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## Free Speech and Defamation in an Era of Social Media: An Analysis of Federal and Illinois Norms in the Context of Anonymous Online Defamers

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# Free Speech and Defamation in an Era of Social Media: An Analysis of Federal and Illinois Norms in the Context of Anonymous Online Defamers

HEIDI FROSTESTAD KUEHL\*

*This Article provides an overview of the evolution of defamation causes of action in an increasingly online era and focuses on successful discovery of anonymous online defamers. After the recent Illinois Supreme Court case of Hadley v. Doe (2015), there are unique Illinois discovery tools that attorneys may use to identify anonymous or unidentified defendants according to Supreme Court Rule 224 and 735 ILCS § 5/2-402. The Article begins with the landscape of federal law preemption of state law according to the Communications Decency Act’s “Good Samaritan” provisions in Section 230 and explains why Internet Service Providers (“ISPs”) and social media websites are not historically liable for online defamation according to federal law. As a result, state law causes of action for defamation are the key for discovery of their online identities and for successful recovery against the alleged online anonymous defamers. This Article focuses on the Illinois defamation law norms and fruitful pre-suit discovery tools in light of Hadley v. Doe. These valuable facets of Illinois procedure might also be more generally useful and applicable in a variety of contexts when there might be anonymous or unidentifiable defendants for civil causes of action; thus, attorneys who practice in Illinois should carefully evaluate their utility as discovery mechanisms in other types of civil actions.*

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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.<sup>1</sup>

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<sup>1</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 (1990) (quoting Iago to Othello in WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3.). In *Othello*, Iago falsely tells Othello that Desdemona is having an affair and then he kills her in the heat of passion without further involvement of Iago. *See OTHELLO*, act 5, sc. 2.

## I. AN INTRODUCTION

### A. OVERVIEW OF DEFAMATION LAW CLAIMS

Defamation causes of action have a fascinating interplay of federal and state law and now enjoy an even greater intrigue with the advent of social media and resultant online statements that are sometimes defamatory.<sup>2</sup> The law of defamation has, at its core, an intent to protect an interest's good reputation while balancing First Amendment freedoms of speech.<sup>3</sup> According to federal statutory norms and common law development, the Communications Decency Act<sup>4</sup> preempts state law claims that are inconsistent with the federal law, and it also allows immunity for the Internet Service Provider ("ISP") or social media website under Federal Communications Decency Act's "Good Samaritan" provision.<sup>5</sup> As a result, most claims for defamation in the online realm are most effectively brought in state court in order to hold the defamatory posters liable for their actions on websites, the Internet, blogs, or other social media.<sup>6</sup> The elements of a cause of action for defamation in Illinois and other states and under the Communications Decency Act, which preempts a state action, are notoriously difficult to prove in the context of the First Amendment freedom of speech protections.<sup>7</sup> In Illinois

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2. See, e.g., Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J. L. & TECH. 253, 263-66 (Spring 2006). See also Jane E. Kirtley, *Mask, Shield, and Sword: Should the Journalist's Privilege Protect the Identity of Anonymous Posters to News Media Websites?*, 94 MINN. L. REV. 1478 (May 2010).

3. See generally 1 SACK ON DEFAMATION §1:1 (April 2015) (stating that the history of defamation has "in large measure been the history of the establishment of First Amendment doctrine to govern the torts of libel and slander, and the application of that doctrine to long-established, frequently contrary, common-law principles").

4. See 47 U.S.C. § 230 (c) (2015) (stating in section 230(c)(1) that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" and in section 230(c)(2) that:

Civil liability. No provider or user of an interactive computer service shall be held liable on account of--(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)).

5. *Id.*

6. See, e.g., Jennifer Meredith Liebman, *Defamed by a Blogger: Legal Protections, Self-Regulation, and Other Failures*, 2006 U. ILL. J.L. TECH. & POL'Y 343 (Fall 2006).

7. See, e.g., Noah Levine, *Establishing Legal Accountability for Anonymous Communication in Cyberspace*, 96 COLUM. L. REV. 1526 (Oct. 1996). See also Jonathan

and other states, a victim of defamatory statements in the online realm through websites, blogs, or social media typically have an onerous task for recovery because of the difficulty of discovering false statements in fact that would harm reputation and filing within the one-year statute of limitations and, further, identifying the liable parties in a social media setting when parties often shield their identities from the general public.<sup>8</sup> Illinois, though, has a couple of helpful procedural tools of discovery for identifying defendants who are anonymous defamatory posters. First, Illinois Supreme Court Rule 224 allows for pre-suit discovery to identify “responsible parties and entities” and this includes any anonymous defendants according to the case law precedent for defamation actions in Illinois.<sup>9</sup> Second, Illinois statutory discovery provision Section 2-402 provides for designating additional respondents in discovery for pleading “those individuals or other entities, other than the named defendants, believed by the plaintiff to have information essential to the determination of who should properly be named . . .” and this could include anonymous parties who are alleged defamers in an action.<sup>10</sup> This Article will provide a commentary on Illinois defamation claims against anonymous defendants and procedural norms after first briefly providing the landscape of the federal norms and will focus on the recent Illinois Supreme Court case of *Hadley v. Doe*<sup>11</sup> and its takeaways for future defamation actions against anonymous defendants and other types of civil actions according to the procedural discovery rules in Illinois.

B. THE INTERNET AND SOCIAL MEDIA AS A BURGEONING TECHNOLOGICAL ENVIRONMENT AND VAST BREEDING GROUND FOR POSSIBLE DEFAMATION CLAIMS

Social media has infiltrated our domestic and world market at a rapid rate and has vast implications for balancing proper use within the current legal regulatory norms and free speech. One recent Pew study estimates that 74% of online adults use social media and networking sites.<sup>12</sup> A majority of

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Zittrain, *A History of Online Gatekeeping*, 19 HARV. J. L. & TECH. 253, 258 (Spring 2006) (analyzing the problems with the cyber-defamation after the *CompuServe* and *Prodigy* cases with new technologies emerging in the market).

8. See, e.g., Tracy Bateman Farrell, 33A IL. L. & PRAC. §§ 40–43 (Nov. 2015). See also Street & Grant, LAW OF THE INTERNET § 6.04[2] (2015).

9. ILL. S. CT. R. 224 (West 2016). See also *Stone v. Paddock Publications, Inc.*, 961 N.E.2d 380 (Ill. App. Ct. 2011).

10. See 735 ILL. COMP. STAT. ANN. 5/2-402 (West 2016). See also *Doe v. Catholic Diocese of Rockford and Doe*, 38 N.E.3d 1239 (Ill. App. Ct. 2015) (revealing a recent analysis of Rule 224 in a defamation *per se* context in Illinois and uploading the Rule 224 disclosure even though there was a clergy-penitent privilege present).

11. See *Hadley v. Doe*, 34 N.E.3d 549 (Ill. 2015) and, *infra*, notes 96-112.

12. *Social Networking Fact Sheet*, PEW RESEARCH CTR. (Dec. 27, 2013), [perma.cc/45K3-KCJT](http://perma.cc/45K3-KCJT). See also *Social Media Usage: 2005-2015*, PEW RESEARCH CTR. (Oct. 8,

those users (a little over 70%) engage in online social media use of Facebook.<sup>13</sup> Others use Twitter, Instagram, and Pinterest at a much lower rate (over 20%).<sup>14</sup> With this open access to the Internet and increased use of social media, though, comes a greater responsibility to use it properly within the tensions of the individuals' constitutional rights of protection of freedom of speech according to the First Amendment and in compliance with federal and state law.<sup>15</sup> The laws that govern various wrongs, including censorship, communications decency, defamation, cyberbullying, and cyberstalking, and together with the associated statutes of limitations, create myriad problems for recovery because they were drafted at the advent of the digital era and not with social media in mind.<sup>16</sup> Most social media websites were born after 2000 and quite some time elapsed after the Communications Decency Act of 1996 (Section 230) had been passed by the time Facebook emerged in 2004.<sup>17</sup> Furthermore, most states like Illinois have short one-year defamation statutes of limitations that make it difficult to timely identify online anonymous defendants for recovery. As well, there are some ways to provide recovery according to Supreme Court Rule 224 petition for discovery in Illinois.<sup>18</sup> There are myriad examples in the federal courts that apply the "Good Samaritan" rule for Internet Service Providers

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2015), [perma.cc/3YGJ-4LF5](https://perma.cc/3YGJ-4LF5) (stating that two-thirds of Americans use social networking sites and now over 90% of young adults were typically using social media sites).

13. *Id.*

14. *Id.*

15. *See, e.g.,* Bruce Drake, *The Darkest Side of Online Harassment: Menacing Behavior*, PEW RESEARCH CTR. (Jun. 1, 2015), [perma.cc/3FT6-9NXS](https://perma.cc/3FT6-9NXS) (summarizing that over forty percent of adults have experienced some kind of online harassment). *See also* Renee Newman Knake, *Legal Information, the Consumer Law Market, and the First Amendment*, 82(6) *FORDHAM L. REV.* 2843 (2014) (stating that all legal information for consumers is protectable under the First Amendment and articulating that all law is basically information).

16. *See* Kevin Park, *Facebook Used Takedown and It Was Super Effective! Finding a Framework for Protecting User Rights of Expression on Social Networking*, 68 *N.Y.U. ANN. SURV. AM. L.* 891 (2013) (analyzing case law under the Communications Decency Act and current regulatory framework of the FCC for censorship). *See also* Joshua N. Azriel, *Social Networking as a Communications Weapon to Harm Victims: Facebook MySpace, and Twitter Demonstrate a Need to Amend Section 230 of the Communications Decency Act*, 26 *J. MARSHALL J. COMPUTER & INFO. L.* 415 (Spring 2009).

17. *See* Danah M. Boyd and Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 *J. COMPUTER-MEDIATED COMM.* 210, 230 (2008).

18. 735 *ILL. COMP. STAT.* 5/13-201 (2015). *See, e.g.,* ERIC MAYER, IDENTIFICATION OF RESPONSIBLE PERSONS, 16 *ILL. L. & PRAC. DISCOVERY* § 9 (Aug. 2015). *See generally* Klayman v. Zuckerberg, 910 F.Supp.2d 314 (D.D.C. 2012), *aff'd* at 753 F.3d 1354 (D.C. Cir. 2014) (stating that user could not hold content provider liable under Communications Decency Act for user's own negligence).

in the context of the Federal Communications Decency Act Section 230.<sup>19</sup> Similarly, the recent Illinois Supreme Court “John Doe” decision<sup>20</sup> and other common law defamation cases reveal some predictability in the social media and online realm while utilizing state procedural discovery tools.<sup>21</sup> Instances of defamatory remarks by anonymous posters in the context of social media are difficult to grapple with as a practicing attorney and evidentiary rules in Illinois and other States are continuing to evolve to keep pace with changing contexts.<sup>22</sup> Overall, the current status of the law and procedure in the realm of state defamation in Illinois after *Hadley v. Doe* is a somewhat complicated but straightforward analysis of the proper procedural discovery norms observed<sup>23</sup> to allow for recovery for injuries sustained from defamation by anonymous posters conducted on social media or Internet sites.

### C. DEFINITION OF SOCIAL MEDIA AND FIRST AMENDMENT FREEDOM OF SPEECH

The Oxford English Dictionary defines “social media” as “websites and applications which enable users to create and share content or to participate in social networking.”<sup>24</sup> Social media sites, which include Facebook, LinkedIn, Twitter, MySpace, Yelp, Pinterest, Snapchat, and others, will be the focus for progressive Internet users in conjunction with proper use and balancing First Amendment freedom of speech for many years to come as courts grapple with the application of state law and associated federal norms to defamation cases.<sup>25</sup> One main difference between social media

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19. See Gregory M. Dickinson, Note, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J. L. & PUB. POL’Y 863 (Spring 2010). See also Patricia Spiccia, *The Best Things in Life are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369 (Fall 2013). See, e.g., *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398 (4th Cir. 2014) (stating that the online service provider was immune from liability for the defamatory statements under the Communications Decency Act).

20. See *Hadley v. Doe*, 34 N.E.3d 549 (Ill. 2015).

21. See Mitchell L. Marinello & Andrew P. Shelby, *Internet Defamation: The Need to Change Illinois and Federal Law*, 27-MAR. CBA REC. 24 (Feb./Mar. 2013) (stating the need for reform regarding timely redress of claims under the current one-year statute of limitations and Rule 224 norms in Illinois).

22. See, e.g., Gary L. Beaver et al., *Social Media Evidence—How to Find It and How to Use It*, ABA SECTION OF LITIGATION ANNUAL MEETING PROCEEDINGS (2013), perma.cc/E3ZA-RQZJ. See also *Illinois Defamation Law*, DIGITAL MEDIA LAW PROJECT, perma.cc/K62R-GM98 (project hosted by the Berkman Center for Internet & Society).

23. See ILL. S. CT. R. 224 (West 2016) and 735 ILL. COMP. STAT. ANN. 5/2-402 (West 2016).

24. OXFORD ENGLISH DICTIONARY, “Social Media”, perma.cc/K52G-AGHL (2015).

25. See generally Monique C.M. Leahy, *Facebook, MySpace, LinkedIn, Twitter, and Other Social Media in Trials*, 122 AM. JUR. TRIALS 421 (May 2015).

versus blogs, other Internet websites, and traditional print media is that traditional newspapers and other publications prior to the advent of the Internet had carefully vetted statements in publications via editors at the helm who could deter any defamatory statements.<sup>26</sup> Under the current structure of dissemination of information in the virtual world, individuals could presumably anonymously create or post false online statements on a social media site or through an Internet Service Provider (“ISP”) without any editing or direct recourse by the ISP or social media site because of the “Good Samaritan” privilege contained in the Federal Communications Decency Act.<sup>27</sup> In the same way, in Illinois and other states, a victim of online defamatory statements through websites, blogs, or social media would have an onerous task for recovery because of the difficulty of discovering false statements in fact that would harm reputation and filing within the one-year statute of limitations and, further, identifying the liable parties in a social media setting when parties often shield their identities from the general public.<sup>28</sup>

This Article will very briefly give an overview of First Amendment protection of freedom of speech under the associated federal law, the Communications Decency Act of 1996, in the online realm. As mentioned, the procedural discovery in many states, such as Illinois, do not allow for proper discovery and filing times to properly recover for injuries by anonymous posters. Second, there are certain anomalies in procedure for Illinois State law defamation claims under Supreme Court Rule 224 and Illinois precedents when the need arises to balance First Amendment freedoms with defamatory statements in the social media realm. While it is certainly important to protect First Amendment freedom of speech and promote active discourse in the online realm via use of the Internet, blogs, and social media in order to be in tune with our inheritance of these traditions from the British common law, it is equally important to safeguard individuals from false statements that harm their reputation.<sup>29</sup> Third, the Illinois State law of defamation and associated First Amendment protection will be especially examined in light of the increasing use of the Internet and in light of the recent *Hadley v. Doe* case.<sup>30</sup> Finally, the Article will reveal that state law defamation norms in Illinois are especially tricky in light of the procedural

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26. Jay M. Zitter, *Liability of Internet or Service Provider for Internet or Email Defamation*, 84 A.L.R. 5th 169 (2000).

27. *Id.* at 14. See also Communications Decency Act, 47 U.S.C. § 230 (West 2014).

28. See, e.g., TRACY BATEMAN FARRELL, 33A ILL. L. & PRAC. §§ 40 – 43 (Nov. 2015). See also STREET & GRANT, LAW OF THE INTERNET § 6.04[2] (2015).

29. Note that this paper will not address the privacy of statements or invasion of privacy on social media sites or online defamatory statements in a school law or higher education context.

30. See Marinello and Shelby, *supra* note 21.



rules when applying Supreme Court Rule 224 and Section 2-402.<sup>31</sup> This Article recommends that newer attorneys and even the most experienced attorneys review the Illinois procedural standards and the governing law prior to initiating a defamation case against an anonymous poster on a social media website to protect injured parties and also to creatively use the Illinois discovery rules in other civil law contexts for anonymous parties after evaluating a hypothetical.<sup>32</sup>

## II. FREEDOM OF SPEECH AND FEDERAL LAW REGARDING ONLINE DEFAMATION CLAIMS: AN OVERVIEW OF THE CURRENT LAW AND INTERPRETATIONS

### A. AN OVERVIEW OF CURRENT FEDERAL STATUTORY LAW

The law of defamation has, at its core, an intent to protect an individual's good reputation while balancing First Amendment freedoms.<sup>33</sup> Impugning a good reputation via false statements is not protected by the United States Constitution.<sup>34</sup> The historical application of the First Amendment's protections in the context of the publication of defamatory statements has resulted in "a morass."<sup>35</sup> According to prominent tort law scholars Prosser and Keaton, there is "a great deal of the law of defamation which makes no sense."<sup>36</sup> There is a simple framework, however, for understanding the elements of an action for defamation which are then left up to common law interpretation and subject to constitutional limitations.<sup>37</sup> According to the *Restatement (Second) of Torts*, the following elements must exist for a defamation action:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting to at least negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the

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31. See *supra* notes 10-11.

32. See *infra* Part V.

33. See generally 1 SACK ON DEFAMATION § 1:1 (April 2015) (stating that the history of defamation has "in large measure been the history of the establishment of First Amendment doctrine to govern the torts of libel and slander, and the application of that doctrine to long-established, frequently contrary, common-law principles").

34. DOBBS, HAYDEN, AND BUBLICK, *THE LAW OF TORTS* § 516 (2d ed. 2015).

35. *Mittelman v. Witous*, 552 N.E.2d 973, 978 (Ill. 1989).

36. W. PAGE KEETON ET AL., *PROSSER AND KEATON ON THE LAW OF TORTS* § 111, at 771 (5th ed. 1984).

37. See 1 SACK ON DEFAMATION § 2:1 (Apr. 2015).

publication.<sup>38</sup>

Each element of an action for a defamation claim is complicated by the First Amendment cases.<sup>39</sup> In addition, defamatory statements made in the online realm invoke certain sections of the Communications Decency Act of 1996 because Internet Service Providers are given immunity for allegedly defamatory content posted without their knowledge.<sup>40</sup> Many of the Internet Service Providers and social media contracts also protect the anonymity of the user and prevent dissemination of identity to a third party.<sup>41</sup> According to ancient norms of qualified privilege, anonymous speech has regularly received First Amendment protection, even when there are questionable statements.<sup>42</sup> This norm of immunity and anonymity has been recently pervasive and problematic in the context of social media and recently sparked interest among the leading scholars in the tort law field, such as Dobbs, because of the interpretation of Section 230(c)(1) of the Communications Decency Act.<sup>43</sup>

The Communications Decency Act of 1996<sup>44</sup> was promulgated as a large bill to overhaul the Communications Act of 1934 to revise the Act for the age of the Internet.<sup>45</sup> The Act defines “interactive computer service” and “information content provider” as follows:

(2) Interactive computer service

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

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38. RESTATEMENT (SECOND) OF TORTS § 558 (1977 & Oct. 2015 Supp.).

39. *Id.* See also 1 SACK ON DEFAMATION § 2:1 (Apr. 2015).

40. Communications Decency Act of 1996, 47 U.S.C. § 230 (West 2015).

41. See 1 SACK ON DEFAMATION § 14:4 (Apr. 2015).

42. See, e.g., Brendan L. Smith, *Meet John Doe*, 96(1) A.B.A. J. 14 (Jan. 2010). See also *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-42 (1995).

43. DOBBS, HAYDEN, AND BUBLICK, *THE LAW OF TORTS* § 543 (2d ed. 2015).

44. See *supra* note 24.

45. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996).

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.<sup>46</sup>

Courts have concluded that Congress intended Section 230(c)(1) to provide Internet Service Providers with immunity for defamatory content posted by third parties, and courts have interpreted that social media websites would qualify under the 1996 definitions for protection as an “interactive computer service” or “information content provider” although the statute was written well before the inception of such social media sites.<sup>47</sup> The Communications Decency Act provides a “Good Samaritan” privilege to online service providers and currently shields them from liability for defamatory statements by third parties or anonymous posters through their online services.<sup>48</sup>

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46. 47 U.S.C. § 230(f) (West 2015).

47. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

48. See 47 U.S.C. § 230 (West 2015), which provides in part:

**(b) Policy**

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

**(c) Protection for “Good Samaritan” blocking and screening of offensive material**

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

Courts have grappled with the broad and narrow construction of the § 230 immunity for users of interactive services and associated ISPs, websites, blogs, or social media in conjunction with the Communications Decency Act's "Good Samaritan" immunity as the technology has evolved since 1996.<sup>49</sup> Internet Service Providers often do not exercise control or take down defamatory statements in a timely fashion when the harm is reported by users on their websites, blogs, or associated postings by third-party users; thus, when providers are sued, courts have consistently recognized immunity for ISPs under the "Good Samaritan" provision of Section 230.<sup>50</sup>

B. FEDERAL CASES UNDER THE CDA SECTION 230

Since the inception of the Internet and other digital media during the last twenty years, courts have been confused about the landscape of liability for defamatory statements in the online realm through the Communications Decency Act of 1996.<sup>51</sup> Section 230 of the Communications Decency Act was promulgated in response to controversial case law during the mid-1990s that held interactive online providers responsible for alleged defamation or wrongful conduct by its users.<sup>52</sup> Since the passage of the Communications Decency Act, federal cases have applied the "Good Samaritan" privilege to online service providers in many contexts as technology has advanced.<sup>53</sup>

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(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

49. STREET & GRANT, LAW OF THE INTERNET § 6.04 *et. seq.* (2015).

50. Jay M. Zitter, *Liability of Internet Service Provider for Internet or E-Mail Defamation*, 84 A.L.R. 5th 169 (2015).

51. See NIMMER, LAW OF COMPUTER TECHNOLOGY: RIGHTS, LICENSES AND LIABILITIES § 14:11 (2015) (stating that the Communications Decency Act preempts any inconsistent State law).

52. See, e.g., *Stratton Oakmost, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995) (holding that an online provider was liable for defamatory content on a bulletin board because it had undertaken to screen content).

53. *Id.*

*Zeran v. America Online, Inc.* (4th Cir. 1997) is one of the seminal circuit court cases that solidified the immunity for an online service provider for defamatory statements posted by a third-party.<sup>54</sup> In this case, Zeran ran a publishing business in Seattle that listed apartments for rent. Unfortunately, an anonymous poster used his AOL username (“Ken Z033” and “Ken ZZ033”) to publish notices on AOL that offensive t-shirts regarding the Oklahoma City bombing were for sale.<sup>55</sup> The notices ended with Mr. Zeran’s first name and his business phone number.<sup>56</sup> Mr. Zeran was injured through an avalanche of abusive and threatening phone calls to his business and had to use local police to keep his home under protective surveillance.<sup>57</sup> He called AOL numerous times to take down the allegedly defamatory content and received assurances that the statements would be removed from the site.<sup>58</sup>

In *Zeran*, the court analyzed the defamatory information under the CDA and the immunity of AOL under Section 230.<sup>59</sup> The Fourth Circuit held that Section 230(c) of the Communications Decency Act creates federal immunity for interactive computer service providers for defamatory information that originates with third parties.<sup>60</sup> At the time, the court took this broad approach to immunity under the CDA because it noted from associated legislative history that it was Congress’s belief that “to preserve the vibrant and competitive free market that presently exists for the Internet . . .” is important to the development of the new electronic medium.<sup>61</sup> Forcing Internet Service Providers to police the huge volume of electronic traffic would certainly chill the growth of the then-expanding Internet and other technological advancements.<sup>62</sup> Zeran’s argument was that AOL was not a publisher for Section 230 purposes and had actual knowledge of the defamatory statements and, thus, should have been liable for the defamation.<sup>63</sup> Overall, the court concluded that Section 230 of the CDA should cover the entire category of publishers (such as distributors and traditional publishers) under its broad immunity provisions and reinforcement of free speech; otherwise, the narrow distributor standard as espoused by Zeran would unduly

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54. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (revealing that Section 230 barred a lawsuit against AOL for defamatory statements by a third party).

55. *Id.* at 329 (revealing offensive material and t-shirts relating to the Oklahoma City bombing such as, “Finally a day care center that keeps the kids quiet—Oklahoma City 1995”).

56. *Id.*

57. *Id.* at 329-30.

58. *Id.*

59. *Zeran*, 129 F.3d at 331-32.

60. *Id.* at 333-35. *See also* RESTATEMENT (SECOND) OF TORTS § 581(d) (Oct. 2015).

61. *Zeran*, 129 F.3d at 330.

62. *Zeran*, 958 F. Supp. 1134-35 (discussing H.R. Rep. No. 104-458 at 194).

63. *Id.* at 329-30.

burden Internet Service providers with an overwhelming volume of messages to monitor and stymie growth of the Internet.<sup>64</sup>

Another important federal case in the context of social media that reiterates the Section 230 immunity for Internet Services Providers under the Communications Decency Act of 1996 is the *Klayman v. Zuckerberg* case.<sup>65</sup> In this case, Klayman encountered an offensive Facebook site in the social media realm entitled “Third Palestinian Intifada” that asked Muslims to kill Jewish people and more than 360,000 Facebook users participated in the page.<sup>66</sup> The page was so offensive that Israel’s Minister for Public Diplomacy wrote a letter to Facebook and Zuckerberg to request that the Intifada pages be removed.<sup>67</sup> Klayman also alleged that he requested removal of the pages.<sup>68</sup> After many days Facebook finally removed the pages, but Klayman filed suit alleging that Facebook’s removal was insufficiently prompt and was an intentional assault and negligent breach of their duty of care owed to Klayman.<sup>69</sup> The District Court held that Facebook was an interactive service provider under the Communications Decency Act and, thus, immune from the suit under the “Good Samaritan” provision.<sup>70</sup> The Court of Appeals also affirmed the lower court’s decision.<sup>71</sup>

There are a couple of noteworthy defamation cases that further analyze the Communications Decency Act’s Section 230 and defamation claims. In *Barrett v. Fonorow*, the Court of Appeals (2d Dist.) examined a defamation claim by a doctor against the provider of an interactive computer service that portrayed the doctor as a liar through disparaging postings.<sup>72</sup> The court examined Section 230 immunity under the CDA and deemed that Intelisoft Multimedia was immune from Barrett’s lawsuit under the “Good Samaritan” privilege as an interactive computer service provider.<sup>73</sup> Barrett attempted to argue that it was not Congress’s intent to have Section 230 immunity apply to those individuals or ISPs who knew or had reason to know that the disseminated statements were defamatory.<sup>74</sup> The Court in *Barrett v. Fonorow* was not persuaded by this argument, though, and highlighted the

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64. *Id.* at 335.

65. *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014) (reiterating that an interactive computer service will not be treated as the publisher or speaker of any information or liable under the Act for defamatory statements made by its users).

66. *Id.* at 1356.

67. *Id.*

68. *Id.*

69. *Id.* at 1357.

70. *Klayman*, 753 F.3d at 1357.

71. *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014), and decision below, 910 F.Supp.2d 314 (D.D.C. 2012).

72. *Barrett v. Fonorow*, 799 N.E.2d 916 (Ill. App. Ct. 2003).

73. *Id.* at 921.

74. *Id.* at 922.

clarity of interpretation in “every state and federal court to confront the issue in a published decision has held that Congress intended section 230 to prevent the element of ‘publication’ from being satisfied in a state tort cause of action . . .” for ISPs who disseminate such defamatory information.<sup>75</sup> Overall, the Court concluded in *Barrett* that Intelisoft Multimedia was an interactive computer service as contemplated by the CDA’s Section 230 immunity provisions and, thus, immune from Barrett’s claims for defamation and false light invasion of privacy against the Internet service.<sup>76</sup>

In a more recent Federal case in Illinois, *Chicago Lawyers’ Committee v. Craigslist*, the Northern District of Illinois again revisited the application of the CDA’s Section 230 immunity provisions in the context of Craigslist and analyzed the “interactive computer service” versus “interactive computer provider” distinction according to the rules of statutory construction.<sup>77</sup> The Court also thoroughly examined *Zeran*<sup>78</sup> and subsequent decisions to glean that Section 230(c)(1) does not bar any cause of action against interactive computer services but only those that treat the interactive computer service as a publisher of third-party content.<sup>79</sup> After applying this standard to the offensive content in the case, the Court determined that Craigslist was acting within the purviews of the Section 230 immunity provisions of the Communications Decency Act as an “interactive computer service” that published third-party content.<sup>80</sup>

Federal courts have generally granted broad immunity when plaintiffs have attempted to hold an online entity liable for web site content posted by a third party in defamation and other types of civil claims.<sup>81</sup> The Communications Decency Act also preempts state law claims that are inconsistent with Section 230.<sup>82</sup> The next section of this article will address the current

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75. *Id.* at 924 (revealing the clear consensus from the line of cases after the passage of the CDA like *Zeran* and its progeny).

76. *Id.* at 926.

77. Chi. Lawyers’ Comm., Civ. Rights v. Craigslist, 461 F.Supp.2d 681, 693 (N.D. Ill. 2006).

78. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

79. Chi. Lawyers’ Comm., Civ. Rights v. Craigslist, 461 F.Supp.2d 681, 695 (N.D. Ill. 2006).

80. *Id.* at 696-97.

81. *See, e.g., Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561 (Cal. Dist. Ct. App. 2d 2009) (revealing that social networking websites had immunity under the CDA from tort claims by minor females who were sexually assaulted by men they met on the website). *See also* Claudia G. Catalano, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act*, 47 U.S.C.A. 230, 52 A.L.R. FED.2D 37 (2011).

82. *See, e.g., City of Chi., Ill. v. StubHub!, Inc.*, 624 F.3d 363 (Ill. App. Ct. 7th 2010); *Doe ex. rel. Roe v. Backpage.com, LLC*, 104 F.Supp. 3d 149 (D. Mass. 2015); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F.Supp.2d 690 (S.D.N.Y. 2009); *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F.Supp.2d 523 (D. Md. 2006); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp.2d 1090 (W.D. Wash. 2004); *Kimzey v. Yelp, Inc.*, 21 F.Supp.3d

landscape of defamation claims in Illinois and will focus on the recent *Hadley v. Doe* analysis of an Illinois Supreme Court Rule 224 claim against an anonymous poster on an Internet website. Then, a review of Illinois's procedural discovery norms will be illuminated by identifying the utility of using Rule 224 or Section 2-402 to identify anonymous online defendants in a defamation suit. Finally, a hypothetical will be posed to uncover the possible ways to successfully identify and recover from an anonymous or unknown defendant in Illinois. An increasing number of states, including Illinois, also have passed anti-SLAPP Laws to prevent "Strategic Lawsuits Against Public Participation" as civil actions to discourage citizens from exercising a constitutional right to oppose or communicate with the government.<sup>83</sup> When considering an action against anonymous posters on the Internet, it is often a difficult procedure to obtain the identity of the poster through discovery procedures and other unique state rules of civil procedure.<sup>84</sup> Overall, this article will illuminate the procedural rules for filing a defamation action in Illinois against an anonymous poster in the context of Internet and other social media and offer a roadmap for navigating Rule 224 defamation claims and gathering information according to case law precedent in Illinois.

### III. ILLINOIS LAW REGARDING ONLINE DEFAMATION CLAIMS AND FIRST AMENDMENT: AN OVERVIEW OF THE CURRENT LAW AND PROCEDURE

Freedom of speech is a defense for libel and defamation claims, and the Illinois Constitution states that "the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."<sup>85</sup> Generally, the rule and elements for achieving a defamation cause of action in Illinois are as follows:

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1120 (W.D. Wash. 2014); and *Zeran v. Am. Online, Inc.*, 958 F.Supp. 1124 (E.D. Va. 1997), affirmed 129 F.3d 347, cert. denied, 524 U.S. 937. See also VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 238-47 (2010).

83. See Eric M. Madiar & Terrence J. Sheahan, *Illinois' New Anti-SLAPP Statute*, 96 ILL. B. J. 620 (Dec. 2008) (revealing that Illinois became the 26th State to enact an Anti-SLAPP statute in August 2007). See also VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 294-95 (2010).

84. See, e.g., Susanna Moore, *The Challenge of Internet Anonymity: Protecting John Doe on the Internet*, 26 J. MARSHALL J. COMPMP. & INFO. L. 469 (Summer 2009). See also Gary L. Beaver et al., *Social Media Evidence—How to Find It and How to Use It*, ABA SECTION OF LITIGATION ANNUAL MEETING (San Francisco, CA 2013) and VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 247-52 (2010). See generally Lyrrisa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L. J. 855 (Feb. 2000).

85. ILL. CONST. art. I, § 4.



1. A false statement (true statements or “substantially true” statements are not the basis of a cause of action in Illinois)
2. The statement must refer personally to the plaintiff
3. The statement must be published
4. The statement must injure the reputation or “lowers that person in the eyes of the community . . . .”<sup>86</sup>

According to the elements of the *Restatement (Second) of Torts* and adoption of this rule in Illinois, these are standard elements for a defamation claim.<sup>87</sup> Petitioners must also note the one-year statute of limitations for a defamation action after the cause of action accrued in Illinois.<sup>88</sup> For a defamation action to succeed in Illinois with an anonymous defendant, the petitioner bringing the action for discovery of an anonymous individual prior to the lawsuit must show that discovery is necessary to support the cause of action and also allege facts supporting a cause of action.<sup>89</sup> Prior to the adoption of Supreme Court Rule 224 in Illinois, case law in Illinois approved of a “bill of discovery” when it was necessary to permit a plaintiff to “conduct discovery needed to understand if a cause of action existed and/or against whom the cause of action might be directed.”<sup>90</sup> There are numerous cases in Illinois since the advent of the Internet age and the Communications Decency Act of 1996’s immunity provisions that discuss defamation claims and proper procedure under Supreme Court Rule 224.<sup>91</sup> In Illinois, there is a one year statute of limitations for defamation “after the cause of action accrued,”<sup>92</sup> which has been deemed to be the date of publication of the defamatory statements.<sup>93</sup> The discovery rule applies to defamation

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86. See KENNETH T. LUMB, CH. 3—INTENTIONAL TORTS § 3.3–3.6 (IICLE 2014).

87. See RESTATEMENT (SECOND) OF TORTS § 558 *et. seq.* (1977). See also Bryson v. News Am. Publ’ns, Inc., 672 N.E.2d 1207 (Ill. 1996).

88. See 735 ILL. COMP. STAT. 5/13-201 (2016). In Illinois, the cause of action accrues when the statement is published. *Id.* The discovery rule also applies to defamation, so the cause of action commences when the plaintiff knew or should have known about the defamatory statement. See Tom Olesker’s Exciting World of Fashion v. Dun & Bradstreet, 334 N.E.2d 160 (Ill. 1975).

89. See *Stone v. Paddock Publ’ns, Inc.*, 961 N.E.2d 380 (Ill. App. Ct. 2011) (According to *Stone*, the plaintiff must plead facts necessary to survive a 735 ILL. COMP. STAT. 5/2-615 motion to dismiss.). See also ILL. S. CT. R. 224 (2015).

90. J. BRIAN MANION & NATHANIEL O. BROWN, DISCOVERY BEFORE SUIT TO IDENTIFY PARTIES, PART IV—DISCOVERY ACTIONS (IICLE 2014).

91. 735 ILL. COMP. STAT. 5/13-201 (2015). See also Timothy J. Harris, *The Power of Pre-Suit Discovery: Supreme Court Rule 224*, 99 ILL. B. J. 136 (March 2011).

92. See 735 ILL. COMP. STAT. 5/13-201 (2015).

93. See, e.g., *Global Relief Found., Inc. v. NYT*, 390 F.3d 973 (7th Cir. 2004); *Myers v. Telegraph*, 773 N.E.2d 192 (Ill.App. Ct. 2002); Tom Olesker’s Exciting World of

claims and the cause of action accrues when the plaintiff knew or should have known about the publication of the defamatory statement.<sup>94</sup> Finally, a Rule 224 discovery action would not extend any existing statute of limitations.<sup>95</sup>

A. THE LANDSCAPE OF RECENT DEFAMATION CASES AND PRETRIAL DISCOVERY IN ILLINOIS

There are a finite group of cases in Illinois that specifically discuss defamation and Rule 224 pre-trial discovery and Section 2-402 discovery in the context of anonymous parties or that would illuminate the unique procedural hurdles for bringing a defamation action against an anonymous poster in the Internet context in Illinois. The following Illinois case summaries provide a succinct view of the procedural issues facing attorneys in Illinois with a focus on defamatory statements and Rule 224 discovery or Section 2-402 discovery as pre-trial tools that should be essential for such claims.

1. *Hadley v. Doe (2015)*

The most enlightening recent Illinois case on defamation and an associated Rule 224 motion for discovery for the identity of an anonymous poster has recently been decided in the Supreme Court of Illinois in *Hadley v. Doe*.<sup>96</sup> In this case, a county politician (Hadley) filed a Rule 224 petition to discover the identity of Subscriber Doe who posted the allegedly defamatory statements (through the name of “Fuboy”) in the comments section of the newspaper’s website.<sup>97</sup> Hadley filed a defamation lawsuit and then requested a disclosure of Fuboy’s identity pursuant to a Rule 224 request.<sup>98</sup> The circuit court granted the request, the appellate court affirmed the request under Rule 224, and then the Supreme Court affirmed the judgment because it deemed the statements to be defamatory *per se* as imputing criminal activity in light of the Sandusky scandal that occurred around the same time.<sup>99</sup>

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Fashion v. Dun & Bradstreet, 334 N.E.2d 160 (Ill. 1975); and Swider v. Yeutter, 162 F. Supp. 225 (N.D. Ill. 1991).

94. See Tom Olesker’s Exciting World of Fashion v. Dun & Bradstreet, 334 N.E.2d 160 (Ill. 1975).

95. See J. BRIAN MANION AND NATHANIEL O. BROWN, ILLINOIS CAUSES OF ACTION: ESTATE, BUSINESS & NON-PERSONAL INJURY ACTIONS § 23.4 (IICLE 2014).

96. Hadley v. Doe, 34 N.E.3d 549 (Ill. 2015).

97. *Id.* at 552.

98. *Id.*

99. *Id.* at 559.

In January 2013, the circuit court informed the parties that the best procedure to use to identify the online poster (Fuboy) would be Illinois Supreme Court Rule 224.<sup>100</sup> The circuit court also allowed Hadley to amend the complaint to add an additional count to seek relief under Rule 224 for the unidentified party.<sup>101</sup> Hadley then filed an amended complaint and alleged a cause of action for defamation against Doe (Fuboy) and Comcast to identify Fuboy's identity under Rule 224.<sup>102</sup> After a hearing, the circuit court found that Hadley's complaint could withstand a motion to dismiss under Section 2-615 and that Fuboy's comments imputed a commission of a crime to Hadley because of the reference to "Sandusky" in the statements that alluded to sexual abuse of numerous boys.<sup>103</sup> Upon appeal, the Court agreed with the lower court's decision that rejected Fuboy's contention that the defamation claim would not survive a motion to dismiss and agreed that Fuboy's statement was defamatory *per se* because it imputed the commission of a crime.<sup>104</sup> Fuboy also contended that the defamation suit was a "legal nullity" because Hadley used a fictitious name in the original complaint and, thus, the respondent argued that the Rule 224 claim would not have been brought within the one-year statute of limitations for that offense if deemed to have no legal effect.<sup>105</sup> The Supreme Court, though, disagreed with this analysis of procedure according to the statute of limitations in light of case law in Illinois and the Illinois Code of Civil Procedure.<sup>106</sup> The Court determined that the complaints were effective because the plaintiff had identified at least one real person or entity as required by Illinois procedure.<sup>107</sup> The Court then proceeded to analyze Hadley's defamation claim according to an analysis of the Rule 224 pleadings and proper statement of a cause of action for defamation.<sup>108</sup> After much analysis and careful consideration, the Supreme Court reviewed the categories of defamation *per se* and applied the innocent construction rule.<sup>109</sup> After reviewing all of the

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100. *Id.* at 553.

101. Hadley v. Doe, 34 N.E.3d 549, 553 (Ill. 2015).

102. *Id.*

103. *Id.* at 554-55.

104. *Id.*

105. *Id.* at 554.

106. Hadley v. Doe, 34 N.E.3d 549, 554 (Ill. 2015). *See also* 735 ILL. COMP. STAT. 5/2-402 (2015).

107. Hadley v. Doe, 34 N.E.3d 549, 554 (Ill. 2015) (revealing that Hadley knew that there was an individual, Fuboy, who had made the presumably defamatory statements on the Freeport Journal Standard website's comments section). The Court made an important distinction between suing fictitious "John Doe" parties and suing an alias adopted of the defendant's own choosing. *Id.* at 555.

108. *Id.* at 556.

109. *Id.* (revealing that even if an alleged statement falls into one of the categories of statements that are defamatory *per se* then it will still not be actionable if it is "reasonably

comments, the Supreme Court found that the statements were more readily construed to be defamatory than innocent and had basis in fact with a “precise and readily understood meaning” that Fuboy intended to convey that Hadley was a pedophile in light of the Sandusky scandal and, thus, could be affirmed as defamatory assertions of fact.<sup>110</sup> In the end, the Court affirmed the judgment of the Court of Appeals and remanded the case to the circuit court for further determination.<sup>111</sup> This recent decision has now opened the door for successful defamation claims against anonymous posters under Rule 224 when the statements are defamatory *per se*. Other cases in Illinois reveal that defamation *per quod* claims are much more difficult to plead and prove because of the proof of special damages.<sup>112</sup>

## 2. *Goral v. Kulys (2014)*

In this case, the Court reviewed a defamation action brought by a political candidate against a blogger.<sup>113</sup> A blogger questioned a political candidate’s qualifications in a blog article because of concerns about possible misuse of the homeowner’s property tax exemption based on misstating her home address.<sup>114</sup> Here, the court analyzed the defamation claim and proper dismissal pursuant to Illinois’s anti-SLAPP provisions of the Citizen Participation Act.<sup>115</sup> In the end, this case reiterated that the anti-SLAPP statute would apply and prevail in actions for defamation in the context of political speech and speech aimed at gaining favorable government action.<sup>116</sup> As such, the appellate court affirmed the dismissal of the claim according to the anti-SLAPP statute and deemed that the blogger’s statements were not defamatory *per se*.<sup>117</sup> The *Kulys* case provided a substantive defamation ruling instead of analyzing a Rule 224 motion.

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capable of an innocent construction”). *See, e.g.,* Tuite v. Corbitt, 866 N.E.2d 114 (Ill. 2006) and Solaia Tech., LLC v. Specialty Publ’g Co., 852 N.E.2d 825 (Ill. 2006).

110. Hadley v. Doe, 34 N.E.3d 549, 559 (Ill. 2015).

111. *Id.* *See also* Erica Daniels, *Illinois Top Court Rules that Online Identity Must be Revealed*, THE NATIONAL TRIAL LAWYERS (Aug. 26, 2015), [perma.cc/W3DG-H7W7](http://perma.cc/W3DG-H7W7) (revealing the national attention that this case received). *But cf.,* Larry Bodine, *Court Refuses to Unmask Anonymous Critic of Attorney on AVVO*, THE NATIONAL TRIAL LAWYERS (July 12, 2015), [perma.cc/EM5F-SFLG](http://perma.cc/EM5F-SFLG).

112. *See* LUMB, *supra* note 86, at §§ 3.7-3.9.

113. *Goral v. Kulys*, 21 N.E.3d 64 (Ill. App. Ct. 2014).

114. *Id.* at 68-70.

115. *Id.* at 74-75. *See also* Citizen Participation Act, 735 ILL. COMP. STAT. 110/5, *et seq.* (2015) and Sandholm v. Kuecker, 962 N.E.2d 418 (Ill. 2010).

116. *Goral v. Kulys*, 21 N.E.3d 64, 82 (Ill. App. Ct. 2014).

117. *Id.* (revealing that the former candidate’s suit was really meant to chill the blogger’s exercise of freedom of speech when evaluating the statements in the context of the political campaign and election).

3. *Guava LLC v. Comcast Cable Comm. (2014)*

In *Guava v. Comcast Cable Comm.*, the Fifth District again reviewed a Rule 224 pre-trial petition in the context of a pornography case that sought the identities of numerous “John Does” served by the ISP who alleged improperly accessed content via the online provider.<sup>118</sup> The circuit court granted the distributor’s petition for the Rule 224 discovery of the anonymous parties and then the “John Does” appealed.<sup>119</sup> Upon reviewing the Rule 224 petition, the appellate court decided that the distributor’s petition did not state sufficient facts to support claims against the “John Doe” defendants.<sup>120</sup> Overall, the court summarized that Illinois courts have generally protected the identities of anonymous individuals from unreasonable inquiries and clarified that a Rule 224 petition must “state with particularity the facts necessary to state a cause of action against the individual whose identity is sought.”<sup>121</sup> The Court in this instance determined that the petitioner couldn’t satisfy the pleading standard in its Rule 224 petition for pre-trial discovery and had not made a particular statement to deem the discovery necessary under the Rule 224 norm.<sup>122</sup>

4. *Brompton Bldg. LLC v. YelpA, Inc. (2013)*

In this case involving an apartment building owner and a negative anonymous review on the Yelp website, the First Circuit Appellate Court again reviewed the Rule 224 discovery of the lower court in the context of a claim for defamation against an anonymous poster.<sup>123</sup> The circuit court dismissed the Rule 224 petition by Brompton regarding the anonymous poster on Yelp’s website who claimed that she regularly and illegally charges late rental fees at a Chicago residential apartment building and gave a review of one out of five stars through the Yelp site.<sup>124</sup> Brompton alleged

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118. *Guava, LLC. v. Comcast Cable Commc’ns, LLC*, 10 N.E.3d 974 (Ill. App. Ct. 2014)

119. *Id.*

120. *Id.* at 990.

121. *Id.* (quoting *Maxon v. Ottawa Publ’g Co.*, 929 N.E.2d 666 (Ill. App. Ct. 2010)).

122. *Id.* at 991 (revealing that it wasn’t clear in this case according to the pleadings whether the ISP subscriber associated with the IP address was necessary to identify the individuals who caused the damages because the pleadings didn’t clearly identify the ISP subscriber as the alleged hacker).

123. *See Brompton Bldg., LLC v. Yelp!, Inc.*, No. 1-12-0547, 2013 WL 416185 (Ill. App. Ct. Jan. 31, 2013).

124. *Id.* at \*1. The Yelp member even posted: “Does Yelp have negative stars? Someone, please look into this.” *Id.*

that the trial court erred in dismissing her discovery petition.<sup>125</sup> She claimed that the statements by the anonymous poster (“Diana Z.”) supported a cause of action for defamation according to Rule 224 procedure and under the *Maxon* and *Stone* standards.<sup>126</sup> Since the petitioner followed proper discovery procedure, the only issue for the court was whether the respondent was someone who was responsible for damages to Brompton for a defamation claim.<sup>127</sup> After reviewing *Stone*, the appellate court determined that the statements by the anonymous poster (“Diana Z.”) did not fall within any of the categories of defamation *per se*.<sup>128</sup> Overall, the appellate court rejected Brompton’s claim that the trial court erred and determined that the challenged comments appeared to be opinions and not statements of fact when reviewing the Yelp posting in its entirety.<sup>129</sup> Even if the statements were deemed defamatory and not subject to the innocent construction rule, the Court also reasoned that Diana Z.’s statements were made about Brompton Bldg. Co. and not the individual plaintiff because Diana Z. only created her account to rate the general property/corporation.<sup>130</sup>

5. *Lightspeed Media Corp. v. AT&T Internet Services (2012)*

In this very short Fifth District decision, the Court reviewed another Rule 224 order for pre-suit discovery to identify unnamed individuals for the petitioner.<sup>131</sup> The Court held that the lower court erred in entering the order allowing the pre-suit discovery and vacated the order.<sup>132</sup> In this case, though, the petitioner alleged that the unnamed parties illegally accessed

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125. *Id.* at \*3. *See also* *Stone v. Paddock Publ’ns, Inc.*, 961 N.E.2d 380 (Ill. App. Ct. 2011).

126. *Brompton Bldg., LLC*, 2013 WL 416185, at \*3. According to *Maxon v. Ottawa Publishing Co.*, a Rule 224 petition must have the following requirements:

First, the petition must be verified. Second, the petition must state the reason the proposed discovery is necessary. Third, the discovery is limited to the identity of one who may be responsible in damages to the petitioner. Fourth, and most importantly, the trial court must hold a hearing at which it must determine that the unidentified person is ‘one who may be responsible in damages’ to the petitioner.

*See* *Maxon v. Ottawa Publ’g Co.*, 929 N.E.2d 666 (Ill. App. Ct. 2010).

127. *Brompton Bldg., LLC*, 2013 WL 416185, at \*3.

128. *Id.* at \*6 (revealing that Diana Z.’s posting potentially falls into three of the five categories of defamation *per se*: (1) words which impute a criminal offense; (2) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; and (3) words that prejudice a party, or impute a lack of ability, in his or her trade, profession or business).

129. *Id.* at \*7.

130. *Id.* at \*8.

131. *Lightspeed Media Corp. v. AT&T Internet Serv’s*, No. 5-11-0566, 2012 WL 7110485 (Ill. App. Ct. 2012).

132. *Id.*

one or more websites owned by Lightspeed Media in violation of a federal statute.<sup>133</sup> The circuit court in that case did not hold a hearing for the Rule 224 motion after a petition was filed.<sup>134</sup> As a result, the appellate court reviewed the plain language of the rule and reiterated that a public hearing is a legal requirement under Rule 224.<sup>135</sup> Rule 224 prevents “fishing expeditions” by unprincipled petitioners by requiring a hearing and proper service to the respondents.<sup>136</sup> Overall, this case illuminates proper procedure under the language of Supreme Court Rule 224 for proper pre-suit discovery in civil cases.

#### 6. *Stone v. Paddock (2011)*

The mother (Stone) of one of the commenters on the Internet website brought a defamation claim on behalf of her minor son and requested discovery of the identity of the anonymous “Doe” defendant.<sup>137</sup> Stone’s son posed as a commenter (“UNCLEW”) on the Daily Herald’s website and engaged in comments about his mother’s campaign with the anonymous poster, “HIPCHECK16.”<sup>138</sup> Unfortunately, the comments by “HIPCHECK16” delved into disparaging comments about the plaintiff and then a response to “UNCLEW” about coming to his home instead of engaging in blog posts as follows: “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?”<sup>139</sup> The petitioner was elected as trustee of Buffalo Grove<sup>140</sup> and then received an order from the trial court permitting limited discovery of the IP address and email address of Doe before the formal Rule 224 request for discovery of the anonymous defendant.<sup>141</sup> The trial court denied Doe’s request to quash the petitioner’s subpoena for failing to comply with Rule 224 and apparently gave information

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Lightspeed Media Corp. v. AT&T Internet Serv’s*, No. 5-11-0566, 2012 WL 7110485 (Ill. App. Ct. 2012). *See also* *Maxon v. Ottawa Publ’g Co.*, 929 N.E.2d 666, 673 (Ill. App. Ct. 2010) (revealing that, “[a] hearing must be held before the court can grant or deny a Rule 224 petition . . .”).

137. *Stone v. Paddock Publ’ns, Inc.*, 961 N.E.2d 380, 386 (Ill. App. Ct. 2011).

138. *Id.* at 384-87.

139. *Id.* at 385.

140. *Id.* at 386. *But cf.*, Steve Zalusky, *Buffalo Grove Recall Vote to Make History*, DAILY HERALD (Oct. 31, 2010, 8:18 PM), <http://www.dailyherald.com/article/20101027/news/710289979/> (revealing that Stone was one of the first recalled officials in the history of Illinois).

141. *Stone*, 961 N.E.2d at 386.

about the subscriber's identity *in camera* before the formal hearing.<sup>142</sup> After the hearing on November 9, 2009, the trial court found that the identity of the Doe defendant and subscriber information based on the IP address should be released according to the Rule 224 motion and concluded that the petitioner's right to recovery outweighed the First Amendment protection of free speech in the online blog post on the newspaper's website.<sup>143</sup> In this First District defamation case, the appellate court again reviewed and analyzed alleged defamatory statements made on an Internet newspaper's comments section by an anonymous poster.<sup>144</sup>

The Appellate Court then analyzed whether the trial court erred when analyzing the defamation claim and discovery according to Rule 224 reviewing it *de novo*.<sup>145</sup> According to Supreme Court Rule 224(a)(1)(ii), the Rule 224 petition must be brought in the name of the petitioner against appropriate respondents and should also clearly identify "*the reason the proposed discovery is necessary . . .*"<sup>146</sup> According to the Rule 224 Committee Comments, the Rule is "not intended to modify in any way any other rights secured or responsibilities imposed by law," and this aligns with the clear language of the rule that it applies to defamation and other civil claims.<sup>147</sup> The defendant argued in the appeal that a defamation or review standard that is set too low would violate his and other individuals' "constitutional rights to engage in anonymous speech and deter the political speech that ensues via the Internet."<sup>148</sup> The Court determined that the recent *Maxon* standard from the Third District was the appropriate standard for reviewing a defamation claim and a trial court's Rule 224 decision.<sup>149</sup> As the *Maxon* decision noted, a dismissal motion in Illinois<sup>150</sup> provided a way to determine whether a 224 petition states a cause of action in pleading defamatory statements as not constitutionally protected.<sup>151</sup> In *Paddock*, though, the Court clarified that this burden to file the motion is on the petitioner, and the petitioner must allege facts to support a legitimate cause of action for defamation.<sup>152</sup> According to the *Paddock* review, Stone failed to clearly identify the defamatory statements as false statements of fact about her that

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142. *Id.*

143. *Id.* at 386-87.

144. *Stone v. Paddock Publ'ns, Inc.*, 961 N.E.2d 380 (Ill. App. Ct. 2011).

145. *Id.* at 387.

146. *Id.*

147. ILL. S. CT. R. 224 cmt.

148. *Stone v. Paddock Publ'ns, Inc.*, 961 N.E.2d 380, 388 (Ill. App. Ct. 2011).

149. *Id.* at 388-89.

150. 735 ILL. COMP. STAT. 5/2-615 (2015).

151. *Stone v. Paddock Publ'ns, Inc.*, 961 N.E.2d 380, 389 (Ill. App. Ct. 2011).

152. *Id.*



caused harm to her reputation.<sup>153</sup> The court also reviewed Stone's claim according to the two types of defamation in Illinois: defamation *per se*<sup>154</sup> and defamation *per quod*.<sup>155</sup> Because Stone alleged defamation *per se* in this case, the claim should have been pleaded with a "heightened level of particularity and precision."<sup>156</sup> In addition to the pleading requirements for the petitioner for the defamation action, Illinois also recognizes three actions in the context of defamation that are protectable by the First Amendment without showing that the statement(s) are factual: "(1) actions brought by public officials; (2) actions brought by public figures; and (3) actions brought against media defendants by private individuals"<sup>157</sup> and in those instances the defamation actions cannot be based on "loose and figurative speech" that no one would reasonably believe as presented as fact.<sup>158</sup> Here, the court applied this test in the context of the statement made to the petitioner's son and determined that no reasonable person would have found the alleged defamatory posting to be interpreted as a factual assertion.<sup>159</sup> The emphasized language in the case that alludes to Stone's son having men over to their home seems to be a warning about dangerous conduct over the Internet and not an assertion of fact that the son invites or even solicits men into the home as the Petitioner contended in the claim for defamation.<sup>160</sup> The Court analyzed that statements were not actionable under the defamation *per se* standards because they were reasonably interpreted

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153. *Id.* See also *Tuite v. Corbitt*, 866 N.E.2d 114 (Ill. 2006) (revealing that a statement is defamatory if it harms an individual's reputation by injuring status in the community or deterring association with the individual in the community).

154. *Stone*, 961 N.E.2d at 389 (revealing that a statement is defamation *per se* if the resulting harm is apparent and obvious on the face of the statement and then actual damage to one's reputation is not required to be plead in Illinois). There are five categories of statements that are deemed to be defamation *per se*: (1) words imputing the commission of a criminal offense; (2) words that impute infections with a loathsome communicable disease; (3) words that impute an individual is unable to perform his employment duties or otherwise lacks integrity in performing those duties; (4) words that prejudice an individual in his profession or otherwise impute a lack of ability in his profession; and (5) words that impute an individual has engaged in fornication or adultery. *Tuite v. Corbitt*, 866 N.E.2d 114 (Ill. 2006).

155. *Stone*, 961 N.E.2d at 389 (noting that defamation *per quod* actions require that a plaintiff plead actual damages to recover). See also *Imperial Apparel, Ltd. v. Cosmo's Designer Direct*, 882 N.E.2d 1011, 1018 (Ill. 2008).

156. *Id.* See also *Green v. Rogers*, 917 N.E.2d 450 (Ill. 2009).

157. *Stone*, 961 N.E.2d at 392. See also *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 882 N.E.2d 1011 (Ill. 2008).

158. *Stone*, 961 N.E.2d at 392 (noting that the test for determining protectable speech under the First Amendment for defamation claims is whether the statement could be reasonably interpreted as stating fact).

159. *Id.* at 393.

160. *Id.*

according to an innocent construction.<sup>161</sup> Thus, the appellate court reversed the trial court's orders that permitted the disclosure of Doe's identity because the petitioner did not meet the standard for pleading her defamation *per se* or defamation *per quod* claims according to the proper pleading standard in Rule 224 and as required by Section 2-615 of the Code.<sup>162</sup> Overall, the court explained that allowing those in the context of a political campaign who are easily offended by online commentary to bring suit for defamation against anonymous posters would have a "chilling effect" on the freedom of speech for those who chose to express their opinions anonymously on such online newspaper websites, blogs, and through other Internet or media portals.<sup>163</sup>

#### 7. *Maxon v. Ottawa Publishing Co. (2010)*

This case involved a few anonymous posters of allegedly defamatory content who published online comments to the "MyWebTimes" portion of the online version of *The Times*, which was published digitally by Ottawa Publishing.<sup>164</sup> The online statements and anonymous comments hinted at bribery and other impropriety in the proposed Ottawa Planning Commission's review of an ordinance to allow a bed and breakfast establishment in a residential area.<sup>165</sup> The Maxons, who were the subject of some of the purportedly defamatory statements, filed a petition for discovery under Supreme Court Rule 224 to require Ottawa Publishing to disclose essential information of the online users and obtain their identities.<sup>166</sup> After an amended petition to identify the defamatory statements, the trial court dismissed the petition and deemed them as not actionable because of the literary and social context of the statements which wouldn't pass a hypothetical motion for summary judgment while applying the *Dendrite-Cahill* defamation test.<sup>167</sup> The rule articulated in the *Dendrite* and *Cahill* cases that requires disclosure for anonymous Internet posters is a three-part test with a burden on the petitioner to show: "(1) the anonymous poster has been noti-

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161. *Id.* at 393-94. *See also* Green v. Rogers, 917 N.E.2d 450 (Ill. 2009).

162. *Stone*, 961 N.E.2d at 393-94. *See also* 735 ILL. COMP. STAT. 5/2-615 (2015).

163. *Stone*, 961 N.E.2d at 394.

164. *Maxon v. Ottawa Publ'g*, 929 N.E.2d 666, 670 (Ill. App. Ct. 2010) (revealing that each anonymous poster had a unique screen name, password for the screen name, and a valid email address, but Ottawa Publishing did not retain additional information about the individual or verify the information of each individual).

165. *Id.*

166. *Id.* at 671.

167. *Id.* at 671-72 (noting that no Illinois courts addressed the degree of analysis required to grant a Rule 224 petition seeking to identify anonymous parties in the defamation context for Internet posts; as such, the court looked to case law outside of the jurisdiction and applied the New Jersey cases of *Cahill* and *Dendrite* in their analysis).

fied of the potential claim so they may have the opportunity to appear; (2) the petitioners have set forth the exact statements that have been purportedly made by the anonymous person; and (3) the allegations meet a *prima facie* standard and are able to withstand a hypothetical motion for summary judgment . . . .”<sup>168</sup> The Appellate Court in *Maxon* reviewed the understanding and purpose of Rule 224 in the context of the Maxons’ Rule 224 petition to determine whether the trial court erred and reviewed both matters of law *de novo*.<sup>169</sup> In the end, Judge Holdridge determined that the defamed individuals had stated an adequate claim for defamation and were entitled to disclosure of the anonymous parties.<sup>170</sup> This decision was a reversal of the trial court’s decision on the defamation claim and review of the Rule 224 motion to protect the anonymous individuals.<sup>171</sup>

Unlike the trial court interpretation, the appellate court noted that Illinois courts had routinely addressed Section 2-615 dismissal motions in conjunction with defamation cases when the plaintiff should overcome the First Amendment protections as part of the *prima facie* case and as part of the Rule 224 petition.<sup>172</sup> The Court also went on to reject the lower court’s analysis and application of the *Dendrite-Cahill* test because Illinois “is a fact-pleading jurisdiction that requires a plaintiff to present a legally and factually sufficient complaint” unlike notice pleading states and, as such, must only survive the motion to dismiss.<sup>173</sup> In Illinois, the plaintiff must only present facts showing that the defendant “made a false statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages” to show a cause of action for defamation or show that the statements were defamatory *per se* by imputing a crime or showing that harm is apparent or obvious on its face.<sup>174</sup> Here, the appellate court in *Maxon* determined that the online statements and allegations that the Maxons bribed a public official could be interpreted as stating an actual fact and went beyond rhetorical hyperbole and opinion.<sup>175</sup> Therefore, the judgment of the circuit court was reversed

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168. *Id.* See also *Dendrite Int’l v. Doe*, 775 A.2d 756, 764 (N.J. Super. Ct. App. Div. 2001).

169. *Maxon*, 929 N.E.2d at 672.

170. *Maxon v. Ottawa Publ’g Co.*, 929 N.E.2d 666, 677 (Ill. App. Ct. 2010).

171. *Id.* at 678.

172. *Id.* at 673. See also *Solaia Tech., LLC v. Specialty Publ’g Co.*, 852 N.E.2d 825 (Ill. 2006) and *Imperial Apparel, Ltd. v. Cosmo’s Designer Direct, Inc.*, 882 N.E.2d 1011 (Ill. 2008).

173. *Maxon*, 929 N.E.2d at 676. See also *Cwikla v. Sheir*, 801 N.E.2d 1103 (Ill. App. Ct. 2003).

174. *Maxon*, 929 N.E.2d at 676. See, e.g., *Solaia Tech.*, 852 N.E.2d 825 (Ill. 2006) and *Owen v. Carr*, 497 N.E.2d 1145 (Ill. 1986).

175. *Maxon*, 929 N.E.2d at 676.

and remanded to pursue the Rule 224 motion.<sup>176</sup> The dissent by Justice Schmidt, though, vigorously debated the majority's proposition regarding the lack of case law to support the assertion that anonymous Internet speakers enjoy a higher degree of protection from claims of defamation than private individuals in a non-virtual realm for defamation causes of action.<sup>177</sup> This case paved the way for some clarity about the Rule 224 analysis and the proper test for successful discovery in Illinois defamation claims.

B. ILLINOIS PROCEDURE: A BRIEF SUMMARY AND A HYPOTHETICAL

The recent *Hadley* decision reaffirms the prior precedent in the context of defamation claims and successful Rule 224 pre-trial discovery motions. However, it seems to confuse a bit the constitutional protections given to political speech and extension of those protections to anonymous or unidentifiable posters in the Internet context because *Hadley* was a county politician. The decision seems to make even more apparent that defamation *per se* actions tend to be more successful in Illinois in the Rule 224 context than defamation *per quod* actions based on the above brief history of Illinois actions. Finally, the case also reveals that the statute of limitations will not bar a properly filed motion with one identifiable defendant in a complaint. Moreover, it reaffirms Rule 224 as a powerful pre-suit discovery tool against anonymous defamers in the online realm and, quite possibly, as an effective discovery mechanism for other civil claims in Illinois against anonymous or unknown parties.

To successfully file the complaint according to Supreme Court Rule 224:

- 1) Complaint must be verified according to Rule 224 and expires 60 days after issuance unless "extended for good cause" under Rule 224(b);
- 2) An action can be brought in the county of residence of the one from whom discovery is sought or in the county in which the action or proceeding might be brought;
- 3) If a deposition is sought, then the "name and address of each person to be examined, if known, or, if unknown, information sufficient to identify each person and the time and place of the deposition" must be included in the petition. (Rule 224(a)(1)(ii));

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176. *Id.* at 678.

177. *Id.* (stating that First Amendment protections extend to speech via the Internet and, especially, anonymous speech via the *Dendrite-Cahill* test).

- 4) Rule 224(a)(2) has a specific form of summons to be utilized in Illinois actions, in particular, a summons for discovery.<sup>178</sup>

The trial court (when reviewing the 224 complaint) will consider:

- 1) Whether the petition was verified according to Rule 224
- 2) Whether the petition states with particularity the facts necessary to state a claim for defamation in Illinois
- 3) Whether the 224 petition seeks only the identity of the potential defendant and no other facts for the cause of action for defamation
- 4) Whether the petition is subject to a hearing (when the court is determining whether the petition states a cause of action for defamation against the potential defendant like in *Maxon v. Ottawa*).<sup>179</sup>

Possible affirmative defenses to anticipate in Illinois defamation claims include: a) discovery of a defendant under rule 224; b) statute of limitations bars the claim (*e.g.*, death of plaintiff or defendant); c) the substantial-truth doctrine; d) absolute privilege for members of government (Governor, Attorney General, police chief, mayor, etc.); and the Citizen Participation Act (anti-SLAPP statute in Illinois protects citizen participation and anonymous postings).<sup>180</sup>

### 1. *A Hypothetical*

Imagine that you are a practicing dermatologist in Illinois and have noticed that your clients have recently stopped coming for regular visits or have moved to other skin specialists in the area based on anecdotal evidence. You might think that it is a sign of the economic downturn, but then one of your friends in a similar area of medical practice tips you off that one of your alleged former clients has posted to Facebook via an anonymous post that you are the worst dermatologist in the area because of non-response to numerous emails and text messages. This post is not true, and the alleged former client goes further and claims that you are part of a money laundering scheme with several doctors in the DeKalb county area. You

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178. See generally, MANION, *supra* note 90, and LUMB, *supra* note 86.

179. See generally, MANION, *supra* note 90, and LUMB, *supra* note 86.

180. See Eric M. Madiar & Terrence J. Sheahan, *Illinois' New Anti-SLAPP Statute*, 96 ILL. B.J. 620 (Dec. 2008) (revealing that Illinois became the 26th state to enact an Anti-SLAPP statute in August 2007).

have no idea which former client, if one, could have spread these rumors through Facebook. Now, what if the post was anonymously made within the purview of the anonymous poster's employment? What if it was really made by the dermatologist's ex-wife who is angry about child custody issues after a divorce? What if the anonymous post was made after personal injuries that were sustained as part of a medical malpractice claim? How would you recover against the possible anonymous parties and possible defendants in a variety of contexts? The suit would be unsuccessful in Federal court because of the "Good Samaritan" provision of the Communications Decency Act and are best situated in Illinois courts as a state defamation cause of action. As this hypothetical highlights, there are a variety of contexts in which Rule 224 pre-trial discovery and Section 2-402 might be useful for identifying possibly responsible parties for civil claims in Illinois. After the decision in *Hadley v. Doe*, Illinois attorneys should especially recognize that these are powerful procedural discovery tools for defamation causes of action, and they may also be more generally helpful for all civil claims when anonymity is an issue for possible defendants.

IV. CONCLUSION: ILLINOIS REQUIRES CAREFUL PLEADING AND  
DISCOVERY PROCEDURE FOR DEFAMATION CLAIMS AND ATTENTION TO  
THE NUANCES OF DEFAMATION LAW FOR DISCOVERY OF ANONYMOUS  
PARTIES AND SUCCESSFUL CLAIMS

In light of *Hadley v. Doe* and other Illinois defamation decisions, attorneys must carefully learn and recognize pre-trial discovery procedure and, especially, Rule 224 and Section 2-402 when properly filing defamation claims against unknown or unidentified anonymous posters. This will achieve more successful actions in the defamation *per se* context for statements made online and with an increasing number of possibly damaging statements made on social media, but defamation *per quod* claims are still very hard to plead and successfully recover against online defamers in the social media or Internet context. Each state has slightly different procedural rules, so it is important to thoroughly understand the discovery mechanisms and available pre-trial discovery procedures for defamation in each state. Illinois has clear norms after *Hadley* for successfully discovering the identities of online anonymous posters. Other states, though, may not have clear procedural norms for such defamation actions to seek the identity of unknown or unnamed defendants in the blossoming technological realm of social media, blogs, and other Internet sites.<sup>181</sup>

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181. See, e.g., Debra L. Innocenti, *Obtaining Identities of Online Anonymous Defamers Just Got Harder*, STRASBURGER (Sept. 3, 2014), [perma.cc/DP5S-CJTL](http://perma.cc/DP5S-CJTL) (revealing the Texas Supreme Court decision that now provide limits on discovery).