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Rule 224 can lead to identity disclosure

INSIDE IP LAW

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What is it that compels people to post snarky comments on Internet comment boards? The seeming anonymity emboldens cyber-commenters to write things that the better angels of their nature would hold in check in a face-to-face conversation. There is little to be gained (perhaps some smug satisfaction or slight notoriety among a niche of comment readers), but much to be lost. The commenter need only cross the indistinct line between a smart-aleck post and a defamatory statement to end up in a quagmire of litigation.

Our old friend John Doe learned this lesson recently when he become an unexpected litigant in *Stone v. Paddock Publications* (Ill. App. 2011). Doe, known on the Internet only as "Hipcheck 16," wrote some less than flattering comments about Lisa Stone, a controversial figure in the local politics of Buffalo Grove. Stone was running for village trustee in 2009. Hipcheck posted comments in response to a letter in support of Stone published on the website of the Daily Herald.

The letter was authored by "Uncle W," who, it was later disclosed, is Stone's son (a minor). The dialogue began with Hipcheck writing "Here we go again — another brainwashed adolescent who can't form an opinion on their own ... You're probably not old enough to vote and I'm certain all you know about this election is what your mommy told you." From this, the level of mean-spiritedness in Hipcheck's posts escalated, calling his online adversary an "ill-informed punk" and writing that "your sense of entitlement sickens me. Your holier than thou attitude and arrogance is disgusting."

Apparently not intimidated, the youth challenged Hipcheck to "show yourself in person ... I'm sure you could navigate your way over the Stone confines. Then I'll be glad to have this conversation with you, however, I will not continue to comment on these blogs where anyone can be anyone."

Then came Hipcheck's coup de grace that led to the litigation: "Thanks for the invitation to visit you ... but I'll have to decline. Seems like you're very willing to invite a man you only know from the Internet over to your house — have you done it before or do they usually invite you to their house?" This statement, according to Stone, suggests that her son solicits men for sex and constitutes defamation.

Stone faced an immediate problem before she could file a defamation suit on behalf of her son: Who is Hipcheck 16? As Uncle W so aptly pointed out on the Internet "anyone can be anyone." Suing the Daily Herald for the defamation would likely be futile because website hosts are in most cases immune from defamation suits under Section 230 of the Communications Decency Act. But Hipcheck himself could be sued, if only he would "show himself."

Anonymous Internet commenters need to appreciate that the shield of anonymity is not impenetrable. Illinois and other states have procedures that allow a petitioner to engage in prelawsuit discovery for the purpose of ascertaining the identity of a potential defendant. This discovery technique is provided in Illinois Supreme Court Rule 224 and is an important tool for someone who has been defamed by an anonymous Internet commenter.

Stone filed a petition under Rule 224 to force the Daily Herald to disclose information that might help unmask Hipcheck. Upon being notified by the Daily Herald of the petition, Hipcheck intervened in the lawsuit as "John Doe" to fight the disclosure request. The trial court granted the petition and Hipcheck had to appeal to avoid disclosure. The appellate court reversed, rejecting Stone's bid to obtain the identity of Hipcheck.

Courts must use particular care when asked to order disclosure in defamation cases. Anonymous speech has played an important role throughout American history and is protected by the First Amendment. Identification and fear of reprisal can chill free speech.

As the Supreme Court said in *McIntyre v. Ohio Elections Commission,* "Anonymity is a shield from the tyranny of the majority," a statement that holds true even in local politics. But there is no constitutional right to defame. A person whose reputation has been harmed by scurrilous online speech should be able to seek redress. Overprotection of defamatory anonymous speech could serve as encouragement for this type of conduct."

To balance these interests, the appellate court in *Stone* outlined several conditions that must be met before granting a petition under Rule 224. There must be a hearing in which the petitioner identifies the defamatory statements with particularity and demonstrates a prima facie case for defamation. This is to be judged under the standards of Section 2-615 of the Code of Civil Procedure. Unlike cases in some other states, the *Stone* case did not require the petitioner to meet the more rigorous showing required for a summary judgment motion. It is enough to show that the complaint, standing alone, states sufficient facts to demonstrate a cause of action.

To state a claim for defamation, the plaintiff must show that the defendant published an unprivileged false statement about the plaintiff that harms the plaintiff's reputation by "lowering the individual in the eyes of the community." It must be a statement of fact, not merely an opinion.

A statement is defamatory per se if harm is obvious on the face of the statement. Here, Stone claimed the statement was defamatory per se because it imputed that the individual "has engaged in fornication or adultery" and imputed "the commission of a crime." Both of these types of statements are considered defamation per se.

Hipcheck no doubt gave a sigh of relief when he learned that the appellate court ruled in his favor. His anonymity would remain intact, thanks to a doctrine of defamation law known as the "innocent construction rule." A statement is not defamatory per se if it can easily and reasonably be subjected to an innocent interpretation. The court ruled that a sexual connotation is not necessarily inherent in Hipcheck's statement. After all, the Internet can be a dangerous place and inviting anonymous Internet commenters to your house is unwise. Good old Hipcheck could have just been giving Uncle W some advice — be careful out there young fella! The court also held that the challenged statement could not reasonably be viewed as a statement of fact regarding Stone's son.

The court spoke strongly in favor of anonymous speech. "Encouraging those easily offended by online commentary to sue to find the name of their 'tormentors' would surely lead to unnecessary litigation and would have a chilling effect on the many citizens who choose to post anonymously ... " Requiring a website host to act as a "cyber-nanny," said the court, is "a noxious concept that offends our country's long history of protecting anonymous speech."

Hipcheck was not required to "show himself." But anonymous speakers who are more direct in asserting false statements on the Internet cannot be guaranteed a similar result. See *Maxon v. Ottawa Publishing Co.* (Ill. App. 2010), where the court ordered disclosure of an anonymous commenter who made accusations of bribery. Hipcheck can continue to post anonymous comments, but he and other Internet commenters may want to choose their words more carefully in the future to avoid being unmasked.