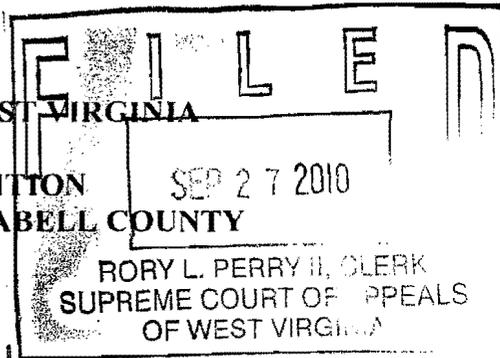


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ON A PETITION FOR WRIT OF PROHIBITION
FROM AN ORDER OF THE CIRCUIT COURT OF CABELL COUNTY
CIVIL ACTION NO. 08-C-1071



TIMOTHY BUTCHER and
BOBBY ADKINS,

Plaintiffs,

v.

THE LINCOLN JOURNAL, INC.,
THOMAS A. ROBINSON, Individually,
and RON GREGORY, Individually,

Defendants/Petitioners,

v.

THE HONORABLE F. JANE HUSTEAD,

Respondent.

**VERIFIED PETITION FOR
WRIT OF PROHIBITION**

PETITION FOR WRIT OF PROHIBITION

David Allen Barnette, Esquire (WVSBN: 242)
Pamela D. Tarr, Esquire (WVSBN: 3694)
Vivian H. Basdekis, Esquire (WVSBN: 10587)
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Counsel for Petitioners

PETITION FOR WRIT OF PROHIBITION

The petitioners, The Lincoln Journal, Inc. ("Lincoln Journal"), Thomas A. Robinson, and Ron Gregory (collectively referred to as "Petitioners") pursuant to the Constitution of the State of West Virginia, Article VIII, Section 3, West Virginia Code § 51-1-3, and Rule 14(a) of the West Virginia Rules of Appellate Procedure, respectfully petition this Honorable Court for a writ to prohibit respondent, the Honorable F. Jane Husted, Circuit Judge of Cabell County, West Virginia ("Respondent" or "Circuit Judge"), from enforcing her Order compelling Petitioners to reveal confidential and First-Amendment privileged news sources and newsgathering materials.

The Circuit Court's ruling constitutes substantial and clear legal error subject to correction by a Writ of Prohibition. Unless a writ issues, the Petitioners will suffer irreversible prejudice and will be without an adequate remedy at law. The Petitioners submit that a Writ of Prohibition is appropriate in this case because, if Petitioners are forced to produce the privileged materials and reveal the identities of their confidential informants, the resulting breach of confidentiality and exposure of privileged news gathering materials will be both severe and irreparable, and this damage cannot be remedied on appeal.

These arguments are more fully set out in Petitioners' Memorandum of Law in Support of this Petition for Writ of Prohibition which is incorporated herein by reference.

WHEREFORE, the Petitioners request that this Court:

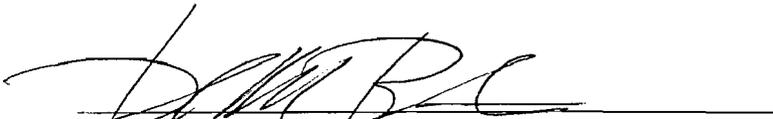
- 1) Issue a rule requiring Respondent to show cause as set forth in West Virginia Rules of Appellate Procedure 14(c);
- 2) Pursuant to W. Va. Code § 53-1-9, enter an Order staying all proceedings in the action styled *Timothy Butcher and Bobby Adkins v. The Lincoln Journal, et al.*, Civil Action No.

08-C-1071, in the Circuit Court of Cabell County, pending this Court's resolution of this Petition;

- 3) Prohibit enforcement of the September 14, 2010, Order entered by Respondent compelling Petitioners to produce their confidential sources and newsgathering materials; and
- 4) Grant the Petitioners all other relief to which they may be entitled.

Pursuant to Rule 14 of the West Virginia Rules of Appellate Procedure, this verified Petition is accompanied by a separate Appendix, a Memorandum of Law citing the relevant authorities, and a Memorandum listing the name and address of the person upon whom the rule to show cause, if granted, is to be served.

Respectfully submitted this 27th day of September, 2010.



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- IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

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TIMOTHY BUTCHER and
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**VERIFIED PETITION FOR
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**MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR WRIT OF PROHIBITION**

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I. INTRODUCTION

Petitioners are defendants in an action styled *Timothy Butcher and Bobby Adkins v. The Lincoln Journal, Inc., Thomas A. Robinson, and Ron Gregory*, Civil Action No. 08-C-1071, pending in the Circuit Court of Cabell County. The respondent, the Honorable F. Jane Husted, is the circuit court judge presiding over this action.

This Petition for a Writ of Prohibition arises from the Circuit Court's Order dated September 14, 2010 ("Order"), whereby Respondent compelled Petitioners to reveal their confidential sources and newsgathering materials notwithstanding the First Amendment and West Virginia qualified reporter's privilege.

This Court has jurisdiction over this action pursuant to the Constitution of the State of West Virginia, Article VIII, Section 3, and West Virginia Code § 51-1-3. Petitioners seek a Writ of Prohibition from this Court prohibiting enforcement of the Order, and granting a stay of further prosecution and trial of the plaintiffs' claims until such time as this Court rules on the foregoing Petition for Writ of Prohibition.

II. PROCEDURAL HISTORY

On December 6, 2008, Plaintiffs filed their Complaint against the Petitioners herein in the Circuit Court of Cabell County, West Virginia, alleging that certain news articles reporting on the 2008 Lincoln County Primary Election and published by the Lincoln Journal were defamatory. Plaintiffs also alleged public disclosure of private facts, false light invasion of privacy, and intentional and/or negligent infliction of emotional distress related to those articles.

During discovery, Plaintiffs served written interrogatories on August 21, 2009, requesting Petitioners to disclose the identity of their confidential news sources and newsgathering materials. On September 29, 2009, Petitioners responded to plaintiffs' discovery, but objected to

disclosure of their First Amendment privileged news materials and confidential sources. Petitioners asserted their qualified reporter's privilege under the First Amendment to the U.S. Constitution and under West Virginia state law as identified and described in *Hudock v. Henry*, 182 W. Va. 500, 505 (1989).

In response, plaintiffs' filed a motion to compel and supporting memorandum on November 13, 2009, requesting that the circuit court enter an Order requiring Petitioners to fully respond to plaintiffs' discovery requests and to disclose the requested source information. Petitioners responded to the motion to compel on or about January 4, 2010 arguing, among other things, that plaintiffs had not satisfied the narrow exception available under *Hudok* because plaintiffs failed to make, as they must, a "clear and specific showing that the information [sought] is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." Syl. Pt. 1, *Hudok*, 182 W. Va. at 500, 389 S.E.2d at 188. In addition, Petitioners argued that plaintiffs must make a preliminary showing of substantial falsity with respect to the allegedly defamatory allegations before disclosure would be appropriate, and that the public's interest protecting a newspaper's confidential sources outweighs plaintiffs' private interests in compelling disclosure in this case. (See 9/14/2010 Order ¶¶ 11-12.)

On January 26, 2010, the parties appeared through counsel for argument on plaintiffs' Motion to Compel. Based upon the circuit court's review of the briefs, the arguments of counsel, and the status of discovery at that time, the court issued its ruling on February 12, 2010, finding that plaintiffs' motion was "premature for failure to exhaust alternative sources," and indicated that plaintiffs could renew their motion at such time they had taken steps to exhaust other reasonable alternative sources. (See 2/12/2010 Order, attached hereto as **Exhibit A**.)

Following the circuit court's ruling, plaintiffs issued subpoenas directed to the Lincoln County Prosecuting Attorney, the West Virginia Secretary of State, and the United States Attorney for the Southern District of West Virginia in an attempt to discover the identity of the individual(s) who signed two criminal complaints at issue. (*See* 9/14/2010 Order ¶ 16, attached hereto as **Exhibit B**.) Plaintiffs did not undertake any additional efforts with regard to the other confidential sources, nor did they initiate any effort to enforce the subpoenas they issued. *Id.* (finding that "Plaintiffs did not bring any action to enforce their subpoenas in court").

Rather, on May 14, 2010, upon receiving denials to their subpoenas, plaintiffs renewed their motion to compel against Petitioners. Plaintiffs asserted that the potential alternative sources identified during the prior hearing had been exhausted, without success, and again requested that Petitioners be ordered to fully respond to discovery and to disclose the requested source information and material. *Id.* ¶ 17. The issue was once again fully briefed by counsel and the parties appeared before Respondent, Honorable F. Jane Husted, for oral argument on July 29, 2010. After the hearing, Judge Husted emailed counsel on August 16, 2010, that she was granting plaintiffs' Renewed Motion to Compel and directing plaintiffs' counsel to draft a proposed Order. Counsel for Petitioners informed the circuit court of Petitioners' intention to file a Writ of Prohibition with this Court.

On September 14, 2010, the circuit court entered the Order substantially prepared by plaintiffs' counsel. *See id.* The Order permitted Petitioners until September 28, 2010, to file their Writ of Prohibition with this Court, or to otherwise comply with the terms of the Order and fully respond to Plaintiffs' First Set of Interrogatories and Request for Production of Documents, Interrogatory Nos. 1, 4, 7, 10, 13, 16, 19, 22, 25, 28, 31, 35 and 36 and Request for Production Nos. 3 and 4. The circuit court agreed to stay its proceedings upon the filing of this Petition for

Writ of Prohibition since compelling disclosure prior to this Court's review would defeat the relief sought.

III. STATEMENT OF FACTS

A. The Lincoln Journal Articles and Allegations of Plaintiffs' Complaint.

In their Complaint, plaintiffs allege that eleven (11) articles published in the Lincoln Journal from approximately April 16, 2008 to May 28, 2008 are defamatory. (Compl. at 3-15.) These articles reported an ongoing investigation by Prosecutor Stevens into alleged campaign law violations during the 2008 Lincoln County primary election, including allegations that election laws were violated by individuals who funneled or received thousands of dollars in support of candidates backed by Dan Butcher.¹

¹ Dan Butcher is plaintiff Timothy Butcher's brother and, at various times, has been the employer of both plaintiffs Butcher and Adkins. At all times relevant to the facts presented here, Dan Butcher owned and managed a rival Lincoln County newspaper, the Lincoln Standard, which is now defunct. Dan Butcher used his competing newspaper and the channel of communication it provided to back a slate of candidates (publically referred to as the "Butcher slate"), which were the same candidates that plaintiffs herein made their substantial contributions to. The Lincoln Standard was also a regular and vocal critic of the Lincoln Journal, the Stowers family, and even Petitioner Ron Gregory.

Dan Butcher is a resident of Florida and owns a landscaping business, among others, which he used to keep the Lincoln Standard afloat. Although not a resident of Lincoln County, West Virginia, Dan Butcher is a well-known, public figure in the community. During the brief period he ran the now defunct Lincoln Standard, Dan Butcher was actively involved in the local politics of Lincoln County, and, through his newspaper, sought to influence its local elections.

Finally, Dan Butcher and one of his companies, Custom Surroundings, Inc., initiated a virtually identical action against Petitioners in federal court, styled *Dan Butcher and Custom Surroundings, Inc. v. The Lincoln Journal, Inc., Thomas Robinson, and Ron Gregory*, Case No. 2:09-CV-00373. Dan Butcher is represented by the same counsel retained by plaintiffs herein, and filed in the federal proceeding the same motion to compel Petitioners' confidential news sources. The issue was fully briefed by counsel. Because the issue was concurrently pending before the state court, and principally involved a question of state law, Judge Stanley stayed the federal court proceeding pending resolution of plaintiffs' state court motion to compel. (See 6/17/2010 Order at 3.) Dan Butcher's interests are thus closely aligned with the plaintiffs' interests herein.

The record shows that the series of articles were principally based on the statements of Prosecutor Stevens, who was conducting the investigation, and/or criminal complaints that were filed with the Prosecutor's Office. In addition to these disclosed sources, the articles were corroborated by other individuals who, out of fear of reprisal, spoke only on condition of anonymity. None of the articles, however, is based solely on information from an undisclosed source. (See 9/14/2010 Order ¶¶ 3, 7 (finding that "[s]aid articles appear to accurately report the contents of the criminal complaints, while referencing other statements and allegations not contained in said complaints".)) Furthermore, because the articles comprise a series, Respondent found that information in early articles is necessarily repeated or restated in later articles. *Id.* ¶ 5.

B. Evidence Supporting the Lincoln Journal Articles

Substantial evidence in the record provides clear support and documentation for the allegations of election law irregularities or violations reported in the articles. The checking account records of plaintiff Timothy Butcher show that, on February 4, 2008, Timothy Butcher deposited check number 1513 from I. A. Management, LLC — a company owned by Dan Butcher — in the amount of \$2,000.00. (See **Exhibit C**.) On February 12, 2008, Timothy Butcher made two \$1,000 donations (check numbers 1927 and 1928) to the campaigns of Collis Tooley and Steve Priestly, respectively. (See **Exhibit D** and **Exhibit E**.) These candidates, along with David Webb, made up the "Butcher slate." On or about March 3, 2008, Timothy Butcher deposited check number 3341 from Daniel N. Butcher and C.S. Holdings, LLC, in the amount of \$5,000. (See **Exhibit F**.) The following day, Timothy Butcher wrote a check to Bobby Adkins in the amount of \$3,000 (check number 1946). (See **Exhibit G**.) The donations made by Timothy Butcher amount to approximately 5.2 percent of the adjusted gross income he reported on his 2008 tax return.

The banking records of Bobby Adkins likewise confirm that money, originating with Daniel Butcher, was eventually funneled down to Timothy Butcher and Bobby Adkins. On March 4, 2008, Bobby Adkins deposited check number 1946 from Timothy Butcher, in the amount of \$3,000.00. (See deposit slip attached hereto as **Exhibit H.**) The same day, Bobby Adkins wrote a \$1,000.00 donation, check number 3261, to the campaign of Steve Priestly, and a \$1,000.00 donation, check number 3262, to the campaign of Collis Tooley. (See **Exhibit I.**) The next day, Bobby Adkins wrote an additional \$1,000.00 donation, check number 3263, to the campaign of David Webb (See *id.*) Thus, within 48 hours after depositing \$3,000.00 into his account — funds that Timothy Butcher received from his brother Daniel Butcher — Bobby Adkins contributed the maximum \$1,000 donation to each of three political candidates of the Butcher slate. For the same year, Bobby Adkins filed an individual income tax return, jointly with his wife, indicating their adjusted gross income of less than \$40,000 and reporting his total business income in 2008 as \$6,472.00. His political donations, totaling \$3,000, thus account for approximately 46 percent of his total business income and approximately 8 percent of their joint adjusted gross income. These banking and financial records clearly document the alleged transactions relating to questionable political donations to the Butcher slate. The last of the donations occurred on March 12, 2008, when Timothy Butcher made a \$1,000 contribution, check number 1950, to the campaign of David Webb. (See **Exhibit J.**)

The accuracy and truthfulness of the articles, which report a matter of public concern, is further confirmed by the sworn testimony of Prosecutor Stevens, the individual who investigated the allegations of election law irregularities and violations, and who has first hand knowledge of that investigation. Article by article, plaintiffs' counsel questioned Prosecutor Stevens concerning the truthfulness and accuracy of the articles and each statement attributed to him. In

response, Prosecutor Stevens identified only one mistake in the articles: he explained that the subpoenas were signed by the circuit clerk, not by Judge Hoke. Other than that single instance, *Prosecutor Stevens stated, "I don't recall, you know, anything that's not accurate"* in the Lincoln Journal articles. (See Stevens Dep, attached hereto as **Exhibit K**, at 150:16-19) (emphasis added).

C. The Confidential Sources

Respondent's Order compels Petitioners to reveal the identity of unnamed sources for quotations and information reported in the articles, and to produce all source documents. The Order does not limit the disclosure to any particular anonymous source, but rather, seeks the disclosure of each and every confidential source and newsgathering material Petitioners used in connection with their articles, irrespective of whether the sources are merely cumulative or whether the source has been revealed through discovery. The scope of the Order is not limited even despite the fact that plaintiffs' renewed pleadings were virtually silent with respect to any sources or documents other than with respect to the author(s) of the criminal complaints. *Id.* at 3. For the sake of clarity, Petitioners will distinguish the criminal complaint sources from all other confidential sources or newsgathering materials plaintiffs seek.

a. The criminal complaint sources.

Plaintiffs seek to compel Petitioners to reveal the identity of the individual(s) who prepared the criminal complaints and/or provided the Lincoln Journal with a copy of the criminal complaints, which were filed with the Prosecutor's Office. The record clearly indicates that plaintiffs had the opportunity during Prosecutor Stevens' deposition to inquire directly as to the identity of the author(s) of the criminal complaints, but did not ask a single question. For their part, Petitioners have repeatedly informed plaintiffs that the criminal complaints they received

were produced without any alteration or redaction by Petitioners. (See Gregory Aff. ¶¶ 2-6, attached hereto as **Exhibit L**.) In mid-April 2008, Defendant Ron Gregory received a copy of a criminal complaint filed with the Prosecutor's Office, and dated April 18, 2008. (*Id.* ¶ 2.) A few days later, a copy of a second criminal complaint filed with the Prosecutor's Office and dated April 21, 2008 was left for Mr. Gregory. (*Id.* ¶ 3.) On each occasion, the complaint was left in an envelope on Mr. Gregory's desk, and was already redacted to "white out" the signature line of the complaint. (*Id.* ¶¶ 2, 5.) Enclosures were not included with either complaint. (*Id.* ¶¶ 2-3.) Mr. Gregory was not present when either of the complaints was delivered. (*Id.* at 5.) The complaints were prepared by an anonymous source(s), and their content was confirmed by other sources familiar with the complaints, including Prosecutor Stevens. The Lincoln Journal articles accurately report the allegations contained in the complaints, and Prosecutor Stevens confirmed receiving the complaints and investigating them. Anonymous sources further corroborated the content and delivery of the complaints. Compelling Mr. Gregory to reveal what he does not know about complaints filed with the Prosecutor would be a futile and fruitless exercise.

b. The remaining sources.

Apart from seeking to identify the anonymous complainant(s), plaintiffs also seek to compel Petitioners to disclose the identity of each of the Lincoln Journal's anonymous, corroborating sources, including for instance those cited as "unnamed sources," "Lincoln Journal sources," "those reporting/complaining to the Lincoln Journal," and a "source familiar with Lincoln County legal matters."

D. Plaintiffs' Efforts to Exhaust Alternative Sources

Plaintiffs' efforts to exhaust alternative sources during the interim between Respondent's February 12, 2010 ruling and the renewal of their motion to compel were limited *exclusively* to

obtaining information about the “identity of the author and/or signatory of the two ‘criminal complaints.’” (See Pls.’ Renewed Motion to Compel at 3.) By plaintiffs’ own admission, they *only* pursued avenues to “obtain that information” — i.e., the identity of the criminal complainant(s) — and did not expend any effort or exhaust alternatives with respect to discovering the other remaining sources they seek. *Id.*

Following the circuit court’s initial denial of their motion to compel, plaintiffs issued FOIA requests and subpoenas to the Offices of the Lincoln County Prosecutor, West Virginia Secretary of State, and the U.S. Attorney for the Southern District of West Virginia. Each of plaintiffs’ requests, however, effectively only addressed the two complaints relating to the 2008 Lincoln County primary election. (See Order ¶ 16.) Thus, plaintiffs failed to exhaust *any* reasonable alternatives with regard to the other confidential sources and privileged newsgathering materials they sought.

When their FOIA requests and subpoenas were denied, Plaintiffs short-circuited their alternate efforts and *inexplicably did not seek to enforce their subpoenas through legal process*, despite the fact that they could do so in the same circuit court. *Id.* Instead of enforcing their subpoenas, however, plaintiffs prematurely renewed their motion to compel against Petitioners.

E. Plaintiffs’ Admissions

On July 28, 2010, plaintiff Timothy Butcher responded to Petitioners’ Requests for Admissions, First Set. Timothy Butcher admitted that he made each of the identified \$1,000 political contributions to the Committee to Elect Collis Tooley (check no. 1927), the Committee to Elect Steve Priestly (check no. 1928), and the Committee to Elect David Webb (check no. 1950). Timothy Butcher further admitted that in any year prior to 2008 or since 2008, he did not make any other individual contributions in the maximum amount of \$1,000. Timothy Butcher

also admitted that the political contribution referenced above amounted to approximately 5.2 percent of his 2008 adjusted gross income.

Plaintiff Bobby Adkins likewise admitted in his responses to Requests for Admissions that he made each of the identified \$1,000 political contributions to the same three candidates, totaling approximately 8 percent of his 2008 adjusted gross income. Mr. Adkins also admitted that in any year prior to 2008, or since 2008, he did not make any other individual contributions in the maximum amount of \$1,000. Each of these contributions was made to candidates backed by Dan Butcher, the employer of both Butcher and Adkins.

IV. STANDARD OF REVIEW

This Court has held that prohibition lies to restrain inferior courts from exceeding their legitimate powers. *See State ex rel. Weirton Med. Ctr. v. Mazzone*, Syllabus Pt. 1, 214 W. Va. 146, 587 S.E. 2d 122 (2002). Five factors can be used to determine whether a lower court has exceeded its legitimate powers:

- (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;
- (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- (3) whether the lower tribunal's order is clearly erroneous as a matter of law;
- (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and
- (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Id. at Syllabus Pt. 2. This Court has clarified that “[a]lthough all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” *Id.*, 214 W. Va. at 150, 587 S.E.2d at 126 (citing *State ex rel. Hoover*

v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996)). Prohibition also lies in cases where damage to a party as a result of a lower court order cannot be corrected on appeal. *See id.* This Court has held that Writs of Prohibition are proper in cases “where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 365, 508 S.E.2d 75, 82 (1998).

V. ARGUMENT

Enforcement of the circuit court’s Order, which grants compulsory disclosure of all of Petitioners’ confidential sources and newsgathering materials, should be prohibited on account of two substantial legal errors in contravention of First Amendment jurisprudence. First, the circuit court erred in permitting disclosure of privileged sources where plaintiffs failed to make a threshold showing of substantial falsity. Second, the circuit court erred in failing to properly apply all three requirements of this Court’s *Hudok* test, as is required under West Virginia law. The effect of the circuit court’s conduct is to deny Petitioners the First Amendment protections and privileges they are afforded pursuant to the United States Constitution and state law.

Worse, the damage that will result from the compelled disclosure will impact not only Petitioners, but also their confidential sources who spoke only on condition of anonymity. This substantial harm will occur immediately upon disclosure, and once revealed, cannot be undone or remedied on appeal. Furthermore, Petitioners have no other adequate means to obtain the desired relief, such as a direct appeal, with respect to this discovery dispute. In fact, Petitioners face the stark dilemma of either waiving their rights and breaching their confidentiality agreements, or asserting their rights and being held in contempt of court for failure to comply with a court order. Under these circumstances, prohibition clearly lies to prevent the circuit

court from exceeding its legitimate powers, and, as discussed more fully below, the petition for Writ of Prohibition should be granted in this case.

I. The Circuit Court Erred by Failing to Require a Preliminary Showing of “Substantial Falsity” Prior to Granting Compulsory Disclosure of Confidential News Sources.

Respondent Judge Husted erred in accepting plaintiffs’ argument that, because this is a libel action against a media defendant, the reporter’s privilege must yield and the First Amendment affords no protection to Petitioners in this case. As discussed below, plaintiffs’ argument and the circuit court’s Order is contrary to well-established law.

Respondent failed to properly consider the persuasive opinions from other courts, including those cited by plaintiffs, that have previously considered the application of the qualified reporter’s privilege in civil cases against media defendants. Courts recognize that the First Amendment shields a reporter from being required to disclose the identity of persons who have imparted information to him in confidence. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 721 (5th Cir. 1980). Even in libel cases, the privilege can be overcome *only if* the requesting party makes a substantial preliminary showing. On rehearing, the Fifth Circuit modified its opinion in *Miller* to clarify that merely filing a defamation suit against a media defendant does not entitle a plaintiff to confidential sources:

We do not mean to intimate that a plaintiff will be entitled to know the identity of the informant merely by pleading that he was injured by an untrue statement. *Before* receipt of such information the plaintiff must show: *substantial evidence* that the challenged statement was published and is both *factually untrue and defamatory*; that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper presentation of the case.

Miller, 628 F.2d at 932 (emphasis added); *see also LaRouche*, 841 F.2d at 1180. In other words, a party cannot make an end run around First Amendment rights simply by lodging a frivolous libel action against a media defendant and then claiming entitlement to privileged discovery.

Not only is the mere fact that a plaintiff brings a libel suit against a media defendant insufficient to automatically permit exposure of the reporter's confidential news sources, but it is also clear that "[m]ere speculation or conjecture about the fruits of such examination simply will not suffice." *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972). In *Cervantes*, the Court of Appeals explained that "the point of principal importance" is that, before the plaintiff is permitted to examine any confidential news sources, he must make "a showing of cognizable prejudice." *Id.* Otherwise, "to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws," and would "lead to an excessive restraint on the scope of legitimate newsgathering activity." 464 F.2d at 993, n.10. It is thus generally accepted that, as a precaution against incursion on press rights and to curb harassment of the press, disclosure may not be ordered unless the plaintiff first can establish an issue of fact on the other elements of his case. *Id.* at n. 12.

Plaintiffs, however, have utterly failed to make the requisite preliminary showing in this case. The only apparent basis for their motion to compel is that the Lincoln Journal articles, which were written in a series and necessarily repeat one another, contain confidential sources — in addition to other disclosed sources. (Pls.' Memo. at 4-6.) Under any reasonable reading of the law, this hardly suffices as a legitimate basis to divulge First-Amendment privileged information. Plaintiffs presented absolutely no evidence indicating "substantial falsity" with respect to the

content of the articles. On the contrary, the record contains substantial evidence of the accuracy of the articles. As discussed above, checking account statements, cancelled checks and deposit slips record the seamless transfer of funds, originating with Dan Butcher or his companies, and then passing directly to Timothy Butcher, Bobby Adkins, and in turn, to the Butcher-slate candidates who received the questionable contributions.

Given the indisputable lack of support for this motion, what is really at issue here? This is a case where plaintiffs are seeking to hide their own political corruption and will stop at no ends — including filing a civil action and seeking discovery against innocent parties — in order to cover their own political and criminal misdeeds. Plaintiffs' motion to compel is simply an attempt to squeeze innocent parties in order to gain vengeance and wreak havoc on a rival newspaper and political adversary. Plaintiffs have styled a frivolous law suit in order to achieve these ends. This Court must not allow justice to be perverted in order for a political and ulterior objective to be achieved, particularly when the stated objective is to discover the identity of confidential third-party informants. *Cervantes*, 464 F.2d at 994. These individuals, of course, are precisely the people who only spoke to the Lincoln Journal on condition of anonymity, out of fear of reprisal from plaintiffs. *See Miller*, 621 F.2d at 726 (recognizing danger of exposing confidential source because “a defamed plaintiff might relish an opportunity to retaliate against the informant”).

This reprehensible conduct, in the form of judicial and political intimidation, is precisely the reason the founding fathers of our Constitution made free speech, and all the protections that accompany free speech, the First Amendment to the U.S. Constitution — because of this exact fear that people would be intimidated with a threat of future prosecution or retribution simply because they made a truthful, but incriminating, statement concerning a matter of public interest.

Plaintiffs' persistence in seeking the identity of the anonymous sources at all costs, and without presenting evidence that the statements were untrue or defamatory, indicates an improper ulterior purpose. Clearly, on the facts of this case, compelled disclosure of Defendants' privileged news sources was inappropriate and this Court should grant Petitioner's petition for a Writ of Prohibition and restrain the enforcement of the Order.

II. The Circuit Court Erred by Granting Compulsory Disclosure Where Plaintiffs Failed to Make a "Clear and Specific Showing" With Regard to the Three *Hudok* Requirements.

Respondent Judge Husted failed to properly apply all three requirements of this Court's *Hudok* test, and therefore, the circuit court's Order constitutes clear error. *See Hudok*, 182 W. Va. at 500, 389 S.E.2d at 188. Paragraph 10 of the Conclusions of Law, which sets forth the *Hudok* standard that the circuit court applied, conspicuously omits that plaintiffs must prove each of the three *Hudok* factors "upon a clear and specific showing." (*See Order* ¶ 10.)

In *Hudok*, this Court expressly held that "[t]o protect the important public interest of reporters in their news-gathering functions under the First Amendment to the United States Constitution, disclosure of a reporter's confidential sources or newsgathering materials *may not be compelled except upon a clear and specific showing that the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.*" Syl. Pt. 1, *Hudok v. Henry*, 182 W. Va. 500, 500, 389 S.E.2d 188, 188 (1989) (emphasis added). With regard to all three *Hudok* requirements, the plaintiffs failed to demonstrate the applicability of the exception, and therefore, the strong presumption of confidentiality that attaches to transactions between a news gatherer and informant should have applied with full force in this case. *See generally* James C. Goodale, et al., *Reporter's Privilege*, 987 PLI/Pat 135, 171 (2009).

I. The information sought is immaterial and irrelevant to Plaintiffs' claim.

The evidence on record does not support the circuit court's finding with regard to the first factor. The record shows that plaintiffs failed to make a "clear and specific showing" that *each* of the anonymous sources or materials sought — and Respondent compelled — is "highly material and relevant" to plaintiffs' claim. Syl. pt. 1, *Hudock*, 182 W. Va. at 500, 389 S.E.2d at 188. The *Hudok* standard is clear: unless plaintiffs can carry their burden with respect to each of the confidential news sources they seek, the privilege applies to prevent disclosure.

Indeed, on the facts of this case, plaintiffs could not possibly make the requisite showing because, regardless of the identity of the *undisclosed* sources, the Lincoln Journal news articles in question were based on inherently reliable and credible *disclosed* sources, namely, the Lincoln County Prosecutor and two criminal complaints filed with the Prosecutor's office.² The fact that not a single Lincoln Journal article was based solely on confidential sources was recognized by Respondent. (See Order ¶ 4.) Importantly, a source can be deemed trustworthy for a variety of reasons, including reasons based on the source's position or access to the particular information transmitted. See generally Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 Vand. L. Rev. 247, 295-306 (March 1985) (discussing a reporter's reasonable reliance on information from law enforcement officials or from public or official records).

² These disclosed sources are inherently reliable, credible, and independently sufficient to support Defendants' good faith reporting of the news. See, e.g., *Walker v. Cahalan*, 542 F.2d 681, 684 (6th Cir. 1976) (affirming summary judgment for defendant when editor relied on letter from prosecutor trying case in issue); *Cervantes v. Time, Inc.*, 464 F.2d at 988, 995 (affirming summary judgment for defendant when writer relied on agents from the FBI and the United States Department of Justice for information regarding plaintiff's connection to organized crime); *Time, Inc. v. McLaney*, 406 F.2d 565, 568-73 (5th Cir.) (reversing denial of summary judgment for defendant when reporter verified allegations concerning organized crime with Department of Justice attorney); *Bell v. Associated Press*, 584 F. Supp. 128, 129, 132 (D.D.C. 1984) (granting summary judgment for defendant when reporter verified charges of public lewdness with police department and municipal court).

It is thus clear that, regardless of the identity of the confidential sources, plaintiffs failed to meet the heavy malice burden of *New York Times v. Sullivan*, and therefore, no purpose would be served by disclosure of the identity of the sources. 376 U.S. 254 (1964); *see Cervantes*, 464 F.2d at 986 (denying compulsory disclosure because, regardless of the identity of the confidential sources, the plaintiff would be unable to establish malice). In light of the fact that the disputed articles are amply supported by authoritative disclosed sources, the identity of any confidential source is merely superfluous, and as such, is “neither highly material nor so relevant to the case as to warrant breaching the qualified [reporter’s] privilege.” *Hudok*, 182 W. Va. at 506, 389 S.E.2d at 194 (finding that the information sought was “neither that highly material nor so relevant to the case as to warrant breaching the qualified privilege”). Despite the fact that the first factor was independently sufficient to prohibit compelled disclosure in this case, Respondent Judge Husted failed to deny plaintiffs’ motion to compel.

2. The information sought is not “necessary or critical to the maintenance of the claim.”

Likewise, with regard to the second factor, Respondent erred because the record clearly shows that the information plaintiffs seek is not “necessary or critical to the maintenance of [their] claim.” In their Renewed Motion to Compel, plaintiffs argued that the identities of the confidential sources are required because the reliability of the sources used by the Petitioners is the only evidence available to determine liability. (*See* Defs’ Memo. at 4, 11-12.) Not only is this statement patently false, but plaintiffs’ reliance on *Miller v. Transamerican Press, Inc.* is grossly misplaced. 621 F.2d 721, 726 (5th Cir. 1980). As discussed above, the identities of the confidential sources are, in fact, immaterial to plaintiffs’ claim because each article is adequately supported by reliable, disclosed sources. Contrary to the legal precedent plaintiffs rely on, this is

not a case where the allegedly defamatory article is based *solely* on a confidential source. *See Miller*, 621 F.2d at 726.

Indeed, *Miller* is clearly distinguishable because the court there explicitly, and repeatedly, noted that the article was “based *solely* on information from a confidential informant” and that “Transamerican’s *only source* for the allegedly libelous comments is the informant.” *Id.* (emphasis added). The unique factual circumstance in *Miller* is simply not present here: none of the articles in question is based exclusively on a confidential source. Moreover, as discussed above, the Fifth Circuit modified its *Miller* opinion, upon rehearing, to explicitly require plaintiffs to make a preliminary, threshold showing of “substantial evidence that the challenged statement was published and is both factually untrue and defamatory,” which plaintiffs have failed to do. 628 F.2d 932. *Miller* does not provide the support plaintiffs seek and the Order relies upon. Nor is there any other legal precedent for breaching the reporter’s privilege when the information sought would be merely superfluous, and by definition, unnecessary to the claim. Plaintiffs’ claim fails as a matter of law, and the circuit court erred in finding that the information sought was “necessary or critical” to plaintiffs’ claim.

3. The information sought is “obtainable from other available sources.”

Third, Respondent Judge Husted erred in compelling disclosure from Petitioners where plaintiffs failed to exhaust other alternative sources. *See Zerilli v. Smith*, 656 F.2d 705, 713-14 (D.C. Cir. 1981) (“Even when the information [sought] is crucial to a litigant’s case, reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information.”). The obligation to pursue alternative sources “is clearly very substantial.” *Zerille*, 656 F.2d at 714-15 (concluding that appellants cannot escape their obligation to exhaust alternative sources simply because they

fearred that deposing Justice Department employees would be time-consuming, costly, and unproductive” since “[p]ermittting this kind of gamesmanship would poorly serve the First Amendment values at stake here”); *see also Baker v. F&F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972) (reasoning that an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure); *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958) (requiring plaintiff to depose other individuals who might have had access to the information sought before asking a journalist to reveal her sources).

In their renewed pleadings, Plaintiffs presumptively — and prematurely — concluded that they had “exhausted all reasonable alternative avenues” for discovering the privileged information. (Pls.’ Memo. at 8.) The basis for plaintiffs’ position was that the FOIA requests and subpoenas they issued to the Offices of the Lincoln County Prosecutor, West Virginia Secretary of State, and the U.S. Attorney for the Southern District of West Virginia were “summarily denied.” *Id.* at 9. To be clear, these efforts pertained only to the two criminal complaint sources, and even then, the record shows that although plaintiffs *initiated* efforts to discover the anonymous complainant(s), they never *completed* those efforts. (See Order ¶ 16 (making a factual finding that “[p]laintiffs did not bring any action to enforce their subpoenas in court”). Rather, plaintiffs’ efforts were prematurely aborted upon receiving the denials to their requests, and plaintiffs have inexplicably not sought to enforce their subpoenas through legal process, despite the fact that they could do so in Respondent’s circuit court. Instead of enforcing their subpoenas, plaintiffs simply renewed their motion to compel against Petitioners, plainly disregarding Petitioners’ substantial First Amendment interests.

With regard to the confidential sources other than the anonymous complainant(s), plaintiffs have simply not initiated, and certainly have not exhausted, pursuit of alternate sources.

Quite tellingly, plaintiffs' pleadings are virtually silent with respect to their efforts to discover the other sources and materials they seek. At best, plaintiffs stated that individuals whose depositions were taken for other purposes were not able to provide any information regarding the Petitioners' other sources of information. In contrast, plaintiffs conceded that their efforts to exhaust alternative sources during the interim between the Court's February 12, 2010 ruling and their renewal of this motion were limited *exclusively* to obtaining information about the "identity of the author and/or signatory of the two 'criminal complaints.'" (See Pls.' Renewed Motion to Compel at 3.) By plaintiffs own admission, then, they have *only* pursued avenues to "obtain that information" — i.e., the identity of the criminal complainant(s) — and have not expended any effort, pursued any avenues, or exhausted any alternatives, with respect to discovering the other sources they seek. *Id.* By any reasonable standard, such limited conduct does not qualify as a clear and specific showing that the information sought is not obtainable from other available sources, as required by *Hudok*.

Accordingly, in applying the foregoing principles, this Court should readily find that the circuit court erred in concluding that plaintiffs fulfilled their obligation to exhaust alternative sources of information, and therefore, the third factor likewise requires application of the qualified First Amendment privilege in this case. *Carey*, 492 F.2d at 638 (concluding that "[t]he values resident in the protection of the confidential sources of newsmen certainly point towards compelled disclosure from the newsman himself as normally the end, and not the beginning of the inquiry").

VI. CONCLUSION

The issue before this Court is straightforward. If, in the underlying proceeding, plaintiffs failed to prove “substantial falsity,” or if they have not made a “clear and specific showing” with respect to *each* of the *Hudok* factors as applied to *each* of the confidential sources, West Virginia law prohibits compulsory disclosure. Admittedly, plaintiffs face an onerous burden. That burden, however, arises from substantial state and federal jurisprudence, and is necessary to ensure that First Amendment rights are protected and upheld in all but the most rare circumstances. Of the modern difficulty in maintaining a libel action, one commentator has written: “No other formula of the law promises so much and delivers so little.” Green, *The Right to Communicate*, 35 N.Y.U. L. Rev. 903, 907 (1960). There is simply no legal precedent for breaching the First Amendment privilege and divulging confidential sources and information under the circumstances of this frivolous case. The limited exception recognized in *Hudok* has not been met.

The Petitioners submit that Respondent Judge Husted’s ruling compelling disclosure of Petitioner’s First-Amendment privileged and confidential news sources and materials is directly contrary to applicable law. Accordingly, the ruling constitutes a clear legal error subject to the extraordinary writ of prohibition. Petitioners submit that, on the basis of the foregoing analysis and the accompanying supporting documentation, this Honorable Court should:

- 1) Issue a rule requiring Respondent to show cause as set forth in West Virginia Rules of Appellate Procedure 14(c);
- 2) Pursuant to W. Va. Code § 53-1-9, enter an Order staying all proceedings in the action styled *Timothy Butcher and Bobby Adkins v. The Lincoln Journal, et al.*, Civil Action No.

08-C-1071, in the Circuit Court of Cabell County, pending this Court's resolution of this Petition;

- 3) Prohibit enforcement of the September 14, 2010, Order entered by Respondent compelling Petitioners to produce their confidential sources and newsgathering materials; and
- 4) Grant the Petitioners all other relief to which they may be entitled.

Pursuant to Rule 14 of the West Virginia Rules of Appellate Procedure, this verified Petition is accompanied by a separate Appendix and a Memorandum listing the name and address of the person upon whom the rule to show cause, if granted, is to be served.

Respectfully submitted this 28th day of September, 2010.

Respectfully submitted,

THE LINCOLN JOURNAL, INC., THOMAS A.
ROBINSON AND RON GREGORY,

By Counsel



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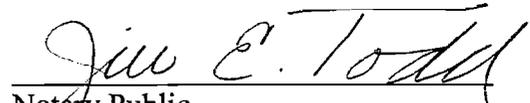
VERIFICATION

I, David Allen Barnette, having first been duly sworn, state that the facts set forth in the foregoing Petition for Writ of Prohibition and accompanying Memorandum of Law in Support of Petition for Writ of Prohibition are true and accurate to the best of my knowledge and belief.


David Allen Barnette (WVSNB 242)

Taken, subscribed, and sworn to before me this 27th day of September, 2010.

My commission expires on September 9, 2017


Notary Public



IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

ON A PETITION FOR WRIT OF PROHIBITION
FROM AN ORDER OF THE CIRCUIT COURT OF CABELL COUNTY
CIVIL ACTION NO. 08-C-1071

TIMOTHY BUTCHER and
BOBBY ADKINS,

Plaintiffs,

v.

THE LINCOLN JOURNAL, INC.,
THOMAS A. ROBINSON, Individually,
and RON GREGORY, Individually,

Defendants/Petitioners,

v.

THE HONORABLE F. JANE HUSTEAD,

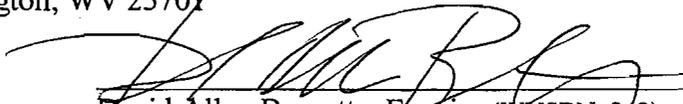
Respondent.

VERIFIED PETITION FOR
WRIT OF PROHIBITION

MEMORANDUM OF PERSONS TO BE SERVED

The Rule to Show Cause in prohibition should be served upon:

The Honorable F. Jane Husted
Judge 6th Judicial Circuit
Cabell County Courthouse
750 Fifth Avenue
Huntington, WV 25701


David Allen Barnette, Esquire (WVSBN: 242)
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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE