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.

MEMORANDUM OF APPELLANT ON THE ISSUE OF IMMEDIATE APPEALABILITY OF THE ORDERS

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

INTRODUCTION

This memorandum is filed in response to the Court's request for a memorandum on the immediate appealability of the trial court's orders. 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 - his constitutional rights to anonymous political speech and the anonymous distribution of political speech. The appellate court should allow the parties to brief the issue of John Doe 2's anonymity and to determine that issue on the merits.

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, Inc. (Facebook). The subpoena to Facebook requests information that will reveal or unmask the identity of John Doe 2. (Appx. 138-146). Second, the decision to deny the motion for a protective order to prevent any discovery that reveals the identity of John Doe 2. 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. (Appx. 113-124).

STATEMENT OF THE CASE

On October 16, 2018, plaintiff Lucas Marchant, a politician who unsuccessfully ran for political office, filed a complaint. (Appx. p. 18). The plaintiff sued two defendants: John Doe and John Doe d/b/a Democrats for Marchant. Since both defendants are named John Doe in the complaint, and to avoid confusion, this memorandum uses the description John Doe 1 to refer to the first defendant to file an answer (Appx. p. 99), and uses the description John Doe 2 to refer to the second defendant to file an answer to the complaint (Appx. p. 103). This memorandum is filed by John Doe 2.

The original complaint has two causes of action. (Appx. p. 19). 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 ...". The second cause of action is a request for declaratory relief. The plaintiff asked the court to declare that the defendants' alleged conduct "violate South Carolina Code § 8-13-1324 as they are anonymous campaign contributions." (Appx. p. 21). The trial court did not grant the injunction or dismiss the complaint within 10 days as mandated by S.C. Code § 8-13-230, and the trial court lost subject matter jurisdiction over the case on October 27, 2018 when the case was required to be dismissed under the law. The courts no longer have subject matter jurisdiction over this case.

On October 17, 2018, the day after the lawsuit was filed, and before the action was commenced by serving the lawsuit on either defendant, the plaintiff issued a subpoena to Facebook, Inc. (Appx. pp. 138-146). The plaintiff did not serve the subpoena on any defendant(s) as required by the South Carolina Rules of Civil Procedure. The subpoena to Facebook, Inc. requests information that would reveal or unmask the identity of John Doe 2. (Appx. pp. 138-146).

On January 2, 2019, John Doe 1 filed a motion to quash the subpoena issued to Facebook, Inc. (Appx. p. 23). On January 18, 2019, the plaintiff filed an amended complaint. (Appx. p. 25). The amended complaint no longer had a request for injunctive relief, but instead, the plaintiff added a second cause of action for defamation. On January 24, 2019, Judge Perry H. Gravely heard oral arguments on John Doe 1's motion to quash. That same day, on January 24, 2019, the trial court issued an order denying John Doe 1's motion to quash. (Appx. p. 14). On February 25, 2019, John Doe 1 filed an answer to the complaint. (Appx. p. 99). On April 4, 2019, the attorney for John Doe 1 was relieved as counsel by the court. (Appx. p. 100).

On May 10, 2019, John Doe 2 filed an answer and a motion to dismiss, a motion for a protective order, and motion to quash the subpoena to Facebook, Inc. (Appx. pp. 103-108). 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, Inc. (Appx. p. 1). 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, Inc. (Appx. pp. 1-13). 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.

FACTUAL BACKGROUND FOR THIS ISSUE

The plaintiff issued discovery requests to John Doe 2. (Appx. pp. 113-124). The interrogatories request information that would reveal 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." (Appx. p. 117). Also, the requests for production seek information that would reveal 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." (Appx. p. 122).

The subpoena to Facebook requests information from Facebook such as the names of the persons that established or operated the "Democrats for Marchant" account and all email addresses for the persons that established or operated the Facebook account. (Appx pp. 139, 145). If the subpoena to Facebook is not quashed, the identity of John Doe 2 will be revealed by the information.

John Doe 2 filed a motion for a protective order to prevent any discovery that would reveal the identity of John Doe 2 and filed a motion to quash the subpoena to Facebook. The trial court denied both motions. Therefore, the identity of John Doe 2 will be revealed through the responses to the plaintiff's interrogatories, requests for production, and the subpoena to Facebook.

LEGAL ANALYSIS

A. The Constitutional Right to Anonymous Political Speech

There is a long tradition in the United States of anonymous political speech. Alexander Hamilton, James Madison, and John Jay wrote *The Federalist Papers* under the pseudonym "Publius" 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 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, 131 L.Ed.2d 426 (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, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting).

Id. In addition, the U.S. Supreme Court in *United States v. Rumely*, 345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 770 (1953), recognized the constitutional right to anonymous distribution of political speech. At the trial court level, the plaintiff cited the case of *Doe v. Reed*, 130 S. Ct. 2811, 561 U.S. 186 (2010) in support of his argument that John Doe 2 does not have a constitutional right to anonymous political speech. However, that case involves the identity of people who signed a petition to place a referendum on the ballot. The *Reed* court reasoned that the State of Washington has a sufficient interest in the integrity of the ballot referendum process to warrant the release of the identities of the people who signed the petition. The *Reed* case does not apply to the fact of this case.

In additional to the federal constitutional rights of John Doe 2, the defendant has a right to freedom of speech guaranteed by the South Carolina Constitution, and that right includes the right to anonymous political speech. S.C. 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.

State courts may grant their citizens more protections under the State Constitution than are granted in the U.S. Constitution. Defendant John Doe 2 asks this Court to recognize that the South Carolina Constitution protects the anonymous political speech of John Doe 2 in this case.

B. THE IMMEDIATE APPEALABILTY OF THE TRIAL COURT ORDERS

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) (1976) 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 his anonymity.

The orders of the trial court are immediately appealable under both S.C. Code Ann. § 14-3-330(2)(a) and § 14-3-330(1). 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)(1976 and Supp. 2018). 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)(1976 and Supp. 2018). 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 he has a constitutional right to anonymous political speech is moot and lost forever. He can never get that defense back after the revelation by Facebook.

CONCLUSION

In this case, the orders of the trial court are immediately appealable pursuant to the decisions of the South Carolina Supreme Court. 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 after the revelation. Therefore, the orders are immediately appealable by the appellant.

On the other hand, if the Court 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 his identity will be revealed, but he will then have lost on the merits.

October 14, 2019

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

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PROOF OF SERVICE

I certify that I have served the Memorandum of Appellant on the Issue of Immediate Appealability of the Orders and the Appendix of Appellant on Lucas Marchant by depositing a copy of it in the United States Mail, postage prepaid, on October 14, 2019, addressed to his attorney of record:

Joshua S. Kendrick
Kendrick & Leonard, P.C.
P.O. Box 6938
Greenville, SC 29606

October 14, 2019

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

DOUBLE AUGHT INJURY LAWYERS

BRYAN RAMEY SAMUEL HARMS

October 14, 2019

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

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 Memorandum of Appellant on the Issue of Immediate Appealability of the Orders. Also enclosed are the following:

1. An original and six copies of the Appendix of Appellant.
2. Proof of Service of the Memorandum and the Appendix on the Respondent.
3. An additional copy of the Memorandum, Appendix, and Proof of Service. Please stamp the copies and return them to me in the enclosed self-addressed stamped envelope.

Sincerely,

Samuel D. Harms
~~Double Aught Injury~~ Lawyers
33 Market Point Drive
Greenville, SC 29607
(864) 453-0000
Attorney for Appellant

cc: Joshua S. Kendrick
Kendrick & Leonard, P.C.
P.O. Box 6938
Greenville, SC 29606
(864) 760-4000
Attorney for Respondent