

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY, PENNSYLVANIA

CONNIE JAVENS and
RENEE JAVENS ZUK
Plaintiffs,

vs.

JOHN DOES (1)-(6)
Defendants.

CIVIL DIVISION

NO.: 10550-2016

**SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION TO QUASH SUBPOENA
ISSUED TO THE BEAVERCOUNTIAN**

Filed on Behalf of John Does (1)(2)
(4)(5) and (6)

Counsel of Record for This Party:

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HARVEY J. ...
PROthonary
BEAVER COUNTY, PA

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AND NOW, comes John Does (1)(2)(4)(5) and (6), by and through their attorneys, James T. Tallman, Esq. and Elliott & Davis, P.C., and files the within Reply Brief in Support of Motion to Quash Subpoena Issued to the BeaverCountian and, in support thereof, avers as follows:

I. Introduction

John Does (1)(2)(4)(5) and (6) ("John Does") have previously submitted a Brief in Support of Motion to Quash and a Reply Brief in Support of Motion to Quash. At oral argument on November 14, 2016, the Court invited the parties to provide additional briefing on certain issues. The John Does submit this supplemental brief to address the "actual harm" requirement an Plaintiff's failure to provide any evidence of such harm. This supplemental brief also briefly reiterates the need to view the "totality of the circumstances" of the alleged defamatory statements and to balance John Does' First Amendment rights against the Plaintiffs' *prima facie* case. It is John Does' contention that John Does' constitutional rights should prevail.

II. Argument

There is no dispute that for the Plaintiffs' to defeat the John Does' Motion to Quash, Plaintiffs have the burden of satisfying the requirements of Pilchesky v. Gatelli, 12 A.3d 430, 442-46 (Pa. Super. 2011). Pilchesky, however, must be applied in a manner consistent with the subsequent Supreme Court of Pennsylvania decision in Joseph v. Scranton Times, L.P., 129 A.3d 404 (Pa. 2015). In Joseph, the Supreme Court of Pennsylvania analyzed in depth the injury element in defamation claims. The Supreme Court of Pennsylvania held that injury to reputation is a threshold requirement to recovery for other damages such as mental and emotional injuries. Id. at 429.

To establish a prima facie case, a plaintiff must present actual evidence of injury to reputation. The Pilchesky court further made it clear that a plaintiff, even in a case involving the actual malice standard, must establish actual harm to compel the revelation of the identity of anonymous speakers. The Superior Court in Pilchesky remanded the case because the trial did not require any evidence of actual harm and simply relied upon averments of harm. See Pilchesky, 12 A.3d 442-444. See also Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (damages cannot be presumed without proof of actual malice).

Thus, Plaintiffs are required to establish actual evidence of actual harm caused by the alleged defamatory statements. As in Pilchesky, Plaintiffs here have not supplied any evidence to support their bald allegations of defamation. Plaintiffs own affidavits is not actual evidence of injury to reputation. Plaintiffs' "Affidavits of Harm" are nothing more than averments in a pleading, which the Pilchesky court specifically rejected as insufficient.

Moreover, any harm to Connie Javens and Renee Javens Zuk's reputation was done by the facts reported in the articles themselves. See Joseph, 129 A.3d at 429, 433-35; Walker v. Grand Central Sanitation, Inc., 634 A.2d 237 (Pa. Super. 1993) (each plaintiff must prove actual harm to reputation *caused* by the defamatory statements about them.); Bausewine v. Norristown Herald, Inc., 41 A.2d 736 (Pa. 1945) (the Court must also consider whether any harm to their reputation was caused by other factors.). See also Robert D. Sack, Sack on Defamation: Libel, Slander & Related Problems, §10. 5.3 (2004) ("[I]n light of the natural tendency of plaintiffs to attribute their every imaginable post publication woe to an alleged defamation, Courts have increasingly insisted the link of causation between publication and injury be clearly established.")

Based on the articles reporting on such facts and circumstances, the John Does and many others made hyperbolic statements to the effect that Connie Javens is corrupt and that her family benefits from such corruption. Anyone reading the BeaverCountian articles may have come to such conclusions or, at the very least, had questions regarding the Javens' ethics and integrity. As John Q Taxpayer points out, the comments suggesting public corruption, cronyism, nepotism, and mishandling of funds appear to be true. Plaintiffs cannot possibly establish that actual harm was caused by the alleged defamatory statements.

Further, the "totality of the circumstances" should be considered when determining whether a communication is defamatory, the court should consider the context in which the communication is made. See Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (setting forth a four factor "totality of the circumstances" analysis to apply: (1) the language used; (2) is the statement verifiable; (3) the general context of the statement; and (4) the broader context in which the state appeared.) See also Maier, 448 Pa. Super. 276, and Rybas v. Wapner, 457 A.2d 108 (Pa.

Super. 1983). This includes the nature of forum of the communication and its social conventions, the nature audience reading the statements, and the effect or impression of the statement on the minds of persons among whom it is intended to circulate. The context of the communications at issue here is particularly important. As discussed in John Does' brief in support, courts in other jurisdictions have held that statements made in online forums are not defamatory. Further, the online commentators, including John Does (1) – (6), are their own audience. This is evidenced by the ongoing dialogue by the commentators, with many posts responding to other posts.

Tellingly, Plaintiffs largely ignore these arguments in their Brief in Opposition. When the "totality of the circumstances" are considered, it is clear the Plaintiffs have not and cannot establish claims for defamation. Instead, they simply make the bald allegation that the statements are defamatory. Such unsupported averments do not satisfy the Pilchesky test.

Lastly, the Court must balance the John Does' First Amendment rights against the strength of the Plaintiff's prima facie case. The Pilchesky court explained that this balancing test should include the defamatory nature of the comments, the quantity and quality of the evidence presented, and the forum of the comments. The court noted that "comments on matters of public importance or those which criticize public officials are entitled to robust protection, for it is in the public forum that the First Amendment right of speech is strongest." Pilchesky, at 445 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).

The John Does' First Amendment right to anonymous free speech on matters of public concern clearly outweighs Plaintiffs' claims that the complained of comments were defamatory. As explained above, when viewed in context, the comments at issue were not defamatory in nature and constituted opinion and fair comment.

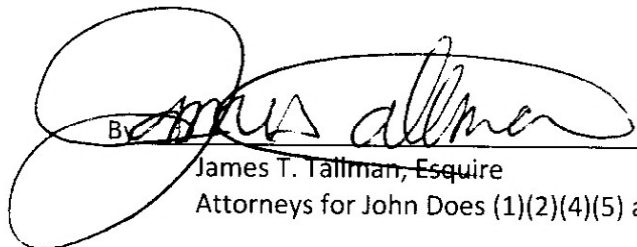
Anonymous speech is fundamental to the right of free speech protected by the First Amendment to the United States Constitution. It is essential to our democratic system of government that Citizens have the ability to criticize public officials without fear of reprisal or being stifled by lawsuits. Such an important constitutional right must be protected against claims of defamation, especially claims from politicians and public figures.

Upon review of the John Doe comments in context, "the general tenor, the setting and the format of [the] statements strongly suggest that the postings are opinion. . . . they were part of an ongoing, free-wheeling and highly animated exchange . . . full of hyperbole, invective, short-hand phrases" and not the type of statements courts have determined to be defamatory. See Global Telemedia International, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001).

The First Amendment Right of John Does (1)(2)(4)(5) and (6) to anonymous free speech should not trampled by Plaintiffs' frivolous claims of defamation. The subpoena issued by Plaintiffs on the BeaverCountian should be quashed.

Respectfully submitted,

ELLIOT & DAVIS, P.C.


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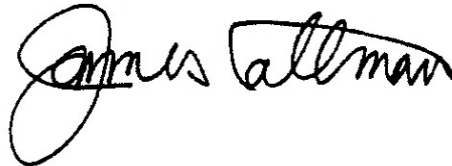
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO QUASH SUBPOENA ISSUED TO THE BEAVERCOUNTIAN was served on the 21st day of December, 2016 via Email and First Class Mail, postage prepaid, as follows:

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A handwritten signature in black ink that reads "James Tallman". The signature is written in a cursive style with a large, looping initial "J".

James T. Tallman, Esquire