

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

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| TAMMY KITZMILLER, et al. | : | Case Number: 04-CV-2688 |
| | : | Judge Jones |
| | : | (Filed electronically) |
| vs. | : | |
| | : | |
| DOVER AREA SCHOOL DISTRICT; DOVER AREA SCHOOL DISTRICT BOARD OF DIRECTORS | : | MOTION TO QUASH SUBPOENA OR FOR PROTECTIVE ORDER |

MOTION TO QUASH SUBPOENA OR FOR PROTECTIVE ORDER

AND NOW, come Joseph Maldonado, a non-party subpoenaed witness, and Heidi Bernhard-Bubb, a non-party subpoenaed witness, by and through their Attorneys, the **BENNLAWFIRM**, and submit the within Motion to Quash Subpoena or For Protective Order pursuant to Fed. R.Civ. P. 26(c) and 45(c), and in support thereof aver the following:

1. Joseph Maldonado (“Maldonado”) is an adult individual and an independent contractor correspondent for the York Daily Record, a newspaper of general circulation in and around York County, Pennsylvania, with offices located at 122 South George Street, York, York County, Pennsylvania.
2. Heidi Bernhard-Bubb (“Bernhard-Bubb”), is an adult individual and, at all relevant times hereto, an independent contractor correspondent for The York Dispatch, a newspaper of general circulation in and around York County, Pennsylvania, with offices located at 205 North George Street, York, York County, Pennsylvania.

3. Maldonado and Bernhard-Bubb have been served with Subpoenas by counsel for the Defendants in the above captioned case to appear and testify at deposition on June 15, 2005 in Dover, Pennsylvania.
4. The Subpoenas were faxed to counsel for Maldonado and Bernhard-Bubb at approximately 4:19 p.m. on Friday, June 10, 2005.
5. Maldonado wrote articles about the Dover Area School District published in the York Daily Record on June 9, 2004, June 14, 2004 and June 15, 2004, and other dates.
6. Bernhard-Bubb wrote articles about the Dover Area School District published in The York Dispatch on June 8, 2004, June 9, 2004 and June 15, 2004, and other dates.
7. The articles published in June of 2004 and referenced in paragraphs 5 and 6 hereinabove contain statements made by Dover School Board members in connection with the Dover School Board meetings held on or about June 7, 2004 and June 14, 2004.
8. Upon information and belief, Maldonado and Bernhard-Bubb have been subpoenaed by Defendants to testify concerning statements made by Dover School Board members at the Dover School Board meetings held open to the public on or about June 7, 2004 and June 14, 2004 and/or to present testimony relative to information contained in their articles published in June of 2004, and matters related thereto.
9. Upon information and belief, all meetings of the Dover School Board on the issue of “intelligent design” were public meetings attended by many members of the public.

10. Many individuals other than Maldonado and Bernhard-Bubb attended the June 7, 2004 and June 14, 2004 Dover School Board meetings.
11. Maldonado and Bernhard-Bubb have provided Plaintiffs' counsel and Defendants' counsel with Affidavits attesting to the accuracy of their published articles. A true and correct copy of the Affidavits of Maldonado and Bernhard-Bubb and of their editors are attached hereto as Exhibit "A" and incorporated herein by reference as if fully set forth. True and correct copies of the Affidavits have previously been filed with the Court.

Motion to Quash or For Protective Order

12. Paragraphs 1-11 are incorporated herein by reference as if fully set forth.
13. Maldonado and Bernhard-Bubb request that this Honorable Court Quash the Subpoenas as issued, and/or issue a Protective Order, pursuant to Federal Rules of Civil Procedure 45 (c)(3)(A)(iii) and 26 (c) on the following necessary and compelling grounds:
 - a. Defendants failed to give the subpoenaed parties reasonable notice of the depositions;
 - b. The information sought by those issuing the Subpoenas at issue was gathered and received by Maldonado and Bernhard-Bubb while engaged in a newsgathering capacity with the intent to disseminate such information to the public;
 - c. The subject matter of the articles in question is a matter of great public interest in the Dover Area School District and other areas;

- d. Maldonado and Bernhard-Bubb assert the Commonwealth and Federal Constitutional privileges afforded news gatherers and any applicable statutory protections and privileges;
- e. Maldonado and Bernhard-Bubb are precluded from disclosing any information which is “off the record” and not printed in the published articles in question;
- f. Defendants have failed to establish, and the Subpoenas as issued do not indicate, how the testimony sought is material, relevant and necessary to the instant matter; See McMenamin v. Tartaglione, 590 A.2d 802 (Pa. Commw. 1991); United States v. Criden, 633 F.2d 346 (3rd Cir. 1980); United States v. Cuthbertson, 630 F.2d 139 (3rd Cir. 1980); Riley v. City of Chester, 612 F.2d 708 (3rd Cir. 1979);
- g. Defendants have failed to establish, and the Subpoenas as issued do not indicate, how the testimony sought is crucial to the claims and defenses of Defendants.
Id.;
- h. Defendants have not made a strong showing, and the Subpoenas as issued do not indicate, that the information sought cannot be obtained by alternative means.
Id.;
- i. Maldonado and Bernhard-Bubb believe that the information sought from them can be obtained from alternative sources. Id. To the best of Maldonado and Bernhard-Bubb’s knowledge, information and belief, members of the general public attended the June 7, 2004 and June 14, 2004 meetings and signed a “sign

in sheet” at these meetings. To the best of Maldonado and Bernhard-Bubb’s knowledge, information and belief, the names of these individuals, and of the Dover School Board members, would be available to all parties;

- j. The Defendants have made no showing that they have made attempts to get the information sought from sources other than Maldonado and Bernhard-Bubb and that those attempts have been exhausted. Id.;
- k. The published newspaper articles in question speak for themselves and Maldonado and Bernhard-Bubb have attested to the accuracy of same;
- l. The Defendants have not set forth a demonstrated, specific need for the purported evidence;
- m. Injecting Maldonado and Bernhard-Bubb into a legal dispute in this matter will limit Maldonado’s and Bernhard-Bubb’s future effectiveness, regardless of the limits placed on their testimony, as the fact of testifying may deter sources of information from speaking with Maldonado and/or Bernhard-Bubb in the future, thus depriving the public of news and information on this matter of public importance;
- n. Injecting Maldonado and Bernhard-Bubb into a legal dispute in this matter will forever taint them and may preclude them from reporting on this matter again in the future, thereby depriving the public of reports from the most knowledgeable reporters available; and

- o. Maldonado and Bernhard-Bubb may not be questioned directly or indirectly as to the identity of any other sources not identified in the articles in question.
 - p. In the alternative, should this Court refuse to quash the subpoena, Maldonado's and Bernhard-Bubb's testimony should be limited solely to what appeared in the published articles.
14. Maldonado and Bernhard-Bubb's counsel conferred with counsel for the Plaintiffs and counsel for the Defendants in a conference call with Judge Jones on June 10, 2005 relative to outstanding discovery issues.
 15. Plaintiffs' counsel have accepted the Affidavits attached to this Motion as Exhibit "A" in lieu of the deposition testimony of Maldonado and Bernhard-Bubb, subject to an agreed upon amendment to the Maldonado Affidavit. In that regard, Plaintiffs have reserved the right to call the subpoenaed parties as witnesses at trial and the subpoenaed parties have reserved the right to raise objections to their appearance as witnesses at that time.
 16. Maldonado and Bernhard-Bubb have been unable to resolve the matter directly with Defendants' counsel, the Thomas More Law Center, as of the date of filing of this Motion.

WHEREFORE, Maldonado and Bernhard-Bubb respectfully request that this Honorable Court enter an Order quashing the Subpoenas compelling the appearance and testimony of Maldonado and Bernhard-Bubb at depositions in the within matter; or, in the alternative, issue a protective order limiting the testimony of Maldonado and Bernhard-Bubb

solely to what was printed in the published articles in issue and barring any questioning of Maldonado and Bernhard-Bubb as to any sources, discussions, notes, documents or other materials gathered or created as part of their functions and duties in preparation for the published articles in issue.

Maldonado and Bernhard-Bubb further respectfully request that the depositions scheduled for June 15, 2005 be postponed and stayed pending a decision by Judge Jones and further order of court on the within Motion to Quash or For Protective Order.

Respectfully submitted,
BENNLAWFIRM

Date: June 14, 2005

By: /s/ Niles S. Benn, Esquire
Niles S. Benn, Esquire
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CERTIFICATE OF SERVICE

I, Christian J. Dabb, Esquire, hereby certify that on this 14th day of June, 2005, I served a true and correct copy of the foregoing "Memorandum of Law" upon the following counsel by the Middle District ECF system and/or fax and other counsel of record by the Middle District ECF system:

VIA FACSIMILE (734) 930-7160

Richard Thompson, Esquire
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/s/ Christian J. Dabb, Esquire
Christian J. Dabb, Esquire
Attorney I.D. #85370

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ORDER

AND NOW, this ____ day of _____, 2005, upon consideration of the Motion to Quash or for Protective Order filed by Joseph Maldonado and Heidi Bernhard-Bubb, it is hereby **ORDERED** and **DECREED** that the Subpoenas issued by Defendants are **QUASHED**. Notice of the Entry of this Order shall be given to all parties as prescribed by law.

BY THE COURT:

J.

EXHIBIT "A"

AFFIDAVIT

I, Joseph Maldonado, do hereby swear and affirm that the information contained in the attached articles: "Dover Schools Still Debating Biology Text," published in the York Daily Record on June 9, 2004, correctly and accurately sets forth the information and quotations contained therein; and "Book is Focus of More Debate," published in the York Daily Record on June 15, 2004, correctly and accurately sets forth the information and quotations contained therein.

This Affidavit also applies to any other articles written by the undersigned Affiant and published in the York Daily Record on the subject of the Dover School Board as to the issue of "intelligent design." All of the information contained in such articles is true to the best of my knowledge and belief.

Any quotes contained in the June 9, 2004 and June 15, 2004 articles as they address Dover School Board members were secured by the Affiant at or following the Dover School Board meetings addressed by those articles, with other members of the Dover School Board and/or the public present. The undersigned Affiant believes that at the Dover School Board meetings referred to in the June 9, 2004 and June 15, 2004 articles the Dover School Board had a tape recorder present recording all statements made by Dover School Board members and members of the general public during the course of said meetings.

The undersigned Affiant swears and affirms that at every Dover School Board meeting he has attended the Dover School Board made a "sign in sheet" available on which members of the general public signed in upon entering each such meeting. Therefore, it would be the belief of the Affiant that the persons present at said Board meetings would be reflected on said "sign in" sheets.

The undersigned Affiant swears and affirms that he does not possess any notes or drafts of stories in connection with any articles published in the York Daily Record on the subject of the Dover School Board as to the issue of "intelligent design." The undersigned Affiant further swears and affirms that he has not received any requests to "retract" or "correct" the articles referenced hereinabove. However, the Affiant is aware of one correction made involving the identification of an individual as "board president" when the said individual should have been identified as the "former board president."

/s/ Joseph Maldonado
Joseph Maldonado
Reporter
York Daily Record

COMMONWEALTH OF PENNSYLVANIA :
 : SS
COUNTY OF YORK :

On this, the 2nd day of June, 2005, before me, the undersigned officer, personally appeared Joseph Maldonado, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same as his free and voluntary act for the purposes expressed therein.

IN WITNESS WHEREOF, I have hereunder set my hand and official seal.

/s/ Shuna K. Thompson
Notary Public

AFFIDAVIT

I, Randy Parker, Managing Editor, do hereby swear and affirm that the York Daily Record has not received any requests to retract or correct anything in any articles written by Joseph Maldonado and published in the York Daily Record on the subject of the Dover School Board as to the issue of "intelligent design."

/s/ Randy Parker
Randy Parker
Managing Editor
York Daily Record

Sworn to and subscribed
before me this 31st day
of May, 2005.

/s/ Donna A. Mandl
Notary Public

AFFIDAVIT

I, Heidi Bernhard-Bubb, do hereby swear and affirm that the information contained in any articles written by me and published in The York Dispatch on the subject of the Dover School Board as to the issue of “intelligent design” correctly and accurately sets forth the information and quotations contained therein, including, without limitation, the information and quotations contained in the June 8, 2004 article “Dover Debates Evolution in Biology Text,” the June 9, 2004 article “Group: Dover Schools Could Face Lawsuit” and the June 15, 2004 article “Church, State Issue Divides.”

Any quotes which relate to Dover School Board meetings and contained in articles written by the undersigned Affiant as they address Dover School Board members, including, without limitation, any quotes contained in the June 8, 2004 article “Dover Debates Evolution in Biology Text,” the June 9, 2004 article “Group: Dover Schools Could Face Lawsuit” and the June 15, 2004 article “Church, State Issue Divides,” were secured either during or immediately subsequent to Dover School Board meetings which occurred in a public arena. The undersigned Affiant believes that at the Dover School Board meetings referred to in articles written by her, the Dover School Board had a tape recorder present recording all statements made by Dover School Board members and members of the general public during the course of said meetings.

The undersigned Affiant swears and affirms that at every Dover School Board meeting she has attended the Dover School Board made a “sign in sheet” available on which members of the general public signed in upon entering each such meeting. Therefore, it would be the belief of the Affiant that the persons present at said Board meetings would be reflected on said “sign in” sheets.

The undersigned Affiant further swears and affirms that she has not received any requests to “retract” or “correct” the articles referenced hereinabove except one request from the ACLU unrelated to any Dover School Board meetings and interviews with Dover School Board members and members of the public in connection with the subject matter of “intelligent design.” Said request pertained to the time frame in which the ACLU and related parties intended to file suit in Federal court.

/s/ Heidi Bernhard-Bubb
Heidi Bernhard-Bubb
Reporter
The York Dispatch

COMMONWEALTH OF PENNSYLVANIA :
 : SS
COUNTY OF YORK :

On this, the 3rd day of June, 2005, before me, the undersigned officer, personally appeared Heidi Bernhard-Bubb, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same as her free and voluntary act for the purposes expressed therein.

IN WITNESS WHEREOF, I have hereunder set my hand and official seal.

/s/ Shuna K. Thompson
Notary Public

AFFIDAVIT

I, Lori Goodlin, Editor, do hereby swear and affirm that The York Dispatch has not received any requests to retract or correct anything in any articles written by Heidi Bernhard-Bubb and published in The York Dispatch on the subject of the Dover School Board as to the issue of “intelligent design.”

/s/ Lori Goodlin
Lori Goodlin
Editor
The York Dispatch

COMMONWEALTH OF PENNSYLVANIA :
 : SS
COUNTY OF YORK :

On this, the 2nd day of June, 2005, before me, the undersigned officer, personally appeared Lori Goodlin, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same as her free and voluntary act for the purposes expressed therein.

IN WITNESS WHEREOF, I have hereunder set my hand and official seal.

/s/ Shuna K. Thompson
Notary Public