No. A-7-10

In the Supreme Court

of

New Jersey

TOO MUCH MEDIA, LLC

Plaintiff-Respondent,

v.

SHELLEE HALE

Defendant-Appellant.

ON APPEAL FROM THE APPELLATE DIVISION (No. 066074)
THE HONORABLES PHILIP S. CARCHMAN, ANTHONY J. PARRILLO
AND MARIE E. LIHOTZ

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, GANNETT CO., INC. AND SOCIETY OF PROFESSIONAL JOURNALISTS

Lucy A. Dalglish
Gregg P. Leslie
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
Tel: (703) 807-2100
Counsel for The Reporters Committee for Freedom of the Press
** Additional counsel appearances listed on inside cover*

* Additional *Amici* counsel:

Barbara W. Wall
Vice President/Senior
Associate General Counsel
GANNETT CO., INC.
7950 Jones Branch Drive
McLean, VA 22107

Bruce W. Sanford
Bruce D. Brown
Laurie A. Babinski
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of
Professional Journalists

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rule

Statute

Other Authorities

PRELIMINARY STATEMENT

New Jersey adopted a reporter's privilege in 1933. Today, the state's "shield law," codified at N.J. Stat. Ann. §§ 2A:84A-21–21.8, is among the strongest in the nation. The Reporters Committee for Freedom of the Press, Privilege Compendium: New Jersey, Introduction (2007), http://www.rcfp.org/privilege/item.php?t=full&state=NJ&level=1. This Court has found that the "legislative intent in adopting this statute ... [was] to protect the confidential sources of the press as well as information so obtained by reporters and other news media representatives to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey." *In re Farber*, 78 N.J. 259, 270 (1978).

The unprecedented growth in size, scope and popularity of the Internet has transformed the news industry. As mainstream news organizations increasingly rely on their websites to deliver their content and attract readers and nontraditional online outlets provide information about current events of public interest, citizen journalists and other Internet content providers have started to invoke the newsperson's privilege.

The Appellate Division in this case addressed the question of who qualifies as a journalist, issuing a potentially problematic interpretation of the state shield law. *Too Much Media, LLC v. Hale*, 413 N.J. Super. 135 (N.J. Super. Ct. App.

Div. 2010). In finding that the shield law did not apply to the defendant, a website operator investigating the online adult entertainment industry, the Appellate Court adopted a series of indicia that present an alarmingly restrictive view of who qualifies as a journalist; the court provides a list of specific qualities that it said are partially necessary to demonstrate before one could qualify for protection under the shield law. *Id.* at 158-60. This list may make it more difficult for anyone who is not a member of the traditional print news media to assert the newsperson's privilege and counters the Legislature's intent to provide a broad privilege. Moreover, the court implied that a trial court must conduct a hearing to determine whether a person claiming the privilege is more than a "self-proclaim[ed]" journalist, *id.* at 158, a procedure that could require disclosure of privileged information.

The Appellate Division noted that "*new* media should not be confused with *news* media," *id.* at 154 (emphasis in original), and *Amici* would agree that the two are not necessarily the same. While some overlap between the two may exist, certainly there are online authors who are not practicing journalism and, thus, are not entitled to invoke the shield law. Indeed, the law's protection cannot extend to anyone who speaks but, rather, must be limited to a very specific type of person. Otherwise, the privilege becomes so broad that it loses its meaning. Yet, the

determination of whether a particular person qualifies for the privilege cannot be based on judicially created factors that try to fit into a framework of what the news media traditionally have been; rather, any set of factors must conform to a definition of the media that is consistent with the constitutionally protected function they perform. Thus, *Amici* urge this Court to reject the Appellate Division's "recognized qualities or characteristics *traditionally* associated with the news process," *id.* at 160 (emphasis added), as a basis for successful invocation of the shield law and, instead, to adopt a standard that more accurately reflects modern and future newsgathering practices by focusing on the would-be invoker's function and intent, rather than his or her title or credentials. Moreover, *Amici* urge the Court to overrule the Appellate Division's finding that a person who invokes the newsperson's privilege is then subject to a full preliminary hearing to determine his or her eligibility for the protection. Requiring authors, for example, to reveal the names of people they interviewed or the questions they asked in an attempt to prove that they are entitled to *refrain* from revealing the names of people they interviewed or the questions they asked belies common sense and, more importantly, threatens to eviscerate the interests protected by the privilege.

ARGUMENT

I. Courts must interpret the shield law broadly enough to include online content providers who have the intent, when gathering information, to disseminate it and, thereby, contribute to the free exchange of ideas.

A. The public policy underlying the shield law supports its applicability to many online content providers.

The courts of this state have consistently recognized that the purpose of the shield law extends beyond the protection of traditional journalists to include the much-broader protection of the free exchange of ideas. In holding that the shield law affords journalists an absolute right not to disclose confidential sources or editorial processes in a libel action, this Court noted the danger in not extending the protection to editorial processes, discovery of which "is especially threatening to newspersons because it inhibits the exchange of ideas that is crucial to the functioning of a free and vigorous press." *Maressa v. N.J. Monthly*, 89 N.J. 176, 188 (1982). Seven years later, this Court, in protecting a newspaper reporter from compelled testimony in a murder trial, even where the substance of the testimony sought already had been disseminated, noted that the "fundamental public policies underlying the Shield Law" were the "most important[]" consideration in its conclusion. *In re Schuman*, 114 N.J. 14, 20–21 (1989). According to *Schuman*, "[t]he public perception conveyed by compelling [the reporter] to testify will hinder the free flow of information from

newspapers to the public. If a reporter is seen to be an 'arm of the prosecution,' the reporter will have difficulty gathering information from fearful sources." *Id.* at 29. And as recently as three years ago, this Court stressed that New Jersey's protection of journalists is robust and that the holdings of *Maressa* and *Schuman* remain intact. *In re Venezia*, 191 N.J. 259, 275, 284 (2007).

Moreover, the Appellate Division recently held that excepting books from the protections of the shield law solely because of their medium of communication "would make no policy sense and would substantially undercut the [l]aw's goals of protecting the free exchange of ideas." *Trump v. O'Brien*, 403 N.J. Super. 281, 304 (N.J. Super. Ct. App. Div. 2008). *See also Kinsella v. Welch*, 362 N.J. Super. 143, 155 (N.J. Super. Ct. App. Div. 2003) (holding that a nonfiction television program filmed in a hospital emergency room had "educational and public policy aspects" and qualified under a broad definition of "news media" and "news" contained in the shield law, even though the show presented primarily human interest stories); *In re Avila*, 206 N.J. Super. 61, 64 (N.J. Super. Ct. App. Div. 1985) (holding that a free 20-page Spanish-language tabloid qualified as a "news medium" covered by the shield law, even though the statute requires a paid circulation and observing that "[i]n a democratic society the public must have information to exercise

its freedoms in a responsible manner. Favoring 'news media' with the newsperson's privilege ... [is] designed to foster the gathering and distribution of information to the public[]"); *In re Burnett*, 269 N.J. Super. 493, 502 (N.J. Super. Ct. Law Div. 1993) (holding that because "this society demands the open and full flow of information and ideas whatever they may be and from wherever they may come," annual reports on the financial conditions of insurance companies were "news medi[a]" protected by the shield law).

The rationale underlying these cases does not apply with any less force to the Internet context. That is, an online publication that provides information that aids the "marketplace of ideas" in achieving its goal of fostering and furthering public debate should not be excepted from statutory protections merely because its author has "no credentials or proof of affiliation with any recognized news entity," did not "provide any details about any fact-checking on the information she collected," *Too Much Media*, 413 N.J. Super. at 158, 159, or lacks any other criterion the Appellate Division seemingly would require. Such bright-line exemptions significantly undercut the shield law's goal of protecting the free exchange of ideas, regardless of their medium of communication. Thus, the public policy underlying the shield law mandates its generous

interpretation to protect nontraditional publications, including those on the Internet.

B. Other courts' broad application of the newsperson's privilege supports its applicability to many online content providers.

Many courts have held that a newsperson's privilege applies to all parties engaged in the practice of compiling information for public dissemination, including nontraditional newsgatherers such as those who, without any affiliation with a recognized media entity, publish their material online. The U.S. Court of Appeals for the Second Circuit, for example, established that a nontraditional journalist can invoke a reporter's privilege when, at the time of the newsgathering, he or she has the intent to investigate and disseminate news to the public. *Von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987). The *von Bulow* case involved a civil lawsuit that Sunny von Bulow's children brought against her husband, Claus von Bulow, who allegedly drugged her. *Id.* at 138–40. The plaintiffs sought information from the author of a book about the Claus von Bulow attempted-murder investigation. *Id.* In determining whether it should apply a reporter's privilege to the book author, the court stated that:

> [T]he individual claiming the privilege must demonstrate, through competent evidence, the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process. ... Further, the protection from disclosure

> may be sought by one not traditionally associated with the institutionalized press.

Id. at 144-45. In that case, the court found that the author did not have the benefit of the reporter's privilege because she was not independent of the von Bulows and did not have the intent to disseminate news. Indeed, the author had a close relationship with Claus von Bulow and admitted during oral argument that her intent in writing a book was to vindicate him, not to publish an unbiased and factual account of the situation. *Id.* at 145. *See also In re Madden*, 151 F.3d 125, 129 (3d Cir. 1998) (holding that an employee of World Championship Wrestling who recorded reports about professional wrestlers for a paid telephone hotline was not a journalist entitled to the reporter's privilege because he was not independent of World Championship Wrestling and did not have the requisite "intent at the inception of the newsgathering process to disseminate investigative news to the public").

Following *von Bulow,* the U.S. Court of Appeals for the First Circuit allowed two book authors to avail themselves of the reporter's privilege. *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998). In so holding, the court noted:

> [T]he medium an individual uses to provide his investigative reporting to the public does not make a dispositive difference in the degree of protection accorded to his work. ... Whether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available

> to him as long as he intended "at the inception of the newsgathering process" to use the fruits of his research "to disseminate information to the public."

Id. at 714 (quoting *von Bulow,* 811 F.2d at 144). The court went on to say that the authors were privileged because their intent had been to "compile, analyze, and report their findings." *Id.* at 715. Likewise, the U.S. Court of Appeals for the Ninth Circuit adopted a test similar to the one in *von Bulow* when it held that a reporter's privilege applied to an investigative book author. *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993). It reiterated *von Bulow*'s reasoning that "[t]he journalist's privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public." *Id.* at 1293. In noting that "[w]hat makes journalism journalism is not its format but its content," the *Shoen* court concluded that "the critical question for deciding whether a person may invoke the journalist's privilege is whether she is gathering news for dissemination to the public." *Id.* Most recently, the New Hampshire Supreme Court found that the privilege derived from the state constitution's guarantee of freedom of the press protected a website providing information about the mortgage industry. *Mortgage-Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 999 A.2d 184 (2010). The court rejected an argument that the website was ineligible for protection under the privilege because it was neither an established media entity

nor engaged in investigative reporting. *Id.* at 189. Rather, because the website "serve[d] an informative function and contribute[d] to the flow of information to the public ... [it was] a reporter for purposes of the newsgathering privilege." *Id.*

The medium in which an author offers his or her news or information to the public is irrelevant, as these cases indicate. An author's function, not the chosen medium of publication, is what defines him or her as worthy of a shield law's protection. Long before the advent of the Internet, the U.S. Supreme Court recognized that the definition of "press" does not depend upon the work's medium of distribution. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin,* 303 U.S. 444, 452 (1938). *See also Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars to play an important role in the discussion of public affairs."). Indeed, it is worth noting here that such nontraditional authors have made significant contributions to the public interest throughout this nation's history, from the reform of the meat industry in the early 20th century, to exposing the health hazards of tobacco, to shaping public

opinion about the Vietnam War. *See* Leon Harris, *Upton Sinclair: American Rebel* 85–90 (1975); Carl Jensen, *Stories That Changed America: Muckrackers of the 20th Century* 78–81 (2000).

In light of the recent evolution in the media industry and its shift toward online publication, this case presents an opportunity for this Court to clarify and expand the scope of New Jersey's shield law as it applies to Internet publishers. Based on the important policies underlying the shield law, as well as this and other courts' generous interpretation of a newsperson's privilege, a court deciding whether an online content provider can invoke the law should consider more function-related factors, such as:

- The contribution to the free exchange of ideas—a notion that should be broadly defined and "not limited to reports of significant public events[;]" *Kinsella*, 362 N.J. Super. at 154;
- The intent, at the time of its gathering, to disseminate information to the public;
- The author's employment status or lack thereof;
- The author's independence;
- The performance of an informative function; and
- The author's editorial contributions to the dissemination process.

Amici submit that these criteria are not dispositive, and a person need not necessarily satisfy each one to successfully invoke the shield law. *Amici* submit them to this Court, however, as a more realistic standard—animated by the Legislature's intent and this Court's history of providing a broad privilege, the shield law's clear statutory language, and modern and future newsgathering practices—than the one the Appellate Division posited. As two other media *Amici* argued to this Court earlier, the Appellate Division's criteria are problematic because they "place far more restrictions on journalistic practice than First Amendment jurisprudence [and the shield law] allow[]." Brief for North Jersey Media Group, Inc. and the New Jersey Press Association as *Amici Curiae* Supporting Petition for Certification, *Too Much Media*, pp. 11-20 (Docket No. A-7-10). As such, this Court should overrule that standard and instead find that when the author of an online publication marked by the above characteristics invokes the protection of the newsperson's privilege in New Jersey, the First Amendment and the shield law's protection of the "liberty of the press," in whatever form it takes, *Lovell*, 303 U.S. at 452, mandate that he or she be allowed to do so successfully.[1]

[1] It is worth noting here, since the Appellate Division appears to have held that the New Jersey shield law protects confidential sources only, *Too Much Media*, 413 N.J. Super. at 157-58, that nothing in the statute requires the source to

II. The Appellate Division erred in holding that a person who invokes the newsperson's privilege is then subject to a full preliminary hearing to determine his or her eligibility for the protection.

A. The New Jersey shield law is absolute in libel cases.

In finding that a trial court should conduct a full preliminary hearing to determine whether a person invoking the shield law meets its requirements, the Appellate Division "discern[ed] no reason not to apply" the qualified privilege that exists in criminal proceedings only. *Too Much Media*, 413 N.J. Super. at 149. The application of such a standard in this case, however, ignores this Court's well-settled rule that the reporter's privilege is absolute in libel proceedings. *Maressa*, 89 N.J. at 176. In *Maressa*, a state senator sued the *New Jersey Monthly* magazine for libel, claiming that its October 1979 article evaluating the performance of New Jersey legislators contained defamatory falsehoods. *Id.* at 182–83. The plaintiff sought a wide range of information from the magazine, including names and addresses of all sources interviewed, copies of rough drafts, notes, questions asked, and summaries of what each source told the reporters. *Id.* at 183. The defendants refused to provide the information, answering each interrogatory with the

---

request anonymity or the reporter to promise confidentiality for the latter to be protected. The privilege belongs to the reporter and is his or hers to waive. *Gastman v. N. Jersey Newspapers Co.*, 254 N.J. Super. 140 (N.J. Super. Ct. App. Div. 1992).

word "privileged." *Id.* The Supreme Court, observing that the plaintiff in a defamation action has no overriding constitutional interest at stake, held that the shield law affords newspapers an absolute right not to disclose confidential sources or editorial processes in a libel action. *Id.* at 194. Thus, absent waiver by the newsperson, a civil litigant cannot pierce the privilege in defamation actions. This absolute protection, however, does not extend to criminal proceedings, where courts must balance reporters' rights with the constitutional interests of defendants, who may overcome the privilege by a showing of relevance, materiality, necessity, and unavailability of the information from any other source. N.J. Stat. Ann. § 2A:84A-21.3(b). This civil defamation case, however, did not implicate any competing constitutional interests and, thus, a court should have afforded a newsperson invoking a privilege absolute protection.

B. In an attempt to provide newspersons with as broad a privilege against disclosure as possible, trial courts must narrowly limit their examinations into one's eligibility for the protection.

It is against this backdrop that *Amici* concede that before a newsperson may benefit from the shield law's absolute privilege in a proceeding such as this one, he or she "shall make a prima facie showing" that he or she is engaged in gathering or disseminating news for the general public. N.J.

Stat. Ann. § 2A:84A-21.3(a). A reporter usually makes such a showing[2] through a motion to quash that includes a certification or affidavit from the reporter attesting to the fact that he or she is employed as a newsperson and that he or she obtained the information sought while "in the course of pursuing his professional activities." *Id.* After a reporter has made such a showing, only a criminal defendant, as discussed above, may attempt to compel testimony, and in civil proceedings, at least those involving the traditional news media, courts generally recognize New Jersey's broad protection and rule accordingly.

Amici recognize, however, that many online publications are not the traditional news media. And extending shield law protections to them (when a party challenges their entitlement to such) without some type of disclosure indicating their entitlement is a dangerous practice that undermines the privilege by allowing too many people to claim its benefits. Yet, such a disclosure cannot, consistent with this state's strong newsperson's protection, resemble the one that the trial court in this case required. Not only does mandating the

[2] The "prima facie" burden of production "has been described as so light as to be 'little more than a mechanical formality....'" *Mogull v. CB Commercial Real Estate Group, Inc.*, 162 N.J. 449, 469 (2000) (quoting *Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 Harv. L. Rev. 1579, 1590 (1996)). Moreover, it "is met whether or not the evidence produced is found to be persuasive." *State v. Segars*, 172 N.J. 481, 494 (2002).

extensive questioning of an author about his or her reporting, editorial, thought, and writing processes in an attempt to prove that the newsperson is protected from disclosing that type of material belie common sense and undermine the interests served by the shield law, it directly contravenes the Legislature's finding and this Court's affirmation that any compelled production, even an in camera one, "dilute[s] a newsperson's privilege." *State v. Boiardo*, 82 N.J. 446, 467 (1980). The *Boiardo* court held that the shield law "declares as clearly as it possibly could the Legislature's belief that disclosure to a trial judge in camera represents precisely the same threat to the interests protected by the privilege as disclosure to counsel or to the world." *Id.* While the disclosure of some facts may be necessary to establish one's eligibility for protection, such an examination should not delve so far into privileged material that the shield law's very purpose is violated. Thus, trial courts—in an attempt to provide newspersons with as broad a privilege against disclosure as can be reconciled with the principle that the privilege must retain its specificity to remain effective—must narrowly limit their examinations.

To do so, *Amici* respectfully submit that a civil litigant who challenges a subpoenaed party's prima facie claim of shield law eligibility may rebut that claim based only on those facts required to meet the prima facie showing. Under state evidence

laws, if that evidence tends to disprove the presumed fact, the trial judge may hold a hearing to determine the matter "unless the evidence is such that reasonable persons would not differ as to the existence or nonexistence of the presumed fact." N.J.R.E. 301. Thus, only if the court determines that reasonable people would differ about the presumed facts in the claimed newsperson's certificate should he or she require a hearing on the issue. Such a hearing must limit itself to unwaived, non-privileged disputed facts only and carefully avoid the disclosure of any protected information. Such a standard highlights this state's consistent reiteration that the policies underlying the shield law are of utmost importance, while, at the same time, ensures that the privilege's strong protection is not diluted by its application to merely anyone who speaks.

CONCLUSION

As traditional media organizations increasingly rely on the Internet to disseminate their information and attract readers, and nontraditional online outlets increasingly contribute to the public discourse about important current events, it is only logical that the newsperson's privilege should be extended to encompass these individuals outside the traditional media who nonetheless perform important news functions. Such an expansive application is particularly important in New Jersey, where the Legislature and courts consistently bestow broad protections on

the press and its newsgathering activities. In keeping with the spirit of such robust protection for journalists, this Court should reject the Appellate Division's "recognized qualities or characteristics traditionally associated with the news process," *Too Much Media*, 413 N.J. Super. at 160, as a basis for successful invocation of the shield law and replace them with a standard that more accurately reflects modern and future newsgathering practices. This Court also must overrule the Appellate Division's finding that a person who invokes the newsperson's privilege is then subject to a full preliminary hearing that threatens to expose protected information in an attempt to determine the person's eligibility for protection. As the U.S. Supreme Court has observed, "[f]reedom of the press is a 'fundamental personal right ... not confined to newspapers and periodicals.' " *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (quoting *Lovell*, 303 U.S. at 450, 452). Yet, the Appellate Division's decision in this case runs dangerously afoul of this breadth of the freedom of the press, in whatever form it takes, and must be modified in the ways discussed above.

Dated: December 7, 2010

Respectfully Submitted,

_____

Lucy A. Dalglish
Gregg P. Leslie
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209

Tel: (703) 807-2100
Counsel for The Reporters Committee for Freedom of the Press

CERTIFICATE OF SERVICE

The undersigned *Amicus* counsel certifies that she provided, via first-class mail to the last known addresses stated below, two copies of this brief to each party and nine copies to the clerk of the Supreme Court.

Joel N. Kreizman
Attorney for Plaintiff-Respondent
Evans, Osborne & Kreizman, LLC
802 West Park Avenue, Suite 222
Ocean, NJ 07712-8526

Jeffrey M. Pollock
Attorney for Defendant-Appellant
Fox Rothschild LLP
997 Lenox Drive, Bldg. 3
Lawrenceville, NJ 08648-2311

Dated: December 7, 2010

Lucy A. Dalglish
Counsel for The Reporters Committee for Freedom of the Press