

IN THE
Supreme Court of New Jersey

No. 66,074

TOO MUCH MEDIA, LLC,

Plaintiff- Respondent,

v.

SHELLEE HALE,

Defendant-Petitioner.

:
:
: ON LEAVE TO APPEAL FROM A
: JUDGMENT OF THE APPELLATE
: DIVISION, SUPERIOR COURT
: NO. A-0964-09T3
:

:
:
: Sat below: CARCHMAN, P.J.A.D.,
: PARILLO, J.A.D., and LIHOLTZ, J.A.D.
:

**BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY**

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INTRODUCTION

Amicus Curiae American Civil Liberties Union of New Jersey ("ACLU-NJ") respectfully submits this brief in support of neither party in this matter.

As is the case in a wide range of legal issues, the creation of the Internet has forced the courts to consider application of long-standing constitutional, statutory and common law norms in a new context that simply was not contemplated at the time those norms were originally adopted. The Internet now allows anyone with a personal computer and network access the ability to publish content throughout the world at relatively little cost, and has dramatically reshaped the nature of news gathering and dissemination, allowing millions of individuals to supplement, and perhaps eventually supplant, the traditional news institutions grounded in the print and broadcast media.

In this case, Amicus ACLU-NJ does not argue for any particular result as to whether defendant Ms. Hale is considered a "journalist" for purposes of New Jersey's shield law. ACLU-NJ is concerned, however, that the opinion of the Appellate Division lays out an overly-narrow definition of the reporter's privilege that fetters the successful invocation of the privilege to obsolete models of what constitutes the news media. Amicus therefore submits this brief in order to encourage this

Court to reinforce the expansive nature of the New Jersey Shield Law and to clarify the appropriate standard - focusing on the objective intent of the individual reporter to engage in the process of information dissemination at the time the news gathering process begins and the dissemination takes place. This standard, explained more fully herein, is supported by the statute, case law, and practical realities of modern times.

FACTS AND PROCEDURAL HISTORY

Amicus incorporates the factual recitation of the Appellate Division opinion in this matter.

SUMMARY OF ARGUMENT

The "reporter's privilege" exists not to protect the sources or purveyors of information for their own sake, but rather to stimulate the free flow of information in order to serve society's interests, such as acquiring knowledge and holding government and other institutions accountable. The privilege therefore depends upon whether the claimant intended to engage in the process of news gathering and dissemination, not on whether the claimant is affiliated with a particular type of news entity, or uses any particular medium of communication. (Part I.)

Nor does the New Jersey reporter's privilege depend upon whether there was a special relationship between the journalist

and the source, or whether the source was promised confidentiality. The privilege applies to all information collected by the person claiming the privilege, whether confidential or non-confidential, so long as the claimant intended to engage in the news gathering process at the time the information was gathered. (Part II.)

ARGUMENT

I. THE NEW JERSEY SHIELD LAW PROTECTS THE PROCESS OF NEWS GATHERING, NOT THE REPORTER-INFORMANT RELATIONSHIP.

New Jersey's Shield Statute, and ultimately the First Amendment guarantees of free speech and a free press, provides broad protection for news-gathering, research, writing, publishing, editing, and other processes intended to obtain or produce information for public dissemination. These guarantees encompass a privilege that persons engaged in those activities may invoke to resist disclosure pursuant to subpoena, discovery, court order, or investigative demand calling for testimony or production of tangible items.

The issue in this case is primarily one of statutory construction, albeit informed by constitutional norms drawn from the First Amendment and correlative provisions of the New Jersey Constitution. The exceptional breadth of the New Jersey Shield Law, N.J.S.A. § 2A:84A-21, has been frequently noted by this Court. See, e.g., Maressa v. New Jersey Monthly, 89 N.J. 176,

187, cert. denied, 459 U.S. 907 (1982) (noting Legislature's "intent to preserve a far-reaching newsperson's privilege in this State"); In re Farber, 78 N.J. 259, 270, cert. denied sub nom., New York Times Co. v. New Jersey, 439 U.S. 997 (1978).

Indeed, the breadth of New Jersey's Shield Law is amply demonstrated solely by its text:

Subject to Rule 37 [now N.J. R. Evid. 530], a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.

- a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and
- b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

N.J.S.A. § 2A:84A-21. "News media" is then liberally defined as "newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public." N.J.S.A. § 2A:84A-21a(a) (emphasis added). "News media" is therefore defined not as a cultural or

social institution, but rather as a process for gathering and then disseminating information.

Several initial observations are warranted. First, the statute does not require that the person invoking the privilege be a professional journalist in the traditional sense. By its terms, any "person engaged on, engaged in, [or] connected with . . . gathering, procuring, transmitting, compiling, editing or disseminating news for the general public" qualifies for purposes of invoking the shield law. The omitted phrase "or employed by news media for the purpose of" is, under the clear terms of the statute, an alternate qualification through which one can fall within the definition of a reporter. In other words, an individual can be protected under the statute by being "engaged in" newsgathering and dissemination without being "employed by the news media." Such surplus language of inclusion that simply provides an alternative in no way limits the general language of the statute, and does not confine the scope of the privilege to those who are employed by traditional news media. Had the Legislature wanted to adopt such a requirement, it would have used the term "and" rather than "or." Obviously, it chose not to do so and, as a result, elected to have a broader class of persons covered.

The Appellate Division, however, concluded that "a finding that defendant [Hale] was connected with the 'news media' and,

in the course of her professional duties, was involved in some aspect of the news process for the general public is essential to the successful invocation of the newsperson's privilege under N.J.S.A. 2A:84A-21." Type Op. at 15. Based on that interpretation, the lower court then concluded that "Defendant has produced no credentials or proof of affiliation with any recognized news entity, nor has she demonstrated adherence to any standard of professional responsibility regulating institutional journalism, such as editing, fact-checking or disclosure of conflicts of interest." Type Op. at 29.

With great respect, the Appellate Division incorrectly parsed the plain text of the statute. By requiring Hale to demonstrate affiliation with "institutional journalism," the court creates an additional hurdle not found in the statute, essentially limiting journalists to those who closely resemble the conventional notion of reporters who publish in established media, such as print or television, and who are part of a self-aware professional community that is sufficiently populated to develop professional standards and codes of conduct. As noted, that position is directly at odds with the statute.

Additionally, recent technological, cultural, and economic changes in the nature of news reporting, including most especially the advent of the Internet, make such definitional restrictions a perilous undertaking that will inevitably lead to

doctrinal obsolescence, or worse. Indeed, limiting the definition of reporter to those affiliated with larger media organizations runs afoul of the Supreme Court's observation that "liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large, metropolitan publisher" Branzburg v. Hayes, 408 U.S. 665, 704 (1972). There is no doctrinal limitation that bestows the reporter's privilege only on those who engage in journalism as part of a collective vocation, and should apply with equal force to the lone, individual disseminator of news and information -- who engages in similar acts (i.e., of gathering news) and with the same intent (to disseminate that information to the public)_as his or her more "traditional" brethren.

In finding that defendant Hale did not qualify as a reporter for purposes of the statute, the Appellate Division apparently construed the term "news media" to be a social institution with which someone claiming the privilege must be affiliated, rather than a "means of disseminating news to the general public" in which the claimant was engaging. That construction is at odds with the text of the statute, which by its terms defines news media as a process, not an entity.

Moreover, as one commentator has noted:

Although it is possible to define who is a journalist by listing job titles and employers, such definitions are increasingly unhelpful. Given economic and

technological change and the purpose of the privilege, such definitions invite equal protection challenges. Journalists' shield laws, whether constitutional or statutory, are designed to protect the free flow of information, not to protect individual or institutional status.

Berger, Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication, 39 Hous. L. Rev. 1371, 1377 (2003); see also Durity, Shielding Journalist-"Bloggers": The Need to Protect Newsgathering Despite the Distribution Medium, 2006 Duke L. & Tech. Rev. 11. Limiting the reporter's privilege only to those who fit a court's pre-conceived and possibly outdated notion of reporter runs the risk of creating a logical circularity in which the question of who constitutes a journalist presumes the answer.

Likewise, the Appellate Division's reference to "professional duties" and adherence to a "standard of professional responsibility" inserts a requirement that the Legislature did not include in the words of the statute. The statute's only use of the word "professional" is in the phrase "In the course of pursuing his professional activities," which is then specifically defined as:

any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which a reporter intentionally conceals from the source the fact that he is a reporter, and does not include any situation in which

a reporter is an eyewitness to, or participant in, any act involving physical violence or property damage.

N.J.S.A. § 2A:84A-21a(h). "Professional activities" according to this definition merely emphasizes the requirement that the person be consciously engaged in the process of gathering information for dissemination to the public. There is no requirement that the person claiming the privilege be affiliated with any organization, or be a conventional employee of a particular entity, and thus use of the word "professional" in the statute should not be construed as a synonym for employment for monetary gain or livelihood.¹

¹ In contrast, the shield law of our neighboring state of New York specifically limits a claimant of the reporter's privilege to a "professional journalist," which is defined as:

one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

N.Y. Civil Rights Law § 79-h(6). See also Cal. Evid. Code § 1070 (limiting privilege to "publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service"); 10 Del. Code § 4320(4) (defining reporter as one who "was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the

The tests set out by federal courts in von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir.), cert. denied sub nom., Reynolds v. von Bulow, 481 U.S. 1015 (1987), and further amplified in Titan Sports, Inc. v. Turner Broad. Sys. (In re Madden), 151 F.3d 125 (3d Cir. 1998), for determining who may claim the qualified First Amendment privilege against disclosure provide a helpful model for purposes of interpreting New Jersey's statute. In von Bulow, the Second Circuit held that the "the talisman invoking the journalist's privilege is intent to disseminate to the public at the time the gathering of information commences." 811 F.2d at 145.

First, the process of newsgathering is a protected right under the First Amendment, albeit a qualified one. This qualified right, which results in the journalist's privilege, emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public. Second, whether a person is a journalist, and thus protected by the privilege, must be determined by the person's intent at the inception of the information-gathering process. Third, an individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press. Fourth, the relationship

aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public.").

The fact that New York's statute and those of other states, differ from New Jersey in such significant ways, and in particular by defining a journalist in terms of employment by a news institution, is but further evidence that our Legislature intended to create a much different, and much broader, privilege, which did not rely on those statutes as a template.

between the journalist and his source may be confidential or non-confidential for purposes of the privilege. Fifth, unpublished resource material likewise may be protected.

Id. at 142. As the Third Circuit explained in In re Madden, the reporter's privilege depends upon "the concurrence of three elements: that they: 1) are engaged in investigative reporting;² 2) are gathering news; and 3) possess the intent at the inception of the news-gathering process to disseminate this news to the public." In re Madden, 151 F.3d at 131. Thus, the intent of the claimant to disseminate information to the public is the polestar in determining whether the privilege applies, rather than the affiliation of the claimant to a particular news organization or medium of expression. As Madden noted:

In our view, the von Bulow test is consistent with the goals and concerns that underlie the journalist's privilege. Because this test emphasizes the intent behind the newsgathering process rather than the mode of dissemination, it is consistent with the Supreme Court's recognition that the "press" includes all publications that contribute to the free flow of information.

151 F.3d at 129.

² The Third Circuit made clear that the requirement that the claimant be engaged in "investigative reporting" was merely an inquiry into the function of news gathering, and not a requirement of affiliation with a traditional form of media. The claimant of the privilege in Madden an employee of a broadcaster of professional wrestling events who produced tape-recorded commentaries for callers of a 900-number hotline, announcing results of wrestling matches, promoting future events, and discussing wrestlers' personal lives and careers. "By his own admission, he is an entertainer, not a reporter, disseminating hype, not news." In re Madden, 151 F.3d at 130.

Of course, intent should not merely be an inquiry into subjective state of mind, but be derived from a reasonable viewer standard. An individual should be able successfully to assert the reporter's privilege if he or she is involved in activities or processes understood to be associated with gathering and disseminating news, even though he or she may not be a regular member of the institutionalized press.

Furthermore, the inquiry into intent, while obviously a factual one, should not degenerate into a free-wheeling inquisition into all the motivations of the claimant, lest the judicial inquiry into the very existence of the privilege becomes so intrusive that it will chill the freedoms it was intended to protect. Whether someone possesses the intent at the inception of the news-gathering process to disseminate the information to the public should not be an unduly invasive process in most cases. Someone who operates an Internet "blog" and who regularly posts information on that blog would seem to present a strong prima facie case that the intent to disseminate existed at the time the information gathering process began. On the other hand, it would be difficult for a casual commenter on www.nj.com, or a similar platform that merely solicits the spontaneous reactions of readers to news stories, to establish that any information contained in a responsive posting was

initially gathered with the intent to disseminate to the public, rather than merely being information that the poster happenstantially acquired in private life. When a claimant submits to the court a certification concerning her intent to engage in the news gathering and dissemination process, and where the averments in the certification are consistent with common understanding as to how the news gathering process operates, then that should be sufficient to establish the privilege without intrusive judicial inquiry into the journalist's work product.

Amicus does not take a position on whether the current record reveals an intent by defendant Hale to disseminate information to the public at the time the information gathering process began.³ If she had regularly solicited and then posted information on her own website (www.pornafia.com), then such an intent would not be difficult to discern. However, although Hale informed Washington State officials that she would be engaging in information-gathering, she never attempted to provide information publicly on her website. Rather, the only publication of information was on another site's bulletin board. Merely collecting and republishing information she

³ Of course, posting information on the Internet is very persuasive evidence that the general public was the intended audience, given the near universal accessibility of the Internet, thus satisfying at least one element of the test set out in von Bulow.

gleaned from postings from other registered users on sites such as www.Oprano.com, in which she was one of many users reading the postings, is a more difficult question as to whether she had an intent to gather and disseminate information, as to which Amicus expresses no position.

II. THE ABILITY TO CLAIM THE REPORTER'S PRIVILEGE DOES NOT DEPEND UPON A PROMISE OF CONFIDENTIALITY.

Amicus is also concerned that the Appellate Division's opinion places too much emphasis on the existence or not of a promise of confidentiality between the journalist and source. "Where, as here, there is no evidence of any mutual understanding or agreement of confidentiality, the rationale for the privilege ceases to exist." Type Op. at 28.

The text of the New Jersey Shield Law, however, does not contain any requirement that there be an express or implied promise of confidentiality for the privilege to exist. Rather, it protects "The source, author, means, agency or person from or through whom any information was procured," as well as "Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated." N.J.S.A. § 2A:84A-21(a)&(b) (emphasis added). Requiring a journalist to disclose any sources or information collected for dissemination can chill the news gathering process, regardless of whether a promise of confidentiality was made. Considering

the broad remedial purposes of the statute, for the courts to inject a confidentiality requirement when the Legislature has not chosen to do so would be improper. "If the language is plain and clearly reveals the intent of the statute, the court's sole function is to enforce the statute in accordance with those terms." Department of Law & Pub. Safety v. Bigham, 119 N.J. 646, 651 (1990).

Several federal circuit courts have also interpreted the qualified First Amendment privilege to apply to a journalist's resource materials even in the absence of elements of confidentiality. See, e.g., Shoen v. Shoen, 5 F.3d 1289, 1295 (9th Cir. 1993) (privilege applies to resource materials even when not protecting confidentiality). von Bulow, 811 F.2d at 143-144 (citing cases); In re Madden, 151 F.3d at 129 (the relationship between the putative journalist and source may be confidential or non-confidential).

The reporter's privilege is different from other privileges, such as the lawyer-client privilege, the doctor-patient privilege, the clergy-communicant privilege, or the inter-spousal privilege. In those cases, the privilege exists in the context of a special relationship between two parties in which one is under a fiduciary or quasi-fiduciary duty to the other to keep confidences. That is not the case with regard to a journalist and an informant. As one state court noted:

In contrast, the reporter's privilege does not arise strictly as a result of confidence or a special relationship. This privilege arises when a journalist gathers information within his or her professional capacity for the purpose of dissemination. The policy rationale behind this privilege is to enhance the newsgathering process and to foster the free flow of information encouraged by the First Amendment to the U.S. Constitution. Accordingly, the privilege from compelled disclosure belongs to the journalist, not the source, who may be unidentified.

Diaz v. Eighth Judicial Dist. Court, 993 P.2d 50, 57 (Nev. 2000) (Nevada shield statute not limited to confidential sources, and covers both published and unpublished information and a journalist does not waive any rights by publication). The Nevada Supreme Court continued, in interpreting its own shield statute:

While confidentiality may be one important factor in communications between a journalist and the source of information, confidentiality is not the defining factor in the existence of the reporter's privilege, nor does confidentiality play a role in determining whether a reporter has waived the privilege. The news shield statute protects all information, not just confidential information, which is obtained by a reporter in his or her capacity as a journalist and which is intended for dissemination.

Diaz, 993 P.2d at 58. New Jersey's statute similarly does not make distinctions between confidential and non-confidential information in defining the scope of the privilege.

Consistent with the general principle that the reporter's privilege created by the New Jersey Shield Law is intended to protect the process of news gathering process, and not simply to

protect the status of being a journalist or informant, the existence or not of a promise of confidentiality to the source should not determine whether the claimant is entitled to invoke the privilege.

CONCLUSION

Amicus ACLU therefore respectfully prays that this Court, in reaching its final judgment in this case, clarifies the doctrinal tests that determine whether the reporter's privilege is successfully invoked in the manner discussed above.

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Respectfully submitted,



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