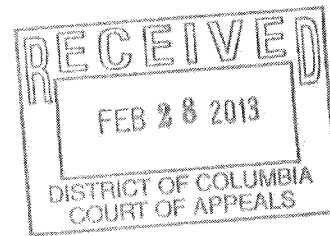


DISTRICT OF COLUMBIA  
COURT OF APPEALS

JOHN DOE No. 1, )  
 )  
 Appellant - Petitioner, ) 2013 CV 083  
 )  
 vs. )  
 )  
 SUSAN L. BURKE, )  
 )  
 Appellee - Respondent )  
 \_\_\_\_\_ )



**APPELLEE SUSAN BURKE'S MOTION TO DISMISS APPELLANT JOHN DOE  
NO.1'S NOTICE OF APPEAL AND MEMORANDUM IN SUPPORT**

On September 19, 2012, Plaintiff Appellee Susan Burke brought suit against John Doe No. 1, as well as another Doe Defendant, asserting claims of defamation and other causes of action. To date that lawsuit has not been served on Doe No. 1, as his or her identity remains unknown. After filing suit, Ms. Burke issued a subpoena to Wikipedia to learn the identity of the defendants, since defendants have refused to identify themselves. John Doe No. 1 filed a motion to quash that subpoena and for a protective order, and after full briefing by the parties and oral argument before the Court, that motion was denied in every respect. Defendant then filed a notice of appeal, acknowledging that the order was not final but claiming to have sought an injunction. An order regarding a discovery dispute such as an order denying a motion to quash a subpoena is not a final appealable order under D.C. law, and the notice of appeal should be dismissed.

## ARGUMENT

By issuing her subpoena, Plaintiff seeks information regarding the identity of the persons repeatedly defaming her on the internet. Defendant has refused the opportunity to identify himself. Since that avenue appears closed, Plaintiff sought discovery of the information from others. Defendant sought to quash the subpoena and sought a protective order, and a standard discovery dispute ensued. Defendant moved the Court for an order quashing the enforcement of the plaintiff's subpoena and a motion for a protective order, which Plaintiff opposed. A copy of that motion is attached as Exhibit 1. After full briefing and a hearing before the Superior Court, Defendant's motion was denied. Denial of the motion does not resolve the dispute between the parties, which is at its earliest stages and continues in the Superior Court. Defendant did not seek certification of the order pursuant to D.C. Code 11-721(d), but instead filed its notice of appeal upon the basis that it sought an "injunction." Under D.C. law, a motion seeking to quash a subpoena is not an appealable interlocutory order.

As District of Columbia courts have noted many times, "a pretrial order granting or denying discovery from a non-party witness is not ordinarily final for purposes of appeal unless, in the case of an order granting discovery, the subject of the order refuses to comply and is adjudicated in contempt." *Crane v. Crane*, 657 A.2d 312, 315 (D.C. 1995); *Scott v. Jackson*, 596 A.2d 523, 527-28 (D.C.1991); *United States v. Harrod*, 428 A.2d 30, 30-32 (D.C.1981) (en banc) (citing *United States v. Ryan*, 402 U.S. 530, 532-33, 91 S.Ct. 1580, 1581-82, 29 L.Ed.2d 85 (1971); *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940); *Alexander v. United States*, 201 U.S. 117, 120-22, 26 S.Ct. 356, 357-58, 50 L.Ed. 686 (1906)). Furthermore, the District of Columbia Court of Appeals has "declined to allow appeal of

discovery orders under the narrow exception [the collateral order doctrine] to the finality rule carved out by the Supreme Court....” *Crane v. Crane*, 657 A.2d 312, 315 (D.C. 1995).

Denial of a motion to quash is not an appealable interlocutory order. *See In Re Johnson*, 690 A.2d 362, 367 n.14 (D.C. 1997) (noting that two attempts to appeal the denial of a motion to quash were denied for lack of jurisdiction); *United States v. Harrod*, 428 A.2d 30, 30-32 (D.C.1981) (en banc) (subpoena or discovery order directed to third party not immediately appealable by party opposing discovery). No other exceptions to the requirement of finality apply – denial of the motion to quash does not conclusively resolve an important and disputed question, the discovery sought is not completely separate from the merits of the action, no claim of immunity is presented nor is the information sought privileged. The denial of the motion to quash lacks the finality required to give this court jurisdiction.

Defendant attempts to evade the scope of the District of Columbia authority refusing to allow appeal of discovery orders by claiming that the basis for their appeal is the “denial” of an “injunction.” Although Defendant claims in his notice of appeal (attached as Exhibit 2) that the basis for jurisdiction is the denial of an injunction, Defendant never sought to establish the basis for an injunction, instead moving to quash the subpoena and seek a protective order. The Court was never asked to enjoin anything, nor where the requirements for an injunction briefed or argued to the Superior Court. See Exhibit 1 (Defendant’s motion presents no discussion of four part test for injunctive relief); *see also Zirkle v. District of Columbia*, 830 A.2d 1250, 1256 (D.C. 2003) (stating four part test for obtaining injunctive relief). Defendant has no authority supporting a claim that a routine discovery dispute can be recast as a request for an injunction simply because the party opposing discovery does not want the subpoena enforced. If Appellant’s construction is credited, every discovery dispute, either those seeking a party to “do

something” or not “do something,” is in effect a request for an injunction and immediately appealable. No injunction was sought – instead this is a standard discovery dispute that is not appealable prior to a final order.

For these reasons, the notice of appeal should be dismissed and the case returned to the Superior Court.

February 28, 2013

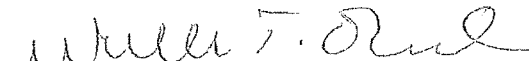
Respectfully Submitted,



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Attorney for Appellee - Respondent Susan  
L. Burke

#### CERTIFICATE OF SERVICE

I certify that on February 28, 2013, I served a copy of the foregoing Appellee – Respondent Susan Burke’s Motion to Dismiss Defendant John Doe No. 1’s Notice of Appeal on Michael Rosman, Esq. by electronic mail and first class mail at the Center for Individual Rights, 1233 20<sup>th</sup> Street NW, Suite 300, Washington, D.C., 20036

  
William T. O'Neil