

FILED
FIFTH DISTRICT COURT
2007 MAY 25 AM 8:33
WASHINGTON COUNTY

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BY _____

Attorneys for *Deseret Morning News*
Reporter Ben Winslow

IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY

STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

**MEMORANDUM IN SUPPORT
OF MOTION TO QUASH
SUBPOENA TO *DESERET
MORNING NEWS* REPORTER
BEN WINSLOW**

Criminal No. 061500526

Judge James L. Shumate

Deseret Morning News reporter Ben Winslow ("Winslow"), through his undersigned counsel, respectfully submits the following Memorandum of Points and Authorities in support of his Motion to Quash Subpoena, filed concurrently herewith. A copy of the subpoena at issue is attached hereto as Exhibit "A".

INTRODUCTION

At 11:30 a.m. today in Salt Lake City, Walter Bugden, counsel to Mr. Jeffs, attempted to serve a subpoena on Ben Winslow, a reporter for the *Deseret Morning News* who is covering these proceedings, commanding him to appear in this Court *tomorrow morning*. Even worse than the lack of timely notice, Mr. Jeffs has indicated that the purpose of the subpoena is to force Mr. Winslow to testify and disclose the identities of his confidential sources—an issue that has nothing to do with the Media Intervenors’ Motion for Limited Intervention, which is the subject of the hearing tomorrow, nor with any other issue in this case. Mr. Jeffs has made no attempt to show the relevance of this information, to explain why this sudden “emergency” must be heard tomorrow, to demonstrate why prevention of law enforcement leaks is Mr. Jeffs’ responsibility to enforce, or to overcome the constitutional privilege that protects the identities of a reporter’s confidential sources.

The law recognizes a qualified First Amendment privilege that protects the *News* and Winslow from compelled disclosure of material obtained in the course of gathering the news, particularly his confidential sources. Under the controlling constitutional case law, to overcome the privilege, a party must establish that the information sought from Mr. Winslow is (I) not available from alternative sources; (ii) goes to “the heart” of the party’s case, such that the party’s case rises or falls on such evidence; and (iii) is of certain relevance. As demonstrated below, Mr.

Jeffs has not and cannot make this required showing. The material sought from Winslow has nothing to do with this case, much less go to the heart of it.

The subpoena to Winslow appears to be an attempt to retaliate against him for his news reporting on these proceedings, including Mr. Jeffs' well-publicized note. This eleventh-hour tactic is wildly inappropriate under the rules, runs afoul of the constitutional privilege protecting newsgathering material, and is an abuse of the Court's subpoena power. It should be quashed immediately.

ARGUMENT

I. THE SUBPOENA FAILS TO PROVIDE REASONABLE NOTICE AND IS UNDULY BURDENSOME.

As a threshold matter, the subpoena should be quashed because it fails to give reasonable notice and would be unduly burdensome. Rule 45(c)(3)(A) of the *Utah Rules of Civil Procedure* provides in pertinent part as follows: "On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it: (I) fails to allow reasonable time for compliance; . . . [or] (iv) subjects a person to undue burden." Utah R. Civ. P. 45(c)(3)(A).

The subpoena to Winslow violates both of these provisions. Mr. Bugden served the subpoena on Winslow at 11:30 a.m. today, giving him *less than twenty hours notice* to appear in a courtroom hundreds of miles away. Under any circumstances, the notice given to Winslow is unreasonably short and would be unduly burdensome, particularly where there are no special circumstances justifying his appearance tomorrow. *See, e.g., United States v. Woods*, 931 F.

Supp. 433, 442 n. 3 (E.D. Va. 1996) (finding seven days notice to comply with subpoena "would not have allowed a reasonable time for compliance and would be subject to a motion to quash.").

Mr. Bugden has made no attempt to confer with Mr. Winslow or his counsel prior to issuing this subpoena, nor has he explained why this issue is such an emergency that it must be heard tomorrow. Mr. Bugden has had weeks to serve this subpoena, and his tactic of serving it at the last minute prejudices Mr. Winslow's legal rights to challenge the subpoena and be afforded a fair and complete hearing. As this Court's Hearing Notice states, the hearing tomorrow concerns only the Media Intervenors' Motion for Limited Intervention regarding this Court's sealed filings. The identity of Winslow's confidential sources is utterly irrelevant to that hearing. To the extent it relates at all to Mr. Jeffs' Motion to Exclude Cameras from Courtroom (and it is not relevant to that Motion either), the subpoena can be resolved in connection with a hearing on that Motion at its duly scheduled time in the future.¹

¹ In addition, the subpoena is procedurally defective because Mr. Bugden, acting as his own process server, failed to tender to Mr. Winslow the required witness fee and mileage reimbursement. See Utah R. Civ. P. 45(b)(1)(A). As such, service of the subpoena is defective and incomplete. See *In re Stratosphere Corp. Secs. Litig.*, 183 F.R.D. 684, 687 (D. Nev. 1999) ("The failure to pay witness and mileage fees, required by Fed. R. Civ. P. 45(b)(1), renders service incomplete."). Nor did Mr. Bugden provide Mr. Winslow with the required Notice to Persons Served With a Subpoena, as Rule 45 expressly requires. Utah R. Civ. P. 45(a)(1)(D). These omissions are significant given the distance Mr. Winslow has been commanded to travel and the significant constitutional issues implicated by the subpoena, and they render the subpoena invalid on its face.

II. **MR. WINSLOW HAS A FIRST AMENDMENT PRIVILEGE PROTECTING HIM FROM COMPELLED DISCLOSURE OF INFORMATION ACQUIRED IN THE COURSE OF GATHERING THE NEWS**

In *Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646 (1972), the United States Supreme Court acknowledged the existence of First Amendment protection for newsgathering. The Court stated that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg*, 92 S. Ct. at 2656. Since *Branzburg*, numerous state and federal courts have recognized a qualified First Amendment privilege protecting journalists from compelled disclosure of information acquired in the course of gathering the news, including their confidential sources. See, e.g., *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977) (protecting confidential sources); *Bottomly v. Leucadia Nat'l Corp.*, 24 Media L. Rep. 2118, 1996 WL 560188 (D. Utah 1996) (Boyce, J.); *Re/Max Int'l, Inc. v. Century 21 Real Estate Corp.*, 846 F. Supp. 910, 911-12 (D. Colo. 1994); *Mitchell v. Superior Court*, 208 Cal. Rptr. 152, 690 P.2d 625, 632 (1984); *Miami Herald Publishing Co. v. Morejon*, 561 So. 2d 577, 579-82 (Fla. Sup. Ct. 1990).²

The privilege has been specifically applied to protect the identities of confidential sources, a context where the constitutional protection is at its apex. See, e.g., *Hopewell v.*

² Other courts that have found a qualified newsgathering privilege rooted in the First Amendment include: *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), cert. denied, 479 U.S. 818 (1986); *Zerilli v. Smith*, 656 F.2d 705, 710-12 (D.C. Cir. 1981); *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *Parr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976); *In re Letellier*, 578 A.2d 722, 726 (Me. 1990).

Midcontinent Broadcasting Corp., 538 N.W.2d 780, 780-83 (S.D. 1995) (noting that "news sources may be subject to harassment or more serious danger if their identity is disclosed" and holding trial court permissibly refused to compel disclosure of confidential news sources relating to judicial election under the qualified reporter privilege where balance of interests favored confidentiality); *Commonwealth v. Bui*, 645 N.E.2d 689, 402 (Mass. 1995) (affirming grant of motion to quash defendant's subpoena that moved for disclosure of confidential news sources based on a balancing of interests); *United States v. Pretzinger*, 542 F.2d 517, 520-21 (9th Cir. 1976) (affirming refusal of trial court to force newsman to reveal the confidential government agent source regarding the drug arrest of defendant); *United States v. Orsini*, 424 F. Supp. 229, 230-32 (E.D.N.Y. 1976) (quashing subpoena that requested reporter to reveal the identify of confidential government official sources because the information sought was irrelevant to the direct issues before the court and the First Amendment balance of the interests "weighed decidedly in favor of protecting the confidentiality of [the reporter's] sources").

In addition to source identities, the privilege has been applied to journalistic material derived from nonconfidential as well as confidential sources. See *Re/Max Int'l, Inc. v. Century 21 Real Estate Corp.*, 846 F. Supp. 910, 911-12 (D. Colo. 1994) (nonconfidential published information in newspaper articles); (*Parsons v. Watson*, 778 F. Supp. 214, 218 (D. Del. 1991) (nonconfidential published information in newspaper articles); *United States v. Blanton*, 534 F. Supp. 295, 296 (S.D. Fla. 1982) (nonconfidential published information in newspaper articles);

Gonzales v. NBC, 194 F.3d 29 (2d Cir. 1999) (nonconfidential videotape interview outtakes); *Blum v. Sehlegel*, 150 F.R.D. 42,44 (W.D.N.Y. 1993) (reporter's tape recording of nonconfidential interview); *United States v. Bingham*, 765 F. Supp. 954, 957 (N.D. Ill. 1991) (television news reporter's nonconfidential interview outtakes); *United States v. Marcos*, 1990 WL 74521, 17 Med. L. Rptr. 2005, 2007 (S.D.N.Y. 1990) (nonconfidential outtakes from "60 Minutes" interview); see also *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) ("We discern a lurking and subtle threat to journalists and their employees if disclosure of outtakes, notes and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly compelled.").

The privilege "is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest of sufficient importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (quoting *Herbert v. Lando*, 441 U.S. 153, 183, 99 S. Ct. 1635, 1652 (1979) (Brennan, J., dissenting) (quoting *McCormick on Evidence* 152 (2d ed. 1972))). As the Second Circuit Court of Appeals stated in the *Gonzales* case:

If the parties to any lawsuit were free to subpoena the press at will, it would likely be standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties – particularly if potential

sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation.

Gonzales, 194 F.3d at 35. Thus, the privilege protects reporters from being compelled to testify against their sources and from "making journalists appear to be an investigative arm of the judicial system, the government, or private parties." *Id.*

The privilege was explicitly recognized by the Tenth Circuit Court of Appeals in *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437-38 (10th Cir. 1977), which also involved confidential sources. Examining *Branzburg* and the current state of the law, the court noted that "[t]he [*Branzburg*] majority also makes clear that it is not requiring the press to publish its sources of information or indiscriminately to disclose them on request. From this discussion we infer that the present privilege is no longer in doubt." *Id.* at 437 (emphasis added). *Silkwood* adopted a four-factor burden that must be overcome by the party seeking to obtain newsgathering information or reporter testimony: (1) the party seeking the information must have independently attempted to obtain the information elsewhere and have been unsuccessful; (2) the information must go to the heart of the case, such that the party's case rises or falls on such evidence; (3) the information must be of certain relevance; and (4) the nature of the proceeding must weigh in favor of disclosure. *Id.* at 438.

In *Bottomly v. Leucadia National Corp.*, 24 Media L. Rep. 2118, 1996 WL 560188 (D. Utah 1996), United States Magistrate Judge Ronald N. Boyce applied the *Silkwood* factors to quash subpoenas requiring *Salt Lake Tribune* reporter Sheila McCann and Associated Press

reporter Mike Carter to give deposition testimony about information they obtained in the course of their reporting on an employment discrimination case. Judge Boyce held that "although there is logical probativeness to the case in what might possibly develop from the depositions [of the reporters]," because the information sought from the reporters was "not central or core to the litigation," the subpoenas should be quashed. *Bottomly*, U.S. Dist. LEXIS 14760 at *7-8.

Trial courts in Utah have similarly recognized this First Amendment privilege and quashed subpoenas to news reporters where the required showing to overcome the privilege has not been met. *See, e.g., State v. Koolmo*, Civil No. 981905396FS (Utah 3d Dist. Ct. March 29, 1999) (J. Hilder) (holding privilege applies in criminal case to nonconfidential newsgathering material and applying *Silkwood* factors); *State v. Michaels*, Civil No. 011902114FS (Utah 3d Dist. Ct. July 9, 2001) (J. Fuchs) (quashing subpoena to reporter seeking videotape of defendant, finding "no reason to disregard a reporter's privilege or news gathering privilege[.]"); *Lester v. Draper*, Civil No. 000906048 (Utah 3d Dist. Ct. Jan. 16, 2002) (J. Frederick) (quashing subpoena to reporter seeking unaired video newsgathering material, holding "[t]he reporter's privilege applies in civil as well as criminal cases and to journalistic material derived from nonconfidential sources, such as the material at issue here."). Copies of these Orders are attached hereto as Exhibits "B" through "D".

Application of the *Silkwood* and *Bottomly* factors to this case reveals that Mr. Jeff's has not and cannot make the showing required to overcome Winslow's First Amendment privilege.

III. **MR. JEFFS HAS MADE NO SHOWING SUFFICIENT TO OVERCOME WINSLOW'S FIRST AMENDMENT REPORTER'S PRIVILEGE**

A. **There Has Been No Showing That Mr. Jeffs Has Exhausted Alternative Sources for the Information Sought From Winslow**

The reporter's privilege requires that, "before disclosure may be ordered, the requesting party must demonstrate that [it] has exhausted all reasonable alternative means for obtaining the information." *Shoen*, 5 F. 3d at 1296. "Under *Silkwood*, if [Winslow] is not the only source for this evidence, the [alternate means] prong of the test is not met." *Re/Max Int'l*, 846 F. Supp. at 912. Mr. Jeffs has not made any showing in this case that he has attempted and failed to obtain the information sought from alternative sources, such as the law enforcement officers he claims are the origin of the "leak."

B. **The Information Sought From Winslow Does Not "Go to the Heart" of This Case**

Application of the second *Silkwood* factor – whether the information sought "goes to the heart" of this case – weighs decisively in favor of quashing the subpoena. The identity of Mr. Winslow's sources has absolutely nothing to do with this case; Mr. Jeffs' right to a fair trial, or more particularly the Motion to Intervene scheduled for hearing tomorrow. Moreover, the information that was supposedly "leaked" has already been widely published, and disclosing the identity of Mr. Winslow's confidential sources would do nothing to remove that information from the public domain.

Under these circumstances, Mr. Jeffs cannot make the requisite showing that the information is "central or core to the litigation." *Bottomly*, 1996 U.S. Dist. LEXIS 14760 at *7. As one court has explained, if testimony and newsgathering material could be compelled merely because the evidence was probative or admissible, "the qualified reporter's privilege would be a mirage." *Doe v. Kohn, Nast & Graf, P.C.*, 853 F. Supp. 150, 152 (E.D. Pa. 1994). In addition, the showing of relevance "must be a showing of actual relevance; a showing of potential relevance will not suffice." *Neal v. City of Harvey*, 173 F.R.D. 231 (N.D. Ill. 1997).

C. The Information Sought From Winslow Is Not of Certain Relevance.

Even assuming Winslow's testimony were relevant, that is still insufficient to overcome the First Amendment reporter's privilege. As Judge Boyce stated in the *Bottomly* case, the information sought must be "central or core" to the litigation for the privilege to be overcome. *Bottomly*, 1996 WL 560188 at *7. "The showing that the sought information is highly relevant and material must be specific." *Neal*, 173 F.R.D. at 233. A mere "hunch," without more, does not constitute a clear and specific showing that the nonpublished information sought is highly material and relevant. *Lopez*, 1987 U.S. Dist. LEXIS 11115, at *6-7; *see also Re/Max*, 846 F. Supp. at 912 (quashing subpoena where requesting party merely wanted to probe potential relevance). And, as noted above, "there must be a showing of actual relevance; a showing of potential relevance will not suffice." *Neal*, 173 F.R.D. at 234.

For the reasons set forth in the preceding section, Mr. Jeffs has not and cannot make the required showing of certain relevancy in this case.

IV. THE PUBLIC INTEREST WEIGHS IN FAVOR OF QUASHING THIS SUBPOENA

The reporter's privilege "reflects a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters." *Burke*, 700 F.2d at 77 (quoting *Baker v. F&I Investment*, 470 F.2d 778, 782 (2d Cir. 1972), *cert denied*, 411 U.S. 966 (1973)). "The compelled production of a reporter's resource materials can constitute a significant intrusion into the news-gathering and editorial process. Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring free flow of information to the public that is the foundation for the privilege." *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980).

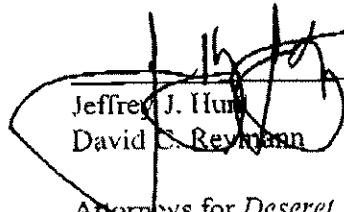
Litigants should not be allowed to subject a news reporter or news organization to legal process to disclose their confidential sources, particularly where, as here, that subpoena appears to be retaliation against a news reporter for covering a criminal trial, and where the information sought is wholly irrelevant to the actual proceedings in the case. The First Amendment exists to protect reporters from such state-sanctioned misuses of the subpoena power. Public policy favoring an independent press and the free flow of information to the public argues in favor of quashing subpoenas where, as here, Mr. Jeffs has failed to make the required showing to overcome the First Amendment reporter's privilege.

CONCLUSION

For the foregoing reasons, Winslow respectfully requests that the Court grant his Motion and quash the subpoena issued to Winslow.

RESPECTFULLY SUBMITTED this 24 day of May 2007.

PARR WADDUPS BROWN GEE & LOVELESS


Jeffrey J. Hunt
David C. Reynolds
Attorneys for *Deseret Morning News* Reporter Ben Winslow

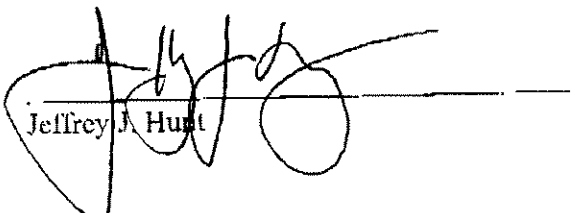
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of May 2007, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA TO *DESERET MORNING NEWS* REPORTER BEN WINSLOW** was sent via facsimile and United States mail, postage prepaid, to:

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Attorneys for Defendant

IN THE FIFTH DISTRICT COURT
 WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

SUBPOENA

Case No. 061500526

Judge James L. Shumate

TO: *Ben Winslow*
The Deseret News

YOU ARE COMMANDED:

to appear in the Fifth District Court, Washington County, St. George, Utah, on the date and time specified below to testify in the above case.

- to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.
- to produce or permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects):
- to permit inspection of the following premises at the date and time specified below.

PLACE

Fifth District Court
220 North 200 East
St. George, UT 84770

DATE AND TIME

May 25, 2007
9:00 a.m.

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other person who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Rule 30(b)(6), Utah Rules of Civil Procedure.



ISSUING OFFICER'S SIGNATURE
(check box below to indicate title)

DATED: May 23, 2007

- Deputy Court Clerk
- Attorney for Plaintiff
- Attorney for Defendant

*The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court. Rule 45(e)(3) Utah Rules of Civil Procedure.

DESERET

Morning News

Richard D. Hall
Managing Editor

Fax: 801.237.2530

FAX

This cover sheet plus 2 pages

To: **Jeff Hunt**

Fax No.: 532-7750

Note:

B

FILED
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SALT LAKE COUNTY
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Attorneys for Amy Donaldson

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE DEPARTMENT, DIVISION II

SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,)	
	)	ORDER
Plaintiff,)	
)	
vs.)	
	)	Case No. 981905396FS
TODD DEAN KOOLMO,)	
	)	Judge Robert K. Hilder
Defendant.)	

WRK

Amy Donaldson's Renewal of Motion to Quash Subpoena came on for hearing before the Court, the Honorable Robert K. Hilder presiding, on March 5, 1999, Jeffrey J. Hunt appearing on behalf of Ms. Donaldson, James Cope and Blake Nakamura appearing on behalf of the State of Utah, and James Bradshaw and Mark Moffat appearing on behalf of the defendant, Todd Dean Koolmo, and the Court having carefully reviewed and considered the memoranda and other materials submitted by the parties, having heard and considered the arguments of counsel, having

previously entered its Minute Entry and Order dated November 24, 1998 in this matter, being fully advised in the premises and good cause appearing therefor,

HEREBY ORDERS, ADJUDGES AND DECREES as follows:

1. As a newspaper reporter, Ms. Donaldson enjoys a qualified First Amendment privilege from being compelled to testify at the trial of the defendant.

2. In determining whether the State has met its burden to overcome the qualified reporter's privilege, the Court considers four factors: (i) whether the party seeking the information has independently attempted to obtain the information elsewhere and been unsuccessful; (ii) whether the information sought goes to the heart of the matter; (iii) whether the information is of certain relevance; and (iv) the type of controversy. Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 437-38 (10th Cir. 1977); Bottomly v. Leucadia Nat'l Corp., 24 Media L. Rep. 2118, 1996 WL 560188 (D. Utah 1996).

3. Based upon the testimony and evidence previously admitted during the trial of the defendant herein, and the statements and quotations attributed to the defendant in the newspaper article authored by Ms. Donaldson, the Court finds that the State has carried its burden of demonstrating that the testimony sought from Ms. Donaldson is of certain relevance and goes to the heart of the State's case. The fact this is a criminal case also weighs in favor of compelling the testimony sought.

4. The Court finds, however, that the affidavit offered by Ms. Donaldson, which authenticates the newspaper article and affirms that the article accurately quotes and/or attributes

the statements made therein by the defendant, is an adequate and sufficient alternative form for the testimony sought by the State.

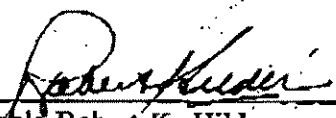
5. Presentation of Ms. Donaldson's testimony by affidavit in lieu of personal appearance as a witness strikes an appropriate balance between the State's need for the testimony and the significant First Amendment interests that are protected and furthered by the reporter's privilege, including the maintenance of an independent press, preservation of reporter-source relationships, and encouraging the free flow of information to the public about issues of public concern.

6. The defendant, Todd Dean Koolmo, has stipulated to the admission of Ms. Donaldson's affidavit and newspaper article in lieu of her personal appearance at trial.

7. The Subpoena issued by the State of Utah to Ms. Donaldson commanding her appearance at trial herein is quashed.

DATED this 18th day of March 1999.

BY THE COURT:



Honorable Robert K. Hilder
Third District Judge

C

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,)	
	)	Audiotape-recorded hearing
Plaintiff,	)	July 9, 2001
	)	Civil No. 011902114FS
vs.	)	RULING GRANTING CBS'S
	)	MOTION TO QUASH SUBPOENA
MICHELLE AFTON MICHAELS,)	
	)	Judge Dennis M. Fuchs
)	
Defendant.)	

Be it remembered that on the 9th day of July 2001,
the above hearing was recorded by audiotape and
hereinafter transcribed by Heather White, a Certified
Court Reporter and Notary Public in and for the State of
Utah.

ORIGINAL



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1 RULING GRANTING CBS'S MOTION TO QUASH SUBPOENA

2 JULY 9, 2001

3
4 THE COURT: Okay, this is the matter of the State
5 of Utah versus Michelle Afton Michaels, 011902114, on --
6 for a motion to quash on behalf of -- I don't want to get
7 it wrong, CBS, which is channel --

8 MR. HUNT: Two, KUTV.

9 THE COURT: Okay. I don't want to make any faux
10 pas here. The Court listened to argument, read
11 memorandums. In the course of argument, both parties
12 agreed that a copy of the videotape would be submitted to
13 the Court along with a certified copy of Michelle
14 Michaels's written statement. The Court has had an
15 opportunity to review those. Based on the review of those,
16 the Court is going to go ahead and grant CBS's motion to
17 quash. The videotape, the written statement,
18 word-for-word, exactly the same, no emotion, no significant
19 emotion on behalf of Ms. Michael, no other thing contained
20 on this tape.

21 So based on that, the Court is finding that the
22 State can independently seek the same documentation, or
23 evidence, or statements that are contained in this tape.
24 The Court does find that the information goes to the heart
25 of the matter. The Court does find that it could be

1 relevant -- relevant, and the Court does find that it's
2 criminal controversy. However, there seems to be no reason
3 to disregard a reporter's privilege or news gathering
4 privilege in regards to this matter. I don't see how there
5 can be any significant difference to the State whether they
6 use the tape statement, the written statement to impeach
7 Ms. Michaels, or the videotape. So the Court is going to
8 return the copy of the video to CBS and order that the
9 affidavit along with the written statement be turned over
10 to the State.

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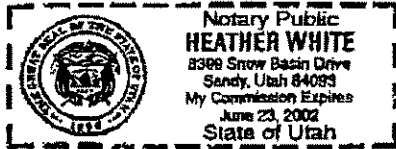
STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, HEATHER WHITE, Registered Professional Reporter and Notary Public in and for the State of Utah, do hereby certify:

That said hearing was taken down by me in shorthand on July 26, 2001, and thereafter pages 2 and 3 were reduced to transcription under my direction.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND AND SEAL this 26th day of July, 2001.



Heather White
HEATHER WHITE, RPR/CSR
Notary Public
Residing in Salt Lake County

My Commission Expires:
June 23, 2002

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FILED DISTRICT COURT
Third Judicial District

JAN 16 2002

By _____
SALT LAKE COUNTY
Deputy Clerk

Jeffrey J. Hunt (5855)
David C. Reymann (8495)
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Attorneys for KUTV, L.P.

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TRUDY LESTER, an individual,)	
)	
Plaintiff,	)	FINDINGS, CONCLUSIONS, AND
	)	ORDER GRANTING KUTV'S
v.	)	MOTION TO QUASH SUBPOENA
)	
LYNN DRAPER, and	)	Civil No. 000906048
GILBERT CAPSON, individuals,)	
	)	Judge J. Dennis Frederick
Defendants.)	

The Court, having carefully reviewed and considered the memoranda and other materials submitted by the parties in connection with KUTV's Motion to Quash Subpoena ("Motion"), having issued its Minute Entry Ruling dated December 18, 2001 granting the Motion, being fully advised in the premises and good cause appearing therefor, makes the following Findings of Fact, Conclusions of Law, and Order.

FACTS

The Court finds the following facts to be undisputed for purposes of KUTV's Motion:

1. KUTV is a television station broadcasting from Salt Lake City, Utah, that regularly gathers and reports news and information of general interest to the public.

2. "Get Gephardt" is a regular KUTV news feature that investigates and reports on consumer problems, product claims, and related consumer issues.

3. Bill Gephardt is the featured reporter on the "Get Gephardt" program.

4. In May 2000, Trudy Lester, the plaintiff in this action, contacted "Get Gephardt" to complain about a termite infestation in a home she recently purchased.

5. "Get Gephardt" investigated Lester's complaint by conducting a videotaped interview of Lester at her home; conducting a videotaped interview of Lynn Draper, a defendant herein, who Lester alleges performed a negligent termite inspection of the home; conducting a videotaped interview of a competing insect exterminator who had inspected Lester's home; and conducting a videotaped interview of a representative from the state housing authority.

6. The videotape interview of Lester was conducted by "Get Gephardt" producer Doug Edwards at Lester's home.

7. The videotape interview of Draper lasted approximately five minutes and was conducted by Gephardt at Draper's home.

8. During the videotape interview of Draper, a woman, later identified as Draper's wife, was present throughout the interview.

9. After conducting the foregoing interviews and performing additional investigation, Gephardt decided not to broadcast a story on "Get Gephardt" about the termite infestation in Lester's home.

10. None of the videotape interviews conducted by Edwards and Gephardt relating to the termite infestation of Lester's home have aired on "Get Gephardt" or any other program on KUTV.

11. Counsel for Lester issued a Subpoena Duces Tecum to KUTV commanding a representative of KUTV to appear for deposition at 10:00 a.m. on September 13, 2000 and to produce for inspection at such deposition the following records:

All records of all information relating to any party to this lawsuit, including specifically but without limitation the videotape of the interview of Lynn J. Draper by Doug Edwards.

12. On September 11, 2000, counsel for KUTV delivered a letter to plaintiff's counsel objecting to plaintiff's subpoena and asserting the protection of the reporter's privilege.

13. On September 13, 2001, KUTV filed its Motion to Quash Subpoena and supporting Memorandum.

CONCLUSIONS OF LAW

Based upon these undisputed facts, the Court makes the following conclusions of law:

1. KUTV and its reporter, Bill Gephardt, enjoy a qualified First Amendment reporter's privilege from being compelled to produce and/or testify at deposition about material obtained in the course of gathering the news.

2. The reporter's privilege applies in civil as well as criminal cases and to journalistic material derived from nonconfidential sources, such as the material at issue here.

3. The documents and information requested in plaintiff's subpoena constitute KUTV's newsgathering material.

4. In determining whether the party seeking to compel production of newsgathering material has met its burden to overcome the qualified reporter's privilege, the Court considers four factors: (i) whether the party seeking the information has independently attempted to obtain the information elsewhere and been unsuccessful; (ii) whether the information sought goes to the heart of the matter; (iii) whether the information is of certain relevance; (iv) the type of controversy. See *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437-38 (10th Cir. 1977); *Bottomly v. Lecadia Nat'l Corp.*, 24 Media L. Rep. 2118, 1996 WL 560188 (D. Utah 1996).

5. Plaintiff has failed to carry her burden of proof with respect to each of the first three *Silkwood* factors set forth above.

6. With respect to the fourth *Silkwood* factor – the type of controversy – the balancing of interests requires a stronger showing of need by a party seeking production of privileged newsgathering material in a civil case, as compared to a criminal case, because the constitutional

rights of a criminal defendant are not implicated. KUTV is a third party that has no involvement or stake in this litigation. Because KUTV's assertion of the reporter's privilege arises in the context of a civil case, the final *Silkwood* factor also weighs in its favor.

7. Before private litigants are allowed to compel news organizations to produce unaired newsgathering material, they must demonstrate the critical need for such information and lack of alternative sources required by the First Amendment. Plaintiff has failed to make this showing.

8. Pursuant to Rule 45(c)(2)(C) of the *Utah Rules of Civil Procedure*, if a party serves a written objection to the production of documents upon the attorney designated in the subpoena prior to the time specified for compliance, "the party serving the subpoena shall not be entitled to inspect and copy the materials . . . except pursuant to order of the court."

9. KUTV's written objection to plaintiff's subpoena, delivered by counsel for KUTV on or about September 11, 2000, preserved KUTV's objection to the subpoena and shifted the burden to plaintiff to seek an order from the Court compelling production. Utah R. Civ. P. 45(c)(2)(C).

10. KUTV timely and properly preserved its objections to plaintiff's subpoena and was under no obligation to produce its privileged newsgathering material unless and until the Court ordered it to do so.

11. Thus, the Court rejects plaintiff's assertion that KUTV was "in contempt" because it did not appear for deposition and produce the requested documents on the date and time specified in the subpoena.

ORDER

Based upon the foregoing Findings and Conclusions, and the reasons set forth in KUTV's supporting memoranda,

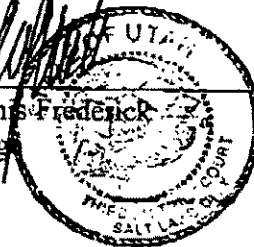
IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

- 1. KUTV's Motion to Quash Subpoena is granted.
- 2. The Subpoena Duces Tecum to KUTV is quashed.


DATED this 16th day of January 2002.


BY THE COURT:

Honorable J. Dennis Frederick
Third District Judge



APPROVED AS TO FORM:


Thor B. Roundy, Esq.
Attorney for Plaintiff


Douglas Mortensen, Esq.
Attorney for Defendants