

IN WAYNE COUNTY CIRCUIT COURT

FAZLUL SARKAR,

Plaintiff,

Case No. 14-013099-CZ

vs.

Hon. Sheila Ann Gibson

JOHN and/or JANE DOE(S),

Defendant(s).

14-013099-CZ

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**SUPPLEMENTAL BRIEF WITH NEW EVIDENCE
IN SUPPORT OF MOTION FOR RECONSIDERATION**

Plaintiff previously (on March 11, 2015) moved for reconsideration of the court's March 9, 2015 order quashing the subpoena to PubPeer of most of the comments regarding the plaintiff. Plaintiff supplements that motion with newly discovered evidence as follows:

FACTS

Plaintiff subpoenaed certain documents from Wayne State University (WSU). Included in the subpoena response that was received on March 31, 2015 was the email exchange that is referenced in paragraph 40 (c) of plaintiff's complaint. That paragraph reads:

40 c. Then an unregistered user (likely the same one, given the context) reveals [on PubPeer] that s/he is either a person at Wayne State University who made a formal complaint against Dr. Sarkar, or is otherwise privy to the a person who did so:

Unregistered Submission:

(June 18th, 2014 4:51pm UTC)

Has anybody reported this to the institute?

Unregistered Submission:

(June 18th, 2014 5:43pm UTC)

Yes, in September and October 2013 the president of Wayne State University was informed several times.

The Secretary to the Board of Governors, who is also Senior Executive Assistant to the President Wayne State University, wrote back on the 11th of November 2013:

"Thank you for your e-mail, which I have forwarded to the appropriate individual within Wayne State University. As you are aware, scientific misconduct investigations are by their nature confidential, and Wayne would not be able to comment on whether an inquiry into your allegations is under way, or if so, what its status might be.

"Thank you for bringing this matter to our attention."

As the court will recall, the court denied PubPeer's motion to quash the subpoena concerning this paragraph only, stating on the record (words to the effect) that the response from WSU could be interpreted to infer that the poster alleged research misconduct against Dr. Sarkar.

The entire email chain has now been obtained from WSU and is attached as an exhibit to this memoranda. It indicates that the court's instinct was entirely correct. The person who posted wrote on November 10, 2013:

“Dear Secretary to the board of governors, Wayne State University, Julie Miller:

“I am writing to you about **multiple scientific concerns** about the published work of **Fazlul H Sarkar** which have been aired on Pubpeer.

“You can find the entries on Pubpeer here: ...

“Many of the entries mention things which amount to what many think of as **scientific misconduct....**” [emphasis in original; entire email attached]¹

This email is hugely significant.

Most importantly, it completely contradicts the multiple assertions made by PubPeer in its written and oral arguments to the court that “the comments Dr. Sarkar complains of are not capable of defamatory meaning ...” [PubPeer's motion to quash, p. 12]. Specifically, concerning paragraph 40 (c) (the email chain reproduced above), PubPeer argued:

“... Dr. Sarkar has attempted to twist the meaning of this PubPeer comment into a charge of ‘research misconduct.’ ... That's not what the comment says or even implies. ... Moreover, Dr. Sarkar is wrong in arguing that Wayne State's use of the phrase ‘scientific misconduct investigation’ suggests that the PubPeer commenter accused him of misconduct.” [PubPeer's supplemental brief, pp. 4-5]

Simply put, PubPeer is dead wrong. They have argued repeatedly that there is no way any of the pleaded statements are capable of defamatory meaning – i.e., accusing Dr. Sarkar of

¹ The email is signed “Clare Francis.” This is almost certainly a pseudonym for someone who is apparently somewhat notorious for making accusations against various scientists of research misconduct. See, for example, <http://www.elsevier.com/connect/its-not-that-clare-francis-is-a-pseudonym-its-that-the-pseudonym-is-clare-francis>. It is apparent that “Clare Francis” is one of the anonymous defendants whose identity is necessary so that Dr. Sarkar's complaint may move forward. It should be noted that the subpoena response from WSU does not include the IP address of “Clare Francis,” and that information is still needed from PubPeer pursuant to the court's order denying the motion to quash for this particular email (paragraph 40 (c) of the complaint).

intentional research misconduct. On the contrary – even the anonymous poster and emailer was astute enough to know that “Many of the entries mention things which amount to what many think of as **scientific misconduct...**” This supports Dr. Sarkar’s argument all along that in the scientific community, people reading on PubPeer would be fully aware that he was being accused of intentional research misconduct - a serious charge and accusation of illegal acts - rather than simply stating their opinion that certain images resembled each other.

If this anonymous defendant who emailed WSU was aware that the posts on PubPeer could be read as accusations of scientific misconduct, then it completely destroys PubPeer’s arguments that the statements on PubPeer were not capable of such a defamatory meaning.

Since the pleadings must be taken in a light most favorable to the plaintiff, with all inferences to be drawn in the plaintiff’s favor: to the extent this court relied on the argument that the complained-of words could not be interpreted as accusations of intentional misconduct, the **new evidence** obtained from WSU compels a different conclusion.

LEGAL STANDARD

MCR 2.119 (F) permits rehearing or reconsideration of a decision where a there was a “palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.” “No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs.” [Id., (2)] This court rule gives the court “considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties...” *Bakian v Nat'l City Bank (In re Estate of Moukalled)*, 269 Mich App 708, 714 (2006).

In addition, a motion for reconsideration may be based on a different court rule such as MCR 2.612 (C) (1) (b), newly discovered evidence, which is a fair characterization of the recent WSU subpoena response.

W H E R E F O R E for the reasons set forth above, and in his original motion for reconsideration, plaintiff respectfully that the court reconsider its order of March 9, 2015 and deny PubPeer's motion to quash, or rehear the matter accordingly.

Respectfully submitted,

NACHT, ROUMEL, SALVATORE,
BLANCHARD & WALKER, P.C.

s/Nicholas Roumel

Nicholas Roumel
Attorney for Plaintiff

April 9, 2015

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon all parties to the above cause to each of the attorneys/parties of record herein by electronic filing on the 9th day of April, 2015.

/s/ Nicholas Roumel

Nicholas Roumel

Julie Hearshen Miller

From: Clare Francis <clare.francis1946@googlemail.com>
Sent: Monday, November 11, 2013 3:29 PM
To: Julie Hearshen Miller
Subject: scientific concerns about published work FH Sakar, Karmanos cancer institute/Wayne State university

Dear Julie Miller,

Many thanks for doing that. I could not ask for more.

Yours sincerely,

Clare

On Mon, Nov 11, 2013 at 9:21 PM, Julie Hearshen Miller <julie.h.miller@wayne.edu> wrote:

November 11, 2013

Dear Ms. Francis:

Thank you for your e-mail, which I have forwarded to the appropriate individual within Wayne State University. As you are aware, scientific misconduct investigations are by their nature confidential, and Wayne would not be able to comment on whether an inquiry into your allegations is under way, or if so, what its status might be.

Thank you for bringing this matter to our attention.

Sincerely,

Julie H. Miller

Julie Hearshen Miller

Secretary to the Board of Governors

Senior Executive Assistant to the President

Wayne State University

4231 Faculty/Administration Building

Detroit, MI 48202

313-577-2084 (Office)

313-577-4231 (Fax)

From: Clare Francis [mailto:clare.francis1346@gocciemail.com]

Sent: Sunday, November 10, 2013 12:59 PM

To: julie.h.miller@wayne.edu

Cc: debra.harris@wayne.edu

Subject: scientific concerns about published work FH Sakar, Karmanos cancer institute/Wayne State university

Dear Secretary to the board of governors, Wayne State university, Julie Miller,

I am writing to you about **multiple scientific concerns** about the published work of **Fazlul H Sarkar** which have been aired on Pubpeer.

You can find the entries on Pubpeer here:

[https://pubpeer.com/search/?u=sakar&sessionId=35\(FE399E7033B15F233&adv=none\)](https://pubpeer.com/search/?u=sakar&sessionId=35(FE399E7033B15F233&adv=none)

On opening the page you will see multiple capsules. On clicking on these they will open and you can read what people have written.

The entries try to stick to the scientific points for the most part.

Many of the entries mention things which amount to what many think of as **scientific misconduct**.

I believe that this is the webpage of the person concerned. I do not know this person. The issues are scientific ones, not personal ones.

<http://pathology.med.wayne.edu/profile.php?id=45054>

The university president and dean of the medical school have been contacted on numerous occasions, but nothing seems to be happening.

Your sincerely,

Clare