the identities of John Doe No. 1 and John Doe No. 2 and to identify which of the posts were posted by each within twenty days unless relief was sought in the Court of Appeals.

For this Court to give proper analysis it will be necessary to analyze the postings which the lower court found to be defamatory:¹

Date of post 3/10/2013. All this post does is to characterize, in pure opinion, as a brazen and arrogant abuse of public office, the replacement of one airport board member with the plaintiff resulting in a transfer of property to "Little Frankie," which the post in its entirety makes clear is the Mayor. The court, without any evidentiary foundation, said that such a post would "tend to injure a person in his business or occupation," that

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The term "defamatory is not synonymous with "actionable."

is to say would cause damages to be presumed. The court also said that this post somehow or another indicates that the plaintiff failed "in his ethical obligations as a member of the bar." This post is pure opinion. The facts upon which the writer opined that the plaintiff had brazenly and arrogantly abused public office are contained in that post.

The post of 3/10/2013. This post has to do with the writer's claim that airport appraisals were manipulated. That post makes no direct reference to the plaintiff but to the extent that it could be implied to do so, the facts upon which that opinion are based are contained in the post. The trial court used identical language in finding this post defamatory.

Post dated 3/11/2013. This post is pure opinion and the facts about that are contained in the post. The speculation is that there may be criminal activity in transferring under-appraised airport holdings to another branch of government, which is called "revenue diversion." In accordance with federal law revenues generated by a federally obligated airport must be expended for the capital or operating costs of the airport. *Title 49 U.S. Code 74107*. All airports that receive federal financial assistance are subject to the revenue-diversion prohibition. The sale of airport property falls under the revenue-diversion prohibition. *49 U.S.C. §7107(1) (2)* defines revenue diversion as use of airport revenues for general economic development unrelated to airports or airport systems which is precisely what the writer of this particular post was complaining about and referring to.

This post is pure opinion, and the facts upon which it is based are contained in the post.

The trial court found this to be defamatory by the precise language used in all the other findings even though there is no specific proof in the record that anything contained in that post was untrue.

Post of 3/17/2013. This post calls the plaintiff a "puppet." In this post the plaintiff was said to have caused a new side-by-side airplane hangar for his personal use and the personal use of his law partner to be built. The plaintiff was called a non-pilot and woefully unqualified to be Chairman of the board. This is pure opinion and the facts upon which that opinion are based are contained within the post.

Post of 3/18/2013. In this post the plaintiff is said to have wasted money on a phantom "dip" in a runway, when the board paid out a fortune to a company to do some unnecessary experiments on an unused section of the airport and the wasting of four million dollars of airport money with nothing to show for it but the hangars previously referred to. The plaintiff below was not called "one of the best crooks in Kentucky," as claimed. The one offering the opinion said, without calling the plaintiff one of the best crooks in Kentucky, said that the best crooks in Kentucky could use the phantom dip in the runway to justify the waste of money. That post is pure opinion.

Post of 3/25/2013. This post is replete with facts, none of which have been refuted. Essentially it says that there is

another lawyer in the plaintiff's law firm whose father was put in charge of building the new hangars, has been attending airport board meetings and has taken a bigger role without qualifications. The author opines that this was because of the connection between the individual and the law firm. The facts upon which that opinion are based are contained in the post.

Post of 5/16/2013. This post has to do with an attempt to obtain big city air service at the local airport and merely states that the plaintiff had announced that there was no interest in such a venture. The post says this makes liars out of some individuals but it is a leap to say that was calling the plaintiff a liar in that he is the one who was said to have announced the correct facts. This is pure opinion and the facts upon which that opinion are based are contained within the post.

The post of 5/16/2013 claims that the plaintiff is inept and had childishly wasted money, had no idea about the position he was appointed to, and was incompetent. Those opinions are based upon facts contained in that post and in previous posts relative to the transfer of property to the city and the overpayment to the father of the plaintiff's law associate. This is a matter of pure opinion.

Post of 5/17/2013. That post declared that millions are being wasted by the airport board and declares that people, without saying who, would profit as a result of lies about commercial air service. The facts upon which that post's opinion are based have appeared amply in the postings.

The post of 5/22/2013 is a summary of the writer's objections to the transfer of property to the city for what he said was one-third of its appraised value and that proof of the unworthiness of the deal (as prior posts indicated the property was transferred to the city for one-third of its value) was found in the accolades heaped upon the plaintiff by the city manager. This matter is pure opinion and the facts upon which that opinion is based were matters by that time of public record and prior postings.

Post of 6/11/2013. This post once again has to do with the using of \$880,000.00 so that the plaintiff and his law partner would have new side-by-side berths for their airplanes. This is an example of the sort of post that the plaintiff could have specifically denied. He could have denied the spending of the money and he could have denied the side-by-side hangars but he did not. The plaintiff was called ill-chosen and miserably unqualified and that was the writer's opinion and the facts upon which he based that opinion are contained in that post.

Post of 9/4/2013. The writer repeats that the plaintiff was a puppet, woefully incompetent and unqualified, states that some appointments were for the purpose of causing revenue to be diverted and gives various opinions about the lack of emphasis by the plaintiff and the board of other things such as improving safety. This is pure opinion.

The post of 9/14/2013. This post calls the use of public money wasteful, calls the objects of those expenditures childish

and those expenditures beneficial to close friends and business associates and makes predictions as to what will happen because of the lack of state money for safety improvements. This is a matter of great public concern and the facts upon which this post is based had been by that time put on Topix for over a month.

The second post of 9/14/2013. This post declares that checks were written, signed, and money taken from an account with no oversight and that airport bills are quite possibly paid without approval, that persons who are not on the board are paid to attend meetings, that the airport's account is being drained by inept, unqualified puppets, and appointed by the mayor with the purpose of getting airport property for city purposes. The facts that this opinion are based upon are clearly apparent and had been for a long time.

The Post of 9/23/2013. This post suggests that the relationship between the airport's engineer, who was being highly paid for non-engineering type of duties, reeks of cronyism and possible corruption. This is opinion based upon facts that had been on the website for weeks.

The post of 10/13/2013. This post is a strong condemnation of revenue diversion which the writer says is criminal but the criminality of which he does not specifically ascribe to the plaintiff.² This post goes back over the transferring of the

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Revenue diversion is in fact not a crime but the periodic certifications to the Federal Aviation Administration before the receipt of federal funds requires certification that there is no revenue diversion and false certification of that fact

"Marions Branch" property from the airport board to the city, reiterates the connection between the airport board's engineer and the claims that he is being overpaid for non-engineering work and reiterates the claim that at the airport board meetings bills are being placed on the table with no one reading what they are paying for. This is all opinion and the facts upon which that opinion are based are contained both in that post and in prior ones.

The post of 9/1/2013. This is pure opinion. The writer says "yes in my opinion, you people stole the public's hard earned dollars to facilitate your elitist [sic] dreams." This opinion cannot be literally construed to say that personal stealing occurred but merely public funds were diverted from one source to facilitate "dreams."

The post of 10/1/2013. This post refers to the "puppets" who spent money and sold the Marions Branch property, asked whether or not the plaintiff "jumped to the front of the line" "to get a hangar" and declares that he did. The plaintiff could have refuted that specific claim and chose not to. These are matters of opinion.

The post of 10/11/2013. This post claims that the plaintiff came to be the first occupant of a new building that cost the public \$800,000.00 as opposed to the two previous similar hangars which cost the public \$50,000.00. This post makes no personal reference to the plaintiff and even if it construed to do so it is a matter of opinion and the facts upon which that opinion

is a crime. 49 U.S.C. §47107(b).

are based in the post.

The post of 10/11/2013. This post suggests that the board was trying to get around the concept of revenue diversion and was spending the money with close associates. This is a matter of opinion, was not denied specifically by the plaintiff and the basis of this opinion by that time had been in the public eye, to the extent that anyone reads Topix, for two months.

In its Order of January 14, 2015 (Appendix 5) the Court did not analyze any of the foregoing posts and found all of them to be defamatory. The court found that a prima facie case had been made accepting the bare conclusory affidavit of the Plaintiff as being sufficient.

The Appellants then went back to the Court of Appeals and sought another Writ of Prohibition. That Writ was denied. (Appendix 6). The Court of Appeals based its decision on three representative samples of postings, saying that they were defamatory.³ The Court of Appeals declined to address the argument of the Appellants that the Plaintiff, not the Appellee, may not rely upon presumed damage in cases like this, and that a prima facie case must as a matter of law demonstrate actual harm, special damage. The Court of Appeals held that the identity of a client is not privileged except in unusual circumstances and affirmed the Order and held that the attorney-client privileges is

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All three of the representative samples that the Court of Appeals analyzed appear to have been posted by the same person, which indicates that at least one of the anonymous Defendants has not had analyzed any of his postings.

inapplicable, incorrectly pointing out that objection had not been raised in the trial court as to this issue. To reiterate, the Plaintiffs below had at no level of the proceedings sought an order requiring the attorney for the anonymous defendants to disclose their identity, and the only time this was ever asserted was in a proposed order submitted by the Appellees (Plaintiffs below) to which the anonymous Defendants made timely objection.

In that the Petition For Writ of Prohibition is an original action, the within appeal to the Supreme Court of the Order denying the same was filed as a matter of right.

STANDARD OF REVIEW

Because this case does not involve application of the law to the facts, this Court should review the decision below on questions of law *de novo*, *New v. Commonwealth*, 156 S.W. 3d 769 (Ky., App. 2005).

ARGUMENT I

THE APPELLANTS ARE SUBJECT TO IRREPARABLE INJURY IF WRONGFULLY REQUIRED TO DISCLOSE THEIR IDENTITIES.

The previous decision of the Court of Appeals correctly found that the Appellants, if entitled to withhold their identities would be subject to irreparable injury if wrongfully required to disclose their identities.

ARGUMENT II

THE "SPECIAL SCRUTINY" REQUIRED WHEN THE CONSTITUTIONAL RIGHT OF ANONYMOUS FREE SPEECH IS THREATENED REQUIRES PROOF MORE THAN A CONCLUSORY AFFIDAVIT, AND SUCH THAT A COURT CAN WEIGH THE CONCRETENESS OF THE SHOWING OF A PRIMA FACIE CASE IN ORDER TO BALANCE THE DEFENDANT'S FIRST AMENDMENT RIGHTS OF ANONYMOUS FREE SPEECH AGAINST THE STRENGTH OF THAT CASE.

A conclusory affidavit is insufficient proof for any court to weigh the concreteness of a public figure plaintiff's case. What is particularly insufficient about the Appellee's affidavit is that it makes no effort to address the facts upon which the Appellants base their opinions.

This Court adopted *Dendrite, supra* and in *Dendrite* the plaintiff verified his complaint, which was found to be insufficient in *Dendrite*. The Plaintiffs in the within case filed a conclusory Affidavit declaring that the matters contained in his Complaint are true without addressing the facts underlying the postings, and without addressing whether or not he had suffered any provable damage.

It is of paramount importance in this developing and relatively new area of law that the Court does not permit anonymity to be breached until a Plaintiff meets certain special requirements and not get by with providing to a trial court more. Really all that the Appellee, plaintiff below, has done in the instant case is to verify his complaint.

The court is not permitted to breach anonymity until a plaintiff meets certain special requirements. Herein the court

found that a simple affidavit, which amounts to no more than a verification of a Complaint, satisfies those requirements. However, the cases which have appeared before the Courts of the United States on this subject require more. For instance *Arista Records, LLC v. Doe*, 604 F. 3d 110 (2nd cir., 2010) requires that a subpoena designed to breach the First Amendment's protected anonymity be quashed unless "the concreteness of the Plaintiff's showing of a prima facie case of actual harm" is established. *Arista*, at 119. A case often cited by the Defendants herein, *Sony Music*, 326 F. 2d 556 says that a court must evaluate the prima facie strength of a Plaintiff's claim of actionable harm. *Sony* at 564-65. *Ashcroft v. Iqbal*, 129 S. Ct., 1937, 173 L. Ed. 2d 868 (2009) states that the facts must be amplified sufficiently to render a claim plausible on its face. *Ashcroft* at 570. Id. The leading case in the whole area, *Dendrite International, Inc., v. Doe*, 775A 2d 756 requires a Plaintiff to produce sufficient evidence to support each element of its cause of action and then for a court to balance the Defendant's First Amendment rights of anonymous free speech against the strength of the prima facie case. That case specifically requires a Plaintiff to show harm by "sufficient evidence."

It should be noted that the Complaint in *Dendrite*, rejected by all courts as being insufficient, was verified. *Doe v. Cahill*, 884 A. 2d 451 (2005) requires a Plaintiff to present sufficient evidence to establish a prima facie case for each essential element of the claim in question and requires the

Plaintiff to "introduce evidence." *Doe v. Cahill* at 463.

Salehoo Group Limited v. ABC Company, 772 F.

Supp., 2d 1210 requires a Plaintiff to allege a valid cause of action, produce prima facie evidence to support all elements of that cause of action and then for the Court to evaluate the strengths of the Plaintiff's case before a Plaintiff is permitted to unmask an anonymous Defendant. That case holds that cursory allegations, without identifying the evidence to support each element of its defamation claim, is not sufficient.

Bell Atlantic Corp., v. Twombly, 550 U.S. 544 127 S. Ct., 1955, 167 L. Ed. 2d 920 (2007) opines that mere "labels and conclusions" or formulaic recitations of a cause of action will not do and that factual allegations must be specific and broad enough to raise a right of relief above a speculative level.

To sum up all of the foregoing, a verified complaint is insufficient. Neither would be a simple Affidavit. Each and every element of a cause of action must have factual underpinning such that the Court can weigh the relative strength of that underpinning against the right of an anonymous Defendant to remain anonymous. The Court must find that the Complaint states a cause of action but also that he proves it sufficiently for a thorough evaluation of the same.

ARGUMENT III

**DEFAMATORY STATEMENTS WHICH CONSIST OF PURE
OPINION ARE ABSOLUTELY PRIVILEGED AND NOT
ACTIONABLE.**

A pure opinion, which is absolutely privileged,

occurs when a commentator states the facts on which the opinion is based.

The Supreme Court's statements on the struggle that Court had theretofore had on the distinction between facts and opinions came in *Gertz, supra* where the court seemed to provide absolute First Amendment immunity from defamation actions for all opinions. The court's analysis stated:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues...They belong to that category of utterances which "are no essential part of any exposition of ideas and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 69 *id* at 339-40.

Gertz imposed on state and federal courts the duty, as a matter of constitutional obligation, to distinguish facts from opinions in order to provide opinions with the requisite First Amendment protection.

In *Yancey v. Hamilton*, 786 S.W. 2d 854, 858 (Ky., 1989) Kentucky held that a defamatory statement that consists of pure opinion is absolutely privileged and not actionable. In the original Court of Appeals Decision in this case Judge Jones quoted the following from *Yancey*:

The Restatement distinguishes between "pure" opinion and "mixed" expressions of opinion.

Pure opinion, which is absolutely privileged, occurs where the commentator states the facts on which the opinion is based, or where both parties to the communication know or assume the exclusive facts on which the comment is clearly based. In contrast, the mixed type "is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication."

The significant difference between the two lies in how the recipient is affected by the communication. With mixed opinion,

"if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability. The defendant cannot insist that the undisclosed facts were not defamatory but that he unreasonably formed the derogatory opinion from them...[T]he meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express."

Judge Jones went on to favorably quote from *Welch*, 3 S.W. 3d at 730 that a statement regarding "whether money was wasted or spent for desirable city purposes is a matter of opinion," which John Doe No. 1 and John Doe No. 2 took as encouragement to the trial court in the within case to take a hard look at the postings.

Not a single posting in this case suggested that there were undisclosed defamatory facts justifying that opinion. Absent such implication, opinions are pure and privileged. *Restatement 2d of Torts 566, Comment c (1977)*. The mere fact that the maker of the statements asserts his own personal view on the objective facts stated does not cause a pure opinion to lose its protected status. *Restatement 2d of Torts 566, Comment b (1977)*.

Opinions are classified in three parts in Prosser and

Keeton, the Law of Torts §13A at 813-14 (5th Ed., 1984). Deductive opinions are when misconduct or disparaging facts about a plaintiff is deduced by the speaker on the basis of true information supplied to the public or generally known to the public. Evaluative opinions involve an opinion involving value judgments on the basis of true information disclosed to known by the public. These first two kinds of opinions are, and should remain, privileged. The third is called a "informational opinion" and that happens when a person making a statement can be regarded as using the superficial form of an opinion to convey information which creates an inference that undisclosed facts exist to justify the opinions expressed. There certainly is no example of that in the postings which are the subject of this case. All of the opinions are, as a matter of law, pure opinion and are not actionable.

ARGUMENT IV

FALSITY IS AN ELEMENT OF A PLAINTIFF'S PRIMA FACIE CASE OF ACTIONABLE DEFAMATION AND IN THE PARTICULAR CIRCUMSTANCES MUST BE PROVED BY THE PLAINTIFF BELOW.

The common law position that truth was an affirmative defense and the burden of proof rested with the defendant (see original *Restatement of Torts* §613(2)(a) (1938) is no longer true. Today the constitutional requirements coming from *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964) have shifted the burden of proving falsity to the plaintiff. There is no longer a presumption of falsity and proof of falsity is part of the plaintiff's case in chief. A number of courts have held that in public official and

public figure cases this burden must be discharged with "convincing clarity." *Pape v. Time, Inc.*, 294 F. Supp. 1087 (N.D. Ill.) *Rev'd on other grounds*, 419 F.2d 980 (7th Cir., 1969); *Whitmore v. Kansas City Star Co.*, 499 S.W. 2d 45 (Mo., App., 1973). Thus it stands that the plaintiff below had a duty when presenting evidence of a prima facie case to prove the falsity of the facts underlying the opinions offered by John Doe No. 1 and John Doe No. 2. Instead of meeting any of those facts head-on the affidavit of the Plaintiff mischaracterizes them and denies them non-specifically.

ARGUMENT V

AT LEAST UNTIL ANONYMITY HAS BEEN BREACHED AND THE DEFENDANT OR DEFENDANTS ARE IDENTIFIED, A PLAINTIFF MAY NOT RELY ON PRESUMED DAMAGES BUT MUST SHOW ACTUAL HARM, THAT IS TO SAY SPECIAL DAMAGE OR ACTUAL DAMAGE.

Judge Jones, writing the Opinion and Order granting the original Petition For Writ of Prohibition in this case (No. 2014-CA-000293-OA), reasoned that it was difficult, if not impossible, for a public figure plaintiff to show that the persons responsible for facially defamatory statements acted "with knowledge that [the statements were] false or with reckless regard of whether [they were] false or not," referring to *Welch v. American Publishing Co., of Kentucky*, 3 S.W.3d 724, 731 (Ky., 1999). This court then ruled that a public figure defamation plaintiff must only show that language contains facially defamatory statements and those facially defamatory statements are false to present a prima facie case of defamation.

It must follow, then, that at this juncture a plaintiff's

cause of action and an unknown defendant's alleged liability cannot be based on a showing of knowledge of the falsity or reckless disregard for the truth and thus special or actual damage must be demonstrated.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 94 S.Ct., 2997, 3011, 41 L. Ed. 2d 789, 810 (1974) Mr. Justice Powell said "we hold that the States may not permit recovery of presumed...damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." He also said that in the absence of such a showing, a defamation plaintiff is restricted "to compensation for actual injury, which "is not limited to out-of-pocket loss" but includes "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." He also said that this "actual injury" "must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." On the other hand, the "special harm" is limited to harm which does have "an actual dollar value." The *Restatement of Law of Torts 2d §621* and the comments hold that one who is liable for defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed, but takes no position on whether the traditional common law rule allowing recovery in the absence of proof with actual harm, for the harm that normally results from such a defamation, may constitutionally be applied if the defendant knew of the falsity of the communication or acted in reckless

disregard of its truth or falsity. Here is a section of the comment section of *Restatement 2d §621, Comments b and c.*

b. *Constitutional limitations on recovery of general damages.* In *Gertz v. Robert Welch, Inc.*, (1974) 418 U.S. 323, the Supreme Court held that the common law rule of presumed damages is incompatible with the First Amendment freedoms and therefore unconstitutional. So long, at least, as the action is based on negligence of the defendant, as described in §580B, a plaintiff's recovery is confined to compensation for "actual injury." The court has not specifically defined actual injury, but it has explained that the term is not confined to out-of-pocket loss. It includes "impairment of reputation and standing in the community," but this must be supported by competent evidence and cannot be presumed in the absence of proof. Unless the harm is pecuniary in nature, the evidence need not "assign an actual dollar value" to it. "Actual injury" is also held to include "personal humiliation, and mental anguish and suffering," provided they are proved to have been sustained. The Constitution does not require proof of impairment of reputation before damages for emotional distress can be recovered. Damages for emotional distress are treated in §623.

Though the action in the *Gertz* case was one of libel and the defendant would be classified within the term, news media, and the defamatory statement involved a matter of public concern, there is little reason to conclude that the constitutional limitation on recoverable damages will be confined to these circumstances. The rationale that a State has no substantial interest in securing for a plaintiff "gratuitous awards of money damages far in excess of any actual injury" seems fully applicable to a slander action against a private defendant. Even if the application of the *Gertz* holding as a constitutional decision should eventually be limited in some respects, so that it does not apply, for example, to a private slander, it seems unlikely that the common law of the State would apply a different test as to the damages that could be recovered. Compare the discussion of the similar problem regarding the constitutional requirement that the defendant be

at fault regarding the truth or falsity of the communication, in §580B, Comment e.

This constitutional limitation is on damages that may be recovered, not on the existence of a cause of action. It may well not apply to nominal damages. (See §620, Comment c).

c. Effect of defendant's knowledge or reckless disregard of falsity of communication. The constitutional limitation of damages to those sufficient to compensation for actual injury is held by the Supreme Court to apply "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." The Court consciously abstained from indicating whether a different rule would apply in the latter situation. Pending further enlightenment from the Court, therefore, the question of whether under these circumstances there can be, without proof of harm, recovery of general damages that normally flow from a defamation of the type involved has been left to a Caveat.

ARGUMENT VI

WHEN THE CONFIDENTIALITY OF A CLIENT'S IDENTITY IS SUBSTANTIVELY LINKED TO THE ADVICE THAT WAS SOUGHT AND WHEN DISCLOSURE OF A CLIENT'S IDENTITY WOULD IMPLICATE THE CLIENT IN THE VERY MATTER UPON WHICH LEGAL ADVICE WAS SOUGHT, THE CLIENT'S IDENTITY IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

In the Order entered herein on January 14, 2015, the Trial Court Orders, on page 25, in paragraph B:

Because two of the Defendants, designated John Doe #1 and John Doe #2, have retained counsel to appear on their behalf in this matter, said counsel is directed to disclose to the Court and to the Plaintiff's counsel the identity of John Doe #1 and John Doe #2, and to identify which of the posts at issue were posted by each, within 20 days of the entry of this Order.

This relief was not requested by the Plaintiff in any motion or

other filing of record. The actual relief sought in the Plaintiff's Motion for Leave to Serve Subpoenas Duces Tecum to Discover Identities of Defendants, Unknown Users of Topix Social Media Website was that the Trial Court "allow him to issue Subpoenas to the various Internet Service Providers utilized by the Unknown Defendants to post on Topix in order to discover the Unknown Defendants' identities".

This relief ordered by the Trial Court far exceeds that requested by the Plaintiff. It is impossible, at this point, to say what documents the ISP's may produce in response to the subpoenas duces tecum. At the most, the documents would identify who the account holders are whose IP's were used to make each post. This is a far cry from identifying the persons who made the posts. By way of example, some or all posts may have been made using public Wi-Fi or other public access internet such that the documents produced in response to the subpoenas would be of little to no use in identifying the anonymous speakers. The effect of the Trial Court's Order that counsel must identify John Doe #1 and John Doe #2, and identify what posts were made by each, is to place John Doe #1 and John Doe #2 in a situation that is potentially far worse than if they had never sought relief from the Court at all. This is despite the fact that their previous Petition for Writ of Prohibition was granted by this Court.

Kentucky Rule of Evidence (KRE) 503 sets forth the lawyer-client privilege and states in relevant part:

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person

from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

- (1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (2) Between the lawyer and a representative of the lawyer;
- (3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (4) Between representatives of the client or between the client and a representative of the client; or
- (5) Among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

The leading case in this area *Baird v. Kroener*, 279 F. 2d 623 (95 ALR 2d 303) (9th Cir., 1960) extended the attorney-client privilege to information that is normally not protected from disclosure. It did so when the subject or circumstances of the attorney-client consultation creates a need to protect information in light of the privileges policy of encouraging more open communications between attorney and client. The Court's theory was that if the information is necessary to the

advice or assistance sought by the client, the goals of full disclosure would be defeated if the attorney could be compelled to provide "the length that could form the chain of testimony necessary to convict" the client on the very matter upon which he should assistance. *Baird*, 279 F. 2d at 633. ⁴

If the undersigned is required to identify John Doe No. 1 and John Doe No. 2, it would amount to a betrayal of attorney-client privilege.

The "communication" here is an expression to which privileged persons, namely John Doe No. 1 and John Doe No. 2 undertake to convey information to another privileged person, their attorney.

The Petitioners assert that they are entitled to a writ of prohibition preventing the Trial Court from proceeding to require disclosure of confidential information protected by the lawyer-client privilege, including their identities and the identification of who authored posts. The applicability of the writ of prohibition standards to privileged information was thoroughly reviewed by the Supreme Court of Kentucky in

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Baird involved a criminal case. The logic is just as equally applicable here. When the client's identity provides a substantial probative link in a chain of evidence, that is to say when the information sought from the attorney would establish the very matters upon which John Doe No. 1 and No. 2 sought assistance from the attorney, then the attorney-client privilege should protect against disclosure.

2012, which stated in *Collins v. Braden*, 384 S.W.3d 154 (Ky. 2012):

... [T]he hospital claims it is entitled to the writ under what has been described as an exception for "certain special cases." See *id.* at 20; *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky.1961). For those cases, the requirement of great and irreparable injury need not be shown. Instead, the court looks at whether "a substantial miscarriage of justice will result if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Bender*, 343 S.W.2d at 801. "[I]n such a situation the court is recognizing that if it fails to act the administration of justice generally will suffer the great and irreparable injury." *Id.*

This Court's precedent holds that violation of a privilege satisfies both the requirement of no adequate remedy by appeal, "because privileged information cannot be recalled once it has been disclosed," and the substitute requirement in "special cases" that the administration of justice would suffer. *St. Luke Hospitals*, 160 S.W.3d at 775. Thus, remedy by a writ of prohibition is available to a petitioner claiming the potential violation of a privilege. *Id.* Such relief will be granted, however, only upon a showing that the lower court has improperly ordered a disclosure that would violate a privilege. *Id.*

Collins v. Braden, 384 S.W.3d 154, 158 (Ky. 2012). The Petitioners must demonstrate that the Trial Court has improperly ordered a disclosure that would violate the lawyer-client privilege.

The Petitioners had no real opportunity to assert the lawyer-client privilege in objection to the disclosure of their identities and the disclosure of who wrote specific posts, because this relief was not sought by the Plaintiff in his Motion. A trial

court may only adjudicate an issue that was not pled if it was tried with the opposing parties' express or implied consent. *Leamon v. Leamon*, 302 S.W.2d 625 (Ky., 1957). However, the Petitioners did have the opportunity to tender a Proposed Order after viewing the Order tendered by the Plaintiff. In that Proposed Order, which was filed with the Circuit Court Clerk under a Notice of Filing on December 29, 2014, the Petitioners, by and through counsel, asserted the lawyer-client privilege by invoking SCR 3.130 on page 7 thereof.

By the very act of choosing to be identified as John Doe #1 and John Doe #2, and participating in the action to prevent the disclosure of their identifies, it is clear that the Petitioners are relying on the lawyer-client privilege to maintain anonymity. The identities of John Doe #1 and John Doe #2 have been disclosed to their attorney for the purpose of obtaining legal advice. The same is true for any statements identifying posts made by each of them.

The lawyer-client privilege clearly applies to the identity of John Doe #1 and John Doe #2 and any statements identifying posts made by each of them, as such statements are necessarily a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's lawyer. The Order of the Trial Court plainly orders a disclosure that would violate the lawyer-client privilege. The Order of the Trial Court requiring

this disclosure is supported by no reasoning whatsoever, and the Plaintiff did not even request the relief in his Motion. While the Petitioners have pointed out herein that the information sought may not be available elsewhere, "when a communication is protected by the attorney-client privilege it may not be overcome by a showing of need by an opposing party to obtain the information contained in the privileged communication." *The St. Luke Hospitals, Inc. v. Kopowski*, 160 S.W.3d 771, 777 (Ky. 2005). As the remedy provided in the Order of the Trial Court was never requested by the Plaintiff, the availability of the information was never addressed.

Collins v. Braden established that "remedy by a writ of prohibition is available to a petitioner claiming the potential violation of a privilege ... upon a showing that the lower court has improperly ordered a disclosure that would violate a privilege." The Petitioners have demonstrated the applicability of the lawyer-client privilege, and that the lower court improperly ordered a disclosure in violation of the privilege. For these reasons, this Court should grant the Writ of Prohibition.

CONCLUSION

A Writ of Prohibition should be granted in this case until such time as the Plaintiff below can establish, by something more than a conclusory affidavit the falsity of matters asserted, and/or actual or special damage from the publication of those matters. Under any scenario the Court's Order that counsel for the Defendants breach the attorney-client privilege should be reversed

and counsel should not be ordered to disclose the identities of the unknown Defendants.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lawrence R. Webster", is written over a horizontal line.

LAWRENCE R. WEBSTER
P.O. DRAWER 712
PIKEVILLE, KENTUCKY 41502
ATTORNEY FOR APPELLANTS