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 REPLY TO APPELLANT JOHN DOE NO.1'S RESPONSE TO APPELLEE'S MOTION TO DISMISS NOTICE OF APPEAL

Appellee Susan Burke moved this court to dismiss John Doe No. 1's notice of appeal because the order below is not a final order, no injunction was sought, and under clear D.C. precedent the Court lacks jurisdiction to hear a case appealing a pre-trial discovery order. Appellant has responded to this motion by re-arguing his original motion, which the Superior Court found lacked any basis in fact or law. Halfway through his opposition, Appellant turns to the relevant issue and argues that the denial of a motion to quash is immediately appealable because the Superior Court order "has the practical effect" of an injunction. Under this standard, every discovery order is immediately appealable, as every such order "has an effect" of forcing someone to "do" or "not do" something. In the alternative, Appellant argues that the order below satisfies the collateral order doctrine. Yet D.C. has specifically rejected the collateral order doctrine in all but the narrowest of circumstances not applicable here. As the Court recognized when, prior to receiving Appellee's motion to dismiss, it issued its show cause order questioning

its jurisdiction based on Appellant's Notice of Appeal, the Order below is not a final order and the Notice of Appeal should be dismissed.[1]

ARGUMENT

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)). The exception does not apply here, and the Superior Court's order is not final and not appealable. Without directly addressing this authority, Appellant instead argues that refusing to grant the motion to quash has the practical effect of an order denying an injunction, or in the alternative that he satisfies the collateral order doctrine. Neither of these claims find support in the record and neither provides the Court of Appeals with jurisdiction over a garden variety dispute over the issuance of a subpoena.

I. The Superior Court Did Not Consider Nor Deny an Injunction

Appellant argues that the denial of his motion to quash should be deemed a denial of an injunction, since it has the "practical effect" of an injunction, but this logic would turn every

[1] The Superior Court agreed, rejecting Defendants Motion for an Emergency Stay filed subsequent to his Notice of Appeal. Appellant has now filed a motion seeking an emergency stay in this Court.

court order into an injunction and make every court order immediately appealable. Here the Superior Court refused to quash a subpoena directed at a third party seeking information about the defendant's use of the third party's web site. The denial of Defendant's motion does not enjoin anyone from acting, it simply allows the normal legal process to proceed. Appellant relies on *McQueen v. Lustine Realty Co.*, 547 A.2d 172 (D.C. 1988) for the proposition that an order relating to a "protective order" is immediately appealable. That case, however, dealt with protective orders in the Landlord Tenant branch, i.e., orders to pay rent into the Court registry, and that case is completely distinguishable from the matter before the Court. The other cases cited are similarly off point. *See Brandon v. Hines*, 439 A.2d 496 (D.C. 1981) (not a discovery dispute -- trial court order dissolving stay of litigation pending arbitration considered appealable order dissolving injunction); *Landise v. Mauro,* 927 A.2d 1026 (D.C. 2007) (not a discovery dispute -- order on motion for prejudgment security not appealable as an injunction). Every discovery order – a motion to compel production of documents, a protective order preventing a deposition -- impacts the parties, either by requiring action or preventing it. But every such order is not appealable, and the discovery dispute here did not result in an appealable order.

While the case law relied upon by Appellant is not relevant to the current dispute, Appellant further seeks to establish that the order below may have "serious or irreparable consequences" justifying appellate review. The "important right" that Defendant hides behind does not exist – an anonymous defamatory speaker "is entitled to no Constitutional protection," and an anonymous speaker is entitled to no greater protection than a known one. *Solers v. Doe*, 977 A.2d 941, 951 (D.C. 2009) (quoting *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005)). Appellant cites no authority that anonymous defamatory speech is entitled to protection under the First Amendment, or that seeking the identity of an anonymous defamer implicates a free

speech right at all.[2] Appellant's rights to public speech are not threatened in the least by holding him to account for defamatory statements.

II. The Collateral Order Doctrine is Inapplicable

Appellant seeks to bring this matter within the scope of the collateral order doctrine first announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), but courts have repeatedly recognized that the collateral order doctrine is inapplicable to a subpoena or discovery order directed to a non-party witness. *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)). As the *Harrod* Court explained, "an examination of the *Cohen* rationale confirms the implicit inference that *Cohen* was never intended to apply to court orders requiring production of information from non-party witnesses" *Harrod,* 428 A.2d at 31-32.

Even if the collateral order doctrine could be applied to the underlying dispute, Appellant fails to establish that the three pronged test of *Cohen* is satisfied. The underlying order does not conclusively determine a disputed question of law. Appellant cites to California case law holding that the determination of whether the California anti-slapp statute applies gives rise to a right of immediate appeal. What Appellants fail to tell the Court is that the California

[2] Contrary to Appellant's suggestion, *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334 (1995), does not establish a first amendment right to remain anonymous in defamation cases. In that case, a pamphleteer during an election resisted a fine imposed by the government for speaking anonymously, and the Supreme Court struck down the Ohio statute at issue based on an extensive history of anonymous political speech. The *McIntyre* Court specifically distinguished libelous or defamatory speech from the scope of its ruling. Appellant's attempt to apply the case in a defamation claim is not supported.

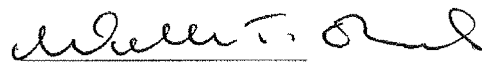
anti-slapp statute differs greatly from the D.C. statute, in that the California statute specifically grants a defendant a right of interlocutory appeal if the motion to dismiss under the statute is denied. *See D.C. Comics v. Pacific Pictures Corp.*, __ F.3d __, 2013 WL 119716, *2 (9th Cir. Jan. 10, 2013) (noting that "California statutes specifically permit a defendant in a state court action to take an interlocutory appeal from the grant or denial of an anti-SLAPP motion to strike"). The D.C. statute contains no such provision. *See* D.C. Stat. 16-5501 et seq. (2012).

Similarly, the Court order below does not determine an important issue separate from the merits of the case, as required by *Cohen*. Nothing could be more central to the merits of the case than the identity of the defendant, and a dispute over discovery aimed at learning this key fact is not separate from the merits. Likewise the order is not unreviewable on appeal. The D.C. anti-slapp statute is not an immunity from suit, particularly in cases such as this where the Superior Court has already found that the Plaintiff's claims are likely to succeed on the merits and thus outside the scope of the statute.

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

March 15, 2013

Respectfully Submitted,



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