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November 19, 2012

VIA UPS Overnight

Hon. Guy D. Reynolds
Circuit Court, Branch 3
Sauk County Courthouse
515 Oak Street
Baraboo, WI 53913

Re: State of Wisconsin v. Vernon D. Hershberger, Case No. 2011CM000696

Dear Judge Reynolds:

I am *pro hac vice* counsel for WMTV-TV NBC 15 and its reporter Chris Woodard in this matter.

As you are aware, the State of Wisconsin has moved to subpoena Mr. Woodard for trial in this action under Wis. Stat. §885.14. For the Court's consideration in advance of the November 27, 2012 hearing, please find enclosed the Opposition to the State's Motion on behalf of WMTV and Mr. Woodard in the above-referenced action.

Sincerely,

Holland & Knight LLP



Drew E. Shenkman

Enclosures

cc: Eric D. Defort, Esq. (w/copy)
Phillip D. Ferris, Esq. (w/copy)
Robert J. Dreps, Esq. (w/ copy)
Elizabeth Gamsky Rich (w/ copy)

STATE OF WISCONSIN

Case No. 2011CM000696

v.

VERNON D. HERSHBERGER

**NON-PARTY WMTV-TV NBC15 AND CHRIS WOODARD'S
OPPOSITION TO STATE OF WISCONSIN'S WIS. STAT. §885.14 MOTION**

WMTV-TV NBC 15 Madison, Wisconsin, and its reporter Chris Woodard, through undersigned counsel, submit this Opposition to the State of Wisconsin's Motion for subpoena under the Wisconsin Reporter's Shield Law, Wis. Stat. §885.14.

PRELIMINARY STATEMENT

Wisconsin's Reporter's Shield Law, Wis. Stat. §885.14, provides news persons with a presumptive right against compelled participation in court proceedings. Only under narrow circumstances—proven by the person requesting a subpoena—may a circuit court judge issue a subpoena to a news person, and only as a last resort.

Here, the State of Wisconsin has failed to meet its burden in seeking a subpoena for WMTV NBC 15 reporter Chris Woodard regarding his June 3, 2010 news report on Defendant Hershberger's sale of raw milk products in the face of a state-issued holding order. His testimony is not relevant, let alone "highly relevant," because he did not observe the purported crime. Moreover, the State has failed to show that the information sought "is not obtainable from any alternative source," Wis. Stat. §885.14(2)(c)(3) (emphasis added), as the continued sale of raw milk products can be shown through countless other sources. The State's Motion is therefore inadequate, and the State's request for a subpoena to Mr. Woodard should be denied.

BACKGROUND

Defendant Vernon D. Hershberger stands charged with, among other things, violating a state-issued holding order forbidding the sale of unpasteurized dairy products to the public.

In June 2010, WMTV NBC 15 broadcast Chris Woodard's news report regarding Mr. Hershberger's purported violation of that holding order. The report indicated that Hershberger broke the State's seals, and was once again selling raw milk products.¹ A copy of Mr. Woodard's June 3, 2012 video news report is attached as Exhibit A. Mr. Hershberger was also interviewed in the news report. *Id.*

Upon Mr. Woodard's arrival on June 3, 2010 to the Hershberger farm, he observed already-broken seals, and did not personally observe Mr. Hershberger or anyone else breaking them. Mr. Woodard also did not observe anyone buy or sell any of Hershberger's products. *See* Affidavit of Chris Woodard at ¶¶3-4, attached as Exhibit B. Numerous other individuals were also present at the Hershberger farm that day, including "Raw Milk Consumer" Ben Kramlich, who was interviewed in Mr. Woodard's news report, *see* Ex. A, as well as at least ten other non-news persons who can be seen in Mr. Hershberger's store purchasing or selling products. *See* WISC-TV's news report attached to the State's Motion for Subpoena to Marc Lovicott.

In an attempt to avoid the holding order, Mr. Hershberger contracted with numerous persons to provide them with an ownership interest in his farm animals so that he could sell them the animals' raw milk. *See* June 22, 2012 Memorandum Decision, at p. 4-5. Upon information and belief, the State and/or Defendant possess those customer lists identifying numerous persons whom Mr. Hershberger likely sold raw milk products to after the holding order was in place.

¹ On August 17, 2012, the State of Wisconsin issued trial subpoenas to Mr. Woodard and other news persons in this case. The State later withdrew those subpoenas, recognizing that they were improperly issued outside of Section 885.14. Currently, the State filed similar motions for the testimony of *The Capital Times* journalist Jessica VanEgeren, and WISC-TV reporter Marc Lovicott. Those motions suffer from many of the same inadequacies raised here.

ARGUMENT

In 2010, Wisconsin's legislature endowed news persons like WMTV NBC 15 reporter Chris Woodard with a broad right against compelled participation in court proceedings in all but the narrowest of circumstances.² Wis. Stat. §885.14.

That law strengthened the longstanding qualified privilege for journalists not to disclose information gathered in the course of their journalistic endeavors, under Article 1, Section 3 of the Wisconsin Constitution and the First Amendment. *See State v. Knops*, 49 Wis.2d 647, 652, 183 N.W.2d 93, 95 (1971); *Kurzynski v. Spaeth*, 196 Wis.2d 182, 192 538 N.W.2d 554, 558 (Wis. App. 1995). The new law thus preserves the strong, presumptive separation between the press and government, guarding against harassment, intimidation, and the risk that reporters could effectively be turned into government investigators.

Section 885.14(2)(a), states that "no person having the power to issue a subpoena may issue a subpoena compelling a news person to testify." Instead, only a Circuit Court judge may issue such a subpoena, and only after the person requesting the subpoena has met a two-part test:

(b) *Procedure before courts.* Subject to par. (c), a circuit court may issue a subpoena to compel a news person to testify . . . if the court finds, after notice to and an opportunity to be heard by the news person that the person requesting the subpoena established, based on information obtained from a person other than the news person, one of the following by clear and convincing evidence:

1. In a criminal prosecution or investigation that there are reasonable grounds to believe that a crime has occurred.

* * *

(c) A circuit court may issue a subpoena under par. (b) only if all of the following conditions are met:

1. The news, information, or identity of the source is highly relevant to the investigation, prosecution, action, or proceeding.

² Wisconsin is among the forty states and the District of Columbia to have enacted statutory prohibitions against compelled disclosure of information from news persons.

2. The news, information, or identity of the source is necessary to the maintenance of a party's claim, defense, or to the proof of an issue material to the investigation, prosecution, action, or proceeding.

3. The news, information, or identity of the source is not obtainable from any alternative source for the investigation, prosecution, action, or proceeding.

4. There is an overriding public interest in the disclosure of the news, information, or identity of the source.

Wis. Stat. §885.14.

Here, the State must initially show that "there are reasonable grounds to believe that a crime has occurred." Wis. Stat. §885.14(b). Upon that showing, the State must then show that the information sought from Mr. Woodard is (1) "highly relevant," (2) "necessary" to the proof of a material issue, (3) "not obtainable from any alternative source," and (4) that there is an overriding public interest in the information from the news person. Wis. Stat. §885.14(b). "Only if all of [those] conditions are met," may a court issue a subpoena to a news person.³ *Id.*

The State asks this Court to issue a subpoena to Mr. Woodard to broadly establish that Mr. Hershberger sold raw milk products in defiance of the holding order. *See* Motion at ¶2. Specifically, the State seeks Mr. Woodard's testimony regarding (1) his personal observations, and (2) Mr. Hershberger's statements in the news report. *See id.*

First, Mr. Woodard is without personal knowledge as to whether Mr. Hershberger removed any seals put in place by State investigators, or whether he made any sales to customers. *See* Woodard Aff. at ¶¶3-4. The subpoena thus cannot be issued for that purpose as it fails to meet the basic requirement of "high relevance" under Section 885.14(2)(c)(1).

³ Indeed, even if the two-part test is met, the issuance of a subpoena is still discretionary, as the law provides that a court "*may* issue a subpoena." §885.14(c) (emphasis added).

Second, and fatal to its entire request, the State has not come close to showing that the information sought from Mr. Woodard is "not obtainable from any alternative source." Wis. Stat. §885.14(2)(c)(3).

In its Motion, the State misapplies this essential element, wrongly arguing that Mr. Woodard is the only source who can testify to Mr. Hershberger's statements made to him. Motion at ¶4. It is the underlying information, and not the interview itself, that controls.⁴ See e.g. *Gonzales v. NBC, Inc.*, 194 F.3d 29, 36 (2d Cir. 1999) (holding that subpoenaed materials "contain *information* that is not reasonably obtainable from other available sources").

Here, many untapped alternative sources are available to the State to prove that Mr. Hershberger defied the holding order and sold raw milk products, including:

- Ben Kramlich, identified in Mr. Woodard's news report as a "Raw Milk Consumer," who was present and interviewed at the Hershberger farm that day;
- Numerous other non-news persons shown in Mr. Woodard's news report who were present that day;
- No less than ten non-news persons visible in WISC-TV's news report inside the Hershberger store;
- Any of the people who apparently contracted with Mr. Hershberger in an effort to circumvent the holding order;
- Any of Mr. Hershberger's current or former employees; and
- Any of the people who appear on Mr. Hershberger's customer lists or membership rolls, or in his non-cash sales records.

⁴ Were the test otherwise, and the availability analysis limited only to a particular video interview conducted by the journalist – as opposed to the information contained in the interview – Wisconsin's statute would be rendered meaningless, as there could never be an alternate source.

The State failed to note any efforts it has undertaken to secure or otherwise attempt to learn the testimony of any of these individuals, all of whom likely have personal knowledge of Mr. Hershberger's violation of the State's holding order.

Additionally, without any factual support, the State baldly avers that "there is no alternative source for . . . the statements Woodard received from Mr. Hershberger." Motion at ¶4. Yet, it is well known that Mr. Hershberger routinely shared his views regarding raw milk consumption with almost anyone willing to listen. The State has therefore not shown that Mr. Hershberger's statements are not available from any alternative source. *See Delaware v. McBride*, 7 Med. L. Rptr. 1371 (Del. Super. 1981) (quashing subpoena for defendant's letter to reporter, as he "made many statements to many people and is apparently willing to talk to anyone willing to talk to him. Therefore, it can reasonably be assumed that whatever material this reporter has is readily available from other sources."). A copy of this opinion is attached for this Court's convenience as Exhibit C.

Finally, the State softly suggests that Mr. Hershberger's statements that "families will go without food" and that he is "not surprised to find himself in court" are "tacit admissions" that he violated the holding order. Motion at ¶2. But even a "tacit admission" made to a news person must still be shown to be "not obtainable from any alternative source." *See In re Arya*, 589 N.E.2d 832, 226 Ill. App. 3d 848 (Ill. App. Ct. 1992) (shield law protected reporter's interview that included admission of uncharged suspect because state failed to show exhaustion of alternative sources); *Mandal v. City of New York*, 33 Media L. Rptr. 1631, 1634-36, 2004 WL 2375817 (S.D.N.Y. 2004) (requiring deposition of all potential city officials with possible knowledge before enforcing subpoena to reporter for direct party admissions). Thus, under this theory as well, State has not shown a lack of "any alternative source" for this information.

CONCLUSION

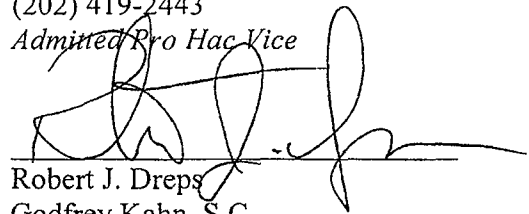
WMTV-TV NBC 15 and its reporter Chris Woodard respectfully request that this Court deny the State's Motion, and refuse to issue the requested subpoena. The State has failed to meet its burden under Wis. Stat. §885.14. In particular, Mr. Woodard is without personal knowledge of the information in his report, and the State has woefully failed to demonstrate that the information sought from Mr. Woodard is "not obtainable from any alternative source."

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that this Opposition was served via UPS Overnight on November 19, 2012 to:

Phillip D. Ferris, Esq.
Eric D. Defort, Esq.
Wisconsin Dep't of Justice
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PO Box 7857
Madison, WI 53707

Elizabeth Gamsky Rich, Esq.
435 East Mill Street
Plymouth, WI 53073



Drew E. Shenkman

EXHIBIT A

State of Wisconsin v. Hershberger
Case No 11-CM-696
Sauk County Circuit Court

EXHIBIT A to WMTV/Chris Woodard's Opposition to State's
Wis. Stat. §885.14 Motion

EXHIBIT B

STATE OF WISCONSIN

CIRCUIT COURT

SAUK COUNTY

STATE OF WISCONSIN

Case No. 2011CM000696

v.

VERNON D. HERSHBERGER

AFFIDAVIT OF CHRIS WOODARD

STATE OF WISCONSIN)
) SS
COUNTY OF DANE)

I, Chris Woodard, being first duly sworn upon oath, depose and state as follows:

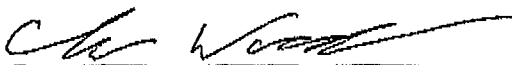
1. I am a reporter for WMTV-TV NBC 15 in Madison, Wisconsin.

2. On June 3, 2010, I covered a potential news story regarding the State of Wisconsin's order to Vernon D. Hershberger to stop selling raw milk products at his farm.

3. Upon my arrival at Mr. Hershberger's farm, I saw that seals which were apparently put in place by the State of Wisconsin had already been broken. I did not see anyone break those or any other seals.

4. I also did not witness anyone buying or selling any products at the farm.

Dated this 19th day of November, 2012.


Chris Woodard

Subscribed and sworn to before me this
19th day of November, 2012.


NOTARY PUBLIC, State of Wisconsin

My Commission expires 08/30/2014

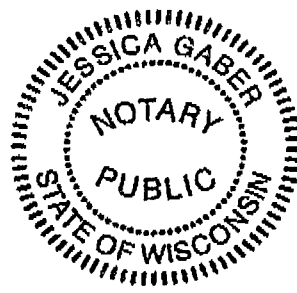


EXHIBIT C

Source: Media Law Reporter Cases > Delaware > Delaware v. McBride, 7 Med.L.Rptr. 1371 (Del. Super. Ct. 1981)

**7 Med.L.Rptr. 1371
Delaware v. McBride
Delaware Superior Court, Kent County**

Nos. IK-80-05-0058, 0059, and IK-80-06-0227

May 6, 1981

STATE OF DELAWARE v. JUDITH MCBRIDE

Headnotes

NEWSGATHERING

Forced disclosure of information — Disclosure of unpublished information (►60.10)

Forced disclosure of information — Disclosure in criminal actions (►60.15)

Murder defendant's failure to show that letters written by codefendant to newspaper reporter are relevant and material to his defense, that they are unavailable from other sources, and that nonproduction of letters would violate defendant's substantial right warrants trial court order quashing subpoena duces tecum served on reporter.

Case History and Disposition

Newspaper reporter files motion to quash subpoena duces tecum served by murder defendant seeking production of letters written to reporter by codefendant.

Motion to quash granted.

Attorneys

Richard G. Elliott, Jr., and L. Susan Faw, of Richards, Layton & Finger, Wilmington, Del., for movants.

James E. Liquori, deputy attorney general, Kent County, for plaintiff.

Henry duP. Ridgely and Gerald I. Street, Dover, Del., for defendant.

Opinion Text

Opinion By:

Wright, J.:

Full Text of Opinion

The defendant has been indicted for first degree murder. Frank L. Ross is a codefendant.

It appears that Ross has written a number of letters to a newspaper reporter employed by Gannett Co., Inc.

The defendant seeks production of these letters by way of a subpoena duces tecum served upon the reporter and her employer. The reporter and her employer move to quash the subpoena.

The law seems clear that a reporter has a qualified privilege to refuse to disclose unpublished material in his possession and that its production will only be required when a defendant demonstrates that the material is relevant and material to the defense, is unavailable from other sources, that the material

has been unsuccessfully sought from other sources, and that nonproduction would violate a substantial right of the defendant. *U.S. v. Criden*, 633 F.2d 346 [6 Med.L.Rptr. 1993] (3d Cir. 1980); *U.S. v. Cuthbertson*, 630 F.2d 139 [6 Med.L.Rptr. 1545] (3d Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708 [5 Med.L.Rptr. 2161] (3d Cir. 1979).

The defendant here has not approached satisfying the above requirements.

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There is no suggestion in the record that the defendant has a justifiable belief that the letters contain anything relevant or material to her defense; only that they may.

Moreover, Ross has made many statements to many people and is apparently willing to talk to anyone willing to talk to him. Under these circumstances there is no reason to believe that he would disclose any information to the reporter here that he has not previously disclosed to others. Therefore, it can reasonably be assumed that whatever material this reporter has is readily available from other sources.

Accordingly, the motion to quash the subpoena duces tecum is granted.

IT IS SO ORDERED.

- End of Case -

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