IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,	)	
	)	
Plaintiffs,	)	**CASE NO. 17CV193761**
	)	
v.	)	**JUDGE JOHN R. MIRALDI**
	)	
OBERLIN COLLEGE, et al.,	)	**(ORAL HEARING REQUESTED)**
	)	
Defendants.	)	
	)	

DEFENDANTS' OPPOSITION TO MOTION TO QUASH SUBPOENA AND/OR FOR PROTECTIVE ORDER OF JASON HAWK AND *OBERLIN NEWS TRIBUNE*
and
DEFENDANTS' MOTION TO COMPEL DEPOSTION TESTIMONY OF JASON HAWK

I. INTRODUCTION

After nine months of litigation, Jason Hawk, a reporter and editor for the *Oberlin News Tribune* (the "Tribune"), is the only person that Plaintiffs have identified as having received an alleged defamatory flyer from an administrator, faculty or staff member of Oberlin College. Mr. Hawk's initial reporting in the Tribune of the protests held outside of Gibson's Bakery on November 10 and 11, 2016, necessitated that the newspaper publish a correction a few days later: namely that Oberlin College students—and not Defendant Dr. Meredith Raimondo or any other employee of the College—authored the alleged defamatory flyer.

Plaintiffs in interrogatory responses have identified Mr. Hawk as a fact witness in their suit in which they have demanded $30 million from Oberlin College. *See e.g.*, Plaintiff Gibson Bros., Inc.'s Objs. and Answers to Interrogatory No. 2 from Oberlin College. Accordingly, Defendants Oberlin College and Dr. Meredith Raimondo (together, "Defendants") issued a subpoena to Mr. Hawk—not to undertake a "fishing expedition" as his counsel argues—but rather to discover, among other things, Mr. Hawk's version of his interaction with Dr. Raimondo on November 10, 2016, outside of Gibson's Bakery. Other than Dr. Raimondo, no one else can describe what happened when she interceded in a confrontation between Mr. Hawk and Oberlin College students. In their misguided and hypocritical motion, Mr. Hawk and the Tribune accuse Defendants of seeking to depose Mr. Hawk in order to "prosecute a defamation action against Mr. Hawk and the [Tribune.]" Hawk and Tribune Mot. at 5. This claim is unsupported and unsupportable. Defendants have no interest in devoting resources to pursuing such a claim, nor could they, given that any defamation claim based on the Tribune's articles published on November 10 and 14, 2016, would be barred by Ohio's one-year statute of limitations. R.C. § 2305.11(a).[1]

Leading up to Mr. Hawk's deposition, his counsel and counsel for Defendants reached a well-documented agreement regarding the extent to which Ohio's Shield Law and any qualified privilege under the First Amendment to the United States Constitution or the Ohio Constitution would limit the scope of questions that Mr. Hawk would answer.

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[1] Counsel for Mr. Hawk and the Tribune likewise baselessly allege—without any citation to the record—that Defendants have previously argued in seeking communications between Plaintiffs' counsel and the news media that "plaintiff's counsel caused the media covering the underlying event to defame the plaintiff." Hawk and Tribune Mot. at 4. Defendants have never made any such accusation.

Counsel for Mr. Hawk and the Tribune completely fail to mention this agreement in their motion, and for good reason: it undermines their argument. Importantly, Mr. Hawk's counsel set forth his understanding of the applicable scope of any privilege that Mr. Hawk could invoke at his deposition:

> I generally do not disagree with your understanding of Ohio's Shield Law, in that Mr. Hawk's personal observations related to the alleged shoplifting incident and public demonstrations are subject to deposition questioning. Also, the information he gathered in reporting on these incidents is also subject to deposition questioning, provided the source of information is not requested and is not necessarily disclosed upon answering the questions directed to him. To that extent, I generally have no objection. However, to the extent that Mr. Hawk would be questioned about decisions made in the editorial process, I would object.

Apr. 16, 2018 email from S. Keslar to C. Snyder (emphasis added).[2] To make sure there was no misunderstanding, counsel for Defendants clarified that the extent of the First Amendment qualified privilege was limited to "internal communications" between reporters and editors and "a reporter's conclusions about [the] veracity of the material he has gathered." May 8, 2018 Letter from C. Snyder to S. Kesler (quoting *Herbert v. Lando*, 441 U.S. 153, 171 (1979)) (attached as Exhibit 1).

In short, Mr. Hawk's counsel agreed that Mr. Hawk could be questioned about his observations at the demonstrations and the facts he gathered in reporting on those events outside Gibson's Bakery on November 10 and 11, 2016. The only exceptions were his identification of any previously undisclosed sources, his opinion on the material he gathered, or his communications with newsroom colleagues at the Tribune. Yet, at

[2] The subpoena issued to Mr. Hawk by Defendants on May 30, 2018, which included copies of the written communications between counsel for Mr. Hawk and Defendants as an exhibit to the subpoena, is attached hereto as Exhibit 1.

Mr. Hawk's deposition, his counsel disregarded the agreed-upon scope of his deposition and improperly asserted privilege under the Ohio Shield Law, and the United States and Ohio constitutions on such basic matters as what he saw and heard, as well as his interaction with Dr. Raimondo. For this reason alone, the motion of Mr. Hawk and the Tribune should be denied and, pursuant to Rule 45 of the Ohio Rules of Civil Procedure, the Defendants' motion to compel the deposition testimony of Mr. Hawk should be granted. Separately, to the extent Mr. Hawk's testimony could possibly be subject to any privilege under Ohio law or the United States Constitution, Defendants have a compelling need for his testimony that overcomes any such privilege. Defendants respectfully request an oral hearing on these motions.

II. MR. HAWK'S COUNSEL IMPROPERLY INSTRUCTED MR. HAWK NOT TO ANSWER QUESTIONS AT HIS DEPOSITION

Defendants, per agreement with Steven Keslar, counsel for Mr. Hawk, served Mr. Hawk with a copy of a subpoena *duces tecum* via email on May 30, 2018. The subpoena commanded Mr. Hawk to appear for deposition at 10 a.m. on June 27, 2018, a date—as with the permissible scope of Mr. Hawk's deposition—that was agreed upon by counsel. Mr. Hawk did not object to the subpoena, as required by Civ.R. 45(2)(b), and he appeared for his deposition on June 27.

Throughout the deposition, Mr. Hawk's counsel improperly and inconsistently instructed Mr. Hawk not to answer questions that asked for his personal observations—what he saw and heard—at the demonstrations outside Gibson's Bakery on November 10, 2016. Importantly, Mr. Hawk's counsel refused to permit Mr. Hawk to answer questions regarding his interaction with Dr. Raimondo at the demonstrations. Examples of this improper assertion of privilege include:

> Q. Are you going to testify about what you said to Dr. Raimondo?
>
> MR. KESLAR: He's – he is not a party to this lawsuit. He's not planning on – there's no reason for him to be testifying at this point as he's not a party to this lawsuit. It's an improper question. It calls for potentially legal conclusions and I'm going to instruct you not to answer that, either.

Hawk Tr. at 131:13-21.[3]

> Q. Can you describe for me how you came into having a conversation with Dr. Raimondo?
>
> MR. KESLAR: To the extent – I'm going to object just to the extent it calls for anything that was said, which I think is privileged information.

Id. at 133:25-134:8.

> Q. So what did you say to Dr. Raimondo?
>
> MR. KESLAR: I'm going to instruct you not to answer based on the First Amendment privilege.

Id. at 142:11-14.

> Q. What did Dr. Raimondo say to you?
>
> MR. KESLAR: Again, I'm going to instruct you not to answer based on the First Amendment privilege. It's undisclosed information gathered during the news reporter – reporting process.

Id. at 142:23-143:3. At one point, Mr. Keslar permitted Mr. Hawk to testify that Dr. Raimondo allegedly told him that "we didn't have the right to take photos of the protest," but soon thereafter and quite oddly prohibited Mr. Hawk from discussing any other part of that conversation. *Id.* at 146:7-8; 147:16-21. The Court should not permit Mr. Hawk to selectively assert a privilege to the prejudice of Defendants, much less to disregard the agreement of counsel on the permissible scope of the deposition.

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[3] Excerpts of the transcript of Mr. Hawk's deposition are attached collectively hereto as Exhibit 2.

Mr. Hawk likewise refused to testify about his interaction with Dr. Raimondo, in which he and the Tribune initially reported that Dr. Raimondo "provided" literature to the Tribune and "stood with the crowd." *See* Jason Hawk, 'End racial profiling' shouts OC crowd after arrests, Oberlin News-Tribune, Nov. 10, 2016 (attached as Exhibit 3). Then, on November 14, 2016, the Tribune published an amended version of the November 10, 2016 article that clarified the flyer was "written by students." *See* Jason Hawk, 'End racial profiling' shouts OC crowd after arrests, Oberlin News-Tribune, Nov. 14, 2016 (attached as Exhibit 4). Examples of Mr. Hawk's improper assertion of privilege in regard to the flyer include:

> Q. Did you ask Dr. Raimondo for the flyer?
> MR. KESLAR: Objection. First Amendment privilege on the same bases previous – previously stated. Reporter's privilege.
> You don't have to answer that question.
> Q. Did you ask Dr. Raimondo about the student protest?
> MR. KESLAR: Same objection.
> I'm going to instruct you not to answer.
> Q. Did you ask Dr. Raimondo why the students were protesting?
> MR. KESLAR: Same objection.
> I'm going to instruct you not to answer.
> Q. Did you ask Dr. Raimondo about the purpose of the student protests?
> MR. KESLAR: Same objection.
> I'm going to instruct you not to answer.
> Q. From where did Dr. Raimondo get this flyer?
> MR. KESLAR: Objection. Calls for information gathered during the reporting process not including in his news articles, so it carries with it a First Amendment privilege, reporter's privilege, so I'm going to instruct you not to answer.

Hawk Tr. at 172:20-173:19.

> Q. Okay. Did Dr. Raimondo tell you that an Oberlin student had given her the flyer?

MR. KESLAR: Objection. First Amendment privilege. I'm going to instruct you not to answer.

Q. Did Dr. Raimondo tell you that the flyer described why the students were protesting?

MR. KESLAR: Same objection. Same instruction. Do not answer.

Q. Did Dr. Raimondo tell you that you could have the flyer if you wanted it?

MR. KESLAR: Same objection. Same instruction. Do not answer.

Q. Did Dr. Raimondo make clear to you that she was not speaking on behalf of the Oberlin students?

MR. KESLAR: Same objection. I'm going to instruct you not to answer.

Q. So what did Dr. Raimondo say to you as she handed you the flyer?

MR. KESLAR: Same objection. First Amendment privilege. I'm instructing you not to answer.

Id. at 174:11-175:8. By the end of the deposition, Mr. Keslar had devolved into prohibiting Mr. Hawk from testifying as to whether he even reads "what's in the [Tribune.]" *Id.* at 228:8-17.

Mr. Hawk and the Tribune ask this Court for a protective order "limiting Defendants' examination of Hawk to verifying the attribution of information described in the Tribune's news reports to the sources disclosed to the Tribune's readers." Mot. at 1. This request does not make sense, given that Mr. Hawk has already refused to answer questions about the facts underlying the information he and the Tribune reported. The Tribune's initial news report stated that Dr. Raimondo allegedly provided a copy of literature to the newspapers and that she "stood with the crowd." Ex. 3. As a result, Mr. Hawk has already disclosed to readers that he interacted with Dr. Raimondo at the November 10, 2016 protests and that she provided Mr. Hawk with a copy of the flyer. Yet, Mr. Hawk, at the insistence of his counsel, refused to answer questions about this

interaction, including the circumstances that led Mr. Hawk to "attribute" that Dr. Raimondo "provided" a copy of the flyer to the Tribune.

III. DEFENDANTS OVERCOME ANY PRIVILEGE THAT MAY APPLY TO MR. HAWK'S TESTIMONY REGARDING THE NOVEMBER 2016 PROTESTS

To the extent any privilege may apply to Mr. Hawk's testimony, Defendants have a compelling need for his testimony that overcomes any such privilege. In *Fawley v. Quirk*, 9th Dist. Summit No. 11822, 1985 WL 11006 (July 17, 1985), which Mr. Hawk and the Tribune quote at length in their Motion, the Ninth District affirmed a trial court order that held a newspaper reporter in contempt of court for, as here, refusing to testify regarding her interactions with a non-confidential source. In doing so, the Ninth District held that a reporter's qualified privilege under the First Amendment to the United States Constitution and/or the Ohio Constitution is not absolute and can be overcome when balanced against other interests, including "a civil litigant's right to discovery evidence or to compel testimony." *Id.* at *2 (quotation and citation omitted).

In order to overcome the qualified privilege of the First Amendment to order a newspaper reporter to testify in a civil action regarding information acquired in the gathering of news, the following factors are considered: "(1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?" *Id.* (quoting *Miller v. Transamerican Press, Inc.* (C.A. 5, 1980), 621 F.2d 721, 726). In addition, the Supreme Court of Ohio has likewise held that "a court may enforce a subpoena over a reporter's claim of privilege, so long as it is persuaded that the subpoena has been requested or issued for a legitimate purpose, rather than for harassment." *State ex rel. Nat. Broadcasting Co. v. Court of Common Pleas of Lake Cty.*, 52 Ohio St.3d 104, 111, 556 N.E.2d 1120, 1127 (1990), *overruled*

on other grounds by State v. Schlee, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431. Defendants did not issue a subpoena to Mr. Hawk to harass him, but rather for the legitimate purpose of discovering the relevant information he possesses as a fact witness identified by Plaintiffs in this litigation.

Further, Defendants satisfy all three criteria set forth by the Ninth District in *Fawley* for Mr. Hawk to be compelled to answer questions about his observations and interactions with Dr. Raimondo at the protests outside Gibson's Bakery. First, Mr. Hawk's testimony regarding his interaction with Dr. Raimondo is undoubtedly relevant to Plaintiffs' defamation claims. Second, the information regarding Mr. Hawk's interaction with Dr. Raimondo and his reporting on the November 2016 demonstrations cannot be obtained through alternate means, other than through the testimony of Dr. Raimondo. Finally, Defendants have a compelling interest in Mr. Hawk's testimony to adequately defend themselves against Plaintiffs' spurious allegations that, among other things, claim that "Raimondo, handed out hundreds of copies of the flyer" during the demonstrations, including to members of the news media. Compl. ¶ 35. Defendants easily overcome any privilege that could apply. Their motion to compel Mr. Hawk's deposition testimony should be granted.

IV. IF THE COURT HOLDS THAT MR. HAWK'S TESTIMONY IS PRIVILEGED, HE SHOULD NOT BE PERMITTED TO WAIVE THAT PRIVILEGE AT TRIAL

Mr. Hawk inconsistently invoked the qualified privilege under the First Amendment to refuse to answer deposition questions about his personal observations at the protests outside of Gibson's Bakery on November 10 and 11, 2016. In the event that the Court grants the motion of Mr. Hawk and the Tribune and holds that Mr. Hawk does not have to answer questions about his personal observations at the protests and

interaction with Dr. Raimondo, Defendants respectfully request that Mr. Hawk be prohibited from waiving any such privilege at trial. Should Mr. Hawk be allowed to waive his assertion of privilege at trial, it would undercut the purpose of the discovery rules, which "is to prevent surprise to either party at the trial or to avoid hampering either party in preparing its claim or defense for trial." *Esparza v. Klocker*, 8th Dist. No. 101604, 2015-Ohio-110, 27 N.E.3d 23, ¶ 31. *Cf. e.g.*, *Amerifirst Savings Bank of Xenia v. Krug*, 136 Ohio App.3d 468, 494-95, 737 N.E.2d 68 (2d Dist. 1999) (affirming that a defendant may not testify at trial when he asserted the Fifth Amendment privilege during a deposition and then sought to waive that privilege at trial). Without the opportunity to have Mr. Hawk answer questions under oath at deposition, Defendants will be unfairly prejudiced by learning of Mr. Hawk's personal observations of the protests for the first time at trial.

V. CONCLUSION

Counsel for Mr. Hawk and the Tribune negotiated a written agreement on the scope of permitted deposition examination. Now, in an about-face, Mr. Hawk and the Tribune want this Court to stop the very examination that they agreed to permit and even memorialized: "Mr. Hawk's personal observations related to the alleged shoplifting incident and public demonstrations are subject to deposition questioning." Apr. 16, 2018 email from S. Keslar to C. Snyder (Ex. 1). For this reason, the arguments and case authorities cited by Mr. Hawk and the Tribune are irrelevant and should be disregarded.

The Motion to Quash Subpoena and/or for Protective Order of Jason Hawk and the Tribune should be denied and Mr. Hawk should be compelled to answer questions

consistent with the pre-deposition agreement between his counsel and that of Defendants. But in the event that the Court grants the motion of Mr. Hawk and the Tribune and quashes the subpoena, the Court should prohibit Mr. Hawk from waiving any privilege at trial, the result of which would prejudice Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 7th day of August, 2018, via e-mail, pursuant to Civ.R. 5(B)(2)(f) of the Ohio Rules of Civil Procedure, upon the following:

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