

# FIRST AMENDMENT PROTECTIONS FOR ANONYMOUS & DEFAMATORY INTERNET POSTS

## ABSTRACT

Although technological advancements like the internet have endless benefits to our society, there are also major downfalls. One of these downfalls is the protection of anonymity provided by the First Amendment. The First Amendment's Freedom of Speech includes the freedom to write, post, and share views anonymously. This freedom, in part, is justified by a person being more willing to share and express their feelings or views knowing they are safe from any retaliation. In theory, anonymity can promote the truthfulness of a publication or post by allowing the person to speak freely without any restraint. However, anonymity often leads to false and sometimes hurtful information being put out into the world. Information posted online can quickly be found and shared. When this is used to disadvantage someone, the effects can be catastrophic. When a plaintiff wants to sue an anonymous individual, the plaintiff has a hefty burden to meet. A plaintiff cannot sue an individual without properly serving them, and when a person's identity is anonymous, that is impossible. Because the First Amendment protects anonymity, the plaintiff has the burden to show there are compelling reasons why the anonymous person's identity should be revealed so they can be sued. Before the identity can be revealed, the plaintiff must prove there is a prima facie case for a defamation claim and there must be a factual and legal basis showing the speech was libelous. The plaintiff must show; (1) the information posted was false, (2) the information was published to and accessible by a third party, (3) the poster acted negligently, and (4) the information posted caused injury. If the plaintiff fails to show any of the elements, they cannot obtain the identity of the anonymous individual and cannot bring a defamation claim against them. Considering the increase in access and reliance on the internet, requiring the plaintiff to prove a prima facie case before revealing the identities of anonymous individuals is too high of a burden. Cases involving defamation or libel claims are bound to increase because future generations will continuously become more dependent on internet sources. A defamatory online post can ruin someone's reputation, career, and personal life, which can lead to catastrophic outcomes. Therefore, it should be easier to get an anonymous individual's identity, sue for defamation, and recover damages.

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I. BACKGROUND

To understand the complexities and difficulties of bringing a defamation claim, the history of the First Amendment, defamation, and a prima facie burden of proof must be reviewed.

A. THE FIRST AMENDMENT

The First Amendment of the Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a

redress of grievances.”<sup>1</sup> The First Amendment provides people the freedom of expression without government interference.<sup>2</sup> People have the right to expression through direct words and symbolic actions.<sup>3</sup> Freedom of Speech and Freedom of the Press are just two forms of protected expression provided by the First Amendment.<sup>4</sup> First Amendment protections also apply to speech on the internet.<sup>5</sup>

### 1. *The Right to Anonymity*

The right to Freedom of Speech includes the right to anonymity. The constitutional right to publish anonymously is a longstanding tradition.<sup>6</sup> It is now recognized that “an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the first amendment.”<sup>7</sup> The decision to protect anonymity is mostly motivated by the fear of retaliation, concern of social ostracism, or simply to protect one’s privacy.<sup>8</sup> Typically, the interest in protecting and allowing anonymous posts or publications outweighs the public interest in disclosing the author’s identity.<sup>9</sup>

Additionally, anonymity offers a “safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal.”<sup>10</sup> Furthermore, anonymity allows all individuals to be heard without suppression or intervention, regardless of economic, political, or social status.<sup>11</sup> However, information posted or published by anonymous individuals can still form the basis of litigation.<sup>12</sup>

### 2. *First Amendment Rights Are Not Absolute*

Although the First Amendment provides certain protections, the right to speak, anonymously or not, is not unlimited.<sup>13</sup> The freedom and protection of anonymity on the internet often lead many to “substitute gossip for

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1. U.S. CONST. amend. I.

2. *First Amendment: An Overview*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/first\\_amendment](https://www.law.cornell.edu/wex/first_amendment) (last updated Mar. 2020).

3. *Id.*

4. *Id.*

5. *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d 231, 239 (6th Dist. Ct. App. 2008).

6. *Id.* at 238.

7. *In re Anon. Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011).

8. *Krinsky*, 72 Cal. Rptr. 3d at 238.

9. *Id.*

10. *ZL Techs., Inc. v. Does 1-7*, 220 Cal. Rptr. 3d 569, 578 (1st Dist. Ct. App. 2017).

11. *Id.*

12. *Dendrite Int’l Inc. v. Doe No. 3*, 775 A.2d 756, 759 (N.J. Super. Ct. App. Div. 2001).

13. *In re Anon. Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011).

accurate reporting” because the sense that “anything goes” is increased by an obscured identity.<sup>14</sup> Courts must strike a balance between the First Amendment rights of the speaker and the rights of the plaintiff to protect its “proprietary interests and reputation.”<sup>15</sup> There are certain classes and types of speech that are not protected by the First Amendment. These include “the lewd and obscene, the profane, the libelous, and the insulting or fighting words.”<sup>16</sup>

These classes and types of speech 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 mortality.”<sup>17</sup> In other words, speech that provides little to no value or benefit to society is unprotected by the First Amendment. Defamation is one type of unprotected speech. “When vigorous criticism descends into defamation, constitutional protection is no longer available.”<sup>18</sup>

## B. DEFAMATION

The North Dakota Century Code states, “Every person . . . has the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to the person’s personal relations.”<sup>19</sup> Further, North Dakota identifies two classifications of defamation: libel and slander.<sup>20</sup> *Defamation* is defined as “a false statement which may constitute slander (spoken) or libel (written) that results in injury to another person.”<sup>21</sup> Generally, most states follow the standard of proof provided in the Restatement (Second) of Torts, section 559, which states that “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.”<sup>22</sup>

Section 558 provides the elements of defamation stating:

To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability

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14. *ZL Techs.*, 220 Cal. Rptr. 3d at 579 (citing *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d 231, 237 (Cal. Ct. App. 2008)).

15. *Dendrite Int’l Inc.*, 775 A.2d at 760.

16. *Chaplinsky v. N. H.*, 315 U.S. 568, 571-72 (1942).

17. *Id.*

18. *Krinsky*, 72 Cal. Rptr. 3d at 238.

19. N.D. CENT. CODE § 14-02-01 (2021).

20. *Id.* § 14-02-02.

21. Prac. L. & Emp., *Defamation Basics*, THOMSON REUTERS PRACT. L. (2021) <https://us.practicallaw.thomsonreuters.com/w-001-0437>.

22. *Id.*; see *infra* section III.C.

of the statement irrespective of special harm or the existence of special harm caused by the publication.<sup>23</sup>

Simplified, a defamation claim requires “the defendant (1) published a statement that (2) was defamatory (3) of and concerning the plaintiff, and (4) resulted in injury to the plaintiff.”<sup>24</sup>

Determining whether the words are libelous (written defamatory statements) requires the words “be construed in the context of the entire document” and the meaning of the document “must be determined by construing the words according to the natural and ordinary meaning a reasonable person of ordinary intelligence would give them.”<sup>25</sup> However, this determination is not necessary if the statement qualifies as defamation *per se*.

*Defamation per se* is defined as “a slanderous or libelous statement that is defamatory on its face, and therefore does not require the proof of special damages.” These statements include, “accusations of indictable crimes of moral turpitude, accusations of immorality or dishonesty . . . accusations of other indictable crimes subjecting a person to a sentence of incarceration,” or accusations “of loathsome diseases . . . .”<sup>26</sup> When a statement or communication is not defamatory *per se*, the court “must determine whether the communication is capable of a particular meaning and whether that meaning is defamatory.”<sup>27</sup>

### C. PRIMA FACIE BURDEN OF PROOF

A plaintiff seeking the disclosure of an anonymous user’s identity “must state a legally sufficient cause of action against the defendant and must make prima facie showing of the elements of that cause of action.”<sup>28</sup> A prima facie case is established by a party presenting sufficient evidence to justify a verdict in their favor.<sup>29</sup> The plaintiff must “produce sufficient evidence supporting each element of its cause of action.”<sup>30</sup> The prima facie burden has different requirements depending on whether the defamed person is a private individual or a public figure or official.

#### 1. Private Individuals versus Public Figures

When bringing a defamation suit, public officials and public figures have a higher burden than private individuals. Public officials are “governmental

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23. RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

24. *Goodman v. Performance Contractors, Inc.*, 308 F. Supp. 3d 1002, 1009 (N.D. Iowa 2018).

25. *Schmitt v. MeritCare Health Sys.*, 2013 ND 136, ¶ 13, 834 N.W.2d 627.

26. *Goodman*, 308 F. Supp. 3d at 1011.

27. *Schmitt*, 2013 ND 136, ¶ 12, 834 N.W.2d 627.

28. *ZL Techs., Inc. v. Does 1-7*, 220 Cal. Rptr. 3d 569, 613 (1st Dist. Ct. App. 2017).

29. *Id.* at 579.

30. *Dendrite Int’l Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”<sup>31</sup> However, a person can be considered a public figure, without being in public office, and still have the higher prima facie burden.<sup>32</sup>

“Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention” can be considered public figures.<sup>33</sup> Those who qualify as public figures have “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issue involved.”<sup>34</sup> For public officials or figures bringing a defamation claim, they must prove the statement was made with actual malice, meaning the statements were made “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>35</sup> Public officials or figures “must show actual malice or go remediless.”<sup>36</sup>

However, private individuals have a lower burden when bringing a defamation claim. Instead of being required to prove the statements were made with actual malice, a private individual only needs to prove the statements were made negligently regarding the truthfulness of the statements.<sup>37</sup> Lowering the burden for private individuals makes it easier for them to successfully bring a defamation claim. Simply put, the burden is lower for private individuals because they are “more vulnerable to injury” and the state has a greater interest in protecting them.<sup>38</sup>

One reason a private individual is more vulnerable is because they lack effective opportunities for rebuttal.<sup>39</sup> Public officials or figures generally “enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”<sup>40</sup> Additionally, by assuming the role of a public official or figure, they have “voluntarily exposed themselves to increased risk of injury [for] defamatory [statements].”<sup>41</sup>

Furthermore, the public’s interest in information of a public official or figure is greater than with a private individual, and the public’s interest “extends to anything which might touch on an official’s fitness for office.”<sup>42</sup> This

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31. RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

32. *Gertz v. Robert Walsh, Inc.* 418 U.S. 323, 345 (1974).

33. *Id.* at 342.

34. *Id.* at 345.

35. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280-81 (1964).

36. *Id.* at 281.

37. RESTATEMENT (SECOND) OF TORTS § 580B (AM. L. INST. 1977).

38. *Gertz*, 418 U.S. at 344.

39. *Riemers v. Mahar*, 2008 ND 95, ¶ 16, 748 N.W.2d 714.

40. *Id.*

41. *Id.* (alteration in original).

42. *Gertz*, 418 U.S. at 344-45.

includes personal attributes or character traits like “dishonesty, malfeasance, or improper motivation.”<sup>43</sup>

To summarize, it is easier for a private individual, not a public official or figure, to bring a defamation claim because they have a lower burden to prove a prima facie case. Thus, it matters who is bringing the suit because private individuals have more protections and a greater likelihood of bringing a defamation claim. A public official or figure must show actual malice, but a private individual only needs to show negligence. Once it is determined whether the defamed person is a private individual or a public official or figure, the appropriate burden must be examined.

## 2. *Malice versus Negligence*

Public officials and figures need to show the publisher of the statements acted with actual malice while private individuals only need to show negligence. Public officials and figures are prohibited from “recovering damages for defamatory falsehood . . . unless he proves that the statement was made with *actual malice*.”<sup>44</sup> According to the Restatement of Torts, “one who publishes a false and defamatory communication concerning a public official or public figure . . . is subject to liability” only if “he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard to these matters.”<sup>45</sup>

A public official or figure can have a valid defamation claim if they can show the publisher of the statement knew the statement was false, or if they can show the publisher acted in “reckless disregard of its truth or falsity[.]” to imply they acted with malice.<sup>46</sup> Reckless disregard is not measured by “whether a reasonable, prudent person would have published the statement[.]” but reckless disregard exists when there is “‘a high degree of awareness of . . . probable falseness’ of the statement, or there are ‘serious doubts as to [its] truth.’”<sup>47</sup> Two factors considered in determining whether the publisher acted with reckless disregard are, the “[a]vailability of sufficient time and opportunity to investigate the truth of the statement” and “republishing of a statement after the defendant has been notified that the plaintiff contended[ed] that it is false and defamatory . . . .”<sup>48</sup>

A defamation claim is possible whether the publisher intentionally or negligently published the defamatory statements.<sup>49</sup> Intent to injure is not an

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43. *Id.* at 345.

44. *N.Y. Times Co. v. Sullivan* 376 U.S. 254, 280-81 (1964) (emphasis added).

45. RESTATEMENT (SECOND) OF TORTS § 580A (AM. L. INST. 1977).

46. *Id.* § 580A cmt. a.

47. *Id.* § 580A cmt. d.

48. *Id.*

49. *McCarthy v. Manchester Police Dep’t*, 124 A.3d 686, 692 (N.H. 2015).

element of defamation because “defamation is often not intended or expected to injure anyone.”<sup>50</sup> The Restatement of Torts states, “One who publishes a false and defamatory communication concerning a private person” is liable if “he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts *negligently* in failing to ascertain them.”<sup>51</sup>

When private individuals bring a defamation claim, the *negligence standard* applies.<sup>52</sup> Using the negligence standard, the question regarding the publisher’s conduct is “whether the defendant acted reasonably in checking on the truth or falsity or defamatory character of the communication before publishing it.”<sup>53</sup> Applying the negligence standard requires the analysis of certain factors.<sup>54</sup> These factors include time, nature of interests, and the extent of damages.<sup>55</sup>

The *time factor* considers the question, “Was the communication a matter of topical news requiring prompt publication to be useful, or was it one in which time and opportunity were freely available to investigate?”<sup>56</sup> When there is time and opportunity to investigate further, greater due care may be required.<sup>57</sup>

The *nature of interests factor* examines the interests the publisher was seeking to promote with the publication.<sup>58</sup> For example, “Informing the public as to a matter of public concern is an important interest[.]” but “spreading mere gossip is of less importance . . .”<sup>59</sup> This factor considers the question, “How necessary was this communication to these recipients in order to protect the interest involved?”<sup>60</sup> The theory behind this factor is, if there was no substantial interest to the public in publishing the statements, then a “reasonable person would be hesitant to publish the communication unless he had good reason to believe that it was accurate.”<sup>61</sup>

The *extent of damages factor* examines how much damage was done “to the plaintiff’s reputation or the injury to his sensibilities that would be produced if the communication proves to be false.”<sup>62</sup> This factor considers the

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50. *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 746-47 (7th Cir. 2001).

51. RESTATEMENT (SECOND) OF TORTS § 580B (AM. L. INST. 1977) (emphasis added).

52. *Id.* § 580B cmt. g.

53. *Id.*

54. *Id.* § 580B cmt. h.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*



questions, “Would its defamatory connotation be known only to a few? How extensive was the dissemination? How easily might the plaintiff protect his reputation by means at his own disposal?”<sup>63</sup>

## II. EVOLUTION OF IDENTIFYING ANONYMOUS USERS

Just as the internet has changed and evolved, so has the required standard applied to determine when an anonymous user’s identity can be revealed.

### A. DENDRITE

In *Dendrite Int’l, Inc. v. Doe No.3*, plaintiff appealed an interlocutory order entered by the trial court, which denied plaintiff’s request to ascertain the identity of the defendant for a defamation claim.<sup>64</sup> The court acknowledged that “information contained in postings by anonymous users of ISP [Internet Service Provider] message boards can form the basis of litigation instituted by an individual . . . under an array of causes of action” which included defamation.<sup>65</sup> The appellate court of New Jersey affirmed the denial of plaintiff’s motion.<sup>66</sup> This decision was based on the conclusion that “[plaintiff] failed to establish harm resulting from [defendant’s] statements as an element of its defamation claim.”<sup>67</sup>

The court offered “guidelines to trial courts” for when a plaintiff seeks an order “compelling an ISP to honor a subpoena and disclose the identity of anonymous internet posters . . . .”<sup>68</sup> Before ruling on a plaintiff’s request for disclosure of an anonymous poster’s identity, trial courts must strike “a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation.”<sup>69</sup>

As part of the guidelines, trial courts should first require “the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure . . . .”<sup>70</sup> The court elaborated on the notification requirement for internet sources by stating, “These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP’s pertinent message board.”<sup>71</sup> Second, the court should require “the plaintiff to identify and

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63. *Id.*

64. 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

65. *Id.* at 759.

66. *Id.* at 760.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.”<sup>72</sup>

Additionally, the court urged the information in the complaint be “carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants.”<sup>73</sup> To meet the prima facie standard, a plaintiff must establish that “its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted . . . .”<sup>74</sup> Also, the plaintiff “must produce sufficient evidence supporting each element of its cause of action . . . prior to a court ordering the disclosure of the identity of the unnamed defendant.”<sup>75</sup>

Finally, once the court has concluded the plaintiff has met the prima facie standard, “[it] must balance the defendant’s First Amendment right of anonymous free speech against the strength of the . . . necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.”<sup>76</sup>

Applying these standards must be “undertaken and analyzed on a case-by-case basis.”<sup>77</sup> The court reasoned, “The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue[]” for each case.<sup>78</sup>

Applying these requirements and standards, the trial court’s decision was affirmed because plaintiff did not meet the prima facie standard by failing to “establish a sufficient nexus between [defendant’s] statements and [plaintiff’s] allegations of harm.”<sup>79</sup> The suggestions made by the court in *Dendrite*<sup>80</sup> have been used and applied by other courts as the issue of disclosing an anonymous internet poster’s identity has become more common.

## B. CAHILL

In *Doe v. Cahill*,<sup>81</sup> plaintiff brought a defamation claim, seeking to compel the identity of anonymous posters from a third party who had the information.<sup>82</sup> The “Superior Court judge applied a good faith standard to test the plaintiff’s complaint[,]” and subsequently ordered the third party to disclose

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 760-61.

77. *Id.* at 761.

78. *Id.*

79. *Id.* at 772.

80. 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

81. 884 A.2d 451, 454 (Del. 2005).

82. *Id.*

the identities of the anonymous posters, which the defendant appealed.<sup>83</sup> The Supreme Court of Delaware reversed the judgement “[b]ecause the trial judge applied a standard insufficiently protective of [defendant’s] First Amendment right to speak anonymously. . . .”<sup>84</sup>

The court in *Cahill* adopted a “modified *Dendrite* standard consisting only of *Dendrite* requirements one and three: the plaintiff must make reasonable efforts to notify the defendant and must satisfy the summary judgment standard.”<sup>85</sup> The court further explained the second and fourth prongs of the *Dendrite* test were not necessary and therefore would not be applied.<sup>86</sup>

Regarding the first prong, the court reasoned “regardless of the medium in which the allegedly defamatory statement is published, the plaintiff must undertake reasonable efforts to notify the anonymous defendant of the discovery request . . . .”<sup>87</sup> Thus, “to the extent reasonably practicable under the circumstances, the plaintiff must undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for order of disclosure.”<sup>88</sup> The court applied *Dendrite*’s standard for notification requirements for internet sources, explaining “in the internet context, the plaintiff’s efforts should include posting a message of notification of the discovery request to the anonymous defendant on the same message board as the original allegedly defamatory posting.”<sup>89</sup>

Regarding the third prong the court reasoned “the summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff’s right to protect his reputation and a defendant’s right to exercise free speech anonymously.”<sup>90</sup> Further, the court held “before a defamation plaintiff can obtain the identity of an anonymous defendant . . . he must support his defamation claim with facts sufficient to defeat a summary judgment motion.”<sup>91</sup>

When elaborating on the summary judgment standard, the court explained “a defamation plaintiff ‘must submit sufficient evidence to establish a *prima facie* case for each essential element of the claim in question.’”<sup>92</sup> In other words, “the defamation plaintiff, as the party bearing the burden of

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83. *Id.*

84. *Id.*

85. *Id.* at 461.

86. *Id.*

87. *Id.*

88. *Id.* at 460.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 463.

proof at trial, must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim.”<sup>93</sup>

The Superior Court applied the summary judgment standard and reversed the judgement because “[t]he statements are . . . incapable of a defamatory meaning[,]” so plaintiff “failed to plead an essential element of his claim[.]”<sup>94</sup> Because plaintiff did not “produce *prima facie* proof of that first element of a libel claim,” plaintiff could not “satisfy the summary judgment standard[.]”<sup>95</sup> The *Dendrite* and *Cahill* standards are further analyzed, explained, and applied in *Krinsky* in an attempt to find uniformity.

### C. KRINSKY

In *Krinsky v. Doe 6*, plaintiff was seeking injunctive relief and damages for allegedly defamatory statements posted on a financial message board.<sup>96</sup> In an attempt to discover the identity of ten of the anonymous posters, plaintiff subpoenaed the message-board’s host.<sup>97</sup> The defendant moved to quash the subpoena, but the trial court denied the motion.<sup>98</sup> Defendant appealed the denial, contending the anonymous posts were protected by the First Amendment.<sup>99</sup> The California Appellate Court reversed the denial because plaintiff failed to make *prima facie* showing and, therefore, had “no viable cause of action that overcame [defendant’s] First Amendment right to speak anonymously.”<sup>100</sup>

The court analyzed *Cahill*<sup>101</sup> and *Dendrite*<sup>102</sup> to determine the standard to follow and apply. After its analysis, the *Krinsky* court adopted the *Cahill* standard requiring the plaintiff to “support his defamation claim with facts sufficient to defeat a summary judgment motion.”<sup>103</sup> To meet the summary judgment requirement, the plaintiff’s claim must make a *prima facie* showing of the elements. The court adopted the first element of the *Dendrite* test like in *Cahill*, which requires “the plaintiff [to] make reasonable efforts to notify the anonymous poster about the subpoena or request for a disclosure order.”<sup>104</sup>

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93. *Id.*

94. *Id.* at 467.

95. *Id.*

96. 72 Cal. Rptr. 3d 231, 234 (6th Dist. Ct. App. 2008).

97. *Krinsky*, 72 Cal. Rptr. 3d at 234.

98. *Id.*

99. *Id.*

100. *Id.* at 251.

101. 884 A.2d 451 (Del. 2005).

102. 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

103. *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 243 (6th Dist. Ct. App. 2008) (quoting *Doe v. Cahill*, 884 A.2d. 451, 460 (Del. 2005)).

104. *Id.*

Regarding the prima facie requirement, the court reasoned that requiring a prima facie showing that a defamation case exists “ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism.”<sup>105</sup> Continuing in its analysis, the court stated to “overcome a defendant’s motion to quash a subpoena seeking his or her identity[.]” the plaintiff must “make a prima facie showing of the elements of libel . . . .”<sup>106</sup>

Regarding the notification requirement, the court reasoned the notification requirement was not unduly burdensome.<sup>107</sup> However, the court recognized there are some difficulties that may arise when attempting to notify an anonymous poster. There is a possibility the online chat room or message board used to post the defamatory statements may “no longer exist or be active by the time the plaintiff brings suit[.]”<sup>108</sup>

Thus, it would be “unrealistic and unprofitable” to require a plaintiff to “post a message notifying the anonymous defendant of the plaintiff’s discovery request on the same message board” as the court did in *Cahill*.<sup>109</sup> Further, message board hosts typically have access to the identity of the anonymous posters and can easily notify the posters of the order because hosts often have a way of contacting them. Therefore, when the message board host notifies the defendant of the order seeking their identity, “notification by the plaintiff should not be necessary.”<sup>110</sup>

The appellate court reversed the denial of the motion to quash the subpoena because plaintiff failed to prove the statements were actual facts, and therefore did not meet the prima facie standard.<sup>111</sup> Consequently, analysis of the notice requirement was not needed because a plaintiff first needs to meet the prima facie standard.

### III. DIFFICULTIES OF THE PLAINTIFF’S BURDEN

When the poster is anonymous, the plaintiff “must state a legally sufficient cause of action against the defendant, and must make a prima facie showing of the elements of that cause of action[.]” before the identity of the poster is disclosed.<sup>112</sup> Imposing the requirement of making a prima facie case before the identity is revealed can be a high, and sometimes nearly impossible burden to meet. It is important to review and analyze this burden because as the internet evolves, it might be time for the burden to evolve as well. The

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105. *Id.* at 245.

106. *Id.*

107. *Id.* at 244.

108. *Id.*

109. *Id.*; see *supra* section II.B.

110. *Krinsky*, 72 Cal. Rptr. 3d at 244.

111. *Id.* at 251.

112. *ZL Techs., Inc. v. Does 1-7*, 220 Cal. Rptr. 3d 569, 580 (1st Dist. Ct. App. 2017)

use of and reliance on the internet is steadily increasing, which means there will most likely be an increase in injured persons and claims for defamation.

In 2019, of the 7.7 billion people in the world, at least 3.5 billion people had access to the internet and were online.<sup>113</sup> Some of the most popular uses of the internet are social media platforms, which are used by one-third of people in the world and more than “two-thirds of all internet users.”<sup>114</sup> Social media use drastically increased from “5% in 2005 to 79% in 2019.”<sup>115</sup> According to a survey from the Pew Research Center, “adults aged 18 to 29 in the U.S. are more likely to get news indirectly via social media than directly from print newspapers or news sites; and they also report being online ‘almost constantly.’”<sup>116</sup>

Although the internet has many benefits, this dramatic increase and reliance on internet and social media sources opens the floodgates for anonymous users to make defamatory posts. With the internet and its protections of anonymity, it is easier to create and post defamatory statements about an individual. Additionally, it is easier to share defamatory posts because it is as simple as a couple clicks or taps on a laptop or smartphone. The internet allows posts to be quickly dispersed and spread across a state, country, nation, or even the world.

Once a post is on the internet, it is nearly impossible to delete, remove, or prevent from spreading. Therefore, the damage to one’s reputation can be immense and attempts to fix the damage can be futile. Hence, an increase in defamation claims and suits will likely occur. However, imposing the high prima facie burden on a plaintiff for the disclosure of an anonymous user’s identity will make it difficult and even impossible for some damaged individuals to successfully bring a claim.

As the court in *Dendrite* explained, “the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis prior to a court ordering the disclosure of the identity of the unnamed defendant.”<sup>117</sup> Consequently, a plaintiff needs to provide sufficient evidence to meet all the elements of a defamation claim before they can obtain an anonymous user’s identity.

#### A. PROVING THE NEGLIGENCE STANDARD

The Restatement of Torts states, “to create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an

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113. Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media>.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Dendrite Int’l, Inc., v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

unprivileged publication to a third party; (c) fault amounting at least to 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 publication.”<sup>118</sup> One is liable for defamation against a *private individual* “if, but *only if*, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts *negligently* in failing to ascertain them.”<sup>119</sup>

Thus, a private individual trying to bring a defamation claim against an anonymous user, must show either that the defendant knew the facts were false and published them anyways, or the defendant did not act “reasonably in checking on the truth or falsity or defamatory character of the communication before publishing it.”<sup>120</sup> This can be difficult to accomplish when the plaintiff does not know the identity of the defendant because the identity can help prove or disprove some of the elements. Namely, knowing who the person is makes it easier to prove factor (a) and factor (c).<sup>121</sup>

Regarding factor (a), proving the defendant knew the statement was false and defamatory towards the plaintiff can be difficult without knowing the defendant’s identity. Depending on who the defendant is, it is possible that the defendant genuinely did not know the statements were false. For example, if the defendant is a friend, acquaintance, or known associate of the plaintiff, it would be easier to show the defendant knew the statements were false due to the nature of the relationship between the parties. A friend, acquaintance, or known associate typically has more knowledge about an individual than a stranger would. Not knowing the identity of the defendant makes it harder to prove essential elements because the plaintiff has no idea about the defendant’s level of knowledge.

Regarding factor (c), proving whether the defendant acted negligently by failing to ascertain the truthfulness or falsity of the statements can be difficult without knowing the defendant’s identity. Like factor (a), the degree of effort needed when ascertaining truthfulness or falsity somewhat depends on who the defendant is and what, if any, the connection is between them and the plaintiff. If the defendant knows or has some connection with the plaintiff, it is not unreasonable to expect them to make a greater effort because they are more likely to have questions or reasonable doubts about the statements’ truthfulness.

On the other hand, if the plaintiff is a stranger to the defendant, the defendant knows little to nothing about the plaintiff, or there is no connection

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118. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

119. *Id.* § 580B (emphasis added).

120. *Id.*

121. *Id.*

whatsoever between the two, it is not unreasonable for them to make a lesser effort when ascertaining truthfulness. Not knowing the identity of the defendant makes it harder to prove the defendant acted negligently in regard to the truthfulness or falsity of the statements. If the plaintiff has no idea who the defendant is, the plaintiff cannot discover or recognize a relationship or connection to help examine the presence of negligence. In addition to the difficulty of proving negligence, not knowing the defendant's identity poses difficulty for other necessary factors, like providing notice.

## B. PROVIDING NOTICE

As previously stated, the *Dendrite* test requires the plaintiff to (1) “undertake efforts to notify the anonymous posters[.]” (2) “identify and set forth the exact statements purportedly made by each anonymous poster[.]” and (3) “produce sufficient evidence supporting each element of its cause of action, on a prima facie basis[.]”<sup>122</sup> The factors of the *Dendrite* test that pose difficulties for plaintiffs bringing a defamation claim are factors (1) and (3). Factor (3) has already been discussed, but the requirement that the plaintiff properly provide notice to the anonymous defendants is another problem for the plaintiff.

When bringing a defamation claim, a plaintiff must “attempt to notify the anonymous internet poster that he or she is the subject of a subpoena or application for a disclosure order, giving a reasonable time for the poster to file opposition.”<sup>123</sup> This requirement is an attempt to properly balance “a plaintiff’s reputational interests with the First Amendment rights of anonymous defendants.”<sup>124</sup> A plaintiff has limited ways available to properly notify anonymous defendants.

One way of notifying anonymous defendants is the posting requirement, which requires a plaintiff “post a message notifying the anonymous defendant of the plaintiff’s discovery request on the same message board where the allegedly defamatory statement was originally posted.”<sup>125</sup> This requirement has gotten criticism because it is “more idealistic than practical” because a “wronged plaintiff is unlikely to want to keep a false assertion alive by inviting continued debate.”<sup>126</sup>

Also, it is “simpler and more effective to require the recipient of the subpoena (who likely knows the identity of the anonymous defendant, or at least

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122. *Dendrite*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001); see *supra* section II.A.

123. *ZL Techs., Inc. v. Does 1-7*, 220 Cal. Rptr. 3d 569, 581 (1st Dist. Ct. App. 2017).

124. *Id.* at 581-82.

125. *Id.*

126. *Id.*



knows how to contact them) to notify defendants.”<sup>127</sup> Because there is a genuine dispute as to who is responsible for providing notice, the decision is left to the “trial court to determine in the circumstances of each case who should notify the anonymous defendant of the efforts to discover his identity.”<sup>128</sup>

This becomes a problematic burden for plaintiffs when it is determined they are required to provide notice to the anonymous defendant. A plaintiff is limited in their ability to properly provide notice to an anonymous defendant. Also, following the posting requirement tends to hurt the plaintiff more because the plaintiff would be reposting information about the defamatory statements, or the defamatory statements themselves. Without following the posting requirement, the plaintiff typically does not have an effective way to provide proper notice to the defendant and therefore, cannot successfully bring a defamation claim.

For example, in *ZL Techs., Inc. v. Does 1-7*, the trial court entered a judgment dismissing the complaint with prejudice for “failure to serve defendants.”<sup>129</sup> Before trial, plaintiff served a subpoena on the website’s owners requesting records that would provide the anonymous posters’ identities and contact information.<sup>130</sup> The owners objected to the subpoena because “compulsory disclosure of defendants’ identities would violate their free speech rights under the First Amendment.”<sup>131</sup> Because the owners objected, plaintiff then filed a motion to compel the owners to comply with the subpoena.<sup>132</sup> The trial court denied the motion because the “defendants had a First Amendment right to remain anonymous” and it was “unclear’ whether [plaintiff] . . . might have alternatives for discovering their identities.”<sup>133</sup>

In response to the trial court’s order, plaintiff “explored independent methods for identifying defendants, without success.”<sup>134</sup> After the trial court denied plaintiff’s “renewal of the subpoena to compel” the owners to identify the defendants, the court dismissed plaintiff’s complaint with prejudice for “failure to serve defendants” and plaintiff appealed.<sup>135</sup> The trial court dismissed the complaint with prejudice for “failure to serve defendants,” and reversed and remanded<sup>136</sup> despite finding there was a “legally sufficient basis

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127. *Id.* (quoting *Solers, Inc. v. Doe*, 977 A.2d 941, 954 (D.C. Ct. App. 2009)); see *supra* section II.C.

128. *ZL Techs.*, 220 Cal. Rptr. 3d at 581-82.

129. *Id.* at 575.

130. *Id.* at 576.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 575.

for [plaintiff's] defamation cause of action."<sup>137</sup> The case is an example of how detrimental it can be when a court requires a plaintiff to provide notice to the anonymous posters.

As illustrated in *ZL Techs.*,<sup>138</sup> when the trial court makes plaintiff responsible for providing notice, it imposes a nearly impossible burden on the plaintiff. Therefore, a plaintiff bringing a defamation claim should rarely be responsible for providing notice to the defendant. Providing notice to defendants is important, but the burden of notification should not be on the plaintiff. Typically, it is easier and more cost-efficient for the subpoenaed party to provide notice. Placing this requirement on the plaintiff creates unnecessary obstacles for the plaintiff to overcome.

### C. EIGHTH CIRCUIT STANDARDS AND BURDENS

North Dakota has statutes regarding defamation that help form the standards that would be applied when handling a defamation case involving an anonymous poster. As previously stated, the North Dakota Century Code dictates that "every person . . . has the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to the person's personal relations."<sup>139</sup> Further, North Dakota identifies two classifications of defamation: libel and slander.<sup>140</sup> *Defamation* is defined as "a false statement which may constitute slander (spoken) or libel (written) that results in injury to another person."<sup>141</sup>

Most states follow the standard of proof provided in the Restatement (Second) of Torts section 559, which states that "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."<sup>142</sup>

North Dakota follows section 559 by defining libel as a "false and unprivileged publication . . . which *exposes any person to hatred, contempt, ridicule, or obloquy*, or which *causes the person to be shunned or avoided*, or which has a tendency to *injure the person in the person's occupation*."<sup>143</sup> Although there is not an abundance of case law regarding the application of First Amendment rights and protections when seeking anonymous posters identities, there are some cases showing the standards that have been followed in the Eighth Circuit.

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137. *Id.* at 595

138. *Id.*

139. N.D. CENT CODE § 14-02-01 (2021).

140. *Id.* § 14-02-02.

141. *See* Prac. L. & Emp., *supra* note 21.

142. *Id.*

143. N.D. CENT. CODE § 14-02-03 (2021) (emphasis added).

### I. North Dakota

Unfortunately, North Dakota has no cases regarding the standard for obtaining the identity of anonymous online posters. In fact, there are few North Dakota defamation cases involving online posts, even when the identity of the poster is known. This is most likely because the current standards typically followed by courts make it difficult to bring and prevail in a defamation suit. There is a consensus that defamation claims “can be a difficult course of action for lawyers and their clients to pursue.”<sup>144</sup> This is partly because the “elements necessary to successfully argue a defamation claim typically remain consistent in the face of social media,” but also due to the vast and “altogether crowded nature of the internet.”<sup>145</sup>

Additionally, anonymity poses more difficulties because “anonymity is the stock and trade of the internet and tracking down the real identity behind an offending comment is likely to consume a great deal of time and resources.”<sup>146</sup> However, although there are limited North Dakota cases involving online defamation, there are some non-online defamation cases that help illustrate, generally, the elements and standards used by North Dakota cases.

For example, in *Riemers v. Mahar*, the court found plaintiff was a “public figure” following the standard from *Gertz*,<sup>147</sup> which required plaintiff to “present clear and convincing evidence [defendant’s] statements were false and were made with actual malice.”<sup>148</sup> Because plaintiff “failed to present any evidence of malice,” the court “presumed such evidence does not exist.”<sup>149</sup> Therefore, the district court properly granted summary judgment because plaintiff “failed to raise a genuine issue of material fact about whether the alleged defamatory statements . . . were made with actual malice.”<sup>150</sup> *Riemers* illustrates how North Dakota courts follow the *Gertz* standard of public versus private individuals and actual malice versus negligence for defamation cases.

Also, in *Schmitt v. MeritCare Health Sys.*, the court analyzed how to handle statements that are “technically true,” but “constitute defamation by implication because they use innuendo, insinuation, or sarcasm to convey an untrue and defamatory meaning.”<sup>151</sup> The court reasoned when a case involves

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144. Frank Ready, *Want to Win a Social Media Defamation Case? Don’t Start One*, LEGAL TECH NEWS (Dec. 18, 2019, 11:00 AM), <https://www.law.com/legaltechnews/2019/12/18/want-to-win-a-social-media-defamation-case-dont-start-one/>.

145. *Id.*

146. *Id.*

147. *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323 (1974).

148. *Riemers v. Mahar*, 2008 ND 95, ¶ 19, 748 N.W.2d 714; *see supra* sections I.B.1 & I.B.2.

149. *Riemers*, 2008 ND 95, ¶ 20, 748 N.W.2d 714.

150. *Id.*

151. 2013 ND 136, ¶ 9, N.W.2d 627.

statements of “a defamatory innuendo or insinuation, the court must decide whether the communication is capable of a particular meaning and whether that meaning is defamatory.”<sup>152</sup>

Applying the Restatement (Second) of Torts section 614, the court explained, “(1) The court determines (a) whether a communication is capable of bearing a particular meaning, and (b) whether that meaning is defamatory. (2) The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.”<sup>153</sup> Expanding on this, the court continued the “relevant words must be construed in the context of the entire document, and the sense or meaning of the document must be determined by construing the words according to the . . . ordinary meaning” a reasonable and intelligent person would give.<sup>154</sup> *Schmitt* illustrates how North Dakota courts follow the Restatement when determining whether statements are defamatory.

Further, in *Wagner v. Miskin*, the court had to decide whether posting defamatory statements online was actionable defamation when the statements were obtained from a privileged hearing.<sup>155</sup> The statements were obtained from a hearing conducted by the University of North Dakota regarding the conduct of a student towards a professor.<sup>156</sup> In a previous case, North Dakota acknowledged school board meetings and hearings “have been considered ‘official proceedings authorized by law.’”<sup>157</sup> However, the professor was not alleging he was defamed at the hearing, but rather that he was defamed later when the student made online posts about him.<sup>158</sup>

The court explained how even privileged statements are limited because they are “not privileged for all subsequent publications by virtue of initially being spoken in a privileged proceeding.”<sup>159</sup> Additionally, the court reasoned “even an ‘absolute’ privilege does not permit an individual to categorically republish possibly defamatory statements without consequences.”<sup>160</sup> Therefore, the defamatory online posts were not privileged, and the student was found liable for defamation.<sup>161</sup> *Wagner* illustrates how privileged statements, that are subsequently posted online, are analyzed in North Dakota.

Although North Dakota has little to no case law pertaining to an anonymous poster’s First Amendment rights when posting defamatory statements

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152. *Id.* ¶ 12.

153. *Id.*; RESTATEMENT (SECOND) OF TORTS § 614 (1977).

154. *Schmitt*, 2013 ND 136, ¶ 12, N.W.2d 627.

155. *Wagner v. Miskin*, 2003 ND 69, ¶ 13, 660 N.W.2d 593.

156. *Id.* ¶ 3.

157. *Id.* ¶ 13.

158. *Id.*

159. *Id.* ¶ 14.

160. *Id.*

161. *Id.* ¶ 23.

online, other states within the Eighth Circuit, particularly Minnesota, have analyzed and ruled on the issue.

## 2. *Minnesota*

As previously stated, North Dakota has no cases regarding the standard for obtaining the identity of anonymous online posters. Therefore, North Dakota practitioners will likely look to Minnesota case law for guidance regarding the issue. In Minnesota, a plaintiff bringing a defamation claim must “prove that the defendant made: (a) a false and defamatory statement about the plaintiff; (b) in unprivileged publication to a third party; (c) that harmed the plaintiff’s reputation in the community.”<sup>162</sup>

In *Weinberger v. Maplewood Rev.*, a reporter appealed an order granted by the district court that compelled him to disclose the identities of people who made defamatory statements published in the news article about the plaintiff.<sup>163</sup> Plaintiff sued the defendants for defamation “alleging that they collaborated to remove him from his position . . . by destroying his reputation through spreading false rumors and publishing false information in the *Maplewood Review*.”<sup>164</sup> Because the statements were posted in a newspaper, the court needed to analyze the “defamation exception found in the Minnesota Free Flow of Information Act” (hereinafter “The Act”).<sup>165</sup>

The Act was developed to “protect the public interest by giving the news media ‘a substantial privilege not to reveal sources of information or to disclose unpublished information.’”<sup>166</sup> The privilege protected anyone “who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of . . . publication to the public.”<sup>167</sup> However, there are two exceptions to the privilege that require “disclosure of unnamed sources under certain limited circumstances.”<sup>168</sup>

The second exception requires disclosure when the plaintiff shows: (1) the identity will lead to relevant evidence to show actual malice, (2) there is probable cause that the source has information relevant to the defamation, and (3) there are no alternatives for obtaining the information.<sup>169</sup>

First, a plaintiff must “demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice.”<sup>170</sup> This does not mean

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162. *Weinberger v. Maplewood Rev.*, 668 N.W.2d 667, 673 (Minn. 2003).

163. *Id.* at 669.

164. *Id.*

165. *Id.* at 671.

166. *Id.* at 672.

167. *Id.*

168. *Id.*

169. *Id.* at 673.

170. *Id.*

the plaintiff “has to prove that the declarant indeed spoke with actual malice[.]” but only that the “plaintiff establish that the identity of the source will lead to relevant evidence on the issue of actual malice.”<sup>171</sup> The court explained “when the identity of the speaker is known and clearly identified, all that plaintiff needs to establish to prove actual malice is what the defendant knew at the time the statements were made[.]” but when the “identity of the speaker is hidden under a cloak of anonymity . . . it is self-evident that the identity of the speaker will lead to relevant evidence on the issue of actual malice.”<sup>172</sup>

Second, the court must determine if “there is probable cause to believe that sources have information clearly relevant to the issue of defamation.”<sup>173</sup> Probable cause in civil cases constitutes a “‘*bona fide* belief in the existence of the facts essential under the law for the action and such as would warrant a [person] of ordinary caution, prudence, and judgment under the circumstances, in entertaining it.’”<sup>174</sup> Finally, the court must determine whether “the information cannot be obtained by any alternative means or remedy less destructive of [F]irst [A]mendment rights.”<sup>175</sup>

The Supreme Court of Minnesota concluded plaintiff satisfied “each of the statutory requirements for disclosure” and therefore, the order compelling disclosure was proper, and the defendants had to comply.<sup>176</sup> *Weinberger* shows how a plaintiff can obtain the identities of anonymous sources when the statements are posted in a newspaper, but the next case shows how a plaintiff can obtain the identities of anonymous posters when the statements are posted online.

In *E. Coast Test Prep LLC v. Allnurses.com, Inc.*,<sup>177</sup> a provider of test preparation services brought a defamation suit against a nurse networking website regarding several anonymous posts.<sup>178</sup> Plaintiff moved to compel the website to reveal the identities of the anonymous posters, but defendant objected. The district court sustained the objection and denied the motion.<sup>179</sup> The court explained that “the ‘basic consensus’ as to how ‘a court should protect rights to anonymous speech in the context of a request for production’” required four findings.<sup>180</sup>

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171. *Id.*

172. *Id.* at 674.

173. *Id.*

174. *Id.* (alteration in original).

175. *Id.* at 673.

176. *Id.* at 675.

177. 309 F. Supp. 3d 644, 644 (D. Minn. 2017).

178. *Id.*

179. *Id.*

180. *Id.* at 654.

First, a plaintiff requesting discovery of an anonymous poster's identity "must make reasonable efforts to notify the speaker by, for example, attempting notice via the same medium used by the speaker to send or post the at-issue message."<sup>181</sup> This requirement "gives the speaker the opportunity to seek to quash the discovery request on their own."<sup>182</sup>

Second, the plaintiff "must produce prima facie support for all of the elements of his or her case that are within his or her control."<sup>183</sup> Requiring a prima facie showing "ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism."<sup>184</sup> Prima facie evidence, the court explained, is evidence that "will support a ruling in favor of its proponent if no controverting evidence is presented."<sup>185</sup>

Third, the court "must consider whether the plaintiff has identified specific statements made by the anonymous speakers and consider 'whether there is an alternative means of obtaining the information.'"<sup>186</sup>

Finally, if the first three factors do not "make it abundantly clear," then the court must determine whether the plaintiff "has demonstrated an interest in obtaining the disclosure it seeks . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of the constitutionally protected right."<sup>187</sup> The United States District Court concluded the plaintiff did not make a prima facie case for defamation because the statements posted were opinions and therefore, all the essential elements for defamation were not proved.<sup>188</sup>

The court in *E. Coast* analyzed, explained, and applied the requirements previously discussed in *Dendrite*,<sup>189</sup> *Cahill*,<sup>190</sup> and *Krinsky*.<sup>191</sup> Although *E. Coast*<sup>192</sup> was not a North Dakota case, North Dakota courts will likely refer to the case for guidance when a similar case arises because Minnesota is in the same circuit, the case is recent, and Minnesota used analysis and guidance similar to that used in North Dakota. Therefore, North Dakota should closely follow and apply the same tests, standards, and requirements as Minnesota

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181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 645.

185. *Id.* at 672.

186. *Id.* at 645.

187. *Id.*

188. *Id.* at 674.

189. *See supra* section II.A.

190. *See supra* section II.B.

191. *See supra* section II.C.

192. *E. Coast Test Prep LLC v. Allnurses.com, Inc.*, 309 F. Supp. 3d 644 (D. Minn. 2017).

did. Accordingly, North Dakota should use the tests, standards, and requirements from *Dendrite*,<sup>193</sup> *Cahill*,<sup>194</sup> and *Krinsky*.<sup>195</sup>

#### IV. OVERVIEW AND RECOMMENDATIONS

Defamatory statements anonymously posted online can be debilitating and sometimes life shattering. The fast-paced nature of the internet allows things to quickly be posted, shared, and spread. Once something is posted online, it is nearly impossible to completely delete and remove it. As the use of the internet steadily increases, the number of people being defamed by an anonymous poster will also steadily increase.

Unfortunately, the high burden imposed on plaintiffs make it difficult, if not impossible, to bring a claim and receive relief, either injunctive or monetary. Due to the burdensome obstacles plaintiffs must overcome, many give up and stop trying to bring a claim. Of these obstacles, the right to anonymity protected by the First Amendment is one of the most difficult to overcome.

The First Amendment's protection for Freedom of Speech includes anonymity, which means people have the right to post anonymously without fear of harassment or retaliation. However, just as people have the right to post anonymously, people have the right to protect their reputation. Thus, defamation is not protected by the First Amendment because it is damaging and typically has little to no societal benefits. Nevertheless, the high burden placed on plaintiffs creates an imbalance between anonymous posters and defamed individuals regarding anonymous, defamatory posts.

As the law stands, it appears defamed individuals' rights to protect their reputations are less important than peoples' rights to anonymity. Often, the right to anonymity trumps the right to protection from reputational harm, mostly because the plaintiff cannot meet their high burden and therefore cannot succeed on a defamation claim. As the technological world continues to evolve, the requirements needed for bringing a defamation claim need to evolve as well. This evolution can be accomplished, while still protecting the right to anonymity, by changing the notification and prima facie requirements.

A practical alternative for the notification requirement is to shift the burden from the plaintiff to the subpoenaed party. The difficulties with plaintiff bearing this burden are illustrated in *ZL Techs., Inc. v. Does 1-7* where the court required the plaintiff to "attempt to notify the anonymous internet poster that he or she is the subject of a subpoena or application for a

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193. See *supra* section II.A.

194. See *supra* section II.B.

195. See *supra* section II.C.



disclosure order, giving a reasonable time for the poster to file opposition.”<sup>196</sup> A plaintiff has limited ways available to properly provide notice, and the posting requirement tends to damage plaintiffs more because they must restate and repost the defamatory statements, which helps spread them further.<sup>197</sup>

Requiring the recipient of the subpoena to notify defendants is a simpler and more effective process because the recipient most likely already knows the defendant’s identity, or at least knows how to contact them to put them on notice.<sup>198</sup> This is a simple and painless change that helps protect both the anonymous poster and the defamed individual. The poster keeps their anonymity and the defamed party is relieved of one of the difficult processes of bringing the claim. Therefore, plaintiffs should not be responsible for notifying defendants, and courts should require the recipient of the subpoena to notify defendants. Another simple change pertains to the prima facie requirement posed on plaintiffs.

In *Weinberger v. Maplewood Rev.*, the court identified three requirements that need to be met before a plaintiff can obtain the identity of an anonymous source whose defamatory statements were published in the newspaper.<sup>199</sup> The first requirement is that the plaintiff must “demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice.”<sup>200</sup> The case required a showing of actual malice because plaintiff was classified as a public figure as opposed to a showing of negligence for a private individual.<sup>201</sup> In the court’s explanation, it is apparent how this standard makes it easier for plaintiffs to bring a claim.

The court reasoned when the identity of the speaker is anonymous, it is clear that the identity of the speaker will lead to “relevant evidence on the issue of actual malice[,]”<sup>202</sup> which subsequently will help plaintiffs meet their burden. As previously discussed, knowing the defendant’s identity makes it easier for plaintiffs to meet all the elements and make a prima facie case because knowing the defendant’s identity helps prove elements pertaining to knowledge, negligence, and sometimes, intent.<sup>203</sup>

Therefore, this standard should be applied for anonymous online posts in addition to anonymous publications in newspapers. Instead of requiring a prima facie showing *before* obtaining the defendant’s identity, courts should

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196. 220 Cal. Rptr. 3d 569, 614 (1st Dist. Ct. App. 2017); *see supra* section III.B.

197. *ZL Techs.*, 220 Cal. Rptr. 3d 569, 615 (1st Dist. Ct. App. 2017).

198. *Id.*

199. 668 N.W.2d 667, 673 (Minn. 2003).

200. *Weinberger*, 668 N.W.2d 667, 673 (Minn. 2003).

201. *See supra* section III.A.

202. *Weinberger*, 668 N.W.2d 667, 674 (Minn. 2003).

203. *See supra* section III.A.

follow the first requirement in *Weinberger*,<sup>204</sup> which allows plaintiffs to make a prima facie showing *after* obtaining the defendant's identity, lessening plaintiff's burden. This change would help protect both the anonymous poster and the defamed individual.

Courts should first require a plaintiff to show how knowing the defendant's identity would provide relevant evidence regarding an element of a defamation claim. If the plaintiff fails to show this, revealing the defendant's identity would be unnecessary because the plaintiff would still be unable to bring a defamation claim. However, if the plaintiff succeeds, they should be able to discover the defendant's identity. After obtaining the identity, a plaintiff would still be required to make prima facie showing to bring their claim. The poster keeps their right to anonymity, unless the defamed party shows an evidentiary need for their identity, and the defamed party has another difficult burden alleviated.

## V. CONCLUSION

Overall, to protect and balance both parties' rights, courts should require the subpoenaed party to notify the defendant and allow plaintiffs to obtain an anonymous poster's identity *before* making a prima facie showing, so long as the plaintiff can demonstrate an evidentiary need for the identity.

Because North Dakota has not reviewed a case that required this analysis, researching and developing these standards now could save time and help with preparation for a defamation case involving an anonymous poster. Due to the rising prevalence of these issues, North Dakota will likely experience similar cases soon. By reconsidering the standards that have been applied in previous cases, North Dakota could help level the playing field and help anonymous posters and defamed individuals have more balanced protections and rights as it pertains to defamatory statements.

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204. *Weinberger*, 668 N.W.2d 667 (Minn. 2003).

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