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**[ORAL ARGUMENT NOT YET SCHEDULED]
No. 22-7072**

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**MARTIN DOHERTY,
Appellant,**

v.

**TURNER BROADCASTING SYSTEMS, INC.,
Appellee.**

**Appeal from the United States District Court
for the District of Columbia, 1:20-cv-00134 TNM
Before the Honorable Trevor N. McFadden**

BRIEF OF APPELLANT DOHERTY

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November 30, 2022**

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Rules 15(c)(3), 26.1 and 28(a)(1), the Petitioner certifies as follows:

1. Parties:

The parties to this Petition for Review are the petitioner Martin Doherty and the respondents Turner Broadcasting Systems, Inc. The Georgetown University Law Center Appellate Litigation Program was appointed to file an Amicus Curiae in support of the Appellant

2. Rulings Under Review:

The Petitioner seeks review of the D.C. District Court's rulings in 1:20-cv-00134 as follows:

(a) Memorandum Order ECF 20 that partially granted Defendant's Motion to Dismiss. *See* JA 029-32.

(b) Memorandum Order ECF 35 granting Defendant's Partial Motion to Dismiss and denying Plaintiff's Motion for Leave to File a Sealed Sur Reply ECF 30. *See* JA 239-254.

(c) Minute Entry on 03/01/2021 denying Plaintiff's Third Motion to Amend Compliant ECF 38 on Docket. *See* JA 004.

(d) On July 26 in a Telephonic status conference, the court ruled Plaintiff could not present evidence of a violation of 26 USC § 7204 based on a waiver and preclusion of privilege via District of Columbia § 16-4204. *See* JA 800-821.

(e) Memorandum Order ECF 45 denying Plaintiff's Motion to Compel ECF 43. *See* JA 332.

(f) Memorandum Opinion ECF 59 on pending ECF's 48, 52, and 56. *See* JA 774.

(g) Order granting Defendant's Motion for Summary Judgement and denying Plaintiff's Cross-Motion for Summary Judgement ECF 52 and Plaintiff's Motion to Strike ECF 56. *See* JA 774 & JA 784.

3. Related Cases:

At this juncture no cases related to this matter are pending.

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GLOSSARY

DCWCA.....District of Columbia Workers Compensation Act
 IRS.....Internal Revenue Service
 JAJoint Appendix
 SA.....Supplemental Appendix
 DCHRA.....District of Columbia Human Rights Act
 SAC.....Second Amended Complaint

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 because Mr. Doherty raised a federal claim under 26 U.S.C. § 7434 alleging that Turner willfully filed fraudulent information returns. On April 15, 2022, the district court issued a final order granting Turner's motion for summary judgment. Mr. Doherty filed a timely notice of appeal on May 10, 2022. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

In order to avoid duplication Doherty fully concurs and incorporates issues I and II listed below and their respective accompanying arguments from the Amicus Brief. Doherty adds III, IV, V, VI, and VII.

- I. Whether there is a genuine dispute of material fact as to whether the W-2s Turner filed on Mr. Doherty's behalf constituted fraudulent information returns, in contravention of 26 U.S.C. § 7434(a).
- II. Whether there is a genuine dispute of material fact that Turner acted willfully, in violation of 26 U.S.C. § 7434(a), when it included Mr. Doherty's workers' compensation payments as taxable income on his W-2s.
- III. Whether Doherty was denied procedural due process rights under the Fifth and Fourteenth Amendments with the district court's rulings in the JA 239 Order granting the Defendant's Partial Motion to Dismiss and Denying Plaintiff's Motion for Leave to File a Sealed Sur Reply.
- IV. Whether Doherty was denied procedural due process rights under the Fifth and Fourteenth Amendments with the district court's rulings in the ECF 45 Order JA 332 denying Plaintiff Motion to Compel.

- V. Whether Doherty was denied procedural due process rights under the Fifth and Fourteenth Amendments during a Post Discovery status conference with the district court on 9/24/2021.
- VI. Whether Doherty, during a telephonic status conference JA 800-21 on 3/1/2021, was denied the right to be heard, present evidence, have the court prepare written findings of fact, and reasons for its oral denial during the status conference. Doherty had no opportunity to present evidence that was at the heart of his case that would have been a brief on the subject of a crime fraud exception that would bring to light inculpatory evidence gleaned from a private mediation with Appellees.
- VII. Whether the district court's granting of Appellees Motion for Summary Judgement was influenced by their inclusion in their Statement of Undisputed Facts JA 397 confidential collateral source payments made to Appellant which have no nexus or relevance to the case at bar.

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STATEMENT OF THE CASE

In order to avoid duplication Doherty fully concurs and incorporates the Amicus Brief's Statement of the Case. Doherty adds and will elaborate on Issues III, IV, V, VI, and VII. This brief will concentrate on the district courts due process violations as the Appellant sees them.

I. Statement of Facts

A. The district courts Memorandum Opinion and Order JA 239-54 denied Plaintiff's Motion for Leave to File a Sealed Sur Reply. In footnote 11 JA 253 the district court states:

The Court will deny Doherty's motion. As relevant here, Doherty argues that the sur-reply is necessary mostly to respond to Turner's res judicata argument. See Pl.'s Mot. for Leave at 1-2. But Turner raised these arguments in its partial motion to dismiss. See Def.'s Mem. at 16-18, 21. And Doherty responded to them in his opposition brief.

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Defendants arguing res judicata and claim splitting on Doherty's DCHRA claims and Retaliation under the DCWCA claims that are subject to the District Courts supplemental jurisdiction claims.

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B. Appellant filed on 8/06/21 a Motion to Compel Responses to Interrogatories, Requests for Production of Documents and Requests for Admissions and a Revised Scheduling order JA 258-290. The proposed Order JA 290 has a section for new discovery deadlines. While the district court denied the Motion JA 007 at ECF 45 it only addressed the Doherty's Motion to Compel and was silent on the revised Scheduling Order for new discovery deadlines.

ORDER denying Plaintiff's (ECF) 43 Motion to Compel. See attached Order for details. Signed by Judge Trevor N. McFadden on 8/30/2021. (lctnm2) (Entered 08/30/2021)

The attached order JA 332-33 also does not reference the Motion for a Revised Scheduling Order or in any manner rule on it.

C. On 7/26/21 the parties had a telephonic status conference.

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In Defendants Statement of Undisputed Facts JA 397 they include confidential collateral source payments made to Appellant which have no nexus or relevance to the case at bar. In the District of Columbia, evidence of payments from a collateral source are not admissible at trial to mitigate damages or in any manner which would mislead, improperly influence, or prejudice the jury. See *Jacobs v. H.L. Rust Co.*, 353 A.2d 6, 7 (D.C. 1976).

II. Procedural History

As to not duplicate and in the interest of judicial economy the Appellant adopts and incorporates the procedural history from the Georgetown University Law Center Appellate Litigation Program Amicus Brief.

SUMMARY OF THE ARGUMENT

The statement of Issues III through VII rest primarily on deprivation of property under the Fifth and Fourteenth Amendments of the United States Constitution.

ARGUMENT

A. Doherty was denied procedural due process rights under the Fifth and Fourteenth Amendments with the district court's rulings in the JA 239

The Supreme Court, in *Roth v. Board of Regents* (1970), noted that, “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim or entitlement to it.” Hence, the key to whether a person has a property interest in a benefit is whether that person is entitled to the benefit.¹

Appellant has a clear property interest in his wage loss/disability benefits under the District of Columbia Workers Compensation Act.² (DCWCA) See *Matthews v.*

¹ <https://civilrights.uslegal.com/due-process-violation/procedural-due-process/deprivation-of-property/>

² District of Columbia Code Annotated §32-1501, *et seq.*

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District of Columbia, 675 F. Supp. 2d 180 (D.D.C. 2009). The taxation by Appellees of Doherty's wage loss/disability benefits that are non-taxable under U.S.C 26 §104 is intertwined with the Appellees violation of the IRS 26 US Code § 7434. In order to have a property interest in disability compensation, the plaintiffs must have a "legitimate claim of entitlement to it." See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577.

Doherty had an undisputed claim for his wage loss/disability benefits under the DCWCA yet because the district court denied the Motion to File a Sealed Sur Reply SA 001 Doherty was denied the "opportunity to be heard at a meaningful time and in a meaningful manner" *Elkins v. Dist. of Columbia*, 527 F. Supp. 2d 36, 48 (D.D.C. 2007) (quoting *UDC Chairs Chapter, Am. Ass'n of Univ. Professors v. Bd. of Trustees of the Univ. of the Dist. of Columbia*, 56 F.3d 1469, 1472 (D.C. Cir. 1995)).

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Due process requires, as Judge Henry Friendly³ recommends, the right to present evidence, including the right to call witnesses, a requirement that the tribunal prepare a record of the evidence presented, a requirement that the tribunal

³ https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5317&context=penn_law_review

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prepare written findings of fact and reasons for its decision, and a notice of the proposed action and the grounds asserted for it. Doherty enjoyed none of these due process procedures in defending his DCHRA claims in the SAC on Count II that the district court ruled were subject to res judicata.

The SAC also contained DCWCA retaliation claims that the district court ruled “rely on facts adjudicated in his prior lawsuits” JA 253.

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B. Doherty was denied procedural due process rights under the Fifth and Fourteenth Amendments with the district court’s rulings in the ECF 45 Order JA 332 denying Plaintiff Motion to Compel and not addressing a Moton to Revise Scheduling Order during a Post Discovery Status Conference

The Order JA 332 fails to address Doherty’s Motion for a Revised Scheduling order. The title of the Motion reads “ Motion to Compel Responses to Interrogatories, Requests for Production of Documents and Requests for Admissions and a Revised Scheduling Order.” While the Motion’s title can be considered inartful in its construction the proposed Order JA 290 has a section that lays out new dates for “Close of Discovery.” While it is clear to Appellant that “Revised Scheduling Order” should be construed as a request to extend discovery

the district court was silent on the request in the written motion JA 258 and did not address it in their Order Denying the Motion to Compel JA 332. As a Pro Se litigant Doherty's pleadings are held "to less stringent standards than formal pleadings drafted by lawyers." *Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 150 (D.C. Cir. 2015) (cleaned up).

It is also possible that the Request for a Revised Scheduling Order was overlooked and in a post discovery status conference on 9/24/21 JA 788 the district court was ambiguous as to whether or not it had ruled on it. In JA 793-94 this discussion ensued: JA 793 Lines 10-25 and JA 794 Line 1

THE COURT: All right. Why didn't you ask for a Motion to Extend Discovery?

MR. DOHERTY: I'm sorry. Can you say that again?

THE COURT: Discovery ended a month ago.

MR. DOHERTY: Yes, sir.

THE COURT: So, you never filed a Motion to Extend Discovery.

MR. DOHERTY: **In my Motion to Compel, I did ask for a Motion to Extend.**

THE COURT: And what did I say?

MR. DOHERTY: **You were silent on that issue in the order.**

THE COURT: **I think I denied your motion.**

MR. DOHERTY: **As I understand it, you denied the Motion to Compel.** I'll have to go back and reread it. I didn't notice what you ordered on the Motion to Extend.

THE COURT: **Okay. All right.**

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The courts answer on line 22 of the JA 793 says “*I think I denied your motion.*” This is not conclusive or determinative statement. Again, on line 2 JA 795 the court again says, “*I think discovery did close.*” Clearly from the tense of these statements Appellants Request for a Revised Scheduling Order was not given any credence or consideration. Even though the court in line 7 of JA 795 decided then and there at the Post Discovery Status Conference that discovery was over. Doherty was denied procedural due process rights. Most importantly the tribunal prepared no written findings of fact and reasons for its decision and provided no notice of the proposed action and the grounds asserted for it.

**C. Doherty, during a telephonic status conference JA 800-21 on 3/1/2021,
was denied procedural due process rights under the Fifth and
Fourteenth Amendments**

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Even though the crime fraud exception can be used here Appellees have waived their confidentiality agreement from the mediation as the telephonic status conference JA 800-21 transcripts were released to the public docket and Appellees had the opportunity to ask for redactions, which they did not do. The following excerpts are from those transcripts.

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JA 810, line 7-25. Next Doherty asserts that Defendants said, “*we will provide you with your corrected w-2s as part of the offer.*” Appellant invites you to read the following JA 810, line 12-14. JA 811, line 1-25, JA 812, line 1-25, JA 813, line 1-25. The subject of their offer to provide the corrected W-2s was memorialized in an email to Appellees lead counsel where Doherty said, “*You indicated that you had the corrected W-2s during the mediation so I think now is the time to give them to me so I can settle the lien issues with the IRS.*” JA 492.

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Again, Doherty was denied procedural due process rights under the Fifth and Fourteenth Amendments. He was denied the right to be heard, present evidence, introduce a witness, have the court prepare written findings of fact, and reasons for its oral denial during the status conference. Doherty had no opportunity to present evidence that was at the heart of his case that would have been a brief on the subject of a crime fraud exception that would bring to light inculpatory evidence gleaned from the public transcripts and possibly the private mediation with Appellees. Once again the tribunal prepared **no written** findings of fact and reasons for its decision and **provided no notice of the proposed action** and the grounds asserted for it.

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The fact is that IRS Code §7204 states that any person:

*“who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051, or regulations prescribed thereunder, shall, for each such offense, upon conviction thereof, be fined not more than 100, or imprisoned not more than 1 year or both.”*⁴

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Now Appellees insist in the transcripts JA 812, line 10 that they only “*offered to look into whether or not we could issue a corrected W-2,*” so in fact the subject was broached by their own admission outside of the mediation. The problem is that statement was made in the telephonic status conference JA 800-21 on 3/1/2021. An April 29, 2016, letter JA 470 from the IRS investigating the W-2 complaint made by Doherty confirmed that Turner Services Corporate Tax Department had deemed to the IRS that Doherty’s 2015 W-2 was correct. It begs the question of why Appellees stated they would look into “*whether or not we could issue a corrected W-2,*” transcripts JA 812, line 10 approximately **4 years and 11 months after** their own tax department told the IRS that there were no corrected W-2 for 2015 to be put forth.

D. Was the district court’s granting of Appellees Motion for Summary Judgement influenced by their inclusion in their Statement of Undisputed Facts JA 397 confidential collateral source payments

⁴ <https://www.law.cornell.edu/uscode/text/26/7204>

In JA 397, number 18 & 20 Appellees list the amounts of “pay” which Appellant has received year to date. This “pay” is actually wage loss benefits paid pursuant to the DCWCA, These amounts have no nexus or relevance to the case at bar. The case at bar is not about how much wage loss benefits have actually been issued. It is about the illegal taxation of said benefits in the past. The case at bar’s genesis is not about how much taxes Doherty paid, rather it is about Appellees deducting payroll taxes, social security, Medicare, Federal and State income tax before Doherty even receives it and then reporting it all as gross income to the IRS. The case is about willfully taxing wage loss benefits that are not taxable under 26 U.S. Code 104.

Thus, Appellees inclusion of what Doherty has received so far is an attempt to tip the scales within the court’s overall analyzation of Doherty’s claim for relief. The problem is that these wage loss benefits come from a collateral source, a third-party insurer. They do not come from Appellees. In the District of Columbia, evidence of payments from a collateral source is not admissible at trial to mitigate damages or in any manner which would mislead, improperly influence, or prejudice the jury. See *Jacobs v. H.L. Rust Co.*, 353 A.2d 6, 7 (D.C. 1976). In the instant case the adjudicators at the Motion for Summary Judgement phase could

possibly be influenced by the disclosure of these payments. The inclusions of these wage loss benefits does not change the calculus as far as Appellees filing false information returns with the IRS that included Doherty's workers compensation wage loss benefits that they included in his gross taxable income when in fact they knew it was improper under 26 U.S. Code 104. Doherty conveyed to them numerous times his W-2s were not accurate. *See* generally Amicus Brief at pp. 38-42.

CONCLUSION

For the foregoing reasons, while also incorporating the Amicus Brief, this Court should reverse the grant of summary judgment and remand or in the alternative instruct the District Court to grant Summary Judgement to Doherty.

Respectfully Submitted, /s/ Martin Doherty November 30, 2022
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3593 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I, Martin Doherty certify that on November 30, 2022, I electronically filed the foregoing corrected version #1 of Appellants Opening Public Brief via this Court's CM/ECF system, which will send notice of such filing to counsel of record. Additionally, Doherty will send via USPS a hard copy and email copy of this filing to counsel of record, the Georgetown University Law Center Appellate Litigation Program Amicus Briefers and Appellees Turner Broadcasting Systems Inc., in the above-captioned case.

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