

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

TAMMY KITZMILLER; BRYAN AND
CHRISTY REHM; DEBORAH FENIMORE
AND JOEL LIEB; STEVEN STOUGH;
BETH EVELAND; CYNTHIA SNEATH;
JULIE SMITH; AND ARALENE
("BARRIE") D. AND FREDERICK B.
CALLAHAN,

Plaintiffs,

vs.

DOVER AREA SCHOOL DISTRICT;
DOVER AREA SCHOOL DISTRICT
BOARD OF DIRECTORS,

Defendants,

:
:
:
:
:
:
:
:
:
: CIVIL ACTION
:
: No. 4:04-cv-2688
:
:
: (JUDGE JONES)
:
:
: (Filed Electronically)
:
:
:

**PLAINTIFFS' RESPONSE TO DEFENDANTS'
MOTION TO COMPEL NON-PARTIES MALDONADO
AND BERNHARD-BUBB, *YORK DISPATCH*, AND *YORK
COUNTY DAILY RECORD*, TO COMPLY WITH SUBPOENAS**

I. INTRODUCTION

This matter originally arose pursuant to subpoenas served by plaintiffs requiring Joseph Maldonado, a correspondent for a newspaper known as the *York*

Daily Record, and Heidi Bernhard-Bubb, a correspondent for a newspaper known as *The York Dispatch* to testify at depositions that had been scheduled for June 8, 2005. In response to the subpoenas, counsel for the reporters filed a motion to quash the subpoenas or, in the alternative, for a protective order.

Plaintiffs ultimately agreed that affidavits provided to them by the reporters were sufficient for the purposes of discovery and, while reserving their right to later seek trial testimony from the reporters, the plaintiffs agreed not to move to compel depositions of the reporters. Pursuant to the Court's instruction, plaintiffs and the reporters have filed a stipulation memorializing their agreement to proceed in this manner.¹ Because of this agreement, the underlying issues concerning privileges asserted by the reporters were not resolved. But it was understood by the plaintiffs that the issues would likely need resolution when the plaintiffs subpoenaed the reporters to testify at the trial.

These same issues regarding the newsmen's privilege have now been brought before this court by motions filed by the defendants, seeking to compel testimony and the production of documents by the reporters, and by the non-party reporters, resisting the depositions and document requests. Because the

¹ To the extent that the Court permits defendants to depose the reporters regarding these events, however, plaintiffs reserve the right to ask follow-up questions at the depositions.

Court's determination as to whether the reporters will have to testify at the deposition involves some of the same issues – or similar issues – as will be addressed by plaintiffs when they seek trial testimony from the reporters, the plaintiffs are responding to the present motion to state their position.

II. ARGUMENT

A. The reporters may be required to give non-privileged testimony.

It is the plaintiffs' position that the reporters may be deposed, or be required to testify at trial, about those things they have seen or heard at public meetings.² In support of its position, plaintiffs refer the Court to the decisions of other courts that have addressed this very issue. When addressing this issue, courts from various jurisdictions have consistently concluded that a reporter's privilege does not apply when the reporter is being questioned about a public incident or event to which he or she was a witness because, in such circumstances, there is no intrusion into the newsgathering or special functions of the press. *See e.g. U.S. v. Steelhammer*, 561 F.2d 539 (4th Cir. 1977) (involving events a reporter witnessed at a public union rally); *Miller v. Mecklenburg County*, 602 F. Supp. 675, 678 (W.D.N.C. 1985), *aff'd.*, 813 F.2d 402 (4th Cir. 1986) (the court stated that

² Plaintiffs have attached their previous motion, Plaintiffs' Response to Motion of Non-Parties Joseph Maldonado and Heidi Bernhard-Bubb to Quash Subpoena or For Protective Order, as Exhibit A. It provides a more exhaustive analysis of the newsperson's privilege and the plaintiffs' position.

newspaper reporters were witnesses to events like other members of the public and could testify about these events); *Alexander v. Chicago Park Dist.*, 548 F. Supp. 277 (N.D. Ill. 1982), *aff'd*. 427 F.2d 1014 (7th Cir. 1991) (the court ordered a reporter to testify regarding his observations of parks he made while preparing for an investigative report on public parks); *Pinkard v. Johnson*, 118 F.R.D. 517 (M.D. Ala. 1987) (the court ordered a reporter to comply with a deposition subpoena that was limited to the events he had witnessed at a specific public meeting).

It appears from the defendants' brief that they also are only seeking testimony about the reporters' observations of public events. According to defendants, they are only asking the reporters to "answer questions about what they heard and saw during public meetings of the Dover Area School Board." Defendants' Response in Opposition to Motion to Quash or For a Protective Order Filed by Joseph Maldonado and Heidi Bernhard-Bubb ("Defendants' Response") at 10. Defendants' motion also suggests that they are not seeking information that was acquired by the reporters on a confidential basis. As the defendants state in their Response: "[a]s far as is known, defendants are not seeking from any of these nonparties the identity of a confidential source or information that is in any way privileged or confidential." Defendants' Response at 7. As it stands, the defendants appear to be limiting their request to testimony about public events that the reporters witnessed. And the plaintiffs believe that a deposition, properly

limited to this type of testimony, is proper. By submitting affidavits averring to the accuracy of the news articles, and by suggesting a protective order limiting the reporters' depositions to questions regarding such observations, the reporters appear to concede that questions of this nature cannot be avoided by invoking a privilege.

The other issue raised by defendants' motions is whether defendants can have access to the reporters' notes relating to the school board meetings, drafts of the articles, and editorial work product associated with the news articles. It is the plaintiffs' position that this request goes beyond the taking of testimony about observations of public events – which courts have consistently stated does not warrant a reporter's privilege. Plaintiffs submit that it is unnecessary for the Court to permit this intrusion into the reporters' newsgathering and news reporting activities in order to accomplish this discovery. *See e.g. Pinkard*, 118 F.R.D. at 523 (granting plaintiff's discovery request to question a reporter about the contents of a conversation in which neither the source nor the content of the conversation was confidential, while denying defendant's subpoena duces tecum); *Alexander*, 548 F. Supp. at 277 (motions to quash subpoenas and bar a deposition were denied after plaintiffs modified their discovery requests stating that they no longer sought the production of documents and photographs allegedly used in preparation of the relevant articles).

III. CONCLUSION

It is plaintiffs' position that the Court can resolve this issue by entering an Order that both allows the parties to depose the reporters while also protecting the reporters' First Amendment right to shield the identity of confidential sources and information. Considering the scope of the defendants' motion and the nature of the reporters' concerns, plaintiffs submit that the parties' and non-parties' interests can be satisfied by an Order that allows for a deposition limited in scope to the reporters' observations at the public school board meetings.

Respectfully submitted,

/s/ Eric Rothschild
Eric Rothschild (PA 71746)
Alfred H. Wilcox (PA 12661)
Stephen G. Harvey (PA 58233)
Christopher J. Lowe (PA 90190)
Pepper Hamilton LLP
3000 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103
(215) 981-4000
rothschilde@pepperlaw.com
wilcoxa@pepperlaw.com
harveys@pepperlaw.com

(continued)

Thomas B. Schmidt, III (PA 19196)
Pepper Hamilton LLP
200 One Keystone Plaza
North Front and Market Streets
P.O. Box 1181
Harrisburg, PA 17108
(717) 255-1155
schmidtt@pepperlaw.com

Witold J. Walczak (PA 62976)
ACLU of Pennsylvania
313 Atwood Street
Pittsburgh, PA 15213
412-681-7864
vwalczak@aclupgh.org

Paula K. Knudsen (PA 87607)
ACLU of Pennsylvania
105 N. Front St., Suite 225
Harrisburg, PA 17101
(717) 236-6827
pknudsen@aclupa.org

Ayesha Khan (adm. *phv*)
Richard B. Katskee (adm. *phv*)
Alex J. Luchenitser (adm. *phv*)
Americans United for Separation of
Church and State
518 C St., NE
Washington, DC 20002
(202) 466-3234
akhan@au.org
katskee@au.org
luchenitser@au.org

Attorneys for Plaintiffs

Date: June 27, 2005

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2005, I caused a copy of the foregoing document to be served upon the following counsel by the Middle District ECF system and/or FAX and other counsel of record by the Middle District ECF system:

Richard Thompson, Esquire
Robert J. Muise, Esquire
Patrick T. Gillen, Esquire
Thomas More Law Center
24 Frank Lloyd Wright Drive
P. O. Box 393
Ann Arbor, MI 48106

Ron Turo, Esquire
Toro Law Offices
28 South Pitt Street
Carlisle, PA 17013

VIA FAX (717.852.8797)

Niles S. Benn, Esquire
Terence J. Barna, Esquire
Benn Law Firm
103-107 East Market Street
PO Box 5185
York, PA 17405-5185

s/ Eric Rothschild
Eric Rothschild (PA 71746)

EXHIBIT A

and Joseph Maldonado, a correspondent for a newspaper known as *The York Daily Record*, to testify at depositions that had been scheduled for June 8, 2005.

Plaintiffs do not seek from either reporter the identity of confidential sources or information that is in any way privileged or confidential. Rather, plaintiffs seek merely to authenticate and lay a foundation for the admissibility of statements made by Dover school board members at public meetings last summer, as reported by these correspondents in their respective newspapers. For this reason, plaintiffs are willing to accept the affidavits already proffered by the two reporters.

Dover board members' statements at public meetings in the summer of 2004 are relevant to the claims in this litigation. Statements reported by Bernhard-Bubb and Maldonado have been denied by defendants in their pleading and in their deposition testimony. For example, William Buckingham, a member of the Board and chair of its curriculum committee, is alleged to have said that he and others were looking for a text that offers a balance between the biblical view of creation and Darwin's theory of evolution. Complaint, ¶ 29. He is also alleged to have said that there need be no consideration of the beliefs of Hindus, Buddhists, Muslims or other competing faiths and views: "[t]his country wasn't founded Muslim beliefs or evolution," and "[t]his country was founded on Christianity and our students should be taught as such." *Id.* At the next meeting of the Board, on June 14, 2004, also in connection with a discussion of the proposed biology

textbook, Buckingham is alleged to have stated that “[t]wo thousand years ago someone died on a cross. Can’t someone take a stand for him?” *Id.* ¶ 30.

Defendants deny that Buckingham made them. Answer, ¶¶ 29-30.

In depositions, plaintiffs’ counsel specifically questioned Mr. Buckingham and other Dover board members and administrators about the statements, as reported in the newspapers by Maldonado and Bernhard-Bubb. Mr. Buckingham and others denied making statements in the articles written by the two reporters. The Dover board members suggested that the correspondents had fabricated them. Consequently, while other people attended the meetings where Mr. Buckingham allegedly made these comments, this dispute centers on the statements as reported by Bernhard-Bubb and Maldonado. While these statements are not the only evidence of Defendants’ *purpose* in adopting their “intelligent design” addition to the ninth grade biology curriculum, nor are they the only evidence of its *effects*, they are certainly relevant to prove both elements of an Establishment Clause claim..

On June 7, 2005, Bernhard-Bubb and Maldonado, through counsel, filed a Motion to Quash Subpoena or for Protective Order (“Motion”), asserting a “news gatherer” privilege. *Id.*, ¶ 12(c). Bernhard-Bubb and Maldonado ask that the subpoenas for their testimony be quashed or, in the alternative, that a protective order be issued limiting their testimony “to what was printed in the published

articles in issue and barring any questioning of [the reporters] as to any sources, discussions, notes, documents or other materials gathered or created as part of their functions and dates in preparation for the published articles in issue.” *Id.* at 7.

Before filing their Motion, Bernhard-Bubb and Maldonado proffered affidavits in lieu of their deposition testimony. Those affidavits were filed with the Motion. With a relatively minor change that would incorporate an additional news article, plaintiffs accepted the proffered affidavits as admissible at trial, in lieu of testimony. *See* Motion, ¶ 14. Defendants, however, apparently do not agree to accept the affidavits in lieu of testimony.

For the reasons stated below, plaintiffs oppose the Motion to the extent it seeks to have the subpoenas quashed. Plaintiffs do not oppose the proposed protective order, which is requested in the alternative. Regardless of how this Court rules, Plaintiffs’ counsel reiterate that they have no intention of inquiring into the reporters’ confidential sources or asking about notes or other arguably privileged information. The case law supports plaintiffs’ right to this limited inquiry.

II. ARGUMENT

A. The “news gatherer” privilege does not apply to the subpoenas at issue.

The cases cited in Maldonado and Berhhard-Bubb’s motion, plus many others not listed, give reporters some First Amendment right to shield the

identity of confidential sources and information, often referred to as the “news gatherer” privilege. *See, e.g., Riley v. City of Chester*, 612 F.2d 708 (3rd Cir. 1979); *U.S. v. Cuthbertson*, 630 F.2d 139 (3rd Cir. 1980); and *U.S. v. Criden*, 633 F.2d 346 (3rd Cir. 1980).¹ Neither these Third Circuit cases nor any others that the undersigned could find support Maldonado and Bernhard-Bubb’s argument claiming complete immunity from testimony. Plaintiffs are unaware of any case law that gives a reporter immunity from testifying as a fact witness to comments made in their presence.

The notion of the “news gatherer” privilege evolved from *Branzburg v. Hayes*, 408 U.S. 665 (1972). While the majority opinion did not articulate clearly whether the First Amendment supported a privilege for journalists, Justice Powell, in his concurring opinion, wrote that courts should strike a balance, on a case-by-case basis, between freedom of the press and the obligation of all persons to give relevant testimony. *Id.*, 408 U.S. at 710.

In *Riley v. City of Chester*, the Third Circuit held that a reporter had a qualified right to refuse to disclose the identity of a confidential source in a federal civil case. The *Riley* court noted that it was not analyzing a situation where the

¹ Plaintiffs also cite *McMenamin v. Tartaglione*, 590 A.2d 802 (Pa. Cmwlth. Ct. 1991), in which the Pennsylvania Commonwealth Court applied state law, not applicable here, and relied on *Riley*, which is discussed *supra*.

reporter was himself or herself actually a witness to the pertinent incidents. *Id.* at 716. In *Cuthbertson* and *Criden*, the Third Circuit both expanded the application, and refined the analysis, of *Riley*. But, none of these decisions involved a reporter who was being called to testify about his or her observations at a public meeting. Courts that have confronted that circumstance have concluded that reporters are not privileged to refuse to testify.

In *U.S. v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976), *reh'g en banc*, 561 F.2d 540 (4th Cir. 1977), the Fourth Circuit upheld a district court judgment that two journalists were in civil contempt for refusing to testify. The court had ordered the reporters to give testimony on matters that did not include any confidential information or materials given to them by another party. *Id.* at 375. The journalists, who had reported upon the events of a public union rally, had filed motions to quash the subpoenas to testify based on the reporter's privilege. *Id.* at 374. They asserted that "if a reporter is compelled to testify to what he has observed or heard while present at a rally or meeting of persons assembled to discuss peculiar problems of their interests, but also of general concern, then thereafter, in retaliation, the sponsors of the occasion will in all probability bar them from later gatherings." *Id.* Initially, the Fourth Circuit vacated the district court's judgment. *Id.* at 376. In his dissent, Judge Winters wrote:

In the instant case it is conceded that the reporters did not acquire the information sought to be elicited from them

on a confidential basis; one of them (Steelhammer) so testified in the district court. My study of the record fails to turn up even a scintilla of evidence that the reporters were subpoenaed to harass them or to embarrass their newsgathering abilities at any future public meetings that the miners might hold. It therefore seems to me that, in the balancing of interests suggested by Mr. Justice Powell in *Branzburg v. Hayes* [citation omitted], the absence of a claim of confidentiality and the lack of evidence of vindictiveness tip the scale to the conclusion that the district court was correct in requiring reporters to testify.

Id. at 376. Nine months later, the Fourth Circuit reheard the case *en banc* and adopted Judge Winters' dissenting position. It affirmed that there was a sufficient basis to find the reporters in contempt, and vacated the unserved portion of their sentences because the underlying proceeding had terminated. *U.S. v. Steelhammer*, 561 F.2d at 540. In *Miller v. Mecklenburg County*, the District Court for the Western District of North Carolina summarized that the *en banc* Fourth Circuit in *Steelhammer* "explicitly found that the newspaper reporters were witnesses to the event like other members of the public." *Miller v. Mecklenburg County*, 602 F. Supp. 675, 678 (W.D.N.C. 1985), *aff'd.*, 813 F.2d 402 (4th Cir. 1986).

Similarly, in *Alexander v. Chicago Park Dist.*, 548 F. Supp. 277 (N.D. Ill. 1982), *aff'd.* 427 F.2d 1014 (7th Cir. 1991), the district court did not recognize the reporter's privilege in a case where a reporter had observed a public place. In this case, the newspaper reporter had written an article about parks as a part of a series entitled "Our Squandered Legacy." *Id.* at 277. The plaintiffs had

subpoenaed the reporter to testify only about his personal observations of the parks during the investigation for the series. *Id.* The court denied the journalist's motion to quash a deposition subpoena, finding that:

a reporter's observations of a public place or event are no different in kind than that of other individuals; and as to this, they are not entitled to constitutional protection. The provisions of the First Amendment simply do not extend to cover reporter[']s observations of the park during their investigation.

Id. at 278. This decision, like *Steelhammer*, stands for the proposition that "the qualified [reporter's] privilege does not apply when the reporter is being questioned about an incident to which he or she may be a witness like any other member of the public. In such a case, there is no intrusion into newsgathering or special functions of the press." *Miller v. Mecklenburg County*, 602 F. Supp. at 679.

Likewise, the District Court for the Middle District of Alabama in *Pinkard v. Johnson*, 118 F.R.D. 517 (M.D. Ala. 1987), ordered a reporter to comply with a deposition subpoena limited to the events he had witnessed a specific public meeting. The plaintiff, a commissioner at an agency that oversaw a racetrack, claimed that the defendant commission had conspired to harass him by manufacturing sexual harassment charges and airing them at a public meeting. *Id.* at 518-19. The journalist filed a motion to quash the deposition subpoena, claiming that the reporter's privilege protected him from deposition. *Id.* at 519.

The court declined to extend the claimed privilege to parts of the subpoena seeking evidence of his observations as a witness at the public meeting. *Id.* at 521. It explained:

Federal courts have generally held that the qualified privilege does not apply when the reporter is being questioned about an incident to which he or she may be a witness like any other member of the public . . . In such a case, there is no intrusion into newsgathering or special functions of the press.

Id.

Many other cases have ruled in similar fashion, namely, that the news gatherer privilege does not apply to the type of non-privileged, non-confidential information Plaintiffs seek in this case. *See e.g., U. S. v. LaRouche Comm.*, 841 F.2d 1176 (1st Cir. 1988); *Shoen v. Shoen*, 48 F.3d 963 (9th Cir. 1995); *In re Shain*, 978 F.2d 850 (4th Cir. 1992); *U.S. v. Smith*, 135 F.3d 963 (5th Cir. 1998); *Gonzalez v. NBC*, 194 F.3d 29 (2d Cir. 1999).

B. The “news gatherer” privilege has been waived in this case.

As Bernhard-Bubb and Maldonado note in their Motion, they have offered to give their evidence in response to plaintiffs’ subpoenas, provided that their evidence is received in the form of affidavits. Motion, ¶ 14. Plaintiffs have agreed to this accommodation, and hope it will not seem ungracious to argue that the proffer of these affidavits represents a waiver of the asserted privilege.

Bernhard-Bubb and Maldonado are willing to provide their evidence, so long as it

is received in the form they prefer. In effect, the privilege they are asking this Court to recognize is a privilege against cross-examination, which has not been recognized by any court and cannot fairly be circumscribed by the balancing called for by Justice Powell in *Branzburg*. However, their interests can be reasonably accommodated by granting the protective order they request as an alternative to quashing the subpoena.

III. CONCLUSION

For the foregoing reasons, the Motion should be denied to the extent it seeks to quash plaintiffs' subpoenas, but plaintiffs do not object to the proposed protective order.

Respectfully submitted,

/s/ Thomas B. Schmidt, III

Eric Rothschild (PA 71746)

Alfred H. Wilcox (PA 12661)

Stephen G. Harvey (PA 58233)

Pepper Hamilton LLP

3000 Two Logan Square

18th & Arch Streets

Philadelphia, PA 19103

(215) 981-4000

rothschilde@pepperlaw.com

wilcoxa@pepperlaw.com

harveys@pepperlaw.com

(continued)

Thomas B. Schmidt, III (PA 19196)
Pepper Hamilton LLP
200 One Keystone Plaza
North Front and Market Streets
P.O. Box 1181
Harrisburg, PA 17108
(717) 255-1155
schmidtt@pepperlaw.com

Witold J. Walczak (PA 62976)
ACLU of Pennsylvania
313 Atwood Street
Pittsburgh, PA 15213
412-681-7864
vwalczak@aclupgh.org

Paula K. Knudsen (PA 87607)
ACLU of Pennsylvania
105 N. Front St., Suite 225
Harrisburg, PA 17101
(717) 236-6827
pknudsen@aclupa.org

Ayesha Khan (adm. *phv*)
Richard B. Katskee (adm. *phv*)
Alex J. Luchenitser (adm. *phv*)
Americans United for Separation of
Church and State
518 C St., NE
Washington, DC 20002
(202) 466-3234
akhan@au.org
katskee@au.org
luchenitser@au.org

Attorneys for Plaintiffs

Date: June 10, 2005

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2005, I caused a copy of the foregoing document to be served upon the following counsel by the Middle District ECF system and/or FAX and other counsel of record by the Middle District ECF system:

Richard Thompson, Esquire
Robert J. Muise, Esquire
Patrick T. Gillen, Esquire
Thomas More Law Center
24 Frank Lloyd Wright Drive
P. O. Box 393
Ann Arbor, MI 48106

Ron Turo, Esquire
Toro Law Offices
28 South Pitt Street
Carlisle, PA 17013

VIA FAX (717.852.8797)

Niles S. Benn, Esquire
Terence J. Barna, Esquire
Benn Law Firm
103-107 East Market Street
PO Box 5185
York, PA 17405-5185

s/ Thomas B. Schmidt, III
Thomas B. Schmidt, III (PA 19196)