THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In the plaintiff's brief, the brief often fails to clearly differentiate between John Doe 1 and John Doe 2. The plaintiff's brief will occasionally refer to John Doe 1 as "John Doe." The plaintiff's brief will occasionally refer to John Doe 2 as "John Doe." This creates confusion when the plaintiff describes the legal filings and legal arguments of John Doe 1 but attributes them to a generic "John Doe;" and at the same time, uses the generic phrase "John Doe" to describe the legal filings and legal arguments of John Doe 2. Since both defendants are named John Doe by the plaintiff in the ethics complaint, and to avoid confusion, this reply brief 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. This reply brief is filed by John Doe 2.

FACTS

In response to the brief of the plaintiff, defendant John Doe 2 highlights two additional facts in this reply brief. In the ethics complaint, the plaintiff alleges that the "Defendants' actions violate ... criminal acts." (R. pp. 22-23) (Complaint para. 19). The complaint asks the trial court to issue a declaratory judgment that would declare that the "Defendants actions violate criminal acts." (R. pp. 22-23) (Complaint para. 19). The plaintiff's complaint does not ask for a jury trial. These facts are important because of the discussion of subject matter jurisdiction in the concurring opinion in *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013).

ARGUMENTS

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.

The following step-by-step analysis summarizes defendant John Doe 2's argument on this issue:

1. The State Ethics Commission has exclusive jurisdiction over campaign ethics violations, unless the complaint involves an allegation against a candidate for the state senate or state house of representatives. This argument is based on the holding in *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013); *see also Ford v. State Ethics Com'n*, 344 S.C. 642, 545 S.E.2d 821 (2001). The complaint in this case is against John Doe 1 and John Doe 2, and there is no allegation in the complaint that either defendant is a candidate for the state house or state senate. Therefore, the State Ethics Commission has exclusive jurisdiction.

2. If the plaintiff's complaint makes allegations "concerning a candidate for elective office during the fifty-day period before an election in which he is a candidate," and it alleges a "violation of this chapter by a candidate," S.C. Code Ann. § 8-13-320(9)(b)(1) (2019) states that the complaint can be filed in the court of common pleas. In the present case, there is no allegation in the complaint that a candidate violated any election laws.

3. If the plaintiff's complaint does not make allegations "concerning a candidate for elective office ... in which he is a candidate," or alleges a "violation of this chapter by a candidate," then the provisions of S.C. Code Ann. § 8-13-320(9)(b)(1) (2019) do not

apply to the present case. The State Ethics Commission (or state house or state senate) has exclusive jurisdiction. In this case, the appellate court's analysis should stop at this step.

4. If the appellate court determines that the plaintiff's complaint does make allegations "concerning a candidate for elective office ... in which he is a candidate" or alleges a "violation of this chapter by a candidate," then the provisions of S.C. Code Ann. § 8-13-320(9)(b)(1) (2019) do apply, and the complaint can be filed with the court of common pleas if the complaint is filed "during the fifty-day period before an election." *Id.*

5. The appellate court must determine if the ethics complaint was filed during the fifty-day period before an election. *Id.* If the complaint was filed more than fifty-days before an election, the State Ethics Commission has exclusive jurisdiction. If the complaint was filed during the fifty-day period before an election, the court of common pleas has limited jurisdiction for 10 days. There was an election scheduled for November 6, 2018. On October 16, 2018, Lucas Marchant filed a campaign ethics complaint in the Greenville County Court of Common Pleas. The ethics complaint was filed within 50 days before the election.

6. The appellate court must determine if the court of common pleas, within 10 days of the filing of the complaint, held "a rule to show cause hearing" and "direct[ed] that a mandamus order or an injunction, or both, be issued." *Id.* In the present case, the court of common pleas did not hold a rule to show cause hearing within ten days of the filing with the court, and the court did not direct that a mandamus order or an injunction, or both, be issued.

7. If no mandamus order or injunction was issued within ten days of the filing of the complaint, the court of common pleas was required to dismiss the complaint on the tenth day. *Id.* In this case, the complaint was filed on October 16, 2018. The court of common pleas had jurisdiction over the complaint for ten days, until October 26, 2018. The complaint was required to be dismissed on October 26, 2018. On October 27, 2018, the court of common pleas no longer had subject matter jurisdiction over the ethics complaint, and jurisdiction reverted back to the State Elections Commission.

8. The S.C. Code does not have any section that authorizes the court of common pleas to keep an ethics complaint pending in the court after ten days.

Defendant John Doe 2 asks the Court of Appeals to dismiss the complaint and amended complaint for lack of subject matter jurisdiction. If the Court of Appeals holds that the court of common pleas never had jurisdiction, then the dismissal should be dated October 16, 2018 *nunc pro tunc*. If the Court of Appeals holds that the court of common pleas had jurisdiction for 10 days, then the dismissal should be dated October 26, 2018 *nunc pro tunc*. If the court dismisses the complaint and amended complaint *nunc pro tunc* for lack of subject matter jurisdiction, then the plaintiff cannot propound any discovery requests or subpoenas by operation of the dismissal of the complaint. This will resolve all issues on appeal.

PLAINTIFF'S ARGUMENTS

The plaintiff's primary argument is that "the [Ethics] Act does not apply to private entities," and therefore, the plaintiff cannot file the complaint with the State Ethics Commission (or state house and state senate), but instead, the plaintiff must file the complaint with the court of common pleas. (Resp. Br. p. 14). The argument of the

plaintiff is without merit, as the campaign ethics laws cover lobbyist, political parties, individuals, groups, candidate committees, ballot-measure committees, non-candidate committees who attempt to influence the results of an election (special interest groups), and other "private entities." The plaintiff is arguing that lobbyist, political parties, and non-candidate committees (special interest groups) are not subject to the campaign ethics laws. If this is true, then lobbyists, special interest groups, and political parties do not have to make disclosures of contributions and expenditures to the State Ethics Commission. If the plaintiff is correct, that private entitles are not subject to "the Ethics Act," then the defendants in this case are not subject to the prohibitions in the Act since they are private entities. The plaintiff's complaint alleges that the defendants are violating "the Act" by making illegal anonymous campaign contributions. If the defendants are not subject to "the Act," what does it matter if the defendants are making anonymous campaign contributions? The plaintiff cannot have it both ways. Either the defendants are subject to the campaign finance laws, and the plaintiff's ethics complaint must be filed with the State Ethics Commission; or the defendants are not subject to the Act, and the plaintiff's complaint is nonsensical since it accuses the defendants of conduct that is not illegal.

The only case cited by the plaintiff in support of his argument that "the Act does not apply to private entities" is *Shah v. Richland Memorial Hosp.*, 350 S.C. 139, 564 S.E.2d 681 (Ct. App. 2002). In Shah, a radiologist who worked at Richland Memorial Hospital sued Richland Memorial Hospital for breach of contract, unfair trade practices, and for violating the State Ethics Act because the new director of the radiology department stopped referring work to Shah, and instead, allegedly engaged in self-

dealing by referring most of the radiology work to a company owned by the new director. The Court of Appeals held that the two self-dealing statutes at issue, S.C. Code Ann. §§ 8-13-700 and 8-13-775 (2019), do not apply to a private entity (Richland Memorial Hospital) because the self-dealing statutes only apply to a "public official, public member, or public employee" pursuant to the plain language of the statutes. The *Shah v. Richland Memorial Hosp.* case is not relevant to any issues in the present case. The present case does not involve any allegations of financial self-dealing by a public official.

The plaintiff's next argument is that S.C. Code Ann. § 15-53-60 (2019) (Enumeration is no restriction on general powers) gives "the courts [ ] broad power to resolve controversies and uncertainties." (Resp. Br. p. 15). The plaintiff fails to understand John Doe 2's primary argument that the court of common pleas lacks subject matter jurisdiction to hear the plaintiff's compliant, so it does not matter what "broad power" the trial court has to resolve controversies. S.C. Code § 15-53-60 specifically refers to S.C. Code Ann. § 15-53-20 (2019) (Courts of record may declare rights, status and other legal relations), and 15-53-20 states: "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." *Id.* (emphasis added). In the present case, the court of common pleas is not "within their respective jurisdictions" when hearing complaints involving violations of the campaign ethics laws. Therefore, it does not matter what broad powers the court of common has because it does not have jurisdiction over the matter.

Third, the plaintiff points to language in the concurring (not majority) opinion in *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013) in support of his argument that the court of common pleas has jurisdiction over the plaintiff's complaint. In the concurring opinion, the opinion sets forth arguments why the court of common pleas has concurrent jurisdiction with the State Ethics Commission. However, the concurring opinion concludes that the plaintiff's complaint must be dismissed because the plaintiff "sought a determination by the circuit court that Respondent's alleged ethical misconduct 'violate[d] the law(s) of South Carolina.'" *Rainey v. Haley*, 404 S.C. at 331.

The concurring opinion reasoned that the plaintiff's ethics complaint must be dismissed by the court because:

> In the instant case, Appellant did not demonstrate the requisite justiciable controversy to maintain a cause of action under the Uniform Declaratory Judgments Act as: (1) these proceedings were inappropriate to determine guilt or innocence in a criminal matter; (2) he was not the proper party to pursue the criminal allegations, and (3) he failed to exhaust the administrative remedies provided for in the Ethics Act.

Rainey v. Haley, 404 S.C. at 331.

For the reasons set forth in the concurring opinion in *Rainey*, the plaintiff has not demonstrated the requisite justiciable controversy to maintain a cause of action under the Uniform Declaratory Judgments Act. *Rainey* at 331. In the present case, the plaintiff's original complaint states that "Defendant's actions violate South Carolina laws related to ethics, elections, and criminal acts." (R. pp. 22-23) (Compliant para. 19). In addition, the request for declaratory relief states: "This Court should declare the Defendants have violated South Carolina Code § 8-13-1324 and any other laws related to elections the Defendants are determined to have violated during the discovery

process." (R. p. 23) (Complaint para. 24). S.C. Code Ann. § 8-13-1324 (2019) makes it a crime to make anonymous campaign contributions. The plaintiff's complaint asks the circuit court to determine guilt or innocence in a criminal matter without a jury trial. Also, in the plaintiff's brief, the plaintiff clearly says he wanted the trial court "to declare the ... activity ... illegal." (Resp. Br. p. 6).

If the Court of Appeals were to follow the concurring opinion in *Rainey v. Haley*, the plaintiff's complaint would still be dismissed by the court. First, the proceedings in the circuit court were "inappropriate to determine guilt or innocence in a criminal manner." *Rainey v. Haley*, 404 S.C. at 331. Second, the plaintiff is "not the proper party to pursue the criminal allegations" as he is not the Attorney General or a Solicitor. *Ibid.* Third, the plaintiff "failed to exhaust the administrative remedies provided for in the Ethics Act" since he did not file a complaint with the State Ethics Commission. *Ibid.* The concurring opinion held that "as a matter of policy and efficiency, it would have been procedurally more appropriate for Appellant to file his Complaint with the House of Representatives Legislative Ethics Committee rather than the circuit court." *Rainey* at 336. In the present case, the complaint could have been filed with the State Ethics Commission, so as a matter of policy and efficiency, the circuit court should not hear the complaint since the plaintiff failed to exhaust his administrative remedies.

Last, the plaintiff argues that he could have filed a separate, stand alone, lawsuit for defamation against the defendants so it is "harmless" that the defamation action was brought by amending the original complaint. (Resp. Br. pp. 17-18). In response, John Doe 2 states that the plaintiff did not file a separate, stand alone, lawsuit for defamation. The Court of Appeals should not issue an advisory opinion on what could have

happened if the plaintiff filed a separate, stand alone, lawsuit for defamation. The Court of Appeals should issue its decision based on the actual legal filings of the parties. The distinction is not "harmless" as argued by the plaintiff. The trial court cannot reacquire subject matter jurisdiction after the trial court has lost subject matter jurisdiction. *Fielden v. Fielden*, 274 S.C. 219 fn. 1, 262 S.E.2d 43 fn. 1 (1980).

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.

John Doe 2's Argument: This issue is an issue of first impression for the South Carolina appellate courts in the context of a civil defamation action against a John Doe who engaged in political speech. 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). The trial court also held "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). The South Carolina Supreme Court has previously stated: "[i]t is clear that speech over the internet is entitled to First Amendment protections and that [t]his protection extends to anonymous internet speech." *State v. Brockmeyer*, 406 S.C. 324 fn. 6, 751 S.E.2d 645 fn. 6 (2013)(internal quotations omitted).

It is the position of John Doe 2 that John Doe 2's federal constitutional rights prohibit the disclosure of John Doe 2's identity since the speech at issue was political - a complete, and absolute bar to the disclosure of the speaker's identity (no balancing tests). However, since this is an issue of first impression in South Carolina, and there is

no controlling legal authority on the Court of Appeals, John Doe 2 made the Court of Appeals aware of the analysis used by the Pennsylvania Supreme Court in *Kuwait & Gulf Link Transp. Co. v. Doe*, 2014 PA Super 96, 92 A.3d 41, 49 (Pa. Super. Ct. 2014) since that case is directly on point. In addition, John Doe 2 mentioned that the South Carolina Supreme Court, in *State v. Brockmeyer,* discussed, but did not adopt, a test for a non-party in a criminal case (not involving political speech). Defendant John Doe 2 reiterates that *State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 645 (2013) is very different than the present case and it is not controlling on the Court of Appeals. The Court of Appeals should not adopt or follow the analysis mentioned in the *Brockmeyer* case. The standard referenced in *Brockmeyer* does not adequately protect the constitutional rights of John Doe 2.

Under the first prong of the four-prong analysis in *Kuwait & Gulf Link Transp. Co. v. Doe*, 2014 PA Super 96, 92 A.3d 41, 49 (Pa. Super. Ct. 2014), the trial court must ensure that the John Does received proper notification by the plaintiff of a petition to disclose the identities of the John Does and a reasonable opportunity to contest the petition. The plaintiff's brief contains a footnote that cites two cases involving defamation actions against various John Does filed in the Charleston Circuit Court. The circuit court orders discuss this issue. In *Goldman v. Doe*, 2018-CP-10-00873 (order dated February 22, 2018) and *Beale v. Doe*, 2017-CP-10-01097 (order dated September 22, 2017), the circuit court conditioned the subpoenas on the following conditions:

> (a) Comcast having seven (7) calendar days after service of the subpoena to notify subscribers that their identity is sought by Plaintiff; (b) each subscriber whose identity is sought having twenty one (21) calendar days from the date

> of such Comcast notice to file any papers contesting the subpoenas; and (c) payment to Comcast by Plaintiff of all reasonable costs of: (1) compiling the requested information; (ii) providing pre-disclosure notifications to subscribers; and (iii) all other reasonable costs and fees incurred responding to discovery. Comcast may provide notice using any reasonable means, including but not limited to written notice sent to the subscriber's last known address, transmitted either by first class mail or via overnight service.

Goldman v. Doe. pp. 1-2. In *Goldman v. Doe* and *Beale v. Doe*, the circuit court recognized that the John Does should be given notice of the subpoena and allowed twenty-one days to contest the subpoena. In the present case, the plaintiff issued the subpoena with no notice to the defendants.

Under the second prong, the plaintiff must present sufficient evidence to establish a prima facie case for all the elements for a defamation claim (or other claims brought by the plaintiff), within the plaintiff's control, such as would survive a motion for summary judgment. In the plaintiff's brief, the plaintiff argues there are four defamatory statements made by the defendants. (Resp. Br. p. 19). First, a Facebook post on October 11, 2018 which reads, in its entirety, as follows:

> Well-meaning supporters of our candidate for Solicitor, Lucas Marchant, have placed a lot of yards [sic] signs on public rights-of-way, including highway medians. This could be against the law and more importantly, it makes Marchant supporters look like they don't care about litter and the environment.
> Lucas is running for a position where he would be responsible for enforcing the law and setting a good example. Needless sign litter works against that goal.
> Please do not place a yard sign in a public space and place them on private property. A good place to start is your yard!

(R. pp. 121, 214) (Exhibit to Pls Memo).

Second, a Facebook post on October 8, 2018 which reads, in its entirety, as follows:

> The [family surname] are one of the most trusted Democrat families in SC and they trust and support Lucas. We all just witnessed an attempted rapist becoming a Supreme Court Justice because Democrats were divided. The message is clear we must unite to defeat the right!!!

(R. pp. 132, 225) (Exhibit to Pls Memo). A September 28, 2018 Facebook post provides context for the October 8, 2018 post and accompanying picture: "Thank you to [family surname] for their generous hospitality at last night's Green Valley area Meet & Mingle." (R. pp. 136, 229) (Exhibit to Pls Memo).

Third, a Facebook post on September 27, 2018 which reads, in its entirety, as follows:

> Please share your opinions and stand up for Dr. Christine Blasey Ford. She and all victims have the right to have their stories heard and be treated with respect.
> We need honest people who respect the law and the rights of victims on the court and as our solicitor.
> Please remind your friends "No" on Kavanaugh and "Yes" on Marchant!!

(R. pp. 137, 230) (Exhibit to Pls Memo).

Fourth, and last, a Facebook post on September 23, 2018 which reads, in its entirety, as follows:

> Thank you Lucas Marchant for standing strong with the Democrats and James Smith for Governor! Those who keep questioning whether we really trust Lucas to be a loyal Democrat, since he comes from a Republican family, should keep their mouths shut.
> Our man, at Smith's fundraiser just over left shoulder towards the back.

(R. pp. 171-172, 264-265) (Exhibit to Pls Memo). The four Facebook posts are not defamatory, most of the comments are not about the plaintiff, and they are opinion statements. In addition, the plaintiff has not provided any argument to the court that he suffered any damages, a necessary element of a defamation action. As such, the plaintiff's evidence could not survive a motion for summary judgment.

Under the third prong, the plaintiff 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. The plaintiff states in his brief: "Signing an affidavit to that effect would not be a problem." (Rep. Br. p. 24). The plaintiff is willing to satisfy the third prong.

Under the fourth prong, the court must expressly balance the defendant's First Amendment rights against the strength of the plaintiff's prima facie case. In the present case, John Doe 2's rights are strong because the speech was political speech about a candidate running for public office. The plaintiff's prima facie case is week because the plaintiff cannot produce any defamatory statements or prove any injuries.

The plaintiff argues in his brief that John Doe 2 did not raise the *Kuwait & Gulf Link Transp. Co. v. Doe* balancing test to the trial court, so this issue should be remanded back to the trial court to conduct a balancing test and the presentation of evidence by the plaintiff. (Resp. Br. pp. 24-25). The plaintiff is correct that John Doe 2 did not argue the *Kuwait* balancing test to the trial court. John Doe 2 found the *Kuwait* decision while drafting the principal brief. The trial court, however, did rule on the issue of John Doe 2's federal constitutional rights. (R. pp. 8-9) (Order 08/28/2019 pp. 6-7). The trial court ruled that John Doe 2 has no federal constitutional rights; so, the court's

analysis ended at that point - there are no rights to balance. The trial court rejected John Doe 2's argument that John Doe 2's federal constitutional rights prohibit the disclosure of John Doe 2's identity since the speech at issue was political - a complete, and absolute bar to the disclosure of the speaker's identity (no balancing tests). This is an issue of first impression with no controlling legal authority. For purposes of judicial economy and providing guidance to the trial courts (and counsel), John Doe 2 asks the Court of Appeals to formulate the correct framework to determine the rights of John Doe 2 and under what conditions John Doe 2's identity can be unmasked. If this case is remanded back to the trial court with no guidance from the appellate courts, this issue will quickly present itself again if the plaintiff issues another subpoena, propounds discovery requests, or notices a deposition.

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

It is the position of John Doe 2 that John Doe 2's state constitutional rights prohibit the disclosure of John Doe 2's identity since the speech at issue was political - a complete, and absolute bar to the disclosure of the speaker's identity (no balancing tests). In the alternative, John Doe 2 requests that the court recognize the protections discussed in the principal brief. The plaintiff argues that: "There is no additional protection based on a state constitutional claim under S.C. Const. Art. 1, Sec. 2. The Appellant is correct that a state can grant its citizens more protection under the South Carolina Constitution than granted by the United States Constitution. However, South Carolina has not done that." (Resp. Br. p. 25). The plaintiff is correct that this issue is an

issue of first impression for the South Carolina appellate courts. In the present case, defendant John Doe 2 asks this court to recognize the rights of John Doe 2.

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

A. REQUEST FOR AN INJUNCTION

The plaintiff, on appeal, does not dispute that the plaintiff no longer has a cause of action for an injunction.

B. REQUEST FOR DECLARATORY RELIEF

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

After reading the brief of the plaintiff, John Doe 2 believes that John Doe 2 has adequately addressed this issue in the opening brief.

C. DEFAMATION ACTION

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

The plaintiff must plead actual malice in the amended complaint because the complaint says the plaintiff is a politician running for public office. The plaintiff argues that: "In construing a complaint, this Court should review the entire pleading," and refers the appellate court to paragraphs 12, 13, 14 and 18 of the amended complaint to create an allegation of "actual malice." (Resp. Br. p. 26). The plaintiff apparently concedes that the phrase "actual malice" does not appear in the amended complaint. The South Carolina Supreme Court has made it clear that "[i]n defamation actions involving a 'public official' or 'public figure,' the plaintiff must prove the statement was made with 'actual malice,' i.e., with either knowledge that it was false or reckless disregard for its truth." *Elder v. Gaffney Ledger*, 341 S.C. 108, 113, 533 S.E.2d 899 (2000). The

Supreme Court has made it equally clear that "the actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term .... [the] phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will ..., or bad motives." *Elder v. Gaffney Ledger*, 341 S.C. 117-118, 533 S.E.2d 899 (2000). In reviewing paragraphs 12, 13, 14 and 18 of the amended complaint, there is no suggestion that the defendants either knew that the allegedly defamatory statements were false or spoke with reckless disregard for their truth. It is not sufficient to allege that the defendants acted with ill will, malice or bad motives. As such, the action is not properly plead in the amended complaint.

PART FOUR: MOTION FOR A PROTECTIVE ORDER

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

After reading the brief of the plaintiff, John Doe 2 believes that John Doe 2 has adequately addressed this issue in the opening brief.

PART FIVE: MOTION TO QUASH SUBPOENA TO FACEBOOK

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

A. The subpoena requests disclosure of a protected matter.

After reading the brief of the plaintiff, John Doe 2 believes that John Doe 2 has adequately addressed this issue in the opening brief.

B. The Legal Requirements of a Subpoena.

There are several defects with the subpoena issued to Facebook that make the subpoena invalid, as follows:

1. **John Doe 2's Argument:** There was no pending action at the time the subpoena was issued because the complaint had not yet been commenced. Rule 3(a)(1), SCRCP.

Plaintiff's Argument: The plaintiff argues: "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." (Resp. Br. p. 29).

John Doe 2's Reply: An attorney may not issue a subpoena if there is no pending action, and an action is not pending until it is served on a defendant. Contrary to the respondent's argument that there are no appellate decisions on point, there are two decisions of the Supreme Court that are directly on point. *In the Matter of Boyce*, 639 S.E.2d 44 (2006). *In re Lundgren*, 421 S.C. 300, 806 S.E.2d 125 (2017). If there is no pending action, the court has no authority to command a person to take a certain action.

2. **John Doe 2's Argument:** The subpoena was not served on either defendant. Rule 45(b), SCRCP.

Plaintiff's Argument: The plaintiff argues that: "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." (Resp. Br. p. 28).

John Doe 2's Reply: The trial court's comment is a hypothetical situation that did not occur in this case. The purpose of this rule is to give the opposing party notice of the subpoena, so that the opposing party has an opportunity to object to the subpoena, or to participate in the commanded action. The trial court cannot cure this defect with the subpoena by issuing an order after the fact, and there is no provision in the Rules of

Civil Procedure to allow the trial court to issue a civil subpoena before an action is commenced or without notice to the opposing party (in a civil case). The law is clear that an attorney issuing a subpoena must serve the opposing party 10 days before the production is due. Rule 45(b), SCRCP. *In the Matter of Margaret D. Fabri*, 418 S.C. 384 (2016).

3. **John Doe 2's Argument:** The subpoena does not indicate if the issuing attorney represents the plaintiff or the defendant.

Plaintiff's Argument: The plaintiff argues that: "Counsel delivered the subpoena with a copy of the Complaint, making it clear which party he represented. It is also clear from the domesticated version that the subpoena was issued on behalf of the Respondent." (Resp. Br. p. 30).

John Doe 2's Reply: The subpoena must reveal if the issuing attorney represents the plaintiff or the defendant. *In re Okpalaeke*, 648 S.E.2d 593 (2007). There is no rule or law that allows an attorney to avoid this requirement by delivering the subpoena with a copy of the compliant. The subpoena and the complaint are separate documents that can become separated by the target of the subpoena.

In addition, the California subpoena does not identify any South Carolina attorney who issued the subpoena. (R. pp. 290-294) (Calif. Subp.). The caption area at the top of the subpoena identifies a California attorney representing the plaintiff, however, the attachment 4 to the California subpoena lists the law office of Kendrick & Leonard, P.C. in Greenville, SC as representing Lucas Marchant, but the place to reveal the name of a South Carolina attorney is blank (compare the address block of the South Carolina attorney information to the California attorney information. (R. p. 294) (Attachment 4

Calif. Subp.). In short, the name of a South Carolina attorney does not appear on the California subpoena. Subpoenas are issued by attorneys, not law firms, so listing the name of the law firm in South Carolina is not sufficient.

4. **John Doe 2's Argument:** The subpoena was issued from the wrong county. Rule 45(a)(1) and (2), SCRCP.

Plaintiff's Argument: The plaintiff argues that: "the subpoena was issued from the correct county. Counsel was required to issue it from the County where the case is pending and domesticate it in the proper county in California. That was done." (Resp. Br. p. 29)(emphasis added).

John Doe 2's Reply: The plaintiff has completely confused the difference between where an action is pending, and where a subpoena is issued. Rule 45(a)(1)(A), SCRCP("issued") and Rule 45(a)(1)(B), SCRCP("pending"). A subpoena can be issued from a county different than from where the action is pending.

5. **John Doe 2's Argument:** The subpoena does not command Facebook to do anything and it is impossible to tell if the subpoena is for a trial appearance, or a deposition appearance, or for the production of documents, or to permit inspection of premises - or a combination of more than one. Rule 45(a)(1)(C), SCRCP.

Plaintiff's Argument: The plaintiff argues that: "Counsel for Respondent failed to check the box commanding production of documents in the subpoena, but he stated the information sought in bold beneath the appropriate box and described the information in his cover letter." (Resp. Br. p. 30).

John Doe 2's Reply: It is irrelevant that there is extra text inserted by the plaintiff in the area near the section on the production of documents, because Facebook is not

commanded to produce the information by a checkbox. As to the plaintiff's cover letter, a cover letter has no legal standing to compel a person to take an action.

6. **John Doe 2's Argument:** The subpoena requires Facebook to travel more than 50 miles. Rule 45(C)(3)(A), SCRCP.

Plaintiff's Argument: The plaintiff argues that "because the subpoena was domesticated in California and returnable to a deposition agent in California hired by Respondent, there is no issue with the distance between the producer and the place to which records are to be produced." (Resp. Br. pp. 29-30).

John Doe 2's Reply: The South Carolina subpoena cannot require Facebook to travel more than 50 miles. The plaintiff could have listed, on the South Carolina subpoena, the address of the return agent in California, but the plaintiff did not list that address on the South Carolina subpoena. Instead, the plaintiff listed an address in Greenville, South Carolina, more than 50 miles from Facebook. The plaintiff created this problem by improperly filling out the subpoena. Since the place of production on the South Carolina subpoena is more than 50 miles away from Facebook, the subpoena is not valid.

7. **John Doe 2's Argument:** The documents and information requested in the California subpoena are not identical to the documents and information requested in the South Carolina subpoena.

Plaintiff's Argument: The plaintiff argues that: "Appellant argues the California version of the subpoena seeks more information than the South Carolina version. The difference in language is mere clarification and there is no substantive difference in the information sought."

John Doe 2's Reply: The Uniform Interstate Depositions and Discovery Act ("UIDDA") does not allow the domesticated subpoena to "clarify" the foreign subpoena. Instead, the terms must be the same. Cal. Civ. Proc. Code § 2029.300 (2019).

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

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

The orders of the trial court are 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 rights to anonymous political speech and the anonymous distribution of political speech. The plaintiff's brief fails to address those two issues. The plaintiff's brief does not cite to any case law that indicates the appellate courts have a remedy that can grant anonymity to John Doe 2 after John Doe 2's identity is unmasked. For these reasons, the Court of Appeals should hear John Doe 2's appeal.

PART SEVEN: ADDITIONAL SUSTAINING GROUNDS

On appeal, the plaintiff raises two additional sustaining grounds to affirm the decision of the trial court.

IX. John Doe 2 is a defendant in this action.

In the plaintiff's brief, the plaintiff argues that John Doe 2 does not have standing to be a defendant. The plaintiff does not cite any case law in support of his argument. Instead, the plaintiff states that he sued only one "John Doe individually and 'doing business as' Democrats for Marchant." (Resp. Br. p. 8) The plaintiff further argues

"[t]here 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." (Resp. Br. p. 8). The plaintiff argues that John Doe 1 should be the only defendant in the case. The plaintiff's argument is without merit and is completely inconsistent with the allegations in his complaint and amended complaint.

The plaintiff should not be surprised that two John Does have appeared in this case. The plaintiff filed a complaint and amended complaint against two distinct John Does. The captions for both the original and amended summons name "John Doe <u>and</u> John Doe d/b/a Democrats for Marchant" as defendants (emphasis added). (R. pp. 20, 25) (Complaint, Amended Complaint). The captions for the summons do not say "John Doe, individually, and d/b/a Democrats for Marchant" as the plaintiff alleges in his brief. The two, separate, John Does are also named in the caption of both the original and amended complaints. (R. pp. 21, 26). The titles used by the plaintiff for the opposing party in the four captions (summons and complaints times two versions) both read "Defendants" - the plural of defendant. The line identifying who the pleading is directed to reads: "TO: THE <u>DEFENDANTS</u> ABOVE-NAMED" - indicating there is more than one defendant. (emphasis added). (R. pp. 20, 25). Paragraph two, of both the complaint and amended complaint, reads: "Defendants, upon information and belief, are residents of Greenville County, South Carolina." (R. pp. 21, 26). The plaintiff alleges that there are "defendants" (plural) residing in the state. Paragraph three, of both the complaint and amended complaint, reads: "Defendants' identities ..." - the plural of defendant. The plaintiff uses the term "defendants" (plural) in the following paragraphs of the complaint: 2, 3, 18 (twice), 19, 21, 24 (twice), and 25. The plaintiff uses the term "defendants"

(plural) in the following paragraphs of the amended complaint: 2, 3, 5 (twice), 22 (twice), 23, 24, 25, 27, 30. In paragraph eleven of the complaint, and in paragraph twelve of the amended complaint, the plaintiff used the word "group" to describe the defendants. (R. pp. 22, 27). The plaintiff served discovery on John Doe 2, which can only be done if John Doe 2 is a defendant to the action. (R. pp. 187-198).

The plaintiff named both defendants John Doe in the complaint. This creates confusion. Normally, a plaintiff would name the defendants John Does 1-[number]. The plaintiff created this confusion, has confused himself, tried to confuse the trial court, and now wants to confuse the Court of Appeals. The plaintiff is trying to dismiss John Doe 2 as a defendant to the lawsuit. Normally, a defendant would gladly be dismissed as a defendant. However, if John Doe 2 is dismissed, the plaintiff will be able to issue subpoenas to unmask John Doe 2's identity with no notice to John Doe 2 or an opportunity to be heard. John Doe 2 needs to remain a defendant to the lawsuit.

John Doe 2 is a defendant in this action, and as such, does not have to intervene as a defendant. John Doe 2 set up the Facebook page Democrats for Marchant. (R. p. 104, line 22 - p. 105, line 8; p. 106, lines 15-17) (June 25, 2019 Hrg. Tr. p. 49, line 22 - p. 50, line 8; Hrg. Tr. p 51, lines 15-17). In addition, John Doe 2 has potential legal jeopardy because of the lawsuit. *Id*. The plaintiff spends a lot of time in his brief being confused over the differences between Facebook "accountholders," Facebook account "creators," and Facebook account "maintainers." Defendant John Doe 2 will attempt to clarify this matter. John Doe 2 "set up" the Facebook page Democrats for Marchant. Facebook owns Facebook accounts and the content on the Facebook pages. Facebook can remove content from a page or suspend and delete an account at any time -

because it is the owner of the account. Facebook determines the color schemes, the text size, and the layout of the pages - because it is the owner of the account. The individuals who use Facebook are "users," not owners, creators, or maintainers. Facebook "created" the Facebook page and "maintained" the page because Facebook owns the software and servers that allow "Democrats for Marchant" to exist. The plaintiff throws out the term "accountholder" in his brief, but he does not define that term, and that term can mean different things to different people in different contexts. The plaintiff's brief uses the terms "set up," "created," and "maintained" interchangeably, even though they have different meanings. John Doe 2 agrees that the term "set up" accurately describes John Doe's participation in the Democrats for Marchant account, but John Doe 2 does not agree that the terms "created" or "maintained" accurately describe John Doe 2's conduct. John Doe 2's identity will be revealed if Facebook responds to the subpoena. John Doe 2 has potential legal jeopardy in this case. For these reasons, John Doe 2 is a defendant in this case.

X. John Doe 2 was not precluded from making arguments at the June 25, 2019 hearing because John Doe 2 was not given notice of the January 24, 2019 hearing or an opportunity to be heard.

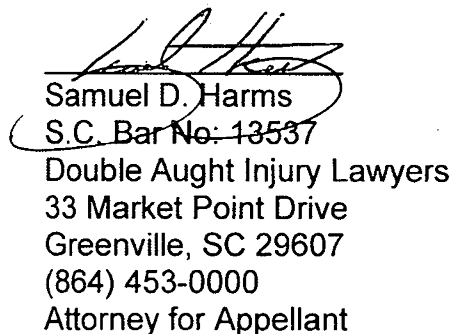
On January 24, 2019, the trial court held a hearing on John Doe 1's motion to quash the subpoena to Facebook. John Doe 2 was not served with the motion pursuant to Rule 5, SCRCP. John Doe 2 was not served with the summons and complaint. The plaintiff did not provide John Doe 2 with notice of the hearing. In addition, John Doe 2 was not given an opportunity to be heard at the hearing. On appeal, the plaintiff argues that John Doe 2 should not have been allowed by the trial court to be heard at the June 25, 2019 hearing because John Doe 1 already had a hearing in January. The plaintiff

does not cite any case law to support his argument. The United States Constitution, Amendment 5, guarantees John Doe 2 the procedural due process rights of notice and an opportunity to be heard in any state court proceeding. U.S. Const. amend. V. *See also* S.C. Const. Art. 1, Sec. 3 (requiring due process of law). Since John Doe 2 was not served with the motion to quash, was not served with the summons and complaint, did not receive notice of the hearing, and was not given an opportunity to be heard at the January 24, 2019 hearing, the procedural due process rights guaranteed to John Doe 2 in the United States Constitution and the South Carolina Constitution allowed John Doe 2 to be heard at the June 25, 2019 hearing.

CONCLUSION

The Court of Appeals should reverse 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 John Doe 2's motion for a protective order, and grant John Doe 2's motion to quash the subpoena issued to Facebook.

December 2, 2020



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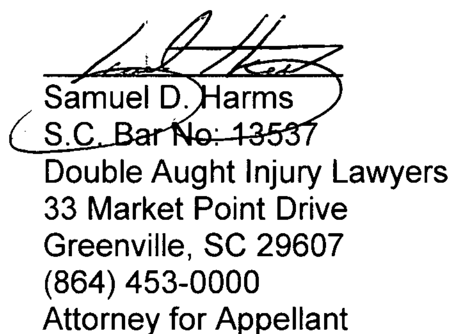

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED
DEC 04 2020
SC Court of Appeals

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2019-001605

Lucas Marchant, ...Respondent,

v.

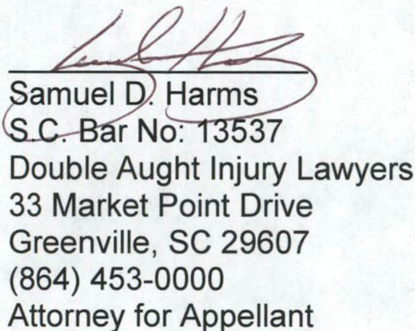
John Doe and John Doe d/b/a Democrats for Marchant, Defendants,

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Reply Brief of Appellant complies with the South Carolina Supreme Court's April 15, 2014 Order Re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

December 3, 2020



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