No. C7-01-2021

STATE OF MINNESOTA
IN SUPREME COURT

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Richard Weinberger,

Appellant,

vs.

Independent School District No. 622, et al.,

Defendants

vs.

Maplewood Review, et al.

Respondents.

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AMICUS BRIEF AND APPENDIX ON BEHALF OF MINNESOTA SOCIETY OF PROFESSIONAL JOURNALISTS, ET AL.

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Introduction

Maintaining the ability of newsgatherers to resist government compulsion to disclose their confidential sources of information is an interest that resonates deeply with every serious journalist and news organization. The amici submitting this brief[1] know from years of personal experience that information flows more freely to newsgatherers who can provide prompt and appropriate assurances to sources who request confidentiality, and that this relationship of trust with sources can enhance the amount and quality of information that is reported to the public.

Amici accordingly request that this Court, in the context of the present appeal, strongly protect the ability of newsgatherers[2] to resist compulsory disclosure of their unpublished information, including unpublished information that would tend to identify confidential sources of information. The Minnesota Free Flow of Information Act, Minn. Stat. § 595.021 et seq., particularly as amended in 1998, provides ample basis for that strong protection.

Identification of Amici

The **Minnesota Society of Professional Journalists** is the local chapter of the Society of Professional Journalists, a voluntary, non-profit organization of approximately

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[1] Other than the identified amici and their counsel, no person has made a monetary contribution to the preparation or submission of this brief. No counsel for a party authored the brief in whole or in part.

[2] Amici herein use the term "newsgatherer" in the same fashion as Minn. Stat. § 595.023 to mean any "person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public."

13,500 members. The national Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism, and for more than 80 years has been dedicated to perpetuating a free press. The Minnesota chapter is one of the nation's largest and most active professional chapters. The chapter's vigorous efforts in support of the 1998 amendments to the Minnesota Free Flow of Information Act earned it the Circle of Excellence Award for Freedom of Information from the national Society.

The **Associated Press**, the world's largest newsgathering organization, is a not-for-profit mutual news cooperative that is owned and controlled by its members. It gathers and transmits international, state and local news to its member newspapers and broadcast stations.

The **Duluth News Tribune** is the third largest newspaper in Minnesota and serves residents in northeastern Minnesota and northwestern Wisconsin.

Hubbard Broadcasting, Inc., is a Minnesota-based broadcasting company. The company serves Minnesota through the following broadcast stations: KSTP-TV (Minneapolis/St. Paul), KSTP-DTV (Minneapolis/St. Paul), KSTC-TV (Minneapolis/St. Paul), KSTC-DTV (Minneapolis/St. Paul), WDIO-TV (Duluth), WIRT-TV (Hibbing), KAAL-TV (Austin, MN), KSAX-TV (Alexandria, MN), KRWF-TV (Redwood Falls), KSTP-FM (KS95) (Minneapolis, St. Paul), KSTP-AM (AM 1500) (Minneapolis, St. Paul), WFMP-FM (FM107) (Coon Rapids, MN), and WIXK-AM (New Richmond, WI).

KARE-TV is a Gannett broadcasting group station serving the Twin Cities.

The **Minnesota Broadcasters Association** is a voluntary trade association comprised of virtually all of Minnesota's licensed radio and television stations. It was organized to promote and protect the broadcast industry, to foster sound broadcasting regulations and practices and to represent the interests of its members in important public policy matters. It is the principal voice of the radio and television industry in Minnesota.

The **Minnesota Joint Media Committee** is a non-profit corporation whose members consist of representatives of various broadcast, print and online media organizations throughout the state of Minnesota.

The **Minnesota Newspaper Association** is a voluntary association of all the general-interest newspapers and most of the special-interest newspapers in the state. It is the principal representative of the organized press in Minnesota, acting on behalf of newspapers in the courts, at the Legislature, and in numerous other arenas. MNA represents the cumulative experience of nearly 400 newspapers in Minnesota, from the smallest to the largest.

Minnesota Public Radio (MPR) is a non-commercial broadcast network of 31 stations located throughout Minnesota and surrounding communities, reaching 96% of the state residents and with a weekly audience of approximately 700,000 listeners. MPR has one of the largest membership bases of any public radio system in the country. MPR also produces programs for national distribution.

The **Rochester Post-Bulletin** is Minnesota's largest evening newspaper and serves the residents of the state's third-largest city.

The **Silha Center for the Study of Media Ethics and the Law** is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media. The Center also sponsors an annual lecture series, hosts forums and symposiums, produces a newsletter and other publications, supports graduate students, and provides information about media law and ethical issues to the public.

Star Tribune publishes Star Tribune daily and Sundays throughout Minnesota.

St. Paul Pioneer Press publishes St. Paul Pioneer Press daily and Sunday.

WCCO-TV is owned and operated by CBS Broadcasting Inc. CBS owns and operates broadcast television stations nationwide.

Argument

I. The Legislature Intended the Statutory Privilege to be Broadly Construed in Favor of Protecting Newsgatherers' Information.

In enacting and amending the Minnesota Free Flow of Information Act over the course of three decades, the Minnesota Legislature has demonstrated its commitment to affording strong protection for newsgatherers to resist government-compelled disclosure of their unpublished information and confidential sources.

In response to government efforts to compel newsgatherers to disclose more than the content of their published communications, courts and legislatures through the mid-1900s began to recognize privileges for newsgatherers to protect their confidential sources and other unpublished information unless disclosure would further an important

government interest, unless the information was relevant and material to that interest, and unless efforts had been made to obtain the information from other sources. See C. Thomas Dienes et al., NEWSGATHERING AND THE LAW Chs. 14-16 (2d ed. 1999); N. Mate, "Piercing the Shield: Reporter Privilege in Minnesota Following State v. Turner," 82 MINN. L. REV. 1563, 1567-77 (1998). This Court, without recognizing a formal privilege, expressed skepticism about sweeping inquiries concerning journalistic sources of information in a notorious felony murder case. State v. Thompson, 284 Minn. 274, 275-76, 170 N.W.2d 101, 102-03 (1969).

In 1973, the Minnesota Legislature reacted to what it perceived to be the too-limited acknowledgement of a constitutionally based newsgatherers' privilege in Branzburg v. Hayes, 408 U.S. 665 (1972), by enacting a statutory privilege designated as the Minnesota Free Flow of Information Act, codified as Minn. Stat. § 595.021 et seq. In the ensuing years, most courts interpreted Branzburg itself to find – outside the grand jury context that had figured so prominently in Branzburg – a qualified First Amendment privilege for newsgatherers that incorporated many of the same tests as the Minnesota statute. See J.J.C. v. Fridell, 165 F.R.D. 513, 516 (D. Minn. 1995) ("most federal courts have assumed the [reporter's] privilege protects a reporter's underlying work product as well as an informant's identity"); Mate, 82 MINN. L. REV. at 1574-76.

The rationale for protecting newsgatherers' unpublished information and confidential sources is simple, and recognized in the statute itself:

> In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information. To this end,

> the freedom of press requires protection of the confidential relationship between the newsgatherer and the source of information.

Minn. Stat. § 595.022. The statutory recognition parallels recognition of this public interest in judicial decisions:

> The First Amendment guarantees a free press primarily because of the important role it can play as "a vital source of public information."... "The press was protected so that it could bare the secrets of government and inform the people."... Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability ... .

Zerilli v. Smith, 656 F.2d 705, 710-11 (D.C. Cir. 1981); Wright v. Fred Hutchinson Cancer Research Center, 206 F.R.D. 679, 681-82 (W.D. Wash. 2002); Grunseth v. Marriott Corp., 868 F. Supp. 333, 334 (D.D.C. 1994). "[R]outine court-compelled disclosure of research materials poses a serious threat to the vitality of the newsgathering process." Mark v. Shoen, 48 F.3d 412, 416 (9th Cir. 1995).

After this Court's decision in State v. Turner, 550 N.W.2d 622 (Minn. 1996) (holding that the statute protected only confidential sources and not all unpublished information), the Minnesota Society of Professional Journalists, the Minnesota Newspaper Association, the Minnesota Broadcasters Association, and individual journalists and news organizations vigorously urged the Minnesota Legislature to amend the statute to clearly protect unpublished information. The legislature responded by amending the statute in 1998, protecting unpublished information "whether or not it would tend to identify the person or means through which the information was obtained."

The "1998 legislative amendments to Minn. Stat. § 595.023, … specifically and clearly expanded the privilege from covering data 'which would tend to identify the [source]' to covering data regardless of whether the data would tend to identify the source. Minn. Laws 1998, ch. 357 §1." Weinberger v. Indep. Sch. Dist. No. 622 v. Maplewood Review, 2001 WL 741313, at *3 (Minn. App. 2001) (unpublished) (A-54).

This legislative history of recognizing and expanding upon judicial construction of a constitutional privilege for newsgatherers suggests two consequences for Minnesota courts applying the statutory privilege. First, as is apparent from the statutory language itself, the statutory requirements should be applied as independent elements, each of which must be satisfied before disclosure can be compelled. Second, the statutory requirements should be construed consistently with those judicial decisions that recognize broader, rather than narrower, readings of the constitutional privilege. As in Bauer v. Gannett Co., Inc., 557 N.W.2d 608, 611 (Minn. App. 1997), factors from constitutional cases can be applied to analysis of the elements of the statute. The legislative expansion of privilege, in reaction to judicial decisions that accorded narrower applications of privilege, warrants broad application of the current statute to protect newsgatherers. Cf. Maressa v. New Jersey Monthly, 445 A.2d 376, 381-82 (N.J.), cert. denied, 459 U.S. 907 (1982).

II. A Party Seeking to Compel Disclosure in a Defamation Action Must Establish Each of Several Elements.

Minn. Stat. § 595.023 broadly prohibits any government body from requiring newsgatherers "to disclose in any proceeding the person or means from or through which

information was obtained, or to disclose any unpublished information procured by the person in the course of work or any of the person's notes, memoranda, recording tapes, film or other reportorial data whether or not it would tend to identify the person or means through which the information was obtained."

The statute allows disclosure to be compelled in two types of cases, subject to certain requirements, in § 595.024 (for criminal actions) and § 595.025 (for defamation actions). There are no other circumstances in which newsgatherers can be compelled to disclose the protected information. See Minn. Stat. § 645.19 ("Exceptions expressed in a law shall be construed to exclude all others.").

Section 595.024 provides that courts may compel disclosure in criminal cases if the person seeking disclosure establishes, by clear and convincing evidence, "all three" of the enumerated elements: (1) clear relevance to the criminal offense, (2) lack of alternative means, and (3) a compelling and overriding interest requiring the disclosure of the information in order to prevent injustice. Disclosure of unpublished information can be compelled in misdemeanor cases, but disclosure of confidential sources can be compelled only in gross misdemeanor and felony cases. Minn. Stat. § 595.024 subd. 2(1).

The only type of civil action in which disclosure can be ordered is an action for defamation. Section 595.025 provides:

> Subdivision 1. Disclosure prohibition; applicability. The prohibition of disclosure provided in section 595.023 shall not apply in any defamation action where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice.

> Subd. 2. Disclosure conditions. Notwithstanding the provisions of subdivision 1, the identity of the source of information shall not be ordered disclosed unless the following conditions are met:
>
> (a) that there is probable cause to believe that the source has information clearly relevant to the issue of defamation;
>
> (b) that the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights.

Under the plain language of the statue, § 595.025 applies only (1) in a "defamation action where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice," and the identity of the source remains protected unless the "following conditions are met" (emphasis added): (2) "there is probable cause to believe that the source has information clearly relevant to the issue of defamation" and (3) "the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights." These are necessary conditions to be met before compelling disclosure, not factors to be "weighed."

III. The Bauer Factors Aid the Analysis of the Statutory Elements but Do Not Eliminate the Need to Satisfy Each Element before Disclosure Can Be Compelled.

Properly viewed, the Bauer factors aid the analysis of whether a party has met the statutory conditions for compelling disclosure. The presence or absence, or strength or weakness, of any particular factor does not eliminate the need to satisfy each statutory condition. See Bauer, 557 N.W.2d at 611 ("we incorporate these factors into any consideration of cases arising under the Act"). To the extent that Bauer or the decisions below suggest that all five factors should be "weighed" or "balanced" and that no single

factor is dispositive, such suggestions cannot overcome the clear statutory directive that certain conditions be met before any disclosure can be compelled.

A. Nature of the litigation.

The Bauer court articulated its first factor as "the nature of the litigation and whether the reporter or news organization from whom disclosure is sought is a party to the litigation." 557 N.W.2d at 611. The court explained that:

> the determination of whether the privilege applies is influenced by the nature of the litigation and whether the reporter or news organization from whom disclosure is sought is a party to the litigation. When the reporter is a party to the litigation, the balance may tip more in favor of disclosure than when the reporter is not a party. This is particularly true in a suit alleging the defamation of a public official or public figure because plaintiffs in those cases must prove that the defamatory publication was made with "actual malice." The disclosure of a confidential source may be essential to the proof of actual malice if a plaintiff must demonstrate that the reporter's source was unreliable.

Id. It "stressed," however, that "this consideration is not dispositive." Id.

This discussion is consistent with judicial applications of the constitutional privilege. Unfortunately, however, it could be read to permit courts to compel disclosure of confidential sources in circumstances clearly beyond the scope of the statute. Under the statute, as discussed above, the "nature of the litigation" can be a dispositive basis for denying a motion to compel disclosure in a civil case, because compelled disclosure is permitted only in defamation actions and not in other types of civil actions even if the newsgatherer is a party to the litigation.

Furthermore, disclosure can be compelled under the statute even in defamation actions only if "the person seeking disclosure can demonstrate that the identity of the

source will lead to relevant evidence on the issue of actual malice." Although the statute does not explicitly so state, it is likely that the legislature contemplated allowing compelled disclosure only in defamation actions where the plaintiff was trying to establish actual malice on the part of a defendant that had relied on a confidential source. There are several reasons for that conclusion:

First, the Court should look at § 595.025 in the context of the entire Act. See Minn. Stat. § 645.17(2) ("the legislature intends the entire statute to be effective and certain"). The required showings for permitting compelled disclosure of confidential sources are less demanding under § 595.025 than under § 595.024. The statute also provides more protection to newsgatherers in misdemeanor cases than in felony and gross misdemeanor cases. The legislature surely regarded society's interest in compelling disclosure to be greater in the more serious criminal cases than in either misdemeanors or in civil defamation actions. See Minn. Stat. § 645.17(5) ("the legislature intends to favor the public interest as against any private interest"). The only logical reason for according less protection to newsgatherers in defamation actions is that the legislature believed that the newsgatherer as a defendant in a defamation action would be more likely to be subject to sanctions in the form of default findings or other monetary sanction tied to the plaintiff's actual damages than to potentially unlimited and continuing sanctions for contempt. Cf. Dienes, NEWSGATHERING § 16-2(f) (discussing penalties for non-disclosure under constitutional privilege).

Second, the legislature limited disclosure to situations where "the identity of the source will lead to relevant evidence on the issue of actual malice." Actual malice

is a subjective fault requirement that applies only to defamation actions brought by public officials or public figures or in which plaintiffs seek punitive damages, and must be established by clear and convincing evidence. Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476 (Minn. 1985). Private figure libel plaintiffs need establish only an objective fault level of negligence (that defendant knew or in exercise of reasonable care should have known that defamatory statement was false). Id. "Actual malice" is not an issue in such cases. See McNeilus v. Corporate Report, Inc., 21 Media L. Rep. 2171, 2174 (Minn. Dist. Ct., Dodge County, 1993) (§ 595.025 did not authorize compelled disclosure of confidential sources in private-figure libel action because actual malice was not an issue). The legislature reasonably could have concluded that plaintiffs who had to establish actual malice had a greater need to compel disclosure of confidential sources in order to overcome their greater evidentiary burdens.

Third, the "identity of the source" (and consequently the reliability of the source) can "lead to relevant evidence on the issue of actual malice" on the part of the newsgatherer/defendant. See Dienes, NEWSGATHERING § 15-2(c)(2)(B). However, when the newsgatherer is not a party to the litigation, the newsgatherer's actual malice is never an issue. As the Court of Appeals recognized below, simply making the newsgatherer a witness against his source for purposes of suing the source "has significant potential to interfere with a reporter's ability to gather news" and does not uncover evidence of actual malice. (A-77-78.) Plaintiffs can question the actual defendants on issues of actual malice, such as their basis (or lack of basis) for believing published statements to be true or false without confirmation by the publisher that the defendant actually made the

offending statements. The identity of the source, in those circumstances, goes to the issue of publication (from source to newsgatherer) rather than the issue of actual malice, and therefore falls outside the areas of compelled disclosure permitted by the statute.

Apart from statutory construction, courts applying the constitutional balancing standard generally are more willing to compel disclosure of confidential sources when the news media are defendants than when the media are subjected to third-party discovery demands. See Dienes, NEWSGATHERING §§ 15(2)(c)(2)(B), 16-(2)(c)(2)(B). "Although discovery is by definition invasive, parties to a lawsuit must accept its travails as a natural concomitant of modern civil litigation. Non-parties have a different set of expectations. Accordingly, concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs." Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998).

As construed by other courts, the constitutional privilege requires a requesting party, even in a defamation action against the journalist asserting the privilege, to satisfy threshold conditions. "[D]isclosure [of journalists' confidential sources] should by no means be automatic in libel cases." Zerilli v. Smith, 656 F.2d at 714. The Eighth Circuit has long admonished that, because of First Amendment concerns, trial courts should not "routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation." Cervantes v. Time, Inc., 464 F.2d 986, 993-94 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973). See Section III-E below.

Therefore, the "nature of the litigation" can be dispositive on the issue of compelled disclosure. Section 595.025 on its face limits compelled disclosure to (1) defamation actions (2) "where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice," and should be construed to apply only in (3) defamation actions in which the newsgatherer is a defendant.

B. Relevance of the source's identity to the action.

The Bauer court equated the statutory language that "the identity of the source will lead to relevant evidence on the issue of actual malice" with the relevance factor, under the constitutional cases, requiring a showing that the information goes to "the heart" of the plaintiff's claim. 557 N.W.2d at 611. Thus, the statutory showing satisfies the constitutional showing.

Bauer further explains that the analysis of the relevance of the source's identity must be conducted with respect to each source whose identity will be compelled to be disclosed. Id. at 611-12. "Other important considerations in evaluating relevance in this context are whether the allegedly defamatory publication referred to confidential sources and whether the information gained from those sources was used directly in the publication." Id. at 612. These additional considerations are simply that – tools to evaluate the statutory requirement of relevance.

The United States Supreme Court has cautioned that "the requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant' should be firmly applied" when courts scrutinize discovery requests directed against media defendants in libel

actions. Herbert v. Lando, 441 U.S. 153, 177 (1979). The Court there specifically recognized that: "There is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed." 441 U.S. at 174.

The simple filing of a defamation action, even against media defendants, presents no sweeping justification to compel disclosure of every shred of information relating to a news story. Limiting plaintiffs' discovery in defamation actions does not deprive them of any enforceable rights. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 (1986) (defamation defendant's assertion of privilege under state shield law does not change the plaintiff's burden of proving the falsity of the challenged statements); Coughlin v. Westinghouse Broadcasting, 780 F.2d 340, 342 (3d Cir. 1985) cert. denied, 476 U.S. 1187 (1986); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 279 n.74 (3d Cir. 1980); Maressa v. New Jersey Monthly, 445 A.2d at 383-390; McNabb v. Oregonian Pub. Co., 685 P.2d 458, 462-463 (Or. Ct. App.), review denied (Or. 1984), cert. denied, 469 U.S. 1216 (1985)).

Defamation claims do provide some basis for carefully scrutinizing and sometimes overcoming a newsgatherer's assertion of privilege relating to confidential sources, but they must not provide a license to ignore the privilege altogether. Otherwise, the subject of any unfavorable news story would have an easy avenue to discover the identities of his critics and retaliate against them: firing or taking other action against them if they are his employees or subordinates, refusing to do business with them if they are his customers or

suppliers, or threatening or punishing them in other ways. Journalistic promises of confidentiality, and legal recognition of the importance of keeping those promises, are intended to prevent that sort of retaliatory tactic, among other consequences. See Star Editorial, Inc. v. U.S. Dist. Ct. for C.D. Cal., 7 F.3d 856, 861 (9th Cir. 1993). Amici are well aware of – because they have been involved in and strenuously resisted – situations in which a defamation plaintiff has offered to dismiss the defamation action against the news organization if the news organization would disclose confidential sources or other privileged information, and in which a plaintiff has served deposition subpoenas on persons he believes are continuing to cooperate with the news organization on a confidential basis. Accordingly, if a court concludes that compulsory discovery is warranted despite the applicable privileges, it should carefully limit that discovery to particular, clearly relevant items.

C. Alternative sources.

"A third factor in the balance is the efforts made by the party seeking disclosure to obtain the information from alternative sources." 557 N.W.2d at 612. The Bauer court in this passage clearly was referring to the constitutional balance. It immediately went on to state that: "The Act allows for disclosure only when the moving party has demonstrated that 'the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights.' Minn. Stat. § 595.025, subd. 2(b) (emphasis supplied). We are certain that this requirement meets the corresponding constitutional imperative." Id. (emphasis added). Exhaustion of alternative means of obtaining

information remains a statutory requirement that plaintiff must meet, rather than a discretionary factor to be balanced by the district court.

Courts have strictly construed the alternative sources requirement. "The fact that it is convenient or expedient to seek information from the press is insufficient for compelling disclosure, even where the alternative requires interrogation of scores of persons." Damico v. Lemen, 14 Media L. Rep. 1031, 1032 (Fla. Cir. Ct. 1987) (third-party subpoena quashed). Compulsory disclosure by journalists is the "last resort," Star Editorial, 7 F.3d at 861 (defamation action), and parties requesting disclosures from the press have first been put to the task of interrogating more than 30 persons, Miller v. Greer, 20 Media L. Rep. 1061 (Ga. Super. Ct. 1992) (defamation plaintiff had not exhausted alternative, non-media sources, particularly the plaintiff's fellow 31 employees at a police department), or even twice that number, In re Roche, 448 U.S. 1312 (1980) (Brennan, J.) (granting stay of a state court's holding a reporter in contempt for refusing to testify pursuant to third-party subpoena, Justice Brennan found that there were "other – albeit roundabout – methods" of obtaining the desired information, by deposing 64 other named witnesses); Zerilli v. Smith, 656 F.2d at 714 (suggesting that taking 60 depositions might be a reasonable prerequisite to compelled disclosure pursuant to third-party subpoena, citing Carey v. Hume, 492 F.2d 631, 639 (D.C. Cir.) (defamation action), cert. dismissed, 417 U.S. 938 (1974)), or even twice that number once again, Overstreet v. Neighbor, 9 Media L. Rep. 2255 (Fla. Cir. Ct. 1983) (finding no exhaustion of alternative sources where plaintiffs' counsel had taken no depositions and had not even interviewed

all of the 117 potential sources named as plaintiffs in defamation action against newspaper).

The Bauer court "decline[d] to endorse any formulaic approach relying, for example, on numbers of potential sources interviewed or deposed to determine whether the 'any alternative means' condition has been satisfied," but "note[d] that this requirement places a burden on the movant to demonstrate that substantial efforts have been made to obtain the information through other means – what constitutes substantial efforts will necessarily vary from case to case." 557 N.W.2d at 612. That is an appropriate construction of the statutory requirement.[3]

D. Compelling interest in the information or source.

The Bauer court, interpreting the statute in conjunction with cases construing a constitutional privilege, explained a fourth consideration for courts faced with demands to compel the disclosure of confidential sources:

> the court must consider whether there is a compelling interest in the information or source. … Thus, the court should consider not only the relevance but also the necessity of any information a confidential source might have. There may be no need to disclose the identity of relevant confidential sources: evidence of malice may be available from nonconfidential sources, or the defendant may have sufficient evidence of truth and prudence in publishing to prevail on a motion for summary judgment. … A compelling interest might also keep the court from disclosing the identity of a confidential source despite demonstrated relevance and necessity. See Mitchell [v. Superior Court, 690 P.2d 625, 634 (Cal. 1984)] ("[W]hen the information relates to matters of great public importance, and when the risk of harm to the source is a substantial one, the

[3] Weinberger claimed that one defendant waived any interest in confidentiality. (A-30.) One alternative method of obtaining the information would have been to secure such waivers from all defendants, which might have obviated Wakefield's concern about identifying confidential sources.

> court may refuse to require disclosure even though the plaintiff has no other way of obtaining essential information.").

557 N.W.2d at 612. Such a "compelling interest" consideration is explicitly required before disclosure can be ordered in criminal cases. Minn. Stat. § 595.024 subd. 2 (3). Although § 595.025 does not explicitly require this feature, it does not preclude such consideration. Neither 595.024 nor 595.025 require a district court to issue an order compelling disclosure if the statutory conditions are met; they only prohibit a district court from issuing an order compelling disclosure if the statutory conditions have not been met. Rule 26.03's allowance of broad district court discretion in issuing protective orders would permit appropriate consideration of this factor.

E. Prima facie demonstration of falsity and other elements of defamation claim.

The Bauer court "agree[d] with a number of courts which have determined that, when the circumstances merit, the court may first require the plaintiff to make a prima facie showing that the alleged defamatory statements are false." 557 N.W.2d at 612. "Stated differently, if the court would grant summary judgment for the defendant on the grounds that the plaintiff, regardless of the identity of the confidential sources, would be unable to establish falsity or malice, then there is no need for disclosure. See Cervantes, 464 F.2d at 994." Id. at 613. The court stated that this was not an absolute requirement, but was "a consideration for the district court to weigh in its decision." Id.

This factor is an appropriate way of approaching whether the party seeking to compel disclosure has met its statutory obligation to demonstrate "that there is probable cause to believe that the source has information clearly relevant to the issue of

defamation." The confidential source will not have information clearly relevant to the issue of a viable claim for defamation if the record shows that plaintiff has not met and cannot meet the various elements of a defamation claim.

Any claim for defamation requires plaintiff to prove that defendant made a false statement about plaintiff. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986) ("to ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern"). "Before the test of reckless or knowing falsity can be met, there must be a false statement of fact." Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974). Statements that are substantially true cannot be equated with knowledge of falsity, and hence cannot provide a foundation for a finding of "actual malice." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516-517 (1991); Harris v. Quadracci, 48 F.3d 247, 253 (7th Cir. 1995).

Truth and falsity are determined independently of the defendant's state of mind. "[I]f the defamatory matter is true, it is immaterial that the person who publishes it believes it to be false; it is enough that it turns out to be true." RESTATEMENT (SECOND) OF TORTS, § 581A comment h (1977). Likewise, it does not matter that substantial evidence confirming the truth of the statements in a broadcast came into being after the date of the broadcast. Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1228 (7th Cir. 1993) ("[I]t makes no difference that the true facts were unknown until the trial. A person does not have a legally protected right to a reputation based on the concealment of the truth.").

Compulsory discovery of a newsgatherer's confidential sources therefore logically should wait until plaintiff has established a prima facie showing of the falsity of specific statements in the allegedly wrongful story, and then be limited to disclosures specifically related to those particular statements. Demonstrating falsity is not simply a matter of alleging in the complaint that the statements were false. The court must employ a screening mechanism of its own. Moreover, "[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability." Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1292 (D.C. Cir.), cert. denied, 488 U.S. 825 (1988), cited with approval in Hunter v. Hartman, 545 N.W.2d 699, 705 (Minn. App.) (noting "the proposition that courts take a grudging view of proof of falsity in the setting of comments on public figures"), rev. denied (Minn. 1996). This Court should not readily permit public officials to use the lever of libel litigation to stifle criticism of their performance, to extract the identity of their critics who may be vulnerable to reprisals in their employment or in their personal lives, or to rummage at will through journalists' privileged newsgathering processes.

Although Herbert v. Lando allowed discovery of a defamation defendant's editorial processes, the justices suggested practical limits on when and to what extent such discovery can be compelled. The majority opinion directed that "the requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant' should be firmly applied." 441 U.S. at 177. Justice Powell concurred to emphasize that "when a discovery demand arguably impinges on First Amendment rights a district court should

measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated." 441 U.S. at 179. He also observed:

> In some instances it might be appropriate for the district court to delay enforcing a discovery demand, in the hope that the resolution of issues through summary judgment or other developments in discovery might reduce the need for the material demanded. It is pertinent to note that respondents here had not sought summary judgment on any issue at the time discovery was opposed, and have not argued that discovery should be postponed until other issues on which liability depend are resolved. (441 U.S. at 180 n.4.)

Justice Brennan, dissenting in part, suggested that a public figure defamation plaintiff be required to make a prima facie showing of defamatory falsehood before inquiring into the defendant's editorial process. 441 U.S. at 181. Justice Stewart, dissenting, doubted the relevance of the questions to which the defendant had objected. 441 U.S. at 198. Justice Marshall, dissenting, noted with approval that "lower courts have displayed sensitivity to First Amendment values in assessing motions to compel disclosure of confidential sources, see Cervantes v. Time, Inc., 464 F.2d 986, 992-994 (CA8 1972), cert. denied, 409 U.S. 1125 (1973)." 441 U.S. at 210 n.6.

Courts should and do require plaintiffs to demonstrate the falsity of allegedly defamatory statements before allowing them to proceed with intrusive inquiries into the constitutionally and statutorily protected newsgathering and editorial processes. E.g., Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 597 (1st Cir. 1980) (plaintiff must establish prima facie case of falsity of article before discovery may be compelled); Star Editorial, Inc. v. U.S. Dist. Ct. for C. D. Cal., 7 F.3d 856, 860 (9th Cir. 1993) (requiring prima facie showing of falsity before discovery is compelled); Mitchell

v. Superior Court, 690 P.2d 625, 632-635 (Cal. 1984); Hopewell v. Midcontinent Broadcasting Corp., 538 N.W.2d 780, 782 (S.D. 1995), cert. denied, 519 U.S. 817 (1996); Dallas Morning News Co. v. Garcia, 822 S.W.2d 675, 680 (Tex. App. 1991).

The same considerations that apply to a showing of falsity also can apply to other elements of a defamation action. For example, a defamation action presents no apparent reason to compel a newsgatherer to disclose the identity of a confidential source of statements that are not defamatory or of information that is not "of and concerning" the plaintiff. Miller v. Transamerican Press, 628 F.2d 932 (5th Cir. 1980), modifying, 621 F.2d 721, cert. denied, 450 U.S. 1041 (1981) (prior to disclosure of information subject to the qualified privilege, plaintiff must show substantial evidence that the published statements were both factually untrue and defamatory, that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available, and that the requested information is necessary to proper preparation and presentation of the case).

This Court accordingly should require defamation plaintiffs in Minnesota to make a prima facie showing of falsity and other elements of a defamation claim before courts order any disclosure of privileged information. This analysis gives effect to the statutory requirement that the disclosure be "relevant to the issue of defamation."

IV. This Court Should Disregard Weinberger's Unfounded Assertions Regarding Media Behavior and Sources.

Amici's long-standing position on protection for newsgatherers' information is based upon principle. They strongly disagree with the assertion in Weinberger's Brief at 31 that:

> It is ironic that when newspapers are sued, they immediately turn over the names of their sources and their notes to protect themselves from being held accountable. When they are not sued, however, they suddenly are hesitant to do so.

Unlike appellant, these amici and their counsel speak from decades of personal knowledge and experience. Newsgatherers in Minnesota do not "immediately turn over the names of their sources and their notes" when they are sued. They assess each request for information carefully in light of the standards of the privilege. Frequently, they object to requests for unpublished information and confidential sources, resisting disclosure until and unless their sources consent to disclosure or a court analyzes the privilege and orders disclosure. See, e.g., Aequitron Medical, Inc. v. CBS Inc., 1995 WL 406157, at *2-3, 24 Media L. Rep. 1025, 1027 (S.D.N.Y. July 10, 1995) (applying Minnesota law and requiring disclosure of unpublished information prior to 1998 amendments to statute), subsequent decision, 964 F. Supp. 704 (S.D.N.Y. 1997) (granting summary judgment to defendant broadcaster because plaintiff, even after discovery, could not produce any evidence of actual malice); Bauer v. Gannett Co., Inc. (KARE 11), 557 N.W.2d 608 (Minn. App. 1997); Steele v. Tell, 1994 WL 593924, at *3 (Minn. App. Nov. 1, 1994) (unpublished); McNeilus v. Corporate Report, Inc., 21 Media L. Rep. at 2174-75.

Weinberger's Brief at 28-29 attacks sources who seek confidentiality as "fabricators" and manipulators who deserve no protection from the courts. This position ignores the long-standing First Amendment protection for anonymous speakers. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) ("Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. … It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse."). See also Dienes, NEWSGATHERING § 16-2(k) (anonymous speech on the Internet).

Conclusion

Amici respectfully request this Court to apply the strong protection for newsgatherers within the Minnesota Free Flow of Information Act and to hold explicitly that:

1. Government cannot compel newsgatherers to disclose their confidential sources or unpublished information in any civil action except in connection with a claim for defamation.

2. The "defamation exception" applies only regarding defamation claims where the person seeking disclosure demonstrates that the identity of the source will lead to relevant evidence on the issue of actual malice.

a. The previously undisclosed identity of the source must be the central element of the compelled disclosure.

b. The evidence sought through compelled disclosure of the source's identity must be relevant to the issue of actual malice.

c. The "source's identity" is likely to be "relevant to the issue of actual malice" only when the "issue of actual malice" is that of the newsgatherer's alleged actual malice. Consequently, § 595.025 authorizes compelled disclosure only when the newsgatherer is a defendant in the defamation action.

3. In order to invoke the "defamation exception" to the newsgatherers' privilege, the party seeking to compel disclosure must establish:

a. that there is probable cause to believe that the source has information clearly relevant to the issue of defamation. A source is unlikely to have "information clearly relevant to the issue of defamation" unless the plaintiff can make a prima facie showing that the specific allegedly wrongful statements are false, are defamatory, and are "of and concerning" the plaintiff.

b. that the information cannot be obtained by any alternative means or remedy less destructive of First Amendment rights.

4. Courts also may consider additional factors and deny compelled disclosure of privileged information under Rule 26 or otherwise.

Dated: November _____, 2002

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STATE OF MINNESOTA
IN SUPREME COURT

Richard Weinberger,

Appellant,

vs.

Independent School District No. 622, et al.,

Defendants

vs.

Maplewood Review, et al.

Respondents.

CERTIFICATION OF BRIEF LENGTH

Appellate Court
Case Number: C7-01-2021

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,916 words. This brief was prepared using Microsoft Word 97 software.

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APPENDIX

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