

**[J-5A & 5B-2003]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

JOAN MELVIN,	:	Nos. 50-51 WAP 2002
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered November 20, 2001, at Nos.
	:	2115-16WDA2000, reversing the Order of
v.	:	the Court of Common Pleas of Allegheny
	:	County, entered November 15, 2000, at
	:	Nos.GD99-10264 and 99-16190.
JOHN DOE, ALLEN DOE, BRUCE DOE,	:	
CARL DOE, DAVID DOE, EDWARD DOE,	:	789 A.2d 696 (Pa. Super. 2001)
FRANK DOE, GEORGE DOE, HARRY	:	
DOE, IRVING DOE, KEVIN DOE, LARRY	:	ARGUED: March 3, 2003
DOE, AND JANE DOE,	:	
	:	
Appellants	:	

**CONCURRING OPINION**

**MR. CHIEF JUSTICE CAPPY**

**DECIDED: NOVEMBER 19, 2003**

I agree with the majority's holding that the trial court's order directing Appellants to disclose their identities is a collateral order under Pa.R.A.P. 313(b), and with its decision to remand this case to the Superior Court for resolution of the questions that Appellants have raised. I also agree with the majority's reasoning as to why the first and third prongs of Rule 313(b) are satisfied.

I do not, however, entirely agree with the majority's reasoning as to why the Rule's second prong is met. Specifically, I take issue with the majority's inquiry into whether Appellants "presents a significant possibility of trespass" upon the right that Appellants have asserted. (Majority Opinion at 13). I believe that the majority's inquiry and

determination in this regard go to the merits of Appellants' appeal, and should not be part of the Court's present opinion.

In connection with the Rule's second prong, the court is to determine whether "the right involved is too important to be denied review...." Pa.R.A.P. 313(b). As I see it, the right that Appellants claim the trial court's discovery order violates is the right to speak anonymously under the First Amendment. See Talley v. California, 362 U.S. 60 (1960). Thus, all that the Court should presently consider in connection with the second prong is that right's relative importance.<sup>1</sup>

The majority, however, goes further. On pages 8 through 13, it engages in a preliminary determination as to whether the First Amendment right to anonymous speech applies to Appellants' particular circumstances, as defendants in a defamation case. In doing so, I believe that the majority goes too far. In my view, Pa.R.A.P. 313(b) is a procedural device for identifying those non-final orders that fall within the narrow exception to the general rule that permits appellate review only of final orders, otherwise known as the collateral order doctrine. See Pugar v. Greco, 394 A.2d 542, 545 (Pa. 1978). It is not a vehicle for any analysis of the substantive questions that the appeal raises.

I find our decision in Ben v. Schwarz, 729 A.2d 547 (Pa. 1998), instructive. There, the Bureau of Professional and Occupational Affairs ("Bureau") objected to a subpoena of its investigative files pertaining to complaints against a dentist who had been sued for malpractice. The Bureau claimed that the information requested was protected by the governmental/executive privilege, the privilege under the Right-to-Know Law, 65 P.S. §66.1 et seq., and the privacy rights of third parties. The trial court ordered the production. The

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<sup>1</sup> The majority concludes that it is. I agree.

Bureau filed an immediate appeal under Pa.R.A.P. 313(b), which the Commonwealth Court quashed, concluding that Rule 313(b)'s first prong was not met.

We disagreed, and held that the trial court's discovery order satisfied all three of the Rule's prongs. In connection with the second prong, we weighed the interests implicated in the case against the costs of piecemeal litigation. Because we determined that the privileges the Bureau had raised concerned rights rooted in public policy, we concluded that the Rule's second prong was met. 729 A.2d at 552. In this part of our opinion, we did not consider whether the privileges or other rights the Bureau was asserting actually applied in the circumstances its case presented. Rather, it was later in our opinion, when we moved to the merits of the Bureau's appeal, that we decided whether the Bureau's files were privileged or otherwise protected from disclosure because of the privacy interests of third parties.<sup>2</sup> Ultimately, we rejected the Bureau's claims of privilege and other interests, and held that its files were subject to discovery. Id. at 553-54.

Thus, given the terms of Pa.R.A.P. 313(b) and our precedent applying it, I would not in connection with the Rule's second prong, analyze the parameters of Appellants' First Amendment rights, if any, or the lawfulness of the trial court's discovery order. Accordingly, I join the majority opinion, except for those portions of the majority opinion that discuss those matters.

Messrs. Justice Nigro and Eakin join this concurring opinion.

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<sup>2</sup> Unlike the present case, we decided to resolve the appeal rather than remand it to the Commonwealth Court. Id. at 552-53.