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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**TIMOTHY BUTCHER, and
BOBBY ADKINS,**

Plaintiffs,

v.

In Prohibition No.: 101235

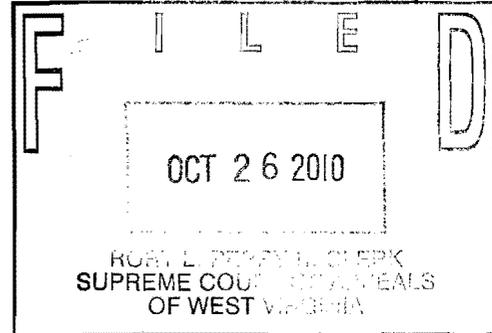
**THE LINCOLN JOURNAL, INC.,
THOMAS ROBINSON, Individually, and
RONALD GREGORY, Individually,**

Defendants/Petitioners,

v.

THE HONORABLE F. JANE HUSTEAD,

Respondent.



RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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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.

Prohibition No: 101235

**THE LINCOLN JOURNAL, INC.,
THOMAS ROBINSON, Individually, and
RONALD GREGORY, Individually,**

Defendants/Petitioners,

v.

THE HONORABLE F. JANE HUSTEAD,

Respondent.

I. INTRODUCTION

Plaintiffs, Timothy Butcher (“Mr. Butcher”) and Bobby Adkins (“Mr. Adkins”) (collectively “Messrs. Butcher and Adkins”) are Lincoln County, West Virginia residents who made legal political contributions to certain candidates that ran for office in the 2008 Lincoln

County, West Virginia Primary Election (“2008 Primary Election”).¹ Over the course of nearly a dozen articles, many of which were reprinted in multiple media outlets, Petitioners Ron Gregory, Thomas A. Robinson, and The Lincoln Journal, Inc. (sometimes collectively referred to as “defendants”) wrote, edited, and/or published numerous false and defamatory allegations of various forms of criminal and wrongful conduct, such as being part of an alleged conspiracy to commit election fraud, funnel money to political candidates, commit campaign contribution violations and/or other activities, against Mr. Butcher, Mr. Adkins, and/or served other individuals substantially, if not exclusively, based upon the alleged assertions of certain alleged confidential and/or anonymous sources.² Defendants have asserted, based solely on the fact they made some political contributions, that Mr. Butcher and Mr. Adkins are limited purpose public figures in an effort to heighten the liability standard from one of negligence to one requiring a showing that Defendants acted with actual malice and/or recklessness. In so doing, defendants have placed their own knowledge and information about their sources and the liability of those sources into issue. Moreover, if actual malice or recklessness are not the appropriate standard of liability, the source information also is relevant to the negligence standard because of the reasonable prudent person analysis involved.

¹ A substantially similar case involving different plaintiffs, Daniel Butcher and Custom Surroundings, Inc., was filed and is currently pending against the same defendants in the United States District Court for the Southern District of West Virginia (2:09-CV-00373). Although there are some differences in the defamatory and/or tortious statements at issue, both cases involve the same newspaper articles, time period, type of conduct, theories of prosecution, and theories of defense. The allegations and claims made in both cases also are substantially similar, *i.e.* (1) defamation of character; (2) public disclosure of private facts; (3) false light invasion of privacy; and (4) intentional and/or negligent infliction of emotional distress. A similar motion to compel disclosure of defendants’ source(s) is pending in the related Federal Case involving plaintiffs Daniel Butcher and Custom Surroundings, Inc. In the Federal Court case, Judge Mary Stanley issued an Order staying all deadlines and holding the Federal Court motion to compel in abeyance pending the outcome of this issue.

² The articles published by the defendants contain numerous references to unidentified sources for the subject allegations, variously cited as “unnamed sources,” “Lincoln Journal sources,” “those reporting/complaining to the Lincoln Journal,” “courthouse sources,” a “source familiar with Lincoln County legal matters,” and “an unnamed Charleston Attorney.”

Considerable written discovery has been conducted by the parties and wide-ranging depositions have been taken of numerous persons including the Lincoln County Prosecuting Attorney, other individuals implicated by defendants in their articles, and other witnesses, all in an effort to, among other purposes, identify any factual basis for the defamatory statements and identify defendants' alleged confidential and/or anonymous sources, so that defendant's knowledge of and conduct to determine their reliability and credibility can be tested. Unfortunately, these efforts have been not been successful. At every turn, defendants have objected to and have refused to disclose their alleged sources based upon their claim that the "West Virginia qualified reporter's privilege" set forth in Hudok v. Henry, 182 W.Va. 500, 505, 389 S.E.2d 188, 193 (1989) precludes the disclosure of their alleged confidential and/or anonymous sources.

Defendants' privilege assertion is not appropriate in this context as the "West Virginia qualified reporter's privilege" is not absolute and because that the privilege yields in libel and defamation actions, especially when the reporter is a defendant. *See generally* Hudok, 182 W.Va. 500, 389 S.E.2d 188, *and* Zirelli v. Smith, 656 F.2d 705, 714 (C.A.D.C. 1981). Based on thorough analysis of applicable law and consideration of the evidence developed to date, on September 16, 2010, the Cabell County Circuit Court entered an Order requiring defendants to disclose their alleged confidential and/or anonymous sources following the parties' extensive briefing and argument.

In their *Petition*, defendants now seek a Writ of Prohibition to prohibit the Circuit Court from enforcing its lawful and well-reasoned twenty-one (21) page Order, consisting of 23 paragraphs of detailed "Findings of Fact" and 34 paragraphs of well-supported and carefully

considered “Conclusions of Law,”³ and to prevent the required disclosure of their alleged confidential and/or anonymous sources. Disclosure of defendants’ alleged confidential and/or anonymous sources, however, is appropriate based upon applicable West Virginia law, including Hudok, and the facts developed in this case. Moreover, the Circuit Court did not exceed its legitimate powers in ordering the disclosure of defendants’ source information. Therefore, defendants *Petition* should be denied.

II. PROCEDURAL HISTORY

Messrs. Butcher and Adkins filed this action on December 26, 2008 asserting multiple claims including defamation of character; public disclosure of private facts; false light invasion of privacy; and intentional and/or negligent infliction of emotional distress caused by defendants’ publication of numerous false and defamatory allegations of criminal and/or wrongful conduct contained in eleven (11) or more articles in *The Lincoln Journal*, its affiliated newspapers, and its internet presence. Defendants’ false allegations chiefly centered on allegations of conspiracy to commit campaign and election violations and related criminal and/or wrongful conduct during and related to the 2008 Primary Election.

Defendants answered the *Complaint* and asserted a variety of defenses including truth, fair report, neutral reportage, that Messrs. Butcher and Adkins were public figures and/or special purpose public figures, public controversy, and others.

On August 21, 2009, Mr. Butcher and Mr. Adkins served discovery requests upon defendants that, among other things, required them to disclose the sources and factual basis for the defamatory statements contained in the subject articles. Defendants responded on September 29, 2009, by objecting and refusing to answer the discovery requests on the

³ Mr. Butcher and Mr. Adkins assert that the Order, dated September 16, 2010, that is at issue in defendants’ *Petition* is so detailed, organized, and analyzed by the Court in its “Findings of Fact” and “Conclusions of Law” that the Order could stand alone without further argument. See Exhibit A attached hereto.

grounds that th[e] question calls for information protected by West Virginia's qualified reporter's privilege. See Hudok v. Henry, 182 W.Va. 500, 505, 389 S.E.2d 188, 193 (1989) (adopting an applying the "general rule that a qualified First Amendment privilege is available to news-gathering material [including sources] whether the material is confidential, published, or not published). In Hudok, the West Virginia Supreme Court explained that the qualified privilege rests on two grounds: (i) the protection of confidential sources which is often critical to news gathering, especially on sensitive subjects where a promise of anonymity is often the only way in which the reporter can obtain information and develop news leads, and (ii) the news-gathering function itself would be substantially hampered and the free flow of information to the public would be impinged in newsmen could be routinely subpoenaed. Id. 182 W.Va. at 504, 389 S.E.2d at 192.

Defendants also object on the grounds that the question invades the privacy rights of third parties and/or seeks confidential business information.

See Defendants' Response to Plaintiffs' First Set of Interrogatories and Request for Production of Documents to Defendants, Answer Nos. 1, 4, 7, 10, 13, 16, 19, 22, 25, 28, and 31, attached hereto as Exhibit B. Defendants also objected to providing information regarding the identity of the individual(s) who defendants "know/understand/believe" filed certain election law complaints upon which defendants claimed to have based portions of their allegations. They based this objection on their claim that the information sought "may be subject to protective orders, confidentiality agreements, First Amendment rights or rights of privacy affecting third parties who are not parties to this action." *Id.*, Answer Nos. 35 and 36,⁴ see Exhibit B.

Following an initial round of discovery, the parties took the depositions of Lincoln County Prosecuting Attorney William J. ("Jackie") Stevens, II ("Prosecutor Stevens"), and

⁴ Ironically, it appears defendants have violated certain Protective Orders entered in and applicable to the litigation of this and the related Federal case by publicly disclosing certain documents with their *Petition*. Early on in discovery, defendants requested certain financial information and cancelled checks from Messrs. Butcher and Adkins. After lengthy discussions, and some intervention by the United States District Court for the Southern District of West Virginia in the aforementioned related case, the parties executed certain Protective Orders that required certain documents identified as "confidential" to be placed under seal when used as exhibits, etc. The checks identified in Defendants' Memorandum in Support of Writ of Prohibition were marked "confidential." Defendants' attachment of these materials, without placing them under seal, is a clear violation of the Protective Order. Messrs. Adkins and Butcher request that these materials be placed under seal, remedially, and that sanctions be levied against defendants for violation of the Protective Order, which still remains in effect.

several individuals whom defendants alleged were involved in the purported criminal conspiracy to affect the 2008 Primary Election. Depositions were taken beginning in October 2009 and continued through December 2009. Additionally, the next spring more depositions were taken. Thus far, a total of ten (10) depositions have been taken.⁵

On November 13, 2009, Messrs. Butcher and Adkins filed a motion to compel plaintiffs to disclose the aforementioned source information. After response and reply briefs, the Circuit Court of Cabell County first heard the parties' arguments during a January 26, 2010 hearing before Judge F. Jane Husted. During the January 26, 2010 hearing, it was readily apparent that, given the applicable liability standards at issue, *i.e.* negligence, actual malice and/or recklessness, the information sought by plaintiffs was relevant and necessary to plaintiffs' claims. The Court, however, expressed concern regarding what was described, arguably inaccurately, as the "exhaustion of alternative sources" requirement of the Hudok standard. During that hearing, discussions were had about FOIA requests to certain governmental agencies that may have information about the source(s) of the criminal complaints. Defendants, however, refused to provide any information about alternative sources that could be utilized to obtain the information requested.

On February 12, 2010, Judge Husted entered an *Order Deferring Ruling on Plaintiff's Motion to Compel* because the Circuit Court, citing Hudok, found that plaintiffs' motion to compel was "premature for failure to exhaust alternative sources." Accordingly, the Circuit Court deferred ruling on plaintiffs' motion to compel to allow additional efforts to obtain the identity(s) of the various anonymous, unidentified and/or confidential sources allegedly relied upon by defendants as the basis for the defamatory statements and allegations they published about Messrs. Butcher and Adkins. The Circuit Court indicated that Messrs. Butcher and Adkins

⁵ Neither plaintiffs nor defendants have been deposed because of this outstanding discovery issue related to the disclosure of defendants' alleged source(s).

could renew their motion to compel when they were “in a position to provide evidence that they had taken steps to exhaust reasonable alternative sources of the information sought.” *See* Order, dated February 12, 2010, attached hereto as Exhibit C.

Thereafter, Mr. Butcher and Mr. Adkins served FOIA requests upon the Lincoln County Prosecuting Attorney, West Virginia Secretary of State, and the United States Attorney for the Southern District of West Virginia in an effort to obtain information regarding the defendants’ source(s) including the source(s) that allegedly filed the alleged criminal complaints. Each of these governmental agencies claimed an exception to the FOIA statute and refused to produce or provide any information regarding the materials requested. Messrs. Butcher and Adkins then issued subpoenas to those same agencies requesting information regarding the criminal complaints. Each of the agencies, again, objected to production of the requested information and/or documentation based on certain enumerated exceptions afforded those agencies. Recognizing the futility of pursuing enforcement of the subpoenas based upon the strong arguments precluding disclosure made by the governmental agencies, *i.e.* ongoing investigation, etc., Messrs. Butcher and Adkins chose not to attempt to force the compelled disclosure of the information through the Court system.

On June 10, 2010, Messrs. Butcher and Adkins, again, moved the Circuit Court of Cabell County to compel defendants to respond to discovery and identify the sources they relied upon in publishing the numerous defamatory statements and allegations regarding the plaintiffs. Defendants filed a *Response* brief and Messrs. Butcher and Adkins replied. Both plaintiffs and defendants attached certain exhibits, including deposition transcripts, affidavits, and documentary evidence, to their briefs in support of their respective positions and arguments. Thereafter, on the morning of July 29, 2010, a lengthy hearing was held on Mr. Butcher and Mr. Adkins’ *Renewed Motion to Compel* before Judge Husted. During the hearing, the parties

presented considerable evidence and made certain proffers regarding facts that had been uncovered during the course of discovery. The parties also argued extensively regarding the facts of the case, the legal standards at issue, the Hudok requirements for discovery purposes, and other issues. Judge Hustead took the matter under advisement and indicated that she would subsequently render a decision.

On August 16, 2010, Judge Hustead, via e-mail, advised all counsel of record of her decision to grant Mr. Butcher and Mr. Adkins' *Renewed Motion to Compel* and directed Mr. Butcher's and Mr. Adkins' counsel to draft and present the Circuit Court with an Order consistent with the rationale included in their memorandum of law. On August 26, 2010, Mr. Butcher and Mr. Adkins' counsel submitted an Order to Judge Hustead for her review and approval pursuant to West Virginia Trial Court Rule 24.01(c). Several days later defendants submitted objections and exceptions to the prepared Order and presented a competing Order to the Circuit Court for consideration. Mr. Butcher and Mr. Adkins then filed *Plaintiffs' Response to Defendants' Objections and Exceptions to Proposed Order Granting Plaintiffs' Renewed Motion to Compel*. Ultimately, after having reviewed and considered the extensive comments made by both parties, the Circuit Court entered an Order similar to that initially proposed by Messrs. Butcher and Adkins on August 26, 2010, but which also included several of the revisions/suggestions made by defendants as well as other changes deemed appropriate by the Circuit Court.

Thereafter, on September 27, 2010, defendants filed the instant *Petition for Writ of Prohibition* with the Supreme Court of Appeals of the State of West Virginia in an effort to prevent the required disclosure of defendants' alleged confidential source(s) at issue in this litigation.

III. STATEMENT OF FACTS

Defendants wrote, edited, and/or published more than eleven (11) newspaper articles,⁶ which contained numerous false allegations claiming that Mr. Butcher and/or Mr. Adkins were involved in criminal and/or otherwise wrongful conduct. The subject articles were purportedly written and/or edited by Ron Gregory and/or Thomas A. Robinson and published by The Lincoln Journal and its affiliates during the months prior to and immediately following the 2008 Primary Election.

The articles indicated that, among other things, Mr. Butcher, Mr. Adkins, and others were involved in a variety of illegal and/or wrongful conduct, including, but not limited to: funneling money to others so that illegal campaign contributions could be made; a conspiracy to illegally influence the 2008 Primary Election; tax fraud; obstruction of justice; and other criminal and/or wrongful conduct. The articles are alleged to have been based upon:

- (1) Statements allegedly made by various different confidential and/or anonymous sources;
- (2) Statements allegedly made by the Lincoln County Prosecuting Attorney, William J. ("Jackie") Stevens, II;
- (3) Alleged analysis of campaign finance reports by the Lincoln Journal staff; and
- (4) Two alleged criminal complaints allegedly submitted to Prosecutor Stevens,⁷ and to the West Virginia Secretary of State, and to the United States Attorney for the Southern District of West Virginia, and supplied anonymously to the defendants that asserted various voting and election campaign issues, tax fraud, and conspiracy and that sought an investigation of Mr. Butcher, Mr. Adkins, and others.

In addition to numerous unattributed allegations and statements, the articles also contained the writer, editor, and/or publisher's interjection of various opinions and conclusions.

⁶ Some of which were reprinted in multiple publications and/or on the internet. Defendants have acknowledged the republication of many of the factual assertions at issue across several different newspapers and the Internet.

⁷ The two alleged criminal complaints were allegedly submitted to Prosecutor Stevens, but he chose to keep them at his personal residence rather than filed at the Lincoln County courthouse as in the normal course of business.

masquerading as facts into stories that they alleged were based upon fact. The published articles have damaged plaintiffs and are believed to have altered the outcome of the 2008 Primary Election.⁸

A. Sources referenced in defendants' articles

Defendants' false and defamatory allegations and articles are largely based upon alleged statements of confidential sources and/or anonymous tips. Nevertheless, defendants make the unsupported claim that their defamatory publications rely "principally" on the statements Prosecutor Stevens, as well as the two (2) criminal complaints that were submitted to Prosecutor Stevens, which he kept in his home, and assert that both are "inherently reliable and credible disclosed sources." Defendants also insist that Prosecutor Stevens and the criminal complaints confirm the defamatory statements that they published.⁹ They also now point to certain checks and tax documents, only recently obtained in discovery, in an effort to support their allegations. However, none of these materials support defendants' allegations.

An examination of the defamatory articles at issue clearly indicates that, none of the statements attributed to Prosecutor Stevens actually support the defamatory statements and allegations at issue. Further, the criminal complaints do not set forth many of the defamatory allegations defendants have made against Messrs. Butcher and Adkins. The Circuit Court, after having considered these issues and after having carefully reviewed significant amounts of

⁸ The articles, at issue, and the defendant newspaper are believed to be involved in a long-played game in Lincoln County politics by certain politically powerful individuals and/or the political establishment in Lincoln County. In furtherance of their activities, plaintiffs believe that the defendant newspaper has been used, at various times, by its present and/or former owners to further the political establishment's control and/or for election campaign purposes. Certain individuals in Lincoln County have challenged the political establishment's activities following certain criminal political corruption investigations and convictions and, as believed to have occurred in the instant action, have been targeted by defendants and/or others for said challenges. Plaintiffs believe that the defamatory allegations made against them were an effort by the political establishment to silence further opposition.

⁹ It is unbelievable that defendants would assert that the two (2) so-called complaints, which are a substantial issue in this *Motion*, can constitute an "inherently reliable and credible disclosed source." These are the same two (2) complaints that defendants indicate in their discovery responses and Mr. Gregory indicates in his affidavit mysteriously appeared on his desk with the purported authors name already redacted, and suggesting that they/he did not know the author. If defendants, including Mr. Gregory, do not know the author, they can neither claim that they are credible nor vouch for their credibility.

evidence presented by the parties, specifically found that defendants published “other statements and allegations not contained in said complaints.” See Order, “Findings of Fact,” ¶7, attached hereto as Exhibit A. The checks and financial materials do not support their allegations and do not prove any criminal conduct or wrongdoing as Defendants claim. As such, Defendants’ argument remains without any factual support.

1. Prosecutor Stevens’ statements

According to the articles themselves, all that Prosecutor Stevens actually confirmed was that he received the criminal complaints, that he was investigating the criminal complaints, and that he was taking the criminal complaints seriously. In fact, the articles actually quote Prosecutor Stevens as stating that he was not accusing anyone of wrongdoing. Specifically, defendants wrote:

At this point, Stevens said “I am not accusing anyone of wrongdoing. I am simply acting on the Complaint that I received and making a good faith effort to look into the allegations contained in it.”

See Exhibit D, *The Lincoln Journal*, “Subpoenas Issued as Investigation Continues,” April 30, 2008. Nevertheless, defendants’ argument suggests, intentionally or not, that Prosecutor Stevens supported defendants’ false and defamatory allegation that Messrs. Butcher and Adkins were involved in certain criminal conduct.

Moreover, contrary to defendants’ representations concerning Prosecutor Stevens’ deposition, he actually disputed that he made several of the statements and quotations that defendants attributed to him. Defendants have taken Prosecutor Stevens’ testimony completely out of context and completely ignore multiple instances in Prosecutor Stevens’ deposition testimony where he indicates that he did not make certain statements or quotations that defendants attributed to him. See W. J. Stevens, Depo. Tr., pp. 51-54, 66-67, 73-75, 77-78, 104-109, 117-118, 151-153, attached as Exhibit E. Moreover, at no time did Prosecutor Stevens

testify that the allegations contained in the two (2) so-called criminal complaints that were filed with him are true or accurate. All he admitted to have told *The Lincoln Journal* was that he had received the criminal complaints, that he was conducting an investigation that was not yet complete, and that he was taking the criminal complaints he had received seriously. *Id.* at pp. 42, 63-65, 82. He also acknowledged that he had indicated that he believed a violation had been confirmed, but he did not indicate the nature of the violation and/or the person(s) who he believed had committed it and testified that he was not accusing anyone of any wrongdoing. *Id.* at pp. 67-68, 93. During the deposition, the following testimony was taken:

Q: “Stevens said, ‘I’m not accusing anyone of wrongdoing. I’m simply acting on the complaint I received and making a good faith effort to look into the allegations contained in it.’” Did you make that statement to him?

A: I specifically remember saying I’m not accusing anybody of wrongdoing. My guess is probably the rest of that, is not exactly accurate, is fairly accurate, yes, sir.

Id. at pp. 67-68.

Based upon these and other references contained in Prosecutor Stevens’ quotations from defendants’ published articles and from his deposition testimony, it is clear that Prosecutor Stevens did not provide defendants with support or any factual basis for the false and defamatory allegations of criminal and/or wrongful conduct that they published about Mr. Butcher and Mr. Adkins.

2. Criminal complaints

The credibility and reliability of the criminal complaints remains in question. Issues exist regarding the identity of the accusing party(s), the manner in which they were filed and/or maintained by Prosecutor Stevens, and the date they were allegedly drafted. All of these concerns raise suspicions regarding the individuals and purposes involved and suggest collusion on the part of defendants with the drafter(s) of the criminal complaints.

The two alleged criminal complaints were allegedly submitted to Prosecutor Stevens. Instead of filing them in the normal course of business in the Lincoln County courthouse, Prosecutor Stevens kept them at his personal residence and away from the courthouse. Further, issues exist regarding the date of publication of the first of the series of the subject articles compared to the date of the criminal complaints. Information indicates that the articles were published, using identical or nearly identical language as contained in the criminal complaints, but the criminal complaints were actually dated after the publication of the articles.

Defendants have suggested that they do not know who authored or filed the criminal complaints that they claim were the basis of so many of their false and defamatory allegations. An affidavit of Ron Gregory submitted by Defendants states that the two complaints, without “enclosures” were “...left in an envelope on my desk.” Gregory’s affidavit further states that the complaints “...were already redacted to “white out” the signature line of the complaint(s).” See Exhibit F attached hereto. Further, in defendants’ *Answer to Plaintiffs’ Timothy Butcher and Bobby Adkins’ Second Set of Interrogatories and Request for Production of Documents to Defendants, Answer to Interrogatories, Set # 1 and Set # 2*, defendants indicated that they did not know how they were delivered to Mr. Gregory’s desk and stated they had “no direct knowledge of who redacted [criminal] the complaints.” They also state “Presumably, the redaction was intended to preserve the complainant(s)’ anonymity and confidentiality.” See Exhibit G, attached hereto. The clear intent of defendants’ language was to imply that defendants did know the identity of the authors of the criminal complaints.

However, not only does Mr. Gregory’s affidavit and defendants’ discovery response not expressly state that they do not know the identity of the authors or signatories of the complaints, repeated references in the articles themselves to the source belies such an implication. Either the defendants knew who provided the complaints at the time of publication, in which case that

information is necessary to determine the credibility of the information, upon which is based their articles, or they did not know the identity of the authors of the defamatory allegations and published them anyway. In either case, the defendants have an obligation to disclose the actual factual situation, instead of engaging in obfuscation and vague insinuation. *See Miller v. Transamerican Press*, 621 F.2d 721, 725 (5th Cir. 1980) (Noting the “inherent unreliability of anonymous tips.”) Either scenario is relevant to the necessary liability determination of negligence, recklessness, or actual malice.

3. Testimonial evidence

Considerable evidence exists in the record of this case indicating that defendants’ published statements and allegations about plaintiffs that are untrue. First, Messrs. Butcher, Adkins and Daniel Butcher have all indicated under oath that they did not commit and were not involved in the activities and criminal conduct described by defendants. *See Dan Butcher Affidavit*, attached as Exhibit H, *Timothy Butcher Affidavit*, attached Exhibit I; and *Bobby Adkins Affidavit*, attached as Exhibit J.¹⁰

Likewise, depositions have been taken of the numerous other individuals who defendants claimed were part of the alleged conspiracy to commit election fraud, funnel money to political candidates, commit campaign contribution violations and/or other wrongful or criminal activity. These witnesses included Sharon Watts, Alvie Watts, Collis Tooley, Donna Martin, Steve Priestley, Randie Lawson, David Webb, Charles (“Doc”) Vance, D.O., and Johnny White. To a person, they each denied the allegations made by defendants against them and the plaintiffs herein. *See Randie Lawson Depo. Tr.*, pp. 13-16, attached as Exhibit K; *Donna Martin Depo. Tr.*, pp. 88-107, 112-118, 148, attached as Exhibit L; *Stephen Priestley Depo. Tr.*, pp. 17-28, 33-

¹⁰ Affidavits, rather than deposition testimony, from Messrs. Butcher and Adkins and Daniel Butcher are attached because defendants canceled their previously scheduled depositions. Defendants indicated that they would take those depositions at or near the end of discovery.

40, 49-68, 73-80, 85-92, 109-112, attached as Exhibit M; Collis Tooley Depo. Tr., pp. 96-107, 112-123, 136-138, attached as Exhibit N; Alvie Watts Depo. Tr., pp. 70-81, attached as Exhibit O; Sharon Watts Depo. Tr., pp. 134-137, 150-161, 166-167, attached as Exhibit P; David Webb Depo. Tr., pp. 14, 33-35, 43-44, 46-48, 58-66, attached as Exhibit Q; Johnny E. White Depo. Tr., pp. 23-24, 31-33, 37-40, attached as Exhibit R; *and* Jay Samuel Watson Depo. Tr., pp. 37-52, 61-64, attached as Exhibit S. Defendants have not deposed anyone that supports their allegations.

No testimony has been taken and/or is known to exist to support defendants' assertion that their allegations were true. On the contrary, the overwhelming weight of evidence actually proves that their allegations were false.

4. Checks and ratio/percentage of income

The only, albeit extremely weak, support that defendants have been able to mount for their entire litany of defamatory statements is a conclusory argument based on the timing of certain valid and legitimate checks issued by Daniel Butcher to Tim Butcher, his brother who currently is, and for many years has been, employed by a company owned and operated by Daniel Butcher, and Mr. Adkins, who is a construction contractor that had done work for Daniel Butcher on several occasions, including around the time of the 2008 Primary Election.¹¹ It must be noted, that defendants did not have access to the checks and/or federal income tax returns upon which they now rely in hindsight in an effort to try to support for their defamatory allegations. These materials were produced as "confidential" under a Protective Order during the

¹¹ Since the defendants only received the checks in discovery during the course of the present litigation, they obviously could not have been evidence relied on by the defendants when the libelous articles were published.

course of this litigation well over a year after the articles were written, edited, and/or published.¹² As such, they were not and could not have been the basis for any of defendants' allegations when the articles were written, edited, and/or published.

Only in footnote 1 of their *Memorandum in Support of their Petition for Writ of Prohibition* do Defendants reluctantly acknowledge the employment and/or independent contractor relationship between Daniel Butcher, Tim Butcher and Mr. Adkins. *See* Memorandum at p. 5. Defendants also assert that the ratio/percentage of income reported in certain tax return materials by Mr. Butcher and Mr. Adkins compared to the amount of campaign contributions made suggests that under defendants' theory, Mr. Butcher and Mr. Adkins were unable to afford to make any campaign contributions and, therefore, their defamatory allegations must be true.

The evidence is and always has been undisputed that Mr. Adkins and Mr. Butcher are employees and/or independent contractors who have performed work for Daniel Butcher or companies he owns and operates, and that Mr. Butcher and Mr. Adkins have been paid for the work that they performed. *See* Dan Butcher Affidavit, attached as Exhibit H; Timothy Butcher Affidavit, attached as Exhibit I; and Bobby Adkins' Affidavit, attached as Exhibit J. Contrary to defendants' assertion, the record is clear that money paid by Daniel Butcher to Tim Butcher and/or Mr. Adkins was for work Tim Butcher and/or Bobby Adkins had performed for Daniel Butcher and/or his companies. Likewise, the record is clear that a check written by Tim Butcher to Mr. Adkins was to pay off the outstanding balance owed on a camper that Tim Butcher was buying from Mr. Adkins. *See* Timothy Butcher Affidavit, attached hereto as Exhibit I.

¹² As noted elsewhere, the Protective Order required that documents marked "confidential" were only to be used in litigation if placed "under seal." Despite the Protective Order's requirements, and identification of the documents as "confidential," defendants failed to place the documents "under seal" when producing them as exhibits in support of their *Petition*.

The Circuit Court, having had the opportunity to thoroughly review the checks, affidavits, arguments regarding income ratios and percentages, and other information discussed at length during the hearing and in brief, rightly determined that:

[r]egardless [of the existence and dates of the checks], to date, no evidence has been identified which indicates that Mr. Adkins and/or Mr. Butcher were “given” or were provided with any funds for or on the condition that the funds be used to make political contributions in the 2008 Primary Election and neither the checks nor ratio/percentage of income prove or establish their allegations against Mr. Butcher and/or Mr. Adkins.

See Order, “Findings of Fact,” ¶19, attached hereto as Exhibit A. In short, there is more than sufficient evidence contained in the record tending to show that defendants’ defamatory statements regarding Tim Butcher, Bobby Adkins, Daniel Butcher and others are false and without any legitimate and reliable basis.

In this case, and as discussed more thoroughly below, defendants published several articles in *The Lincoln Journal* and through other media outlets. The articles contained numerous false statements alleging conspiracy and certain criminal conduct on the part of Mr. Butcher and others.¹³ The allegations of serious criminal conduct constitute defamation *per se*. Furthermore, although discovery is not complete, the overwhelming evidence indicates that the defamatory allegations published by defendants are false. As the Supreme Court indicated in Herbert v. Lando, 441 U.S. 153, 171 (1979) *citing and quoting* Gertz v. Welch, 418 U.S. 323, 340 (1974), “spreading false information in and of itself carries no First Amendment credentials. There is no constitutional value in false statements of fact.”

Further, and despite defendants’ assertions to the contrary, evidence demonstrates that, plaintiffs have diligently and actively pursued the identity of defendants’ alleged sources and, other than compelled disclosure by the defendants, no other reasonable source is available to obtain the identity of defendants’ source(s) for the defamatory statements and allegations.

¹³ See “Summary of Defendants’ Published Allegations Against Plaintiffs,” attached as Exhibit T.

Defendants allege that plaintiffs herein are “limited purpose public figures and that, as a result, in order to recover against defendants, they must show that defendants acted with “actual malice.”¹⁴ Case law suggests that “actual malice” merely requires evidence that the statements and allegations at issue were made knowing that they were false or with reckless disregard for their truth or falsity. As a result, “actual malice” often requires an investigation of the mental state of the publisher and/or the publisher’s knowledge of the alleged source and his/her reliability. Here, this investigation cannot be properly completed without the source’s identity. Moreover, Mr. Butcher and Mr. Adkins assert that a negligence standard is applicable to the liability analysis of defendants’ activities, requiring review using a reasonable prudent person standard. Regardless of whether the negligence, the actual malice, or the recklessness standard applies, Hudok, Miller, and the cases cited therein, indicate that disclosure is appropriate.

Regarding the complaints, applicable authority holds that a private criminal complaint is not a report of Court or governmental action that qualifies for any protection under the Fair Reporter Privilege that can be published with immunity from action for libel. Finally, in their response, the defendants insinuate that the complaints were delivered anonymously to them, and that their authors are unknown. If true, the defendants published defamatory allegations solely in reliance on allegations contained in anonymous *ex parte* documents without knowledge or any investigation into the reliability, veracity and/or agenda of the authors. By definition, actions of this type constitute reckless disregard for the truth of the published allegations of criminal behavior.

For these reasons, and those more thoroughly discussed below, plaintiffs respectfully request that this Court deny defendants’ *Petition for Writ of Prohibition*.

¹⁴ Plaintiffs dispute that they are “limited purpose public figures”; rather they are private figures and the applicable standard is negligence, i.e. that a reasonably prudent person would not have published the defamatory allegations. Nevertheless, malice is an element of plaintiffs’ claim since they seek punitive damages, and regardless of whether the applicable standard is negligence, actual malice and/or recklessness, information regarding the sources defendants relied upon, and their credibility and reliability, are clearly relevant and necessary.

IV. STANDARD OF REVIEW

The West Virginia Supreme Court has set forth the standard for determining whether to entertain and issue a writ of prohibition when a trial court is alleged to have exceeded its legitimate powers. In State ex rel. Shelton v. Burnside, the Supreme Court held that its determination shall consider five factors:

- 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.

See 212 W.Va. 514, 517, 575 S.E.2d 124, 127 (2002).¹⁵ Further, these factors are considered “general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition” should be issued. *Id.* This Court has indicated that “the existence of clear error” as to the third factor, *i.e.* whether the lower tribunal's order is clearly erroneous as a matter of law, “should be given substantial weight.” *Id.* Likewise, this Court has stated that a writ of prohibition should not issue if there is no “clear-cut error that needs resolution.” *See State ex rel. United States Fidelity & Guar. Co. v. Canady*, 194 W.Va. 431, 437, 460 S.E.2d 677, 683 (1995) *citing State ex rel. Doe v. Troisi*, __ W.Va. __, __ S.E.2d __ (No. 22817 5/18/95). As a result, where, as in the instant matter, the absence of “clear-cut” legal error is dispositive of the issuance of a writ of prohibition.

¹⁵ Mr. Butcher and Mr. Adkins argue that factors two, three, four, and five each weigh in favor of denying defendants' *Petition*. Most importantly, no clear error exists in the Circuit Court's decision granting Mr. Butcher and Mr. Adkins' motion to compel defendants' to disclose their source information and other items. Plaintiffs do not argue factor one as defendants have no right of direct appeal or other means to address this issue.

This Court, in discussing appellate review of discovery matters concerning certain evidentiary privileges, has held that the Circuit Court's decisions are reviewed using an abuse of discretion standard. *See State ex rel. United States Fidelity & Guar. Co.*, 194 W.Va. at 431, 460 S.E.2d at 677. This Court also has indicated that when reviewing discovery decisions regarding privilege issues its "primary obligation is to determine whether the lower judicial tribunal acted in excess of its authority" and not "merely to decide who is right or wrong or what the law is." *Id.* at n. 11. This Court also noted that a trial court abuses its discretion when ruling on discovery motions only when its decisions are "clearly against the logic of the circumstances then before the [trial] court and so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration." *See* Syl. Pt. 5, *State ex rel. Atkins v. Burnside*, 212 W.Va. 74, 569 S.E.2d 150 (2002) *citing* Syl. Pt. 1, *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W.Va. 463, 475 S.E.2d 555 (1996). In discussing the strong privilege and liberty concerns at stake in the Fifth Amendment right against self-incrimination context, this Court noted that:

"[a] trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion." Syl. Pt. 1, *in part*, *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W.Va. 463, 475 S.E.2d 555 (1996). Because of this broad discretion, we are generally quite hesitant to interfere in a trial court's decisions regarding discovery issues.

See State ex rel. Myers v. Sanders, 206 W.Va. 544, 549, 526 S.E.2d 320, 325 (1999). It is clear that this Court gives significant deference to the Circuit Courts regarding discovery and privilege matters.

Also, this Court has discussed the necessity of a sufficient Order from the Circuit court upon which appellate review to determine whether the issuance of a Writ of Prohibition is appropriate. *See generally State ex rel. United States Fidelity & Guar. Co.*, 194 W.Va. at 440, 460 S.E.2d at 686. This Court noted:

In the area of privilege, the need for a circuit court to delicately balance the interests of the parties, the Rules of Civil Procedure, and the policy concerns underlying the privilege is obvious. Circuit judges are well situated to regulate and control discovery requests to prevent abuses. More precisely, we are confident that circuit courts can and will balance these competing interests on the record where each ruling when challenged can be meaningfully reviewed by this Court.

Id. at 194 W.Va. at 686, 460 S.E.2d at 440. By requiring a detailed Order that includes findings of fact and conclusions of law, this Court has ensured that Circuit Courts will give ample consideration and thought to the important issues at stake. As noted elsewhere, in this case, the Circuit Court included Findings of Fact and Conclusions of Law in an extensive 21 page Order that analyzed the facts and issues following its review of numerous written briefs, extensive evidence presented by the parties, oral argument during two (2) separate hearings, and lengthy objections and comments regarding the Order it ultimately entered. It is clear that the Circuit Court acted appropriately and in accordance with this Court's direction and requirements.

No issue and/or evidence exist in this case to base a finding that the Circuit Court of Cabell County exceeded its legitimate powers and/or abused its discretion in ordering disclosure of the source information. Likewise, the factors to be considered by this Court in determining whether a Writ of Prohibition should be issued weigh in Mr. Butcher and Mr. Adkins' favor and against issuance of a Writ of Prohibition. Therefore, defendants' *Petition* must be denied.

V. ARGUMENT

The Circuit Court properly exercised its discretion on the issues of disclosure of evidentiary materials and it did not exceed its legitimate powers. No issue of jurisdiction is presented in defendants' *Petition*. As a result, defendants' *Petition for a Writ of Prohibition* must be denied.

A. No clear error exists in the Circuit Court’s decision to require defendants to disclose their confidential sources because the Circuit Court’s decision was consistent with applicable West Virginia law.

1. Hudok v. Henry provides the applicable West Virginia standard for determining whether confidential sources should be disclosed.

The standard for determining whether disclosure of source material is appropriate pursuant to West Virginia law is found at Syl. Pt. 1, Hudok v. Henry, 389 S.E.2d 188 (W.Va. 1989). *See also* Charleston Mail v. Ranson, 488 S.E.2d 5, 14 (W.Va. 1997). West Virginia law requires a showing that: (1) the information is highly material and relevant; (2) necessary or critical to the maintenance of the claim; and (3) not obtainable from other available sources. *See* Syl. Pt. 1, Hudok, 389 S.E.2d at 188. The qualified reporter’s privilege for news gathering individuals and organizations is not absolute. *See* Hudok, 389 S.E.2d at 188, 193 *and* Ashcraft v. Conoco, Inc., 218 F.3rd 282 (4th Cir. 2000). This Court, in Hudok, explained that the qualified reporter’s privilege was stronger in civil cases “...except those [cases involving] the libel area.” 389 S.E.2d at 193. Therefore, in defamation/libel cases the qualified reporter’s privilege may yield in certain circumstances making disclosure of source information appropriate. Likewise, in Zirelli v. Smith, 656 F.2d 705, 714 (C.A.D.C. 1981), cited and discussed in Hudok, the D.C. Circuit held that “[w]hen the journalist is a party, and successful assertion of the privilege will effectively shield [the journalist] from liability, the equities weigh somewhat more heavily in favor of disclosure....” since a refusal to disclose the information may act as a shield to liability. The Circuit Court properly identified and cited Hudok in its Order as the mandatory, applicable law. *See* Order, “Conclusions of Law,” ¶10, attached hereto as Exhibit A.

Additionally, West Virginia law requires that the party asserting a given privilege bears the burden of proving its applicability. *See* Syl. Pt. 4, State ex rel. United States Fidelity & Guar. Co., 194 W.Va. at 431, 460 S.E.2d at 677 (1995) (concerning assertion of attorney-client privilege); *see also* State ex rel. Brison v. Kaufman, 213 W.Va. 624, 584 S.E.2d 480 (2003)

(holding that party asserting the attorney-client privilege has the burden of establishing its applicability.) Evidentiary privileges in litigation are not favored, and even those rooted in the United States Constitution must give way in proper circumstances. See Herbert v. Lando, 441 U.S. 153 (1979).

Defendants, however, seek to read extra requirements into the Hudok standard and they claim that the Circuit Court committed clear error by not requiring a showing of “substantial falsity,” as required by some other jurisdictions. Specifically, they claim that the Circuit Court “failed to properly consider the *persuasive opinions from other courts*,¹⁶ including those cited by plaintiffs, that have previously considered the application of the qualified reporter’s privilege in civil cases against media defendants.” See *Petition* at p. 13. (Emphasis added.) They also assert, without citing any West Virginia authority, that “[e]ven in libel cases, the privilege can be overcome *only if* the requesting party makes a substantial preliminary showing.” *Id.* This additional requirement has not been adopted in West Virginia and it is not a part of West Virginia law or necessary to the Circuit Court’s ruling.

In their *Petition*, defendants paraphrase Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980) for the proposition that 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. See *Petition* at pp. 13-14. They also claim Miller as the basis for their additional “substantial falsity” requirement. Despite defendants’ proposition, the Mr. Butcher and Mr. Adkins herein submit that the principles followed by the Miller court, actually, support the Circuit Court’s decision below and mandate disclosure.

Miller was the plaintiff in a libel action who sought disclosure of a reporter’s confidential sources for a magazine article accusing Miller of improper diversion of Teamsters Union pension

¹⁶ Mr. Butcher and Mr. Adkins believe that defendants are primarily referring to Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980) cited by plaintiffs on other issues presented herein.

funds. After several unsuccessful motions to compel, the trial court ultimately ordered disclosure of the informant's identity. Operating on the assumption that Miller was a public figure,¹⁷ the trial court noted that Miller needed to prove actual malice to recover. The Miller Court defined malice as knowledge that the story was false, or was published with "reckless disregard" for the truth:

In order for the plaintiffs to recover damages, therefore, they were required to prove by clear and convincing evidence that the defendants acted with actual malice as defined in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and its progeny... A publisher acts with actual malice when he prints a story with knowledge that it is false or with reckless disregard for the truth.

Id. at 724.

The trial court initially denied Miller's motions to compel for failure to provide evidence concluding that he had failed to exhaust alternative means of proving that Transamerican was reckless. Miller then submitted an affidavit stating that the charges were false. The defendants then asserted that Morris Shenker, a trustee of the pension fund, could testify regarding Miller's culpability. In response to interrogatories, Shenker also denied any wrongdoing by Miller. Accordingly, the Court granted Miller's motion to compel and in sustaining the ruling of the District Court, the Fifth Circuit in Miller, stated, citing Herbert v. Lando:

a reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential informants, however, the privilege is not absolute and in a libel case as is here presented, the privilege must yield. As the Supreme Court observed in Herbert v. Lando: "Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances."

¹⁷ Note that defendants claim that plaintiffs are "special purpose" or "limited purpose" public figures and, as a result, Mr. Butcher and Mr. Adkins must show that "actual malice" or "recklessness" is necessary to prove liability. Mr. Butcher and Mr. Adkins have denied the applicability of this heightened classification. Nevertheless, plaintiffs must be allowed to conduct discovery on the defenses asserted by defendants.

Miller at 725. Also citing Herbert, the Court noted that requiring disclosure of a journalist's thought processes would have no chilling effect on the editorial process. Instead, the only effect of disclosure would be to deter recklessness. *Id.*

The Miller Court specifically noted the Herbert decision, holding that when the purpose of discovery is to assess whether the defendant had acted recklessly, the First Amendment privilege was not applicable:

Herbert held that the press had no First Amendment privilege against discovery of mental processes where the discovery was for the purpose of determining whether malice existed.

Id. at 725.

Defendants also attempt to rely on Cervantes v. Time, Inc., 464 F. 2d 986 (8th Cir. 1972). In Cervantes the Court refused to compel disclosure and granted summary judgment for the defendant. However, in doing so, the Court made clear that its decision rested on the particular, unique facts of the case, and those facts differ significantly from the case at bar. Specifically, in Cervantes, the plaintiff was the mayor of St. Louis, who disputed the veracity of four (4) paragraphs of an 87 paragraph magazine article, which alleged his association with mob figures. The Court noted that the record contained a large volume of evidence that the defendant had carefully collected and extensively vetted and corroborated evidence supporting the truth of the published allegations:

As the opinion of the District Court makes clear, **the record contains substantial evidence indicating that it was over a period of many months that Life's reporter carefully collected and documented the data on the basis of which the article was written and published.** In turn, Life's key personnel, including **one researcher, four editors and three lawyers, spent countless hours corroborating and evaluating this data.** Once suit was instituted, **the mayor was provided with hundreds of documents utilized in preparation of the article.** He then deposed virtually every Life employee who possessed any connection whatever with the article's preparation and publication and, with one exception, each affirmed his or her belief in the truth of the article and

each gave deposition testimony sufficient to raise a strong inference that there was good reason for that belief.

Id. at 994. (Emphasis added).

To illustrate the practicality and necessity of compelling disclosure of the identity of confidential informants, Miller cited and discussed Carey v. Hume 492 F.2d 631 (D.C. Cir. 1974) and Garland v. Torre, 259 F. 2d 545 (2d Cir. 1958):

In Carey, the D.C. Circuit found a compelling interest in disclosure. The record did not disclose a thorough investigative effort by the defendant. The plaintiff, a high official of the United Mine Workers, was accused of thwarting a government investigation by removing boxes of incriminating documents from his office at night over an indefinite period of weeks. **The only evidence within the plaintiff's control that could disprove the story was his own testimony. Since the story was based solely on information from a confidential informant, the only way to determine recklessness was to examine the reliability of the informant.**

Garland was similar to Carey. Judy Garland claimed she was defamed in a newspaper article that quoted an unnamed CBS executive. **She sued CBS and deposed the two executives who supposedly had made the defamatory statement. Both denied having made it. Garland subpoenaed the reporter to determine the source of her information. The reporter's claim of privilege was overridden. The information was obviously relevant and there was no other proof reasonably available to Miss Garland.**

Id. at 726. (Emphasis added).

In Carey v. Hume, 492 F.2d 631 (D.C.Cir. 1974), the Court indicated that the information sought, *i.e.* the reporter's source goes to the heart of the plaintiff's libel action.

It would be exceedingly difficult for [plaintiff] to introduce evidence beyond his own testimony to prove that he did not, at any time of day or night over an indefinite period of several weeks, remove boxfuls of documents from the UMW offices. Even if he did prove that the statements were false, Sullivan also requires a showing of malice or reckless disregard of the truth. That further step might be achieved by proof that [defendant] in fact had no reliable sources, that he misrepresented the reports of his sources, or that reliance on those particular sources was reckless.

Id. at 636-637. The court further noted that knowledge of the identity of the alleged sources would logically be an initial element in the proof of any such circumstances and consequently

the Court held that the identity of defendants' sources was critical to the plaintiff's claim. *Id.* at 637.

In short, the Circuit Court identified, cited, and applied the mandatory legal standard in West Virginia found in the Hudok case. Therefore, the Circuit Court did not exceed its legitimate powers or abuse its discretion. Defendants' *Petition* must be denied.

a. The information sought is highly material and relevant to Mr. Butcher and Mr. Adkins' claims.

The information sought is highly material and relevant to all potential liability standards that may be applicable to this case and to punitive damages issues. Defendants have asserted that Mr. Butcher and Mr. Adkins are "special purpose" and/or "limited purpose" public figures because they have injected themselves into the political process by making certain campaign contributions. Defendants' assertion is an effort to raise the liability hurdle that plaintiffs' must meet from one of negligence to "actual malice" or "recklessness." As a result, issues such as the knowledge and intent of the reporter, the credibility of the source, and other issues come into play that require identification and discussion of the defendants' sources at trial.

Under the circumstances of this case, the principles announced in Cervantes clearly mandate disclosure of the reporter's sources. In fact, the Court in Miller indicated that:

Miller's case is more akin to Garland and Carey than it is to Cervantes. Unlike the Mayor in Cervantes, Miller challenges every statement that refers to him and that could be interpreted as defamatory. Like the defendants in Carey and Garland, Transamerican's only source for the allegedly libelous comments is the informant. The only way that Miller can establish malice and prove his case is to show that Transamerican knew the story was false or that it was reckless to rely on the informant. In order to do that, he must know the informant's identity.

Id. at 726-727. Here, in order to establish negligence, or "actual malice" or "recklessness" and prove their case against defendants, plaintiffs must show that defendants knew the published statements were false and/or that defendants acted recklessly or negligently in publishing the

defamatory statements relying on their alleged source(s). This burden necessarily requires consideration and evaluation of defendants' sources, their credibility and reliability, and the defendants' efforts, if any, to verify and corroborate the many defamatory statements and allegations they published prior to their publication.

The Circuit Court appropriately determined that this element was met. It determined issues regarding the knowledge, motivation, and intent of the sources were necessary for liability determinations. It also stated that defendants' actions in asserting the credibility of their alleged sources were important to the issues presented. Specifically, it found that:

12. Regarding the materiality of the source information sought, applicable law holds that an essential element of defamation is negligence by the publisher in ascertaining the truth and veracity of the defamatory statements and in evaluating the reliability, motivation, bias and overall credibility of a reporter's sources. The West Virginia Supreme Court has held that the publisher of defamatory statements has a duty to take reasonable steps to ascertain the truthfulness of the published statements, and must also have a good faith belief in the credibility of his sources and the truth of the published statement, "[the power of the press] imposes a moral and social duty on the publishers of newspapers to make no statement... until an honest and diligent effort has been made to ascertain the truth of the matter stated." See Bailey v. Charleston Mail Ass'n, 27 S.E.2d 837, 844 (W. Va. 1943).

13. Whether the defendant in a defamation action acted appropriately in assessing the credibility of his source(s), and truthfulness of the published allegations is to be measured against what a reasonably prudent person would have done under the same circumstances. See Syl. Pt. 1, 2, Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70 (1983). Identification of source information is an extremely important first step to the evaluation of defendants' source(s)' credibility and truthfulness of the published allegations in this case. The identity and credibility of the person providing information upon which published statements and allegations are based is essential to whether the reporter properly discharged his/her fact-finding duty or instead negligently, maliciously and/or recklessly published damaging allegations. Obviously, the credibility of the sources can only be tested after they have been identified.

See Order, "Conclusions of Law," ¶¶ 12-13, attached hereto as Exhibit A.

For these reasons, the Circuit Court did not exceed its legitimate powers in finding that disclosure of the source information was appropriate.

b. The information sought is necessary and/or critical to the maintenance of Mr. Butcher and Mr. Adkins' claims.

For the same reasons that the information is highly material and relevant to their claims, the confidential source information is also necessary and/or critical to the maintenance of Mr. Butcher and Mr. Adkins' respective claims. Issues of negligence, "actual malice," "recklessness," and punitive damage all exist in this case and the information sought is necessary and critical to the determinations of those issues. Here, the Circuit Court appropriately found that the confidential source information sought by plaintiffs was necessary and/or critical to the maintenance of plaintiffs' claims and it did not exceed its legitimate powers in doing so. Therefore, defendants' *Petition* must be denied.

c. The information sought is not obtainable from other available sources.

West Virginia law indicates that disclosure is appropriate when the information sought is "not obtainable from other *available* sources." See generally Hudok, 389 S.E.2d at 193. (Emphasis added.) There is no requirement, particularly under West Virginia law, to "exhaust all alternative sources," or even exhaust "all reasonable alternative sources" of the information sought. Nor is it "not obtainable from other sources." Rather, assuming Courts choose their words and phrases carefully, it is important to consider the meaning of the word "available" and the phrase "available sources." Pursuant to multiple dictionary definitions, and as commonly used, the word "available" means "present and ready for immediate use," "at one's disposal," "near, handy, at hand, convenient; readily obtainable or accessible." In contrast, "unavailable" means "not available," "inaccessible," "difficult," and "not handy."

In briefs presented to the Circuit Court and in this brief, plaintiffs described their actions in investigating and pursuing discovery to obtain the source information. As noted, there has been written discovery, numerous depositions, and FOIA requests and subpoenas sent to certain Lincoln County, West Virginia and federal agencies. In each circumstance, no information indicating the cited source or potential source of the allegations has been identified. The information sought is not “available” from another source, and no other reasonable alternative means to obtain the information exists. In fact, Mr. Butcher’s and Mr. Adkins’ efforts go well beyond what is required by West Virginia law, which does not require exhausting all reasonable alternative sources for the information, but simply requires that the information not be obtainable from other “available sources.”

In Garland, 259 F.2d at 545, and Miller, 621 F.2d at 721, after deposing available witnesses, and the submission of affidavits denying the defamatory allegations, the only source of proof of the actual malice or recklessness of the defendants, available to those plaintiffs was the confidential sources of the reporters who authored the defamatory articles. In each case, while still arguing that the plaintiffs had failed to exhaust reasonable alternative means for the information, the **defendants directed** the Court and the plaintiffs to witnesses that supposedly could identify their sources and/or provide the necessary information that would support the defendant’s defamatory statements. In both cases, after unsuccessfully exhausting those potential sources, the Court granted their motions to compel. In contrast, in this matter, while defendants assert that the plaintiffs can obtain the requested information from other sources, the

defendants are tellingly silent on what those alternative sources might be.¹⁸

At the first hearing on plaintiffs' motion to compel source information, Mr. Butcher and Mr. Adkins attempted to avoid defendants' anticipated argument that all potential avenues of obtaining and/or identifying defendants' alleged source(s) had not been exhausted, although exhaustion is not the standard in West Virginia. At the January 26 hearing on Mr. Butcher's and Mr. Adkins' motion to compel, their counsel advised the Court of their concern that when plaintiffs renewed their motion, the defendants would again argue that other potential avenues to obtain the requested information had not been investigated and/or exhausted, and therefore, disclosure would not be proper. To avoid this situation, both the Court and plaintiffs' counsel inquired of defendants' counsel of any other potential means to acquire the information sought. Paraphrasing defendants' counsel response, he said that defendants are not required to tell plaintiffs how to prove their case, and they offered no suggestions.

After Mr. Butcher and Mr. Adkins' efforts to obtain source information from certain county, state, and federal government offices were unsuccessful, they renewed their motion to compel and their concern came to pass. Defendants continued to argue that other alternative methods to obtain the information had not been investigated and/or exhausted and they continued to refuse to identify where these alleged alternative source(s) may be located and/or who they may be. Defendants also refused to provide any suggestions or clues where plaintiffs should look. Rather, defendants have continued their delaying tactics and efforts to make discovery in this case unreasonably difficult, expensive and time consuming.

¹⁸ In Garland, there was some limited indication as to the possible identity and source of the defamatory allegations. After Miss Garland deposed three CBS executives that had been suggested to her, without success, the Court granted Miss Garland's motion and compelled disclosure of the reporter's source. *See* 259 F.2d at 545. Similarly, in Miller, Transamerican directed Miller to the fund trustee Morris Shenker, as the possible source of the defamatory allegations, but when Shenker denied any knowledge of the defamatory allegations, the Court compelled disclosure of the Transamerican source. *See* 621 F.2d at 721. In this case, other than suggesting that some of the requested source information could be obtained from Prosecutor Stowers, the WV Secretary of State and U.S. Attorney for the Southern District of WV, defendants have done nothing to suggest any potential alternative sources of the requested information.

The Carey Court noted that plaintiffs are not to be subjected to unduly vague or onerous measures to show they had reasonably exhausted alternatives before confidential sources that are necessary to the proof of the case would be compelled:

There is, finally, the matter of the possible availability of the information in question from someone other than appellant. The values resident in the protection of the confidential sources of newsmen certainly point towards compelled disclosure from the newsmen himself as normally the end, and not the beginning, of the inquiry. In Garland the court took into account the fact the plaintiff had deposed three CBS executives without success before turning to Torre. In Baker, note 9 *supra*, the district court, in exercising its discretion to deny compelled revelation by the writer, had found that there were other sources that might have disclosed the true name of the pseudonymous informant...

We think it may be assumed that the national offices of the UMWA are manned by a very substantial number of employees. It is also clear from the foregoing that **the observations in question could have been made by anyone from an office boy to a top officer, and in any part of the building. We do not think that the concept of exhaustion of remedies relevant here is invoked by guide marks as vague as these. [Defendant's] own information as to the circumstances of the observations was so imprecise as to afford [plaintiff] no reasonable basis to know where to begin...**

The courts must always be alert to the possibilities of limiting impingements upon press freedom to the minimum; and one way of doing so is to make compelled disclosure by a journalist a last resort after pursuit of other opportunities has failed, **but neither must litigants be made to carry wide-ranging and onerous discovery burdens where the path is as ill-lighted as that emerging from appellant's deposition.**

See Carey, 492 F.2d. at 639. (Emphasis added).

The question exists: are plaintiffs in this case required to depose every person in Lincoln County (approximately 22,108 people), assuming all of defendants' sources are even Lincoln County residents, or, based on the defendants' defamatory articles which indicate that the first of the two complaints was from a Harts area resident, depose everyone from the Harts area of Lincoln County? The Harts, West Virginia area alone consists of approximately 2,361 people. According to Carey and any reasonable interpretation of Hudok, the answer is "no."

In assessing whether plaintiffs' efforts to exhaust alternative sources are adequate, Condit v. National Enquirer, 289 F. Supp. 2d 1175 (E.D. Cal. 2003) and Zerilli, supra, are also helpful. In Condit, the Court noted that, unlike the present case, the plaintiff had not made any attempt to obtain the identity of sources, or information that would lead to the identity of sources, from the Justice Department:

Plaintiff is not required to depose everyone in the Justice department to locate the source, but plaintiff must make some reasonable attempt to exhaust that alternative source. Carey v. Hume. (Plaintiff is not required to depose everyone at an organization). There is no evidence before the Court that plaintiff has made any attempt to investigate within the Justice Department or any other law enforcement agency. Thus, absent this evidence, the Court cannot conclude that plaintiff investigated all "reasonable alternative sources."

Id. at 1180. (Internal citations omitted.)

In contrast, Mr. Butcher and Mr. Adkins have used multiple avenues of the written discovery to attempt to acquire available relevant information. Additionally, have deposed virtually every person of interest named or reasonably known to be connected with the defamatory articles, all without success.

Indeed, in discussing exhaustion, the Condit Court, citing Dangerfield v. Star Editorial, 817 F.Supp. 833, 838 (C. D. Cal. 1993), noted that in a defamation case, the reporter is the obvious source for evidence as to the identity of informants. While simply naming the reporter as a defendant does not extinguish the privilege, where the informant's identity is necessary to determining whether the defendant was malicious, or reckless in relying on the informant, and the defendant is the only source if such information, the qualified reporter's privilege must yield. *See* Dangerfield, 817 F.Supp. at 833; Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir., 1980), *reh'g denied*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 238 (1981). Likewise, the same exhaustion rules and considerations apply to facts relevant to the negligence standard and any reasonable prudent person analysis.

In Ashcraft v. Conoco, Inc., 1998 U.S. Dist. LEXIS 16371 (E.D.N.C. 1998)¹⁹, the Court compelled the reporter to disclose source information concerning a confidential settlement agreement placed under seal by the Court, ruling that plaintiff had exhausted all reasonable alternative means of obtaining the identity of the reporter's source by serving interrogatories and deposing a limited number of witnesses known to have had contact with the reporter in the past. The Court held that a plaintiff is not required to pursue and exhaust every alternative and potential means of identifying the source and that further efforts to obtain the identity of the sources would be speculative at best and would constitute a waste of resources of the parties and the Court. *See* 1998 U.S. Dist. LEXIS 16371. Although the District Court's contempt order was reversed based solely on a finding that the Court had failed to follow proper procedures in issuing the Order, the lower Court's decision and reasoning regarding exhaustion was not addressed, and remains valid, logical, and applicable to the instant case. *See* Ashcraft v. Conoco, 281 F.3rd 282 (4th Cir. 2000).

Having reviewed these issues and with these concerns in mind, the Circuit Court made lengthy conclusions based upon plaintiffs' efforts to uncover the information needed for their claims. It discussed the applicable case law, defendants' refusal to even provide hints/clues to potential sources, the FOIA requests, and subpoenas duces tecum, and other issues. Specifically, it found that:

23. This Court does not believe that plaintiffs should be put into a position of having to depose additional people who may be the defendants' alleged source(s) without further guidance or information to determine whom to depose. As noted above, in Garland, Carey, and Miller, after deposing available witnesses, and the submission of affidavits denying the defamatory allegations, the only source of proof of the actual malice, or recklessness of the defendants, available to the plaintiffs were the confidential sources of the reporters who authored the defamatory articles. In each case, in arguing that the plaintiffs had failed to exhaust reasonable alternative means for the information, the defendants directed

¹⁹ Ashcraft was reversed on procedural grounds unrelated to the substance or merits of the decision.

the Court and the plaintiffs to witnesses that supposedly could identify their sources and/or provide the necessary information that would support the defendant's defamatory statements. In both cases, after unsuccessfully exhausting those potential sources, the Court granted their motions to compel.

24. In the present case, while the Court recognizes that it is not defendants [sic] to do so, defendants have not provided any direction or suggestion as to any alternative source that would support the truth of the allegedly defamatory statements and allegations and/or that would identify the various anonymous and unidentified sources allegedly relied upon by the defendants other than to suggest the plaintiffs might depose courthouse personnel. The sole source for information necessary to evaluate the alleged sources defendants claim to have relied upon, and their credibility and reliability, if any, and whether the defamatory allegations were published negligently, recklessly and/or with or without the requisite regard for their truth or falsity, remains tied to the identity of the anonymous sources relied upon by the defendants.

25. Plaintiffs also have sought information that could lead to identification of defendants' source information by filing FOIA requests and subpoenas duces tecum with the Lincoln County Prosecuting Attorney's Office, West Virginia Secretary of State's Office and the United States Attorney's Office for the Southern District of West Virginia. Those offices each have invoked their privileges and/or statutory immunity from providing such information.

26. This Court does not believe it is necessary to require plaintiffs to jump through the hurdle of seeking to enforce the FOIA requests or subpoenas duces tecum due to the well established grounds upon which the Lincoln Prosecuting Attorney's Office, West Virginia Secretary of State's Office and the United States Attorney's Office for the Southern District of West Virginia have set forth for their respective refusals to produce the information sought.

See Order, "Conclusions of Law," ¶¶23-26, attached hereto as Exhibit A. These findings clearly establish the Circuit Court's reasoning with regard to Mr. Butcher and Mr. Adkins' efforts to obtain the information needed for their claims.

In the present case, defendants have refused to suggest or offer to provide any direction to any alternative source that would support the truth of their defamatory allegations and/or that would identify the various anonymous and unidentified sources allegedly relied upon by the defendants. The sole source for information necessary to evaluate the alleged sources defendants

claim to have relied upon, and their credibility and reliability, if any, and whether the defamatory allegations were published negligently, recklessly and/or with or without the requisite regard for their truth or falsity, remains tied to the identity of the anonymous sources relied upon by the defendants. As such, defendants must be ordered to produce the requested source information and the Circuit Court has not exceeded its legitimate powers in ordering defendants to do so.

2. **If “substantial falsity” is an element that must be met prior to disclosure of source information, the record developed by Mr. Butcher and Mr. Adkins indicates that defendants’ articles were “substantially false.”**

Mr. Butcher and Mr. Adkins deny that a preliminary showing of “substantial falsity” is an element of West Virginia law. However, should this Court determine that the Circuit Court should have applied the “persuasive opinions from other courts” in disregard of and/or in addition to the mandatory authority of Hudok, the Circuit Court, as it pointed out in its Order, still had ample evidence supporting its finding of “substantial falsity” and its ordered mandating disclosure of the confidential sources. As noted above, a trial court must be afforded significant discretion in making discovery rulings and that most discovery rulings are reviewed under an abuse of discretion standard. *See State ex. rel. Atkins*, 212 W. Va. at 74, 569 S.E.2d at 150. The Circuit Court did not abuse its discretion in making its discovery rulings.

Defendants, as support for a finding of “substantial falsity,” merely offer and rely on: (1) the alleged statements of Prosecutor Stevens, which do not actually support the published defamatory statements and allegations that the plaintiffs and others violated election laws; (2) several checks, which indicate that Daniel Butcher and/or his companies paid the plaintiffs for work they had performed work for him and/or his companies; and (3) two alleged criminal complaints submitted to certain governmental agencies and to the defendants by some unknown person.

Defendants' discovery responses and the sworn affidavit of defendant Ron Gregory, imply that the defendants authored and published the subject statements and allegations of criminal behavior based on these anonymously authored and suspiciously delivered complaints, with no corroboration.²⁰ The Circuit Court considered each of these items in its decision. Moreover, the allegations contained in the so-called criminal complaints are expressly contradicted by multiple verified and reliable sources, including the deposition testimony of multiple witnesses, the affidavits of Mr. Butcher, Mr. Adkins, and Daniel Butcher, and the certified Campaign Financial Reports. Over two (2) years after publication of the defamatory allegations, and extensive discovery in two (2) separate civil actions, the defendants are unable to cite a single reference, statement or a reasonable conclusion drawn from any of the competent evidence produced to date, that even qualifiedly supports the truth of any of their published defamatory statements and allegations of criminal conduct by the plaintiffs.

Mr. Butcher and Mr. Adkins have adduced, and defendants have utterly failed to contradict, sworn testimony and documentary evidence from multiple sources that the defendants published statements and allegations of criminal behavior, have no basis in fact. More importantly, the Circuit Court had access to all of the facts outlined herein and additional materials provided by the parties. The Circuit Court, based on the extensive information available to it, made specific findings of fact and conclusions of law regarding the evidence

²⁰ Contrary to prior assertions and/or suggestions, defendants indicated in their *Petition* that some degree of corroboration had occurred through "anonymous" sources" following their receipt of the criminal complaints. See *Petition* at p. 9.

presented.²¹ The Circuit Court specifically determined that “plaintiffs have set forth significant evidence supporting their position that the allegations made against them by defendants were false and untrue to address this point if such a [‘substantial falsity’] requirement exists.” *See* Order, “Conclusions of Law,” ¶27, attached hereto as Exhibit A. The Circuit Court also concluded that:

Based upon the evidence identified above and other information submitted by plaintiffs contained in and/or attached to their briefs, the Court believes that plaintiffs’ respective claims are not frivolous and that they have overcome any discovery burden they may have to prove that the allegations were false or untrue that would be a prerequisite to disclosure of the requested information, regardless of whether the requirement may be phrased as “probably cause” or proof of “substantial falsity.”

See Order, “Conclusions of Law,” ¶30, attached hereto as Exhibit A.

The proof presented by Mr. Butcher and Mr. Adkins to the Circuit Court clearly established “substantial falsity” and the Circuit Court found that plaintiffs had met any burden

²¹ The Court made the following conclusions regarding the evidence presented to it:

27. *** In particular, plaintiffs provided affidavits from themselves and from Daniel Butcher, a plaintiff in a similar action pending in the United States District Court for the Southern District of West Virginia against the same defendants with similar claims stemming from defendants’ articles, which denied the subject allegations. Messrs. Butcher and Adkins also cited excerpts from numerous depositions from other individuals implicated by defendants in the subject articles as having been involved in a criminal conspiracy with plaintiffs regarding certain aspects of the 2008 Lincoln County Primary Election. Each of the other individuals implicated by defendants also denied the allegations.

28. Plaintiffs also produced excerpts from the deposition of Prosecutor Stevens. In particular, Prosecutor Stevens did not testify that the two (2) “criminal complaints” filed with him against plaintiffs were true or accurate. Although he had indicated that he believed one of the allegations contained in the “criminal complaints” had been confirmed, he did not indicate the nature of the violation or the person(s) who had committed the alleged violation. He also testified that he had not accused anyone of any wrongdoing.

29. To date, with reference to any other alleged defamatory allegations published by defendants, no evidence, testimony or information has been specifically identified, to support the same other than the two “criminal complaints” which were received by Jack Stevens, but never prosecuted, Jack Stevens’ testimony, and the existence of the referenced checks. The court does note that discovery is still on-going and further proof thereof could be produced during said discovery.

See Order, “Conclusions of Law,” ¶¶27-29, attached hereto as Exhibit A.

that may exist in West Virginia law in that regard. The Circuit Court's evidentiary rulings are entitled to significant deference and nothing here indicates that the Circuit Court exceeded its legitimate powers or abused its discretion. Therefore, defendants' *Petition* must be denied.

B. Other means exist to prevent damage or prejudice if disclosure is ordered.

Mr. Bucher and Mr. Adkins deny that any damage or prejudice would be caused by the disclosure of defendants' confidential source information. As noted above, although not a requirement in West Virginia, the Circuit Court determined that Mr. Butcher and Mr. Adkins had shown "substantial falsity" in the articles defendants published. Moreover, deference is given to a trial court in its evidentiary ruling. Further, courts have held that false statements hold no First Amendment credentials. See Herbert, 441 U.S. at 153. This premise applies to both defendants and to their alleged sources. Therefore, no protection is necessary.

Nevertheless, should this Court still believe that defendants or their alleged confidential sources are entitled to some protection, other means are available to this Court to prevent any potential of damage or prejudice claimed by defendants. For instance, this Court could require the disclosure of confidential source information to take place, but require that the disclosure be made pursuant to a protective order with terms that limit use of the confidential source information to this case and the similar Federal Court action (Civil Action No. 2:09-CV-00373).

C. No issue of often repeated error is presented and this not a matter of first impression.

The issues presented in this case are not common and also are not matters of first impression as they have been previously decided and ruled upon by this Court in Hudok v. Henry, 182 W.Va. 500, 389 S.E.2d 188 (1989). Therefore, the issuance of a Writ of Prohibition would not be helpful in other cases.

VI. CONCLUSION

The Circuit Court did not abuse its discretion, but rather it properly exercised its authority in ordering defendants to disclose their confidential sources pursuant to the applicable standard set forth by this Court in Hudok v. Henry, 182 W.Va. 500, 505, 389 S.E.2d 188, 193 (1989). It found that (1) defendants' confidential source information was highly material and relevant to plaintiffs' claims; (2) defendants' confidential source information was necessary or critical to the maintenance of Mr. Butcher and Mr. Adkins' respective claims; and (3) defendants' confidential source information was not obtainable from other available sources. The Circuit Court also reviewed the considerable amount of evidence presented to it in the form of deposition testimony, affidavits, documentary evidence, and other materials and it made specific findings of fact and conclusions of law on that evidence indicating that Mr. Butcher and Mr. Adkins had met any burden that may exist upon them to show the "substantial falsity" in the subject articles written, edited, and/or published by defendants. Based upon the Circuit Court's well-reasoned and careful consideration of the facts and issues presented that were memorialized in its lengthy Order, dated September 16, 2010, it is clear that the Circuit Court's decisions were appropriate in all regards. Additionally, there are means to protect against damage or prejudice that the disclosure may cause through the use of a Protective Order, or similar mechanism. Also, none of the issues presented in defendants' *Petition for Writ of Prohibition* are matters of first impression for this Court and they do not constitute matters upon which errors are often committed. For

these reasons, defendants' *Petition for Writ of Prohibition* must be denied.

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TABLE OF AUTHORITY

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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 ROBINSON, Individually, and
RONALD GREGORY, Individually,**

Defendants.

CERTIFICATE OF SERVICE

I, Gary A. Matthews, do hereby certify that I have served a true and correct copy of the foregoing "*Response to Petition for Writ of Prohibition*" upon the following individuals by United States Mail, first class postage prepaid, this 26th day of October, 2010:

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE