THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Jan 30 2023

S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2019-001605
Unpublished Opinion No. 2022-UP-413

Lucas Marchant, ……………………………………………………..……………Respondent,

v.

John Doe and John Doe d/b/a Democrats for Marchant, Defendants,

Of which John Doe is the ……………………………………………………………Petitioner.

PETITION FOR A WRIT OF CERTIORARI

Samuel D. Harms
S.C. Bar No: 13537
Double Aught Injury Lawyers
33 Market Point Drive
Greenville, SC 29607
SamuelHarms@Call00.com
(864) 453-0000
Attorney for Petitioner

TABLE OF CONTENTS

Certificate of Counsel 1

Questions Presented for Review 1

Statement of the Case 2

Facts 4

Arguments 8

PART ONE: SUBJECT MATTER JURISDICTION

Question 1 8

PART TWO: THE IMMEDIATE APPEALABILITY OF THE TRIAL COURT'S ORDER

Question 2 9

PART THREE: FEDERAL AND STATE CONSTITUTIONAL RIGHTS

Question 3 14

Question 4 17

PART FOUR: THE DEFAMATION CLAIM

Question 5 19

PART FIVE: MOTION TO QUASH THE SUBPOENA TO FACEBOOK

Question 6 20

Question 7 22

Conclusion 23

CERTIFICATE OF COUNSEL

Counsel for the petitioner certifies that a Petition for Rehearing was filed on December 5, 2022, and it was denied by the South Carolina Court of Appeals on January 3, 2023.

QUESTIONS PRESENTED FOR REVIEW

1. The plaintiff filed a campaign ethics complaint against the defendants in the Court of Common Pleas instead of the South Carolina State Ethics Commission. Does the Court of Common Pleas have subject matter jurisdiction over the campaign ethics complaint?

2. The order of the trial court will unmask the identity of John Doe 2. Once the identity of John Doe 2 is unmasked, the appellate courts have no remedy to correct the trial court, so the order of the trial court determines the action and prevents a subsequent appealable judgment. The Court of Appeals found that the order of the trial court was not immediately appealable and dismissed the appeal. Did the Court of Appeals err in dismissing the appeal?

3. Does John Doe 2 have a federal constitutional right to anonymous political speech and the anonymous distribution of political speech of third parties? Did the Court of Appeals err in not reaching the issue?

4. Does John Doe 2 have a state constitutional right to anonymous political speech and the anonymous distribution of political speech of third parties? Did the Court of Appeals err in not reaching the issue?

5. The plaintiff is a politician who alleges that he was defamed during his campaign for political office. Can a politician bring a defamation action when the politician alleges that the defendants acted with mere malice? Did the Court of Appeals err in not reaching the issue?

6. The plaintiff's attorney issued a subpoena to Facebook to unmask the identity of the defendants without first commencing a lawsuit. Can a plaintiff's attorney issue a subpoena without first commencing a lawsuit? Did the Court of Appeals err in not reaching the issue?

7. The plaintiff's attorney issued a subpoena to Facebook to unmask the identity of the defendants but did not serve the subpoena on either defendant. Is a plaintiff's attorney required to serve a subpoena to a non-party on a defendant? Did the Court of Appeals err in not reaching the issue?

STATEMENT OF THE CASE

The plaintiff, Lucas Marchant, was an independent candidate for the office of 13th Judicial Circuit Solicitor. (R. p. 21) (Complaint). On October 16, 2018, Lucas Marchant filed a campaign ethics complaint in the Greenville County Court of Common Pleas. (R. p. 21) (Complaint). The plaintiff filed the ethics complaint against two defendants: John Doe and John Doe d/b/a Democrats for Marchant. Since both defendants are named John Doe in the ethics complaint, and to avoid confusion, this petition uses the description John Doe 1 to refer to the first defendant to file an answer, and uses the description John Doe 2 to refer to the second defendant to file an answer to the ethics complaint (R. p. 30) (John Doe 1 Answer); (R. p. 31) (John Doe 2 Answer). This petition is filed by John Doe 2.

On October 17, 2018, the day after the ethics complaint was filed, but before the action was commenced by serving the complaint on either defendant, the plaintiff issued a subpoena to Facebook, Inc. ("Facebook"). (R. pp. 286-294) (Subp. Cover Letter, SC Subp. and Calif. Subp.). The plaintiff did not serve the subpoena on any defendant as required by the South Carolina Rules of Civil Procedure. On January 2, 2019, John Doe 1 filed a motion to quash the subpoena issued to Facebook. (R. pp. 110) (Motion to Quash). On January 18, 2019, the plaintiff filed an amended ethics complaint. (R. p. 25) (Amended Complaint). The amended complaint dropped the request for an injunction and added a cause of action for defamation. On January 24, 2019, Judge Perry H. Gravely heard oral arguments on John Doe 1's motion to quash the subpoena to Facebook. (R. p. 35) (Hearing Transcript 01/24/2019). That same day, on January 24,

2019, the trial court issued an order denying John Doe 1's motion to quash the subpoena. (R. p. 16) (Order 01/24/2019).

On February 25, 2019, John Doe 1 filed an answer to the complaint. (R. p. 30) (John Doe 1 Answer) and a Notice of Appeal (R. p. 303) (John Doe 1 Notice of Appeal). On April 4, 2019, the attorney for John Doe 1 was relieved as counsel by the court. (R. p. 180) (Consent Order 04/04/2019). On May 2, 2019, the Court of Appeals issued an order dismissing the appeal of John Doe 1 because the underlying order was not immediately appealable. (R. p. 304) (Order 05/02/2019). The remittitur was sent on May 21, 2019. (R. p. 305) (Remittitur).

On May 10, 2019, John Doe 2 filed an answer and a motion to dismiss, a motion for a protective order, and a motion to quash the subpoena to Facebook. (R. p. 31) (John Doe 2 Answer); (R. p. 183) (Motion to Dismiss); (R. p. 184) (Motion for Protective Order/Quash). On June 25, 2019, Judge Edward W. Miller heard oral arguments on John Doe 2's motion to dismiss, motion for a protective order, and motion to quash the subpoena to Facebook. (R. p. 56) (Hearing Transcript 06/25/2019). On August 28, 2019, the trial court issued an order denying John Doe 2's motion to dismiss, motion for a protective order, and motion to quash the subpoena to Facebook. (R. p. 3) (Order 08/28/2019). On September 23, 2019, John Doe 2 filed the Notice of Appeal appealing the January 24, 2019 and August 28, 2019 orders of the trial court. (R. p. 307) (Notice of Appeal). The Court of Appeals, on November 23, 2022, found that the trial court's order was not immediately appealable and dismissed the appeal of John Doe 2. (Unpublished Opinion No. 2022-UP-413) (the "Opinion"). The petitioner, John Doe 2, now seeks a writ of certiorari to review that decision.

FACTS

The plaintiff, Lucas Marchant, was a candidate for the office of 13th Judicial Circuit Solicitor. (R. p. 21) (Complaint). He ran as an independent, petition candidate who had collected the required signatures to have his name appear on the November 6, 2018 general election ballot. *Id.* On October 16, 2018, Lucas Marchant filed a campaign ethics complaint in the Greenville County Court of Common Pleas against defendants John Doe and John Doe d/b/a Democrats for Marchant. (R. p. 21) (Complaint). The ethics complaint was filed within 50 days before the November 6, 2018 election. The plaintiff could have waited 3 weeks, until the day after the election, and filed the ethics complaint with the State Ethics Commission. The *Greenville News* published a news article about the allegations in the complaint.

The ethics complaint, in the facts section, alleges that the plaintiff is a candidate for the office of 13th Circuit Solicitor. (R. p. 21) (Complaint para. 5). The complaint further alleges that the defendants set up a Facebook page called "Democrats for Marchant," and that the defendants are "attempting to polarize the Solicitor's race and trick people into avoiding voting for Plaintiff." (R. p. 22) (Complaint para. 11, 13). The complaint alleges that John Doe 1 and John Doe 2 worked together as a "group" (plaintiff's phrase) to run Democrats for Marchant (an alleged committee). (R. p. 22) (Complaint para. 11, 12). The ethics complaint has two causes of action. (R. pp. 22-23) (Complaint). The first cause of action is a request for injunctive relief and alleges that the "Defendants' actions violate South Carolina laws related to ethics, elections …." (R. pp. 22-23) (Complaint para. 19). The plaintiff asked the court to enjoin the defendants from "[d]efrauding the public with false messages regarding campaign activity." (R. p.

23) (Complaint para. 21). The second cause of action is a request for declaratory relief. The plaintiff asked the court to declare that the defendants' alleged conduct "violate[s] South Carolina Code Ann. § 8-13-1324 (2019) as they are anonymous campaign contributions." (R. p. 23) (Complaint para. 23). The complaint also asks the court to declare the "Defendants have violated … other laws related to elections," and that the "Defendants have fraudulently sought to influence an election." (R. p. 23) (Complaint para. 24-25). The only two causes of action in the ethics complaint allege violations of the state's campaign ethics laws. There are no causes of action that do <u>not</u> involve an alleged violation of the campaign ethics laws.

The State Ethics Commission has exclusive jurisdiction over any allegation of a violation of the campaign ethics laws, including allegations against candidates, individuals, "a <u>group</u> of persons which, to influence the outcome of an elective office, receives contributions or makes expenditures," or "a noncandidate committee, or a <u>committee</u> that is not a campaign committee for a candidate but that is organized for the purpose of influencing an election." S.C. Code Ann. § 8-13-1300(6) and (6)(b) (2019) (emphasis added); S.C. Code Ann. § 8-13-320(7) and (9) (2019); S.C. Code Ann. § 8-13-1372(B) (2019); S.C. Code Ann. § 8-13-130 (2019). For complaints filed in the Court of Common Pleas against a candidate for solicitor within 50 days before an election, South Carolina Code Ann. § 8-13-320(9)(b)(1) (2019) requires the Court of Common Pleas to dismiss the ethics complaint within 10 days if the court does not issue a mandamus order or injunction within those 10 days. In this case, the trial court did not grant a mandamus order or injunction within 10 days, and therefore, the Court of Common Pleas was required to dismiss the ethics complaint on October 26, 2018. The

Court of Common Pleas never had subject matter jurisdiction in this case because the plaintiff did not file a complaint against a candidate. In the alternative, on October 27, 2018, the Court of Common Pleas lost subject matter jurisdiction over the complaint. Subject matter jurisdiction is with the State Ethics Commission.

On October 17, 2018, the day after the ethics complaint was filed, but before the action was commenced by serving the complaint on either defendant, the plaintiff issued a subpoena to Facebook, Inc. ("Facebook") (R. pp. 286-294) (Subp. Cover Letter, SC Subp. and Calif. Subp.). The plaintiff did not serve the subpoena on any defendant as required by the South Carolina Rules of Civil Procedure. The subpoena to Facebook requests information from Facebook such as the names of the persons that established or operated the "Democrats for Marchant" Facebook account and all email addresses for the persons that established or operated the Facebook account. (R. pp. 287, 293) (SC Subp. p. 1; Calif. Subp. Attachment 3). The subpoena to Facebook requests information that would reveal or unmask the identity of John Doe 2. (R. pp. 286-294) (Subp. Cover Letter, SC Subp. and Calif. Subp.). In addition, the subpoena requests the internet protocol (IP) addresses used to "[p]ublish statements [or] comment using the Democrats for Marchant account/profile." (R. p. 293) (Calif. Supb. Attachment 3). The request would unmask the identity of anyone who posted a comment on the Facebook page.

On January 18, 2019, the plaintiff filed an amended ethics complaint. (R. pp. 25-29) (Amended Complaint). The trial court did not issue any order allowing the plaintiff to amend his ethics complaint. The amended complaint no longer had a request for injunctive relief, but instead, the plaintiff added a cause of action for defamation. The

amended complaint continues to allege that the plaintiff was a candidate for the office of solicitor, that the defendants set up a Facebook page called "Democrats for Marchant," and that the defendants "intended to polarize the Solicitor's race and trick people into avoiding voting for Plaintiff." (R. pp. 26-27) (Amended Complaint para. 6, 12, 14). The amended complaint continues to refer to John Doe 1 and John Doe 2 as a "group" and alleges that they had a committee Democrats for Marchant. (R. p. 27) (Amended Comp. para. 12-13). The amended complaint asks the court to declare that the defendants' alleged conduct "violated South Carolina Code Ann. § 8-13-1324 (2019) as they are anonymous campaign contributions." (R. p. 28) (Amended Complaint para. 21). The amended complaint also asks the court to declare the "Defendants have violated … other laws related to elections," and that the "Defendants have fraudulently sought to influence an election." (R. p. 28) (Amended Complaint para. 22-23). The defamation action alleges that the defendants "made multiple false statements about the Plaintiff intended to … deter third parties from … voting for him." (R. p. 28) (Amended Complaint para. 24). In short, the amended complaint is a campaign ethics complaint with an additional defamation cause of action alleging the defendants' violations of the ethics laws caused people to not vote for the plaintiff. The amended complaint is still just an ethics complaint. The defamation cause of action does not allege "actual malice" by the defendants, but instead, it just pleads mere "malice." (R. p. 28) (Amended Complaint para. 27).

The plaintiff also propounded discovery requests to John Doe 2. (R. pp. 187-198) (Cover letter, interrogatories, requests for production). The interrogatories request information that would unmask the identity of John Doe 2. For example, interrogatory

number 8 states: "List your full legal name, address, social security number, date of birth, and place of employment." (R. p. 191) (Interrogatory No. 8). Also, the requests for production seek information that would unmask the identity of John Doe 2. For example, request for production number 1 states: "Please provide a copy of the front and back of your current drivers' license." (R. p. 196) (Requests for Production No. 1).

ARGUMENTS

PART ONE: SUBJECT MATTER JURISDICTION

Question 1. The plaintiff filed a campaign ethics complaint against the defendants in the Court of Common Pleas instead of the South Carolina State Ethics Commission. Does the Court of Common Pleas have subject matter jurisdiction over the campaign ethics complaint?

The plaintiff filed a campaign ethics complaint against the defendants in the Court of Common Pleas instead of the South Carolina State Ethics Commission. The defendants are not candidates for public office, but instead, the plaintiff alleges that the defendants are a group or a committee. In *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013), the Supreme Court held that the Court of Common Pleas does not have subject matter jurisdiction over campaign ethics complaints, except in the limited situation where a complaint is filed against a candidate during the fifty-day period before an election. Defendant John Doe 2 filed a motion to dismiss for lack of subject matter jurisdiction, but the trial court denied the motion. (R. pp. 3-15) (Court Order 08/28/2019). The Court of Appeals, and all courts, have an affirmative responsibility to avoid hearing matters if the court lacks subject matter jurisdiction. *Anderson v. Anderson*, 299 S.C. 110, 382 S.E.2d 897 (1989); *Eagle Container Co. v. County of Newberry*, 366 S.C. 611, 622 S.E.2d 733, (Ct. App. 2005). The Court of Appeals' Opinion fails to recognize that

the Court of Common Pleas (and the Court of Appeals) does not have subject matter jurisdiction over the ethics complaint. The Supreme Court should grant a writ of certiorari because the Opinion conflicts with the Supreme Court's decision in *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013).

In addition, the Supreme Court should grant a writ of certiorari because *Rainey v. Haley* was resolved on a split decision with 3 Justices forming the majority opinion and 2 Justices concurring in the result. In the concurring opinion, Chief Justice Beatty and Justice Hearn disagreed with the majority opinion because they argued that the Court of Common Pleas has subject matter jurisdiction over ethics complaints. *Rainey,* 404 S.C. at 330. In support of that argument, the concurring opinion points out that the Court of Common Pleas is the exclusive forum for resolving complaints against a candidate during the fifty-day period before an election. In the instant case, the ethics complaint was filed within fifty days of an election. Therefore, a writ of certiorari is needed to provide a resolution of the disagreement between the majority opinion and concurring opinion on this important issue of campaign law.

PART TWO: THE IMMEDIATE APPEALABILITY OF THE TRIAL COURT'S ORDER

Question 2. The order of the trial court will unmask the identity of John Doe 2. Once the identity of John Doe 2 is unmasked, the appellate courts have no remedy to correct the trial court, so the order of the trial court determines the action and prevents a subsequent appealable judgment. The Court of Appeals found that the order of the trial court was not immediately appealable and dismissed the appeal. Did the Court of Appeals err in dismissing the appeal?

The order of the trial court will unmask the identity of John Doe 2. The order is immediately appealable. This issue is an issue of first impression in the context of a

plaintiff seeking to unmask the identity of a John Doe defendant in a civil lawsuit. In her book on appellate practice, Chief Justice Jean Toal wrote:

> [W]here the appealed order has the effect of revealing the very thing the appellant claims should remain confidential, an immediate appeal may well be warranted and permitted by the appellate courts.

Jean Hoefer Toal et al., *Appellate Practice in South Carolina*, p. 154, (3rd ed. 2016). The supreme courts of other States have addressed this issue. The Supreme Court of Pennsylvania issued a decision in a defamation action with similar facts and procedural history to the instant case. *Melvin v. Doe*, 836 A.2d 42, 575 Pa. 264 (Pa. 2003). The Pennsylvania Supreme Court ruled that John Doe could immediately appeal the denial of Doe's motion for a protective order. In that case, the plaintiff propounded discovery seeking the identity of John Doe. John Doe filed a motion for a protective order alleging that Doe's comment was protected by the constitutional right to engage in anonymous political speech. The trial court denied the motion for a protective order, and John Doe appealed. The Supreme Court of Pennsylvania held that the denial of John Doe's motion for a protective order was immediately appealable because John Doe's constitutional right to anonymous political speech "falls within the class of rights that are too important to be denied review" by the appellate courts. *Melvin v. Doe*, 836 A.2d at 50. The Pennsylvania Supreme Court reasoned that once John Doe's identity is disclosed, Doe's First Amendment claim is irreparably lost as there are no means to later cure such disclosure. *Id*. at 50. For these reasons, the South Carolina Supreme Court should issue a writ of certiorari to address this novel issue of first impression.

The South Carolina Supreme Court has held that a trial court's order is immediately appealable if the order permits discovery of a confidential matter. In this

case, the order permits the discovery of a confidential matter - the identity of John Doe 2. Once the identity of John Doe 2 is revealed, the appellate courts have no remedy to correct the trial court, so the order of the trial court in effect determines the action and prevents an appealable judgment. In addition, the trial court's order affects a substantial right of John Doe 2 - his constitutional rights to anonymous political speech and the anonymous distribution of political speech.

There are two decisions in the trial court's orders that are immediately appealable. First, the decision to deny the motion to quash the subpoena to Facebook. (R. pp. 11-14). The subpoena to Facebook requests information that will reveal or unmask the identity of John Doe 2. (R. pp. 287, 293) (SC and Calif. Subps.). Second, the decision to deny the motion for a protective order to prevent any discovery that reveals the identity of John Doe 2. (R. pp. 10-11). The trial court's decision will require John Doe 2 to respond to the plaintiff's interrogatories that request John Doe 2's name and address, and to respond to plaintiff's requests for production of documents that request a copy of John Doe 2's driver's license. (R. p. 187-198) (Discovery Requests).

In *City of Columbia v. ACLU of S.C., Inc*, 323 S.C. 384, 475 S.E.2d 747 (1996), the South Carolina Supreme Court allowed an immediate appeal of an order involving the discovery of a confidential, internal police investigation report. The Court said: "The appealed order allows discovery of documents that respondents ultimately seek disclosed as the subject of these FOIA actions. This order is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (2019) because it in effect determines the action and prevents an appealable judgment..." *Id.* at fn.2 (citing *Knight Publishing Co. v. University of South Carolina*, 295 S.C 31, 32, 367 S.E.2d 20, 21 (1988).

In *Knight Publishing Co. v. University of South Carolina*, 295 S.C 31, 367 S.E.2d 20 (1988), the South Carolina Supreme Court allowed an immediate appeal of an order permitting the discovery of confidential information. The University of South Carolina resolved by public vote that information regarding a discretional fund was not part of the public record, and therefore, the University argued that the information was not subject to disclosure under the Freedom of Information Act. The Court specifically noted that: "This appeal is from an order allowing discovery of certain documents and ordering limited depositions." 295 S.C. 32. In *Knight*, the Supreme Court discussed the concept of the availability of an immediate appeal "because a decision on appeal would be without practical effect." *Id.* at fn.2. In this case, once the identity of John Doe 2 is revealed, "a decision on appeal would be without practical effect" in the words of the Court.

The *Knight* court cited *Jones v. Dillon-Marion Human Resources Dev. Comm'n*, 277 S.C. 533, 291 S.E.2d 195 (1982). In *Jones*, the Court said: "A case becomes moot when judgment, if rendered, will have no legal effect upon existing controversy. This is true when some event occurs making it impossible for reviewing Court to grant effectual relief." *Jones*, 277 S.C. 536. In this case, once the identity of John Doe 2 is unmasked, it is "impossible for reviewing Court to grant effectual relief" on appellate review after the revelation since there is no method to re-mask John Doe 2.

The *Jones* Court cited *Mathis v. South Carolina State Highway Dept.*, 260 S.C. 344, 195 S.E.2d 713 (1973). In *Mathis*, the Court said: "There remains no actual controversy between the parties. We have held that this Court will not pass on moot and academic questions or make an adjudication where there remains no actual

controversy." *Mathis*, 260 S.C. 346. In this case, once the identity of John Doe 2 is revealed, then the appellate review of that revelation becomes an "academic question" in the language of the Court. The Court has no remedy that can again grant John Doe 2 anonymity.

The orders of the trial court are immediately appealable under both S.C. Code Ann. § 14-3-330(1) and § 14-3-330(2)(a) (2019). Section 14-3-330(2) states: "An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken …" is immediately appealable. S.C. Code Ann. § 14-3-330(2)(a)(2019). In *McLaughlin v. Strickland*, 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1983), the Court of Appeals allowed an immediate appeal of an order terminating the parental rights of a parent because it was a substantial right. In this case, the constitutional right to anonymous political speech and the constitutional right to anonymous distribution of political speech are both substantial rights, and the trial court's orders affect that right. An immediate appeal under § 14-3-330(2) is allowed in situations where a substantive right could not be vindicated on appeal after the end of the case. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000).

The petitioner also argues that the orders of the trial court are immediately appealable under Section 14-3-330(1), which states: "Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the [C]ourt of [C]ommon [P]leas." S.C. Code Ann. § 14-3-330(1) (2019). A case involving the merits is one that "must finally determine some substantive matter forming the whole or part of some cause of action or defense." *Mid-State Distributors, Inc. v. Century Importers*, Inc.,

310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). In this case, the trial court orders finally determine the anonymity of John Doe 2 because once Facebook responds to the subpoena, John Doe 2's defense that Doe has a constitutional right to anonymous political speech is moot and lost forever. Doe can never get that defense back after the revelation by Facebook.

In this case, the order of the trial court is immediately appealable pursuant to the previous decisions of the South Carolina Supreme Court. The Supreme Court should follow the analysis in *Melvin v. Doe*, 836 A.2d 42, 575 Pa. 264 (Pa. 2003). Specifically, the identity of John Doe 2 is protected by the United States Constitution and the Constitution of the State of South Carolina. If the trial court's order is not immediately appealable, then John Doe 2's identity will be revealed, and that revelation cannot be undone by the appellate courts after the revelation. Therefore, the order is immediately appealable by the petitioner. On the other hand, if the Supreme Court allows an immediate appeal of the trial court's order and issues a decision on the merits of the appeal, then the identity of John Doe 2 can remain confidential if John Doe 2 is successful on appeal. If John Doe 2 is not successful on the merits on appeal, then Doe's identity will be revealed, but Doe will then have lost on the merits. For these reasons, the Supreme Court should grant a writ of certiorari for this issue of first impression.

PART THREE: FEDERAL AND STATE CONSTITUTIONAL RIGHTS

Question 3. Does John Doe 2 have a federal constitutional right to anonymous political speech and the anonymous distribution of political speech of third parties? Did the Court of Appeals err in not reaching the issue?

The defendants set up a Facebook page, Democrats for Marchant, to engaged in anonymous political speech about the plaintiff's campaign for public office. The defendants also anonymously distributed the political speech of third parties (the comments of third parties on the Facebook page). John Doe 2 has a federal constitutional right to anonymous political speech and the anonymous distribution of political speech of third parties, however, the trial court held: "The Defendant does not have a constitutional right to speech at issue in this case." (R. pp. 8-9) (Order 08/28/2019 pp. 6-7) and "that John Doe 2 does not have a federal constitutional right to anonymous political speech or a federal constitutional right to anonymous distribution of political speech." (R. p. 9) (Order 08/28/2019 p. 7). This is an issue of first impression in South Carolina in the context of a civil lawsuit. The Court should issue a writ of certiorari to provide clarity on this novel issue.

In the context of a criminal case, the South Carolina Supreme Court recognized, in a footnote, a federal constitutional right to anonymous speech (the speech was non-political). *State v. Brockmeyer*, 406 S.C. 324, fn.6, 751 S.E.2d 645, fn.6 (2013). However, the Supreme Court avoided any rulings on the asserted right to anonymous speech (non-political) for a variety of reasons, and most important, it did not adopt any analysis to be used by the lower courts. There is a long tradition in the United States of anonymous political speech. Alexander Hamilton, James Madison, and John Jay, under the pseudonym "Publius," wrote *The Federalist Papers* to encourage the States to ratify the U.S. Constitution (https://en.wikipedia.org/wiki/The_Federalist_Papers; last visited June 21, 2019). The right to anonymous political speech was fully recognized by the

U.S. Supreme Court in 1995 in the case of *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S.Ct. 1511, (1995):

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. … It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. See *Abrams v. United States*, 250 U.S. 616, 630-631, 40 S.Ct. 17, 22 (1919) (Holmes, J., dissenting).

Id. "[T]here are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified." *Talley v. California*, 362 U.S. 60, 65, 80 S.Ct. 536 (1960). In addition, the U.S. Supreme Court in *United States v. Rumely*, 345 U.S. 41, 73 S.Ct. 543 (1953), recognized the constitutional right to anonymous distribution of political speech of third parties. The right to anonymous political speech allows people to comment on candidates for political office without the fear of intimidation or reprisals from government officers. *Publius v. Boyer-Vine*, 237 F.Supp.3d 997 (E.D. Cal. 2017).

Since this is an issue of first impression, John Doe 2 argues that the Court should recognize an absolute right to anonymous political speech and the anonymous distribution of political speech in South Carolina with no balancing test to pierce either right (especially in the context of a campaign ethics complaint where there is no financial injury to a plaintiff, but instead, a request for an injunction). For civil lawsuits, this issue has been ruled up by various state supreme courts and those courts have

adopted different tests. For example, the Pennsylvania Supreme Court adopted a four-prong analysis for defamation actions brought against anonymous speakers, which borrows from the procedures adopted by other state courts:

> The trial court must address the following four factors before ordering the disclosure of the identity of an anonymous or pseudonymous speaker: first, the reviewing court must ensure that the John Doe defendant receives proper notification of a petition to disclose his identity and a reasonable opportunity to contest the petition; second, the party seeking disclosure must present sufficient evidence to establish a prima facie case for all elements of a defamation claim, within the plaintiff's control, such as would survive a motion for summary judgment; third, a petitioner must submit an affidavit asserting that the requested information is sought in good faith, is unavailable by other means, is directly related to the claim and is fundamentally necessary to secure relief; and fourth, the court must expressly balance the defendant's First Amendment rights against the strength of the plaintiff's prima facie case. … The four requirements are necessary to ensure the proper balance between a speaker's right to remain anonymous and a defamation plaintiff's right to seek redress.

Kuwait & Gulf Link Transp. Co. v. Doe, 2014 PA Super 96, 92 A.3d 41, 49 (Pa. Super. Ct. 2014) (internal citations and quotations omitted). The trial court should have granted the defendant's motion to dismiss and for a protective order. The Court of Appeals should have reached this issue. The defendant requests that the Court issue a writ of certiorari on this important and novel issue.

Question 4. Does John Doe 2 have a state constitutional right to anonymous political speech and the anonymous distribution of political speech of third parties? Did the Court of Appeals err in not reaching the issue?

In additional to the federal constitutional rights of John Doe 2, the defendant has a right to freedom of speech and a right to freedom of the press guaranteed by the

South Carolina Constitution, and those rights include the right to anonymous political speech and a right to the anonymous distribution of political speech of third parties. This is an issue of first impression for the Court. The South Carolina Const. Art. I, Sec. 2 Religious freedom; freedom of speech; right of assembly and petition, states:

> The General Assembly 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 or any department thereof for a redress of grievances.

Id. However, the trial court held "that John Doe 2 does not have a state constitutional right to anonymous political speech, or a state constitutional right to anonymous distribution of political speech, and … S.C. Const. Art. 1, Sec. 2 does not protect the speech of John Doe 2 in this case." (R. p. 9) (Order 08/28/2019 p. 7). The trial court further held "[t]here is no additional protection based on a state constitutional claim under S.C. Const. Art. 1, Sec 2." (R. p. 9) (Order 08/28/2019 p. 7).

State courts may grant their citizens more protections under the state constitution than are granted in the U.S. Constitution. William J. Brennan, Jr, *State Constitutions and the Protection of Individual Rights*, Harvard Law Review, 90 Harv. L. Rev. 489 (1977). State courts have held that their respective state constitutions grant more free speech rights to their citizens than the United States Constitution. *State v. Henry*, 302 Or. 510, 732 P.2d 9 (Or. 1987) (obscenity law found unconstitutional when applied against an adult bookstore owner); *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 650 A.2d 757 (N.J. 1994) (protestors had a constitutional right to distribute issue-oriented literature at a shopping mall). In the present case, defendant John Doe 2 asks the Supreme Court to recognize that the

South Carolina Constitution's "freedom of speech or of the press" clause protects the anonymous political speech and anonymous distribution of political speech by John Doe 2. The defendant asks the Court to adopt legal guardrails and an analytical framework that protects these rights in both the context of a campaign ethics complaint (where there is no financial injury to a plaintiff, but instead, a request for an injunction) and in the context of a defamation claim. The trial court should have granted the defendant's motion to dismiss and for a protective order. The Court of Appeals should have reached this issue. The South Carolina Supreme Court should issue a writ of certiorari to address this novel and important issue.

PART FOUR: THE DEFAMATION CLAIM

Question 5. The plaintiff is a politician who alleges that he was defamed during his campaign for political office. Can a politician bring a defamation action when the politician alleges that the defendants acted with mere malice? Did the Court of Appeals err in not reaching the issue?

The plaintiff is a politician who alleges that he was defamed during his campaign for political office. His amended complaint alleges that the defendants acted with malice, but not actual malice. (R. p. 28) (Amended Complaint para. 27). Defendant John Doe 2 filed a motion to dismiss for failure to state a claim for defamation, but the trial court denied the motion. The decision of the trial court is in conflict with a prior decision of the Supreme Court, and as such, the Supreme Court should grant a writ of certiorari.

The South Carolina Supreme Court has issued a decision that is directly on point. *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000). In *Elder*, the court said: "The actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Elder*, 341 S.C. at 114. In *Elder*, a public

official was awarded $310,000 in a defamation action against a newspaper. The Supreme Court reversed the verdict because the evidence in the case established only malice, but not actual malice. The court differentiated between malice, and actual malice, and held that mere malice was insufficient. The *Elder* decision mirrored the U.S. Supreme Court's reasoning in *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), in which the U.S. Supreme Court held that in defamation cases involving a public official or public figure, the actual malice standard requires a plaintiff to allege the publisher of the statement in question knew that the statement was false or acted in reckless disregard of its truth or falsity.

Paragraph 27 of the plaintiff's amended complaints states: "The Defendants made the statements with malice." (R. p. 28). The plaintiff's defamation cause of action does not recite the necessary elements to constitute a proper cause of action for defamation involving a public figure. Instead, the amended complaint alleges mere malice, which is not sufficient. The trial court should have granted the defendant's motion to dismiss. The Court of Appeals should have reached this issue. Since the Court of Appeals' Opinion does not reach this issue, the Opinion has the effect of allowing a trial court decision that is in conflict with a prior decision of the Supreme Court, and therefore the Supreme Court should grant a writ of certiorari.

PART FIVE: MOTION TO QUASH THE SUBPOENA TO FACEBOOK

Question 6. The plaintiff's attorney issued a subpoena to Facebook to unmask the identity of the defendants without first commencing a lawsuit. Can a plaintiff's attorney issue a subpoena without first commencing a lawsuit? Did the Court of Appeals err in not reaching the issue?

The plaintiff's attorney issued a subpoena to Facebook to unmask the identity of the defendants. (R. pp. 286-294) (Subp. Cover Letter, SC Subp. and Calif. Subp.). The attorney issued the subpoena without first commencing a lawsuit. This issue, surprisingly, is a novel question of law in the context of a motion to quash in a civil case. In the context of attorney disciplinary matters, the Supreme Court has made it clear that an attorney may not issue a subpoena if there is no pending action. *In the Matter of Boyce*, 639 S.E.2d 44 (2006). *See also In re Lundgren*, 421 S.C. 300, 806 S.E.2d 125 (2017); *In the Matter of Fabri*, 418 S.C. 384, 793 S.E.2d 306 (2016) ("… and issuing a subpoena in a case that was not pending"). However, the trial court denied the defendant's motion to quash the subpoena. (R. p. 184) (Motion to Quash); (R. pp. 56-109) (Hearing Transcript 06/25/2019); (R. pp. 11-14) (Order 08/28/2019). John Doe 2 asks the Supreme Court to grant a writ of certiorari to provide clear guidance to the trial courts and attorneys on whether attorneys can issue subpoenas when there is no pending lawsuit. This issue affects all civil cases, and the practice of law, and as such, is an important issue.

Rule 3(a)(1), SCRCP states:

> (a) Commencement of civil action. A civil action is commenced when the summons and complaint are filed with the clerk of court if:
>
> (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or …

Id. The subpoena is dated October 17, 2018, one day after the filing of the complaint on October 16, 2018. (R. p. 287). However, on October 17, 2018, the complaint had not been commenced by the plaintiff because he had not served any defendant. Rule 45(a)(1)(B), SCRCP requires the subpoena to: "state the title of the action, the name of

the court in which it is pending, and its civil action number." The trial court should have granted the defendant's motion to quash. The Court of Appeals should have reached this issue. For these reasons, the Supreme Court should grant a writ of certiorari to address this important issue affecting the practice of law.

Question 7. The plaintiff's attorney issued a subpoena to Facebook to unmask the identity of the defendants but did not serve the subpoena on either defendant. Is a plaintiff's attorney required to serve a subpoena to a non-party on a defendant? Did the Court of Appeals err in not reaching the issue?

The plaintiff's attorney issued a subpoena to Facebook to unmask the identity of the defendants. (R. pp. 286-294) (Subp. Cover Letter, SC Subp. and Calif. Subp.). The plaintiff's attorney did not serve the subpoena on either defendant. This issue, surprisingly, is a novel question of law in the context of a motion to quash in a civil case. In the context of attorney disciplinary matters, the Supreme Court has made it clear that an attorney issuing a subpoena to a non-party must serve the opposing party 10 days before the production is due. *In the Matter of Fabri*, 418 S.C. 384, 793 S.E.2d 306 (2016); *In re Lundgren*, 421 S.C. 300, 806 S.E.2d 125 (2017) ("attorney falsely certified in the subpoena that it was issued in compliance with Rule 45, SCRCP"). However, the trial court denied the defendant's motion to quash the subpoena. (R. p. 184) (Motion to Quash); (R. pp. 56-109) (Hearing Transcript 06/25/2019); (R. pp. 11-14) (Order 08/28/2019). John Doe 2 asks the Supreme Court to grant a writ of certiorari to provide clear guidance to the trial courts and attorneys on whether attorneys must serve a subpoena to a non-party on the opposing party. This issue affects all civil cases, and the practice of law, and as such, is an important issue.

Rule 45(b), Service, SCRCP states:

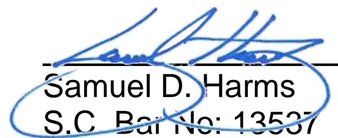
> Unless otherwise ordered by the court, prior notice in writing of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b) at least 10 days before the time specified for compliance.

In this case, the subpoena stated that production was due on October 29, 2018, so a defendant had to be served on or before October 19, 2018 (3 days after the filing of the lawsuit). On October 19, 2018, no defendant had been served with the subpoena. The signature line on the subpoena states that "I certify that … notice as required by rule 45(b)(1) has been given to all parties." (R. p. 287). However, no notice was given to either defendant in this case. The trial court should have granted the defendant's motion to quash. The Court of Appeals should have reached this issue. For these reasons, the Supreme Court should grant a writ of certiorari to address this important issue affecting the practice of law.

CONCLUSION

The petitioner respectfully asks the Court to grant a petition for a writ of certiorari to answer these novel questions of law and to correct the decisions of the trial court and the Court of Appeals that are in conflict with a prior decision of the Supreme Court.

January 30, 2023



Samuel D. Harms
S.C. Bar No: 13537
Double Aught Injury Lawyers
33 Market Point Drive
Greenville, SC 29607
(864) 453-0000
Attorney for Petitioner