RECEIVED
Mar 13 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the 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Unpublished Opinion No. 2022-UP-213

Lucas Marchant,..Respondent,

v.

John Doe and John Doe d/b/a as Democrats for Marchant,
of which John Doe is the... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Joshua Snow Kendrick (SC Bar 70453)
Christopher S. Leonard (SC Bar 80166)
KENDRICK & LEONARD, P.C.
506 Pettigru Street (29601)
P.O. Box 6938
Greenville, SC 29606
(864) 760-4000

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Questions Presented.. 3

Statement of the Case..4

Arguments 6

GROUNDS TO DENY THE PETITION 6

1. JOHN DOE 2 LACKS STANDING TO INTERVENE IN THIS ACTION 8

2. THE ARGUMENTS RAISED BY THE PETITIONER IN THE TRIAL COURT WERE UNTIMELY AND WAIVED BY THE PREVIOUS DECISIONS IN THIS CASE 10

ARGUMENTS RAISED BY JOHN DOE 2 12

1. THE CIRCUIT COURT HAD SUBJECT MATTER JURISDICTION OVER THIS CASE. 12

2. THE ORDER OF THE CIRCUIT COURT WAS NOT IMMEDIATELY APPEALABLE. 15

3. JOHN DOE DOES NOT HAVE A FEDERAL CONSTITUTIONAL RIGHT TO ANONYMOUSLY DEFAME RESPONDENT. 16

4. JOHN DOE DOES NOT HAVE A STATE CONSTITUTIONAL RIGHT TO ANONYMOUSLY DEFAME RESPONDENT. 19

5. RESPONDENT PROPERLY PLED A DEFAMATION ACTION. 19

GENERAL RESPONSE TO PART FIVE OF THE PETITION 20

6. THE CIRCUIT COURT DID NOT ERR IN FINDING A SUBPOENA CAN BE SERVED PRIOR TO SERVICE OF THE LAWSUIT UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE. 21

7. THE CIRCUIT COURT DID NOT ERR IN FINDING A SUBPOENA CAN BE SERVED WITHOUT SERVICE ON THE DEFENDANT UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE. 22

Conclusion 23

QUESTIONS PRESENTED

1. THE CIRCUIT COURT HAD SUBJECT MATTER JURISDICTION OVER THIS CASE.

2. THE ORDER OF THE CIRCUIT COURT WAS NOT IMMEDIATELY APPEALABLE.

3. JOHN DOE DOES NOT HAVE A FEDERAL CONSTITUTIONAL RIGHT TO ANONYMOUSLY DEFAME RESPONDENT.

4. JOHN DOE DOES NOT HAVE A STATE CONSTITUTIONAL RIGHT TO ANONYMOUSLY DEFAME RESPONDENT.

5. RESPONDENT PROPERLY PLED A DEFAMATION ACTION.

6. THE CIRCUIT COURT DID NOT ERR IN FINDING A SUBPOENA CAN BE SERVED PRIOR TO SERVICE OF THE LAWSUIT UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE.

7. THE CIRCUIT COURT DID NOT ERR IN FINDING A SUBPOENA CAN BE SERVED WITHOUT SERVICE ON THE DEFENDANT UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE.

STATEMENT OF THE CASE

Facebook is the largest, most popular social media application in the world. Users create a profile and publish posts about topics chosen by the user. *Parker v. State*, 85 A.3d 682, 685-86 (Del. 2014). Users can create personal pages or pages for groups or organizations.

Defendant John Doe 1[1] operated a fake Facebook page during the 2018 election for the office of Thirteenth Circuit Solicitor in Greenville, South Carolina. The page was intended to spread a false message about Respondent Lucas Marchant to influence an ongoing election and cause damage to his reputation. The fake Facebook page falsely associated Marchant with the Democratic Party. The page targeted Upstate Republicans, who quickly associated Marchant with Democrats and vowed never to vote for him on that fact alone.

Because it was clear the page was engaging in deceptive speech to affect an election and over $1000 had been spent on the page, Marchant filed a lawsuit to accomplish two things: (1) to stop the page's false and fraudulent message, and (2) to declare the deceptive, anonymous activity related to an election illegal.

In relation to the lawsuit, Marchant issued a subpoena from the trial court and properly domesticated it through local counsel in California requesting Facebook reveal the identifying information of the person behind the fake page. John Doe 1 hired counsel to quash the subpoena.

Marchant's initial complaint was mooted when he lost the election for Solicitor and he amended his complaint to add a defamation claim. At the same time, John Doe 1 moved to quash the subpoena on three grounds: (1) First Amendment protection; (2) the lack of false or fraudulent statements; and (3) the lack of engagement in electioneering, which meant John Doe 1 was not subject to any campaign disclosures. The Honorable

[1] Two John Does have appeared in this case. One claimed to be a supporter of Marchant, while the other was unclear on his relationship to Marchant. John Doe 1 appeared first and statements from counsel at both hearings reveal John Doe 1 and 2 are not the same person. Based on that, it is unlikely John Doe 2 has standing in this action.

Perry Gravely heard that motion and issued an Order the same day, denying the motion to quash. (R. p.16).

After the hearing, John Doe 1 answered the original complaint. (R. p.30). At the same time, Doe 1 filed an appeal. (R. p.303). The answer denied all allegations in the Amended Complaint and demanded proof of the allegations. It did not request a jury trial, nor did it assert any affirmative defenses. Because the appeal was not from an appealable order, it was dismissed by the Court of Appeals on May 2, 2019. (R. p.304).

On May 10, 2019, a new John Doe filed an answer asserting various affirmative defenses. (R. p.31). In his pleadings, this John Doe claimed he was "not the John Doe who has already filed an Answer in this case." Doe also filed another motion to quash the subpoena to Facebook, essentially making the identical argument Judge Gravely had already rejected in this case. (R. p.110).

Marchant served discovery requests. The second John Doe, John Doe 2, filed a protective order in the case related to pending discovery and a motion to dismiss arguing the circuit court did not have jurisdiction.[2] A hearing on that case was scheduled in front of the Honorable Edward Miller.

Judge Miller questioned John Doe 2's standing at the hearing and was concerned about the propriety of multiple John Does appearing in this litigation without having to prove they were legitimate parties to the case. John Doe 2 argued at the hearing, and continues to argue in this appeal, that Marchant was seeking not only the identity of the person behind the fake Facebook page, but the identity of every person who commented on that page. That assertion is wrong. Marchant sought the identity of the person behind the fake Facebook page. None of his subpoenas or discovery requests were geared towards finding any identity beyond that person.[3]

---

[2] Respondent does not concede John Doe 2 is a different person from John Doe 1 or that John Doe 2 has standing in this matter. However, the parties who have appeared are labelled "John Doe 1" and "John Doe 2" to differentiate between them.

[3] If John Doe 2 is merely a commenter on the Facebook page, it is clear Doe 2 has no standing here.

Judge Miller rejected the Petitioner's arguments. On August 28, 2019, Judge Miller ruled he had jurisdiction over the case and Judge Gravely had properly decided the First Amendment issues raised by John Doe 1 in his first motion. He further ruled the trial court had jurisdiction over the initial complaint and the amended complaint. The trial court also ruled discovery should proceed in this matter. (R. p.3).

John Doe 2 appealed, arguing the grounds raised here to the South Carolina Court of Appeals. The Court of Appeals affirmed, finding the discovery order at issue was not immediately appealable. *Marchant v. Doe*, 2022 S.C. App. Unpub. LEXIS 545 S.C. Ct. App. Nov. 23, 2022). The Court further found there was no right to defamatory speech, and the discovery order was proper.

The trial court's orders were well-reasoned and the Court of Appeals properly upheld the trial court's decisions. This Court should deny the petition for a writ of certiorari.

GROUNDS TO DENY THE PETITION

The petition for a writ of certiorari should be denied. Rule 242 sets out five reasons the Supreme Court should grant such a petition. SCACR, Rule 242(b)(1)-(5). None of those five reasons apply here.

In addition to responding to Petitioner's arguments, the reasons below are additional grounds to deny the petition for a writ of certiorari. A South Carolina appellate court can affirm for any reason appearing in the record below. *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 418-421, 526 S.E.2d 716, 722-725 (2000).

1. JOHN DOE 2 LACKS STANDING TO INTERVENE IN THIS ACTION.

Marchant sued John Doe individually and "doing business as" Democrats for Marchant. There is nothing in the complaint to suggest these are two separate Defendants, nor is there any allegation in the Complaint that a group of people was running the fake Facebook page. Doe 2 refers to several paragraphs in the pleading to support the claim Marchant has referred to a "group" in his lawsuit. Those paragraphs do not refer to a group of people sued collectively under the name "John Doe." Rather, the

cited paragraphs in the pleadings refer to Doe pretending to be a group. The Facebook page, its identity, and its premise are all fake. Marchant has not asserted more than one person operates the Facebook page and does not believe that is the case.[4]

When John Doe 1 appeared by counsel to quash the subpoena to Facebook, there was nothing in the motion to suggest there were multiple Does and this was just one of the multiple Does appearing. At the hearing, Doe 1's counsel offered no condition or restriction on her representation; she was appearing on behalf of both Defendants (who were really just one John Doe described both individually and as a business entity). (R. p.37, ll.9-11).

Doe 1's counsel described the subpoena at issue in the hearing as seeking the "identity of my clients for the Facebook pages that they created..." (R. p.37, l.24 – p.38, l.2.). Doe 1's counsel offered this description of her client:

> "My client's position, Your Honor, is that they created this Facebook page as a supporter of Mr. Marchant. They are not saying Mr. Marchant is affiliated with them. They are not saying that they are representing him on his behalf. They are advocating for him to win, Your Honor. And ... if they said that they were a political committee that were actually affiliated with him, then it would have been false advertising or a misrepresentation as having authority on behalf of his campaign...they are simply advocating for him, and as long as they're not saying they're a political committee and not raising money or trying to negate the vote for him, then the activity should be protected as political speech."

(R. p.39, l.20 – p.40, l.14). On January 24, 2019, counsel told the trial court the fake Facebook page had been created by an alleged supporter of the Marchant campaign.

Months later, after an adverse ruling from the trial court and this Court, John Doe 2 appeared and claimed he or she was the person who set up the Facebook account. (R. p.104, l.22 – p.105, l.8.). At the same time, counsel for Doe 2 claimed he did not know

[4] Petitioner also refers to Marchant seeking the identity of anyone who posted on the Facebook page, which is incorrect. The subpoena only seeks the identity of the person who created and used the fake page. There is a reference to comments by the actual page because a page can comment on other posts. But Marchant never sought the identity of anyone beyond the person who set up and used the fake page. (R. p.100, ll.2-16).

who Doe 1 was. (R. p.104, ll.14-15). But Doe 1 also claimed to be the person who set up the Facebook page.

There are now two defendants who both claim to have set up the page, yet also deny knowing each other. The trial court pointed out the problem Doe 2 created. A party does not get to unilaterally decide it is a defendant in a lawsuit. (R. p.102, ll. 20-25). The proper way to join a lawsuit as a defendant is a motion to intervene. Rule 24, SCRCP. The trial court pointed this out but declined to grant the motion to intervene made in the middle of the hearing. (R. p.104, ll.1-21). The trial court also recognized the person who set up the Facebook page was the person who had already appeared and litigated the First Amendment question. (R. p.105, ll.17-20).

After appearing in the case, Doe 2 was served with discovery requests, including requests to admit certain facts. In his response to those requests to admit, Doe 2 denied creating or maintaining the Facebook account, the very thing he now claims triggers standing to participate in this case. (R. p.197).

Standing is typically a hurdle plaintiffs face; most people are not interested in fighting to become a defendant. However, in those cases, the proper procedure is a motion to intervene under Rule 24. A party does not just appear and begin litigating. Legally, this requires a potential intervenor to be a real party in interest; they must have a real, actual, material, or substantial interest in the subject matter of the action, not just a nominal, formal, or technical connection to the action. *Ex parte GEICO v. Goethe,* 378 S.C. 132, 138 (2007).

Though the intervention rule should be liberally construed to protect the rights of all affected parties in an action, courts must also consider the practical implications of a decision denying or allowing intervention. *Id*. The trial court did that in this case on the record and denied a motion to intervene. (R. p.104, ll.19-21). Because that denial was correct under South Carolina law and appears on the record, it supports affirmance by this Court.

The trial court identified the practical problem with allowing intervention. John Doe 1 had already appeared and asserted it was the Facebook account creator and accountholder. After losing in the trial court and this Court, a new John Doe appeared and made essentially the same argument, adding additional legal grounds. By appearing without the formality of a motion to intervene, the John Does are free to continue appearing until a ruling is made in one, some, or all the Does' favor.

Doe 1 was the person who created the Facebook account. When lawyers for Facebook received the subpoena and contacted the accountholder, they were told a motion to quash was being filed.[5] Doe 1 made his motion and lost. This original John Doe is the real John Doe. As the accountholder Doe 1 was the proper defendant in the lawsuit.

Doe 2 cannot also be the accountholder, yet at the same time is not the original John Doe. Two people are taking inconsistent positions in this case. Those positions create an advantage because no John Doe will be bound by any court ruling. They can just keep showing up until the litigation becomes pointless.

The trial court also correctly denied standing on the specific facts asserted at the hearing. John Doe 2's counsel asserted his client's identity would be revealed if Facebook responded to the subpoena. (R. p.96, ll.18-20). However, he was unclear on why. Initially, he claimed Marchant's subpoena would identify anyone who published on the Facebook page, anyone who bought advertising, and anyone who edited the page. (R. p.96, l.22 – p.97, l.1).

It was unclear if John Doe 2 was truly asserting there are multiple people running the Facebook page or if John Doe 2 was just guessing that was the case. (R. p.97, ll.1-6). The trial court properly pointed out that such a vague and broad description may result in John Doe 2 being a witness, but not a party. (R. p.97, ll.7-8).

[5] Counsel describes these events at (R. p.91, ll.4-20). The case was appealed before any discovery was conducted so there was no opportunity to develop this on the record. However, counsel can produce communications with Facebook attorneys well before John Doe 2 ever appeared.

An anonymous party appeared to defend against a subpoena to Facebook. The same party had a full opportunity to challenge the subpoena in court. That party has also triggered the protection of Facebook, who refuses to comply with the subpoena based on its communication with the anonymous party. After losing his challenge, the anonymous party then unsuccessfully appealed to this Court.

A second anonymous party has now appeared claiming it has the same rights as the first party, but is a different, and seemingly unrelated party from the first one. The confusion created makes it impossible for Marchant to litigate this matter and for the trial court to enforce its authority. Putting aside that confusion, John Doe 2 has not properly asserted its rights through a motion to intervene. Doe 2 has no standing in this matter and the decision of the trial court should be affirmed.

2. THE ARGUMENTS RAISED BY THE PETITIONER IN THE TRIAL COURT WERE UNTIMELY AND WAIVED BY THE PREVIOUS DECISIONS IN THIS CASE.

Related to the standing argument, the issues raised by the Petitioner have been addressed by both the trial and appellate court or waived. Based on communication with Facebook, John Doe 1 was the proper party to this case and John Doe 2 has no standing in this matter.

If John Doe 2 does have standing, it would be because he is really John Doe 1. There is no question the January 2019 motion to quash was filed on behalf of the target of the subpoena to Facebook. Facebook will notify an accountholder if a subpoena or court order is served on the company.[6] This is consistent with counsel's communications with Facebook, as he described at a hearing in this matter.

Counsel questioned the standing of John Doe 2 because of the communication with Facebook in this matter. It was clear Facebook had been in touch with the accountholder and was learning about the progress of the litigation through that person. (R. p.93, l.7 –

[6] See https://www.facebook.com/help/133221086752707?helpref=uf_permalink, which describes Facebook's compliance policies. (last accessed March 13, 2023).

p.94, l.10). Facebook specifically mentioned it would not comply with any subpoena based on John Doe 1's motion to quash.

John Doe 1 argued his constitutional rights at the January hearing. He made the identical argument on anonymous speech John Doe 2 makes. John Doe 2 has made a more detailed argument, but it still fails based on the order from the January hearing. Judge Gravely carefully considered the constitutional implications of his ruling and found that the subpoena to Facebook was proper. (R. p.18). He also noted there had been no challenge to the form of the subpoena or the process by which it was issued. (R p.16).

The subpoena Judge Gravely was ruling on is the same subpoena John Doe 2 was challenging in his motion. After Judge Gravely's order, John Doe 1 appealed to this Court. That appeal was denied because the underlying order was not immediately appealable. (R. p.304).

After remittal to the trial court, John Doe 1's only option to continue his argument about the subpoena was to file a motion to reconsider Judge Gravely's ruling. *Elam v. S.C. DOT,* 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004) (a Rule 59(e) motion is a vehicle to seek reconsideration of issues and arguments). Judge Miller referenced the earlier order and it is clear he did not intend to modify it. (R. p.107, l.1-6).

Doe 1 previously argued issues related to the subpoena in this matter. He answered without asserting affirmative defenses. There is no "do-over" where a party claims to be a different person (though somehow also the same person legally) and re-litigates all the issues it previously lost or failed to raise.

The record reflects John Doe 2 is either the same as John Doe 1 or is not a proper defendant to this action.[7] Either way, the trial court was correct in ruling the case should move forward and that ruling should be affirmed.

[7] Both parties claim to be the Facebook accountholder, but do not assert any other connection or collusion, which is impractical.

ARGUMENTS IN RESPONSE TO PETITION

1. THE CIRCUIT COURT HAD SUBJECT MATTER JURISDICTION OVER THIS CASE.

Doe's interpretation of the campaign ethics laws disregards the plain language of the statute and creates the absurd result that a significant group of people are not subject to campaign finance laws. S.C. Code § 8-13-320(b)(1) specifically refers to a complaint against a candidate for office, not any complaint involving a candidate. Additionally, the Act does not apply to private entities. *Shah v. Richland Mem'l Hosp.,* 350 S.C. 139, 152, 564 S.E.2d 681, 687 (Ct. App. 2002). John Doe was not a candidate for office.

While *Shah* declined to exercise jurisdiction over the matter presented in that case, it relied on the mootness doctrine. Mootness has never been raised in this case and is not properly before this Court. On the other hand, South Carolina courts have broad power to resolve controversies and uncertainties. S.C. Code § 15-53-60. Under that power, the trial court had jurisdiction to resolve this matter. A decision of the court would have terminated a controversy and removed uncertainty, which is exactly what the statute calls for.

The Ethics Act has both substantive and procedural components. Marchant alleged Doe violated the anonymous campaign contribution law by contributing significant financial resources to express campaign advocacy. The Ethics Act only provides a mode of enforcement against public officials, public members, or public employees.[8] The form for initiating a complaint requires a named respondent.[9] An anonymous complaint would not be accepted or investigated by the Commission, because it would have no respondent to list in its initiation forms.[10]

---

[8] See *General Information – Who can file a complaint?*, https://ethics.sc.gov/complaints (last accessed March 13, 2023).

[9] *State of South Carolina State Ethics Commission Complaint Form,* https://ethics.sc.gov/sites/default/files/Documents/Complaints/C102form.pdf (last accessed March 13, 2023).

[10] Counsel is aware of this fact from other dealings with the Commission. To the extent

Under the Petitioner's interpretation of the statute, an anonymous person is not subject to any campaign laws. Relying on *Rainey v. Haley*, Petitioner argues exclusive jurisdiction over all ethics complaints is vested in the State Ethics Commission, unless the allegation is against a member of the legislature in which case either the Senate or the House would have jurisdiction. *Rainey v. Haley,* 404 S.C. 320, 323-25, 745 S.E.2d 81, 82-84 (2013). This is incorrect.

Rainey does not address exclusive jurisdiction over the Ethics Act; it addresses exclusive jurisdiction over specific people subject to the Ethics Act. Justice Beatty pointed out in his concurrence that a circuit court has subject matter jurisdiction over violations of the Ethics Act. *Id.* at 329 (Beatty, J., concurring). There is no statute conferring exclusive jurisdiction to the State Ethics Commission or the Legislative Ethics Commission. *Id.* That conferring of jurisdiction is only exclusive in certain cases, not all cases.

Under Doe 2's reading of the statute, neither a non-public entity, such as a citizen, nor an anonymous person could ever be found in violation of the Ethics Act. Doe 2 argues the exclusive way to resolve an Ethics Act violation is with either the Ethics Committee of the House or Senate or the State Ethics Commission. The House or Senate only polices their own members. The Commission needs a named party that has some public status.

An unnamed person not serving in the state legislature is immune from the Ethics Act under Doe 2's reading. For example, the Doe in this case (the real Doe) is not subject to any consequences from its actions if there is no procedure by which it can be prevented from illegally participating in an election. This is absurd.

No matter what a statute says, courts must reject any interpretation that will lead to a result so plainly absurd it could not have been intended by the legislature. *Duke Energy Corp. v. S.C. Dep't of Revenue,* 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). The Court's reading of a statute should be in harmony with its purpose. *Id.* Obviously, the

---

this Court does not accept this assertion, this would be an appropriate matter for factual development on remand.

General Assembly did not intend to place the vast majority of the State of South Carolina outside the reach of its Ethics Act. There must be some remedy for election shenanigans carried out by anonymous or private citizens. A proper reading of the statute at issue here requires recognition that the circuit court has jurisdiction over a controversy that would not otherwise be addressed.

If Respondent conceded a problem with subject matter jurisdiction in the original complaint for the sake of argument, it would have little effect on this case.[11] The trial court ruling would still be appropriate. By the time either of the Does responded to the complaint, it had been amended to add a claim for defamation, which would not be subject to the Petitioner's statutory argument. Respondent argues the lack of subject matter jurisdiction over the original complaint would void any amendments to that complaint. There is no authority for this proposition and such a rule would go against South Carolina court's general authority on amendments.

South Carolina freely allows amendments to a complaint to cure pleading defects, if those amendments would not be futile. *Skydive Myrtle Beach v. Horry Cty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019). If Doe is correct, and the trial court could not exercise jurisdiction over a violation of the Ethics Act, that would constitute a defect in the pleading. An amendment would have been allowed to bring an action that has nothing to do with the Ethics Act.

The defamation claim in this case was well within the statute of limitations and properly brought. Even if the trial court had no jurisdiction over the first complaint, there is no authority to prohibit the second complaint. Marchant could have dismissed the first complaint entirely and brought the second complaint. Even if Doe could convince a court it did not have jurisdiction over the causes of action related to the Ethics Act, he has no argument the defamation act was not properly before the court. The rule he advances

[11] Respondent does not concede this point, but as explained, it does not seem to matter.

would mean a party filing a defective pleading could never file a lawsuit against the same defendant, even if the cause of action were entirely different.

Marchant could have filed a separate defamation action against Doe. He could have filed a subsequent action for defamation any time within the statute of limitations. That action would not have been dependent in any way on the causes of action related to the Ethics Act. Any error in exercising jurisdiction was harmless and the order of the trial court should be affirmed.

2. THE ORDER OF THE CIRCUIT COURT WAS NOT IMMEDIATELY APPEALABLE.

A party's right to appeal is governed by statutory law. *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). An appeal can typically be pursued only after a final judgment in the matter. *Id.*; S.C. Code Ann. § 14-3-330; Rule 72, SCRCP; Rule 201(a), SCACR. To be immediately appealable, an order must fall within one of the subsections of §14-3-330. *Enersys Del., Inc. v. Hopkins,* 401 S.C. 615, 617, 738 S.E.2d 478, 479 (2013).

§14-3-330 sets four classes of orders that may be immediately appealable: (1) an order involving the merits of the action; (2) an order affecting a substantial right when the order would prevent judgment or discontinue the action, grants or refuses a new trial, or strikes a pleading; (3) affects a substantial right in a special proceeding after judgment; or (4) relates to an injunction or the appointment of a receiver. *Id.* Subsections 3 and 4 do not apply in this case. Subsection 1 does not apply; the order from the lower court simply ordered the case to proceed through discovery. It does not serve as a ruling on the merits.

Subsection 2 requires the order to affect the substantial rights of a party if *such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.* §14-3-330(2)(emphasis added). This subsection has been narrowly construed to generally

disallow the immediate appeal or orders issued before or during a case. *Hagood v. Summerville,* 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). This Court has cautioned that piecemeal appeals should be avoided. *Id.*

The Court disfavors these piecemeal appeals for good reason. Factual disputes, and even the legal issues they trigger, are often best resolved by the trial court. In this case, two separate trial courts have considered the exact issues raised in this petition. None of those orders were rulings on the merits. They were simply rulings on whether discovery and litigation in this case can proceed. The Defendants have not lost any mode of trial nor been prevented from choosing their representation. *Hagood,* 362 S.C. at 197 (an order granting a motion to disqualify a party's attorney affects a substantial right and may be immediately appealable, as is an order depriving a party of a particular mode of trial to which it is entitled).

Even if Doe were to prove the trial court order involved a substantial right, which Marchant does not concede, that is only one element required for an appeal. An appeal affecting a substantial right must not only involve the right but must prevent a judgment from which the affected party can appeal. *Cobb v. Maccaro,* 310 S.C. 303, 305, 423 S.E.2d 156, 157 (Ct.App. 1992).

The trial court has twice thoroughly analyzed Doe's claims it should not have to participate in this case[12] and has twice ruled against Doe. The Court of Appeals correctly found the order was not immediately appealable and the decision was correct.

3. JOHN DOE DOES NOT HAVE A FEDERAL CONSTITUTIONAL RIGHT TO ANONYMOUSLY DEFAME RESPONDENT.

A statement is defamatory if it tends to harm an individual's reputation in a way that lowers him in the eyes of the community or deters third parties from dealing with or associating with the individual. *Holtzscheiter v. Thomson Newspapers,* 332 S.C. 502, 518, 506 S.E.2d 497, 506 (1998)(Toal, J. concurring). Communications may be

[12] An interesting position, since John Doe 2 voluntarily appeared in the case.

defamatory to one person at a given time and place even if the communication would not be defamatory at a different time and place. *Id.* at 518 n.2.

The statements Doe made on the fake Facebook page were false.[13] The posts garnered hundreds of negative comments, as intended by the operator of the Facebook page. None of the messages were true. They falsely attempted to associate Marchant with unpopular ideas to sway voters not to vote for him.

The posts were widely published by Doe to conservative voters. Financial analysis of the page and the advertising spent reflects over $1000 was spent publishing this message, proving an intent to publish as widely as possible.[14] Marchant suffered harm from the message as voters associated him with the Democratic Party and refused to vote for him. Proof of malice and reckless disregard for the truth are central to Marchant's claim. It is almost certain the party behind this page acted maliciously. Hiding behind a fake Facebook page further proves malice.

The First Amendment does not apply to defamatory speech made with actual malice. *New York Times v. Sullivan,* 376 U.S. 254, 279-80 (1964).[15] In cases involving a public figure, like this, actual malice means the speaker knew its statements were false or made them in reckless disregard for their truth. *Murray v. Holnam, Inc.,* 344 S.C. 129,

[13] Marchant does not believe the record shows it is Doe 2 that made these statements. Doe 1 made them. Doe 2's argument that it is the speaker is inconsistent with Doe 1's argument that it is the speaker. Marchant has argued Doe 2's lack of standing. If the Court rejects that argument, it does not necessarily matter which Doe the speaker was, since both Does have claimed to be the speaker on Facebook. For that reason, Marchant does not differentiate between Doe 1 and Doe 2 in this section.

[14] These facts do not appear in the record because this appeal is from the denial of a motion to dismiss and quash a subpoena. Counsel does not believe their existence is determinative of this appeal, but to the extent the Court believes they must be in the record for a ruling, this matter would have to be remanded.

[15] The *New York Times* standard applies to a public figure seeking damages against a news outlet. That is the highest protection offered in the defamation context. It is probably not applicable here, since there is no evidence Doe is a journalist. For the sake of argument, if Doe is not protected under *New York Times* there is certainly no other protection available for his statements.

144, 542 S.E.2d 743, 750-51 (Ct.App. 2001). In other words, lies are not protected by the First Amendment.

Doe incorrectly argues Marchant seeks to silence speech. Marchant is not complaining about speech, or criticism. Rather, he is complaining about defamatory speech. Defamatory speech is not protected by the First Amendment. *Beauharnais v. Illinois,* 343 U.S. 250, 266 (1952).

Doe claims the Supreme Court has "fully recognized" the right to anonymous political speech, citing *McIntyre v. Ohio Elections Commission*. *McIntyre* involved an Ohio law banning anonymous campaign literature. *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 338 (1995).

McIntyre is distinguishable from the instant case. The specific speech at issue in that case was not false, misleading, or libelous. *Id.* at 337. The Supreme Court held the Ohio statute being considered was unconstitutional. However, it also recognized the deterrence of false statements by liars was a legitimate aim. *Id.* at 350-51. A blanket prohibition on anonymous materials did not aid in that goal. The Supreme Court approvingly discussed the common law action for libel in Ohio and its use in combatting election-related libel or election fraud. *Id.* at 350, n.13. There is no blanket law at issue in this case. *McIntyre* does not apply to a private suit for defamation.

For the same reasons, *Talley v. California* is not applicable to this case. It considered a similarly broad ordinance in Los Angeles that outlawed anonymous handbills. *Talley v. California*, 362 U.S. 60, 60-61 (1960). The ordinance was found unconstitutional. However, the Court recognized there was an argument that the ordinance targeted fraud, false statements, and libel. Because the ordinance did not contain those limitations, the Court disregarded that argument. It did not address the validity of an ordinance that was limited to preventing those harms. *Id.* at 64.

Petitioner cites *United States v. Rumely* as recognizing a constitutional right to anonymously distribute speech. *United States v. Rumely*, 345 U.S. 41 (1953). *Rumely* narrowed the lower court's First Amendment holding, declining to establish a broad

constitutional right under the doctrine of constitutional avoidance. *Id.* at 46-47. The Supreme Court holding did not establish any rights.

Petitioner suggests this Court should adopt a test to apply to this case, as it involves a novel issue. As a practical matter, the Petitioner never mentioned the imposition of such a test in the trial court. It is well-settled an issue cannot be raised for the first time on appeal but must have been raised to and ruled on by the trial court to be preserved for appellate review. *Staubes v. City of Folly Beach,* 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

The practical implications of that rule are apparent here. It is difficult to respond to the Petitioner's claims about the requested test because the issue was never raised in the trial court, where it could have been factually developed. The Petitioner has not established a federal constitutional right to deceptive, false, and defamatory speech and the opinion of the Court of Appeals on this ground should be affirmed.

4. JOHN DOE DOES NOT HAVE A STATE CONSTITUTIONAL RIGHT TO ANONYMOUSLY DEFAME RESPONDENT.

Most of the Petitioner's argument on this ground involves the ability of a State to adopt greater protections in its constitution than those in the federal constitution. This is true, but there is nothing in South Carolina law that suggests this State has decided to protect anonymous lies and defamation, regardless of the context in which the lies were made. There is also nothing novel about declining to offer protection to false and defamatory speech. In fact, that is well-settled in both state and federal law.

5. RESPONDENT PROPERLY PLED A DEFAMATION ACTION.

Petitioner correctly distinguishes between malice and actual malice in its brief. But it misses the difference in its argument and what occurred here. The *Elder* opinion reversed a verdict where actual malice was not proven. *Elder v. Gaffney Ledger*, 341 S.C. 108, 118-19, 533 S.E.2d 899, 904 (2000). There is no question Marchant will have to prove actual malice at any trial of this matter. But at the pleading stage, he only must allege it.

Actual malice in this context "is a subjective standard testing the publisher's good faith belief in the truth of his or her statements." *Id*. at 113. If the speaker knew at the time of the speech it was false or he spoke with reckless disregard for the truth, actual malice exists. *Id*. at 114.

Paragraphs 12, 13, 14, and 18 all describe the falsity of the Petitioner's actions. Petitioner made statements knowing those statements were untrue. That is all that is required for actual malice. In construing a complaint, this Court should review the entire pleading. *Doe ex rel. Legal Guardian v. Barnwell School Dist. 45*, 369 S.C. 659, 663, 633 S.E.2d 518, 520 (Ct. App. 2006); *Smith v. Nelson*, 83 S.C. 294, 300, 65 S.E.261, 263 (1909)(construing the "complaint upon the whole").

The pleading alleges actual malice and the ruling of the trial court should be affirmed and the decision of the Court of Appeals upheld.

GENERAL RESPONSE TO PART FIVE OF THE PETITION

Arguments related to the subpoena in this matter were waived by the actions of John Doe

Respondent does not concede that John Doe 2 is a proper party in this case. Respondent has previously argued against Doe 2's standing. In summary, the actions of Doe 1 in response to the subpoena make it unlikely Doe 2 was the accountholder. Doe 1 was notified by Facebook of the subpoena and appeared through counsel to quash the subpoena.

After losing the motion to quash, Doe 1 filed an answer in this matter generally denying the allegations but not raising any affirmative defenses. Doe 1's actions in fully challenging the subpoena and engaging in litigation should waive any claim the action was not properly served, or the subpoena was defective. The Does (whichever Doe is the real one) have suffered no prejudice from the subpoena. None of their complaints about the subpoena prejudiced their ability to challenge it.

6. THE CIRCUIT COURT DID NOT ERR IN FINDING A SUBPOENA CAN BE SERVED PRIOR TO SERVICE OF THE LAWSUIT UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE.

Arguments related to the subpoena in this matter were waived by the actions of John Doe

Respondent does not concede that John Doe 2 is a proper party in this case. Respondent has previously argued against Doe 2's standing. In summary, the actions of Doe 1 in response to the subpoena make it unlikely Doe 2 was the accountholder. Doe 1 was notified by Facebook of the subpoena and appeared through counsel to quash the subpoena.

After losing the motion to quash, Doe 1 filed an answer in this matter generally denying the allegations but not raising any affirmative defenses. Doe 1's actions in fully challenging the subpoena and engaging in litigation should waive any claim the action was not properly served, or the subpoena was defective.

Even if there are errors in the subpoena's form, two different circuit courts have fully heard argument on the subpoena and the Does (whichever Doe is the real one) have suffered no prejudice from the subpoena. None of their complaints about the subpoena prejudiced their ability to challenge it.

The trial court ruled it had jurisdiction over this case, regardless of whether it has been served. The purpose of any notice requirement for a subpoena is the notice and opportunity to object to a specific subpoena by its target or the party. In this case, both occurred. Respondent was aware the Facebook subscriber whose identity was sought in the subpoena would be informed of the subpoena by Facebook and given the opportunity to object. Based on the actions of Facebook and Doe, Doe had ample opportunity to assert an objection and did so twice in this case.

The trial court held Rule 27 of the South Carolina Rules of Civil Procedure did not apply to subpoenas. Rule 27, SCRCP. Because that rule addresses actions prior to service of a complaint, ruling that no subpoena could be served until an action was served would

block any person from ever discovering the identity of an anonymous speaker. The trial court ruled it would have authorized an *ex parte* subpoena upon filing of this lawsuit and authorized the issuance of a subpoena to Facebook for the identity of John Doe, ordering it *nunc pro tunc* to the date the subpoena was issued.

Doe argues no action is commenced until served. In this case, Marchant directed a subpoena at the identity of the party to be served. There is no South Carolina appellate opinion on this subject.[16] Nor is one needed. Under the unique circumstances of this case, which are unlikely to arise often, the procedure followed was proper. Because both Does had the ability to argue their cases in front of the Circuit Court, there is no prejudice to either party. Requiring service on an anonymous party (which, of course, would be impossible) prior to taking any further action, would create a blanket rule that all anonymous parties are beyond the reach of the Courts.

Doe was notified of the subpoena by Facebook and given a full and fair opportunity to litigate it. Because there was no prejudice to Doe, any error was harmless.

7. THE CIRCUIT COURT DID NOT ERR IN FINDING A SUBPOENA CAN BE SERVED WITHOUT SERVICE ON THE DEFENDANT UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE.

The arguments in the previous section apply to this argument. The subpoena was specifically directed towards identifying the anonymous Facebook speaker. Facebook notified John Doe 1 of the subpoena and John Doe 1 had the opportunity to quash the subpoena.

---

[16] There are two circuit court opinions that allowed the service of subpoenas to identify the proper defendant in a defamation action, which suggests a court is not barred from all action until a complaint is served. *Goldman v. Doe,* 2018-CP-10-0873 (Order dated April 25, 2018); *Beale v. Doe,* 2017-CP-10-1097 (Order dated August 23, 2017).

These rulings rely in part on a Circuit Court opinion from Virginia. Though not binding on this Court, its sound reasoning counsels that the procedure here was an appropriate way to determine the identity of an anonymous defamer. *In re Subpoena Duces Tecum to America Online, Inc.,* 52 Va. Cir. 26 (2000)(overruled on other grounds). The case was remanded for further consideration of anonymous proceedings. *Am. Online v. Anonymous Publicly Traded Co.,* 261 Va. 350 (2001).

Interestingly, Facebook refused to comply with the subpoena on a theory that it had been served both too early and too late. Despite prevailing in the argument against John Doe 1, it is unlikely Respondent would have been able to identify Doe 1 based on Facebook's conduct. Facebook appears poised to flatly refuse to cooperate with this case. Interestingly, it is not Facebook that might identify John Doe 2, but John Doe 2 itself.

It is the conduct of John Doe 2 that has left some opening for the discovery of his or her identity, which suggests that person was not in contact with Facebook and likely not the correct party to this action. As the case was set to fade away, John Doe 2 inserted itself into the litigation and at the same time argued he or she should not be identified. It would seem strange to allow parties to anonymously enter a case and remain anonymous, effectively insulating themselves from any court oversight.

This is a simple matter. To the extent John Doe 2 has any real interest in this matter, he certainly has no right to anonymity. This case should proceed through the normal discovery process. Both Does have had more than adequate notice of the subpoena and opportunity to be heard on it.

CONCLUSION

John Doe 2 has voluntarily intervened in a case in which he or she then vigorously argues he should remain anonymous. He is asking this Court to do more than place him beyond the reach of the Court's authority, he is asking this Court to allow him to litigate anonymously. The Court should not allow this. The petition should be denied.

Respectfully submitted,

s/ Joshua Snow Kendrick
Joshua Snow Kendrick (SC Bar 70453)
Christopher S. Leonard (SC Bar 80166)
KENDRICK & LEONARD, P.C.
506 Pettigru Street (29601)
P.O. Box 6938
Greenville, SC 29606
(864) 760-4000

March 13, 2023
Greenville, South Carolina

RECEIVED
Mar 13 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2018-CP-23-05309
Appellate Case No. 2019-001605

Lucas Marchant,..Respondent,

v.

John Doe and John Doe d/b/a as Democrats for Marchant,
of which John Doe is the,..Petitioner.

CERTIFICATE OF SERVICE

The RETURN TO PETITION FOR WRIT OF CERTIORARI in this case was served by email this 13th day of March, 2023 to the following parties:

Samuel D. Harms
33 Market Point Drive
Greenville, SC 29607
Samuel Harms SamuelHarms@Call00.com

s/ Joshua Snow Kendrick
Joshua Snow Kendrick
KENDRICK & LEONARD, P.C.
P.O. Box 886
Columbia, SC 29202
(803) 667-3186