

STATE OF MICHIGAN  
COURT OF APPEALS

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THOMAS M. COOLEY LAW SCHOOL,

Plaintiff-Appellee,

v

JOHN DOE 1,

Defendant-Appellant,

and

JOHN DOE 2, JOHN DOE 3, and JOHN DOE 4,

Defendants.

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FOR PUBLICATION

April 4, 2013

No. 307426

Ingham Circuit Court

LC No. 11-000781-CZ

Before: WHITBECK, P.J., and METER and BECKERING, JJ.

BECKERING, J. (*concurring in part and dissenting in part*).

With the advent of the Internet and the accompanying easy, rapid, and global exchange of information and opinions, new legal issues have come to the forefront. This case presents one of those new legal issues and involves a matter of first impression in Michigan. How do we balance a defendant's First Amendment right to speak anonymously and a plaintiff's right to learn an anonymous defendant's identity in order to seek redress for the defendant's alleged defamatory statements? In this case, plaintiff Thomas M. Cooley Law School (Cooley) alleges that defendant John Doe 1 (Doe 1), a former Cooley student, defamed it in his weblog post titled "Thomas M. Cooley Law School Scam." Cooley sued Doe 1 for defamation and tortious interference. It then obtained a subpoena from a California court that ordered Weebly, Inc. (Weebly), the website host for Doe 1's weblog, to produce documents that included Doe 1's user account information. Doe 1 learned that he had been sued after reading about Cooley's lawsuit in the media. He moved the trial court to quash the subpoena or, in the alternative, to issue a protective order limiting or restricting Cooley's use of any information obtained pursuant to the subpoena. Unfortunately, before the trial court resolved the motion to quash, and through no apparent fault of either party, Weebly disclosed Doe 1's user account information to Cooley. Cooley now knows Doe 1's identity.

I agree with my colleagues in the majority that the only remedy available to Doe 1, because his identity is known to Cooley, is a protective order and that the trial court, on remand, must evaluate the necessity of a protective order. As noted by the majority, and contrary to

Cooley’s argument, Cooley’s knowledge of Doe 1’s identity does not render Doe 1’s appeal moot. It is possible to fashion a remedy, a protective order, if merited, that will have a practical legal effect on the controversy.<sup>1</sup> A protective order can prevent Doe 1’s identity from being disclosed to others. I also agree with the majority that we may, and should, review the issue whether Michigan law adequately protects the respective rights of plaintiffs and defendants in the complicated interplay between the First Amendment right of anonymous free speech and a person’s right to know the identity of his or her defamer. The issue is a matter “of public significance that is likely to recur, yet evade judicial review.”<sup>2</sup>

Where I diverge from the majority is in its conclusion that Michigan law adequately protects a defendant’s right to anonymous free speech except for the “extreme” case. Because an anonymous defendant cannot undertake any efforts to protect against disclosure of his or her identity until the defendant learns about the lawsuit—which may well be too late given that discovery is available to a plaintiff as soon as the action is commenced—we, like numerous appeal courts in other jurisdictions, must adopt a formal procedure that balances the rights of plaintiffs and defendants. The majority of jurisdictions that have addressed this issue have adopted either the *Dendrite*<sup>3</sup> or *Cahill*<sup>4</sup> standard. These standards require, in part, that a plaintiff alleging defamation present the trial court with prima facie evidence on the elements of its defamation claim before it is allowed to discover the anonymous defendant’s identity. I would adopt a modified version of the *Dendrite* standard.

## I. THE FIRST AMENDMENT AND DEFAMATION

### A. THE RIGHT TO FREE SPEECH

The First Amendment of the United States Constitution provides: “Congress shall make no law . . . abridging the freedom of speech . . . .”<sup>5</sup> “Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.”<sup>6</sup> Because the right to free speech under the Michigan Constitution is coterminous with the right to free speech under the First Amendment, this Court may use federal authority to interpret Michigan’s guarantee of free speech.<sup>7</sup>

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<sup>1</sup> *Gen Motors Corp v Dep’t of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Doe No 1 v Cahill*, 884 A2d 451 (Del, 2005).

<sup>4</sup> *Dendrite Int’l, Inc v Doe, No 3*, 342 NJ Super 134; 775 A2d 756 (2001).

<sup>5</sup> US Const, Am 1. The First Amendment is applicable to the states under the Fourteenth Amendment. *Schneider v New Jersey*, 308 US 147, 160; 60 S Ct 146; 84 L Ed 155 (1939).

<sup>6</sup> Const 1963, art 1, § 5.

<sup>7</sup> *In re Contempt of Dudzinski*, 257 Mich App 96, 100; 667 NW2d 68 (2003).

The right to free speech includes the right to speak anonymously.<sup>8</sup> Numerous reasons exist for why a person may choose to speak anonymously. “The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.”<sup>9</sup> Whatever the person’s reason to speak anonymously, “the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”<sup>10</sup> The right to free speech extends to speech on the Internet.<sup>11</sup>

## B. DEFAMATION

However, “the right of free speech is not absolute at all times and under all circumstances.”<sup>12</sup> It provides no protection to defamatory statements.<sup>13</sup> A statement “is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>14</sup>

The elements of a defamation claim are the following:

(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.<sup>[15]</sup>

In addition, if the plaintiff is a public official or a public figure, the plaintiff must prove that the alleged defamatory statement was made with actual malice, i.e., that the statement was made with knowledge of its falsity or with reckless disregard of whether the statement was false.<sup>16</sup>

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<sup>8</sup> *McIntyre v Ohio Elections Comm*, 514 US 334, 342; 115 S Ct 1511; 131 L Ed 2d 426 (1995).

<sup>9</sup> *Id.* at 341-342.

<sup>10</sup> *Id.* at 342.

<sup>11</sup> *Reno v American Civil Liberties Union*, 521 US 844, 870; 117 S Ct 2329; 138 L Ed 2d 874 (1997) (stating that case law from the United States Supreme Court “provide[s] no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].”).

<sup>12</sup> *Chaplinsky v New Hampshire*, 315 US 568, 571; 62 S Ct 766; 86 L Ed 2d 1031 (1942).

<sup>13</sup> *Ashcroft v Free Speech Coalition*, 535 US 234, 245-246; 122 S Ct 1389; 152 L Ed 2d 403 (2002); *Beauharnais v Illinois*, 343 US 250, 266; 72 S Ct 725; 96 L Ed 919 (1952) (stating that “[l]ibelous utterances” are not within the scope of constitutionally protected speech).

<sup>14</sup> *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010) (quotation omitted).

<sup>15</sup> *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

<sup>16</sup> *Garvelink v Detroit News*, 206 Mich App 604, 608; 522 NW2d 883 (1994).

C. BALANCING THE EQUITIES AND RIGHTS OF THE PARTIES:  
THE *CAHILL* AND *DENDRITE* STANDARDS

Although this Court has never addressed the relationship between a defendant's right to speak anonymously and a plaintiff's right to learn an anonymous defendant's identity, numerous courts in other jurisdictions have addressed this issue. As mentioned, Doe 1 requests that this Court adopt the standard articulated in either *Dendrite* or *Cahill*.

In *Dendrite*, a New Jersey intermediate court was called on to determine the standard trial courts were to use in evaluating applications to discover the identity of anonymous users of Internet message boards.<sup>17</sup> It adopted a four-part test for trial courts to apply when a plaintiff seeks the disclosure of an anonymous defendant's identity.<sup>18</sup> First, the plaintiff must undertake efforts to notify the anonymous defendant and then withhold action to afford the defendant a reasonable opportunity to oppose the discovery request.<sup>19</sup> According to the court, the notification efforts should include placing a message regarding the discovery request on the Internet message board on which the alleged defamatory statement was posted.<sup>20</sup> Second, the plaintiff must identify the exact statements that it claims were defamatory.<sup>21</sup> Third, the trial court must review the complaint and all the information provided by the plaintiff and determine whether the plaintiff has set forth a prima facie case against the anonymous defendant.<sup>22</sup> The plaintiff must not only be able to withstand a motion to dismiss for failure to state a claim; it must also present the trial court with prima facie evidence sufficient to support each element of its cause of action.<sup>23</sup> Fourth, if the plaintiff has presented a prima facie case, the trial court must balance the anonymous defendant's First Amendment rights against the strength of the plaintiff's prima facie case and the necessity of disclosure of the defendant's identity to allow the plaintiff to proceed.<sup>24</sup>

In *Cahill*, the Delaware Supreme Court was called on to adopt a standard for trial courts to apply when a defamation plaintiff seeks to discover the identity of an anonymous defendant.<sup>25</sup> The court was concerned about adopting a standard that was too low and would chill persons from exercising their right to speak:

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<sup>17</sup> *Dendrite Int'l, Inc.*, 342 NJ Super at 140.

<sup>18</sup> *Id.* at 141.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 142.

<sup>25</sup> *Cahill*, 884 A2d at 457.

The possibility of losing anonymity in a future lawsuit could intimidate anonymous persons into self-censoring their comments or simply not commenting at all. A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker “may subject that speaker to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes.” Plaintiffs can often initially plead sufficient facts to meet the good faith test applied by the [trial c]ourt, even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision. After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.

Indeed, there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics. As one commentator has noted, “the sudden surge in John Doe Suits stems from the fact that many defamation actions are not really about money.” “The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him.” This “sue first, ask questions later” approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked.<sup>[26]</sup>

The Delaware Supreme Court concluded that application of a summary judgment standard, which requires a plaintiff to present evidence sufficient to create a genuine issue of material fact, sufficiently balanced a defendant’s right to speak anonymously with a plaintiff’s right to protect its reputation.<sup>27</sup> Accordingly, following the New Jersey intermediate court in *Dendrite*, the Delaware Supreme Court held that, before a defamation plaintiff may discover an anonymous defendant’s identity, the plaintiff must support its defamation claim with evidence sufficient to defeat a summary judgment motion.<sup>28</sup> The court, however, did not adopt the complete four-part *Dendrite* standard. It only retained the first and third prongs, holding that a defamation plaintiff (1) must make reasonable efforts to notify the anonymous defendant and then withhold action to afford the defendant an opportunity to oppose the discovery request and (2) must satisfy a summary judgment standard.<sup>29</sup> According to the court, the notification prong

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<sup>26</sup> *Id.* at 457 (alterations omitted).

<sup>27</sup> *Id.* at 460, 463.

<sup>28</sup> *Id.* at 457, 460, 463.

<sup>29</sup> *Id.* at 460-461.

imposed very little burden on a defamation plaintiff while giving an anonymous defendant the opportunity to respond.<sup>30</sup> When a party's First Amendment rights were implicated, the court disfavored ex parte discovery requests that afforded a plaintiff the important relief, and sometimes the only desired relief, of unmasking the defendant.<sup>31</sup> In regard to the plaintiff's burden to satisfy a summary judgment standard, the court explained that a plaintiff was only required to produce evidence on the elements of a defamation claim that were in its control.<sup>32</sup> It explained that because proof of actual malice might be impossible without knowing the defendant's identity, a public figure plaintiff was not required to present proof of actual malice.<sup>33</sup> According to the court, the second and fourth prongs of the *Dendrite* standard were unnecessary.<sup>34</sup> It explained that a plaintiff, to survive summary judgment, will quote the alleged defamatory statements in the complaint.<sup>35</sup> It also explained that the summary judgment standard, itself, was the balancing test of a defendant's First Amendment rights and the strength of the plaintiff's defamation claim.<sup>36</sup>

Numerous appellate courts have adopted either the *Dendrite* or *Cahill* standard or some form of one of the two standards.<sup>37</sup>

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<sup>30</sup> *Id.* at 461.

<sup>31</sup> *Id.* at 457, 461.

<sup>32</sup> *Id.* at 464.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 461.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *Mobilisa, Inc v Doe 1*, 217 Ariz 103, 111-112; 170 P3d 712 (Ariz App, 2007) (adopting the *Cahill* standard but stating that a balancing test remains necessary); *Krinsky v Doe 6*, 159 Cal App 4th 1154, 1171-1172; 72 Cal Rptr 3d 231 (2008) (stating that it agrees with the courts that have required the plaintiff to make a prima facie showing of the elements of defamation); *Solers, Inc v Doe*, 977 A2d 941, 954-956 (DC, 2009) (adopting a test that "closely resembles" the *Cahill* standard); *In re Indiana Newspapers Inc*, 963 NE2d 534, 552 (Ind App, 2012) (adopting the *Dendrite* standard but only requiring the plaintiff to produce evidence to support the elements of the claim that are not dependent on the anonymous defendant's identity); *Indep Newspapers, Inc v Brodie*, 407 Md 415, 454-456; 966 A2d 432 (2009) (adopting the *Dendrite* standard); *Mortgage Specialists, Inc v Implode-Explode Heavy Indus, Inc*, 160 NH 227, 239; 999 A2d 184 (2010) (adopting the *Dendrite* standard); *Pilchesky v Gatelli*, 12 A3d 430, 442-446 (Pa Super, 2011) (adopting a "modified version" of the *Dendrite* and *Cahill* standards); *In re Does 1-10*, 242 SW3d 805, 821-823 (Tex App, 2007) (adopting the *Cahill* standard).

## II. THE NEED FOR ADOPTION OF A STANDARD IN MICHIGAN

The majority concludes that the procedures for a protective order, when combined with the procedures for summary disposition, will be sufficient in nearly every case to adequately protect a defendant's right to speak anonymously. I respectfully disagree.

When presented with a “motion by a party or by the person from whom discovery is sought” a trial court may issue a protective order.<sup>38</sup> However, an anonymous defendant can only request a protective order and ask that the plaintiff be prohibited from unmasking his or her identity or that, as a condition of discovering his or her identity, the plaintiff not disclose his or her identity to third parties, if the defendant knows of the plaintiff's defamation lawsuit and discovery request. There is no guarantee that an anonymous defendant will learn of the plaintiff's lawsuit and its attempt to discover his or her identity in time to request a protective order. Parties may obtain discovery as soon as an action is commenced,<sup>39</sup> and an action is commenced when a complaint is filed.<sup>40</sup> Although a plaintiff may not take the deposition of a person or send a request for production to a nonparty without leave of the trial court until the defendant “has had a reasonable time to obtain an attorney,” the court may grant leave to conduct the discovery without notice having been granted to the defendant.<sup>41</sup>

In the present case, Doe 1 did not receive notice from Cooley of the defamation lawsuit or of the subpoena that it obtained directing Weebly to produce his user account information. According to Doe 1, he learned of the defamation lawsuit because Cooley issued a press release after it filed suit. Had Doe 1 not learned of the defamation lawsuit through the media, which caused him to hire an attorney who moved to quash Cooley's subpoena, Cooley could have discovered and publicized Doe 1's identity before Doe 1 even learned that he had been sued for defamation. In my view, the court rules do not preclude such an outcome in a future case.

In my opinion, because the court rules do not guarantee that an anonymous defendant will have an opportunity to protect his or her identity before a defamation plaintiff engages in discovery to learn the defendant's identity, this Court must adopt a standard that will protect a defendant's right to speak anonymously. I acknowledge the majority's concern that it is the province of the Legislature to enact an anti-SLAPP statute<sup>42</sup> and that it is the province of the Michigan Supreme Court to write, or rewrite, the court rules regarding discovery and summary disposition. However, in the absence of action by the Legislature or the Supreme Court, I see nothing wrong with this Court adopting a standard, which, itself or a similar one, has been adopted by numerous appellate courts across the country, to protect the First Amendment right to

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<sup>38</sup> MCR 2.302(C).

<sup>39</sup> MCR 2.302(A)(1).

<sup>40</sup> MCR 2.101(B).

<sup>41</sup> MCR 2.306(A)(1); MCR 2.307(A)(1); MCR 2.310(D)(1).

<sup>42</sup> SLAPP is an acronym for “strategic lawsuit against public participation.” Black's Law Dictionary (7th ed).

speaking anonymously. Although this right is not absolute,<sup>43</sup> it “would be of little practical value if there was no concomitant right to remain anonymous after the speech is concluded.”<sup>44</sup> Failure by this Court to adopt a standard that protects the constitutional right to speak anonymously could intimidate persons into self-censoring their comments or not speaking at all.<sup>45</sup>

### III. A MODIFIED *DENDRITE* STANDARD

I agree with the courts in *Dendrite* and *Cahill* that a standard requiring the plaintiff to present prima facie evidence to create a genuine issue of material fact on the elements of its defamation claim is one that strikes an appropriate balance between a plaintiff’s right to sue for defamation and a defendant’s right to speak anonymously. To be clear, I do not wish to prohibit any plaintiff from pursuing redress to which he or she is entitled for having been defamed. As noted above, the right to free speech is not absolute; it does not protect defamatory statements. “Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right . . . .”<sup>46</sup> However, the interests of both plaintiffs and defendants must be considered, and a defendant should be given an opportunity to protect his or her right to anonymity before it is too late. I would adopt a modified *Dendrite* standard to afford defendants this opportunity.

The first requirement of the *Dendrite* standard, which is also part of the *Cahill* standard, is that the plaintiff must undertake reasonable efforts to notify the anonymous defendant that his or her identity is, or will be, the subject of a discovery request.<sup>47</sup> I would adopt this requirement. “A court should not consider impacting a speaker’s First Amendment rights without affording the speaker an opportunity to respond to the discovery request.”<sup>48</sup> Thus, at a minimum, the plaintiff should attempt to notify the anonymous defendant through the same medium used by the defendant to post the alleged defamatory statement. For example, if the anonymous defendant posted the statement on a message board, the plaintiff should post a message notifying the defendant of the impending discovery request on the same message board.<sup>49</sup> Then, after making reasonable efforts, the plaintiff must withhold action to allow the defendant an opportunity to oppose the discovery request.<sup>50</sup>

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<sup>43</sup> *Chaplinsky*, 315 US at 571.

<sup>44</sup> *In re Does 1-10*, 242 SW3d at 820.

<sup>45</sup> See *Cahill*, 884 A2d at 457.

<sup>46</sup> Const 1963, art 1, § 5.

<sup>47</sup> *Id.* at 460-461; *Dendrite Int’l, Inc.*, 342 NJ Super at 141.

<sup>48</sup> *Mobilisa, Inc.*, 217 Ariz at 110.

<sup>49</sup> *Id.* at 110-111; *Cahill*, 884 A2d at 461; *Dendrite Int’l, Inc.*, 342 NJ Super at 141.

<sup>50</sup> *Cahill*, 884 A2d at 461; *Dendrite Int’l, Inc.*, 342 NJ Super at 141.

The second requirement of the *Dendrite* standard is that the plaintiff set forth the exact statements by the defendant that it claims were defamatory.<sup>51</sup> I would not adopt this requirement because it is unnecessary. Michigan case law requires that alleged defamatory statements be specifically pleaded in the complaint.<sup>52</sup>

The third requirement of the *Dendrite* standard, which is also part of the *Cahill* standard, is that the plaintiff must present the trial court with prima facie evidence sufficient to support each element of its cause of action.<sup>53</sup> Michigan is a notice-pleading state.<sup>54</sup> Therefore, a complaint need only “set forth ‘allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.’”<sup>55</sup> A court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted.<sup>56</sup> In deciding such a motion, a court must accept the factual allegations as true and view them in the light most favorable to the nonmoving party.<sup>57</sup> A motion under MCR 2.116(C)(8) may only be granted if no factual development could possibly justify recovery.<sup>58</sup> I acknowledge that claims of defamation must be specifically pleaded, including the defamatory words, the connection between the plaintiff and the defamatory words, and the publication of the defamatory words.<sup>59</sup> However, because of the relative ease to plead a claim that survives a motion for summary disposition under MCR 2.116(C)(8), I do not believe that subjecting a defamation plaintiff’s complaint to an MCR 2.116(C)(8) standard, in order to determine whether the plaintiff is entitled to discover the defendant’s identity, provides sufficient protection to a defendant’s First Amendment right to speak anonymously.

I agree with the courts in *Dendrite* and *Cahill* that requiring the plaintiff to produce prima facie evidence sufficient to support each element of its cause of action more appropriately protects an anonymous defendant’s First Amendment rights. “Requiring the [plaintiff] to satisfy this step furthers the goal of compelling identification of anonymous internet speakers only as a means to redress legitimate misuses of speech rather than as a means to retaliate against or chill legitimate uses of speech.”<sup>60</sup> Essentially, a plaintiff must produce factual support on its

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<sup>51</sup> *Dendrite Int’l Inc.*, 342 NJ Super at 141.

<sup>52</sup> See *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc.*, 197 Mich App 48, 53-54; 495 NW2d 392 (1992); *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 77; 480 NW2d 297 (1991).

<sup>53</sup> *Dendrite Int’l, Inc.*, 342 NJ Super at 141; *Cahill*, 884 A2d at 460-461, 463.

<sup>54</sup> *Johnson v QFD, Inc.*, 292 Mich App 359, 368; 807 NW2d 719 (2011).

<sup>55</sup> *Id.*, quoting MCR 2.111(B)(1) (alteration omitted).

<sup>56</sup> *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010).

<sup>57</sup> *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012).

<sup>58</sup> *Id.*

<sup>59</sup> *Gonyea*, 192 Mich App at 77.

<sup>60</sup> *Mobilisa, Inc.*, 217 Ariz at 111.

defamation claim to withstand a summary disposition motion under MCR 2.116(C)(10). Summary disposition is proper under MCR 2.116(C)(10) when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>61</sup> Because the plaintiff must produce the evidence before it learns the defendant's identity, I agree with the court in *Cahill* that the plaintiff should not be required to produce evidence on any element that is dependent on the defendant's identity, such as the defendant's fault in publishing the statement.<sup>62</sup> Requiring the plaintiff to present evidence on the elements of the claim that are not dependent on the defendant's identity, such as the alleged defamatory statement, publication, falsity, and harm (if necessary) will not, in my estimation, be overly burdensome. The elements can generally be established either through production of the alleged defamatory statement or through the plaintiff's affidavit.

The fourth requirement of the *Dendrite* standard is that the court must balance the defendant's First Amendment rights against the strength of the plaintiff's case and the necessity for disclosure of the defendant's identity to allow the plaintiff to proceed.<sup>63</sup> Unlike the court in *Cahill*,<sup>64</sup> I would not dispose of this requirement. In my view, the balancing test serves as a safety mechanism. It permits a trial court to consider and balance all the circumstances and any idiosyncrasies in the case.

I clarify that a plaintiff, by satisfying this modified *Dendrite* standard, would only be entitled to discover the anonymous defendant's identity. After the plaintiff has learned the defendant's identity, the case must proceed along the normal channels of civil procedure, including discovery, case evaluation, summary disposition motions, and, possibly, trial. A plaintiff's satisfaction of the modified *Dendrite* standard does not necessarily mean that the real purpose of the plaintiff's lawsuit was not to unmask the defendant and then engage in extrajudicial self-help remedies. Much less does a plaintiff's satisfaction of the modified *Dendrite* standard establish that the plaintiff will ultimately prevail on its defamation claim. Accordingly, even after a trial court permits the plaintiff to engage in discovery to learn the anonymous defendant's identity, the court retains discretion to enter any protective orders that it deems necessary to protect the defendant's First Amendment rights.<sup>65</sup>

I do not believe that this Court has to create any new proceedings in order for a trial court to apply the modified *Dendrite* standard to a defamation plaintiff's discovery request to learn the identity of an anonymous defendant. Michigan follows an open, broad discovery policy,<sup>66</sup> and discovery is available on any matter, not privileged, that is relevant to the subject matter of the

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<sup>61</sup> *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 599; 792 NW2d 344 (2010).

<sup>62</sup> *Cahill*, 884 A2d at 464; see also *Mobilisa, Inc*, 217 Ariz at 111.

<sup>63</sup> *Dendrite Int'l, Inc*, 342 NJ Super at 142.

<sup>64</sup> *Cahill*, 884 A2d at 461.

<sup>65</sup> MCR 2.302(C).

<sup>66</sup> *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

action.<sup>67</sup> There are two relevant and important limitations on a party's right to discovery. First, despite the broad scope of discovery, the court rules acknowledge the wisdom of placing limits on discovery.<sup>68</sup> MCR 2.302(C) provides:

On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court[.]

“Good cause simply means a satisfactory, sound or valid reason[.]”<sup>69</sup> Protective orders may be used to protect First Amendment rights.<sup>70</sup> Second, as already indicated, although parties may engage in discovery after an action is commenced,<sup>71</sup> and an action is commenced by the filing of a complaint,<sup>72</sup> a plaintiff may need to obtain leave of court to engage in discovery.<sup>73</sup>

The court rules provide two methods from which a party can obtain discovery from a nonparty: (1) deposition and (2) request for production. A party may depose “a person,

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<sup>67</sup> MCR 2.302(B)(1).

<sup>68</sup> *Alberto v Toyota Motor Corp*, 289 Mich App 328, 336; 796 NW2d 490 (2010).

<sup>69</sup> *People v Buie*, 491 Mich 294, 319; 817 NW2d 33 (2012) (quotation omitted).

<sup>70</sup> See *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 38; 654 NW2d 610 (2002), overruled on other grounds *Stand Up For Democracy v Secretary of State*, 492 Mich 588; 822 NW2d 159 (2012).

<sup>71</sup> MCR 2.302(A)(1).

<sup>72</sup> MCR 2.101(B).

<sup>73</sup> MCR 2.306(A)(1).

including a party,” either on oral examination or on written questions,<sup>74</sup> and a deposition may be for the sole purpose of the production of documents or other tangible items for inspection and copying.<sup>75</sup> A party desiring to take the deposition of a person must give written notice to every other party to the action.<sup>76</sup> The notice must name the person to be deposed and, for a deposition on oral examination, the notice must state the time and place for the deposition.<sup>77</sup> A party may request a “nonparty” to produce and permit the party to inspect and test or sample tangible things.<sup>78</sup> A copy of the request must be served on the other parties.<sup>79</sup>

After an action has been commenced, a party generally does not need to obtain leave of court to depose a person.<sup>80</sup> However, “leave of court, granted with or without notice *must* be obtained . . . if the plaintiff seeks to take a deposition before the defendant has had a reasonable time to obtain an attorney.”<sup>81</sup> A reasonable time has elapsed if:

- (a) the defendant has filed an answer;
- (b) the defendant’s attorney has filed an appearance;
- (c) the defendant has served notice of the taking of a deposition or has taken other action seeking discovery;
- (d) the defendant has filed a motion under MCR 2.116; or
- (e) 28 days have expired after service of the summons and complaint on a defendant or after service made under MCR 2.106.<sup>[82]</sup>

The term “must” indicates a mandatory requirement.<sup>83</sup> Similarly, a party may submit a request for production of documents to a nonparty “at any time, except that leave of the court is required

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<sup>74</sup> MCR 2.306; MCR 2.307.

<sup>75</sup> MCR 2.305(A)(3).

<sup>76</sup> MCR 2.306(B)(1); MCR 2.307(A)(2).

<sup>77</sup> MCR 2.306(B)(1); MCR 2.307(A)(2).

<sup>78</sup> MCR 2.310(B)(2).

<sup>79</sup> MCR 2.310(D)(2).

<sup>80</sup> MCR 2.306(A)(1); MCR 2.307(A)(1).

<sup>81</sup> MCR 2.306(A)(1) (emphasis added).

<sup>82</sup> *Id.*

<sup>83</sup> *Vyletel-Rivard v Rivard*, 286 Mich App 13, 25; 777 NW2d 722 (2009).

if the plaintiff seeks to serve a request before the occurrence of one of the events stated in MCR 2.306(A)(1).”<sup>84</sup>

Presumably, because the plaintiff has sued an anonymous defendant and because the plaintiff wants to learn the defendant’s identity, the defendant has not yet been served with process. Accordingly, unless the defendant learned of the plaintiff’s lawsuit and took one of the actions listed in MCR 2.306(A)(1)(a)-(d), the plaintiff must obtain leave of court to engage in discovery with a nonparty to learn the defendant’s identity. At this point, presented with a motion for leave to conduct discovery, the trial court can apply the modified *Dendrite* standard. The trial court should only grant the plaintiff permission to engage in discovery to learn the defendant’s identity if the plaintiff has made reasonable efforts to notify the defendant and, having withheld action to allow the defendant an opportunity to oppose the discovery request, has submitted evidence sufficient to withstand summary disposition, on a prima facie basis, under MCR 2.116(C)(10). In addition, the trial court must determine that the strength of the plaintiff’s case and the necessity of discovery the defendant’s identity outweigh the defendant’s right to speak anonymously. If MCR 2.306 is not applicable, either because the defendant was served with process or because the defendant took one of the actions listed in MCR 2.306(A)(1)(a)-(d), the plaintiff can serve the required discovery notice on the defendant and the defendant can move for a protective order, specifically asking that the discovery not be had.<sup>85</sup> At this point, presented with a motion for a protective order, the trial court can apply the modified *Dendrite* standard. Because the defendant already received notice of the requested discovery, the trial court should grant the requested protective order unless the plaintiff has produced sufficient evidence supporting each element of its cause of action on a prima facie basis, and the balancing test weighs in favor of the plaintiff.

#### IV. CONCLUSION

I do not believe that Michigan law adequately protects a defendant’s First Amendment right to speak anonymously when his or her identity is sought in a defamation action. Consequently, I would adopt a modified *Dendrite* standard to strike the appropriate balance between an anonymous defendant’s First Amendment rights and a plaintiff’s right to learn the defendant’s identity in order to seek redress for alleged defamatory statements. Under this standard, a defamation plaintiff may engage in discovery to learn an anonymous defendant’s identity only after (1) the plaintiff has made reasonable attempts to notify the defendant and then has given the defendant a reasonable opportunity to defend against the discovery request, (2) the plaintiff has presented the trial court with prima facie evidence sufficient to support each element of its cause of action, other than the elements dependent on the defendant’s identity, and (3) the strength of the plaintiff’s prima facie case and the necessity of disclosure of the defendant’s identity outweighs the defendant’s right to speak anonymously. However, because Cooley has already learned Doe 1’s identity, I concur with the majority that remand is necessary to

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<sup>84</sup> MCR 2.310(D)(1).

<sup>85</sup> MCR 2.302(C)(1).

determine whether Doe 1 is entitled to a protective order to prevent further destruction of his anonymity.

/s/ Jane M. Beckering