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No. 72321-9

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

DEBORAH THOMSON,

Appellant,

v.

JANE DOE, et al.,

Appellee.

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STATE OF WASHINGTON
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REPLY TO RESPONSE BRIEF OF NON-PARTY AVVO, INC.

**DEBORAH L. THOMSON (pro se)
13902 N. Dale Mabry Hwy.
Suite 137
Tampa, Florida 33618
(813)443-5572
dthomson@thewomenslawgroup.com**

TABLE OF CONTENTS

<u>Item</u>	<u>Page(s)</u>
Table of Authorities.....	iii
Reply to Non-party Avvo’s Statement of the Case.....	1
Reply Non-party Avvo’s Argument	1
THE SUPERIOR COURT ERRED WHEN IT ARBITRARILY AND PRESUMABLY APPLIED A HEIGHTENED STANDARD AND DENIED THOMSON’S MOTION TO COMPEL.....	1
THE SUPERIOR COURT ERRED WHEN IT CONCLUDED THAT THOMSON FAILED TO “MAKE A PRIMA FACIE SHOWING OF DEFAMATION” BECAUSE THOMSON SHOWED THAT THE STATEMENTS IN THE REVIEW WERE PROVABLY FALSE, ALLEGED THEY WERE DEFAMATORY, AND PROVIDED THE NECESSARY ALLEGATIONS REGARDING DAMAGES....	4
Conclusion.....	7

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Chaplinsky v. N.H.</i> , 315 U.S. 250 (1942).....	1
<i>Davis v. Fred’s Appliance, Inc.</i> , 287 P.3d 51, 60 (Wash. Ct. App. 2012).....	5
<i>Dendrite v. Doe</i> , 775 A.2d 756 (N.J. App. 2001).....	4
<i>Doe v. 2TheMart.com</i> , 140 F. Supp. 2d 1088 (W.D. Wash. 2001).....	2
<i>Hauter v. Cowles Publishing Co.</i> , 811 P.2d 231 (Wash. Ct. App. 1991).....	6
<i>In re Anonymous Online Speakers</i> , 661 F.3d 1168 (9 th Cir. 2011).....	2
<i>Rosenblatt v. Baer</i> , 383 U.S. 75 (1966).....	1
 <u>Articles</u>	
Danielle Keats Citron, <i>Cyber Civil Rights</i> , 89 B.U. L. Rev. (2009).....	2
Nathanial Gleicher, <i>John Doe Subpoenas: Towards a Consistent Legal Standard</i> , 118 Yale L. J. 320 (Nov. 2008).....	2
<i>Legal Protections for Anonymous Speech in Washington</i> , http://www.dmlp.org/legal-guide/washington/legal-protections-anonymous-speech-washington	2
Courtney T. Shillington, <i>Unmasking Online Assailants: When Should an Anonymous Online Poster be Exposed for Defamatory Content?</i> , Selected Works (April 2011) http://works.bepress.com/courtney_shillington/1	3,4,6,7
 <u>Other</u>	
Hock G. Tjoa, <i>The Ingenious Judge Dee</i>	7
McCormick, <i>Law of Damages</i> , §116, p. 423 (1935).....	6

REPLY TO NON-PARTY AVVO'S STATEMENT OF THE CASE

Avvo's Statement of the Case is fairly accurate and mirrors much of what Thomson provided, with the following exception: Avvo asserts that Josh King was given information from Doe that indicated that she was a client of Thomson. (Avvo Response 4). The only information provided by Mr. King was the following: "While I can't give you the specifics, it included information **sufficient for me to believe** the reviewer was a client of yours." (CR.79)(emphasis added).

ARGUMENT

THE SUPERIOR COURT ERRED WHEN IT ARBITRARILY AND PRESUMABLY APPLIED A HEIGHTENED STANDARD AND DENIED THOMSON'S MOTION TO COMPEL

It is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include ... the libelous ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. N.H., 315 U.S. 250, 266 (1942). "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects on more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)(Stewart, J. concurring). "Behind anonymous masks of their screen names, people may be more willing to say things that they would not ordinarily, and this uninhibited communication can produce more defamation. People, believing that they cannot be caught, can use the internet to damage the reputation of others. As one commentator has proclaimed,

“[i]ndividuals say and do things online that they would never consider saying or doing offline because they feel anonymous.” (quoting Nathaniel Gleicher, *John Doe Subpoenas: Towards a Consistent Legal Standard*, 118 Yale L. J. 320, 324 (November 2008)(quoting Danielle Keats Citron, *Cyber Civil Rights*, 89 B. U. L. Rev. (2009)).

Non-party Avvo asserts that no Washington court has had the ability to determine the standard of this issue. This is not entirely correct, as Washington’s federal counterpart has had such an occasion,¹ as well as a Washington state court has dealt with a similar issue.² Like Doe, Avvo argues that there are two prevailing tests and that this court should

¹ *In re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011)(where the court noted that **political** speech is given the highest level of protection and that some speech is not given protection). The court noted that the lower court applied the most exacting standard of *Cahill* to the facts at issue. The court noted that “[t]he district court here appropriately considered the important value of anonymous speech balanced against a party’s need for relevant discovery in a civil action. It also recognized ‘the great potential for irresponsible, malicious, and harmful communication’ and that particularly in the age of the Internet, the ‘speed and power of internet technology makes it difficult for the truth to ‘catch up’ to the lie.’” *Id.*

2. “Washington law with regard to the protection of anonymous online speech is unclear. The only relevant Washington case is *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088 (W.D. Was. 2001), which considered a subpoena to discover the identity of an anonymous witness, as opposed to the usual situation of an anonymous defendant. For this situation, the court adopted a ‘good faith’ standard with a few extra precautions. It is not clear how this case applies to a subpoena asking for disclosure of the identity of an anonymous defendant.

Doe v. 2TheMart.com, 140 F. Supp. 2d 1088 (W.D. Was. 2001). Stockholders of the company 2TheMart.com sued its directors, claiming that they were responsible for a recent fall in the company’s stock price. The directors tried to defend themselves by arguing that the fall in stock price was actually caused by negative comments about the company posted on an online message board by anonymous users. To support this argument, the directors subpoenaed InfoSpace, the Seattle-based company that ran the website, for the identities of the posters. InfoSpace notified the anonymous posters, and one of them filed a motion to quash the subpoena.

The court announced a standard for deciding when a court should allow disclosure of the identity of an anonymous witness. The court required the plaintiff to satisfy the following four requirements:

1. the plaintiff seeks the subpoena in good faith and not for an improper purpose;
2. the information requested relates to a core claim or defense;
3. the information is directly and materially relevant to the claim or defense; and
4. the information that the plaintiff needs for that claim or defense is not available anywhere else.

Applying that test, the court found that information about the identities of the anonymous posters was not directly and materially relevant to a core claim or defense. Therefore, it granted the anonymous poster’s motion to quash the subpoena.”

Legal Protections for Anonymous Speech in Washington, <http://www.dmlp.org/legal-guide/washington/legal-protections-anonymous-speech-washington>

choose one of them. Avvo neglects to indicate that these cases are by no means determinative nor mandatory precedent over this Court, nor that there are other alternatives for this Court. Avvo makes the argument that it was “in light of these well-established principles” that the Superior Court applied a heightened standard to the Motion to Compel (Avvo Response 10). This is a statement made without support. In fact, there is no indication as to what the superior court considered in coming to its decision nor its reasoning behind same.

Thomson asserts that this Court should adopt a good faith test or a motion to dismiss standard, and that it should follow the lead of the State of Virginia, which went through great lengths to research the issue of internet anonymity and the many rights of parties involved. This argument is fully addressed in Thomson’s Reply to Response Brief of Jane Doe, at pages 6 – 12. Many of Avvo’s arguments have been addressed in Thomson’s Reply to Response Brief of Jane Doe, and same shall not be duplicated herein. However, Thomson reasserts and incorporates same herewith.

As a preliminary matter, most jurisdictions require that the plaintiff provide the defendant with notice. Courts then apply one of the four tests. The good faith standard requires the plaintiff to meet the lowest burden of all the tests. Under a good faith standard, the plaintiff is required to prove that they are bringing their suit in good faith and not solely to silence the defendant. Under the motion to dismiss standard, the plaintiff must prove that his or her claim can survive a motion to dismiss before the defendant is unmasked. A prima facie evidentiary standard requires the plaintiff to prove that he or she can make a prima facie showing that the content was false and defamatory. The summary judgment standard requires that the plaintiff to meet the highest burden, or prove that his or her case can withstand a summary judgment challenge.

Courtney T. Shillington. *Unmasking Online Assailants: When Should an Anonymous Online Poster be Exposed for Defamatory Content?*, Selected Works, at pg. 4 (April 2011)
http://works.bepress.com/courtney_shillington/1.

The superior court in this case stated that Thomson failed to make a prima facie showing regarding a defamation claim. The court provided no reasoning, no guidance, no authority for applying what appears to be one of the more exacting standards so early on in a legal proceeding. The trial court is in a position of making what could in effect be a final determination in cases such as this, without providing the parties an opportunity to be heard. Again, this argument is addressed more fully in Thomson's Reply to Response Brief of Jane Doe and shall not be recited again herein.

THE SUPERIOR COURT ERRED WHEN IT CONCLUDED THAT THOMSON FAILED TO "MAKE A PRIMA FACIE SHOWING OF DEFAMATION" BECAUSE THOMSON SHOWED THAT THE STATEMENTS IN THE REVIEW WERE PROVABLY FALSE, ALLEGED THEY WERE DEFAMATORY, AND PROVIDED THE NECESSARY ALLEGATIONS REGARDING DAMAGES.

Avvo argues that portions of Doe's statement are not provably false and portions are not defamatory. Thomson stands by her arguments in her Motion to Compel, Reply to Avvo's Response to Motion to Compel, and her Initial Brief. It must be noted, however, that Avvo is presumptively applying *Dendrite* in its argument. This Court has not determined that this standard applies here. It is Thomson's position that this standard is too strict, and effectively prevents injured parties from obtaining their legal right to a remedy. This court should follow suit with the states that have decided *not* to follow same, but rather, to follow Virginia's guide and rule that both parties receive adequate protection with a similar standard and apply same to this case. (See Reply to Doe's Response 6-12).

Avvo also suggests that Doe's statements were mere opinion. This is not a logical argument. The statements made by Doe are not simply that a party alleged that they thought Thomson was a poor attorney or that they thought she was ineffective as counsel.

For those statements that Thomson considered combined opinion and fact and therefore provably false (as addressed in her Motion to Compel and Reply to Response to Motion to Compel), there is a three-part test that is examined to determine if the statements are actionable: A court must consider (1) the medium and context in which the statement was published (here, on a lawyer review website that is self-proclaimed leader in the industry); (2) the audience to whom it was published (here, published to those searching for attorney to assist them with a legal family law matter), and (3) whether the statement implies undisclosed facts (here, the statements at issue discuss how Thomson failed to take certain actions on her behalf, certainly implying undisclosed facts leading to the basis of the statement). *See Davis v. Fred's Appliance, Inc.*, 287 P.3d 51, 60 (Wash. Ct. App. 2012). Applying these factors leads to only one logical conclusion – these three statements are provably false.

Also, Avvo suggests that even if a statement *could* be actionable, since the Complaint is based on a review, that “[c]ourts have consistently rejected libel claims premised on reviews.” (Avvo Response 17). The cases cited by Avvo vary significantly from the facts herein, and none of them have any relation to the facts or issues in this matter. The statements made by Doe stand on their own as factual allegations and the discussion on whether opinions are protected or not is not relevant to this case.

Avvo also alleges that readers give less credence to what they read on the internet than they do to remarks in other contexts. (Avvo Response 18). Considering that Avvo maintains an online site where individuals looking for attorney representation go for guidance, that it allows individuals to make a well-informed decision about said representation, and that they hold themselves out as a leader in this industry, this is an

illogical argument. How Avvo can claim that the statements from Doe are anything but defamatory but yet suggest that a reader would not consider this “warning” as such is incredulous. If the reader is viewed as receiving a “warning” – this would be a warning that is a conclusion reached after citing numerous *factual* false allegations of Thomson.

Once again, this is all assuming, again, that the court is inclined to follow *Dendrite*. This standard is too high for plaintiffs to meet at this stage and fails to protect the victims of online defamation like Thomson. Thomson addresses this issue in greater detail in her Reply to Response Brief of Jane Doe, and she reasserts the entire contents of same and incorporates herein.

Avvo speaks about missing elements of damages, but fails to address that Thomson alleged defamation per se in her complaint, and that “a publication is libelous *per se* if it tends to expose a living person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or *to injure him in his business or occupation.*” *Hauter v. Cowles Publishing Co.*, 811 P.2d 231 (Wash. Ct. App. 1991). In cases of defamation per se, the “plaintiff is relieved from the necessity of producing any proof whatsoever that he has been injured.” C. McCormick, *Law of Damages*, S 116, p. 423 (1935). Further, “[i]ncreased access to the channels of communication can also make online defamation more damaging. Greater access to the internet means that lies about a person’s reputation can spread further than they would with traditional channels of communication. As one commentator points out, “The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that ‘the truth rarely catches up with a lie.’” Courtney T. Shillington, *Unmasking Online Assailants: When Should an Anonymous Online Poster be Exposed for Defamatory*

Content?, Selected Works (April 2011) http://works.bepress.com/courtney_shillington/1.

“Even the false accusations of a person of dubious morality can taint the reputation of an upright servant.” Hock G. Tjoa, *The Ingenious Judge Dee*.

CONCLUSION

Avvo suggests that Thomson had a remedy – to post a response to the review. In fact, she did post a response, but that is just a band-aid over an open wound. The damage has not been erased, and such an open injury will turn into a scar – to remain as a permanent reminder any time a person looks at that person’s proverbial damaged skin. Covering it with a band-aid does not repair the scar. Reading ten reviews, nine of which are positive and one that is glaringly negative, readers are going to remember the negative. It’s human nature. The only real remedy is for Thomson to obtain the records necessary to determine the author of the defamatory post. This court should reverse the superior court’s order denying her motion to compel. Should this court find that the standard was not met, this Court should permit and direct Thomson to file an Amended Complaint and/or Amended Motion to Compel to include any such proof regarding same that she deems necessary, and then direct the superior court to allow due process prior to dismissing same.

CERTIFICATE OF SERVICE

I, DEBORAH THOMSON, hereby certify that this Reply to Response Brief of Non-Party Avvo has been served by U.S. Mail to the Washington Court of Appeals, Division 1, Attention Clerk of Court Richard Johnson, One Union Square Bldg., 600 University Street, Seattle, Washington 98101, and delivered to the following individuals via email on this 23rd day of February, 2014.

Counsel for Avvo:

Ambika K. Doran, Esquire

ambikadoran@dwt.com

Bruce E.H. Johnson, Esquire

brucejohnson@dwt.com

Counsel for Doe:

Paul Alan Levy, Esquire

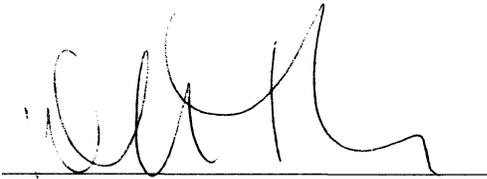
plevy@citizen.org

F. Davis Woods-Morse, Esquire

Davis@woodsmorselaw.com

Judy Endejan, Esquire

jendejan@gsblaw.com

A handwritten signature in black ink, appearing to read 'Deborah Thomson', written over a horizontal line.

Deborah Thomson