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INTRODUCTION

Referenced herein, Appellant shall be referred to as “Appellant”, “Ms. Thomson”, and/or “Plaintiff”. The record on appeal is cited to the Clerk’s Papers, cited herein as (CP. __).

This is an appeal of an Order Denying Plaintiff's Motion to Compel Compliance with Subpoena Duces Tecum. Plaintiff filed that motion because she has a pending defamation action against a yet-to-be identified defendant, and she requires information to discover the identity of the author of the defamatory statements in order to proceed. The trial court erred when it denied Plaintiff's Motion and summarily ruled that she failed to make a prima facie showing of defamation in her Complaint.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFF'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA DUCES TECUM BECAUSE PLAINTIFF ALLEGED THE REQUIRED ELEMENTS FOR A PRIMA FACIE SHOWING OF DEFAMATION AND THE FIRST AMENDMENT PROTECTIONS DO NOT EXTEND TO PROTECT DEFAMATORY SPEECH.

STATEMENT OF THE CASE

On May 21, 2014, Deborah Thomson filed a Complaint in Hillsborough County, Florida, Case Number 14-CA-5277, against an unidentified Jane Doe. (CP.9-22). The Complaint contained four Counts: Defamation Per Se, Defamation, Defamation by Implication, and Intentional Infliction of Emotional Distress. (CP.9-22) . The Complaint's allegations center around three separate misleading, false, and defamatory online postings, one published on Yelp, one on Google, and one on Avvo.com (CP.9-22). This matter concerns the posting on Avvo.

The Complaint alleges the following material allegations:

- Deborah Thomson is a partner in the law firm of The Women's Law Group. (CP.10,11,12,13).
- The Women's Law Group is a law firm located in Tampa, Florida. (CP.9,10,11,12,13).
- Since 2009, Plaintiff, Deborah Thomson, has provided legal services specializing in divorce and custody proceedings with The Women's Law Group. (CP.10,11,12,13).
- Ms. Thomson discovered three online anonymous postings believed to be the same person using various identities, one on Yelp, one on Google, and one on Avvo.com. (CP.9,10,11,12,13)
- The post on Avvo states as follows:

I am still in court five years after Ms. Thomson represented me during my divorce proceedings. Her lack of basic business skills and detachment from her fiduciary responsibilities has cost me everything. She failed to show up for a nine hour mediation because she had vacation days. She failed to subpoena documents that are critical to the division of assets in any divorce proceeding. In fact, she did not subpoena any documents at all. My interests were simply not protected. (CP.20,94).

- All three posts contain misleading, false, and defamatory statements posted by the same Defendant who was *not a client* of Plaintiff, and that were designed to impugn Plaintiff's personal and professional reputation. (CP.9,10,11,12,13).
- Defendant's false, defamatory, and misleading postings on the three online sites have been viewed by hundreds of visitors to the various websites. (CP.11,12,13).

- As a result, Plaintiff has suffered significant reputational and economic damages from Defendant's misleading, false, and defamatory postings. (CP.10,11,12,13).
- Defendant's publication of the statements has harmed Plaintiff's reputation in the community and deterred third persons from dealing or associating with the Plaintiff. (CP.10,11,12,13).
- Defendant's posing as a former client and expressing false negative views about Plaintiff's legal representation ... including that Deborah Thomson "failed to show up for a nine hour mediation because she had vacation days. She failed to subpoena documents that are critical to the division of assets in any divorce proceeding. In fact, she did not subpoena any documents at all", directly and by implication state that Plaintiff has engaged in conduct incompatible with Plaintiff's business, trade, position, or office and is unprofessional. (CP.12,13,20,94).
- Defendant's misrepresentations are false and defamatory in nature. (CP.9,10,11,12,13).
- The defamatory nature of Defendants' statements is apparent without resort to extrinsic facts or circumstances. (CP.12,13).
- The import of Defendant's statements indicate and suggest that Plaintiff is guilty of unprofessional conduct within her profession as an attorney and that she is ineffective. (CP.12,13).
- The statements by Defendant were made with malice and/or with fault amounting to at least negligence. (CP.12,13).
- These statements were published on an Avvo review. (CP.12,13,20,94).
- As a result of the publication of these statements, Plaintiff has been damaged. (CP.10,11,12,13).

- Defendant's publication of the statements disguised as a former client are designed to create false impressions of Plaintiff's abilities as an attorney and her professionalism. (CP.12,13).
- Defendant's expression of opinions as well as the false statements of fact while impersonating a former client create the appearance that Plaintiff is unprofessional and ineffective as an attorney and have caused her damages. (CP.13).
- Defendant's publication of the review has subjected and will subject Plaintiff to severe emotional distress. (CP.13).
- The statements contained within Defendant's published review were intended to harm Plaintiff and are outrageous in character and intolerable under community standards. (CP.11,12,13).
- Defendant acted intentionally, outrageously, and recklessly in publishing the reviews with the intent to cause Plaintiff emotional distress. (CP.13).
- Defendant's publication of the reviews has caused and will cause Plaintiff emotional distress. (CP.13).

On May 27, 2014, Ms. Thomson filed a Subpoena Duces Tecum Without Deposition requesting specific information to identify the author of the defamatory Avvo post. (CP.23-29). As its principal place of business is located in Washington, Ms. Thomson filed the underlying suit in order to issue a subpoena to Avvo.

After receipt and acknowledgement of the subpoena, Avvo refused to comply absent a court order, asserting that it was protecting the author's privacy and anonymity. (CP.100). On July 16, 2014, Ms. Thomson filed a

Motion to Compel Compliance with Subpoena Duces Tecum asserting that Washington's discovery rules are liberal and broad to permit discovery, that the First Amendment protections do not apply to defamatory speech, that the contents of the Avvo posts and the allegations in the Complaint meet the elements of defamation and defamation per se, and that when balancing the interests of the parties in seeking to obtain the records, the Motion to Compel Compliance should be granted. (CP.30-58).

On July 23, 2014, Avvo filed a Response to Motion to Compel (requesting oral argument) asserting that Ms. Thomson did not meet the heightened First Amendment standard to speak anonymously and that she did not allege a prima facie case of defamation. (CP.59-102). In its Response, Avvo included the following in its Statement of Facts:

- Avvo operates the world's leading online lawyer-rating and review system. Its mission is simple: to help people make the best decisions for their legal needs, free of charge.
- Avvo intends the rating [of an attorney] to guide the public in finding a suitable lawyer.
- Avvo also provides a forum where clients can "review" lawyers with whom they have had experience.

(CP.65-66,78-79).

Ms. Thomson then filed her Reply to Avvo's Response to Motion to Compel Compliance with Subpoena Duces Tecum. (CP.103-10). Ms.

Thomson noted the following in her Direct Reply to Avvo's Statement of Facts, providing information on an attorney's options if she receives a negative review on Avvo:

"What if I get a negative client review"

Please note that we do not verify the information in client reviews. All reviews on Avvo.com are the responsibility of the reviewers, and under 47 USC 230, Avvo, Inc. cannot be held liable for making Avvo.com available to the reviewers.

(CP.105).

On July 28, 2014, the trial court entered an Order Denying Plaintiff's Motion to Compel Compliance with Subpoena Duces Tecum without granting oral argument. (CP.111). The Court did not provide any other explanation in the Order, except, "Ms. Thomson has failed to make a prima facie showing re: defamation claim." (CP.111).

ARGUMENT

"Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; 'tis something, nothing;
'twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed."

William Shakespeare, *Othello*, act 3, sc. 3 (1622).

**THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFF'S
MOTION TO COMPEL COMPLIANCE WITH SUBPOENA DUCES
TECUM BECAUSE PLAINTIFF SUFFICIENTLY ALLEGED THE**

REQUIRED ELEMENTS FOR A PRIMA FACIE SHOWING OF DEFAMATION AND THE FIRST AMENDMENT PROTECTIONS DO NOT EXTEND TO PROTECT DEFAMATORY SPEECH.

Free speech. It is one of the backbones of our society, protected by the First Amendment of our United States Constitution. But it is certainly not without limits, for if it was, there would be no restraint on what any individual could say, write, or publish about another, leaving an injured party without any remedy. At the root of this appeal is a defamation action against a yet unidentified Jane Doe Defendant. The only avenue to discover her identity is through the subpoena requesting said information. The trial court in this matter effectively prevented any redress by ruling, without explanation or reason, that the plaintiff's Complaint did not give a prima facie showing of defamation. As demonstrated below, Plaintiff made a clear showing of defamation, to the extent required in a Complaint, and the online post at issue is not entitled to First Amendment protection. This Court should reverse the Order denying Plaintiff's Motion to Compel Compliance with Subpoena Duces Tecum.

STANDARD OF REVIEW

This Court has two options for the Standard of Review in this matter. First, it is Appellant's position that the correct standard is *de novo* review because the trial court ruled, as a matter of law, that no prima facie case

exists. By making this decision of law, the effect of the trial court's decision was a dismissal of Ms. Thomson's Complaint, as she has no other available remedy to obtain information concerning her underlying defamation claim. As a trial court's ruling on a dismissal is a holding on a question of law, the appellate court review is *de novo*. *Hoffer v. State*, 755 P.2d 781, 110 Wn.2d 415, 420 (Wash. 1988)(citing *Guillory v. County of Orange*, 731 F.3d 1379, 1381 (9thCir. 1984)); *see Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. Court of Appeals 2009).

Alternatively, if this Court considers this a simple appeal of an order on a discovery motion, an abuse of discretion standard applies. *T.S. v. Boy Scouts of America*, 138 P.3d 1053, 117 Wn.2d 772, 777-78 (Wash. 2006); *Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370 (1991). Under this standard, a trial judge's exercise of discretion is abused if it "rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 71 P.3d 638, 641-42 (2003).

THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFF'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA DUCES TECUM BECAUSE PLAINTIFF ALLEGED THE REQUIRED ELEMENTS FOR A PRIMA FACIE SHOWING OF DEFAMATION

The trial court improperly and arbitrarily denied Ms. Thomson's Motion to Compel Compliance with Subpoena Duces Tecum, stating that "she failed to make a prima facie showing re: defamation claim." (A.111).

The Court provided no explanation as to how this conclusion was reached or upon what it based its decision. Failing to make a prima facie showing is language that a court uses when ruling on a Motion to Dismiss.

Courts should dismiss a claim under CR12(b)(6) only if ‘it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.’ *Orwick v. Seattle*, 692 P.2d 793 (1984)(quoting *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 577 P.2d 580 (1978)). Under this rule, a plaintiff’s allegations are presumed to be true. Moreover, a court may consider hypothetical facts not part of the formal record. *Halvorson v. Dahl*, 574 P.2d 1190 (1978). Therefore, a complaint survives a CR12(b)(6) motion if *any* set of facts could exist that would justify recovery.

Hoffer, 110 Wn.2d at 420 (citations omitted). Courts have stated that complaints should be dismissed “sparingly and with care.” *Orwick*, at 254 (quoting 27 Federal Procedure *Pleadings and Motions* § 62:465 (1984)). It is the court’s task to determine “if there is any possible set of facts for each claim under which recovery should be granted.” *Hoffer*, 110 Wn.2d at 421.

In fact, “[a] complaint need only set forth a short and plain statement of a claim showing that the pleader is entitled to relief. No dismissal for failure to state a claim should be granted unless it appears, beyond doubt, that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief. Factual allegations of the complaint must be accepted as true for purposes of the motion.” *Berge v. Gorton*, 567 P.2d 187, 88 Wn.2d 756, 759 (Wash. 1977)(citations omitted)(emphasis added).

Courts have stated that these rules are designed to facilitate “the full airing of claims having a legal basis and to this end, we have reversed dismissal of complaints which have adequately set forth a claim for relief.” *Id.*

A trial court’s role in examining this type of issue is clear:

[A]ny hypothetical situation conceivably raised by the complaint defeats a 12(b)(6) motion if it is legally sufficient to support plaintiff’s claim. ... [T]here is no reason why the “‘hypothetical’ situation should not be that which the complaining party contends actually exists.” ... Because the legal standard is whether any state of facts supporting a valid claim can be conceived, there can be no prejudice and unfairness to a defendant if a court considers specific allegations of the plaintiff to aid in the evaluation of the legal sufficiency of the plaintiff’s claim. Thus, we find nothing improper in appellant’s additional allegations of fact made initially upon this appeal.

Halvorson, 89 Wn.2d at 674-75(citations omitted); *see Orwick*, 103 Wn.2d at 254-55 (trial court has a duty to examine the complaint to determine if allegations provide relief under any possible theory); *Bravo v. The Dolsen Companies*, 888 P.2d 147, 125 Wn.2d 745 (Wash. 1995)(hypothetical facts may be introduced to assist the court in establishing the “conceptual backdrop” against which the challenge to the legal sufficiency of the claim is considered, and these facts may be alleged by the complaining party for the first time on appellate review). It is here where the trial court should have examined all of the allegations in Ms. Thomson’s Complaint, rather than summarily ruling that she failed to make a prima facie showing of defamation. It is here where the trial court should have determined if there

was *any* possible set of facts that could support her defamation claim, and if so, granted her motion to compel.

Libel and defamation are not constitutionally protected forms of speech. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues. They belong to that category of utterances which "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."

Gertz v. Welch, 418 U.S. 323, 340 (1974)(citations omitted). Further, "[p]rivate individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."

Tasket v. King Broadcasting Co., 546 P.2d 81, 86 Wn.2d 439, 446 (Wash. 1976)(quoting *Gertz*). For a simple defamation action, a plaintiff must prove four elements: "falsity, an unprivileged communication, fault, and damages." *Robel v. Roundup Corp.*, 59 P.3d 611 (S. Ct. Wash. 2002); *Maison De France, Ltd. v. Mais Oui!, Inc.*, 108 P.3d 787 (Wash. Ct. App. 2005); *Valdez-Zontek v. Eastmont School Dist.*, No. 27197-8-III (Wash. Ct. App. 2010). Ms. Thomson did just that in her Complaint.

Falsity – Falsity is the first element in a defamation claim. "To establish the falsity element of defamation, [a] plaintiff must show the

offensive statement was ‘provably false.’ ‘Expressions of opinion are protected by the First Amendment’ and ‘are not actionable.’ But a statement meets the provably false test to the extent it expresses or implies provable facts, regardless of whether the statement is, in form, a statement of fact or a statement of opinion. One way a statement could be provably false is when ‘it falsely describes the act, condition or event that comprises its subject matter.’ *Valdez-Zontek* , No. 27197-8-III (citations omitted).

In the Complaint, with regard to Avvo, Ms. Thomson set forth the specific statements written by the unknown defendant, to-wit:

I am still in court five years after Ms. Thomson represented me during my divorce proceedings. Her lack of basic business skills and detachment from her fiduciary responsibilities has cost me everything. She failed to show up for a nine hour mediation because she had vacation days. She failed to subpoena documents that are critical to the division of assets in any divorce proceeding. In fact, she did not subpoena any documents at all. My interests were simply not protected.

(CP.20,94). The Complaint alleged that these statements were misleading, false, and defamatory. (CP.9,10,11,12,13). As argued in the Motion to Compel, the sentences examined individually (as well as combined) are all either straight claims of alleged fact or provably false to the extent that they imply facts. (CP.32-34). Nothing contained therein is straight opinion. Accordingly, Ms. Thomson sufficiently alleged the falsity element of

defamation and the trial court should have examined the facts in light most favorable to the Plaintiff.

Unprivileged communication – An unprivileged communication is the second element in a claim for defamation. The communication referred to herein is not subject to any privilege, nor was any asserted. In fact, a crucial part of the allegations by Ms. Thomson is that the author of the post was actually not even a prior or current client. (CP.9,11,12,13). Notably, in the Complaint, it is alleged that the statements were made by a defendant not a client, which would make this an unprivileged communication. (CP.9,11,12,13).

Fault – The third element in a defamation claim is fault. “Negligence is generally the standard of fault for proving defamation of a private person, and the standard of proof is a preponderance of the evidence.” *An Act Relating to the Uniform Correction or Clarification of Defamation Act*, HB 1406 (Feb. 5, 2013). A negligent standard of fault is established upon a showing that a defendant “knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect.” *Tasket*, (italics omitted). There is no actual malice standard as Avvo claims in its Response to Motion. (CP.75).

The Complaint alleges that the statements were designed to impugn Ms. Thomson's personal and professional reputation and that they were made with malice to harm her. (CP.9,10,11,12,13). The Complaint also alleges that the statements were made with malice and/or fault amounting to at least negligence. (CP.12,13). Therefore, for purposes of the trial court, this was sufficient to meet the requirements of a prima facie showing of defamation and prevent a dismissal.

Damages – The final element in a claim for defamation is damages. A communication is defamatory if “it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Restatement Second of Torts* § 559 (1977). Commercially motivated defamatory speech is not granted the same level of First Amendment protection as politically motivated speech. Allen, Mallory. *Ninth Circuit Unmasks Anonymous Internet Users and Lowers the Bar for Disclosure of Online Speakers*, 7 Wash J.L. Tech. & Arts 75, 79 (2011).

Further, the Plaintiff alleged defamation *per se* in her Complaint. “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.” *Haueter v. Cowles Publishing Co.*, 811 P.2d 231 (Wash. Ct. App. 1991)(emphasis added)(quoting *Purvis v. Bremer’s, Inc.*, 344 P.2d 705 (Wash. 1959)). In a defamation *per se* action, “the plaintiff is relieved from the necessity of producing any proof whatsoever that he has been injured” in order to recover substantial compensatory damages. C. McCormick, *Law of Damages*, § 116, p. 423 (1935). “[S]tatements that are defamatory *per se* by their very nature are likely to cause mental and emotional distress, as well as injury to reputation, so there arguably is little reason to require proof of this kind of injury either.” *Bryson v. News America Publications, Inc.*, 672 N.E. 2d 1207 (Ill. 1996). ***[I]t is actionable without proof of damage to say of a physician that he is a butcher . . . , of an attorney that he is a shyster...***” W. Page Keeton e. al. *Prosser and Keaton on the Law of Torts* S112, at 791 (5th ed. 1984)(emphasis added).

Here, although Ms. Thomson alleged various damages in her Complaint, she was not required to prove damages pursuant to her claim for defamation *per se* because the false statements were those about her profession that tended to injure her reputation, which was sufficiently alleged in her Complaint. However, demonstrating compliance with the requirements of establishing a prima facie claim of defamation, Ms. Thomson did, in fact, alleged damages in her Complaint. She noted that her

reputation, both personal and professional, was harmed, that third persons have been deterred from dealing or associating with her or her business, and that she has been damaged. (CP.10,11,12,13).

The ultimate test as to whether or not words are defamatory “is the sense in which they would ordinarily and reasonably be understood by the recipients. ‘In determining how the recipients would understand the words used, account may be taken of the circumstances under which they were published in so far as they were known to the recipients. It is proper to allege in the complaint that the words were published concerning the plaintiff and with reference to the extrinsic circumstances, upon which their peculiar applicability to the plaintiff depends. Words which are harmless in themselves may be defamatory in light of surrounding circumstances.’”

Arnold v. Nat’l Union of Marine Cooks and Stewards Assoc., 219 P.2d 121 (Wash. 1950)(quoting *Ziebell v. Lumbermens Printing Co.*, 127 P.2d 677 (Wash. 1942)).

The language used by the author of the Avvo post indicated to the reader that she had first-hand experience with Ms. Thomson as her attorney. (CP.20,33-35,94). She alleged many specific, factual events to have occurred, as well as inferences therefrom. (CP.20,33-35, 94). These statements would be ordinarily and reasonably understood by a reader as a

valid review and warning to stay away from Ms. Thomson and her law firm. In fact, Avvo stands by and is proud of its self-proclaimed role in the online market, stating that they are the go-to website for people searching for an attorney. (CP.65-66,78-79). However, when a potential client clicks on Ms. Thomson's page, they see what an ordinary reader would view as a review by a previous client warning others to avoid her and her law firm. If this website is the leader in the industry, as claimed, a reasonable person would assume that the contents would surely have to be verified, at least to some degree. But that is not the case here. (CP.105). Just based on one of the statements alone, a potential client reading that review would believe that Ms. Thomson did not attend a nine hour mediation because she chose to go on vacation, leaving her client to sit in mediation all by herself.¹

In *Dunlap v. Wayne*, 716 P.2d 842, 105 Wn.2d 529, 535 (Wash. 1986), when discussing a prima facie case for defamation, the court stated that a case can be dismissed if no genuine issue of material fact exists when

¹ Avvo claims that since Ms. Thomson has some favorable reviews, this negative review is not damaging to her. (CP.75). However, it is far from a novel concept that "negative information more strongly influences people's evaluations than comparably extreme positive information." Tiffany A. Ito, et. al. *Negative Information Weighs More Heavily on the Brain: The Negativity Bias in Evaluative Categorizations*, 75 J. of Personality and Soc. Psych. 887, 887 (1998). "Research tells us, bad feedback has much more of an impact than good feedback." <http://lindesycaplan.com/2012/03/26/why-our-brains-focus-on-the-negative-via-the-new-york-times/> Why Our Brains Focus on the Negative – via the New York Times.

the evidence and all reasonable inferences from the evidence are considered in light most favorable to the plaintiff. Each element of defamation was addressed in Ms. Thomson's Complaint, and the trial court should have reviewed it and considered all reasonable inferences in the light most favorable to her. If the court had done so, a prima facie case is clearly made.

No matter which standard of review with which this court reviews this matter, the trial court's ruling should be reversed. If this court applies *de novo* review, no deference is given to the trial court, and this Court should reverse the ruling because Ms. Thomson's Complaint sufficiently alleged a prima facie defamation claim. Further, even under an abuse of discretion standard, as the decision made by the trial court rests on facts unsupported in the record and applied the wrong legal standard, a reversal is hereby warranted.

THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFF'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA DUCES TECUM BECAUSE THE FIRST AMENDMENT PROTECTIONS DO NOT EXTEND TO PROTECT DEFAMATORY SPEECH.

Although the trial court did not address Avvo's claim that the author's privacy is protected by the First Amendment, as a precautionary measure, as it was addressed in the pleadings filed by the parties, this issue shall be addressed should this Court decide to consider it. Courts have authorized discovery to unmask defendants that engage in anonymous online behavior

because a Plaintiff would not be able to identify the poster without such discovery. *Chavan v. Doe*, No. C13-01823 RSM (Wash. Dist. Ct. Oct. 2013); see e.g. *Malibu Media, LLC.*, 2012 WL 1144822, at *2, *Arista Records, LLC v. John Does 1-19*, 551 F.Supp.2d 1, 6 (D.D.C. 2008). A defendant is unlikely to suffer prejudice where the discovery request is narrowly tailored to seek the identity of a complaint that alleges tortuous acts to which First Amendment Protections do not apply. See *USA Technology, Inc. v. Doe*, 13 F.Supp.2d 901, 906 (N.D. Dist. Ct. 2010)(affirming that the “Constitution does not [] protected tortuous, defamatory, or libelous speech”). The balance of those interests favor granting leave to Plaintiff to take early discovery.

The rules of procedure in Washington “were patterned after the Federal Rules of Civil Procedure which were established to permit broad discovery.” *Bushman v. New Holland Div. of Sperry Rand Corp.*, 518 P.2d 1078 (Wash. 1974); see also Fed. R. Civ. P. 26(b)(1). That is the issue we deal with in this case, and the reason for the subpoena – defamatory statements were posted online, and the only avenue available to determine the identity of the Jane Doe defendant is by way of a subpoena via the discovery process. “Courts routinely permit early discovery for the limited

purpose of identifying ‘Doe’ defendants on whom process could not otherwise be served.” *Chavan*, No. C13-01823RSM.²

Over the years “[s]tate courts have applied three distinct tests to determine when a plaintiff has made a sufficient showing to merit a court-issued motion to compel disclosure of the identity of an anonymous poster. Court have previously required plaintiffs to demonstrate either (1) a good faith basis warranting disclosure^[3]; (2) evidence sufficient to survive a motion to dismiss before allowing disclosure^[4]; or (3) evidence sufficient to

² See also *The Thompsons Film, LLC v. Does 1-194*, Case No. 2:13-cv-00560-RSL (W.D. Wash. Apr. 1, 2013)(allowing early discovery from internet service providers because plaintiff cannot otherwise identify Doe defendants); *Digital Sin, Inc. v. Does 1-5698*, 2011 WL 5362068 (N.D. Cal. 2011)(granting leave to subpoena internet service provider to identify Doe defendant); *Cottrell v. Unknown Correctional Officers 1-10*, 230 F.3d 1366, *1 (9th Cir. 2000)(explaining that “[t]he Federal Rules of Civil Procedure do not require that a district court dismiss unknown defendants simply because the plaintiff is unaware of the identity of those defendants at the time of the filing of the complaint.”)

³ The “Good Faith Basis” was enunciated in *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372 (Va. Cir. Ct. 2000). The court determined that “the party requesting the subpoena must have a legitimate, good faith basis to contend that it may be the victim of actionable conduct and that the subpoenaed identity information is ‘centrally needed to advance that claim.’”

⁴ The “Prima Facie Case Standard”, enunciated in *Dendrite Int’l v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), was relied upon by Avvo in its Response. The court determined that plaintiffs must first “undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure.” 7 Wash J.L. Tech. & Arts 75, 83. The purpose of this was to allow a John Doe defendant a reasonable opportunity to file and serve an opposition. *Id.* Next, the plaintiff has to identify the exact actionable speech made by the anonymous person. *Id.* Third, the plaintiff “must set forth a prima facie cause of action that can withstand a motion to dismiss for failure to state a claim upon which relief can be granted.” *Id.* at 83-84. Finally, if Plaintiff presented a sufficient cause of

survive a hypothetical motion for summary judgment⁵. The former asks for the least stringent proof, while the latter requires the most robust proof from the plaintiff.” 7 Wash J.L. Tech. & Arts at 81-82. The case law shows that these tests have developed over the years, but none are mandatory precedent for this Court.

In Ms. Thomson’s Motion to Compel, she argued that the test enunciated in *Salehoo Group, Ltd. v. ABC Co.*, 722 F.Supp.2d 1210 (Wash. Dist. Ct. July 2010) would apply to this Court and that the elements noted therein were met. (CP.34-36). While she still stands by the arguments contained therein, the Washington Federal Court has directly addressed this issue after *Salehoo* and provided a revised test by which this Court shall comply. In *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011), the Court held that the *Cahill* standard was too strict for commercial defamation claims. The Court raised and dismissed various tests, including

action, the court should then balance the defendant’s First Amendment right of anonymous free speech against the strength of the case presented and the necessity of the identity disclosure to the plaintiff’s ability to properly proceed.” *Id.* at 84.

⁵ The “Summary Judgment Standard” was enunciated in - *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). The court determined here that a plaintiff had to survive a hypothetical motion for summary judgment by making a prima facie showing for each element of the claim. *Id.* This court adopted only parts one and three of the *Dendrite* test, basically concluding that in order to satisfy this standard, “a plaintiff must establish a prima facie case for each element and give notice to the speaker.” 7 Wash. J.L. Tech. & Arts, 75, 85. It was also noted that these facts to be plead and prove are only those within plaintiff’s control. 884 A.2d at 463-64.

the *Dendrite* “prima facie” standard, upon which Avvo relied in its Response, and the *America Online* “good faith” standard, but also found the *Cahill* standard to be too strict. 7 Wash. J.L. Tech. & Arts, at 87. “The court noted that because *Cahill* addressed political speech, the heightened summary judgment standard was appropriate, but the court found that when commercial speech is balanced against a discretionary discovery order under Federal Rule of Procedure 26, ‘*Cahill*’s bar extends too far.’ The court reasoned that because of the lesser constitutional protection afforded commercial speech, a lower bar to reveal the identities of the anonymous posters was more appropriate.” *Id.*

Anonymous Online’s “new” standard considers the nature of the speech as the primary driving force in balancing the rights of anonymous speakers in discovery disputes, based upon the idea that “the specific circumstances surrounding the speech serve to give context to the balancing exercise.” Commercial speech, as opposed to political speech, enjoys a “limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.” This “subordinate position” makes commercial speech “subject to modes of regulation that might be impermissible in the realm of noncommercial expression.”

7 Wash. J.L. Tech. & Arts at 88 (citations omitted).

Against this backdrop, the district court applied *Cahill*, which elevates the bar to disclosure to the highest level. Because *Cahill* involved political speech, that court’s imposition of a heightened standard is understandable. In the context of the speech at issue here balanced against a discretionary discovery order under Rule 26, however, *Cahill*’s bar extends too far. As ...recently illustrated by the Supreme Court in *Doe v. Reed*, we suggest that the nature of the

speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes. *Doe v. Reed*, 130 S.Ct. 2811, 2817-18 (2010). For example, in discovery disputes involving the identity of anonymous speakers, the notion that commercial speech should be afforded less protection than political, religious, or literary speech is hardly a novel principle. *See Lefkoe [v. Jos. A. Bank Clothiers*, 577 F.3d 240, 248 (4th Cir. 2009)] (inasmuch as the speech in question is of a commercial nature it "enjoys less First Amendment protection"). The specific circumstances surrounding the speech serve to give context to the balancing exercise.

Anonymous Online, at 1176-77 (citation omitted).

It is important to note that Washington's discovery rules are patterned after the federal rules of procedure, which were established to permit broad discovery. *See Bushman*. Avvo's claim that the poster of the statements is entitled to privacy and First Amendment protections would be accurate as a general rule, but for the fact that a sufficient defamation claim has been alleged. This Court must follow *Anonymous Online's* direction and consider the nature of the speech at issue and balance it with the rights of the plaintiff. Commercial speech such as this only enjoys limited protection, and defamation and libel are not protected forms of speech. *See USA Technology, Inc.*

CONCLUSION

Under either standard of review, this Court must reverse the trial court's denial of Plaintiff's Motion to Compel Compliance with Subpoena Duces Tecum. Ms. Thomson sufficiently alleged all of the elements of

defamation in her Complaint, and the trial court should have examined same and reviewed them in the light most favorable to her. Further, such defamatory speech is not entitled to First Amendment protections as Avvo would claim. The poster of the online statements demonstrated to an average reader what would appear to be based on knowledge and experience from having dealt with Ms. Thomson, none of the statements were opinion, as they were all either statements of fact or provably false statements. The defamation elements were sufficiently alleged and this Court should reverse the trial court's Order and compel Avvo to produce the documents requested in the Motion to Compel Compliance with Subpoena Duces Tecum.

CERTIFICATE OF SERVICE

I, DEBORAH THOMSON, hereby certify that this Initial Brief of Appellant 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 27th day of October, 2014.

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