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RECENT DEVELOPMENT

INDEPENDENT NEWSPAPERS, INC. v. BRODIE: MARYLAND REQUIRES A PRIMA FACIE SHOWING OF DEFAMATION AND A BALANCING OF FIRST AMENDMENT RIGHTS BEFORE ORDERING THE RELEASE OF THE IDENTITY OF AN ANONYMOUS INTERNET SPEAKER.

By: Molly Deere

The Court of Appeals of Maryland held that releasing the identity of an anonymous Internet speaker in a defamation action requires a prima facie showing. *Indep. Newspapers, Inc. v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009). In addition, a Maryland court must find that the plaintiff made an adequate effort to notify the anonymous speaker, provided the speaker with a reasonable opportunity to oppose the request, and submitted the exact statements in question to the court. *Id.* at 456, 966 A.2d at 457. Finally, the court must balance the need for identification and the strength of the prima facie case against the speaker's First Amendment right to speak anonymously. *Id.*

Independent Newspapers, Inc. ("Independent Newspapers") maintained a web-based Internet forum that allowed registered users to post comments and opinions for the general public to read. Two discussion threads posted on the Internet forum referenced Queen Anne's County resident, Zebulon Brodie ("Brodie"). The first discussion thread, Centerville Eyesores, accused Brodie of participating in the sale and burning of an antebellum home and a grove of trees. Three usernames were identified in the discussion thread. In expressing their ire toward the person responsible for the antebellum home's demolition, the posters named the developer as the culprit and mentioned that Brodie sold the property to the developer.

The second discussion thread involved two different posters and discussed unsanitary conditions at Brodie's Dunkin' Donuts franchise. The Dunkin' Donuts posters described trash piled up outside the restaurant and their refusal to eat at the establishment. Brodie claimed that these statements injured his profession and his employment.

Brodie filed a claim in the Circuit Court for Queen Anne's County for defamation and conspiracy to defame against the Internet forum host, Independent Newspapers, and the three Centerville Eyesores

posters. Independent Newspapers filed a motion to protect the anonymity of the posters. The circuit court dismissed Independent Newspapers and the Centerville Eyesores' posters from the suit, but compelled the company to divulge the Dunkin' Donuts posters' identities.

Brodie served a subsequent subpoena ordering Independent Newspapers to release documents related to all five posters. Independent Newspapers argued that the posters' anonymity should be maintained because Brodie failed to assert an actionable claim. The circuit court ordered Independent Newspapers to comply with the subpoena. Independent Newspapers appealed to the Court of Special Appeals of Maryland. The Court of Appeals of Maryland granted certiorari prior to any proceedings in the Court of Special Appeals of Maryland.

The Court of Appeals of Maryland reversed the circuit court's judgment because the three posters named as defendants wrote only under the Centerville Eyesores discussion thread, which did not defame Brodie. *Indep. Newspapers, Inc.*, 407 Md. at 442-43, 966 A.2d at 448-49. The second thread, discussing Brodie's Dunkin' Donuts restaurant, involved two posters that Brodie did not sue. *Id.* at 443, 966 A.2d at 449. Additionally, the statute of limitations had expired on Brodie's defamation claim against the Dunkin' Donuts posters. *Id.*

After dismissing the actual claims against all of the defendants, the court elucidated a test meant to guide lower courts in determining when to compel the identification of an anonymous Internet speaker in a defamation suit. *Id.* In doing so, the court considered First Amendment rights and policy arguments for protecting anonymity. *Id.* at 427-28, 966 A.2d at 440.

The court stated that an individual's right to speak anonymously is fundamental to the First Amendment. *Id.* at 428, 966 A.2d at 440. Furthermore, protecting anonymous speech encourages citizens to participate in First Amendment freedoms by dissolving fear of official retaliation or social ostracism. *Indep. Newspapers, Inc.*, 407 Md. at 428-29, 966 A.2d at 440-41. The right to speak anonymously, however, is not absolute. *Id.* at 430, 966 A.2d at 441 (citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952)). Defamation considerations are one class of restrictions that courts may place on the anonymity of speech. *Id.* (citing *Beauharnais*, 343 U.S. at 266).

Maryland has not previously considered whether First Amendment protections should apply to Internet speech. *Id.* at 430, 966 A.2d at 442. Other courts, however, have recognized the value in such an

extension, because the Internet affords citizens an opportunity to participate more fully in public discourse. *Id.* (citing *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005)).

The Court of Appeals of Maryland conflated state and federal decisions to create an applicable test for Maryland courts. *Id.* at 454, 966 A.2d at 456. The court found the stringent summary judgment threshold too rigorous, because the plaintiff would be required to prove the case without being able to identify the speaker. *Indep. Newspapers, Inc.*, 407 Md. at 455-56, 966 A.2d at 456-57 (citing *Cahill*, 884 A.2d 451). Conversely, the “good faith basis” and the motion to dismiss thresholds were too weak, and threatened to stifle public discourse. *Id.* at 455, 966 A.2d at 456 (citing *In re Subpoena Duces Tecum to AOL*, 52 Va. Cir. 26 (Va. Cir. Ct. 2000)). The court compromised by requiring a plaintiff to make a prima facie showing before compelling the release of an anonymous Internet speaker’s identity. *Id.* at 454, 966 A.2d at 456.

In addition to the prima facie showing requirement, a plaintiff must provide: (1) notice to the anonymous speaker on the message board where the allegedly defamatory comments were made; (2) a reasonable opportunity for the anonymous poster to respond to the discovery request; and (3) the exact statements in question. *Id.* at 456, 966 A.2d at 457 (citing *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001)). Subsequently, the court must weigh the anonymous speaker’s First Amendment rights with the “strength of the prima facie case.” *Id.* (citing *Dendrite*, 775 A.2d at 760-61).

The *Independent Newspapers, Inc.* concurring opinion disagreed with the addition of a First Amendment balancing test. *Id.* at 457, 966 A.2d at 457 (Adkins, J., concurring). In particular, the concurrence viewed the balancing test as being implicit in the prima facie showing. *Indep. Newspapers, Inc.*, 407 Md. at 459, 966 A.2d at 460 (Adkins, J., concurring). The concurring opinion stressed that, by also requiring a balancing test, the majority has granted the trial court discretion to dismiss a defamation claim, despite the fact that the plaintiff already made a prima facie showing. *Id.* (Adkins, J., concurring).

With the burgeoning field of web-based communication, defamation cases arising out of anonymous Internet speech are likely to increase. This opinion provides valuable instruction on Internet anonymity in the context of a defamation claim. Lawyers preparing a defamation claim must anticipate a thorough balancing of the plaintiff’s right to pursue a claim against the defendant’s right to First Amendment protections. Lawyers defending an anonymous Internet

speaker against a defamation claim should focus their arguments on the First Amendment violations implicated by releasing the identity of the anonymous poster. Furthermore, practitioners engaged in First Amendment cases should take note of the breadth of this opinion, which provides a foundation for future disputes involving the Internet and free speech.