

STATE OF MICHIGAN
IN THE COURT OF APPEALS

FAZLUL SARKAR,

Plaintiff–Appellant,

COA Case No. 326667

vs.

Wayne County Circuit Court
Case No. 14-013099-CZ (Gibson, J.)

JOHN and/or JANE DOE(S),

Defendants,

THE PUBPEER FOUNDATION,

Appellee.

FAZLUL SARKAR,

Plaintiff–Appellee,

COA Case No. 326691

vs.

Wayne County Circuit Court
Case No. 14-013099-CZ (Gibson, J.)

JOHN and/or JANE DOE(S),

Defendants,

THE PUBPEER FOUNDATION,

Appellant.

PUBPEER’S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to MCR 7.212(G), The PubPeer Foundation moves the Court for leave to file a supplemental brief, attached as Exhibit A. The brief concerns the recent disclosure by Wayne State University of the conclusions of its investigation into the plaintiff here, Dr. Fazlul Sarkar. The university concluded that Dr. Sarkar “engaged in and permitted (and tacitly encouraged) intentional and knowing fabrication, falsification, and/or plagiarism of data.” That recently disclosed conclusion is directly relevant to several of the legal questions presented by this

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appeal, including the central question of whether this Court should endorse the standard articulated in *Dendrite Int'l, Inc v Doe No 3*, 342 NJ Super 134 (NJ App, 2005). As PubPeer has explained in the principal briefs, none of Dr. Sarkar's claims satisfy the lower standard articulated in *Ghanam v Does*, 303 Mich App 522 (2014), but should the Court disagree, Wayne State's findings concerning Dr. Sarkar highlight the importance of testing the factual merit of defamation claims before permitting defamation plaintiffs to strip commenters of their constitutional right to remain anonymous.

For these reasons, PubPeer requests that the Court grant this motion and accept the attached brief as filed.

October 20, 2016

Respectfully submitted,

/s/ Daniel S. Korobkin

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EXHIBIT A

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PUBPEER’S SUPPLEMENTAL BRIEF

Following the parties’ oral argument before this Court, Wayne State University released an August 2015 report finding that Plaintiff Dr. Fazlul “Sarkar engaged in and permitted (and tacitly encouraged) intentional and knowing fabrication, falsification, and/or plagiarism of data, and its publication in journals, and its use to support his federal grant applications.” Bob Grant, *Investigation Finds Pathologist Guilty of Systemic Misconduct*, THE SCIENTIST, Oct. 19, 2016, <http://www.the-scientist.com/?articles.view/articleNo/47297/title/Investigation-Finds->

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Pathologist-Guilty-of-Systemic-Misconduct/ (attached as Exhibit 1). The report, authored by an investigative panel convened by Wayne State's Associate Vice President for Research Integrity, additionally suggested that 42 of Dr. Sarkar's publications should be retracted. *Id.* Wayne State released the investigative panel's report in response to a news organization's Freedom of Information Act ("FOIA") request.¹ See MCL 15.231 *et seq.*

Wayne State's investigative findings, and their release in response to a FOIA request, are directly relevant to two of the questions presented by this appeal: (1) whether the comment in paragraph 40(c) is protected as a fair and true report of an official investigation by a public institution and (2) whether, if the Court determines that Dr. Sarkar has adequately pleaded a claim of defamation, the Court should require that Dr. Sarkar support his claim with evidence. Wayne State's investigation shows that the answer to both questions is, unequivocally, "yes" and that, if the March 26, 2015 circuit court order is allowed to stand, the First Amendment right of individuals to anonymously discuss scientific work and to accurately report on the investigations of public institutions will be violated.

A. The fair reporting privilege protects the comment in paragraph 40(c) of the Complaint.

The comment in paragraph 40(c) responds affirmatively to the question of whether anyone had reported similarities among Dr. Sarkar's images to Wayne State University and quotes an official university response to a related inquiry. PubPeer has explained that this comment cannot form the basis of a defamation action because it is privileged as a fair and true report of a government record, see MCL 600.2911(3), and Wayne State's release of its findings in response to a FOIA request bolsters that fact. See *Northland Wheels Roller Skating Ctr, Inc v*

¹ The news organization that requested the report has published several quotes from it, including its conclusions, but has not published the full report itself. If the full report becomes public, PubPeer may seek the Court's leave to file it with the Court.

Detroit Free Press, Inc, 213 Mich App 317, 326 (1995) (the fair reporting privilege protects any statements that “represent[] ‘fair and true’ reports of matters contained in [a state agency’s] written reports or records that are generally available to the public pursuant to the Freedom of Information Act”); see also *id.* (the Legislature “explicit[ly] amend[ed] . . . the fair reporting privilege [to include] not only the publication of public and official proceedings but also the broadcast of matters of public record, of a governmental notice, announcement, written or recorded report or record generally available to the public”).

B. The Court should require Dr. Sarkar to substantiate his defamation claims with evidence if any of those claims survive the *Ghanam* standard.

As PubPeer has explained in the principal briefs, none of Dr. Sarkar’s claims are legally adequate, and thus this case can and should be resolved on the basis of the standard articulated in *Ghanam v Does*, 303 Mich App 522 (2014). But should this Court disagree, the findings of the Wayne State report highlight the importance of requiring Dr. Sarkar to substantiate his claim with evidence before unmasking PubPeer’s anonymous commenters. See *Dendrite Int’l, Inc v Doe No 3*, 342 NJ Super 134, 142 (NJ App, 2005).

The findings of the Wayne State investigation underscore the danger of allowing unmasking on the basis of legally sufficient but factually untested claims. None of PubPeer’s commenters have stated any false and defamatory fact about Dr. Sarkar. But even if they had, as Dr. Sarkar alleges they have done through innuendo, Wayne State’s findings support the *truth* of that alleged innuendo. See Ex. 1 (quoting Wayne State finding that “Sarkar engaged in and permitted (and tacitly encouraged) intentional and knowing fabrication, falsification, and/or plagiarism of data, and its publication in journals”). Permitting Dr. Sarkar to unmask PubPeer’s commenters without any inquiry into the factual merit of his claims—particularly given the strong basis to believe that they are completely meritless—would be unconstitutional. It would

permit Dr. Sarkar to strip PubPeer's commenters of their constitutionally protected anonymity for naught. The First Amendment does not permit that result, and this Court should not allow it. Instead, the Court should require Dr. Sarkar to offer evidentiary support of his claims before unmasking PubPeer's commenters.

Respectfully submitted,

October 20, 2016

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EXHIBIT 1

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[The Scientist](#) » [News & Opinion](#) » [Daily News](#)

Investigation Finds Pathologist Guilty of Systemic Misconduct

A Wayne State University probe into allegations of research misconduct leveled against pathologist Fazlul Sarkar has found the scientist guilty of multiple instances of image manipulation, among other infractions.

By Bob Grant | October 19, 2016



PIXABAY, CESKYFREUND36

Pathologist Fazlul Sarkar, formerly of Wayne State University, fostered a culture of research misconduct over several years in his lab, according to a report obtained by *The Scientist* via the Freedom of Information Act.

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"Dr. Sarkar established in his laboratory an environment and practices which focused on high productivity in publications and grant applications but which disregarded basic checks on the integrity of data, records, and reporting," the investigative panel, convened by Wayne State's associate vice president for research integrity, Philip Cunningham, wrote in its August 2015 report. "The Investigation Committee finds that the evidence shows that Dr. Sarkar engaged in and permitted (and tacitly encouraged) intentional and knowing fabrication, falsification, and/or plagiarism of data, and its publication in journals, and its use to support his federal grant applications."

Sarkar said that he rejects the findings in the report. "There was no falsification in any of my publications, and there was some error all of which was correctable," he wrote in an email to *The Scientist*. "These findings were unjust, and their recommendations were false but I had no energy to fight after they decided to turn my appeal down for correcting their report that I submitted to them."

Investigators at Wayne State started with 24 allegations of misconduct leveled against Sarkar by an anonymous source. As they pored over six years' worth of Sarkar's publications, National Institutes of Health (NIH) grant applications and progress reports, patent filings, hard drives, laboratory notebooks, and more than 80 hours of interviews with Sarkar lab members and collaborators, the panel received additional allegations from anonymous and pseudonymous sources. The 24 original allegations were joined by dozens more. Altogether, the university investigated more than 140 allegations of research misconduct on the part of the pathologist.

Most of the allegations involved the reuse and relabeling of images in figures that were published in scientific journals, used to support grant applications, employed to communicate progress on funded projects, or printed in a patent application and dissertation. The images involved western blots, electrophoretic mobility shift assay (EMSA) data, cell culture photographs, and other research outputs.

In total, the investigative committee suggested that 10 of Sarkar's publications be amended with possible corrections, including replacing duplicated images, and that 42 publications be retracted. To date, 18 of Sarkar's papers have been retracted, including some of the studies the panel pointed to

"The Investigation Committee concludes that Dr. Sarkar has no basis to claim that he did not know what was happening in his laboratory because he was too busy or not paying attention," the report stated, referring to Sarkar's responses to questions from the panel. "The evidence shows that Dr. Sarkar failed to establish or maintain standards of quality control in record keeping, or to exercise due diligence to correct unacceptable practices. The Committee concludes, based on an examination of the evidence, that Dr. Sarkar's failures of mentorship and laboratory management rise to levels of recklessness that enable irresponsibility, uncritical collegiality, acceptance of poor laboratory practices indiscriminant [sic] awarding of authorships, and ultimately resulted in widespread research misconduct by him and others."

Sarkar has been embroiled in [legal proceedings](#) involving criticism of his work on the post-publication peer review platform PubPeer. His legal team has maintained that the researcher is being defamed by anonymous commenters on the site, and his attorneys have subpoenaed PubPeer to learn the identities of those commenters, including the pseudonymous whistleblower [Clare Francis](#).

See "Misconduct Finding Could Impact PubPeer Litigation"

According to Cunningham, Wayne State was required to communicate its findings to the Department of Health and Human Services's Office of Research Integrity (ORI) because Sarkar's misconduct involved applications and progress reports on federal grants awarded to the researcher. (According to the NIH's Research Portfolio Online Reporting Tools database, as of October 18, Sarkar was listed as the principal investigator on 51 federal grants, all from the National Cancer Institute, awarded to him between 1993 and 2015.) "I don't know what they're doing with respect to this report," Cunningham told *The Scientist*.

ORI spokesperson Diane Gianelli noted that the agency is unable to comment on the case. "ORI cannot confirm or deny the existence of an investigation," she wrote in an email to *The Scientist*.

Cunningham confirmed that Sarkar retired from Wayne State earlier this year. "This was a more significant investigation than we typically see," he added.

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