

STATE OF NORTH CAROLINA  
CABARRUS COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

05 CRS 9395  
2006 JUL 24 P 4: 38

STATE OF NORTH CAROLINA

v.

MARK DONALD SPIVEY

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CABARRUS COUNTY, C.S.C.

BY AW

**ORDER**

This matter came on for hearing before the undersigned on July 18, 2006, on a Motion to Compel filed by the State. The State's motion is in the nature of a motion to enforce a subpoena issued on behalf of the State to Ms. Shamona McClary. The State appeared through Assistant District Attorney Brandy Cook. The defendant Mark Donald Spivey appeared through counsel, Vernon A. Russell of Plummer, Russell, Cement & Plummer, PLLC. The Evening Post Publishing Company, d/b/a *The Salisbury Post* and its employee, Ms. McClary (collectively "the Post") appeared through their counsel, C. Amanda Martin of Everett, Gaskins, Hancock & Stevens, LLP.

The Court, having reviewed the motion to compel filed by the State, the response filed by *The Post* and a June 30, 2005, *Post* article submitted by the State, and having heard argument of counsel, makes the following findings of fact:

1. Ms. McClary was at all material times a journalist employed as a reporter for *The Salisbury Post*, a daily newspaper of general circulation in Rowan County and throughout North Carolina. Both Ms. McClary and *The Post* are engaged in the business of gathering, compiling, writing, editing, photographing, recording and processing information for dissemination.
2. Ms. McClary is not a party to this case, and the information sought from her was acquired by her as part of her newsgathering responsibilities with *The Post*.

3. In the scope of her employment, Ms. McClary interviewed the defendant and wrote news articles concerning the allegations at issue in this criminal prosecution. The State tendered one news article written by Ms. McClary that was published by *The Post* on June 30, 2005. The State represented to the Court that the purpose of the subpoena was to inquire of Ms. McClary whether the statements in the article attributed to the defendant accurately reflected the defendant's statements to Ms. McClary. Among the statements included in the article were the defendants' admission that he had injured his girlfriend's 11-month-old son and his denial that he had put a rag down the child's throat.

4. The State represented that the defendant made statements to law enforcement officers that were substantially similar to the statements attributed to him in the June 30 article. The State represented that among the anticipated witnesses at trial are the mother of the victim, treating physicians and hospital employees, all or some of whom had conversations with the defendant following the alleged incident.

5. Counsel for defendant represented that at this time he does not intend to file a motion to suppress the defendant's statements to law enforcement.

The Court's conclusions of law are as follows:

1. Ms. McClary has asserted a qualified privilege against compelled testimony under the North Carolina Journalists' Privilege, N.C. Gen. Stat. § 8-53.11, and the United States and North Carolina Constitutions.

2. G. S. § 8-53.11, which is sometimes referred to as the journalist's "shield law," provides:

In order to overcome the qualified privilege provided by subsection (b) of this section, any person seeking to compel a journalist to testify or provide information must establish by the greater weight of the evidence that the testimony or production sought:

(1) Is relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought;

(2) Cannot be obtained from alternate sources; and

(3) Is essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought. Any order to compel any testimony or production as to which the qualified privilege has been asserted shall be issued only after notice to the journalist and a hearing and shall include clear and specific findings as to the showing made by the person seeking the testimony or production.

3. G.S. § 8-53.11 codifies the qualified constitutional privilege grounded in the First

Amendment to the United States Constitution and Article I, § 14 of the North Carolina Constitution.

4. Both the statutory privilege and the constitutional privilege are intended to protect the free flow of information and avoid the impediment that inevitably occurs when reporters are subjected to in-court examination into their newsgathering activities. This intrusion is especially offensive and unwarranted when the same information can be derived from other sources. The privilege allows journalists to remain in their proper roles as neutral observers when they cover judicial or administrative proceedings. By enacting G.S. § 8-53.11 the North Carolina General Assembly has made the public policy determination that only in extraordinary circumstances will journalists be compelled to provide testimony in judicial proceedings. The heavy burden of overcoming the privilege rests with the party seeking to compel a journalist's testimony.

5. The compelled production of a journalist's resource materials and testimony can constitute a significant intrusion into the newsgathering and editorial processes and may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege. It is only by preserving the right of the press to avoid being made a part of a controversy merely as a result of its performing its constitutionally protected

duties that the press may avoid the "chilling effect" that the enforcement of this subpoena would have on the flow of information to the press and to the public. The test, under the statute, essentially is whether the party seeking the testimony can establish the essential elements of his case, and proceed to a jury, without the journalist's testimony.

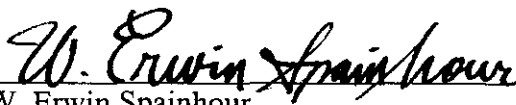
6. The qualified journalist's privilege attaches to the information sought by the State from *The Post*.

7. The State has failed to make a showing sufficient to overcome *The Post's* and Ms. McCleary's qualified constitutional privilege because it has failed to demonstrate that information sought from them cannot be obtained from other available sources.

8. Accordingly, the State has not satisfied the requirements of the statutory privilege to overcome the journalist's privilege.

In view of the foregoing findings of fact and conclusions of law, it is hereby ORDERED, ADJUDGED AND DECREED that the motion to compel is denied and the subpoenas are quashed.

This the 24<sup>th</sup> day of July, 2006.

  
W. Erwin Spainhour  
Superior Court Judge Presiding

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing order was served on counsel of record by depositing a true copy thereof with the United States Postal Service, first-class postage prepaid addressed to:

Brandy L. Cook, Esq.  
Assistant District Attorney  
19A Prosecutorial District  
P.O. Box 70  
Concord, NC 28026

This the 31<sup>st</sup> day of July, 2006.

  
C. Amanda Martin