Beware the Clumsy Retraction

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A recent Idaho state court opinion ordering an Idaho newspaper to unmask the identity of an anonymous commenter on the newspaper's website demonstrates, among other things, the pitfalls that come with a clumsily worded retraction.

The case, *Jacobson v. Doe*, arose from a blog entry posted in February 2012 on the *Spokesman-Review*'s website about Tina Jacobson, the chair of the county Republican Central Committee. The post included a picture of Jacobson posing with then-Presidential candidate Rick Santorum and other local Republicans. In an anonymous comment to the story, a commenter named "almostinnocentbystander" wrote: "Is that the missing $10,000 from Kootenai County Central Committee funds actually stuffed inside Tina's blouse."

That comment drew requests from other commenters for additional details, which "almostinnocentbystander" provided in a follow up post, noting that Jacobson was a bookkeeper by profession and that "a whole Boat load of money is missing and Tina won't let anyone see the books."

Those comments were taken down by the author of the original blog post within a few hours, and after complaints from local Republicans and a request for the identity of the commenter, "almostinnocentbystander" posted an apology: "I apologize for and retract my derogatory and unsubstantiated commentary regarding Tina Jacobson."

A libel suit following in April, and a subpoena was served on the newspaper asking for the identity of the commenter. The newspaper moved to quash, claiming the commenter was a "news source" protected by the First Amendment and the Idaho Constitution. Idaho does not have a shield statute, but state courts have recognized a qualified privilege.

The court rejected the newspaper's motion, holding that the commenter was not a "source." Rather, the court held, the newspaper was "acting as a facilitator of commentary and administrator of the Blog."

Recognizing constitutional protections for anonymous speech, the court then analyzed what standard it should apply in deciding whether to quash the subpoena. This is an issue we have written about often here. In a positive move for newspapers, the court applied a three-part test, derived from the oft-cited New Jersey case *Dendrite Int'l, Inc. v. Doe no. 3*, 775 A.2d 756 (N.J. Super.

Ct. 2001), and an unpublished Idaho federal court case.

Under that test, the court may order disclosure if: (1) the plaintiff "makes reasonable efforts to notify the defendant" of the subpoena; (2) the plaintiff "demonstrates that it would survive a summary judgment motion"; and (3) the court must then balance the commenter's First Amendment rights with the plaintiff's case and the necessity of disclosure. The application of the summary judgment standard at this stage is generally a win for the speaker.

In this case, though, the court held that the plaintiff had established that it could survive summary judgment. Key to this analysis was the court's holding that the retraction posted by the commenter demonstrated "actual malice," the standard of fault required for public figure plaintiffs.

In the absence of any evidence from the commenter, the court held that the commenter's "recanting shows that the speaker knew the falsity of the statement when he said it," or at least acted "recklessly by not only making the statement once, but on two occasions."

The court's holding should be a caution to anyone considering recanting or retracting a statement because of a fear of a defamation suit. The lesson -- it is probably best to seek legal counsel before publishing a retraction or apology. In this case, for example, stating in the retraction that the statements were "unsubstantiated" may have been problematic.