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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2019-001605

Lucas Marchant, ...Respondent,

v.

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

Of which John Doe is the .....Appellant.

APPELLANT JOHN DOE'S PETITION FOR REHEARING

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Attorney for Appellant

INTRODUCTION

The appellant, John Doe 2, hereby petitions this Court for a rehearing pursuant to Rule 221 of the *South Carolina Appellate Court Rules*. The Opinion of the Court (Opinion No. 2022-UP-413) was filed November 23, 2022. The Opinion dismisses the appeal of John Doe 2 as interlocutory and not immediately appealable. The appellant respectfully asserts that the Court overlooked or misapprehended the issues set forth below and the Court should reconsider its Opinion and issue a decision in favor of John Doe 2.

STANDARD OF REVIEW

The petition should be granted because the Court overlooked or misapprehended the appellant's arguments. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001); Rule 221(a), SCACR. The purpose of a petition for rehearing is "to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 172, 167 S.E. 234, 238 (1933). The standard for a rehearing is met by John Doe 2.

ARGUMENT

I. The orders of the trial court are immediately appealable.

A. INTRODUCTION

The Court of Appeal's Opinion dismissed the appeal of John Doe 2 because it held that the orders of the trial court are interlocutory and not immediately appealable. The Court of Appeals overlooked or misapprehended John Doe 2's point that 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. As such, the trial court's order is immediately appealable.

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 - the constitutional right 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).

B. LEGAL ANALYSIS

The Court of Appeals overlooked or misapprehended John Doe 2's point that the trial court's orders are immediately appealable because the orders permit the discovery of a confidential matter. In this case, the confidential matter is the identity of John Doe 2.

> [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).

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 revealed, it is "impossible for reviewing Court to grant effectual relief" on appellate review after the revelation.

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.

Also, the Court of Appeals overlooked or misapprehended John Doe 2's point that 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 appellant 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 involves 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.

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 Supreme Court ruled that John Doe could immediately appeal the denial of Doe's motion for a protective order. 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 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.

In this case, the orders of the trial court are immediately appealable pursuant to the decisions of the South Carolina Supreme Court. The Court of Appeals 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 orders are not immediately appealable, then John Doe 2's identity will be revealed, and the revelation cannot be undone by the Court of Appeals after the revelation. Therefore, the orders are immediately appealable by the appellant. On the other hand, if the Court of Appeals allows an immediate appeal of the trial court's orders 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.

OTHER ARGUMENTS RAISED ON APPEAL

The Court of Appeal's Opinion dismissed the appeal of John Doe 2 because it held that the orders of the trial court are interlocutory and not immediately appealable. As such, the Court of Appeals did not make any decisions or holdings on the other arguments raised by John Doe 2 regarding the merits of the case or the trial court's lack of subject matter jurisdiction. Since the Court of Appeals did not make any decisions on the merits of the case, or the trial court's lack of subject matter jurisdiction, the Court of Appeals overlooked or misapprehended John Doe 2's point that the court of common pleas does not have subject matter jurisdiction over the plaintiff's complaint. In addition, the Court of Appeals overlooked or misapprehended John Doe 2's point that the trial court should have granted defendant John Doe 2's Rule 12(b)(6) motion to dismiss the complaint. Next, the trial court should have granted John Doe 2's motion for a protective order and motion to quash the subpoena issued to Facebook. Finally, the trial court should also have granted John Doe 1's motion to quash the subpoena issued to Facebook. The petitioner hereby incorporates by reference the statement of the case, statement of facts, standard of review, and the arguments sections of John Doe 2's final brief and final reply brief in this petition for rehearing. The petitioner respectfully requests that the Court of Appeals issue a decision on the following issues raised by John Doe 2 on appeal:

PART ONE: SUBJECT MATTER JURISDICTION

I. The court of common pleas does not have subject matter jurisdiction over the plaintiff's ethics complaint, or alternatively, the court of common pleas lost jurisdiction over the ethics complaint 10 days after the complaint was filed by the plaintiff.

PART TWO: FEDERAL AND STATE CONSTITUTIONAL RIGHTS

II. Defendant John Doe 2 has a federal constitutional right to anonymous political speech and a right to anonymous distribution of political speech.

III. Defendant John Doe 2 has a state constitutional right to anonymous political speech and a right to anonymous distribution of political speech.

PART THREE: RULE 12(b)(6) MOTION TO DISMISS

IV. The cause of action for declaratory relief should be dismissed by the court.

V. The cause of action for defamation in the amended complaint should be dismissed by the court.

PART FOUR: MOTION FOR A PROTECTIVE ORDER

VI. The defendant's motion for a protective order should have been granted by the trial court.

PART FIVE: MOTION TO QUASH SUBPOENA TO FACEBOOK

VII. The plaintiff's subpoena to Facebook should be quashed by the court.

CONCLUSION

The Court of Appeals overlooked or misapprehended the appellant's arguments and the facts of the case, and a rehearing should be granted by the Court. The Court should withdraw its current Opinion and file a new Opinion reversing the decision of the trial court. The court of common pleas does not have jurisdiction over the plaintiff's complaint. The Court of Appeals should dismiss the plaintiff's complaint, grant the defendant's motion for a protective order, and grant the defendant's motion to quash the subpoena issued to Facebook.

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December 5, 2022

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Lucas Marchant, ...Respondent,

v.

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

Of which John Doe is the .....Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant John Doe's Petition for Rehearing on Lucas Marchant on December 5, 2022, via email, pursuant to paragraph (d)(1) of the Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022) (Appellate Case No. 2020-000447), as follows:

Joshua S. Kendrick
Josh@KendrickLeonard.com
Kendrick & Leonard, P.C.
P.O. Box 6938
Greenville, SC 29606

Christopher S. Leonard
Chris@KendrickLeonard.com
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P.O. Box 886
Columbia, SC 29202

A copy of the sent e-mail serving the document is enclosed with this proof of service.

[Signature on Next Page]

December 5, 2022

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Samuel Harms

From:	Samuel Harms
Sent:	Monday, December 5, 2022 7:26 AM
To:	Joshua Snow Kendrick; Chris Leonard
Subject:	Lucas Marchant v. John Doe; Appellate Case No. 2019-001605; APPELLANT JOHN DOE'S PETITION FOR REHEARING
Attachments:	John Doe 2 - To Court of Appeals - From 00 - Peition for Rehearing and Proof of Service - 12-05-2022.pdf

Josh and Chris: I am serving on you the attached Appellant John Doe's Petition for Rehearing, a Proof of Service, and a letter to the Clerk of the S.C. Court of Appeals.

Sincerely,

Samuel Harms

DOUBLE AUGHT
INJURY LAWYERS
BRYAN RAMEY SAMUEL HARMS

December 5, 2022

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Via Hand Delivery

RE: Lucas Marchant, Respondent, v. John Doe and John Doe d/b/a Democrats for Marchant, Defendants, Of which John Doe is the Appellant.
Appellate Case No. 2019-001605

Dear Ms. Kitchings:

Please find enclosed an original and six copies of the Appellant John Doe's Petition for Rehearing. Also enclosed are the following:

1. An original and six copies of the Proof of Service of the Petition on the Respondent.
2. A check for $50.00 for the filing fee.

Sincerely,

Samuel D. Harms
Double Aught Injury Lawyers
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Greenville, SC 29607
Attorney for Appellant

cc: Joshua S. Kendrick
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