

STATE OF SOUTH CAROLINA)
)
 COUNTY OF NEWBERRY)
)
 Jefferson Davis, Jr.,)
)
 Plaintiff,)
)
 v)
)
 Chad Connelly, Dave Wilson, Stephen)
 Kirkland, Tom Persons, Neil Mellen,)
 John Doe #1, John Doe #2,)
 John Does #3-#40,)
)
 Defendants.)

COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Case No.: 2020-CP-36-0382

**Order Granting John Doe 1's
Motion to Quash the Subpoena
of Plaintiff to
Endurance International Group, Inc.**

FILED
 NEWBERRY COUNTY
 2022 JAN - 4 PM 11:53
 ELIZABETH P. FOLLE
 CLERK OF COURT

This matter came before the court upon a motion to quash filed by Jessica E. Kimard, Esq. on behalf of John Doe 1. The request was to quash a subpoena issued by Plaintiff to Endurance International Group, Inc. The motion to quash was heard on October 7, 2021 via the Court's virtual courtroom.

Facts, Background and Procedural History:

Plaintiff Jefferson Davis, Jr. is a licensed attorney in Georgia who has filed numerous *pro se* lawsuits in South Carolina. Plaintiff filed the present action on September 10, 2020. The complaint alleges that defendants created a website called JeffDavisFirst.com and used this website to publish defamatory information regarding Plaintiff. The complaint listed defamation *per se*, defamation *per quod*, defamation by innuendo, invasion of privacy, negligence, intentional infliction of emotional distress and conspiracy as causes of action. All of the causes of action stem from the creation of the website JeffDavisFirst.com.

Plaintiff issued a subpoena to Endurance International Group, Inc., the host of JeffDavisFirst.com, in May 2021. The subpoena requested information disclosing the identity of the owner of the web domain JeffDavisFirst.com. Plaintiff Davis requested Endurance International Group respond to the subpoena no later than June 9, 2021.

Defendant John Doe 1 (“Anonymous”) is the owner of the web domain JeffDavisFirst.com and has successfully defeated previous attempts by Plaintiff to use the court system to uncover Anonymous’ identity.

A motion to quash the present subpoena was filed by Anonymous, by and through counsel, on June 9, 2021. The motion to quash contends the JeffDavisFirst.com website quotes and provides information found in publicly available official documents, and the underlying lawsuit lacks merit and was filed for the purpose of using the Court as a tool to disclose the identity of an individual who wishes to speak anonymously. Any information on this website that is not found in the body of these documents is opinion and, therefore, not subject to defamation claims. Anonymous contends that the underlying lawsuit fails as a matter of law due to the truth of the material contained in the website JeffDavisFirst.com being a defense to the causes of action brought by Plaintiff.

The motion to quash was heard on October 7, 2021 via the Court’s virtual courtroom. Plaintiff represented himself *pro se* and Anonymous was represented by Attorney Jessica E. Kinard. In a memo in support of Anonymous’ motion and at the hearing, Anonymous presented a Bankruptcy Case Order, an order from the Certified Financial Planner Board, and an Audit Report from the South Carolina Department of Revenue. Anonymous also provided the court with screenshots of the website and linked every allegation made in the website regarding Plaintiff to the text of these three official documents.

Plaintiff issued an identical second subpoena on November 19, 2021, mere hours after this court requested Anonymous submit a proposed order quashing the June 9, 2021 subpoena. Plaintiff’s second subpoena to Endurance International Group, Inc. seeks the exact same information as the former subpoena.

Law:

The instant subpoena seeks “registration agreements,” “identity of persons or entities associated with the website,” “status changes of ownership,” and “copies of customer records” related to the domain name JeffDavisFirst.com. In a sister case based in Richland County (Case Number 2018-CP-40-02425), Anonymous also filed a motion to quash a substantially identical subpoena. This, along with all discovery requests, was stayed by the Honorable L. Casey Manning (see order dated January 31, 2020).

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Anonymous has and continues to assert that he or she has a right to privacy pursuant to the Fourth Amendment of the United States Constitution and Article 1 Section 10 of the South Carolina Constitution, which includes but is not limited to protected anonymous activities that are constitutionally and statutorily protected such as posted material on websites and email. Therefore, his or her identity must be protected. Plaintiff, by subpoenaing the information and identity of domain name ownership, seeks to circumvent the constitutional protections afforded anonymous and protected speech.

The subpoena requested by Plaintiff, if upheld, would violate the First Amendment right of Anonymous to engage in anonymous speech. The U.S. Supreme Court has consistently protected the right of individuals and groups to engage in anonymous political speech. See Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 199-200, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999). The Supreme Court has noted that “[a]nonymity is a shield from the tyranny of the majority.” McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 356, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). Indeed, “[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.” Id.

The protections of the First Amendment extend to the Internet. See Reno v. ACLU, 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). “Courts have recognized the Internet as a valuable forum for robust exchange and debate.” Sony Music Entm’t, Inc. v. Does 1-40, 326 F.Supp.2d 556, 562 (S.D.N.Y. 2004). Speech over the Internet is afforded no lower level of First Amendment scrutiny. Reno, 521 U.S. at 870, 117 S.Ct. 2343. Indeed, the Supreme Court has characterized Internet speech by the same terms as traditional political speech: “Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.” Id. at 870, 117 S.Ct. 23243; see also Doe v. Cahill, 884 A.2d 451, 456 (Del.2005) (“Anonymous Internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering.”).

Several courts have noted that Internet anonymity serves a particularly vital role in the exchange of ideas and robust debate on matters of public concern. See, e.g., Doe v. 2TheMart.com Inc., 140 F.Supp.2d 1088, 1092-93 (W.D.Wash.2001) (Internet exchange of ideas “driven in large part by the ability of Internet users to communicate anonymously”); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D.Cal.1999). The protection of Internet

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speech also includes the protection of anonymous electronic speech. See, e.g., 2TheMart.com Inc., 140 F.Supp.2d at 1092 ("The right to speak anonymously extends to speech via the Internet.") In re Does 1-10, 242 S.W.3d 805 (Tex. App. 2007); State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (S.C. 2013).

"Congress shall make no law ... abridging the freedom of speech, or of the press[.]" U.S. Const. amend. I. "[A]n author's decision to remain anonymous ... is an aspect of the freedom of speech protected by the First Amendment." Enterline v. Pocono Med. Ctr., 751 F.Supp.2d 782, 787 (M.D.Pa.2008) (quoting McIntyre v. Ohio Elections Commission, 514 U.S. 334, 342, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995)). "This is because 'the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.'" Id. Indeed, "[i]t is clear that speech over the internet is entitled to First Amendment protection" and that "[t]his protection extends to anonymous internet speech." Doe v. Cahill, 884 A.2d 451, 456 (Del.2005).

Id., FN 1.

In Krinsky v. Doe, the California Court of Appeals noted the reasons as to why anonymous speech, especially on the internet, is important and why people may want to engage in anonymous political speech: The use of a pseudonymous screen name offers a safe outlet for the use to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal. In addition, by concealing speakers' identities, the online forum allows individuals of economic, political, or social status to be heard without suppression or other intervention by the media or more powerful figures in the field. Krinsky v. Doe, 159 Cal. App.4th 1154, 1164 (Cal. App. 2008).

While private parties may ultimately determine the identity of an anonymous speaker, such identification does not necessarily require state action and is, therefore, not subject to the constitutional limits on state action under the First Amendment. In contrast, a court order, such as a subpoena, is a state action and is, therefore, subject to constitutional limitations. New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); Shelley v. Kraemer, 334 U.S. 1 (1948).

The subpoena requested by Plaintiff, seeking to compel the production of the identity of Anonymous, would compromise the exercise of Anonymous's fundamental rights. Such a subpoena "is subject to the closest scrutiny." NAACP v. Alabama, 357 U.S. 449, 461 (1958); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). To overcome the scrutiny required to

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disclose the identities of individuals engaging in protected speech, there must be a showing of a "subordinating interest which is compelling," where such compelled disclosure threatens to significantly impair the fundamental right of individuals. Bates, 361 U.S. at 524; NAACP v. Alabama at 463.

In State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (S.C. 2013) the SC Supreme Court acknowledged, recognized, and cited Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005) (requiring plaintiffs to satisfy a summary judgment standard before obtaining the identity of an anonymous defendant because "[p]laintiffs can often initially plead sufficient facts to meet the good faith test ... even if the defamation claim is not very strong").

The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508, 506 S.E.2d 497, 502; Murray v. Holnam, Inc., 344 S.C. 129, 138, 542 S.E.2d 743, 748 (Ct.App.2001). Defamatory communications take two forms: libel and slander. Holtzscheiter, 332 S.C. at 508, 506 S.E.2d at 502. Libel is the publication of defamatory material by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed word. Id. at 517, 506 S.E.2d at 505 (Toal, J., concurring); Restatement (Second) of Torts, § 568 (1977).

To recover for defamation, a plaintiff must establish by a preponderance of the evidence, that there was (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged communication; (3) fault on the defendant's part in publishing the statement; and (4) either actionability of the statement irrespective of special harm or the existence of special harm to the plaintiff caused by the publication. Id., 332 S.C. at 518, 506 S.E.2d at 506 (Toal, J., concurring); Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

To prove fault in a defamation action, a plaintiff who is a public official or public figure must prove by clear and convincing evidence that the defendant acted with actual malice in publishing a false and defamatory statement about the plaintiff. New York Times Co. v. Sullivan, 376 U.S. at 254, 279-80, 84 S.Ct. at 710 (1964); Erickson v. Jones Street Publishers, 368 S.C. 444, 629 S.E.2d 653 (2006). Actual malice exists when a statement is made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times, 376 U.S. at 279-80, 84 S.Ct. at 726, 11 L.Ed.2d at 706. Actual malice under the New York Times

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standard should not be confused with the concept of common law malice as an evil intent or a motive arising from spite or ill will. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510, 111 S.Ct. 2419, 2429 (1991).

An important initial step in analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure. This determination is a matter of law which must be decided by the court, on a case by case basis after a careful examination of the facts and circumstances. Erickson, 368 S.C. at 469-70, 629 S.E.2d at 666-7.

Public figures are people who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. By doing so, they invite attention and comment. Id., citing Gertz v. Welch, 418 U.S. 323, 345, 94 S.Ct. 2997, 3009 (1974).

Some statements are so clearly innocent or defamatory the court is justified in determining the question itself. Holtzscheiter, 332 S.C. at 530, 506 S.E.2d at 512. "In making the determination of whether to submit the issue to the jury, the trial court may consider not only the statement on its face, but also evidence of any extrinsic facts and circumstances." Id.

"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." Gertz, 418 U.S. at 339-40, 94 S.Ct. at 3007. To be actionable as defamation, a statement must state actual ascertainable facts rather than a mere expression of opinion. Opinions, ideas and hyperbole are protected under the First Amendment and are not actionable as defamation. Garrard v. Charleston Cnty. Sch. Dist., 429 S.C. 170, 838 S.E.2d 698 (Ct. App. 2019)

Analysis:

Anonymous presented a summary judgment-style argument at the hearing and in Anonymous' supplemental memo supporting the motion to quash. Anonymous presented screenshots of the JeffDavisFirst.com website and a link between each statement of fact and an underlying section of a South Carolina Department of Revenue Audit of Plaintiff's charity organization, the Certified Financial Planner Board's publication of revocation of Plaintiff's CFP

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credentials or a District of South Carolina Bankruptcy Court Order dated July 26, 2013 in case number 11-07525-dd, Adv. Proceeding 12-80034-dd.

Documents submitted to the Court by Anonymous show that Plaintiff Davis consented to the Certified Financial Planner Board's findings "that he told clients that they were purchasing a stock while failing to tell them about a \$5 million dollar liability, told clients that their \$950,000 was being used to purchase a stock when he was really using it to pay interest on the loan as well as business and personal expenses, told clients that he was indicating to the bank to change the guarantors of the loan when he did not, informed the clients that the loan was current when it was not and filed bankruptcy after promising to have the clients released as guarantors on the \$5 million dollar loan" and that Plaintiff's CFP certification was revoked. Supplemental Memo in Support of Motion to Quash, Exhibit I, CFP Board Announcement of the Revocation of Licenses, October 24, 2014.

Anonymous also presented as Exhibit G to the Supplemental Memo in Support of Anonymous' Motion to Quash a District of South Carolina Bankruptcy Court Order dated July 26, 2013 in case number 11-07525-dd, Adverse Proceeding Number 12-80034-dd Paragraph 107 of the Bankruptcy Court Order found Plaintiff Davis asserted the fifth amendment when asked whether he signed his clients' names on loan guarantees without their authorization, whether he took the May 2008 loan guarantees to Georgian Bank to induce the bank to lend Plaintiff Davis \$5 million and whether he took the August 2008 loan guarantee documents to Georgian Bank to renew the \$5 million loan. Supplemental Memo in Support of Anonymous' Motion to Quash, Exhibit G:United States Bankruptcy Court, District of South Carolina, Adv. Pro. No. 12-80034, Order dated July 26, 2013, ¶107.

The Bankruptcy Court Order presented by Anonymous stated it is entitled to draw the adverse inference from Plaintiff Davis' assertion of the fifth amendment, but the other facts of the case established Plaintiff Davis' fraudulent intent. *Id.* pp 36 to 38, footnote 15, footnote 19 and footnote 20.

The Bankruptcy Order presented by Anonymous found that Plaintiff Davis did embezzle money from his clients, *Id.* p 48., that Plaintiff Davis did intend to defraud his clients, *Id.* p 35, that Plaintiff Davis misrepresented facts and knowingly made false statements to his clients, *Id.* p 34 and Plaintiff Davis was found not to be an honest but unfortunate debtor, *Id.* p 49.



The South Carolina Department of Revenue Audit, presented as Supplemental Memo in Support of Anonymous' Motion to Quash, Exhibit H, states: "Based on its review during the Audit Period, the Department has identified twenty (20) findings as violations or potential violations of Provisos 1.85 and 1. 80, or the laws governing tax-exempt charitable organizations." Supplemental Memo in Support of Motion to Quash, Exhibit H, South Carolina Department of Revenue Audit, p 3.

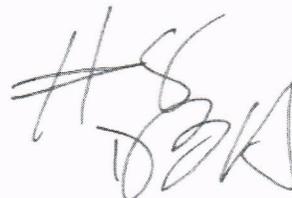
The Department of Revenue Audit indicates Plaintiff's scholarship funding organization operated a quid pro quo scheme. Supplemental Memo in Support of Anonymous' Motion to Quash, Exhibit H: South Carolina Department of Revenue Audit, p 6.

This Court finds the statements of fact on the JeffDavisFirst.com website were taken from the documents provided as Exhibits G, H and I to Anonymous' Supplemental Memo in Support of Anonymous' Motion to Quash. Truth undercuts the first element of defamation, that there must be a false statement. As such, Defendant Davis' Defamation cause of action for defamatory statements on the JeffDavisFirst.com is not a meritorious cause of action to warrant the disclosure of Anonymous' identity through a subpoena.

Plaintiff Davis' other causes of action include Negligence, Intentional Infliction of Emotional Distress, Invasion of Privacy, and Conspiracy. Plaintiff's causes of action for Negligence, Intentional Infliction of Emotional Distress and Conspiracy are not meritorious causes of action warranting disclosure of Anonymous' identity through subpoena because they are predicated on the underlying wrongful act of making defamatory statements. Plaintiffs claim that his privacy is invaded by the JeffDavisFirst.com website is not a meritorious cause of action because quoting and statements of fact already contained in publicly available documents does not invade the privacy of an individual.

Conclusion:

Without an underlying meritorious cause of action, there is no legitimate reason to allow Plaintiff to use government action via a subpoena to uncover the identity of Anonymous. Anonymous has a constitutionally protected right to speak anonymously.

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Both the November 2021 and May 2021 subpoenas to Endurance International Group are identical in respect to the information sought. The same reasoning for quashing the May 2021 subpoena applies to the subpoena issued hours after this Court requested a proposed order from Anonymous. This Court quashes the subpoena issued by Plaintiff Davis in May 2021 (Dated September 8, 2020) as well as the subpoena issued November 19, 2021 (Dated October 21, 2021) seeking the disclosure of the owner of JeffDavisFirst.com website.

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IT IS SO ORDERED



Donald B. Hocker
Presiding Judge

December 29, 2021

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